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IMPORTANT CLIENT UPDATE

EXECUTIVE ORDER STATUS

As you are likely aware, the Michigan Supreme Court issued an opinion last Friday (October 2, 2020) in which the majority of the Justices agreed that the Governor's Executive Orders issued after April 30, 2020 were invalid, as the law under which they were issued allowed an unconstitutional delegation of legislative authority to the Governor. The case presents a likely change in the near future, but as of now the Executive Orders appear to remain in effect.

The case reviewed involved a request (Certification) from the federal District Court from the Western District of Michigan, seeking clarification as to the appropriate interpretation of Michigan law, so the federal District Court could address the issue in a federal case challenging the Governor's Executive Orders in the context of the impact the Executive Orders had on limiting and regulating certain medical procedures by health care professionals. The Certification Opinion was therefore not a direct order as to a case before the Michigan Supreme Court, but rather provided instruction to the federal District Court on the law that the federal Judge would then need to apply in that federal lawsuit. Moreover, there are a number of cases pending action before the Michigan Supreme Court on these same and related issues, and this interpretation of the law in the Certification Opinion therefore will also control those pending decisions, which will likely be forthcoming in the very near future. However, the actual changes will likely be determined by these State cases even if the federal Judge issues an order in that particular federal lawsuit based on the guidance provided by the Supreme Court in the Certification Order.

The Governor has asserted that this new decision should not take effect for 21 days, which is the normal practice for the effective date of Supreme Court decisions, unless the Supreme Court directs the Certification Opinion to have immediate effect. This would then generally allow time for a request for a motion to reconsider the Supreme Court's decision. (MCR 7.315) However, it is not clear that there would be such a separate "order" from the Supreme Court in this type of legal "Certification" interpretation opinion, as the actual litigation is in federal District Court. The Michigan Court Rules [MCR 7.308(A)(5)] do provide that such a "certified" decision may be rendered by the Supreme Court "...in the ordinary form of an opinion to be published with other opinions of the Court." Although the Governor's Attorneys filed a motion on October 5, 2020, seeking clarification that the Supreme Court's Certification Opinion will not take effect until after the 21-day period has lapsed, it appears that as of now the Governor's Executive Orders remain in effect.

Before an order is entered to implement or clarify this issue, a number of other factors may also impact the outcome, including:

1) The Governor's Administration may issue additional Health Department Orders under the Public Health Code, and other agency orders, that may cover many of the same restrictions covered by the current Executive Orders in question. Many of the current health related Executive Orders were previously also adopted by reference as Michigan Department of Health and Human Services (MDHHS) Director's Orders. On October 5, 2020, the Director of the Michigan Department of Health and Human Services adopted an Emergency Order under the Michigan Public Health Code (MCL 333.2253) that adopted many of the Executive Orders on "gatherings," "face coverings," "food service establishments," and "organized sports." (Copy attached.) The MDHHS Director's Order indicates it is to be effective through October 30, 2020 (being the date the Governor is requesting in her Motion to the Supreme Court). It is possible that there may also subsequently be additional executive branch Health Emergency Orders that clarify, extend and/or expand upon the current MDHHS Director's Order, as well as policies, directives and administrative orders from other State Departments on issues that relate to matters covered under the current Executive Orders.

2) Pending legislation on some of these issues may be enacted into law [e.g., the proposed changes to the Open Meetings Act (OMA) on holding remote meetings. [Senate Bill 1108 (2020), House Bill 6207 (2020)]

3) The Legislature and the Governor may agree to revise Executive Orders on issues covered under the current Executive Orders.

4) The Supreme Court may give some guidance as to the effective impact of the ruling on existing Executive Orders (retroactive, prospective, or a mixture as to the effect).

One area raised by many clients has been the status of "remote" meetings with the new Michigan Supreme Court Certification Opinion. It is important to initially clarify that the OMA previously allowed remote meetings, provided that a quorum was present at the meeting site, and all the members and public could hear and address the public body during the proceedings. The Executive Orders modified this by allowing all members to attend via remote access, and limited, in most cases, physical attendance of the public to not more than 10 persons. If the public and public body members can communicate during a meeting, remote access remains an option. The use of "hybrid" meetings during which some members attend by remote access, and public access of more than 10 persons can be accommodated by remote access, should still be viable. If a quorum of the public body is not present, a fully remote meeting remains valid for now; however, if there is no legislative adjustment to the OMA, that will only remain a short-term option. Moreover, as the effective date of the Court's decision is uncertain, when the public body next meets with a quorum physically present, it would be prudent and it is our recommendation to "re-enact," confirm, and ratify all actions taken by the public body that occurred at any prior meeting in which a quorum a public body's members was not physically present, (e.g. from April 30, 2020, to present.)

It is also noted that this new Supreme Court Certification Opinion was not a straight 4-3 decision, but there are 4 differing opinions, and that also may have an impact when the State cases are reviewed. Moreover, the authors of the concurred in majority and dissenting opinions will both have their current terms in office expire this December, with dissenting Chief Justice McCormack seeking re-election this November, and the majority opinion writer, Justice

Markman, retiring from the Court. Thus, there will be 1 or more new Justices on the Supreme Court who may review these issues in early 2021.

We will provide more guidance as the changes become more settled. In the meantime, the Executive Orders remain in effect, and each local governmental unit should in the abundance of caution prepare a list of motions, resolutions, etc., which were acted on without a quorum being present after April 30, 2020, for ratification/re-enactment and be prepared to consider options for subsequent developments.

Should you have questions, please do not hesitate to contact our Office.

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