



## Interpretive Notice & Formal Opinion (“INFO”) # 6C:

### How Healthy Families and Workplaces Act (“HFWA”) Paid Leave Differs in 2020 & 2021, and How It Differs from Federal Law, Prior Colorado Law, and Paid Family/Medical Leave

#### Overview

INFOs #6A and #6B detail the paid leave requirements of the “[Healthy Families and Workplaces Act](#)” (“HFWA,” [S.B. 20-205](#), July 14, 2020) in 2020 and 2021, respectively. This INFO summarizes key ways that leave differs:

- (1) *in different time periods* -- the differing requirements of paid COVID leave in 2020 and in 2021; and
- (2) *in different laws* -- under federal law and under varied Colorado statutory, rule, and initiative provisions.

#### (1) Different Time Periods: 80-Hour COVID Leave in 2020 and in 2021

**Under § 405, all employers in the state, regardless of size, are required to provide a new supplement of up to 80 hours of COVID-related leave in 2021.** The vast majority of employers have had to provide 80-hour<sup>1</sup> COVID leave since spring 2020, under federal law and Colorado rules.<sup>2</sup> As of July 14, 2020, HFWA § 406 expanded federally required 80-hour COVID leave to “each employee who is not covered” by federal law. But that federal law expired after 2020, so HFWA § 405 requires 80-hour COVID leave for 2021 if there is a public health emergency: “On the date a public health emergency is declared, each employer ... shall supplement each employee’s ... [2021] leave ... to ensure” 80-hour COVID leave. HFWA § 405 adds 80-hour COVID leave only as of 2021, because § 406 already covered 2020 with its expansion of 2020 federal leave. But all of HFWA, including § 405, had the same effective date: July 14, 2020. Thus, the § 405 requirement that employers supplement 2021 leave as of “the date a public health emergency is declared” was in effect on July 14, 2020, and was triggered by any qualifying emergency declaration on or after July 14, 2020.

A COVID-19 emergency was declared on March 11, 2020, then consistently renewed by extended and amended emergency declarations<sup>3</sup> through the date of this INFO that qualify as triggering 80-hour COVID leave for 2021, under HFWA and rules recently adopted to clarify this point:

“Public health emergency” means: (a) ... an epidemic caused by a novel and highly fatal infectious agent, for which: (i) an emergency is declared by a federal, state, or local public health agency; or (ii) a disaster emergency is declared by the governor; or (b) a highly infectious illness or agent with epidemic or pandemic potential for which a disaster emergency is declared by the governor.<sup>4</sup>

A public health emergency is “declared” by any initial, amended, extended, restated, or prolonged declaration of an emergency that meets the above definition. Employees have up to 80 hours of ... leave usable as of January 1, 2021, because a public health emergency declared after the HFWA effective date remains in effect long enough to trigger paid leave in 2021 (under HFWA § 405 and Rule 3.5.1(C) of the Wage Protection Rules, distinct from the up to 80 hours of leave provided for 2020 by HFWA § 406 to conform to the federal paid leave law that expired on December 31, 2020).<sup>5</sup>

Thus, the HFWA § 405 requirement of 80-hour COVID leave in 2021 continues until four weeks after the expiration of any and all applicable public health declarations.

**2021 COVID PHE Leave is a New Supplement of up to 80 Hours Based on an Emergency Declaration, Not a Continuation of the 2020 COVID Leave That Was Based on Federal Leave Law.** In 2020, all COVID leave was provided under HFWA § 406, which adopted and expanded federal leave that only covered

<sup>1</sup> Or proportionately fewer hours for part-time employees; the term “80-hour COVID leave” is used for simplicity.

<sup>2</sup> Colorado Health Emergency Leave with Pay Rules (“Colorado HELP”), 7 CCR 1103-10 (Mar. 11 - July 14, 2020).

<sup>3</sup> *E.g.*, Executive Orders [D 2020 003](#) (Mar. 11, 2020) (original disaster emergency declaration), [D 2020 264](#) (Nov. 28, 2020) (extended and renewed declaration); [Executive Order D 2020 268](#) (Dec. 3, 2020) (amended declaration).

<sup>4</sup> C.R.S. § 8-13.3-402(9).

<sup>5</sup> Wage Protection Rules, 7 CCR 1103-7, Rule 2.11.

employees through December 31, 2020. Employees can use this new 80-hour COVID leave supplement that § 405 provides once per public health emergency, starting either as of January 1, 2021 (if they are already employed on that date), or as of their first date of employment (if they are hired after that point), whether they use all 80 hours at once or divide them among multiple qualifying events.<sup>6</sup>

**Employers with fewer than 16 employees must still provide 80-hour COVID leave in 2021, despite not having to provide 48-hour “accrued” paid leave until 2022.** Such employers are exempt until 2022 from the HFWA § 403 requirement of 48-hour *accrued paid leave* for a range of health or safety needs.<sup>7</sup> But such employers already had to provide 80-hour COVID leave in 2020.<sup>8</sup> For 2021, HFWA § 405 requires 80-hour COVID leave at “each employer in the state,” “in addition to” the 48-hour general sick leave requirement of § 403, without repeating or adopting the under-16-employees exemption that appears in, and applies to only, § 403.

## **(2) Different Laws: HFWA Coverage Compared to Federal Law and Various Other Colorado Provisions**

**HFWA requires its paid leave for all employees and employers, in all sectors, industries, and jobs, with only the three exemptions listed in HFWA.** Colorado HELP applied only to certain industries totaling roughly ⅓ of the private sector: all retail, offices, restaurants, hotels, and other leisure or hospitality; child care and education, including related services (cafeterias, transportation, etc.); a range of health care (all elective medical or dental, nursing homes or community living facilities, and home health care for elderly, ill, disabled, or high-risk persons); food service and manufacturing; and real estate. Federal paid leave law excluded larger employers and let health care employers exclude certain employees most focused on “patient care.”<sup>9</sup> In contrast to Colorado HELP and federal law expressly exempting certain industries or jobs, HFWA expressly covers “each employer” and “all employees” in Colorado,<sup>10</sup> exempting only those in three listed categories: (1) “the federal government” is exempt (but not a mere federal contractor or federally chartered entity); (2) employees subject to the federal Railroad Unemployment Insurance Act are exempt; and (3) employers with fewer than 16 employees are exempt in 2021 from 48-hour accrued paid leave requirements (but not 80-hour COVID leave, and they are no longer exempt as of 2022, as noted above).<sup>11</sup> Thus, no exemptions in any other statutes or rules apply to HFWA.

**Paid leave rights and responsibilities do not depend on tax credits or subsidies being available.** Certain tax credits or subsidies have been available for employers providing paid leave. But all paid leave statutes and rules, federal or state, have required leave even if such credits or subsidies expire or are unavailable.

**Longer-duration paid leave under the Paid Family and Medical Leave Insurance Act (PFMLIA) is not in effect yet.** The [Paid Family and Medical Leave Insurance Act](#) (“PFMLIA”) became law upon passage of Proposition 118 by statewide vote in 2020. PFMLIA provides for up to 12 weeks of paid leave for a range of family and medical needs. However, PFMLIA mandates a specific planning, funding, and implementation schedule for that paid leave system. Under that schedule, PFMLIA provides paid leave only as of 2024.

### **For Additional Information:**

Visit the Division [website](#), call 303-318-8441, or email [cdle\\_labor\\_standards@state.co.us](mailto:cdle_labor_standards@state.co.us).

<sup>6</sup> C.R.S. § 8-13.3-405(4)(c); Wage Protection Rules, 7 CCR 1103-7, Rule 2.11.

<sup>7</sup> C.R.S. § 8-13.3-403(1)(b),(c).

<sup>8</sup> C.R.S. § 8-13.3-405(1) (as of July 14, 2020, HFWA provision requiring 80-hour COVID leave at “each employer in the state, regardless of size”); Colorado HELP, 7 CCR 1103-10, Rule 3.1 (as amended Apr. 27, 2020) (through July 14, 2020, requiring 80-hour COVID leave for all covered industries and jobs regardless of employer size).

<sup>9</sup> 29 C.F.R. § 826.10(a); U.S. Dep’t of Labor, Families First Coronavirus Response Act: Questions and Answers, #56 (excludable employees are those in “provision of patient care ... [or] integrated into and necessary to the provision those services” -- listing, for example, doctors, nurses, physician or nurse assistants, and medical or lab techs -- not just any employee “merely because ... [the] employer provides health care services or ... [the employee] affects the provision of health care services. For example, IT professionals, building maintenance staff, human resources personnel, cooks, food services workers, records managers, consultants, and billers are not ... [excludable], even if ... at a hospital or a similar health care facility.”).

<sup>10</sup> C.R.S. §§ 8-13.3-406(2) (80-hour COVID leave in 2020: “each employer in the state, regardless of size”), 405(1) (80-hour COVID leave as of 2021: “each employer in the state”), 403(1) (48-hour general sick leave as of 2021: “[a]ll employees ... in Colorado,” excluding small employers for one year, then at employers of all sizes).

<sup>11</sup> C.R.S. §§ 8-13.3-402(5)(b), 402(4), and 403(1), respectively.