



STATE OF MICHIGAN

GRETCHEN WHITMER
GOVERNOR

DEPARTMENT OF HEALTH AND HUMAN SERVICES
LANSING

ROBERT GORDON
DIRECTOR

December 1, 2020

**Emergency Order Under MCL 333.2253 – Testing of State of Michigan Nursing Home
Inspection Staff**

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine for this disease. COVID-19 spreads through close human contact, even from individuals who may be asymptomatic. On March 10, 2020, the Michigan Department of Health and Human Services (“MDHHS”) identified the first two presumptive-positive cases of COVID-19 in Michigan. Throughout the pandemic, Michigan has used a range of public health tools and guidance to contain the spread of COVID-19 and protect the public health, including via the Governor’s authority under the Emergency Management Act and the Emergency Powers of the Governor Act. On Friday, October 2, 2020, the Michigan Supreme Court concluded that the Governor was not authorized to issue executive orders addressing COVID-19 after April 30, 2020.

Michigan was one of the states most heavily impacted by COVID-19 early in the pandemic, with new cases reaching nearly 2,000 per day in late March. Strict preventative measures and the cooperation of Michiganders drove those numbers down dramatically, greatly reducing the loss of life. Although an average of fewer than 100 new cases per day were reported in mid-June, cases have increased dramatically since that time, and recently an average of over 7,000 new cases have been reported per day. Case positivity rates, which were below 5% in September, have now averaged over 13% in November. To ensure continuation of essential public health services, we must not permit the spread of COVID-19 to increase. This necessitates continued measures to condition the gathering of individuals upon certain precautions being put in effect, including the ability to identify and isolate cases in order to reduce the spread of the virus. Based on the authority of MDHHS, it is necessary to issue orders under the Public Health Code to control the COVID-19 epidemic.

Michigan law imposes on MDHHS a duty to continually and diligently endeavor to “prevent disease, prolong life, and promote public health,” and gives the Department “general supervision of the interests of health and life of people of this state.” MCL 333.2221. MDHHS may “[e]xercise authority and promulgate rules to safeguard properly the public health; to prevent the spread of diseases and the existence of sources of contamination; and to implement and carry out the powers and duties vested by law in the department.” MCL 333.2226(d). Furthermore, where imminent danger to the health or lives of individuals exists in the state, MDHHS has an interest in regulation to rectify conditions that constitute a menace to the public health. MCL 333.2251(1) and (3).

In recognition of the severe, widespread harm caused by epidemics, the Legislature has granted MDHHS specific authority, dating back a century, to address threats to the public health like that posed by COVID-19. MCL 333.2253(1) provides that “[i]f the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code.” See also *In re Certified Questions*, Docket No. 161492 (Viviano, J., concurring in part and dissenting in part, at 20) (“[T]he 1919 law passed in the wake of the influenza epidemic and Governor Sleeper’s actions is still the law, albeit in slightly modified form.”); see also *id.*

(McCormack, C.J., dissenting, at 12). Enforcing Michigan’s health laws, including preventing disease, prolonging life, and promoting public health, requires limitations on gatherings and the establishment of procedures to control the spread of COVID-19. This includes testing protocols to identify COVID-19 cases and isolate them to prevent spread to additional individuals.

Considering the above, and upon the advice of scientific and medical experts employed by MDHHS, I have concluded pursuant to MCL 333.2253 that the COVID-19 pandemic continues to constitute an epidemic in Michigan. I further conclude that control of the epidemic is necessary to protect the public health and that it is necessary to establish procedures to be followed during the epidemic to ensure the continuation of essential public health services and enforcement of health laws. As provided in MCL 333.2253, these emergency procedures are not limited to the Public Health Code.

I therefore order that:

1. **Definitions.** For purposes of this Order, terms are defined as follows:

- (a) “Nursing home” has the same meaning as provided by section 20109(1) of the Public Health Code, MCL 333.20109(1).
- (b) “Nursing home inspection staff” means employees of the Michigan Department of Licensing and Regulatory Affairs who conduct on-site inspections to ascertain compliance with requirements from the federal Centers for Medicare and Medicaid Services (CMS) and State of Michigan licensing requirements.
- (c) “Testing” means one of the following:
 - (1) Diagnostic tests that seek to identify viral RNA, have received Emergency Use Authorization from the Food and Drug Administration, and are completed by a laboratory of moderate or high complexity under the Clinical Laboratory Improvement Amendments (“CLIA”).
 - (2) Antigen diagnostic tests that have received Emergency Use Authorization from the Food and Drug Administration.

2. **Testing Protocols.**

- (a) The Michigan Department of Licensing and Regulatory Affairs (“LARA”) must demonstrate that nursing home inspection staff complete weekly COVID-19 testing (i.e., once per seven days) and provide proof of a negative test result, within the last seven days, prior to conducting any on-site inspection.
- (b) Nursing home inspection staff must also get tested for COVID-19 as soon as possible if experiencing COVID-19 symptoms or if the staff member has a suspected or confirmed exposure to an individual with COVID-19.
- (c) Asymptomatic individuals who have recovered from COVID-19 in the past 3 months are exempted from testing under sections 2(a) and 2(b).
- (d) For the purposes of this Order, testing of nursing home inspection staff should use rapid point of care testing whenever possible, including by using point of care testing available at a nursing home prior to conducting an on-site inspection. When point of care testing is not available at a nursing home, LARA must require staff to be tested in the community, or at a different nursing home, within 72 hours prior to conducting an on-site inspection at a nursing home; negative results from a community test will fulfill the weekly testing

requirement under section 2(a) for any on-site inspection completed in the following seven days.

- (e) Nursing home inspection staff must provide proof of negative results in order to enter a nursing home for an on-site inspection, or alternatively proof of a prior confirmed COVID-19 case within the past 3 months. LARA may define appropriate forms of proof of results, including for rapid point of care tests.
 - (1) Nursing home inspection staff may not conduct on-site inspections while in isolation following a positive COVID-19 test or in quarantine following close contact with a COVID-19 positive individual, in accordance with guidance from the Centers for Disease Control and Prevention.
- (f) Nursing home inspection staff who do not receive a test when required may not conduct on-site inspections of a nursing home, unless:
 - (1) The nursing home inspection staff is responding to an immediate jeopardy complaint where federal or state law or regulations require the covered staff to be on-site within a specified timeframe; and
 - (2) To delay the onsite investigation could cause potential harm or risk to the residents as a result of an immediate jeopardy complaint not being investigated timely; and
 - (3) A rapid point of care test is not available.
- (g) In the situation in which nursing home inspection staff who do not receive a test must conduct an inspection under section 2(f), the nursing home inspection staff must:
 - (1) Be asymptomatic and not showing COVID-19 symptoms.
 - (2) Complete a COVID-19 screening that may include a temperature check.
 - (3) Attest that he or she does not have any COVID-19 symptoms.
- (h) Testing in compliance with this order must begin as soon as practicable and no later than December 2, 2020.

3. Implementation.

- (a) Nothing in this order modifies, limits, or abridges protections provided by state or federal law for a person with a disability.
- (b) Consistent with MCL 333.2261, violation of this order is a misdemeanor punishable by imprisonment for not more than 6 months, or a fine of not more than \$200.00, or both.
- (c) Nothing in this order affects any prosecution or civil citation based on conduct that occurred before the effective date of this order.
- (d) Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority, or protections guaranteed by the state or federal constitutions under these emergency circumstances.
- (e) If any provision of this order is found invalid by a court of competent jurisdiction, whether in whole or in part, such decision will not affect the validity of the remaining part of this order.

This order is effective immediately and remains in effect until May 1, 2021, unless otherwise rescinded. Persons with suggestions and concerns are invited to submit their comments via email to COVID19@michigan.gov.

Date: December 1, 2020



Robert Gordon, Director
Michigan Department of Health and Human Services