DEPARTMENT OF LABOR AND EMPLOYMENT

Division of Family and Medical Leave Insurance

REGULATIONS CONCERNING PRIVATE PLANS

7 CCR 1107-5

5.1 Statements of Authority, Purpose, and Incorporation by Reference

1. This regulation is adopted pursuant to the authority in section C.R.S. § 8-13.3-501 et seq., 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 C.R.S. § 8-13.3-501 et seq. (the "FAMLI Act").

2. The general purpose of these rules is to exercise the authority of this Division to enforce and implement the Paid Family and Medical Leave Insurance Act (C.R.S. § 8-13.3-501 et seq.) with regard to private plans.

3. ~~Articles 4, 13.3, and 70 of C.R.S. Title 8 (2024), Article 4 of C.R.S. Title 24 (2024),~~ 7 CCR 1107-1 (2024), 7 CCR 1107-3 (2024), 7 CCR 1107-4 (2024), 7 CCR 1107-9 (2024), and 7 CCR 1101-2 (2024) are hereby incorporated by reference. Earlier versions of such laws and regulations may apply to events that occurred in prior years. Such incorporation excludes later amendments to or editions of the statutes and regulations. 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.

5.2 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.

2. These rules govern employees who are localized to Colorado pursuant to 7 CCR 1107-1, and govern employers and private plan administrators with regard to employees who are localized to Colorado pursuant to 7 CCR 1107-1. These rules do not govern employees who are not localized to Colorado pursuant to 7 CCR 1107-1, and do not govern employers or private plan administrators with regard to employees who are not localized to Colorado pursuant to 7 CCR 1107-1.

3. "Additional conditions or restrictions" as used in C.R.S. § 8-13.3-521(1)(i) means material conditions or restrictions, and does not include incidental conditions or restrictions that do not interfere with, restrict, or lessen an employee's rights under FAMLI Act.

4. "Adverse determination" means either a complete denial of benefits, or a determination to award a claimant benefits in a frequency or duration less than the claimant requested, or a determination to award a wage replacement amount less than what the claimant believes they are entitled to under the FAMLI Act and its implementing regulations.

5. "Insurer approved by the state" as used in C.R.S. § 8-13.3-521(2)(c) and these rules means an insurance provider licensed by the Division of Insurance within the Colorado Department of Regulatory Agencies, and in good standing with the Division of Insurance in accordance with its regulations.

6. "Private plan administrator" means an entity or individual tasked with the administration of an approved private plan, and can include without limitation the employer, a third-party administrator, a labor union, and/or an insurer approved by the state.

7. "Rights, protections, and benefits provided to employees under this part 5" as used in C.R.S. § 8-13.3-521(1) includes any rights, protections, and benefits conferred by rules promulgated under the FAMLI Act and its implementing regulations.

8. "Wages" has the same meaning as in 7 CCR 1107-1, Section 1.2.9.

5.3 Private Plan Requirements

1. An employer may comply with the FAMLI Act by providing an approved private plan that provides all of the same rights, protections and benefits provided to employees by the FAMLI Act and its implementing regulations, including but not limited to:

   A. Allowing family and medical leave insurance benefits to be taken for all purposes specified in C.R.S. § 8-13.3-504(2);

   B. Providing family and medical leave insurance benefits to a covered individual for any of the purposes, including multiple purposes in the aggregate, as set forth in C.R.S. § 8-13.3-504(2), for the maximum number of weeks required in C.R.S. § 8-13.3-505(1) in a benefit year as defined in 7 CCR 1107-3 Section 3.2.4;

   C. Allowing family and medical leave insurance benefits under C.R.S. § 8-13.3-504(2)(b) to be taken to care for any family member as defined under C.R.S. § 8-13.3-503(11) and 7 CCR 1107-3 Section 3.4.6;

   D. Allowing family and medical leave insurance benefits under C.R.S. § 8-13.3-504(2)(c) to be taken by a covered individual with any serious health condition;

   E. Allowing family and medical leave insurance benefits under C.R.S. § 8-13.3-504(2)(e) to be taken for any safe leave purposes;

   F. Providing a wage replacement rate for all family and medical leave insurance benefits of at least the amount required by C.R.S. § 8-13.3-506(1)(a);

   G. Providing a maximum weekly benefit for all family and medical leave insurance benefits of at least the amount specified in C.R.S. § 8-13.3-506(1)(b);

   H. Allowing a covered individual to take intermittent leave as authorized by C.R.S. § 8-13.3-505(3) or a reduced leave schedule pursuant to 7 CCR 1107-3;

I. Imposing no additional conditions or restrictions on family and medical leave insurance benefits, or paid family and medical leave taken in connection therewith, beyond those explicitly authorized by the FAMLI Act or regulations issued pursuant to the FAMLI Act;

J. Allowing any employee covered under the private plan who is eligible for family and medical leave insurance benefits under the FAMLI Act to receive benefits and take paid family and medical leave under the private plan; and

K. Providing that the cost to employees covered by a private plan shall not be greater than the cost charged to employees under the state plan under C.R.S. § 8-13.3-507.

2. Subject to the limitations described at Section 5.5.3 of these rules, an approved private plan shall be in the form of either self-insurance or a policy obtained through an insurer approved by the state. An insurer shall not allow coverage for an employer under its policy to become effective earlier than thirty (30) days after the employer has received private plan approval from the FAMLI Division.

3. Private plans must offer benefits to all covered individuals employed by the employer. Nothing prohibits a private plan from covering multiple employers' workforces; however, if an employer intends to meet its obligations under the FAMLI Act and its implementing regulations with an approved private plan, it must apply for private plan approval, pay the administrative fee described in these rules, pay the maintenance fee described in these rules, and otherwise comply with these rules regardless of how many other employers use or intend to use the same private plan to meet their obligations under the FAMLI Act and its implementing regulations.

4. Private plans must not impede the ability of an employer, an employee, or a private plan administrator to comply with the provisions of the FAMLI Act or its implementing regulations.

5. The earnings requirement necessary to be a "covered individual" pursuant to C.R.S. § 8-13.3-503(3)(a)(I) is not "per-employer" and private plans may not deny or otherwise limit benefits to which the covered individual would otherwise be entitled. However, if the private plan administrator does not have verified wages from other employers, the private plan administrator may determine a claimant's wage replacement amount based on the private plan employer's wages, so long as the employee is able to appeal the benefit decision to provide accurate wage information for their other employment.

6. Employers who are approved to provide FAMLI benefits under a self-insured plan must establish and maintain a separate account for their localized Colorado employees: (1) into which all localized employee contributions are deposited and kept; and (2) from which all benefits for localized employees must be paid, and from which private plan administrative costs may be paid. Employers may not withdraw from the account except to pay benefits and private plan administrative costs. Upon any voluntary or involuntary termination of a self-insured plan, the employer must remit the remaining balance of the account to the Division.

7. All private plans must provide for the confidentiality of employee information related to FAMLI benefits, and such information must be kept separate from all other employment records.

8. By submitting an application for benefits to a private plan administrator, the claimant consents to the private plan administrator sharing with the employer, upon the employer's request, limited information necessary for the employer to coordinate FAMLI benefits with other benefits for which the claimant is eligible, in accordance with the information-sharing provisions of 7 CCR 1107-4, including the wage replacement amount and the reason for leave. The employer shall not request, and the private plan administrator shall not provide, information that is not absolutely necessary for such benefit coordination. An employer's request for information not absolutely necessary for such benefit coordination, or a private plan administrator's provision of information

not absolutely necessary for such benefit coordination, may constitute discrimination, retaliation, and/or interference in violation of C.R.S. § 8-13.3-509. The employer must store and maintain the confidentiality of such information in accordance with all applicable federal, state, and local laws and regulations, and failure to do so may constitute discrimination, retaliation, and/or interference in violation of C.R.S. § 8-13.3-509.

9. All private plans must provide that an employee shall be provided, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to the employee's claim for benefits within seven (7) days of the request. If the Division determines that an employee was not granted access and copies in violation of this section, the Division may assess upon the private plan administrator a fine of up to $250.00 per violation.

10. With regard to forms that claimants and/or health care providers will be required to complete in relation to a claim for benefits, all private plans shall either utilize the forms provided by the Division, or utilize forms that are no more onerous than the forms provided by the Division. If a private plan administrator makes changes to an approved form, they may submit the revised form to the Division for review and approval. If the Division determines that an employee had to, as a condition to access benefits, use a form more onerous than the forms provided by the Division, the Division may assess upon the private plan administrator a fine of up to $500.00 per violation, except that the Division shall not assess a fine for a form that it has approved.

11. Private plans must determine whether an application for benefits is properly filed, and must do so in a manner consistent with 7 CCR 1107-3 Section 3.6.8.

12. In accordance with C.R.S. § 8-13.3-521(7), in addition to the initial administration fee described in these rules, starting in 2025, an employer with an approved private plan must pay the Division an annual maintenance fee to cover amounts expended by the division for costs arising out of the administration of private plans.

    A. The Division will calculate a flat fee per employer with an approved private plan for all routine costs. The flat fee will be prorated for employers who did not have private plan approval from the Division for the entire period covered by the maintenance fee. Routine costs are costs that are incurred on all private plans, or costs that are incurred regardless of private plan administration, including, but not limited to, review of plan modifications necessary to comply with changes to the FAMLI Act, data reporting and analysis costs, data sharing across plans, review of continuing coverage requirements, and random audits. Technology development costs will be included in the flat fee and considered spent evenly over each of the five years after the division incurs them.

    B. The Division will calculate an individualized fee for each employer with an approved private plan for all non-routine costs. Non-routine costs are costs the Division incurs as a result of the private plan administration, including, but not limited to, appeals of private plan determinations, appeals of withdrawals of private plan approval, appeals of denials of private plan applications, retaliation and interference investigations, appeals of retaliation or interference determinations for employers with an approved private plan, surety bond reviews, review of private plan modifications not necessary to comply with changes to the FAMLI Act, and targeted audits. The individualized fee will not include any costs incurred in reviewing an employer's application for private plan approval.

    C. The maintenance fee shall cover all costs arising out of the employer's private plan for the prior fiscal year beginning July 1 and ending June 30.

    D. The Division will deliver an invoice of the maintenance fee to each employer no later than November 30 each year.

E. Private plan maintenance fees shall be due no later than December 31 each year. The Division may extend this deadline for good cause.

F. Private plan maintenance fee calculations may be appealed pursuant to 7 CCR 1107-9.

G. Employers who are members of a professional employer organization ("PEO") certified pursuant to C.R.S. § 8-70-114 do not have to pay an annual maintenance fee if the PEO has an approved private plan that covers all the employer's Colorado employees. The certified PEO will be assessed a maintenance fee for private plan costs attributable to its member employers.

13. Private plans must make reasonable efforts to make forms and communications under these rules available in an individual's primary language.

14. The internal reconsideration and appeals procedures under a private plan need not be equivalent or better than those procedures under the state plan, so long as the private plan provides for appeals to the Division and any court of competent jurisdiction, in accordance with C.R.S. § 8-13.3-521(5). However, all determinations under a private plan are appealable directly to the Division pursuant to 7 CCR 1107-9, and a private plan may not require a claimant to go through any internal review, reconsideration, or appeal before appealing a private plan determination to the FAMLI Division.

15. Private plans will not be reviewed or approved for any local government, or for any individual electing coverage pursuant to C.R.S. § 8-13.3-514.

16. An insurer approved by the state shall send notification to the Division within fourteen (14) days after any lapse in or end of coverage under the policy. The notification shall include:

A. The effective date of the lapse in or end of coverage;

B. The cause of the lapse in or end of coverage;

C. Whether the employer may reinstate the policy;

D. If eligible for reinstatement, the time period during which the employer has to reinstate; and

E. If eligible for reinstatement, the requirements for reinstatement.

17. An insurer approved by the state shall send notification to the Division within three (3) business days after the employer is sent notification of reinstatement. The reinstatement notification shall include:

A. The effective date of the reinstatement;

B. Whether there was a lapse in coverage; and

C. If there was a lapse in coverage, the dates coverage lapsed.

5.4 Application Requirements and Effective Date of New Private Plans

1. Private plans must be approved by the Division prior to implementation. Private plans in the form of an insurance policy issued by an insurer approved by the state must first be submitted to the Colorado Division of Insurance for approval.

2. To obtain approval of a private plan, an employer must first submit a completed application for private plan approval to the Division. Entities with separate federal employer identification numbers (FEINs) must submit separate applications and pay separate application fees, except that employers who are members of a professional employer organization ("PEO") certified pursuant to C.R.S. § 8-70-114 do not have to pay an application fee if they are covered by their PEO's private plan and their PEO has paid an application fee. Applications may be submitted at any time, and the Division will review applications as they are received.

3. An application for private plan approval must include:

   A. The employer's federal employer identification number ("EIN");

   B. The employer's name;

   C. The employer's business address;

   D. The employer's mailing address;

   E. A designated contact person, with that person's name and contact information;

   F. A copy of the employer's self-insured private plan, or if the private plan is in the form of an insurance policy provided by an insurer approved by the state, a copy of that insurance policy form;

   G. If the private plan is in the form of self-insurance, a surety bond, issued by a surety company authorized to transact business in Colorado, in an amount equal to one year of total premiums calculated pursuant to C.R.S. § 8-13.3-507, along with payroll documentation supporting the surety bond calculation;

   H. If the private plan is in the form of self-insurance, attestation that the employer has complied with the separate account requirements at Section 5.3.6 of these rules;

   I. An attestation, completed by the employer, that the employer understands, and the private plan satisfies, the requirements set forth in the FAMLI Act and its implementing regulations;

   J. An attestation, completed by the employer, that the forms used by the employees and/or health care providers will be no more onerous than the forms used by employees and/or health care providers under the state plan;

   K. A copy of the posted notice required by Section 5.9.4 of these rules;

   L. Other information as required on the application form; and

   M. An administration fee of:

      1. $500.00 for private plan applications received through 2024; and

      2. For private plan applications received in 2025 and later, the amount determined by the Director pursuant to C.R.S. § 8-13.3-521(7), and published on the Division's website.

4. Approved private plans must take effect no earlier than sixty days after the date of application so that the Division has sufficient time to review the application, and the employer has sufficient time to provide notice to employees in accordance with Section 5.9 of these rules.

5. The employer must submit to the Division any forms to be used by employees and/or health care providers under the approved private plan at least thirty (30) days prior to making them available to employees for usage.

6. Employers remain liable to the FAMLI Division for premiums on wages paid until the effective date of the approved private plan, and remain entitled under C.R.S. § 8-13.3-507(5) to withhold the employees' share of premiums from wages paid until the effective date of the approved private plan. Throughout the duration of an approved private plan, employers may withhold premiums deductions from employees in an amount not to exceed the amount authorized by C.R.S. § 8-13.3-507(5), if such a deduction is pursuant to the terms of the approved private plan.

7. Employees remain eligible for benefits under the FAMLI Act until the effective date of the approved private plan.

8. Benefits awarded to an employee must be paid by the plan that awarded the benefits for the full duration of the employee's approved FAMLI benefits claim, pursuant to 7 CCR 1107-4 Section 4.9.1.

   A. In the event of an approved private plan failing to pay benefits due to an insurance carrier's insolvency, if the policy is covered by an insurance guaranty association, the claims will be paid by the insurance guaranty association pursuant to their rules and procedures. If the policy is not covered by a guaranty association, then the employer will become responsible for paying all claims approved by the private plan prior to the date of insolvency. In either event, the employer shall immediately notify the FAMLI Division of the insolvency, the notice requirements under Section 5.14 of these rules are waived, and the employer will be deemed covered under the state system.

   B. If a self-insured employer fails to pay benefits as awarded and private plan approval is withdrawn pursuant to Section 5.16 of these rules, the Division shall execute upon the surety bond and use the proceeds and the remaining funds in the separate account established pursuant to Section 5.3.6 of these rules to pay benefits due for claims arising prior to the date of termination.

   C. If an employer fails to pay benefits as required by 5.4.8.A, or if the surety bond and remaining funds are insufficient to pay the benefits under 5.4.8.B, those claims shall be paid by the FAMLI Division. The employer is indebted to the Division for such amounts, and the Division may pursue all legal means to collect such amounts from the employer.

5.5 Review of Private Plan Applications

1. If the Division does not approve an application for a private plan, the Division shall notify the employer~~applicant~~ in writing of any issues that must be addressed in order for the private plan application to be approved.

2. The employer~~applicant~~ may request to meet and confer with the Division to discuss the issues and how they can be addressed, and the Division shall make a good faith effort to schedule a prompt meeting with the employer~~applicant~~ at a convenient time and in a convenient manner.

3. For applications for self-insured private plans received by the Division on or after January 1, 2025, the employer must use the self-insurance private plan template approved by the FAMLI Division and published on its website.

4. The ~~applicant~~ employer may submit another application for private plan approval after sufficiently addressing any identified issues.

5. No additional administrative fee will be assessed for an application received within one year of the initial application for private plan approval.

6. Each application is a separate application for purposes of determining the effective date of an approved private plan.

7. The outcome of a private plan application is subject to an appeal, in accordance with 7 CCR 1107-9.

5.6 Surety Bond Requirement for Employer Self-Insured Private Plan

1. The Division will only accept a surety bond issued by a surety company authorized by the Colorado Insurance Commissioner to transact such business in Colorado.

2. The bond amount must be an amount equal to one year of total premiums calculated pursuant to C.R.S. § 8-13.3-507.

3. The bond amount must be based on four quarters of projected wages, as represented by:

   A. The previous four quarters of wages reported by the employer to the Division, in accordance with 7 CCR 1107-3 Section 3.3.2; or

   B. If the employer has not reported four quarters of wages to the Division, the previous four quarters of wages reported by the employer to the Colorado Unemployment Insurance Division, in accordance with 7 CCR 1101-2, Section 7.2.4; or

   C. If the employer has not reported wages to FAMLI or the Colorado Unemployment Insurance Division for four quarters, the previous four quarters of wages paid to its employees; or

   D. If none of the above is possible, a reasonable estimate of one year of projected wages supported by documentation.

4. The Division may disapprove a private plan if an employer fails to provide documentation the Division deems necessary for purposes of calculating an appropriate surety bond amount. This disapproval is a determination subject to appeal pursuant to 7 CCR 1107-9.

5. If an employer has reason to believe that the amount calculated pursuant to Section 5.6.3 of this rule does not accurately reflect its projection of the next year of wages, the employer must notify the Division and provide an explanation as to why, along with any supporting documentation.

6. A surety bond shall be issued on a form prescribed by the Division.

7. The bond must include a statement that the bonding company must give ninety (90) days' notice of its intent to terminate liability to both the principal and the Division, except that if the bonding company is terminating liability because it is issuing a replacement bond, it may do so without providing prior notice. In the event of a replacement bond, the surety company and the employer must notify the Division no later than fourteen (14) days after its effective date.

8. The employer must maintain surety bond coverage for the duration of its approved self-insured private plan.

9. The Division will review the bond annually to ensure that the amount corresponds with the wage projections as described in this rule. The employer must provide the Division with any documentation necessary to review the bond amount. If the Division determines that the bond

amount must be increased, the employer must do so to maintain private plan approval. If the Division determines that the bond amount exceeds the projected wages as described in Section 5.6.3 of this rule, the employer may reduce the bond amount to match such projected wages.

10. The Division may execute on and collect the bond amount if the employer's private plan approval is terminated, voluntarily or involuntarily, pursuant to these rules.

    A. The Division may execute on and collect the entire bond amount, less any funds received from the employer within 30 days after the effective date of the termination of the private plan approval or as agreed upon by the employer and the Division.

    B. Funds so received by the Division from the employer and/or the surety, as well as funds received by the Division pursuant to Section 5.3.6 of these rules, will be deposited into the fund, and if applicable, will be credited toward the employer's obligations under Section 5.17 of this rule, and will not be refunded pursuant to 7 CCR 1107-1, Section 1.4.8.B.

5.7 Duration of Private Plan Approval; Renewal Requirements

1. Unless otherwise authorized by the Division pursuant to these rules, private plan approval expires after eight years from the date that the private plan went into effect.

2. Beginning in November 2024 and every November thereafter, employers with approved private plans must annually submit an attestation to the Division that their contact information is accurate and their approved private plan continues to satisfy the requirements of the FAMLI Act and its implementing regulations. Such attestation must be in the form and manner specified by the Division on its website. Failure to submit an attestation may result in the Division's withdrawal of the private plan approval.

3. Employers seeking renewal of their private plan approval must submit an application for renewal at least sixty (60) days before the expiration of their private plan approval. The Division will send to the employer's email address an expiration notice at least ninety (90) days before the expiration of the private plan's approval.

5.8 Partial Colorado Workforce Coverage Prohibited

If an employer meets its obligations under the FAMLI Act and its implementing regulations with an approved private plan, it must cover all of the employer's employees localized in Colorado in accordance with 7 CCR 1107-1.

5.9 Notice to Employees of Private Plan Benefits and Administration

1. No later than thirty (30) days before the effective date of an approved private plan, an employer must deliver to each of its employees a written notice of its election and approval by the Division to offer a private plan in lieu of participating in the state plan. For an employee whose start date or Colorado transfer is later than thirty (30) days before the effective date of an approved private plan, an employer must deliver the written notice to the employee immediately upon hire or transfer. Additionally, the employer must deliver the private plan notice to an employee within five days after either learning of an employee experiencing an event that triggers eligibility pursuant to C.R.S. § 8-13.3-504, or receiving from the employee a request for leave under the Family and Medical Leave Act at 29 U.S.C. § 2601 et seq., absent extenuating circumstances.

2. The written notice may be delivered to the individual employee electronically, in person, or via mail.

3. The written notice must include:

   A. The effective date of the approved private plan;

   B. A description of the private plan's wage replacement benefits;

   C. A description of the private plan's leave and employment protection benefits;

   D. A description of how employee eligibility is determined;

   E. A description of how any employee contributions are calculated and collected;

   F. A description of how and when an employee may file a claim for benefits under the approved private plan;

   G. A notification to the employee of the employee's appeal rights pursuant to the FAMLI Act, and if applicable, of the employee's optional alternative to appeal a benefits determination to the private plan administrator;

   H. Contact information for the FAMLI Division and the plan administrator; and

   I. A notification to the employee of the employee's rights under C.R.S. § 8-13.3-509.

4. In addition to delivering the written notice to each of its employees localized in Colorado, an employer must post a notice containing the same information.

   A. The notice must be posted in a conspicuous and accessible place in each establishment where employees are employed.

   B. The notice must be in English, Spanish, and any language that is the first language spoken by at least five percent of the employer's Colorado workforce.

   C. If the employer does not maintain a physical workplace, or an employee works remotely, the employer may satisfy the posting requirement by sending the notice via email or through a conspicuous posting in a web-based or app-based platform that the employee regularly uses.

5. If the Division determines that an employer has violated any part of Section 5.9 of these rules, the Division may assess upon the employer a fine of up to $500.00.

5.10 Collection of Employee Contributions Authorized

Where an employer lawfully deducts premium contributions from an employee's wages pursuant to C.R.S. § 8-13.3-507(5) or the terms of an approved private plan, then for the purposes of compliance with C.R.S. § 8-4-105, premium contributions are considered wages paid for the benefit of the employee, and collecting such premium contributions does not violate C.R.S. § 8-4-105(2). If an employer deducts premium contributions from an employee's wages, and subsequently receives a refund of premiums paid from the private plan, the employer must distribute the refund proportionately and in accordance with how it was collected. If an employee terminates employment with the employer, any premiums previously deducted remain part of the employer's approved private plan.

5.11 Calculation of Benefits Under Private Plans

Private plans must provide a wage replacement rate for all family and medical leave insurance benefits of at least the amount required by 7 CCR 1107-3 Section 3.5.

5.12 Recordkeeping and Reporting Requirements; Division Access to Records

1. A private plan administrator must keep and maintain documentation of the following for a minimum of six years:

   A. Applications for benefits;

   B. Benefits paid, including payment dates and amounts;

   C. Adverse determinations of benefits applications;

   D. Internal appeals received;

   E. The outcome of internal appeals received; and

   F. Documents, including wage data, containing the information upon which benefits determinations were based.

2. An employer must keep and maintain documentation of the following for a minimum of six years:

   A. Records of any premium contributions it collected from employees.

   B. Wage records.

3. A private plan administrator must, on a quarterly basis, submit to the Division a private plan administration summary of the previous calendar quarter. The private plan administration summary must be submitted no later than the last day of the month immediately following the end of the calendar quarter addressed by the summary. After an approved private plan has been effective for three years, the private plan administrator may, unless otherwise directed by the Division, submit its private plan administration summary annually, which will be due on January 30 of each year. Information received by the Division in the private plan administration summary will be aggregated so that the Division can comply with its reporting obligations at C.R.S. § 8-13.3-519. The private plan administration summary must include aggregate summaries of the following:

   A. Total number of benefits applications received;

   B. Total number of benefit applications approved, pending, denied, or closed.

   C. Total benefit amounts paid;

   D. Total number of employees covered under the private plan;

   E. The purposes for approved leave;

   F. The reported gender of individuals for whom leave was approved, and for whom leave was denied in whole or in part;

   G. The average weekly wage of individuals for whom leave was approved;

   H. If leave was taken to care for a family member, the relationship of that family member to the beneficiary;

   I. Total number of appeals received; and

J. Total number of appeals affirmed, reversed, modified, or withdrawn.

4. For private plan administrators who administer private plans for multiple employers, the aggregate summaries included in the private plan administration summaries may be aggregated across employers.

5. Within twenty-eight (28) days of the Division's written request, a private plan administrator or an employer with an approved private plan shall provide any documentation either is obligated to maintain pursuant to Section 5.12 of these rules. If the employer or private plan administrator requests an extension and provides good cause for the extension, the Division may extend the 28-day deadline. If the employer or private plan administrator does not provide the requested documentation by the deadline, the Division may withdraw its approval of the private plan.

5.13 Modification of a Private Plan

1. An employer shall notify the Division, in writing, of any material change to an approved private plan at least sixty (60) days before the change is to take effect. However, if an employer is changing from one approved private plan to another approved insurance carrier's private plan, the employer must notify the Division, in writing, of the change at least thirty-five (35) days before the change is to take effect. The notification shall include:

   A. A detailed explanation of all material changes; and

   B. For self-insured private plans, a statement describing how any material changes do not reduce benefits or impose new requirements on covered employees beyond what would be provided and required under the state plan.

2. The Division will review the material change to the approved private plan, and will determine whether the material change impacts private plan approval. The Division will make a good faith effort to confer with the employer regarding any impact to continued private plan approval, and to notify the employer of its determination within thirty (30) days of the employer's notification to the Division. In no event may an employer make a material change without first obtaining Division approval and providing at least thirty (30) days' notice to its employees.

3. Division review of material changes to a private plan may impact the calculation of an employer's annual maintenance fee.

4. Material changes to an approved private plan include, but are not limited to:

   A. Changing from one private plan to another;

   B. Changing the private plan to reduce benefits or leave types;

   C. Changing the private plan to increase claims adjudication timeframes;

   D. Changing the private plan to increase benefits payment timeframes; or

   E. Changing the private plan to increase the information collected from employees to apply for or receive benefits.

5. Material changes to an approved private plan do not include:

   A. Updating the private plan benefits application form in a way that does not make the form more onerous than the state's benefits application form;

B. Changing business or contact information;

C. Correcting typographical errors;

D. Increasing benefits or leave types; or

E. Updating the private plan to align with regulatory changes.

6. A change to an approved private plan will not extend the duration of its approval.

7. If the Division determines that an employer has not notified the Division of a material change in accordance with Section 5.13 of these rules, the Division may assess upon the employer a fine of up to $250.00. If the Division determines that an employer has not notified its employees of a material change in accordance with Section 5.13 of these rules, the Division may assess upon the employer a fine of up to $100 per employee per day.

5.14 Voluntary Termination of an Approved Private Plan by an Employer

1. Before terminating coverage under an approved private plan as part of a transition to the state plan, an employer must provide at least thirty (30) days advance written notice to its employees and to the Division. Coverage termination as part of a transition from one private plan to another is governed by Section 5.13 of this rule.

2. The Division will withdraw approval of an employer's private plan, effective the date coverage under the private plan was terminated~~later of the effective date described in the notification, or thirty (30) days after receiving the notification described in Section 5.14.1~~.

3. If the employer terminates coverage under an approved private plan without providing thirty (30) days advance notice to its employees and to the Division, the Division may assess upon the employer a fine of up to $500.00 per employee who did not receive timely advance notice. If the Division awards benefits to a private plan employer's employee with a benefit start date occurring before thirty days after the employer's notice to the Division, the Division may assess upon the employer a fine of up to $500.00.~~An employer must continue the approved private plan's coverage through the effective date of a withdrawal described in Sections 5.14 or 5.16 of these rules. If an employer does not continue the approved private plan's coverage through the withdrawal's effective date, the Division may assess against the employer a fine, per employee per day the employee was not covered through the withdrawal's effective date. The fine amount will be the lesser of (a) the daily total premium amount per employee, calculated by using the total annual premium amount paid by the employer and employee, divided by 365 or (b) $500.00.~~

5.15 Expiration of an Approved Private Plan

If an employer does not renew its private plan in accordance with Section 5.7 of these rules, the employer will be deemed to have voluntarily terminated its private plan, and will be subject to the requirements in Section 5.14 of these rules.

5.16 Involuntary Termination of a Private Plan by the Division

1. The Division will withdraw approval for a private plan when the terms or conditions of the plan have been violated. Causes for plan termination shall include, but not be limited to, the following:

A. Failure to pay benefits in the amount and duration required by the FAMLI Act and its implementing regulations;

B. Failure to pay benefits in the amount and duration required by the private plan, where the private plan provides benefits in a greater amount or duration than is required by the FAMLI Act and its implementing regulations;

C. Failure to pay benefits within the timeframes and in the manner specified by the FAMLI Act and its implementing regulations;

D. Failure to maintain an adequate surety bond in accordance with the FAMLI Act and its implementing regulations;

E. Misuse of private plan money, including the use of private plan funds for anything other than paying out and administering benefits, or transferring private plan funds from an account established pursuant to Section 5.3.6 of these rules to any account not exclusively for holding private plan funds;

F. Failure to submit reports or comply with other compliance requirements as required by the FAMLI Act and/or its implementing regulations;

G. Failure to pay the annual maintenance fee;

H. Failure to maintain private plan coverage; or

~~I~~H. Failure to otherwise comply with the FAMLI Act and its implementing regulations.

2. The Division will conclude that the terms or conditions of the plan have been violated, and therefore withdraw approval of the private plan, if the Division determines that the employer or the private plan administrator has repeatedly violated the private plan's terms and/or the FAMLI Act and its implementing rules, has willfully or recklessly violated the private plan's terms and/or the FAMLI Act or its implementing rules, or has otherwise violated the private plan's terms and/or the FAMLI Act or its implementing rules in such a way that indicates a widespread compliance concern.

3. If the Division withdraws approval of an employer's private plan, the Division will issue to the employer and the private plan administrator a Notice of Withdrawal of Private Plan Approval. The employer may appeal that withdrawal to the Division pursuant to 7 CCR 1107-9. If the employer does not appeal the withdrawal, the effective date is the day following the appeal deadline specified by 7 CCR 1107-9, except that if the Division withdraws approval because the employer failed to maintain private plan coverage, the effective date is the date coverage ended. The Division will stay the withdrawal of approval during an appeal unless the Division withdrew approval because the employer failed to maintain private plan coverage.

5.17 Employer Obligations After Termination of Private Plan Approval

1. Within seven (7) days of the effective date of a voluntary or involuntary termination of private plan approval, the employer must notify all Colorado employees of the termination, notify all Colorado employees that they are under the state plan as a result of the termination, and deliver to all Colorado employees the information contained in the program notice described at C.R.S. § 8-13.3-511.

2. If an employer's workforce becomes covered by the state plan because the employer's private plan approval was voluntarily or involuntarily terminated, the employer must remain covered by the state plan and pay premiums to the state for a period of at least three (3) years and deliver to the Division all remaining amounts in the account established pursuant to Section 5.3.6 of these rules.

3. If the employer returns to coverage under an approved private plan before the end of three (3) years, the employer must pay to the state the amount of premiums it would have been required to remit pursuant to C.R.S. § 8-13.3-507(5) through the remainder of the three-year period. The employer may choose to either remit the remainder as a lump sum based on a projection determined by the Division, or may continue to remit premiums based on actual wage data on a quarterly basis through the remainder of the three-year period.

4. If the Division determines that an employer has violated Section 5.17 of these rules, the Division may assess upon the employer a fine of up to $100.00 per employee per day.

5.18 Division Oversight of Private Plans

1. The Division may, at any time at its sole discretion, initiate a review of a private plan and its administration to determine whether the private plan and its administration are in accordance with the FAMLI Act and its implementing regulations.

2. Upon initiation of a review and request by the Division, the private plan administrator and the employer shall provide all information and documentation necessary to conduct the review.

3. The Division will ensure confidentiality of records.

4. Information and documentation requested by the Division must be provided within fourteen (14) days after the request. The Division may extend the deadline where good cause for such an extension exists.

5. Failure to provide information and documentation necessary for the Division's review of a private plan and its administration may result in the Division's withdrawal of the private plan's approval, and may result in a fine of up to $250.00 per employee whose information is requested, per day that it is late.

6. Upon determination that a private plan administrator is not administering private plans in accordance with the FAMLI Act and its implementing regulations, the Division may withdraw its approval of private plans administered by that private plan administrator, and may deny approval of future private plans administered by that private plan administrator. If the Division withdraws approval pursuant to this rule, it will make a reasonable effort to do so in a way that ensures employers can maintain consistent coverage for their employees. All withdrawals of private plan approval may be appealed pursuant to 7 CCR 1107-9.

5.19 Appeals

1. Claimants under an approved private plan may appeal any adverse determination made by the private plan administrator pursuant to 7 CCR 1107-9, including but not limited to:

    A. A private plan administrator's failure to issue a determination within two weeks of filing;

    B. A private plan's adverse determination of a claim for benefits;

    C. A private plan's failure to pay the full claim it approved;

    D. A private plan's closure of a claim based on its determination that the claim was not properly filed in accordance with 7 CCR 1107-3 Section 3.6.9;

    E. A private plan's determination that an employee is disqualified from benefits due to its conclusion that the employee willfully made a false statement or misrepresentation regarding a material fact, or willfully failed to report a material fact, to obtain benefits; or

F. A private plan's identification and/or collection of an overpayment.

2. A claimant under an approved private plan may file an appeal with the Division, or may choose to file an appeal with the private plan administrator if the private plan allows for a discretionary internal appeal mechanism. Regardless of whether there is an internal private plan appeal process, a claimant under an approved private plan may choose to file an appeal directly to the FAMLI Division in accordance with 7 CCR 1107-9.

3. If a claimant chooses to file an appeal with the private plan administrator, the claimant may appeal the outcome of that appeal to the Division in accordance with 7 CCR 1107-9.

4. If a covered individual appeals a benefit determination under an approved private plan, and the Division determines that the covered individual is entitled to additional payment, the Division will notify the private plan administrator, and the private plan administrator must pay the additional amount within the same time frames the Division would have to pay additional amounts pursuant to 7 CCR 1107-9.

5. The Division will specify the benefit amount due and when such additional payments are due in its determination.

6. If the Division overturns or modifies a benefits determination under an approved private plan, and the private plan administrator seeks judicial review of the Division's decision, the private plan administrator must still pay the additional amount within the timeframes above. However, if the Division's determination is overturned or modified by a court upon judicial review, the private plan administrator may:

   A. Deduct any overpayment from an employee's wages in accordance with C.R.S. § 8-4-105, if the private plan administrator is the employee's employer;

   B. Enter into a repayment plan with the employee; or

   C. File suit against the employee in a court of competent jurisdiction to recover the overpayment.

5.20 Fines

1. If, upon appeal or judicial review, the Division or a court determines that the private plan administrator owes additional payments to a covered individual, and the private plan administrator fails to issue payment of the benefits by the date or dates specified by the Division or the court in its determination, then the Division may assess fines upon the private plan administrator.

2. Each day after the due date that additional payments owed by a private plan to an individual claimant go unpaid constitutes a separate violation.

3. The Division may assess fines as follows:

   A. For the first day of nonpayment after the due date, a fine of up to $100.00 per individual claimant;

   B. For the second day of nonpayment after the due date, a fine of up to $200.00 per individual claimant;

   C. For the third day of nonpayment after the due date, a fine of up to $300.00 per individual claimant;

D. For the fourth day of nonpayment after the due date, a fine of up to $400.00 per individual claimant; and

E. For the fifth day of nonpayment after the due date, and for every additional day thereafter, separate fines of up to $500.00 per day per individual claimant.