

## Michigan Governor Lacks Authority to Continue COVID-19 State of Emergency, Supreme Court Rules

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October 5, 2020

Since March 2020, Michigan Governor Gretchen Whitmer has relied on the Emergency Powers of the Governor Act of 1945 (EPGA) and the Emergency Management Act (EMA) as authorities for her ability to declare and extend the state-of-emergency and state-of-disaster in an effort to curtail the spread of COVID-19. On Oct. 2, 2020, the Michigan Supreme Court held that actions exceeded her emergency authority after April 30, 2020.

The questions concerning the ability of the governor to declare and extend the state-of-emergency and state-of-disaster under the EMA and EPGA were referred to the Michigan Supreme Court by the United States District Court for the Western District of Michigan in *Midwest Institute of Health d/b/a Grand Health Partners, et al. v. Governor of Michigan et al* as unsettled issues of state law. The plaintiffs, healthcare providers who were restricted from providing nonessential medical services and a patient who was restricted from receiving such services under the governor's executive orders, filed suit challenging her ability to issue such directives.

The Michigan Supreme Court unanimously held that under the EMA Whitmer did not have the power to issue COVID-19 emergency orders after April 30, 2020. This law only allows the governor to declare a state-of-emergency and state-of-disaster for up to 28 days once, after which she is required to seek extensions from the legislature. Because the legislature declined to authorize an extension beyond April 30, 2020, the governor could not renew the COVID-19 related state-of-emergency or state-of-disaster declaration.

The justices, however, were divided on whether the EPGA, which does not require the governor to seek approval from the legislature to extend the state-of-emergency, constitutionally provides the governor the emergency power to confront the COVID-19 pandemic. A four-member majority of the court, comprised of justices Stephen Markman, Brian Zahra, Elizabeth Clement and David Viviano, held that the EPGA is unconstitutional and could not provide a basis for the governor to continue her declaration of a COVID-19 state of emergency. Specifically, the majority concluded that the EPGA offends the separation-of-powers doctrine because it amounts to an unconstitutional delegation of legislative authority. The dissenting minority, including Chief Justice Bridget McCormack and justices Megan Cavanagh and Richard Bernstein, argued that the EPGA does not violate the separation-of-powers doctrine because it includes adequately specific standards within which the governor must operate.

### What does this mean for businesses and employers?

In response to the court's decision, Whitmer issued a **statement**, taking the position that the current COVID-19 executive orders remain in effect for at least 21 days after the Michigan Supreme Court's ruling, and subsequently, many responsive measures that have been in place will continue under alternative sources of authorities. However, on Oct. 4, 2020, Michigan Attorney General Dana Nessel issued a statement indicating that the governor's executive orders will no longer be enforced through criminal prosecution. Most recently, on Oct. 5, 2020, the governor and Michigan Department of Health and Human Services (DHHS) Director Robert Gordon have asked the court to clarify that its Oct. 2 ruling would not take effect until Oct. 30, 2020.

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The outcome of this new development is still uncertain, and Whitmer has stated that she will try to work with the state legislature to address the issues or to use other legal authorities to impose the health and safety restrictions. However, despite the court's decision, and separate of the governor's executive orders, business and employers continue to have legal obligations to provide a safe environment for employees, customers and visitors. Otherwise, they might be found legally negligent and liable. A few states have introduced legislation to provide limited immunity from such potential lawsuits to businesses and employers, but not in Michigan. Accordingly, safety policies, practices and procedures in accordance with public health guidance and local orders and ordinances, should continue to be implemented and followed to limit the exposure of COVID-19 in the workplaces and on the business premises.

If you have any questions, please feel free to contact the authors or your Miller Canfield attorney.

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