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## Back To Work

Best Practices for Resuming Business Operations Under Michigan & Federal Law Panel Discussion

Panelists  
**Laura M. Dinon** ■ **Courtney L. Nichols** ■ **Claudia D. Orr**

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## Today's Panelists



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## Today's Program

- Current status of applicable Michigan Executive Orders
- Primary concerns when resuming in-person business activities
- Discussion of applicable administrative guidance
- Answering YOUR questions!

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### Executive Order 2020-77

- Effective May 7, 2020
- Extends Stay Home, Stay Safe Order until May 28, 2020
- Part of phased reopening
- Allows for re-starting of manufacturing operations, subject to provisions within the order




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### Executive Order 2020-77

- New categories of businesses that may conduct in-person work (i.e., "Resumed Activities") include workers necessary:
  - To train, credential, and license first responders and health-care workers, including CNAs, provided that as much instruction as possible is conducted remotely.
  - To perform start-up activities at manufacturing facilities, including activities necessary to prepare the facilities to follow the workplace safeguards.
  - To perform manufacturing activities, subject to workplace safeguards.




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### Resumed Manufacturing Activities

- Must conduct a daily entry screening protocol for workers, contractors, suppliers and anyone else entering the facility.
  - Includes a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with temperature screening as soon as no-touch thermometers can be obtained.
- Must create dedicated entry point(s) at every facility for daily screening and ensure physical barriers are in place to prevent anyone from bypassing the screening.




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### Daily Screening Questions

- Have you been in close contact with a confirmed case of COVID-19 within the past 14 days?
- Have you had a fever or felt feverish in the last 72 hours?
- Are you experiencing any new respiratory symptoms, including a runny nose, sore throat, cough or shortness of breath?
- Are you experiencing any new muscle aches or chills?
- Have you experienced any new change in your sense of taste or smell?
- Have you traveled on an airplane internationally or domestically within the past 14 days?



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### Temperature Check

- Executive Order 2020-77 provides:
  - Manufacturing operations must take temperatures as soon as touchless thermometers are available.
  - Construction industry operations *should* “if possible.”
- Check county-specific guidelines and updates.



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### Resumed Manufacturing Activities

- Suspend all non-essential in-person visits, including tours.
- Train workers on various COVID-19 related issues:
  - Transmission
  - Symptoms
  - PPE use
  - Preventative rules



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### Training Suggestions

- Webinars/web-based programs
- Pre-shift training
- Dissemination of written materials
  - Have employees acknowledge receipt in format that can be saved
- Make sure training is company and/or location specific and 100% accurate.
  - Add discretionary language re: updates/modifications



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### Resumed Manufacturing Activities

- Reduce congestion in common spaces wherever practicable (suggestions: closing salad bars and buffets within kitchens, markings for seating, etc.)
- Implement rotational shift schedules where possible
- Stagger start times and meal times
- Install temporary physical barriers (where practicable) between work stations and cafeteria tables

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### Resumed Manufacturing Activities

- Create protocols for minimizing personal contact upon delivery of materials to the facility
- Adopt protocols to limit sharing of tools/equipment to the "maximum extent possible"
- Frequently and thorough clean and disinfect high-touch surfaces, paying special attention to parts, products and shared equipment (i.e., tools, machinery, vehicles)

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## Resumed Manufacturing Activities

- Ensure there are sufficient hand-washing/hand-sanitizing stations at the worksite to enable easy access by workers, and discontinue use of hand dryers.
- Notify plant leaders and potentially exposed individuals upon identification of a positive case of COVID-19 in the facility, as well as maintain a central log for symptomatic workers or workers who received a positive test for COVID-19.
- Send potentially exposed individuals home upon identification of a positive case of COVID-19 in the facility.
- Encourage workers to self-report to plant leaders as soon as possible after developing symptoms of COVID-19.
- Shut areas of the manufacturing facility for cleaning and disinfection, as necessary, if a worker goes home because he or she is displaying symptoms of COVID-19.



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## FAQs Regarding EO 2020-77

- What does the word “necessary” mean as it relates to resumed manufacturing activities?
- What if I only have one or two touchless thermometers and several hundred employees?
- Should we use applications/online programs to track the screening results?
- Do we have to give letters to employees who are coming back for resumed activities?



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## EEOC Guidance

- Available at <https://www.eeoc.gov/wysk/what-you-should-know-about-ada-rehabilitation-act-and-coronavirus>
- May 2020 updates: elaborate on advice for disability accommodation requests and harassment; adds a section regarding employees returning to work after the pandemic

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## EEOC Guidance

- EEOC laws, including ADA and Rehabilitation Act, still apply during pandemic
- Employers may still follow guidelines and suggestions from CDC and state/local public health authorities
- Critical infrastructure and essential critical workers still covered by ADA and Rehabilitation Act

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## EEOC Guidance

- ADA allows employers to make disability-related inquiries and conduct medical exams as they are job related and consistent with business necessity
- Excluding employees with a medical condition that would pose a direct threat to health or safety may meet this standard

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## EEOC Guidance

- If employee does not seek a reasonable accommodation – employer does not have to take any action
- If employer believes employee may be direct threat to his/her health or that of others:
  - Must do direct threat analysis
  - High standard to show direct threat
- Even if direct threat exists, employer can't keep out of the workplace unless no way to provide a reasonable accommodation that isn't an undue hardship

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### EEOC Guidance

- Cannot select employees for disparate treatment based on national origin
- CDC warning of prejudice against Asians
- Employers need to closely monitor concerns in the workplace of disparate treatment or harassment because of national origin, including avoiding other employees
- Can bar an employee from the workplace if they were recently in China (self-quarantine) and/or have symptoms of COVID-19



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### FAQs re: EEO-Law Issues

- When should we require our employees to be tested or perform on-site testing of employees?
- How do we ensure the safety of “vulnerable” workers without engaging in unlawful age/disability discrimination?
- What are the primary harassment concerns regarding COVID-19?



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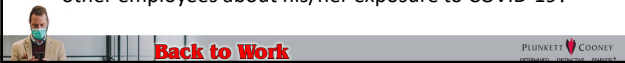
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### FAQs re: Confidentiality

- Where do we keep the screening results?
- What if an employee tests positive and we require a return-to-work note – where do we keep that?
- Can we disclose the name of an employee to a public health agency when we learn the employee has tested positive?
- What if an employee voluntarily sends a message to other employees about his/her exposure to COVID-19?



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## OSHA Considerations

- <https://www.osha.gov/Publications/OSHA3990.pdf> – Guidance on Preparing Workplaces for COVID-19
  - Regularly check [www.osha.gov](http://www.osha.gov) website for updates, due to rapidly evolving situation
- Prevent Worker Exposure – <https://www.osha.gov/Publications/OSHA3989.pdf>
- In general, OSHA guidance includes the following:
  - Require social distancing (at least six feet between co-workers their work stations), where possible. Establish flexible work hours, such as staggered shifts, if feasible.
  - Discourage shared use of phones, tools, desks or other equipment.
  - Encourage telecommuting or work from home where feasible to limit worksite exposures.
  - Train workers on how to properly put on, use/wear, take-off and maintain protective clothing and other equipment, including the use of face coverings (consistent with the CDC's and OSHA's recommendations).

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## OSHA Considerations

- Guidance also includes:
  - Train workers on how to properly put on, use/wear, take-off and maintain PPE (consistent with the CDC's and OSHA's recommendations).
  - Require employees to stay away from workplace and seek medical assistance if ill.
  - Allow **(or require)** workers to wear face coverings/masks over their nose and mouth to prevent spread of the virus (unless under ADA accommodating workers who have conditions preventing or restricting use).
  - Monitor public health communications (including from the CDC, OSHA and local health authorities) for COVID-19 recommendations for the workplace and provide workers access to that information.
  - Promote covering coughs/sneezes and frequent hand washing with soap and water (at least 20 seconds) and provide soap/water and hand sanitizer or alcohol-based hand rubs (>60% alcohol).
  - Provide disinfectants and disposable towels for cleaning work surfaces, work stations and work areas (in accordance with manufacturer instructions).
  - Encourage workers to report any safety and health concerns.



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## OSHA – COVID-19 Recordable?

- If your company had 10 or less employees at all times during last calendar year, you do not need to keep OSHA injury and illness records *unless* OSHA or Bureau of Labor Statistics told you in writing that you must keep records under § 1904.41 or § 1904.42.
- But, all employers covered by OSHA must report any work-related incident that results in a fatality, in-patient hospitalization, amputation, or loss of an eye.

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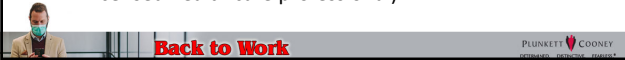
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## OSHA – COVID-19 Recordable?

- COVID-19 is a recordable illness, if the case:
  - is a confirmed case of COVID-19
  - is work-related (29 CFR § 1904.5) and
  - involves one or more of the general recording criteria in 29 CFR § 1904.7 (death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness or involves a significant injury or illness diagnosed by licensed health care professional).




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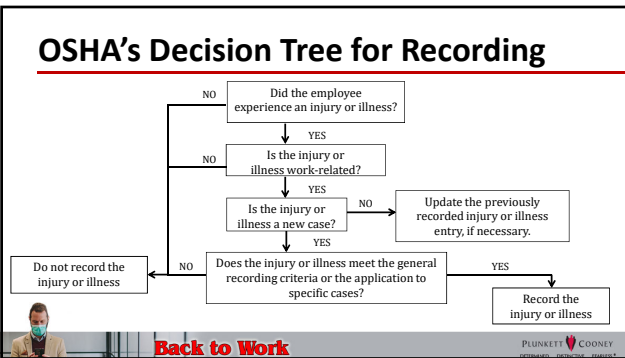
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## OSHA’s Decision Tree for Recording




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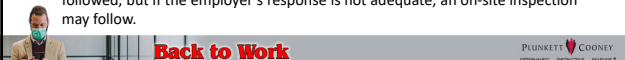
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## OSHA Enforcement Guidance

- April 13, 2020 – Enforcement Guidance issued
  - <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>
- Fatalities and imminent danger exposures related to COVID-19 are prioritized for inspection, “with particular attention given to healthcare organizations and first responders.”
- Formal complaints (written and signed) alleging unprotected exposures to COVID-19 by employees in high or very high-risk jobs may warrant on-site inspection. Other workplaces, won’t “normally” result in on-site inspection.
- “Non-formal” procedures set out in the Field Operations Manual will be followed, but if the employer’s response is not adequate, an on-site inspection may follow.




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### Practical Considerations Under OSHA

- OSHA requires employers to (1) conduct hazard assessment and (2) isolate sick employees:
  - Physical environment
  - Traffic & scheduling
  - Sick employees



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### FAQS: Bringing Employees Back To Work



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### Who Gets Called Back to Work?

- Everyone? By seniority (CBA)? By business needs? (disparate impact review, discrimination concerns)
- Full time or “work sharing?”
- Right to remain off? Leave of absence rights versus unemployment benefits preference.
- Documenting who was offered work and response.



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### How do we Prepare to Reopen?

- What type of policies should we create before we reopen for business?
- Can we adjust employee wages (temporarily) due to the current economic condition and uncertainty?
- Can we prohibit employees from using accrued and available vacation/PTO for a period of time after we reopen?



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### How do we Handle Employees who do *not* Want to Return?

- We had a number of employees working from home since mid-March, who want to continue working from home, can we order them to work in-person?
- What if we have an employee who traditionally worked in the office but we want to require to work from home moving forward – can we make the change?
- What if an employee is making more on unemployment than working and doesn't want to return to work?

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### How do we Handle Employees who do *not* Want to Return?

- We are NOT covered by the Families First Coronavirus Response Act – what are our obligations to an employee who cannot return to in-person work because of child-care obligations?
  - What about because the employee is “scared” to return to work?
  - What about if the employee is in the vulnerable population?



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## What is Our Exposure?

- If an employee is exposed to COVID-19 in the workplace, is that a potential workers' compensation claim?
- What if we cannot get PPE in time to reopen?
- What if we have employees not wearing masks because of "medical reasons" and, what are sufficient "medical reasons"?



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## Attendee Questions



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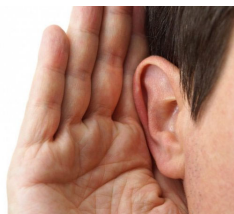
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Date: May 12, 2020  
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The COVID-19 pandemic has turned most business operators upside down. After Michigan



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Have a  
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