

DEPARTMENT OF LABOR AND EMPLOYMENT

Division of FAMILI

REGULATIONS CONCERNING PAID FAMILY MEDICAL LEAVE PROGRAM

7 CCR 1107-1

[Editor's Notes follow the text of the rules at the end of this CCR Document.]

1.1 Authority

This regulation is adopted pursuant to the authority in section 8-13.3-501 C.R.S. and is intended to be consistent with the requirements of the State Administrative Procedures Act, section 24-4-101 et seq. (the "APA"), C.R.S. and the Paid Family and Medical Leave Insurance Act, sections 8-13.3-501 through 524 (the "Act"), C.R.S.

1.2 Scope and Purpose

- A. Regulations 1.5 and 1.6 implement the procedural and substantive provisions for the Family and Medical Leave Insurance program pursuant to C.R.S. 8-13.3-507, concerning the establishment, collection, and administration of premium collections.
- B. This regulation does not apply to any other premiums, fees, taxes, or collections outlined in unemployment insurance, worker compensation, private temporary disability insurance or private family leave insurance programs or other programs not administered by the Division.

1.3 Applicability

The provision of this Section will apply to employers as defined in 8-13.3-503 (8) C.R.S. who are operating within the State of Colorado, no matter what State, county, or territory the employer is physically located in or claims as a base of operations, unless otherwise specified by exemptions in 8-13.3-503 C.R.S (8) or federal law.

The provisions of this Section will be applicable to self-employed persons who elect coverage under 8-13.3-514 C.R.S. and employees of any local government who elect coverage under 8-13.3-514 C.R.S.

If any part of these rules is held invalid, the remainder shall remain valid, and if any part is held not wholly invalid, but in need of narrowing, it will be retained in narrowed form.

1.4 Definitions

"Calendar Quarter" has the same definition as 8-70-103 (6) C.R.S.

"Division" has the same definition as 8-13.3-503 (5) C.R.S.

"Employee" has the same definition as 8-13.3-503 (7) C.R.S.

"Employee share" is defined as 50 percent of the premium required for an employee by section 8-13.3-507 (3) C.R.S.

"Employer" has the same definition as 8-13.3-503 (8) C.R.S.

“Employer share” is defined as 50 percent of the premium required for an employee by section 8-13.3-507 (3) C.R.S.

“FAMLI” is defined as the Paid Family and Medical Leave Insurance Act, sections 8-13.3-501 through 524 (the “Act”), C.R.S.

“Net earnings from self employment” has the same meanings as in the Internal Revenue Code at 26 U.S.C. § 1402 (a), in effect for the taxable year, and the implementing regulations at 246 CFR § 1.1402 (a).

Gross income has the same meaning as in the Internal Revenue Code at 26 CFR § 1.61-2.

“Premium” is defined as the money payments required pursuant to 8-13.3-507 C.R.S. to finance the payment of family and medical leave insurance benefits and administer the family and medical leave insurance program.

“Self-Employed Person” is defined to include: an individual worker who is primarily free from external control and direction in the performance of their duties, labor or services, both under the individual’s contract for the performance of the labor or services, and those who are customarily engaged in an independent trade, occupation, profession, or business related to the labor or service performed; is a sole proprietor, a joint venturer or a member of a partnership; a member of a limited liability company, or a person who is otherwise in business for themselves.

1.5 Assessing and Collecting Premiums

1.5.1 Election, Withdrawal, and Cancellation of Coverage for Self-Employed Persons Regarding Premium Assessment

A. Self-employed persons may elect coverage under 8-13.3-514 C.R.S.

1. Notice of election of coverage must be submitted to the Division online or in another format approved by the Division.
2. Elective coverage begins on the first day of the calendar quarter immediately following the notice of the election.
3. A period of coverage is defined as:
 - (a) Three years following the first day of elective coverage or any gap in coverage; and
 - (b) Each subsequent year.
4. Any self-employed person may file a notice of withdrawal within thirty calendar days after the end of each period of coverage.
5. A notice of withdrawal from coverage must be submitted to the Division online or in another format approved by the Division.
6. Any levy resulting from the Division’s cancellation of coverage is in addition to the due and unpaid premiums and interest for the remainder of the period of coverage.

1.5.2 Determining Wages Earned for Self-Employed Persons Regarding Premium Assessment

- A. A self-employed person will update information with the Division not less than quarterly within the period of coverage to ensure timely and accurate benefit coverage amounts.
- B. Pursuant to 8-13.3-507 (4)(a) C.R.S., a self-employed person is required to submit only 50 percent of the premium required for an employee by section 8-13.3-507 (3) C.R.S. on that individual's income from self employment.
- C. Not less than each quarter, a self-employed person who has elected coverage under 8-13.3-514 C.R.S. will report to the Division net earnings from self employment once they have elected to use net earnings as the basis of both premium collection and benefit payments for the three year opt-in period.
- D. Not less than each quarter, a self-employed person who has elected coverage under 8-13.3-514 C.R.S. will report to the Division gross earnings from self employment once they have elected to use gross earnings as the basis for both premium collection and benefit payments for the three year opt-in period. Gross wages from self employment will be reported as gross wages for a specific quarterly pay period and not gross wages for the year to date.
- E. If a self-employed individual elects to change their premium and benefit calculation between gross and net, they may do so one time within the three year opt-in period.
- F. The Division may require copies of tax returns, bank records, self- attestations, or any other documents deemed necessary by the Division to verify or determine a self-employed person's wages.
- G. If a self-employed individual has elected coverage under 8-13.3-514 C.R.S., and is also employed by another or multiple employers, the self-employed person's FAML benefit payment will be based on the combined wages pursuant to this rule and Rule 1.5.3.

1.5.3 Determining Wages for All Employees Regarding Premium Assessment

- A. Wages reportable to the Division for premium assessment purposes include:
 - 1. Salary or hourly wages, including "wages" as defined by 8-70-141 C.R.S; and other compensation, including board, lodging, payments in kind, and/or other benefits provided as compensation for services performed by employees, including but not limited to domestic and agricultural employees.
 - 2. The Division may, after investigation, determine in individual cases the amounts to be included as reasonable value of remuneration payable in any medium other than cash for the purpose of computing premiums due under the act, but where the cash value of such benefits is agreed upon in a written contract, the amounts agreed upon will presumptively be the reasonable value of such benefits; and
 - 3. Commissions, payments on a piecework basis, or bonuses earned for labor or services performed in accordance with the terms of any agreement between an employer and employee.
- B. Tips/gratuities and service charges will be considered to be wages for the purposes of the act when the employer exercises significant control over the amount and distribution of money received by an employee as a tip/gratuity or service charge.

- C. An employer is considered to have significant control over tips/gratuities or service charges when they are collected by the employer and then redistributed to employees.
- D. Notwithstanding any other provision of this section, any tips/gratuities and service charges when used by the employer in order to conform to the minimum-wage requirements of federal or state law will be deemed to be wages for the purposes of the act, to the extent of such use.
 - 1. For the purposes of this section, the inclusion, for the convenience of the customer, of a tip/gratuity in an amount charged by a customer through the use of a credit card will not, by itself, be deemed to constitute significant control.
 - 2. For the purposes of this section, a requirement by an employer that an employee report or account for tips/gratuities will not, by itself, be deemed to constitute significant control.
- E. In addition to the foregoing provisions of this section, wages will also include tips that are received while performing services that constitute employment and that are made known to the employer through a written statement furnished by the employee.
- F. In circumstances where the employer's records regarding wages or other compensation pursuant to this section are inaccurate or incomplete, the Division may consider any evidence, written or otherwise, to determine the amount of wages as a matter of just and reasonable inference, absent any specific evidence provided by the employer suggesting that such inference is unreasonable.

1.5.4 Exempted From Wages

- A. The Division will not consider the following as wages.
 - 1. Per-diem or mileage reimbursements;
 - 2. Amounts of payments made by the employer on behalf of the employee into other insurance or annuity accounts that are not associated with FAML including but not limited to:
 - (a) Short term or long term disability
 - (b) Medical or hospitalization expenses in connection with sickness or accident disability
 - (c) Death
 - (d) Earnings from investment-interest payments, dividend payments, or rent receipts from rental property, except if the income is earned through a business owned or operated by the claimant.
 - (e) Severance pay with the exception of payments pursuant to 8-73-110 C.R.S.

1.5.5 Premiums Remitted by an Employer

- A. Premiums must be paid not less than quarterly in the form and manner determined by the Division. Quarterly payments will include all premiums with respect to wages paid for employment in all payroll periods that end within the calendar quarter.

1. Due Date of Premiums. Premiums will become due and be paid no later than the last day of the month immediately following the end of the calendar quarter for which the premiums have accrued.
 - (a) Payment will be considered timely if postmarked or received in person or electronically on or before the due date. If the due date of premiums falls on a Saturday, Sunday, or legal holiday, payment will be considered timely if postmarked or received in person or electronically on the next business day that is not a Saturday, Sunday, or legal holiday.
 - (b) Quarterly payment will not be required when the total amount of any premiums due, including any penalties and interest accrued for an untimely or incorrect report, is less than five dollars.
 2. Erroneous Rate Notice. If, as a result of an incorrect notification or computation of rate by the Division, an employer is required to make an additional payment of premiums, such additional payment will not accrue interest until thirty days after notification by the Division that such additional payments are due.
 3. First payment of a new employer, unless stated otherwise by exemption.
 - (a) The first premium payment of any employing unit that becomes an employer subject to 8.13.3-501 C.R.S. et seq., at any time during a calendar year will become due and be paid on or before the last day of the month immediately following the calendar quarter in which such an employing unit becomes an employer.
 - (b) Said payment will include the FAML premiums with respect to wages paid for employment occurring on and from the first day of the calendar year through all payroll periods that end within the calendar quarter in which the employing unit becomes an employer.
- B. Employers ability to deduct premiums from employees
1. An employer required to remit premiums pursuant to 8-13.3-507 C.R.S. may not deduct more than the maximum allowable employee share of the premium from wages paid for a pay period.
 - (a) If an employer fails to deduct the maximum allowable employee share of the premium from wages paid for a pay period, the employer is considered to have elected to pay that portion of the employee share under 8-13.3 -507 C.R.S., and the employer cannot deduct this amount from a future paycheck of the employee for a different pay period.
 - (b) An employer will not deduct the employee share of the premium for a pay period where there is a lack of sufficient employee wages to cover the premium for that pay period.
 - (c) In the payment of any premiums, a fractional part of a cent will be disregarded unless it amounts to one-half cent or more, in which case it will be increased to one cent.

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2. Employers not required to pay the Employer share of the FAML premium due to employer size of business pursuant to 8-13.3-507 (5) C.R.S. must remit the employees' share of the premium in the manner outlined by the Division. Such employers may deduct up to 50 percent of the premium required for an employee by section 8-13.3-507 (3) C.R.S., from the employee's wages and will remit 50 percent of the premium required by section 8-13.3-507 (3) C.R.S., to the Division.
 3. An employer who is not required to pay the employer share of the premium pursuant to 8-13.3-507 (4)(c), may elect to remit the employee share of the premium for employees who elect coverage under 8-13.3-514 C.R.S.
- C. Application of payments made to premiums
1. A payment received by the Division as a premium payment will be applied to the quarter for which the premium assessment applies.
 - (a) A payment exceeding the legal fees, fines, penalties, interest and premiums due for that quarter will be applied to any other debt owed to the Division in accordance with subsection 2 (c) in part C. of these rules.
 - (b) If no debt exists, premium overpayments of less than fifty dollars will be credited to future payments due.
 - (c) If no debt exists, premium overpayments of fifty dollars or more may be refunded to the employer at the employer's request. Otherwise, such overpayments will be credited to future payments due.
 2. Payments received will be applied in the following order of priority:
 - (a) Current quarter balance;
 - (b) Any previous quarter premium balance due starting with the oldest quarter;
 - (c) Then beginning with the oldest quarter in which a balance is owed:
 - (1) Penalties;
 - (2) Fines;
 - (3) Fees; and
 - (4) Interest charges.
- D. Pursuant to § 8-13.3-507 (6), C.R.S., premiums will not be required for employees' wages above the contribution and benefit base limit established annually for the federal social security administration for purposes of the federal old-age survivors, and disability insurance program limits pursuant to 42 U.S.C. § 430.

1.5.6 Calculating Employer Size Related To Premium Exemptions

- A. For determining premium exemptions based on employer size as outlined in § 8-13.3-507(5), C.R.S., the rules for counting employees to determine whether an employer is covered under the federal Family and Medical Leave Act apply; the employer must employ the requisite number of employees “for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year”; “a[ny] employee whose name appears on the employer’s payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week”; “Employees on paid or unpaid leave, including [sick or medical leave], leaves of absence, disciplinary suspension, etc. are counted as long as the employer has a reasonable expectation the employee will later return to active employment”; and “a corporation is a single employer rather than its separate establishments or divisions.”
1. If the Division determines the employer's status has changed as it relates to premium liability, the Division will notify the employer as to their premium liability.
 2. An employer's size for purposes of this regulation 1.5.6 will be calculated annually by counting the number of employees pursuant to regulation 1.5.4 (A) during the preceding calendar year. A new premium discount pursuant to § 8-13.3-507(5) will not take effect until the Division has completed such calculation.
 3. If an employer has not been in business in Colorado long enough to report employer's size pursuant to regulation 1.5.6 (A), the employer's size will be calculated after the second quarter of reporting is due by averaging the number of employees reported over the quarters for which reporting exists. Premium calculations based on this determination will begin on this reporting date. This size determination remains in effect through the following calendar year.
- B. Determination of employer size for premium collection beginning January 1, 2023.
1. For purposes of premium calculations for calendar year 2023, the Division will determine the size of all employers by reviewing the number of employees reported pursuant to 8-70-113 C.R.S, for the first calendar quarter. Employers that report ten or more employees will be required to pay the employer share of the premium for all calendar quarters in calendar year 2023.
- C. Determining in-state status of employees
1. An employee's wages will be subject to premiums for all services performed within Colorado and for all services performed both within and outside of Colorado where:
 - (a) The employee's entire service is performed within Colorado;
 - (b) The employee's service is performed both within and outside of Colorado, but the service performed outside the state is incidental to the employee's work within Colorado or, for example is, temporary or transitory in nature and consists of isolated transactions; or
 - (c) Services are not localized in any state, but some of the services are performed in Colorado, and
 - (1) The base of operations is in Colorado, or if there is no base of operations, then the place from which such services are directed or controlled is in Colorado as established in 8-70-117 C.R.S., or

- (2) The base of operations or place from which some part of the service is directed or controlled is not in any state in which part of the service is performed, but the employee's residence is in Colorado.
2. Payment to Another Jurisdiction. An employer who has erroneously paid to another jurisdiction an amount as premiums properly payable to Colorado will not be delinquent if premiums properly payable to Colorado are paid within thirty days of the date on which the Division determines that such premiums are payable to Colorado.

1.5.7 Assessments and Recomputations of FAML Premiums

- A. If, in the judgment of the Division or upon its information and knowledge, the report of wages included in an employer's FAML premium report is incomplete or in error, the Division may require, and the employer shall respond within the time allotted, a further report, examine the employer's relevant books and records, or use other reasonable measures to the extent necessary to obtain an accurate report.
- B. If a contributing employer is either delinquent in filing a premium report within the time prescribed by the Division or whose records are needed to make a proper determination of an amount of indebtedness or other matter declines to make its records available, the Division may, in its discretion:
 1. Use the information and knowledge available to the Division to estimate the amount of chargeable wages paid by a contributing employer during the premium period or periods. The amount of chargeable wages so determined will be deemed to have been paid by the employer and will be used to determine the annual payroll;
 2. Assess the employer for FAML premiums calculated on the basis of the estimated wages; and
 3. Issue a subpoena duces tecum to compel an employer to release books and records to the Division for use in obtaining the required information.
- C. A contributing employer who is delinquent in filing reports or paying FAML premiums will be promptly notified of the assessment by the communication method the employer elected during FAML registration. Premiums will not be considered delinquent if paid within thirty days after the date on which the Division notifies the employer of the delinquent payment.
- D. The Division may correct errors of computation whenever such erroneous computations are found or brought to the Division's attention.

1.6 Notification of FAML Premium Liability

- A. The Division will notify employers and individual persons who have elected coverage of their expected premium on the first business day of the calendar month the premium is due to be paid.
 1. Notification may be either electronic or sent by postal mail to the address provided to the Colorado Department of Labor and Employment.
 - (a) Employers, including self-employed persons may choose a business representative such as a payroll service provider, attorney, or accountant to receive notification on their behalf.

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- (b) Self-employed persons and local government employees who elect coverage pursuant to § 8-13.3-514, C.R.S., may elect to be notified electronically or by postal mail.
 - (c) Local governments that have declined participation in the FAMLI program pursuant to 8-13.3-522 C.R.S., but which have agreed to withhold and remit the employee share of premiums for employees who elect coverage under 8-13.3-514, C.R.S., will be provided a quarterly list of employees who have elected coverage pursuant to 8-13.3-514 C.R.S. Local governments which have declined participation in the FAMLI program pursuant to section 8-13.3-522, C.R.S., and have declined to withhold and remit the employee share of premiums for employees who elect coverage under 8-13.3-514 C.R.S., will not receive information from the Division regarding any such employees who have voluntarily elected coverage.
 - 2. A schedule of due dates as well as guidance as to how to remit premiums will be posted by the Division on the FAMLI website and will remain publicly available.
- B. Employers not subject to a premium liability due to coverage through a pre-approved substitute private plan under 8-13.3-521, C.R.S., will not receive quarterly notifications of premium liability from the Division.
- 1. In the event of a loss of coverage or significant change in status, the employer is required to notify the Division within 30 days, and a premium liability will begin to accrue from the first day of the previous calendar quarter.
 - 2. Premium liability will then continue to follow the regular calendar quarter payment schedule, until such time as a new and separate waiver has been approved by the Division.

Editor's Notes

History

New rule eff. 01/01/2022.