



Ever-Expanding Labor Laws: Colorado Restaurant Updates for 2024

December 14, 2023

Presented by:

Todd Fredrickson
(303) 218-3660
tfredrickson@fisherphillips.com

TODAY'S SESSION:

Colorado Labor & Employment
Law Update

- CO Update on Existing Laws
 - FMLI Act/FMLA
 - PTO/ Vacation
 - COMPS Order No. 39
 - HFWA Developments
 - Colorado Secure Savings Program
- New CO Laws:
 - POWR Act
 - Revised Equal Pay for Equal Work Act

TODAY'S SESSION:

Colorado Labor & Employment
Law Update

- New CO Laws
 - Job Application Fairness Act
 - U/C Disclosure
 - Increased Penalties under the CO Wage Claim Act

FAMLI Act - Purpose

- Covers all employers regardless of size
- Quite a bit of overlap with FMLA
- 12 weeks of paid family and medical leave funded through a payroll tax paid by employers and employees - 50/50 split
 - Additional four weeks of leave for pregnancy or childbirth complications.
 - Bonding leave to be available in 2024 for a child born in 2023
- Premiums already being paid; benefits start January 1, 2024.

FAMLI Act - Eligibility

- Covered individual:
 - Once employee earns \$2,500 during a base period
- Covered leaves:
 - Birth, adoption, or placement within first year
 - Family member with serious health condition (SHC)
 - Domestic partners
 - “significant personal bond” like a family relationship
 - One’s own SHC
 - Qualifying exigency (military) leave
 - Safe leave (domestic violence, stalking, sexual assault/abuse victims)

FAMLI Act - Duration

- 12 (to 16) weeks for any purpose, or purposes in the aggregate
 - Based on a rolling annual year
 - Concurrent with FMLA
- Can be intermittent (1 hour or shorter if employer uses shorter increments to measure leave)
- Employee must make reasonable effort to schedule so as not to unduly disrupt operations
- 30 days' advance notice if foreseeable; otherwise, as soon as practicable



FAMLI Act – Amount of Benefits

- Employees only receive a portion of their paycheck dependent on their average weekly wage and not the full amount
- Benefits capped at \$1,100.00/week until 1/1/25

FAMLI Act - Premiums

- Shared fee between employers and employees based on 0.9% of wages - rate is set through 2025
- If 10 or more employees, employer may deduct up to 50% of the 0.9% premium as a standard payroll deduction
 - less than 10 employees, no required employer share
- Formula used to calculate premiums:
 - $(\text{annual income} \times .009) / 2 = \text{employer share}$
 - $(\text{annual income} \times .009) / 2 = \text{employee share}$

FAMLI Act – Leave/Employment Protections

- Right to take leave and non-retaliation
- Job restoration for those employed 180 days or more
 - Same or substantially equivalent position
- Employer must maintain health-care benefits on same terms
- Employer cannot count FAMLI leave as unexcused, or use it as the basis for discipline or discharge
- Enforced through civil action, with same remedies as FMLA
- 2-year SOL (unless willful, which is 3-year SOL)

FAMLI Act - Coordination of Benefits

- Worker's and Unemployment Comp benefits do not overlap with FAMLI – you get one or the other
- Recent rulemaking in this area – FAMLI and employer-provided PTO or paid leave
 - Employees don't get both for the same hours absent, however . . .
- Employees can't be required to use or exhaust any accrued vacation/sick leave, or other PTO prior to or while receiving FAMLI benefits
 - So they can stack benefits

FAMLI Act - Coordination of Benefits

- Employee and employer may mutually agree that the employee may use any accrued vacation/sick leave, or other PTO while receiving FAMLI benefits
 - Up to the employee's average weekly wage
- Employers will have to carefully track requirements under FAMLI leave and HFWA paid sick leave

FAMLI Act - Notice and Documentation

- Notice to employees had to be posted by 1/1/23
- Posters (including translated ones) can be found here:
 - <https://famli.colorado.gov/employers/famli-toolkit-for-employers>.
- Paycheck stuffer and FAMLI employee handbook available as well
- Register business at My FAMLI+ Employer if you haven't already done so
- Employers can require the same documentation as under the FMLA, which will be helpful

ONGOING WAGE & HOUR ISSUES

- Continuing issue with Restaurants - Proper payment and carryover of vacation/PTO
- Vacation pay is considered wages, and unused vacation pay must be paid to employees at separation or at carryover:
 - No “use it or lose it.”
- For “unlimited” PTO policies, make sure the PTO is truly unlimited and not restricted by company practice (i.e., no caps)

Colorado Overtime & Minimum Pay Standards (COMPS) Order No. 39

- Effective January 1, 2024
- Key Provisions:
 - Covers all employers
 - Increased minimum wage
 - Slightly different requirements for exempt employees
 - i.e., Executive Exemption (Managers) – 50%+
 - Increased salary thresholds for exempt employees - to \$55,000 on January 1, 2024 (then CPI-based)

Colorado Overtime & Minimum Pay Standards (COMPS) Order No. 39

- New definition of “Tipped Employee:”
 - Any employee who regularly receives more than \$1.55 per hour in tips
 - Tips include amounts designated as a tip by credit card customers on their charge slips
 - Employer can still require employees to share or allocate such tips or gratuities, provided that it is:
 - On a pre-established basis (\$ in, \$ out)
 - Among other employees who perform *significant customer-service functions* in contact with patrons
 - Employer-required sharing of tips with management, or with employees who do not have such duties, or deduction of credit card processing fees from tipped employees, shall nullify allowable tip credits towards the minimum wage
- Continuing challenges/litigation with Rest and Meal Periods



COMPS Order

- A 10-minute break every 4 hours “or major fractions thereof”

<u>Work Hours</u>	<u>Rest Periods Required</u>
2 or fewer	0
Over 2, and up to 6	1
Over 6, and up to 10	2
Over 10, and up to 14	3
Over 14, and up to 18	4
Over 18, and up to 22	5
Over 22	6

- Make sure you are tracking these!

HFWA Update

- Yet another new Info Sheet No. 6B
 - <https://cdle.colorado.gov/infos>.
- 1/30/48 PSL still in place (no more PHE)
- Uses:
 - Condition prevents work
 - Care or treatment
 - Victim of domestic abuse
 - Care for family member
 - Public Health Emergency

HFWA Update

- Additional uses as of 8/7/23:
 - Grieve, attend services, or deal with financial and legal matters arising after the death of a family member
 - Care for a family member whose school or daycare is closed due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected event
 - Evacuate residence due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected event
- How to curb abuse? Track and get off the books ASAP – if it's not accrued, it's not excused
- Documentation
 - Four consecutive working days

CO Secure Savings Program

- State-run retirement account
- Not intended to replace your existing 401(k) programs – covers employers with 5 or more employees
- Employees are automatically enrolled in the new program (**but can opt out**)
 - Percentage of employee pay (5% of gross pay; limit \$6,500 - \$7,500 if 50+) will be automatically deposited into an Individual Retirement Account (IRA)
 - Account belongs to each employee and is portable from job to job - employees can opt out of the program or decrease the percentage of pay being withheld
- “Employer implementation package” (with model disclosures) and an “employee information packet” now available on-line

NEW CO LAWS

Protecting Opportunities and Workers' Rights (POWR) Act

- Effective 8/7/23
- New definition of "harassment" - repeals the current definition that requires creation of a hostile work environment
 - Specifies that harassment need not be severe or pervasive to constitute a discriminatory employment practice
 - Just based on protected class and subjectively/objectively offensive
 - Deletes the failure-to-complain-to employer defense
 - Deletes nature-of-the-workplace defense
- Discriminatory or unfair employment practice for an employer to fail to initiate an investigation of a complaint or to fail to take prompt, reasonable, and remedial action
- Adds protections from discrimination based on "marital status"

Protecting Opportunities and Workers' Rights (POWR) Act

- Limits defenses for supervisor harassment
 - Employer must have an “established a program that is reasonably designed to prevent harassment, deter future harassers, and protect employees from harassment.”
 - Key components
 - Communicate the program to all employees
 - Employee must fail to take advantage of harassment prevention program
 - Side note: “Sexual harassment” policies aren’t enough

Protecting Opportunities and Workers' Rights (POWR) Act

- CADA and ADA
 - Ok to make employment decision based on disability “if there is no reasonable accommodation that the employer can make with regard to the disability, and the disability actually disqualifies the individual from the job.”
 - defense only applies if the employer cannot make reasonable accommodations “that would allow the individual to satisfy the essential functions of the job.”

Protecting Opportunities and Workers' Rights (POWR) Act

- Limits NDAs – Employee can still discuss underlying allegations
- 5-year record-keeping requirement
 - For complaints and investigation-related documents
 - “Designated Repository” requirement for complaints

Amendments to Equal Pay for Equal Work Act

- Pay discrimination (6-year SOL on 1/1/24)
- Posting requirements
 - Effective January 1, 2024:
 - An internal “job opportunity” subject to posting rules is only when an employer has a “vacancy,” meaning an opening for a newly created or vacant position
 - Elimination of the in-line promotional opportunity posting requirement
 - “Job opportunity” does not include “career development” or “career progression”

Amendments to Equal Pay for Equal Work Act

For a job opportunity, within 30 days of a candidate starting work, inform their co-workers of the:

- Selected candidate's name
- Former job title (if any) and new job title
- Information on how others may show interest in similar positions
- Exceptions: Applicable law prohibits; candidate volunteers health/safety concerns (then only new title and how to show %)

For positions with defined “career progression,” share:

- Requirements for career progression, each position's compensation, benefits, full/part time status, duties, access to further advancement.

Job Application Fairness Act

- C.R.S. § 8-2-131
- Effective July 1, 2024
- Cannot require job applicant to disclose age, DOB, dates of school attendance/graduation, except:
 - If required by bona fide occupational qualification for safety;
 - If required by state or local laws and regulations also based on a bona fide occupational qualification; and
 - For compliance with federal laws and regulations
- Enforcement by the CDLE only by penalties; there is no private right of action



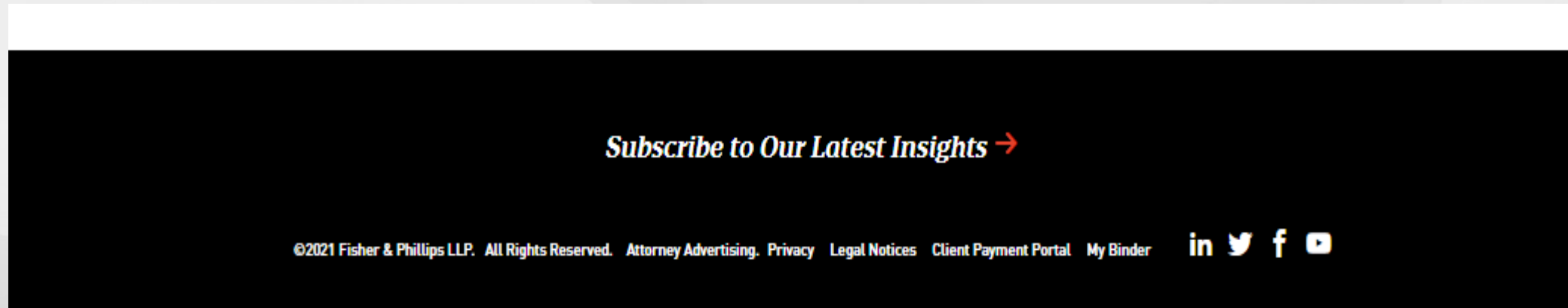
Recent Legislation

- Sneaky C.R.S. Section 8-74-101:
 - Requires employers to provide departing employee with a written statement regarding the availability of unemployment benefits, including employer's identifying information, employee's start/end dates and earnings history, and reason for the separation
 - Use the Division's form
- Senate Bill 22-161
 - Increased penalties for failing to pay wages in a timely manner



FP Legal Alerts

- Subscribe to Fisher Phillips' Alert System to get the most up-to-date information (located at the bottom of our homepage)
<https://www.fisherphillips.com>



Questions?



Presented by:

Todd Fredrickson

(303) 218-3660

tfredrickson@fisherphillips.com

Thank You



Presented by:

Todd Fredrickson
(303) 218-3660
tfredrickson@fisherphillips.com