

# EMPLOYMENT LAWSCENE ALERT: WISCONSIN ISSUES NEW BAN ON MASS GATHERINGS OF 10 OR MORE PEOPLE-WHAT DOES THAT MEAN FOR MY BUSINESS?

Under the direction of Wisconsin Governor Tony Evers, the Wisconsin Department of Health Services has ordered a ban on mass gathering of 10 or more people. Pursuant to Emergency Order #5 Prohibiting Mass Gatherings of 10 People or More, a “mass gathering” is “any planned or spontaneous, public or private event or convening that will bring together or is likely to bring together 10 or more people in a single room or single confined or enclosed space at the same time.” All gatherings that bring together fewer than 10 people in a single room or confined or enclosed space at the same time must preserve social distancing of six feet between people and follow all other public health recommendations issued by the Wisconsin Department of Health Services and Centers for Disease Control. Additionally, all bars and restaurants in the State of Wisconsin shall be closed, except that restaurants may remain open for take-out or delivery service only. No seating may be provided, and no food may be consumed at the restaurant. Restaurants are to preserve social distancing of six feet between customers during pick up. Under the order, all public and private schools and institutions of higher learning shall be closed for instructional and extracurricular activities.

This does not affect critical infrastructure and services such as grocery stores, food pantries, childcare centers, pharmacies, and hospitals. Retail food establishments, such as grocery stores, convenience stores, and farmer’s markets, are required to close all seating intended for consuming food, cease self-service operations of salad bars, beverage stations, and buffets, and prohibit customers from self-servicing all unpackaged food. Office spaces are also exempt from the Order, although they are required to implement social distancing, including teleworking, as much as practicable. Additionally, manufacturing, processing, distribution, and production facilities are exempt from this Order. This is intended to encourage social distancing and limit the spread of coronavirus. This Order goes into effect at 5:00 p.m. on Tuesday, March 17, 2020, and will remain in effect for the duration of the public health emergency declared in Governor Evers’s Executive Order #72 or until a superseding order is issued. At this time, there is no specific end date to Executive Order #72 or the Order Prohibiting Mass Gatherings of 50 People or More. Failure to comply with this directive could result in fines and imprisonment.

The full Order can be found [here](#).

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# **EMPLOYMENT LAWSCENE ALERT: WISCONSIN BANS MASS GATHERINGS OF 50 OR MORE PEOPLE-WHAT DOES THAT MEAN FOR MY BUSINESS?**

Earlier this afternoon, Wisconsin Governor Tony Evers directed Wisconsin Department of Health Services Secretary-designee, Andrea Palm, to order a ban on mass gathering of 50 or more people. Pursuant to the Order Prohibiting Mass Gatherings of 50 People or More, a “mass gathering” is “any planned or spontaneous, public or private event or convening that will bring together or is likely to bring together 50 or more people in a single room or single confined or enclosed space at the same time.” This does not affect critical infrastructure and services such as grocery stores, food pantries, childcare centers, pharmacies, and hospitals. Office spaces as well as manufacturing, processing, distribution, and production facilities are also exempt from the Order. Some affected Wisconsin businesses, including bars and restaurants, will be permitted to remain open provided that they operate at 50% of seating capacity or 50 total people, whichever is less; preserve social distancing of six feet between tables, booths, bar stools, and ordering counters; cease self-service operations of salad bars, beverage stations, and buffets; and prohibit customers from self-dispensing all unpackaged food and beverage. This is intended to encourage social distancing and limit the spread of coronavirus. This Order goes into effect at 12:01 a.m. on Tuesday, March 17, 2020, and will remain in effect for the duration of the public health emergency declared in Governor Evers’s Executive Order #72 or until a superseding order is issued. At this time, there is no specific end date to Executive Order #72 or the Order Prohibiting Mass Gatherings of 50 People or More. Failure to comply with this directive could result in fines and imprisonment.

The full Order can be found [here](#).

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# **EMPLOYMENT LAWSCENE ALERT: ECONOMIC RELIEF IS COMING FOR EMPLOYEES IMPACTED BY THE CORONAVIRUS-EMERGENCY FMLA EXPANSION ACT-EMERGENCY PAID SICK LEAVE ACT**

On the heels of President Trump declaring a National Health Emergency, the U.S. House of

Representatives passed a 110-page relief bill (HR 6201) during the early morning hours of Saturday, March 14th, to address the economic effects upon individuals negatively impacted by the coronavirus pandemic. H.R. 6201 is designed to provide affected workers expanded Family and Medical Leave Act (FMLA) protections, expansion of food assistance and unemployment insurance benefits, and up to 80 hours of paid sick leave, as well as other relief.

H.R. 6201 will be presented to the U.S. Senate this week for debate for a high-profile vote. President Trump has already indicated that he would sign the legislation in its current form. Employers should expect the U.S. Senate to act quickly so that a bill can be presented to President Trump for signature as soon as possible.

This article will describe what employers need to know about two significant provisions of H.R. 6201 as it moves forward to the Senate: The Emergency FMLA Expansion Act and the Emergency Paid Sick Leave Act.

### **Emergency FMLA Expansion Act - Small Employers Beware**

Targeting that segment of the economy that will be hit the hardest by the impact of the coronavirus pandemic, employers with 500 or fewer employees will be required to provide employees, who have worked for their employer at least 30 calendar days (forget about the 1,250 hour service requirement during the preceding 12-month period for other FMLA leave), with up to 12-weeks of FMLA leave. The expanded FMLA leave rights extends through December 31, 2020. Employers may be required to provide up to 10 weeks of paid leave for their employees who qualify for this expanded leave.

Currently, the proposed legislation would cover all employers with 500 or fewer employees, including small employers who employ less than 50 employees. However, the Department of Labor would be authorized to issue regulations that would exempt small employers with fewer than 50 employees from the paid leave requirements of the bill if such payment obligation would jeopardize the viability of the employer's business as a going concern. This means that if a small employer chooses not to provide the paid leave benefit for expanded FMLA leave, it does so at its own peril subject to its ability to defend itself on the basis that any such paid leave jeopardizes the employer's existence as a going concern. That burden could be high for small employers to meet.

#### Qualifying Need Related to a Public Health Emergency

Forget about the concept of an employee having a "serious health condition" in order to be entitled to this expanded FMLA leave. Now, because of the public health emergency caused by the coronavirus, employees will be entitled to expanded FMLA rights if they have a "qualifying need related to a public health emergency." Under this standard, employees who

have been employed by the same employer for at least 30 calendar days, regardless of the number of hours previously worked, will be entitled up to 12 weeks of leave if the employees are:

- Complying with the recommendation of a public health official or a health care provider who recommends that the employee be quarantined because of their exposure to coronavirus or because they exhibit the symptoms of coronavirus;
- Providing care for a family member who has been quarantined because of their exposure to coronavirus or because the family member exhibits the symptoms of coronavirus;
- Providing care for their son or daughter under the 18 years of age if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to the public health emergency.

### Expanded FMLA Provides for Both Unpaid and Paid Leave

The first 14 days of leave under the expanded FMLA would be unpaid. However, employees may elect, but employers cannot require employees, to substitute any accrued vacation leave, personal leave, or medical or sick leave for the unpaid portion of the leave.

After expiration of the 14 days of leave for a qualifying need related to a public health emergency, employers will be required to provide employees with paid leave. The paid leave provision of the bill would require employers to pay employees an amount equal to at least two-thirds of each employee's regular rate of pay multiplied by the number of hours the employee would otherwise be normally scheduled to work. If the employee works a varying number of hours each workweek, then the employer must base the amount of paid leave on the average number of hours that the employee was scheduled to work per day over the previous 6-month period preceding the need for the leave.

### Restoration Rights

Like with other types of leave provided under the FMLA, employers will be required to restore employees to their position after expiration of their leave. However, employers with fewer than 25 employees are relieved of the obligation to restore an employee to his or her position if all the following four conditions are met:

- The employee took leave for a qualifying need related to a public emergency;
- The position that the employee held no longer exist due to economic conditions or other changes of the employer caused by the public health emergency;
- The employer makes reasonable efforts to restore the employee to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment; and
- If the employer is not able to restore the employee's employment to an equivalent position, then the employer must contact the employee within a 1-year period beginning on the date the FMLA leave concludes if an equivalent position does

eventually become available within that 1-year time period.

## **Emergency Paid Sick Leave Act**

H.R. 6201 will require employers with 500 or fewer employees, through December 31, 2020, to provide up to 80 hours paid sick leave to employees who:

- Are required to self-isolate because they are diagnosed with coronavirus;
- Seek medical diagnosis or care if they are experiencing the symptoms of coronavirus;
- Are required to comply with the recommendations or orders by a public health official or a health care provider because their physical presence on the job would jeopardize the health of others because of the employee's exposure to coronavirus;
- Are required to care for or assist a family member who is either self-isolating because the family member has been diagnosed with coronavirus or is experiencing symptoms of coronavirus; or
- Are required to care for their child because the child's school or place of care has been closed, or the child's care provider is unavailable due to coronavirus.

Full-time employees will be entitled up to 80 hours of paid leave based on their normal wage. Part-time employees will be entitled to paid leave equal to the number of hours worked, on average, over a two-week period. However, both full-time and part-time employees will be entitled only to two-thirds of their wages when the sick leave is used to either provide care for a family member with coronavirus or to take care of a child whose school is closed or the child care provider is unavailable because of the coronavirus.

The paid sick leave provided under H.R. 6201 would be in addition to any other paid leave made available to the employee by the employer. Employers cannot require an employee to use other paid time, like vacation or PTO, before using paid sick time provided under H.R. 6201. In addition, the paid sick leave can't be carried over from year to year, and the employer is not required to pay any unused paid sick leave to the employee at time of the employee's separation of employment if the employee has not used such sick leave prior to separation.

## **Tax Credits for Paid Sick Leave and Paid Family and Medical Leave**

Employers would be entitled to tax credits for their employer's portion of payroll taxes for wages paid to employees taking either paid sick leave or paid FMLA leave. The sick leave credit for each employee would be for wages as much as \$511 per day while the employee is receiving paid sick leave to care for themselves, or \$200 if the sick leave is to care for a family member or child if the child's school is closed. The amount of tax credit for qualified family leave wages for each employee is \$200 per day or \$10,000 in the aggregate. If any credit exceeds the amount of payroll taxes due by the employer, then such excess would be treated as an overpayment entitling the employer to a refund.

We will keep you posted on the developments of H.R. 6201 as it moves to the Senate for consideration. Stay tuned!

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## EMPLOYMENT LAWSCENE ALERT: CAN I SEND MY SICK EMPLOYEE HOME?

Many companies are currently wondering what to do if they know an employee or their family member is sick with coronavirus or the flu or if someone seems to be sick with the coronavirus or the flu. The CDC has issued Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19). The CDC has issued the following recommendations, along with other tips and guidance:

- **Actively encourage sick employees to stay at home.** This means that employees who have symptoms of respiratory illness (e.g., cough, fever over 100.4°) should not come to work until they are free of all such symptoms for at least 24 hours, without the use of medicine. Employees who are caring for someone who is sick may also refer to CDC guidance on how to conduct a risk assessment of their potential exposure and should also stay home if they are at risk of contracting a contagious illness. This may require employers to be more flexible with their sick leave policies and use of time off. If sick employees are encouraged or required to come to work for fear of losing their jobs, it could have a larger impact on your company by making more employees sick and further limiting the company's ability to conduct normal operations.
- **Separate sick employees.** Employees who show signs of respiratory illness while at work should be separated from other employees and sent home immediately.
- **Emphasize staying home when sick, respiratory etiquette, and hand hygiene.** Companies should emphasize that sick employees should stay home. Additionally, while at work, employees need to cover their noses and mouths while coughing and sneezing, use tissue, wash their hands, and use hand sanitizer frequently. Companies may consider putting up posters with reminders of these actions and providing tissues and hand sanitizer. The CDC has sample posters ([here](#)) that employers can post at their workplace that encourage employees who are sick to stay at home.
- **Perform routine cleaning.** Companies need to ensure that frequently touched surfaces - workstations, countertops, doorknobs - are cleaned and disinfected regularly. Companies may also consider providing disposable wipes for employees to use.

There are certain legal obligations regarding how companies treat sick employees. All Wisconsin companies with one or more employees are subject to the Wisconsin Fair Employment Act ("WFEA"), and all companies with fifteen or more employees are subject to the Americans with Disabilities Act ("ADA"). Both of these laws protect employees with disabilities and perceived disabilities, as well as employees who are associated with people

with disabilities, from discrimination. However, these laws still allow companies to send an employee who has or appears to have a contagious disease such as coronavirus or the flu home because that employee poses a direct threat of making other employees sick.

In conclusion, yes, sick employees who pose a risk of spreading a contagious illness to your other employees can be sent home from work and should be encouraged to stay home from work until they no longer pose such risk. In this instance, businesses may need to consider one-time, situation-based modifications to their sick leave and absenteeism policies that would allow employees to miss work and not be penalized for it. Employers should not make their decisions about sending an ill employee home based on fear but, rather, on rational, objective, and observable facts designed to protect the interests of all employees and to ensure that your company's continued operations are not placed at risk.

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## **EMPLOYMENT LAWSCENE ALERT: WORRIED THAT YOUR EMPLOYEE HAS THE FLU? OR IS IT CORONAVIRUS?! HERE ARE SOME THINGS TO CONSIDER**

The recent world-wide coronavirus outbreak has, thus far, had a fairly limited impact in the U.S. However, health officials believe that it's not a matter of "if" the U.S. has an outbreak of the virus, but "when." The CDC has stated that the "[d]isruption to everyday life may be severe," which could include schools being closed, mass public gatherings being suspended, and businesses having their employees work remotely. Additionally, we're still well within the grasp of cold and flu season, so employers are going to have to deal with the impact of employees needing leave illnesses of some severity. This raises a number of potential employment law concerns, and employers must consider the following:

- Wage and Hour.
  - Under the FLSA, an employee is considered exempt if they meet certain duties tests and receive compensation on a "salary basis." The FLSA regulations provide that, for an exempt employee to be paid on a "salary basis," the employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked. However, a deduction may be made when an exempt employee is absent from work for one or more full days for sickness or disability if the deduction is made pursuant to a "bona fide" plan, policy, or practice of providing compensation for loss of salary occasioned by sickness or disability. The employer is not required to pay any portion of the employee's salary for a full-day absence for which they receive

compensation under such plan or if they do not receive compensation under such plan because the employee has not yet qualified for the plan or has exhausted their leave allowance under the plan. Therefore, an exempt employee may be forced to take leave for such illness under the employer's bona fide plan. If they are not yet eligible or have exhausted their leave, an employer may deduct a full day's wages from an exempt employee's salary if that person does not report for work for the day due to sickness or disability. Such a deduction will not violate the "salary basis" rule or otherwise affect the employee's exempt status. If, however, the employee works only a partial day because of sickness or disability, the employer may not make deductions from the employee's salary for the lost time because an exempt employee must receive a full day's pay for the partial day worked in order for the employer to meet the "salary basis" rule. Time worked includes time worked from home.

- Additionally, if the employer chooses to close due to concerns regarding the spread of disease, it cannot deduct the day's wage from an exempt employee's salary. It is the U.S. Department of Labor's ("DOL") position that an employer must pay an exempt employee his or her full salary for any week in which work was performed if the employer closes its operations due to a weather-related emergency or other emergency. The DOL's position is based, in part, on the FLSA's regulation that provides that deductions may not be made for time when work is not available. When it is the employer's decision to close its business because of an emergency, the DOL presumes that employees remain ready, willing, and able to work. Under such circumstances, deductions may not be made from an exempt employee's salary when work is not available. If deductions are made under such circumstances, the employer risks losing the exemption, thus subjecting it to potential overtime liability. If the employer's operation are closed for a full workweek, no salary must be paid. Employers are permitted to require that employees utilize their available paid time off during an employer-mandated office closure, whether for a full day or a partial day. However, if the employer does not provide paid time off or if the employee does not have available paid time off, the employer may not deduct from the employee's salary for the closure. The employer may not require that the employee have a negative leave balance or make an already negative leave balance more negative as the result of requiring the employee to take paid time off for an office closure.
  - Non-exempt employees do not have to be paid for time not worked.
- FMLA.
    - The FMLA is clear that, ordinarily, the common cold and flu are not serious health conditions. However, more severe cases that require inpatient care or continuing treatment by a healthcare provider, and therefore meet the definition of serious health condition, do qualify. Therefore, employers need to be carefully tracking who is eligible for FMLA leave and why the employee needs time off and providing timely eligibility notices to employees. When in doubt, employers should err on the side of caution and provide a eligible employee taking time off for illnesses with an eligibility notice and certification of healthcare provider. Then, with the

information provided by the employee's healthcare provider, the employer (potentially assisted by counsel) can determine whether the employee's particular illness meets the definition of a "serious health condition" under the FMLA. Additionally, eligible employees are entitled to FMLA for the care of a family member who has a serious health condition, so employees with spouses, children, or parents who are suffering from a severe flu or coronavirus may also be entitled to FMLA leave.

- Disability Discrimination.
  - Employees with certain health conditions may be more susceptible to other diseases, such as colds, flus, or the coronavirus. Therefore, employers may have to consider reasonable accommodations such as working from home or avoiding travel in order to help those employees avoid the risk of further infection. However, employers should use caution about requiring health screenings or otherwise inquiring about potential medical conditions, as this could also be a violation of the ADA and state disability discrimination laws.
  - If the employee is displaying symptoms of a contagious illness at work the employer can (and probably should) send them home, and that will not violate the ADA. If it turns out that the condition was a minor illness, it will not be considered a disability; and if the condition is severe enough to be considered a disability, then the employer was justified in protecting other employees from the direct threat that the contagious illness posed.
- OSHA.
  - Although OSHA has not issued any guidance specific to the coronavirus, under OSHA, employer have a general duty to furnish a place of employment that is free from recognized hazards that are causing or likely to cause the death of or serious physical harm to employees. To that end, employers should consider making hand sanitizer available, particularly in environments with public contact; making sure that surfaces and eating areas are cleaned and disinfected; and encouraging employees who are sick to stay home. Additionally, while the standard cold and flu are not reportable illnesses, OSHA has deemed the 2019 Novel Coronavirus a recordable illness when a worker is infected on the job. Therefore, employers need to know whether their employees are infected, how they got infected, and fill out the appropriate OSHA Form 300 if necessary.

In planning for a pandemic, employers will have to consider how to maintain essential operations and services when necessary resources may not be available. In particular, employers will have to determine if core business activities can be sustained over an extended period of time when only a minimal workforce may be available. The U.S. Department of Homeland Security provides some steps employers can take now to ensure that their respective businesses can survive and continue to provide critical goods and services to the public. These steps include:

- Identify your company's essential functions, such as payroll or information technology, and identify the individuals that can perform them;
- Cross train non-essential employees to perform essential functions;

- Ensure sufficient essential resources are available at each worksite;
- Plan for interruptions of essential government services, such as mass transit;
- Update and modify sick leave policies and communicate with employees the importance of staying away from the workplace if they become ill;
- Establish policies and practices to allow employees to work from home;
- Collaborate with insurers, health plans, and major healthcare facilities to share your pandemic contingency plans and to learn about their capabilities and plans;
- Promote and maintain a healthy work environment by, for example, providing easy access to alcohol-based hand sanitizer products;
- Communicate with your employees about the threat of a pandemic and the steps that you, as their employer, are taking to prepare for it.

For more information on what your business can do to be prepared for a pandemic, visit the U.S. Department of Homeland Security's website [www.ready.gov](http://www.ready.gov).