

Understanding the Impact of Michigan's Stay-at-Home Order on the Construction Industry

April 17, 2020

On March 10, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan and Gov. Gretchen Whitmer declared a state of emergency across the state.

Gov. Whitmer issued Executive Order 2020-21 on March 23, directing all Michigan businesses and operations to temporarily suspend in-person operations unnecessary to sustain or protect life. She extended and expanded her initial mandate on April 9 with Executive Order 2020-42.

The Governor's decision was intended 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." The order is enforceable by state and local government, and violations may be punishable as misdemeanors.

Construction Under Executive Order 2020-42

The specific language of Executive Order 2020-42 does not discuss construction. However, the order's Frequently Asked Questions (FAQ) supplement state that some limited forms of construction are permissible, including construction to maintain and improve roads, bridges, telecommunications infrastructure, and public health infrastructure (such as the creation or expansion of hospitals or other medical facilities to provide or support the provision of necessary care during the emergency).

Construction workers may also undertake projects that are necessary to maintain the safety, sanitation, and essential operations of a residence during the emergency, including projects immediately necessary to restore the habitability of a residence. Any non-emergency maintenance or improvements to residences are not permitted.

In addition, a business may designate a construction firm to provide necessary support to the work of that business's critical infrastructure workers. That is, a supplier, distribution center, or service provider may designate a contractor to construct or expand its operations to support its operations.

UNDERSTANDING THE IMPACT OF MICHIGAN'S STAY-AT-HOME ORDER ON THE CONSTRUCTION INDUSTRY Cont.

Construction projects that do not meet these criteria cannot be started or progressed while the order is in effect. This includes any such projects that were already underway at the time the order was issued. For projects underway when the order was issued, workers are permitted on site only to carry out “minimum basic operations.” That work is limited to in-person tasks strictly necessary to preserve the current condition of the project while the order is in effect, such as putting in place temporary security and weatherization measures. All other in-person work on the project must cease until the restrictions of the order are lifted and normal operations resume.

The phrase "I know it when I see it" is a colloquial expression by which a speaker attempts to categorize an observable fact or event, although the category is subjective or lacks clearly defined parameters. Michigan's Executive Order related to construction is similar—it may be difficult to put your finger on what is permitted, but if it doesn't feel like essential work, it probably isn't and won't be allowed. Cities are taking strict stances on violations, including \$1,000 fines in Detroit and \$500 fines in Flint.

Critical Infrastructure Industries

Construction touches every industry and the following industries are specifically listed in Executive Order 2020-42 as employing critical infrastructure workers:

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

Jobs that are continuing during this time include hospital construction projects, distribution and supply chain construction projects, and oil refineries construction work. Residential construction is also permitted where the work is necessary to maintain the safety, sanitation and essential operation of residences.

Historic Time, Safety First, Best Practices

We are dealing with a novel virus, but methods of maintaining safety are not new. Safety in the construction industry is the priority.

General contractors may consider requesting letters from their subcontractors explaining why they are critical infrastructure workers and their work should continue. Review the letter and compare it with the Executive Order and FAQs regarding construction before deciding whether to permit the work.

Remember, contractors have a common-law duty to perform their work so as not to unreasonably endanger employees of other subcontractors or anyone else lawfully on the worksite. *Finazzo v Fire Equip Co*, 323 Mich App 620, 634 (2018).

While it is difficult to tell a worker to stay home or reduce workforce pay to maintain the business, these are historic times. But this crisis will pass, and worker safety must remain the priority. Along those lines, in some cases contractors are idling projects they can argue are essential.

For contractors that continue to work, remember that the way you treat your employees now will go a long way toward gaining or maintaining their loyalty and respect after this pandemic abates. No worker wants to feel like they are being used by their employer without regard for their safety. Consider creating a protocol for your workers to follow upon their return home from the job site (and have a copy for all workers to place in a prominent space in their home so their family also understands). Upon arriving home—before hugging children or kissing a loved one—a worker should be undressing, placing their clothing in the wash and showering.

OHSA Recordable Illness, COVID-19

Finally, OSHA has relaxed its initial stance of COVID-19 being a recordable worksite illness. While COVID-19 is a recordable illness under OSHA's recording requirements, it will not enforce its recordkeeping requirements to require employers to make work-relatedness determinations for COVID-19 cases because of the difficulty determining whether workers who contracted COVID-19 did so at work.

The exceptions include situations where: (1) there is objective evidence that a COVID-19 case may be work-related; and (2) the evidence was reasonably available to the employer."

Should you or your business have any questions or concerns regarding Michigan's Stay Home, Stay Safe Executive Orders, do not hesitate to contact your attorney for counsel.