



## An Eye on the Future of COVID and the Workplace

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*Foster Swift Labor & Employment Law News E-blast*

March 25, 2021

Governor Whitmer issued Michigan's first COVID-19 Stay-at-Home Order approximately one year ago on March 23, 2020. On that day Michigan had 291 new COVID cases and a seven day average of 181 cases. As of March 23, 2021, Michigan had 4,546 new COVID cases and a seven day average of 3,554 cases. On the brighter side, approximately 25% of Michigan's population has been at least partially vaccinated, vaccination rates are increasing, some gathering restrictions are being loosened, and Michigan's seven day death average is down to 18 from a summer high of 145. The pandemic is not over, but in the spirit of hope, let's review some recent and potential upcoming developments in employment law as we escape the grip of COVID.

**MDHHS and MiOSHA Orders.** The current Michigan Occupational Safety and Health Administration (MiOSHA) Emergency Rules that require employers to have a policy prohibiting in-person work to the extent that employee work activities can feasibly be completed remotely **expires on April 14, 2021**. The current Michigan Department of Health and Human Services (MDHHS) March 19, 2021 order which requires that employer gatherings comply with the MiOSHA order **expires on April 19, 2021**. Current MDHHS written guidance advises that work should be completed remotely unless it is strictly necessary for an employee to be in person to complete their job duties. The MiOSHA and MDHHS orders and guidance may be extended or modified in the upcoming days or weeks.

**The American Rescue Plan Act.** On March 10, 2020, President Biden signed the American Rescue Plan Act (ARPA), which gave employers an **additional six months** to voluntarily allow their workforces to take **paid sick leave** under the Families First Corona Response Act. Under the ARPA some employers who voluntarily offer qualifying employees to take paid sick leave are eligible to receive tax credits until the end of September 2021. The ARPA also expanded the qualifying reasons for paid sick leave to include time off for obtaining a COVID immunization, to recover from an illness related to a COVID immunization, and in some cases to seek or await a COVID test result. The ARPA permits

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employers to receive a tax credit for qualifying wages paid from **April 1, 2021** through **September 30, 2021**.

Under the ARPA, qualifying leave under the **Emergency Family Medical Leave Act** (EFMLA) may be paid for a **full twelve weeks**, rather than the first two weeks being unpaid. The **qualifying reasons** for taking EFMLA have been **expanded** to include all of the reasons an employee can take emergency paid sick leave under the Emergency Paid Sick Leave Act. Before the ARPA became effective, the only qualifying reason for an employee to take EFMLEA was that the employee is caring for a son or daughter because the child's school has been closed or the childcare provider is unavailable due to COVID-19 precautions.

**Vaccine Requirements and Incentives.** Generally, employers may have a policy which requires employees to get a COVID vaccine, or a policy which offers financial incentives for employees to get vaccinated. However, before implementing either policy, employers should consult with an employment lawyer. Any mandatory or incentivized vaccination program must make accommodations for an employee's sincerely held religious beliefs against vaccinations, and any medical disabilities which exempt the employee from a vaccination.

We recommend that incentives not be so large as to potentially be deemed coercive. This area of the law is likely to change in the future so please seek further legal consultation.

**What Happens When We Are No Longer in a Pandemic?** While the end of the pandemic may seem far off on the horizon, it is not too soon to at least start thinking about some of the consequences when it ends.

For example, current workplace COVID-testing programs and employer questions about employee medical conditions are only permissible under the Americans with Disabilities Act (ADA) because of the existence of the pandemic. When the pandemic ends, employers will once again be bound by more strict ADA prohibitions on such testing and medical questions.

Many employees have become accustomed to working from home pursuant to remote work policies. In some cases, those remote arrangements have been successful. Employers should start thinking now about how to transition employees back to the regular workplace. In cases where an employee with a disability has worked successfully from home, the employee may make a new proposal to continue to work from home as a reasonable accommodation under the ADA.

The employment lawyers of Foster Swift Collins & Smith can help you with these and other COVID-related employment law issues:

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