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Michigan's Stay-at-Home Order Spares Some in the Construction Industry

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To curtail the spread of COVID-19, Governor Gretchen Whitmer yesterday signed the "Stay Home, Stay Safe" Executive Order (EO 2020-21), directing all Michigan businesses and operations to temporarily suspend in-person operations which are unnecessary to sustain or protect life. The order also directs Michiganders to stay in their homes unless they're a part of that critical infrastructure workforce, engaged in an outdoor activity, or performing tasks necessary to the health and safety of themselves or their family, like going to the hospital or grocery store.

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. This order takes effect on March 24, 2020, at 12:01 am and continues through April 13, 2020, at 11:59 pm

The Order is enforceable by State and local law enforcement, classifying willful violations a misdemeanor.

Michiganders must, therefore, remain in their homes or places of residence unless exempt by the Order. The state is mostly following guidelines from the White House on "essential critical infrastructure workers." Those exempt employees include hundreds of thousands of workers in Michigan, such as hospital employees and first responders. However, there is a great deal of ambiguity over construction crews and other employees are deemed essential. This bulletin will assist you to make that determination, and once that decision is reached we advise what you must do next.

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Limited Exemption for Contractors Engaged in Essential Critical Infrastructure.

The Order provides a limited exemption for some private construction activities. Employees are not subject to the “stay home” directive if their in-person work is “necessary to sustain or protect life.” The Order classifies these employees as “critical infrastructure workers.” The definition of “critical infrastructure workers” is found in the Cybersecurity and Infrastructure Security Agency’s “Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response” (the “CISA Guide”).

- **Critical Trades:** The Order exempts building and construction tradesmen and tradeswomen, including but not limited to plumbers, electricians, exterminators, residential and commercial waste hauling and other companies provide services that are “necessary to maintaining the safety, sanitation, and essential operation of residences.”
- **Support Services.** The Order also exempts companies that provide support for road and line clearing to ensure the availability of needed facilities, transportation, energy and communications, and companies needed to remove, store and dispose of residential and commercial solid waste and hazardous waste.
- **Supplies for Essential Businesses & Operations:** The Order further exempts businesses that “enable, support, or facilitate the work of critical infrastructure business.” These essentially are your supply-chain companies.

Lest there be any confusion, the State updated its FAQ section on its Coronavirus webpage last night:

Q: Are people who repair homes considered critical infrastructure employees for the purposes of Executive Order 2020-21?

A: In general, yes. Under the order, critical infrastructure workers include workers “who provide services that are necessary to maintaining the safety, sanitation and essential operation of residences.” To the extent your workers perform jobs that are necessary to the safety, sanitation, and operation of homes, they may be designated as critical infrastructure workers.

Public Works Projects are Exempt from the Stay Home Order.

The Governor’s Order expressly exempts “Public Works” from the scope of its direction to keep employees home, but the Order offered little clarity as to what constitutes Public Works. The CISA Guide provides some assistance, exempting workers who construct “critical or strategic infrastructure.” Focusing on that “critical or strategic” qualification, the state last night added the following information to its FAQs on its coronavirus webpage:

Q: Is construction allowed under the executive order?

A: Some limited forms of construction are permissible, including construction to maintain and improve essential public works like roads, bridges, the telecommunications infrastructure, and public

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health infrastructure. Construction workers may also undertake such projects as necessary to maintain and improve the safety, sanitation, and essential operations of residences. In addition, businesses may designate construction firms to provide the necessary support to the work of the businesses' critical infrastructure workers. All construction work that is carried out while the order is in effect must be done in accordance with the mitigation measures required under section 5(c) of the order.

Lastly, the MDOT has confirmed that its projects qualify as "public works" and are generally exempt. Construction of interstate highways, roads, and bridges is critical for the movement of essential goods and services. You may ask your public Owner for similar clarification. However, one can reasonably conclude that construction and maintenance of water lines, sewers, telecommunications, and electrical infrastructure qualify as necessary for public health and welfare, and would be therefore exempt.

What to do next. Determining whether you can continue working is only the beginning of your task. If you are exempt from the Order, there are still certain tasks you may need to carry out. And Butzel Long can help you with those tasks. Here are two things that exempt companies must do, one thing that non-exempt companies must do, and something all companies may have to do.

Exempt Companies Must Designate Their Employees

First, under Paragraph 5 of the Governor's Order, businesses and operations that employ critical infrastructure workers may continue in-person operations subject to certain conditions. One such condition is that the in-person activities that are unnecessary to sustain or protect life must be suspended until normal operations resume. This means that even though your company may perform "critical infrastructure work," not every one of your employees will be exempt if their specific work is not for the purposes of critical infrastructure.

Second, once a company determines that it is exempt under this Order as providing critical infrastructure services, it "must determine which of their workers are critical infrastructure workers and inform such workers of that designation." These designations must be in writing by March 31, 2020. You do not have to send these designations to the state or publically file them anywhere, but you should send a written notice to the individual employees so designated. Also, keep a copy of the notices in the company's files. Instruct your employees who do receive such letters to carry those letters with them while they are traveling in case questioned by authorities.

If you have determined that you are a company that provides "critical infrastructure," you must now designate those employees who provide such critical infrastructure services.

Exempt Companies May Designate Their Suppliers and Distribution Centers

If a company employs critical infrastructure workers, that company may also designate its suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the work of its critical infrastructure workers. Those suppliers, distribution centers, or

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service providers so designated may then designate *their* appropriate workers as critical infrastructure workers. Those suppliers, distribution centers, or service providers may then also designate *their* suppliers, distribution centers, and service providers whose continued operation is necessary to enable, support, or facilitate the work of their critical infrastructure workers. This can continue down the supply chain or contract stream.

This may mean that a contractor installing a sewer who is exempt from the Order can designate their trucking companies, their distributors, and other vendors who keep them in business and the project moving forward. Similarly, a paving contractor performing Public Works is exempt from the Order, and may designate its concrete supplier as critical infrastructure workers. And so on.

Under Paragraph 9(b)(5), “Businesses, operations, suppliers, distribution centers, and service providers must make all designations in writing to the entities they are designating” The designations also must be put in writing by March 31, 2020. We strongly encourage companies to do this written designation soon, so an exempt company’s downstream suppliers and materialmen know that they, too, can keep their doors open.

Maintaining your basic office operations.

Even if your company is not exempt under the Order and therefore must either close its doors or work from home, such companies may still designate certain essential workers necessary to keep their business running or who are necessary to assist others in working from home. Under Paragraph 4 of the Order, companies may still conduct operations that require workers to leave their homes if “those workers are necessary . . . to conduct minimum basic operations.” Under Paragraph 4(b) of the Order, “workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.”

This exemption is intended to include a “bare-bones” skeletal crew who may be necessary to be in the office for certain activities to keep the company running while everyone else works from home. This would appear to clearly include HR and Accounting departments necessary to send out checks, process payroll, stay on top of employee benefits, and other similar office function tasks. It would also clearly cover IT workers necessary to facilitate the ability of everyone else in the company to work from home. There are others who would also clearly fall within this definition, whose in-person presence will be needed “to keep the trains running.”

Your company must also designate who are these employees, and notify them in writing, even if the company itself is not exempt under the Order. Under Paragraph 4(b), “Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation.” A company must notify in writing its affected “necessary” employees by March 31, 2020. You should also direct these designated employees to carry these letters with them when they travel for work. We also recommend the company keep a copy of such designations in their own files.

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What All Companies and Individuals Must Do -- Wash your hands and Six Foot Distance

If a business may continue its operations, or if an employee is designated as necessary to work under the Order, certain minimum guidelines still must be followed. "Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons." The Order is silent on the effect of an exemption if a company cannot follow these measures, but presumably, your company could not continue in-person operations. We recommend, therefore, your company adopt a policy that implements at a minimum these practices:

- Restricting the number of workers present on-premises to no more than is strictly necessary to perform the business's critical infrastructure functions.
- Promoting remote work to the fullest extent possible.
- Keeping workers and patrons who are on-premises at least six feet from one another to the maximum extent possible, including for customers standing in line.
- Increasing standards of facility cleaning and disinfection to limit exposure to COVID-19.
- Adopting policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person known or suspected to have COVID-19.
- Any other social distancing practices and mitigation measures recommended by the CDC.

Know Your Obligations

Determining whether your business or employees provide critical infrastructure services or are otherwise exempt under the Order is only Step 1. Once you make that determination, make sure that you are properly following the order by designating your proper employees, suppliers, and distribution centers. For assistance in properly following these designation procedures, contact Butzel Long. We are here to assist you.

Eric Flessland

313.983.6901

Flessland@butzel.com

Jim Urban

517.372.4358

urban@butzel.com

Mike Decker

517.372.4928

Decker@butzel.com

Paul Mersino

313.225.7015

Mersino@butzel.com