

Takeaways– Can Employees Avoid Work, Avoid Discipline and Get Paid?

Part One: Recent Developments

- Governor Whitmer’s Executive Order 2020-42 mandates that businesses continuing in-person work develop a “**COVID-19 preparedness and response plan**,” consistent with the Occupational Health and Safety Administration’s “Guidance on Preparing Workplaces for COVID-19.”
 - This OSHA Guidance can be found [here](#).

Contact any member of the Workplace Law Group to develop a plan for your workplace.

- Plan should be maintained at worksites and address the following:
 - Implementation of prevention efforts and workplace controls, including cleanliness and social distancing techniques;
 - Establishment of procedures to identify and isolate sick and/or exposed employees, including self-monitoring recommendations, daily employee screenings, and return-to-work processes; and
 - Summary of workplace flexibilities and potential benefits available to employees affected by COVID-19.
- OSHA Guidance requires that employers classify their workforce based upon the potential for exposure to COVID-19. This classification may necessitate additional protective and/or preventative measures. Employees will fall into one of four categories.
 - **Low Risk** workers are those who do not frequently and/or closely interact with the general public and maintain social distancing among coworkers (e.g., critical infrastructure workers performing manufacturing tasks at least six feet apart).
 - Supplemental measures are generally not essential for low risk workers.
 - **Medium Risk** workers are those who frequently and/or closely interact with the general public (e.g., grocery store workers).
 - Employers of medium risk employees should install physical barriers where feasible, offer face masks to ill employees, limit employees’ exposure to the general public, and minimize face-to-face contact.
 - **High Risk** workers are those who have a high potential for exposure to known or suspected sources of COVID-19 (e.g., healthcare workers exposed to known or suspected COVID-19 patients).

- Employers of high risk employees should provide appropriate personal protective equipment and comply with all infectious-disease requirements for healthcare facilities.
- **Very High Risk** workers are those who have a high potential for exposure to known or suspected sources of COVID-19 during specific medical, postmortem, or laboratory procedures (e.g., healthcare workers performing aerosol-generating procedures on known or suspected COVID-19 patients).
 - Similarly, employers of very high risk employees should provide appropriate personal protective equipment and comply with all infectious-disease requirements for healthcare facilities.

Contact any member of the Workplace Law Group to determine the appropriate classification(s) for your workers.

- **The Worker Health Coverage Protection Act**

- This Bill, sponsored by House Democrats and introduced by Rep. Debbie Dingell (D-MI), Rep. Steven Horsford (D-NV), and Rep. Bobby Scott (D-VA), promises to subsidize COBRA coverage for 15 months or until workers enroll in another health insurance plan.
- It also promises that workers will get access to the Affordable Care Act marketplace through a "special enrollment period" after their subsidized COBRA premiums run out.
- A House Education and Labor Committee staffer has confirmed that Democrats will push to include the measure in the next Coronavirus relief package after Congress' break ends May 4.
- If the Bill becomes law, **the federal government would cover 15 months** of premiums for workers who stay on their employer's health plan after a layoff, furlough or reduction in hours that occurred on or after March 1.
- More information on the Bill can be found here: <https://www.congress.gov/bill/116th-congress/house-bill/6514?r=1&s=1>.

Monitor Bodman's COVID-19 Response Team website for updates.

Part Two: How are Critical Infrastructure Workers Avoiding Work?

- **Unemployment Compensation Benefits**
 - **Executive Order 2020-24** expands eligibility for benefits.
 - Eligibility is expanded to include individuals who are immunocompromised, displaying COVID-19 symptoms, having contact in the last 14 days with a COVID-19 diagnosis, needing to care for someone with a COVID-19 diagnosis, or subject to a family care responsibility as a result of a government directive.
 - **The CARES Act** increases the amount and duration of benefits.
 - Per agreement between Governor Whitmer and the Department of Labor, Michigan employees approved for unemployment compensation benefits are entitled to as much as \$962/week for as many as 39 weeks.
- **Families First Coronavirus Response Act ("FFCRA")**
 - Paid leave is available under the **Emergency Paid Sick Leave Act ("EPSLA")** and **Emergency Family and Medical Leave Expansion Act ("EFMLA")**.

- EPSLA
 - Employees may seek up to two weeks (i.e., 10 business days) of paid leave for the following reasons:
 - Subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
 - Advised to self-quarantine due to concerns related to COVID-19;
 - Experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 - Caring for an individual subject to a quarantine or isolation order or advised to self-quarantine due to concerns related to COVID-19;
 - Caring for a son or daughter whose school or childcare provider is closed or unavailable due to COVID-19 precautions; and
 - Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.
 - Paid leave for reasons 1, 2, and 3, above, is paid at the employee's regular rate of pay, capped at \$511/day. Paid leave for reasons 4, 5, and 6, above, is paid at a rate equivalent to two-thirds of an employee's regular rate of pay or minimum wage, whichever is greater, capped at \$200/day.
- EFMLA
 - Employees may seek up to twelve weeks of leave to care for a son or daughter whose school or childcare provider is closed or unavailable due to COVID-19 precautions.
 - The first two weeks of leave, which run concurrently with the EPSLA leave, may be unpaid; the remaining ten weeks of leave are paid at a rate equivalent to two-thirds of an employee's regular rate of pay or minimum wage, whichever is greater, capped at \$200/day.
- **Executive Order 2020-36**
 - Anti-retaliation protections for those suffering COVID-19 symptoms or exposed to COVID-19 via close contact.
- **Family and Medical Leave Act ("FMLA") and Americans with Disabilities Act ("ADA")**
 - FMLA
 - Employees may be entitled to unpaid FMLA leave if their absence is related to their own serious health condition or that of a family member.
 - COVID-19 may constitute a serious health condition where "complications arise."
 - ADA
 - Employers must also be mindful of their obligations under the ADA.
 - Specifically, if an employee requests an accommodation because of a condition that may be complicated by COVID-19 (e.g., cystic fibrosis, emphysema, COPD), then employers must engage in the interactive process to provide a reasonable accommodation.
 - Reasonable accommodations may include, for example, remote work or an alternative schedule.

Contact any member of the Workplace Law Group to discuss how these laws and regulations affect your employees.

Part Three: Avoid Work, Avoid Discipline and Get Paid?

	Return to Work	Stay Home	Work Part Time
Pay	\$15 x 40 = <u>\$600</u>	<u>\$962</u> unemployment likely, even if an employee is just “afraid” to work	Up to \$542 in wages per week + \$1 state unemployment + \$600 in federal unemployment = up to <u>\$1,143</u> per week
Healthcare	Receives	Receives for ???	Receives
Retirement, etc.	Receives	None	Receives
Other	Long-term security	No long-term security	Long-term security

- Because too many employees may fall into the “Stay Home” category, consider the following to restart your workforce:
 - Notice of critical/essential status
 - Strong messaging regarding consequences
 - Denying unemployment
 - Application of attendance policies
 - Loss of health insurance
 - FFCRA leave only if satisfactory documentation is provided
 - Notify employees that EFMLA diminishes FMLA
 - Safety measures
 - Returning means security
 - Financial benefits for returning

Contact any member of the Workplace Law Group to discuss the best incentives to keep your workforce working, and what to do in response to employees’ refusals to work.

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