

# COVID-19 GUIDE FOR EMPLOYERS

FAHEY SCHULTZ BURZYCH RHODES PLC

*In response to the growing threat posed by COVID-19, federal, state, and local governments have been forced to take drastic measures in the hopes of containing the virus's effects both on public health and the economy. With ever-increasing pressure for employees, guests, and customers to stay home and practice social distancing, the strain on Michigan businesses and employers has grown exponentially in the last week. While the government recommendations, orders, and new legislation regarding COVID-19 are likely to continue evolving, we hope this COVID-19 Guide for Employers can help your operation avoid some of the pitfalls the virus creates for Michigan employers. Read on for details about new [federal legislation](#) and some [other commonly asked questions](#).*

## **NEW FEDERAL FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

On March 14, 2020, the United States House of Representatives passed (and would later additionally amend on Monday, March 16) legislation providing for sweeping changes in federal employment law, at least for the duration of the COVID-19 outbreak. The United States Senate followed suit on March 18, 2020, and the President signed the bill into law on the very same day. It will take April 2, 2020. In light of these fast-approaching, heightened employer-provided leave obligations ushered in under the Families First Coronavirus Response Act ("Act"), we at FAHEY SCHULTZ BURZYCH RHODES want to provide you with some key take-aways on [\(1\) New Emergency Family Medical Leave Act \(FMLA\) Leave Requirements](#); [\(2\) Other Paid Leave Requirements](#); and [\(3\) Relief Available to Small Businesses and Health Care or Emergency Workers](#).

**New Emergency FMLA Leave.** The Act creates NEW temporary, emergency protections under the FMLA but only for employees impacted by COVID-19.

*Is My Business Required to Comply?*

Emergency FMLA provisions apply to all employers with 500 or fewer employees and does not provide minimum employee provisions like the remainder of the FMLA. This means that you are subject to its terms, even if you have less than 50 employees. *More on this later.*

*Which Employees are Eligible—and When?*

Emergency FMLA is available **only** to employees:

1. Employed at least 30 days *and*
2. Who are unable to work (or telework) because they must care for a son or daughter under the age of 18 whose school or place of care have been closed due to COVID-19 or whose child-care provider is unavailable due to COVID-19.

*How Much of this Emergency FMLA Leave is Available to Employees?*

Employees are entitled to up to 12 weeks of Emergency FMLA Leave or the end of the school or childcare closure.

*Is this All Paid Leave?*

Employers are not required to pay for the first 10 days of Emergency FMLA Leave, unless employees choose to use available paid leave during that time. The remainder of the leave must be paid at a rate of at least two-thirds (2/3) the employee's regular rate of pay based on the number of hours the employee is normally scheduled to work in a workweek. Employers are not required to pay more than \$200 per day and \$10,000 in the aggregate to an employee for this Emergency FMLA Leave. Paying employees on FMLA leave is a significant variance from traditional FMLA obligations and will require careful planning by employers.

Accrued paid leave **may be used** by employees instead of the 2/3rds pay described above. But an

employer may not *require* an employee to use or exhaust accrued leave banks before receiving Emergency FMLA pay; this, too, is a significant departure from traditional FMLA leave, too.

Tax credits are available to private employers required to provide paid Emergency FMLA Leave. Details are forthcoming.

*Am I Required to Hold a Job for Someone on Emergency FMLA Leave?*

No, if:

1. You employ less than 25 employees AND
2. The employee's position no longer exists when he or she is ready to return to work. (In this case, an employer must make a reasonable effort to find an equivalent position and, if there is no other equivalent position, make reasonable effort to inform the employee if an equivalent position becomes available.)

*Is there a Notice Requirement for the Employee??*

If the need for this Emergency FMLA Leave is foreseeable, the employee must provide notice "as is practicable." This could mean a phone call, an email, or a text!

**Additional (Non-FMLA) Paid Sick Leave Requirements.** The Act also creates a new category of **Emergency Paid Sick Leave** that must be made available to employees affected by COVID-19. This is IN ADDITION to the Emergency FMLA leave discussed above.

*Is My Business Required to Comply?*

Emergency Paid Sick Leave provisions apply to all public employers and private employers with fewer than 500 employees.

*Which Employees are Eligible—and When?*

Emergency Paid Sick Leave is available only when an employee is unable to work (or telework) because the employee is:

1. subject to federal, state, or local quarantine or isolation due to COVID-19;
2. advised by a health care provider to quarantine or isolate due to COVID-19;
3. caring for an individual who falls into one of the above two categories;
4. experiencing symptoms of COVID-19 and seeking medical diagnosis;
5. required to care for a son or daughter under the age of 18 whose school or place of care have been closed due to COVID-19 or whose child-care provider is unavailable due to COVID-19; or
6. "experiencing any other substantially similar condition" as specified by the Secretary of Health and Human Services.

There is no minimum length of employment before an employee is entitled to this leave.

*How Much Paid Leave, Exactly?*

Full-time employees are entitled to up to 80 hours of paid leave, while part-time employees are entitled to as many hours of leave as they would normally work in a two-week period.

The leave is paid at the higher of the employee's regular rate of pay, the federal minimum wage, or the state minimum wage, unless the leave is for care of a family member. In that case, the rate is two-thirds of that. Remember that Michigan's minimum wage of \$9.45 per hour exceeds federal minimum wage.

Emergency Paid Sick Leave benefits may not exceed \$511 per day and \$5,110 in the aggregate for leave related to the employee's own quarantine, isolation, or COVID-19 symptoms.

Benefits may not exceed \$200 per day or \$2,000 in the aggregate for care of another related to COVID-19 or care of a son or daughter for school or place of care closure related to COVID-19.

Tax credits are available to private employers required to provide Emergency Paid Sick Leave.

This Emergency Paid Sick Leave may be used *before* any accrued leave, and employers may not require that other accrued leave be used first. Presumably, an employee may also seek to utilize any other paid leave options after exhausting this new Emergency Paid Sick Leave. This means any paid leave employees are entitled to under your policies, any collective bargaining agreements, or state law are still available. (This includes Michigan's Paid Medical Leave if applicable!) Accrued leave is not to be reduced by the number of Emergency Paid Sick Leave hours provided.

Employees are not entitled to payouts for unused Emergency Paid Sick Leave upon separation of employment.

*What Notice of Intent to Use Emergency Paid Sick Leave?*

After an employee's first day on this Emergency Paid Sick Leave, you may require compliance with "reasonable notice procedures" in order to allow the leave to continue. If you already have standard call-in or documentation procedures, rely upon those!

*What Else Should I Know?*

Employers will be required to post a notice about this emergency leave in the place customarily used for posting notices of this kind. The Secretary of Labor will develop a notice within 7 days of the Act's passage. Stay tuned!

Unsurprisingly, employees may not be retaliated against for use of this Emergency Paid Sick Leave.

The availability of this benefit will end on December 31, 2020, unless Congress takes further action.

### **Relief Available to Small Businesses and Health Care or Emergency Workers.**

*I'm a Small Business. Is there any Relief for Me?*

The Act authorizes the Secretary of Labor to issue regulations that **may** create an exception for small businesses with fewer than 50 employees when the new requirements may

"jeopardize the viability of the business as a going concern." As of this writing, the Secretary of Labor has yet to issue such regulations.

It is important to note, however, that if you are not traditionally obligated to comply with the FMLA, because you employ fewer than 50 employees, you are exempt from employee civil suits for violation of the Emergency FMLA provisions. There is no similar current exemption as to the Emergency Paid Sick Leave provisions.

The Governor also recently announced that Michigan businesses are eligible to apply for SBA emergency loan funds and the Michigan Economic Development Corporation will facilitate loans and grants. Get more information about MEDC resources [here](#) and SBA loans [here](#). Stay tuned to our Corporate Practice for more on this.

*Can I Recoup Any of My Costs of Providing Emergency Paid Medical Leave and Emergency FMLA Leave?*

The Act does make tax credits available to private employers who provide these new types of leave. The tax credits are not available for public employers.

*I'm in the Health Care Field. How Can This Possibly Apply?*

The Act permits you to simply elect not to permit such employees to utilize Emergency FMLA. But it also authorizes the Secretary of Labor to issue regulations that **may** alter how this Emergency FMLA and Emergency Paid Sick Leave applies to health care workers and emergency responders. We'll keep you updated as that evolves.



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## OTHER FREQUENTLY ASKED COVID-19 QUESTIONS

*The following discusses common questions from employers stemming from the COVID-19 pandemic and related governmental activity. Further emergency changes to the law are anticipated and this FAQ is not intended to substitute for fact-specific legal advice. If you have specific questions, please contact us directly.*

### **My business is still open, and I need my employees on-site, but some of my employees are facing responsibilities related to the school and childcare closings tied to COVID-19. Can they just refuse to come to work? And if so, are they entitled to continuation of pay?**

*Yes, when the Families First Coronavirus Response Act (“Act”) becomes effective, parents may rely upon Emergency FMLA Leave and Emergency Paid Sick Leave to monitor their children if school or childcare is closed due to COVID-19. While the first two weeks of Emergency FMLA Leave are not required to be paid, employees may rely upon the Act’s other provision of Emergency Paid Sick Leave to cover that time and receive payment while off work. Employees are entitled to continue using Emergency FMLA leave for childcare and school closures related to COVID-19 for an additional 10 weeks. Those additional 10 weeks are paid, but there are limits on the amount of pay an employee is entitled to per day and in total. (See our discussion on the Emergency FMLA Leave topic above.)*

*Between Paid Sick Leave Time and Emergency FMLA leave for a Qualifying Need Related to a Public Health Emergency, the employee may miss a total of 12 weeks’ time for childcare related to COVID-19 school or place of care closure. This is in addition to paid leave available to employees per contract (like a collective bargaining agreement), employer policy, or state law (like Michigan’s Paid Medical Leave Act (“PMLA”) if you have more than 50 employees).*

*Note also that Governor Whitmer’s March 16, 2020 Executive Order 2020.10 (COVID-19) provides that employees who have “family care responsibilit[ies] as a result of a government directive” may be eligible for unemployment benefits as having left work involuntarily or on a leave of absence rendering them unemployed through April 14, 2020. This will most likely apply to those Michigan employees who have already been required to leave work before the federal paid leave requirements become effective in the next two weeks.*

### **My business is still open. What do I do if an employee or an employee’s family member contracts COVID-19?**

*You have an obligation to provide a safe work environment for the remainder of your employees. If an employee is diagnosed with COVID-19, you should absolutely not allow that employee to come to work. An employee ordered to be quarantined or isolated by a health care provider or one who has been diagnosed with COVID-19 is likely eligible for Emergency Paid Sick Leave under the Act. The same is true those who are caring for someone ordered to be quarantined, isolated, or is diagnosed with COVID-19.*

*If you employ 50 or more employees, Michigan’s PMLA protections would also provide leave for a COVID-19 diagnosis or for the care of a family member with COVID-19 diagnosis.*

*If your business is not required to provide leave under the Act or the PMLA, an employee diagnosed with COVID-19 will need to rely on your accrued leave policies, if any. As provided elsewhere in this Guide, unemployment benefits are likely also available to any who is diagnosed or is caring for a family member who has been diagnosed, with COVID-19 and can no longer work.*

## **Can my employees refuse to come to work due to fear of COVID-19?**

*Under the Occupational Safety and Health Act “OSHA,” as well as its Michigan equivalent, an employee may only refuse to work when work conditions create a risk of immediate death or bodily harm. OSHA Section 13(a); MiOSHA Section 31(2). Unless an employee qualifies for Emergency Paid Sick Leave under the Act (when it becomes effective) or has an auto-immune related disorder or disease that could qualify as a disability under the Americans with Disabilities Act (see below), you are not required to permit an employee to simply stay home out of fear, especially absent any known exposure or diagnosis amongst your staff.*

*Governor Whitmer issued an Executive Order regarding unemployment benefits as related to COVID-19. Employees who refuse to work due to COVID-19 are entitled to unemployment benefits if they: (a) are immunocompromised; (b) display symptoms of COVID-19; (c) have had contact with someone within the past 14 days who has been diagnosed with COVID-19; (d) are caring for someone diagnosed with COVID-19; or (e) if they have a family care responsibility as the result of government directive. These emergency unemployment changes are currently in effect and last until April 14, 2020.*

## **One of my employees recently shared that he has a disease that compromises his immune system. His work could be accomplished remotely, but we do not have a remote work policy in place. What should I do?**

*You may have multiple employees come forward requesting to work remotely on account of the employee being part of a demographic group that is particularly harmed by COVID-19. Obligations under the Americans with Disabilities Act (“ADA”) apply to employers with 15 or more employees; similar obligations under the Michigan Persons with Disabilities Civil Rights Law apply to employers with one or more employees.*

*The individuals protected by the ADA include employees with disabilities and employees perceived to have a disability. The ADA defines a disability as a physical or mental impairment that substantially limits one or more major life impairments. A compromised auto-immune system on account of disease would likely qualify a disability under the ADA protection, with diseases that impact the autoimmune system such as cancer and HIV-AIDS being recognized as disabilities. If an individual has a disability, employers are obligated to make reasonable accommodations to facilitate the disabled employee doing their job. Employers are not required to make accommodations that are an undue hardship on the employer.*

*Absent an employee having a disability, an employer is under no obligation to offer an individual a reasonable accommodation because the employee falls into another group impacted severely by COVID-19.*

*As an example, if an employer is approached by an employee who has a compromised immune system (thus, perhaps disabled), whose job can be accomplished remotely, allowing the employee to work remotely could be a reasonable accommodation. If the employee’s job required them to be at a location, such as a cashier, that work cannot be done remotely, so the request would not typically be viewed as a reasonable accommodation, but instead as an undue burden on the employer. Preferably, an employer should have a remote work policy in place before granting that accommodation to avoid abuse but consider developing one in response to a request to accommodate.*

*Under Governor Whitmer’s Executive Order 2020-10, employees will be eligible for unemployment benefits if they refuse to work due to self-quarantine or self-isolation due to being immunocompromised. This is true even if the quarantine or isolation is not ordered or directed by a public official or health care provider.*

**How does providing severance pay to employees I'm terminating or laying off impact the amount of their unemployment benefits or eligibility for those benefits at all?**

*Michigan employees are only considered "unemployed" for weeks in which they do not work and do not receive any "renumeration" from their former employer. Severance payments are considered "renumeration" under Michigan law. If you wish to provide your employees with both the severance and unemployment benefits, provide severance packages in a lump sum so that only a single week is impacted by the payment. If severance pay is given during a week in which the employee worked, they will likely be eligible for unemployment benefits the following week(s). If severance payments are stretched out across multiple weeks, however, the terminated employees will not be considered "unemployed" until the payments cease. MCL 421.48.*

**My business was required to close by an Executive Order, and I am making the impossible decision to layoff employees as a result. Will I be charged for their unemployment benefits?**

*Answer: No. Governor Whitmer's Executive Order on unemployment benefits is clear that employers who were required to close due to Executive Order will not be charged for unemployment benefits. If, however, you are a business not impacted by such an Order who is facing layoffs because of the ripple-effects of social distancing, the unemployment benefits received by your laid off staff are still chargeable to your account.*

**I own a restaurant or microbrewery that is temporarily shut down on account of COVID-19. During the shutdown, I fear for my employees' ability to pay their expenses. All of my employees make the FLSA minimum for tipped employees. During the closure can I employ them to clean my facility?**

*Answer: Under the Fair Labor Standards Act and applicable regulations, Employers may pay tipped employees less than minimum wage when doing tipped work ("Tip Wage Credit") 29 CFR § 531.59. When an employee is not engaged in tipped work, the employer cannot pay the employee below minimum wage. You can continue to employ your tipped employees during the closure; however, you must pay the minimum wage for non-tipped work. Keep in mind that a dramatic reduction in available hours could also qualify employees for unemployment benefits as an "underemployed" individual.*

**I had to furlough my FLSA exempt staff on account of my business being closed due to COVID-19. My salaried staff is paid weekly and the furlough is on a week-to-week basis. I have a dedicated team and we continue corresponding by email about plans for the business during this off period despite exempt staff not receiving their salary. Should I have any concerns?**

*Yes. When salaried employees are furloughed, the employer must implement a strictly enforced "no work" policy. If a salaried employee does work during a furlough, you may become obligated to pay the employee their salary for that period. 29 CFR § 541.602(a)(1) In other cases, actions as minor as reading an email have been determined to violate the no work rule.*

**I am reducing work hours at my business due to decreased demands. I plan on reducing the pay of both salaried and hourly employees accordingly to the reduction in schedule. What should I be concerned about?**

*Answer: First, consider whether you have an organized work force subject to a collective bargaining agreement, because that agreement may already impose a process or limitations on your ability to manage hours of work. If your hourly employees are not unionized, it becomes simpler. Hourly employees are entitled to wages only for the*

*hours they work. As an employer you may reduce hours to meet your business necessities. If employees become underemployed, they may seek unemployment benefits.*

*Reducing the salary of exempt employees is more complicated, as a reduction to their salary could result in loss of exempt status. Under the FLSA regulations, a salaried employee must make at least \$684 per week to qualify as an exempt employee and therefore not trigger any employer obligation to pay overtime compensation. 29 C.F.R § 541.300; 29 C.F.R. § 541.602. In the event of a business slowdown, providing advance written notice to the employee of the salary reduction is less likely to result in loss of the exemption. Exempt status may be lost if the employer makes the change to evade salary requirements or if the employer engages in short-term, day-to-day, or week-to-week deductions from the fixed salary.*

## **CONCLUSION**

While the law and employer obligations related to COVID-19 are rapidly evolving, FAHEY SCHULTZ BURZYCH RHODES is committed to providing you with the most accurate information possible as quickly as we can. While we have touched on many of the highlights concerning employer's legal obligations, if you have a specific labor or employment questioning arising out of COVID-19, please do not hesitate to contact us.



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