STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

SENATE JOURNAL
SEP 30 2020 AM8:49

EXECUTIVE ORDER

No. 2020-189

Temporary COVID-19 protocols for entry into Michigan Department of Corrections facilities and transfers to and from Department custody; temporary recommended COVID-19 protocols and enhanced early-release authorization for county jails, local lockups, and juvenile detention centers

Rescission of Executive Order 2020-170

The novel coronavirus presents an unusually deadly threat to people living in congregate settings like jails and prisons. In order to protect these vulnerable people, I took swift action in March 2020 to stem the tide of COVID-19 in prisons and jails by ordering a suspension of transfers from jails to prisons, and requiring the Department of Corrections to implement certain risk reduction protocols. Under this order, jails were allowed to resume transfers only upon demonstrating that they had implemented comparable risk reduction protocols.

Michigan continues to be a leader in testing for COVID-19. Our state now conducts the eighth-highest number of daily tests and requires testing in congregate settings like nursing homes and agricultural worker housing. In light of the ongoing threat of COVID-19 to jail and prison populations, and the increased availability of testing in our state, it is now reasonable and necessary to require entry, transfer, and release testing of inmates in Michigan prisons, and to allow transfers only from jails that implement comparable testing protocols.

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.

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, I issued Executive Order 2020-4. This order declared 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 (EMA), MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended (EPGA), MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. 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. And on April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the EPA, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the EMA.

Those executive orders have been challenged in *Michigan House of Representatives and Michigan Senate v. Whitmer*. On August 21, 2020, the Court of Appeals ruled that the Governor's declaration of a state of emergency, her extensions of the state of emergency, and her issuance of related EOs clearly fell within the scope of the Governor's authority under the EPGA.

On September 29, 2020, I issued Executive Order 2020-186, again finding that the COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan. That order constituted a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. And, to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature had declined to grant an extension request, that order also constituted a state of emergency and state of disaster declaration under that act.

The Emergency Powers of the Governor Act provides a sufficient legal basis for issuing this executive order. In relevant part, it provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

Nevertheless, subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, I also invoke the Emergency Management Act as a basis for executive action to combat the spread of COVID-19 and mitigate the effects of this emergency on the people of Michigan, with the intent to preserve the rights and protections provided by the EMA. The EMA vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)–(2). This executive order falls within the scope of those powers and duties, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, they too provide a sufficient legal basis for this order.

Acting under the Michigan Constitution of 1963 and Michigan law, I find it reasonable and necessary, for the reasons outlined above, to order:

1. **Transfers from jails to prisons.** All transfers into the custody of the Department of Corrections ("Department") are temporarily suspended unless the transferring jail or local lockup satisfactorily implements both the risk reduction protocols described in section 2 and the testing protocols described in section 3.

   (a) Beginning seven days from the effective date of this order, and no more than once every seven days, a jail or local lockup may request that the Director of the Department ("Director") determine that the jail or lockup has satisfactorily implemented both the risk reduction protocols described in section 2 and the testing protocols described in section 3.

   (b) Upon inspection, if the Director determines that a jail or local lockup has satisfactorily implemented risk reduction protocols and testing protocols, transfers from that jail or lockup will resume in accordance with those protocols.

   (c) Jails and local lockups must provide documentation of each transferee's testing history upon transfer. The Director may reject transfers that do not pass the screening protocol for entry into a facility operated by the Department.

   (d) Parole violators in the Department's custody must not be transported to or lodged in a county jail or local lockup unless the Director has determined that such county jail or local lockup has satisfactorily implemented both the risk reduction protocols described in section 2 and the testing protocols described in section 3.

2. **Risk reduction protocols.** The Department must implement risk reduction protocols to address COVID-19, including the following:

   (a) Screening all persons arriving at or departing from a facility, including staff, inmates, vendors, and any other person entering the facility, in a manner consistent with guidelines issued by the Centers for Disease Control and Prevention ("CDC"). Such screening includes a temperature reading and obtaining information about travel and any contact with persons under investigation for COVID-19 infection.

   (b) Isolating and testing any inmate who has one or more of the principal symptoms of COVID-19, including fever, sore throat, a new uncontrolled cough that causes difficulty breathing, diarrhea, vomiting, abdominal pain, new onset of a severe headache, and new loss of taste or smell.

   (c) Restricting all indoor inmate visitation, except for service providers (including but not limited to educational, legal, and medical professionals), conducting any visitation without physical contact to the extent feasible.

   (d) Coordinating with local public health departments on isolation plans and outbreak response.

   (e) Notifying the local public health department of any suspected or confirmed case of COVID-19.

(f) Providing, to the fullest extent possible, appropriate personal protective equipment to all staff as recommended by the CDC.

(g) To the extent feasible, opening windows and doors, and using fans, to increase air circulation; considering taking additional steps to improve ventilation in the facility, in consultation with an HVAC professional, based on local environmental conditions.

(h) Conducting routine cleaning and sanitizing consistent with CDC guidance, as provided at https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/index.html.

(i) Ensuring access to personal hygiene products for inmates and correctional staff, including soap and water sufficient for regular handwashing.

(j) Ensuring that protective laundering protocols are in place.

(k) Posting signage and continually educating on the importance of social distancing, handwashing, and personal hygiene.

(l) Requiring inmates and staff to practice social distancing to the fullest extent feasible, and to wear facial coverings when maintaining six feet of social distance from persons housed separately is not possible.

(m) Minimizing crowding, which may include scheduling more times for meal and recreation to reduce person-to-person contact.

(n) During transport, ensuring that staff and inmates wear facial coverings and maintain appropriate social distance, including by reducing vehicle capacity.

3. **Testing protocols.** Consistent with guidance issued by the Michigan Department of Health and Human Services, the Department must conduct COVID-19 diagnostic testing in all of its facilities as follows (obtaining consent of the individual or other person legally authorized to make medical care decisions for the individual):

(a) Except as otherwise provided in this subsection, test all inmates entering a facility at least once, and no more than 48 hours after entry, or in the 72 hours prior to intake. Although testing is recommended for all inmates entering a facility, this requirement does not apply to inmates held outside general population, housed in single cells (i.e. without other inmates), released within 24 hours, and provided with educational materials on the importance of testing and contact tracing.

(b) Test any inmate scheduled to be transferred to another facility, including a Department facility, within 72 hours prior to transfer. The test conducted pursuant to subsection (a) satisfies the requirements of this subsection if conducted within the 72 hours prior to transfer.

(c) Test any inmate scheduled for release within 72 hours prior to release. The test conducted pursuant to subsection (a) satisfies the requirements of this subsection if conducted within the 72 hours prior to transfer. An inmate must not be detained solely because they refuse consent for a COVID-19 test or because of positive COVID-19 status, but the Department must not release an inmate into any other congregate setting if that inmate is in isolation protocol.

(d) In case of a sustained outbreak (any confirmed positive case identified within the last 14 days epidemiologically linked to another positive case within the same facility) or other high-risk situation, conduct ongoing testing coupled with contact tracing, in coordination with the local public health department.

(e) Isolate and medically manage any inmate who tests positive for COVID-19 as appropriate. Except for transfers to isolation units, to manage medical needs, or for exigent security reasons, inmates testing positive should not be transferred to another corrections facility or other congregate setting, unless they meet the following criteria:

(1) At least 10 days have passed since symptom onset, except in cases in which infection-control experts recommend longer isolation (e.g., up to 20 days in severely immunocompromised persons), and;

(2) At least 24 hours have passed since resolution of fever without the use of fever-reducing medications and;

(3) Other symptoms have improved.

(f) Isolate any inmate who refuses a test for COVID-19 when required to be tested for 14 days. Except for transfers to isolation units (including isolation units at another correctional facility), to manage medical needs, or for exigent security reasons, inmates held in isolation under this subsection should not be transferred to another corrections facility or other congregate setting during this 14-day isolation period.

(g) In the event that a former inmate who has been released tests positive for COVID-19, the Department must make reasonable efforts to notify that individual of their tests (such as calling the number provided by that individual) or arrange for an alternative notification method.

4. **State assistance for expanded testing.**

(a) The Department of Health and Human Services must provide direct assistance with testing supplies, specimen collection, and laboratory processing to jails and local lockups that request assistance, as resources permit. Jails and local lockups may submit requests for assistance to MDHHS-cjtestingrequests@michigan.gov.

(b) A jail or local lockup that receives assistance yet still cannot comply with the testing protocols described in section 3 due to delays in test processing time may

request adjustments to the timing requirements of section 3, which the Director may grant in her sole discretion.

5. **Priority release.** To mitigate the risk of COVID-19 spreading in county jails, strict compliance with the capacity and procedural requirements regarding county jail overcrowding states of emergency in the County Jail Overcrowding Act ("CJOA"), 1982 PA 325, MCL 801.51 et seq., is temporarily suspended. While this order is in effect, all actions that would be authorized under the CJOA in the event of a declaration of a county jail overcrowding state of emergency are authorized and shall remain authorized without regard to any reduction in jail population or any other such limitations on the duration of authorization imposed by the CJOA. Anyone authorized to act under this section is strongly encouraged to consider early release for all of the following, so long as they do not pose a public safety risk:

   (a) Older people, people who have chronic conditions or are otherwise medically frail, people who are pregnant, and people nearing their release date.

   (b) Anyone who is incarcerated for a traffic violation.

   (c) Anyone who is incarcerated for failure to appear or failure to pay.

   (d) Anyone with behavioral health problems who can safely be diverted for treatment.

6. **Reimbursement to counties.** The State Budget Office must ensure that counties are reimbursed for lodging inmates who would have been transferred into the Department's custody if not for the suspension of transfers.

7. **Juvenile detention centers.** Juvenile detention centers are strongly encouraged to reduce the risk that those at their facilities will be exposed to COVID-19 by implementing as feasible the following measures:

   (a) Adopting the risk reduction protocols and testing protocols described in sections 1 and 2.

   (b) Removing from the general population any juveniles who have COVID-19 symptoms.

   (c) Eliminating any form of juvenile detention or residential facility placement except for juveniles who are determined to be a substantial and immediate safety risk to themselves or others.

   (d) Providing written and verbal communications to all juveniles at such facilities regarding COVID-19, access to medical care, and community-based support.

   (e) To the fullest extent possible, facilitating access to family, education, and legal counsel through electronic means (such as telephone calls or video conferencing) at no cost, rather than through in-person meetings.

8. **Juveniles on court-ordered probation.** Unless otherwise directed by court order, for juveniles on court-ordered probation, the use of out-of-home confinement for technical violations of probation and any requirements for in-person meetings with probation officers are temporarily suspended.

9. **Effective Date.** This order is effective immediately and continues through October 30, 2020 at 11:59 pm.

10. **Effects on prior orders.** Executive Order 2020-170 is rescinded.

Given under my hand and the Great Seal of the State of Michigan.

Date: September 29, 2020

Time: 6:21 pm

GRETCHEN WHITMER

GOVERNOR

By the Governor:

SECRETARY OF STATE