



IS THE MDHHS EMERGENCY GATHERINGS AND MASK ORDER LAWFUL?

The Michigan Supreme Court decision on October 2, 2020, invalidated Governor Whitmer’s COVID-19 Executive Orders (EOs) issued since April 30, 2020. Notwithstanding the Supreme Court’s ruling, the Governor says she intends to continue her COVID-19 restrictions through orders from her administrative agencies. MDHHS Director Gordon issued the first such order on October 5, 2020 (Order 2020-12). This order limits people gathering together and sets face covering and social distancing requirements. The order was issued pursuant to the Public Health Code, MCL 333.2253.

I. CONTROLLING STATUTES

MCL 333.2253 states:

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.

MCL 333.2261 makes it a misdemeanor to violate a state health order, punishable by up to six months in jail and/or a fine of \$200.00.

Further, MCL 333.2262 permits MDHHS to issue a civil fine of up to \$1,000 “for each violation or day that a violation continues” of a MDHHS statute, rule, or order.

II. WHAT DOES THE STATUTE REQUIRE?

Under the statute, the State must preliminarily determine if in fact a COVID-19 epidemic exists. If an epidemic exists, the State must determine whether control of the epidemic

is necessary to protect public health. If the answer is yes, the statute empowers the director to issue an emergency order. The GLJC expects most courts to say (correctly or not) that the State remains in the midst of an “epidemic”.

The CDC is currently considering whether to reduce COVID-19’s classification from “epidemic” to “outbreak.” If the CDC reclassifies the status of COVID-19 to something less than an epidemic, any legitimacy for an order by the MDHHS Director evaporates.

Science and data demonstrate a dramatic decline in deaths and hospitalizations from the virus. We flattened the infamous “curve” months ago.

Assuming the preliminary conditions exist, however, the MDHHS Director may hold limited authority to issue emergency orders and take other actions.

MCL 333.2253 states that the director only holds the authority to do two things:

1. “The director by emergency order may prohibit the gathering of people for any purpose,” and
2. “may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws.”

No Michigan Court has interpreted or explained the extent of the Director’s authority pursuant to MCL 333.2253.

III. DEFINITION OF “PROHIBIT”

The statute is clear that the Director may only “prohibit” the gathering of people. The statute does not define “prohibit.” Whenever a statute does not define a term, courts must give the term its “plain meaning.”¹ Merriam-Webster defines “prohibit” as “to forbid by authority; enjoin.” This means that the Director can ban or forbid gatherings during an epidemic.

Most importantly, the statute did not give the Director the ability to “limit,” “reduce,” or

¹ *Adanalic v Harco Nat'l Ins Co*, 309 Mich App 173, 179-180; 870 NW2d 731 (2015)



“regulate” gatherings. Instead, it only gave the Director the ability to prohibit or forbid gatherings. This means that the Director can stop people from gathering. Nothing in the statute, however, authorizes the Director to regulate how people interact with each other in public, how close people are to each other, or what clothing or equipment must be worn in public (e.g., masks).

Moreover, no language in the statute authorizes the Director to partially “prohibit” gatherings, placing indefinite and unlimited conditions on gatherings, or permitting gatherings only with certain exceptions.

The statute specifically states that the Director only has the authority to “prohibit the gathering of people for any purpose.” Assuming this statute is otherwise found to be constitutional and applied in a constitutional way, this means the Director could potentially prohibit certain gatherings.

It is one thing for an unelected state official to be able to stop people from gathering in public, it is quite another to allow that state official to regulate and issue requirements for every interaction between people in public.

Nothing in the statute authorizes the Director to use this statute as a vehicle to implement the Governor’s Executive Orders that were struck down by the Michigan Supreme Court. No matter what good intentions the Director may have, or his desire to protect public health, he is still constrained by the specific statutory language, and by the specific authority granted to him by the legislature.

The Director’s discretion is limited to determining what gatherings are banned or prohibited, not what conditions or regulations people must follow if they go out in public.

The Director can no more require certain attire to be worn in public (like masks) than he could require people to receive a COVID-19 vaccine or have proof of COVID-19 antibodies before they gather in public. The Director cannot impose any such additional requirements on public gatherings.

IV. “ESTABLISH PROCEDURES”

Under the statute, the Director may also “establish procedures to insure continuation of essential public health services and enforcement of health laws.” No public health laws or administrative rules exist requiring people to

maintain social distance, wear masks in public, or be limited to certain gathering sizes. Further, the Director cites no specific health laws or administrative rules to support his requirements, other than MCL 333.2253.

It is important to note that an “order” is very different than a “procedure.” “Orders” are typically requirements on specific parties or the general public. “Procedures,” however, are typically not enforceable on the public and are requirements that MDHHS or local health departments must follow.

One only need review the statutory penalties cited in the Director’s order, to see that “procedures” are not enforceable on the general public. The Director cites MCL 333.2261 for a criminal penalty and MCL 333.2262 for a civil penalty/fine.

MCL 333.2261 states:

*Except as otherwise provided by this code, a person who violates a **rule or order** of the department is guilty of a misdemeanor punishable by imprisonment for not more than 6 months, or a fine of not more than \$200.00, or both.*

MCL 33.2262 states:

*The department may promulgate rules to adopt a schedule of monetary civil penalties, not to exceed \$1,000.00 for each violation or day that a violation continues, which may be assessed for a **specified violation of this code or a rule promulgated or an order** issued under this code and which the department has the authority and duty to enforce.*

What is noticeably absent from both of these penalty provisions is any penalty for violating a “procedure.” The statutes clearly indicate that persons can only be punished for violating the

statute (code), an administrative rule, or an order, but not a procedure.

Further, the Director's order has nothing to do with setting procedures to continue to make sure "essential public health services" are available to the public during an epidemic. There is no statutory definition of "essential public health services." It arguably applies to making sure governmental service providers, hospitals, medical supplies, medical services like vaccinations, health information, medical personnel, etc., are readily available to the public. "Essential" means something that is absolutely necessary. Requiring everyone to wear a mask has nothing to do with setting up procedures to continue to ensure public health services are in place, or that those procedures are essential. While providing free masks to the public might be considered a public health service, mandating everyone must wear a mask is not.

Thus, the GLJC believes that this provision does not allow the Director to issue these mandates under the guise of "procedures." These mandates are neither procedures nor proper orders as permitted by the statute. In addition, even if a court finds that the statute permits the Director to institute procedures for what people must wear in public, he holds no means to punish any violations of those procedures.

V. CONSTITUTIONAL IMPLICATIONS

In addition to the statutory problems, there are potential constitutional violations. While it is beyond the scope of this Issue Brief to fully analyze all of the potential constitutional violations, the statute and the Director's order may violate the following constitutional rights:

- First Amendment Freedom of Speech
- First Amendment Right to Assembly
- Separation of Powers/Non-Delegation Doctrine
- Fourteenth Amendment Due Process

In order to discern how and in what way there may be constitutional violations, it will be important to analyze not only the text of the statute and emergency order, but also how the State applies and enforces the provisions against individuals and businesses.

VI. DO I HAVE TO FOLLOW THE ORDER?

There is a saying that "nothing is unconstitutional until a court says so." Just as the Governor continued to enforce her own EOs up until the Michigan Supreme Court ruled, the Director will surely enforce his own orders until a court rules otherwise.

This means that MDHHS, local prosecutors, local police, Attorney General, or State Police may all engage in enforcement of the Director's order. Charges will surely be brought, and fines will surely be issued for violation of the order.

Every person must personally decide and count the cost when determining whether to obey the Director's order. To be sure, the GLJC expects to see challenges brought as to its legality and constitutionality. But this order remains in effect until a court strikes it down. This means that up until that point, a person may have to fight criminal charges, civil fines, or even licensing sanctions for violations of the order.

This Issue Brief raises serious statutory and constitutional problems with the Director's order, but it is up to every person to decide if they will comply with the order until a court of law rules on these issues.

Also, it is important to remember that businesses and schools can continue to require masks or other COVID-19 procedures no matter what the Director orders.

The GLJC hopes that this analysis provides insight and clarity as to the MDHHS Director's order and its legality. We encourage anyone cited criminally or civilly for a violation of Director's order to seek legal counsel immediately and fight the charges or fines.

VII. CONCLUSION

Based on the above analysis, the GLJC believes that MCL 333.2253 does not authorize the MDHHS Director to issue his emergency order as written. Ultimately, the courts will decide if this emergency order is legal and enforceable.

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