

Executive Orders Invalidated but Employers Should Continue to Follow COVID-19 Safety Plans

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On Friday October 2, 2020, the Michigan Supreme Court ruled on two questions submitted by the U.S. District Court for the Western District of Michigan in *Midwest Institute of Health, PLLC v. Governor*. Federal district courts generally defer to the state Supreme Court's interpretation of the state constitution, which is why the federal court judge in the *Midwest Health* case requested guidance from the Michigan Supreme Court. The issues submitted to the Michigan Supreme Court concerned whether the Governor had the power to issue Executive Orders related to COVID-19 under either the 1976 Emergency Management Act ("EMA") or 1945 Emergency Powers of the Governor Act ("EPGA").

The Michigan Supreme Court unanimously held that the Governor did not have authority after April 30, 2020 to issue or renew any Executive Orders related to COVID-19 because the Governor lacked the authority to declare a state of emergency after that date under the EMA. The Court also held 4-3 that the Governor did not possess the authority to issue Executive Orders under the EPGA because that statute unconstitutionally delegates legislative powers to the Governor.

Although the Governor has taken the position that the ruling is not effective for 21 days (the period of time during which a motion for rehearing/reconsideration may be filed), Michigan precedent provides that a court's order is not stayed during this period absent an order from the Court. Given this precedent, not surprisingly, Attorney General, Dana Nessel, announced that she will no longer prosecute violations of the Governor's COVID-19 related Executive Orders. The Governor also indicated that she will find "other means" of continuing the restrictions found in her Executive Orders. The Michigan Department of Health and Human Services (MDHHS) then issued a new order, which essentially re-establishes requirements for mask use in commercial spaces, capacity limits for venues, and restrictions on indoor gatherings. Importantly, the indoor gatherings restrictions contained in MDHSS order does not apply to workplaces. Oakland, Kent, Ingham, and Washtenaw County Health Departments have also issued local orders requiring the use of masks. The Ingham and Washtenaw County orders also include capacity restrictions for bars and restaurants.

So what does this mean for employers? Even though the Executive Orders no longer have the force of law, employers continue to have a general duty to maintain a safe work place under the Michigan and Federal Occupational Safety and Health Acts. Because of this duty, employers should continue to follow their COVID-19 safety plans, including screening employees, the MDHHS order, local health orders and CDC guidelines regarding social distancing and the use of masks. Of particular concern is that the safety protocols set forth in the now-defunct Executive Orders may have set a standard of care that could be relied on by MIOSHA, workers' compensation claimants, or non-employment related litigants claiming injuries due to COVID-19. Abandoning Executive Order compliant safety plans at this time could place your business at increased risk of liability. While the legislature and the Governor are expected to collaborate on new state-wide rules to replace the Executive Orders, it is likely that many of the requirements will be similar to those found in the now defunct Executive Orders.

Employers should contact a member of **Bodman's Workplace Law Group** if they have any questions. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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