

# **ATTACHMENT A**



STATE OF MICHIGAN

GRETCHEN WHITMER  
GOVERNOR

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
LANSING

ELIZABETH HERTEL  
DIRECTOR

January 20, 2022

**Emergency Order under MCL 333.2253 – Nursing Home Vaccine Order**

Michigan law imposes on the Michigan Department of Health and Human Services (“MDHHS”) a duty to “continually and diligently endeavor to prevent disease, prolong life, and promote the public health,” and gives the Department “general supervision of the interests of the health and life of the people of this state.” MCL 333.2221. MDHHS may “[e]xercise authority and promulgate rules to safeguard properly the public health; to prevent the spread of diseases and the existence of sources of contamination; and to implement and carry out the powers and duties vested by law in the department.” MCL 333.2226(d).

SARS-CoV-2 (“COVID-19”) is a respiratory disease that can result in serious illness or death. It is caused by a strain of coronavirus not identified in humans prior to 2019 and is easily spread from person to person. COVID-19 spreads primarily through respiratory aerosol and droplets, even from individuals who may be asymptomatic.

In recognition of the severe, widespread harm caused by epidemics, the Legislature has granted MDHHS specific authority, dating back a century, to address threats to the public health like those posed by COVID-19. MCL 333.2253(1) provides that:

If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code.

*See also In re Certified Questions from the United States District Court*, Docket No. 161492 (Viviano, J., concurring in part and dissenting in part, at 20) (“[T]he 1919 law passed in the wake of the influenza epidemic and Governor Sleeper’s actions is still the law, albeit in slightly modified form.”); *id.* (McCormack, C.J., concurring in part and dissenting in part, at 12). Enforcing Michigan’s health laws, including preventing disease, prolonging life, and promoting public health, requires the establishment of procedures to control the spread of COVID-19.

On March 10, 2020, MDHHS identified the first two presumptive-positive cases of COVID-19 in Michigan. As of January 14, 2022, Michigan had seen a total of 1,746,707 confirmed cases and 28,479 confirmed deaths attributable to COVID-19. Through January 6, 2022, the seven-day average rates in the State of Michigan were 1,608.6 daily cases per million people and 7.9 daily deaths per million people. As of January 13, 2022, the weekly average positivity rate was 33.1%, and the current number of COVID-19 cases detected per day in Michigan was above 13,000. As of January 18, 2022, there were 4,530 Michiganders hospitalized with COVID-19. As of January 15, 2022, 64.4% of Michigan residents had received at least one dose of a COVID-19 vaccine.

The Omicron variant of COVID-19 (“Omicron”), first reported by South Africa on November 24, 2021, spreads much more rapidly than prior variants of COVID-19. Omicron is more readily able to evade immunity from both vaccination and infection, significantly increasing the number of individuals who may experience severe illness, hospitalization, and death for persons who are inadequately immunized.

This makes delivery of additional doses of the COVID-19 vaccines even more important. Omicron was first detected in Michigan on December 1, 2021. Omicron reached Michigan during a period of high case counts and stretched hospital resources driven by the Delta variant. In addition to COVID-19, Michigan is experiencing an uptick in cases of other respiratory illnesses, including influenza and respiratory syncytial virus. The confluence of these sharp increases in respiratory infections is putting significant strain on Michigan's emergency and hospital systems.

Recent estimates suggest that roughly half of persons who suffer from COVID-19 will experience long-term symptoms, referred to as "long COVID." These symptoms – including fatigue, shortness of breath, joint pain, depression, and headache – can last for months and be disabling. In some cases, these long-term symptoms can arise unexpectedly in patients who had few or no symptoms of COVID-19 at the time of diagnosis. COVID-19 has also been shown to damage the heart and kidneys. Furthermore, minority groups in Michigan have experienced a higher proportion of "long COVID." The best way to prevent these complications is to prevent transmission of COVID-19.

COVID-19 can spread quickly in crowded settings, especially congregate living settings where physical distancing cannot be consistently maintained, such as nursing homes. While COVID-19 can cause deaths in persons of any age, deaths remain most prevalent among persons of advanced age. COVID-19 vaccine booster doses significantly reduce the risk of hospitalization and death, and so are especially important among nursing home residents. Many nursing homes have acted swiftly to ensure that their residents have the opportunity to receive booster doses; 74% of eligible Michigan nursing home residents having received a booster as of the week ending January 14, 2022. Some residents, however, have not yet had the opportunity to receive a COVID-19 booster dose.

Considering the above, and upon the advice of scientific and medical experts, I have concluded pursuant to MCL 333.2253 that the COVID-19 pandemic continues to constitute an epidemic in Michigan. I further conclude that control of the epidemic is necessary to protect the public health and that it is necessary to establish procedures to be followed during the epidemic to ensure the continuation of essential public health services and enforcement of health laws. As provided in MCL 333.2253, these emergency procedures are not limited to the Public Health Code.

## **1. Definitions.**

- (a) "Nursing home" has the meaning provided by MCL 333.20109(1).
- (b) "Up to date" means a person has received all recommended doses of a COVID-19 vaccine, including any COVID-19 booster dose(s) when eligible, as determined by the Centers for Disease Control and Prevention.

## **2. Requirement to offer vaccination on site.**

- (a) As soon as possible, and no later than February 19, 2022, each nursing home in this state must offer and provide on-site administration of COVID-19 vaccines to residents who are not up to date as of January 20, 2022.
- (b) Beginning February 20, 2022, nursing homes must continue to offer and provide on-site administration of COVID-19 vaccines to residents as follows:
  - (1) Within 30 days of a newly admitted resident's transfer into the nursing home, if eligible to receive a recommended dose of a COVID-19 vaccine; and
  - (2) Within 30 days of a resident becoming eligible to receive a recommended dose of a COVID-19 vaccine.

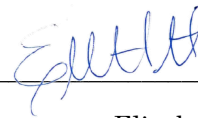
- (c) For residents who are unable to make their own medical decisions, nursing homes are required to contact the person(s) legally authorized to make medical decisions on behalf of the resident and make them aware of the on-site availability of COVID-19 vaccines.
- (d) Nursing homes must document residents' consent or refusal of the offer of a COVID-19 vaccine. Nursing homes must also document the consent, assent, or refusal of persons under subsection (c).
- (e) Nursing homes are encouraged to provide educational materials to residents regarding the benefits of COVID-19 vaccines. Materials can be located on [MDHHS's Long-Term Care COVID-19 Plan](#) webpage.

### 3. Implementation.

- (a) Nothing in this order modifies, limits, or abridges protections provided by state or federal law for a person with a disability.
- (b) Under MCL 333.2235(1), local health departments are authorized to carry out and enforce the terms of this order.
- (c) Law enforcement officers, as defined in MCL 28.602(f), are deemed to be "department representatives" for purposes of enforcing this order and are specifically authorized to investigate potential violations of this order. They may coordinate as necessary with the appropriate regulatory entity and enforce this order within their jurisdiction.
- (d) Consistent with MCL 333.2261, each violation of this order is a misdemeanor punishable by imprisonment for not more than 6 months, or a fine of not more than \$200.00, or both. Nursing homes that fail to comply with this order may be subject to other penalties and remedies under applicable law.
- (e) Nothing in this order affects any prosecution or civil citation based on conduct that occurred before the effective date of this order.
- (f) Nothing in this order requires a nursing home resident to receive a COVID-19 vaccine.
- (g) Nursing homes that are unable to comply with this order due to lack of resources are strongly encouraged to contact MDHHS immediately at [MDHHS-COVID-LongTermCare@michigan.gov](mailto:MDHHS-COVID-LongTermCare@michigan.gov).

This order takes effect on January 21, 2022, at 12:01 AM. This order remains in effect until rescinded. Persons with suggestions and concerns are invited to submit their comments via email to [COVID19@michigan.gov](mailto:COVID19@michigan.gov).

Date: January 20, 2022



Elizabeth Hertel, Director

Michigan Department of Health and Human Services

# **ATTACHMENT B**

## Moua, Andrea (AG)

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**Subject:** FW: Iron Pig Appeal

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**From:** David Delaney <[dmdlawyer@gmail.com](mailto:dmdlawyer@gmail.com)>

**Sent:** Friday, May 14, 2021 9:13 AM

**To:** Fowler, Darrin (AG) <[FowlerD1@michigan.gov](mailto:FowlerD1@michigan.gov)>

**Cc:** Moua, Andrea (AG) <[MouaA@michigan.gov](mailto:MouaA@michigan.gov)>; Miers, Linda (AG) <[MiersL@michigan.gov](mailto:MiersL@michigan.gov)>

**Subject:** Re: Iron Pig Appeal

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**CAUTION: This is an External email. Please send suspicious emails to [abuse@michigan.gov](mailto:abuse@michigan.gov)**

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Monday May 17

On Fri, May 14, 2021 at 9:09 AM David Delaney <[dmdlawyer@gmail.com](mailto:dmdlawyer@gmail.com)> wrote:

Darrin,

Thank you for reducing to writing your interpretation of a portion of our verbal discussion.

I look forward to touching base on Monday November 17, 2021.

Very truly,

David

On Tue, May 11, 2021 at 4:32 PM Fowler, Darrin (AG) <[FowlerD1@michigan.gov](mailto:FowlerD1@michigan.gov)> wrote:

David,

Confirming our conversation from today, we discussed DHHS' concern about the document you called a "hybrid." You said it is your intention that the document serve as both an appeal of DHHS' agency decision, and separately as a lawsuit against the Governor.

From our vantage point, we believe this is an improper filing. It does not adhere to the requirements for a claim of appeal under MCR 7.119 and MCR 7.104. We are aware of no authority for the idea a lawsuit can be embedded into a claim of appeal. And you acknowledged during our discussion that even you have never seen this attempted before.

For this reason, I asked that you withdraw the present filing and amend your client's appeal to conform to MCR 7.119. And you could then file any lawsuit your client wishes to bring as a separate action and cross-reference the appeal as a related filing. From our discussion, I understand that your "hybrid" is an attempt to avoid what you called the "bifurcation" of the lawsuit being in front of the Court of Claims while the appeal resides in Otsego County. But the Court of Claims has exclusive jurisdiction over claims against the State like those in your hybrid document—so, to the extent this document might be construed as alleging such claims, we see that bifurcation as legally required.

Further, I expressed to you our belief that, if this is a lawsuit (and we do not concede that given the improper filing), it has not been properly served on any defendant. You acknowledged you have only had a summons issued for the Governor. The Governor is not a party to the administrative appeal. We have not appeared on behalf of the Governor, nor do we accept service on her behalf. If you will agree to amend your claim of appeal and separate any desired lawsuit into a separate filing, we will seek such authorization from the Governor's Office to the extent you name the Governor as a party defendant. Meanwhile, you have not had a summons issued for DHHS. You took the position in our discussion that this is unnecessary because DHHS is a party to the appeal and no summons is needed for the appeal. You went so far as to say DHHS is not intended as a defendant in the lawsuit, only to the appeal; but this appears to be inconsistent with the framing of the document. We also discussed former MDHHS Director Robert Gordon, who is described in the document as a Defendant (see, e.g., paragraph 14), and you said he is not in the caption and is not intended as a defendant. These statements led me to emphasize to you that this is a very confusing filing that should be amended and split.

You said you would consider this request and discuss with your client. Initially, you asked for 14-21 days to do this, indicating you would toll any deadline the defendants have for answering the lawsuit. I responded this response presupposes a lawsuit both exists and has been served, which we believe questionable at best. I also said we are considering other options, including a motion to dismiss and court of claims transfer—and that waiting for 2-3 weeks to hear back from you is not an option.

We thus agreed that you will circle back with us on Monday, May 17<sup>th</sup>, with your decision. I look forward to hearing from you then.

Darrin

# **ATTACHMENT C**



STATE OF MICHIGAN  
46<sup>TH</sup> CIRCUIT COURT FOR THE COUNTY OF OTSEGO

In the matter of:

MOORE MURPHY HOSPITALITY, LLC  
D/B/A IRON PIG SMOKEHOUSE,

Circuit Court Case No.: 21-18522-AE

Petitioner-Plaintiff,

HON. COLIN G. HUNTER

v

MICHIGAN DEPARTMENT OF HEALTH  
AND HUMAN SERVICES; GRETCHEN  
WHITMER, IN OFFICIAL CAPACITY AS  
GOVERNOR OF THE STATE OF MICHIGAN,

Respondent-Defendant.

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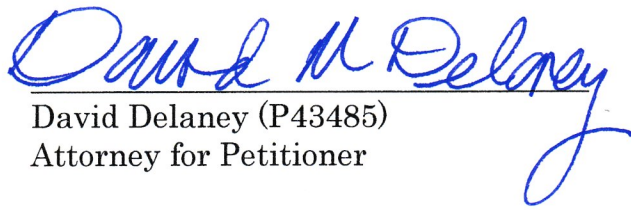
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**STIPULATION FOR ORDER REGARDING APPEAL AND DISMISSING  
RESPONDENT WHITMER WITHOUT PREJUDICE**

Petitioner filed this appeal on May 6, 2021. A disagreement then arose between Petitioner and Respondents regarding this filing, which was structured as a hybrid document encompassing an appeal of an administrative decision, as well as causes of action against Respondents. To resolve this disagreement, the parties stipulate to the following:

1. The filing in the above-captioned matter shall be regarded solely as an appeal from an administrative agency decision and not as a lawsuit against any party. Counts III and IV in the appeal, which are structured as claims for uncompensated taking under the State and Federal Constitutions, are withdrawn by Petitioner and shall be deemed stricken from the appeal document. Also stricken from the appeal document are Counts V and VI related to procedural and substantive due process. Petitioner waives any challenge on appeal to the evidence on the grounds relating to competent, material and substantial evidence. The court will decide two legal issues:
  - Does MCL 333.2253(1) violate the non-delegation clause of the Michigan Constitution?
  - Are the MDHHS orders a “rule” as defined in MCL 24.207 and did the MDHHS comply with the notice of public hearing requirements of MCL 24.241?
2. Petitioner also withdraws relief request d, which shall also be deemed stricken.
3. Respondent Gretchen Whitmer is dismissed from this matter without prejudice. Nothing in this stipulation shall be deemed as waiving any ability Petitioner may have to file suit against the Governor or the Michigan Department of Health and Human Services in the Court of Claims.
4. The parties agree that the record presented to the Circuit Court shall include the Administrative Law Judge’s decision being appealed, as well as the briefs and exhibits filed with the Administrative Tribunal on MDHHS’ motion for summary disposition. The MDHHS shall be responsible for filing this record, consisting of its summary disposition motion and brief, Petitioner’s Response, and its reply brief with the Court within thirty days of entry of an order upon this stipulation. Nothing in this stipulation shall preclude either party from asking this Court, or another Court on appeal, to take judicial notice of other information contained in the administrative record giving rise to this appeal, or in the records in the tribunal and circuit court relating to proceedings between Petitioner and the Michigan Department of Agriculture and Rural Development.
5. Within 60 days of filing the record the parties will file briefs on the legal issues identified in the stipulation. The matter will be scheduled for oral argument.

  
David Delaney (P43485)  
Attorney for Petitioner

  
Darrin F. Fowler (P53464)  
Attorney for Respondent

# **ATTACHMENT D**

# The Detroit News

## MICHIGAN

# Northern Michigan judge's ruling casts doubt on public health orders



**Beth LeBlanc**

The Detroit News

Published 6:56 a.m. ET Jan. 19, 2022 | Updated 6:59 a.m. ET Jan. 19, 2022

An Otsego County judge last week declared unconstitutional a key part of Michigan's public health law that has allowed the state to issue epidemic orders for several months during the pandemic.

The ruling throws out state fines for a Gaylord restaurant, the Iron Pig Smokehouse, that continued to operate during a statewide shutdown. But the more far-reaching effect of the decision on state public health orders is not yet clear.

A lawyer for the restaurant said the Otsego County ruling is binding on state health law.

But state officials are staying mum — except to say they are "reviewing" the ruling.

Otsego County Circuit Judge Colin Hunter's decision issued last Thursday "severed" a section of the state's public health code that allowed the state health director to issue orders closing restaurants and schools, restricting gathering sizes and requiring indoor mask usage.

Hunter said the law was an unconstitutional delegation of the Legislature's power to make laws because it had no clear guidelines, benchmarks or time limits for implementation. The reasoning is similar to the factors the Michigan Supreme Court used to overturn Gov. Gretchen Whitmer's COVID-19 executive orders in October 2020, after which the governor immediately turned to her appointed state health director to issue similar orders.

Hunter said the law under which the state health director issued orders from late 2020 through early 2021 "transitions an overwhelming level of legislative lawmaking authority to another branch of government and does nothing to check the use of that authority."

The section of the public health code questioned by Hunter allows the state health director to "establish procedures" and limit gatherings if the director "determines that control of an

epidemic is necessary."

A separate section of the law provides the same power to local public health directors, who have been using the public health code to issue mask mandates for schools in recent months.

Hunter's decision appears to only affect the section related to the state's authority, but he noted there were other problematic areas of the law where similar delegations of power were made.

The state deemed youth vaping an epidemic in 2019 so as to implement emergency rules banning flavored vaping under the current law, the judge said. Under the same reasoning, he said, the state could impose similarly strict emergency rules to respond to an "opiate epidemic" or "obesity epidemic."

"... the unexercised but available use of the director's authority could conceivably reach and effect each and every political, social, moral or other societal problem if only the director determines that the concern can now be categorized as an "epidemic," Hunter wrote.

## **'Risk it for the brisket'**

Barring a state appeal, Hunter's order concludes a roughly 14-month battle between the Iron Pig Smokehouse in Gaylord and the Michigan Department of Health and Human Services.

The Iron Pig remained open after a Nov. 15, 2020, state health department order by then-director Robert Gordon that closed restaurants in an effort to slow the spread of a surge in COVID-19 cases.

The health department issued the order under the law allowing it to prohibit gatherings and "establish procedures" in the event of an epidemic. The order came after the Michigan Supreme Court on Oct. 2, 2020, ruled 4-3 that a state emergency law allowing the governor to issue similar rules was unconstitutional.

The Iron Pig closed for a few days after the order was issued before deciding to reopen, said owner Ian Murphy.

"We went through that first week of being shutdown," Murphy said. "There was just no way we were going to make it."

The restaurant has had steady support throughout its challenge of the state rules and now devotes part of its website to legal updates for its supporters. The restaurant developed the

tagline "Risk it for the brisket" — a reflection of the risk the business was taking to challenge the state, Murphy said — and printed it on gear to fundraise for the legal efforts.

The local health department, citing the Nov. 15, 2020, state health directive, issued the restaurant a cease and desist order Nov. 25, 2020. In later weeks, the restaurant was hit with citations, orders and suspensions — citing the health department directive — from the Liquor Control Commission and Michigan Department of Agriculture and Rural Development, which issue liquor licenses and food licenses, respectively. It also faced a \$5,000 fine from the Department of Health and Human Services.

Unlike other restaurants that challenged state shutdown orders, the Iron Pig eventually worked with the liquor commission and agricultural department to come into compliance but it maintained its administrative appeal against the state.

The strategy, said lawyer David Delaney, allowed the restaurant to ultimately appeal its administrative denial in its own local court rather than having the arguments pulled downstate and litigated in front of Ingham County judges, as was the case with restaurants in the Upper Peninsula and west Michigan.

"We appealed only the MDHHS aspect of the case," said Delaney, a lawyer for the Iron Pig. "That's the core of the case. It's the Michigan Department of Health and Human Services' public health code that we isolated."

Delaney expects that the state may appeal to the Michigan Court of Appeals, in which case judges there will have the 2020 Michigan Supreme Court opinion on Whitmer's powers and last week's U.S. Supreme Court opinion on vaccine mandates to guide them.

If the case makes it to the state's high court, the Iron Pig will face a Democratic-nominated majority that wasn't there when the Supreme Court overturned Whitmer's executive orders along party lines in 2020.

## **Effect on public health law**

Delaney argued that because the Michigan Constitution and state law make agency orders subject to direct review by the courts, Hunter's ruling sets "binding precedent on the Michigan Department of Health and Human Services."

Attorney General Dana Nessel's office and the state Department of Health and Human Services didn't counter that argument and instead said they were reviewing the decision.

But the state health department and the Michigan Association for Local Public Health Executive Director Norm Hess said the ruling would not have an effect on local health department orders since those are enforced under a separate section of the law.

The state health department would not respond to questions regarding what, if any, influence Hunter's decision would have on its ability to issue future epidemic orders.

Michigan court rules appear to indicate only Michigan Supreme Court opinions or published opinions from the Michigan Court of Appeals have precedential effect.

In Hunter's opinion, the judge notes that his court "must invoke its judicial review authority as a co-equal branch of government" to undo the inappropriate delegation of authority and severed the emergency epidemic provision from the state public health code.

"...the court finds that it cannot merely throw up its hands and sanction airy standards like 'necessary' or a finding that an 'epidemic' exists as enough guidance on the exercise of the director's discretion to make the delegation proper, especially not when considering the monumental breadth of lawmaking authority delegated," Hunter wrote.

*eleblanc@detroitnews.com*



# **ATTACHMENT E**

The Iron Pig Smokehouse-Gaylord

https://www.facebook.com/ironpigsSmoke/posts/1784664255071018

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# **ATTACHMENT F**

## **BPL Clarification: Exemption of Michigan Licensure Time of Disaster/State of Emergency**

Revised: 3/16/2020 9:45 AM

The Department of Licensing and Regulatory Affairs (LARA) and its Bureau of Professional Licensing (BPL) acknowledge the current State of Emergency in responding to COVID-19 cases throughout the state of Michigan whereby the state's health care providers are playing a significant role in treating and triaging each case. Given the demand on the health care workforce, LARA and BPL are issuing this clarification to allow providers to hire individuals to help in the efforts to appropriately respond and care for those who are affected by the virus. The following provision should help health care providers develop the personnel resources needed to cover all shifts to appropriately handle patient needs during this pandemic and Time of Disaster/State of Emergency.

Michigan law provides:

MCL 333.16171

*Under the circumstances and subject to the limitations stated in each case, the following individuals are not required to have a license issued under this article for practice of a health profession in this state:*

*(c) An individual who by education, training, or experience substantially meets the requirements of this article for licensure while rendering medical care in a time of disaster or to an ill or injured individual at the scene of an emergency.*

Situations that fall under MCL 333.16171 are exempt and therefore those individuals that meet the criteria for this exception are not required to have a license issued under Article 15 for practice of a health profession in this state. **This provision does not require an individual apply for or be granted an exemption by the Department.**

If the Bureau of Professional Licensing were to receive a complaint regarding unlicensed activity, it would evaluate each case to determine whether the individual meets the criteria for an exemption.

In reviewing claims of exemption for licensure under this provision the Department would consider all the relevant circumstances, including the following information:

- "An individual who by education, training, or experience substantially meets the requirements of this article" this includes, but is not limited to, individuals who are properly licensed in another state, country (i.e. Canada) or are recently retired from the profession in Michigan.

## **BPL Clarification: Exemption of Michigan Licensure Time of Disaster/State of Emergency**

- Individuals who were licensed as a health professional but have been retired for five or less years may be eligible to provide services and practice in his/her previously licensed profession under this provision to assist health care providers during the COVID-19 response and while the State of Emergency is in effect.
- In a “time of disaster” may include an individual event (such as a car accident) but it may also include larger scale “natural” or “manmade” disasters. These include, but are not limited to, events that are declared an “Emergency” or a “State of Emergency” by the proper authority (even after the event happened).
- In “rendering medical care” the individual should only render that care if they have the proper “education, training or experience” to perform that care.
- The exemption does NOT allow unlicensed individuals to prescribe Controlled Substances during a disaster. The exemption is for licensure “under this article”, which is Article 15 of the Michigan Public Health Code. The requirements for Controlled Substance Licensure are in Article 7 of the Michigan Public Health Code.
- This exemption does not apply to licenses that have been suspended or revoked and does not remove requirements to comply with disciplinary limitations, probationary terms or other requirements imposed by the health professional boards.

For up to date information regarding the state’s COVID-19 response please go to:

[www.michigan.gov/coronavirus](http://www.michigan.gov/coronavirus)

Also, the CDC website is a very good resource for additional information:

[www.cdc.gov](http://www.cdc.gov)