Michigan Governor Expands COVID-19 Paid Medical Leave Rights and Anti-Retaliation Protections

April 6, 2020

On April 3, 2020, Michigan Governor Gretchen Whitmer signed Executive Order (EO) 2020-36, which expands the protections of Michigan’s Paid Medical Leave Act until the end of the declared state of emergency and prohibits retaliation against workers who are particularly at risk of infecting others in the workplace.

Under the executive order, the governor declares it the public policy of Michigan “that an employer shall not discharge, discipline, or otherwise retaliate against an employee for staying home when he or she is at particular at risk of infecting others with COVID-19.”

The executive order protects workers who continue to work in jobs necessary to sustain or protect life or who are otherwise exempt from Executive Order 2020-21, which requires all individuals to stay home. Those workers are allowed to stay home without discipline, discharge, or retaliation if they are particularly at risk of infecting others as defined below. In providing this explicit protection, EO 2020-36 asserts a new public policy in Michigan and encourages individuals particularly at risk of infecting others with COVID-19 to stay home from work.

The State also released a chart along with the executive order that helps explain when an employee may return to work.

An employee is particularly at risk of infecting others at work if the employee:

1. **Tests positive for COVID-19.** An employee testing positive must remain home, except for recreational activity or to the extent absolutely necessary to obtain food, medicine, medical care, or supplies, for seven days after being swabbed for their positive test or developing symptoms. The employee may not return to work until those seven days have passed and they have been symptom free for three days.

2. **Displays one or more of the three principal symptoms of COVID-19** (“fever, a typical cough, or a typical shortness of breath”). An employee showing symptoms must remain home, except for recreational activity or to the extent absolutely necessary to obtain food, medicine, medical care, or supplies, for seven days after developing symptoms. An employee may not return to work until those seven days have passed and they have been symptom free for three days. However, an employee who shows symptoms but receives a negative test result may return to work (provided another reason to stay home, such as close contact with a family member who tests positive, does not exist).
Had close contact with an individual who tests positive for COVID-19.

Employees having close contact with someone who tests positive for COVID-19 must remain home, except for recreational activity or to the extent absolutely necessary to obtain food, medicine, medical care, or supplies, for 14 days after their last contact with the sick person, and may return to work after that if they are symptom free. Having "close contact" with an individual means "being within approximately six feet of an individual for a prolonged period of time." Significantly, the State of Michigan has indicated that living with someone who tests positive would be considered close contact.

Had close contact with an individual who displays one or more COVID-19 symptoms. Employees living with or having close contact with someone who shows COVID-19 symptoms must remain home, except for recreational activity or to the extent absolutely necessary to obtain food, medicine, medical care, or supplies, for 14 days after their last contact with the individual showing symptoms and may return to work after that if they are symptom free (or sooner if the individual who was showing symptoms tests negative for COVID-19).

Employees in the above categories are protected from discipline, discharge, or retaliation during the above periods of time, as applicable, although some of that time may be unpaid. Likewise, employers may not discipline, discharge, or retaliate against employees who have been diagnosed with, or live with someone who has been diagnosed with, COVID-19 or are symptomatic or live with someone who is symptomatic because the employee did not comply with a requirement to document that the employee, or the individual with whom the employee had close contact, has one or more of the principal COVID-19 symptoms.

Notably, under the executive order, employers must treat employees particularly at risk of infecting others with COVID-19 as if they were taking medical leave under the Michigan Paid Medical Leave Act even if they do not have paid leave available to use. An employee in one of the above categories is entitled to unpaid leave beyond the limits established by the Michigan Paid Medical Leave Act until the above time periods have lapsed. However, employers may debit the time off from the employee’s accrued leave banks.

The executive order does not prohibit employers from discharging or disciplining an employee:

- "[w]ho is allowed to return to work . . . but declines to do so;"
- "[w]ith the employee’s consent; or"
- "[f]or any other reason that is not unlawful"

The executive order extends the protections of the Michigan’s Paid Medical Leave Act (for the above COVID-19 reasons) to employees working for employers with fewer than 50 employees and to periods of time after an employee has exhausted accrued paid medical leave under the act. Its mandates, however, do not apply to "[h]ealth care professionals,” “[w]orkers at a health care facility,” “[f]irst responders,” “[c]hild protective service employees,” “[w]orkers at child caring institutions,” “[w]orkers at correctional facilities,” to the extent they have had close contact with individuals who have tested positive for COVID-19 or who display one or more principal symptom. The executive order still applies to these workers if they test positive for COVID-19 or display one or more principal symptom.
The Department of Labor and Economic Opportunity has the authority to enforce the order in accordance with the enforcement mechanisms under the Paid Medical Leave Act. There is explicitly no private cause of action created by the executive order, but employees are encouraged to file a complaint with the Michigan Occupational Safety and Health Administration.

**Key Takeaways**

The practical impact of the executive order may be minimal to many employers. If an employee tests positive, lives with someone who tests positive, shows COVID-19 symptoms or lives with someone who does, it is in the employer’s interest to keep that person from coming to work in order to ensure a safe workplace. What is notable is the extension of Michigan Paid Medical Leave protection to affected employees.

Ogletree Deakins will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm’s [Coronavirus (COVID-19) Resource Center](https://www.ogletree.com/coronavirus) as additional information becomes available. Critical information for employers is also available via the firm’s [webinar programs](https://www.ogletree.com/Events/Webinars).