

Michigan Department of Health and Human Services (“MDHHS”) Announces New COVID-19 Related Restrictions

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As of November 14, 2020, the State of Michigan has reported 251,813 cases and 7,994 deaths due to the COVID-19 pandemic. In response, Robert Gordon Director of the MDHHS announced additional COVID-19 related safeguards through a newly promulgated [Gatherings and Face Mask Order](#) (the “Order”) on November 15. The Order contains many updates that concern municipalities, including new restrictions on non-residential gatherings, which will have significant impacts on in-person public meetings. The Order is set to take effect on Wednesday, November 18, 2020, at 12:01 a.m., and remains in effect until December 8, 2020, until 11:59 p.m.

Order’s Prohibition on Gatherings Will Impact Public Meetings

Significant changes under the November 15, 2020 [Gatherings and Face Mask Order](#) (“Order”) include heightened restrictions on residential and non-residential gatherings. Under the Order, a “gathering” is defined as “any occurrence, either indoor or outdoor, where two or more persons from more than one household are present in a shared space.” Order, Section 1(e).

The Order places the following restrictions on gatherings:

- Indoor gatherings at *non-residential* venues are prohibited.
- Outdoor gatherings at *non-residential* venues have capacity limitations:
 - 25 or fewer persons gathered at a venue without fixed seating, and attendance is limited to 20 persons per 1,000 square feet; and
 - 25 or fewer persons are gathered at a venue with fixed seating, and attendance is limited to 20% of the seating capacity of the venue.
- Indoor gatherings at residential homes are prohibited, except where no more than 10 persons are gathered from no more than 2 households.
- Outdoor gatherings at residential homes are prohibited, except where no more than 25 persons are gathered from no more than 3 households.

The Order’s prohibition on indoor nonresidential public gatherings will result in municipalities conducting public meetings using the newly adopted authorization for electronic meetings under the Open Meetings Act (“OMA”). On October 16, 2020, the Michigan Legislature, in response to rising concerns about COVID-19 and electronic meetings, [amended the OMA](#) to facilitate public bodies hosting electronic meetings.

- Now, until January 1, 2021, a public body subject to the OMA can host a electronic meeting for “any circumstances.”

- Between January 1, 2021, and December 31, 2021, a public body subject to the OMA can allow remote participation in meetings for select reasons: (1) members absent due to military duty, (2) a medical condition, or (3) a statewide or local state of emergency or state of disaster. For those meetings held, starting in January 2021, the public body will need to consider adopting an electronic meeting policy which satisfies specific requirements of the OMA.
- Due to notice requirements under the OMA, municipalities should be most concerned about public meetings scheduled to take place between November 16, 2020, and November 20, 2020, as public bodies are obligated to give advance notice that a meeting will occur remotely 18 hours before the meeting begins.

When scheduling [electronic public meetings](#) (which we addressed in March and can be viewed [here](#)), the newly amended OMA has specific requirements different from a nonelectronic meeting, including the following:

- Electronic meetings must be conducted **in a manner that permits 2-way** communication between and among members of the public body and public participants. This means that a video conference service is not the only means to hold a meeting, but a telephone conference service is equally applicable for meeting this requirement. There are various services available that can satisfy this requirement as discussed in our March E-Letter.
- Public bodies are obligated to **post notice at least 18 hours before a meeting** is held electronically. The notice must be posted on the public body’s home page or on a separate webpage dedicated to public notices for non-regularly scheduled or electronic meetings. Among other requirements, the notice must include:
 - How members of the public can participate in the electronic meeting;
 - If the public body has prepared an agenda for the meeting, the agenda must be released to the public on the public body’s website at least 2 hours before the electronic meeting begins.
- Members of public bodies participating remotely must announce their location when participating in electronic public meetings (unless away on military duty). At the outset of the meeting, the member of the public body must state their physical location “by stating the county, city, township, or village and state from which he or she is attending the meeting remotely.” The member’s declared location must be included in the meeting minutes. The amendment to the OMA suggests that this requirement is not mandatory until meetings being held in January 2021, but due to the ambiguity in the language, municipalities may consider complying with this requirement now.

Notably, the Order does not prohibit all “gatherings” for municipalities in their capacity as employers. Nothing in the Order or MIOSHA Emergency Rules requires municipalities to cease providing in-person service to residents for tasks that cannot be feasibly conducted remotely.

Order, Section 2(c)(2). Workplace gatherings that occur must have employees socially distanced six feet apart, wearing face coverings, and following all other requirements enumerated in [MIOSHA Emergency Rules Issued on October 14, 2020](#). If a municipality has a concern about a member of their public body not having access to reliable technology, paperwork, or other items located at his or her dwelling to feasibly participate in a remote public meeting, municipalities should consult with their Township attorney about granting public body members access to the municipality's facility as part of a permissible workplace gathering under the MIOSHA Emergency Rules.

Developing a Pandemic Response Plan and Work from Home Policy

In addressing workplace restrictions, the Order reaffirms the existing [MIOSHA Emergency Rules Issued on October 14, 2020](#), which you can learn more about through our October [publication](#). Under the MIOSHA Emergency Rules, all employers must adopt a Preparedness and Response Plan. With many municipal employers adopting a Preparedness and Response Plan under the previous Michigan Governor Executive orders, municipalities should review their plans to ensure compliance with the MIOSHA Emergency Rules.

One significant requirement from the MIOSHA Emergency Rules is that all employers create a policy governing which employees can work in-person. In its relevant portion, the Emergency Rules state "The employer shall create a policy prohibiting in-person work for employees to the extent that their work activities can feasibly be completed remotely." MIOSHA Emergency Rules, 5(8). Under this provision, municipalities should consider examining (if not already done) what "work activities can feasibly be completed remotely."

Other Provisions for Consideration.

Many municipalities offer an array of services to their citizens. Below are other pertinent parts of the Order that may impact current services:

- Exercise Facilities may remain open with the following safeguards:
 - Gatherings must not exceed 25% of the total occupancy limit;
 - There must be at least 12 feet of distance between occupied workout stations;
 - Gatherings for group fitness activities or classes are prohibited; and
 - Exercise facilities must maintain accurate records, including the date and time of entry, names of patrons, and contact information, to aid with contact tracing, and deny entry to any visitor who refuses to provide, at a minimum, their name and phone number.
- Gatherings are prohibited at all entertainment venues and recreational facilities.
- Gatherings at retail stores, libraries, or museums must not exceed 30% of total occupancy limits; however, such facilities may permit one customer at a time to enter if strict adherence to the 30% occupancy limit would otherwise result in closure.

- 25 persons may gather for the purpose of attending a funeral.

Conclusion

As the COVID-19 Pandemic continues to evolve, there is a high probability the State will see new regulations issued by the Legislature, MDHHS, or MIOASHA. As always, the dedicated team at Fahey Schultz Burzych Rhodes PLC, will continue to monitor these updates. Feel free to contact an attorney at Fahey Schultz Burzych Rhodes PLC with any questions or concerns.



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