



LEGAL UPDATE Mar 12, 2020

Paid Leave and Coronavirus Considerations — Colorado Emergency Paid Sick Leave Rules in Effect

Seyfarth Synopsis: *Yesterday, March 11, 2020, the Colorado Department of Labor and Employment (CDLE) published the “Colorado Health Emergency Leave with Pay” Rules (HELP Rules) to aid in combatting the 2019 Novel Coronavirus disease, also known as COVID-19. The HELP Rules are a temporary mandate that went into effect immediately (i.e., on March 11). The Rules require employers in certain industries to provide up to four days of paid sick leave to employees who are absent for certain reasons connected to COVID-19.*

As federal, state and local governments contemplate ways to respond to the spread of COVID-19, Colorado has pushed ahead with a paid sick leave (PSL) mandate known as the HELP Rules. Although the HELP Rules will remain in effect for only a period of between 30 and 120 days (at least as currently drafted), their meteoric emergence onto the PSL scene has triggered a similar need for affected employers to rapidly react to the Rules’ requirements.

In particular, any employer engaged in the field of **(a)** leisure and hospitality, **(b)** food services, **(c)** child care, **(d)** education at all levels (including related services, including but not limited to cafeterias and transportation to, from, and on campuses), **(e)** home health care (working with elderly, disabled, ill, or otherwise high-risk individuals), **(f)** operating a nursing home, or **(g)** operating a community living facility, must comply with the HELP Rules’ PSL mandate.

The HELP Rules are in response to Governor Jared Polis’ March 10 declaration of a “State of Disaster Emergency” in Colorado related to COVID-19. In the declaration,

Governor Polis “direct[ed] that immediate rulemaking be initiated to provide employees in certain industries with paid sick leave for possible coronavirus cases and testing.” As the state mulls potential additional COVID-19 workplace measures, here are the highlights of the HELP Rules:

- **Effective Date:** The Help Rules went into effect on March 11 — the same day they were published. They will remain in effect for the later of **(a)** 30 days after adoption (*i.e.*, April 10), or **(b)** the duration of the current Colorado State of Disaster Emergency, up to a maximum of 120 days after adoption (*i.e.*, July 9).
 - Immediate Effective Date Explanation: The Colorado HELP “Statement of Basis, Purpose, Authority, and Findings” justifies the immediate effective date of its new PSL mandate as follows — “Given the imperative risk to health and safety, this grant of paid sick time cannot wait the several months that the normal rulemaking schedule takes.”

- **Employee Definition:** “Employee” includes the following: **(a)** Every person in the service of an employer, under any contract of hire, express or implied; and **(b)** any person, including a migratory laborer, performing labor or services for the benefit of an employer. For the purpose of subpart (b), relevant factors in determining whether a person is an employee include the degree of control the employer may or does exercise over the person and the degree to which the person performs work that is the primary work of the employer. This includes private sector, local government, school district, and public authority employees.
 - Employee does not include: **(a)** an elective official of the state, or of any county, city, town, irrigation, drainage, or school district thereof; **(b)** any officers or enlisted men of the National Guard of the state of Colorado; and **(c)** an individual primarily free from control and direction in the performance of service, both under his or her contract for the performance of service and in fact, and who is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.

- **Employer Definition:** For purposes of the HELP Rules, “employer” is defined as **(a)** the state, and each county, city, town, irrigation, and school district therein, and all public institutions and administrative boards thereof having four or more employees; **(b)** every person, association of persons, firm, and private corporation, including any public service corporation, manager, personal representative, assignee, trustee, and receiver, *who has four or more persons regularly engaged in the same business or employment*, in service under any

contract of hire, expressed or implied; and **(c)** every person, firm, partnership, association, corporation, migratory field labor contractor or crew leader, receiver, or other officer of court in Colorado, and any agent or officer thereof, of the above mentioned classes, *employing any person* in Colorado.

– Employer does not include: **(a)** employers of private domestic servants or farm and ranch labor; and **(b)** employers who employ less than four employees regularly in the same business, or in or about the same place of employment.

- **Scope of Covered Industries:** Despite the above seemingly broad, and potentially conflicting, definition of “employer,” the HELP Rules’ PSL mandate only applies to businesses in certain industries. Specifically, the HELP Rules require that the following employers provide PSL to their eligible employees — Any employer engaged in **(a)** the field of leisure and hospitality, **(b)** food services, **(c)** child care, **(d)** education at all levels (including related services, including but not limited to cafeterias and transportation to, from, and on campuses), **(e)** home health care (working with elderly, disabled, ill, or otherwise high-risk individuals), **(f)** operating a nursing home, or **(g)** operating a community living facility.
- **Amount of Require PSL:** Up to four days.
 - FAQs - Employees who need to be absent for more than four days: The HELP FAQs note that the current emergency rules only speak to paid leave for the four-day period required for testing and that the CDLE is analyzing and potentially will pursue additional employee support and wage replacement.
- **Reasons for Use:** PSL under the HELP Rules is available to an eligible employee **(a)** with flu-like symptoms, and **(b)** who is being tested for COVID-19. An employee’s entitlement to PSL under the HELP Rules ends if the employee receives a negative COVID-19 test result.
- **Existing Employer Policies:** The HELP Rules do *not* require employers to offer additional PSL to employees if they already offer employees a sufficient amount of paid leave, i.e., at least four days of paid leave.
 - Exception: An employee who already exhausted his or her paid leave allotted by the employer, but then has flu-like symptoms and is being tested for COVID-19, is entitled to up to four additional PSL days.
- **Payment of Sick Time:** The HELP Rules require that PSL provided under the Rules must be paid **(a)** at the employee’s regular rate of pay,[1] including all forms of

wages and compensation (but increased to the applicable minimum wage for an employee paid below the minimum wage due to a tip credit), and **(b)** for the employer's regularly worked hours.

- Varying Rate of Pay or Hours: To the extent the employee's rate of pay or hours worked had varied before the absence for illness, the employer must pay the employee for used sick leave under the HELP Rules in the amount of the employee's average daily pay for the preceding month.

- **Connection to Federal FMLA**: The HELP Rules state that "to 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 these rules."

- Exceptions: **(a)** an employer cannot terminate an employee for inability to provide documentation during an illness covered by the HELP Rules, and **(b)** FMLA provisions do not narrow the rights and responsibilities provided by the HELP Rules.

- **Enforcement**: The HELP Rules note that failing to provide mandated PSL will constitute a failure to provide wages under **(a)** the Colorado Minimum Wage Order #35 until March 15, 2020, and then **(b)** the Colorado Overtime and Minimum Pay Standards Order #36 on and after March 16, 2020.

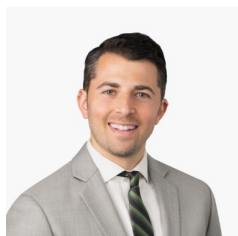
Impacted Colorado employers should start complying with the HELP Rules immediately. Here are some actions to consider:

- Monitor the CDLE website for further guidance on the HELP Rules, and potential additional employment measures related to COVID-19.
- Review existing paid leave policies and assess the effect of the HELP Rules on those policies, including whether any employees are entitled to additional paid sick leave.

With the paid sick leave landscape continuing to expand and grow in complexity, companies should reach out to their Seyfarth contact for solutions and recommendations on addressing compliance with this law and sick leave requirements generally. To stay up-to-date on Paid Sick Leave developments, [click here](#) to sign up for Seyfarth's Paid Sick Leave mailing list. Companies interested in Seyfarth's paid sick leave laws survey should reach out to sickleave@seyfarth.com.

[1] “Regular rate of pay” in this context is as defined in Colorado Overtime and Minimum Pay Standards Order #36. While the definition contains additional components, it generally states that **(a)** regular rate of pay means the hourly rate actually paid to employees for a standard, non-overtime workweek, **(b)** employers need not pay employees on an hourly basis, and **(c)** if pay is on a piece-rate, salary, commission, or other non-hourly basis, any overtime compensation is based on an hourly regular rate calculated from the employee’s pay.

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Coronavirus (COVID-19)

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