

Michigan Employers: Emergency Rules And Legislation Replacing Invalidated Executive Orders

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Highlights

Special COVID-19 unemployment executive orders now replaced with new pending legislation in Michigan

Status of required remote work now under a feasibility standard

Compliance with COVID-19 requirements provides liability protection

In the wake of the Michigan Supreme Court's invalidation of Gov. Gretchen Whitmer's executive orders, administrative and legislative action are replacing many of them. The legislation is awaiting the governor's signature. Here is a quick recap for Michigan employers, with links to the pending bills and rules.

Worker Safeguards Executive Order 2020-184 and the remote work requirements in Executive Order 2020-183 are replaced with MIOSHA emergency rules.

On October 14, MIOSHA promulgated [new emergency rules](#) that regulate the safety requirements employers must follow to protect their employees from COVID-19. The new emergency rules will remain in effect for six months. Manufacturing, construction, retail, and health care industries are among those with industry specific safeguards.

Industries that were previously required to provide mandatory temperature checks, including the manufacturing sector, are potentially no longer required to do so and are instead 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.”

Regarding remote work, the emergency rule states the “employer shall create a policy prohibiting in-person work for employees to the extent that their work activities can feasibly be completed remotely.” Many wonder if MIOSHA has the authority to direct that employees not report to the workplace. Regardless, an employer should justify and document infeasibility every time it determines that an employee cannot perform their duties remotely.

As with prior executive orders, businesses that resume in-person work must, among other things, have a written COVID-19 preparedness and response plan and provide training to employees that covers, at a minimum, workplace infection-control practices, the proper use of personal protection equipment (PPE), steps workers must take to notify the business or operation of any symptoms of COVID-19 or a suspected or confirmed diagnosis of COVID-19, and reporting known COVID-19 cases to the local health department.

COVID-19 unemployment benefits Executive Order replaced with new legislation.

The Michigan Legislature passed [legislation](#) that closely mirrors Gov. Whitmer’s unemployment Executive Order 2020-76. The bill extends the maximum unemployment benefit period from 20 weeks to 26 weeks, does not charge an employer’s account for benefits when someone is laid off due to COVID-19, allows employers to use the work-share program even if not normally eligible, and allows people to receive benefits while taking time off work for a COVID-19-related cause. The bill does not mention waiving the requirement for people to actively search for work – like the executive order did – meaning recipients may need to prove they are looking for a job to get benefits.

Non-retaliation Executive Order 2020-172 replaced with new legislation.

Under this [bill that covers retaliation](#), which is substantially similar to Gov. Whitmer’s Executive Order 2020-172, employers are prohibited from disciplining, discharging, or retaliating against an employee for COVID-19 related reasons. Specifically, employers cannot take action against an employee who:

1. Does not report to work because he tests positive for COVID-19, displays symptoms of COVID-19, or comes into close contact with someone who tests positive or displays symptoms of COVID-19
2. Opposes a violation of the act
3. Reports health violations related to COVID-19.

The prohibition against discipline or retaliation does not apply when an employee fails to make reasonable efforts to schedule a COVID-19 test within three days after receiving a request from their employer to get tested. A violation of these prohibitions can result in a civil action with minimum damages of \$5,000. The non-retaliation bill also applies retroactively for claims accruing after March 1, 2020.

Like the prior executive order, this bill prohibits employees from reporting to work if they: (1) test positive for COVID-19, (2) display the principal symptoms of COVID-19, or (3) come into close contact with an individual who tests positive for COVID-19, or with an individual who displays the

principal symptoms of COVID-19. The bill also explains when an employee who falls into one of the above categories may return to work.

There are, however, exceptions to these mandates. The legislation exempts certain employees who might regularly be exposed to COVID-19 positive patients and/or those showing symptoms of COVID-19 where their jobs are of a type that would regularly put them in contact with such individuals, like first responders, health care workers, etc.

These employees are not prohibited from reporting to work where they are exposed to someone who is COVID-19 positive or showing symptoms of COVID-19 and their employers are not prohibited from retaliating against them if they fail to report to work for those reasons. Nevertheless, these individuals remain subject to the prohibitions related to reporting to work for their own symptoms or positive test and their employers remain prohibited from retaliating against them when they do so.

New legislation provides legal immunity to businesses who comply with COVID-19 rules.

Under [another bill awaiting Gov. Whitmer's signature](#), a business would be immune from COVID-19 related claims related to COVID-19 when a business acts in compliance with all relevant federal, state, and local statutes, rules, regulations, executive orders, and agency orders. Therefore, if businesses were in compliance with all legal COVID-19 rules and regulations, then they are protected from claims that could be brought by customers, vendors, suppliers, and any other person who entered the business after March 1, 2020. Importantly, a de minimis deviation from strict compliance does not deny a business from immunity. This provision applies retroactively to any claim or cause of action that accrues after March 1, 2020.

New legislation provides legal immunity for MIOSHA violations to businesses who comply with COVID-19 rules.

Like the other new legislation, this [bill protects an employer](#) from MIOSHA liability for an employee's exposure to COVID-19 if the employer was operating in compliance with all COVID-19 legal requirements. As with the legislation providing immunity to businesses for COVID-19 claims, a de minimis deviation of a COVID-19 rule or regulation will not prevent the employer from protection and this applies retroactively to any claim that accrues after March 1, 2020.

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