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STATE OF COLORADO
DEPARTMENT OF LAW

Office of the Attorney General

FORMAL OPINION	)	No. 21-01
OF	)	
	)	March 5, 2021
PHILIP J. WEISER Attorney General	)	

Kara Veitch, Executive Director of the Colorado Department of Personnel and Administration and designee of Governor Jared Polis, requested this Formal Opinion under § 24-31-101(1)(d)(II), C.R.S. (2020).

QUESTIONS PRESENTED AND SHORT ANSWERS

Questions Presented.

(1) Is the State Personnel Director ("Personnel Director" or "Director") authorized to adopt and implement a new type of leave, specifically paid family leave, for employees within the Colorado state personnel system?

(2) If so, is it lawful for the Personnel Director to adopt and implement a job-protected leave benefit for family and medical reasons as codified in 4 Code Colo. Regs. 801-1, § 5-16?

Short Answers.

(1) Yes, as a general rule, the State Personnel System Act ("Act"), § 24-50-101, *et seq*., C.R.S. authorizes the Personnel Director to adopt benefits, including leave benefits, even if not explicitly provided for by statute. The power to do so is significantly circumscribed, however, and the Director must ensure that any new type of leave benefit: (1) is adopted pursuant to technically and professionally sound survey methodologies; (2) is typically consistent with prevailing practices; (3) is adopted pursuant to formal rulemaking processes; and (4) is not inconsistent with and does not change any leave provisions already provided for by statute. Only if all these conditions are satisfied does the statute authorize the Personnel Director to adopt paid family leave as a nonstatutory benefit. However, while the Personnel

Director may establish such a benefit nonstatutorily, implementation of the benefit remains subject to the General Assembly's power of appropriation.

(2) Yes, based on the analysis, the promulgation of Rule 5-16 is a lawful action by the Personnel Director to grant new leave benefits to state employees.

ANALYSIS

I. Authority of the Personnel Director to Adopt and Implement a New Type of Leave Benefit.

A. Overview of total compensation philosophy and leave benefits in the State Personnel System Act.

The Act establishes and focuses on Colorado's "total compensation philosophy," an express policy "to provide prevailing total compensation" to state employees to "ensure the recruitment, motivation, and retention of a qualified work force." § 24-50-104(1)(a)(I), C.R.S. Total compensation includes salary, group benefit plans, retirement benefits, merit pay, incentives, premium pay practices and, as relevant here, leave benefits. *Id.*

The Personnel Director is directed to "establish technically sound survey methodologies to assess prevailing total compensation practices, levels, and costs." *Id.* at § 104(1)(a)(II), C.R.S. For employee salaries, contributions to group benefit plans, and merit pay, the Director is required to "annually review the results of appropriate surveys by public or private organizations, including surveys by the state personnel director," but for all other elements of total compensation, including leave benefits, the Personnel Director instead must "adopt appropriate procedures to determine and maintain" these elements. *Id.* The Personnel Director's "review and determination of total compensation practices shall not be subject to appeal except as otherwise authorized by law or state personnel director procedures." *Id.*

The Act explains that "[b]enefits shall include insurance, retirement, and leaves of absence with or without pay and may include jury duty, military duty, or educational leaves." *Id.* at § 104(1)(g). The Personnel Director "shall prescribe procedures for the types, amounts, and conditions for all leave benefits that are typically consistent with prevailing practices," but the General Assembly must approve "any changes to leave benefits granted by statute before such changes are implemented." *Id.* Further, the Director "shall prescribe by procedure any nonstatutory benefits." *Id.*

The Act expressly addresses the following types of leave: sick leave (no employee may accrue more than ten days per year or retain in excess of 45 days); paid leave for organ, tissue, or bone marrow donation for transplants (no more than two days per year); transfer of annual leave between employees (Director may establish procedures for such transfers); and paid leave for specialized disaster relief services (no more than five days for a local disaster or fifteen days for a national disaster). *Id.* at §§ 104(7)(a)-(d). No other types of leave are specifically provided for in the Act.

B. The State Personnel System Act grants the Personnel Director authority to implement new leave benefits under certain conditions.

The Act *does* authorize the Director to adopt new types of leave benefits not specifically provided for in statute. Indeed, § 24-50-104(1)(g), C.R.S. of the Act expressly contemplates that the Personnel Director may adopt additional benefits: "[t]he state personnel director shall prescribe by procedure any nonstatutory benefits." And in fact, it appears that, historically, nonstatutory leave benefits have indeed been adopted and provided to state employees.[1]

However, it is crucial to recognize that the Act contains several limitations on the Personnel Director's authority to adopt new leave benefits, and that any effort to adopt a new type of leave benefit must be conducted in strict conformity with the Act's procedural requirements. Adherence to the procedural requirements in the Act is mandatory, and failure to strictly follow them renders agency action voidable. *See Colorado Ass'n of Pub. Employees v. Colorado Dep't of Pers.*, 991 P.2d 827, 831 (Colo. App. 1999) (determining that Personnel Director's decision to repeal injury leave benefit without following survey procedures set forth in previous version of State Personnel System Act was contrary to law).

First, as a general matter, the Personnel Director must "establish technically and professionally sound survey methodologies . . . to *assess* prevailing total compensation practices[.]" § 24-50-104(1)(a)(II), C.R.S. (emphasis added). Because a leave benefit is one of the elements of total compensation, prevailing leave practices must be assessed and determined based on a survey or surveys conducted according to technically and professionally sound survey methodologies. *See Bostron v. Colo. Dep't of Personnel*, 860 P.2d 595, 596 (Colo. App. 1993) (known as the "survey of surveys"). Additionally, the Personnel Director is limited to the types, amount, and conditions of leave benefits that are in fact "*typically consistent* with prevailing

[1] Procedures governing leaves are located at 4 Code Colo. Regs. 801-1, Chapter 5, and types of leave provided for there include nonstatutory benefits such as bereavement leave (§ 5-12), jury leave (§ 5-14), administrative leave (§ 5-15), unpaid leave (§ 5-17), and parental academic leave (§ 5-18). The procedures set forth the amounts and conditions for each type of leave.

practices." § 24-50-104(1)(g), C.R.S. (emphasis added). The General Assembly imposed this requirement to ensure that leave granted to state employees follows, not leads, the employers surveyed. As a result, the Personnel Director is only empowered to adopt a type of leave practice that is consistent with existing leave practices, and in amounts and under conditions that are consistent with such practices, as well.

When subsections (1)(a)(II) and (1)(g) of the Act are read together, it is apparent that a new type of leave benefit can be adopted only if having been determined by technically and professionally sound surveys to be "typically consistent" with a prevailing practice. For a leave practice to be "prevailing" it must currently be prevalent among the employers surveyed. *Cf. Indus. Comm'n v. State Fed'n of Labor*, 110 P.2d 253, (Colo. 1941) (reversing wage rates based on public contracts awarded one and two years ago because "the ultimate question as to what are the actual prevailing wage rates applicable to a given public work contract must be resolved by the commission from a consideration of evidence as to what is *then* the prevailing rate of wage for laborers and mechanics performing work of a similar nature in the locality in which the public project is located." (emphasis added)); *Smith-Brooks Printing Co. v. Young*, 85 P.2d 39, 41 (Colo. 1938) ("Prevailing standards of working hours and conditions in the printing industry are *existing* facts." (emphasis added)). And if the term "prevailing practice" has a technical meaning within the field of professional surveyors, a surveyor's application of that meaning in a manner consistent with "technically and professionally sound survey methodologies" controls the determination of what types of leave benefits are prevailing practices. § 24-50-104(1)(a)(II), C.R.S.

Additionally, in evaluating whether a proposed family leave benefit is "typically consistent with prevailing practice," the statute provides no limit barring the Personnel Director from considering other dispositive data or information. For example, the Director may find highly informative new personnel benefits established by the voters. The 2020 statewide election results show the prevailing will of voters regarding the availability of paid family leave for all Colorado workers. The approval of Proposition 118, to create a statewide program to provide up to 12 weeks of paid time off for workers caring for newborns, sick relatives, or dealing with personal health emergencies, is information the Personnel Director may weigh when determining whether family leave is "typically consistent with prevailing practice". This survey of the voters may provide additional evidence of what would be "typically consistent with prevailing practice."

Furthermore, the Act requires that the Personnel Director "prescribe by procedure any nonstatutory benefits." § 24-50-104(1)(g), C.R.S. That is, once a nonstatutory leave benefit has been determined to be a prevailing practice, if it is to be adopted it must be done via the formal rulemaking processes set out in the

Administrative Procedure Act, § 24-4-101, *et seq.*, C.R.S. And in doing so, it is essential that the Personnel Director ensure that any nonstatutory leave benefits do not in any way infringe upon those leave benefits addressed elsewhere in the Act. To the extent that paid family leave potentially intersects with sick leave, leave for donation of organs, tissue, or bone marrow, transferred annual leave, or disaster service leave, then, the Personnel Director does not have the authority to provide paid family leave in such a manner that would contravene any of the provisions in subsection (7), and any changes to those benefits granted by statute must be approved by the General Assembly. *Id.*.

For example, "sick leave," a statutory leave benefit enumerated in § 24-50-104(7), C.R.S., is not defined by the Act. But it is explicated in 4 Code Colo. Regs. 801-1, Chapter 5, § 5-5, which states: "[s]ick leave is for health reasons only, including diagnostic and preventative examinations, treatment, and recovery. Accrued sick leave may be used for the health needs of: [ill or injured employees or the employee's family members]." If the Director promulgates a rule creating family leave, the purpose of such leave must not overlap with the purpose of "sick leave" in § 5-5 to avoid triggering the express limitation in § 24-50-104(7), C.R.S. and requirement of legislative approval in § 24-50-104(1)(g), C.R.S. Family leave could be connected to the birth or adoption of a child or other qualifying condition, so that it appears to be a new type of benefit, separate and distinct from sick leave. This type of benefit, not connected to medical issues of the employee, would be least likely to infringe on the General Assembly's authority with regards to sick leave.[2]

Lastly, this Formal Opinion 21-01 is specific to the administrative creation of nonstatutory benefits for state employees. Regardless of whether a paid leave benefit is created—either nonstatutorily or legislatively—such a benefit requires an appropriation by the General Assembly, or lawful reprioritization of funds within existing line item spending authority, to allow for the distribution of such benefits to the state workforce. Thus, while this opinion concludes that the creation of the nonstatutory family leave benefit is permissible; such a benefit still requires a General Assembly appropriation to have effect. COLO. CONST. art. V, § 33 ("No moneys in the state treasury shall be disbursed . . . except upon appropriations made by law, or otherwise authorized by law[.]"); *In re Interrogatories Submitted by Gen. Assembly on House Bill 04-1098*, 88 P.3d 1196, 1200 (Colo. 2004) ("While the General Assembly holds plenary power to appropriate state funds, subject only to constitutional limitations, the executive branch has the authority to administer those funds once appropriated.").

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[2] The federal government's recent decision to provide paid family leave to its employees is an example of straight paid parental leave, providing "12 administrative workweeks of paid parental leave…in connection with the birth or placement" of a child. 5 U.S.C.A. § 6382(d)(2)(B)(i).

II. Authority of the Personnel Director to Adopt and Implement an Unpaid, Job-protected Leave Benefit for Family and Medical Reasons as Codified in 4 Code Colo. Regs. 801-1, § 5-16.

A. Overview of 4 Code Colo. Regs. 801-1, § 5-16.

4 Code Colo. Regs. 801-1, § 5-16 ("Rule 5-16") establishes new paid, job-protected leave benefits for six new categories of leave:

1. Birth and care of a child;
2. Placement and care of an adopted or foster child;
3. Serious health condition of an employee's parent, child under the age of eighteen (18), an adult child who is disabled at the time of leave, spouse, partner in a civil union, or registered domestic partner for physical care or psychological comfort;
4. Employee's own serious health condition;
5. Active duty military leave when a parent, child, or spouse experiences a qualifying event directly related to being deployed to a foreign country; and
6. Military caregiver leave for a parent, child, spouse, or next of kin who suffered a serious injury or illness in the line of duty while on active duty.

4 Code Colo. Regs. 801-1, § 5-16. Rule 5-16 offers full-time employees a maximum of 80 hours of paid leave within a qualifying 12-month period, when such leave is protected by the Family and Medical Leave Act ("FMLA").

B. 4 CCR 801-1, § 5-16 is Based on Prevailing Practices, as Determined by the Personnel Director, and Does Not Conflict with Existing Personnel Benefits Provided in Statute.

Paid leave benefits provided by Rule 5-16 covering birth and care of a child, placement or care of an adopted or foster child, active duty military leave, military caregiver leave are based on prevailing practices through a determination made by the Personnel Director. Furthermore, the Rule 5-16 benefits are all new benefits for Colorado employees not currently provided for by state statute.

Paid benefits for leave related to an employee's own serious health condition, or for the care of an employee's parent, child, adult child, or partner are not grants of additional leave and do not provide time off work. As in the case of the other four benefits provided by Rule 5-16, the Personnel Director determined that these two benefits also are based on prevailing practices.

Furthermore, both benefits are also *new* benefits not currently provided for by statute. As stated in Rule 5-16, the benefit provided by the State is a replacement for loss of wages for time off protected by the FMLA. The state benefit provided, therefore, is not a form of sick leave but is instead a wage replacement benefit linked to federal job-protections during times of illness.

While the FMLA explicitly permits employers to provide covered leave on an unpaid basis, 29 U.S.C. § 2612(c), "[t]he Act encourages businesses to adopt more generous policies, and many employers have done so." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 84 (2002). The State recently opted to do so as well by promulgating Rule 5-16. The Personnel Director's decision to provide wage replacement for the first 80 hours of FMLA leave for eligible employees does not, however, expand state employees' sick leave or otherwise conflict with statutory provisions relating to sick leave.

Rather, state statutes governing sick leave benefits and federal FMLA leave are conceptually separate and distinct. The FMLA itself specifically recognizes that accrued paid sick leave may, but need not, run concurrently with FMLA leave. 29 U.S.C. § 2612(d)(2)(B) ("An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for ... any part of the 12-week period" of FMLA leave); 29 C.F.R. § 825.207(a). Here, consistent with the FMLA, the State has always required its employees who take FMLA leave to substitute accrued paid leave, including sick leave. 4 Code Colo. Regs. 801-1, § 5-23 ("The employee shall use all accrued paid leave subject to the conditions for use of such leave before being placed on unpaid leave for the remainder of FML and state family medical leave.").

Because sick leave is treated as distinct from FMLA leave under both the FMLA itself and the Director's Administrative Procedures, the Personnel Director's decision to provide 80 hours' worth of wage replacement for the latter does not impermissibly expand or alter the former, nor does it infringe upon the General Assembly's exclusive authority over sick leave benefits.

CONCLUSION

The State Personnel System Act sets forth the state's total compensation philosophy and details the manner in which the Personnel Director is to determine prevailing total compensation. The Act does authorize the Personnel Director to adopt nonstatutory leave benefits, but places several conditions and limits on how those leave benefits are to be identified and implemented. Most significantly, the Personnel Director may only adopt those leave benefits that have been determined by technically and professionally sound surveys to in fact be prevailing practices among

employers. Furthermore, while the Personnel Director may adopt such a benefit absent express statutory authorization, the benefit remains subject to the General Assembly's authority over appropriations to have effect.

As the Court of Appeals has explained, the Personnel Director's authority in this realm "stands alongside—and must be exercised in conjunction with—numerous rules, procedures, and rights that have been defined by the General Assembly." *Idowu v. Nesbitt*, 338 P.3d 1078, 1087 (Colo. App. 2014). As a result, the Personnel Director must diligently adhere to the procedural requirements of the Act before deciding to adopt a paid family leave benefit and, once that decision has been made, must be careful to design the benefit so as to avoid impacting sick leave or any other leave granted by statute.

Furthermore, the analysis supports that Rule 5-16 is a lawful action by the Personnel Director to grant new leave benefits to state employees.

Issued this 5th day of March, 2021.

/s/ Phillip J. Weiser
PHILIP J. WEISER
Attorney General