

Colorado Adopts Emergency Rule Mandating Paid Sick Leave for Employees, Effective March 11

By Ryan P. Lessmann

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On March 11, 2020, the Colorado Department of Labor and Employment (CDLE) adopted the Colorado HELP Rules to require up to four days of paid sick leave for employees in select industries to attend to flu-related symptoms and treatment.

The HELP Rules (which stands for Health Emergency Leave with Pay) were implemented less than 48 hours after Colorado Governor Jared Polis declared a [State of Disaster Emergency](#) on March 10, 2020, in response to the increase of coronavirus COVID-19 cases in the state. The Governor's Executive Order directed the CDLE to (1) "engage in emergency rulemaking for temporary paid sick leave" and (2) "identify additional supports and wage replacement such as access to unemployment insurance."

Employer Coverage and Responsibilities

The HELP Rules apply to employers engaged in the following industries:

- Leisure and hospitality;
- Food services;
- Child care;
- Education at all levels (including related services, including but not limited to, cafeterias and transportation to, from, and on campuses);
- Home healthcare (working with elderly, disabled, ill, or otherwise high-risk individuals);
- Operating a nursing home; and
- Operating a community living facility.

An employer who engages in any of the above industries must provide up to four days of paid sick leave for an employee (A) with flu-like symptoms, *and* (B) who is being tested for COVID-19. The paid sick leave ends if an employee receives a negative COVID-19 test result.

Exceptions to Employer Responsibilities

The Rules "do not require an employer to offer additional days of paid sick leave if it already offers all employees an amount of paid leave sufficient to comply with" the four-day paid leave requirement.

However, an employee who has *already* exhausted his or her paid sick leave allotment, "but then has flu-like symptoms and is being tested for COVID-19, is entitled to the additional paid sick days" under the Rules.

As summarized by the CDLE on its website, the leave entitlement under the HELP Rules "is not on top of sick leave an employer already provides and does not cover wage replacement should an employee test positive and require quarantine resulting in lost work time and wages" (emphasis in original).

How Employees are to be Paid

During an employee's sick leave, the employer must provide pay (A) at the employee's "regular rate of pay," as defined in the [Colorado Overtime & Minimum Pay Standards \(COMPS\) Order](#), "including all forms of wages and compensation"; and (B) for the employer's regularly scheduled hours.

For an employee paid below the minimum wage due to a tip credit, the "regular rate of pay" must be "increased to the applicable minimum wage" — currently \$12.00 an hour in Colorado.

The CDLE website clarifies further that "[w]orkers are covered regardless of pay rate or method (hourly, weekly, piece rate, etc.); the daily pay during leave is either their established daily rate or, if their pay fluctuates, their average daily pay for the past month."

FMLA and Anti-Retaliation

The Rules also direct that, "[t]o the extent feasible, employees and employers should comply with the procedures of the federal Family Medical Leave Act ('FMLA') to pursue and provide paid sick leave under"

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the HELP Rules.

Additionally, an employer may not “terminate an employee for inability to provide documentation during an illness covered by these rules.”

Enforcement

An employer's failure to provide paid sick leave under the HELP Rules constitutes “a failure to provide wages” under the Colorado Industrial Relations Act, the Colorado Wage Act, the Colorado Minimum Wage of Workers Act (Articles 1, 4, and 6, respectively, of C.R.S. Title 8); under the Colorado Minimum Wage Order (until March 15, 2020); and under the COMPS Order (on and after March 16, 2020).

Additionally, the prohibition against retaliation in the COMPS Order applies equally to rights provided by the HELP Rules.

Effective Date and Duration

The HELP Rules took effect on adoption on March 11, 2020. They will remain in effect for either “the longer of (A) 30 days after adoption, or (B) the duration of the State of Disaster Emergency declared by the Governor, up to a maximum of 120 days after adoption” of the Rules. In other words, these Rules may be in effect until July 9, 2020.

What Employers Can Do Now

Some actions employers in the covered industries can undertake now include the following:

- For those employers that take a tip credit toward their minimum wage obligations for tipped employees, remember that employees who take leave under the Rules must be paid the “applicable minimum wage,” currently \$12.00 an hour.
- To the extent practicable, and if applicable, employers should comply with the procedures of the FMLA to pursue and provide paid sick leave under the Rules.
- Employers should notify their employees that they may be eligible for paid leave under the Rules.

Additionally, the Rules “only speak to paid leave for the four-day period required for testing,” and do not require pay for all absences that are related to COVID-19.

If you have questions about the Colorado HELP Rules or any other wage and hour question, please contact a Jackson Lewis attorney.

Jackson Lewis has established a dedicated [COVID-19 Task Force](#) that is continually assessing risks, preparing employee communications, and providing practical advice on the workplace compliance issues.

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