

OPERATING AN A/E FIRM UNDER OHIO'S STAY-AT-HOME ORDER

MARCH 2020

A/E firms throughout Ohio have been left reeling since the [Stay-at-Home Order](#) issued by Dr. Amy Acton of the Ohio Department of Health became effective on March 23, 2020. Typically small businesses, trying to protect the health and welfare of their employees while also interpreting and understanding the implications of the Order can be onerous for A/E firms. The purpose of this article is to offer guidance in interpreting the Order as well as understanding some recent changes to employment law that may impact A/E firms in the immediate future.



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Under the Order, all non-essential business and operations must cease activities except for minimum basic operations. Essential businesses are encouraged to remain open, however. Section 9 of the Order states that individuals may leave their residence to provide any services or perform any work necessary to provide or maintain "Essential Infrastructure." "Essential Infrastructure" includes "construction (including, but not limited to, construction required in response to this public health emergency, hospital construction, construction of long-term care facilities, public works construction, school construction, essential business construction, and housing construction)." Subsection u. of Section 12 of the Order states that business providing professional services are "Essential Infrastructure" and exempt from the "cease activities" requirement. While Subsection u. does not specifically identify A/E firms in its list, it is clear from reviewing the Order that the list is not exhaustive. Accordingly, any reasonable interpretation of the Order would find that A/E firms are exempt from the "cease activities" requirement and may continue to operate as essential to infrastructure, subject to the previous social distancing at work requirements ordered by Dr. Acton and Governor DeWine.

Of course, being allowed to operate and being able to operate in this new environment are two entirely different issues. Several A/E firms are trying to operate with as much staff as possible working remotely and just a skeleton crew working from the office as necessary. Some employees lack the technical skill or ability to be able to work remotely. A/E firms are left with difficult decisions as to finances and staffing. In that light, it is important to understand how legislation set to take effect in the near future may impact such decisions.

The [Families First Coronavirus Response Act](#) is a law passed by the Senate and signed by the President on March 18, 2020. This law responds to the impact of the ongoing coronavirus pandemic on employees. The act provides paid FMLA leave, 14-days paid sick leave for full time American workers affected by the pandemic, and funding for other programs. Two key components of this law - the temporary expansion of FMLA and the immediate provision of paid sick leave to certain employees - are discussed below.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

The Act applies to employers with fewer than 500 employees and exempts certain health care providers and emergency responders. Small businesses with fewer than 50 employees are exempt when the imposition of the Act's requirements would jeopardize viability of the business as an ongoing concern.

Here are the key changes that covered employers should implement effective April 2, 2020 through December 31, 2020:

- The Act amends the FMLA to cover full or part time employees who have worked for an employer for 30 days. Note: this temporarily substitutes for the previous 1 year and 1,250 hour eligibility requirement.
- Employees may use the expanded FMLA for a qualifying need related to a public health emergency if they are unable to work or telework due to a need for leave to care for a son or daughter under the age of 18 if the school or place of care has been closed or the child care provider of such son or daughter is unavailable due to a public health emergency. Employees may still use the traditional FMLA for any other qualifying events.
- The first 10 days are unpaid. An employee may elect to substitute paid time off for these days. Subsequent days are paid at 2/3 the regular rate of pay capped at \$200 per day, \$10,000 in aggregate total over 12 weeks of FMLA leave. There are alternate calculations for less than full time employees where an employer pays 2/3 the average weekly hours over 6 months, or the average weekly hours of a reasonable period of time.

Employees are required to provide as much notice as possible. Employers are required to restore the employee to the same or similar position. Employers with less than 25 employees are exempted if the position no longer exists due to economics or operational changes due to the pandemic. The employer has to make reasonable efforts to find an equivalent position within the company if possible for 1 year.

EMERGENCY PAID SICK LEAVE

Another section of the Families First Coronavirus Response Act grants certain employees an allotment of paid sick leave. This sick leave does not roll over past December 31, 2020. This applies to employers with fewer than 500 employees. Healthcare providers and emergency responders are exempted. Small businesses with fewer than 50 employees are exempt when the imposition would jeopardize the viability of the business as an ongoing concern.

Full time eligible employees are provided 80 hours of emergency sick leave to be used if they are unable to work or telework because:

1. They are ordered to be quarantined or isolated due to COVID-19 by Federal, State or local officials.
2. They are advised to quarantine or self-isolate by a medical professional due to exposure.
3. They are experiencing symptoms of COVID-19 and seeking treatment.
4. Caring for someone either diagnosed with COVID-19 or exposed to it (see 1 or 2).
5. Caring for a son or daughter if a school or day care provider closes due to the COVID-19 pandemic.
6. They are experiencing substantially similar conditions.

Less than full time employees are provided with a number of hours equal to the number of hours that such employee works on average over a 2-week period. In no event will such paid sick time exceed:

- \$511 per day and \$5,110 in the aggregate for a use described in paragraphs 1, 2, or 3; and
- \$200 per day and \$2,000 in the aggregate for a use described in paragraphs 4, 5 and 6 above.

Other key provisions of the emergency grant of sick leave include:

- An employer may not require the employee search for or find a replacement employee to cover the hours during which the employee is using paid sick time.
- The paid sick time under this section is available for immediate use by the employee regardless of how long the employee has been employed by an employer. In other words, this temporary and emergency grant of sick leave begins the first day of employment, unlike the new 30 day wait period for the emergency amended FMLA.
- An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time.
- An employer may not discharge, discipline or in any manner discriminate against any employee who takes leave under this Act or filed any complaint related to this Act.

The Act further provides covered employers with tax credits for the payment of the paid sick leave and expanded FMLA.

The attorneys at Weston Hurd LLP remain dedicated to providing its clients the advice and professional services needed during these uncertain times. The Stay-at-Home Order issued by Dr. Acton and the Ohio Department of Health and ensuing legislation both locally and at the federal level will continue to impact A/E firms as the country tries to slow the spread of the coronavirus and navigate a rapidly changing economy. They will impact your firm, practice, and employees in a myriad of ways. Weston Hurd's Employment Section is working to stay on top of the legislation to ensure its clients derive the benefits businesses of all sizes need.

Please see [Weston Hurd's Coronavirus Employment FAQs](#) for additional guidance and

do not hesitate to contact us with any questions or concerns you may have moving forward.

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