

I will be the first to tell you that I have never worked in state or federal government, my practice area is DUI/Criminal and I do not darken “the halls of power” (or should I say “frequent the dark halls of power”) of the state capitol with frequency. So what gives with all the reading and writing on these Executive Orders and other pronouncements from state and local government?

1. I cannot think of anyone more qualified to dissect and discuss the heart of the Constitution’s civil liberties clauses of the 4th, 5th and 6th Amendment (and its corollaries in the state constitution) than a skilled and well-read, aggressive DUI lawyer. Often the difference between a good argument and a great result is persuading a judge that the government actors acted unreasonably in violation of one of these provisions;
2. Add to that my fascination in the 1st Amendment from my years as a broadcast journalist;
3. The fact that a lot of friends, clients, former clients and others are small business owners or sole proprietors who need to know and many of them are sending texts, I’M’s, emails and others and I am staying on all of the news release distribution lists for the Governor, Michigan State Police, the MDNR, LARA and the Attorney General (which is about a half day job to keep up with her PR team) so I can read these just as easily and quickly as the earnest and brightest of the members of the media;
4. We all need to be informed, improved and involved citizens in this time;
5. I promised myself that I would never again give short-shrift to my own take on the state constitution and statutory framework when I failed to focus on a particular clause in our state constitution (“fair treatment in legislative investigations”) and I did not insist on subpoena power for the house special committee investigating my client, when I represented a state rep in a disciplinary proceeding and the so-called “experts’ were telling the media what the committee and legislature could and could not do -- and I spent all my time with a team of lawyers reading “the goods” on my client – which was nothing more than a lot of hearsay, speculation and ultimately a bowl of nothing. Never again! I am gonna’ read everything myself and not rely on what other people tell me. Having practiced law for almost 21 years and having graduated with Honor with a degree in political science-pre-law makes me just as qualified as anyone else to try to interpret and understand what is going on and where we go from here (yeah – so finally I have a skill set that matters. Wendy still changes the lightbulbs though, so do not worry).

*** note though – I do not ‘roll’ with frequency in the area of campaigns, elections, municipal law or “government affairs.” I am just a guy who sometimes follows politics, I stay active in my bar associations’ legislative and rule-making committees and I try to read these things with common sense.

So, after a full Saturday morning of going back through the “biggies” of the week of March 28 – April 4, 2020 and listening to “Off the Record” on my PBS app, here is a summary of the 3 most significant Executive Orders (EO’s) for the week ending April 4, 2020 (what famous assassination happened today – post on my FB if you know – without looking. Bonus points if you know another one that happened almost exactly 103 years previously give or take 11 days).

There were a bunch of developments in the “law” by way of EO’s for the week and you can go through every one of them yourself (John Sullivan I am talking to you) by typing in “executive orders, Michigan governor, 2020, Michigan legislature” or words to that effect and you will find every single EO for the year, in successive order on the Michigan legislature’s website. They are all duly filed by the clerks.

The biggest EO in my view is the executive order that declared a disaster and has a lot of you scratching your head about whether we are still to “stay home” and for how long. I want you to look at these 2 orders carefully. Focus on what the governor actually ordered that is any different from what she ordered on March 10, 2020. Spoiler alert: other than rescinding the March 10, 2020 the orders are exactly the same except for 1 small but important addition: she brought in all of the prior orders (EO 5 through EO 32) under this order.

<http://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-04.pdf>

Now look at the Executive Order that came out on April 1st.

<http://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-33.pdf>

Did she intend to make all of those Orders effective nunc pro tunc to April 1st, 2020? Nunc pro tunc is a latin phrase for “now for then,” and it refers to changing back to an earlier date of an order, judgment or filing of a document (dictionary.law.com).

She did not state that specifically but I wonder if that is what she (her legal team) is hoping to accomplish with this order. The only thing different otherwise is all the “preamble” – which is another way of saying “introductory” – it is an introduction to a speech or a piece of writing, often to explain or justify what is coming like “four score and seven years ago” (dictionary.cambridge.org/preamble).

It is not clear but usually you need to declare that something is nunc pro tunc in a court order or a stipulation, in order for it to have nunc pro tunc effect (in other words “this order is effective nunc pro tunc to December 31, 2019). I wonder about this intent because the week of August 6th is a big week for all of us. The legislature is supposed to come back on August 7th. The letter that the governor sent to the majority leaders in the house and senate is where everyone seems to be confused about. She *requested* an additional 70 days for a disaster declaration and use of the Governor’s powers for an emergency situation (MCL 10.31 et seq) and a disaster (MCL 30.401 et seq).

There is a lot of interpretation to be made here and not a lot of “caselaw” from appellate court guidance on which to interpret it. Some may say she had to get an extension within 28 days of her order on March 10th, or 28 days certainty – from her “lockdown” “stayhome-staysafe” order of March 23rd. I disagree. The Emergency

Powers Act of 1945 contains no language requiring legislative approval for an extension. The governor can continue to operate as if there is an emergency until she decides there is no longer an emergency.

As I read the statutes together, she only needs to seek legislative approval to continue a *disaster* declaration if she acts under MCL 30.401 and declares a disaster. The governor has much more expansive powers to control our lives – and the life of your business – by declaring that “the thing we were worried about actually happened and it’s still happening or we are cleaning up from it” as opposed to “we are concerned that something emergent is about to happen”

I have no inside intel as to whether she has made a preliminary “framework” agreement with the legislative leaders, Senator Shirkey and Speaker Chatfield respectively. It seems to make sense that they give her a compromise for 30 days and that would force her to come back within that time and declare that the state needs to continue to be effectively shut down. If the majority party in both houses (it is the same party in Michigan – the republicans) wanted to play politics – the best move would be to give her a full 70 days and say “ok – we trust you – only use that amount of time that you think you need” and then they could excoriate her for “performing-at-less-than-full-potential” economy in 2022 by pointing to “the lost summer of 2020” that was made worse because she unilaterally kept the economy in lockdown.

The important part is that as of now, April 14th is the date that the stayhome-staysafe order expires. I expect that we will probably do these extensions in 2 week chunks and re-assess the data because everyone is so anxious – and rightly so. I am a

business owner and my wife and I are anxious and so are the extended family in our lives who are our employees.

It seems to me that she left the door open to herself to do this: issue another EO, add more preamble about the number of tragic deaths and soaring COVID-19 cases and rescind EO 2020-33, then make all prior orders effective under that inchoate EO.

What about our state schools? She ended the “students in seats” aspect of the school year on Thursday with EO 2020-35. This is a very complicated Order. It re-writes the law, the interpretations of how to implement portions of federal law and re-writes state administrative rules all at the same time. It must have taken a long time to put together, which means the Governor must have made the decision at least days before it was announced. It is too long and way beyond the scope of my ken to interpret with detail. I copied and pasted sections of the EO. I cannot help but agree on this one point with Zoe Clarke of Michigan Public Radio, who was a panelist on Off the Record this week (4.3.2020): “there may be no one right answer ... these are unprecedented times ... we just do the best with what we have.”

It gives schools flexibility but directs each and every school district to try to come up with a way to educate kids for the rest of the school year and be ready to do so next year. It states the schools must have a plan by April 3, 2020 that includes:

“A description of the methods a district will use to provide alternative modes of instruction other than in-person instruction and a summary of materials each pupil and the pupil’s parents or guardians will need to meaningfully access the alternative modes of instruction included in the Plan. If the Plan relies on electronic instruction, the Plan must ensure to the extent feasible that pupils have access to a connected device

capable of accessing the electronic instruction and must not penalize a pupil for the pupil's inability to fully participate." (EO 2020-35, B1)

"A Plan may provide for the adoption of a balanced calendar instructional program for the remainder of the 2019-2020 school year and planning for the adoption of a balanced calendar instructional program for the 2020-2021 school year." (EO 2020-35 C)

"A district with an approved Plan is eligible to receive continued payments from the State School Aid Fund for the 2019-2020 school year," (EO 2020-35; L).

That is a critical piece of this Order because many school districts financially live or die with those payments. The EO also contains provisions directing school districts to comply with social distancing measures for those necessary workers who are obligated to maintain a physical presence in a school building (but otherwise, your school building will be locked up); orders districts to have a plan to graduate high school seniors (who have their own section of this order); have a plan for allowing students in Advanced Placement (AP) classes (I never qualified for AP classes but some of my kids did – and they sound cool); "rehabilitate" seniors who were failing a class as of March 11, 2020 if possible and graduate them; provide for a process to allow for completion of the Michigan Merit Curriculum among other things.

My heart goes out to special needs families. The EO allows for "relaxed" compliance with IED's and programs for students with special needs but encourages intermediate districts to continue to offer services. That is going to make things tough for parents who do not have the ability to turn on a switch and be the expert that many of the special needs teachers and support personnel are for those kids.

The 3rd biggie is the EO that was issued late Friday afternoon, EO 2020-36, which is an Order that protects employees who test positive for COVID-19. It is awkward and

hard to understand why it would exempt workers in almost all of the fields that have been declared critical infrastructure fields EXCEPT for grocery store workers, therefore apply pretty much only to those workers who are supposed to be in office buildings, warehouses and factories to foster “remote” operations for those buildings. It is almost a “grocery store worker protection act.”

This is not legal advice: this is just me thinking out loud as an employer and what I might do for our operation. It may make sense to post a notice in your building – even on 8.5 by 11 letterhead that parrots the 1st clause of this order:

1. “It is the public policy of this state that an employer shall not discharge, discipline, or otherwise retaliate against an employee for staying home when he or she is at particular risk of infecting others with COVID-19. To effectuate that policy:
 - a. Employers are prohibited from discharging, disciplining, or otherwise retaliating against an employee described in sections 2 or 3 of this order for staying home from work for the periods described in those sections.
 - b. Employers must treat such an employee as if he or she were taking medical leave under the Paid Medical Leave Act, 2018 PA 338, as amended, MCL 408.961 et seq.”
 1. To the extent that the employee has no paid leave, the leave may be unpaid. Employers are permitted, but not required, to debit any hours that an employee described in sections 2 or 3 of this order stays home from work from the employee’s accrued leave.
 2. Subject to the exceptions in section 5 of this order, it is the public policy of this state that any and all individuals who test positive for COVID-19 or who display one or more of the principal symptoms of COVID-19 should remain in their home or place of residence, even if they are otherwise permitted to leave under Executive Order 2020-21 or any executive order that may follow it, until:
 - a. three days have passed since their symptoms have resolved, and

- b. seven days have passed since their symptoms first appeared or since they were swabbed for the test that yielded the positive result.

This section will cease to apply to anyone who, after showing symptoms, receives a negative COVID-19 test.

I may just copy and paste that on the bulletin board by the refrigerator in the kitchen, even though the only people who will see it will be Kelly Thomison, Wendy and me (when I finally am forced to make a trip to the office – 12 days and counting working at home). Then add to it the following language:

“This (corporation/firm/company/store) intends to follow this Order but the language may be subject to interpretation. Please track any hours for which you believe you have a claim against your unused paid leave or in the alternative, a claim under the Paid Medical Leave Act, 2018 PA 338 as amended, (MCL 408.961 et seq). Please be prepared to verify your medical status with necessary documentation from a health care provider as defined by EO 2020-30.”

***2020-30 is the EO that relaxed the requirements on who can provide medical care.

The EO also allows for an employer to terminate an employee who fails to return to work after testing negative for COVID-19 and still allows an employer to terminate an employee for any other lawful reason – which really changes nothing.

The protections DO NOT apply to the following categories of workers:

- a. Health care professionals.
- b. Workers at a health care facility, as defined in section 7(d) of this order.
- c. First responders (e.g., police officers, fire fighters, paramedics).
- d. Child protective service employees.
- e. Workers at child caring institutions, as defined in section 1 of Public Act 116 of 1973, MCL 722.111.

f. Workers at correctional facilities. (EO 2020-36, 3a-f)

I highlighted “f” because if corrections officers cannot stay home, why we are not draining the prison population of every inmate *except* for those who we can establish are a clear danger to the public is beyond me. It is for the protection of not only loved ones who are in prison but loved ones WHO WORK AT PRISONS. Especially when the state’s chief medical officer said this on Friday, April 3, 2020:

“Ensuring those who experience symptoms or test positive for COVID-19 and the people they live with remain in their homes will help mitigate community spread,” ...
“It’s crucial that anyone experiencing symptoms, and those they live with, stay home and stay safe.” (Dr. Joneigh Khaldun, April 3, 2020 press release)

Finally, the big legal development of the week was the Attorney General (AG) sending a memo to local law enforcement that advised that road patrol officers are not to make traffic stops of vehicles on the road simply because the officer believes the person is “out” of the house when they should not be. The AG also issued a press release – and I do not think that even the staff at the National Superconducting Cyclotron Laboratory (NSCL) could count the number of releases from that office the past month. She thanked local law enforcement for taking the front-line position in enforcing “Stayhome-staysafe”:

“This situation is fluid and rapidly changing, and we appreciate your patience,” ...
“We’re all in this together and we are counting on every resident to do everything they can to stay safe, stay healthy and stay home,” (Attorney General Dana Nessel (undated press release).

Looking at the facebook pages for the East Lansing Police Department, Meridian Township Police Department and talking to at least 1 supervisory officer, it is clear to me that we are going to have to restrain ourselves on our own: police officers want to

have as little physical contact as possible and only that which is necessary. The big priorities like violent situations and threats to safety – remain the big priorities.

What may be coming:

The City of Detroit is talking about a curfew. The mayor of Flint has already imposed a curfew. I do not want to foment rebellion here - but I am not sure those are enforceable. The only enforceable curfew right now IN MY OPINION would be a state-wide curfew issued by the governor using her powers under MCL 30.401. The reason is the “preemption” doctrine. All of the powers during a statewide emergency are conferred on the state and local governments are preempted. I encourage every lawyer and every one of you to read the fascinating case of *Walsh v River Rouge*, 385 Mich 623 (1971).

In the justice system, when forensic evidence is part of a case, it is often a matter of dogma v data in determining who wins the battle of persuasion. In politics, it is almost always dogma. Let us hope in days like these, data carries the day: every time. Our lives depend on it.