

DEPARTMENT OF LABOR AND EMPLOYMENT

Division of Family and Medical Leave Insurance

REGULATIONS CONCERNING BENEFITS AND EMPLOYER PARTICIPATION REQUIREMENTS

7 CCR 1107-3

3.1. Statements of Authority, Purpose, and Incorporation by Reference

1. 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.

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 benefits and employer participation.

3. Article 6 of C.R.S. Title 26 (2022), Articles 13.3 and 70 of C.R.S. Title 8 (2022), Articles 4 and 11 of C.R.S. Title 24 (2022), 29 C.F.R. 825, *et seq.* (2022), and 45 U.S.C. section 351 *et seq.* (2022) 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.

3.2. Definitions and Clarifications

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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.

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2. "Benefit start date" means the first day the covered individual is unable to attend work based on the qualifying reason for leave.

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3. "Business Days" means Monday, Tuesday, Wednesday, Thursday, and Friday, and excludes any Colorado state holidays, as listed in C.R.S. 24-11-101.

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4. "Continuous leave" means ~~one a~~ non-recurring ~~uninterrupted~~ period of leave ~~lasting more than one consecutive day on which the covered individual would have ordinarily worked absent the leave-qualifying condition.~~

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Commented [A1]: This aligns with the definition of consecutive days contained in 7 CCR 1103-7, relating to HFWA leave.

5. "Designated Representative" means a person or entity legally authorized to make decisions on behalf of another, with regard to the FAMLI program. For employers, that legal authorization may be in the form of a written designation. For claimants, that legal authorization may be through written designation from the claimant or through legal status as a parent, guardian, conservator, or power of attorney. For safe leave applications, the perpetrator of domestic violence, stalking, sexual assault, or sexual abuse may not be the claimant's designated representative.

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6. "Employer" as defined at C.R.S. 8-13.3-503(8) does not include self-employed individuals.

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7. "Intermittent leave" has the same meaning as set forth at 29 CFR 825.202(a).

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8. "Reduced schedule leave" has the same meaning as set forth at 29 CFR 825.202(a).

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9. "Wage replacement benefit" means the monetary weekly benefit amount described at C.R.S. 8-13.3-506(a).

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10. "Willful" or "willfully" as used in the FAMLI Act or its implementing regulations means ~~knowledge that behavior meets a particular standard, or reckless disregard for whether behavior meets a particular standard. All facts and circumstances surrounding a situation shall be taken into account in determining whether behavior is willful. the employer or individual knew or showed reckless disregard for whether its conduct was prohibited by the FAMLI Act.~~

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Commented [A2]: This tracks the standard for wilfulness under the FMLA. See *Bass v. Potter*, 522 F.3d 1098, 1104 (10th Cir. 2008)

11. "Application year" as used at C.R.S. 8-13.3-505(1), and as described at C.R.S. 8-13.3-521(1)(b) as a "benefit year," means the 12-month period beginning on the individual's benefit start date.

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3.3. Employer Participation Requirements

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1. Employers must register with the FAMLI Division via "MyFAMLI+ Employer" by January 1, 2023, or when they become an employer, whichever occurs later.

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2. Employers must register regardless of whether they decline participation as a local government, or whether they meet their FAMLI obligations under an approved private plan.

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3. Employers must submit wage reports to the Division on the same quarterly schedule as they must submit premiums to the Division pursuant to 7 CCR 1107-1. If an employer fails to timely submit wage reports, the Division may assess upon the employer a fine of up to \$50.00 per employee whose wages were not reported for each quarter that the wage report is delinquent. An employer newly-subject to FAMLI is subject to a \$10 penalty for each occurrence during the first four quarters of coverage.

4. An employer must notify the Division if it ceases business operations in Colorado or otherwise stops employing workers in Colorado ceases to employ Colorado employees, in accordance with the provisions as defined by 7 CCR 1107-1, Rule 1.5.6(C) regarding 4. in state status of employees. The An employer with no Colorado employees employer will not longer be required to remit premiums, submit wage reports, or otherwise participate in the FAMLI program. If the employer later resumes business operations or again employs workers in Colorado, it must re-register with the FAMLI Division via "MyFAMLI+ Employer."

3.4. Clarifications Regarding Use of Paid Family and Medical Leave Insurance Benefits

1. The use of paid family and medical leave benefits is restricted to absences caused by a qualifying condition described at C.R.S. 8-13.3-504(2). If the absence is caused by a reason other than a qualifying condition described at C.R.S. 8-13.3-504(2), including but not limited to the claimant's separation from employment or the employer suspending or ceasing business operations, paid family and medical leave benefits are not available.

A. If an employer offers paid holidays to its employees, a paid holiday occurs partially or completely during an employee's paid family and medical leave, and the employer pays the employee some or all of that day's holiday pay during their absence, the amount of holiday pay paid to the employee does not count against the awarded leave duration, and the employee is not entitled to paid family and medical leave for the time paid as holiday pay.

B. If an employer does not pay an employee holiday pay during the employee's paid family and medical leave, the employee is entitled to a wage replacement benefit for the absence, and the absence counts against the awarded leave duration.

2. Paid family and medical leave insurance benefits are available to an individual while taking paid family and medical leave if the individual meets the definition of "covered individual" under

C.R.S. 8-13.3-503(3) and has a qualifying condition described at C.R.S. 8-13.3-504(2).

A. To determine whether an individual has met the \$2,500.00 threshold described at C.R.S. 8-13.3-503(3)(a)(I), the Division will rely on wages reported to the Division by the employer pursuant to 7 CCR 1107-3 Section 3.3.3. If a claim for benefits is denied because the reported wages do not establish that the individual has met the \$2,500.00 threshold, the individual may appeal the Division's denial and submit evidence that they have met the threshold.

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Commented [A3]: This tracks the penalties for failing to report Unemployment Insurance Premiums. See [Pay Premiums and Report Wages FAQ | Department of Labor & Employment \(colorado.gov\)](#) ("You are assessed a \$50 penalty for each quarter that your Unemployment Insurance Premiums Report is delinquent. If you are a newly subject employer, the penalty is \$10 for each occurrence during the first four quarters of coverage.").

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B. An individual claimant can meet the \$2,500.00 threshold described at C.R.S. 8-13.3-503(3)(a)(I) by earning wages subject to premiums from any combination of employers, and a claimant need not earn \$2,500.00 from their current employer to meet the threshold.

C. An individual meets the \$2,500.00 threshold described at C.R.S. 8-13.3-503(3)(a)(I) if the individual has been paid that amount of wages during either the individual's base period, as defined at C.R.S. 8-70-103(2), or the individual's alternative base period, as defined at C.R.S. 8-70-103(1.5).

3. "Serious health condition" has the same meaning as "serious health condition" under the Family and Medical Leave Act's implementing regulations at 29 C.F.R. 825 *et seq.*, except where those regulations conflict with the FMLI Act or its implementing regulations.

4. It shall be a covered individual's burden to prove that an individual is a "family member" under C.R.S. 8-13.3-503(11)(e). To determine whether an individual is a family member under C.R.S. 8-13.3-503(11)(e) because the individual is someone with whom the covered individual has a significant personal bond that is or is like a family relationship, the Division will look to the totality of the circumstances surrounding the relationship, including, but not limited to, the following

4. non-dispositive factors:

A. Shared financial responsibility, including shared leases, common ownership of real or personal property, joint liability for bills, or beneficiary designations;

B. Emergency contact designations;

C. The expectation prior provision of care created by the relationship by the covered individual to the purported "family member";

D. Cohabitation and the duration thereof; and

E. Geographical proximity.

5. Clarifications regarding "caring for new child" under C.R.S. 8-13.3-504(2)(a):

A. "Caring" includes bonding with with and providing basic needs for a healthy newborn child.

B. "Child" means a person under the age of 18.

C. Benefits under C.R.S. 8-13.3-504(2)(a) are limited to the child's legal parents.

D. If a person has received benefits under C.R.S. 8-13.3-504(2)(a) to care for a new child placed through foster care, and the person later adopts the child, the person is not entitled to again receive benefits under C.R.S. 8-13.3-504(2)(a) in relation to the adoption of the same person.

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Commented [A4]: "The expectation of care created by the relationship" is so vague to be meaningless. It would essentially sweep any friendship into a factor that could indicate a family relationship.

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~~E. A covered individual may use intermittent or reduced schedule Paid-paid family and medical leave under C.R.S. 8-13.3-504(2)(a) may be continuous or intermittent leave after the birth to be with a healthy newborn child only if the employer agrees. For example, an employer and covered individual may agree to a part-time work schedule after the birth. If the employer agrees to permit intermittent or reduced schedule leave for the birth of a child, the employer may require the covered individual to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the covered individual is qualified and which better accommodates recurring periods of leave than does the covered individual's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, Federal law (such as the Americans with Disabilities Act), and Colorado law. Transfer to an alternative position may include altering an existing job to better accommodate the covered individual's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the expectant mother or newborn child.~~
E.

~~F. Spouses who are eligible for paid family and medical leave under C.R.S. 8-13.3-504(2)(a) and are employed by the same employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as the spouses are employed by the same employer.~~

6. Clarifications regarding "safe leave" under C.R.S. 8-13.3-503(18) and 504(2)(e):

A. To determine whether an individual is the victim of domestic violence, the victim of stalking, or the victim of sexual assault or abuse, for purposes of determining eligibility for safe leave, an individual need not prove that a court has determined that the individual was the victim of domestic violence, stalking, sexual assault, or sexual abuse.

B. Benefits may be awarded based on the victim's good-faith attestation that the circumstances giving rise to the safe leave satisfy the elements of the offense.

C. If an individual is granted safe leave based on their good-faith attestations, and is later found by a court not to have been a victim of domestic violence, stalking, sexual assault, or sexual abuse, benefits paid for the leave will not be considered an overpayment unless the court's findings show that the attestations were not in good faith.

3.5. Amount, Duration, and Format of Benefits

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1. Benefit Amounts

A. A covered individual's weekly benefit will be determined as follows:

1. The portion of the covered individual's average weekly wage that is equal to or less than 50 percent of the state average weekly wage shall be replaced at a rate of 90 percent; and

2. The portion of the covered individual's average weekly wage that is more than 50 percent of the state average weekly wage shall be replaced at a rate of 50 percent.

B. The maximum weekly benefit for a covered individual is 90 percent of the state average weekly wage, except that for paid family and medical leave beginning before January 1, 2025, the maximum weekly benefit is \$1,100.00.

C. To determine an individual's average weekly wage in accordance with C.R.S. 8-13.3-503(2), the Division will rely on earnings reported to the Division pursuant to 7 CCR 1107-3 Section 3.3.3. If the Division cannot sufficiently calculate an individual's average weekly wage based on earnings reported to the Division pursuant to 7 CCR 1107-3 Section 3.3.3, the Division may request from the individual and/or the individual's current or former employers documentation of the individual's earnings during the individual's base period or alternative base period, and may rely on that documentation and any other information that is reasonable or reliable.

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D. If a covered individual has multiple jobs, has multiple sources of self-employment, or has a job in addition to being self-employed, and the covered individual does not take paid family and medical leave from all sources of employment or self-employment, then the individual's weekly benefit will be determined by first calculating the amount described at 7 CCR 1106-3 Sections 3.5.1.A and 3.5.1.B, and then prorating that amount based on the portion of the individual's current weekly earnings lost due to the absence from work.

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E. If some or all awarded leave is for a duration of less than a week, the benefit amount will be prorated based on the portion of work missed for the week. That proration shall be as follows:

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1. Determine the wage replacement benefit for a full week of leave;

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2. Divide the approved duration of leave by claimant's regular work schedule; and

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3. Multiply these two numbers together.

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F. Benefits for absences of less than 8 hours will be paid in accordance with C.R.S. 8-13.3-505(3).

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2. Duration of Leave

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A. The Division will award benefits for a reasonable duration in accordance with the details in the application, the documentation submitted, and known standards of care. The awarded benefits must not exceed the duration limits described at C.R.S. 8-13.3-505(1).

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B. The hourly expression of a covered individual's total allotted leave duration is equal to the total number of hours the covered individual typically works per week, multiplied by the number of weeks of leave the individual is entitled to pursuant to C.R.S. 8-13.3-505(1).

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C. Approved leave may be taken in increments of one hour or less, in accordance with C.R.S. 8-13.3-505(3).

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3. Approved leave may be in the form of continuous leave, intermittent leave, or reduced schedule leave.

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4. The amount and duration of family and medical leave benefits may be reduced by the receipt of other benefits, as detailed in 7 CCR 1107-4.

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3.6. Applying for Benefits

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1. To request paid family and medical leave benefits, the claimant or the claimant's designated representative ~~can~~ must apply to the Division for ~~benefits-paid family and medical leave benefits~~.

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2. Applications may be submitted up to forty-five (45) days prior to the benefit start date.

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3. A covered individual must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. If covered individual does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, the request for benefits and leave may be delayed or denied.

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3.4. If the need for leave is ~~un~~unforeseeable, or if submitting an application in advance of the leave is otherwise impracticable, applications ~~may~~ must be submitted as soon as practicable under the facts and circumstances of the particular ~~case~~ be submitted up to seven (7) days after the leave has begun. If the Division receives an application after seven (7) days, but before forty-five (45) days, the Division may consider the application if it includes evidence establishing good cause for the claimant's failure to submit the application within seven (7) days. It generally should be practicable for a covered individual to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave.

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4.5. Additional Documentation Requirements Certification. All applications for benefits shall be supported by a certification evidencing that the leave is for a qualifying reason.

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A. For leave necessary to care for a child because of birth, the claimant must submit the following documentation with their application:

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1. Proof of legal parenthood and birth, which may include a birth certificate, an application for a birth certificate, documentation from a health care provider who provided care during the birth or recovery, or other vital records showing parenthood and birth; and

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2. Any other reasonable information or documentation necessary to adjudicate the claim for benefits, as requested by the Division.

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B. For leave necessary to care for a child because of adoption, the claimant must submit the following documentation with their application:

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1. Proof of adoption and parenthood, which may include documentation from a court or an adoption agency; and

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2. Any other reasonable information or documentation necessary to adjudicate the claim for benefits, as requested by the Division.

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C. For leave necessary to care for a child because of placement through foster care,

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the claimant must submit the following documentation with their application:

1. Either:

- a. Proof that the claimant is either a licensed or certified foster parent and the child has been placed in their care; or

- b. Documentation from a child placement agency as defined in C.R.S. 26-6-102, the state department of human services, a county department

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of human services, or a court indicating a kinship or emergency placement was necessary to provide for the immediate care and safety of a minor child, and the relative will be standing in loco parentis through a power of attorney or other legal designation; and

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2. Any other reasonable information or documentation necessary to adjudicate the claim for benefits, as requested by the Division.

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D. For leave necessary to care for a family member with a serious health condition, the claimant must submit a "Serious Health Condition Certification - Family Member" certification in a form prescribed by the Division confirming the relationship between the covered individual and the family member and must include the following from the covered individual or the family member's health care provider:

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1. the name and address of the family member and the relationship to the covered individual;
2. a statement that the family member has a serious health condition;
3. the date on which the family member's serious health condition commenced;
4. the probable duration of the family member's serious health condition;
5. a statement that the covered individual is needed to care for the family member;
6. an estimate regarding the frequency and the anticipated duration of time that the covered individual is needed to care for the family member; and
7. information from the covered individual that proves to the satisfaction of the Division the identity of the family member.

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1. A Serious Health Condition Certification - Family Member form, completed and signed by the family member's health care provider; and

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2. Any other reasonable information or documentation necessary to adjudicate the claim for benefits, as requested by the Division.

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E. For leave necessary because of the claimant's own serious health condition, the claimant must submit the following documentation with their application a "Serious Health Condition Certification - Self" form, completed and signed by the health care provider. The certification must include:

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1. A "Serious Health Condition Certification - Self" form, completed and signed by the health care provider; a statement that the covered individual has a serious health condition;
2. the date on which the serious health condition commenced;
3. the probable duration of the serious health condition;
4. other information required by the Department, including a certification by the health care provider that the individual is incapacitated from work due to the serious health condition; and
- 4-5. where the application for benefits is for leave on an intermittent or reduced

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leave schedule, information regarding the need for intermittent leave, including a statement that such leave or schedule is medically necessary and.

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2. Any other reasonable information or documentation necessary to adjudicate the claim for benefits, as requested by the Division.

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F. For leave due to a need for qualifying exigency leave, the claimant must submit the following documentation with their application:

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1. Documentation supporting indicating the need for qualifying exigency leave; and

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2. Any other reasonable information or documentation necessary to adjudicate the claim for benefits, as requested by the Division.

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G. For leave due to a need for safe leave, the claimant must submit the following documentation with their application:

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1. A "Safe Leave Attestation Form" completed by the victim or a family member of the victim; and

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2. Any other reasonable information or documentation necessary to adjudicate the claim for benefits, as requested by the Division.

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5-6. Applications may be submitted using the FAMLI Division's online system or by mailing, emailing, or faxing a paper application to the Division.

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6.7. Requirements for an Application to be Considered Filed

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A. Upon receipt of an application for benefits, the Division will review the application. If the Division needs more information or documentation to adjudicate the claim for benefits, it will make a reasonable effort to obtain the additional information or documentation from the claimant.

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B. An application will not be considered filed until all required and requested information and documentation has been received by the Division.

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C. If an application is not properly filed within thirty (30) days after the Division receives it, the application will be closed and the Division will take no further action on it, absent a finding of good cause based on evidence submitted by the claimant.

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D. Once an application is properly filed, the Division will notify the claimant and the employer within five (5) days after it is filed.

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3.7. Employer Notification Requirements

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1. A claimant must schedule leave in accordance with C.R.S. 8-13.3-505(4), and must notify their employer or employers of the need for leave in accordance with C.R.S. 8-13.3-505(5). Notification must reasonably implicate qualifying leave under the FAMLI Act to satisfy the notification requirement at C.R.S. 8-13.3-505(5).

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2. Employers may require the notice to contain the anticipated start time, anticipated duration, and where applicable, anticipated frequency of leave.

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3. An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FAMLI leave may be delayed or denied by the employer. Such notification must be in the same manner as the claimant and employer typically communicate work availability.

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4. If an employer fails to post the program notice required at C.R.S. 8-13.3-511, the employer may not punish or discipline an employee for failing to provide notice in accordance with C.R.S. 8-13.3-505(5).

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5. Nothing in the FAMLI Act or its implementing regulations prohibit an employer in compliance with C.R.S. 8-13.3-511 from disciplining an employee for failing to provide notice in accordance with C.R.S. 8-13.3-505(5).

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6. A covered individual filing an application for benefits must provide the Division with consent

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~~to share information regarding the application for benefits and other information necessary for the Division to process the individual's application for benefits, including consent to share information with the individual's employer (if any) and health care provider. Consent shall be acknowledged by the individual in a form provided by the Division. An application for benefits will not be processed, unless a consent is provided by the covered individual.~~

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~~6. Upon filing an application for benefits, the claimant may consent to the Division sharing records and information with the employer. If it does not, the Division will only share information with the employer that does not relate to the claimant's reason for leave, including the date the claim was filed, the date that leave will begin, the date that leave will end, and the amount of~~

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awarded wage replacement benefits. The claimant may rescind any granted consent by notifying the Division in writing.

7. Records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members created for purposes of the FMLI must be maintained as confidential medical records in separate files/records from the usual personnel files. If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLI containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (see 29 CFR 1635.9). If the Americans with Disabilities Act (ADA) is also applicable, such records should be maintained in conformance with ADA confidentiality requirements, except that:

A. Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

B. First aid and safety personnel may be informed if the employee's physical or medical condition might require emergency treatment; and

C. Division and/or other government officials investigating compliance with the FMLI Act should be provided relevant information upon request.

3.8. Division Review of Applications

1. After an application is properly filed, the Division will adjudicate the claim within two weeks after filing.

2. The Division will ~~notify~~ provide contemporaneous notice to the claimant and the employer of the outcome of the adjudication, and will provide information on how the claimant can appeal the outcome.

A. If the outcome is a denial of benefits, the Division will send separate notices to the claimant and to the claimant's employer or employers. The notice to the claimant will explain the reason for the benefits denial. The notice to the claimant's employer or employers will state that the claim for benefits has been denied, include the date of the denial, and include a description of the claimant's appeal rights, but will not include details regarding why the claim was denied unless the claimant consented to the sharing of such information.

B. If the outcome of the adjudication is to award benefits, the notification will include

- the reason for the approved leave benefits,
- the duration of the approved leave benefits, including start and end dates,
- for intermittent leave, the frequency and duration of the leave benefits
- the expiration of the approved leave benefits benefit amount,

B. • the weekly benefit amount, the leave amount, the leave start date, the leave duration, and where applicable, the leave increments or approved schedule

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3. If the Division awards benefits, it will issue payment for the benefits within two weeks after the beginning of the leave, and where applicable, every two weeks thereafter.

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4. For applications approved in advance of the needed leave, the claimant must notify the Division once the leave begins.

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3.9. Covered Individual Obligations During Leave

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1. A covered individual or their designated representative must notify the FMLI Division within five (5) days after the occurrence of any event, or the foreseeability of any event, that could change the amount or duration of approved leave, including but not limited to the following:

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A. A change in the covered individual's need to care for a new child, including death of the child, placement of the child in another home, or a caregiving arrangement whereby someone other than the child's legal parent provides care;

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B. A change in the covered individual's need to care for a family member with a serious health condition, including any increase or decrease in the care the covered individual must provide;

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C. A change in the covered individual's need for exigency leave;

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D. A change in the covered individual's need for safe leave;

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E. Any event resulting in the covered individual no longer being localized to Colorado, pursuant to 7 CCR 1107-1, and its provisions regarding in-state status of employees;

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F. An addition or loss of one or more jobs;

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G. A change in the covered individual's regular work schedule;

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H. A change in the covered individual's wages, salary, or any other compensation earned from the employer; or

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I. A change in employment resulting in non-coverage, including unemployment, retirement, obtaining employment with the federal government, obtaining employment with a local government that has declined participation pursuant to C.R.S. 8-13.3-522, or obtaining employment as an "employee" as defined by 45 U.S.C. section 351(d) who is subject to the federal "Railroad Unemployment Insurance Act," 45 U.S.C. section 351 et seq.

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2. If a covered individual notifies the Division of an event that would increase the amount or duration of benefits, the Division may require the covered individual to submit additional documentation in support of their claim.

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3. If a covered individual receives reduced schedule leave or intermittent leave, the covered individual must submit documentation sufficient to recertify their need for leave at least every six months. Upon recertification, benefit amounts will be recalculated and the Division will notify the employer or employers from which the covered individual is taking leave. If an individual fails to recertify, the approval for the leave will expire and the Division will notify the employer or employers from which the covered individual was taking leave.

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3.10. Fitness for Duty at Close of Medical Leave Period

- (1) As a condition of restoring an employee whose leave was occasioned by their own serious health condition, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees who take leave for such conditions to obtain and present certification from their health care provider that the employee or covered contract worker is able to resume work.
- (2) An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee need for leave. The certification from the health care provider must certify that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of their job. In order to require such a certification, an employer or covered business entity must provide an employee with a list of the essential functions of their job within ten business days of the notice to the employer or covered business entity of the approval of leave by the Division and must indicate that the certification must address the employee's ability to perform those essential functions. If the employer satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of their job.
- (3) An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification, unless the employer has failed to provide the notice required. If an employer provides the notice required, an employee who does not provide a fitness-for-duty certification following the approved leave period by the Division is no longer entitled to reinstatement. In furtherance of the foregoing, an employee who does not provide a fitness-for-duty certification following the approved leave period by the Division shall not be entitled to an extension of benefits.
- (4) An employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. An employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 calendar days if reasonable safety concerns exist regarding the employee's ability to perform their duties, based on the serious health condition for which they took leave.

3.10.3.11. Appeals

1. A claimant may appeal an adverse claim determination by submitting a completed "Appeal Request Form" to the FAML I Division.
2. For the appeal to be considered, the FAML I Division must receive the completed form within twenty (20) days of the Division issuing its initial benefits determination. The Division may consider an appeal received later than twenty (20) days after issuing its initial benefits determination, but within thirty (30) days after issuing its initial benefits determination, if the claimant submits with the appeal form evidence establishing good cause for the late appeal.

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3. Upon receipt of a timely appeal, the Division will designate a hearing officer to preside over the matter. The employer shall have a right to notice of the appeal and to attend the hearing. The hearing officer will have the power and authority to call, preside at, and conduct hearings. The hearing officer will have the power to administer oaths and affirmations, take depositions, certify to official acts, permit parties to participate by telephone, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with an appealed benefits determination.

A. In case of a failure to obey a subpoena issued to any person by the hearing officer, upon application by the Division or its duly authorized representative, any court of this state has jurisdiction to issue to the person an order requiring him or her to appear before the hearing officer to produce evidence or give testimony touching the matter under appeal. The court may issue an order of contempt to a person who fails to obey the order.

B. Any failure to obey such an order of the court may be punished by said court as a contempt thereof. Any person who, without just cause, fails or refuses to attend and testify or to answer any lawful inquiry, or to produce books, papers, correspondence, memoranda, and other records, if it is in his power so to do in obedience to a subpoena of the division or its duly authorized representative, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than two hundred dollars, or by imprisonment in the county jail for not more than sixty (60) days, or by both such fine and imprisonment. Each day such violation continues shall be deemed a separate offense.

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4. The hearing may be bifurcated at the hearing officer's discretion.

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5. The hearing officer, after affording the claimant a reasonable opportunity for a fair hearing, shall make a decision on each relevant issue raised, including findings of fact, conclusions of law, and an order. The division shall promptly provide the claimant with a copy of the hearing officer's decision. The Division shall also contemporaneously provide a copy of the hearing officer's decision to the claimant's employer, ~~with protected health information redacted if the claimant did not consent to the sharing of such information with the employer.~~

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6. The employer or the claimant may appeal the hearing officer's decision only by commencing an action for judicial review in the district court of competent jurisdiction within twenty (20) days after the date of mailing the decision by the division. The hearing officer's decision constitutes a final agency action pursuant to C.R.S. 24-4-106. Judicial review is limited to appeal briefs and the record designated on appeal.

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7. If the Division reverses a benefits denial upon either appeal or judicial review, the Division will pay the benefits within fourteen (14) days after the order awarding benefits.

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8. Leave and employment protection provided by C.R.S. 8-13.3-509 is limited to the benefit duration provided by C.R.S. 8-13.3-505. An employer may not treat an absence that is subject to appeal or judicial review as an absence not protected by the FMLI Act unless and until the leave is denied and the claimant exhausts any right to appeal or judicial review. However, if the outcome of an appeal or judicial review is pending outside of the benefits duration provided by C.R.S. 8-13.3-505, it does not extend the leave and employment protection provided by C.R.S. 8-13.3-509.

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3.11.3.12. Disqualification from Benefits

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1. If the Division determines that a covered individual has willfully made a false statement or misrepresentation regarding a material fact in order to obtain family and medical leave insurance benefits, or has willfully failed to report a material fact in order to obtain family and medical leave insurance benefits, the covered individual will be disqualified from family and medical leave insurance benefits for one year.

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2. If the Division will notify the claimant of any disqualification of benefits, the claimant may appeal the disqualification within twenty (20) days and in accordance with the procedures of a benefits denial.

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3. If the claimant does not appeal the disqualification, or if the Division upholds the claimant's disqualification upon appeal, the Division will notify the claimant's employer or employers of the disqualification.

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4. If a claimant is disqualified from family and medical leave insurance benefits, the claimant's employer or employers remain obligated to remit premiums for the claimant in accordance with

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the FMLI Act, and remain entitled to require premium contributions from the employee in accordance with the FMLI Act.

3.42.3.13. Erroneous Payments of Benefits

1. If family and medical leave insurance benefits are paid erroneously or as a result of willful misrepresentation, or if a claim for family and medical leave insurance benefits is rejected after benefits are paid, the division may seek repayment of benefits from the recipient in accordance with C.R.S. 8-13.3-513.

2. If the Division identifies a benefits overpayment, the Division will notify the claimant of the overpayment, and will notify the claimant of any amount for which it will seek repayment. If the Division seeks repayment of a benefit, the claimant may appeal the repayment decision within twenty (20) days and in accordance with the procedures of a benefits denial.

3. The Division may seek repayment of benefits in accordance with the procedures set forth in the FMLI Act and its implementing regulations.

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