



STATE OF MICHIGAN

GRETCHEN WHITMER
GOVERNOR

DEPARTMENT OF HEALTH AND HUMAN SERVICES
LANSING

ROBERT GORDON
DIRECTOR

January 11, 2021

**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 are currently two vaccines available for emergency use authorization, but these vaccines are currently prioritized only for certain individuals at high risk for contracting disease or experiencing severe outcomes. 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 daily case numbers dramatically down to less than 200 confirmed cases per day in mid-June 2020, greatly reducing the loss of life. Beginning in October 2020, Michigan again experienced an exponential growth in cases. Cases have decreased from November’s record highs but remain at elevated levels, and recently an average of over 2,500 new cases have been reported per day. As of January 7, 2021, Michigan had seen 512,751 confirmed cases and 13,094 confirmed deaths attributable to COVID-19. Case positivity rates, which were below 5% in September 2020, now average around 10% in January 2021. Ninety percent of deaths are among those over the age of 60, and over 15% of hospitalizations are for COVID-19 in some regions in Michigan. Following the holidays, Michigan is experiencing another increase in cases in many settings including long term care facilities and nursing homes. 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).

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). Ensuring continuation of essential public health services and 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, 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) Molecular (PCR) 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 have obtained a negative test result on their most recent test prior to conducting any on-site inspection.

- (b) Nursing home inspection staff must also get tested with a molecular (PCR) diagnostic test 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. Nursing home inspection staff must not conduct on-site inspections while exhibiting the principal symptoms of COVID-19, even if testing is negative for 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 purposes of this Order, testing of nursing home inspection staff should be done by use of antigen diagnostic testing whenever possible, including LARA administered testing under a protocol developed by LARA or using point of care antigen diagnostic testing available at a nursing home prior to conducting an on-site inspection.
- (e) Nursing home inspection staff must provide proof of weekly negative results from LARA administered tests, which will issue letters certifying compliance with the terms of this order for each week. In order to enter a nursing home for an on-site inspection, nursing home inspection staff must provide:
 - (1) A LARA-issued compliance letter, or
 - (2) A negative test result from a nursing home point of care antigen diagnostic test, or
 - (3) A negative molecular (PCR) diagnostic test result from a community site.
- (f) 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.
- (g) 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 a resident as a result of an immediate jeopardy complaint not being investigated timely; and
 - (3) A rapid point of care test is not available.
- (h) In the situation in which nursing home inspection staff who do not receive a test must conduct an inspection under section 2(g), 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.
- (i) Testing in compliance with this order must begin immediately.

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) Under MCL 333.2235(1), local health departments are authorized to carry out and enforce the terms of this order.
- (c) 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.
- (d) The December 1, 2020 order entitled Testing of State of Michigan Nursing Home Inspection Staff is rescinded. Nothing in this order shall be construed to affect any prosecution or civil citation based on conduct that occurred before the effective date of this order.
- (e) 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.
- (f) 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: January 11, 2021



Robert Gordon, Director
Michigan Department of Health and Human Services