



4151 Okemos Road
Okemos, MI 48864 USA

Township Law *E-Letter*

Back to Work in the COVID-19 Era

With the Michigan Stay at Home Order being lifted and resumption of operations pursuant to Michigan Executive Order 2020-114, townships now face new challenges as they bring employees back to work. Employees may have concerns or fears about reopening plans, medical challenges, or family care obligations that will impact ability (or willingness) to return to work. Some of the most frequent challenges with return to work are discussed below.

PAID SICK LEAVE OR PAID FAMILY LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (“FFCRA”)

Duration. The FFCRA created two categories of leave to facilitate workers adversely impacted by COVID-19: 1) FFCRA Paid Sick Leave and 2) FFCRA Paid Family Leave. FFCRA Paid Sick leave grants eligible full-time employees up to two weeks (no more than 80 hours) of paid leave and part-time employees as many hours of leave as they would normally work in a two-week period. FFCRA Paid Family leave works in conjunction with FFCRA Paid Leave (the first two weeks of Family Leave are FFCRA Paid Sick Leave; the following 10 weeks employees are paid 2/3 their salary) allowing an employee to take up to 12 weeks of leave.

Employee Eligibility. All employers with less than 500 employees must provide FFCRA Paid Sick Leave to an employee (regardless of their length of employment) unable to work (or telework) because the employee is:

1. subject to a federal, state, or local quarantine or isolation due to COVID-19;
2. advised by a health care provider to quarantine or isolate due to COVID-19;
3. caring for an individual who falls into one of the above two categories;
4. experiencing symptoms of COVID-19 and seeking medical diagnosis;
5. required to care for a son or daughter under the age of 18 whose school or place of care have been closed due to COVID-19 or whose child-care provider is unavailable due to COVID-19; or
6. experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services. FFCRA, § 5102(a).

In addition, Paid Family Leave is available under the FFCRA if the employee:

1. has been employed at least 30 days; and
2. is unable to work (or telework) because they must care for a son or daughter under the age of 18 whose school or place of care has been closed due to COVID-19 or whose child-care provider is unavailable due to COVID-19. FFCRA, § 3102(b)(2)(A).

Necessary Documentation. To qualify for either FFCRA leave, employees must provide “documentation” containing the following information:

1. The employee’s name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work for such reason. 29 C.F.R. 826.100(a)

If leave is based on a quarantine order or self-quarantine advice, the statement should include the name of the governmental entity ordering quarantine (29 C.F.R 826.100(b)), or the name of the health care professional advising self-quarantine (29 C.F.R. 826.100(c)).

If leave is based on caring for an individual subject to a quarantine or self-isolation order, the employee should list the name of the government entity that issued the quarantine or isolation order or “the name of the healthcare provider who advised the individual being cared for to self-quarantine due to concerns related to COVID-19. 29 C.F.R. 826.100(D) (1-2).

If leave is based on school closing or childcare provider unavailability, the written statement from the employee should include:

1. The name and age of the child (or children) to be cared for;
2. The name of the school that has closed or place of care that is unavailable; and
3. A representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave. 29 C.F.R. 826.100(E)(1-3).

EMPLOYEES WHO ARE SUSCEPTIBLE TO COVID-19

If the employee is susceptible to a severe case of COVID-19 and other medical complications related to COVID-19, there may be an ADA duty to accommodate, in addition to offering and adhering to the FFCRA leave discussed above for an immunocompromised state. In general, employees are not entitled to accommodation due to their status as “susceptible to a severe case of COVID-19” but may seek and receive a reasonable accommodation if they are “susceptible to a severe case of COVID-19” due to an ADA qualifying disability (see below discussion).

FAMILY MEMBERS SUSCEPTIBLE TO SEVERE CASES OF COVID-19

If an employee's family member (living in the immediate household) is immunocompromised or susceptible to severe consequences from COVID-19, an employee may request to telework to avoid potentially contracting COVID-19. The EEOC recently reaffirmed that the ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom they are associated. The EEOC cautions employers to "be careful" to "not engage in disparate treatment on a protected EEO basis" when issuing flexibilities.

FEAR-BASED REFUSAL TO RETURN TO WORK

Except in very narrow circumstances, an employee's general fear of contracting COVID-19 at work is an insufficient basis for extended leave, accommodations, or a guarantee of continued employment. In limited circumstances, the Occupational Health and Safety Act (and related Michigan requirements) protects an employee's right to refuse to do work only if there is an "imminent danger" at the work site. An "imminent danger" means any conditions or practices in a place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated..." 29 C.F.R. 1908.2. An employee's right to refuse to do a work task is protected under OSHA's terms only if certain conditions are met. Generalized COVID-19 fears are not likely to meet the OSHA threshold as *specific* conditions at the job site must create such concerns. Importantly, implementing the terms of applicable Executive Orders related to reopening or returning to work would establish meaningful protocols that further mitigate allegations of "imminent dangers" at the workplace or job site.

EMPLOYEES AGE 65 AND OLDER

With the [Centers for Disease Control](#) stating that individuals age 65 or older are susceptible to complications from COVID-19, it is reasonable to wonder whether an employer is required to allow these employees to work from home.

Employees are *not* entitled to an altered work environment on the basis of age alone. [EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws](#). The federal statute that prevents age discrimination in the workplace is the Age Discrimination in Employment Act ("ADEA). Unlike the Americans with Disabilities Act ("ADA"), the ADEA does not require employers to make alterations (such as an ADA reasonable accommodation) based on age alone. Thus, an employer is not obligated to allow an employee work from home *based on age alone*.

Certainly, nothing prohibits a municipality from permitting continued teleworking, assuming such remote work provides a workable solution based on the employee's position and duties. In that case, a telework (or telecommute) policy can guide the parties' interaction. Do not, however, implement or apply a blanket policy excluding all individuals 65 years or older from the workplace!

A DISABLED EMPLOYEE UNDER THE ADA

The Equal Employment Opportunity Commission (“EEOC”) has plainly stated that the COVID-19 pandemic does not nullify an employer’s obligations under ADA. [EEOC, Pandemic Preparedness in the Workplace and the Americans with Disabilities Act, \(Q.14\)](#). If an employee is concerned about returning to work on account of an underlying health condition that places them at higher risk for complications of COVID-19, an employer should engage in the **interactive process** with the employee to determine if the employee is disabled under the ADA, and if so, what reasonable accommodations may be available. [EEOC, What You Should Know About COVID-19 and the ADA, The Rehabilitation Act and Other EEO Laws \(D.6\)](#).

Although, [telework](#)¹ and [unpaid leaves of absence](#) are two EEOC recognized reasonable accommodations, an employer is not obligated to grant the specific accommodation requested by the employee. If the essential functions of job require in-person presence (e.g. customer service for a receptionist), telework or unpaid leaves of absence may not be considered “reasonable” accommodations if it would require a significant modification or restructuring of the essential job duties. In instances where a job must be performed in person, the EEOC highlights “changes to the work environment such as designating one-way aisles”, use of “plexiglass” barriers, and use of “tables, or other barriers to ensure minimum distances” as potential reasonable accommodations for individuals whose disability puts them at heightened risk of complications from COVID-19. [EEOC, What You Should Know About COVID-19 and the ADA, The Rehabilitation Act and Other EEO Laws \(D.1\)](#). In some circumstances, an employer may be able to accommodate a disabled employee by allowing them to telework or take an unpaid leave of absence.

CONCLUSION

Unquestionably, the law and employment-related obligations related to COVID-19 are rapidly evolving. While we have touched many of the scenarios a Township may face when employees have limitations in their ability to report to the worksite due to COVID-19, there are numerous scenarios, or variations on these scenarios, to be experienced. If you have a specific labor or employment question arising out of COVID-19, contact our labor and employment attorneys at Fahey Schultz Burzych Rhodes, PLC.

¹ The EEOC has explicitly stated that “employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic. [EEOC, Pandemic Preparedness in the Workplace and the Americans with Disabilities Act, \(Q.10\)](#).

JOIN US AT NOON SOON, ON ZOOM!

We were unable to do our **MTA 2020 You Be the Judge Session** as planned, but we're not letting that stop us! When we asked you to submit legal questions about Township issues (for a chance to win a \$100 Visa gift card), the response was tremendous! So, we're inviting you to join us for a "live" one-hour Q&A session via Zoom. Go to the Zoom link below on **Wednesday, July 15, 2020 at Noon** to get real answers to those legal questions from the expert counsel provided by our team of Township attorneys at Fahey Schultz Burzych Rhodes PLC.

Zoom Link:

<https://us02web.zoom.us/j/85771324807?pwd=VGITajNna2ZZQi9RRnBMRlcrQzZVUT09>

US Toll-free: (888) 475-4499

Meeting ID: 857 7132 4807

Password: 071817

Helen Mills & Jacob Fox

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