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Employer-Paid Sick Leave in Colorado: Important Paid Sick Leave Requirements Under Colorado's Healthy Families & Workplaces Act ("HFWA")

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The Colorado legislature has tried for years to pass a statute requiring Colorado employers to provide paid sick leave to their employees. With the COVID-19 pandemic raging, it did so this past summer and the Healthy Families & Workplaces Act, C.R.S. § 8-13.3-401, et. seq. (the "HFWA" or the "Act"), went into effect January 1, 2021. The far-reaching changes set out in the HFWA affect most Colorado employers. Employment manuals and policies – even "pro-employee" policies – are likely in violation of at least some of the provisions set forth in the HFWA and should be carefully reviewed and revised to ensure compliance. This article sets forth some of the major requirements of the HFWA. For specific questions or issues, please contact the author.

First, the HFWA requires that employers with sixteen (16) or more employees provide paid sick leave to all full- and part-time employees in 2021. Beginning in 2022, all employers must do so, regardless of size.

Second, the HFWA requires employers to provide no less than forty-eight (48) hours of accrued paid sick leave per year for full-time employees and a pro-rated amount for part-time employees.

Accrual requirements are strict. Employers must allow accrual of paid leave to begin on the date of hire (i.e., no more waiting periods for accrual of paid leave to begin). The Act also requires a minimum of one hour accrued for every thirty hours worked, up to the required forty-eight (48) hours of paid leave. [1] Employers must allow 100% of any accrued and unused paid sick leave to be carried forward into subsequent years, although employers do not have to "pay out" accrued but unused sick leave at the end of each year or upon separation, or grant an employee more than 48 hours of paid sick leave in any given year (except in the case of a public health emergency, [2] as discussed below).

Under the HFWA, employees may use paid sick leave for their own or a family member's [3] need to seek care for:

- a mental or physical illness, injury or health condition which prevents them from working;
- a medical diagnosis, care or treatment of that condition;
- preventative medical care; or
- a medical or mental health condition or injury resulting from domestic abuse, assault or harassment, counseling, use of services from a victim services organization, or time to relocate or seek legal services due to the abuse, assault or harassment.

In addition, paid sick leave may be used if, due to a public health emergency, a public official has ordered closure of the employee's place of business or the school or care center of employee's child and the employee needs to care for their child.

There are numerous provisions regarding how an employee may request leave, procedures an employer may implement to address leave, and how accrual and use of the leave may occur. For example, employers must allow employees to use sick leave in *no more* than hourly

increments, employers cannot require an employee to find a replacement worker in order to use the leave, and employers may require "reasonable documentation" if an employee needs four (4) or more consecutive days of leave, unless the leave is requested pursuant to a public health emergency, in which case documentation may not be required.

Third, if a public health emergency is declared, in addition to providing the forty-eight (48) hours of accrued paid sick leave, employers must provide an additional eighty (80) hours of paid sick leave for full-time employees and a pro-rated additional amount of hours based on a 14-day work period for part-time employees. Employers can count accrued, unused paid sick leave towards the additional eighty (80) hours. This "supplemental" paid sick leave may be used by an employee to self-isolate or care for themselves or a family member due to the diagnosed illness that caused the public health emergency, to self-isolate or care for themselves or a family member if the employee/family member has symptoms of such illness, to seek medical diagnosis, care or treatment of that illness for themselves or a family member, or to seek preventative care regarding that illness for themselves or a family member.

It should be noted that employees are only entitled to one supplemental paid sick leave of up to eighty (80) hours *per public health emergency*. So, for example, if an employee used eighty (80) hours of paid sick leave in 2020 because they had to care for a spouse with COVID-19 and months later – in 2021 – they are diagnosed with COVID-19, the employee is not entitled to the eighty (80) hours of supplemental paid leave again, although the employee would be entitled to any 2021 accrued paid leave, up to forty-eight (48) hours.

Additional requirements of the HFWA include the employer maintaining records regarding hours worked and paid sick leave accrued and used, and posting notice to employees of their HFWA rights. This requirement can be met by posting a Colorado Department of Labor and Employment poster (specifically, the Colorado Workplace Public Health Rights Poster: Paid Leave, Whistleblowing, & Protective Equipment poster) in an "easily accessible" place.

Based on the numerous requirements and restrictions briefly (and necessarily incompletely) described above, many employers may be in violation of the HFWA already. Even for employers who already meet the minimum paid sick leave hourly requirements, many of the "how" and "when" requirements may conflict with employers' current policies and all such policies should be reviewed and revised. ■

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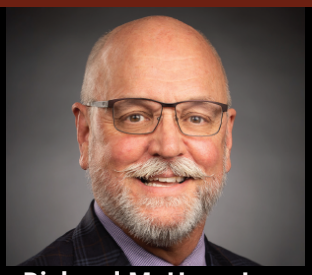

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[1] It should be noted that the HFWA provides a "floor" for paid sick leave and specifically encourages employers to provide more paid leave if they are able and willing to do so.

[2] A "public health emergency" is defined in the statute as an act of bioterrorism, pandemic influenza, epidemic caused by a novel and highly fatal infection agent, or highly infectious illness or epidemic or pandemic potential for which an emergency is declared by a federal, state or local public health agency or a disaster emergency declared by the governor.

[3] A family member is broadly defined as an immediate family member, a child/person to whom the employee stands, or stood, in loco parentis, or a person for whom the employee is responsible for providing or arranging health care, who needs the employee's help in getting the listed care.

IRS Provides Definition for "Real Property" in Recently Released Final Regulations Under Section 1031

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In late November, 2020 the Treasury Department and the Internal Revenue Service ("Service") released the much anticipated final regulations relating to Section 1031 of the Internal Revenue Code (the "Code") on like-kind exchanges. In these final regulations, the Service addressed, among other things, the definition of real property under Section 1031. This article explores the definition of real property under the final regulations.

Overview:

Generally, a taxpayer recognizes gain or loss on an exchange of property for another property. [1] Section 1031 provides special rules for nonrecognition of gain or loss when real property that is held for productive use in a trade or business or for investment is exchanged solely for real property that is of like-kind and which is to be held for productive use in a trade or business or for investment. [2] Section 1031 provides a deferral of rather than an exclusion from gain.

Several requirements must be satisfied for a transaction to qualify for nonrecognition under Section 1031. This article focuses on the "real property" requirement.

Real Property:

Section 1031 of the Code does not define real property. The Service provided a definition of real property in the final regulations under section 1031. Under the final regulations, real property includes:

1. Property that is real property under state or local law;
2. Land;
3. Improvements to Land;
4. Unsevered Natural Products of Land;
5. Water and Air Space Superjacent to Land; and
6. Certain Intangible Assets.

State or Local Law:

If property is classified as real property on the date it is transferred in the exchange and under the state or local law in which such property is located, then it is real property for purposes of Section 1031. [3] It is important to note that when property is being exchanged for property outside of the state in which the relinquished property is located the state or local law of the replacement property will control.

Land:

The final regulations do not specify what constitutes land. As such, one can presume that the current regulations continue to apply to this category of real property. That is, unimproved land and improved land are like-kind and land held for investment is like-kind to land held for the productive use in a trade or business.

Improvements to Land:

There are two categories under improvements to land: (1) inherently permanent structures, and (2) structural components of inherently permanent structures. [4]

An inherently permanent structure means any building or other structure that is a distinct asset and is permanently affixed to real property and that will ordinarily remain affixed for an indefinite period of time. [5] A building is an inherently permanent structure and is thus real property.[6] Further, the final regulations provide a list of other structures that will qualify as real property. [7] The final regulations further provide a multi-factor test to determine whether a structure is inherently permanent under the regulations.

A structural component of an inherently permanent structure is any distinct asset that is a constituent part of, and integrated into, an inherently permanent structure. [8] They further provide that, if interconnected assets work together to serve an inherently permanent structure, those assets are analyzed together as one distinct asset to determine whether they are structural components. [9] It should be noted that a structural component may qualify as real property only if the taxpayer holds its interest in the structural component together with a real property interest in the space in the inherently permanent structure served by the structural component. [10] This category also

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includes tenant improvements. Similar to an inherently permanent structure, a structural component may be real property under a multi-factor test. [11]

Unsevered Natural Products of Land:

Certain unsevered natural products of land, including growing crops, plants, timber, mines, wells, and other natural deposits, are generally treated as real property for purposes of section 1031. [12] Once those natural products are extracted, severed, or removed from the land they cease to be real property. [13]

Water and Air Space Superjacent to Land:

The final regulations illustrate that water and air space superjacent to land is real property for purposes of section 1031. [14] The example describes a marina that is comprised of a U-shaped boat slip and end ties, which are rented out to boat owners. The boat slips and end ties are real property under the example. [15]

Intangible Assets:

Lastly, the final regulations list the following intangible assets as real property: (i) fee ownership; (ii) co-ownership; (iii) a leasehold; (iv) an option to acquire real property; (v) an easement; (vi) stock in a cooperative housing corporation; (vii) shares in certain mutual ditch, reservoir, or irrigation companies; and (viii) land development rights. [16] Additionally, a license, permit, or other similar right that is solely for the use, enjoyment, or occupation of land or an inherently permanent structure and that is in the nature of a leasehold, easement, or other similar right, generally is an interest in real property. However, a license or permit to engage in or operate a business on real property is not real property or an interest in real property, regardless of its classification under state or local law.

Conclusion:

As you can see, based on the all of the nuances of the final regulations, determining whether particular property is real property under section 1031 may include a detailed analysis, which done incorrectly potentially could result in significant adverse tax consequences. As such, the assistance of an experienced team can help mitigate the risks inherent in making such a determination. ■

AMANDA T. HUSTON HAS BEEN APPOINTED TO THE FORT COLLINS DOWNTOWN DEVELOPMENT AUTHORITY BOARD.

Amanda T. Huston
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[1] I.R.C. § 1001(c).
[2] I.R.C. § 1031.
[3] Treas. Reg. § 1.1031(a)-3(a)(6).
[4] Treas. Reg. § 1.1031(a)-3(a)(2)(i).
[5] Treas. Reg. § 1.1031(a)-3(a)(2)(ii)(A).
[6] Treas. Reg. § 1.1031(a)-3(a)(2)(ii)(B).
[7] Treas. Reg. § 1.1031(a)-3(a)(2)(ii)(C).
[8] Treas. Reg. § 1.1031(a)-3(a)(2)(iii).
[9] Treas. Reg. § 1.1031(a)-3(a)(2)(iii)(A).
[10] *Id.*
[11] Treas. Reg. § 1.1031(a)-3(a)(2)(iii)(B)(1).
[12] Treas. Reg. § 1.1031(a)-3(a)(3).
[13] *Id.*
[14] Treas. Reg. § 1.1031(a)-3(b)(2) Example 2.
[15] *Id.*
[16] Treas. Reg. ЬІ 1.1031(a)-3(a)(5)(i).

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