

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



DANA NESSEL
ATTORNEY GENERAL

M E M O R A N D U M

April 9, 2020

TO: Christina Grossi
Chief of Operations

FROM: Joseph E. Potchen
Division Chief
Corporate Oversight Division

Rebecca Berels
Assistant Attorney General
Corporate Oversight Division

RE: **Enforcement of MDHHS Director's Emergency Order**

You have asked whether local law enforcement and county prosecutors are legally authorized to issue civil citations and otherwise enforce the Michigan Department of Health and Human Services (MDHHS) Director's April 2, 2020 Emergency Order to Control an Epidemic (Emergency Order) (Attachment 1).

Summary Answer

Yes. Local law enforcement and county prosecutors are legally authorized to issue civil citations and otherwise enforce the Emergency Order.

Analysis

The People of the State of Michigan have recognized that "[t]he public health and welfare of the people of the state are . . . matters of primary public concern." 1963 Const, art 4, § 51. In keeping with this pronouncement, the Legislature tasked MDHHS with, among other things, the duty to prevent and control the spread of disease. MCL 333.2221(1); 333.2226(d). To allow MDHHS to execute this duty, the Legislature delegated all "powers necessary or appropriate to perform the duties and exercise the powers given by law to the department" that are not otherwise prohibited. MCL 333.2221(2)(g). In addition to this broad grant of authority, the Legislature has declared that the provisions of the Public Health Code must be "liberally construed for the protection of the health, safety, and welfare of the people

of this state.” MCL 333.1111. Thus, it follows that MDHHS has broad power and authority to implement and enforce general laws aimed at disease prevention.¹

During an epidemic, this power and authority is even further expanded. That is, “[i]f the director [of MDHHS] determines that control of an epidemic is necessary to protect the public health, the director by emergency order . . . may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws.” MCL 333.2253(1). Such procedures need not be limited to those provided for within the Public Health Code. *Id.* This provision—when teamed with the required liberal construction—demonstrate a legislative intent to grant MDHHS extremely broad authority to confront an epidemic.

And the director of MDHHS acted within such authority in issuing the April 2, 2020 Emergency Order: Upon finding that the novel coronavirus (COVID-19) had reached epidemic status in Michigan, the director established various procedures—including the investigation into violations and enforcement of the Governor’s Executive Orders by local law enforcement and county prosecutors—aimed at controlling the spread of the COVID-19 epidemic and “insur[ing] continuation of essential public health services and enforcement of health laws,” as contemplated by MCL 333.2253(1). Not only is law enforcement authorized to bar access to businesses and operations that fail to comply with the procedures and recommendations outlined in the Executive Orders, but they are also authorized to issue penalties of up to \$1,000 for each violation or day that the violation continues. And, if the person is regulated by a licensing agency, violations must be referred to the relevant licensing agency for additional enforcement action as determined by the licensing agency. (See Attachment 2, Emergency Rules)

Notably, MDHHS’s authority to mobilize local law enforcement and county prosecutors exists regardless of the current epidemic. Indeed, the Public Health Code provides that violations of any MDHHS orders are misdemeanors. MCL 333.2261. Also within the Public Health Code, county prosecutors (along with the Attorney General) are expressly granted the authority to prosecute violations of the code, rules promulgated under the code, and local health department regulations. MCL 333.1299; *see also* MCL 49.153 (“The prosecuting attorneys shall, in their respective counties, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested.”) And “[p]olice officers have a duty to investigate violations of the law and seize evidence.”

¹ MDHHS may also authorize a local health department to exercise a power or function of the department, unless such an authorization is otherwise prohibited. MCL 333.2235(1).

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People v. Bennett, No. 296140, 2011 WL 3689155, at *4 (Mich. Ct. App. Aug. 23, 2011) (citing *Robinson v. Inches*, 220 Mich. 490, 491 (1922); *People v. Hess*, 85 Mich. 128, 132 (1891); *People v. Johnson*, 137 Mich. App. 295, 301 (1984); *People v. Stiles*, 99 Mich. App. 116, 120 (1980)); see also *Flores v. Dalman*, 199 Mich. App. 396, 403 (1993) (stating that a police officer has a duty to the public to preserve the peace and detect and investigate crime).

In addition, the Department has the duty to coordinate public health services “including effective cooperation of public and non-public entities to provide a statewide system of health care.” MCL 333.2224. The Director’s Emergency Order authorizes county prosecutors to enforce the Order and protect the public health in coordination with the appropriate local law enforcement authority and, as necessary, the local health department.

JEP/meg

Enclosures



STATE OF MICHIGAN

DEPARTMENT OF HEALTH AND HUMAN SERVICES

LANSING

GRETCHEN WHITMER
GOVERNOR

ROBERT GORDON
DIRECTOR

DIRECTOR'S ORDER

Emergency Order Pursuant to MCL 333.2253 Regarding Executive Orders 2020-11, 2020-20, and 2020-21

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 or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, Governor Gretchen Whitmer issued Executive Order 2020-4 declaring a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33. And in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, the Governor issued Executive Order 2020-33 on April 1, 2020. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945.

As of April 1, 2020, there were 9,334 cases of COVID-19 diagnosed in Michigan and 337 reported deaths. The exponential increase in cases demonstrates that many of these cases are the result of widening community spread.

Social distancing measures, including isolation of persons affected by COVID-19, are essential to control the epidemic. Social distancing is the primary tool available to slow the spread of COVID-19 and reduce the overwhelming strain on the State's healthcare system.

On March 16, 2020, Governor Whitmer issued Executive Order 2020-11 re: Temporary prohibition on large assemblages and events and temporary school closures.

On March 22, 2020, Governor Whitmer issued Executive Order 2020-20 re: Temporary restrictions on the use of places of public accommodation.

On March 23, 2020, Governor Whitmer issued Executive Order 2020-21 re: Temporary requirement to suspend activities that are not necessary to sustain or protect life (i.e., stay home stay safe order).

Considering the above, and upon the advice of scientific and medical experts employed by the Michigan Department of Health and Human Services, I have concluded pursuant to MCL 333.2253 that COVID-19 has reached epidemic status 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.

I therefore order that:

1. The procedures and restrictions outlined in EO 2020-11, EO 2020-20, and EO 2020-21 and their accompanying frequently asked questions (FAQs) that may be updated from time-to-time (available at www.michigan.gov/coronavirus) are necessary to control the epidemic and protect the public health. Every person, as that term is defined in MCL 333.1106, in this State, must comply with the procedures and restrictions outlined in EO 2020-11, EO 2020-20, and EO 2020-21 and their accompanying FAQs.
2. This Order applies to any future Executive Order that may be issued that rescinds and replaces EO 2020-11, EO 2020-20, or EO 2020-21.
3. Pursuant to MCL 333.2235(1), I authorize local health departments to carry out and enforce the terms of this Order.
4. Chiefs of police, sheriffs, and other local law enforcement leaders are specifically authorized to investigate potential violations of EO 2020-11, EO 2020-20, and EO 2020-21. They may coordinate as necessary with the local health department and enforce this Order within their jurisdiction. Law enforcement is specifically authorized to bar access to businesses and operations that fail to comply with the procedures and restrictions outlined in EO 2020-11, EO 2020-20, and EO 2020-21 and its accompanying FAQs. County prosecutors are likewise specifically authorized to enforce this Order to control the epidemic and protect the public health in coordination with the appropriate local law enforcement authority and, as necessary, the local health department.

This Order is effective immediately and remains in effect until vacated in writing or until the state of emergency in Michigan ceases.

Date: April 2, 2020



Robert Gordon, Director

Michigan Department of Health and Human Services

DEPARTMENT OF HEALTH AND HUMAN SERVICES
CREATING A SCHEDULE OF FINES FOR
VIOLATION OF APRIL 1, 2020 EMERGENCY ORDER
REGARDING EXECUTIVE ORDERS 2020-11, 2020-20, AND 2020-21

EMERGENCY RULES

Filed with the Secretary of State on

These rules take effect upon filing with the Secretary of State and shall remain in effect for 6 months.

(By authority conferred on the department of health and human services by sections 2221, 2226, 2233, 2253, and 2262 of the public health code, 1978 PA 368, MCL 333.2221, 333.2226, 333.2233, 333.2253, and 333.2262, section 48 of the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.248, and Executive Reorganization Order No. 2015-1, MCL 400.227)

FINDING OF EMERGENCY

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 or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, Governor Whitmer issued Executive Order No. 2020-4 declaring a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 to 30.421, and the Emergency Powers of the Governor Act, 1945 PA 302, as amended, MCL 10.31 to 10.33. And in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, the Governor issued Executive Order 2020-33 on April 1, 2020. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. As of April 1, 2020, at least 9,334 people have been confirmed to have COVID-19; many thousands more are likely infected but have not been tested; and 337 people have died. Hospitals in the regions with the largest number of cases report that their beds are full or nearly full and convention centers and dormitories are being converted into provisional medical care facilities to cope with the overflow.

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On March 16, 2020, the Governor issued Executive Order No. 2020-11 (EO 2020-11), which temporarily prohibits large assemblages and events and temporarily closes schools. On March 22, 2020, the Governor issued Executive Order No. 2020-20 (EO 2020-20), which places temporary restrictions on the use of places of public accommodation. On March 23, 2020, the Governor issued Executive Order No. 2020-21 (EO 2020-21), which temporarily restricts gatherings and travel and prohibits in-person work that is not necessary to sustain or protect life. These orders aim to promote social distancing, which public health experts agree is the best way currently available to slow the spread of the disease and prevent it from overwhelming the health-care system.

On April 2, 2020, I issued an emergency order under section 2253 of the public health code, 1978 PA 368, MCL 333.2253(1) (Emergency Order). The Emergency Order concluded that COVID-19 has reached epidemic status in Michigan. Further, the Emergency Order concluded 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 continuation of essential public health services and enforcement of health laws. The Emergency Order requires, among other things, that every person, as that term is defined in section 1106 of the public health code, 1978 PA 368, MCL 333.1106, in this State must comply with the procedures and restrictions outlined in EO 2020-11, EO 2020-20, and EO 2020-21, and the instructions provided in their accompanying FAQs.

Ensuring compliance with EO 2020-11, EO 2020-20, and EO 2020-21, and any future orders that rescind and replace these orders, requires identifying appropriate methods to enforce these orders. In addition to criminal prosecution for violating the Governor's Executive Orders, I find that civil penalties would be an effective supplementary method of deterring violations of EO 2020-11, EO 2020-20, and EO 2020-21, and any future orders that rescind and replace these orders.

The Michigan Department of Health and Human Services has authority to create a schedule of civil monetary penalties under section 2262 of the public health code, 1978 PA 368, MCL 333.2262(1), and would, under normal circumstances, follow the standard rulemaking process, including the notice and participation procedures required by sections 41 and 42 provided for in the Michigan Administrative Procedures Act of 1969 (APA), 1969 PA 306, MCL 24.241 and 24.242. Here, if the standard rulemaking process were followed, monetary civil penalties would not go into effect until well after they could provide useful deterrent measures. The resulting delay would result in less compliance with the Emergency Order, contribute to the spread of COVID-19, and exacerbate the current state of emergency. I therefore find that preservation of the public health, safety, and welfare requires promulgation of emergency rules under section 48 of the APA, MCL 24.248, to create a schedule of civil monetary penalties under the Director's authority in section 2262 of the public health code, 1978 PA 368, MCL 333.2262(1).

Rule to Enforce Emergency Order Regarding Executive Orders 2020-11, 2020-20, and 2020-21:

Rule 1. Violations and penalty.

(1) A violation of the April 1, 2020 Emergency Order is subject to a penalty of up to \$1,000 for each violation or day that a violation continues.

(2) For a person, as that term is defined in section 1106 of the public health code, 1978 PA 368, MCL 333.1106, regulated by a licensing agency, violations must also be referred to the relevant licensing agencies for additional enforcement action as determined by the licensing agency.

(3) No place of religious worship, when used for religious worship, is subject to penalty under subrules (1) or (2) of this rule.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES



Robert Gordon
Director

Date:

Pursuant to Section 48(1) of the administrative procedures act of 1969, 1969 PA 306, MCL 24.248(1), I hereby concur in the finding of the Department of Health and Human Services that circumstances creating an emergency have occurred and that preservation of the public health, safety, and welfare requires promulgation of the above rule.



Honorable Gretchen Whitmer
Governor

Date: April 2, 2020 3:08pm