

8 FAQs FOR COLORADO EMPLOYERS FACING NEW PAID FAMILY AND MEDICAL LEAVE INSURANCE OBLIGATIONS FOR 2023

Insights
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All Colorado employers will be subject to new paid family and medical leave insurance obligations — starting on January 1 — thanks to the Colorado Family and Medical Leave Insurance (FAMLI) program. What do Colorado employers need to know about their responsibilities under the new law? Here are the answers to eight frequently asked questions to help you prepare for upcoming compliance deadlines.

1. What is the FAMLI Program?

By ballot measure, Colorado voters approved a state-run paid Family and Medical Leave Insurance program in November 2020. Beginning in January 2024, most Colorado workers will be eligible to apply for FAMLI leave benefits and receive compensation from the state while addressing family and medical needs for themselves or family members.

While leave eligibility does not begin until January 2024, Colorado employers have an obligation — starting January 1, 2023 — to collect FAMLI insurance premiums from workers' wages and provide notice to workers about their new benefit. Private employers with at least 10 employees also must contribute insurance premiums to the state of Colorado to help finance the FAMLI program.

2. What Contributions Will Employees and Employers Make to FAMLI?

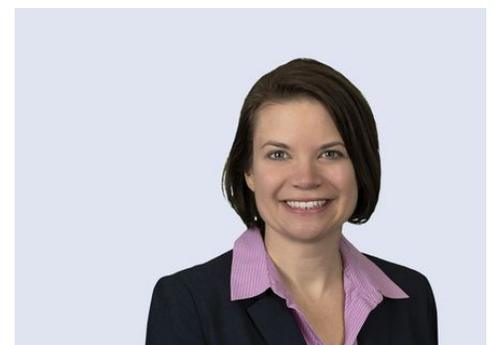
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The employee share of FAMLI premiums is set at 0.45% of employee wages. All Colorado employers are required to facilitate collection of FAMLI premiums for their Colorado employees through a simple payroll deduction.

Employers with 10 or more employees are responsible for separately paying 0.45% of their Colorado employee wages as FAMLI premiums. This is true even if an employer has one to nine employees in Colorado and the remaining employees working outside the state of Colorado. Employers with fewer than 10 employees total do not have to make separate employer contributions and are responsible only for facilitating collection of the employee share of FAMLI premiums for their Colorado employees.

Employers are required to remit payment of FAMLI premiums to the state of Colorado on a quarterly basis. The first quarterly premium payments are due on March 31, 2023. There is a 30-day grace period, however, allowing payment by April 30, 2023.

For 2023 and 2024, the employee and employer contribution rates are capped at 0.45%. The director of the FAMLI Division sets the premium rate and may raise rates beginning in 2025. Contributions are statutorily capped at 1.2%.

3. For What Purposes Can Employees Use FAMLI Leave?

Eligible employees have access to FAMLI leave for the following purposes after January 1, 2024:

- The employee is caring for a child during the first year after the birth, adoption, or foster care placement of that child;
- The employee needs to care for a family member with a serious health condition;
- The employee needs to care for their own serious health condition;
- The employee needs to make arrangements for a family member's military deployment; or
- The employee or family member has been the victim of domestic abuse, sexual assault, or criminal harassment and needs to be absent from work for purposes related to

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medical attention, mental health care or other counseling, victim services (including legal), or relocation.

4. How Much FAMLI Leave Can Employees Take?

Starting January 1, 2024, employees are eligible to receive up to 90% of their average weekly wages — although FAMLI compensation is capped at \$1,100 per week. Employees generally have access to 12 weeks of paid leave, and employees with serious health conditions due to pregnancy complications or childbirth have access to an additional four weeks of paid leave (for a total of 16 weeks). FAMLI leave may be taken in increments of as little as one hour, but Colorado will not pay FAMLI leave benefits until an employee takes eight hours of FAMLI leave.

5. What Rights and Obligations Do Employees and Employers Have Under the Act?

Almost all employees are immediately eligible for FAMLI leave upon hire, and all employees are eligible for FAMLI leave once they earn \$2,500 in wages from their current employer. Notably, the FAMLI program differs from the federal Family and Medical Leave Act (FMLA) because employees are not required to work a certain number of hours for a specific employer before becoming eligible for FAMLI leave. Colorado workers have a right to FAMLI leave if they earned at least \$2,500 over the previous year for work performed in Colorado for *any* employer. Employees are not allowed to opt out of the program and must contribute to the FAMLI program even if they never intend to use the benefit. Employees who believe their employer has retaliated or interfered with their use of FAMLI benefits may contact the FAMLI division of the Colorado Department of Labor and Employment (CDLE) or file a civil lawsuit.

If an employee has worked at least 180 days for an employer and exercises their right to FAMLI leave, the employer is obligated to restore the employee to the same or a comparable position to the one held prior to FAMLI leave. However, an employee who has not met the 180-day threshold is not entitled to job protection under the FAMLI program.

Employers can require employees to inform them directly of their need for FAMLI leave, separate and apart from the employee's obligation to inform the state of Colorado of their need for FAMLI benefits. Employers are prohibited from

retaliating against any employee who uses FAMLl leave or otherwise exercises their rights with regard to FAMLl leave.

6. What if I Already Provide (or Plan to Provide) Paid Family and Medical Leave to My Employees?

Employers who have already implemented or plan to implement a paid family and medical leave program for their employees may obtain approval from the state of Colorado to opt out of their FAMLl obligations. However, until the state of Colorado determines that an employer's private paid family and medical leave program provides equal or greater benefits and protections as FAMLl, the employer must comply with FAMLl's contribution and notice provisions.

To qualify as a FAMLl-replacement private plan, an employer's plan must:

- Provide benefits for the same number of weeks as FAMLl;
- Provide the same level of wage replacement;
- Include no additional requirements or conditions;
- Deduct the same amount from employee paychecks; and
- Cover all employees for the duration of their employment.

You should note that all employers — including those with private paid family and medical leave benefits for their employees — must pay premiums starting January 1, 2023. The state of Colorado will allow refunds for any premiums paid in 2023 for employers who submit approved private plans with an effective date on or before January 1, 2024. To be eligible for a refund, employers must submit their private plan applications to the CDLE by October 31, 2023.

7. How Does FAMLl Interact with Other Laws and Employer Policies?

- ***FAMLl and Workers' Compensation Act.*** FAMLl benefits do not run concurrently with the Workers' Compensation Act of Colorado. If an absence from work is caused by circumstances that would entitle an individual to benefits under the Workers' Compensation Act, the individual is not entitled to FAMLl benefits for that absence. An individual must notify the FAMLl Division if they receive any benefits under the Workers' Compensation Act during a period that they receive FAMLl benefits. If employees fail

to disclose either a workplace injury or the receipt of benefits under the Workers' Compensation Act, it may constitute grounds for disqualification of FAMLI benefits.

- ***FAMLI and Unemployment Insurance Benefits.*** FAMLI benefits do not run concurrently with benefits under the Colorado Employment Security Act (CESA). If an absence from work is caused by circumstances that would entitle an individual to benefits under CESA, the individual is not eligible for FAMLI benefits. Failure to disclose receipt of CESA benefits constitutes grounds for disqualification of FAMLI benefits.
- ***FAMLI and Employer-Provided Paid Leave.*** An employee may choose whether to take FAMLI leave or employer-provided paid leave. An employer may not require an employee to exhaust employer-provided paid leave before using FAMLI leave. Further, an employee is not entitled to receive both FAMLI benefits and employer-provided paid leave for the same hours absent. An employer and employee, however, mutually may agree that the employee may use any accrued employer-provided leave as a supplement to FAMLI leave in an amount not to exceed the difference between the employee's FAMLI benefits and average weekly wage. So, an employer can make an employee whole by supplementing FAMLI benefits with paid leave, but an employer cannot rely on FAMLI benefits to improve an employee's weekly compensation while the employee is out on leave. An employer may recoup an overpayment by any legal means, including by deducting money from an employee's paycheck.
- ***FAMLI and Colorado Health Families and Workplaces Act (HFWA).*** An employee may choose whether to take FAMLI leave or HFWA paid sick leave. An employer may not require an employee to exhaust HFWA paid sick leave before using FAMLI leave. Further, an employee is not entitled to receive both FAMLI and HFWA paid sick leave for the same hours absent. However, an employer and an employee can mutually agree that the employee may use any accrued paid sick leave as a supplement to FAMLI payments in an amount not to exceed the difference between the individual's wage replacement benefits under FAMLI and the individual's average weekly wage. Any overpayments may be recouped by any legal means, including by deducting money from an employee's paycheck. The employer must then replenish the

employee's bank of accrued employer-provided paid leave in the amount recouped as an overpayment. Employers should not read the FAMLI and HFVA regulations in a manner that reduces rights under either statute.

- ***FAMLI, Short-Term Disability, and Long-Term Disability.*** If you provide required FAMLI notice and an employee takes FAMLI leave for a reason that also qualifies for a short-term or long-term disability benefit, you may count both the wage replacement amount and the duration of the FAMLI leave against the benefit amounts and leave duration provided under the short-term or long-term disability policies. The terms of the applicable long-term or short-term disability policy will govern whether the employer, employee, or both must notify the policy's program administrator of concurrent paid family and medical leave insurance benefits received by the employee.
- ***FAMLI and FMLA.*** FAMLI leave that also qualifies as FMLA leave runs concurrently with the FMLA. If an employee requests FMLA leave, the employer must notify the employee that they may be eligible for paid FAMLI leave.

8. What Should Employers Do to Comply?

You should act quickly to comply with FAMLI requirements and consider take the following seven steps now:

1. Determine how FAMLI will apply to your business by assessing how many people you employ and what portion of FAMLI costs you'll need to cover.
2. Register your businesses with [the CDLE's FAMLI Division](#). Registration is now open, and all employers will have to register to make their first FAMLI premium payments by April 30, 2023.
3. Update your employee handbook and leave policies to ensure FAMLI compliance.
4. Communicate with employees about FAMLI, deductions the company will take from wages in 2023, and available leave in 2024.
5. Display the [2023 FAMLI Program Notice](#) in a prominent place at your worksite.

6. Prepare to collect employee FAMLII premiums beginning January 1, 2023.
7. Consult with an employment attorney to assess compliance with FAMLII and other federal, state, and local employment regulations.

Conclusion

We will continue to monitor these developments and provide updates as necessary. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to receive the most up-to-date information. If you have questions about new FAMLII program requirements, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in [our Denver office](#) for assistance.