OFFICE OF THE GOVERNOR
STATE OF MONTANA

STEVE BULLOCK
GOVERNOR

MIKE COONEY
LT. GOVERNOR

TO: Montanans; all officers and agencies of the State of Montana
FROM: Governor Steve Bullock
DATE: Thursday, May 7, 2020
RE: Directive implementing Executive Orders 2-2020 and 3-2020 and providing for measures to maintain health and safety in foster or congregate care while combatting COVID-19

Executive Orders 2-2020 and 3-2020 declare that a state of emergency exists in Montana due to the global outbreak of COVID-19 Novel Coronavirus.

For the duration of the emergency, § 10-3-104(2)(a), MCA, provides authority to the Governor to "suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or orders or rules of any state agency if the strict compliance with the provisions of any statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency or disaster."

Due to the evolving nature of this emergency, it is critical to the response to ensure that staff shortages do not arise in Montana's congregate care facilities. A number of state law and administrative rules for these care settings mandate particular personnel requirements as a prerequisite to a provider performing certain tasks. In order to ensure that acute, inpatient or residential, mental health, or substance abuse care needs are met, there must be regulatory flexibility to make adjustments to service delivery methods and workload priorities, as well as to suspend home visits, where necessary. These actions are necessary to maintain health and safety in congregate care environments while simultaneously working to curtail the spread of the COVID-19 pandemic in Montana.

Based on the foregoing considerations, I have determined that strict compliance with the provisions of certain statutes and administrative rules regulating congregate care would prevent, hinder, or delay necessary action to cope with the COVID-19 pandemic.

Therefore, in accordance with the authority vested in me under the Constitution, Article VI, Sections 4 and 13, and the laws of the State of Montana, Title 10, Chapter 3 and Title 50, Chapter 1, MCA, and other applicable provisions of the Constitution and Montana law, I hereby direct the following measures be in place in the State of Montana effective immediately:

- Name-based background checks must be completed for all applicants to work at congregate care facilities and must supplemented with fingerprint-based checks as soon as these services can be safely offered in all locations. To the extent there is a temporary shortage in physical fingerprinting services due to the emergency, and to accommodate staffing needs in congregate care facilities, the Department may temporarily waive licensing or certification requirements for congregate care facilities that require fingerprint background checks, provided that a name-based background check is conducted and that a fingerprint check is done as soon as services become available. Accordingly, strict compliance with the following provisions is suspended for the duration of the emergency, but only to the limited extent they conflict with the

Department's implementation of guidance, waivers, or rules by the Centers for Medicare and Medicaid Services (CMS), and the Administration for Children and Families pertaining to background checks of providers, employees, or applicants, and only to the extent necessary to respond to the emergency:

- Section 41-3-304, MCA, related to emergency foster placements; Section 52-2-622(4), MCA, and ARM 37.51.207 and 37.51.310, related to youth foster home license applications, but only to the extent there is a specific conflict with the purposes of this Directive.
- ARM 37.40.1018(7), related to self-directed community first choice services providers, but only to the extent there is a specific conflict with the purposes of this Directive.
- ARM 37.97.132 and 37.97.140, related to the licensure of youth care facilities, but only to the extent there is a specific conflict with the purposes of this Directive.
- ARM 37.100.138(1)-(2) and 37.100.165(5), related to community residences, but only to the extent there is a specific conflict with the purposes of this Directive.
- Any other statute or administrative rule that would require fingerprint-based checks for the above-described congregate care providers, employees, or license applicants, but only to the extent there is a specific conflict with the purposes of this Directive.

- In order to reduce in-person interactions, the Department may waive training, and other training-related annual recertification requirements in congregate care facilities when these requirements cannot be met during the emergency. In-person training should be supplemented when it can be safely completed, and all care providers remain subject to competency requirements. Accordingly, strict compliance with the following provisions is suspended for the duration of the emergency to the limited extent they conflict with the Department's implementation of guidance, waivers, or rules by CMS pertaining to the response to the COVID-19 pandemic, but only to the extent necessary to respond to the emergency:
  - Section 50-5-238, MCA, related to the licensure of intermediate care facilities for developmentally disabled persons, but only to the extent there is a specific conflict with the purposes of this Directive.
  - Provisions of Title 37, Chapter 34, ARM, related to services of the developmental disabilities program and the home and community-based services program, but only to the extent there is a specific conflict with the purposes of this Directive.
  - Provisions of Title 37, Chapter 40, ARM, related to home and community-based services for elderly and physically disabled persons, but only to the extent there is a specific conflict with the purposes of this Directive.
  - Provisions of Title 37, Chapter 97, ARM, related to the licensure of youth care facilities, but only to the extent there is a specific conflict with the purposes of this Directive.
  - Provisions of Title 37, Chapter 100, ARM, related to community residences, but only to the extent there is a specific conflict with the purposes of this Directive.
  - Provisions of Title 37, Chapter 106, ARM, related to the licensure of health care facilities, but only to the extent there is a specific conflict with the purposes of this Directive.

- When illness or COVID-19 response makes compliance impossible, but care quality can be maintained, the Department may waive staffing-related licensing and certification requirements in congregate care facilities. Accordingly, strict compliance with the following provisions is suspended for the duration of the emergency to the limited extent they conflict with the Department's implementation of guidance, waivers, or rules by the Centers for Medicare and

Medicaid Services pertaining to the response to the COVID-19 pandemic, but only to the extent necessary to respond to the emergency:

- Section 50-5-238, MCA, related to the licensure of intermediate care facilities for developmentally disabled persons, but only to the extent there is a specific conflict with the purposes of this Directive.
- Provisions of Title 37, Chapter 40, ARM, related to home and community-based services for elderly and physically disabled persons, but only to the extent there is a specific conflict with the purposes of this Directive.
- Provisions of Title 37, Chapter 90, ARM, related to the Home and Community-based Services Waiver for Adults with Severe Disabling Mental Illness, but only to the extent there is a specific conflict with the purposes of this Directive.
- Provisions of Title 37, Chapter 97, ARM, related to the licensure of youth care facilities, but only to the extent there is a specific conflict with the purposes of this Directive.
- Provisions of Title 37, Chapter 100, ARM, related to community residences, but only to the extent there is a specific conflict with the purposes of this Directive.
- Provisions of Title 37, Chapter 106, ARM, related to the licensure of health care facilities, but only to the extent there is a specific conflict with the purposes of this Directive.

- Where quarantine or isolation considerations necessitate alternative settings and resident health, safety, and comfort will not be jeopardized, the Department may waive licensing and certification requirements related to permissible premises, settings, or construction standards in situations. Accordingly, strict compliance with the following provisions is suspended for the duration of the emergency to the limited extent they conflict with the Department's implementation of guidance, waivers, or rules by CMS pertaining to permissible premises, settings, or construction standards necessary to accommodate quarantine or isolation measures, and only to the extent necessary to respond to the emergency:
  - Section 52-4-204, MCA, related to licensing of community homes for the physical disabled, and § 50-5-238, MCA, related to the licensure of intermediate care facilities for developmentally disabled, but only to the extent there is a specific conflict with the purposes of this Directive.
  - Provisions of Title 37, Chapter 97, ARM, related to the licensure of youth care facilities, but only to the extent there is a specific conflict with the purposes of this Directive.
  - Provisions of Title 37, Chapter 100, ARM, related to community residences, but only to the extent there is a specific conflict with the purposes of this Directive.
  - Provisions of Title 37, Chapter 106, ARM, related to the licensure of health care facilities, but only to the extent there is a specific conflict with the purposes of this Directive.

Authorities: Section 10-3-104, MCA; §§ 50-1-202, -203, and -204, MCA; 37 A.G. Op. 132 (1978); Executive Orders 2-2020 and 3-2020; Montana Constitution, Art. VI, Sections 4 and 13; §§ 10-3-103, -302, and -305, MCA; and all other applicable provisions of state and federal law.

Limitations

- This Directive is effective immediately and expires at the end of the declared state of emergency in Executive Orders 2-2020 and 3-2020.

- This Directive shall be implemented consistent with applicable law and subject to the availability of appropriations.
- This Directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the State of Montana, its departments, agencies, or entities, its officers, employees, or agents, or any other person.