



ALERTS

Michigan Governor's Executive Order Sets Further Restrictions, Prohibits Discrimination

April 6, 2020

In Michigan, an April 3 [executive order, Executive Order 2020-36](#), which took effect immediately, established further restrictions on individuals who are sick or who are in close contact with sick individuals. Gov. Gretchen Whitmer's order will remain in place until the declared emergency ends, or it is otherwise rescinded.

In issuing this executive order, the governor instituted a rule prohibiting discrimination for certain individuals staying home from work under one of these two circumstances. As such, this most recent order may have significant implications for those critical infrastructure employers continuing to operate after the original Executive Order 2020-21 expires on April 13.

Under Executive Order 2020-36, Gov. Whitmer confirmed that any individual testing positive for COVID-19 or displaying one or more of the principal symptoms of COVID-19 – fever, atypical cough, or atypical shortness of breath – should remain in their home or principal place of residence until they 1) receive a negative test, 2) three days have passed since their symptoms resolved, or 3) seven days have passed since their symptoms first appeared, or since they were swabbed for the test that yielded the positive result.

The order also states that certain individual having “close contact” with an individual who tests positive for COVID-19 or who displays one or more of the principal symptoms of COVID-19 should also remain in their homes until either 1) 14 days have passed since they last had close contact with the sick or symptomatic individual, or 2) the symptomatic individual receives a negative COVID-19 test.

The order specifically defines “close contact” as “being within

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approximately six feet of an individual for a prolonged period of time,” for example caring for, living with or sharing a waiting room with a sick or symptomatic individual. However, healthcare professionals, workers at healthcare facilities, first responders (e.g., police officers, fire fighters, paramedics, etc.), child protective service employees, workers at child care institutions, and workers at correctional facilities are excluded from the order’ “close contact” requirement. Healthcare facilities are designated to include ambulance operations, aircraft transport operations, nontransport prehospital life support operations, or medical first response services; county medical care facilities; freestanding surgical outpatient facilities; health maintenance organizations; homes for the aged; hospitals; nursing homes; hospice; and hospice residences, as well as state-owned hospitals and surgical centers, state operated outpatient facilities and veterans facilities, and entities used as surge capacity by those entities.

Other than these exempted workers, affected individuals are now prohibited from leaving their homes or principal residence for the periods involved except as is absolutely necessary to obtain food, medicine, medical care, or supplies that are needed to sustain life (where those items cannot be obtained via delivery) and to engage in outdoor activity consistent with remaining at least six feet from people outside their household.

These individuals are now also required to wear some form of cover over their nose and mouth such as a mask, bandana or handkerchief, if they leave their home or principal place of residence, which includes individuals previously allowed to leave their homes under the original order.

Bans Discrimination of Workers Who Are at Home

Furthermore, Gov. Whitmer ordered that Michigan employers shall not discharge, discipline or otherwise retaliate against an employee for staying home when they are at particular risk of infecting others with COVID-19. The order requires employers to treat these individuals as if they were taking leave under Michigan’s Paid Medical Leave Act, even if the employer has less than 50 employees (where the act did not actually apply).

This means that, while employers are permitted to deduct time off from an employee’s accrued leave, employers must extend leaves beyond the 40 hours provided for under Michigan’s Paid Medical Leave Act regardless of whether that act originally applied to them. Rather, employers must extend leave as long as the employee remains away from work under the periods required by the most recent order. To the extent the employer’s employees are exempt from the “close contact” provisions of the order, they still must provide leaves where they test positive for COVID-19 or display one or more of the principal symptoms of COVID-19.

Just to make things even more challenging, employers are required to provide this leave without penalizing employees for failing to comply with any other employer requirement(s) that might exist, such as requiring employees to document the employee or individual with whom they had close contact who has one or more of the principal symptoms of COVID-19. Employers must essentially take their employees at their word in complying with the mandates included in Executive Order 2020-36.



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However, the order does confirm that an employer can discipline an individual who is allowed to return to work but fails to do so, “with the employee’s consent,” or for any other reason that is not unlawful. Therefore, it appears an employer would still be able to discipline an individual for obtaining leave for fraudulent reasons, especially if they provided voluntary consent.

There are significant penalties for employers who might be found in violation of Executive Order 2020-36. Although the order does not create a private right of action, it empowers enforcement by the Department of Labor and Economic Opportunity in a manner similar to its enforcement of Michigan’s Paid Medical Leave Act. This means employers violating the governor’s order could face back pay awards and fines of up to \$1,000.00. The department has also been instructed to report violations to the relevant licensing authority of any employer found to have violated the order.

Given the potential implications involved with this executive order, employers should consider taking great care in how they respond to employee quarantine requests going forward and seek counsel if there are any questions as to whether this order applies to them and their businesses.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work, or Grant Pecor at 616-742-3911 or grant.pecor@btlaw.com, Keith Brodie 616-742-3958 or at keith.brodie@btlaw.com, Amy Zdravecky at 616-742-3988 or amy.zdravecky@btlaw.com, or Alex Petrik at 947-215-1322 or alex.petrik@btlaw.com.

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