

Michigan COVID-19 Update: Putting the pieces together for employers



Miriam L. Rosen | Monday, November 16, 2020

Over the past seven months, Michigan employers became experts in parsing the state's numerous executive orders for directives on workplace COVID-19 requirements. The Michigan Supreme Court's decision in October striking down the Governor's continued use of emergency powers did away with the executive orders. Filling that void, employers now have new points of reference in several new COVID-19 laws as well as rules and directives issued by the Michigan Occupational Safety and Health Administration (MIOSHA) and the Michigan Department of Health and Human Services (MDHHS). It is important for Michigan employers to understand how these new legislative and regulatory pieces fit together to create a new COVID-19 compliance framework.

New Michigan COVID-19 Legislation

Three new COVID-19 related laws, passed with bipartisan support, combine to provide protections for both employees and employers.

Anti-retaliation law protects employees

Picking up on a directive in a previous executive order, one of the new laws prohibits employers from discharging, disciplining, or otherwise retaliating against an employee who does not report to work because they:

- Are exhibiting principal symptoms of, or have tested positive for, COVID-19 (even if the employee later

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tests negative)

- Had close contact with an individual who tests positive for COVID-19 or displays the principal symptoms of COVID-19
 - However, employees who, after displaying the principal symptoms of COVID-19, fail to make reasonable efforts to schedule a COVID-19 test within three days after receiving a request from their employer to get testing for COVID-19, are not protected by the law

The law also prohibits employers from discharging, disciplining, or otherwise retaliating against an employee for opposing a violation of the law or for reporting health violations related to COVID-19. The protections in this law apply retroactively to March 1, 2020.

Liability shield laws protect employers

Along with the employee protections, the Governor also signed the “COVID-19 Response and Reopening Liability Assurance Act,” which offers employers immunity from liability for a “COVID-19 claim” if the employer acts in compliance with all federal, state and local statutes, rules, regulations, executive orders, and agency orders related to COVID-19. In addition, a third law amends Michigan law to provide liability protection to employers for an employee’s exposure to COVID-19 if the employer operates in compliance all federal, state and local statutes, rules, regulations, executive orders, and agency orders related to COVID-19.

Given the onerous nature of strict compliance with all COVID-19 related laws, rules, and orders, the liability shield laws provide that an isolated, de minimus deviation from strict compliance with COVID-19 rules and regulation does not deny an employer the laws’ immunity protections. The liability shield laws apply retroactively to any claim or cause of action after March 1, 2020.

Rules, Guidance, and Enforcement

MIOSHA Emergency Rules

Acting under its authority to protect workers’ safety, MIOSHA issued **Emergency Rules** related to COVID-19 effective on October 14, 2020, and for the next six months. The new Emergency Rules are generally similar to the rules under the executive orders, requiring:

- **Evaluation of Risk** - The Emergency Rules specifically require employers to make an exposure determination for all job categories of employees. The exposure determination requires evaluation of job tasks and procedures by degree of risk, ranging from jobs that involve little, if any, exposure to COVID-19 to those that involve a very high potential of risk of exposure to COVID-19.
- **COVID-19 Preparedness and Response Plan** - A carryover from an executive order, the new MIOSHA rules require employers to create a written “COVID-19 preparedness and response plan” consistent with guidance from OSHA and the CDC. The plan must specifically include the exposure determinations noted above and detail other procedures for preventing employee exposure. The plan must be readily available to employees on the business’s website, intranet, or in a hard copy document.
- **Basic Infectious Disease Prevention Measures** - The rules confirm that employers must implement the now well-established disease prevention measures, including frequent hand washing, no sharing of equipment, and increased cleaning of facilities.

Significantly, employers should take note that the new MIOSHA rules require employers to “create a

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policy prohibiting in-person work for employees to the extent that their work activities can feasibly be completed remotely.” This provision takes the previous executive order requirement to “[p]romote remote work to the fullest extent possible” a step farther by creating a “feasibility” standard that MIOSHA may enforce.

As discussed below, MDHHS has now taken that standard a step further with guidance on a “strict requirement” for in-person work.

- **Health Surveillance** - Under the new MIOSHA rules, employers are required to “conduct a daily entry self-screening protocol for all employees or contractors entering the workplace, including, at a minimum, a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with if possible a temperature screening.”
- **Training Requirements for All Employers** - The MIOSHA rules require employers to train employees on COVID-19 infection-control practices. Training is to include “[t]he proper use of personal protective equipment,” steps to take to alert employers of “any symptoms of COVID-19 or a suspected or confirmed diagnosis of COVID-19,” and “how to report unsafe working conditions.”
- **Recordkeeping Requirements for All Employers** - Employers are required to maintain a record of the following for one year after generation:
 - All COVID-19 employee training
 - Screening information for each employee or visitor entering the workplace
 - A record of each notice provided as part of the health surveillance program

MIOSHA has a variety of resources to assist employers in their compliance efforts including [MIOSHA Emergency Rules Fact Sheet](#), which provides a graphic overview of the requirements.

Enforcement Efforts

With COVID-19 cases surging in Michigan, on Nov. 5, 2020, Governor Whitmer announced that MIOSHA will introduce a new statewide program relating to office work. The program will be designed to educate employers and seek compliance with COVID-19 rules and guidance. The program will be coupled with increased MIOSHA enforcement of the Emergency Rules. Employers that fail to comply with the requirements may incur significant penalties, including fines of up to \$7,000 per violation.

Michigan Department of Health and Human Services

Following the Governor’s Nov. 5 announcement, the Michigan Department of Health and Human Services (“MDHHS”) issued [new guidance](#) on Nov. 6, 2020 providing additional context around the Governor’s comments and setting the stage for enhanced enforcement of the work from home directive.

First, the MDHHS reiterated that if in-person work occurs the steps outlined in the Emergency Rules should be followed by, among other requirements, creating and maintaining a COVID-19 preparedness plan, establishing clear workplace procedures to minimize the spread of COVID-19, and conducting daily self-screening for all people entering the workplace.

Second, the MDHHS guidance stressed the responsibility to maintain a safe workplace by limiting in-person work. Significantly, the MDHHS guidance introduces the concept of a “strict requirement” for in-

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person work under which “employers should only permit in-person work when attendance is strictly required to perform job duties.”

The MDHHS guidance provides additional insight about the “strict requirement” indicating that “in-person work means that a worker is unable to physically complete required job tasks from a remote setting (e.g., like a food service or auto assembly worker, or a job involving protected data that cannot be accessed remotely).” The guidance further notes that impediments to remote work, such as decreased productivity or efficiency or because of additional costs associated with remote work, are not sufficient to support in-person work. The “stricter requirement” is stated in MDHHS guidance - not a public health order, but employers may find both MDHHS and MIOSHA relying on it as if it were an order.

Employer Takeaways

Through a combination of legislation, new regulations and guidance, and enhanced enforcement efforts, Michigan has put together a new COVID-19 compliance framework for employers. Key steps to take include:

- Review and comply with the requirements of the Emergency Rules
- Implement a comprehensive COVID-19 Preparedness and Response Plan
- Implement a work-from-home policy taking into consideration of the “stricter requirement” of the MDHHS guidance

Employers should carefully review the new requirements and put these pieces together to ensure their own plans continue to meet the state’s new requirements.

The McDonald Hopkins Labor and Employment Response Team will continue to monitor developments and provide updates on further employment law issues as they arise related to the COVID-19 crisis.



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Team member bio