



MDHHS MASK ORDER F.A.Q.

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. Director Gordon then rescinded this order and issued an amended Emergency Order on October 9, 2020. This new order kept most of the requirements of the prior order but added a definitions section and requirements for capacity limitations and contact tracing. This order limits gatherings and establishes face covering and social distancing requirements.

It is important to remember that this FAQ is not determining whether masks are good, effective, or should be required. This analysis examines the authority of the State to force everyone to wear a mask and the implications from Director Gordon's order. The GLJC believes that every person, business, school, and organization can make their own informed decisions and determine what is best for them.

The following are answers to some of the most frequently asked questions:

1. WHAT DOES THE SUPREME COURT ORDER MEAN AND WHAT ARE ITS EFFECTS?

The Supreme Court did not rule that masks were unconstitutional, but it did rule that the 1945 emergency law Governor Whitmer was using to require masks was unconstitutional. That is a big difference. The Supreme Court ruled that she did not have the power to issue any emergency EOs after April 30th, which of course includes the mask mandate. The Court, however, did not make any specific finding as to mask requirements or their constitutionality. Further, the Court did not make any findings that businesses, public or private schools, or any other entity requiring

masks are unconstitutional. This ruling did not restrict the State from utilizing any other statute.

In summary, the Supreme Court held that the 1945 emergency law was unconstitutional and struck down every Executive Order issued by Governor Whitmer based upon that law. Thus, the courts have not yet had an opportunity to decide whether Director Gordon's order, or the statute he is basing it upon (MCL 333.2253), are constitutional.

2. IS DIRECTOR GORDON'S ORDER LAWFUL?

It is our legal opinion that the order is unlawful; however, there is only one entity in our state that has the power to rule that his order is unlawful: a court. The Director's order goes beyond the authority given by the statute. For a full analysis, see our Issue Brief at the link below.¹

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 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. Criminal charges will surely be brought, and civil fines will surely be issued for violation of the order.

Every person must personally decide and count the cost when determining whether to comply with the Director's order. To be sure, the GLJC expects to see court 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.

We encourage anyone cited criminally or civilly for a violation of the Director's order to

¹ https://greatlakesjc.org/is_mdhhs_order_lawful/



seek legal counsel immediately and fight the charges or fines. That is the best way to obtain a court ruling that the Director acted unlawfully.

3. CAN PRIVATE BUSINESSES VIOLATE MY CONSTITUTIONAL RIGHTS?

No. This is a myth. It is essentially impossible for any private entity, private business, or private individual to violate your constitutional rights. Our Constitution and Bill of Rights are limitations on, and protections against, government action, not private action. The First Amendment prevents the State of Michigan, not Home Depot, from silencing you. The easiest example to illustrate this principle is to look at the actual text of the First Amendment, it states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment limits the lawmaking authority of Congress. Since the First Amendment was enshrined in our Constitution, the U.S. Supreme Court has held that the First Amendment is a limitation on all government action. These limitations apply equally to both state and federal government actions.

Most importantly, the First Amendment does not state that “Home Depot shall make no law,” or that any private business “shall make no law.” It only applies to government. There is a simple reason for this. If you do not like what a private business is doing, go to another business. But if you do not like what our government is doing, you do not have the option of going to a different government.

Further, businesses cannot criminally charge people, businesses cannot issue orders for all citizens to follow, and businesses cannot fine or impose penalties against everyone who violates their policies.

The Michigan Supreme Court agrees:

[T]he principle that private action is immune from the restrictions of the [Constitution] is well established and easily stated . . .²

The way a person interacts with a business is by either voluntarily going to that business or by voluntarily entering into a contract with that business. In the end, no one is forced to do business with anyone. This is why we are a free country.

You are able to choose which businesses to buy from, and businesses are free to choose which customers they sell to. Having said that, everyone must always act in compliance with the law and not discriminate against someone because of a protected class (race, sex, religion, medical condition, etc.). Outside of those limitations, people and businesses are free to buy and sell from whomever they please. Businesses are free to make illogical and uninformed decisions, and you are free to shop elsewhere.

4. IF A PRIVATE BUSINESS REQUIRES CUSTOMERS TO WEAR A MASK, IS THAT BUSINESS ACTING AS AN “ARM OF THE STATE?”

The short answer is: No. Despite what you may have heard online, this is simply not true and anyone who espouses this view has a fundamental misunderstanding of constitutional law. While there are some extremely narrow exceptions to this principle, those exceptions are outside the scope of this FAQ and do not apply to the scenario we are discussing here.

The Michigan Supreme Court has clearly held:

If any presumption is to be raised it is to the contrary: that unless otherwise expressed, constitutionally guaranteed protections are applicable only against government.³

Businesses are heavily regulated by the State. They have accounting regulations, tax regulations, health/safety regulations, non-

² *Morris v Metriyakool*, 418 Mich 423, 452; 344 NW2d 736 (1984)

³ *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 212; 378 NW2d 337 (1985)

discrimination regulations, etc. A business simply attempting to comply with the State's rules, regulations, or orders does not automatically make that private business an "arm of the state." Otherwise, there would be no such thing as a private business and every business would be an "arm of the state." This is obviously not true.

Additionally, it does not matter if a business is attempting to comply with a governmental rule or order which is later found to be illegal or unconstitutional. Just because a court finds the government action to be unlawful or unconstitutional, that does not mean a person is prohibited from doing it voluntarily.

For example, a business could voluntarily implement a policy that they will not sell any of their products to a person wearing political attire. This would be completely within a business' authority. However, the State could never require that same policy because such a policy would violate the First Amendment. This is again because the First Amendment only restricts the government, not private individuals or private businesses. Private businesses are free to make unwise or unreasonable decisions, but that does not mean those businesses violated your constitutional rights.

Finally, the reason for the business requiring masks does not matter because private businesses have the ability to impose any lawful conditions on any person who wishes to shop there. It does not matter if a business is requiring masks because the owner personally thinks masks should be worn at his business premises, or if the owner is requiring masks just because he thinks he must comply with the Director's order. In either situation, that business is not an "arm of the State."

A person does not suddenly lose his or her freedom when a business is opened. Again, if you don't like what a certain business is doing, don't shop there. Freedom is a two-way street. Customers are free to choose where they buy products, and businesses are free to choose to whom they sell their products (as long as they are complying with the law and not illegally discriminating). Customers must be free to shop wherever they want, but businesses must also free to have policies with which many people may personally disagree.

5. WHAT IS PREVENTING A PERSON FROM BRINGING A LAWSUIT TO STOP THE DIRECTOR'S ORDER?

In order for anyone to bring a lawsuit, they must have something called "standing." This means that there is an actual case or controversy between you and the person you are suing. This means that just being a citizen of Michigan typically is not enough to be able to bring a lawsuit against a state official.

In order for someone to bring a lawsuit, that person must have something that separates him or her from the general public as a result of the State enforcing the order. For example, if the State issued you a civil fine or other punishment, or even specifically threatened you with punishment, that might be enough to get "standing" to contest the order.

So far, we are unaware of anyone being criminally charged or civilly fined for violation of the Director's order. This is why we are encouraging anyone who is cited under the order to immediately seek legal counsel and contest the legality of the Director's order.

Finally, in order to have the best case possible to contest the Director's order, a person should be cited, disciplined, or punished by an actual state entity. This means that if Home Depot requires you to wear a mask in order to enter their store, that will not likely give you "standing" to sue the state. If you want to sue the state, then the state needs to be the one who is acting.

Standing is a complex legal doctrine which goes beyond the scope of this FAQ. But if you are upset because you do not see anyone suing the State yet, it is likely because of a "standing" issue.

6. CAN PRIVATE BUSINESSES REQUIRE CUSTOMERS TO WEAR MASKS?

The short answer is: Yes. A private business is just that, private. Businesses are free to impose just about any restriction they want on who can enter their store as long as it does not violate the law or illegally discriminate against anyone. In the same way that a private business can post a sign which reads "no shirt, no shoes, no service," a business could add wearing a mask to that requirement.

In our country, we want businesses to be as free as possible. But the cost of that freedom is

that some businesses might do things you personally disagree with or dislike. That's ok. We would much rather permit businesses to make their own decisions (for good or for ill) than be micromanaged by the government. Having said that, if a business discriminates against a person because of their race, age, religion, or medical conditions, that may very well violate the law. But that analysis must be done on a case-by-case basis. In general, however, a business can institute policies on what is required for customers to enter their premises. Of course, you are then free to choose which businesses you utilize.

The most important point is this, no business can truly force anyone to wear a mask because no one is forcing you to use that business. A business can only require that masks be worn within their business.

No business is dragging people off the street and forcibly putting masks on them. If you don't like that policy, then don't go to that business. If you are choosing to voluntarily go to a business, then you are voluntarily accepting the policies of that business (as long as those policies are lawful and don't discriminate). We live in a free country. If you do not like how a certain business is run, do not go there and do not give them your business.

7. CAN PRIVATE SCHOOLS REQUIRE MASKS?

Almost all of the same analysis for private businesses also applies to private schools. We also want private schools to be free to institute whatever policies they feel necessary to protect the health and safety of their staff and the children.

However, whatever requirements they impose must comply with the law. If a person does not like how a certain private school is operating, the answer is to find a different school. This is the best way to have the most freedom possible.

Again, the GLJC believes the Director's order is unlawful as applied to private schools. Every person and private school must count the cost of not complying with the Director's order. While the GLJC believes the order is unlawful, a private school or its officials can still be cited for criminal or civil violations of the order until a court rules otherwise. We encourage anyone who

is cited for a violation of the Director's order to stand strong and fight it.

8. CAN PUBLIC SCHOOLS REQUIRE MASKS?

Public Schools are run by the government and are therefore in a different situation than a private entity. Any time the government acts it must be able to cite to where it obtains its authority to act. In Michigan, the Public School Code outlines the powers and duties of schools and school districts. MCL 380.11a(3)(b) specifically confers the authority to every school district to provide "for the safety and welfare of pupils while at school or a school sponsored activity or while en-route to or from school or a school sponsored activity."

This means that schools have the authority to implement policies to protect the "safety and welfare" of students. School Districts are using this authority to implement COVID-19 policies, including masks. This power is not absolute and anything the school does must comply with the law. This means that there may be a violation of the law if a school does not make accommodations for a student with medical conditions which make it impossible for that student to wear a mask safely. But in general, public schools have the authority to implement such policies, whether there is an order from Director Gordon, or not.

If parents do not agree with how a public school is operating, those parents are free to instead send their children to private school, online school, or start homeschooling (which we highly recommend). There is always the political option as well. School board elections are important because it is those elected officials who decide what policies to implement.

9. CAN MASKS BE REQUIRED FOR CHILDREN PLAYING SPORTS?

The short answer is: most likely, yes. This is a tricky question because all of the public schools, and most of the private schools, are a part of the same non-profit organization for student athletics, the Michigan High School Athletic Association (MHSAA).

The MHSAA is effectively a private organization that is free to implement any policies or procedures it deems appropriate. No school is forced to join the MHSAA. But if a

school does join, it agrees that it will only play official games with other MHSAA teams.

This has created an unfortunate scenario where all schools are essentially beholden to whatever policies the MHSAA institutes if that school wants to play games with other schools. As unfortunate as this is, this is the system we have in Michigan.

In summary, if the MHSAA requires masks, which they can do, then most schools are going to accept that requirement because they want to be able to play against all the other schools.

10. CAN DIRECTOR GORDON ISSUE THIS ORDER EVEN THOUGH HE WAS A DEFENDANT IN THE SUPREME COURT CASE?

It is important to remember exactly what the Supreme Court ruled and what it did not rule. The Supreme Court ruled that the 1945 emergency law was unconstitutional in its entirety. This means that no government official can use that statute to order anyone to do anything. The Supreme Court, however, did not rule on the issue of whether administrative agencies have the authority to issue their own orders, what the scope of those orders may be, or whether social distancing or mask requirements are unconstitutional.

The Director's latest order is not based upon the 1945 emergency law. Instead, it is based upon an epidemic law in the Public Health Code, MCL 333.2253. Since no court has ever ruled on how this epidemic law may be used, there are now conflicting interpretations. As we outlined in our Issue Brief, we believe that the Director is exceeding his authority granted by this statute. Again, it will be up to the courts to make that determination. Until a court rules on this issue, you can be sure that Governor Whitmer, Attorney General Nessel, and Director Gordon will try to enforce this order any way they can.

11. ARE BUSINESSES OR SCHOOLS THAT REQUIRE MASKS FORCING PEOPLE TO MAKE A "MEDICAL DECISION?"

No. No one is forcing anyone to use a certain business or go to a certain school. If you do not want to wear a mask or disagree with such a requirement, do not go to that business or school. You cannot be forced to make a "medical

decision" if you never have to go there in the first place.

Further, being asked to wear safety equipment or PPE at certain locations or at certain businesses does not rise to the level of being a "medical decision." Making people wear a hard-hat at a construction site is not forcing people to make a "medical decision" any more than asking people to wear a mask, cloth, bandana, or plastic shield over their nose and mouth.

Having said that, businesses and schools must make reasonable accommodations to anyone who has a medical condition which prevents them from safely wearing a mask or face covering. Using our example above, a business would have to make an accommodation for someone who had a medical or skin condition which prevented that person from wearing a hard-hat. This issue is further explained below.

12. CAN A PERSON WITH A MEDICAL CONDITION BE FORCED TO WEAR A MASK?

No. There are two ways that a person with a medical condition cannot be forced to wear a mask. The first way is because the Director's order specifically says that is not permitted. If the State is going to enforce the Director's order, then it must adhere to the exceptions to the order as well.

Paragraph 6 of the Director's order states:

Although a face covering is strongly encouraged even for individuals not required to wear one (except for children under the age of 2), the requirement to wear a face covering in sections 2, 5 and 6 of this order do not apply to individuals who . . . (b) Cannot medically tolerate a face covering;

The Director's order is surprisingly a bit more lenient when it comes to informing a business or school of a medical condition compared to Governor Whitmer's previous EOs. Paragraph 5(b) of the order states:

A person responsible for a business, government office, school, or other operation, or an agent of such person, may not assume that someone who enters the operation without a face covering falls

*in one of the exceptions specified in section 6 of this order, including the exception for individuals who cannot medically tolerate a face covering. An individual's **verbal representation that they are not wearing a face covering because they fall within a specified exception, however, may be accepted.***

This means that a business may accept verbal representations of a person's medical condition that prevents he or she from wearing a mask.

The other reason that a business or school cannot force a person to wear a mask who has a medical condition is because of the Americans with Disabilities Act (ADA). No business can discriminate or refuse to provide services to a person because of a medical disability. If a business refuses to provide services or sell goods to a person not wearing a mask because of a medical condition, that may give rise to an ADA claim.

The procedure for filing an ADA claim goes beyond the scope of this FAQ and the merits of an actual ADA claim must be analyzed by looking at the specific facts of each case. If a person believes they have been discriminated against, it may be worth reaching out to an attorney who specializes in ADA claims.

In any case, a business or school cannot force a person with a medical condition to wear a mask because of the Director's order or the ADA, or both.

The GLJC highly recommends that if you do have a medical condition which prevents you from wearing a mask, then try to have documentation to show the school or business. This will help you show the school or business that you do have a verified medical condition and they should take your representations seriously.

13. CAN I WEAR A FACE SHIELD, BANDANA, OR SCARF INSTEAD OF A MASK?

The Director's order does not actually use the term "mask." Instead, the order only requires a "face covering." Paragraph 1(c) of the order states:

"Face covering" means a covering that covers at least the nose and mouth.

Many items could fulfill this description and would likely satisfy the order's requirements, such as a disposable mask, bandana, scarf, plastic face shield, or any other piece of cloth or material which covers a person's nose and mouth.

14. WHO IS PAYING FOR THIS LEGAL ANALYSIS, ISSUE BRIEFS, FACTSHEETS, AND FAQs?

No one. The GLJC is a 501(c)3 non-profit organization. We are attorneys who give our time, *pro-bono*, to fight for civil rights issues and help the public understand what our government is requiring for all of us.

We are donating our time because we believe these issues are important and we want to provide clear and concise legal analysis of these pressing legal issues. Our organization is funded by charitable donations from anyone who supports our cause. If you would like to learn more about us, please visit our website. If you appreciate our analysis and you would like to support what we are doing, please consider donating to the GLJC at greatlakesjc.org/donate.

CONCLUSION

We want to emphasize again that this FAQ is not to pick a side as to whether masks are effective or should be required. Instead, we are analyzing whether the government has the authority to require masks, social distancing, and other requirements. Ultimately, just as with Governor Whitmer's unlawful EOs, the courts will decide if this emergency order is legal and enforceable.

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