

MIOSHA Releases New Guidance, Requiring COVID-19 Remote Work Policies, and Promising to Enforce its Feasibility Rule

By: Rebecca Seguin-Skrabucha, Associate, Workplace Law Practice Group

The Michigan Occupational Safety and Health Administration (“MIOSHA”) predominantly defines the workplace safeguards employers must implement responsive to the COVID-19 pandemic, and it investigates employers’ failures to comply, leveraging citations and fines as its most convincing enforcement mechanisms. In particular, on October 14, 2020, MIOSHA issued Emergency Rules, adopting many of the guidelines employers came to know under the now-invalidated Executive Orders.

Emergency Rule 5(8), the “remote work rule,” is significant: **“The employer shall create a policy prohibiting in-person work for employees to the extent that their work activities can *feasibly* be completed remotely.”** The former standard was that “any work capable of being performed remotely . . . must be performed remotely,” leaving many employers to wonder what constitutes “feasibly.”

MIOSHA initially released guidance on the feasibility standard, suggesting employers be “thoughtful” and “reasoned” in their determinations of work capable of remote or in-person performance, and agreeing, in general, that it “will not focus on evaluating the business’ judgment of feasibility.”

Then, on November 6, 2020, the Michigan Department of Health and Human Services (“MDHHS”) recommended a stricter interpretation of the remote work rule, preferring that employers permit in-person work only where “a worker is unable to physically complete required job tasks from a remote setting,” denouncing the interpretation that the feasibility standard ought to consider “productivity” or “efficiency.”

On November 12, 2020, MIOSHA followed suit, replacing its initial guidance with the following:

MIOSHA will accept a written policy which indicates that employees are not to perform in-person work activities where the work activity can be feasibly completed remotely. Employers are obligated to demonstrate infeasibility of remote work. Employers should include in the remote work determination information which covers at least:

- *Which positions/classifications report for in-person work and why they must be physically present in the workplace;*
- *Reasons that this work cannot be performed remotely, this must include enough specificity to show this analysis has been performed.*

All employers, but especially those with office workspaces, must quickly craft a written policy. MIOSHA announced its launch of a State Emphasis Program “focused on office settings that addresses the need for increased vigilance, education and enforcement on remote work policies.” Through this program, MIOSHA is warning that its experts will be “visiting businesses statewide,” undoubtedly checking for compliance with

the remote work rule.

Bodman's Workplace Law Group created a sample COVID-19 Remote Work Policy. Employers should contact any member of **Bodman's Workplace Law Group** to obtain a copy of this sample policy and to discuss its customization for their workforces. 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.

WORKPLACE LAW PRACTICE GROUP	AARON D. GRAVES <i>Chair</i> 313.392.1075 agraves@bodmanlaw.com	JOHN T. BELOW 248-743-6035 jbelow@bodmanlaw.com	JOHN C. CASHEN 248.743.6077 cashen@bodmanlaw.com
	GARY S. FEALK 248-743-6060 gfealk@bodmanlaw.com	STEVEN J. FISHMAN 248.743.6070 sfishman@bodmanlaw.com	JOHN DAVID GARDINER 616.205.3123 jgardiner@bodmanlaw.com
	MELISSA M. TETREAU 248.743.6078 mtetreau@bodmanlaw.com	BRENT R. SCOTT 616.205.3317 bscott@bodmanlaw.com	REBECCA C. SEGUIN-SKRABUCHA 313.393.7594 rseguin-skrabucha@bodmanlaw.com
	KATHERINE F. CSER 248.743.6031 kcs@bodmanlaw.com	MICHELLE L. KOLKMEYER 248.743.6031 mkolkmeier@bodmanlaw.com	DAVID B. WALTERS 248.743.6052 dwalters@bodmanlaw.com
		ALEXANDER J. BURRIDGE 313.393.7560 aburridge@bodmanlaw.com	KAREN L. PIPER <i>Of Counsel</i> 248.743.6025 kpiper@bodmanlaw.com