Understanding the FFCRA and If Your Small Business Employs Critical Infrastructure Workers Under The Stay Home, Stay Safe EO
Followed Ohio – effective midnight on 3/23.
Could have followed lead of states like CA, IL, and OH but chose to issue more restrictive order.
EO effective through April 13 – likely to be extended.
Stay Home, Stay Safe Executive Order

• “This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.”

• No business may require workers to leave home except to the extent that those workers are necessary to sustain or protect life or to conduct minimum basic operations.

• Workers who are necessary to conduct minimum basic operations – “those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, insure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.”

• For purposes of the order, workers who are necessary to sustain or protect life are defined as “critical infrastructure workers” as described in sections 8 and 9 of the EO.
So what is a critical infrastructure worker?

Workers described in 3/19/20 CISA guidance

“. . . those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020 on the COVID-19 response . . .”

- Workers within critical infrastructure sectors

* Healthcare/public health
* Energy
* Public works
* Critical Manufacturing
* Chemical
* Financial services
* Law enforcement, public safety, first responders
* Water and Wastewater
* Communications and information technology
* Hazardous materials
* Defense industrial base
* Food and agriculture
* Transportation and logistics
* Other community-based government operations and essential functions
- **Workers at designated suppliers, distribution centers, and service providers**

  Workers at designated suppliers, distribution centers, and service providers whose continued operation is necessary to enable, support, or facilitate the work of another business’s critical infrastructure workers.
  - “. . . only to the extent those workers are necessary . . .”
  - Abuse of discretion subject to “sanctions to the fullest extent of the law.”

- **Workers at additional suppliers, distribution centers, and service providers**

  Workers at additional suppliers, distribution centers, and service providers who have in turn been designated by designated suppliers, distribution centers, and service providers.
  - “. . . only to the extent those workers are necessary . . .”
  - Abuse of discretion subject to “sanctions to the fullest extent of the law.”
- **Workers in the insurance industry** – Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.
- **Child care workers** - Child care workers to the extent necessary to serve the children or dependents of critical infrastructure workers, including individuals who have arranged to care for those children or dependents.
- **Necessities of life workers and volunteers** – Workers and volunteers for businesses or operations that provide food, shelter, and other necessities of life for economically disadvantaged individuals, individuals who need assistance as a result of this emergency, and people with disabilities.
- **Workers performing critical labor union functions**
### Executive Order FAQ’s

**Website** - [https://www.michigan.gov/coronavirus/](https://www.michigan.gov/coronavirus/)

<table>
<thead>
<tr>
<th>Critical infrastructure</th>
<th>Not critical infrastructure</th>
<th>Some critical infrastructure</th>
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<tbody>
<tr>
<td>Work to prevent severe psychological harm; repairing homes; food service for students; laundromat/coin laundry employees; hardware stores; members of the media</td>
<td>Bottle-return service; RV sales, manufacturing, and distribution; golf courses; tobacco shops, cigar bars, vape shops, and hookah lounges; hunting, shooting, or target sports facilities/clubs; car washes; pool or spa stores; massage parlors; furniture deliveries; craft/hobby stores</td>
<td>Car dealerships, childcare workers; child custody and visitation; bicycle shops; real-estate agents, brokers, and real estate service employees; construction; landscaping, lawncare, tree service, irrigation, and related outdoor maintenance companies; pest-control companies</td>
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Other guidance

- Guidance from state departments and agencies
- Governor’s public statements
Gray areas

- Meaning of broad language in 3/19/20 CISA guidance memo
- Use of other CISA guidance
- Updated CISA guidance memo
- Letters from customers
- Employee relationships
Related requirements

- Minimum basic operations employee letter
- Critical infrastructure worker letter
- Supplier letter
- COVID-19 protocols
Enforcement

- Violation is misdemeanor – up to $500 fine or 90 days in jail
- Attorney General guidance and actions
- State and local law enforcement
Emergency Paid Sick Leave Act

Applies to all employers with under 500 employees.

• Full-time and part-time employees.
• Anywhere in the United States (including DC, U.S. territories or possessions).
• Employees on leave.
• Temporary employees.
• Day laborers.
Emergency Paid Sick Leave Act

The normal FMLA “integrated employer test” applies to determine if related employers are counted as a single employer.

- Interrelation of operations.
- Common management.
- Centralized control of labor relations.
- Common ownership and financial control.
Emergency Paid Sick Leave Act

Secretary of Labor may issue regulations exempting employers with less than 50 employees, if it is determined that the obligation would “jeopardize the viability of the business as an ongoing concern.”

A small business may claim this exemption if “an authorized officer” of the business makes one of three determinations:
Emergency Paid Sick Leave Act

- Pay for sick leave or expanded FMLA would result in expenses and financial obligations that exceed available business revenues and cause the small business to cease operating at a minimal capacity, or

- Absence of the employee(s) requesting leave entails a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities, or

- There are not sufficient workers able, willing, qualified, and available at the time and place needed, to do the work of the employee(s) requesting leave, and that work is necessary to operate at a minimal capacity.
**Emergency Paid Sick Leave Act**

Requires employers to provide paid sick time to all employees (including new hires and part-time employees) who are unable to work or telework for specified reasons related to COVID-19.
An employee is entitled to emergency paid sick leave if they are:

- Subject to a federal, state or local quarantine or isolation order related to COVID-19.
- Advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- Experiencing symptoms of COVID-19 and seeking a medical diagnosis.
Emergency Paid Sick Leave Act

- Caring for an individual who is subject to a quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

- Caring for a son or daughter of the employee if the school or place of care of the son/daughter has been closed, or their child care provider is unavailable due to COVID-19 precautions.

- Experiencing any other “substantially similar condition” as specified by the Secretary of Health and Human Services (in consultation with the Secretary of the Treasury and the Secretary of Labor).
Is Governor Whitmer’s stay at home order a quarantine or isolation order that triggers paid sick leave?

- Guidance from the Department of Labor indicates that it is not.

- If an employer is closed “you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it was required to close pursuant to a Federal, State or local directive.”

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Emergency Paid Sick Leave Act

• Full-time employees (those normally scheduled for 40 hours or more per week) are eligible for 80 hours of paid leave.

• Part-time employees (those normally scheduled for less than 40 hours per week) are entitled to leave in an amount equal to the average number of hours they work over a two week period.

• Calculating pay.
Emergency Paid Sick Leave Act

• Employees are entitled to receive full pay, capped at $511 per day/$5,111 total, for time missed due to government order or their own health reasons.

• Employees are entitled to receive 2/3 pay, capped at $200 per day/$2,000 total, for time missed due to care for a child or another individual.
Emergency Paid Sick Leave Act

This paid sick leave:

- Does not need to be paid out at termination.
- Does not need to be carried over into next year.
Emergency Family and Medical Leave Expansion Act

Applies to companies with fewer than 500 employees:

• The normal FMLA “integrated employer test” applies to determine if related employers are counted as a single employer.

• As with sick leave, employers with less than 50 employees can be exempt, if it is determined that the obligation would “jeopardize the viability of the business as a going concern”.

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Emergency Family and Medical Leave Expansion Act

Applies to employees who have been employed for 30 or more calendar days (full or part time) and have a “qualifying need.”

CARES Act Update:

Also applies to employees (1) laid off not earlier than March 1, (2) worked for the employer 30 of last 60 days before layoff, and (3) are subsequently rehired.
Emergency Family and Medical Leave Expansion Act

“Qualifying Need”

• Unable to work (or telework) due to a need to care for the employee’s minor child if, due to COVID-19:
  – The child’s elementary or secondary school has been closed.
  – The child’s place of care has been closed.
  – The child’s care provider is unavailable.
Emergency Family and Medical Leave Expansion Act

• Employees can take the first 10 days of leave as unpaid leave.

• Employees may elect to use any accrued vacation, personal, medical or sick leave instead of taking unpaid leave.
Emergency Family and Medical Leave Expansion Act

After the first 10 days, the employer must provide at least partial paid leave for each additional day of qualifying leave.

- Must be at least 2/3 of the employee’s regular rate of pay, multiplied by the number of hours the employee would otherwise have been scheduled to work.
- Credit is capped at $200 per day/$10,000 total.
Emergency Family and Medical Leave Expansion Act

- Employees taking leave are entitled to job restoration, like any other FMLA leave.

- Small employers (less than 25 employees) may be able to deny job restoration if, at the end of the leave:
  - The position the employee held no longer exists due to conditions caused by COVID-19;
  - The employer makes reasonable efforts to restore them to an equivalent position; and
  - If those efforts fail, the employer makes reasonable efforts to contact the employee to offer an equivalent position that becomes available within 12 months.
Can this emergency FMLA leave be taken intermittently?

• Teleworkers: Allowed, if employer agrees

• In-person workers: Not allowed, except for care for a child whose school or place of care is closed, or childcare provider is unavailable (and, again, if employer agrees).
FFCRA Documentation

- Paid Sick Leave: “as specified in applicable IRS forms, instructions, and information.”
- Expanded FMLA: employers may also require proof of closure of school, place of care, or unavailability of care provider
  - Posted on website
  - Published in a newspaper
  - Provided via email
Thank you

COVID-19

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