

**EXEMPTIONS TO MICHIGAN’S COVID-19
“STAY HOME, STAY SAFE” EXECUTIVE ORDER**

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To combat the spread of COVID-19, Governor Gretchen Whitmer signed Executive Order 2020-21, the “Stay Home, Stay Safe” executive order (the “Order”), on March 23, 2020. The stated purposes of the Order are “[t]o 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.”¹ The Order went into effect at 12:01 a.m. on March 24, 2020 and requires that Michiganders generally stay at home through April 14, 2020 at 11:59 p.m.² It also mostly precludes businesses and operations from requiring that employees leave their homes.³ The Order’s term and restrictions are subject to modification by the governor based on the circumstances of the ongoing COVID-19 epidemic.⁴ The willful violation of the Order is a misdemeanor offense.⁵

Two types of workers are exempt from the Order: 1) “critical infrastructure workers”⁶ and 2) workers who are necessary “to conduct minimum basic operations.”⁷ The Order explicitly exempts these workers from its stay-at-home requirement and allows them to travel to perform their duties as critical infrastructure workers and to conduct minimum basic operations.⁸ “Critical infrastructure worker” and “workers who are necessary to conduct minimum basic operations” are both defined terms in the Order.

I. Workers Necessary to Conduct Basic Operations

Paragraph 4 of the Order allows businesses and operations to require that workers leave their homes if they are necessary to “conduct minimum basic operations.”⁹ Under the Order, people necessary to conduct minimum basic operations are workers “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.”¹⁰ Employers are required to determine which of their workers are necessary to conduct minimum basic operations and inform them of

¹ Executive Order 2020-21 (COVID-19) (Mar. 23, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html.

² *Id.* ¶ 2.

³ *Id.* ¶ 4.

⁴ *Id.* ¶ 13.

⁵ *Id.* ¶ 14.

⁶ *Id.* ¶ 4(a), 8, 9.

⁷ *Id.* ¶ 4.

⁸ *Id.* ¶ 7.

⁹ *Id.* ¶ 4.

¹⁰ *Id.* ¶ 4(b).

that designation.¹¹ These designations must be made either in writing or orally until March 31, 2020 at 11:59 p.m.¹² Starting April 1st, these designations must be made in writing.

II. Critical Infrastructure Workers

The Order allows businesses and operations that employ critical infrastructure workers to continue in-person operations subject to certain conditions.¹³ Critical infrastructure workers are those who are necessary to sustain or protect life and include:

- Workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency (“CISA”) in his guidance of March 19, 2020 on the COVID-19 response;¹⁴ and
- Workers listed in paragraph 9 of the Order.¹⁵

The Order notes that critical infrastructure workers only includes “some workers” in the CISA guidance, including those in the following industries:

- Health care and public health.
- Law enforcement, public safety, and first responders.
- Food and agriculture.
- Energy.
- Water and wastewater.
- Transportation and logistics.
- Public works.
- Communications and information technology, including news media.
- Other community-based government operations and essential functions.
- Critical manufacturing.
- Hazardous materials.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* ¶ 5.

¹⁴ *Id.* ¶ 8.

¹⁵ *Id.* ¶ 9(b).

- Financial services.
- Chemical supply chains and safety.
- Defense industrial base.¹⁶

The Order also designates other specific categories of workers as critical infrastructure workers:

- Licensed or unlicensed childcare workers who serve the children or dependents of other critical infrastructure workers.
- Workers at suppliers and distribution centers that have been designated as necessary by another business or operation that employs critical infrastructure workers.
- Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.
- Workers and volunteers for businesses or operations (including both and religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.
- Workers who perform critical labor union functions, including those who administer health and welfare funds and those who monitor the well-being and safety of union members who are critical infrastructure workers, provided that any administration or monitoring should be done by telephone or remotely where possible.

Generally, critical infrastructure workers must be designated as such by their employers.¹⁷ These designations must be made in writing or orally until March 31, 2020 at 11:59 p.m.¹⁸ and must be designated in writing starting April 1st. Business do not need to formally designate the following categories of workers:

- Workers in health care and public health;
- Workers who perform government activities that are necessary to sustain or protect life; and

¹⁶ *Id.* ¶ 8.

¹⁷ *Id.* ¶ 5(a).

¹⁸ *Id.*

- Workers and volunteers for businesses or operations (including both and religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.¹⁹

III. On-Site Requirements for Exempt Workers

The Order provides requirements for employers and their workers who leave their homes while it is in effect.²⁰ All individuals who leave their homes must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention, including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.²¹ "In-person activities that are not necessary to sustain or protect life must be suspended until normal operations resume."²² At a minimum, businesses and operations are required to adopt the following social distancing practices and other mitigation measures:

- Restricting the number of workers present on the premises to no more than is strictly necessary to perform the business's or operation'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 who are standing in line.
- Increasing standards of facility cleaning and disinfection to limit worker and patron exposure to COVID-19, as well as adopting protocols to clean and disinfect in the event of a positive COVID-19 case in the workplace.
- Adopting policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person who is known or suspected to have COVID-19.
- Any other social distancing practices and mitigation measures recommended by the Centers for Disease Control.²³

¹⁹ *Id.*

²⁰ *Id.* ¶ 3.

²¹ *Id.* ¶ 3.

²² *Id.* ¶ 5(b).

²³ *Id.* ¶ 5(c).

IV. Quick Tips and Best Practices

- The Order provides that it “must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.”²⁴ Thus, to the extent that there is ambiguity in the Order, employers should err on the side of requiring that their employees stay home while the Order is in effect.
- Designation of workers necessary to conduct minimum basic operations, critical infrastructure workers, and suppliers and distribution centers that are necessary to employers that employ critical infrastructure workers must be made by in writing prior to April 1st, or prior to an employing providing support for either minimum basic operations or critical infrastructure thereafter.
- Many employers prefer to provide these designations in writing in a document that their employees can provide to law enforcement in the event that they are stopped while traveling or approached while they are on the job. While the state has confirmed that the Order doesn’t require that employees carry a written designation of their status and purpose,²⁵ doing so may alleviate any question regarding their purpose for traveling.
- Employers should exercise caution in relying on the March 19, 2020 CISA guidance to designate critical infrastructure workers. This guidance does not broadly allow employers in the listed industries to designate all of their employees as critical infrastructure workers under the Order. Rather, the CISA guidance lists certain categories of critical infrastructure workers in each industry.²⁶ Moreover, the Order specifically provides that only “some workers” in the listed industries are critical infrastructure workers under the Order.²⁷ Businesses and operations should take care to only designate employees as critical infrastructure workers under the CISA guidance if a given employee qualifies as a critical infrastructure worker.
- Due to the Order’s broad stay-at-home mandate, employers should ensure that their employees who have been designated as critical infrastructure workers or as workers necessary to conduct minimum basic operations are only required to leave their homes to the extent

²⁴ *Id.* ¶ 1.

²⁵ Executive Order 2020-21 FAQs, https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-522631--,00.html (last visited Mar. 30, 2020).

²⁶ U.S. Department of Homeland Security Cybersecurity & Infrastructure Security Agency, Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, at p. 5–11.

²⁷ Executive Order 2020-21 (COVID-19), ¶ 8.

necessary to perform their duties as critical infrastructure workers or to conduct minimum basic operations, respectively.

V. Useful Links

- The State of Michigan's COVID-19 information website:
<https://www.michigan.gov/coronavirus>
- Executive Order 2020-21:
https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html
- The State of Michigan's Executive Order 2020-21 FAQs:
https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-522631--,00.html
- The U.S. Department of Homeland Security Cybersecurity and Infrastructure Security Agency March 19, 2020 Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response:
<https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf>