



STATE OF MICHIGAN

GRETCHEN WHITMER
GOVERNOR

DEPARTMENT OF HEALTH AND HUMAN SERVICES
LANSING

ELIZABETH HERTEL
DIRECTOR

May 5, 2021

**Order under MCL 333.2253
Testing in Skilled Nursing Facilities, Homes for the Aged, and Adult Foster Care Facilities
Rescission of October 28, 2020 Order**

Michigan law imposes on the Michigan Department of Health and Human Services (MDHHS) a duty to continually and diligently endeavor to “prevent disease, prolong life, and promote the public health,” and gives the Department “general supervision of the interests of the health and life of the 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).

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. COVID-19 spreads through close human contact, even from individuals who may be asymptomatic.

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 those posed by COVID-19. MCL 333.2253(1) provides that:

If 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 from the United States District Court, 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.”); *id.* (McCormack, C.J., concurring in part and dissenting in part, 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 limiting the number, location, size, and type of gatherings, and requiring the use of mitigation measures at gatherings as a condition of hosting such gatherings.

On March 10, 2020, MDHHS identified the first two presumptive-positive cases of COVID-19 in Michigan. As of May 3, 2021, Michigan had seen 849,420 confirmed cases and 17,771 confirmed deaths attributable to COVID-19. Michigan was one of the states most heavily impacted by COVID-19 early in the pandemic, with new cases peaking at nearly 2,000 per day in late March. Strict preventative measures and the cooperation of Michiganders drove daily case numbers dramatically down to fewer than 200 confirmed cases per day in mid-June, greatly reducing the loss of life. Beginning in October, Michigan again experienced an exponential growth in cases. New cases peaked at nearly 10,000 cases per day in mid-November, followed by increases in COVID-19 hospitalizations and deaths.

In November 2020, MDHHS issued an order to slow the high and rapidly increasing rate of spread of COVID-19. Cases, hospitalizations, and deaths remained high through early December, threatening hospital and public health capacity. These protections were sustained by subsequent orders through mid-January. These orders played a crucial role in slowing the spread in Michigan and had brought new cases down to about 1,500 per day. This decrease in cases helped prevent Michigan's healthcare system from being overwhelmed with a holiday surge. Beginning in late January 2021, in light of the reduction in cases, MDHHS issued orders permitting indoor dining and contact sports. On March 19, 2021, MDHHS issued an order requiring testing for youth sports.

Cases dropped to under 1,000 per day in mid-February. However, trends shifted and cases increased to a seven-day daily average of 6,555 on April 11. The statewide positivity peaked at 18.5% on April 8. Metrics approached all-time highs, and in some cases surpassed the peaks from the fall/winter surge. While the Spring 2021 surge saw more cases who were under the age of 60, there remained a high number of cases seeking emergency care and hospitalizations. Healthcare capacity peaked in mid-April with 601 daily hospital admissions seen in Michigan. Individuals under the age of 60 accounted for nearly 50% of all new admissions.

Positivity, case rates, and hospitalizations have improved since the April peak, but all metrics remain high. Positivity remains above 12% and the case rate for Michigan is above 350 cases per million. As of May 3, there are still over 3,000 Michiganders hospitalized with COVID-19, and 15.9% of all available inpatient beds were occupied by patients who had COVID-19. During this time, Michigan led the nation in number of cases and case rate in the last seven days, as well as COVID hospital utilization, and COVID ICU utilization according to data from the CDC and U.S. Health and Human Services. The state death rate was 6.5 deaths per million people on May 1, and there are approximately 450 weekly deaths in Michigan attributable to COVID-19. This is an increase of over 350% from the 1.4 deaths per million on March 9, 2020.

Even where COVID-19 does not result in death, and where Michigan's emergency and hospital systems are not heavily burdened, the disease can cause great harm. Recent estimates suggest that one in ten persons who suffer from COVID-19 will experience long-term symptoms, referred to as "long COVID." These symptoms, including fatigue, shortness of breath, joint pain, depression, and headache, can be disabling. They can last for months, and in some cases, arise unexpectedly in patients with few or no symptoms of COVID-19 at the time of diagnosis. A study published on April 6 in the medical journal *The Lancet* indicates that COVID-19 has been associated with a significantly increased risk of neurological and psychiatric disorders in the 6 months after a diagnosis. COVID-19 has also been shown to damage the heart and kidneys. Furthermore, racial and ethnic minority groups in Michigan have experienced a higher proportion of "long COVID." The best way to prevent these complications is to prevent transmission of COVID-19.

Since December 11, 2020, the Food and Drug Administration has granted emergency use authorization to three vaccines to prevent COVID-19, providing a path to end the pandemic. Michigan is now participating in the largest mass vaccination effort in modern history and is presently working toward vaccinating at least 70% of Michigan residents 16 years of age and older as quickly as possible. As of May 3, 50% of Michigan residents 16 and older have received at least one dose of COVID-19 vaccine. And an increasing number and volume of therapeutics are available, such as monoclonal antibodies, which can help to reduce the severity of COVID-19 cases.

New and unexpected challenges continue to arise: in early December 2020, a variant of COVID-19 known as B.1.1.7 was detected in the United Kingdom. According to the CDC, this variant is roughly 50 percent more infectious than the original strain. On January 16, 2021, this variant was detected in Michigan. B.1.1.7 is currently the dominant strain of COVID-19 in Michigan and the United States. Michigan is second in the nation with respect to the number of B.1.1.7 variant cases detected. Michigan has also detected cases of variants B.1.351, P.1, and B.1.427/B.1.429, which experts continue to study and monitor closely. This further complicates the battle against COVID-19.

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 have also, subject to the grant of authority in 2020 PA 238 (signed into law on October 22, 2020), herein defined the symptoms of COVID-19 based on the latest epidemiological evidence. I further conclude that control of the epidemic is necessary to protect the public health and that it is necessary to restrict gatherings and 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.

- (a) “Adult foster care facility” has the same meaning as provided by section 3(4) of the Adult Foster Care Facility Licensing Act, 1979 PA 218, as amended, MCL 400.703(4).
- (b) “Home for the aged” has the same meaning as provided by section 20106(3) of the Public Health Code, MCL 333.20106(3).
- (c) “Nursing home” has the same meaning as provided by section 20109(1) of the Public Health Code, MCL 333.20109(1).
- (d) “Staff” includes employees, consultants, contractors, volunteers, and caregivers who provide care and services to residents on behalf of the facilities listed above, as well as students in the facility’s training programs or from affiliated academic institutions.
- (e) “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 and are used consistently with CDC guidance.
- (f) “Unvaccinated” means a person who is not fully vaccinated.
- (g) “Fully vaccinated” means a person who has received their second dose in a 2-dose series (Pfizer-BioNTech or Moderna) plus at least two weeks or a person who has received a single-dose vaccine (Johnson and Johnson (J&J)/Janssen) plus at least two weeks.
- (h) “Facilities subject to this Order” means “adult foster care facility” licensed to care for 13 individuals or more, “home for the aged,” and “nursing home.”

2. Testing Protocols.

- (a) The State of Michigan will provide testing support for nursing homes, homes for the aged, and adult foster care facilities licensed to care for 13 individuals or more as capacity allows and assist facilities subject to this Order in identifying other sources of testing capacity as needed.
- (b) Facilities subject to this Order must conduct COVID-19 diagnostic testing as follows:

(1) Initial testing of all new or returning residents to a facility covered by this Order and newly hired staff when the individual is unvaccinated and has not been tested in the 72 hours prior to intake or start date.

(2) Testing any resident or staff member with symptoms of COVID-19 or suspected exposure to COVID-19, regardless of that individual's vaccination status.

(3) Weekly testing of all residents and staff in facilities experiencing an outbreak (any facility-acquired positive cases among residents or staff), until 14 days after the last new positive case, regardless of vaccination status; and

(4) Weekly testing of all unvaccinated staff.

(c) Facilities subject to this Order are responsible for requesting, obtaining, and maintaining a record of vaccination status for all residents and staff members, including:

(1) A facility's own electronic medical record system reflecting a resident's receipt of vaccination dose(s); or

(2) Michigan Care Improvement Registry (MCIR) or other official immunization record from a local health department, hospital, pharmacy, or health system (including individual doctor's office) that includes the name, date of birth, medical record number, or other unique identifiers to link the record to the vaccinated resident or staff; or

(3) A staff member's presentation of a valid CDC vaccination card.

(d) Asymptomatic individuals who have recovered from COVID-19 in the past 3 months are exempted from testing so long as the electronic medical records system of a facility subject to this Order contains documentation of the resident's diagnosis, or the staff member has provided medical documentation of the diagnosis, a copy of which shall be maintained by the facility for at least twelve months.

(e) The federal Centers for Medicare and Medicaid Services (CMS) has also issued testing requirements for nursing homes. Nursing homes must comply with both state and federal requirements.

(f) Hospice facilities licensed by the state as a nursing home must test all staff at the same intervals as nursing home staff. Testing of a hospice patient may take place with consent of the individual or other person legally authorized to make medical care decisions for the individual.

(g) Facilities subject to this Order must also take the following actions:

(1) Facilities must obtain consent or assent to conduct testing from each resident or another person legally authorized to make medical care decisions for the resident. Facilities must develop a protocol for residents who decline or are unable to be tested.

(2) Facilities must establish a protocol for staff who decline or are unable to be tested. Staff who decline testing when required, and regardless of vaccination status, without medical justification and documentation are prohibited from direct contact with residents.

(3) Following a positive test of a staff member or resident, facilities must take all necessary precautions in accordance with relevant guidance from the CDC to prevent transmission of the COVID-19 virus, including, but not limited to, excluding employees with COVID-19 from work until they have met all required return-to-work criteria.

(h) Facilities subject to this Order may request state assistance to complete testing. The State of Michigan will provide testing support for each facility as its capacity allows and/or assist facilities in identifying other sources of testing capacity as needed. Requests for state assistance must be submitted in accordance with MDHHS guidance.

(i) Unlicensed assisted living facilities, substance use disorder residential facilities, adult foster care facilities license for less than 13 individuals, and independent living facilities are not subject to this Order.

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) Law enforcement officers, as defined in the Michigan Commission on Law Enforcement Standards Act, 1965 Public Act 203, MCL 28.602(f), are deemed to be "department representatives" for purposes of enforcing this order and are specifically authorized to investigate potential violations of this Order. They may coordinate as necessary with the appropriate regulatory entity and enforce this order within their jurisdiction.

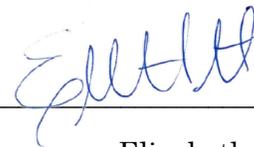
(d) Consistent with MCL 333.2261, violation of this order is a misdemeanor punishable by imprisonment for not more than 6 months, or a fine of not more than \$200.00, or both.

(e) The October 28, 2020 order entitled "Testing in Skilled Nursing Facilities, Homes for the Aged, and Adult Foster Care Facilities" is rescinded as of the effective date of this Order. Nothing in this Order shall be construed to affect any prosecution or enforcement based on conduct that occurred before the effective date of this Order.

(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.

Date: May 5, 2021



Elizabeth Hertel, Director

Michigan Department of Health and Human Services