

DEPARTMENT OF LABOR AND EMPLOYMENT

Division of FAML I

REGULATIONS CONCERNING PAID FAMILY MEDICAL LEAVE PROGRAM

8 CCR 1107-1

1.1 Authority

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 Act, sections 8-13.3-501 through 524 et seq.(the “Act”), C.R.S.

1.2 Scope and Purpose

- A. Regulations 1.5 and 1.6 implements the procedural and substantive provisions for the Family and Medical Leave Insurance program pursuant to C.R.S. 8-13.3-507, concerning the establishment **collection**, and administration of premium collections.
- B. This regulation does not apply to any other premiums, taxes, or collections outlined in unemployment insurance, worker compensation, private temporary disability insurance or private family leave insurance programs or other programs not administered by the Division.

1.3 Applicability

~~The provisions of this section shall be applicable to employers of 10 or more employees operating within the State of Colorado, no matter what state, country, or territory the employer is physically located or claims as a base of operations, unless otherwise specified by exemptions.~~

~~The provisions of this section also applies to employers of 1-9 employees within the State of Colorado, as they must remit FAML I premiums on behalf of their employees.~~

~~The provisions of this section also apply to self-employed workers and those employed by local governments who are opting into the FAML I program for coverage.~~

The provision of this Section will apply to employers as defined in 8-13.3-503 (8) C.R.S. who are operating within the State of Colorado, no matter what State,

county, or territory the employer is physically located in or claims as a base of operations, unless otherwise specified by exemptions in 8.13.3-503 C.R.S (8) or federal law.

The provisions of this Section shall also be applicable to self-employed persons who elect coverage under 8-13.3-514 C.R.S. and employees of any local government who elect coverage under 8-13.3-514 C.R.S.

1.4 Definitions

“Calendar Quarter” has the same definition as 8-70-103 (6) C.R.S.

“Division” has the same definition as 8-13.3-503 (5) C.R.S.

“Employee” has the same definition as 8-13.3-503 (7) C.R.S.

“Employee share” is defined as 50 percent of the premium required for an employee by section 8-13.3-507 (3) C.R.S.

“Employer” has the same definition as 8-13.3-503 (8) C.R.S.

“Employer share” is defined as 50 percent of the premium required for an employer by section 8-13.3-507 (3) C.R.S.

“FAMLI” is defined as the Paid Family and Medical Leave Insurance Act, sections 8-13.3-501 through 524 (the “Act”), C.R.S.

“Net earnings from self employment” has the same meanings as in the Internal Revenue Code at 26 U.S.C. § 1402 (a), in effect for the taxable year, and the implementing regulations at 24 CFR § 1.1402 (a).

Gross income has the same meaning as in the Internal Revenue Code at 26 CFR § 1.61-2.

“Premium” is defined as the money payments required pursuant to ~~has the same definition as 8-13.3-507 C.R.S. to finance the payment of family and medical leave insurance benefits and administer the family and medical leave insurance program.~~

“Self-Employed Person” is defined to include an individual worker who is primarily free from external control and direction in the performance of their duties, or is a sole proprietor, a joint venturer or a member of a partnership, a member of a limited liability company, an independent contractor or a person who is otherwise in business for themselves.

~~“Wages” has the same definition as 8-70-141 C.R.S.~~

1.5 Assessing and Collecting Premiums

1.5.1 Election, Withdrawal, and Cancellation of Coverage

- A. Self-employed persons ~~who~~ **may** elect coverage under 8-13.3-514 C.R.S. ~~are subject to the same eligibility requirements of all other covered individuals but must be localized within the State of Colorado.~~
- (1) Notice of election of coverage must be submitted to the ~~department~~ **Division** online or in another format approved by the ~~department~~ **Division**.
 - (2) Elective coverage begins on the first day of the calendar quarter immediately following the notice of election.
 - (3) A period of coverage is defined as:
 - (a) Three years following the first day of elective coverage or any gap in coverage; and
 - (b) Each subsequent year.
 - (4) Any self-employed person may file a notice of withdrawal within thirty calendar days after the end of each period of coverage.
 - (5) A notice of withdrawal from coverage must be submitted to the ~~department~~ **Division** online or in another format approved by the ~~department~~ **Division**.
 - (6) Any levy resulting from the ~~department's~~ **Division's** cancellation of coverage is in addition to the due and unpaid premiums and interest for the remainder of the period of coverage.

1.5.2 Determining Wages Earned and ~~hours worked for self-employed persons seeking coverage~~

- A: ~~The department will use the self-employed person's wages reported in a quarter and divide it by the state's minimum wage to presume the number of hours worked for the quarter being reported.~~
- ~~(1) The self-employed person may overcome the presumption of hours by providing sufficient documentation to the department including, but not limited to, personal logs or contracts.~~
- ~~(2) If the determination of hours in subsection is greater than eight hundred twenty hours for that quarter, the number of hours worked will be considered eight hundred twenty hours.~~
- B-A:** A self-employed person will update information with the Division **not less than** quarterly within the period of coverage to ensure timely and accurate benefit coverage amounts.

- €B. Pursuant to 8-13.3-507 (4)(a) C.R.S., a ~~A~~ self-employed person is ~~only~~ required to submit ~~a half share of the premium rate amount to the fund as a self-elected covered individual.~~ only 50 percent of the premium required for an employee by section 8-13.3-507 (3) C.R.S. on that individual's income from self employment.
- C. Not less than each quarter, a self- employed person who has elected coverage under 8-13.3-514 C.R.S. will report to the Division net earnings from self employment once they have elected to use net earnings as the basis of both premium collection and benefit payments for the three opt-in period.
- D. Not less than each quarter, a self-employed person who has elected coverage under 8-13.3-514 C.R.S, will report to the Division gross earnings from self employment once they have elected to use gross earnings as the basis for both premium collection and benefit payments for the three year opt-in period. Gross wages from self employment will be reported as gross wages for a specific quarterly pay period and not gross wages for the year to date.
- E. If a self-employed individual elects to change their premium and benefit calculation between gross and net, they may do so one time within the three year opt-in period.
- F. The Division may require copies of tax returns, bank records, self-attestations, or any other documents deemed necessary by the Division to verify or determine a self-employed person's wages.
- G. If a self employed person who has elected coverage under 8-13.3-514 C.R.S., is also a covered employee employed by an employer, the self employed person's FAMLI benefit payment shall be based on the combined wages from covered employment and self employment income.

1. 5.3 Determining Wages for All Employees Regarding Premium Assessment

- A. Examples of wages reportable to the Division for premium assessment purposes include, but are not limited to:
 - (1) Salary or hourly wages, including "wages" as defined by 8-70-141 C.R.S; and other compensation, including board, lodging, payments in kind, and.or other benefits provided as compensation for services performed by employees, including but not limited to domestic and agricultural employees. The Division may, after investigation, determine in individual cases the amounts to be included as reasonable value of remuneration payable in any medium other than cash for the purpose of computing premiums due under the act, but where the cash value of such benefits is agreed upon in a written contract, the amounts agreed upon shall presumptively be the reasonable value of such benefits; and

~~_____ (b) Cash value of goods or services given in the place of money~~

~~_____ (2) Commissions, payments on a piecework basis, or bonuses earned for labor or services performed in accordance with the terms of any agreement between an employer and employee.~~

B. Tips/gratuities shall be considered to be wages for the purposes of the act when the employer exercises significant control over the amount and distribution of money received by an employee as a tip/gratuity.

C. An employer is considered to have significant control over tips/gratuities when they are collected by the employer and then redistributed to employees.

D. Notwithstanding any other provision of this section, any tips/gratuities, used by the employer in order to conform to the minimum-wage requirements of federal or state law shall be deemed to be wages for the purposes of the act, to the extent of such use.

(1) For the purposes of this section, the inclusion, for the convenience of the customer, of a tip/ gratuity in an amount charged by a customer through the use of a credit card shall not, by itself, be deemed to constitute significant control.

(2) For the purposes of this section, a requirement by an employer that an employee report or account for tip/ gratuities shall not, by itself, be deemed to constitute significant control.

(E) In addition to the foregoing provisions of this section, wages shall also include tips that are received while performing services that constitute employment and that are made known to the employer through a written statement furnished by the employee.

(F) In circumstances where the employer's records regarding wages or other compensation pursuant to this section are inaccurate or incomplete, the Division may consider any evidence, written or otherwise, to determine the amount of wages as a matter of just and reasonable inference, absent any specific evidence provided by the employer suggesting that such inference is unreasonable.

~~_____ (d) Bonuses~~

~~_____ (e) Cash value of meals and lodging when given as compensation~~

~~_____ (f) Cash value of prizes or gifts~~

~~_____ (g) Holiday pay~~

~~(h) Paid time off, including vacation leave and sick leave, as well as associated cash outs, unless these wages are considered supplemental benefit payments provided by the employer;~~

~~(i) Separation pay including, but not limited to, severance pay, termination pay, and wages in lieu of notice;~~

~~(j) Value of stocks at the time of transfer to the employee if given as part of a compensation package;~~

~~(k) Compensation for use of specialty equipment, performance of special duties, or working particular shifts; and~~

~~(l) Stipends/per diems unless provided to cover a past or future cost incurred by the employee as a result of the performance of the employee's expected job functions.~~

B. Exempted from Wages Examples of what the department **Division** will not consider wages include, but are not limited to:

(a) ~~A payment from an employer benefit that is not part of the employee's standard compensation;~~

(1) (b) Per-diem or mileage reimbursements;

(2) e) Amounts of payments made by the employer on behalf of the employee into other insurance or annuity accounts that are not associated with FAML I including but **not** limited to:

(a) Short term or long term disability

(b) Medical or hospitalization expenses in connection with sickness or accident disability or:

(c) Death **or**;

(d) Earnings from investment-interest payments, dividend payments, or rent receipts from rental property, except if the income is earned through a business owned or operated by the claimant.

(e) **severance pay with the exception of payments pursuant to 8-73-110 C.R.S..**

1.5.3 Premiums Remitted by an Employer

A. Premiums must be paid **not less than** quarterly in the form and manner determined by the Division. Quarterly payments shall include all premiums with respect to wages paid for employment in all payroll periods that end within the calendar quarter.

1. **Due Date of Premiums.** Premiums shall become due and be paid no later than the last day of the month immediately following the end of the calendar quarter for which the premiums have accrued.

(a) Payment will be considered timely if postmarked or received in person or electronically on or before the due date. If the due date of premiums falls on a Saturday, Sunday, or legal holiday, payment will be considered timely if postmarked or received in person or electronically on the next business day that is not a Saturday, Sunday, or legal holiday.

(b) Quarterly payment shall not be required when the total amount of any premiums due, including any penalties and interest accrued for an untimely or incorrect report, is less than five dollars.

2. **Erroneous Rate Notice.** If, as a result of an incorrect notification or computation of rate by the Division, an employer is required to make an additional payment of premiums, such additional payment shall not accrue interest until thirty days after notification by the Division that such additional payments are due.

3. **First Payment of a New Employer, unless stated otherwise by exemption**

(a) The first premium payment of any employing unit that becomes an employer subject to 8.13.3-501 C.R.S. **et seq.**, at any time during a calendar year shall become due and be paid on or before the last day of the month immediately following the calendar quarter in which such employing unit becomes an employer.

(b) Said payment shall include the FAMLII premiums with respect to wages paid for employment occurring on and from the first day of the calendar year through all payroll periods that end within the calendar quarter in which the employing unit becomes an employer.

B. **Employers ability to deduct premiums from employees**

1. An employer **required to remit premiums pursuant to 8-13.3-507 C.R.S.**, may not deduct more than the maximum allowable employee share of the premium from wages paid for a pay period.

- (a) If an employer fails to deduct the maximum allowable employee share of the premium from wages paid for a pay period, the employer is considered to have elected to pay that portion of the employee share under 8-13.3 -507 C.R.S., and the employer cannot deduct this amount from a future paycheck of the employee for a different pay period.
- (b) ~~This (subsection a) does not apply if an employer was unable to deduct the maximum allowable~~ the employer will not deduct the employee share of the premium for a pay period ~~due to~~ where there is a lack of sufficient employee wages to cover the premium for that pay period.
- (c) In the payment of any premiums, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

2. Employers not required to pay the Employer share of the FAMLII premium due to employer size of business pursuant to 8.13.3-507 (5) C.R.S. must remit the employees' share of the premium in the manner outlined by the Division. Such employers may deduct up to 50 percent of the premium required for an employee by section 8-13.3-507 (3) C.R.S., from the employee's wages and will remit 50 percent of the premium required by section 8-13.3-507 (3) to the Division.

3. An employer who is not required to pay the employer share of the premium pursuant to 8.13.3-507 (3)(c), may elect to remit the employee share of the premium for employees who self-elect coverage under 8-13.3-514 C.R.S.

C. Application of payments made to premiums

1. A payment received by the ~~FAMLII~~ Division as a premium payment will be applied to the quarter for which the premium assessment applies.

(a) A payment exceeding the legal fees, penalties, interest and premiums due for that quarter will be applied to any other debt owed to the ~~FAMLII~~ Division in accordance with subsection 2 (c).

(b) If no debt exists, premium overpayments of less than fifty dollars will be credited to future payments due.

(c) If no debt exists, premium overpayments of fifty dollars or more may be refunded to the employer at the employer's request.

Otherwise, such overpayments will be credited to future payments due.

2. Payments received will be applied in the following order of priority:

(a) Current quarter balance;

(b) Any previous quarter premium balance due starting with the oldest quarter;

(c) Then beginning with the oldest quarter in which a balance is owed:

(i) Penalties;

(ii) Fees; and

(iii) Interest charges.

D. Pursuant to 8-13.3-507 (6) C.R.S., premiums shall not be required for employees wages above the contribution and benefit base limit established annually for the federal social security administration for purposes of the federal old-age survivors, and disability insurance program limits pursuant to 42 U.S.C., section 430.

1.5.4 Calculating Employer **Size Related To Premium Exemptions**

A. For determining premium exemptions based on employer size as outlined in 8-13.3-507(5). ~~The Division will determine the size of employers to determine eligibility for premium waivers based on the number of in-state or Colorado-localized employees.~~ the rules for counting employees to determine whether an employer is covered under the federal Family and Medical Leave Act apply; the employer must employ the requisite number of employees “for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year”; “any employee whose name appears on the employer’s payroll will be considered employed each working day of the calendar week, and must be counter whether or not any compensation is received for the week”; “Employees on paid or unpaid leave, including sick or medical leave, leaves of absence, disciplinary suspension, etcare counter as long as the employer has a reasonable expectation the employee will later return to active employment”; “a corporation is a single employer rather than its separate establishments or divisions.”

1. If the Division determines the employer's status has changed as it relates to premium liability, the Division will notify the employer as to their premium liability.

2. An employer's size for purposes of this regulation 1.5.4 will be calculated annually by counting the number of employees pursuant to regulation 1.5.4 (A) during the preceding calendar year.

~~(a) If the employer was determined to have 10 or more employees for the preceding calendar year, and the employer is then determined to have fewer than 10 employees for the subsequent calendar year, the employer will not be required to pay the employer portion of the premium for the next calendar year.~~

~~(b) If the employer was determined to have nine or less employees for the preceding calendar year, and the employer is then determined to have 10 or more employees for the subsequent calendar year, the employer will be required to pay the employer portion of the premium for the next calendar year.~~

3.2. If an employer has not been in business in Colorado long enough to report four calendar quarters by January 1st of the subsequent year the employer's size pursuant to regulation 1.5.4 (A), the employer's size will be calculated after the second quarter of reporting is due by averaging the number of employees reported over the quarters for which reporting exists. Premium calculations based on this determination will begin on this reporting date. This size determination remains in effect through the following calendar year.

B. Determination of employer size for premium collection beginning 1 January 2023.

1. For purposes of premium calculations for calendar year 2023, the Division will determine the size of all employers by reviewing the number of employees reported pursuant to 8-70-113 C.R.S, for the first calendar quarter. Employers that report ten or more employees will be required to pay the employer share of the premium for all calendar quarters in calendar year 2023.

2. ~~On September 30, 2023 the department~~ Division will average the number of employees reported over the quarters for which reporting exists to determine the employer size for 2024.

C. Determining in-state status of employees ~~subject to premium liability~~

1. ~~An employee's wages shall be subject to premiums for all services performed within Colorado and for all services performed both within and outside of Colorado where: An employer's work is subject to all reporting requirements and premiums then the work is localized in Colorado. An employee's work is considered localized in Colorado when:~~

(a) ~~All of~~ The employees ~~entire service work~~ is performed ~~entirely inside~~ within Colorado; ~~or~~

(b) ~~The employee's service if performed both within and outside of Colorado, but the service performed outside the state is incidental to the employees work within Colorado or, for example is, temporary or transitory in nature and consists of isolated transactions; or Most of the employees work services are performed within Colorado, but some of the work which is temporary or transitory in nature, or consists of isolated transactions performed outside of Colorado~~

(c) ~~2. Services are localized in Colorado will be subject to reporting requirements and premiums when the~~ Services are not localized in any state, but some of the services are performed in Colorado, ~~and;or~~

(1) ~~The base of operations of the employee~~ is in Colorado, or if there is no base of operations, then the place from which such services is directed or controlled from is in Colorado ~~as established in 8-70-117 C.R.S.~~

(2) The base of operations or place from which some part of the services is directed or controlled is not in any state in which part of the service is performed, but the individual's residence is in Colorado.

3. Payment to Another Jurisdiction. An employer who has erroneously paid to another jurisdiction an amount as premiums properly payable to Colorado shall not be delinquent if premiums properly payable to Colorado are paid within thirty days of the date on which the Division determines that such premiums are payable to Colorado.

1.6 Assessments and recomputations of FAML I Premiums

A. If, in the judgment of the Division or upon its information and knowledge, the report of wages included in an employer's FAML I premium report is incomplete or in error, the Division may require a further report, examine the employer's relevant books and records, or use other reasonable measures to the extent necessary to obtain an accurate report.

B. If a contributing employer is **either** delinquent in filing a premium report within the time prescribed by the Division or ~~if an employer whom has voluntarily advanced an employee a leave benefit under 8-13.3-515 (2) C.R.S.~~ whose records are needed to make a proper determination of an amount of indebtedness or other matter declines to make its records available, the Division may, in its discretion:

1. Use the information and knowledge available to the Division to estimate the amount of chargeable wages paid by a contributing employer during the premium period or periods. The amount of chargeable wages so determined shall be deemed to have been paid by the employer and shall be used to determine the annual payroll;
2. Assess the employer for FAML I premiums calculated on the basis of the estimated wages; and
3. Issue a subpoena duces tecum to compel an employer to release books and records to the Division for use in obtaining the required information.

C. A contributing employer who is delinquent in filing reports or paying FAML I premiums shall be promptly notified of the assessment by the communication method the employer elected during FAML I registration and computed **under regulation 1.6 (B). Premiums will not be considered delinquent if paid within thirty days after the date on which the Division notifies the employer of the delinquent payment.**

D. The Division may correct errors of computation whenever such erroneous computations are found or brought to the Division's attention.

1. Every interested party shall be promptly notified of any recomputation made hereunder that affects an employer's liability for premiums.
2. **Recomputation Not a Redetermination.** An initial recomputation issued hereunder shall not be deemed to be a redetermination decision.

1.6.1 Notification of FAML I Premium Liability

A. The Division will notify employers and individual persons who have elected coverage of their expected premium on the first business day of the calendar month the premium is due to be paid.

1. Notification may be either electronic or sent by postal mail to the address provided to the Colorado Department of Labor and Employment.

(a) Employers may choose a business representative such as a payroll service provider, attorney, or accountant to receive notification on their behalf.

(b) ~~Self-employed individuals including~~ persons and local government employees, who elect coverage pursuant to 8-13.3-514 C.R.S., ~~whose local government has declined to provide coverage,~~ may elect to be notified electronically or by postal mail.

(c) Local governments that have declined participation in the FAMLI program pursuant to 8-13.3-522 C.R.S., but agree to withhold and remit the employee share of premiums for employees who elect coverage under 8-13.3-514 C.R.S., will be provided a quarterly list of employees who have elected coverage pursuant to 8-13.3-514 C.R.S. Local government which have declined participation in the FAMLI program pursuant to section 8-13.3-522 C.R.S., and declines to withhold and remit the employee share of premiums for employees who elect coverage under 8-13.3-514 C.R.S., will not receive information from the Division regarding any such employees who have voluntarily elected coverage.

~~Municipalities and local government entities who have opted out of the premium liability but whose employees are individually electing into FAMLI coverage, will be provided a quarterly list of employees who have registered with the program.~~

2. A schedule of due dates as well as guidance as to how to remit premiums will be posted by the Division on the FAMLI website and will remain publicly available.

B. Employers not subject to a premium liability due to ~~their employees'~~ coverage **through a** pre-approved **substitute** ~~efficiently equivalent~~ private plans **under 8-13.3-521 C.R.S., will** not receive quarterly notifications of premium liability from the Division.

1. In the event of a loss of coverage or significant change in status, the Employer is required to notify the Division within 30 days, and a premium liability will begin to accrue from the first day of the previous calendar quarter.
2. Premium liability will then continue to follow the regular calendar quarter payment schedule, until such time as a new and separate waiver has been approved by the Division.