

Designation of Public Education Employees as Critical Infrastructure and Essential Employees Pursuant To Governor Whitmer's Executive Order No. 2020-21 (COVID-19)

March 25, 2020

On Monday, March 23, 2020, Governor Whitmer issued Executive Order No. 2020-21 (COVID-19) (the "Order") ordering residents to remain at home to the maximum extent feasible. The Order is to "be construed broadly to prohibit in-person work that is not necessary to sustain or protect life." The Order does not affect employees working remotely who are able and directed by their employers to work remotely from home, but it does contain exceptions for "critical infrastructure workers" and workers "whose presence is strictly necessary to enable, support, or facilitate the work of" critical infrastructure workers. With many school districts and intermediate school districts continuing to provide services, whether through virtual learning or meals for needy families, we have compiled the available guidance to date as to what public education employees might fall within these exceptions.

While the Order contains some examples of both types of workers, and incorporates by reference the types of employees identified as critical in guidance issued by the Cyber Security & Infrastructure Agency of the U.S. Department of Homeland Security on March 19, 2020[1], the Order does not provide many concrete examples of the types of education employees who might be considered critical or essential. The Order directs businesses and operations to determine, in writing, by March 31, 2020, which workers are critical or essential, and inform both the State [2] and the workers of that determination. Electronic notification and posting on the district's website are authorized means of communicating the determination. While the Order does not require designations for "necessary government activities," the lack of detail in the Order with respect to the status of public education employees strongly underscores the importance of making a formal written designation for each of these employees designated as critical infrastructure or essential workers.[3]

A broad designation will not comply with the terms of the Order, and violation of the Order is designated as a misdemeanor. The Attorney General has the power to enforce the Order, and has indicated publicly that she will do so for egregious violations.[4] The Attorney General has also announced that she expects local law enforcement to enforce the Order.[5]

Where in-person operations are continued, the Order requires employers to impose measures to protect workers, including social distancing, increased sanitary standards and a means of barring entry to those who display COVID-19 symptoms or who have had contact with a person known or suspected to have COVID-19. In Oakland County, employers have been directed to screen employees working in-person daily before they begin work. Workers must work remotely wherever possible.

The following is a list of job descriptions for public education employees who may be considered critical workers or essential for the support of critical workers, based on available information. The list should not be regarded as exhaustive, and may not apply to all districts.

1. IT workers supporting virtual learning[6], virtual meetings and other essential functions (such as payroll and benefits), including technology for special education.[7]

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2. Data center operations employees.[8]
3. Employees managing payroll, benefits, bill payments, receipts and related banking.[9]
4. Custodial services for buildings where other essential and critical workers are working.[10]
5. Childcare for children of critical infrastructure workers, including those children with special needs.[11]
6. Special education services which can only be managed in person.[12] We have seen at least one report that autism services may be continued in person.[13]
7. Security services to protect RESA facilities.[14]
8. Any employee whose responsibilities include protecting public health, including students' mental health needs.[15]
9. Food service employees and other workers providing meals/food packages to needy families.[16]
10. On a very limited basis, travel to retrieve materials at the district not available online which are necessary for the provision of virtual learning by the employee from his or her home.[17]
11. Travel to a district facility to retrieve or send protected personnel documentation or special education referrals via secure fax.[18]

Districts must provide a written determination no later than March 31, 2020, but earlier if possible. Posting the determination prominently on the district's website satisfies this requirement. The header for the website posting could be "Determination of Critical Infrastructure Workers and Essential Employees Performing Necessary Government Activities."

Districts should also consider providing a letter to each employee covered by the determination, identifying the employee as a critical infrastructure worker or performing an essential governmental function, both to provide assurance to the employee and to local law enforcement in the event the employee's status is questioned. It would be helpful to identify the job function in the letter and if possible also include a reference to the posting on the district's website and if possible, a phone number to be called to verify the designation. For occasional travel for the purposes identified in 10 and 11 above, a different letter should be supplied for the specific trip to make it clear that the district discourages unnecessary travel.

The State has promised to update and continue to clarify its guidance on this subject. We will provide more information to you as it becomes available.

This is part of a series of Miller Canfield **COVID-19 alerts** providing clients with practical advice on measures they can take to navigate through these challenging times. Please contact the authors or your Miller Canfield attorney with further questions.

This information is based on the facts and guidance available at the time of publication, and may be subject to change.

[1] CISA Guidance: <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf>

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[2] At this time there is no mechanism for reporting a district's determination to the State. The Order does not specifically require notification to the State, but some press reports suggest that notification to the State is expected, and both the Governor and the Attorney General have implied that the State is going to monitor and enforce the designations.

[3] We understand that in some local jurisdictions in Michigan individuals are being stopped and ticketed for being away from home.

[4] Order, paragraph 9.b.6. "Businesses...and service providers that abuse their designation authority shall be subject to sanctions to the fullest extent of the law." Governor: "Don't play fast and loose." Nessel: Will prosecute egregious violations. <https://www.bridgemi.com/michigan-government/what-jobs-are-exempt-michigan-coronavirus-lockdown-you-may-be-surprised>

[5] https://www.michigan.gov/ag/0,4534,7-359-92297_92299-522905--,00.html

[6] The CISA Guidance identifies services to support virtual learning.

[7] https://www.michigan.gov/documents/mde/Distance_Learning_for_SE_684596_7.pdf

[8] Order, paragraph 4.b.

[9] Order, paragraph 4.b.

[10] Order, paragraph 5.c.4.

[11] https://www.michigan.gov/documents/mde/Child_Care_within_Classrooms_684283_7.pdf

[12] Betsy DeVos, in a posting this week, expressed her opinion that most special education services could be provided through virtual programming. <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>

[13] Bridge Magazine suggested on 3/23/2020 that autism therapists would be critical employees.

[14] Order, paragraph 4.b.

[15] Order, paragraph 8.a https://www.michigan.gov/documents/mde/Guidance_Mental_Health_Providers_684243_7.pdf

[16] Order, paragraph 9.d.

[17] See footnote 6.

[18] CISA Guidance.