

MDHHS Director Issues Emergency Order Addressing Gatherings, Face Coverings, Worker Protection and Contact Tracing

October 14, 2020

On October 9, 2020, the Director of the Michigan Department of Health and Human Services issued an emergency order reinstating some, but not all, of the restrictions contained in Governor Whitmer's COVID-19 emergency orders that were invalidated by the Michigan Supreme Court. In this alert, we summarize many of the important features of the MDHHS Oct. 9 Order.

Background

On Monday, October 12, 2020, the Michigan Supreme Court denied Michigan Governor Gretchen Whitmer's request to stay until October 30 the precedential effect of the Court's October 2 opinion in *In re Certified Questions from the United States District Court, Western District of Michigan, Southern Division (Midwest Institute of Health PLLC v Governor)* ("*In re Certified Questions*"). That opinion invalidated Governor Whitmer's COVID-19 executive orders issued after April 30, 2020, in reliance on the Emergency Powers of the Governor Act of 1945. The Court also peremptorily reversed the Michigan Court of Appeals opinion in a separate Michigan Court of Claims case, *House of Representatives and Senate v Governor*, on the basis of its opinion in *In re Certified Questions*, and confirmed that its order in that case would be effective upon entry by the Court of Claims.

On October 5, 2020, one business day after the Supreme Court's opinion in *In Re Certified Questions*, Robert Gordon, director of the Michigan Department of Health and Human Services, issued an emergency order titled "Emergency Order Under MCL 333.2253 – Gathering Prohibition and Masking Order" ("MDHHS Oct 5 Order"). That Order, issued pursuant to Section 2253 of the Michigan Public Health Code, MCL 333.1101 et seq, imposes attendance limitations on gatherings of two or more persons, face covering requirements at gatherings, and additional requirements applicable to food service establishments and organized sports. Please see our alert dated Oct. 5, 2020 analyzing the Court's *In re Certified Questions* opinion and its effect.

The MDHHS Oct. 5 Order was followed four days later on Oct. 9 by Director Gordon's "Emergency Order Under MCL 333.2253 – Gathering Prohibition and Face Covering Order" (the "MDHHS Oct. 9 Order") which includes the provisions from the Oct. 5 MDHHS Order and also provides additional protections for workers, capacity limitations, establishes contact tracing requirements for some businesses, and expands the requirements applicable to food service establishments. The MDHHS Oct. 9 Order rescinded the MDHHS Oct. 5 Order, became effective immediately and will expire Oct. 30, 2020.

The limitations and requirements set forth in the MDHHS Oct. 9 Order are similar to, but not as extensive as, the gathering limitations, face covering requirements and workplace safeguards in the COVID-19 executive orders issued by Governor Whitmer.

Section 2253 of the Michigan Public Health Code authorizes the MDHHS director to issue emergency orders "if the director determines that the control of an epidemic is necessary to protect the public health, ... [to] prohibit gatherings of people for any purpose and . . . establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws." Hence, the MDHHS Oct. 9 Order, like the MDHHS Oct. 5 Order, is framed in terms of prohibiting or limiting gatherings except in compliance with the order. The term

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"gatherings" is defined in the order as "any occurrence where two or more persons from more than one household are present in any shared space." What constitutes a "shared space" is not defined in the order.

Important Features of the MDHHS Oct. 9 Order

Protection of workers

Gatherings of employees in the workplace are prohibited "if not strictly necessary to perform job duties" and, where a gathering is necessary, employees must maintain six feet distance as *practicable*. However, employees not required to wear face coverings *must maintain* at least six feet distance and may not gather in conference rooms, restrooms, hallways or other shared spaces. Businesses that require employees to gather with other persons for work must require a daily entry self-screening protocol for all employees and contractors entering the workplace including, at a minimum, a questionnaire covering COVID-19 and suspected or confirmed possible COVID-19 exposure.

Any employee who is subject to an isolation or quarantine recommendation consistent with CDC guidance; has been instructed to remain home by a health or public health professional; or is waiting for a COVID-19 test or test results after having COVID-19 symptoms must not return to work until either the employee (a) is cleared to return to work by a health or public health professional or (b) all three of the following conditions are satisfied: 24 hours has elapsed after the fever has been resolved without fever-reducing medication; 10 days after the symptoms first appeared or the positive COVID-19 test; and improvement of other symptoms.

Attendance and capacity limitations; face covering requirements

The MDHHS Oct. 9 Order imposes attendance and capacity limitations on gatherings depending on the venue (residential or non-residential) and whether indoor or outdoor, and additional capacity limitations applicable to certain types of businesses. However, the restrictions do not apply to "the incidental gathering of persons in a shared place" such as at an airport, factory floor, food service establishment or workplace. The attendance and capacity limitations are comparable in many respects to those set forth in Governor Whitmer's EOs 2020-183 and 2020-184.

* Region 6 consists of the following Michigan counties: Manistee, Wexford, Missaukee, Roscommon, Benzie, Grand Traverse, Kalkaska, Crawford, Leelanau, Antrim, Otsego, Montmorency, Alpena, Charlevoix, Cheboygan, Presque Isle, and Emmet.

Face covering requirements applicable to businesses, governmental offices, schools or other operations

- Face coverings, where required, must cover at least the nose and mouth
- Face coverings must be required for indoor gatherings of any kind (including employees)
- Face coverings in schools in Region 6 are strongly recommended but not required
- May accept a person's verbal representation that the person meets a specified face covering exception (see below)
- Additional requirements apply to child-care organizations

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Exceptions to face covering requirements

The face covering requirements of the MDHHS Order are subject to the same exceptions as outlined in Governor Whitmer's EO 153. The requirements do not apply to:

- Children younger than 5 years old (and children under the age of 2 years should not wear a face covering per CDC guidance) except as provided in the MDHHS Oct. 9 Order applicable to child-care organizations
- Persons not able to medically tolerate a face covering
- Eating or drinking while seated at a food service establishment
- Exercising outdoors provided consistently able to maintain six feet of distancing
- Swimming
- Temporarily removing a face covering as necessary to receive a service
- Temporarily removing a face covering for identification if requested when entering into a business or receiving a service
- Communicating with someone whose ability to see the mouth is essential to communication, including persons who are deaf, deafblind or hard of hearing
- Performing public safety roles where a face covering would seriously interfere with the person's public safety responsibilities, including law enforcement, firefighters and emergency medical personnel
- At a polling place for voting in an election
- Engaging in a religious service
- Giving a speech provided the audience is at least six feet distant

Posting requirements applicable to establishments open to the public: Any establishment open to the public must post signs at entrances instructing customers of their legal obligations to wear a face covering while in the store and informing customers to not enter if they are or have recently been sick. The posting requirements are similar to, but not as extensive as some of, the requirements in Governor Whitmer's EO 2020-184.

Additional requirements applicable to food service establishments

The capacity limits for food service establishments (as defined in section 1107(t) of the Michigan Food Law to include "any fixed or mobile restaurant, coffee shop, cafeteria, tavern, bar, ... theater, or similar place in which food or drink is prepared for direct consumption through service on premises or elsewhere, and any other eating or drinking establishment or operation where food is served or provided to the public") are 50% of normal seating capacity and the establishment must require at least six feet of distance between each party. Also, indoor common areas where customers can congregate, dance or mingle are off limits.

Further, food service establishments are not permitted to sell alcoholic beverages on site unless customers are seated at a table or bar top and separated by at least six feet and do not intermingle. Customers must wait outside if seating is not available.

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Additional requirements applicable to organized sports

The MDHHS Oct. 9 Order includes face covering, attendance limitations, prohibition of concessions and, in the case of professional sports, a safety plan consistent with CDC and MDHHS guidance. These requirements are the same as in Governor Whitmer's EO 2020-183.

Contact tracing requirements applicable to certain businesses

The following facilities must maintain accurate records to aid in contact tracing including date and time of entry, names of patrons, and contact information and must deny entry to any visitor not providing, at a minimum, name and phone number:

- Facilities providing personal care services including barbering, cosmetology, body art (including tattooing and body piercing), tanning and massage services
- Sports and entertainment facilities, including arenas, cinemas, concert halls, sporting venues, stadiums and theaters and places of public amusement, including amusement parks, bowling centers and skating rinks
- Gymnasiums, fitness centers, recreation centers, exercise facilities and studios, bowling centers and roller and ice rinks

All businesses that provide in-home services must maintain accurate appointment records, including date and time of service and client name and contact information. Examples of in-home services providers include cleaners, repair persons and painters.

Penalties for violations

Violations of the MDHHS Oct. 9 Order are misdemeanors punishable by imprisonment for up to six months or a fine not exceeding \$200 or both. Violations are also subject to a civil fine of up to \$1,000 for each violation or day that a violation continues.

If you have questions about the MDHHS Oct. 9 Order or related developments, please contact your Miller Canfield attorney or the authors of this alert.