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REAL SOLUTIONS

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# *The “New Normal”: COVID-19’s Lasting Impact on Employment*

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# COVID-19: Where Do We Go From Here?





# The COVID-19 Filter in Labor and Employment Law



**If you look at the history of infectious diseases, we've only eradicated one infectious disease in man, and that's smallpox. That's not going to happen with this virus.**

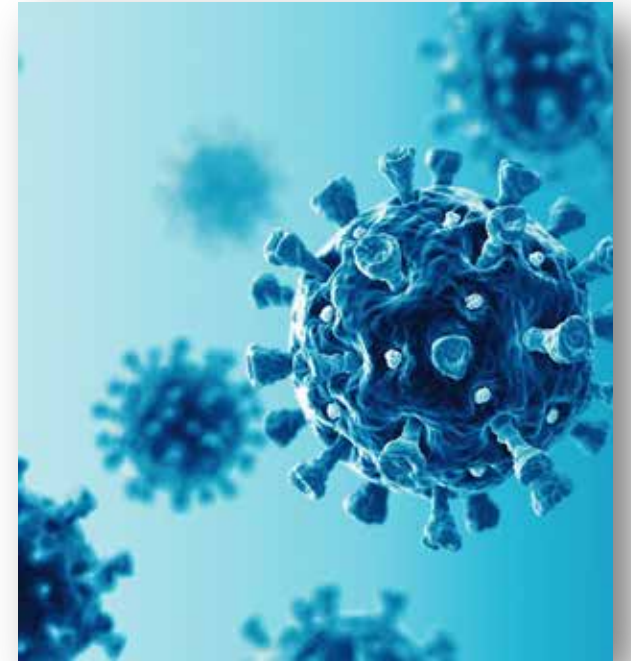
**- DR. ANTHONY FAUCI**

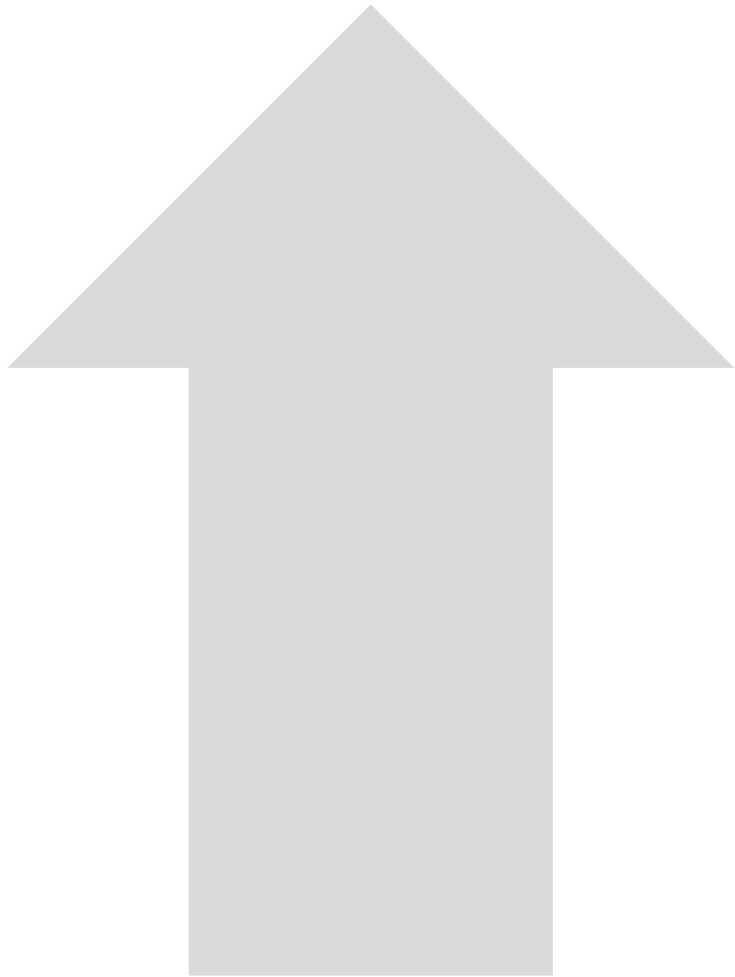


# Exiting the Pandemic: Will COVID-19 Ever End?

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- There have been three major variants to date and a new one on its way.
- It is unknown how COVID-19 will continue to evolve.
- Taking the time to analyze your Township's ability to respond to future COVID-19 needs is vital to continued success.





## Action Items:

Assess how your township responded to COVID-19 and its many challenges...

- Strengths
- Opportunities
- Insights





## Tools in Combating COVID-19 Requirements in the Workforce

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- Workplace Controls to Prevent the Spread of COVID-19:
  - Daily COVID-19 Screenings
  - Restructuring the Workspace to Ensure Social Distancing
  - Utilizing Electronic Meetings Whenever Possible
- Quarantine and Isolation for Employees Impacted by COVID-19

# Michigan's COVID-19 Employment Rights Act

Employers cannot discharge, discipline, or otherwise retaliate against an employee because the employee:

- Is impacted by COVID-19 and must quarantine and isolate per CDC Guidance.
- Opposes a violation of the act.
- Reports a health violation related to COVID-19.





- Employees that are not required to isolate or quarantine per CDC guidance but have other COVID-19 related reasons for missing work.
  - e.g., employees who must stay home to care for children whose school or daycare was closed by COVID-19, but who did not have close contact with someone with COVID-19.
- Employees who display the principal symptoms of COVID-19 but fail to make reasonable efforts to schedule a COVID-19 test within 3 days after employer requests COVID-19 test.
- Employees who report to work that have COVID-19 or had a close contact.

Who is **Not** Entitled to Protection Under Michigan's  
COVID-19 Employment Rights Act

# Changes to CDC Quarantine & Isolation Guidelines

The CDC recently modified its guidance on how long individuals who have COVID-19 should isolate, and how long those exposed should quarantine.

Result: reduced isolation and quarantine periods in certain circumstances.

These changes impact your township's workplace because MI COVID-19 Employment Rights Act adopted the CDC's definitions of "isolation period" and "quarantine period." MCL 419.401

In other words: affected employees may report back to work sooner.



# Recommendations for People with COVID-19

Have you tested positive for COVID-19 or have mild symptoms and are waiting for test results?

## Here's What To Do:

**Isolate. Stay at home for at least 5 days.\***



To keep others safe in your home, wear a mask, stay in a separate room and use a separate bathroom if you can.



**Do not travel for 10 days.**



If you can't wear a mask, stay home and away from other people for **10 days**.



To calculate the recommended time frames, **day 0** is the day you were tested if you don't have symptoms, or the date your symptoms started.



Contact your healthcare provider to discuss your test results and available treatment options. Watch for symptoms, especially fever. If you have an [emergency warning sign](#), such as trouble breathing or persistent chest pain or pressure, seek emergency medical care immediately.



**Day 6: Do a self-check. How are you feeling?**

*You could have loss of taste or smell for weeks or months after you feel better. These symptoms should not delay the end of isolation.*



No symptoms or symptoms improving. No fever without fever-reducing medication for 24 hours: You can leave isolation. Keep wearing a mask around other people at home and in public for **5 more days** (days 6-10).



Symptoms not improving and/or still have fever: Continue to stay home until 24 hours after your fever stops without using fever-reducing medication and your symptoms have improved.

After you feel completely better, keep wearing a mask around other people at home and in public through **day 10**.

# Recommendations for COVID-19 Close Contacts

Have you been in close contact with someone who has COVID-19? You were a close contact if you were less than 6 feet away from someone with COVID-19 for a total of 15 minutes or more over a 24-hour period ([excluding K-12 settings](#)).

## Here's What To Do:



To calculate the recommended time frames, **day 0** is the date you last had close contact to someone with COVID-19.



If you can't wear a mask, **stay home** (quarantine) and away from other people, and do not travel for **10 days**.

## Protect Others

Take these steps to keep others safe.



**Quarantine** if you are not up to date with COVID-19 vaccines or didn't have COVID-19 in the past 90 days. Stay home and away from other people for at least **5 days**.  
If you are up to date or had COVID-19 in the past 90 days you do not have to quarantine.



**Avoid travel through day 10.**



**Wear a mask** around other people for **10 days**.



Watch for symptoms of COVID-19 for **10 days**.

*Up to date means a person has received all recommended COVID-19 vaccines, including any booster dose(s) when eligible.*



# Recommendations for COVID-19 Close Contacts

Have you been in close contact with someone who has COVID-19? You were a close contact if you were less than 6 feet away from someone with COVID-19 for a total of 15 minutes or more over a 24-hour period ([excluding K-12 settings](#)).



## Here's What To Do:



### Get Tested

Get a COVID-19 test on or after **day 5** or if you have **symptoms**.

*People who had COVID-19 in the past 90 days should only get tested if they develop symptoms.*



You tested **negative**. You can leave your home.



Keep **wearing a mask** in public and when traveling through **day 10**.



You tested **positive** or have **symptoms**.



**Isolate** away from other people. Stay home for at least **5 days** and follow steps for [isolation](#).



**Do not travel for 10 days.**

If you are unable to get tested, you can leave your home after **day 5** if you have not had symptoms. Keep wearing a mask in public and avoid travel through **day 10**.

# Workplace Needs During a COVID-19 Surge: Get Creative

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- Identify core Township operations and ensure cross-training to conduct vital functions.
- Ensuring access to adequate paid sick leave or remote work option to ensure employees do not go to work sick:
  - **Option #1** Creating designated paid *leave* for employees impacted by COVID-19. Consider, too, the employees who will need time off to care for their family members impacted by COVID-19
  - **Option #2** Creating designated *remote work* for employees impacted by COVID-19 to the extent the employee does not have remaining available paid sick leave.

Remember, when considering changing benefits or work conditions for a unionized workforce, there may be a duty to bargain with the union.



# Remote Work Revolution?

*WILL MY TOWNSHIP BE  
REQUIRED TO PROVIDE  
REMOTE WORK AS A  
REASONABLE  
ACCOMODATION UNDER  
THE AMERICANS WITH  
DISABILITIES ACT?*







# Remote Work Statistics: The COVID-19 Effect

## 2019

23.7% OF EMPLOYED PEOPLE DID SOME OR ALL OF THEIR WORK FROM HOME.

41.7% OF THOSE WITH ADVANCED DEGREES PERFORMED SOME WORK AT HOME.

## FEBRUARY TO MAY 2021

46.7% OF EMPLOYED PEOPLE DID SOME OR ALL OF THEIR WORK FROM HOME.

67.1% OF THOSE WITH BACHELOR'S DEGREES OR HIGHER WORKED DID AT LEAST SOME WORK AT HOME.



Is the Position exempt  
or nonexempt under  
the Fair Labor  
Standards Act?



Can all of the essential  
functions of the  
position be performed  
remotely?



Remote work and  
hostile work  
environments.



Are there procedures  
in place governing  
remote work?

## Remote Work Considerations



# Remote Work: FLSA Exempt



FLSA Exempt Employees (Executive, Administrative, and Professional Employees), individuals paid on a salary basis and meet other requirements.



Must be paid their full salary for weeks they perform any work.



Not entitled to overtime.



No specific requirements for tracking hours worked by FLSA exempt employees; however, employers should be cognizant of employee burnout that can result from remote work.



# Remote Work: FLSA Nonexempt

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- Employees entitled to overtime if they work more than 40 hours per week.
- Nonexempt employees entitled to pay for work they perform:
  - Expressly authorized by their employer (i.e. regularly scheduled hours).
  - Hours their employer have reason to believe is being performed including unauthorized work.

**Department of Labor Field Assistance Bulletin 2020-05**

# Remote Work: FLSA Nonexempt

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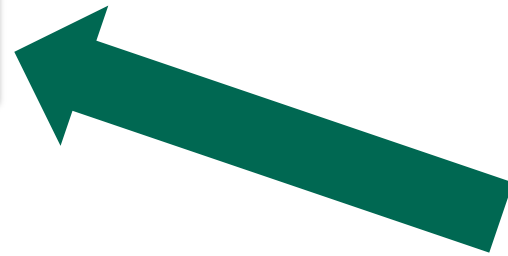
- FLSA obligation to exercise reasonable diligence to track working time for non-exempt employees. Can be satisfied by providing a reasonable procedure for reporting unscheduled work. Reporting procedures are not reasonable if the employer:
  - Prevents or discourages employees from reporting working time;
  - Does not provide proper training on the procedure; or
  - Requires employees to waive their right to compensation for hours worked





# Remote Work As a Reasonable Accommodation?

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**If only it were that simple!**





# Remote Work as an Americans with Disabilities Act Reasonable Accommodation

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- The ADA provides workplace protections to individuals with disabilities, so long as that employee can do the essential functions of their job with or without accommodation.
- Under the ADA, the term “disability” means:
  - A physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment







# Remote Work as an Americans with Disabilities Act Reasonable Accommodation

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- An employer may be required to provide reasonable accommodations to an employee with qualifying disabilities so that the employee can perform his or her job, unless providing accommodations would constitute an “undue hardship.”
- In engaging in the interactive process to determine a reasonable accommodation, an employer is not obligated to grant the first accommodation the employee requests.
  - A reasonable accommodation that allows the employee to do the job is a sufficient alternative.

## When a Requested Accommodation is an Undue Hardship

- Whether a requested accommodation is reasonable or an undue hardship is a fact-sensitive determination.
- A “reasonable accommodation” may include “job restructuring [and] part-time or modified work schedules.” But it does not include removing an “essential function [ ]” from the position, for that is per se unreasonable. *Brickers v Cleveland Bd of Ed*, 145 F3d 846, 850 (CA 6, 1998).





## Is the requested accommodation an undue hardship?

1. The nature and cost of the accommodation needed under [the ADA];
2. The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
3. The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
4. The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.



# FACTORS WHERE REMOTE WORK CAN BE A REASONABLE ACCOMMODATION

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- Employee's two-year history of performing the essential function of their job successfully while working remote.
  - *DeRosa v Natl Envelope Corp*, 595 F3d 99, 105 (CA 2, 2010).
- An employee that works remote can still, in theory, meet certain essential functions such as being able to have close interaction with coworkers and meet tight deadlines.
  - *Bisker v GGS Info Services, Inc*, No. CIV. 1:CV-07-1465, 2010 WL 2265979, at \*4 (MD Pa, June 2, 2010).





## FACTORS THAT CREATE AN INFERENCE REMOTE WORK IS NOT APPROPRIATE

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- Employee is in a customer service positions, like a City Purchasing Agent, where the employee must be physically present at the workplace. *Garrison v City of Tallahassee*, 664 Fed Appx 823, 826 (CA 11, 2016).
- The job requires onsite operation of equipment and ability to perform inventories. *Murry v Gen Services Admin*, 519 Fed Appx 866, 869 (CA 5, 2013).
- The position required teamwork, meetings with third-parties , and on-site “availability to participate in ... face-to-face interactions,” *EEOC v Ford Motor Co*, 782 F3d 753, 763 (CA 6, 2015).
  - Ahhh, but Zoom?



# Avoiding Error in Deciding Remote Work Reasonable Accommodation Questions

- Ensure that the position has an up-to-date job description that reflects the current essential functions of the job.
- If the position was converted to remote work during the COVID-19 pandemic, document what essential functions were momentarily set aside to meet pandemic operational needs.
- Document what dates the position was allowed to work remote and how it aligned with state work from home orders.



# Final Remote Work Considerations

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- If your township allows employees to work remotely, is there a remote work policy?
- Policies can establish employer expectations for remote workers on topics including but not limited to:
  - Hours remote workers are expected to work;
  - Appropriate workplace attire;
  - Time keeping procedures (FLSA Concern); and
  - Appropriate workplace language.
- Remote work and enhanced communication may result in some employees stampeding across boundaries. Keep in mind that employees' digital conduct may result in a hostile work environment for coworkers.



BONUS COVERAGE:  
MORE ADA  
ACCOMMODATIONS!







# Remote Accommodation for Public Meetings

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- On February 4, 2022, Michigan Attorney General Dana Nessel issued AG Opinion 7318, ostensibly opening the door for townships to provide full electronic participation to board members and the general public during public meetings held pursuant to the OMA.
- Specified that in-person attendance (except for those away on military service) is required by the OMA, and that remote participation for all others is only allowed to the extent the township's duty to accommodate under the ADA preempts its obligations under the OMA.
- Determination must be made on a case-by-case basis, which will necessarily entail the township having access to sensitive medical information.

# Remote Accommodation for Public Meetings

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Adopt a standard policy outlining the accommodation request and review process, as well as other requirements for electronic participation under the OMA.



If presented with an accommodation while with no policy in place, evaluate the request on a case-by-case basis







# Questions?

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