DEPARTMENT OF LABOR AND EMPLOYMENT

Division of Family and Medical Leave Insurance

RULES CONCERNING EMPLOYEE JOB PROTECTION, ANTI-RETALIATION AND ANTI-INTERFERENCE

7 CCR 1107-7

7.1 Statements of Authority, Purpose, and Incorporation by Reference

1. This regulation is adopted pursuant to the authority in section C.R.S. § 8-13.3-509 and is intended to be consistent with the requirements of the State Administrative Procedures Act, C.R.S. § 24-4-101 et seq. (the "APA"), and the Paid Family and Medical Leave Insurance Act, sections 8-13.3-501 et seq. (the "FAMLI Act"), C.R.S.

2. The general purpose of these Employee Job Protection and Anti-Retaliation and Anti-Interference rules is to exercise the authority of this Division to enforce and implement Colorado legislative enactments and accompanying rules protecting against retaliation for, or interference with, the exercise of protected rights, and requiring that employees receive various forms of notification of their rights under the Paid Family and Medical Leave Insurance Act (C.R.S. Title 8, Article 13.3, Part 5). These Rules are adopted pursuant to Division authority in C.R.S. § 8-13.3-509(7).

3. Incorporations by Reference. Articles 13.3 and 13.5 of C.R.S. Title 8 (2023), Articles 1 and 3 of C.R.S. Title 18 (2023), Article 6 of C.R.S. Title 26 (2023), Article 34 of C.R.S. Title 24 (2023), 29 C.F.R. 825, et seq. (2023), 29 U.S.C. 2601, et seq.(1993), 42 U.S.C. § 12101 et seq.(2023), 41 U.S.C. § 21F (2023), and 38 U.S.C. § 4301, et seq (2023) are hereby incorporated by reference. Earlier versions of such laws may apply to events that occurred in prior years. Such incorporation excludes later amendments to or editions of the statutes. These statutes and regulations are available for public inspection at the Colorado Department of Labor and Employment, Division of Family and Medical Leave Insurance, 633 17th Street, Denver, CO 80202. Copies may be obtained from this Division at a reasonable charge or can be accessed electronically from the website of the Colorado Secretary of State. Pursuant to C.R.S. 24-4-103(12.5)(b), the agency shall provide certified copies of the statutes and regulations incorporated at cost upon request or shall provide the requestor with information on how to obtain a certified copy of the material incorporated by reference from the agency originally issuing the statutes. All Division Rules are available to the public at famli.colorado.gov. Where these Rules have provisions different from or contrary to any incorporated or referenced material, the provisions of these Rules govern so long as these are consistent with Colorado statutory and constitutional provisions.

4. 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.

7.2 Definitions and Clarifications

1. Unless otherwise indicated, terms used here that are defined in the FAMLI Act have the same definition as they do under the FAMLI Act. Terms defined under the federal Family Medical Leave Act of 1993 ("FMLA," 29 U.S.C. 2601, et seq. (1993)), or its implementing regulations (28 CFR § 825) shall be treated as persuasive, supplementary authority when those definitions are not facially inconsistent with the FAMLI Act or its implementing regulations.

2. "Complaint" has the same meaning as 7 CCR 1107-8, Section 8.2.4.

3. “Eligible employee” means an employee entitled to the protections described at C.R.S. 8-13.3-509(1).

4. “Protected activity” means any activity described under C.R.S. § 8-13.3-509(4).

5. “Retaliation” means, and is synonymous with, discrimination based on or for protected activity, and it encompasses any act (whether an affirmative act, an omission, or a statement) that is intended to, and could, deter a reasonable person from engaging in, or impose consequences for, protected activity. Examples of unlawful retaliation may include, but are not limited to:

    A. Subjecting an employee to intimidation, threat, reprisal, harassment, or discrimination;

    B. Subjecting an employee to an adverse employment action, including discipline, discharge, suspension, transfer, or assignment to a lesser position in terms of job classification, job security, or another term or condition of employment;

    C. Reducing the pay or hours of work of an employee or denying an employee additional hours of work;

    D. Failing to hire an individual for a past protected activity;

    E. Failing to reinstate an employee following a return from leave, in accordance with Section 7.3 of these rules;

    F. Failing to store and maintain the confidentiality of employee information related to requests for leave under the FAMLI Act or its implementing regulations, in accordance with all applicable federal, state, and local laws and regulations, and as provided by 7 CCR 1107-5, Section 5.3.8.

    G. Engaging in conduct which would reasonably have the effect of discouraging a reasonable employee from accessing paid family and medical leave insurance benefits;

    H. Enacting or enforcing an employer attendance policy that counts leave taken under the FAMLI Act as an absence that may lead to or result in discipline, demotion, or suspension. Such an attendance policy shall constitute per se retaliation under C.R.S. § 8-13.3-509. An employee working under this policy is entitled to appropriate legal and equitable relief under the FAMLI Act.

    I. Taking any effort to use a person’s immigration status to negatively impact the rights, responsibilities, or proceedings of any person or entity under the FAMLI Act. Such efforts shall constitute per se retaliation and/or extortion, based on statutory provisions including but not limited to the following that make it unlawful: for any person to “threaten[] to report to law enforcement officials the immigration status of the threatened person or another person” to “induce another person” to give up money “or another item of value” (C.R.S. § 18-3-207(1.5)), including inducing the surrender of any “tangible and intangible personal property, contract rights, choices in action, [or] services …, and any rights of use or enjoyment connected therewith” (C.R.S. § 18-1-901).

6. “Interference” means any act or omission that, regardless of intent, interferes with any right or protected activity under the FAMLI Act or its implementing regulations. Interference includes but is not limited to:

    A. Intimidating or threatening conduct intended to discourage an employee from accessing family and medical leave insurance benefits, or which has the effect of discouraging an employee from accessing such benefits;

B. Providing false or misleading information intended to interfere with an employee's ability to access paid family and medical leave insurance benefits, or which has the effect of interfering with an employee's ability to access such benefits;

C. Failing to provide notice, as required by C.R.S. § 8-13.3-511;

D. Information requests prohibited by 7 CCR 1107-3, Section 3.7.6 or 7 CCR 1107-5, Section 5.3.8.

E. Requiring the production of information defined as confidential under these rules or other statutes including but not limited to the Healthy Family and Workplaces Act of 2020 (“HFWA,” C.R.S. Title 8, Article 13.3, Part 4), the Family and Medical Leave Act of 1993 (“FMLA,” 29 U.S.C. §§ 2601–2654 (2006)), the Americans With Disabilities Act of 1990 (“ADA,” 42 U.S.C. § 12101 et seq. (1990)), and the Genetic Information Nondiscrimination Act of 2008 (“GINA,”41 U.S.C. § 21F (2008)).

F. Failing to cooperate with the Division in processing a request for paid family and medical leave insurance benefits;

G. Failing to cooperate with the Division during the processing of a complaint arising under C.R.S. § 8.13.3-509;

H. Inducing or attempting to induce an individual to prospectively waive a right under the FAMLI Act or its implementing regulations;

I. Taking any effort to use a person’s immigration status to negatively impact the rights, responsibilities, or proceedings of any person or entity under the FAMLI Act. Such efforts constitute per se interference and/or extortion.

7.3 Clarifications Regarding Job Reinstatement

1. Pursuant to C.R.S. § 8-13.3-509(1), Any covered individual who has been employed with the covered individual's current employer for at least 180 days prior to the commencement of the covered individual's paid family and medical leave who exercises the covered individual's right to family and medical leave insurance benefits shall be entitled, upon return from that leave, to be restored by the employer to the position held by the covered individual when the leave commenced, or to be restored to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment.

A. An individual is considered employed on any day they work, on their days off, and during any leave, paid or unpaid, where the employer reasonably believes the individual will return to work. Where employment is seasonal, an individual is not considered employed between seasons.

B. The 180 days need not be consecutive. However, if a gap in employment exceeds 365 days, then the number of days employed resets to zero.

C. A change in the employee’s status with their current employer does not reset or negate the number of days the employee was employed prior to the change in status (e.g., full-time to part-time, seasonal to full-time).

D. Leave taken under the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA,” 38 U.S.C. §§ 4301-4334 (1994)) is considered “employment.”

E. The replacement of an employer by a “successor employer,” as defined by C.R.S. 8-13.3-503(8)(b)(II), does not interrupt an employee’s accumulation of days employed.

2. An employer is not obligated to reinstate an employee:

A. Where the covered individual has not been employed with the current employer for at least 180 days prior to the commencement of the covered individual's paid family and medical leave;

B. Where the covered individual’s paid family and medical leave extends beyond the maximum benefit duration provided by C.R.S. § 8-13.3-505(1);

C. Where the employee’s return from paid medical and family leave coincides with an employer’s scheduled cessation of operations for the season (e.g., ski resorts, waterparks) and the employer can show that the employee would not otherwise have been employed at the time of reinstatement;

D. Where the employee’s contract for employment with the employer has ended pursuant to its terms,

E. Where an employee’s position is eliminated due to legitimate downsizing or reorganization;

F. Where the employee cannot perform the essential functions of their job any longer following the period of leave. An employee may be eligible to request reasonable accommodation under the Americans with Disabilities Act ("ADA"), C.R.S. § 24-34-402.3, or other applicable state or federal law; or

G. Where the Division has made a determination under 7 CCR 1007-8, Section 8.8.17 that the employee applied for or was approved for family and medical leave insurance benefits based on a fraudulent certification.

3. Employers shall restore eligible employees to their original job, or to an equivalent position, with equivalent pay, benefits, and other terms and conditions of employment upon the employee’s return from approved paid family and medical leave. For purposes of this section, an “equivalent position” means a similar, but not necessarily identical, position, and must involve the same or substantially similar duties, responsibilities, skill, effort, and authority.

A. Under this Rule, “an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment,” includes:

1. Base pay - Providing an employee with equivalent base pay upon returning from paid family and medical leave. Base pay does not include overtime or tips unless such overtime was regular or consistent. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from paid family and medical leave.

2. Benefits - Providing an employee with equivalent benefits upon returning from paid family and medical leave. Benefits include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan.

3. Proximate location - Permitting an employee to return to an equivalent location as worked prior to taking paid family and medical leave. If it is not possible to return the employee to the exact location, an employer may offer to return the employee to a proximate location or site where work is performed for and/or in connection with the employer’s business. If the employer offers a position at a location different from the employee’s original worksite, the employee must be reinstated to a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance).

4. Approximate shift times - Providing an employee with a schedule that is equivalent to the employee’s schedule prior to taking paid family and medical leave. Material changes to an employee’s schedule upon return from leave may raise an adverse inference of retaliation (e.g., scheduling a historically day shift working employee to graveyard shifts, etc.). In returning a covered employee to their equivalent position, employers may be required to remove an employee temporarily working the covered employee’s shift in order to comply with this section.

5. Approximate hours per week - An employee returning to work from paid family and medical leave shall be permitted to work the equivalent number of hours per week as was worked prior to the employee taking leave. Material changes to an employee’s working hours that change the employment status of an employee may raise an adverse inference of retaliation (e.g., reducing an employee’s hours from 40 hours per week to 25 hours per week, changing the employee’s status from full-time to part-time).

6. Nothing in these Rules shall be construed to require an employer to extend or offer permanent or indefinite employment to a temporary or seasonal employee.

7. Employers shall not be prohibited from disciplining or terminating employees who have attendance issues unrelated to protected leave under the FAMLI Act (e.g., excessive tardiness), or employees who have violated company policies that comply with applicable local, state, and federal laws.

8. Nothing in these Rules requires an employer to ignore an employee’s performance or retain an underperforming employee.

9. No employer shall be required to postpone or avoid legitimate layoffs or downsizing of a business solely to restore an eligible employee to their prior position upon returning from approved leave under the FAMLI Act.

10. An employee who is approved for and takes leave on an intermittent or reduced leave schedule and who fails to work during hours scheduled in accordance with that leave may be subject to employer discipline. In the event that an employee's utilization of intermittent leave is inconsistent with the Division's approval, it shall not be considered retaliation under C.R.S. § 8-13.3-509(3) for an employer to request additional information related to the use of leave.

7.4 Employment Agencies

1. When an employee is employed by an employment agency and the employment agency’s client (“client employer”), both employers are responsible for compliance with the FAMLI Act.

2. Employees who are employed by both an employment agency and a client employer must be counted by both employers to determine employer status, and premium liability under the FAMLI

Act and its implementing regulations, regardless of whether the employee is maintained on one or both of the employers' payrolls. However, only one of these parties need pay premiums pursuant to the agreement between the employment agency and the client employer.

3. Under these Rules, employment agencies are responsible for the following:

   A. Providing the required notice under C.R.S. § 8-13.3-511 to its employees;

   B. Maintaining any health care benefits during the paid family and medical leave benefit period as described by Section 7.3.3; and

   C. Restoring an eligible employee to an equivalent position upon return from paid family and medical leave.

4. Employment agencies are responsible for maintaining all records required by the FAMLI Act with respect to their employees.

5. Employment agencies shall meet all of their obligations under the FAMLI Act even when their client employer is not in compliance with the law or does not provide support to the employment agency in meeting these responsibilities.

6. Client employers must keep basic payroll and personnel records with respect to any such employees.

7. Client employers are subject to the prohibitions on retaliation and interference described by C.R.S. § 8-13.3-509(4).

7.5 Fines

1. In addition to any remedies available under C.R.S.§ 8-13.3-509(6), the Division will assess a fine of $500 per covered individual, per each violation under C.R.S. § 8-13.3-509.