

COVID-19 – FAQs for Employers

March 24, 2020

At GMH, we are committed to partnering with you in this rapidly changing situation. We know you are receiving a lot of information right now and we, as a business and employer, sympathize with the difficulties involved in sorting through the information and making the best decisions possible. As the number of positive COVID-19 cases grows, and the government response is ever-changing, this FAQ sheet is our best effort to address your most frequently asked questions. You can send other questions to any member of our COVID-19 Task Force, who are identified below.

1. Essential or Non-Essential?

Under Michigan's Governor's "Stay Home, Stay Safe" Order, "No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life (defined as critical infrastructure workers) or to conduct minimum basic operations." Most common industries that employ critical infrastructure workers include:

- Law enforcement, public safety, and first responders
- Health care
- Grocery stores
- Pharmacies
- Banks
- Gas stations
- Carry-out and drive-through restaurants

Further definitions can be found in the guidance from the Director of the U.S. Cybersecurity and Infrastructure Security Agency, which is available on our website. Also, and importantly, not all workers in these industries are critical infrastructure workers, and some workers in these industries would need to remain home.

The Governor was clear that we are not to play fast and loose with what is essential and non-essential. But the spirit of the Order is to supply workers to fill roles necessary to keep people alive and well during this period of time. Many of our clients are vendors to businesses providing services necessary for sustaining or protecting life, which may be exempt under the Order. If your business falls into this category, contact us and we will help you navigate the situation.

2. Designating Employees Necessary to Conduct Minimum Basic Operations.

The Order allows businesses to give certain employees who are “necessary to conduct minimum basic operations” access to facilities. These employees are those who:

- Maintain the value of inventory and equipment
- Care for animals
- Ensure security
- Process transactions (including payroll and employee benefits)
- Facilitate the ability of other workers to work remotely

The Order requires companies to make such designations, in writing, “whether by electronic message, public website, or other appropriate means.” It is unclear to us how or to whom businesses are to send such electronic messages or what “appropriate means” are contemplated under the Order. For now, we advise posting the names of individuals who a company deems necessary to conduct minimum basic operations on your website. It need not be on the first page; rather, requiring a click through to a second page via a COVID-19 “button” should satisfy the Order’s requirements; we also recommend e-mailing the designated workers a letter confirming their involvement. We anticipate that the State will offer further guidance on this reporting requirement before March 31, 2020, the deadline for making the in-writing designation. We will report on such guidance upon its release.

3. Layoff or Emergency FMLA/sick leave?

The Governor’s Order does not require individuals to quarantine, so in our opinion, the Emergency Family and Medical Leave Expansion Act (EFMLEA) and Emergency Paid Sick Leave Act (EMPSLA) do not apply to employees who must remain home under the Order. Details on the Emergency FMLA and sick leave laws are available on our website.

Businesses should therefore decide whether to lay workers off to comply with the Order or to wait for the stimulus bill currently pending in the United States Senate. The bill is incomplete, but we understand that it may include a provision granting government loans to businesses with fewer than 500 employees and if those businesses can later prove that they used the funds to meet payroll, rent, and other operational obligations without laying off employees, the loans are forgiven. We are watching the progress of the bill and will report on it as soon as information becomes available. In the meantime, if your organization can wait to lay off employees, consider waiting. The bill could pass anytime.

Notwithstanding the potential relief under this bill, the “Stay Home, Stay Safe” Order remains in effect, meaning that although you may decide not to lay off some of the workers, they may still not be allowed to come to the office unless they fall under the exceptions described in the Order.

4. Tax Credits under EFMLEA and EPSLA

For businesses with employees who qualify for leave under the EFMLEA or EMPSLA, the federal government has promised relief in the form of tax credits. The IRS and Department of Labor issued IR-2020-57 indicating there will be additional guidance issued this week regarding the

process of companies being reimbursed for the amount of the tax credits payable to businesses who pay for this leave. The initial guidance suggests that companies can retain payroll taxes equal to the credit amount and that if the amount of credit exceeds the required deposit, an accelerated payment form can be filed. The IRS expects to process the refund requests in two weeks or less. We will report on the guidance and forms as soon as they are released.

5. EEOC Guidance on Temperature Screenings

For employers with essential workers, the U.S. Equal Employment Opportunity Commission (EEOC) recently updated its guidance to accommodate temperature screenings. Ordinarily, such measures would be unlawful under the Americans with Disabilities Act (ADA), but “because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees’ body temperature.” However, the EEOC cautions employees “that some people with COVID-19 do not have a fever.” In other words, implementing temperature screenings may identify those who have a fever (but not necessarily COVID-19) such that an employer may isolate or send the employee home, but it’s not a perfect screening device.

When assessing whether temperature screenings are appropriate, employers should consider:

- Public health recommendations for their specific location. Employers should reference the measures recommended by the Center for Disease Control and Prevention (CDC), State, and local health agencies. The CDC published “community mitigation plans” that vary by locality: <https://www.cdc.gov/coronavirus/2019-ncov/community/index.html>.
- Public health recommendations for their specific industry. Employers should consider whether the CDC, State, or local health agencies have issued recommendations for their specific industry.

If an employer intends to implement temperature screenings, it should:

- Conduct screenings in a private area
- Conduct screenings in a way that doesn’t allow other employees to ascertain who may have a fever
- Understand that HIPAA will apply to the screening results
- Advise all employees with a fever of 100.4°F/38°C or higher to stay home, and comply with the recommendations of the CDC, State, and local health agencies.

GMH’s Coronavirus Task Force is here to answer your questions. While GMH is complying with Governor Whitmer’s “Stay Home, Stay Safe” Order, we are available to assist you. Please contact any of the below lawyers for more Coronavirus support:



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