

OCTOBER 9, 2020

SPECIAL ALERT

Official newsletter of Khoury Johnson Leavitt



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KJL SPECIAL ALERT

The Khoury Johnson and Leavitt team remain informed and engaged during these times of uncertainty. We are in communication with leadership in the executive, legislative and judiciary branches of state government, in addition to locals on a regular basis. Updates will continue every Friday as a mechanism to recap relevant activity from the past week.

FBI, MSP, Attorney General and Others Foil Attempt on Governor's Life

On October 8th, the Attorney General in conjunction with several law enforcement agencies such as the FBI and Michigan State Police, announced charges against several individuals who were planning to kidnap the Governor and other government officials.

According to the press release issued by Attorney General Dana Nessel, the suspects, now under arrest, are alleged to have called on the groups' members to identify the home addresses of law enforcement officers in order to target them; made threats of violence to instigate a civil war leading to societal collapse; and engaged in the planning and training for an operation to attack the state Capitol building and kidnap government officials, including Gov. Gretchen Whitmer.

According to FBI reports, several members talked about murdering 'tyrants' or 'taking a sitting governor.' They went on to say one of the men, Adam Fox, said he needed '200 men' to storm the Capitol building and take hostages, including the Governor. They intended to try the Governor for 'treason', and they would execute the plan before the November 2020 elections.

Through the efforts of more than 200 state and federal law enforcement officials - including experts from outside of Michigan - officers executed a series of search warrants and arrest warrants in more than a dozen cities around the state, including, Belleville, Cadillac, Canton, Charlotte, Clarkston, Grand Rapids, Luther, Munith, Orion Township, Ovid, Portage, Shelby Township and Waterford.

Movie theaters, bingo halls, arcades, water parks and more can open in Michigan

Movie theaters, among other entertainment businesses, can reopen in Michigan today. The list of places that can reopen includes theaters, performance venues, amusement parks, arcades, bingo halls, bowling centers, indoor climbing facilities, indoor dance areas, roller rinks, ice rinks, trampoline parks, carnival or amusement rides, water parks and other similar recreational and entertainment facilities.

Gov. Gretchen Whitmer's [Executive Order 2020-183](#) - issued Sept. 25 - allowed these businesses to reopen Friday. There's an argument they could have opened as soon as last Friday, however, as [Michigan's executive orders were struck down by a state Supreme Court ruling that day](#).

Whitmer's team argued the orders still have merit for three to four weeks, but other experts disagree. While that question remains in limbo, these entertainment venues are now off the hook from either angle.

Friday marks the first day every Michigan industry can open its businesses under Whitmer's executive orders - albeit with restrictions.

Supreme Court Issues Order Against Gov Authority and 1945 Law

The MI Supreme Court ruled on October 2, that the 1945 Emergency Powers Act delegating broad emergency authority to the Governor was unconstitutional. The decision was issued in response to a request from a federal judge considering challenges to some of the Governors orders issued pursuant to the Emergency Powers Act and other authority. The Governor has 21 days to file an appeal and the factual issues in dispute are not technically back before the federal judge. Bottom line, regardless of the timeline most local/state enforcing agencies are no longer enforcing the EOs.

To make sense of this let's break her EOs into 4 buckets:

1. Worker protections
2. Economic support/Recovery
3. Health and Safety
4. General governance

The authority retained by the executive office:

1. MIOSHA/Licensing Dept emergency rules
2. DHHS Emergency rules
3. The Health Code Offers authority for DHHS Director to issue orders protecting against a pandemic

Worker Protections

Like all departments with rule promulgation authority, MIOSHA had and still has the authority to issue emergency rules subject to concurrence by the Governor. Emergency rules last 6 months and can be renewed once. What is likely to happen is MIOSHA will issue emergency rules mandating much of the worker protections that have been enacted via EO. Once the rules are filed, MIOSHA will simultaneously begin promulgating a new rule that would be permanent. Once a rule goes through the promulgation process it is sent to the Legislative Joint Committee on Administrative Rules (JCAR).

While the issuance of emergency rules and the 6-month extension are not subject to legislative review, the promulgation of the permanent rules must go through the JCAR process. Given when the clock expires on the emergency rules it could be a very important position. The committee can take several actions ranging from delaying a rule to no action - but has no legislative veto authority.

It is also possible that someone will mount an attempt to block the emergency rules or the permanent rules by arguing that MIOSHA lacks rulemaking authority or the subject of the rules is covered in statute and cannot, therefore, be promulgated as a rule.

Considerations:

- Exemptions- not every business is subject to MIOSHA regulation. Working to see how the exemptions impact ability to protect all workers
- 14 days of job protection may not be able to be protected via rules
- Legislature has a role after one year.

Additionally, almost every licensing statute grants rule making authority to the licensing department. Meaning if you are a licensed profession the same process outlined for MIOSHA could be taken to regulate the license profession.

Considerations:

- Rifle shot approach as not every job is licensed.
- Legislature has a role after one year.
- Rules cannot conflict with existing statutory requirements and rule authority must be general enough to permit promulgation.

Economic Support/Recovery

This is the area where the governor suffered her greatest loss. She really was aggressive in her authority in handling Unemployment Insurance (UI). The legislature has already said their top priority after the ruling is ensuring UI is not disrupted but there are broad differences between the Republican led legislature and Governor on what 'disruption' means.

Points of Contention:

- Preserving 26 weeks of UI
 - This will be the biggest fight.
 - GOP could say anyone who has filed a claim is entitled to 26 weeks.
 - Democrats will fight hard to extend 26 weeks in perpetuity.
- Work share
- Acceptance of additional federal pandemic assistance

Health and Safety

The court recognized the executive's authority to manage things like crowd size and masks via the health code by either the state or local public health offices. DHHS Director Gordon immediately issued a mask mandate and crowd size order. The Director of DHHS also has wide authority to issue emergency rules to protect the public from imminent dangers that dates back to the state's response to the Avian Flu. Expect more use of the health code.

General Governance

Things like electronic signature, notary, and open meetings act all need to be aligned with the other rules issued by the agencies and may require legislation. There may be some latitude, depending on the underlying statute, for emergency rules. If not, this should largely be a point of bipartisan consensus with open meetings being the area of potential pitfall.

Early Voting at Record Level

The Department of State has announced that 2.7 million absentee ballots have been requested for the November election, 2.6 million have already been sent to voters with more than 380,000 ballots having already been cast. This is up from the 2.55 million ballot requests as of last week, where 2 million ballots had been sent and just 28,000 returned. They are estimating that Michigan will go into the November 3 election with roughly 1 million ballots already cast.



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ADDITIONAL RESOURCES

www.michigan.gov/coronavirus.com

www.michigan.gov/ag

www.cdc.gov/coronavirus.com

www.congress.gov.com

www.michiganbusiness.org

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