ASAP WEBINAR

FAMLI MATTERS

Employer updates to Colorado's Family & Medical Leave Insurance (FAMLI) Program

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PRESENTED BY

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THE LAW FIRM OF BECHTEL & SANTO

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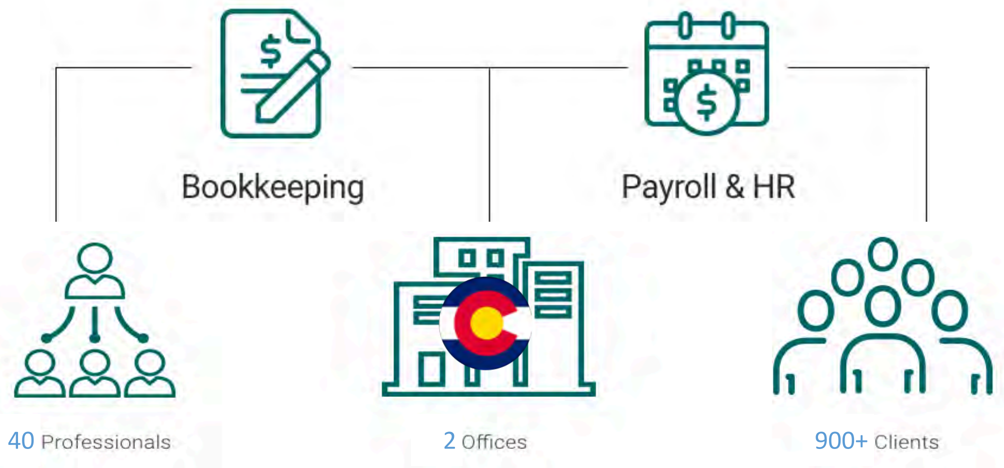

REAL PEOPLE. REAL CONNECTIONS.

Meet Michael

THE LAW FIRM OF
BECHTEL & SANTO

Michael Santo, Presenter

Cofounder & Partner, Bechtel & Santo

Employment law attorney Michael Santo is cofounder and partner at Bechtel & Santo in Grand Junction, Colorado. Since 1994, Michael has focused his practice on defending companies in employment litigation, including discrimination lawsuits; wrongful discharge; and wage and hour matters. Counseling companies on day-to-day employment issues is also an important part of Michael's practice. This includes advising employers on hiring, discipline, and termination decisions; on leave and disability issues; and on preparing and revising employee handbooks. By helping employers develop sound personnel policies, Michael assists many Colorado companies, large and small, in minimizing the risk of employment-related litigation.

What We'll Cover

- Calculating and deducting employee premiums from paychecks and remitting payments to the state's FAMLI Division
- August updates to FAMLI rules for employers Benefits to Small Businesses
- How FAMLI works with other Federal and State paid leave programs, such as FMLA and HFWA
- Impacts on multi-state/remote workforces
- Exemption process (local governments/special tax districts and private plans)
- Updates to PTO and leave policies, employee handbooks, and notification postings
- Q&A

Colorado’s Paid Family and Medical Leave Insurance (FAMLI) Program

Bechtel & Santo

What is FAMLI?

FAMLI will provide Colorado workers 12-16 weeks of paid leave…

- To manage their own serious health condition
- To care for a family member with a serious health condition
- To care for a new child (within the 1st year of birth, foster placement, or adoption)
- To make arrangements for military deployments
- To address immediate safety needs and impact of domestic violence/sexual assault

Premiums are set to 0.9% of the employee's wage, with 0.45% paid by the employer and 0.45% paid by the employee

FAMLI Timeline

January 1, 2022
Initial FAMLI rules adopted

July 2022
Public education campaign begins

January 1, 2023
Employers begin payroll deductions for FAMLI premiums and remitting premium payments to the FAMLI Division

April 30, 2023
First quarterly premium payments due (30-day grace period)

January 1, 2024
Covered workers can begin submitting requests for FAMLI leave

How will FAMLI be funded?

Premium Responsibilities Under Proposition 118

Employer Type	Employer Premium	Employee Premium	No Premium
9 or fewer employees		✓	
10+ employees	✓	✓	
Participating self-employed		✓	
Participating local government employee		✓	
Nonparticipating local government			✓
Nonparticipating self-employed			✓
Employer with private plan			✓

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Will FAMLI premiums increase?

Possibly. The initial 0.9% FAMLI premium rate is fixed through 2024

For 2025 and beyond, the director of the FAMLI Division sets the premium rate according to a formula based on monetary value of fund each year.

The FAMLI premium rate is capped by statute at 1.20%

FAMLI Wages Subject to Premiums

- Payments defined as wages under the Federal Unemployment Tax Act (FUTA)
- Tips
- Employee contribution to 401(k) or IRC 408 simplified Retirement Plans
- Contributions to a Medical Savings Account
- Employee-matching contributions into IRC 219 simplified employee pension plan
- Payments for personal services, including anything other than cash that has cash value
- Employee contributions to a Salary Reduction Simplified Employee Pension Plan (SARSEP)
- 125 Cafeteria Plan if cash is chosen

Amounts not included in "wages."

- Per-diem or mileage reimbursements
- Payments made by the employer on behalf of the employee into other insurance or annuity accounts that are not associated with FAMLI, including:
  - Short term or long term disability
  - Medical or hospitalization expenses in connection with sickness or accident disability
  - Death
  - 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.
  - Severance pay, with the exception of payments pursuant to 8-73-110 C.R.S.

Employer Deductions from Employee Wages

- Employers carry the burden of correctly calculating an employee's premium
- That is, if an employer makes a mistake and deducts less than an employee owes, the employer must then cover the remainder of employee's premium for that pay period
- Employers cannot go back later and deduct more from an employee's subsequent paycheck

Counting Employees Under FAMLI

- Employer count will be calculated **once a year**
- Total # of employees = # of employees on the payroll during each of 20 or more calendar workweeks in the preceding calendar year
- If an employer has 10 or more employees who worked 20 or more weeks in all of 2022, the employer is required to pay the employer share of the premium for all four quarters in 2023
- Employees on leave must be counted if they are expected to return to active employment

How much will employees receive when using FAMLI benefits?

Weekly wage	Weekly deduction	Weekly benefit	Maximum annual benefit	Percent of weekly wage
$500	-$2.25	$450	$5,400	90%
$1,500	-$6.75	$976.60	$12,216	65%
$2,000	-$9.00	$1,100	$13,200	55%
$2,500	-$11.25	$1,100	$13,200	44%
$3,000	-$13.50	$1,100	$13,200	37%

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Last Name, First
POSITION TITLE

EMPLOYEE ID
KAA 990000000

Payment Period	Payment Date
04/01/2023 - 05/01/3023	05/04/2023

Earnings	PAY PERIOD HOURS	PAY PERIOD GROSS	YTD
	168.00	5,000.00	20,000.00

Deductions	INFO	PAY PERIOD	YTD
NOT subject to FAMLI premiums	Kaiser Cafe 125 Medical	55.00	220.00
NOT subject to FAMLI premiums	EyeMed Cafe 125 Medical	5.00	20.00
NOT subject to FAMLI premiums	FSA Cafe 125 Medical	20.00	80.00
NOT subject to FAMLI premiums	Group Term Life Cafe 125	20.00	80.00
	401k Retirement Contribution	700.00	2,800.00
	Medicare	65.00	260.00
	Federal Tax	600.00	2,400.00
	State Tax	225.00	900.00
	Local Tax	5.00	20.00
	Social Security Tax	310.00	930.00
	FAMLI Premium	22.05	88.20
	Total Deductions:	2,027.05	7,798.20
	Net Pay:	2,972.95	12,201.80

Example of FAMLI deduction
0.45% of wages (Gross wages - deductions not subject to FAMLI premiums)

How does the program work?

Employers: must collect 50% of the employee's premium, and, for employers with 10 or more employees, contribute 50% of the employee's premium and remit those premiums to the Division.

Employees: apply for benefits to the FAMLI Division when a qualifying event occurs.

Division: evaluate claims, request documentation as needed, and approve or deny benefits.

Unlike FMLA or HFWA, the employer is <u>not</u> required to determine whether employees qualify for benefits. The state will make this determination.

Which Employees Are Eligible?

Any Colorado worker who makes more than $2,500 in yearly wages within the state.

This includes employees who work for exempt organizations.

Sole-proprietors may elect to participate in FAMLI if they so choose.

Job Protection

- Employees who have served at their current job for 180 days or more may not be penalized, harassed, or terminated for:
  - Requesting FAMLI leave
  - Using FAMLI leave
  - Informing any person of their rights under FAMLI
  - Informing any person of an employer's violation of FAMLI
  - Attending a hearing or other proceeding with the Division or the private insurer regarding an application for benefits or an appeal

Job Protection

Qualifying employees who use FAMLI leave must be restored to the same or equivalent protection upon return to work

Employees must retain any and all accrued/seniority benefits

Employer must maintain healthcare benefits for employees who are on leave

Employees may be required to continue paying their share of premiums

Employers may not count FAMLI leave as an absence

Employers who violate these job protection rules are liable for penalties and money damages

Exemptions

- There are only three categories of exemptions from the FAMLI Program
  - Local government entities
  - Self-employed individuals
  - Privately insured organizations
- In order to be exempted from FAMLI, employers in these categories need to undertake proactive steps

Local Government Entity

Full participation

- Employer and employee pay premiums; all employees must participate

Decline all participation

- Employer pays no premiums; employees are responsible for their own premiums if they choose to participate

Decline employer participation

- Employer pays no premium; employees may opt-in and employer still covers administrative burden of employees’ share of premiums

What is a local government entity?

- Any county, city, town, or other municipal entity
- School districts
- Special districts created pursuant to the “Special District Act”
- Any other political subdivision of the state

Local Governments

Full Participation

No vote is required, but employer must participate for a minimum of 3 years

Employer must register with FAMLI system and create an account in Fall 2022

All employees must participate and receive job protection when applicable

Local Governments – No Participation

Vote

The governing body must vote to decline all participation

- This process must include a public notice and comment period
- Such a vote must be re-evaluated every 8 years

Notify

Notify the FAMLI Division prior to January 1, 2023

- Notification must be on letterhead, indicate the day the vote was taken, and the result of the vote

Notice

Notice of governing body's vote must be given to employees, in writing, within 30 days

Local Governments

No Participation

- Employers who do not participate are not required to take any steps to remit employee premiums to the Division for those employees who opt-in
- Employees who opt-in to FAMLI will register with the FAMLI Division, calculate their premium rate, and remit their portion of premiums independently
- Employees are not entitled to job protection or benefit retention while on leave – unless required by insurance policy to do so

Local Governments

No Employer Participation

- Middle of the road option
  - Employers do not contribute their share of employees’ premiums
  - Employees may opt-in or opt-out
  - Employer takes administrative burden of calculating and remitting premiums to the Division

Local Governments

No Employer Participation

Employer must register with the FAMLI Division and set up an account

Voting and procedure is the same as for the No Participation route

Employees not entitled to job protection

Voting Timelines

First Vote
Anytime before January 1, 2023

Within 30 Days
Notify employees of decision

180 Days Prior to Change in Benefits
Notify employees of any forthcoming changes. This will not apply in 2022 as benefits won't be until 2024

3 Years
Required length of participation if a local government chooses to opt in after previously opting out.

8 Years
A vote to opt out of the program must be held at least every 8 years.

COLORADO
Department of Labor and Employment

Private Plans and Self Insurance

Private Plans are allowed; however, they must include:

- The same number of weeks of benefits
- Same level of wage replacement
- Include no additional requirements or conditions
- Deduct no more than the same amount from employee paychecks
- Cover all employees through the duration of their employment

The FAMLI Division is still writing detailed regulations on this issue – more to come

Self insurance will require a surety bond

Self Employed Persons

- People who are self-employed are not required to participate in the FAMLI program
- They may enroll in FAMLI and pay premium rates if they choose to participate
  - They are only responsible for the employee's share of premiums (0.45% of wages)
- Once enrolled, individuals cannot withdraw from coverage for the first 3 years. After the first "coverage period," individuals may withdraw at the end of each year.

Self Employed Persons

- In order to calculate premiums and benefit amounts, self employed persons may choose between reporting net earnings or gross earnings to the Division
  - Net earnings cause lower premium payments, and lower wage replacement benefits
  - Gross earnings cause higher premium payments, and higher wage replacement benefits
  - Individuals may switch one time between the two in a 3-year period
- Must update the Division quarterly

FAMLI and FMLA

For FMLA-covered entities, employees who apply for FAMLI leave benefits may also qualify for FMLA

FMLA and FAMLI may run concurrently, meaning that an employee who receives FAMLI leave is also protected by FMLA during their leave period

In essence: if an employee takes FAMLI leave, they are not also entitled to 12 weeks of FMLA

Intermittent Leave

Employees may receive Division-approved leave in increments as small as one hour

Employees will not be paid by the Division for these increments until an employee has used eight hours of paid leave

FAMLI and HFWA

- HFWA and FAMLI are two separate leave programs
- If an employee uses 12 weeks of FAMLI leave, and otherwise does not use HFWA that year, the that employee is still entitled to HFWA
- HFWA is paid for, and administered by, employers whereas FAMLI is paid for through a payroll tax and is administered by the state
- HFWA is short-term sick leave, FAMLI is long-term family and medical leave
- FAMLI leave cannot be used to cover an employer's obligation under PHEW

What information do employers receive when employees request benefits?

- Notice that an employee applied for benefits, including an opportunity to submit information to the Division
- The determination made by the Division
- Procedures for employer appeal process
- Anticipated leave duration and return date

Multi-state Employers and FAMLI

Employees who work or live in Colorado for out-of-state entities may be covered by FAMLI

Multi-State organizations must count all employees in all states for premium purposes

Employers who mistakenly remit premium payments to other state family leave programs on behalf of a Colorado resident will not be delinquent if paid within 30 days of the determination that premiums are due in Colorado

Multi-State Employee Wage Analysis

The employee’s entire service is performed within Colorado;

The employee’s service is performed both within and outside of Colorado, but the service performed outside the state is incidental to the employee’s work within Colorado; or

Services are not localized in any state, but some of the services are performed in Colorado, and

- The base of operations is in Colorado, or if there is no base of operations, then the place from which such services are directed or controlled is in Colorado; or
- Employee’s residence is in Colorado

FAMLI and PTO

May an employer require an employee to exhaust accrued PTO before taking FAMLI leave? No.

Employers may, at their discretion, allow employees to utilize PTO benefits to cover the "gap" between what the FAMLI Division pays per week and the employee's usual wage.

Are employers responsible for paying employees who are on FAMLI leave?

No. The Division will pay the employee a portion of their wage during their leave.

Employers must, however, continue to provide any health insurance or other benefits during leave (unless they are a local government entity that has opted-out via the vote and notice process).

Employees are still responsible for paying their share of premiums while on FAMLI leave for any insurance benefits they receive.

How often can employees take FAMLI leave?

Employees can take up to 12 weeks (16 for pregnancy complications) for qualifying events

Employees must provide documentation to substantiate the need for leave

Employees can only use up to 12 weeks (or 16) once in a rolling calendar year. So, if an employee takes 12 weeks of paternity leave starting March 1, 2024, they cannot be eligible until March 1, 2025 for additional benefits.

Employees may use intermittent FAMLI leave, just like FMLA

Disqualifying Events

Any covered individual who is found to have willfully made a false statement or misrepresentation regarding a material fact, or willingly failed to report a material fact, to obtain benefits will be disqualified from receiving FAMLI benefits for one year

Any benefits paid erroneously to an employee may be recovered by the Division

Regulatory Update – August 2022

- In August, after receiving nearly 300 written and oral comments on FAMLI's benefits rules, the Department revised and adopted its Benefits and Employer Participation Requirements. Notable changes from the proposed version of the rules include but are not limited to:
  - Deadlines for submitting an application for FAMLI benefits when the need for leave is unforeseeable have been extended to **30 days after the leave has begun** (previously listed as seven days.)
  - While formal appeal rights have been limited to the claimant applying for benefits, additional provisions were added to allow employers to file a grievance with the Division if it has a good-faith belief, supported by evidence, that the Division has granted FAMLI benefits to a claimant in an amount, duration or frequency beyond what the claimant is entitled or in a way that unduly disrupts the employer's operations.
  - Employers will now have an opportunity to request limited information regarding the amount and reason for leave where such information is strictly necessary for benefits coordination.
- With the benefits rules adopted, the Department then began working on private plan rules. See 7 CCR 1107-5.

CDLE Questions & Answers

- **What do I do when an employee is on leave?**
  - While an employee is on leave, employers are not responsible for paying wages at that time. Because of this, you may have access to vacancy savings to spend as needed. Optionally, as an employer you may, but are not required to, contract with a temporary worker to supplement your staffing needs.
  - Your employee will only be receiving a portion of their paycheck dependent on their average weekly wage and not the full amount. The benefit is capped at $1,100.00 a week. Employees are not required to use earned paid time off (PTO) before taking leave under the FAMLI program, but employers may allow employees to use their accrued PTO to "top off" or cover the remaining balance of their typical weekly wage in order to "make whole" their take-home pay while on leave.

CDLE Questions & Answers

- **I have highly-skilled workers, and a temporary worker would not be a solution for our company?**
  - Even a single employee vacancy can be a strain for a businesses' daily operations. Businesses may have other employees share the workload from the employee taking leave. While an employee is on leave, employers have access to vacancy savings. Employers may use vacancy savings from an employee on leave to provide a bonus or hazard pay for other employees who take on additional work.

CDLE Questions & Answers

- **How do I count nationwide employees?**
  - Your total nationwide employee count will be what determines whether or not you pay the employer share of the premium. You will only need to pay premiums for the employees who are localized in Colorado. For example, if you have 100 employees nationwide, and nine working completely in Colorado, the employer would be required to pay the 0.45% employer's share and collect and remit the 0.45% of the employee's share for each of those nine employees because the employer has more then ten total employees.

CDLE Questions & Answers

- **Are these employees subject to FAMLI? (1) an employee works outside of Colorado, but the company is a Colorado company? (2) an employee works in Colorado, but lives in another state?**
  - Under the FAMLI Act, most private sector employers must provide paid family and medical leave to their Colorado employees, whether through the state-run plan or through a private plan with equal or greater benefits and protections. An employee's wages will be subject to FAMLI premiums if:
    - The employee's work is performed entirely within Colorado;
    - The employee performs work both within and outside of Colorado, but the work performed outside of Colorado is incidental to the employee's work within Colorado, or is temporary or transitory and consists of isolated transactions; or

CDLE Questions & Answers

- The employee's work is not primarily localized in any state, but some work is performed in Colorado, and one of the following is true:
  - The employer's base of operations is in Colorado, or if there is no base of operations, the place from which the employee's work is directed or controlled is in Colorado; or
  - Neither the base of operations nor the place from which some part of the work is directed or controlled is not in any state in which part of the employee's work is performed, but the employee's individual residence is in Colorado.
  - More information regarding localization can be found in the FAMLI Division's Premium Rules at 7 CCR 1107-1, Section 1.5.6.C.

Questions?

Resources

- https://famli.colorado.gov/
- https://famli.colorado.gov/proposed/adopted-rules
- https://famli.colorado.gov/employers/famli-newsletters
- https://famli.colorado.gov/employers/employer-faqs
- https://famli.colorado.gov/employers/employer-webinars

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