

## Update for Employers in Light of the Michigan Supreme Court Ruling and Emergency Order Issued by MDHHS

On October 2, 2020, the Michigan Supreme Court released an important Opinion declaring that **Governor Whitmer exceeded her authority by issuing Executive Orders related to the COVID-19 pandemic effective after April 30, 2020.**

### The MI Supreme Court's Decision

The Supreme Court's Opinion was issued as a result of a federal lawsuit in the U.S. District Court for the Western District of Michigan brought by several health care institutions challenging one of the Governor's several Executive Orders. The federal judge in that case certified two questions to the Supreme Court for interpretation of Michigan law. The Supreme Court **unanimously held that the Governor did not have the authority** after April 30, 2020 (i.e., beyond 28 days) to unilaterally issue or renew any Executive Orders under the 1976 Emergency Management Act ("EMA"). A majority of the Supreme Court also held that the 1945 Emergency Powers of Governor Act ("EPGA"), upon which the Governor had also relied, was unconstitutional because it unlawfully delegated legislative power to the Governor in violation of the separation of powers.

Governor Whitmer then issued a press release criticizing the Supreme Court Opinion and claiming that her Executive Orders continue to be in full force and effect for at least 21 days. However, Attorney General Nessel issued a statement on October 4 that the Attorney General's office "will no longer enforce the Governor's Executive Orders through criminal prosecution". On October 5, the Governor and the Director of the Department of Health and Human Services filed a Motion for Immediate Consideration asking that the Michigan Supreme Court rule that the October 2 decision not take effect until October 30 (28 days after the decision was issued).

Therefore, the many **Executive Orders** the Governor has unilaterally issued, including the current requirement that all work capable of being performed remotely must be performed remotely, are **no longer enforceable legal requirements**. However, this doesn't mean there won't soon be enforceable state requirements regarding COVID-19. It is expected that Governor Whitmer will now work with the Michigan Legislature, as suggested by the Supreme Court, to pass new laws with similar, though perhaps less restrictive, legal requirements related to COVID-19.

### The MDHHS Emergency Order

On October 5, 2020, the Michigan Department of Health and Human Services ("MDHHS") issued an **Emergency Order** under MCL 333.2253 (the Public Health Code) which includes many, but not all, of the Governor's earlier requirements and is more concise. The Order went into effect immediately, and remains in effect, for now, only **through October 30, 2020**. Unless and until a court renders this Emergency Order unenforceable or other legislative action is taken, which is certainly possible, we recommend that employers comply with the Emergency Order.

The key provisions of the Emergency Order are as follows:

- **Facial coverings are required at all non-residential indoor and outdoor gatherings.**

- A "gathering" is defined as "any occurrence where persons from multiple households are present in a shared space in a group of two or more."

- The same exceptions to face coverings apply (e.g., does not apply to a person who is under 5 years old, those eating at a restaurant, those who cannot medically tolerate a face covering, when communicating with the deaf, when asked to identify, etc.).



- **Gatherings are limited in number** as follows:

- Indoor gatherings of between 10-500 people are permitted, except that in venues with fixed seating, attendance must be limited to 20% of seating capacity\*; and for venues without fixed seating, attendance must be limited to 20 people per 1,000 square feet in each room.

\*In Region 6 (Up North region of the lower peninsula), the capacity limits are 25% for fixed seating and 25 people per 1,000 square feet for venues without fixed seating.

- Outdoor gatherings of between 100-1,000 people are permitted, except that in venues with fixed seating, attendance must be limited to 30% of seating capacity; and for venues without fixed seating, attendance must be limited to 30 people per 1,000 square feet.
  - Social distancing must be enforced at gatherings.
  - The restrictions imposed by this section do **not apply** to the incidental gathering of persons in a shared space, including an airport, bus station, factory floor, restaurant, shopping mall, public pool, or workplace.
- **Food service establishments** must:
    - Close indoor common areas in which people can congregate, dance, or otherwise mingle; and
    - Prohibit indoor gatherings anywhere alcoholic beverages are sold for consumption onsite, except for where parties are seated and separated from one another by at least six feet, and do not intermingle.
  - There are no express requirements for **retail establishments**, but the intent seems to be that the social distancing rules applicable to food service establishments should apply to retail as well.
  - There is **no requirement** that work which is capable of being performed remotely must be **performed remotely**.

- There is **no requirement to conduct daily COVID-19 screenings**, though the CDC guidelines recommend daily screenings.

Local health departments are authorized to carry out and enforce the Order, and law enforcement officers are permitted to enforce the Order and investigate potential violations. A violation of the Order is punishable as a misdemeanor (imprisonment for less than 6 months and/or a fine not to exceed \$200).

It is recommended that employers comply with the new Emergency Order and continue to follow the [CDC COVID-related workplace safety guidelines](#), as well as any local county or municipality orders. Note that employers are free to impose more stringent COVID-19 precautions than are required, as long as they do not run afoul of other employment and labor laws.

**This memo is intended only as a summary and general overview. If you have any questions or would like legal advice regarding the above or any other employment issue, please contact [David Lawrence](#) or [Stacey DiDomenico](#).**