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MEMORANDUM

TO: Board of Trustees/ Poudre River Public Library District

FROM: Seter & Vander Wall, P.C.

DATE: October 31, 2022

RE: Family and Medical Leave Insurance Program (“FAMLI”) for Local Governments

I. INTRODUCTION TO FAMLI

The Colorado Paid Family and Medical Leave Insurance Act (“Act”) approved by Colorado voters at the November 3, 2020 is now codified in Part 4 of Title 8, Article 13.3, of the Colorado Revised Statutes. The Act creates a new insurance program, run by the State of Colorado through its newly created FAMLI Division, within the Colorado Department of Labor and Employment. It will be funded through contributions from Colorado employers and employees, and provides Colorado employees up to 12 weeks of paid leave within a 12-month period for specified family and medical leave purposes. FAMLI’s employer / employee contribution requirements commence in 2023. Leave benefits become available in 2024.

Local government employers may decline participation by resolution and must communicate any such declination to the FAMLI Program **by January 1, 2023**.

II. IMPLICATIONS & CONSIDERATIONS FOR LOCAL GOVERNMENTS

1. Local Government “Employer.” Under the Act, a local government is a political subdivision and qualifies as an “employer” so long as it either (i) employs at least one person for each working day during 20 or more calendar workweeks in the current or preceding year; or (ii) has paid wages of \$1,500 or more during any calendar quarter in the preceding calendar year.

Each local government employer must register with the FAMLI Division and must make one of the following determinations:

- (i) Participate in FAMLI;
- (ii) Decline ALL Participation in FAMLI; or
- (iii) Decline EMPLOYER Participation in FAMLI.

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In the event a local government has no current employees but later employs individual(s), and thus becomes an “employer” it must then take steps to come into compliance with FAMLI by registering with the FAMLI Division, and making a selection regarding participation.

If a local government has paid wages to its elected officials of \$1,500 or more in any calendar quarter in the preceding year (e.g. \$100 per meeting for five directors for three monthly meetings), arguably, the government qualifies as a local government “employer” and would be required to register with the FAMLI Division. However, the Q&A on the FAMLI website indicates otherwise, as shown in the following:

Q: What about local governments, like special districts, that do not have any employees? Are these local governments still required to register with the FAMLI Division?

A: Local governments without employees are not “local government employers” and will not be required to register with the FAMLI Division. However, as is the case for other CDLE divisions that enforce laws extending benefits and protections to employees, the Division may investigate claims that an employer has misclassified one or more employees as independent contractors.

Local governments may look toward future clarifications in the FAMLI Division Rules, and/or clarifying changes to the Act which may be made by the Colorado Legislature for further guidance, although there is no assurance that further changes will be made.

2. Elected Official “Employees.” Under the Act, a local government elected official might be considered an “employee” as a result of receiving director fees as compensation for services. However, based on statements made by FAMLI (and concurring agreement by the Special District Association), elected officials likely will not be deemed an “employee” under the Act, pursuant to FAMLI’s interpretation of the exemption incorporated within the statutory definition of “employee.”¹ The FAMLI Division has advised that elected officials generally fall outside of the definition of “employee” and are not counted as employees:

Q: Are elected officials counted in employment numbers?

A: The FAMLI Act’s definition of “employee” includes a two-prong exception. If a person is both primarily free from control in the performance of their work, and that work is part of their profession or trade, then that person is not considered an employee under the FAMLI Act. Elected officials will generally satisfy this two-prong exception and should not be counted as employees, and payments made to them for their services will not be subject to premiums.

¹ Section -502(7) of the Act defines an “Employee” as “any individual, including a migratory laborer, performing labor or services for the benefit of another, irrespective of whether the common-law relationship of master and servant exists. For the purposes of this part 5, an individual primarily free from control and direction in the performance of the labor or services, both under the individual’s contract for the performance of the labor or services and in fact, and who is customarily engaged in an independent trade, occupation, profession, or business related to the labor or services performed is not an ‘employee.’”

Again, there may be clarifying changes in the FAMLI Rules or the Act to provide additional guidance to local governments.

III. DESCRIPTION OF FAMLI PARTICIPATION OPTIONS

As the January 1, 2023 deadline approaches, local governments that qualify as “employers” should decide whether to participate in the program. Below is a description of each of the three options.

1. Participate in FAMLI: Beginning January 2023, a local government employer that does not decline participation is deemed to be a full participant, and must begin reporting to the FAMLI program and pay employee premiums. The premium is to be calculated on an annual basis by the State and may not exceed 1.2% of an employee’s wage. For 2023, the premium is calculated as 0.9% of the employee’s wages.

If an employer has 10 or more employees, the employer may either (a) pay the full premium, or (b) deduct up to 50% of the premium from an employee’s wage and pay the remainder. If an employer has fewer than 10 employees, the premium requirement is cut in half (i.e. 0.45% of an employee’s wage for 2023) and the employer may either (a) pay the premium with employer funds, or (b) deduct the premium from the employee’s wages.

A local government employer that participates in the FAMLI program is obligated to participate for a minimum of three years, after which it may choose another option.

2. Decline ALL Participation in FAMLI: A local government employer may decline participation in the FAMLI program by following the statutory procedures outlined below. If a local government does not decline participation by the end of 2022, it is automatically enrolled in the program for a minimum of three years.

NOTE: As described in the third option below, an employee whose local government employer has declined participation may still participate in the FAMLI program in the same manner as an “independent contractor.” A local government that declines all participation has no involvement with an employee’s independent participation, but it must still comply with the Act’s notice requirements.

A local government employer’s declination expires after eight years, and must be renewed prior to expiration in order to remain out of the program. Once a local government has declined participation, the local government may join the program in any subsequent year and would then be required to participate for a minimum of three years.

3. Decline EMPLOYER Participation in FAMLI: A local government employer may decline participation but still assist any employee who determines to independently participate in the FAMLI program by withholding and remitting the employee’s premium. This would relieve such employee from having to independently calculate and pay the premium; the

employer would retain responsibility for making the withholding calculations and remittance of the premiums.

IV. NEXT STEPS FOR PARTICIPATION OPTIONS

1. Full Participation. Local government employers that do not provide the “notice of declination” to the FAMLI program by the end of 2022 are automatically enrolled in the program for a minimum of three years. An online portal to administer participation in the program is expected to be available for use in the late Fall of 2022.

Participating local government employers will need to register with the portal, and begin making quarterly reports and remit premium payments in 2023. The FAMLI program leave benefits will be made available to covered employees in January 2024.

Additional detailed information is available for participating local government employers to assist in program administration, including required notices, quarterly reporting, premium calculation and payment, and administration of employee leave taken under FAMLI.

2. Declining All Participation. In order to decline participation, a local government employer must follow prescribed procedures:

- a. Register with the online portal in Fall 2022 (once it becomes available). Even if it declines participation, a local government employer is required to register with the FAMLI Division’s online portal.
- b. Schedule a public hearing to give employees and the public the opportunity to submit comments on the matter.
 - i. Note, the “public hearing” takes place as part of a scheduled regular or special meeting. It requires special notice as described in Section 2.c., below, but does not require a legal notice publication in the newspaper.
- c. Provide two forms of notice that the local government employer will hold a public hearing and vote on whether decline participation:
 - i. General notice to the public in the same manner as any other business that may come before the local government (i.e. providing due notice of the board meeting, and including the public hearing and consideration of the declination resolution as an agenda item notifying the public of its right to provide comment on the matter).
 - ii. Written notice to employees, which must indicate the date, time and place of the regular or special meeting that the public hearing will be held, and that summarizes the program and vote process for declining participation.

The notice must inform employees of their right to submit comments on the matter and the process for doing so.

- d. Public hearing and Board vote to decline participation. This will occur at the noticed board meeting.
 - e. If the Board vote is in favor of declining participation, the local government must notify the FAMLI Division of the vote outcome.
 - i. This notice must be provided on the local government’s letterhead and must indicate the date the vote was taken and the result of the vote.
 - f. Within 30 days of the vote, the local government employer must send employees individual written notice, including the impact on FAMLI coverage, or other paid family and leave insurance coverage. The notice must include, at a minimum:
 - i. An explanation of the differences between the benefits offered by the FAMLI program and any other paid leave offered by the local government employer.
 - ii. Identification of which employees, if any, are eligible for job protection under the federal Family and Medical Leave Act (FMLA) benefits or other local provisions where applicable (the federal FMLA is generally applicable to employers with 50 or more employees).
 - iii. Information regarding the right of employees to participate in the FAMLI program in the same manner as independent contractors.
 - g. Post FAMLI-created notice posters in a conspicuous and accessible place in each establishment where employees work (provide electronic communication or post in conspicuous place on local government website for remote workers).
 - h. Provide new-hires individual written notice of the FAMLI program.
3. Assist Individual Employees Participating as Independent Contractors. Follow the declination procedures described above. Assist participating employees by calculating, withholding, and remitting such employee’s premium to the FAMLI program.

V. SUMMARY OF THE ACT

The Colorado Paid Family and Medical Leave Act establishes an insurance program and a new Division of Family and Medical Leave Insurance to administer and fund paid leave. It establishes a State-run enterprise fund for receiving premiums and other revenue to fund administration of the FAMLI program.

All local governments must post notice regarding the Act at the workplace and provide personal notice to employees in writing. A participating local government may not retaliate or take an adverse action against an employee that exercises rights under the Act, and an employer can be subject to a fine of up to \$500 per violation.

Paid leave is available to an employee that is a “covered individual” under the Act and for the following purposes:

- To care for a child during the first year after birth, adoption, or foster care placement;
- To care for oneself or family member if suffering from a “serious health condition”;
- To address a need arising out of a family member’s active duty or forthcoming duty in the armed forces; or
- To address a need for an employee or employee’s family member that arises from being the victim of domestic violence, stalking, or sexual assault or abuse.

An employee may take up to 12 weeks of paid leave in hourly increments for the reasons set forth above, and an employee may take an additional 4 weeks of leave for a serious health condition related to a pregnancy or childbirth. The 12-month period where the leave can be taken begins upon an employee filing an application for the leave. When leave is foreseeable, an employee should provide its employer at least 30 days’ notice. In all other cases the employee should provide notice as soon as practicable.

The paid leave consists of (a) 90% of an employee’s weekly wage that is less than or equal to 50% of the State’s average weekly wage and (b) 50% of an employee’s weekly wage that exceeds 50% of the State’s average weekly wage. However, any paid leave used prior to 2025 is capped at \$1,100 per week.