



# Whitmer Narrows COVID-19 Leave Protections For Michigan Employees

Insights

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Governor Gretchen Whitmer just issued an executive order that limits the availability of job-protected leave moving forward only to those employees who pose a “particular risk of infecting others with COVID-19.” She did this by narrowing the definition of which COVID-19 symptoms – whether standing alone or in combination with others – will trigger COVID-19 leave protections under Michigan law. At the same time, her August 27 executive order is not retroactive in nature and is still more protective than [CDC guidelines](#) with regard to when an employee may return to work. What do Michigan employers need to know about Executive Order 2020-172 and what they can and cannot do to return employees to work?

## Michigan Law’s New Requirements

Michigan employers of all sizes cannot discharge, discipline, or retaliate against their employees for staying home from work while they pose a “particular risk of infecting others.” During the time the covered employee is home, the employer must treat them as though they are on leave under the Michigan Paid Medical Leave Act. If an employee runs out of paid leave (or has none), the employer must provide them with unpaid leave during their absence for as long as they pose a “particular risk of infecting others with COVID-19.” Note that Emergency Paid Sick Leave under the Families First Coronavirus Response Act applies separately from EO 2020-172 and leave offered under Michigan’s PMLA.

Whether someone is considered to pose a particular risk of infecting others with COVID-19 under EO 2020-172 depends on the order’s vital definition of **“the principal symptoms of COVID-19.”** The order defines that phrase as occurring in only two scenarios: (1) an employee has either a fever, an uncontrolled cough, or shortness of breath that cannot be explained by a known medical or physical condition; or (2) **at least two** of the following: loss of taste or smell, muscle aches (“myalgia”), sore throat, severe headache, diarrhea, vomiting, or abdominal pain, that cannot be explained by a known medical or physical condition. In sum, an employee is no longer entitled to protected leave under Michigan law if they simply exhibit any of the COVID-19 symptoms in isolation (for example, just a sore throat).

With that definition in mind, the order distinguishes between two sets of broad circumstances for when an employee poses a “particular risk of infecting others with COVID-19.” First, employees are protected from adverse employment action because they had to stay home after testing positive for

COVID-19 or display “the principal symptoms of COVID-19,” but only until three milestones are reached:

- 24 hours have passed since the resolution of fever without the use of fever reducing medications;
- 10 days have passed since the symptoms first appeared or since the employee was swabbed for the test that yielded the positive result; and
- other symptoms have improved.

Further, the order does not allow an employer to order an employee back to work upon receiving a subsequent negative COVID-19 test. This is more restrictive than the CDC guidelines that allow return after two consecutive negative tests taken 24 hours apart.

Second, employees are protected from adverse employment action because they had to stay home after coming into close contact with someone who either tested positive for COVID-19 or displays “the principal symptoms of COVID-19,” *but only until* either 14 days have passed since the last close contact (within six feet for 15 or more minutes) or the symptomatic individual receives a negative COVID-19 test. This “exposure risk” set of circumstances does not apply to healthcare professionals, first responders, workers at adult foster care facilities, child protective services employees, or those who work at healthcare facilities, daycares, and correctional facilities. Note again that an employee cannot be ordered back to work upon receiving a negative COVID-19 test result.

In good news for employers, the order removed the predecessor order’s prohibition on employers requiring employees to provide documentation to prove they or anyone they were in close contact with were exhibiting COVID-19 symptoms to substantiate their protected leave. Therefore, employers may now request documentation from employees to substantiate their protected leave under EO 2020-172. This is a huge change that should enable employers to better police leave abusers.

## Conclusion

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips’ Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in our [Detroit](#) office, or any member of [our Post-Pandemic Strategy Group Roster](#).

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