



FERGUSON WIDMAYER & CLARK PC

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MEMO TO: Ferguson Widmayer & Clark PC Employer Clients

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SUBJECT: Coronavirus Relief

In response to the Coronavirus emergency, the federal government has enacted provisions to help employers and employees manage the economic challenges presented and the State of Michigan has expanded the availability of unemployment benefits to employees. These provisions are discussed below.

The Families First Coronavirus Response Act (“FFCRA”) was signed into law on March 18, 2020. The FFCRA provides for limited, paid sick leave and expanded paid family and medical leave to be paid by employers, with employer relief in the form of tax credits for small and midsize employers (employers with less than 500 employees). **The good news is that the employer tax credits will likely cover much of the cost of expanded paid sick leave and FMLA leave.** The bad news is that employers front the money.

Paid Sick Leave includes:

- Up to 80 hours of paid sick leave
- This is at 100% of the employee’s pay, where the employee is unable to work, including unable to **telework**, because:
 - the employee is quarantined or isolated by government order related to COVID-19, or
 - has been advised by a health care provider to self-quarantine, or
 - is experiencing COVID-19 symptoms and seeking a medical diagnosis; and
- This is paid at 2/3 of the employee’s pay, when the employee is unable to work because of a need to care for an individual subject to quarantine, to care for a child whose school is closed or child care provider is unavailable for reasons related to COVID-19, and/or the employee is experiencing “substantially similar conditions as specified by the U.S. Department of Health and Human Services.”
- Notably, an individual can receive both of types of leave, **but the total cannot exceed 80 hours total.**
- There is a possible exemption for the requirement to provide paid sick leave for employers with less than 50 employees (but **ONLY** for the need to care for a child whose

school is closed or child care provider is unavailable for reasons related to COVID-19), further discussed below.

- **NOTE that this is only for people who are sick or unable to do work that is otherwise available to them for reasons related to COVID-19. It does not apply to people who are laid off due to lack of work.**

This special extra paid sick time under FFCRA (which we will refer to as “CV19 sick time) is available for immediate use by the employee for the allowed purposes, regardless of how long the employee has been employed. Employers may not require employees to use other paid leave prior to using CV19 paid sick time, as long as a qualifying reason to take CV19 paid sick time is present. In addition, employers may not require employees to search for a replacement to cover their hours as a condition of using CV19 paid sick time. After the first workday taking CV19 paid sick time, employers may require employees to use reasonable notice procedures to continue using CV19 paid sick time.

Employers are required to post or deliver a notice, attached, of the requirements described in the FFCRA. **We advise you to send the model notice to your employees who are working remotely (via email or direct mail) and post it in workplaces occupied by employees.**

Emergency FMLA Expansion Leave includes:

- Up to an additional 10 weeks of employer-paid leave at 2/3 of the employee’s pay (“expanded paid family and medical leave”) is available when an employee’s child’s school is closed or child care providers are unavailable for reasons related to COVID-19.
- Notably, the employer threshold for FMLA is revised by replacing “fewer than 500 employees” for “50 or more employees for each working day during 20 or more calendar workweeks in the current or preceding calendar year.” The result is that **even employers with less than 50 employees are required to provide this type of leave**, subject to a possible exemption, further discussed below. Further, for employers with less than 25 employees, the right to restoration to employment normally available under the FMLA will not apply if certain requirements are met. Please contact us for further details.
- **NOTE that this is only for people who are unable to do work that is otherwise available to them for reasons related to childcare and COVID-19. It does not apply to people who are laid off due to lack of work.**

Possible Exemption from Requirement to Provide Paid Leave related to Childcare

The Secretary of Labor retains authority to issue regulations for good cause to exclude certain health care providers and emergency responders from the definition of “eligible employee” and to exempt small businesses with fewer than 50 employees from the requirements of the law (both paid sick leave and emergency FMLA expansion leave for leave related to child care) when the imposition of such requirements would “jeopardize the viability of the business as a going concern.” We anticipate guidance on this from the Department of Labor in the next few days.

Tax Credits for Employers include:

Tax Credits for Sick Leave

- For an employee who is unable to work because of Coronavirus quarantine or self-quarantine or has Coronavirus symptoms and is seeking a medical diagnosis, eligible employers (those with under 500 employees) may receive a refundable sick leave credit for sick leave at the employee's regular rate of pay, up to \$511 per day, and \$5,100 in the aggregate, for a total of 10 days; and
- For an employee who is caring for someone with Coronavirus, or is caring for a child because the child's school or child care facility is closed, or the child care provider is unavailable due to the Coronavirus, eligible employers may claim a credit for 2/3 of the employee's regular rate of pay, up to \$200 per day and \$2,000 in the aggregate, for up to ten days.
- Eligible employers are entitled to an additional tax credit determined based upon costs to maintain health insurance coverage for the eligible employee during the leave period.

Tax Credits for Child Care Leave under Emergency FMLA Expansion Leave

- Eligible employers may receive a refundable child care credit equal to 2/3 of the employee's regular pay, capped at \$200 per day or \$10,000 in the aggregate;
- 100% reimbursement for paid leave through an immediate dollar-for-dollar tax offset against payroll taxes;
- Credit is refundable;
- Credits may be claimed based on qualifying leave provided through the effective date (April 1, 2020) and December 31, 2020; and
- Additional tax credit is available, to be determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.

Steps for Employers

In order to take immediate advantage of the paid leave credits, businesses can retain and access funds that they would otherwise pay to the IRS in payroll taxes. If these amounts are insufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS (expected to be processed in two weeks or less) by submitting a claim form that will be released this week.

Under guidance to be released this week, eligible employers who pay qualifying sick or child care leave will be able to retain an amount of payroll taxes equal to the amount of qualifying sick and child care leave they paid, rather than deposit them with the IRS. Payroll taxes that are available for retention include the following:

- Federal income taxes;
- The employee share of Social Security and Medicare taxes; and
- The employer share of Social Security and Medicare taxes with respect to all employees.

Notably, the paid sick leave provisions are not intended to diminish the right or benefits that an employee is entitled to under any:

- other Federal, State, or local law;
- collective bargaining agreement; or
- existing employer policy; or
- to require financial or other reimbursement to an employee from an employer upon the employee's termination, resignation, retirement, or other separation from employment for paid sick time under this Act that has not been used by such employee.

While it is not completely clear, we believe that payment of paid sick leave and/or emergency FMLA expansion leave would negatively impact the right of employees to obtain full unemployment benefits for the period the sick/emergency FMLA expansion leave is paid. We hope to receive further guidance on this in the next weeks. In the meantime, please see the discussion of how to manage unemployment benefit claims below.

Inapplicability of Paid Sick Leave and Expanded FMLA Leave if Business is Closed

Department of Labor guidance provides that if a business is closed prior to April 1, 2020, employees will not be eligible for paid sick leave or expanded family and medical leave but may be eligible for unemployment insurance benefits.

Guidance provides that if an employer closes on or after April 1, 2020 and while an employee is on paid sick leave or expanded family and medical leave, the employer must pay for any sick leave or expanded family and medical leave used before the employer closed. As of the date an employer closes its worksite, employees are no longer entitled to paid sick leave or expanded family and medical leave, but may be eligible for unemployment insurance benefits.

In addition, if an employee's work hours are reduced because the employer does not have work for the employee to perform, the employee may not use paid sick leave or expanded family and medical leave for the hours the employee is no longer scheduled to work.

Lastly, all of the above apply regardless of whether the business was closed due to lack of work or because it is required to close pursuant to a Federal, State or local directive.

State of Michigan Unemployment Benefit Relief

Governor Gretchen Whitmer signed Executive Order 2020-10, which provides a temporary expansion of eligibility for unemployment benefits, to be effective March 16, 2020 through April 14, 2020.

Under the order, unemployment benefits (maximum of \$362 per week (increased by \$600 a week for up to four months under the CARES Act, see below)) are extended to:

- Workers who have an unanticipated family care responsibility, including those who have childcare responsibilities due to school closures, or those who are forced to care for loved ones who become ill (specifically, an individual must be considered to have left work involuntarily for medical reasons or deemed laid off if they leave work because of family care responsibility as a result of a government directive);
- Workers who are sick, quarantined, or immunocompromised and who do not have access to paid family and medical leave or are laid off; and
- First responders in the public health community who become ill or are quarantined due to exposure to COVID-19.

In addition:

- Benefits will be increased from 20 to 26 weeks (and further increased to 39 weeks under the CARES Act, see below);
- The application eligibility period will be increased from 14 to 28 days; and
- The normal in-person registration and work search requirements will be suspended.

Individuals on a paid sick leave or receiving a disability benefit would not be considered “unemployed” under the directive.

The executive order provides that through April 14, 2020 at 11:59 pm, an employer or employing unit must not be charged for unemployment benefits if their employees become unemployed because of an executive order requiring them to close or limit operations.

Accordingly, if you lay off employees due to an executive order requiring shutdown, they will be entitled to unemployment benefits without your unemployment insurance account being charged.

Specifically, the following provisions of the Michigan unemployment benefit laws are being relaxed:

- the requirement that an employee is disqualified if the employee “left work voluntarily without good cause attributable to the employer or employing unit”
- the requirement that an employee who claims to have left work involuntarily for medical reasons must have
 - secured a note from a medical professional substantiating the need for leave
 - attempted to have secured alternative work with the employer and
 - unsuccessfully attempted to be placed on a leave of absence with the employer.

Guidance issued by the Michigan Department of Economic Growth and Opportunity on March 16, 2020 provides that **“until we have clarity at the federal level, we are asking employers to consider placing employees on unpaid leave to preserve flexibility” and “if you do need to layoff/place employees on a leave as a result of closure ban, the Governor has waived employer charge by Executive Order.”**

Until we receive further guidance, we believe that receipt of either or both of paid sick leave or paid emergency FMLA expansion leave would amount to “remuneration” under Michigan’s

unemployment laws and would negatively affect an employee's right to receive unemployment insurance benefits.

The paid sick leave and emergency FMLA expansion provisions are effective as of April 1, 2020. Therefore, prior to that date, employees should be able to receive unemployment insurance compensation that is unaffected by the new, paid leave provisions and your unemployment insurance accounts should not be charged through April 14, 2020.

On March 30, 2020, Gov. Gretchen Whitmer announced new programs for workers affected by COVID-19. The governor, under the federal CARES Act, signed an agreement between Michigan and the U.S. Dept. of Labor to implement Pandemic Unemployment Assistance and Compensation programs that grant benefits to workers who do not already qualify for state unemployment benefits. Workers include self-employed, 1099-independent contractors, gig, and low-wage workers who can no longer work because of the pandemic. **The agreement also increases weekly benefits for all unemployed workers by \$600 a week for up to four months and extends benefit payments from 26 to 39 weeks.**

We will advise as soon as further guidance is issued.

Steps for Employers

The State of Michigan has provided for a "Waiver of Work Registration" for employers temporarily laying off workers. Michigan's Unemployment Insurance website provides that employers who will be temporarily laying off workers should file a "Seeking Work Waiver" as follows:

If you are an employer temporarily laying off workers, you can request a waiver of the work registration and seeking work requirements for your laid off worker(s). This waiver can only be requested if you expect work to be available within 45-days of the individual's last day of work and must be requested prior to the individual becoming payable for benefits. To request this waiver, employers can log into their Michigan Web Account Manager (MiWAM) at www.michigan.gov/uia and click on the Seeking Work Waiver link. Employers will be required to enter the business's employee's last day worked and back to work date. If the laid off worker does not return to work within 45-days of the last day worked, the individual will need to register for work and begin looking for work. The waiver cannot be extended and late waiver requests or requests submitted without the required information will not be granted.

Accordingly, it is important that you file a "Waiver of Work Registration" as soon as possible.

Other Michigan Executive Orders

Governor Gretchen Whitmer signed Executive Order 2020-17, which imposes temporary restrictions on non-essential medical and dental procedures beginning as soon as possible but no later than March 21, 2020 at 5:00pm.

Executive Order 2020-17 states that hospitals, freestanding surgical outpatient facilities, and dental facilities, and all state-operated outpatient facilities, must implement a plan to temporarily postpone all non-essential procedures until the termination of the COVID-19 state of emergency.

On Monday, March 23, 2020, Governor Whitmer issued Executive Order 2020-21 outlining a “temporary requirement to suspend activities that are not necessary to sustain or protect life.” This order includes but is not limited to the following mandates:

- The order must be “construed broadly to prohibit in-person work that is not necessary to sustain or protect life” (for purposes of this order, workers who are necessary to sustain or protect life are defined as “critical infrastructure workers,” including health and public health workers, law enforcement, public safety, and first responders, among others); and
- No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life or to **conduct minimum basic operations.**

“Critical infrastructure workers” are workers needed to “sustain and protect life” and who are further defined under federal guidance as members of certain industries, such as health and public health, law enforcement and public safety, etc.

For employees who are **not** critical infrastructure workers, the order provides that employees who are needed to “conduct minimum business operations” may be required to work. These include, but are not limited to the following:

Workers who are necessary to conduct minimum basic operations are those whose in-person presence is **strictly necessary** to allow the business or operation to

- maintain the value of inventory and equipment,
- care for animals,
- ensure security,
- process transactions (including payroll and employee benefits), or
- facilitate the ability of other workers to work remotely.

The order also provides that: “Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations **and inform such workers of that designation.** Businesses and operations **must make such designations in writing, whether by electronic message, public website, or other appropriate means.** Such designations, however, may be made orally until March 31, 2020 at 11:59 pm.”

Accordingly, for workers who are not “critical infrastructure workers,” business must designate and advise workers who are necessary to conduct minimum basic operations of this designation. **We recommend that you advise the designated employee formally by email no later than March 31, 2020. You should also do this by paper proof as soon as possible that the**

employee is the designated minimum basic operations employee and therefore allowed to travel freely.

The order takes effect on March 24, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.

Changes and Developments Likely

Please be advised that federal, state and local legislation, regulations and guidance are forthcoming every day and that this is a changing landscape. The contents of this memorandum are likely to be affected by these ongoing changes.

Please feel free to contact us if you need help in determining whether any of your employees may be required to remain working under Michigan's Executive Order 2020-21.

Please also feel free to contact us if you would like to discuss any of these provisions. We will continue to update our perspective based on new developments (such as the Federal relief package) so check back with us.