

## COVID-19 EMPLOYMENT LAW UPDATE

### New Information from the Department of Labor Final Regulations

**Revised April 6, 2020**

This revised update provides new information just released from the Department of Labor Final Regulations, Department of Labor Guidance, IRS Guidance, and Governor Whitmer's Executive Order 2020-36. On April 6, 2020, the Department of Labor (DOL) published its final regulations to implement the Families First Coronavirus Response Act (the "Act"). Employers can find the final regulations at the [Federal Register](#). On April 3, 2020, the DOL issued new guidance to questions that have caused challenges for legal professionals since the Act was enacted on March 18, 2020. Employers should read the DOL guidance for a complete update at the [U.S. Department of Labor site](#). Lastly, Governor Whitmer issued Executive Order 2020-36 prohibiting discharge, discipline, and retaliation against individuals who miss work due to COVID-19 related absences. Employers can find the Order here: [Michigan Executive Orders](#).

**New or revised information from the March 24, 2020 update is color highlighted for clarity.**

#### **Families First Coronavirus Response Act**

The Act becomes effective on April 1, 2020. It requires emergency paid sick leave to eligible employees for a limited period of time and expanded The Family and Medical Leave Act (FMLA) coverage, including paid leave at a portion of the employee's regular rate of pay, related to leaves of absence due to COVID-19.

The paid leave provisions became effective on April 1, 2020 and apply to leaves of absence taken between April 1, 2020 and December 31, 2020. Employers who paid employees prior to April 1, 2020 for a reason identified in the Act must still pay employees who qualify under the Act as of April 1, 2020. The requirements of the Act are not retroactive.

The Act creates two new emergency paid leave requirements in response to the COVID-19 pandemic: (1) Emergency Paid Sick Leave under Division E of the Act; and, (2) Emergency Family Medical Leave Expansion under Division C of the Act. Both of the paid leave requirements are discussed in detail below.

#### ***Posted Notification***

Employers must post on their premises a notice that explains the Act's paid leave provisions. In light of recent shelter orders, we recommend it be posted, at a minimum, on any electronic bulletin boards and/or employee intranet resources for access by employees. Alternatively, you may satisfy this requirement by emailing or direct mailing this notice to employees.

## ***Fewer Than 500 Employees and Small Business (fewer than 50 employee) Exemption***

**Covered Employers:** All employers with fewer than 500 full-time or part-time employees are covered under the Act. This applies to full-time and part-time employees regardless of their length of employment. To help determine whether you have fewer than 500 employees, refer to our [March 28<sup>th</sup> update](#).

**Small Business (fewer than 50 employees) Exemption:** When the pay requirements would jeopardize the viability of the business as a going concern, an employer with fewer than 50 employees is exempt from providing:

- paid sick leave to an employee who cannot work because he or she must care for a child out of school or daycare; or
- expanded family medical leave to an employee for the same reason under the Act.

**DOL Final Regulation – Small Business Exemption:** A small business may claim this exemption if an authorized officer of the business has determined that:

- (1) The leave requested would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- (2) The absence of the employee(s) requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- (3) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee(s) requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

The exemption only applies to those otherwise eligible employees whose absence would cause (1) – (3) above to the covered employer. To elect the small business exemption, the employer must document that a determination has been made pursuant to the criteria listed above. The employer should NOT send the documentation to the DOL, but rather retain the records in its files for use in the event of an audit or investigation.

Employers must still post the required notifications even if one or more of its employees are exempted.

### ***Emergency Paid Sick Leave Act (EPSLA)***

**Eligible Employee:** All employees of a covered employer are eligible for paid sick leave, except that an employer of a health care provider or an emergency responder may elect to exclude such employee from this section of the Act. The final regulations provide greater definition to these categories of employees.

**Reasons for Sick Leave:** Covered employers are required to provide emergency paid sick time to an employee who is unable to work (or telework) due to need for leave because the employee:

- (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- (2) has been advised by a health-care provider to self-quarantine due to concerns related to COVID-19;
- (3) is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (4) is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order, or has been advised by a health care provider to self-quarantine, due to concerns related to COVID-19;
- (5) is caring for a son or daughter if, because of COVID-19, the school or daycare has been closed or the child-care provider is unavailable; or
- (6) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The DOL final regulation finally answered the question of whether a state “shelter in place” or “stay at home” order qualifies under (1) above as a Federal, State, or local quarantine or isolation order. In all likelihood, the practical effect will have little impact on the previous DOL guidance (which did not directly address the issue).

**DOL Final Regulation – Quarantine or Isolation Order:** A Federal, State, or local quarantine or isolation order includes orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility. However, employees subject to such order are entitled to paid sick leave *only if, but for being subject to the order, he or she would be able to perform work that is otherwise allowed or permitted by his or her employer, either at the employer’s normal workplace or by telework. An employee may not take paid sick leave where the employer does not have work for the employee as a result of the order or other circumstances, including lack of work.*

### **What does this mean for employees?**

If you have work for your employees to perform, but they cannot do the work due to the stay-at-home order, these employees would be entitled to paid sick leave under the EPSLA. Similarly, if employees are teleworking and become unable to work while sheltering at home (for example, loss of power or internet connection), those employees would be entitled to paid sick leave under this provision of the Act.

**DOL Guidance #60 – How do I know if I can receive paid sick leave for a Federal, State, or local quarantine or isolation Order related to COVID-19?** For purposes of the Act, a Federal, State, or local quarantine or isolation order includes quarantine or isolation orders, as well as shelter-in-place or stay-at-home orders, issued by any Federal, State, or local government authority that cause you to be unable to work (or telework) even though your employer has work that you could perform but for the order. You may not take paid sick leave for this qualifying reason if your employer does not have work for you as a result of a shelter-in-place or a stay-at-home order. In the instance that your employer does not have work for you as the result of a shelter-in-place or a stay-at-home order, refer to questions #23 - #27 below.

**DOL Guidance #23 – If my employer closed my worksite before April 1, 2020 (the effective date of the FFCRA), can I still get paid sick leave or expanded family and medical leave?** No. If, prior to the FFCRA’s effective date, your employer sent you home and stops paying you because it does not have work for you to do, you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. *This is true whether your employer closes your worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive.* You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility. For additional information, visit [CareerOneStop](#). It should be noted, however, that if your employer is paying you pursuant to a paid leave policy or local requirements, you are not eligible for unemployment insurance.

**DOL Guidance #24 – If my employer closes my worksite on or after April 1, 2020 (the effective date of the FFCRA), but before I go out on leave, can I still get paid sick leave and/or expanded family and medical leave?** No. If your employer closes after the FFCRA’s effective date (even if you requested leave prior to the closure), you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. *This is true whether your employer closes your worksite for lack of business or because it was required to close pursuant to a Federal, State or local directive.* You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility or visit [CareerOneStop](#).

**DOL Guidance #25 – If my employer closes my worksite while I am on paid sick leave or expanded family and medical leave, what happens?** Your employer must pay for any paid sick leave or expanded family and

medical leave you used before the employer closed. As of the date your employer closes your worksite, you are no longer entitled to paid sick leave or expanded family and medical leave, but you may be eligible for unemployment benefits. *This is true whether your employer closes your worksite for lack of business or because the employer was required to close pursuant to Federal, State or local directive.*

**DOL Guidance #26 – If my employer is open, but furloughs me on or after April 1, 2020, can I receive paid sick leave or expanded family and medical leave?** No. If your employer furloughs you because it does not have enough work or business for you, you are not entitled to then take paid sick leave or expanded family and medical leave. However, you may be eligible for unemployment benefits.

**DOL Guidance #27 – If my employer closes my worksite on or after April 1, 2020 but tells me that it will reopen at some time in the future, can I receive paid sick leave or expanded family and medical leave?** No, not while your worksite is closed. If your employer closes your worksite, even for a short period of time, you are not entitled to take paid sick leave or expanded family and medical leave. However, you may be eligible for unemployment insurance benefits. *This is true whether your employer closes your worksite for lack of business or because it was required to close pursuant to Federal, State, or local directive.* If your employer reopens and you resume work, you would then be eligible for paid sick leave or expanded family and medical leave as warranted.

**DOL Guidance** – The DOL clarified that an employee is only “unable to work” if (a) the employer actually has work for the employee to perform and (b) the employee cannot work (either at the worksite or from home, if the employer permits telework) due to one of the covered reasons under the Act.

**DOL Guidance** – If the employer reduces employee hours because the employer does not have enough work, employees are not eligible for paid sick leave or expanded FMLA leave for days or hours when they are no longer scheduled to work.

**DOL Final Regulation – Advised by a Health Care Provider to Self-Quarantine:** An employee may only take paid sick leave under this circumstance when:

- (i) A health care provider advises the employee to self-quarantine based on a belief that –
  - a. The employee has COVID-19;
  - b. The employee may have COVID-19; or
  - c. The employee is particularly vulnerable to COVID-19; and
- (ii) Following the advice of a health care provider prevents the employee from being able to work or telework.

If the employee is still able to telework while in quarantine, the employee is not eligible for sick pay.

**DOL Final Regulation – Seeking a Medical Diagnosis:** An employee may take paid sick leave when the employee is experiencing fever, dry cough, shortness of breath, or another COVID-19 symptom identified by the CDC and seeking medical diagnosis (making, waiting for, or attending an appointment for a test) limits the employee’s ability to work. An employee who is waiting for a medical diagnosis and who is able to telework is not eligible for paid sick leave. **According to DOL Guidance, employees may not take paid sick leave if the employee unilaterally decides to self-quarantine for an illness without medical advice, even if the employee has COVID-19 symptoms.**

**DOL Final Regulation – Caring for an Individual:** Individual means employee’s immediate family member, a person who regularly resides in the employee’s home, or similar relationship that creates an expectation that the employee would care for such person if that person was quarantined or self-quarantined (like a

roommate). The employee may take paid sick leave if unable to work or telework because the employee is caring for an individual who has been advised to quarantine for the same reasons set forth above.

**DOL Final Regulation definition of “Son or Daughter”** includes biological, adopted or foster child, stepchild, legal ward, or a child of person standing *in loco parentis*, who is under 18 years of age or 18 years of age or older, who is incapable of self-care because of a mental or physical disability.

**Amount of Paid Leave:** Employees who are still working may be eligible for paid leave benefits under the Act if they experience a qualifying reason discussed above. Full-time employees (those who are normally scheduled to work at least 40 hours per week) are eligible for up to 80 hours of paid emergency leave at employee’s regular rate of pay. Part-time employees (those who do not meet the definition of full-time) are eligible to receive pay for the number of hours worked, on average, over a two-week period. Employers should check the regulations for further guidance on calculating a weekly schedule for employees who lack a regular schedule or with irregular hours.

- If leave is taken for reasons (1), (2), or (3) on page 2 above, the employee must be paid 100% of the employee’s average regular rate of pay capped at \$511 per day or \$5,110 in the aggregate.
- If leave is taken for reasons (4), (5), or (6) of page 2 above, the employee must be paid 67% of the employee’s average regular rate of pay capped at \$200 per day or \$2,000 in the aggregate.

Employers with other paid leave policies (vacation, sick, PTO, etc.) cannot revoke that leave or “substitute it” with the paid sick leave under the Act. Employers also cannot force employees to use their accrued but unused leave before using the emergency paid sick leave. Therefore, once an employee has exhausted 80 hours of paid sick leave, employers must allow employees the use of any accrued but unused state sick leave under the Michigan Paid Medical Leave Act, discussed in more detail below.

***Intersection between Emergency Paid Sick Leave Act (EPSLA)  
& Emergency Family and Medical Leave Expansion Act (EFMLEA)  
(DOL Final Regulation)***

**Use of EPSLA and EFMLEA for Care of Child out of School or Daycare:** Employees who take paid sick leave to care for a son or daughter who is out of school or daycare may take leave under the EPSLA and the EFMLEA, which runs concurrently. Such an employee may take a total of 12 weeks of leave. The first 2 weeks (up to 80 hours) are paid under the EPSLA and the remaining 10 weeks are paid under the EFMLEA.

**Use or Exhaustion of FMLA prior to Need for COVID-19 Leave:** Where an employee has used all or part of his or her FMLA leave entitlement in the current 12 month period, the maximum 12 weeks of EFMLEA is reduced by the amount of the FMLA leave entitlement already taken. If the employee has exhausted his or her 12 workweeks of FMLA or EFMLEA, he or she is still able to take paid sick leave under EPSLA for a COVID-19 qualifying reason.

**Use of EPSLA Unrelated to Care of Child out of School or Daycare:** Where an employee takes 2 weeks of emergency paid sick leave for reasons unrelated to care of a child due to school/daycare closure, that employee has exhausted the paid sick leave available under the Act. If the employee then needs to take expanded family medical leave, the employee may do so, but the first 10 days of expanded family medical leave may be unpaid because the employee has already exhausted paid sick leave under EPSLA. In this case, the employee may choose to use employer provided paid leave (such as PTO, sick, or vacation) for the first 10 days of expanded family medical leave. In accordance with the employer’s regular FMLA policies, the employer may also require the employee to use accrued paid time off during the unpaid portion of the expanded medical leave. The employer paid time and the expanded family medical leave would run concurrently.

## ***Expanded Family Medical Leave***

**Eligible Employees:** The Act is expanded to cover all full-time and part-time employees who have been employed for at least 30 calendar days for purposes of seeking leave under the expanded protections.

**DOL Final Regulations – 30 Calendar Days:** An employee has worked for 30 calendar days if:

- (i) the employee was on the employer’s payroll for the 30 calendar days immediately before the day the leave would begin; or
- (ii) the employee was laid off or terminated on or after March 1, 2020 and rehired or reemployed before December 31, 2020 provided the employee had been on the payroll for 30 or more of the 60 days prior to the layoff or termination date. For example, an employee who was originally hired on January 15, 2020, but laid off on March 14, 2020, would be eligible for leave under the Act if the same employer rehired the employee on October 1, 2020 because the employee had been on the payroll for 30 or more days between January 15<sup>th</sup> and March 14<sup>th</sup>.

However, the Act excludes various health care providers and emergency responders from eligibility, and the final regulations provide greater definition to these categories of employees.

**Posted Notification:** Employers must post on their premises a notice that explains the Act’s paid leave provisions. The employer may satisfy the posting requirement by emailing or direct mailing the notice to employees or by posting the notice on an internal or external website accessed by employees.

**Reasons for Family Medical Leave:** An employee is eligible for expanded FMLA leave when the employee is unable to work (or telework) in order to care for employee’s son or daughter (under 18 years of age) if the child’s school or place of care is closed or the childcare provider is unavailable due to an emergency with respect to COVID-19 declared by a federal, state, or local authority. The definition of son or daughter described on page 5 above applies under this section of the Act as well.

**DOL Final Regulations – Interplay with FMLA:** If an eligible employee has already taken FMLA leave for one of the covered reasons under the FMLA, the employee may only use the remaining portion of his or her 12 workweeks of leave for expanded family medical leave. If the eligible employee has already used his or her entire 12 workweeks of leave under the FMLA, the employee is not entitled to take any additional time under the EFMLEA. However, in that instance, the employee’s entitlement to take paid sick leave is not impacted. The employee would still be able to use paid sick leave (for any covered reason) under the EPSLA, but the employee could not take expanded family medical leave.

If an eligible employee does not use all 12 workweeks of leave under the EFMLEA, then he or she may take the remaining time unpaid for a covered reason under the FMLA.

Remember that eligible employees who are afflicted with COVID-19, or who have been hospitalized or treated by a doctor, satisfy the definition of a serious health condition under the FMLA and would be entitled to FMLA leave under its original definition. Likewise, an eligible employee who is caring for a family member with COVID-19 is eligible for FMLA leave under the original eligibility criteria in the FMLA. Since this is an expansion of the FMLA, employers should still plan on sending the required designation notices with instructions on how to designate FMLA leave should it fall under this new provision and further explain which portions of the leave will be unpaid, paid, or paid subject to this new provision.

**Paid Leave:** Neither employees nor employer can require the use of PTO, vacation, sick, or other employer paid leave benefit in lieu of or in advance of expanded family medical leave. Employers can follow their normal FMLA policy related to use of other paid time off during FMLA leave in order to supplement the employee's 2/3 pay.

**DOL Final Regulations – Use of PTO or Other Paid Leave Time:** If an employer's policies allow for it, employees may elect to use paid time offered under employer's policies (like PTO, sick, or vacation time) concurrently with any unpaid portion of expanded family medical leave. Employers may also require, in accordance with policies, that employees use accrued but unused PTO, vacation, or sick time contemporaneously to supplement the 2/3 pay during expanded family medical leave. Thus, the employee would receive 100% of wages while the employee has accrued paid time off available. In this situation, once the PTO, vacation, or sick time is used, the remainder of the leave under the expanded family medical leave would be paid at 2/3 of employee average regular rate.

**DOL Final Regulation – Use of Other Paid Time Off and Taking Tax Credits:** Employers who pay employees any or all of the employee's available PTO, vacation, or sick pay are capped at taking \$200 a day or \$10,000 in the aggregate in tax credits for expanded family medical leave pay under the Act.

**Return to Work:** The FMLA requires employers to restore an employee who takes FMLA covered leave to his or her position. The Act does not protect an employee when that employee was subject to layoff if the employee would have been laid off regardless of whether the leave was taken. The employer must be able to demonstrate that the employee would have been laid off even if the leave was not taken.

However, employers with fewer than 25 employees may be excluded from this requirement if the employee's position no longer exists following the emergency FMLA leave due to an economic downturn or other circumstances caused by a public health emergency during the period while the employee was on emergency FMLA leave. The employer in this circumstance must make a reasonable attempt to return the employee to the equivalent position and must make efforts to return the employee to work for up to a year following the employee's emergency FMLA leave.

#### ***How to Calculate Average Regular Rate of Pay under the Act (DOL Final Regulation)***

Under both the EPLSA and the EFMLEA of the Act, the employer must calculate the employee's average regular rate of pay to determine the amount of the paid leave entitlement. Employers must use the methods described in other parts of the regulations (29 CFR 531 and 29 CFR 778) to calculate the regular rate for each workweek that the employee has been employed over the lesser of: (1) the 6-month period ending on the date on which the employee takes the EPSL or EFML or (2) the entire period of employment, if employed for less than 6 months. Compute the average of the weekly regular rates weighted by the number of hours worked for each workweek. Make sure to include commissions, tips, and piece rates in the calculation.

#### ***Intermittent Leave (DOL Final Regulation)***

An employee may take paid sick leave or expanded family medical leave on an intermittent basis only when the employer and employee agree and only under certain circumstances. While it is not required, employers should memorialize the intermittent arrangement in writing. Only the amount of leave actually taken may be counted against the leave entitlement.

**Reporting to the Worksite:** Upon agreement, employees who are still reporting to the worksite may take either paid sick leave or expanded family medical leave on an intermittent basis only when leave is being taken to care for the employee's son or daughter who is unable to attend school or daycare. In this situation, leave may be taken in any increment of time agreed to by the employer and employee.

Employees may NOT take paid sick leave intermittently if the leave is taken for any of the other qualifying reasons under the EPSLA portion of the Act. Allowing intermittent leave in these situations poses too great a risk of spreading COVID-19 to the employer's workforce. When using paid sick leave, the employee must use the permitted days off consecutively until the employee no longer has a qualifying reason to take paid sick leave.

**Teleworking:** If the employee is teleworking and unable to work for a qualifying reason, the employer and employee can agree to allow the use of intermittent leave for paid sick leave or expanded family medical leave. They can also agree to the increments of time that the employee will use intermittent leave. This allows employers and employees broad flexibility to agree to arrangements that balance the needs of teleworking employees and the employer's business.

### ***How to Document Leaves of Absence***

It is important to document this new paid leave just like you would document any other leave under the FMLA. When you become aware of the need for leave, provide your employee with the Eligibility and Rights and Responsibilities Notice. You may use Form WH-381 which can be found at the [U.S. Department of Labor](#).

Based on the particular situation, make sure to specify the type of documentation you expect the employee to return to you. The DOL is urging employers to relax the medical documentation standards because doctors and hospitals are stretched to the breaking point. **In the final regulation, the DOL indicated that the employee must provide the employer with the following information prior to taking paid sick leave or expanded family medical leave: (1) employee's name; (2) date(s) for which leave is requested; (3) qualifying reason for the leave; and (4) oral or written statement that the employee is unable to work because of the qualified reason for leave.**

Rather than the typical FMLA Medical Certification, the DOL issued the following guidance to employers for securing documents to substantiate these leaves of absence:

**DOL Final Regulation and IRS Guidance – Emergency Paid Sick Leave:** The employee must also provide documentation to substantiate the reason for the covered leave including:

- (i) the name of the government entity that issued the quarantine or isolation order related to COVID-19 applicable to the employee;
- (ii) the name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19;
- (iii) the name of the government entity that issued the quarantine or isolation order or the name of the health care provider who advised the individual being cared for to self-quarantine due to COVID-19 related concerns;
- (iv) the name and age of the son or daughter being cared for, the name of the school or daycare that is closed, and a statement that no other person will be providing care for the child during the period for which the employee is receiving paid sick leave or expanded family medical leave. The IRS will also require a special statement explaining why an employee must care for a child over 14-years-old during daylight hours.

**DOL Final Regulation – Expanded Family Medical Leave:** See (iv) above.

Remember to follow the Designation Notice requirements. You can use Form WH-382 or another written communication to your qualified employee. Make sure the notice designates the leave as FMLA leave, states the amount of leave that will be counted as FMLA, and explains the amount of pay (full or partial) the employee will receive while on leave. Given the uncertainty of continued business operations, your designation notice should also explain that you will provide notice to the employee if future business decisions impact the employee's continued eligibility to receive paid leave.

### ***Tax Credits***

An employer generally is entitled to a credit against Social Security taxes for the amount of emergency paid sick leave and expanded family medical leave paid under the Act. The credits for any quarter are limited to the amount of Social Security taxes imposed on the employer for the quarter, and any credits that exceed this limitation are fully refundable. An employer's income is increased by the amount of such tax credits (so that the employer does not also benefit from a deduction for the leave paid), and the employer also receives a credit for the portion of its Medicare taxes that is attributable to the leave paid. A corresponding credit is allowed to taxpayers who are subject to self-employment taxes.

It is important for employers to secure and retain the documents outlined above in order to substantiate the tax credits provided under the Act. Employers should also consult applicable IRS forms, instructions, and information for the procedures employers must follow to claim a tax credit, including any other documentation needed to support the credit. Employers should consult the [IRS website](#).

According to the DOL and IRS, employers should also maintain the following additional records for at least 4 years to substantiate eligibility for the tax credits:

- (1) Documentation to show how the employer determined the amount of qualified paid sick leave and expanded family medical leave wages paid to the employee eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave;
- (2) Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages;
- (3) Copies of any completed Forms 7200, Advance of Employer Credits Due to COVID-19, that the employer submitted to the IRS; and
- (4) Copies of completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS.

**Caution:** As set forth above, unless the DOL says otherwise, employers who paid employees for the reasons stated in the Act prior to April 1, 2020 will not be eligible for a tax credit for those payments. After April 1st, employers who pay ineligible employees for the reasons stated in the Act will not be eligible for tax credits for any sick leave pay provided to these employees. The DOL may yet offer more definitive guidance on this subject.

### **Governor Whitmer Executive Order 2020-36**

#### **(Protecting Workers who stay home, stay safe, when they or their close contacts are sick)**

In order to protect workers, Governor Whitmer issued [Executive Order 2020-36](#). Employees must stay home when they or their close contacts are sick, and employers cannot punish them for doing so. The Executive Order requires employees to stay home for a specified number of days depending on their own diagnosis or symptoms or their exposure to another person who tested positive or displays symptoms of COVID-19. In fact, an employee who returns to work before the time required by the order is no longer protected from discharge, discipline, or retaliation by the employer.

**Employers Cannot Discharge, Discipline, or Retaliate.** Employers are prohibited from discharging, disciplining, or retaliating against an employee for staying home when he or she is at particular risk of infecting others with COVID-19. Employers must treat such an employee as if he or she were taking medical leave under the Michigan Paid Medical Leave Act. To the extent the employee does not have paid leave available, the leave of absence may be unpaid. The length of the leave is not limited to the leave entitlement under the Michigan Paid Medical Leave Act and must, instead, extend for as long as the employee remains away from work as described below.

**Employee Tests Positive for COVID-19 or Displays Symptoms of COVID-19.** All individuals who test positive for COVID-19 or who display one or more of the principal symptoms should remain in their home until:

- (a) 3 days have passed since their symptoms have resolved, and
- (b) 7 days have passed since their symptoms first appeared or since they were swabbed for the test that yielded a positive result.

This section of the order shall cease to apply to anyone who, after showing symptoms, receives a negative COVID-19 test result.

**Employee Close Contact with Individual who Tests Positive or Displays Symptoms.** Any and all people who have had close contact with an individual who tests positive for COVID-19 or with an individual who displays one or more of the principal symptoms should remain in their home until either 14 days have passed since the last close contact with the sick or symptomatic individual or the symptomatic individual receives a negative COVID-19 test result.

This section does not apply to (a) health care professionals, (b) workers at a health care facility, (c) first responders, (d) child protective service employees, (e) workers at child caring institutions, and (f) workers at correctional facilities.

**Loss of Protection.** Employees who return to work prior to the periods described in the Executive Order are not entitled to the protections against discharge, discipline, or retaliation.

This Executive Order also shall not prevent an employer from discharging or disciplining an employee:

- (a) Who is allowed to return to work but declines to do so;
- (b) With the employee's consent; or
- (c) For any other reason that is not unlawful.

**Definitions.** "Principal symptoms" are fever, atypical cough, or atypical shortness of breath. "Close contact" means being within approximately six feet of an individual for a prolonged period of time. For example, close contact can occur while caring for, living with, visiting, or sharing a health care waiting room with an individual.

**No Private Right of Action.** The Executive Order does not create a private right of action against an employer for failing to comply or against an individual for acting contrary to the public policies of this order.

### **The Michigan Paid Medical Leave Act**

Michigan employers with more than 50 employees (including those with over 500 employees) must still comply with the Michigan Paid Medical Leave Act and provide paid leave for covered reasons to eligible employees. The paid sick leave obligation includes leave to care for a child out of school due to a public health emergency. It is likely that most employees have already used their available MPMLA paid leave prior to the effective date of the Act. However, remember that eligible employees may be entitled to paid leave for all of the following reasons:

- The employee's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the employee's mental or physical illness, injury or health condition; or preventive medical care for the employee

- The employee's family member's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the employee's family member's mental or physical illness, injury or health condition; or preventive medical care for the employee's family member
- For the closure of employee's primary workplace by order of a public official due to a public health emergency
- Employee's need to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency; or if it has been determined by the health authorities or by a health care provider that the employee or the employee's family member's presence in the community jeopardizes the health of others because of their exposure to a communicable disease

Employers should consult their HR professionals or counsel to ensure compliance with these laws.

### **Michigan Expanded Unemployment Benefits**

Governor Whitmer signed an executive order to expand eligibility for unemployment benefits during the COVID-19 pandemic. The order is effective March 16 through April 22, 2020.

**Eligibility:** In addition to employees who lose their employment due to lack of work, business closure, furlough, permanent layoff, or termination, the executive order makes clear that benefits also apply to employees who leave work or are laid off because of:

- self-isolation or self-quarantine in response to elevated risk from COVID-19 due to being immunocompromised,
- displaying the symptoms of COVID-19,
- having contact in the last 14 days with someone with a confirmed diagnosis of COVID-19,
- the need to care for someone with a confirmed diagnosis of COVID-19, or
- a family care responsibility as a result of a government directive.

**Expansion of Benefits:** The expanded unemployment benefits include:

- Benefits will be increased from 20 to 39 weeks. However, an employee receiving paid sick leave under either the Act or the employer's paid time off policy are not eligible for unemployment benefits while receiving pay.
- The application eligibility period will be increased from 14 to 28 days.
- The normal in-person registration and work search requirements will be suspended.

**No Charge to Employer Account:** Any benefit paid to a claimant who is laid off or placed on a leave of absence must not be charged to the account of the employer(s) who otherwise would have been charged but instead must be charged to the Unemployment Insurance Agency's non-chargeable account.

**Expanded Benefits Under CARES Act:** The State of Michigan announced that it entered into an agreement with the DOL to implement enhanced unemployment benefits for Michigan, per the federal CARES Act. For Michigan workers, this means increased benefits and expanded eligibility.

- All unemployed (including furloughed) individuals will be eligible for an additional \$600 per week on top of the state unemployment amount (combined maximum of \$962 per week) for up to 4 months. Individuals who have already applied for benefits do not have to re-apply in order to receive this benefit.
- The duration of State unemployment benefits is increased to 39 weeks (the added \$600 is capped at 4 months).
- Unemployment benefits have been expanded to include many workers who are not customarily entitled to benefits, such as those who are self-employed and independent contractors.

With these enhanced benefits, it is possible for workers to receive more from unemployment than they did while working. Employers should take this into consideration when deciding about the various loans available under the CARES Act. For more information, please see our update related to [Title 1 of the CARES Act](#).

The Michigan Unemployment Agency should be issuing updated guidance soon.

### **WARN Act Implications**

The Worker Adjustment and Retraining Notification (WARN) Act applies to employers with 100 or more full-time employees or 100 or more employees, including part-time employees who work at least an aggregate of 4,000 hours. The WARN Act requires a covered employer to provide employees with 60 days' advanced notice of employment loss when the employer:

- Closes a facility or discontinues an operating unit, permanently or temporarily, that impacts at least 50 full-time employees at a single site;
- Implements a mass layoff of 500 or more full-time employees at a single site during a 30-day period, or lays off 50-499 employees constituting 33% of the employer's total workforce at a single site;
- Announces a temporary layoff of fewer than 6 months that meets any of the above criteria and then extends the layoff for more than 6 months; or
- Reduces the hours of work for 50 or more workers by 50% or more for each worker in any 6-month period.

The WARN Act is not triggered if employees will be laid off for fewer than 6 months. However, with this pandemic, employers do not know how long employees may be laid off. There is an exemption to the 60-day notice requirement for "unforeseeable business circumstances" where the plant closing or mass layoff was not foreseeable at the time notice would have been required. To be considered unforeseeable, the event must have been sudden, dramatic, and an unexpected condition outside the employer's control. The DOL has not issued guidance confirming that the COVID-19 pandemic qualifies under this exemption.

Even if an exemption applies, however, employers must still provide employees with as much advanced notice of a termination as possible. If the layoff is expected to last fewer than 6 months, then WARN is not triggered. If the employer must extend the layoff beyond 6 months, the employer must provide the WARN notice and demonstrate that the layoff extension was not foreseeable at the time of the initial layoff. In this circumstance, the employer must give as much advanced notice as possible when it becomes foreseeable that the layoff will extend beyond 6 months. There are significant penalties for WARN Act violations, so err on the side of caution, and be prepared to give WARN Act notification to your employees.

### **Things to Consider**

- Think outside the box. Consider work from home arrangements whenever possible. Ensure the safety and security of accessing employer systems from a remote location. Make sure computer and system virus protection is up-to-date.
- Consider shift changes to accommodate employees who need to care for children during the day but who may be able to work the night shift.
- Implement cleaning protocols on a regularly scheduled basis. Encourage employees to sanitize their work surfaces every hour, and encourage regular hand washing.
- Require social distancing - no more than a few people together at a time, and always 6 feet apart.
- Follow health and safety guidelines if an employee tests positive for the coronavirus or has been exposed to an individual who tested positive.

- Stay updated by visiting the following websites
  - [DOL: COVID-19 and the American Workplace](#)
  - [EEOC: Pandemic Preparedness in the Workplace and the Americans With Disabilities Act](#)
  - [OSHA: Standards and Directives](#)
  - [CDC: COVID-19 Information and Guidance](#)

This situation is very fluid. We urge all employers to be patient as laws, regulations, and public health guidelines are developed to manage the COVID-19 impact on business and employee lives. Jaffe will continue to provide analysis of these requirements and any changes or updates as the situation unfolds.

For questions, please reach out to:

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