

Paid Sick Leave Bill Signed Into Law

While many employers already offer paid time off, they should review policies for compliance

JESSICA FOLKER
LAW WEEK COLORADO

Gov. Jared Polis on July 14 signed the Healthy Families and Workplaces Act, which requires Colorado employers to provide annual paid sick leave as well as paid leave for coronavirus-related absences.

Starting in 2021, employers with 16 or more employees are required to provide up to 48 hours of paid sick leave annually to workers, who begin accruing the sick leave upon employment at a rate of one hour per 30 hours worked. Smaller employers will have until Jan. 1, 2022 to start providing paid sick leave.

Employees may use the paid sick leave as it accrues and may carry unused sick leave forward to future calendar years. The leave may be used to

cover an employee's own illness and treatment or for caretaking duties related to a family member's illness or school closures due to a public health emergency. Employees can also use the leave to seek care or services if they or a family member have been the victim of domestic abuse, sexual assault or harassment.

The law's coronavirus-specific provisions, effective immediately, require employers to provide paid sick leave through the end of 2020. The HFWA requires employers to offer paid leave to cover pandemic-related absences for the amount of time and reasons required under the Emergency Paid Sick Leave Act of the Families First Coronavirus Response Act. While EPSLA does not cover private employers with 500 or more employees, Colorado employers of all sizes must comply with the

COVID-19 provisions of the HFWA.

EPSLA gives full-time employees up to 80 hours of paid sick leave for those unable to work because they are sick or quarantined due to COVID-19, caring for a sick or quarantined person or caring for a child whose school or childcare provider is closed due to the pandemic. Under EPSLA, part-time employees are covered for the number of hours they would normally work in a two-week period.

In the event of future public health emergencies, the HFWA will require Colorado employers to provide additional paid sick leave to supplement the hours employees have already accrued. Those time requirements mirror the amounts outlined in EPSLA: 80 hours for full-time employees, and the typical amount worked in a two-week period for part-timers.

Before the HWFA, about 40% of Colorado employees had no access to paid sick leave. While that leaves a sizeable chunk of employers who already offer sick leave, they'll need to check their policies to make sure they comply with the new law.

"I represent a broad variety of industries and I don't have a single client who doesn't offer some form of PTO," said Christine Samsel, shareholder at Brownstein Hyatt Farber Schreck. But even employers with generous paid leave policies don't always offer the benefit to part-time or temporary workers, she added. Those companies will have to make sure they're offering sick leave for employees not currently covered.

Many employers offer paid time

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Despite popular belief, lawyers do have lives outside the office. Colorado's legal professionals can be found performing ballet on stage, building a 1,000-horsepower Mustang in a mechanic's garage, or even skiing across the Antarctic. Law Week is on the lookout for more unique stories happening, "Outside the Law."

Let us know of any attorneys with any interesting non-legal hobbies at
newsroom@lawweekcolorado.com

CONTINUED**LOWDOWN**

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The members of the nominating commission for the 7th Judicial District are: Leah Gates of Ridgway; William Masters of Telluride; Eric McPhail of Gunnison; Anna Cooling of Montrose; Cynthia Dozier of Lake City; Bradley Harding of Paonia; and Aaron Huckstep of Crested Butte.

GOOD FOR YOU

Fox Rothschild attorney Edgar Barraza was selected by the Colorado Lawyers Committee to serve as a delegate for the Colorado Bar Association and Colorado Judicial Institute's Diversity on the Bench Coalition.

The CBA/CJI coalition is a joint initiative that will lead a commun-

ty-wide effort to address a lack of diversity among Colorado state court judges. The mission is for Colorado's state court bench to reflect the diversity of the state's population.

Barraza joins a robust roster of legal leaders in the region who will work together to create and implement an action plan that will promote diversity.

Rita (Ruta) Sanzgiri, a partner with Sheridan Ross whose practice focuses on intellectual property in life sciences, in particular patents in the biotechnology and pharmaceuticals areas, has been elevated to chair of the Colorado Bar Association's Intellectual Property Section.

Sanzgiri will be responsible for ensuring that the section continues its mission of promoting the exchange of information about new or proposed developments in the IP field and facil-

itating interactions among the section members and the public, while following the new social distancing norms of the post-COVID world.

The IP section committee will host programs and events in the IP field to address developments in patent, trademark, copyright, trade secret and antitrust law, as well as pertinent ethics issues.

Ireland Stapleton Pryor & Pascoe announced Wednesday Elizabeth Woodward has been named a director and shareholder.

Woodward is a real estate and environmental law attorney. She represents individuals, businesses, and special districts in navigating the complexities of real estate purchases and management and environmental compliance and due diligence. She ad-

vises clients along the entire spectrum of real estate ownership from acquisition, development, and leasing, to the sale and liquidation of assets. Further, she advises prospective, current, and past landowners regarding contamination, including the purchase and sale of contaminated properties, and other environmental due diligence matters.

Prior to joining Ireland Stapleton, Woodward practiced law at the Washington, D.C., firm, Wiley Rein, where she counseled clients on a range of environmental, health and safety-related regulatory matters related to compliance with the U.S. Environmental Protection Agency, the U.S. Food and Drug Administration, the Consumer Product Safety Commission, and state and local agency laws, regulations, and policies. •

PAID SICK LEAVE

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off that can be used for vacation, sick days or other absences, said Sherman & Howard member Brooke Colaizzi. But while sick leave doesn't need to be paid out upon termination of employment, PTO does.

"Although the guidance on the new statute doesn't particularly go into this situation, my belief is that if employers use their general PTO to cover the sick leave, they are in fact going to have to pay it out as PTO," Colaizzi said.

"Employers are going to have to look at their policies and figure out ... if they want to proceed with a general PTO policy or if they want to carve out a sick leave program for this particular requirement."

According to Colaizzi, the HWFA's carryover provision has caused some confusion among employers. The statute requires up to 48 hours of unused sick leave to be carried over from year

to year, but it also allows employers to cap usage at 48 hours per year.

"The question that I've gotten is: Why are we carrying it over? If the employer can cap it, why are we not just requiring 48 hours a year, period?" she said. She's not sure of the answer, but she said it's important employers understand how the carryover and cap work together and that they are allowed to limit use to 48 hours annually.

Samsel said that, compared to other jurisdictions with sick leave requirements, Colorado's law is a bit unusual in that it doesn't require a waiting period for using paid sick leave once it has accrued. "Even California, which is very employee friendly, has a 90-day waiting period" during which employees may accrue sick leave but aren't allowed to use it, she said.

There are also considerations employers should keep in mind while the COVID-19 provisions remain in effect. Employers subject to the leave requirements under the FFCRA will want

to be aware of the differences between the federal and state laws and how they interact.

For example, Samsel said, the FFCRA provides for a tax credit but the Colorado law doesn't. "To the extent that the leave is running concurrently... they may want to designate it as FFCRA leave for purposes of getting a tax credit," she said.

Both the FFCRA and HFWA have record-keeping requirements. In order to get a tax credit for paid sick leave under the federal law, employers must have appropriate documentation, Samsel said, and if an employee fails to provide the documentation, the employer can deny the leave. However, she added, the state law "doesn't seem to have that same protection for employers."

"This law says documentation is not required to take paid sick leave, but it can be required as soon as the employee reasonably can provide it," she said. "So you're already having to

grant leave even in the absence of the documentation."

Colorado's new law allows employers to get credit for paid sick leave already given to employees earlier this year. But employers need to make sure conditions of the earlier leave match the requirements of the new law, Colaizzi said. For example, the employee must have received full pay when dealing with their own coronavirus-related illness or absence, and two-thirds pay if caring for a COVID-19 patient.

The guidance issued for the HFWA says that paid leave is not required if the entire business is closed but, Samsel said, it's not clear where that leaves businesses that have opened but have workers on furlough.

"This language [in the guidance] makes it sound like even if the individual is furloughed, if the business is operating in any capacity, that individual may be entitled to paid leave," she said. •

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DENVER MATTRESS

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"I don't think this is uncommon," Collins said. "People are scared. If you're in a position where you have to choose between your livelihood and your health, it's really difficult. So we have heard lots of stories of

people who [are] worried and still go to work." She has also heard of employers not paying the full amount owed, which varies depending on the applicable laws.

Collins said that in most cases, it's probably ignorance, not malice, that is causing employers to withhold sick pay amid the pandemic.

"I think a lot of it is there's so much information, and there's so much new information constantly being rolled out as the virus changes and the responses change in terms of what employers are required to do and when," Collins said. "I really think it's just not having the information and not understanding their legal obligations."

"I think the main takeaway for everyone ... is to really understand the current guidelines and know what your obligations are, because it's crucial — not just for that individual workplace," Collins said, "but for their families and their communities and for everyone to prevent community spread." •

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SEXUAL HARASSMENT

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decision intended to head off First Amendment objections and make it clear the rule is about conduct, not attorneys' personal views.

Before 8.4(i)'s adoption, Colorado already had Rule 8.4(g) in place that prohibits bias in the course of client representation against a person based on race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

The ABA's new guidance is not binding on Colorado's rules. The Office of Attorney Regulation Counsel is only bound by Colorado's professional conduct rules and opinions of the

state Supreme Court. But according to Jack Tanner, chair of the Colorado Bar Association's Ethics Committee that releases opinions interpreting already adopted rules, guidance from the ABA on its model rules can still be relevant. He added that although the wording of Colorado's Rule 8.4(i) is different than Model Rule 8.4(g), the "spirit" is the same, though in the interview with Law Week he said he was not speaking on behalf of the Ethics Committee.

Anything outside of Colorado's professional conduct rules and the Supreme Court's opinions just has the potential to be persuasive, Tanner said. "Included in that is ABA opinions, CBA opinions, and then a third area could be opinions from other states."

However, Tanner declined to comment on whether the Ethics Committee is likely to discuss the ABA's new opinion, citing confidentiality.

But he said controversy among states about a model rule can be relevant when the Ethics Committee considers whether the disagreement makes it difficult for the committee to give clear guidance of its own on Colorado's rules. He said the committee doesn't necessarily shy away from a topic just because it has engendered different opinions in other states. For example, Colorado's professional conduct rules make it misconduct if an attorney commits a crime that reflects on their fitness to practice law. And the Ethics Committee has taken the position that

an attorney using marijuana in their off time isn't an ethical violation, even though it is still illegal federally.

Tanner said the committee is more likely to stay away from weighing in on something controversial if the committee can't come to an opinion that is clear.

"If there's an issue out there that 20 states have looked at, and 10 have said one thing and 10 have said the opposite thing, and there's no authority in Colorado, that's something the bar association might not weigh in on," Tanner said. "We would hate to come out with an opinion that says the answer here is 'A' when it turns out the answer is 'B' because there's no authority and all the states are split." •

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