

Coronavirus

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June 1, 2021 Gatherings and Face Mask 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. Since October 9, 2020, MDHHS has issued epidemic orders to combat the spread of COVID-19. As of May 20, 2021, 8.0% of all available inpatient beds were occupied by patients who had COVID-19. The seven-day average daily death rate through May 15 is 4.8 deaths per million. This reduction in cases, likely attributable to an increase in vaccinations and the return of warm weather, permit further cautious relaxation of the restrictions imposed via epidemic order.

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. As of May 20, 57.1% 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.

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.

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% 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.

On May 13, 2021, the CDC released guidance indicating the fully vaccinated persons need not wear a mask in most settings, regardless of whether indoors or outdoors. CDC indicated that fully vaccinated persons are at low risk of experiencing symptomatic or severe COVID-19 infection, and pose a reduced risk of transmitting COVID-19 to others. Additionally, recent studies, including a study published in *The Journal of Infectious Diseases*, confirm that transmission of COVID-19 outdoors is exceedingly rare.

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.

1. Definitions.

- (a) "Camp" means a day, residential, travel, or troop camp for children (as defined by Rule 400.11101(1)(q) of the Michigan Administrative Code).
- (b) "Child care organization" means that term as defined by section 1(b) of the Child Care Organizations Act, 1973 PA 116, as amended, MCL 722.111(b).
- (c) "Competition" means a game of skill played between opposing teams.
- (d) "Establishment" means a business, store, office, government office, school, organized event, public transit service, or other public or private operation or facility where gatherings may occur. This term does not include residences.
- (e) "Employee" means that term as defined in section 2(c) of the Improved Workforce Opportunity Wage Act, 2018 PA 337, as amended, MCL 408.932(c), and also includes independent contractors.
- (f) "Face mask" means a tightly woven cloth or other multi-layer absorbent material that closely covers an individual's mouth and nose.
- (g) "Food service establishment" means that term as defined in section 1107(t) of the Food Law, 2000 PA 92, as amended, MCL 289.1107(t).
- (h) "Fully vaccinated persons" means persons for whom at least two weeks has passed after receiving the final dose of an FDA-approved or authorized COVID-19 vaccine.
- (i) "Gathering" means any occurrence, either indoor or outdoor, where two or more persons from more than one household are present in a shared space.
- (j) "Household" means a group of persons living together in a shared dwelling with common kitchen or bathroom facilities.
- (k) "Indoors" means within a space that is fully or partially enclosed on the top, and fully or partially enclosed on two or more contiguous sides.

Additionally, in a space that is fully or partially enclosed on the top, and fully or partially enclosed on two non-contiguous sides, any part of that space that is more than 8 feet from an open side is indoors.

- (l) "Outdoors" means a space that is not indoors.
- (m) "Organized sports" means competitive athletic activity requiring skill or physical prowess and organized by a sports organizer.
- (n) "Practice" means a training session for a game of skill, involving only members of a single team.
- (o) "Principal symptoms of COVID-19" means at least 1 of fever, uncontrolled cough, or atypical new onset of shortness of breath, or at least 2 of the following not explained by a known physical condition: loss of taste or smell, muscle aches, sore throat, severe headache, diarrhea, vomiting, or abdominal pain. Per section 1(j) of 2020 PA 339, this definition represents the latest medical guidance, and serves as the controlling definition.
- (p) "Sports organizer" means an association or other organization that sets and enforces rules to ensure the physical health and safety of all participants for an organized sport.

2. Indoor gathering limitations for establishments.

- (a) Indoor gatherings are permitted at establishments only if occupancy does not exceed the greater of:
 - (1) 50% of the limits established by the State Fire Marshal or a local fire marshal (or 30 persons per 1,000 square feet if no applicable fire marshal limit exists); or
 - (2) 25 persons.
- (b) Section 2(a) does not apply to the following:
 - (1) Workplace gatherings that occur consistent with the Emergency Rules issued by MIOSHA on October 14, 2020, and subsequently extended or replaced;
 - (2) Voting or official election-related activities;
 - (3) Education and support services at public, nonpublic, and boarding schools, colleges, and universities;
 - (4) Children in a child care organization, after school program, or camp setting;
 - (5) Persons traveling on a school bus or public transit;
 - (6) Gatherings for the purpose of medical treatment, including mental health and substance use disorder support services;
 - (7) Residential care facilities, which are subject to the March 17, 2021, epidemic order entitled "Requirements for Residential Facilities," or any replacement of that order;
 - (8) Gatherings for public health or other emergency purposes; and
 - (9) Homeless shelters or shelter programs for victims of domestic violence.
- (c) Gatherings at establishments are prohibited unless establishments, hosts, organizers, and other persons responsible for gatherings ensure that the gatherings comply with the requirements of this order.

3. Organized sports gathering restrictions.

- (a) Gatherings for the purpose of sports practice and competition involving persons ages 13 to 19 are prohibited unless all such persons comply with a testing program as specified in the MDHHS publication entitled "Interim Guidance for Athletics" issued May 24, 2021.
- (b) For gatherings where the sports organizer has determined that it would be unsafe for indoor sport participants to wear a mask, participants who are not fully vaccinated persons must be tested consistent with the MDHHS publication entitled "Interim Guidance for Athletics" issued May 24, 2021.

4. Indoor face mask requirement.

- (a) Except as specified in section 5, all persons participating in indoor gatherings are required to wear a face mask.
- (b) A person responsible for an establishment, or an agent of such person, must prohibit gatherings at their establishment unless the person makes a good faith effort to ensure that all persons at their establishment (including employees) comply with section 4(a). For purposes of this section, a "good faith effort" may include any of the following:
 - (1) posting a sign notifying people that wearing a mask is required unless a person falls into a specified exception;
 - (2) asking patrons not wearing masks whether they fall into a specified exception;
 - (3) requiring face masks of all patrons and employees; or
 - (4) any other policy designed to ensure compliance with section 4(a).

5. Exceptions to face mask requirement. The requirement to wear a face mask at indoor gatherings does not apply to individuals who:

- (a) Are fully vaccinated persons;
- (b) Are younger than 2 years old;
- (c) Cannot medically tolerate a face mask;
- (d) Are eating or drinking;
- (e) Are swimming;
- (f) Are receiving a medical or personal care service for which removal of the face mask is necessary;
- (g) Are asked to temporarily remove a face mask for identification purposes;
- (h) Are communicating with someone who is deaf, deafblind, or hard of hearing and whose ability to see the mouth is essential to communication;
- (i) Are actively engaged in a public safety role, including but not limited to law enforcement, firefighters, or emergency medical personnel, and where wearing a face mask would seriously interfere in the performance of their public safety responsibilities;
- (j) Are engaging in a religious service;
- (k) Are giving a speech for broadcast or to an audience, provided that the audience is at least 12 feet away from the speaker; or
- (l) Are engaging in an activity that requires removal of a mask not listed in another part of this section, and are in a facility that provides ventilation that meets or exceeds 60 ft³/min of outdoor airflow per person.

(m) Are engaged in practice or competition where the wearing of a mask would be unsafe and are participating in a testing program specified in MDHHS's document entitled Guidance for Athletics issued May 24, 2021.

6. Contact tracing requirements for particular gatherings.

(a) Gatherings are prohibited at indoor food service establishments unless the establishment maintains accurate records, including date and time of entry, names of patrons, and contact information, to aid with contact tracing:

(b) Upon request establishments must provide names and phone numbers of individuals with possible COVID-19 exposure to MDHHS and local health departments to aid in contact tracing and case investigation efforts.

(c) Data collected under this section:

(1) Must not be sold, or used for sales or marketing purposes without the express consent of each patron;

(2) Must be protected as confidential information to the fullest extent of the law;

(3) Must not be provided to law enforcement or immigration officials except upon receipt of a lawful subpoena from a court or other lawful court order;

(4) Must be retained for 28 days by the collecting organization, after which time the data must be destroyed. If facilities use existing data to fulfill this requirement, they may instead follow their own data retention and destruction policies at the conclusion of the 28-day retention period.

7. 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) Neither a place of religious worship nor its owner is subject to penalty under this order for allowing religious worship at such place. No individual is subject to penalty under this order for engaging in religious worship at a place of religious worship.

(e) Consistent with MCL 333.2261, each 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.

(f) Nothing in this order affects any prosecution or civil citation based on conduct that occurred before the effective date of this order.

(g) Consistent with MCL 333.2262, violations of this order are punishable by a civil fine of up to \$1,000. 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.

(h) 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 constitution under these emergency circumstances.

This order takes effect on Tuesday, June 1, 2021, at 12:01 AM. At that time, the order entitled "Gatherings and Face Mask Order" issued on May 14, 2021, is rescinded. This order remains in effect through July 1, 2021, at 11:59 PM. Persons with suggestions and concerns are invited to submit their comments via email to COVID19@michigan.gov.

Date: May 24, 2021

Elizabeth Hertel, Director
Michigan Department of Health and Human Services

[June 1, 2021 Gatherings and Face Mask Order \(PDF\)](#)

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