



# The Families First Coronavirus Response Act (FFCRA) – What Public Employers Need To Know

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# **The Families First Coronavirus Response Act (FFCRA) – What Employers Need To Know**

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**Sponsored by the Michigan Municipal League**

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# FFCRA Basics

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- Signed into law on Wednesday, March 18, 2020.
- Effective April 1, 2020.
- Two key issues for employers:
  - Emergency Paid Sick Leave Act providing 2 weeks paid sick leave.
  - Emergency Family and Medical Leave Expansion Act providing 12 weeks family leave (10 weeks paid).
- Expires on December 31, 2020.

# Emergency Paid Sick Leave Act

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- Covers all private employers with 500 or fewer employees, and all public employers.
- No minimum period of employment is required.
- Provides 2 weeks leave
  - 80 hours for full time employees;
  - Typical number of hours over 2 weeks for part time employees.
- These sick leave benefits are in addition to any sick, vacation, PTO benefits already offered by the employer.
- Sick leave has to be permitted first and cannot be combined with other leave benefits.

# Emergency Paid Sick Leave Act

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- Leave allows an employee to be absent for:
  - Subject to a Federal, State or local quarantine or isolation order related to COVID-19;
  - Advised by a health care provider to self-quarantine related to COVID-19;
  - Experiencing COVID-19 symptoms and is seeking a medical diagnosis;
  - Caring for an individual with items 1 or 2 above;
  - Caring for children if schools are closed or caregiver is unavailable because of ongoing public health emergency;
  - To address any other “substantially similar condition” identified by HHS in consultation with Treasury and Dept. of Labor.

# Emergency Paid Sick Leave Act

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- Payment rate for reasons 1-3.
  - Greater of federal minimum wage, state minimum wage, or regular rate.
  - Capped at \$511 per day (\$5,110 for the entire 10 days)
- Payment rate for reasons 4-6.
  - Greater of federal minimum wage, state minimum wage, or regular rate.
  - Capped at \$200 per day (\$2,000 for the entire 10 days).

# Emergency Paid Sick Leave Act

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- Exceptions to Required Paid Sick Leave:
  - Secretary of Labor may issue regulations to exempt “health care providers” and “emergency responders” from the definition of employer.
  - Secretary of Labor may issue regulations exempting small businesses (less than 50 employees) from requirement to offer leave for a child when school is closed if that paid sick time would jeopardize the viability of the business as an ongoing concern.
- Poster issued by Department of Labor for workplace.
- Regulations issued ASAP to provide some guidance regarding open questions.

# Emergency Family and Medical Leave Expansion Act

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- Covers all private employers with 500 or fewer employees, and all public employers.
- 30 days minimum period of employment is required.
- Provides 12 weeks leave
  - First 2 weeks leave is unpaid (but the intent is for the employee to use paid sick leave time to cover);
  - Next 10 weeks is paid at 2/3 of typical wage or salary rate, not to exceed \$200 per day or \$10,000 for the entire leave period.

# Emergency Family and Medical Leave Expansion Act

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- Paid family leave available only if an employee is unable to work or telework because of the need to care for children if schools are closed or daycare is unavailable as a result of a public health emergency.
- Leave is NOT available to recover from a COVID-19 diagnosis, or to self quarantine.
  - No blanket exemption for small employers.
  - Secretary of Labor can exempt health care providers, emergency responders, and small businesses with fewer than 50 employees if leave would jeopardize the business.
- In some cases, employer with fewer than 25 employees is excused of requirement to reinstate.
- No private cause of action for employers smaller than 50.

# Reimbursement of Paid Leave Benefits

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- Payments by private employers for paid sick time and paid leave are 100% reimbursed by the federal government.
- Mechanism to receive pay is a credit against quarterly social security tax remittances to the government.
- Public employers are NOT eligible for any reimbursement for paid leave benefits.

# Questions

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- If an employee used some of their FMLA allotment in the past year, are they still eligible for the full 12 weeks of family leave, or do they only get whatever is left of their normal 12 week leave period?
- Does an employer providing paid sick leave or family leave have to continue to pay the employer portion of health care benefits?
- If an employee is off on a paid sick leave or family leave, are they immune from layoff while on that leave?
- What is a "healthcare provider" under the Act that can be exempted?

# Questions

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- Can an employer require an employee to use paid time during the unpaid portion of the family leave?
- If both parents work for the same employer, are both eligible for the child care leave, either concurrently or consecutively?
- What certification can be required for leaves, whether for paid sick leave or paid family leave?
- Will the paid child care leaves remain available after schools would have closed anyway?
- Are employees who work outside of regular school hours eligible for paid child care leaves?

# COVID-19 ISSUES RELATED TO RETURN TO WORK

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- **Health and Safety Issues**

- Implement COVID-19 Preparedness / Response Plan

- Sources

- Governor Whitmer Executive Orders

- 2020-42 (In effect through April 30, 2020)

- New Order – To be determined

- State, county, and local health department orders

- OSHA - Guidance on Preparing Workplaces for COVID-19

- CDC - Guidance for Employers to Plan and Respond to COVID-19

# COVID-19 ISSUES RELATED TO RETURN TO WORK

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## Health and Safety Issues (cont.)

- Plan components
  - Protective safety measures
    - Employee screening
    - Social distancing
    - Hygiene – hand washing
    - Respiratory etiquette -covering cough, sneezes
    - Cleaning and disinfecting
    - Prohibit use of another employee's computer, etc.
    - Personal protective equipment (as required)

# COVID-19 ISSUES RELATED TO RETURN TO WORK

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- **Health and Safety Issues (cont.)**
  - Plan components (continued)
    - Designate a leader
    - Require sick employees to stay home
    - Remote work option
    - Return to work of
      - Employees off work with symptoms
      - Employees who tested positive
    - Employee awareness sessions
    - Supervisor training

# COVID-19 ISSUES RELATED TO RETURN TO WORK

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- **Fair Labor Standards Act**
  - Exempt employee working a reduced workweek
    - Entitled to full salary, but can
      - Reduce salary
      - Convert to hourly pay
  - Non-exempt employee working at home
    - Tracking hours
    - Policy/Agreement

# COVID-19 ISSUES RELATED TO RETURN TO WORK

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- **Americans With Disabilities Act**
  - Permitted Employer Actions – An employer can
    - Question employee why called in sick
    - Screen employees for COVID-19 symptoms
      - Including temperature
      - Before report to work is optimal
    - Require employees with symptoms stay home
    - Require fitness for duty certification upon return
    - Disclose information to those with a need to know

# COVID-19 ISSUES RELATED TO RETURN TO WORK

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- **Americans With Disabilities Act (cont.)**
  - Applicants
    - After conditional offer of employment, may
      - Screen for symptoms
      - Take temperature
    - If applicant has symptoms or tests positive, may
      - Delay start date
      - Withdraw offer if need applicant to start immediately

# COVID-19 ISSUES RELATED TO RETURN TO WORK

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- **Americans With Disabilities Act (cont.)**
  - Accommodations
    - Work from home; video conferencing
    - Place barriers between employees
    - Modify work schedule
    - Move employee workspace within the office
    - Extended leave
  - Discrimination – Adverse Employment Actions
    - Which employees called back to work
    - Work schedule and assignments
    - Termination

# COVID-19 ISSUES RELATED TO RETURN TO WORK

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- **Time Off Issues**
  - Families First Coronavirus Response Act
    - Paid sick time; Paid family leave
  - Family and Medical Leave Act
    - Employee's own serious health condition
    - Care for employee's spouse, child or parent with a serious health condition
    - FFCRA family leave included in 12 week calculation
  - ADA accommodation – additional leave time
  - Employer policies/collective bargaining agreement

# COVID-19 ISSUES RELATED TO RETURN TO WORK

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- **Employee Complaints/Protests**
  - Whistleblower Protection Act
    - Protection against adverse action
    - Elements
      - Reports or is about to report to a public body
      - Violation or suspected violation
      - Federal or state (including a political subdivision), law, regulation or rule

# COVID-19 ISSUES RELATED TO RETURN TO WORK

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- **Employee Complaints/Protests (cont.)**
  - Michigan Public Employment Relations Act
    - Applies to union **and** non-union employees
    - Prohibits adverse action for engaging in protected concerted activity
    - Protected concerted activity
      - Terms / conditions of employment = protected
      - With or on behalf of other employees = concerted
  - First Amendment – Freedom of Speech

# COVID-19 ISSUES RELATED TO RETURN TO WORK

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- **Employee Complaints/Protests (cont.)**
  - Do not take adverse action because employee spoke out
  - Address issue
    - Acknowledge, or
    - Refute
  - Comment not a shield against future adverse action
    - Need to show legitimate business reason
    - Considerations
      - Timing
      - Disparate treatment
      - Two level approval of employment action

# COVID-19 ISSUES RELATED TO RETURN TO WORK

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- **Title VII of Civil Rights Act and Elliott Larsen Civil Rights Act**
  - Harassment
  - Discrimination
    - Call-back or continuation of leave
    - Full time or part time
    - Conditions of employment
    - Termination

# COVID-19 ISSUES RELATED TO RETURN TO WORK

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- **Older Workers Benefit Protection Act**
  - Reduction in force (more than one employee) / severance
  - Release for employees over 40
    - 45 day review period
    - 7 day revocation period
  - Information to provide to employees 40 or older
    - The classification, unit or group of individuals covered
    - The eligibility factors
    - The job titles and ages of all selected
    - The ages of employees not selected

# COVID-19 ISSUES RELATED TO RETURN TO WORK

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- **Loose Ends:**
  - Unemployment Compensation Benefits
    - Part-time work
      - partial benefits (to a point, depends on weekly pay)
      - Impact on federal supplement
    - Refusal to return to work
  - Health Insurance Coverage Issues
    - Provided to employees working reduced hours?
    - Get insurance carrier written approval

# COVID-19 ISSUES RELATED TO RETURN TO WORK

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- **Loose Ends (cont.)**
  - Exhaustion of accrued leave prior to return to work
    - Allow employees to “borrow” time?
    - Enter into Payback Agreement
  - Update policies, as required
  - Collective bargaining agreement constraints
    - Management Right’s Clause
    - If right to change not maintained, required to negotiate changes of mandatory bargaining subjects

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# Speaker

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**Jim's** practice focuses on the defense and trial of employment cases in federal and state courts, as well as counseling, advising and training corporations regarding their obligations under state and federal employment laws. He represents a broad range of clients in a variety of employment and discrimination related matters, including representation in administrative proceedings before the EEOC, defense of lawsuits involving race, national origin, age, and sex discrimination, defense of sexual harassment claims, defense of disability and religious accommodation claims under state and federal law, and the defense and prosecution of claims for alleged violations of covenants not to compete. He also assists employers in the drafting and implementation of employment policies, as well as the negotiation of employment and severance agreements with highly placed corporate executives.

# Speaker

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Melvin Muskovitz, a member of Dykema's Labor and Employment Practice Group, represents public and private sector employers in federal and state courts, and before administrative agencies. He also devotes a significant portion of his time counseling and assisting employers, including the Michigan Municipal League, with respect to issues arising under state and federal employment laws. Prior to entering private practice, Mr. Muskovitz investigated and litigated unfair labor practice cases with the National Labor Relations Board and served as in-house employment and labor counsel for the City of Ann Arbor. As a result of his diverse background, Mr. Muskovitz provides a unique counseling perspective, combining his investigative and trial skills with hands-on in-house experience, allowing him to find creative and practical solutions to personnel disputes and complex legal issues without disrupting an employer's operations.

Mr. Muskovitz has been named in *The Best Lawyers in America* from 2009 to present in the practice area of Labor and Employment Law and named a "Lawyer of the Year" in Ann Arbor for Litigation - Labor and Employment by *Best Lawyers* for 2015, 2017 and 2019. For seminar and training programs Mel has presented, and articles he has written, visit:

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# Upcoming Webinars



Register for the upcoming webinars here:  
<http://www.mml.org/coronavirus>

- April 24, Noon – 1 pm: Considerations For Municipal Enforcement of Executive Order 2020-42
- April 27, Noon – 1pm: Monday Morning Live

