GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST II
LT. GOVERNOR

SECRETARY OF SENATE
2020 AUG 11 AM 10:07

EXECUTIVE ORDER

No. 2020-169

Enhanced protections for residents and staff of long-term care facilities during the COVID-19 pandemic

Rescission of Executive Order 2020-148

From day one, I have taken action to protect seniors from the deadly COVID-19 pandemic. Because of the inordinate risk of COVID-19 to elderly Michiganders living in congregate settings, I have issued executive orders implementing special protections for residents and employees of long-term care facilities. To ensure our nursing homes are as safe as possible, I pushed our inspectors to complete 100% of infection control surveys more than two months before the federal deadline, and they delivered. And I have worked tirelessly to procure tests and PPE to keep seniors safe, and to facilitate testing for all nursing home residents and staff, with little to no assistance from federal authorities. To protect against a possible second wave, I created the nursing home preparedness task force, which is set to produce its report August 31. Finally, my stay-home and safe-start orders have dramatically cut the infection rate and limited community spread, the single-greatest threat to the residents of long-term care facilities.

Because COVID-19 continues to threaten the health and safety of elderly Michiganders living in long-term care facilities, it is reasonable and necessary to continue the enhanced protections for residents and staff of long-term care facilities put in place back in April 2020. This order rescinds my prior executive order on this topic, and extends those protections for additional four weeks.

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 or antiviral treatment for this disease.

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 May 21, 2020, the Court of Claims ruled that Executive Order 2020-67 is a valid exercise of authority under the Emergency Powers of the Governor Act but that Executive Order 2020-68 is not a valid exercise of authority under the Emergency Management Act. Both of those rulings are being challenged on appeal.

On August 7, 2020, I issued Executive Order 2020-165, 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 order the following:

I. Protections for residents of long-term care facilities

1. Notwithstanding any statute, rule, regulation, or policy to the contrary, a long-term care facility must not effectuate an eviction or involuntary discharge against a resident for nonpayment, nor deny a resident access to the facility, except as otherwise provided in this order.

2. A long-term care facility must not prohibit admission or readmission of a resident based on COVID-19 testing requirements or results in a manner that is inconsistent with this order or relevant guidance issued by the Department of Health and Human Services ("DHHS").

3. The following apply to a resident that voluntarily obtained housing outside of a long-term care facility such as by moving in with a family member (but not to a resident who was hospitalized) during any state of emergency or state of disaster arising out of the COVID-19 pandemic:

   (a) The resident does not forfeit any right to return that would have been available to the resident under state or federal law had they been hospitalized or placed on therapeutic leave. Nothing in this section affects the rights of a resident who was hospitalized or placed on therapeutic leave.

   (b) Except as provided in subsection (c), as soon as capacity allows, the long-term care facility of origin must accept the return of the resident, provided it can meet the medical needs of the resident, and there are no statutory grounds to refuse the return.

   (c) Prior to accepting the return of such a resident, the long-term care facility must undertake screening precautions that are consistent with relevant DHHS guidance when receiving the returning resident. A facility must not accept the return of a COVID-19-positive resident if the facility does not have a dedicated unit or regional hub meeting the requirements of this order.

4. Nothing in this order abrogates the obligation to pay or right to receive payment due under an admission contract between a resident and a long-term care facility.

5. All long-term care facilities must use best efforts to facilitate the use of telemedicine in the care provided to their residents, including, but not limited to, for regular doctors' visits, telepsychology, counseling, social work and other behavioral health visits, and physical and occupational therapy.

II. Protections for employees and residents of long-term care facilities

1. It is the public policy of this state that employees of long-term care facilities or regional hubs who test positive for COVID-19 or who display one or more of the principal symptoms of COVID-19 should remain in their homes or places of residence, as provided in section 2 of Executive Order 2020-166 or any order that may follow from it, and that their employers shall not discharge, discipline, or

otherwise retaliate against them for doing so, as provided in section 1 of Executive Order 2020-166 or any order that may follow from it.

2. Long-term care facilities must:

   (a) Cancel all communal dining and all internal and external group activities;

   (b) Take all necessary precautions to ensure the adequate disinfecting and cleaning of facilities, in accordance with relevant guidance from the Centers for Disease Control and Prevention ("CDC");

   (c) Use best efforts to provide appropriate personal protective equipment ("appropriate PPE") and hand sanitizer to all employees that interact with residents;

   (d) As soon as reasonably possible, but no later than 12 hours after identification, inform employees of the presence of a COVID-19-affected resident;

   (e) Notify employees of any changes in CDC recommendations related to COVID-19;

   (f) Keep accurate and current data regarding the quantity of each type of appropriate PPE available onsite, and report such data to EMResource upon DHHS's request or in a manner consistent with DHHS guidance; and

   (g) Report to DHHS all presumed positive COVID-19 cases in the facility together with any additional data required under DHHS guidance.

III. Procedures related to transfers and discharges of COVID-19-affected residents

1. A long-term care facility must report the presence of a COVID-19-affected resident to their local health department within 24 hours of identification.

2. Except as otherwise provided by an advance directive, a long-term care facility must transfer a COVID-19-affected resident who is medically unstable to a hospital for evaluation.

3. A nursing home must make all reasonable efforts to create a unit dedicated to the care and isolation of COVID-19-affected residents ("dedicated unit").

   (a) A nursing home with a dedicated unit must provide appropriate PPE to direct-care employees who staff the dedicated unit.

   (b) A nursing home provider that operates multiple facilities may create a dedicated unit by designating a facility for such a purpose.

   (c) A nursing home must not create or maintain a dedicated unit unless it can implement effective and reliable infection control procedures.

4. A long-term care facility must adhere to the following protocol with respect to a COVID-19-affected resident who is medically stable:

   (a) If the long-term care facility has a dedicated unit, the facility must transfer the COVID-19-affected resident to its dedicated unit.

   (b) If the long-term care facility does not have a dedicated unit, it must attempt to transfer the COVID-19-affected resident to a regional hub, an alternate care facility with physical and operational capacity to care for the resident, or an available swing bed at a hospital.

   (c) If a transfer under subsection (b) of this section is not possible, the long-term care facility must attempt to send the resident to a hospital within the state that has available bed capacity.

5. Once a long-term care facility resident who has been hospitalized due to onset of one or more of the principal symptoms of COVID-19 becomes medically stable, the hospital must conduct testing consistent with best practices identified by the CDC prior to discharge. Discharge may be made to any of the following: a regional hub, the facility where the resident resided prior to hospitalization, an alternate care facility with physical and operational capacity to care for the resident, or an available swing bed.

6. Discharge destinations should be determined consistent with CDC and DHHS guidelines. Decisionmakers should consider patient safety, the safety of the residents of any destination facility, the wishes of the patient and patient's family, and any guidance or recommendations from the local health department. However, a resident may only be discharged to a facility capable of safely isolating the resident, consistent with any applicable CDC and DHHS guidelines.

7. Until an acceptable discharge destination is identified, the individual must remain in the care of the hospital where they reside.

8. For any transfer or discharge of a resident, the transferring or discharging entity must ensure that the resident's advance directive accompanies the resident and must disclose the existence of any advance directive to medical control at the time medical control assistance is requested.

9. A long-term care facility that transfers or discharges a resident in accordance with this order must notify the resident and the resident's representative (if reachable) of the transfer or discharge within 24 hours.

10. The department of licensing and regulatory affairs is authorized to take action to assure proper level of care and services in connection with this order, consistent with section 21799b of the Public Health Code, MCL 333.21799b, and any other relevant provisions of law.

11. A transfer or discharge of a long-term care facility resident that is made in accordance with this order constitutes a transfer or discharge mandated by the physical safety of other facility residents and employees as documented in the clinical record, for purposes of section 21773(2)(b) of the Public Health Code, 1978 PA 368, as amended, MCL 333.21773(2)(b), and constitutes a transfer or discharge that is necessary to prevent the health and safety of individuals in the facility from being endangered, for purposes of 42 CFR 483.15(c)(1)(i)(C)-(D) and (c)(4)(ii)(A)-(B).

12. To the extent necessary to effectuate this terms of this order, strict compliance with any statute, rule, regulation, or policy pertaining to bed hold requirements or procedures, or to pre-transfer or pre-discharge requirements or procedures, is temporarily suspended. This includes, but is not limited to, strict compliance with the requirements and procedures under sections 20201(3)(e), 21776, 21777(1), and 21777(2) of the Public Health Code, MCL 333.20201(3)(e), MCL 333.21773(2), MCL 333.21776, MCL 333.21777(1), and MCL 333.21777(2), as well as Rules 325.1922(13)-(16), 400.1407(12), 400.2403(9), and 400.15302 of the Michigan Administrative Code.

IV. Definitions and general provisions

1. For purposes of this order:

   (a) "Adult foster care facility" has the same meaning as provided by section 3(4) of the Adult Foster Care Facility Licensing Act, 1979 PA 218, as amended, MCL 400.703(4).

   (b) "Alternate care facility" means any facility activated by the state to provide relief for hospitals that surge past their capacity,

   (c) "Appropriate PPE" means the PPE that DHHS recommends in relevant guidance.

   (d) "Assisted living facility" means an unlicensed establishment that offers community-based residential care for at least three unrelated adults who are either over the age of 65 or need assistance with activities of daily living (ADLs), including personal, supportive, and intermittent health-related services available 24-hours a day.

   (e) "COVID-19-affected resident" means a resident of a long-term care facility who is COVID-19 positive, who is a person under investigation, or who displays one or more of the principal symptoms of COVID-19.

   (f) "Home for the aged" has the same meaning as provided by section 20106(3) of the Public Health Code, MCL 333.20106(3).

   (g) "Long-term care facility" means a nursing home, home for the aged, adult foster care facility, or assisted living facility.

(h) "Medically unstable" means a change in mental status or a significant change or abnormality in blood pressure, heart rate, oxygenation status, or laboratory results that warrants emergent medical evaluation.

(i) "Nursing home" has the same meaning as provided by section 20109(1) of the Public Health Code, MCL 333.20109(1).

(j) "Person under investigation" means a person who is currently under investigation for having the virus that causes COVID-19.

(k) "Principal symptoms of COVID-19" are fever, atypical cough, or atypical shortness of breath.

(l) "Regional hub" means a nursing home that is designated by DHHS as a dedicated facility to temporarily and exclusively care for and isolate COVID-19-affected residents. A regional hub must accept COVID-19-affected residents in accordance with relevant DHHS orders and guidance.

(m) "Swing bed" has the meaning provided by 42 CFR 413.114(b).

2. DHHS may issue orders and directives, and take any other actions pursuant to law, to implement this executive order.

3. This order is effective immediately and continues through September 7, 2020.

4. Executive Order 2020-148 is rescinded.

5. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

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

Date: August 10, 2020

Time: 6:04 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE