STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

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EXECUTIVE ORDER

No. 2020-128

Clarifying WDCA Eligibility for Workplace Exposure to COVID-19

Rescission of Executive Order 2020-125

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended (EMA), MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended (EPGA), MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And on April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the Emergency Powers of the Governor Act, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the Emergency Management Act.

These executive orders have been challenged in *Michigan House of Representatives and Michigan Senate v. Whitmer*. On May 21, 2020, the Court of Claims ruled that Executive Order 2020-67 is a valid exercise of authority under the Emergency Powers of the Governor Act but that Executive Order 2020-68 is not a valid exercise of authority under the Emergency Management Act. Both of those rulings are being challenged on appeal.

On June 18, 2020, I issued Executive Order 2020-127, again finding that the COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan. That order constituted a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. And, to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature had declined to grant an extension request, that order also constituted a state of emergency and state of disaster declaration under that act.

The Emergency Powers of the Governor Act provides a sufficient legal basis for issuing this executive order. In relevant part, it provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

Nevertheless, subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, I also invoke the Emergency Management Act as a basis for executive action to combat the spread of COVID-19 and mitigate the effects of this emergency on the people of Michigan, with the intent to preserve the rights and protections provided by the EMA. The EMA vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)–(2). This executive order falls within the scope of those powers and duties, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, they too provide a sufficient legal basis for this order.

Michigan's COVID-19-response workers face regular exposure to a deadly and highly contagious virus. They do so to ensure that Michiganders have access to emergency medical care; that Michigan's laws are enforced; that prisoners and pretrial detainees in state and local custody receive their constitutionally guaranteed rights; and that the safety and security of the State and its citizens remains protected.

The Workers' Disability Compensation Act of 1969 (WDCA), MCL 418.101 *et seq.*, affords important protections to Michigan's workers and employers. In effectuating these protections, section 418.401 of the WDCA requires an employee seeking entitlement to wage-loss benefits to demonstrate, in part, the existence of a work-related injury that prevents the employee from performing his or her job duties. But due to the possibility of asymptomatic transfer of COVID-19, requiring a COVID-19-response employee to affirmatively demonstrate that they contracted COVID-19 in the course of their employment unduly shifts risk to the worker, and may therefore hinder Michigan's emergency response by undermining confidence in the worker's compensation system among the most critical members of the workforce.

Executive Order 2020-125 assured COVID-19-response employees of their eligibility for WDCA coverage when injured or disabled by COVID-19 infection at work. This order clarifies the scope of that order. With this order, Executive Order 2020-125 is rescinded.

Accordingly, acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. "COVID-19-response employee" means an employee whose job responsibilities require them to have regular or prolonged contact with COVID-19 in the course of their employment. For purposes of this order, the following individuals are COVID-19-response employees:

   (a) A person who is required to report to work in one of the following workplaces:

      (1) An ambulance operation, as that term is defined in section 20902(5) of the Public Health Code, 1978 PA 368, as amended, MCL 333.20902(5), including advanced mobile emergency care services;

      (2) A county medical care facility, as that term is defined in section 20104(3) of the Public Health Code, MCL 333.20104(3);

      (3) An emergency response service, as that term is defined in section 102(m) of the Emergency 9-1-1 Service Enabling Act, 1986 PA 32, as amended, MCL 484.1102(m);

      (4) A home for the aged, as that term is defined in section 20106(3) of the Public Health Code, MCL 333.20106(3);

      (5) A hospice, as that term is defined in section 20106(4) of the Public Health Code, MCL 333.20106(4);

      (6) A hospital, as that term is defined in section 20106(5) of the Public Health Code, MCL 333.20106(5); or

      (7) A nursing home, as that term is defined in section 20109(1) of the Public Health Code, MCL 333.20109(1).

   (b) A person working in a home health agency, as that term is defined in section 20173a(15)(f) of the Public Health Code, MCL 333.20173a(15)(f), or a visiting nurse association, who is required to provide in-person medical care to patients.

   (c) A person working as a physician, physician assistant, licensed practical nurse, registered professional nurse, medical first responder, nurse, emergency medical technician, emergency medical technician specialist, paramedic, or respiratory therapist who is required to provide in-person medical care to patients.

   (d) A law enforcement officer, as that term is defined in section 2(f) of the Michigan Commission on Law Enforcement Standards Act, 1965 PA 203, as amended, MCL 28.602(f), to the extent the law enforcement officer is required to report to work and interact with the general public.

(e) A motor carrier officer within the Michigan Department of State Police as described in section 6d of the Michigan State Police Act, 1935 PA 59, as amended, MCL 28.6d.

(f) A firefighter, as that term is defined in section 1(n) of the Fire Prevention Code, 1941 PA 207, as amended, MCL 29.1(n).

(g) A member of an emergency rescue team, as described in section 161(j) of the WDCA, MCL 418.161(j), to the extent that the member is required to report to work and interact with the general public.

(h) A volunteer civil defense worker, as described in section 161(g) of the WDCA, MCL 418.161(g), to the extent that the worker is required to report to work.

(i) An on-call member of a life support agency, as described in section 161(h) and (i) of the WDCA, MCL 418.161(h) and (i), to the extent the member is required to report to work.

(j) A state or local government employee that is required to work within the secured perimeter of a penal institution, including but not limited to correctional facilities, jails, and detention centers.

2. For purposes of the WDCA, and subject to rebuttal by specific facts to the contrary, a COVID-19-response employee who is confirmed as COVID-19 positive on or after March 18, 2020, either by physician or by test, shall be presumed to have suffered a "personal injury," as that term is defined by section 401(2)(b) of the WDCA, MCL 418.401(2)(b).

3. The Director of the Department of Labor and Economic Opportunity (LEO) is authorized to issue orders and directives necessary to implement this executive order.

4. This order replaces the emergency rules that LEO filed with the Secretary of State on March 30, 2020; those rules are hereby suspended.

5. If any portion of this order is finally adjudicated invalid, section 4 is void.

6. This order is effective immediately and does not terminate until the end of the states of emergency and disaster declared in Executive Order 2020-127 or the end of any subsequently declared states of disaster or emergency arising out of the COVID-19 pandemic, whichever comes later.

Given under my hand and the Great Seal of the State of Michigan.

Date: June 18, 2020

Time: 3:16 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE