STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

SECRETARY OF SENATE
2020 MAY 26 PM 2:52

EXECUTIVE ORDER

No. 2020-104

Increasing COVID-19 testing by expanding the scope of practice for certain professionals and encouraging the establishment of community testing locations

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 Emergency Powers of the Governor Act, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the Emergency Management Act.

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 likely to be appealed.

On May 22, 2020, I issued Executive Order 2020-99, 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 has 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 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.

To help prevent the further spread of COVID-19 and provide protections against the dangers to this state posed by the COVID-19 emergency, it is reasonable and necessary to enable a broader range of qualified medical professionals to order COVID-19 tests and to encourage the establishment of community testing locations by reducing barriers to siting and staffing such test sites.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. It is the public policy of the State of Michigan that testing for COVID-19 should be available to any individual with reason to be tested for COVID-19 without any out-of-pocket cost to such individual.

   (a) For purposes of this order, "person with reason to be tested for COVID-19" includes anyone who meets at least one of the COVID-19 testing prioritization criteria specified by the Chief Medical Executive.

   (b) A person with reason to be tested for COVID-19 may receive a test at a community testing location without securing an order from a medical provider in advance. Medical providers will be available to order testing upon arrival. A person who wishes to be tested may call the coronavirus hotline at 1-888-535-6136 or visit www.michigan.gov/coronavirustest to find an appropriate testing location.

(c) DHHS may issue orders and directives to implement this section.

2. Qualifications.

   (a) Nothing in this order is intended to alter any obligation of a health insurance company, pursuant to the terms of an insurance policy, to cover costs related to COVID-19 testing for any policyholder.

   (b) Nothing in this order is intended to supersede the medical judgment of any health care provider.

3. A licensee holding one of the following license types may establish and administer a COVID-19 testing service without an additional state license or permit at any site, with permission from the person with the right to occupy and exclude others from the property:

   (a) Physician's assistant, licensed under Part 170 of the Public Health Code, 1978 PA 368, as amended ("Public Health Code"), MCL 333.17001 et seq.;

   (b) Advanced practice registered nurse, licensed practical nurse, or registered professional nurse, licensed under Part 172 of the Public Health Code, MCL 17201 et seq.;

   (c) Pharmacist, licensed under Part 177 of the Public Health Code, MCL 333.17701 et seq.

4. The licensees identified in section 2 must be considered to be persons authorized to order a laboratory test that has been classified by the Food and Drug Administration as moderate or high complexity, consistent with section 20521 of the Public Health Code, 1978 PA 368, as amended. MCL 333.20521.

5. Strict compliance with the scope-of-practice, supervision, and delegation provisions of the parts of the public health code identified in paragraph 1 of this order are temporarily suspended to the extent necessary to allow licensees governed by these parts to comply with section 6 of this order, provided the licensee is properly trained to perform those tasks and functions.

6. Licensees administering a COVID-19 testing service or testing laboratory shall comply with the following:

   (a) Any specimen collected at a COVID-19 testing service shall be tested at a laboratory or entity in accordance with federal CLIA regulations as facilitated by the Department of Licensing and Regulatory Affairs. High-complexity tests, including PCR tests, must be tested at a laboratory that is CLIA certified. Waived tests, including rapid point-of-care diagnostic tests, must be tested at an entity that has obtained a CLIA waiver.

(b) The licensee shall provide personnel with any training necessary to operate a COVID-19 testing service.

(c) The licensee shall comply with any reporting requirements issued by DHHS.

(d) COVID-19 testing service personnel shall use proper personal protective equipment when administering and conducting specimen collection and testing.

(e) A licensee collecting specimens for testing who does not perform testing shall securely store specimens pending retrieval by the entity that will test the specimens.

(f) A licensee shall refer patients to appropriate medical providers for follow up, if not available through the entity conducting testing.

7. Unlicensed individuals may perform any of the tasks and functions of COVID-19 testing services, including screening of patients, observing self-swabbing, temporarily storing specimens pending transmittal to a laboratory, transmitting specimens to a laboratory, reporting test results to the Michigan Disease Surveillance System, and referring patients to appropriate medical providers for follow-up, provided:

   (a) The unlicensed individuals have been trained to perform the tasks and functions they are performing; and

   (b) The unlicensed individuals are supervised by a licensed medical provider referenced in section 2 of this order or by county or municipal health personnel who have been properly trained to supervise the performance of the tasks and functions the unlicensed individuals are performing.

8. Insofar as section 11 of the Emergency Management Act, MCL 30.411, remains in effect, anyone establishing, volunteering, or working at a community testing location constitutes personnel of a disaster relief force, and, with respect to the activities of COVID-19 testing, are entitled to the same rights and immunities as provided by law for the employees of this state under MCL 30.411(1)(c).

9. Definitions.

   (a) For purpose of this order, "COVID-19 testing service" means any operation that administers the collection of samples to be tested by a CLIA certified or CLIA waived entity for COVID-19 to individuals in this state.

   (b) For purposes of this order, "community testing location" means a COVID-19 testing service that (a) offers testing for any individual with reason to be tested for COVID-19; (b) does not require any out-of-pocket payment for a COVID-19 test for any individual with reason to be tested for COVID-19; (c) does not require a person with reason to be tested for COVID-19 to obtain a prescription for testing in advance of booking an appointment; and (d) has medical providers available and able to order a COVID-19 test onsite.

10. This order is effective immediately upon issuance.

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

Date: May 26, 2020

Time: 2:45 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE