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Covid-19

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Coronavirus / COVID–19 Response Team

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FFCRA Regulations Update & Michigan EO-166

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Today's Topics

- FFCRA Regulations Update
  1. The work availability requirement
  2. The definition of Health Care Provider
  3. Intermittent leave
  4. Documentation
- Michigan Executive Order 166

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FFCRA Regulations Update

Background: FFCRA

- April 1, 2020- December 31, 2020
- (1) Most public-sector and (2) private-sector employers with fewer than 500 employees
- EPSLA: Up to two weeks of paid leave for one of six COVID-19 virus related reasons
- Expanded FMLA: Up to 10 weeks of partially paid leave to care for a child whose school or place of care is closed because of the pandemic

Legal Challenge: FFCRA

- Legal challenge to four specific areas:
  - Work availability requirement, health care provider definition, intermittent leave, documentation
- Take-away for non-SDNY employers is not straightforward
  - Applicability: New York or nationwide?
  - DOL appeal?
  - DOL new regulations?
  - Retroactivity: Going forward or dating back to April 1st?

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1. Work Availability Requirement

- As written:
  - <u>DOL's position</u>: The inability to work must be solely caused by the qualifying condition (e.g., one of the 6 qualifying reasons for leave)
  - <u>Practically</u>: Excludes from benefits any employee whose employer does not have work for them
- Court's decision:
  - The sole cause of the employee's inability to work does not have to be the qualifying condition
  - <u>Practically:</u> If an employee is furloughed, but the employee cannot work for one of the qualifying reasons, the employee is entitled to FFCRA leave.

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2. Definition of "Health Care Provider"

- As written:
  - **DOL position**: "Health care providers include any individual who is capable of providing health care services necessary to combat COVID-19 public health emergency. Such individuals include not only medical professionals, but also other workers who are needed to keep hospitals and similar health care facilities well supplied and operational."
  - **Practically**: Very, very broad; essentially included any employee of certain types of employers.

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2. Definition of "Health Care Provider" (Cont.)

- Court's decision:
  - Definition is "vastly overbroad," definition should be linked to the type of employ**ee** rather than the type of employ**er**.
  - **Practically**: Court did not replace the definition, or given instructions on what the parameters an employer could or should use when determining the appropriate scope of this exemption.

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3. Intermittent Leave

- As written:
  - <u>DOL's position</u>: In an effort to limit the risk that an employee might spread COVID-19 to other employees, intermittent leave should be limited to certain situations, and employers must consent before an employee can take intermittent leave.
- Court's decision
  - Agree that intermittent leave should be limited to certain situations to limit risk of spreading virus
  - Where intermittent leave is permitted, employer consent is not required

4. Documentation Requirement

- As written:
  - <u>DOL's position</u>: Employee required to submit documentation substantiating the employee's need for leave prior to taking FFCRA leave.
- Court's decision:
  - Requirement that employee submits documentation substantiating the need for leave remains
  - However, employer can no longer require that the employee submit this documentation ***prior to*** the employee taking leave.

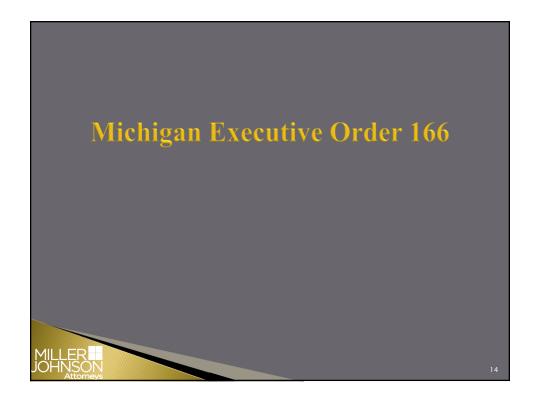## FFCRA: Practical Considerations

- Impending school closures could implicate each one of these "revised" regulations
  - The work availability requirement
  - The definition of Health Care Provider
  - Intermittent leave
  - Documentation
- Outside FFCRA obligations: What are we doing to keep working parents/childcare providers supported and in the workforce?

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Michigan Executive Order 166

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EO 2020-166: Protecting Workers Who Stay Home, Stay Safe

- *Rescinds* EO 2020-36
- Effective: Friday, August 7, 2020
- Update: Primary symptoms of COVID-19:
  - Fever, sore throat, new uncontrolled cough that causes difficulty breathing, diarrhea, vomiting, abdominal pain, new onset of a severe headache, new loss of taste or smell
  - Note: This listing is different than the listing symptoms that require a restaurant/bar to immediately close (EO 2020-161)

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EO 166 Update: Return to Work Formula

- Employees should stay home until:
  - 24 hours have passed since resolution of fever, and
  - 10 days have passed since symptoms first appeared (or, since swabbed for the test the yielded the positive test result), and
  - Other symptoms have "improved"
- Test-based strategy
  - Removes the ability for a one-time symptomatic employee to return immediately upon receiving a negative test result
  - Note: CDC does have a test-based strategy

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EO 166: Updates Close Contacts

- Definition of "close contact": Within 6 feet for 15 minutes
- Workers exempted from the "close contact" quarantine: Now includes emergency medical technicians and workers in adult foster care facilities
- ***Does not*** change the 14-day quarantine requirement for being in close contact with a symptomatic individual or a confirmed positive case

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EO 166 Update: Documentation

- The prohibition in EO 2020-36 against employer discipline/discharge for an employee's failure to comply with documentation requirements has been removed
- Take-away:
  - Employers may take ordinary and traditional steps to ask substantiation of an employee's need for leave (e.g., health care provider verification that employee has experienced qualifying symptoms)

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EO 2020-166: Q & A

Q: Can an employee that has symptoms and tests negative for COVID-19 return to work prior to 10 days?

Q: Can an employee with symptoms return to work after receiving a negative test?

Q: If an employee answers "yes" to having a EO 166 symptom and tests negative, do they remain home? If so, how long?

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Questions?

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Back to Work Resource Center

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Here is a sampling of what subscribers will find:

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- Practical Guidance – tools to effectively, safely and confidently return to work incorporating best practices from outside organizations, including community partners such as Spectrum Health

- Industry Specific Guidance – pages devoted to industries singled

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