



Michigan Governor Creates Broad Employment Protections During COVID-19 Crisis

Insights

4.04.20

Michigan Governor Gretchen Whitmer just issued an executive order aimed at protecting the jobs of those employees forced to shelter-in-place because they pose a “particular risk of infecting others with COVID-19.” However, [the April 3 order](#) creates many practical hurdles for employers. The order prevents employers from requesting proof that the employee posed such a risk, opening the door for potential confusion and abuse. In the future, the order could also serve as the basis for a number of wrongful discharge claims.

What The Order Says

Michigan employers of all sizes cannot discharge, discipline, or retaliate against their employees for staying home from work while they posed a “particular risk of infecting others.” During the time the covered employee is home, the employer must treat them as though they are on Michigan Paid Medical Leave Act.

If an employee runs out of paid leave (or has none), the employee must be provided unpaid leave for their absence for as long as they pose a “particular risk of infecting others with COVID-19.” The order explicitly prohibits employers from requiring employees to provide documentation to prove they or anyone they were in contact with were exhibiting COVID-19 symptoms to substantiate their protected leave. Because of this, employers will essentially have to trust whatever their employee says, thus opening up this type of leave for potential abuse and confusion.

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 displaying one of the symptoms, but only *until* three days have passed since the symptoms resolved themselves *and* seven days have passed since symptoms appeared or the employee was swabbed for COVID-19 (and tested positive). This “personal risk” set of circumstances ceases to apply (i.e., an employer is free to order the employee to report for work) once the employee tests negative for COVID-19.

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 one of the COVID-19 symptoms, *but only until* either 14 days have passed since the last close contact or the symptomatic individual receives a negative COVID-19 test. This “exposure risk” set of

circumstances does not apply to healthcare professionals, first responders, child protective services employees, or those who work at healthcare facilities, daycares, and correctional facilities.

Finally, the order contains two more important provisions. The order defines the symptoms of COVID-19 broadly as “fever, atypical cough, or atypical shortness of breath.” The order, however, does not explain what is meant by “atypical.” Further, the order says it will stay in force until the end of the declared states of emergency and disaster (i.e., not at the end of the shelter-in-place order). This simply means that this order will most likely affect employers who reopen operations once the shelter-in-place order has been lifted.

What The Order Means

The main short-term issue with the order is that employees may consistently report being symptomatic without needing to provide any documentation they ever exhibited the symptoms. However, the long-term issue of possible lawsuits is more concerning considering the state of the economy and significant increase in layoffs and terminations. The order purposefully declares the public policy of the state of Michigan is that employers not take an adverse employment action against those who pose a particular risk of infecting others.

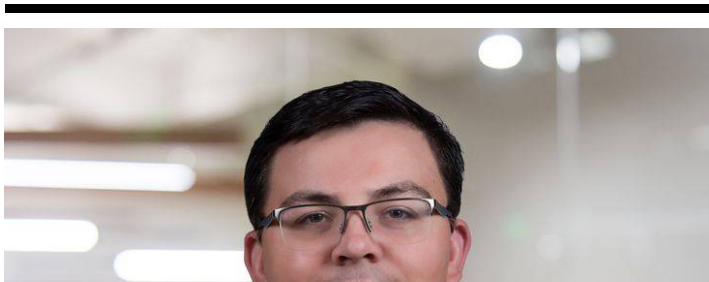
As a result, former and laid off employees may seek to assert a wrongful discharge claim, especially considering the dour foreseeable economic and hiring conditions. The governor’s order is well intentioned, but will almost certainly create problematic situations for many employers trying to keep their businesses afloat during this very trying time.

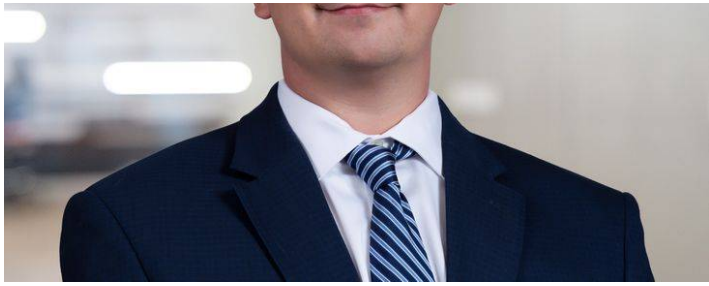
Conclusion

We 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 COVID-19 Taskforce](#). You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#) and our [FP Resource Center For Employers](#), maintained by our Taskforce.

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