

## Coronavirus and the Workplace

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### Part III: Leave

March 3, 2020

#### The Family and Medical Leave Act

Employers covered by the Family and Medical Leave Act ("FMLA") must allow an eligible employee to take leave due to a serious health condition of the employee or to care for the employee's close family member with a serious health condition. The Department of Labor, and at least one Michigan federal court, has taken the position that ordinary flu with no complications is not the sort of chronic serious health problem contemplated by the FMLA. While COVID-19 shares flu-like symptoms, it is known to cause severe illnesses, complications, hospitalizations, incapacitation, and even death. Thus, it is possible that infection by COVID-19 may involve a serious health condition, requiring covered employers to provide eligible employees with FMLA job-protected leave.

According to the Department of Labor's guidance, *Pandemic Flu and the Family and Medical Leave Act: Questions and Answers*, in dealing with pandemic influenza and providing FMLA leave for employees, employers should keep in mind that:

- Not all leaves related to a pandemic are protected by the FMLA. Leaves taken by an employee to avoid exposure to the pandemic influenza or to care for healthy children whose schools are closed because of the pandemic are not protected by the FMLA. However, employers should explore flexible leave policies for their employees in these circumstances.
- Employers can still require employees to obtain medical certification to support FMLA leave. However, considering the potential hysteria around a pandemic, it might be difficult for employees to see their doctors. As a practical matter, it might seem appropriate to relax the medical certification requirement during a pandemic.
- Employers may require an employee to do certain things before returning to work, such as providing a fitness-for-duty certification, undergoing a medical examination, or remaining symptom-free for a specific period of time before returning to work.
- Except where otherwise provided pursuant to a collective bargaining agreement, employers may require the employees to substitute paid sick and paid vacation/personal leave for unpaid FMLA-qualified leave.
- Policies and practices should be applied uniformly to employees in similar situations. Decisions should comply with laws prohibiting discrimination in the workplace based on a protected characteristic.

#### Michigan Paid Medical Leave Act

As of March 29, 2019, the Michigan Paid Medical Leave Act ("PMLA") requires Michigan employers that employ 50 or more individuals to provide eligible employees paid medical leave. Excluded from the definition of "eligible employees" are: those who are FLSA "exempt;" private-sector employees covered by a collective bargaining agreement; employees employed by the U.S. government, another state, a political subdivision of another state; an employee whose primary work location is in another state; temporary employees who work less than 25 weeks in a calendar year; and employees who work less than 25 hours per week on average.

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Eligible employees may take paid medical leave for qualified reasons, including:

- Physical or mental illness, injury, or health condition of the employee or his or her family member.
- Medical diagnosis, care, or treatment of the employee or the employee's family member.
- Preventative care of the employee or his or her family member.
- Closure of the employee's primary workplace by order of a public official due to a public health emergency.
- The care of his or her child whose school or place of care has been closed by order of a public official due to a public health emergency.
- The employee's or his or her family member's exposure to a communicable disease that would jeopardize the health of others as determined by health authorities or health care provider.

Accordingly, in a pandemic, eligible employees who work for covered employers may take paid leave for their own or their family members' sickness caused by pandemic influenza. Unlike the FMLA, there is no requirement that the leave be taken for a "serious health condition" under the PMLA. Eligible employees can also take paid leave for reasons not FMLA-qualified, such as to care for healthy children whose schools are closed because of the pandemic. However, leave provided under the PMLA is limited. In contrast to the 12-week (or 26-week for military family leave) leave allowed under the FMLA, the amount of paid family leave provided and used under the PMLA can be capped at 40 hours per year.

In requesting paid medical leave, eligible employees may be required to comply with the covered employer's usual and customary notice, procedural and documentation, but the employer must provide the employees with at least three (3) days to provide requested documentation (unlike the 15 days allowed under the FMLA). The employer may discipline or discharge an employee who fails to comply with the employer's usual and customary notice, procedural and documentation requirements.

This is the third of a four-part series. Please find parts 1, 2 and 4 here:

**Part I: Safety**

**Part II: Non-Discrimination**

**Part IV: Pay**

*This information is based on the facts and guidance available at the time of publication, and may be subject to change.*