

**Division of Family And Medical Leave Insurance (FAMLI)**

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**STATEMENT OF BASIS, PURPOSE, SPECIFIC STATUTORY AUTHORITY, AND FINDINGS Premium Rules, 7 CCR 1107-1 (2021), as adopted on January 1, 2022.**

**(1) BASIS.** The purpose of these rules concerning the Paid Family and Medical Leave Insurance (FAMLI) Rules (or “Rules”) is to implement and enforce the Paid Family and Medical Leave Insurance Act, Colorado Revised Statutes (“C.R.S.”) Title 8, Article 13.3, Part 5 (C.R.S. 8-13.3-507)(2020).

**(2) SPECIFIC STATUTORY AUTHORITY.** The Director is authorized to adopt rules and regulations to enforce, execute, implement, apply, and interpret C.R.S. Title 8, Article 13.3, by C.R.S. §§ 8-13.3 -507, -508, -514, -516, -522; and §§ 24-4-103 and -105. These rules are intended to be consistent with the requirements of Colorado’s Administrative Procedures Act, C.R.S. §§ 24-4-101, et seq..

**(3) FINDINGS, JUSTIFICATIONS, AND REASONS FOR ADOPTION.** Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds: **(A)** demonstrated need exists for the rules (detailed in Part 4, which this finding incorporates); **(B)** proper statutory authority exists for the rules (detailed in Part 2, which this finding incorporates); **(C)** to the extent practicable, the rules are clearly stated so that their meaning will be understood by any party required to comply; **(D)** the rules do not conflict with other provisions of law; and **(E)** any duplicating or overlapping has been minimized and is explained by the Division.

**(4) SPECIFIC FINDINGS FOR ADOPTION.**

**(A) Broad Purpose of Rules**

The FAMLI Act, a new “Part 5” of C.R.S. Title 8, Article 13.3 (§ 8-13.3-501 to -524), establishes a new Division within the Colorado Department of Labor and Employment (CDLE), the Director of which is responsible for promulgating rules and coordinating the FAMLI program (§ 8-13.3-508 (1)). The Division is an enterprise (§ 8-13.3-508(2a)). The Division shall establish and administer a family and medical leave insurance program and begin collecting premiums as specified by Part 5”(§ 8-13.3-507 & -516(7)). In order

to finance Family and Medical leave Insurance benefits and program administration costs, premiums will be collected through payroll deductions beginning January 1, 2023 (§ 8-13.3-507(1) & (2)).

The Division is a self-sustaining enterprise that has “all the powers and duties authorized by [the Act] pertaining to family and medical leave insurance benefits.” § 8-13.3-508(b). As such, the Division is statutorily authorized to administer, carry out, and enforce all provisions of this Part 5, including the promulgation of rules, the ability to investigate complaints, enforce premium collections, and administer guidance as needed and requested.

These Rules pertain to those statutory provisions contained in Part 5, specifically the manner in which the Division is to collect premiums through payroll deductions for the purposes of paying benefits and administering the program. The Division’s charge to promulgate rules in support of enforcement and implementation of this Part 5 is mandatory, statutorily taking effect on January 1, 2022. The Division initiated rulemaking in late summer 2021, to assure implementation of rules by that statutory effective date.

The Act created the FAMLI program as a whole and outlines the overall purpose, duties and responsibilities of the Division to fulfill the law passed by over 57% of the voters in November 2020<sup>1</sup> through Proposition 118<sup>2</sup>.

These Rules are limited to the collection of premiums and are needed imminently to implement the Division’s mandatory authority by the statutory effective date. The promulgation of these Rules does not preclude any later implementation and/or rulemaking as to the Division’s authority under the Administrative Procedure Act, C.R.S. § 24-4-103.

## **(B) Rules 1.1 through 1.4 : Statutory Framework and Definitions**

Rule 1.1 through 1.4 details the relationship of these Rules to relevant statutes, and the Division’s intent for these Rules to remain in effect to the maximum extent possible if a portion is held invalid<sup>3</sup>. Throughout these rules the Division has capitalized the words

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<sup>1</sup> <https://elections.denverpost.com/results/county-break-down/?Prop-118/7703>

<sup>2</sup> <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2019-2020/283Final.pdf>

<sup>3</sup> *E.g., High Gear & Toke Shop v. Beacom*, 689 P.2d 624, 633 n.10 (Colo.1984)(§ 2-4-204, C.R.S., “can be used not only to sever separate sections, subsections, or sentences, but may also be used to sever words and phrases” even in statutes lacking severability provisions) (citing *Shroyer v. Sokol*, 191 Colo. 32, 34, 550 P.2d 309, 311 (1976)).

“Rule” and “Rules” when referring to the specific rules found in this section on premium collection.

### **(C) Rule 1.5.1 Election, Withdrawal, and Cancellation of Coverage for Self-Employed Persons**

Following the ballot provision allowing for self-employed persons to self-elect coverage into the FAML I program, Section 1.5.1 of Rule 7 CCR 1107-1, creates the mechanism by which a self-employed person becomes eligible for coverage, and outlines how and when a self-employed person may decline further FAML I coverage after a period of coverage was fulfilled under C.R.S § 8-13.3-514. The same section also applies to people who work for units of local government who have an option to self-elect coverage in the event a local government employer both chooses not to fully participate in the FAML I program and denies employees the option of a voluntary payroll deduction to assist the employee to remit of premium amount to the Division.

Self-employed persons who have self-elected coverage and then begin working for an employer as defined in C.R.S. § 8-13.3-503(8), during either the three-year minimum coverage period, or subsequent years, may notify the Division they wish to withdraw from their self-elected coverage and the Division will process the request no sooner than 30 days after the notice is filed. The thirty day notice period is outlined in the language of the statute at C.R.S. § 8-13.3-514 (2)

Self-employed persons who work for one or more employers in addition to working for themselves, may stay in the program if they choose to continue to pay the premium amount associated with their status as a self-employed person in addition to any premium required as by an employee share<sup>4</sup> by their succeeding employer. This is consistent with language found in C.R.S 8-13.3-506(2) allowing a “covered individual with multiple jobs to elect whether to take leave from one job or multiple jobs.”

### **(D) Rule 1.5.2 Determining Wages Earned for Self-Employed Persons**

This section of the Rules outlines the process for self-employed persons who are electing FAML I coverage. Quarterly submission of wages earned from self-employment to the Division will help ensure the premium amount assessed is accurate and can

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<sup>4</sup> “Employee share” is defined as 50 percent of the premium required for an employee by section 8-13.3-507(3), C.R.S.

support an accurate wage benefit calculation and disbursement for claimants should they apply for benefits.

Self-employed persons may choose between reporting either their gross wages or their net earnings from self-employment. During 2020 and 2021, a national collective experience among states administering Pandemic Unemployment Assistance demonstrated many self-employed persons did not have immediate or quarterly access to tax advisors and other professionals to assist them to properly identify and calculate their net incomes. This has resulted in claimants owing thousands of dollars in repayment which has added burden to state Unemployment insurance programs. Learning lessons from the past 18 months, and following the leads of several other states offering similar paid family and medical leave (PFML) programs, Rule 1.5.2 (E) was created to allow self-employed persons flexibility as to how they may calculate premium and benefits by selecting to base their contributions and payments from either gross earnings or use the well established net earnings for self-employment standard.

Self Employed persons will choose which basis to calculate premiums and benefits at the time they register with the Division and will only be permitted to change their calculation one time within the initial three year enrollment period. After the initial three year enrollment period has passed and the renewal period continues in an annual enrollment cycle, the self-employed person may switch between the gross or the net earnings calculation as long as the change corresponds with the beginning of their annual self-election of FAML I coverage.

The FAML I benefit is not subject to state income tax, and as of 2021 we do not have a determination from the IRS as to whether benefits paid under PFML programs will be federally taxable income. Without this Federal guidance the Division will be building the supporting technological solution needed to administer the program with the ability to issue 1099 forms, and will provide standard guidance accordingly, which will direct people to consult with their own tax preparers and professionals.

### **(E) Rule 1.5.3 Determining Wages For All Employees Regarding Premium Assessment**

The Division has made a decision to mirror existing state Unemployment Insurance mechanisms and other state level rules and definitions in an effort to reduce complexity for employers within these premium Rules. The FAML I program will use the same definition of wages as is currently in use as of 2021. None of the points made in this

section of Rules represent new practices, however the sections do provide more detailed guidance than what has been previously been published by CDLE regarding workers whose wages are dependent on tip credits against their minimum hourly wage obligation<sup>5</sup>.

#### **(F) Rule 1.5.4 Exempted from Wages**

This section of the rules also mirrors existing practices, with the exception of the treatment of severance pay. A decision was made to closely follow the provisions and guidance from the Colorado Unemployment Insurance Program due to employers' familiarity with the process. These Rules follow the well established guidelines as to what constitutes wages in Colorado state unemployment insurance, which of course also closely aligns with federal unemployment insurance standards.

However, the Division also recognizes employers familiarity and governance under Colorado's wage and hours laws as outlined in the Colorado Overtime and a Minimum Pay standards orders known as COMPS #37<sup>6</sup>. This has created an effort to increase clarity between a few of the various rules specifically for the FAML I program. As an example, severance pay under COMPS #37 is exempted from wages and will remain exempt in FAML I under most circumstances. However, when an employer finds it necessary to arrange a series of severance payments over a period of time to a former employee, those payments are considered wages under current Unemployment Insurance standards. To limit confusion and fraud, we have mirrored this exception in the FAML I rules and have crafted this narrow exemption in Rule at 1.5.4 A.2.(e).

#### **(G) Premiums Remitted by an Employer**

Most sections and guidance mirror timeframes and practices found in the Unemployment Insurance system, to reduce complexity and multiple timelines for employers. Each mechanism in Rules section 1.5.5 A., is an existing Unemployment Insurance practice.

Rules section 1.5.5 B., is unique to the FAML I program and provides guidance for employers who will choose to deduct an employee share of premiums from wages. This

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<sup>5</sup> [Colorado Overtime and Minimum Pay Standards Order \(Comps order\) #37](#)

<sup>6</sup> [Colorado Overtime and Minimum Pay Standards Order \(Comps order\) #37](#)

Rule clarifies any wage deductions must be done per pay period and may not be deducted from former or future pay periods.

Rules section 1.5.5 C., mirrors existing Unemployment Insurance practices and describes how the Division will apply employer payments to premium liabilities.

Rules section 1.5.5.D., is language directly from Proposition 118. During the listening session with employers conducted by CDLE in August of 2021, a common question from employers emerged as to the social security wage cap and premium liability and so we have added this ballot language to the rules for clarity.

### **(H) Calculating Employer Size Related to Premium Exemptions**

All Colorado employers with two or more employees are required to participate in the FAML I program, unless they qualify to opt out of the program by virtue of being a local government entity or they are an employer electing FAML I coverage under a private insurance program that meets or exceeds FAML I standards and pricing and has been previously approved by the Colorado Department of Insurance as an adequate substitute.

The Rule in section 1.5.6 A., relies upon a well-established standard under the federal Family and Medical Leave Act (FMLA) to determine if an employee is adequately attached to an employer's payroll and must be counted as an employee to determine the employer's size to determine premium liability under the FAML I program. The Division will calculate employer size annually.

Rule section 1.5.6.C, addresses the determination of in-state status of employees, through a test metric which mirrors an existing long standing practices found with Colorado's Unemployment Insurance system in C.R.S §§ 8-70-116 and 8-70-117, and is also located in federal<sup>7</sup> requirements.

This type of "localization" is also widely accepted by PFML programs across the country for purposes of premium collection and benefits. This Rule does not expand any existing definition of employment, and mirrors existing mechanisms employers with multistate and multinational workforces are well experienced in executing for purposes of Unemployment Insurance and other benefit programs.

### **(I) Assessments and recomputations of FAML I premiums**

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<sup>7</sup> [https://wdr.doleta.gov/directives/attach/Unemployment InsurancePL20-04\\_AttachI.html](https://wdr.doleta.gov/directives/attach/Unemployment%20InsurancePL20-04_AttachI.html)

Rule section 1.5.7 follows existing CDLE practices as found in Unemployment Insurance relating to premium payments, assessments, and delinquencies.

**(J) Notification of FAMI Premium Liability**

Rule section 1.6, outlines the Division's best practices for communicating with employers regarding the timing and submissions of premiums. Keeping with the spirit of streamlining a time saving process for employers, this mechanism also follows existing practices found in Unemployment Insurance.