



NEW EXECUTIVE ORDER PROVIDES PROTECTIONS TO MICHIGAN EMPLOYEES WHO STAY HOME WHEN THEY OR THEIR CLOSE CONTACTS ARE SICK

On April 3, 2020 Governor Gretchen Whitmer issued a new [Executive Order](#), Executive Order 2020-36, providing additional protections to employees who stay home when they or their “close contacts” are sick. This Order has important ramifications for Michigan employers:

SUMMARY OF EXECUTIVE ORDER 2020-36

Executive Order 2020-36 generally prohibits Michigan employers from disciplining, discharging or retaliating against any employee who does not report to work because the employee or someone with whom the employee has had “close contact” tests positive for COVID-19 or has symptoms of the disease (fever, cough, shortness of breath). The Order defines “close contact” as being “within 6 feet of an individual for a prolonged period of time,” so it could mean a member of the employee’s family or household, an intimate partner, or someone the employee has been caring for. The Order states “close contact” could occur, for example, when caring for, living with, visiting, or sharing a health care waiting room with another individual.

Under Executive Order 2020-36, when an employee requests time off or chooses to stay home from work because they have tested positive for COVID-19 or are exhibiting symptoms of COVID-19, or have had close contact with such an individual, the employer must treat it as a qualifying request for medical leave under Michigan’s Paid Medical Leave Act (“PMLA” -- which requires certain Michigan employers to provide paid medical leave to employees). The employee is to be granted medical leave for the following time frames:

1. For an employee who is experiencing symptoms of COVID-19, until three (3) days have passed with no symptoms, and seven (7) days have passed since the symptoms first appeared or since they were swabbed for the test that yielded a positive result; and
2. For an employee who has had close contact with someone who has tested positive or is experiencing symptoms of COVID-19, until fourteen (14) days have passed since the last close contact with the sick or symptomatic individual, or until the symptomatic individual receives a negative COVID-19 test.

In both of the above situations, a medical leave can terminate early if there is a subsequent negative COVID-19 test.

As with PMLA, under the Order when an employee doesn't have any remaining PTO/paid sick time, or has used up all of their remaining accrued time, the medical leave is unpaid.

Significantly, although the Order does not prohibit employers from requiring documentation that the employee is experiencing symptoms, has tested positive, or documentation that the individual they have had close contact with has either of those situations, it does provide that employers cannot discharge, discipline or retaliate against an employee for failing to comply with a request for such documentation. As a result, the employer is effectively barred from enforcing any request for documentation under this Executive Order.

Of note, PMLA only applies to Michigan employers with 50 or more employees (full-time and part-time); however, this Executive Order applies to all Michigan employers. Michigan employers with fewer than 50 employees are required to grant medical leave to employees as described above, but if there is no PTO or sick leave available under the employer's policies or pursuant to another law (such as FFCRA), then the leave could be unpaid. Additionally, unlike federal FMLA, PMLA does not include any requirement for job restoration to employees returning from a medical leave.

PRACTICAL IMPLICATIONS FOR EMPLOYERS WITH LESS THAN 500 EMPLOYEES

Employees who are themselves experiencing symptoms of COVID-19 or who have tested positive for COVID-19 are already entitled to up to 80 hours of paid sick time under the newly-enacted Families First Coronavirus Response Act (FFCRA). This Executive Order does not require Michigan employers to give employees even more paid sick time; once all of an employee's available paid time off is used up, any remaining leave time can be unpaid. But this Executive Order does establish time frames for how long such an individual should remain home and away from any worksite. It also prohibits employers from discharging or retaliating against such employees, **including discharging or disciplining them for failing to comply with a request for documentation of their need for medical leave.**

FFCRA paid sick time does not cover employees who cannot work because they have had "close contact" with another person who is symptomatic or has tested positive for COVID-19 (although it does cover "caring for another person under a quarantine or isolation order"). Thus, under this Executive Order, when an employee requests medical leave (or simply declines to work) due to "close contact," Michigan employers should take the following steps:

1. Ascertain whether the employee is caring for a person who is under a medical quarantine or isolation order (to determine if FFCRA paid sick time applies);
2. If no FFCRA paid sick leave is applicable, determine the date of last "close contact";
3. Grant the employee medical leave until fourteen (14) days after the last date of close contact, or until there is a subsequent negative COVID-19 test;
4. Advise the employee to remain at home except as absolutely necessary to obtain food, medicine, medical care, or supplies necessary to protect or preserve life; or to engage in outdoor exercise or activity while maintaining appropriate social distancing; and
5. Advise the employee to keep the employer updated, including the results of any subsequent COVID-19 testing.

Again, employees can use any available PTO/sick time to cover their leave; if none is available, the leave can be unpaid.

Because of the provisions prohibiting employers from taking action against an employee who fails to comply with a request for documentation, we recommend that employers do not request or require such documentation at this time, except for documentation that may be required by the IRS if any paid sick leave qualifies for refundable tax credit treatment under FFCRA. In such cases, however, the employer must take care not to discipline or discharge employees who fail to comply with the request for documentation.

The above article is presented solely for informational purposes, and does not constitute legal advice. If you have questions or concerns about these matters you should consult with legal counsel regarding your specific situation. If you would like to discuss the Families First Coronavirus Response Act and what responsibilities your business may have, the attorneys at Loomis, Ewert, Parsley, Davis & Gotting are happy to consult with you. Please contact Kevin J. Roragen kjroragen@loomislaw.com or call us at 517-482-2400.