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Changes to employment law, August 2020

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Paid Sick Leave: How it will impact municipal employers

By Meghan Dollar, CML legislative advocacy manager

The conversation regarding paid sick leave has been significant in the past several legislative sessions. With the ongoing presence of COVID-19, the 2020 General Assembly passed minimum thresholds for paid sick leave. That bill was SB 20-205, Healthy Families and Workplaces. Shortly following the 2020 legislative session, CML created a memo outlining the requirements of SB 20-205. CML has included the body of that memo below so that all CML members have access to the requirements of the act. The act sets specific paid leave thresholds that an employer must meet. If a municipal employer provides higher amounts of paid leave, quicker accrual time frames, and allows paid leave for the same reasons and under the same conditions as those listed in the act, this may not affect current policy. Be sure to check your current work policies with your municipal attorney.

COVID-19 related sick leave

Through December 31, 2020, every Colorado employer, including local governments, must provide paid sick leave as required under the federal Families First Coronavirus Response Act (FFCRA).

Paid sick leave thresholds

Beginning January 1, 2021, employers with 16 or more employees must provide one hour of paid sick leave for every 30 hours worked, up to a maximum of 48 hours per year. For employers with less than 16 employees, the bill goes into effect on January 1, 2022.

- Employees begin accruing paid sick leave when employment begins, or may receive all hours up front, and may use that leave as it is accrued.
- Employees are permitted to carry accrued sick leave forward to use in the future, but the employer is not required to allow employees to accrue or take more than 48 hours in a 12-month period.

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- Exempt employees accrue based on a 40-hour work week unless they work fewer hours. In that case, the accrual will be based on the actual hours.
- An employee may use paid sick leave in hourly increments.
- The employee must make a good faith effort to provide notice of any paid sick leave.
- Employers may request documentation for absences longer than four consecutive days.
- Nothing prohibits the employer from exceeding these thresholds.
- An employer may loan an employee paid sick leave in advance of accrual.

Use of leave

Paid sick leave may be used for:

- The employee's own health or health care or that of a member of the employee's family (which is expanded to include another person related by blood, marriage, civil union, or adoption; foster or legal guardianship; or any person whom the employee is responsible for providing or arranging health-related care);
- Absences related to specified incidences of domestic abuse, sexual assault, or harassment of either the employee or a family member of the employee; or
- When a public official has ordered the closure of the employee's workplace, or the school or childcare facility of the employee's child, due to a public health emergency.

Employers are not required to pay out unused sick leave balances. However, if a terminated employee returns to work with the same employer within a six-month period, that employer is required to reinstate

any uncompensated, accrued sick leave balances for that employee.

Paid sick leave during a public health emergency

SB 20-205 requires employers to provide employees with additional paid leave during a public health emergency.

- Employers must provide employees who normally work 40 or more hours a week with at least 80 hours of additional paid sick leave.
- For employees who work fewer than 40 hours a week, employers must provide additional paid sick leave in the amount of time the employee is scheduled to work in a 14-day period or the amount of time the employee actually works on average in a 14-day period.
- Employees may only use the leave once during a declared public health emergency, and employees may use this additional leave for up to a month after the end or suspension of a public health emergency.
- Employers must provide this additional sick leave for absences that are listed in the bill such as self-isolation and seeking medical care, or caring for a family member; however, employers may require employees to use other available paid sick leave provided by the employer before using public health emergency paid sick leave.

Notice

Employers are required to notify employees of the amount of paid sick leave to which they are entitled and the terms of its use.

- The Colorado Department of Labor and Employment (CDLE) is required to create and make available posters and notices outlining the paid sick leave policy for use by employers.

- An employer who willfully violates these requirements is subject to a civil fine not to exceed \$100 per separate violation.

Employee rights and civil actions

Employees are not required to disclose the details of medical conditions or absences related to abuse.

- An employer is prohibited from retaliating against any attempt by an employee to exercise his or her rights under the bill or from counting paid sick leave used by an employee as an absence that may lead to or result in disciplinary action.
- Employers may take disciplinary action against employees who use sick leave for anything other than the purposes outlined in the bill.
- An aggrieved employee may file a civil action in District Court.

Enforcement.

Employers are required to retain records documenting hours worked, paid sick leave accrued, and paid sick leave used for each employee for a three-year period.

- Employers are to provide reasonable access to records for monitoring by the CDLE. If the employer does not allow reasonable access, then they are presumed in violation of the bill unless they can prove otherwise by preponderance of the evidence.
- The CDLE is provided with rulemaking authority and is given jurisdiction over enforcement of the bill's requirements.
- Any findings, awards, or orders issued by the CDLE are subject to judicial review.

For specific questions on this act, please contact Meghan Dollar, Legislative Advocacy Manager (mdollar@cml.org) or Laurel Witt, Associate Counsel (lwitt@cml.org).

General Assembly passes Whistleblower Protection Public Health Emergencies Act

By Heather Stauffer, CML legislative and policy advocate

In June 2020, the Colorado General Assembly passed HB 20-1415, Whistleblower Protection Public Health Emergencies. The bill was signed into law by Governor Jared Polis on July 11, 2020.

The law prohibits an employer, including local government employers, from discriminating, retaliating, or taking adverse action against any worker who raises any reasonable concern, in good faith, about workplace health and safety practices or hazards related to a public health emergency. While many municipalities already have whistleblower protection policies which protect public workers from retaliations and adverse actions and all municipal

employees fall under the retaliation protections of the First Amendment, there are important distinctions in this law which municipal employers need to be aware of.

The requirements of this law are only applicable if an employee accuses an employer of violating government health or safety rules as they relate to either a disaster emergency declared by the governor based on a public health concern, or a public health order issued by a state or local public health agency. Outside of a public health order or declared emergency, this law does not apply.

In addition to prohibiting an employer from taking adverse action against a worker who raises any reasonable concern about workplace health and

safety practices related to a public health emergency, the law also prohibits an employer from discriminating, retaliating, or taking adverse action against a worker who voluntarily wears personal protective equipment. The personal protective equipment must be more protective than what is provided by the employer; recommended by a federal, state or local public health agency which has jurisdiction over the worker's workplace; and cannot prevent a worker from fulfilling the duties of their position.

The law defines a "worker" as either an employee or a person who works for an entity that contracts with five or more independent contractors in the state of Colorado each year. The law is only applicable if the employer controls workplace conditions that

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have given rise to the threat or violation. An employer cannot require an employee to sign a contract or other agreement that would prevent the employee from disclosing information about workplace health and safety practices or hazards related to the public health emergency. Also, an employer is required under this law to post notice of a worker's rights under the law in a conspicuous location on the employer's premises.

An employee or former employee may file a complaint against an employer within two years after an alleged

violation by filing a complaint with the Division of Labor Standards. Before bringing an action to district court, an employee is required to exhaust all administrative remedies. The Division of Labor Standards will either investigate the alleged principal violations or authorize an aggrieved individual to proceed with an action in district court. An employee may, within 90 days after exhausting administrative remedies, bring an action to district court. A court may order affirmative relief it deems to be appropriate, including punitive and

compensatory damages against an employer. Reasonable attorney's fees may also be awarded. It should be noted that this law does not include damage award caps or liability caps for local governments. The requirements of the law are prospective and not retroactive from the date it was signed into law.

For additional questions on HB 20-1415, please contact Heather Stauffer at hstauffer@cml.org.



General Assembly passes unemployment insurance legislation – expands eligibility for employee benefits, Increases premiums for local governments

By Morgan Cullen, CML legislative and policy advocate

During the 2020 legislative session, the Colorado General Assembly passed sweeping unemployment insurance legislation in response to the increased jobless claims due to the COVID-19 pandemic.

Effective upon enactment, SB 20-207 expands and increases qualifications for unemployment insurance benefits and increases the amount of money workers can make (from up to 25 percent of the benefit amount to up to 50 percent as they start to get more part-time work) and still receive unemployment benefits. The legislation also expands “good cause” reasons for workers to quit their jobs and still be eligible for benefits including employers failing to follow health and safety guidelines, an executive order issued by the governor, a childcare crisis due to the public health emergency, or caring for sick or quarantined family members.

Additionally, the bill codifies standards for a person refusing to return to work due to health concerns to still qualify for unemployment benefits. This provision takes into consideration whether an employee is immunocompromised and more susceptible to illness or disease during a public health emergency as

evidenced by the employee's healthcare provider.

Finally, SB 20-207 changes the time period that an interested party may have to respond to a notice of a claim received by the division concerning unemployment benefits from 12 calendar days to seven calendar days and removes the cap on the amount of money that can be paid into, and remain in, the employment support fund.

The legislation also directs the Department of Labor and Employment to study the feasibility of modernizing the state's unemployment insurance system and report their findings to the Colorado General Assembly by January 2021, which could lead to further changes within the program.

While much of the anticipated \$18 million in increased unemployment assistance costs will be covered by federal CARES Act relief funding passed by Congress earlier this spring, it is important to note that the legislation will result in an increase in unemployment insurance premiums once the funding ends for proprietors - including local government employers.

The extent of these impacts on municipalities will vary

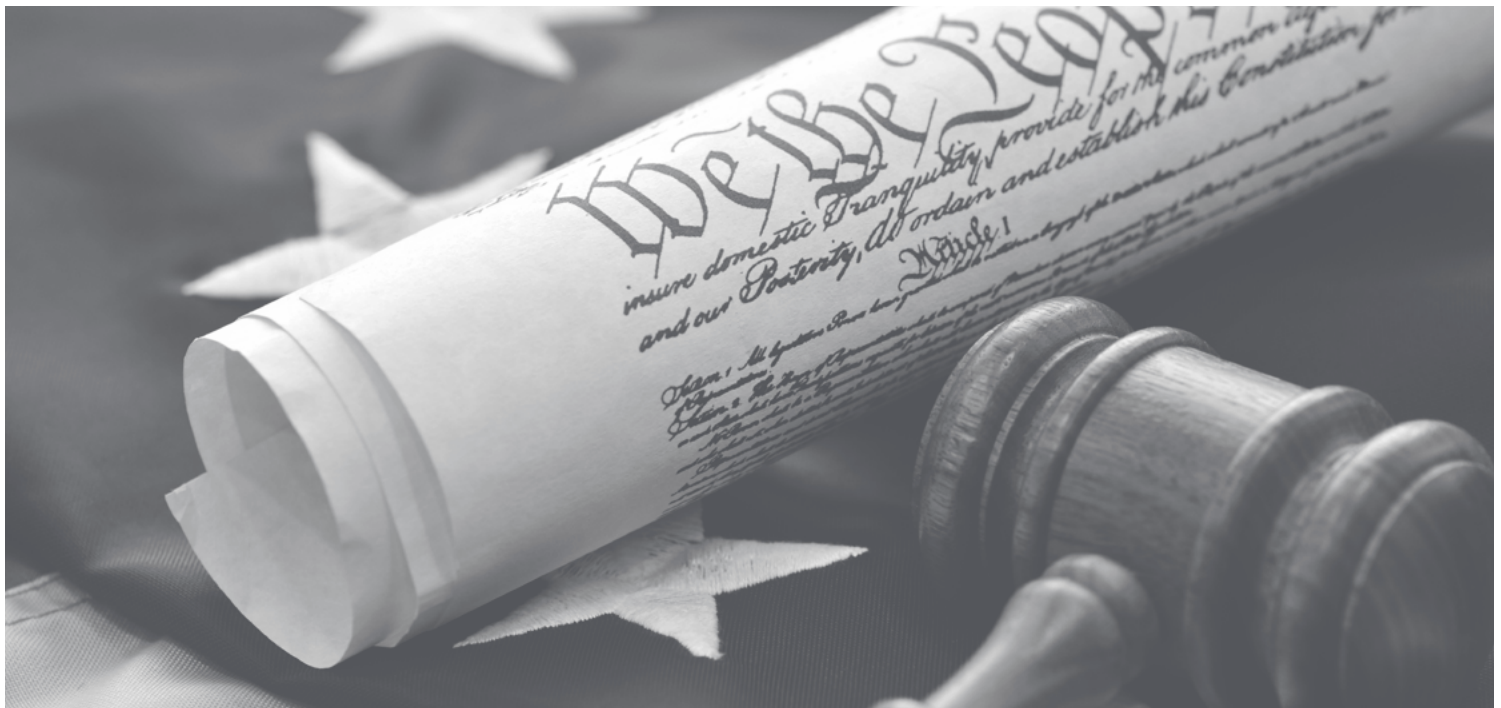
widely across the state and, though an in-depth fiscal analysis has not yet been conducted, cities and towns should remain cognizant about these future impacts and prepare accordingly over the coming years.

Key changes impacting municipalities

These important changes to the Colorado unemployment compensation system will be important for municipal employers to understand for at least three reasons:

- The changes will drive higher premiums for municipal employers starting next year.
- For municipal employees who may be laid off due to the current fiscal crisis, the changes will improve employee's rights to receive unemployment compensation while looking for another full time job.
- For municipal employees who refuse to return to in-person work due to health concerns associated with COVID-19, the bill codifies how the employee can still qualify for unemployment compensation despite refusing work.

For additional questions regarding SB 20-207, please contact Morgan Cullen at mcullen@cml.org.



Employer civil liability expanded following 2020 legislative session

By Jennifer Gilbert, GPS Legal Solutions

The Colorado General Assembly was very busy addressing employment concerns in the abbreviated session this year. Some, such as the Healthy Families and Workplaces Act (Employee Paid Sick Leave), were in the works from previous sessions, but modified for current circumstances. Others, like the Worker Rights Related to a Public Health Emergency Act (Whistleblower Protections), were a direct response to the COVID-19 situation facing Colorado residents. Additionally, changes to Unemployment Insurance were passed in consideration of the recent deluge of claims and underfunding of the fund.

Violations of Whistleblower Protection Act create costly employer liability

Whistleblowers in Colorado's government sector generally are limited to claims under local rules and regulations. This session, Colorado created a state claim related to public health emergencies that provides a new avenue for reporting public health violations by any employer, as opposed to those governed solely by OSHA standards.

HB 20-1415 Whistleblower Protections, took effect on July 11, 2020, and allows the most potential civil liability for employers of the three bills addressed in this article. Under this act, an employer cannot take adverse action, retaliate, or discriminate against an employee or contractor that raises reasonable concerns about violations of government health and safety rules in the workplace. C.R.S. § 8-14.4-102(1). Additionally, an employer cannot discriminate,

retaliate, or take adverse action against an employee who voluntarily wears "personal protective equipment" (e.g., mask, gloves, faceguard) if the personal protective equipment:

1. Provides more protection than employer provided equipment;
2. Is recommended by federal, state, or local agencies with jurisdiction over the workplace; and
3. Does not keep the worker from performing his or her job.

C.R.S. § 8-14.4-102(3)

Employers cannot require workers to sign a waiver that limits their ability to report violations or engage in practices that violate health and safety practices.

C.R.S. § 8-14.4-102(2). One alternative is a questionnaire for workers regarding their contact with potentially exposed populations, travel in the previous two weeks, whether they have experienced a fever, whether they have received a COVID-19 test or are awaiting results, and other factors specific to the public health emergency. Workers may also be asked to take a contactless temperature reading, recorded on the questionnaire, before entering the workplace.

Agencies and businesses that regularly welcome members of the public can adapt a similar questionnaire for customers. A voluntary information sheet that logs the public's name and contact information, such as email or phone number, can also be used for contact-tracing if an exposure does occur. Although these steps do not directly relate to

retaliation, discrimination, or adverse action against a worker for reporting a violation, they are helpful to defend against the initial claim by an employee that a workplace employer has engaged in a public health violation.

Within two years of a violation, a worker must file a complaint with Colorado's Division of Labor Standards and Statistics. C.R.S. § 8-14.4-104, 8-14.4-105(1)(a). The division can investigate or authorize a civil suit automatically. Discrimination, retaliation, or adverse action for reporting a health safety matter can result in an award of attorney fees, fines, and back pay or front pay. C.R.S. § 8-14.4-105(3).

Regardless of whether an investigation finds a violation, the worker can file a civil action in district court. In the civil suit, the parties can request a jury and a worker can be rehired with or without back pay. Absent rehire, they can collect \$10,000, or back pay or front pay, whichever is more. C.R.S. § 8-14.4-106(2). If violations are intentional, the worker also may get compensatory and punitive damages. Another bucket the worker can draw from is punitive damages, meaning hefty fines solely for malicious or reckless indifference. C.R.S. § 8-14.4-106(3)(b).

The only limits are the size and assets of the employer, and the egregiousness of the discrimination, adverse action, or retaliation. C.R.S. § 8-14.4(106)(3)(d). If the worker wins the civil case, the court is required to award attorney fees. C.R.S. § 8-14.4-106(5). There is no similar requirement for the whistleblower if he or she loses.

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In addition to personal claims, the whistleblower can also bring claims on behalf of the state. The state can become involved or allow the whistleblower to carry the case. C.R.S. 8-14.4-107(2)(a). Those claims carry a fine of \$100-\$1,000 in addition to attorney fees. C.R.S. § 8-14.4-107(2)(c).

This act promises to create a slew of litigation given the high potential awards available to workers. To avoid potential liability, employers should develop sound practices that account for state, federal, and local health agency policies. Workers and management should be trained, and management should enforce those practices. Additionally, internal reporting systems and feedback should be provided so workers can address issues with an employer.

Finally, an employer is cautioned against reducing a worker's pay who files a complaint, changing that person's hours or shifts, demoting the worker, terminating the person on that basis, or otherwise engaging in discrimination, adverse action, or retaliation. If an employer determines a change in the worker's situation or employment is appropriate for some reason other than the worker's compliance with public safety and health recommendations, that should be clearly documented and expressed to limit potential future liability. Employers should proceed cautiously when taking steps under whistleblower protections.

Employee Paid Sick Leave extends to require 48 hours of paid sick leave for all employees going forward

The Employee Paid Sick Leave Act creates three categories for paid sick leave, as outlined in the article. Employers must pay sick time in keeping with the law or face backpay and penalties under the Colorado Wage Act. If the employer does not maintain records, the employer is presumed to have violated the law.

All employers should review their sick leave policies and reporting procedures to ensure tallies meet new state standards, as well as update any record-keeping processes to accurately track accumulation and use for at least two years. If the division finds that an employer has retaliated against an employee for requesting sick leave or taking it, the employer can be

required to pay fines in addition to wages to the employee, and potentially face civil claims as well.

Although the employer can create policies for notice of sick-time use, it cannot deny payment when an employee fails to comply or otherwise take an adverse action against that employee. Employers also cannot use sick leave as an excuse to demote, discipline, discharge, or suspend or otherwise retaliate against an employee. Claims of retaliation will be investigated, and each finding of a violation will be treated as a separate violation. Violations can result in paying lost pay, or a reasonable period if the employee cannot feasibly be rehired, or both. Payment is in addition to the \$100 maximum fine per violation. Unlike other laws that require an employee to exhaust administrative remedies prior to filing a civil claim, this law only requires that the employee file a complaint. Once that is accomplished, the employee is at liberty to file a civil claim, including requesting a jury, any time within two years of the alleged violation.

Unlike the whistleblower protections, the awards do not provide for punitive damages or other types of compensation if an employee is successful in a civil suit. Additionally, employers are permitted to take adverse actions when an employee is falsely claiming sick leave. False use will be difficult to prove, given the lack of reporting required, yet helps limit employer's liability.

Realistically, these claims will have a smaller dollar value than those for whistleblowers, but still could cost employers with the combination of wages and fines. Policies that reflect the current sick leave options will help employers defend against complaints by employees moving forward.

Unemployment Insurance modified, claims expanded

The unemployment insurance modifications respond to the record number of people filing for, and remaining on, unemployment through the pandemic. The law provides progressively increasing amounts of an employee's wages that are charged for unemployment, starting at \$13,600 on January 1, 2021, and increasing to \$30,600 by January 1, 2026. C.R.S. § 8-70-103(6.5). Of note, it does not include wages paid to an election judge.

Employers can apply for workshare to limit unemployment liability so long as the employee's hours are reduced by 10% and no more than what is allowed under the Federal Unemployment Tax Act, currently 60%, an increase from the 40% previously permitted in Colorado.

Like the two other employment acts discussed, this allows for investigation, administrative hearing, review, and appeal. However, appeals are to the Industrial Claim Appeals Office, and from there appealed to the Colorado Court of Appeals. Employers should review the amounts of unemployment insurance they are paying as of January 1, 2021 to ensure they are paying on the correct amount. The first quarterly reporting following the passage of the act is October 1, so employers will also want to ensure all payments comply with the new law for that deadline.

Employers may also want to consider options such as work share programs and referrals to other jobs, such as delivery or healthcare, that are in demand and could alleviate unemployment claims. Cutting unnecessary expenses, such as travel or paid vacation, to maintain the workforce is also an option to prevent unemployment claims during this period. Assessing economic impact, employment policies, payroll procedures, and safety provisions will be useful to any employer under these laws.

Jennifer Gilbert of GPS Legal Solutions provides employment representation, trainings, and investigations for employers. You can reach her at jgilbert@GPSLegalSolutions.com, or 720-541-9640.

General Assembly passes race trait hair style anti-discrimination protection

By Meghan Dollar, CML legislative advocacy manager
HB 20-1048, commonly referred to as the "Crown Act" nationally, as well as in Colorado, specifies that an individual's hair style cannot be used to racially discriminate in the context of employment, housing,

and public accommodation. The act specifies that race includes hair texture, hair type, and protective hairstyles that are commonly or historically associated with race, such as braids, locs, twists, corn rows, tight coils or curls, Bantu knots, Afros, and

headwraps. The law applies to all public employers. If an individual believes they were discriminated against, they may file complaints with the Colorado Department of Labor and Employment, the Colorado Civil Rights Division, or file a civil lawsuit in court.



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