

STATE OF MICHIGAN  
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT  
INGHAM COUNTY

MICHIGAN DEPARTMENT OF  
AGRICULTURE AND RURAL  
DEVELOPMENT,

Plaintiff,

Case No. 2021-\_\_\_\_\_-CZ

HON. \_\_\_\_\_

v

MOORE MURPHY HOSPITALITY, L.L.C.,  
D/B/A IRON PIG SMOKE HOUSE,

Defendant.

---

Danielle Allison-Yokom (P70950)  
Laura R. LaMore (P79943)  
Eileen C. Whipple (P74700)  
Assistant Attorneys General  
Attorneys for Plaintiff MDARD  
Environment, Natural Resources, and  
Agriculture Division  
P.O. Box 30755  
Lansing, MI 48909  
(517) 335-7664  
AllisonYokomD@michigan.gov  
LamoreL1@michigan.gov  
WhippleE@michigan.gov

/

**EX PARTE MOTION FOR TEMPORARY  
RESTRAINING ORDER**

Plaintiff, Michigan Department of Agriculture and Rural Development  
(MDARD), by and through its attorneys, Dana Nessel, Attorney General of the  
State of Michigan, and Danielle Allison-Yokom, Laura LaMore, and Eileen Whipple,  
Assistant Attorneys General, based upon the Verified Complaint, move this Court

to issue a Temporary Restraining Order against Defendant Moore Murphy Hospitality, L.L.C., d/b/a Iron Pig Smoke House, for the reasons stated in the accompanying brief.

The undersigned attorney certifies that at approximately 8:47 a.m. on January 27, 2021, she sent the attached e-mail to Defendant's attorney that included copies of the Verified Complaint and brief in support of MDARD's motion for temporary restraining order that stated MDARD's intent to file this motion around 11 a.m. today. (Attachment A.)

At approximately 10:24 a.m. on January 27, 2021, Defendant's Attorney sent the undersigned an e-mail indicating in part, "I have not been retained to date for representation in the Ingham County Circuit Court." (Attachment B.)

Shortly thereafter, prior to 11:10 a.m. on January 27, 2021, the undersigned sent the Defendant an e-mail including copies of the Verified Complaint and brief in support of MDARD's motion for temporary restraining order that stated MDARD's intent to file this motion around 12:30 p.m. today. (Attachment C.)

Respectfully submitted,

Dana Nessel  
Attorney General

/s/ Eileen C. Whipple  
Danielle Allison-Yokom (P70950)  
Laura R. LaMore (P79943)  
Eileen C. Whipple (P74700)  
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WhippleE@michigan.gov

Dated: January 27, 2021

LF: Iron Pig Smokehouse (MDARD v) CC/AG# 2020-0308468-B/Ex Parte Motion 2021-01-27

# Attachment A



**From:** [Whipple, Eileen \(AG\)](#)  
**To:** [dmdlawyer@gmail.com](mailto:dmdlawyer@gmail.com)  
**Cc:** [Wierenga, Jamie \(AG\)](#)  
**Subject:** Iron Pig Smokehouse  
**Date:** Wednesday, January 27, 2021 8:47:10 AM  
**Attachments:** [Verified Complaint 2021-01-27.pdf](#)  
[Ex Parte Motion for Temporary Restraining Order, Brief and Exhibits 2021-01-27.pdf](#)

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Good morning Mr. Delaney,

Attached please find a verified complaint, motion for TRO, and brief in support that MDARD intends to file today in the Ingham County Circuit Court. MDARD intends to file around 11 a.m.

Respectfully,

**Eileen C. Whipple**  
Assistant Attorney General  
Michigan Department of Attorney General  
Environment, Natural Resources,  
and Agriculture Division  
525 W. Ottawa Street  
P.O. Box 30755  
Lansing, MI 48909

# Attachment B

**From:** [David Delaney](#)  
**To:** [Whipple, Eileen \(AG\)](#)  
**Subject:** Re: Iron Pig Smokehouse  
**Date:** Wednesday, January 27, 2021 10:24:30 AM

---

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

Mrs. Whipple,

Thank you for emailing the pleadings.

I represent the Iron Pig in administrative proceedings.

I have not been retained to date for representation in the Ingham County Circuit Court.

Please serve notice on the Iron Pig pursuant to court rule.

MCR 3.310 provides that the applicant for a temporary restraining order certify to the court in writing the efforts made to give notice or the reasons that notice should not be required.

Very truly,

David Delaney

On Wed, Jan 27, 2021 at 8:47 AM Whipple, Eileen (AG) <[WhippleE@michigan.gov](mailto:WhippleE@michigan.gov)> wrote:

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Respectfully,

**Eileen C. Whipple**

Assistant Attorney General

Michigan Department of Attorney General

Environment, Natural Resources,

and Agriculture Division

525 W. Ottawa Street

P.O. Box 30755

Lansing, MI 48909

# Attachment C

**From:** [Whipple, Eileen \(AG\)](#)  
**To:** [theironpigsmokehouse@gmail.com](mailto:theironpigsmokehouse@gmail.com)  
**Cc:** [Wierenga, Jamie \(AG\)](#)  
**Subject:** FW: Iron Pig Smokehouse  
**Date:** Wednesday, January 27, 2021 11:10:27 AM  
**Attachments:** [Verified Complaint 2021-01-27.pdf](#)  
[Ex Parte Motion for Temporary Restraining Order, Brief and Exhibits 2021-01-27.pdf](#)

---

Good morning Mr. Murphy,

Attached please find a verified complaint, motion for TRO, and brief in support that MDARD intends to file today in the Ingham County Circuit Court. MDARD intends to file around 12:30 p.m. I initially provided this information to Mr. Delaney, but based on his e-mail below, I am providing directly to you. Prior to filing the motion will be updated to reflect the actual time this e-mail was sent.

Respectfully,

**Eileen C. Whipple**  
Assistant Attorney General  
Michigan Department of Attorney General  
Environment, Natural Resources,  
and Agriculture Division  
525 W. Ottawa Street  
P.O. Box 30755  
Lansing, MI 48909

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**To:** Whipple, Eileen (AG) <WhippleE@michigan.gov>  
**Subject:** Re: Iron Pig Smokehouse

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**Eileen C. Whipple**  
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---

**BRIEF IN SUPPORT OF PLAINTIFFS' EX PARTE MOTION FOR  
TEMPORARY RESTRAINING ORDER**

**INTRODUCTION**

Defendant, Moore Murphy Hospitality, L.L.C., D/B/A Iron Pig Smoke House,  
has blatantly and willfully been operating its food service establishment in a  
manner that the Plaintiff, Michigan Department of Agriculture and Rural



Development (MDARD) has determined poses an imminent threat to the public health, safety, or welfare. Based on MDARD's determination that Iron Pig Smokehouse's continued operations posed an imminent threat to the public health, safety, or welfare, MDARD summarily suspended Iron Pig Smokehouse's food service establishment license. An administrative hearing was held before Administrative Law Judge (ALJ) Eric J. Feldman who found that MDARD's summary suspension should be continued. Despite ALJ Feldman's decision and order and despite that Iron Pig Smokehouse does not currently have a valid food license, Iron Pig Smokehouse has continued operating in violation of Michigan's Food Law, MCL 289.1101 *et seq.*

## **STATEMENT OF FACTS**

Iron Pig Smokehouse operates a food service establishment located at 143 West Main Street in Gaylord, Michigan. Iron Pig Smokehouse previously held a food establishment license issued by MDARD. Iron Pig Smokehouse is a restaurant and bar<sup>1</sup> that offers carryout and dine in services. Iron Pig Smokehouse has not complied with the Michigan Department of Health and Human Services' (MDHHS) Epidemic Orders intended to curb the spread of Coronavirus. Specifically, Iron Pig Smokehouse has failed to require social distancing, failed to require customers and staff to wear facial coverings, and continued to allow indoor dining. Under the Food Law, if the MDARD Director determines that an imminent threat to the public

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<sup>1</sup> Iron Pig's liquor license is currently suspended.

health, safety, or welfare exists, the MDARD Director may summarily suspend a food establishment license.

### **Michigan's efforts to curb Covid-19**

On March 10, 2020, Governor Whitmer issued Executive Order 2020-4 declaring a state of emergency due to the breakout of COVID-19 in the State of Michigan. COVID-19 is a respiratory disease that can result in serious illness or death. COVID-19 is caused by a new strain of coronavirus not previously identified in humans and it easily spreads between persons. To date, there have been over 552,550 confirmed cases of COVID-19 in the State of Michigan, resulting in over 14,400 deaths.

The Public Health Code gives the Michigan Department of Health and Human Services (MDHHS) “general supervision of the interests of health and life of people of this state,” MCL 333.2221(2), and requires it to “endeavor to prevent disease, prolong life, and promote the public health,” MCL 333.2221(1). 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). Further, MDHHS is authorized to issue emergency orders to address epidemics, pursuant to MCL 333.2253(1):

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.

On January 13, 2021, MDHHS issued a Gatherings and Face Mask Order, which took effect on January 16, 2021, and remains in effect until February 1, 2021.<sup>2</sup> See attached Ex 4. The January 13, 2021 Order states that, “[t]he state death rate is 7.7 deaths per million people; this is six times higher than it was in early October, and there are more than 500 weekly deaths in Michigan attributable to COVID-19.” The order concludes that “the COVID-19 pandemic continues to constitute an epidemic in Michigan” and “that it is necessary to restrict gatherings and establish procedures to be followed during the epidemic to ensure the continuation of essential public health services and enforcement of health laws.”

MDHHS’s order generally prohibits indoor gatherings at non-residential venues. See 01/13/2021 Gatherings and Face Mask Order, section 2(a)(2). A “gathering” is “any occurrence, either indoor or outdoor, where two or more persons from more than one household are present in a shared space.” *Id.* at section 1(g). Specifically, the order prohibits indoor gatherings at food service establishments except in “custodial settings, medical facilities, school and university cafeterias, shelters, and soup kitchens.” *Id.* at section 3(b)(1). Further, subject to limited exceptions, “[a]ll persons participating in gatherings are required to wear a face

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<sup>2</sup> MDHHS issued three prior epidemic orders that have been at issue in this case—the November 18, 2020 Gatherings and Face Mask Order, the December 7, 2020 Gatherings and Face Mask Order, and the December 18, 2020 Gatherings and Face Mask Order. (Ex 1-3.) All orders contained substantially similar requirements for food establishments. On January 22, 2021, MDHHS issued an additional epidemic order. That order allows for some indoor dining when specific preventative measures are in place. The relevant portions of the January 22, 2021 order go into effect on February 1, 2021. (Ex. 5).

mask.” *Id.* at section 7(a). “Except as provided elsewhere in [the] order, a person responsible for a business . . . must prohibit gatherings of any kind unless the person requires individuals in such gatherings (including employees) to wear a face mask[] and denies entry or service to all persons refusing to wear face masks while gathered.” *Id.* at section 7(c).

### **Iron Pig Smokehouse’s operations in violation of MDHHS’s order**

On November 25, 2020, the Health Department of Northwest Michigan issued Iron Pig Smokehouse a “Order to Cease and Desist Food Service Operations” (Ex. 6, Health Department Order). The Health Department Order stated that the Iron Pig Smokehouse was open to the public for indoor dining.

The Health Department Order required that Iron Pig Smokehouse to immediately cease operations. But, in spite of the Health Department’s Order, the Iron Pig continued to offer indoor dining, did not require social distancing, and did not require employees and customers to wear facial coverings.

On December 2, 2020, the Liquor Control Commission summarily suspended the Iron Pig’s liquor license for allowing illegal activities on the licensed premises—specifically permitting indoor dining in violation of the November 15 Gatherings and Face Mask Order.

Also, on December 2, 2020, based on concerns raised by the Health Department, including consideration of coronavirus data in Otsego County where Iron Pig Smokehouse is located, MDARD issued Iron Pig Smokehouse an “Order to Cease and Desist Food Operations” (Cease and Desist Order). (Ex.7.) MDARD’s

Cease and Desist was hand delivered to the Iron Pig by Chuck Edwards, Environmental Health Coordinator, Health Department of Northwest Michigan on the same date. The MDARD's Cease and Desist Order was issued pursuant to the agency's authority under MCL 289.2113(3). The Cease and Desist Order was based on MDARD's determination that Iron Pig Smokehouse's continued operations would create an imminent or substantial threat to the public health. The Cease and Desist Order required that Iron Pig Smokehouse immediately cease food operations.

On December 11, 2020, an administrative hearing regarding the summary suspension of the Iron Pig's Liquor License was held. Following the hearing and based on the ALJ's factual findings that the Iron Pig was operating in violation of the MDHHS Gatherings and Face Mask Order and therefore in violation of the Michigan Liquor Control Commission Rules, the Iron Pig's liquor license was suspended for 90 days.

The Health Department of Northwest Michigan continued to monitor the Iron Pig's operations. On multiple occasions after the issuance of MDARD's Cease and Desist Order, employees of the Health Department of Northwest Michigan, Investigators from the Michigan Liquor Control Commission, or police officers from the Gaylord Police Department, have observed the Iron Pig offering indoor dining services and not requiring customers or employees to wear face coverings. The Iron Pig continued to openly violate the Health Department of Northwest Michigan's order and MDARD's Cease and Desist Order, and openly admitted so on their Facebook page, including a post on December 25, 2020 specifically stating:

Thank you to all our wonderful friends & guests we've entertained over the last 30 days since we opened our Dining Room back up. It's because of your amazing support our families will have a Merry Christmas! [<https://www.facebook.com/ironpigsmoke/>, accessed December 28, 2020.]

Based on Iron Pig Smokehouse's ongoing violations of the Health Department's Order, MDHHS order, and MDARD's Cease and Desist Order and the failure of Iron Pig Smokehouse to take actions to protect the public, on December 29, 2020 MDARD determined that an imminent threat to the public health, safety, or welfare existed and summarily suspended Iron Pig Smokehouse's food service establishment license pursuant to MCL 289.4125(4). (Ex. 8, Summary Suspension.) A hearing on MDARD's summary suspension of Iron Pig Smokehouse's license was scheduled for January 12, 2021 at 9:00 am before the Michigan Office of Administrative Rules (MOAHR) Administrative Law Judge (ALJ) Eric J. Feldman.

### **Summary Suspension Hearing and Order**

The hearing on MDARD's summary suspension of Iron Pig Smokehouse's food service establishment license began on January 12, 2021. However, pursuant to Iron Pig Smokehouse's Request to Adjourn, the hearing was continued to January 14, 2021 at 9:00 am. On January 14, 2020, Iron Pig Smokehouse appeared at the hearing, was represented by counsel, and offered evidence.

On January 20, 2021, following the administrative hearing, ALJ Feldman issued his Decision and Order Continuing Summary Suspension. Specifically, ALJ Feldman made factual findings including that:

27. Otsego County issues monthly summary reports for the county concerning COVID-19 data, as follows:

a. For November 2020, the county reported an increase in total COVID-19 cases. Specifically, there were 467 total cases, 14 inpatients at the hospital, and 6 deaths.

b. For December 2020, there were 255 total cases, 5 inpatients at the hospital, and 6 deaths. This appeared to show a decrease in the total case count. [Pet. Exh. 6, pp. 1-2.]

28. As of January 8, 2021, Otsego County had a total of 1,056 COVID-19 cases and 25 deaths. [Pet. Exh. 9, pp. 1-2.]

29. Lisa Peacock is a Health Officer with HDNW.<sup>7</sup> Ms. Peacock tracks the COVID-19 epidemic both locally and nationally. For November 2020, Ms. Peacock stated there was a huge increase in COVID-19 numbers, resulting in a public health advisories and statements being issued. Ms. Peacock encourages that the public practice masking and social distancing to avoid the spread of COVID-19. Ms. Peacock issued HDNW's November 25, 2020, Order to Cease and Desist Food Service Operations against Respondent because it violated the indoor dining prohibition. Currently, she acknowledges that the general COVID-19 trends are down, but the data indicates a potential increase in numbers.

30. Ms. Peacock states that the HDNW reports shows that Otsego County is experiencing a surge of COVID-19 cases. She acknowledges there has been no contact tracing that has led back to Respondent.

31. Joshua Meyerson, M.D., is the Medical Director for HDNW.<sup>8</sup> Dr. Meyerson states that it is hard to contact trace for COVID-19 exposures in restaurant/bars. Dr. Meyerson reiterates that COVID-19 is a respiratory virus that is transmitted through respiratory droplets from person to person. He states it can spread by people talking, coughing, and breathing. He recommends that people have facial coverings and maintain social distancing to avoid the spread of COVID-19.

32. In mid-November 2020, Dr. Meyerson stated they began seeing a ten-fold increase in COVID-19 cases in HDNW jurisdiction (which includes Otsego County). He states they also saw an increase in positivity and HDNW and local hospitals were being stressed to their maximum capacity. He agrees it was correct to issue the pandemic orders and public health advisories to flatten the curve. He states Otsego County is in the highest risk

category of “E.” He states there is a high risk activity for the spread of COVID-19 for indoor food gathering.

33. James Padden, Food Safety and Inspection Program Manager with MDARD, stated MDARD took into consideration a number of factors when issuing the cease and desist/summary suspension order against Respondent, including consideration of the local health department, MDHHS epidemic orders, CDC guidelines, status of the outbreak both in the state and county levels, masking considerations, and other factors. The MDARD Director ultimately concluded to summarily suspend Respondent’s food establishment license in order to control the epidemic.

\* \* \*

35. Respondent continues to operate its indoor dining, despite its license being summarily suspended.

\* \* \*

38. Respondent’s ongoing non-compliance with COVID-19 mitigation measures, including offering indoor dining, patrons seating/being less than six feet apart, staff and patrons not wearing face coverings, which are required by the state and local health departments for licensed food establishments, remains an imminent threat to the public health, safety, and welfare. [Ex 9, 01/20/21 Decision and Order Continuing Summary Suspension, pp 14–17]

Based on the findings of fact, ALJ Feldman concluded that Iron Pig Smokehouse “has failed to implement any safety measures to avoid the spread of COVID-19.” (*Id.* at p 17.) ALJ Feldman also concluded “there is high risk of spreading COVID-19 for indoor seating at restaurants. Despite repeated warnings, cease and desist orders from HDNW and MDARD, and MDHHS epidemic orders, Respondent failed to comply with COVID-19 mitigation measures by its continued offering of indoor dining.” (*Id.* at p 20.)



Further, ALJ Feldman found that the issuance of MDARD's Emergency Summary Suspension Order was "not only based on the MDHHS emergency orders, but is also based on [MDARD's] own credible documented findings, the local health department (HDNW) credible documented findings, CDC guidelines, and Petitioner's credible witnesses, who all agree that there is an imminent public health threat posed by Respondent's continued operation of indoor dining." (*Id.* at p 21.)

ALJ Feldman concluded that "a preponderance of the evidence shows that Respondent, Moore Murphy Hospitality, L.L.C., d/b/a Iron Pig Smoke House, has engaged in conduct that constitutes an ongoing imminent threat to the public health, safety, and welfare under Section 4125 of the Food Law, MCL 289.4125." (*Id.* at p 21.)

### **Iron Pig's operations after MOAHR's determination to continue the summary suspension**

The January 20, 2021 Decision and Order Continuing Summary Suspension was served on MDARD, Iron Pig Smokehouse, and Iron Pig Smokehouse's attorney by email on January 20, 2021. Following the issuance of the Order, both MDARD and the Gaylord Police conducted visits to Iron Pig Smokehouse. On January 21, 2021, officers from the Gaylord Police visited Iron Pig Smoke House and observed three groups of people eating at tables within the restaurant. Additionally, the officers observed two people sitting at the bar. (Ex. 11, C. Huff Affidavit. )

Additionally, James Padden, the MDARD Food Safety Inspection Program Manager made similar observations from outside of Iron Pig Smokehouse on January 21, 2020. Mr. Padden observed that the establishment was open for indoor dining and individuals sitting at tables eating inside the establishment. (Ex. 10, J.

Padden Affidavit.) Mr. Padden also observed a waitress without a mask. (*Id.*) Mr. Padden also observed that the front door was propped open, the lights were on, and an illuminated “open” sign was visible on the side of the building where the front door is located. (*Id.*) Based on his observations, Mr. Padden concluded that establishment was not only continuing to operate, but was also still offering indoor dining. (*Id.*) Additionally, Mr. Padden observed that Iron Pig Smokehouse continues to openly advertise on their Facebook page that they are open, and offering indoor dining. (*Id.*)

Iron Pig Smokehouse has not had a license to operate a food service establishment since MDARD summarily suspended the license on December 29, 2020. Michigan’s Food Law provides that a person cannot operate a food establishment unless licensed by MDARD. MCL 289.4101(1). Iron Pig’s current operations not only pose an imminent or substantial threat to the public health, but also are in violation of Michigan’s Food Law because Iron Pig Smokehouse does not have a food establishment license.

## **ARGUMENT**

In determining whether to issue a preliminary injunction, a court must consider four factors: (1) whether the applicant will suffer irreparable injury if the relief is not granted; (2) the likelihood that the applicant will prevail on the merits; (3) the harm to the public if the injunction issues; and (4) whether the harm to the applicant absent temporary relief outweighs the harm to the opposing party if relief is granted. *Thermatool Corp v Borzym*, 227 Mich App 366, 376 (1998). Plaintiff

bears the burden of demonstrating that the factors weigh in its favor. MCR

3.310(A)(4). In this case, all four factors weigh in favor of MDARD's request for a temporary restraining order.

**I. MDARD, as well as the public, will suffer irreparable harm without the injunction.**

The demonstration of irreparable harm is an indispensable requirement of obtaining a preliminary injunction. *Michigan AFSCME Council 25 v Woodhaven-Brownstown School Dist*, 293 Mich App 143, 149 (2011). Defendant's continued failure to comply with MDHHS Orders, Local Health Department Orders, and MDARD's summary suspension, places the public health at risk. Based on local data, the local health Department and MDARD have concluded that Iron Pig Smokehouse's continued operations that permit indoor gatherings and dining, do not require employees or staff to wear facial coverings, and do not require social distancing, create an imminent threat of increased coronavirus transmission in the local community.

The risk posed by Iron Pig Smokehouse is not only to its employees and patrons, but also to the community at large. The CDC describes how Iron Pig Smokehouse is operating as being in the highest risk category for restaurant and bar operations. (Ex. 12, CDC Considerations for Restaurant and Bar Operators.) Because coronavirus can be transmitted by individuals who show no signs of being ill, patrons and staff of Iron Pig Smokehouse may unwittingly be spreading the virus to others in their community. Iron Pig Smokehouse's patrons do not go to the

Iron Pig Smokehouse and stay there indefinitely—instead they go there to eat and leave potentially taking with them a dangerous virus that can be passed to their families, neighbors, colleagues, and communities. The result is that it is not only Iron Pig Smokehouse that bears the burdens of their risky operations, but instead the entire community.

Further, A licensee that willfully and wantonly ignores both MDARD's Cease and Desist Order and Summary Suspension Order and continues to do so after a hearing is conducted and the issuance of the Summary Suspension Order is continued by an impartial ALJ, threatens the very credibility of the regulatory agency as well as the broader rule of law. A regulatory agency that cannot enforce its laws is like the toothless lion. If there are no consequences for violating the MDARD Director's Orders, MDARD's credibility is diminished, not just in the area of food safety, but across all other regulatory programs. This harm not only damages MDARD and its regulatory programs, but it also damages the public at large that depend on those regulatory programs to keep them safe.

Without an injunction preventing Iron Pig Smokehouse's continued operations without a valid food establishment license, MDARD and the public will suffer irreparable harm.

**II. MDARD is likely to succeed on the merits of their claim because operation of a food service establishment without a license is prohibited.**

Second, MDARD is likely to succeed on the merits of this case. The only issue before this court is whether Iron Pig Smokehouse is operating without a valid food service establishment license. The Food Law defines “food” as “articles used for food or drink for humans or other animals, chewing gum, and articles used for components of any such article.” MCL 289.1107(m). The Food Law defines “food establishment” as “an operation where food is processed, packed, canned, preserved, frozen, fabricated, stored, prepared, served, sold, or offered for sale. Food establishment includes, but is not limited to, a food processor, a food warehouse, a food service establishment, and a retail grocery. . . .” MCL 289.1107(p). Defendant Iron Pig Smokehouse is selling and offering food for sale and, therefore, is a food establishment as defined by the Food Law.

The Food Law provides that a person cannot operate a food establishment unless licensed by MDARD. MCL 289.4101(1). Iron Pig Smokehouse’s food service establishment license has been suspended. (12/29/20 Summary Suspension; 01/20/2021 Decision and Order Continuing Summary Suspension.) Because Iron Pig Smokehouse does not have a food service establishment license, they are operating a food establishment illegally and in violation of MCL 289.4101(1).

Further, the Food Law provides that:

In addition to the remedies provided for in this act, the department may apply to the circuit court for, and the court shall have jurisdiction upon hearing and for cause shown, a temporary or permanent injunction restraining any person from violating any provision of this act or rules promulgated under this act irrespective of

whether or not there exists an adequate remedy at law. [MCL 289.5111.]

MDARD is likely to succeed on its claim that Iron Pig Smokehouse is operating without a license in violation of the Food Law and that MDARD is entitled to an injunction to prevent continued violations.

**III. The harm to MDARD and the public if the injunction does not issue outweigh any harm to the Defendants.**

The third and fourth factors address the balance of harms if injunctive relief is issued. The interests of MDARD and the public overlap considerably in this situation, and the potential harm from Defendants' continued failure to comply with the summary suspension outweighs the harm to Iron Pig Smokehouse.

Undoubtedly, Iron Pig Smokehouse is harmed by the summary suspension—it prevents Iron Pig Smokehouse from operating its business and generating income. But Iron Pig Smokehouse, like all other food establishments in Michigan, is required to be licensed by MDARD and is required to operate in a manner that does not pose an imminent or substantial threat to the public health. Iron Pig Smokehouse is no longer licensed to operate a food establishment. Iron Pig Smokehouse was afforded due process, including notice and an opportunity for a hearing. Iron Pig Smokehouse also has the right to appeal MOAHR's continuation of the summary suspension. But Iron Pig Smokehouse cannot operate a food establishment without a food establishment license.

Although MDARD understands the burden that has been placed on food service establishments during this pandemic, that burden does not mean that any

establishment can place the public health at risk. In this case, MDARD and the local health department have concluded that Iron Pig Smokehouse's continued operations pose an imminent threat to the public health. That risk to the public—along with the risk that restrictions for all businesses will be extended because a few refuse to comply with directions from health experts and perpetuate the spread of Covid-19—outweighs the harm done to Iron Pig Smokehouse.

## **CONCLUSION**

Iron Pig Smokehouse no longer has a license to operate a food establishment. Despite this, Iron Pig Smokehouse continues to offer food for sale. Further, Iron Pig Smokehouse's operation continue to be conducted in a manner that poses an imminent or substantial threat to the public health. Because Iron Pig Smokehouse is not licensed to operate a food establishment and because all four factors weigh in MDARD's favor, a temporary restraining order to immediately cease Iron Pig Smokehouse's food operations is necessary.

## RELIEF REQUESTED

For these reasons, Plaintiffs seek an immediate order from this Court that prohibits Iron Pig Smokehouse from continuing to operate a food establishment without a valid license issued by MDARD.

Respectfully submitted,

Dana Nessel  
Attorney General

/s/ Eileen C. Whipple  
Danielle Allison-Yokom (P70950)  
Laura R. LaMore (P79943)  
Eileen C. Whipple (P74700)  
Assistant Attorneys General  
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Dated: January 27, 2021

LF: Iron Pig Smokehouse (MDARD v) CC/AG# 2020-0308468-B/Brief in Support of TRO 2021-01-27



STATE OF MICHIGAN  
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT  
INGHAM COUNTY

MICHIGAN DEPARTMENT OF  
AGRICULTURE AND RURAL  
DEVELOPMENT,

Plaintiff,

Case No. 2021-\_\_\_\_\_-CZ

HON. \_\_\_\_\_

v

MOORE MURPHY HOSPITALITY, L.L.C.,  
D/B/A IRON PIG SMOKE HOUSE,

Defendant.

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LF: Iron Pig Smokehouse (MDARD v) CC/AG# 2020-0308468-B/Index of Exhibits 2021-01-27

# Exhibit 1



STATE OF MICHIGAN

GRETCHEN WHITMER  
GOVERNOR

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
LANSING

ROBERT GORDON  
DIRECTOR

**November 15, 2020**

**Emergency Order under MCL 333.2253 – Gatherings and Face Mask 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 public health,” and gives the Department “general supervision of the interests of health and life of 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).

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 for this disease. COVID-19 spreads through close human contact, 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 “[i]f 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*, 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., dissenting, at 12). Enforcing Michigan’s health laws, including preventing disease, prolonging life, and promoting public health, requires limitations on gatherings and the establishment of procedures to control the spread of COVID-19. This includes limiting the number, location, size, and type of gatherings, and requiring the use of mitigation measures at gatherings as a condition of hosting such gatherings.

On March 10, 2020, MDHHS identified the first two presumptive-positive cases of COVID-19 in Michigan. As of November 13, 2020, Michigan had seen 244,741 confirmed cases and 7,929 confirmed deaths attributable to COVID-19. Michigan was one of the states most heavily impacted by COVID-19 early in the pandemic, with new cases peaking at nearly 2,000 per day in late March. Strict preventative measures and the cooperation of Michiganders drove daily case numbers dramatically down to less than 200 confirmed cases in mid-June, greatly reducing the loss of life. Since October, Michigan has seen an exponential growth in cases. Daily new cases are now over 6,000 which is three times higher than what was seen in the spring.

The State of Michigan presently has a seven-day average of 512 cases per million people, which is five times higher than the case rate on October 1. Test positivity has increased from 3.2% in early October to 12% on November 13. And while testing has increased 78% since October 1, test positivity has increased 225% during that same time frame, indicating COVID-19 spread is happening much more quickly than tests being administered. All regions in Michigan are now at the highest risk level, with seven-day averages in excess of 150 cases per million residents. Rising cases creates significant pressure on our

emergency and hospital systems. Complaints of coronavirus-like illness in emergency departments increased for the ninth week in a row for the state. Hospitalizations for COVID-19 have doubled in less than two weeks, and there are now over 4.5 times the hospitalizations recorded on October 1. An average of 363 daily hospital admissions were seen in Michigan in the last week, and with individuals under 60 years old accounting for nearly half of all new hospital admissions. With over 3,000 Michiganders hospitalized for COVID-19, 15% of all available inpatient beds are now occupied by patients who have COVID-19, the highest number since mid-April. The state death rate is 5 deaths per million people and continues to increase. The current death rate is four times higher than it was in early October. There are more than 300 weekly deaths in Michigan and nearly every region has more than 20 weekly deaths. Due to delays between exposure, onset of symptoms, and hospitalization, the sharp rise in new infections suggests that the state is entering the most challenging phase of the pandemic thus far.

To protect vulnerable individuals, ensure the health care system can provide care for all health issues, and prevent spread in schools during the influenza season, we must reduce the spread of COVID-19. This necessitates use of more forceful mitigation techniques to reduce the spread of the virus. As such, it is necessary to issue orders under the Public Health Code addressing these topics.

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 have also, subject to the grant of authority in 2020 PA 238 (signed into law on October 22, 2020), herein defined the symptoms of COVID-19 based on the latest epidemiological evidence. I further conclude that control of the epidemic is necessary to protect the public health and that it is necessary to restrict gatherings and 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.

I therefore order that:

**1. Definitions.**

- (a) “Child-care organization” means that term as defined by section 1(b) of the Child Care Organizations Act, 1973 PA 116, as amended, MCL 722.111(b)) and day, residential, travel, and troop camps for children (as defined by Rule 400.11101(1)(q) of the Michigan Administrative Code).
- (b) “Face mask” means a tightly woven cloth or other multi-layer absorbent material that closely covers an individual’s mouth and nose.
- (c) “Food service establishment” means that term as defined in section 1107(t) of the Food Law, 2000 PA 92, as amended, MCL 289.1107(t).
- (d) “Employee” means that term as defined in section 2 of the Improved Workforce Opportunity Wage Act, 2018 PA 337, as amended, MCL 408.932, and also includes independent contractors.
- (e) “Gathering” means any occurrence, either indoor or outdoor, where two or more persons from more than one household are present in a shared space.
- (f) “Household” means a group of persons living together in a shared dwelling with common kitchen or bathroom facilities. In dwellings with shared kitchen or bathroom facilities occupied by 20 or more unrelated persons, households are defined by individuals who share a bedroom.
- (g) “Organized sports” means competitive athletic activity requiring skill or physical prowess and organized by a sports organizer.

- (h) “Sports Organizer” means an institution, association, or other organization that sets and enforces rules to ensure the physical health and safety of all participants for an organized sport.
- (i) “Exercise facility” means a location in which individuals participate in individual or group physical activity, including gymnasiums, fitness centers, and exercise studios.
- (j) “Symptoms of COVID-19” means at least 1 of fever, uncontrolled cough, or atypical new onset of shortness of breath, or at least 2 of the following not explained by a known physical condition: loss of taste or smell, muscle aches, sore throat, severe headache, diarrhea, vomiting, or abdominal pain. Per section 1(h) of 2020 PA 238, this definition represents the latest medical guidance, and serves as the controlling definition.

## **2. General capacity limitations at gatherings.**

### **(a) Indoor gatherings:**

- (1) Are prohibited at residential venues, except where no more than 10 persons from no more than 2 households are gathered. Such gatherings should be held consistent with guidance issued by the Department of Health and Human Services for such gatherings;
- (2) Are prohibited at non-residential venues.

### **(b) Outdoor gatherings are permitted only as follows:**

- (1) At residential venues, 25 or fewer persons are gathered, comprised of no more than 3 households;
- (2) At non-residential venues:
  - (A) 25 or fewer persons are gathered at a venue without fixed seating, and attendance is limited to 20 persons per 1,000 square feet, including within any distinct area within the event space;
  - (B) 25 or fewer persons are gathered at a venue with fixed seating, and attendance is limited to 20% of seating capacity of the venue.

### **(c) The limitations to gatherings in sections 2(a) and 2(b) do not apply to:**

- (1) Incidental, temporary gatherings of persons in a shared space, such as frequently occur in an airport, bus station, exercise facility, food service establishment, shopping mall, or public pool, except as prohibited in section 3;
- (2) Gatherings between an employee and a customer for the purpose of receiving services;
- (3) Workplace gatherings that occur consistent with the Emergency Rules issued by MIOSHA on October 14, 2020;
- (4) Voting or official election-related activities;
- (5) Training of law enforcement, correctional, medical, or first responder personnel, insofar as those activities cannot be conducted remotely;

- (6) Education and support services at public, nonpublic, and boarding schools serving students in prekindergarten through grade 8;
  - (7) Children in a child-care organization or camp setting;
  - (8) Persons traveling on a school bus or other public transit;
  - (9) Gatherings for the purpose of medical treatment, including mental health and substance use disorder support services;
  - (10) Gatherings of up to 25 persons for the purpose of a funeral;
  - (11) Residential care facilities, which are subject to the October 21 epidemic order entitled “Requirements for Residential Facilities,” or any replacement of that order.
- (d) As a condition of hosting a gathering under this order, organizers and venues must design the gathering to encourage and maintain physical distancing, and must ensure that persons not part of the same household maintain 6 feet of distance from one another to the extent possible.

**3. Gathering restrictions for particular types of facilities.**

- (a) Gatherings, are prohibited in the following settings:
- (1) Entertainment venues, including: auditoriums; arenas; banquet halls; cinemas; conference centers; concert halls; performance venues; sporting venues; stadiums; and theaters;
  - (2) Recreational facilities and places of public amusement, including: amusement parks; arcades; bingo halls; bowling alleys; casinos; night clubs; skating rinks; strip clubs; water parks; and trampoline parks;
- (b) Gatherings are permitted at food service establishments under the following conditions:
- (1) Persons are not gathered indoors except in custodial settings, medical facilities, school and university cafeterias, shelters, and soup kitchens. If attendees are seated at tables, persons must be 6 feet apart, or members of a household may share a table and tables must be spaced a minimum of 6 feet apart;
  - (2) Persons participating in outdoor dining are seated no more than 6 to a table and tables are spaced a minimum of 6 feet apart.
- (c) Nothing in this section shall be construed to prohibit the use of these facilities for public health or other emergency purposes.

**4. Gathering restrictions for facilities.** In addition to the gathering limitations set forth elsewhere in this order, the following limitations apply to gatherings in the following facilities:

- (a) A gathering at a retail store, library, or museum must not exceed 30% of total occupancy limits established by the State Fire Marshal or a local fire marshal. Nevertheless, a retail store, library, or museum may permit one customer at a time to enter if strict adherence to the 30% total occupancy limit would otherwise result in closure.

- (1) Retail stores must establish lines to regulate entry and checkout, with markings for patrons to enable them to stand at least six feet apart from one another while waiting.
- (b) At exercise facilities:
  - (1) Gatherings must not exceed 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal; and
  - (2) There must be at least 12 feet of distance between each occupied workout station;
  - (3) Gatherings for group fitness activities or classes are prohibited.
- (c) Gatherings in waiting rooms at outpatient health-care facilities, veterinary clinics, and other businesses are prohibited unless the facility implements a system to ensure that persons not of the same household maintain 6 feet of distance. To the extent possible, this system must include a policy that patients wait in their cars for their appointments to be called.
- (d) A gathering at an indoor or outdoor pool not otherwise prohibited by this order must not exceed 25% of bather capacity limits described in Rule 325.2193 of the Michigan Administrative Code.
- (e) In facilities offering non-essential personal care services, including hair, nail, tanning, massage, traditional spa, tattoo, body art, and piercing services, and similar personal care services, gatherings are only permitted to the extent that services do not involve the removal of face masks. All services must be provided by appointment, and gatherings in waiting areas are prohibited.

## **5. Schools, colleges, and universities.**

- (a) Gatherings at public, nonpublic, and boarding schools for the purpose of conducting in-person instruction, sports, and extracurricular activities serving pupils in grades 9 through 12 are prohibited, except for in-person instruction of pupils who are English Language Learners or participants in special education services;
- (b) Gatherings at public, nonpublic, and boarding schools for the purpose of conducting in-person instruction of pupils in prekindergarten through grade 8 are permitted, subject to local health department and school district decisions on remote learning. Gatherings for the purpose of sports and extracurricular activity are prohibited;
- (c) Gatherings at public, nonpublic, and boarding schools are permitted for the purpose of providing services to students in need, including food distribution, access to internet connectivity, physical and mental health care services, and child care;
- (d) Gatherings at colleges and universities are prohibited for the purpose of holding in-person classes, extracurricular events, or other events are prohibited, except as permitted in sections 2 and 6 of this order.

## **6. Organized sports gathering restrictions.**

- (a) Gatherings for the purpose of organized sports are prohibited unless all participants, teams, and venues comply with the enhanced testing regimen specified in the Additional Mitigation Measures for Safer Athletic Practice and Play without the use of Face Coverings section of [MDHHS guidance on Additional Measures for Safer Athletic Practice and Play](#).



Sports organizers complying with this section may host gatherings for the purpose of practice and competition notwithstanding the gathering prohibitions in sections 2 and 5(c).

- (b) Sports organizers may not permit gatherings of spectators.

**7. Face mask requirement at gatherings.**

- (a) All persons participating in gatherings are required to wear a face mask.
- (b) As a condition of gathering for the purpose of transportation, transportation providers must require all staff and patrons to use face masks, and must enforce physical distancing among all patrons to the extent feasible.
- (c) Except as provided elsewhere in this order, a person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, must prohibit gatherings of any kind unless the person requires individuals in such gatherings (including employees) to wear a face mask, and denies entry or service to all persons refusing to wear face masks while gathered.
- (d) A person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, may not assume that someone who enters the facility without a face mask falls within one of the exceptions specified in section 8 of this order, including the exception for individuals who cannot medically tolerate a face mask. An individual's verbal representation that they are not wearing a face mask because they fall within a specified exception, however, may be accepted.
- (e) A person responsible for a child-care organization or camp, or an agent of such person, must not allow gatherings unless face masks are worn by all staff. Children must wear face masks as indicated below:
  - (1) All children 2 years and older when on a school bus or other transportation provided by the child-care organization or camp;
  - (2) All children 4 years and older when in indoor hallways and indoor common areas;
  - (3) All children 5 years and older when in classrooms, homes, cabins, or similar indoor settings.

**8. Exceptions to face mask requirements.** Although a face mask is strongly encouraged even for individuals not required to wear one (except for children under the age of 2), the requirement to wear a face mask in gatherings as required by this order does not apply to individuals who:

- (a) Are younger than 5 years old, outside of child-care organization setting (which are subject to requirements set out in section 7(e));
- (b) Cannot medically tolerate a face mask;
- (c) Are eating or drinking while seated at a food service establishment or at a private residence;
- (d) Are exercising outdoors and able to consistently maintain 6 feet of distance from others;
- (e) Are swimming;
- (f) Are receiving a medical service for which removal of the face mask is necessary;

- (g) Are asked to temporarily remove a face mask for identification purposes;
- (h) Are communicating with someone who is deaf, deafblind, or hard of hearing and whose ability to see the mouth is essential to communication;
- (i) Are actively engaged in a public safety role, including but not limited to law enforcement, firefighters, or emergency medical personnel, and where wearing a face mask would seriously interfere in the performance of their public safety responsibilities;
- (j) Are at a polling place for purposes of voting in an election;
- (k) Are engaging in a religious service; or
- (l) Are giving a speech for broadcast or to an audience, provided that the audience is at least 6 feet away from the speaker.

**9. Contact tracing requirements for particular gatherings.**

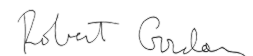
- (a) Gatherings are prohibited at the following facilities unless the facility maintains accurate records, including date and time of entry, names of patrons, and contact information, to aid with contact tracing, and denies entry for a gathering to any visitor who does not provide, at a minimum, their name and phone number:
  - (1) All businesses or operations that provide barbering, cosmetology services, body art services (including tattooing and body piercing), tanning services, massage services, or similar personal care services;
  - (2) Exercise facilities.
- (b) All businesses or operations that provide in-home services, including cleaners, repair persons, painters, and the like must not permit their employees to gather with clients unless the business maintains accurate appointment records, including date and time of service, name of client, and contact information, to aid with contact tracing.
- (c) Upon request, businesses, schools, and other facilities must provide names and phone numbers of individuals with possible COVID-19 exposure to MDHHS and local health departments to aid in contact tracing and case investigation efforts.
- (d) Data collected under this section:
  - (1) Must not be sold, or used for sales or marketing purposes without the express consent of each patron;
  - (2) Must be protected as confidential information to the fullest extent of the law;
  - (3) Must not be provided to law enforcement or immigration officials except upon receipt of a lawful subpoena from a court or other lawful court order;
  - (4) Must be retained for 28 days by the collecting organization, after which time the data must be destroyed. If facilities use existing data to fulfill this requirement, they may instead follow their own pre-existing data retention and destruction policies at the conclusion of the 28-day retention period.

## 10. 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 the Michigan Commission on Law Enforcement Standards Act, 1965 Public Act 203, 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) Neither a place of religious worship nor its owner is subject to penalty under this order for allowing religious worship at such place. No individual is subject to penalty under this order for engaging in religious worship at a place of religious worship.
- (e) Consistent with MCL 333.2261, 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.
- (f) Nothing in this order affects any prosecution or civil citation based on conduct that occurred before the effective date of this order.
- (g) Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority, or protections guaranteed by the state or federal constitution under these emergency circumstances.
- (h) Consistent with any rule or emergency rule promulgated and adopted in a schedule of monetary civil penalties under MCL 333.2262(1) and applicable to this order, violations of this order are also punishable by a civil fine of up to \$1,000 for each violation or day that a violation continues.
- (i) If any provision of this order is found invalid by a court of competent jurisdiction, whether in whole or in part, such decision will not affect the validity of the remaining part of this order.
- (j) It is not a violation of this order for a person to enter a facility otherwise closed for gatherings if they are entering solely for the purpose of using restroom facilities.

This order takes effect on November 18, 2020 at 12:01 AM, at which time the October 29, 2020, order entitled Gatherings and Face Mask Order is rescinded. This order remains in effect through December 8, 2020 at 11:59 PM. Persons with suggestions and concerns are invited to submit their comments via email to [COVID19@michigan.gov](mailto:COVID19@michigan.gov).

Date: November 15, 2020



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Robert Gordon, Director

Michigan Department of Health and Human Services

# Exhibit 2



STATE OF MICHIGAN

GRETCHEN WHITMER  
GOVERNOR

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
LANSING

ROBERT GORDON  
DIRECTOR

**December 7, 2020**

**Emergency Order under MCL 333.2253 – Gatherings and Face Mask 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 public health,” and gives the Department “general supervision of the interests of health and life of 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).

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 for this disease. COVID-19 spreads through close human contact, 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 “[i]f 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*, 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., dissenting, at 12). Enforcing Michigan’s health laws, including preventing disease, prolonging life, and promoting public health, requires limitations on gatherings and the establishment of procedures to control the spread of COVID-19. This includes limiting the number, location, size, and type of gatherings, and requiring the use of mitigation measures at gatherings as a condition of hosting such gatherings.

On March 10, 2020, MDHHS identified the first two presumptive-positive cases of COVID-19 in Michigan. As of December 6, 2020, Michigan had seen 395,036 confirmed cases and 6,004 confirmed deaths attributable to COVID-19. Michigan was one of the states most heavily impacted by COVID-19 early in the pandemic, with new cases peaking at nearly 2,000 per day in late March. Strict preventative measures and the cooperation of Michiganders drove daily case numbers dramatically down to less than 200 confirmed cases per day in mid-June, greatly reducing the loss of life. Beginning in October, Michigan again experienced an exponential growth in cases. Daily new cases are now over 5,000, which is roughly three times higher than what was seen in the spring.

On November 15, 2020, MDHHS issued an order to slow the high and rapidly increasing rate of spread of COVID-19. While the rate of spread has been reduced, there are still tremendously high numbers of cases, hospitalizations, and deaths, which threaten hospital and public health capacity. As changes in data lag behind changes in policy by several weeks, it is difficult to determine at this time whether the order has sufficiently reduced the rate of spread. This is particularly true where travel and gatherings for the Thanksgiving holiday are applying upward pressure on the rate of spread.

The State of Michigan presently has a seven-day average of 522.3 cases per million people, which is five times higher than the case rate on October 1. Test positivity has increased from 3.2% in early October to 14% on December 5. Rising cases create significant pressure on our emergency and hospital systems. Although complaints of coronavirus-like illness in emergency departments are now starting to decrease for the state, the current rate remains near the all-time high, and is four times higher than early October. An average of 500 daily hospital admissions were seen in Michigan in the last week, with individuals under 60 years old accounting for almost a third of all new admissions. With over 4,000 Michiganders hospitalized for COVID-19, 18% of all available inpatient beds are now occupied by patients who have COVID-19, the highest number since mid-April. The state death rate is 9.1 deaths per million people and continues to increase. The death rate is seven times higher than it was in early October, and there are more than 650 weekly deaths in Michigan. We must act to control the high rate of spread in order to save lives as we push through this difficult phase of the pandemic, and await widespread distribution of an effective COVID-19 vaccine.

To protect vulnerable individuals, ensure the health care system can provide care for all health issues, and prevent spread in schools during the influenza season, we must reduce the spread of COVID-19. This necessitates use of more forceful mitigation techniques to reduce the spread of the virus. As such, it is necessary to issue orders under the Public Health Code addressing these topics.

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 have also, subject to the grant of authority in 2020 PA 238 (signed into law on October 22, 2020), herein defined the symptoms of COVID-19 based on the latest epidemiological evidence. I further conclude that control of the epidemic is necessary to protect the public health and that it is necessary to restrict gatherings and 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.

I therefore order that:

**1. Definitions.**

- (a) “Child-care organization” means that term as defined by section 1(b) of the Child Care Organizations Act, 1973 PA 116, as amended, MCL 722.111(b)) and day, residential, travel, and troop camps for children (as defined by Rule 400.11101(1)(q) of the Michigan Administrative Code).
- (b) “Closed-campus boarding school” means a boarding school, as defined in section 3 of the Revised School Code, 1976 PA 451, as amended, MCL 380.3(4), where at least 90 percent of students reside on campus, and are prohibited from travel off campus property during the term, the campus is closed to visitors, and all staff and students who travel to and from the campus are regularly tested for COVID-19.
- (c) “Employee” means that term as defined in section 2 of the Improved Workforce Opportunity Wage Act, 2018 PA 337, as amended, MCL 408.932, and also includes independent contractors.
- (d) “Exercise facility” means a location in which individuals participate in individual or group physical activity, including gymnasiums, fitness centers, and exercise studios.
- (e) “Face mask” means a tightly woven cloth or other multi-layer absorbent material that closely covers an individual’s mouth and nose.
- (f) “Food service establishment” means that term as defined in section 1107(t) of the Food Law, 2000 PA 92, as amended, MCL 289.1107(t).

- (g) “Gathering” means any occurrence, either indoor or outdoor, where two or more persons from more than one household are present in a shared space.
- (h) “Household” means a group of persons living together in a shared dwelling with common kitchen or bathroom facilities. In dwellings with shared kitchen or bathroom facilities occupied by 20 or more unrelated persons, households are defined by individuals who share a bedroom.
- (i) “Indoors” means within a space that is fully or partially enclosed on the top, and fully or partially enclosed on two or more contiguous sides. Additionally, in a space that is fully or partially enclosed on the top, and fully or partially enclosed on two non-contiguous sides, any part of that space that is more than 8 feet from an open side is indoors.
- (j) “Outdoors” means a space that is not indoors.
- (k) “Organized sports” means competitive athletic activity requiring skill or physical prowess and organized by a sports organizer.
- (l) “Sports Organizer” means an institution, association, or other organization that sets and enforces rules to ensure the physical health and safety of all participants for an organized sport.
- (m) “Symptoms of COVID-19” means at least 1 of fever, uncontrolled cough, or atypical new onset of shortness of breath, or at least 2 of the following not explained by a known physical condition: loss of taste or smell, muscle aches, sore throat, severe headache, diarrhea, vomiting, or abdominal pain. Per section 1(h) of 2020 PA 238, this definition represents the latest medical guidance, and serves as the controlling definition.

## **2. General capacity limitations at gatherings.**

### **(a) Indoor gatherings:**

- (1) Are prohibited at residential venues, except where no more than 10 persons from no more than 2 households are gathered. Such gatherings should be held consistent with guidance issued by the Department of Health and Human Services for such gatherings;
- (2) Are prohibited at non-residential venues.

### **(b) Outdoor gatherings are permitted only as follows:**

- (1) At residential venues, 25 or fewer persons are gathered, comprised of no more than 3 households;
- (2) At non-residential venues:
  - (A) 25 or fewer persons are gathered at a venue without fixed seating, and attendance is limited to 20 persons per 1,000 square feet, including within any distinct area within the event space;
  - (B) 25 or fewer persons are gathered at a venue with fixed seating, and attendance is limited to 20% of seating capacity of the venue.

### **(c) The limitations to gatherings in sections 2(a) and 2(b) do not apply to:**

- (1) Incidental, temporary gatherings of persons in a shared space, such as frequently occur in an airport, bus station, exercise facility, food service establishment, shopping mall, or public pool, except as prohibited in section 3;
  - (2) Gatherings between an employee and a customer for the purpose of receiving services;
  - (3) Workplace gatherings that occur consistent with the Emergency Rules issued by MIOSHA on October 14, 2020;
  - (4) Voting or official election-related activities;
  - (5) Training of law enforcement, correctional, medical, or first responder personnel, insofar as those activities cannot be conducted remotely;
  - (6) Education and support services at public, nonpublic, and boarding schools serving students in prekindergarten through grade 8;
  - (7) Children in a child-care organization, after school program, or camp setting;
  - (8) Persons traveling on a school bus or other public transit;
  - (9) Gatherings for the purpose of medical treatment, including mental health and substance use disorder support services;
  - (10) Gatherings of up to 25 persons for the purpose of a funeral;
  - (11) Residential care facilities, which are subject to the October 21 epidemic order entitled “Requirements for Residential Facilities,” or any replacement of that order;
  - (12) Cardiopulmonary resuscitation courses and swimming instruction courses;
  - (13) Proctored, nationally-administered admissions and certification examinations that are not available remotely, provided that examinees are spaced no less than 12 feet apart.
- (d) As a condition of hosting a gathering under this order, organizers and venues must design the gathering to encourage and maintain physical distancing, and must ensure that persons not part of the same household maintain 6 feet of distance from one another to the extent possible.

### **3. Gathering restrictions for particular types of facilities.**

- (a) Gatherings, are prohibited in the following settings:
  - (1) Entertainment venues, including: auditoriums; arenas; banquet halls; cinemas; conference centers; concert halls; performance venues; sporting venues; stadiums; and theaters;
  - (2) Recreational facilities and places of public amusement, including: amusement parks; arcades; bingo halls; bowling alleys; casinos; night clubs; roller rinks; strip clubs; water parks; and trampoline parks;
- (b) Gatherings are permitted at food service establishments under the following conditions:



- (1) Persons are not gathered indoors except in custodial settings, medical facilities, school and university cafeterias, shelters, and soup kitchens. If attendees are seated at tables, persons must be 6 feet apart, or members of a household may share a table and tables must be spaced a minimum of 6 feet apart;
  - (2) Persons participating in outdoor dining are seated no more than 6 to a table and tables are spaced a minimum of 6 feet apart;
  - (c) Nothing in this section shall be construed to prohibit the use of these facilities for public health or other emergency purposes.
- 4. **Gathering restrictions for facilities.** In addition to the gathering limitations set forth elsewhere in this order, the following limitations apply to gatherings in the following facilities:
  - (a) A gathering at a retail store, library, or museum must not exceed 30% of total occupancy limits established by the State Fire Marshal or a local fire marshal. Nevertheless, a retail store, library, or museum may permit one customer at a time to enter if strict adherence to the 30% total occupancy limit would otherwise result in closure. Spaces for indoor dining, including food courts, must be closed.
    - (1) Retail stores must establish lines to regulate entry and checkout, with markings for patrons to enable them to stand at least six feet apart from one another while waiting.
  - (b) At exercise facilities:
    - (1) Gatherings must not exceed 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal; and
    - (2) There must be at least 12 feet of distance between each occupied workout station;
    - (3) Gatherings for group fitness activities or classes are prohibited.
  - (c) Gatherings in waiting rooms at outpatient health-care facilities, veterinary clinics, and other businesses are prohibited unless the facility implements a system to ensure that persons not of the same household maintain 6 feet of distance. To the extent possible, this system must include a policy that patients wait in their cars for their appointments to be called.
  - (d) Gatherings at an indoor or outdoor pool not otherwise prohibited by this order must not exceed 25% of bather capacity limits described in Rule 325.2193 of the Michigan Administrative Code.
  - (e) Gatherings at indoor and outdoor ice skating rinks are prohibited, except for individual exercise or one-on-one instruction, and occupancy is limited to 20 persons per 1,000 square feet, including within the exercise space. Gatherings for the purpose of open skating are permitted only at outdoor rinks.
  - (f) In facilities offering non-essential personal care services, including hair, nail, tanning, massage, traditional spa, tattoo, body art, and piercing services, and similar personal care services, gatherings are only permitted to the extent that services do not involve the removal of face masks. All services must be provided by appointment, and gatherings in waiting areas are prohibited.

5. **Schools, colleges, technical schools, and universities.**

- (a) Gatherings at public and nonpublic schools for the purpose of conducting in-person instruction, sports, and extracurricular activities serving pupils in grades 9 through 12 are prohibited, except for in-person instruction of pupils who are English Language Learners or participants in special education services, or as provided in sections 5(d), and 5(g);
- (b) Gatherings at public and nonpublic schools for the purpose of conducting in-person instruction of pupils in prekindergarten through grade 8 are permitted, subject to local health department and school district decisions on remote learning. Gatherings for the purpose of sports and extracurricular activity are prohibited;
- (c) Gatherings at public and nonpublic school are permitted for the purpose of child care programs, tutoring and academic support, and for providing services to students in need, including food distribution, access to internet connectivity, physical and mental health care services;
- (d) Gatherings at closed-campus boarding schools for the purpose of conducting in-person instruction are permitted, subject to local health department and school district decisions on remote learning.
- (e) Gatherings at colleges and universities, trade schools, and career schools, are prohibited for the purpose of holding in-person classes, extracurricular events, or other events, except as permitted in sections 2, 5(f), 5(g), and 6 of this order.
- (f) Gatherings at trade schools and career schools are permitted for the purpose of providing technical education services, including manufacturing, industrial technology, trades, and cosmetology, but only to the extent that these activities cannot be completed remotely.
- (g) Gatherings at public and nonpublic schools for the purpose of delivering career and technical education services to pupils in grades 9 through 12 are permitted, but only to the extent that these activities are necessary to complete requirements for a recognized postsecondary credential and only to the extent that these activities cannot be completed remotely.

## **6. Organized sports gathering restrictions.**

- (a) Gatherings for the purpose of organized sports are prohibited unless all participants, teams, and venues comply with the enhanced testing regimen specified in the Additional Mitigation Measures for Safer Athletic Practice and Play without the use of Face Coverings section of [MDHHS guidance on Additional Measures for Safer Athletic Practice and Play](#). Sports organizers complying with this section may host gatherings for the purpose of practice and competition notwithstanding the gathering prohibitions in sections 2 and 5(e).
- (b) Sports organizers may not permit gatherings of spectators.

## **7. Face mask requirement at gatherings.**

- (a) All persons participating in gatherings are required to wear a face mask.
- (b) As a condition of gathering for the purpose of transportation, transportation providers must require all staff and patrons to use face masks, and must enforce physical distancing among all patrons to the extent feasible.
- (c) Except as provided elsewhere in this order, a person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, must prohibit gatherings of any kind unless the person requires individuals in such

gatherings (including employees) to wear a face mask, and denies entry or service to all persons refusing to wear face masks while gathered.

- (d) A person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, may not assume that someone who enters the facility without a face mask falls within one of the exceptions specified in section 8 of this order, including the exception for individuals who cannot medically tolerate a face mask. An individual's verbal representation that they are not wearing a face mask because they fall within a specified exception, however, may be accepted.
- (e) A person responsible for a child-care organization or camp, or an agent of such person, must not allow gatherings unless face masks are worn by all staff. Children must wear face masks as indicated below:
  - (1) All children 2 years and older when on a school bus or other transportation provided by the child-care organization or camp;
  - (2) All children 4 years and older when in indoor hallways and indoor common areas;
  - (3) All children 5 years and older when in classrooms, homes, cabins, or similar indoor settings.

8. **Exceptions to face mask requirements.** Although a face mask is strongly encouraged even for individuals not required to wear one (except for children under the age of 2), the requirement to wear a face mask in gatherings as required by this order does not apply to individuals who:

- (a) Are younger than 5 years old, outside of child-care organization setting (which are subject to requirements set out in section 7(e));
- (b) Cannot medically tolerate a face mask;
- (c) Are eating or drinking while seated at a food service establishment or at a private residence;
- (d) Are exercising outdoors and able to consistently maintain 6 feet of distance from others;
- (e) Are swimming;
- (f) Are receiving a medical service for which removal of the face mask is necessary;
- (g) Are asked to temporarily remove a face mask for identification purposes;
- (h) Are communicating with someone who is deaf, deafblind, or hard of hearing and whose ability to see the mouth is essential to communication;
- (i) Are actively engaged in a public safety role, including but not limited to law enforcement, firefighters, or emergency medical personnel, and where wearing a face mask would seriously interfere in the performance of their public safety responsibilities;
- (j) Are at a polling place for purposes of voting in an election;
- (k) Are engaging in a religious service; or
- (l) Are giving a speech for broadcast or to an audience, provided that the audience is at least 6 feet away from the speaker.

## **9. Contact tracing requirements for particular gatherings.**

- (a) Gatherings are prohibited at the following facilities unless the facility maintains accurate records, including date and time of entry, names of patrons, and contact information, to aid with contact tracing, and denies entry for a gathering to any visitor who does not provide, at a minimum, their name and phone number:
  - (1) All businesses or operations that provide barbering, cosmetology services, body art services (including tattooing and body piercing), tanning services, massage services, or similar personal care services;
  - (2) Exercise facilities.
- (b) All businesses or operations that provide in-home services, including cleaners, repair persons, painters, and the like must not permit their employees to gather with clients unless the business maintains accurate appointment records, including date and time of service, name of client, and contact information, to aid with contact tracing.
- (c) Upon request, businesses, schools, and other facilities must provide names and phone numbers of individuals with possible COVID-19 exposure to MDHHS and local health departments to aid in contact tracing and case investigation efforts.
- (d) Data collected under this section:
  - (1) Must not be sold, or used for sales or marketing purposes without the express consent of each patron;
  - (2) Must be protected as confidential information to the fullest extent of the law;
  - (3) Must not be provided to law enforcement or immigration officials except upon receipt of a lawful subpoena from a court or other lawful court order;
  - (4) Must be retained for 28 days by the collecting organization, after which time the data must be destroyed. If facilities use existing data to fulfill this requirement, they may instead follow their own pre-existing data retention and destruction policies at the conclusion of the 28-day retention period.

## **10. 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 the Michigan Commission on Law Enforcement Standards Act, 1965 Public Act 203, 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) Neither a place of religious worship nor its owner is subject to penalty under this order for allowing religious worship at such place. No individual is subject to penalty under this order for engaging in religious worship at a place of religious worship.

- (e) Consistent with MCL 333.2261, 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.
- (f) Nothing in this order affects any prosecution or civil citation based on conduct that occurred before the effective date of this order.
- (g) Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority, or protections guaranteed by the state or federal constitution under these emergency circumstances.
- (h) Consistent with any rule or emergency rule promulgated and adopted in a schedule of monetary civil penalties under MCL 333.2262(1) and applicable to this order, violations of this order are also punishable by a civil fine of up to \$1,000 for each violation or day that a violation continues.
- (i) If any provision of this order is found invalid by a court of competent jurisdiction, whether in whole or in part, such decision will not affect the validity of the remaining part of this order.
- (j) It is not a violation of this order for a person to enter a facility otherwise closed for gatherings if they are entering solely for the purpose of using restroom facilities.

This order takes effect on December 9, 2020 at 12:01 AM, at which time the November 18, 2020, order entitled Gatherings and Face Mask Order is rescinded. This order remains in effect through December 20, 2020 at 11:59 PM. Persons with suggestions and concerns are invited to submit their comments via email to [COVID19@michigan.gov](mailto:COVID19@michigan.gov).

Date:

December 7, 2020



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Robert Gordon, Director

Michigan Department of Health and Human Services

# Exhibit 3



STATE OF MICHIGAN

GRETCHEN WHITMER  
GOVERNOR

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
LANSING

ROBERT GORDON  
DIRECTOR

December 18, 2020

### **Emergency Order under MCL 333.2253 – Gatherings and Face Mask 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 public health,” and gives the Department “general supervision of the interests of health and life of 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).

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. COVID-19 spreads through close human contact, 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 “[i]f 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*, 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., dissenting, at 12). Enforcing Michigan’s health laws, including preventing disease, prolonging life, and promoting public health, requires limitations on gatherings and the establishment of procedures to control the spread of COVID-19. This includes limiting the number, location, size, and type of gatherings, and requiring the use of mitigation measures at gatherings as a condition of hosting such gatherings.

On March 10, 2020, MDHHS identified the first two presumptive-positive cases of COVID-19 in Michigan. As of December 16, 2020, Michigan had seen 446,752 confirmed cases and 11,018 confirmed deaths attributable to COVID-19. Michigan was one of the states most heavily impacted by COVID-19 early in the pandemic, with new cases peaking at nearly 2,000 per day in late March. Strict preventative measures and the cooperation of Michiganders drove daily case numbers dramatically down to less than 200 confirmed cases per day in mid-June, greatly reducing the loss of life. Beginning in October, Michigan again experienced an exponential growth in cases. Daily new cases are now near 5,000, which is roughly three times higher than what was seen in the spring.

On November 15, 2020, MDHHS issued an order to slow the high and rapidly increasing rate of spread of COVID-19. Cases, hospitalizations, and deaths remained high through early December, threatening hospital and public health capacity. On December 7, 2020, MDHHS issued an order sustaining the protections of the prior order.

The State of Michigan presently has a seven-day average of 439 cases per million people, which is nearly five times higher than the case rate on October 1. Test positivity has increased from 3.2% in early October to 10.6% on December 18. A high number of cases creates significant pressure on our emergency and hospital systems. Although complaints of coronavirus-like illness in emergency departments are now starting to decrease for the state, the current rate remains near the all-time high, and is four times higher than early October. An average of 425 daily hospital admissions were seen in Michigan in the last week, with individuals under 60 years old accounting for a third of all new admissions. There are over 3,500 Michiganders hospitalized for COVID-19 and 17.3% of all available inpatient beds are occupied by patients who have COVID-19. The state death rate is 11.7 deaths per million people and continues to increase. The death rate is nine times higher than it was in early October, and there are more than 800 weekly deaths in Michigan. On December 11, 2020, the Food and Drug Administration granted an emergency use authorization for the first vaccine to prevent COVID-19, and more approvals are expected in the coming weeks. There is good reason for hope, but the pandemic is not yet at an end, and many more challenging months lay ahead.

In light of the beginning of vaccination and the recent promising reductions in the rate of spread of COVID-19, we can now begin cautious reopening with close monitoring of impacts. In so doing, however, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone. As we reopen, the surest way to maintain our momentum in controlling the spread of COVID-19 is to open lower risk venues first, and gradually, rather than all at once. By taking deliberate steps and closely monitoring the data, we can ensure that Michigan remains on the path to recovery.

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 have also, subject to the grant of authority in 2020 PA 238 (signed into law on October 22, 2020), herein defined the symptoms of COVID-19 based on the latest epidemiological evidence. I further conclude that control of the epidemic is necessary to protect the public health and that it is necessary to restrict gatherings and 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.

I therefore order that:

**1. Definitions.**

- (a) “Child-care organization” means that term as defined by section 1(b) of the Child Care Organizations Act, 1973 PA 116, as amended, MCL 722.111(b)) and day, residential, travel, and troop camps for children (as defined by Rule 400.11101(1)(q) of the Michigan Administrative Code).
- (b) “Employee” means that term as defined in section 2 of the Improved Workforce Opportunity Wage Act, 2018 PA 337, as amended, MCL 408.932, and also includes independent contractors.
- (c) “Lower risk entertainment facility” means: auditoriums; arenas; cinemas; concert halls; performance venues; sporting venues; stadiums; and theaters.
- (d) “Exercise facility” means a location in which individuals participate in individual or group physical activity, including gymnasiums, fitness centers, and exercise studios.
- (e) “Face mask” means a tightly woven cloth or other multi-layer absorbent material that closely covers an individual’s mouth and nose.



- (f) “Food service establishment” means that term as defined in section 1107(t) of the Food Law, 2000 PA 92, as amended, MCL 289.1107(t).
- (g) “Gathering” means any occurrence, either indoor or outdoor, where two or more persons from more than one household are present in a shared space.
- (h) “Higher risk recreational facilities” means recreational facilities other than lower risk recreational facilities. This includes: laser tag; night clubs; strip clubs; water parks; and trampoline parks.
- (i) “Household” means a group of persons living together in a shared dwelling with common kitchen or bathroom facilities. In dwellings with shared kitchen or bathroom facilities occupied by 20 or more unrelated persons, households are defined by individuals who share a bedroom.
- (j) “Indoors” means within a space that is fully or partially enclosed on the top, and fully or partially enclosed on two or more contiguous sides. Additionally, in a space that is fully or partially enclosed on the top, and fully or partially enclosed on two non-contiguous sides, any part of that space that is more than 8 feet from an open side is indoors.
- (k) “Lower risk recreational facilities” means recreational facilities where there is not physical contact among participants, there is minimal interaction between households participating in activities, masks can be worn, and, if indoors, activities involve a low degree of exhalation or physical exertion. This means: archery ranges; amusement parks; arcades; bingo halls; bowling centers; casinos; and gun ranges.
- (l) “Outdoors” means a space that is not indoors.
- (m) “Organized sports” means competitive athletic activity requiring skill or physical prowess and organized by a sports organizer.
- (n) “Sports Organizer” means an institution, association, or other organization that sets and enforces rules to ensure the physical health and safety of all participants for an organized sport.
- (o) “Principal symptoms of COVID-19” means at least 1 of fever, uncontrolled cough, or atypical new onset of shortness of breath, or at least 2 of the following not explained by a known physical condition: loss of taste or smell, muscle aches, sore throat, severe headache, diarrhea, vomiting, or abdominal pain. Per section 1(h) of 2020 PA 238, this definition represents the latest medical guidance, and serves as the controlling definition.

## **2. General capacity limitations at gatherings.**

### **(a) Indoor gatherings:**

- (1) Are prohibited at residential venues, except where no more than 10 persons from no more than 2 households are gathered. Such gatherings should be held consistent with guidance issued by the Department of Health and Human Services for such gatherings;
- (2) Are prohibited at non-residential venues.

### **(b) Outdoor gatherings are permitted only as follows:**

- (1) At residential venues, 25 or fewer persons are gathered, comprised of no more than 3 households;
- (2) At non-residential venues:
  - (A) 25 or fewer persons are gathered at a venue without fixed seating, and attendance is limited to 20 persons per 1,000 square feet, including within any distinct area within the event space;
  - (B) 25 or fewer persons are gathered at a venue with fixed seating, and attendance is limited to 20% of seating capacity of the venue.
- (c) The limitations to gatherings in sections 2(a) and 2(b) do not apply to:
  - (1) Incidental, temporary gatherings of persons in a shared space, such as frequently occur in an airport, bus station, exercise facility, food service establishment, shopping mall, or public pool, except as prohibited in section 3;
  - (2) Gatherings between an employee and a customer for the purpose of receiving services;
  - (3) Workplace gatherings that occur consistent with the Emergency Rules issued by MIOSHA on October 14, 2020;
  - (4) Voting or official election-related activities;
  - (5) Training of law enforcement, correctional, medical, or first responder personnel, insofar as those activities cannot be conducted remotely;
  - (6) Education and support services at public, nonpublic, and boarding schools serving students in prekindergarten through grade 8;
  - (7) Children in a child-care organization, after school program, or camp setting;
  - (8) Persons traveling on a school bus or other public transit;
  - (9) Gatherings for the purpose of medical treatment, including mental health and substance use disorder support services;
  - (10) Gatherings of up to 25 persons for the purpose of a funeral;
  - (11) Residential care facilities, which are subject to the October 21 epidemic order entitled “Requirements for Residential Facilities,” or any replacement of that order;
  - (12) Cardiopulmonary resuscitation courses and swimming instruction courses;
  - (13) Proctored, nationally-administered admissions and certification examinations that are not available remotely, provided that examinees are spaced no less than 12 feet apart;
  - (14) Gatherings at lower risk entertainment and lower risk recreational facilities that comply with the restrictions set forth in section 3(a) of this order;
  - (15) Gatherings for public health or other emergency purposes.

- (d) As a condition of hosting a gathering under this order, organizers and facilities must design the gathering to encourage and maintain physical distancing, and must ensure that persons not part of the same household maintain 6 feet of distance from one another to the extent possible.

**3. Gathering restrictions for entertainment and food service facilities.**

- (a) Gatherings are permitted at lower risk entertainment facilities and lower risk recreational facilities, provided that:
  - (1) Organizers do not permit persons to mingle with others from outside of their household;
  - (2) Household groups consist of no more than 6 persons;
  - (3) Households are spaced or seated at least 6 feet apart;
  - (4) No food or beverages are sold or consumed on the premises;
  - (5) Venues comply with the following capacity limits:
    - (A) For venues with fixed seating, occupancy must not exceed 20% of the limits established by the State Fire Marshal or a local fire marshal;
    - (B) For venues with non-fixed seating, occupancy is limited to 20 persons per 1,000 square feet, including within any distinct space within the venue;
    - (C) For all venues, no more than 100 persons may be gathered within any distinct space within the venue, except at stadiums and arenas hosting sporting events as provided in section 6, in which case up to 250 persons may be gathered.
- (b) Gatherings are permitted at food service establishments under the following conditions:
  - (1) Persons are not gathered indoors except in custodial settings, medical facilities, school and university cafeterias, shelters, and soup kitchens. If attendees are seated at tables, persons must be 6 feet apart, or members of a household may share a table and tables must be spaced a minimum of 6 feet apart;
  - (2) Persons participating in outdoor dining are seated no more than 6 to a table and tables are spaced a minimum of 6 feet apart;
- (c) Nothing in this section shall be construed to prohibit the use of these facilities for public health or other emergency purposes.

**4. Gathering restrictions for other facilities.** In addition to the gathering limitations set forth elsewhere in this order, the following limitations apply to gatherings in the following facilities:

- (a) A gathering at a retail store, library, or museum must not exceed 30% of total occupancy limits established by the State Fire Marshal or a local fire marshal. Nevertheless, a retail store, library, or museum may permit one customer at a time to enter if strict adherence to

the 30% total occupancy limit would otherwise result in closure. Spaces for indoor dining, including food courts, must be closed.

- (1) Retail stores must establish lines to regulate entry and checkout, with markings for patrons to enable them to stand at least six feet apart from one another while waiting.
- (b) At exercise facilities:
  - (1) Gatherings must not exceed 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal; and
  - (2) There must be at least 12 feet of distance between each occupied workout station;
  - (3) Indoor gatherings for group fitness activities or classes are prohibited. Outdoor gatherings for group fitness activities or classes are permitted.
- (c) Gatherings in waiting rooms at outpatient health-care facilities, veterinary clinics, and other businesses are prohibited unless the facility implements a system to ensure that persons not of the same household maintain 6 feet of distance. To the extent possible, this system must include a policy that patients wait in their cars for their appointments to be called.
- (d) Gatherings at an indoor or outdoor pool not otherwise prohibited by this order must not exceed 25% of bather capacity limits described in Rule 325.2193 of the Michigan Administrative Code.
- (e) Gatherings at indoor ice and roller rinks are prohibited, except for individual exercise or one-on-one instruction, where occupancy is limited to 2 persons per 1,000 square feet, including within the exercise space. Gatherings at outdoor ice and roller rinks are permitted, except for organized contact sports, provided that occupancy is limited to 2 persons per 1,000 square feet, including within the exercise space. Gatherings for the purpose of non-contact sports and open skating are permitted only at outdoor rinks.
- (f) In facilities offering non-essential personal care services, including hair, nail, tanning, massage, traditional spa, tattoo, body art, and piercing services, and similar personal care services, gatherings are only permitted to the extent that services do not involve the removal of face masks. All services must be provided by appointment, and gatherings in waiting areas are prohibited.

## **5. Schools, colleges, technical schools, and universities.**

- (a) Gatherings at public, nonpublic, and boarding schools for the purpose of conducting in-person instruction of pupils in prekindergarten through grade 12 are permitted, subject to local health department and school district decisions on remote learning. Gatherings are permitted for the purpose of extracurricular activities except those that involve physical contact among participants, a high degree of exhalation or physical exertion indoors, or where masks cannot be worn.
- (b) Gatherings at public, nonpublic, and boarding schools are permitted for the purpose of child care programs, tutoring and academic support, and for providing services to students in need, including food distribution, access to internet connectivity, and physical and mental health care services.

- (c) Gatherings at colleges and universities, trade schools, and career schools are permitted for the purpose of holding in-person classes and other events sponsored by the educational institution. The limits imposed by section 2(a) and 2(b) do not apply to such gatherings, but they remain subject to all other applicable requirements of this order.

## **6. Organized sports gathering restrictions.**

- (a) Gatherings for the purpose of indoor organized sports and contact organized sports are prohibited unless all participants, teams, and venues comply with the enhanced testing regimen specified in the Additional Mitigation Measures for Safer Athletic Practice and Play without the use of Face Coverings section of [MDHHS guidance on Additional Measures for Safer Athletic Practice and Play](#), or a school is participating in an MDHHS testing pilot program. Sports organizers complying with this section may host gatherings for the purpose of practice and competition notwithstanding the gathering prohibitions in section 2.
- (b) Gatherings for the purpose of outdoor, non-contact sports are permitted.

## **7. Face mask requirement at gatherings.**

- (a) All persons participating in gatherings are required to wear a face mask.
- (b) As a condition of gathering for the purpose of transportation, transportation providers must require all staff and patrons to use face masks, and must enforce physical distancing among all patrons to the extent feasible.
- (c) Except as provided elsewhere in this order, a person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, must prohibit gatherings of any kind unless the person requires individuals in such gatherings (including employees) to wear a face mask, and denies entry or service to all persons refusing to wear face masks while gathered.
- (d) A person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, may not assume that someone who enters the facility without a face mask falls within one of the exceptions specified in section 8 of this order, including the exception for individuals who cannot medically tolerate a face mask. An individual's verbal representation that they are not wearing a face mask because they fall within a specified exception, however, may be accepted.
- (e) A person responsible for a child-care organization or camp, or an agent of such person, must not allow gatherings unless face masks are worn by all staff. Children must wear face masks as indicated below:
  - (1) All children 2 years and older when on a school bus or other transportation provided by the child-care organization or camp;
  - (2) All children 4 years and older when in indoor hallways and indoor common areas;
  - (3) All children 5 years and older when in classrooms, homes, cabins, or similar indoor settings.

8. **Exceptions to face mask requirements.** Although a face mask is strongly encouraged even for individuals not required to wear one (except for children under the age of 2), the requirement to wear a face mask in gatherings as required by this order does not apply to individuals who:
- (a) Are younger than 5 years old, outside of child-care organization setting (which are subject to requirements set out in section 7(e));
  - (b) Cannot medically tolerate a face mask;
  - (c) Are eating or drinking while seated at a food service establishment or at a private residence;
  - (d) Are exercising outdoors and able to consistently maintain 6 feet of distance from others;
  - (e) Are swimming;
  - (f) Are receiving a medical service for which removal of the face mask is necessary;
  - (g) Are asked to temporarily remove a face mask for identification purposes;
  - (h) Are communicating with someone who is deaf, deafblind, or hard of hearing and whose ability to see the mouth is essential to communication;
  - (i) Are actively engaged in a public safety role, including but not limited to law enforcement, firefighters, or emergency medical personnel, and where wearing a face mask would seriously interfere in the performance of their public safety responsibilities;
  - (j) Are at a polling place for purposes of voting in an election;
  - (k) Are engaging in a religious service; or
  - (l) Are giving a speech for broadcast or to an audience, provided that the audience is at least 6 feet away from the speaker.
9. **Contact tracing requirements for particular gatherings.**
- (a) Gatherings are prohibited at the following facilities unless the facility maintains accurate records, including date and time of entry, names of patrons, and contact information, to aid with contact tracing, and denies entry for a gathering to any visitor who does not provide, at a minimum, their name and phone number:
    - (1) All businesses or operations that provide barbering, cosmetology services, body art services (including tattooing and body piercing), tanning services, massage services, or similar personal care services;
    - (2) Exercise facilities.
  - (b) All businesses or operations that provide in-home services, including cleaners, repair persons, painters, and the like must not permit their employees to gather with clients unless the business maintains accurate appointment records, including date and time of service, name of client, and contact information, to aid with contact tracing.

- (c) Upon request, businesses, schools, and other facilities must provide names and phone numbers of individuals with possible COVID-19 exposure to MDHHS and local health departments to aid in contact tracing and case investigation efforts.
- (d) Data collected under this section:
  - (1) Must not be sold, or used for sales or marketing purposes without the express consent of each patron;
  - (2) Must be protected as confidential information to the fullest extent of the law;
  - (3) Must not be provided to law enforcement or immigration officials except upon receipt of a lawful subpoena from a court or other lawful court order;
  - (4) Must be retained for 28 days by the collecting organization, after which time the data must be destroyed. If facilities use existing data to fulfill this requirement, they may instead follow their own pre-existing data retention and destruction policies at the conclusion of the 28-day retention period.

## **10. 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 the Michigan Commission on Law Enforcement Standards Act, 1965 Public Act 203, 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) Neither a place of religious worship nor its owner is subject to penalty under this order for allowing religious worship at such place. No individual is subject to penalty under this order for engaging in religious worship at a place of religious worship.
- (e) Consistent with MCL 333.2261, 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.
- (f) Nothing in this order affects any prosecution or civil citation based on conduct that occurred before the effective date of this order.
- (g) Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority, or protections guaranteed by the state or federal constitution under these emergency circumstances.
- (h) Consistent with any rule or emergency rule promulgated and adopted in a schedule of monetary civil penalties under MCL 333.2262(1) and applicable to this order, violations of this order are also punishable by a civil fine of up to \$1,000 for each violation or day that a violation continues.

- (i) If any provision of this order is found invalid by a court of competent jurisdiction, whether in whole or in part, such decision will not affect the validity of the remaining part of this order.
- (j) It is not a violation of this order for a person to enter a facility otherwise closed for gatherings if they are entering solely for the purpose of using restroom facilities.

This order takes effect on December 21, 2020 at 12:01 AM, at which time the December 7, 2020, order entitled Gatherings and Face Mask Order is rescinded. This order remains in effect through January 15, 2021 at 11:59 PM. Persons with suggestions and concerns are invited to submit their comments via email to [COVID19@michigan.gov](mailto:COVID19@michigan.gov).

Date: 12/18/2020

A handwritten signature in cursive script that reads "Robert Gordon". The signature is written in dark ink and is positioned above a horizontal line.

Robert Gordon, Director

Michigan Department of Health and Human Services



# Exhibit 4



STATE OF MICHIGAN

GRETCHEN WHITMER  
GOVERNOR

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
LANSING

ROBERT GORDON  
DIRECTOR

**January 13, 2021**

**Emergency Order under MCL 333.2253 – Gatherings and Face Mask 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 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).

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. COVID-19 spreads through close human contact, 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 limitations on gatherings and the establishment of procedures to control the spread of COVID-19. This includes limiting the number, location, size, and type of gatherings, and requiring the use of mitigation measures at gatherings as a condition of hosting such gatherings.

On March 10, 2020, MDHHS identified the first two presumptive-positive cases of COVID-19 in Michigan. As of January 12, 2021, Michigan had seen 525,612 confirmed cases and 13,501 confirmed deaths attributable to COVID-19. Michigan was one of the states most heavily impacted by COVID-19 early in the pandemic, with new cases peaking at nearly 2,000 per day in late March. Strict preventative measures and the cooperation of Michiganders drove daily case numbers dramatically down to fewer than 200 confirmed cases per day in mid-June, greatly reducing the loss of life. Beginning in October, Michigan again experienced an exponential growth in cases. Daily new cases are now near 2,500, which is roughly two times higher than what was seen in the spring.

On November 15, 2020, MDHHS issued an order to slow the high and rapidly increasing rate of spread of COVID-19. Cases, hospitalizations, and deaths remained high through early December, threatening hospital and public health capacity. On December 7, 2020, and again on December 18, 2020, MDHHS issued orders sustaining those protections. These orders played a crucial role in slowing the spread in Michigan while many states experienced uncontrolled growth, including many neighboring states in the Midwest. However, there remains widespread community transmission in Michigan and the progress that has been made is susceptible to another surge.

The State of Michigan presently has a seven-day average of 265.8 cases per million people, which is nearly three times higher than the case rate on October 1. Test positivity was 9.8% as of January 9, three times higher than the 3.2% positivity rate in early October. A high number of cases creates significant pressure on our emergency and hospital systems. An average of 300 daily hospital admissions was seen in Michigan in the last week, with individuals under 60 years old accounting for a third of all new admissions. There are over 2,400 Michiganders hospitalized for COVID-19 and 12.1% of all available inpatient beds are occupied by patients who have COVID-19. The state death rate is 7.7 deaths per million people; this is six times higher than it was in early October, and there are more than 500 weekly deaths in Michigan attributable to COVID-19. Since December 11, 2020, the Food and Drug Administration has granted emergency use authorization to two vaccines to prevent COVID-19, providing a path to end the pandemic. Michigan is now partaking in the largest mass vaccination effort in modern history, and is presently working toward vaccinating at least 70% of Michigan's most high-risk residents as quickly as possible.

Despite making significant strides in controlling the virus since early November, recent data show a plateau and potential reversal. And new and unexpected challenges continue to arise: in early December 2020, a variant of COVID-19 known as B.1.1.7 was detected in the United Kingdom. This variant is roughly 50 to 70 percent more infectious than the more common strain. It was first detected in the United States in late December and has now been found in at least eight states. While the variant has not yet been detected in Michigan, it may already be spreading here. It is anticipated that this variant, if it becomes widespread in the state, will significantly increase the rate of new cases. We must therefore continue to maintain protections to reduce spread, alongside efforts to increase the rate of vaccination.

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 have also, subject to the grant of authority in 2020 PA 238 (signed into law on October 22, 2020), herein defined the symptoms of COVID-19 based on the latest epidemiological evidence. I further conclude that control of the epidemic is necessary to protect the public health and that it is necessary to restrict gatherings and 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.

I therefore order that:

**1. Definitions.**

- (a) "Child-care organization" means that term as defined by section 1(b) of the Child Care Organizations Act, 1973 PA 116, as amended, MCL 722.111(b)) and day, residential, travel, and troop camps for children (as defined by Rule 400.11101(1)(q) of the Michigan Administrative Code).
- (b) "Employee" means that term as defined in section 2 of the Improved Workforce Opportunity Wage Act, 2018 PA 337, as amended, MCL 408.932, and also includes independent contractors.
- (c) "Lower risk entertainment facility" means: auditoriums; arenas; cinemas; concert halls; performance venues; sporting venues; stadiums; and theaters.

- (d) “Exercise facility” means a location in which individuals participate in individual or group physical activity, including gymnasiums, fitness centers, and exercise studios.
- (e) “Face mask” means a tightly woven cloth or other multi-layer absorbent material that closely covers an individual’s mouth and nose.
- (f) “Food service establishment” means that term as defined in section 1107(t) of the Food Law, 2000 PA 92, as amended, MCL 289.1107(t).
- (g) “Gathering” means any occurrence, either indoor or outdoor, where two or more persons from more than one household are present in a shared space.
- (h) “Higher risk recreational facilities” means recreational facilities other than lower risk recreational facilities and moderate risk recreational facilities. This includes: night clubs; strip clubs; and water parks.
- (i) “Household” means a group of persons living together in a shared dwelling with common kitchen or bathroom facilities. In dwellings with shared kitchen or bathroom facilities occupied by 20 or more unrelated persons, households are defined by individuals who share a bedroom.
- (j) “Indoors” means within a space that is fully or partially enclosed on the top, and fully or partially enclosed on two or more contiguous sides. Additionally, in a space that is fully or partially enclosed on the top, and fully or partially enclosed on two non-contiguous sides, any part of that space that is more than 8 feet from an open side is indoors.
- (k) “Lower risk recreational facilities” means recreational facilities where there is not physical contact among participants, there is minimal interaction between households participating in activities, masks can be worn, and, if indoors, activities involve a low degree of exhalation or physical exertion. This means: archery ranges; amusement parks; arcades; bingo halls; bowling centers; casinos; and gun ranges.
- (l) “Moderate risk recreational facilities” means recreational facilities where there is not physical contact among participants, there is minimal interaction between households participating in activities, masks can be worn, and the activities involve a significant degree of exhalation or physical exertion indoors. To the extent that facilities take the necessary precautions to avoid potential physical contact among participants, this category includes laser tag and trampoline parks.
- (m) “Outdoors” means a space that is not indoors.
- (n) “Organized sports” means competitive athletic activity requiring skill or physical prowess and organized by a sports organizer.
- (o) “Sports Organizer” means an institution, association, or other organization that sets and enforces rules to ensure the physical health and safety of all participants for an organized sport.
- (p) “Principal symptoms of COVID-19” means at least 1 of fever, uncontrolled cough, or atypical new onset of shortness of breath, or at least 2 of the following not explained by a known physical condition: loss of taste or smell, muscle aches, sore throat, severe headache, diarrhea, vomiting, or abdominal pain. Per section 1(h) of 2020 PA 238, this definition represents the latest medical guidance, and serves as the controlling definition.

## 2. General capacity limitations at gatherings.

### (a) Indoor gatherings:

- (1) Are prohibited at residential venues, except where no more than 10 persons from no more than 2 households are gathered. Such gatherings should be held consistent with guidance issued by the Department of Health and Human Services for such gatherings;
- (2) Are prohibited at non-residential venues.

### (b) Outdoor gatherings are permitted only as follows:

- (1) At residential venues, 25 or fewer persons are gathered, comprised of no more than 3 households;
- (2) At non-residential venues:
  - (A) 25 or fewer persons are gathered at a venue without fixed seating, and attendance is limited to 20 persons per 1,000 square feet, including within any distinct area within the event space;
  - (B) 25 or fewer persons are gathered at a venue with fixed seating, and attendance is limited to 20% of seating capacity of the venue.

### (c) The limitations to gatherings in sections 2(a) and 2(b) do not apply to:

- (1) Incidental, temporary gatherings of persons in a shared space, such as frequently occur in an airport, bus station, exercise facility, food service establishment, shopping mall, or public pool, except as prohibited in section 3;
- (2) Gatherings between an employee and a customer for the purpose of receiving services;
- (3) Workplace gatherings that occur consistent with the Emergency Rules issued by MIOSHA on October 14, 2020;
- (4) Voting or official election-related activities;
- (5) Training of law enforcement, correctional, medical, or first responder personnel, insofar as those activities cannot be conducted remotely;
- (6) Education and support services at public, nonpublic, and boarding schools serving students in prekindergarten through grade 12;
- (7) Children in a child-care organization, after school program, or camp setting;
- (8) Persons traveling on a school bus or other public transit;
- (9) Gatherings for the purpose of medical treatment, including mental health and substance use disorder support services;
- (10) Gatherings of up to 25 persons for the purpose of a funeral;
- (11) Residential care facilities, which are subject to the October 21 epidemic order entitled "Requirements for Residential Facilities," or any replacement of that order;

- (12) Cardiopulmonary resuscitation courses and swimming instruction courses;
  - (13) Proctored, nationally-administered admissions and certification examinations that are not available remotely, provided that examinees are spaced no less than 12 feet apart;
  - (14) Gatherings at lower risk entertainment and lower and moderate risk recreational facilities that comply with the restrictions set forth in section 3(a) of this order;
  - (15) Gatherings for the purposes of indoor group fitness, exercise, or non-contact sports that comply with the restrictions set forth in sections 4(b) and 6(b) of this order;
  - (16) Gatherings for public health or other emergency purposes.
- (d) As a condition of hosting a gathering under this order, organizers and facilities must design the gathering to encourage and maintain physical distancing, and must ensure that persons not part of the same household maintain 6 feet of distance from one another to the extent possible.

### **3. Gathering restrictions for entertainment and food service facilities.**

- (a) Gatherings are permitted at lower risk entertainment facilities and lower and moderate risk recreational facilities, provided that:
- (1) Organizers do not permit persons to mingle with others from outside of their household;
  - (2) Household groups consist of no more than 6 persons;
  - (3) If participating in stationary activities, households are spaced or seated at least 6 feet apart. If participating in non-stationary activities, participants maintain a consistent 6 feet of distance from others at all times and no physical contact between participants is permitted;
  - (4) No food or beverages are sold or consumed on the premises;
  - (5) Venues comply with the following capacity limits:
    - (A) For venues with fixed seating, occupancy must not exceed 20% of the limits established by the State Fire Marshal or a local fire marshal;
    - (B) For venues with non-fixed seating, occupancy is limited to 20 persons per 1,000 square feet, including within any distinct space within the venue;
    - (C) For all venues, no more than 100 persons may be gathered within any distinct space within the venue, except at stadiums and arenas hosting sporting events as provided in section 6, in which case up to 250 persons may be gathered.
- (b) Gatherings are permitted at food service establishments under the following conditions:
- (1) Persons are not gathered indoors except in custodial settings, medical facilities, school and university cafeterias, shelters, and soup kitchens. If attendees are seated at tables, persons must be 6 feet apart, or members of a household may share a table and tables must be spaced a minimum of 6 feet apart;

- (2) Persons participating in outdoor dining are seated no more than 6 to a table and tables are spaced a minimum of 6 feet apart;
  - (c) Nothing in this section shall be construed to prohibit the use of these facilities for public health or other emergency purposes.
- 4. **Gathering restrictions for other facilities.** In addition to the gathering limitations set forth elsewhere in this order, the following limitations apply to gatherings in the following facilities:
  - (a) A gathering at a retail store, library, or museum must not exceed 30% of total occupancy limits established by the State Fire Marshal or a local fire marshal. Nevertheless, a retail store, library, or museum may permit one customer at a time to enter if strict adherence to the 30% total occupancy limit would otherwise result in closure. Spaces for indoor dining, including food courts, must be closed.
    - (1) Retail stores must establish lines to regulate entry and checkout, with markings for patrons to enable them to stand at least six feet apart from one another while waiting.
  - (b) At exercise facilities:
    - (1) Gatherings must not exceed 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal; and
    - (2) There must be at least 6 feet of distance between each occupied workout station and physical layout of the space must be established such that exercisers can move between stations while maintaining 6 feet of distance from others at all times;
    - (3) Gatherings for group fitness activities or classes are permitted, provided that all persons maintain at least 6 feet of distance from others at all times and wear a face mask at all times.
  - (c) Gatherings in waiting rooms at outpatient health-care facilities, veterinary clinics, and other businesses are prohibited unless the facility implements a system to ensure that persons not of the same household maintain 6 feet of distance. To the extent possible, this system must include a policy that patients wait in their cars for their appointments to be called.
  - (d) Gatherings at an indoor or outdoor pool not otherwise prohibited by this order must not exceed 25% of bather capacity limits described in Rule 325.2193 of the Michigan Administrative Code.
  - (e) Gatherings at ice and roller rinks are permitted, except for organized contact sports, provided that occupancy is limited to 4 persons per 1,000 square feet, including within the exercise space. Gatherings for the purpose of non-contact sports and open skating are permitted.
  - (f) In facilities offering non-essential personal care services, including hair, nail, tanning, massage, traditional spa, tattoo, body art, and piercing services, and similar personal care services, gatherings are only permitted to the extent that services do not involve the removal of face masks. All services must be provided by appointment, and gatherings in waiting areas are prohibited.



**5. Schools, colleges, technical schools, and universities.**

- (a) Gatherings at public, nonpublic, and boarding schools for the purpose of conducting in-person instruction of pupils in prekindergarten through grade 12 are permitted, subject to local health department and school district decisions on remote learning. Gatherings are permitted for the purpose of extracurricular activities except those that involve physical contact among participants, or where masks cannot be worn.
- (b) Gatherings at public, nonpublic, and boarding schools are permitted for the purpose of child care programs, tutoring and academic support, and for providing services to students in need, including food distribution, access to internet connectivity, and physical and mental health care services.
- (c) Gatherings at colleges and universities, trade schools, and career schools are permitted for the purpose of holding in-person classes and other events sponsored by the educational institution. The limits imposed by section 2(a) and 2(b) do not apply to such gatherings, but they remain subject to all other applicable requirements of this order.

**6. Organized sports gathering restrictions.**

- (a) Gatherings for the purpose of contact organized sports are prohibited unless all participants, teams, and venues comply with the enhanced testing regimen specified in the Testing and Additional Mitigation Measures for Athletic Practice and Play During Statewide Athletics 'Pause' section of MDHHS's document entitled [Interim Guidance for Athletics](#), or a school is participating in an MDHHS testing pilot program. Sports organizers complying with this section may host gatherings for the purpose of practice and competition notwithstanding the gathering prohibitions in section 2.
- (b) Gatherings for the purpose of non-contact sports are permitted, provided that:
  - (1) Gatherings do not exceed 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal; and
  - (2) Participants maintain 6 feet of distance from each other at all times.

**7. Face mask requirement at gatherings.**

- (a) All persons participating in gatherings are required to wear a face mask.
- (b) As a condition of gathering for the purpose of transportation, transportation providers must require all staff and patrons to use face masks, and must enforce physical distancing among all patrons to the extent feasible.
- (c) Except as provided elsewhere in this order, a person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, must prohibit gatherings of any kind unless the person requires individuals in such gatherings (including employees) to wear a face mask, and denies entry or service to all persons refusing to wear face masks while gathered.
- (d) A person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, may not assume that someone who enters the facility without a face mask falls within one of the exceptions specified in section 8 of this order, including the exception for individuals who cannot medically tolerate a face mask. An individual's verbal representation that they are not wearing a face mask because they fall within a specified exception, however, may be accepted.



(e) A person responsible for a child-care organization or camp, or an agent of such person, must not allow gatherings unless face masks are worn by all staff. Children must wear face masks as indicated below:

(1) All children 2 years and older when on a school bus or other transportation provided by the child-care organization or camp;

(2) All children 4 years and older when in indoor hallways and indoor common areas;

(3) All children 5 years and older when in classrooms, homes, cabins, or similar indoor settings.

(f) Participants in gatherings for any exercise activities, group fitness, or organized sports must comply with face mask requirements listed in the [Interim Guidance for Athletics](#).

8. **Exceptions to face mask requirements.** Although a face mask is strongly encouraged even for individuals not required to wear one (except for children under the age of 2), the requirement to wear a face mask in gatherings as required by this order does not apply to individuals who:

(a) Are younger than 5 years old, outside of child-care organization setting (which are subject to requirements set out in section 7(e));

(b) Cannot medically tolerate a face mask;

(c) Are eating or drinking while seated at a food service establishment or at a private residence;

(d) Are exercising outdoors and able to consistently maintain 6 feet of distance from others;

(e) Are swimming;

(f) Are receiving a medical service for which removal of the face mask is necessary;

(g) Are asked to temporarily remove a face mask for identification purposes;

(h) Are communicating with someone who is deaf, deafblind, or hard of hearing and whose ability to see the mouth is essential to communication;

(i) Are actively engaged in a public safety role, including but not limited to law enforcement, firefighters, or emergency medical personnel, and where wearing a face mask would seriously interfere in the performance of their public safety responsibilities;

(j) Are engaging in a religious service; or

(k) Are giving a speech for broadcast or to an audience, provided that the audience is at least 12 feet away from the speaker.

9. **Contact tracing requirements for particular gatherings.**

(a) Gatherings are prohibited at the following facilities unless the facility maintains accurate records, including date and time of entry, names of patrons, and contact information, to aid with contact tracing, and denies entry for a gathering to any visitor who does not provide, at a minimum, their name and phone number:

- (1) All businesses or operations that provide barbering, cosmetology services, body art services (including tattooing and body piercing), tanning services, massage services, or similar personal care services;
  - (2) Exercise facilities.
- (b) All businesses or operations that provide in-home services, including cleaners, repair persons, painters, and the like must not permit their employees to gather with clients unless the business maintains accurate appointment records, including date and time of service, name of client, and contact information, to aid with contact tracing.
- (c) Upon request, businesses, schools, and other facilities must provide names and phone numbers of individuals with possible COVID-19 exposure to MDHHS and local health departments to aid in contact tracing and case investigation efforts.
- (d) Data collected under this section:
  - (1) Must not be sold, or used for sales or marketing purposes without the express consent of each patron;
  - (2) Must be protected as confidential information to the fullest extent of the law;
  - (3) Must not be provided to law enforcement or immigration officials except upon receipt of a lawful subpoena from a court or other lawful court order;
  - (4) Must be retained for 28 days by the collecting organization, after which time the data must be destroyed. If facilities use existing data to fulfill this requirement, they may instead follow their own pre-existing data retention and destruction policies at the conclusion of the 28-day retention period.

## **10. 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 the Michigan Commission on Law Enforcement Standards Act, 1965 Public Act 203, 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) Neither a place of religious worship nor its owner is subject to penalty under this order for allowing religious worship at such place. No individual is subject to penalty under this order for engaging in religious worship at a place of religious worship.
- (e) Consistent with MCL 333.2261, 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.
- (f) Nothing in this order affects any prosecution or civil citation based on conduct that occurred before the effective date of this order.

- (g) Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority, or protections guaranteed by the state or federal constitution under these emergency circumstances.
- (h) Consistent with any rule or emergency rule promulgated and adopted in a schedule of monetary civil penalties under MCL 333.2262(1) and applicable to this order, violations of this order are also punishable by a civil fine of up to \$1,000 for each violation or day that a violation continues.
- (i) If any provision of this order is found invalid by a court of competent jurisdiction, whether in whole or in part, such decision will not affect the validity of the remaining part of this order.
- (j) It is not a violation of this order for a person to enter a facility otherwise closed for gatherings if they are entering solely for the purpose of using restroom facilities.

This order takes effect on January 16, 2021, at 12:01 AM, at which time the December 18, 2020, order entitled Gatherings and Face Mask Order is rescinded. This order remains in effect through January 31, 2021, at 11:59 PM. Persons with suggestions and concerns are invited to submit their comments via email to [COVID19@michigan.gov](mailto:COVID19@michigan.gov).

Date: January 13, 2021



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Robert Gordon, Director

Michigan Department of Health and Human Services

# Exhibit 5



STATE OF MICHIGAN

GRETCHEN WHITMER  
GOVERNOR

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
LANSING

ROBERT GORDON  
DIRECTOR

**January 22, 2021**

**Emergency Order under MCL 333.2253 – Gatherings and Face Mask 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).

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. COVID-19 spreads through close human contact, 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 limitations on gatherings and the establishment of procedures to control the spread of COVID-19. This includes limiting the number, location, size, and type of gatherings, and requiring the use of mitigation measures at gatherings as a condition of hosting such gatherings.

On March 10, 2020, MDHHS identified the first two presumptive-positive cases of COVID-19 in Michigan. As of January 20, 2021, Michigan had seen 542,146 confirmed cases and 13,905 confirmed deaths attributable to COVID-19. Michigan was one of the states most heavily impacted by COVID-19 early in the pandemic, with new cases peaking at nearly 2,000 per day in late March. Strict preventative measures and the cooperation of Michiganders drove daily case numbers dramatically down to fewer than 200 confirmed cases per day in mid-June, greatly reducing the loss of life. Beginning in October, Michigan again experienced an exponential growth in cases. New cases peaked at over 10,000 cases per day in mid-November, followed by increases in COVID-19 hospitalizations and deaths.

On November 15, 2020, MDHHS issued an order enacting protections to slow the high and rapidly increasing rate of spread of COVID-19. Cases, hospitalizations, and deaths remained high through early December, threatening hospital and public health capacity. On December 7, 2020, December 18, 2020, and January 13, 2021, MDHHS issued orders sustaining those protections. These orders played a crucial role in slowing the spread in Michigan and have brought new cases down to about 2,500 per day. These lower rates prevented Michigan's healthcare system from being overwhelmed with a holiday surge.

The State of Michigan presently has a seven-day average of 224.6 cases per million people, which is three times higher than on October 1, but nearly 70% lower than the case rate in mid-November. Test positivity was 6.7% as of January 20, two times higher than the positivity rate in early October. While metrics have decreased from all-time highs, there remains a high rate of spread throughout the state. A high number of cases creates significant pressure on our emergency and hospital systems. An average of 250 daily hospital admissions was seen in Michigan in the last week, with individuals under the age of 60 accounting for a third of all new admissions. There are over 2,000 Michiganders currently hospitalized for COVID-19 and 10% of all available inpatient beds are occupied by patients who have COVID-19. The state death rate is 6.1 deaths per million people and there are more than 400 weekly deaths in Michigan attributable to COVID-19. This is a 55% decrease from the second peak, which reached 13.7 deaths per million on December 10, 2020.

Since December 11, 2020, the Food and Drug Administration has granted emergency use authorization to two vaccines to prevent COVID-19, providing a path to end the pandemic. Michigan is now partaking in the largest mass vaccination effort in modern history and is presently working toward vaccinating at least 70% of Michigan's most high-risk residents as quickly as possible.

Despite making significant strides in controlling the virus since early November, there is much uncertainty. New and unexpected challenges continue to arise: in early December 2020, a variant of COVID-19 known as B.1.1.7 was detected in the United Kingdom. This variant is roughly 50 to 70 percent more infectious than the more common strain. On January 16, 2021, this variant was detected in Michigan. It is anticipated that the variant, if it becomes widespread in the state, will significantly increase the rate of new cases. Therefore, as lower COVID-19 rates permit easing of precautions, we must continue to proceed slowly and carefully, with tight monitoring of cases and impacts, alongside efforts to increase the rate of vaccination.

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 have also, subject to the grant of authority in 2020 PA 238 (signed into law on October 22, 2020), herein defined the symptoms of COVID-19 based on the latest epidemiological evidence. I further conclude that control of the epidemic is necessary to protect the public health and that it is necessary to restrict gatherings and 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.

I therefore order that:

**1. Definitions.**

- (a) "Child-care organization" means that term as defined by section 1(b) of the Child Care Organizations Act, 1973 PA 116, as amended, MCL 722.111(b)).
- (b) "Camp" means a day, residential, travel, and troop camps for children (as defined by Rule 400.11101(1)(q) of the Michigan Administrative Code).
- (c) "Employee" means that term as defined in section 2 of the Improved Workforce Opportunity Wage Act, 2018 PA 337, as amended, MCL 408.932, and also includes independent contractors.

- (d) “Entertainment and recreational facility” includes: auditoriums; arenas; cinemas; concert halls; performance venues; sporting venues; stadiums; theaters; night clubs; strip clubs; water parks; archery ranges; amusement parks; arcades; bingo halls; bowling centers; casinos; gun ranges; laser tag; trampoline parks; and the like.
- (e) “Exercise facility” means a location in which individuals participate in individual or group physical activity, including gymnasiums, fitness centers, and exercise studios.
- (f) “Face mask” means a tightly woven cloth or other multi-layer absorbent material that closely covers an individual’s mouth and nose.
- (g) “Food service establishment” means that term as defined in section 1107(t) of the Food Law, 2000 PA 92, as amended, MCL 289.1107(t).
- (h) “Gathering” means any occurrence, either indoor or outdoor, where two or more persons from more than one household are present in a shared space.
- (i) “Household” means a group of persons living together in a shared dwelling with common kitchen or bathroom facilities. In dwellings with shared kitchen or bathroom facilities occupied by 20 or more unrelated persons, households are defined by individuals who share a bedroom.
- (j) “Indoors” means within a space that is fully or partially enclosed on the top, and fully or partially enclosed on two or more contiguous sides. Additionally, in a space that is fully or partially enclosed on the top, and fully or partially enclosed on two non-contiguous sides, any part of that space that is more than 8 feet from an open side is indoors.
- (k) “Outdoors” means a space that is not indoors.
- (l) “Organized sports” means competitive athletic activity requiring skill or physical prowess and organized by a sports organizer.
- (m) “Principal symptoms of COVID-19” means at least 1 of fever, uncontrolled cough, or atypical new onset of shortness of breath, or at least 2 of the following not explained by a known physical condition: loss of taste or smell, muscle aches, sore throat, severe headache, diarrhea, vomiting, or abdominal pain. Per section 1(j) of 2020 PA 339, this definition represents the latest medical guidance, and serves as the controlling definition.
- (n) “Sports Organizer” means an institution, association, or other organization that sets and enforces rules to ensure the physical health and safety of all participants for an organized sport.

## **2. General capacity limitations at gatherings.**

### **(a) Indoor gatherings:**

- (1) Are prohibited at residential venues, except where no more than 10 persons from no more than 2 households are gathered. Such gatherings should be held consistent with guidance issued by the Department of Health and Human Services for such gatherings; and
- (2) Are prohibited at non-residential venues, except where no more than 10 persons from no more than 2 households are gathered.

(b) Outdoor gatherings are permitted only as follows:

- (1) At residential venues, 25 or fewer persons are gathered, comprised of no more than 3 households;
- (2) At non-residential venues:
  - (A) 25 or fewer persons are gathered at a venue without fixed seating, and attendance is limited to 20 persons per 1,000 square feet, including within any distinct area within the event space; or
  - (B) 25 or fewer persons are gathered at a venue with fixed seating, and attendance is limited to 20% of seating capacity of the venue.

(c) The limitations to gatherings in sections 2(a) and 2(b) do not apply to:

- (1) Incidental, temporary gatherings of persons in a shared space, such as frequently occur in an airport, bus station, exercise facility, food service establishment, shopping mall, or public pool, except as prohibited in section 3;
- (2) Gatherings between an employee and a customer for the purpose of receiving services;
- (3) Workplace gatherings that occur consistent with the Emergency Rules issued by MIOSHA on October 14, 2020;
- (4) Voting or official election-related activities;
- (5) Training of law enforcement, correctional, medical, or first responder personnel, insofar as those activities cannot be conducted remotely;
- (6) Education and support services at public, nonpublic, and boarding schools serving students in prekindergarten through grade 12;
- (7) Children in a child-care organization, after school program, or camp setting;
- (8) Persons traveling on a school bus or other public transit;
- (9) Gatherings for the purpose of medical treatment, including mental health and substance use disorder support services;
- (10) Gatherings of up to 25 persons for the purpose of a funeral;
- (11) Residential care facilities, which are subject to the October 21 epidemic order entitled “Requirements for Residential Facilities,” or any replacement of that order;
- (12) Cardiopulmonary resuscitation courses and swimming instruction courses;
- (13) Proctored, nationally-administered admissions and certification examinations that are not available remotely, provided that examinees are spaced no less than 12 feet apart;
- (14) Gatherings at entertainment and recreational facilities that comply with the restrictions set forth in sections 3(a) of this order;



(15) Gatherings for the purposes of indoor group fitness, exercise, or non-contact sports that comply with the restrictions set forth in sections 4(b) and 6(b) of this order;

(16) Gatherings for public health or other emergency purposes.

(d) As a condition of hosting a gathering under this order, organizers and facilities must design the gathering to encourage and maintain physical distancing, and must ensure that persons not part of the same household maintain 6 feet of distance from one another to the extent possible.

**3. Gathering restrictions for entertainment facilities, recreational facilities, and food service establishments.**

(a) Gatherings are prohibited at entertainment facilities and recreational facilities unless:

(1) Venues and activities held at those venues comply with masking and distancing requirements in this subsection. Venues that cannot consistently adhere to these requirements (e.g., water parks, dance floors at a nightclub, or children's indoor playgrounds in-as-much as staff are not present to prevent physical contact) may not be open.

(A) Patrons remain masked at all times, except when eating or drinking in designated areas;

(B) Groups of patrons participating in activities together (such as those seated together at a concert or movie, or bowling in the same lane) do not exceed 10 persons from up to two households;

(C) Patrons are prevented from mingling with or engaging in physical contact with persons outside their group;

(2) If participating in stationary activities, groups are spaced or seated at least 6 feet apart. If participating in non-stationary activities, groups maintain a consistent 6 feet of distance from other groups at all times;

(3) Consumption of food or beverages is permitted only where patrons are seated, groups of patrons are separated by at least six feet, no more than 6 patrons are seated at a table, and groups of patrons do not intermingle;

(4) Venues that are also food service establishments must, as a condition of offering food or beverages, ensure their designated dining areas comply with all requirements in subsection (b);

(5) Venues abide by the following density limitations:

(A) For venues with fixed seating, occupancy must not exceed 20% of the limits established by the State Fire Marshal or a local fire marshal;

(B) For venues with non-fixed seating, occupancy is limited to 20 persons per 1,000 square feet, including within any distinct space within the venue;

(6) Venues abide by the following maximum capacity limitations:

(A) At stadiums and arenas hosting sporting events as provided in section 6, up to 250 patrons may be gathered at venues with a seating capacity under 10,000, and up to 500 patrons may be gathered at venues with a seating capacity of over 10,000. This provision is effective immediately, replacing section 3(a)(5)(C) of the January 13, 2021 order, entitled Gatherings and Face Mask Order;

(B) For all other entertainment and recreation facilities, no more than 100 patrons may be gathered within any distinct space within the venue.

(b) Gatherings are prohibited at food service establishments unless:

(1) Consumption of food or beverages is permitted only in a designated dining area where patrons are seated, groups of patrons are separated by at least six feet, no more than 6 patrons are seated together (at a table, booth, or group of fixed seats), and groups of patrons do not intermingle;

(2) Patrons are not permitted to gather in common areas in which people can congregate, dance, or otherwise mingle;

(3) In the event that an employee of a food service establishment is confirmed positive for COVID-19 or shows symptoms of COVID-19 while at work, a gathering at that food service establishment is prohibited until the food service establishment has been deep cleaned consistent with Food and Drug Administration and CDC guidance;

(4) At establishments offering indoor dining:

(A) The number of patrons indoors (or a designated dining area of a multi-purpose venue) does not exceed 25% of normal seating capacity, or 100 persons, whichever is less;

(B) Food service establishments, or the food service establishment portion of a multi-purpose venue, must close indoor dining between the hours of 10:00 PM and 4:00 AM;

(C) The venue displays, in a prominent location, the MDHHS “Dining During COVID-19” brochure.

4. **Gathering restrictions for other facilities.** In addition to the gathering limitations set forth elsewhere in this order, the following limitations apply to gatherings in the following facilities:

(a) A gathering at a retail store, library, or museum must not exceed 30% of total occupancy limits established by the State Fire Marshal or a local fire marshal. Nevertheless, a retail store, library, or museum may permit one customer at a time to enter if strict adherence to the 30% total occupancy limit would otherwise result in closure. Spaces for indoor dining, including food courts, must comply with the requirements for food service establishments as set forth in section 3(b).

(1) Retail stores must establish lines to regulate entry and checkout, with markings for patrons to enable them to stand at least six feet apart from one another while waiting.

(b) At exercise facilities:

- (1) Gatherings must not exceed 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal;
  - (2) There must be at least 6 feet of distance between each occupied workout station and physical layout of the space must be established such that exercisers can move between stations while maintaining 6 feet of distance from others at all times; and
  - (3) Gatherings for group fitness activities or classes are permitted, provided that all persons maintain at least 6 feet of distance from others at all times and wear a face mask at all times.
- (c) Gatherings in waiting rooms at outpatient health-care facilities, veterinary clinics, and other businesses are prohibited unless the facility implements a system to ensure that persons not of the same household maintain 6 feet of distance. To the extent possible, this system must include a policy that patients wait in their cars for their appointments to be called.
- (d) Gatherings at an indoor or outdoor pool not otherwise prohibited by this order must not exceed 25% of bather capacity limits described in Rule 325.2193 of the Michigan Administrative Code.
- (e) Gatherings at ice and roller rinks are permitted, provided that occupancy is limited to 4 persons per 1,000 square feet, including within the exercise space. Gatherings for the purpose of non-contact sports and open skating are permitted. Gatherings for the purpose of contact sports are prohibited except for activities permitted under section 6(a).
- (f) In facilities offering non-essential personal care services, including hair, nail, tanning, massage, traditional spa, tattoo, body art, piercing services, and similar personal care services, all services must be provided by appointment, and gatherings in waiting areas are prohibited.

**5. Schools, colleges, technical schools, and universities.**

- (a) Gatherings at public, nonpublic, and boarding schools for the purpose of conducting in-person instruction of pupils in prekindergarten through grade 12 are permitted, subject to local health department and school district decisions on remote learning. Gatherings are permitted for the purpose of extracurricular activities except those that involve physical contact among participants, or where masks cannot be worn.
- (b) Gatherings at public, nonpublic, and boarding schools are permitted for the purpose of child-care programs, tutoring and academic support, and for providing services to students in need, including food distribution, access to internet connectivity, and physical and mental health care services.
- (c) Gatherings at colleges and universities, trade schools, and career schools are permitted for the purpose of holding in-person classes and other events sponsored by the educational institution. The limits imposed by section 2(a) and 2(b) do not apply to such gatherings, but they remain subject to all other applicable requirements of this order.

## **6. Organized sports gathering restrictions.**

- (a) Gatherings for the purpose of contact sports are prohibited unless all participants, teams, and venues comply with the enhanced testing regimen specified in the Testing and Additional Mitigation Measures for Athletic Practice and Play During Statewide Athletics 'Pause' section of MDHHS's document entitled [Interim Guidance for Athletics](#), or a school is participating in an MDHHS testing pilot program. Sports organizers complying with this section may host gatherings for the purpose of practice and competition notwithstanding the gathering prohibitions in section 2.
- (b) Gatherings for the purpose of non-contact sports are permitted, provided that:
  - (1) Gatherings do not exceed 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal; and
  - (2) Participants maintain 6 feet of distance from each other at all times.

## **7. Face mask requirement at gatherings.**

- (a) All persons participating in gatherings are required to wear a face mask.
- (b) As a condition of gathering for the purpose of transportation, transportation providers must require all staff and patrons to use face masks, and must enforce physical distancing among all patrons to the extent feasible.
- (c) Except as provided elsewhere in this order, a person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, must prohibit gatherings of any kind unless the person requires individuals in such gatherings (including employees) to wear a face mask, and denies entry or service to all persons refusing to wear face masks while gathered.
- (d) A person responsible for a business, store, office, government office, school, organized event, or other operation, or an agent of such person, may not assume that someone who enters the facility without a face mask falls within one of the exceptions specified in section 8 of this order, including the exception for individuals who cannot medically tolerate a face mask. An individual's verbal representation that they are not wearing a face mask because they fall within a specified exception, however, may be accepted.
- (e) A person responsible for a child-care organization or camp, or an agent of such person, must not allow gatherings unless face masks are worn by all staff. Children must wear face masks as indicated below:
  - (1) All children 2 years and older when on a school bus or other transportation provided by the child-care organization or camp;
  - (2) All children 4 years and older when in indoor hallways and indoor common areas;
  - (3) All children 5 years and older when in classrooms, homes, cabins, or similar indoor settings.
- (f) Participants in gatherings for any exercise activities, group fitness, or organized sports must comply with face mask requirements listed in the [Interim Guidance for Athletics](#).

8. **Exceptions to face mask requirements.** Although a face mask is strongly encouraged even for individuals not required to wear one (except for children under the age of 2), the requirement to wear a face mask in gatherings as required by this order does not apply to individuals who:
- (a) Are younger than 5 years old, outside of a child-care organization or camp setting (which are subject to requirements set out in section 7(e));
  - (b) Cannot medically tolerate a face mask;
  - (c) Are eating or drinking while seated at a food service establishment or at a private residence;
  - (d) Are exercising outdoors and able to consistently maintain 6 feet of distance from others;
  - (e) Are swimming;
  - (f) Are receiving a medical or personal care service for which removal of the face mask is necessary;
  - (g) Are asked to temporarily remove a face mask for identification purposes;
  - (h) Are communicating with someone who is deaf, deafblind, or hard of hearing and whose ability to see the mouth is essential to communication;
  - (i) Are actively engaged in a public safety role, including but not limited to law enforcement, firefighters, or emergency medical personnel, and where wearing a face mask would seriously interfere in the performance of their public safety responsibilities;
  - (j) Are engaging in a religious service; or
  - (k) Are giving a speech for broadcast or to an audience, provided that the audience is at least 12 feet away from the speaker.
9. **Contact tracing requirements for particular gatherings.**
- (a) Gatherings are prohibited at the following facilities unless the facility maintains accurate records, including date and time of entry, names of patrons, and contact information, to aid with contact tracing, and denies entry for a gathering to any visitor who does not provide, at a minimum, their name and phone number:
    - (1) All businesses or operations that provide hair, nail, tanning, massage, traditional spa, tattoo, body art, piercing services, or similar personal care services;
    - (2) Exercise facilities.
  - (b) All businesses or operations that provide in-home services, including cleaners, repair persons, painters, and the like must not permit their employees to gather with clients unless the business maintains accurate appointment records, including date and time of service, name of client, and contact information, to aid with contact tracing.
  - (c) All dine-in food service establishments must maintain accurate records of the names and phone numbers of patrons who purchase food for consumption on the premises, and the date and time of entry.

- (d) Upon request, businesses, schools, and other facilities must provide names and phone numbers of individuals with possible COVID-19 exposure to MDHHS and local health departments to aid in contact tracing and case investigation efforts.
- (e) Data collected under this section:
  - (1) Must not be sold, or used for sales or marketing purposes without the express consent of each patron;
  - (2) Must be protected as confidential information to the fullest extent of the law;
  - (3) Must not be provided to law enforcement or immigration officials except upon receipt of a lawful subpoena from a court or other lawful court order;
  - (4) Must be retained for 28 days by the collecting organization, after which time the data must be destroyed. If facilities use existing data to fulfill this requirement, they may instead follow their own pre-existing data retention and destruction policies at the conclusion of the 28-day retention period.

## **10. 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 the Michigan Commission on Law Enforcement Standards Act, 1965 Public Act 203, 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) Neither a place of religious worship nor its owner is subject to penalty under this order for allowing religious worship at such place. No individual is subject to penalty under this order for engaging in religious worship at a place of religious worship.
- (e) Consistent with MCL 333.2261, 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.
- (f) Nothing in this order affects any prosecution or civil citation based on conduct that occurred before the effective date of this order.
- (g) Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority, or protections guaranteed by the state or federal constitution under these emergency circumstances.
- (h) Consistent with any rule or emergency rule promulgated and adopted in a schedule of monetary civil penalties under MCL 333.2262(1) and applicable to this order, violations of this order are also punishable by a civil fine of up to \$1,000 for each violation or day that a violation continues.

- (i) If any provision of this order is found invalid by a court of competent jurisdiction, whether in whole or in part, such decision will not affect the validity of the remaining part of this order.
- (j) It is not a violation of this order for a person to enter a facility otherwise closed for gatherings if they are entering solely for the purpose of using restroom facilities.

Except as otherwise provided herein, this order takes effect on February 1, 2021, at 12:01 AM, at which time the January 13, 2021, order entitled Gatherings and Face Mask Order is rescinded. This order remains in effect through February 21, 2021, at 11:59 PM. Persons with suggestions and concerns are invited to submit their comments via email to [COVID19@michigan.gov](mailto:COVID19@michigan.gov).

Date: January 22, 2021



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Robert Gordon, Director  
Michigan Department of Health and Human Services

# Exhibit 6



**HEALTH DEPARTMENT OF NORTHWEST MICHIGAN**

In the matter of:  
The Iron Pig Smokehouse

**ORDER TO CEASE AND DESIST FOOD SERVICE OPERATIONS**

**THE IRON PIG SMOKEHOUSE (SFE0569217771)  
AT 143 WEST MAIN STREET, GAYLORD, MI 49735**

Matters of concern to the health of Otsego County citizens have been brought to the attention of the Administrative Health Officer of the Health Department of Northwest Michigan, and the Administrative Health Officer having made the following determinations, issues this Order pursuant to the Michigan Public Health Code, MCL 333.2451 and 333.2453, as well as the applicable November 15, 2020 Emergency (Pandemic) Order issued by the Michigan Department of Health and Human Services (MDHHS) and the Food Law (Act 99 of 2000, as amended) referenced in the findings:

1. The Iron Pig Smokehouse remains open to the public for in-person dining and allowing gatherings of persons not of the same household.

Allowing these activities violate the following sections of the MDHHS November 15, 2020 Emergency Order:

1. Section 2(a)(2), which restricts indoor gatherings and mandates that indoor gatherings are "prohibited at non-residential venues".

**Now, therefore,** it is hereby Ordered that:

- A) The Iron Pig Smokehouse, its owner(s), employees and agents shall immediately cease all operations facilities located at 143 West Main Street, Gaylord, MI 49735.
- B) The businesses and persons identified in this Order shall comply with the Michigan Public Health Code.
- C) The businesses and persons identified in this Order shall comply with the Michigan Department of Health and Human Services (MDHHS) November 15, 2020 Emergency Order.
- D) Copies of this Order shall be served upon the businesses and persons identified in this Order.
- E) Copies of this Order shall be posted on all entrance doors of the Iron Pig Smokehouse at 143 West Main Street, Gaylord, MI 49735 and shall remain posted and not be removed or obstructed in any way that would prevent public notice of this Order.
- F) Upon failure to promptly comply with this Order, the Health Department of Northwest Michigan may enforce this Order or seek enforcement of this Order as authorized by law, which includes, but is not limited to referring this matter to the Michigan Department of Agriculture and Rural Development (MDARD), Michigan Department of Labor and Economic Opportunity, Michigan

- Occupational Safety and Health Administration (MIOSHA) and Liquor Control Commission to commence proceedings revoking licenses including the applicable Food Establishment License.
- G) Upon failure to promptly comply with this Order and as authorized by law, the Health Department of Northwest Michigan Corporate Counsel will take actions to revoke any food licenses under Section 289.2113 of the Michigan Food Law (Act 99 of 2000, as amended) and may seek enforcement assistance from the Michigan Attorney Generals office and/or commence legal proceedings in Circuit or District Court to compel compliance with this Order and the Public Health Code.



Lisa Peacock  
Administrative Health Officer  
Health Department of Northwest Michigan

# Exhibit 7



GRETCHEN WHITMER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF AGRICULTURE  
AND RURAL DEVELOPMENT

GARY MCDOWELL  
DIRECTOR

December 2, 2020

**ORDER TO CEASE AND DESIST FOOD OPERATIONS**

The Director of the Michigan Department of Agriculture and Rural Development (MDARD), pursuant to a finding of IMMINENT DANGER TO THE PUBLIC HEALTH by the Health Department of Northwest Michigan, has determined that continued operation of **The Iron Pig Smokehouse** (License No. SFE0569217771), an MDARD licensed food service establishment, constitutes an IMMINENT and SUBSTANTIAL DANGER TO THE PUBLIC HEALTH.

This food service establishment operates under a food service license issued by MDARD and referred for approval by the delegated authority of the Health Department of Northwest Michigan.

Section 2113 of the Food Law provides that the Director may order the immediate cessation of operation of a food establishment upon a determination that continued operation would create an imminent or substantial hazard to the public health.

Upon review of the Health Department of Northwest Michigan finding of IMMINENT DANGER TO THE PUBLIC HEALTH AND REQUIRING CORRECTIVE ACTION issued on November 25, 2020, the MDARD Director has made the following findings:

1. The Iron Pig Smokehouse is open to the public and allowing inside dining with no restrictions.
2. The Iron Pig Smokehouse is openly advertising that they are open for inside dining.
3. The Health Department of Northwest Michigan has determined that The Iron Pig Smokehouse activity poses an imminent danger to the public health.

Based on the evidence provided by the Health Department of Northwest Michigan and pursuant to the Director's authority under MCL 289.2113(1), the MDARD Director has determined that the continued operation of this food establishment creates an IMMINENT AND SUBSTANTIAL DANGER TO THE PUBLIC HEALTH.

Therefore, The Iron Pig Smokehouse is hereby ORDERED TO IMMEDIATELY CEASE AND DESIST ALL FOOD OPERATIONS.

This order is effective immediately and remains in effect until such time as an evaluation demonstrates the conditions have been abated.

Failure to comply with this Order is a violation of the Food Law. Pursuant to MCL 289.2113(3), The Iron Pig Smokehouse may request an administrative hearing regarding MDARD's issuance of this Order. To request an administrative hearing, contact Brad Deacon, Director of Legal Affairs and Emergency Management at 517-284-5729 or [deaconb9@michigan.gov](mailto:deaconb9@michigan.gov) by December 9, 2020.

Gary McDowell, Director  
Michigan Department of Agriculture and Rural Development

# Exhibit 8

STATE OF MICHIGAN  
MICHIGAN DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT

IN THE MATTER OF:

Moore Murphy Hospitality, LLC  
d/b/a Iron Pig Smoke House  
143 W. Main Street  
Gaylord, Michigan 49735

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CASE TYPE: REVOCATION

**EMERGENCY SUMMARY SUSPENSION ORDER PURSUANT TO MCL  
289.4125 AND MCL 24.292(2) AND NOTICE OF HEARING**

**GENERAL ALLEGATIONS**

1. The food establishment license issued to Moore Murphy Hospitality, LLC, d/b/a Iron Pig Smoke House (Iron Pig) to operate a food service establishment at 143 West Main Street in Gaylord, Michigan, is summarily suspended. This summary suspension proceeding is undertaken pursuant to the Michigan Department of Agriculture and Rural Development's (MDARD's) authority under Section 4125 of the Michigan Food Law, MCL 289.1101 *et seq.*, and in accordance with the Administrative Procedures Act, MCL 24.201 *et seq.*

**BACKGROUND**

2. The Iron Pig operates a food service establishment located at 143 West Main Street in Gaylord, Michigan. The Iron Pig's food establishment license is issued by MDARD.

3. Pursuant to the Food Law, if the MDARD Director determines that an imminent threat to the public health, safety, or welfare exists, the MDARD Director may summarily suspend a food establishment license.

4. Additionally, the Administrative Procedures Act, provides that if an agency concludes that the health, safety, or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license may be ordered effective on the date specified in the order or on service of a certified copy of the order on the licensee, whichever is later. See MCL 24.292(2).

### **Michigan's efforts to curb Covid-19**

5. On March 10, 2020, Governor Whitmer issued Executive Order 2020-4 declaring a state of emergency due to the breakout of COVID-19 in the State of Michigan. COVID-19 is a respiratory disease that can result in serious illness or death. COVID-19 is caused by a new strain of coronavirus not previously identified in humans and it easily spreads between persons. To date, there have been over 458,800 confirmed cases of COVID-19 in the State of Michigan, resulting in over 11,400 deaths.

6. The Public Health Code gives the Michigan Department of Health and Human Services (MDHHS) "general supervision of the interests of health and life of people of this state," MCL 333.2221(2), and requires it to "endeavor to prevent disease, prolong life, and promote the public health," MCL 333.2221(1). 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). Further, MDHHS is authorized to issue emergency orders to address epidemics, pursuant to MCL 333.2253(1):

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.

7. On December 18, 2020, MDHHS issued its most recent Gatherings and Face Mask Order, which took effect on December 21, 2020, and remains in effect until January 15, 2021. See attached Ex. 1. The December 18, 2020 Order states that, “[t]he death rate is nine times higher than it was in early October, and there are more than 800 weekly deaths in Michigan.” The order concludes that “the COVID-19 pandemic continues to constitute an epidemic in Michigan” and “that it is necessary to restrict gatherings and establish procedures to be followed during the epidemic to ensure the continuation of essential public health services and enforcement of health laws.”

8. MDHHS’s order generally prohibits indoor gatherings at non-residential venues. See 12/18/2020 Gatherings and Face Mask Order, section 2(a)(2). A “gathering” is “any occurrence, either indoor or outdoor, where two or more persons from more than one household are present in a shared space.” *Id.* at section 1(g). Specifically, the order prohibits indoor gatherings at food service establishments except in “custodial settings, medical facilities, school and university cafeterias, shelters, and soup kitchens.” *Id.* at section 3(b)(1).

9. Further, subject to limited exceptions, “[a]ll persons participating in gatherings are required to wear a face mask.” *Id.* at section 7(a). “Except as provided elsewhere in [the] order, a person responsible for a business . . . must prohibit gatherings of any kind unless the person requires individuals in such gatherings (including employees) to wear a face mask[] and denies entry or service to all persons refusing to wear face masks while gathered.” *Id.* at section 7(c).

10. Violations of the Gatherings and Face Mask Order constitute misdemeanors and are punishable by up to six months imprisonment and certain fines. See *id.* at section 10(e), (h).

### **The Iron Pig’s operations in violation of MDHHS’s order**

11. Following MDHHS’s November 15 Gatherings and Face Mask Order prohibiting indoor dining, the Health Department of Northwest Michigan issued the Iron Pig an “Order to Cease Food Service Operations” (Health Department Order). The Health Department Order stated that the Iron Pig was open to the public for indoor dining.

12. The Health Department Order required that the Iron Pig cease operations and comply with the MDHHS Order and the Public Health Code.

13. In spite of the Health Department’s Order, the Iron Pig continued to offer indoor dining, did not require social distancing, and did not require employees and customers to wear facial coverings.

14. On December 2, 2020, the Liquor Control Commission summarily suspended the Iron Pig’s liquor license for allowing illegal activities on the licensed



premises—specifically permitting indoor dining in violation of the November 15 Gatherings and Face Mask Order.

15. Also on December 2, 2020, MDARD issued the Iron Pig an order to Cease and Desist Food Operations. MDARD's Cease and Desist Order was hand delivered to the Iron Pig by Chuck Edwards, Environmental Health Coordinator, Health Department of Northwest Michigan on the same date.

16. On December 11, 2020, an administrative hearing regarding the summary suspension of the Iron Pig's Liquor License was held. Following the hearing and based on the ALJ's factual findings that the Iron Pig was operating in violation of the MDHHS Gatherings and Face Mask Order and therefore in violation of the Michigan Liquor Control Commission Rules, the Iron Pig's liquor license was suspended for 90 days.

17. The Health Department of Northwest Michigan has continued to surveil and monitor the Iron Pig's operations. On multiple occasions since December 11, 2020, employees of the Health Department of Northwest Michigan have observed the Iron Pig offering indoor dining services.

18. The Iron Pig continues to openly violate the Health Department of Northwest Michigan's order and MDARD's Cease and Desist Order, and openly admits so on their Facebook page, including a post on December 25, 2020 specifically stating:

Thank you to all our wonderful friends & guests we've entertained over the last 30 days since we opened our Dining Room back up. It's because of your amazing support our families will have a Merry Christmas!

[<https://www.facebook.com/ironpigsmoke/>, accessed December 28, 2020.]

19. As of December 29, 2020, Otsego County, where the Iron Pig is located, has had 1,007 confirmed and probable cases of Covid-19 and 19 deaths from Covid-19.<sup>1</sup>

20. Between December 12, 2020, and December 21, 2020, Otsego County, where the Iron Pig is located, had 42 probable cases of Covid-19 and 2 deaths from Covid-19.<sup>2</sup> In other words, more than 4.2% of the total confirmed and probable Covid-19 cases in Otsego County since March occurred in the ten days between December 12 and 21, 2020.

### **SUMMARY SUSPENSION**

21. The Food Law provides that MDARD's Director can summarily suspend a food establishment license upon a determination that an imminent threat to the public health, safety, or welfare exists. MCL 289.4125(4).

22. MDARD's Director has determined that the Iron Pig's continued offering of indoor dining creates an imminent threat to the public health, safety, and welfare.

23. Additionally, consistent with the Administrative Procedures Act, MDARD finds that emergency action is required because the Iron Pig's current operations pose a significant risk to the community's health, safety, and welfare.

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<sup>1</sup> See [https://www.michigan.gov/coronavirus/0,9753,7-406-98163\\_98173---,00.html](https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html), accessed December 29, 2020.

<sup>2</sup> See *Id.*

24. For the foregoing reasons:

A. Effective immediately, the Iron Pig's food establishment license is summarily suspended;

B. MDARD's December 2, 2020 Cease and Desist Order is replaced with this summary suspension; and

C. The Michigan Office of Administrative Hearings and Rules will hold a hearing on MDARD's summary suspension of the Iron Pig's food establishment license on January 12, 2021, at 9:00 a.m. via Zoom.

A handwritten signature in blue ink that reads "Gary McDowell". The signature is written in a cursive, flowing style.

Gary McDowell, Director  
Michigan Department of Agriculture  
& Rural Development

Date: December 29, 2020

# Exhibit 9

**STATE OF MICHIGAN  
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

**IN THE MATTER OF:**

**Docket No.: 20-027914**

**Michigan Department of Agriculture and  
Rural Development,  
Petitioner**

**Case No.: N/A**

**Agency: Agriculture**

**v**

**Case Type: AG Food & Dairy**

**Moore Murphy Hospitality, L.L.C., d/b/a Iron  
Pig Smoke House,  
Respondent**

**Filing Type: Summary  
Suspension**

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**Issued and entered  
this 20<sup>th</sup> day of January 2021  
by: Eric J. Feldman  
Administrative Law Judge**

**DECISION AND ORDER CONTINUING SUMMARY SUSPENSION**

**PROCEDURAL HISTORY**

This matter commenced in accordance with the Administrative Procedures Act of 1969, 1969 PA 306, as amended (APA), Michigan Compiled Laws (MCL) 24.201 *et seq.*, and with the Michigan Food Law Act of 2000, 2000 PA 92, as amended (Food Law), MCL 289.1101, *et seq.*

On December 29, 2020, the Director of the Michigan Department of Agriculture and Rural Development (MDARD/Department), Petitioner, issued an Emergency Summary Suspension Order Pursuant to MCL 289.4125 and MCL 24.292(2) and Notice of Hearing (Emergency Suspension Order) to Moore Murphy Hospitality, L.L.C., d/b/a Iron Pig Smoke House, Respondent, alleging that its continued offering of indoor dining creates an imminent threat to the public health, safety, and welfare, pursuant to MCL 289.4125(4) of the Food Law.<sup>1</sup>

On December 29, 2020, the matter was forwarded to the Michigan Office of Administrative Hearings and Rules (MOAHR) to schedule a hearing.

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<sup>1</sup> Petitioner's December 2, 2020, Order to Cease and Desist Food Operations filed against Respondent was replaced with the December 29, 2020, Emergency Suspension Order.

On December 29, 2020, MOAHR issued a Notice of Videoconference Hearing, scheduling a videoconference hearing to convene on January 12, 2021. This matter was assigned to the undersigned Administrative Law Judge, Eric J. Feldman.

On December 30, 2020, MOAHR issued an Amended Notice of Videoconference Hearing scheduling a videoconference hearing to convene on January 12, 2021.

On January 4, 2021, the undersigned issued a Summary Suspension Hearing Scheduling Order.

On January 8, 2021, Assistant Attorney General (AAG) Eileen C. Whipple, filed a Notice of Appearance on behalf of Petitioner.

On January 8, 2021, Attorney David M. Delaney, P.L.C., on behalf of Respondent, filed a Notice of Appearance and Respondent's Request to Adjourn January 12, 2021 Summary Suspension Hearing. On January 11, 2021, Petitioner filed its Statement of Opposition to Respondent's Request to Adjourn January 12, 2021 Summary Suspension Hearing.

On January 12, 2021, Petitioner filed copies of its proposed exhibits.

On January 12, 2021, the videoconference hearing commenced, but did not conclude. On January 12, 2021, the undersigned issued an Order Continuing Hearing via videoconference for January 14, 2021.

On January 13, 2021, Petitioner filed its Witness and Exhibit Lists. On January 13, 2021, Respondent also filed a copy of its proposed exhibits.

On January 14, 2021, the videoconference hearing commenced and concluded. The undersigned presided. AAG Whipple appeared on behalf of Petitioner. James Padden, Food Safety and Inspection Program Manager with MDARD, was also present for Petitioner. Attorney Delaney appeared on behalf of Respondent. Ian Murphy, owner of the establishment, was also present for Respondent.

The record closed at the conclusion of the hearing.

**WITNESS LIST**

1. Chuck Edwards, Health Department of Northwest Michigan.
2. Scott Kendzierski, Health Department of Northwest Michigan.

3. Rodney Blanchard, MDARD.
4. Sgt. Stefan Crane, Gaylord City Police Department.
5. Officer Blake Huff, Gaylord City Police Department.
6. Theodore Orm, Michigan Liquor Control Commission.
7. Bradley Szatkowski, Michigan Liquor Control Commission.
8. Daniel Rademacher, Michigan Liquor Control Commission.
9. Nicole Spires, Health Department of Northwest Michigan.
10. Jay Krystyniak, MDARD.
11. Lisa Peacock, Health Department of Northwest Michigan.
12. Joshua Meyerson, M.D., Health Department of Northwest Michigan.
13. James Padden, MDARD.

**EXHIBIT LIST**

The following exhibits were offered on behalf of Petitioner and admitted into the record unless otherwise indicated:

1. Petitioner Exhibit 1 is a Michigan Department of Health and Human Services (MDHHS) Epidemic Order, dated November 15, 2020.
2. Petitioner Exhibit 2 is a MDHHS Epidemic Order, dated December 7, 2020.
3. Petitioner Exhibit 3 is a MDHHS Epidemic Order, dated December 18, 2020.
4. Petitioner Exhibit 4 is Petitioner's Complaints for Respondent.
5. Petitioner Exhibit 5 is a Health Department of Northwest Michigan Order to Cease and Desist Food Service Operations.
6. Petitioner Exhibit 6 is a Health Department of Northwest Michigan COVID-19 Otsego County Monthly Summary for November 2020.

7. Petitioner Exhibit 7 is a Health Department of Northwest Michigan Jurisdiction COVID-19 Monthly Summary for November 2020.
8. Petitioner Exhibit 8 is a Gaylord Police Department Case Report, dated November 25, 2020.
9. Petitioner Exhibit 9 is a Health Department of Northwest Michigan COVID-19 Data Dashboard as of January 8, 2021.
10. Petitioner Exhibit 10 is a Michigan Liquor Control Commission (MLCC) Complaint Violation Report, dated November 30, 2020.
11. Petitioner Exhibit 11 is Respondent's Social Media Postings.
12. Petitioner Exhibit 12 is a MLCC Complaint Violation Report, dated December 3, 2020.
13. Petitioner Exhibit 13 is Respondent's Social Media Postings.
14. Petitioner Exhibit 14 is a MLCC Complaint Violation Report, dated January 7, 2021.
15. Petitioner Exhibit 15 is Respondent's Social Media Postings.
16. Petitioner Exhibit 16 is a Photo of Establishment.
17. Petitioner Exhibit 17 is a MLCC Emergency Suspension Order Pursuant to MCL 24.292(2) and Notice of Hearing against Respondent.
18. Petitioner Exhibit 18 is a MLCC Decision and Order issued on December 14, 2020, by ALJ Michael J. St. John.
19. Petitioner Exhibit 19 is Video Evidence from Gaylord Police Department, dated December 4, 2020.
20. Petitioner Exhibit 20 is Video Evidence from Gaylord Police Department, dated December 10, 2020.
21. Petitioner Exhibit 21 is Video Evidence from Gaylord Police Department, dated December 4, 2020.



22. Petitioner Exhibit 22 is Video Evidence from Gaylord Police Department, dated December 9, 2020.
23. Petitioner Exhibit 23 is Respondent's Order to Cease and Desist Food Operations against Respondent, dated December 2, 2020.
24. Petitioner Exhibit 24 is Respondent's Emergency Summary Suspension Order against Respondent, dated December 29, 2020.
25. Petitioner Exhibit 25 is Respondent's Special Report, dated December 29, 2020.
26. Petitioner Exhibit 26 is Respondent's Website.
27. Petitioner Exhibit 27 is CDC Restaurants and Bars – Reduce the Spread of COVID-19.
28. Petitioner Exhibit 28 is COVID-19 Fact Sheet.
29. Petitioner Exhibit 29 is a CDC Study.
30. Petitioner Exhibit 30 is a MDHHS Epidemic Order, dated January 13, 2021.

The following exhibits were offered on behalf of Respondent and admitted into the record unless otherwise indicated:

1. Respondent Exhibit A is By the Facts: 46,000 Data Points regarding Statewide Contact Tracing Data.
2. Respondent Exhibit B is Petitioner's Brief in Support of Plaintiffs' Ex Parte Motion for Temporary Restraining Order, dated December 28, 2020.
3. Respondent Exhibit C is MI COVID Response Data and Modeling Update, dated December 1, 2020.

## **ISSUE**

Whether Petitioner has properly determined that Respondent's conduct constitutes an imminent threat to the public health, safety or welfare, requiring emergency action and a continuation of the summary suspension of Respondent's food establishment license, pursuant to MCL 289.4125 of the Food Law?

**APPLICABLE LAW**

MCL 289.1107 states as follows, in pertinent part:

Sec. 1107.

As used in this act:

- (a) "Department" means the department of agriculture and rural development.
- (b) "Director" means the director of the department or his or her designee.

\* \* \*

- (p) "Food establishment" means an operation where food is processed, packed, canned, preserved, frozen, fabricated, stored, prepared, served, vended, sold, or offered for sale. Food establishment includes, but is not limited to, a food processor, a food warehouse, a food service establishment, a vending machine location, and a retail grocery. Food establishment does not include any of the following:
  - (i) A charitable, religious, fraternal, or other nonprofit organization operating a home-prepared baked goods sale or serving only home-prepared food in connection with its meetings or as part of a fund-raising event.
  - (ii) An inpatient food operation located in a health facility or agency subject to licensure under article 17 of the public health code, MCL 333.20101 to 333.22260.
  - (iii) A food operation located in a prison, jail, state mental health institute, boarding house, fraternity or sorority house, convent, or other facility where the facility is the primary residence for the occupants and the food operation is limited to serving meals to the occupants as part of their living arrangement.

\* \* \*

- (t) "Food service establishment" means a fixed or mobile restaurant, coffee shop, cafeteria, short order cafe, luncheonette, grill, tearoom, sandwich shop, soda fountain, tavern, bar, cocktail lounge, nightclub,

drive-in, industrial feeding establishment, private organization serving the public, rental hall, catering kitchen, delicatessen, theater, commissary, food concession, or similar place in which food or drink is prepared for direct consumption through service on the premises or elsewhere, and any other eating or drinking establishment or operation where food is served or provided for the public. Food service establishment does not include any of the following:

- (i) A motel that serves continental breakfasts only.
- (ii) A bed and breakfast that has 10 or fewer sleeping rooms for rent.
- (iii) A bed and breakfast that has more than 10 sleeping rooms for rent, if the bed and breakfast serves continental breakfasts only.
- (iv) A child care organization regulated under 1973 PA 116, MCL 722.111 to 722.128, unless the establishment is carrying out an operation considered by the director to be a food service establishment.

MCL 289.1109 states as follows, in pertinent part:

Sec. 1109.

As used in this act:

\* \* \*

- (c) "Imminent or substantial hazard" means a condition at a food establishment that the director determines requires immediate action to prevent endangering the health of people.

MCL 289.4125 states as follows:

Sec. 4125.

- (1) Before a food establishment license, bottled water registration, or shellfish dealer certificate is issued, the director shall determine if the applicant meets the minimum requirements of this act and rules.
- (2) After an opportunity for a hearing pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, the director may revoke or suspend a food establishment license, a

registration for bottled water, or a shellfish dealer certificate issued under this act for failure to comply with requirements of this act or a rule. A person whose food establishment license, registration for bottled water, or shellfish dealer certificate is revoked or suspended shall discontinue the sale and offering for sale of food, the bottled water, or shellfish, respectively, until he or she complies with this act and the director issues a new registration or removes the suspension.

- (3) If a person's food establishment license is revoked for egregious violations under section 5101(a), (b), (c), or (k), the director may refuse to issue or reissue a license to any establishment in which that person has ownership or management interest for a period of 2 years after the revocation.
- (4) Based upon facts submitted by a person familiar with those facts or upon information and belief alleging that an imminent threat to the public health, safety, or welfare exists, the director may summarily suspend a license, registration, or certificate issued under this act. A person whose license, registration, or certificate has been summarily suspended under this section may petition the director to dissolve the order. Upon receipt of such a petition, the director shall immediately schedule a hearing to decide whether to grant or deny the petition to dissolve. The presiding officer shall grant the requested relief dissolving the summary suspension order unless sufficient evidence is presented that an imminent threat to the public health, safety, or welfare exists requiring emergency action and continuation of the director's summary suspension order.

MCL 289.4127 states as follows:

Sec. 4127.

- (1) After the regulatory authority receives a petition for a hearing from a license, registration, or certificate holder whose license, registration, or certificate is summarily suspended under section 4125, the proceedings shall be promptly commenced and determined as required by section 92 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.292.
- (2) This section does not prevent the regulatory authority's immediate reinstatement of a license, registration, or certificate when the regulatory authority determines the public health hazard or nuisance no longer exists.

MCL 24.292(2) states as follows:

If the agency finds that the public health, safety or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license may be ordered effective on the date specified in the order or on service of a certified copy of the order on the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

### **FINDINGS OF FACT**

The following findings of fact are established based on the entire record in this matter, including the witness testimony and admitted exhibits:

1. The Food Law empowers the Director of MDARD/Petitioner to summarily suspend a food service establishment if the Director determines that an imminent threat to the public, healthy, safety, or welfare exists.
2. Respondent's food establishment license is issued by Petitioner.
3. Respondent is located at 143 West Main Street, Gaylord, Otsego County, Michigan, 49735. Ian Murphy is the owner of the establishment. [Pet. Exh. 12, p. 1.]
4. Respondent is a restaurant/bar that serves food to patrons.
5. On November 15, 2020, the Director of the Michigan Department of Health and Human Services (MDHHS) issued an Emergency Order under MCL 333.2253 – Gatherings and Face Mask Order (Emergency Order).<sup>2</sup> The Emergency Order stated that the “novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death” and that “COVID-19 spreads through close human contact, even from individuals who may be asymptomatic.” The Emergency Order stated that since October of 2020, there has been an exponential growth in cases. [Pet. Exh. 1, p. 1.]
6. In recognition of the severity, MDHHS issued the Emergency Orders in an attempt to control the epidemic to protect the public health. Specifically, the Emergency Order (i) prohibits indoor gatherings at food establishments under

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<sup>2</sup> On December 7, 2020, December 18, 2020, and January 13, 2021, MDHHS issued similar Emergency Orders that extended the same restrictions for food service establishments. [Pet. Exh. 2, pp. 1-9; Pet. Exh. 3, pp. 1-10; Pet. Exh. 30, pp. 1-10.]

part 3 of the order and (ii) requires face masks to be worn by patrons and staff indoors under part 7 of the order. [Pet. Exh. 1, pp. 1 and 4-6.]

7. The Emergency Order further authorizes that “local health departments are authorized to carry out and enforce the terms of [the] order.” [Pet. Exh. 1, p. 8.]
8. The Health Department of Northwest Michigan (HDNW) is the “local health department” that falls within the jurisdiction of Respondent’s food establishment. HDNW serves four counties, including Otsego County, where Respondent’s establishment is located. [Pet. Exh. 5, p. 1.]
9. From October 26, 2020 to January 8, 2021, Petitioner received multiple complaints from the public alleging that Respondent was open to the public and allowing indoor dining with no restrictions. Rodney Blanchard, a Food Service Specialist with Petitioner,<sup>3</sup> is located in the division that handles these complaints. [Pet. Exh. 4, pp. 1-3.]
10. On November 25, 2020, HDNW also received multiple complaints from the public claiming the same allegations against Respondent.
11. On November 25, 2020, Chuck Edwards, an Environmental Health Coordinator for HDNW,<sup>4</sup> went to Respondent’s establishment and issued HDNW’s Order to Cease and Desist Food Service Operations. As a result of the indoor dining, the order informed Respondent that it was in violation of the MDHHS pandemic orders and the Food Law. Mr. Edwards further observed that Respondent was open for indoor dining, patrons were inside the facility, the staff at the front entrance did not wear face coverings until Mr. Edwards identified himself, and a staff member in the kitchen did not have a face covering. Mr. Edwards spoke to Mr. Murphy, who stated it is not requiring face coverings in the establishment. [Pet. Exh. 5, p. 1.]
12. On November 25, 2020, after HDNW’s cease and desist order was issued, Sgt. Stefan Crane with the Gaylord City Police Department, went to Respondent’s establishment to see if Respondent was in compliance with the cease and desist order. He observed that Respondent was open for indoor dining, patrons were inside the facility, and patrons were not social distancing. He spoke to Mr. Murphy, who stated he would continue to serve indoor dining for financial and

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<sup>3</sup> Mr. Blanchard’s job responsibilities include working with 45 local health jurisdictions and ensuring that the local health jurisdictions are in compliance with the Food Law.

<sup>4</sup> Mr. Edwards’s job responsibilities include land use activities, enforcing the Food Law, and handling public health related issues for COVID-19. He has 30-years of experience with HDNW. He received his bachelor’s degree in biology and he is a registered sanitarian.

business purposes. [See Pet. Exh. 8, pp. 1-2.] Sgt. Crane again visited the establishment on December 4 and 9, 2020, and he made similar observations, including body camera footage of his observations. [Pet. Exhs. 21 and 22.]

13. The Michigan Liquor Control Commission (MLCC) also conducted an investigation against Respondent. Petitioner elicited testimony from several investigators from MLCC to recount their observations when they visited the establishment. [See Pet. Exh. 17, pp. 1-14.]
14. On November 25, 2020, Theodore Orm, Investigator with MLCC for 20-years, went to Respondent's establishment. Mr. Orm's responsibilities include enforcement of liquor violations. On his visit, Mr. Orm observed Respondent's establishment was open for indoor dining and neither patrons nor staff were wearing face coverings. Mr. Orm spoke to Mr. Murphy and Mr. Murphy stated he had a moral and fiduciary responsibility to remain open for indoor dining.
15. On November 30, 2020, HDNW exhausted all of its administrative remedies against Respondent and therefore, HDNW requested assistance from Petitioner.
16. On or about December 2, 2020, Mr. Edwards went to Respondent's establishment and issued it Petitioner's December 2, 2020, Order to Cease and Desist Food Operations. He again observed that Respondent was open for indoor dining, patrons were inside the facility, and staff were not wearing face coverings.
17. On December 2, 2020, Scott Kendzierski, the Director of Environmental Health Services for HDNW,<sup>5</sup> went to Respondent's establishment and issued a MDHHS citation. He further observed 15-20 patrons in the establishment, neither patrons nor staff were wearing face coverings, and no social distancing taking place. Mr. Kendzierski made the same observations when he visited the establishment on December 18, 2020, and January 5, 2021.
18. On December 2, 2020, Bradley Szatkowski, Investigator with MLCC, went to Respondent's establishment and handed the manager MLCC's Emergency Suspension Order. This Order summarily suspended Respondent's liquor licenses on the premises. Mr. Szatkowski spoke to Mr. Murphy and told him that his liquor license was suspended for violation of the MDHHS epidemic orders. [Pet. Exh. 17, pp. 1-14.]

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<sup>5</sup> Mr. Kendzierski's job responsibilities include managing 14 environmental health programs (including food program), COVID-19 response, managing complaints about COVID-19, and enforcement of COVID-19.

19. On December 3, 2020, Nicole Spires, an Administrative Supervisor with HDNW for 13-years, observed from the outside of the establishment, approximately 30-40 patrons dining inside the establishment and staff not properly wearing face coverings.
20. On December 4 and 10, 2020, Officer Blake Huff with the Gaylord City Police Department went to Respondent's establishment. On these dates, Officer Huff observed Respondent's establishment was open for indoor dining and neither patrons nor staff were wearing face coverings. Officer Huff documented these encounters at the establishment with body camera footage. [Pet. Exhs. 19 and 20.]
21. On December 29, 2020, Jay Krystyniak<sup>6</sup>, a Food Safety Scientist with Petitioner, went to Respondent's establishment and provided the establishment with Petitioner's December 29, 2020, Emergency Suspension Order. [Pet. Exh. 24, pp. 1-7.] He observed Respondent's establishment was open for indoor dining and several staff were not wearing face coverings. [Pet. Exh. 25, p. 1.]
22. The December 29, 2020, Emergency Suspension Order informed Respondent that its "continued offering of indoor dining creates an imminent threat to the public health, safety, and welfare." As a result, Respondent's food establishment license was summarily suspended. [Pet. Exh. 24, pp. 1-7.]
23. On January 6, 2021, Daniel Rademacher, Investigator with MLCC for 16-years, went to Respondent's establishment. He observed Respondent's establishment was open for indoor dining and neither patrons nor staff were wearing face coverings. Mr. Rademacher took a photo of his observation:

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<sup>6</sup> Mr. Krystyniak's responsibilities include food inspection and ensuring that establishments are in compliance with the Food Law and federal regulations.





[Pet. Exh. 16, p. 1.] The above photo clearly shows that patrons were inside Respondent's establishment and not wearing face coverings.

24. The Centers for Disease Control and Prevention (CDC) states the following about COVID-19:

- It is mainly spread from person to person.
- People can be infected by coming into close contact with one another (within about 6 feet).
- People become infected from respiratory droplets when an infected person coughs, sneezes, or talks.
- One way to protect yourself is to wear a mask that covers your nose and mouth in public settings.

[Pet. Exh. 28, pp. 1-2.]

25. The CDC states there is a high risk of spreading COVID-19 for outdoor and indoor seating with no restrictions at restaurants and bars. The CDC further states there is still a high risk at restaurants and bars even if patrons are sitting at least six feet apart. [Pet. Exh. 27, p. 1.]

26. On September 11, 2020, the U.S. Department of Health and Human Services/CDC released a report entitled “Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults ≥18 Years in 11 Outpatient Health Care Facilities —United States, July 2020,” which stated the following:

Findings from a case-control investigation of symptomatic outpatients from 11 U.S. health care facilities found that close contact with persons with known COVID-19 or going to locations that offer on-site eating and drinking options were associated with COVID-19 positivity. Adults with positive SARS-CoV-2 test results were approximately twice as likely to have reported dining at a restaurant than were those with negative SARS-CoV-2 test results.

\* \* \*

Eating and drinking on-site at locations that offer such options might be important risk factors associated with SARS-CoV-2 infection. Efforts to reduce possible exposures where mask use and social distancing are difficult to maintain, such as when eating and drinking, should be considered to protect customers, employees, and communities.

[Pet. Exh. 29, pp. 1-7.]

27. Otsego County issues monthly summary reports for the county concerning COVID-19 data, as follows:

- a. For November 2020, the county reported an increase in total COVID-19 cases. Specifically, there were 467 total cases, 14 inpatients at the hospital, and 6 deaths.
- b. For December 2020, there were 255 total cases, 5 inpatients at the hospital, and 6 deaths. This appeared to show a decrease in the total case count.

[Pet. Exh. 6, pp. 1-2.]

28. As of January 8, 2021, Otsego County had a total of 1,056 COVID-19 cases and 25 deaths. [Pet. Exh. 9, pp. 1-2.]

29. Lisa Peacock is a Health Officer with HDNW.<sup>7</sup> Ms. Peacock tracks the COVID-19 epidemic both locally and nationally. For November 2020, Ms. Peacock stated there was a huge increase in COVID-19 numbers, resulting in a public health advisories and statements being issued. Ms. Peacock encourages that the public practice masking and social distancing to avoid the spread of COVID-19. Ms. Peacock issued HDNW's November 25, 2020, Order to Cease and Desist Food Service Operations against Respondent because it violated the indoor dining prohibition. Currently, she acknowledges that the general COVID-19 trends are down, but the data indicates a potential increase in numbers.
30. Ms. Peacock states that the HDNW reports shows that Otsego County is experiencing a surge of COVID-19 cases. She acknowledges there has been no contact tracing that has led back to Respondent.
31. Joshua Meyerson, M.D., is the Medical Director for HDNW.<sup>8</sup> Dr. Meyerson states that it is hard to contact trace for COVID-19 exposures in restaurant/bars. Dr. Meyerson reiterates that COVID-19 is a respiratory virus that is transmitted through respiratory droplets from person to person. He states it can spread by people talking, coughing, and breathing. He recommends that people have facial coverings and maintain social distancing to avoid the spread of COVID-19.
32. In mid-November 2020, Dr. Meyerson stated they began seeing a ten-fold increase in COVID-19 cases in HDNW jurisdiction (which includes Otsego County). He states they also saw an increase in positivity and HDNW and local hospitals were being stressed to their maximum capacity. He agrees it was correct to issue the pandemic orders and public health advisories to flatten the curve. He states Otsego County is in the highest risk category of "E." He states there is a high risk activity for the spread of COVID-19 for indoor food gathering.
33. James Padden, Food Safety and Inspection Program Manager with MDARD,<sup>9</sup> stated MDARD took into consideration a number of factors when issuing the

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<sup>7</sup> Ms. Peacock has been a Health Officer for five years and has been with HDNW for 11-years. Her job responsibilities include overall operations and functions of HDNW. She also has been a nurse for 30-years with a master's of science degree in nursing. In regard to COVID-19, her duties have changed to protect the public and serve as the incident commander.

<sup>8</sup> Dr. Meyerson obtained his medical degree from Tulane School of Medicine in 1992. He is board certified in pediatrics and also obtained a master's degree in public health in 1992. His job responsibilities include guidance and oversight of all the clinical programs, oversight of contact tracing for COVID-19, questions related to transmission of COVID-19, and immunizations and testing for COVID-19.

<sup>9</sup> Mr. Padden's job responsibilities include managing inspection and food staff for the State of Michigan. He has held his current position for two-years, but has been with MDARD for over 20-years. In regard to COVID-19, his role is to ensure that food establishments are not posing an imminent threat to the public health. He obtained a bachelor's of science degree in biology and minor in physical science.

cease and desist/summary suspension order against Respondent, including consideration of the local health department, MDHHS epidemic orders, CDC guidelines, status of the outbreak both in the state and county levels, masking considerations, and other factors. The MDARD Director ultimately concluded to summarily suspend Respondent's food establishment license in order to control the epidemic.

34. Throughout Respondent's non-compliance, it has consistently advertised/posted on social media that it would remain open, by way of example:



[Pet. Exh. 11, p. 2.]

35. Respondent continues to operate its indoor dining, despite its license being summarily suspended.
36. At the present time, COVID-19 is a pandemic that is continuing, especially in Otsego County where Respondent's establishment is located. Respondent does not qualify for an exception to the indoor gathering prohibition in the MDHHS Epidemic Orders. Respondent has not posed any operational reason for its non-compliance with COVID-19 mitigation measures, other than financial or business concerns.
37. Respondent's management or staff did not misunderstand any of the state and local health department requirements or the cease and desist order.

38. Respondent's ongoing non-compliance with COVID-19 mitigation measures, including offering indoor dining, patrons seating/being less than six feet apart, staff and patrons not wearing face coverings, which are required by the state and local health departments for licensed food establishments, remains an imminent threat to the public health, safety, and welfare.

### **CONCLUSIONS OF LAW**

Petitioner bears the burden of proving, by a preponderance of evidence, that the public health, safety, or welfare requires emergency action and a continuation of the food establishment license suspension. See MCL 289.4125(4) and MCL 24.292(2).

As the Michigan Supreme Court has stated, "[p]roof by a preponderance of the evidence requires that the factfinder believe that the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence." *Blue Cross and Blue Shield of Michigan v Milliken*, 422 Mich 1, 89; 367 N.W.2d 1, 44 (1985). Additionally, a preponderance of evidence is evidence which is of a greater weight or more convincing than evidence offered in opposition to it. It is simply that evidence which outweighs the evidence offered to oppose it. *Martucci v Ballenger*, 322 Mich 270, 274 (1948) (citing *Strand v. Chicago & W. M. Ry. Co.*, 67 Mich. 380, 34 N.W. 712, 715).

Here, Petitioner alleges that Respondent's continued offering of indoor dining creates an imminent threat to the public health, safety, or welfare. And therefore, Petitioner requests that this Tribunal continue the summary suspension of Respondent's food establishment license, pursuant to MCL 289.4125(4) of the Food Law.

First, Petitioner elicited testimony from multiple witnesses, including HDNW staff, Gaylord City Police Department officers, MLCC investigators, and Petitioner's staff, who all credibly testified that they conducted on-site visits of Respondent's establishment and confirmed that Respondent was open to the public and allowing indoor dining. These witnesses further credibly testified that neither patrons nor staff were wearing face coverings and no social distancing took place. Many of these testimonies were corroborated by violation reports and/or video evidence. For example, during the hearing, the undersigned watched multiple bodycam footages from the Gaylord City Police Department, which showed that Respondent's establishment was open to the public and allowing indoor dining. In fact, it is not disputed that Respondent consistently advertised/posted on social media that it would remain open. [See Pet. Exhs. 11 and 15.]

Moreover, the evidence establishes that Respondent failed to implement any safety measures to avoid the spread of COVID-19.

Second, Lisa Peacock is the Health Officer with HDNW. Her job responsibilities for Otsego County include the overall operations and functions of HDNW. She credibly testified that the HDNW reports shows that Otsego County has a surge of COVID-19 cases. Of note, she acknowledges there has been no contact tracing that has led back to Respondent.

Third, Dr. Meyerson is the Medical Director with HDNW. He credibly testified that there was a ten-fold increase in COVID-19 cases in mid-November 2020. He also credibly testified that it was proper for the state and local agencies to issue the pandemic orders and public health advisories to flatten the curve.

Fourth, James Padden is the Food Safety and Inspection Program Manager with MDARD. In regard to COVID-19, his role is to ensure that food establishments are not posing an imminent threat to the public health. Mr. Padden credibly testified that Petitioner took into consideration a number of factors when issuing the cease and desist/summary suspension order against Respondent, including consideration of the local health department, MDHHS epidemic orders, CDC guidelines, status of the outbreak both in the state and county levels, and other factors. Ultimately, Mr. Padden credibly testified that it was necessary for the MDARD Director to summarily suspend Respondent's food establishment license in order to control the epidemic.

In response, Respondent did not offer any witnesses to rebut Petitioner's case presentation. Instead, Respondent's counsel made a legal argument that Petitioner's Emergency Suspension Order should have never been issued in the first place and therefore, this matter should be dismissed. Section 4125(4) of the Food Law, MCL 289.4125(4), provides the controlling language for summary suspensions, as follows:

Based upon facts submitted by a person familiar with those facts or upon information and belief alleging that an imminent threat to the public health, safety, or welfare exists, the director may summarily suspend a license, registration, or certificate issued under this act... [Emphasis added.]

Respondent's counsel argued that the Food Law defines "imminent or substantial hazard" under Section 1109(c), MCL 289.1109(c), as follows:

'Imminent or substantial hazard' means a condition at a food establishment that the director determines requires immediate action to prevent endangering the health of people. [Emphasis added.]

Respondent's counsel argues that the definition of "imminent or substantial hazard" applies to summary suspensions under Section 4125. Although the words "imminent or substantial hazard" are not verbatim in Section 4125, Respondent's counsel argues that

“imminent or substantial hazard” is analogous with the summary suspension language of “imminent threat.” Respondent’s counsel basically argues that “imminent or substantial hazard” and “imminent threat” can be used interchangeably.

Respondent’s counsel argues that because the definition of “imminent or substantial hazard” applies to summary suspensions, a “condition” at the food establishment must occur in order to trigger the rights of a summary suspension. For example, Respondent’s counsel argues that this “condition” would be evidence that COVID-19 had been traced back to the establishment. However, Respondent’s counsel states Petitioner has presented no evidence that COVID-19 originated from the establishment. And because there is no evidence that a “condition” occurred at Respondent’s establishment, Respondent’s counsel argues that there can be no imminent threat to the public and the summary suspension must be dismissed.

Although Respondent’s counsel makes an intriguing argument, it is ultimately unpersuasive. A plain reading of Section 1109(c) finds that it is not applicable to Section 4125, but instead, it is applicable to Section 2113. Section 2113(1) of the Food Law, MCL 289.2113(1), provides the controlling language for cease and desist orders, as follows:

The director may order immediate cessation of operation of a food establishment upon a determination that continued operation would create an imminent or substantial hazard to the public health. [Emphasis added.]

In *Sun Valley Foods Co v Ward*, 460 Mich. 230, 236, 596 NW2d 119, 123 (1999), the Michigan Supreme Court stated the following:

The rules of statutory construction are well established. The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. *Murphy v Michigan Bell Telephone Co.*, 447 Mich. 93, 98, 523 N.W.2d 310 (1994). See also *Nation v W. D. E. Electric Co.*, 454 Mich. 489, 494, 563 NW2d 233 (1997). This task begins by examining the language of the statute itself. The words of a statute provide ‘the most reliable evidence of its intent....’ *United States v Turkette*, 452 U.S. 576, 593, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. *Tryc v Michigan Veterans' Facility*, 451 Mich. 129, 135, 545 NW2d 642 (1996). Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. *Luttrell v*

*Dep't of Corrections*, 421 Mich. 93, 365 NW2d 74 (1984).

The language of Section 1109(c) is unambiguous. A plain reading of the word “imminent or substantial hazard” of Section 1109(c) is used only verbatim in the cease and desist language of Section 2113(1). Nowhere in the summary suspension language of Section 4125 do the words “imminent or substantial hazard” appear in this statute. Instead, Section 4125 uses the words “imminent threat,” which is nowhere defined in the Food Law. Respondent is not permitted to apply the definition of “imminent or substantial hazard” to summary suspensions under Section 4125. Because the statute is unambiguous, judicial construction ends here.

Nonetheless, assume the definition of “imminent or substantial hazard” does apply to summary suspensions, Respondent’s argument is still unpersuasive that a “condition” would require evidence of COVID-19 at the establishment. Black’s Law Dictionary defines “condition” as “[a] future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance.” *Black’s Law Dictionary* (11th ed. 2019). “Condition” does not mean there has to be evidence of positive COVID-19 cases, but instead, “conditions” can mean evidence that the food establishment continues indoor dining, or the establishment does not implement social distancing, or the establishment does not require staff or patrons to wear face coverings. All of these are examples of “conditions” at a food establishment that requires immediate action to prevent the spread of COVID-19 to the public. As such, there were “conditions” present at Respondent’s establishment (e.g., no social distancing, no masks) that required the MDARD Director to issue the summary suspension. Again, this analysis assumes that the definition of “imminent or substantial hazard” applies to summary suspensions.

Based on the totality of the hearing record, the undersigned concludes that Petitioner has demonstrated, by a preponderance of the evidence, that Respondent’s actions constitute an imminent threat to the public health, safety, or welfare.

The evidence record is overwhelmingly clear that there is high risk of spreading COVID-19 for indoor seating at restaurants. Despite repeated warnings, cease and desist orders from HDNW and MDARD, and MDHHS epidemic orders, Respondent failed to comply with COVID-19 mitigation measures by its continued offering of indoor dining.

Petitioner’s decision to issue the summary suspension is not only based on the MDHHS emergency orders, but is also based on Petitioner’s own credible documented findings, the local health department (HDNW) credible documented findings, CDC guidelines, and Petitioner’s credible witnesses, who all agree that there is an imminent public health threat posed by Respondent’s continued operation of indoor dining.



The evidence establishes that for several months Respondent has not complied with both local and state health departments COVID-19 mitigation measures. The evidence further establishes that Respondent's management or staff did not misunderstand any of the state and local health department requirements. The evidence further establishes that Respondent's ongoing non-compliance with COVID-19 mitigation measures, including offering indoor dining, patrons seating less than six feet apart, and patrons and staff not wearing face coverings, which are required by the state and local health departments for licensed food establishments, remains an imminent to the public health, safety, and welfare.

In conclusion, Petitioner made its findings that Respondent posed an imminent threat to the public by the evidence record presented at the hearing and has acted within its own authority to issue the summary suspension pursuant to the Food Law, MCL 289.4125 and MCL 289.4127. Accordingly, Petitioner has met its burden of proof to show sufficient evidence for the issuance and continuance of the emergency suspension order.

### **DECISION**

Based on the above findings of fact and conclusions of law, a preponderance of the evidence shows that Respondent, Moore Murphy Hospitality, L.L.C., d/b/a Iron Pig Smoke House, has engaged in conduct that constitutes an ongoing imminent threat to the public health, safety, and welfare under Section 4125 of the Food Law, MCL 289.4125. Petitioner's emergency suspension order is therefore properly continued under that statute and MCL 24.292.

### **ORDER**

**NOW THEREFORE, IT IS HEREBY ORDERED** that Respondent's petition to dissolve Respondent's Emergency Suspension Order issued on December 29, 2020, shall be and hereby is **DENIED**, and that the Order is therefore **CONTINUED** under the provisions of MCL 289.4125 and MCL 289.4127.



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**Eric J. Feldman**  
**Administrative Law Judge**

**APPEAL PROCEDURES**

MCL 24.304(1) provides:

A petition shall be filed in the court within 60 days after the date of mailing notice of the final decision or order of the agency, or if a rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order thereon. The filing of the petition does not stay enforcement of the agency action but the agency may grant, or the court may order, a stay upon appropriate terms. See also Mich Admin Code R 792.10137, Rule 137.

MCL 289.5115 further states:

When a license holder or registrant has exhausted all administrative remedies available under this act and is aggrieved by a final decision or order in a contested case, the decision or order is subject to direct review by the courts as provided by law.

**PROOF OF SERVICE**

I certify that I served a copy of the foregoing document upon all parties and/or attorneys, to their last-known addresses in the manner specified below, this 20th day of January 2021.



J. Delaney  
Michigan Office of Administrative Hearings  
and Rules

**Via Electronic Mail**

David M. Delaney  
Attorney at Law  
113 North Illinois Avenue, P.O. Box 1771  
Gaylord, MI 49734  
dmdlawyer@gmail.com

Eileen C. Whipple  
Department of the Attorney General  
P.O. Box 30755  
Lansing, MI 48909  
whipplee@michigan.gov

Moore Murphy Hospitality, LLC, d/b/a Iron Pig Smoke House  
143 W Main Street  
Gaylord, MI 49735  
theironpigsmokehouse@gmail.com

# Exhibit 10

## **AFFIDAVIT OF JAMES PADDEN**

I, James Padden, employee of the Michigan Department of Agriculture and Rural Development (MDARD), swear and attest under penalty of perjury as follows:

1. I am over the age of eighteen and have personal knowledge of the facts stated in this affidavit and, if called as a witness, I am competent to testify accordingly.

2. I am currently employed by MDARD.

3. On January 21, 2021 at approximately 6:41 p.m., I conducted on-site observations at Iron Pig Smokehouse located at 143 West Main Street in Gaylord, Michigan.

4. I observed that the establishment was open for business. The front door was propped open, the lights were on and an illuminated “open” sign was clearly visible on the side of the building where the front door is.

5. I did not enter the establishment. Through the glass front of the building, I observed a waitress without a mask.

6. I observed patrons seated at 6 tables. The number of patrons at each table ranged from 1 to 5 people.

7. I observed two individuals dining at the front table just on the other side of the window. I have included a photo I took of the front window as an attachment to this Affidavit. See Attachment A.

8. Based on my observations, I concluded that Iron Pig Smokehouse was operating as a food establishment on January 21, 2020.

9. On January 25, 2021 I reviewed the Facebook page of the Iron Pig Smokehouse. The Iron Pig Smokehouse Facebook page is accessible to the public. There are several posts by Iron Pig Smokehouse admitting that they are continuing to operate. I have attached screen captures of some of their most recent Facebook posts indicating that they continue to operate, and continue to offer indoor dining. See Attachment B.



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James Padden  
Food Safety Inspection Program Manager  
Michigan Department of Agriculture and  
Rural Development

Subscribed and sworn to by this 26<sup>th</sup> day  
of January 2021.



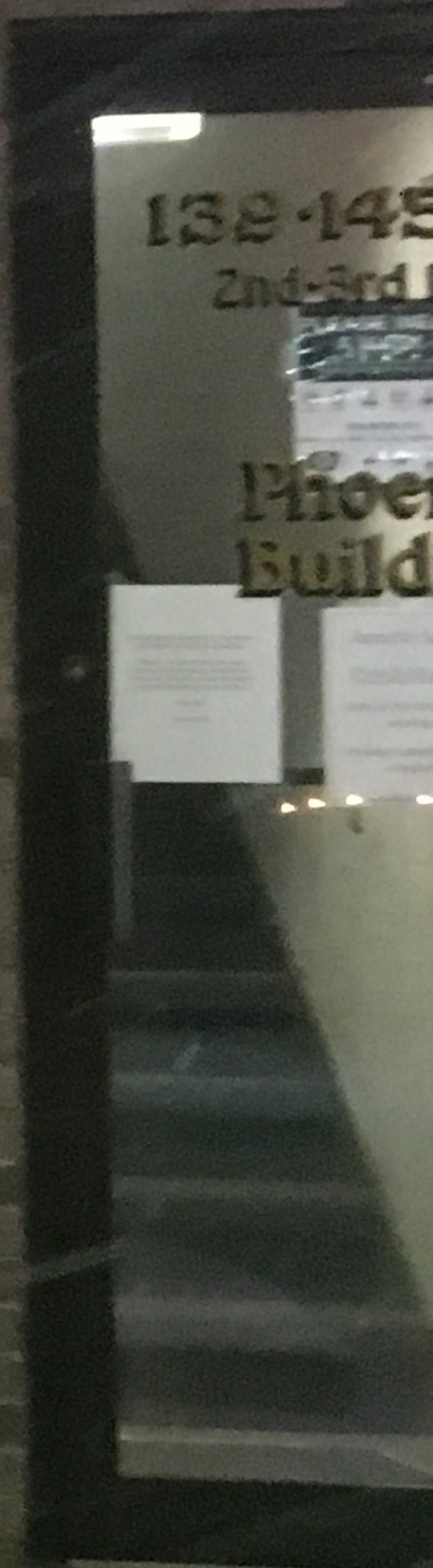
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HEATHER R. BREWER, Notary Public  
Eaton County, Michigan  
My commission expires: August 31, 2025  
Acting in the county of Grand Traverse,  
Michigan

# Attachment A



IRON PIG SMOKERS





# Attachment B



The Iron Pig  
Smokehouse-  
Gaylord  
@ironpigsSmoke

Home

Reviews

Photos

Posts

Videos

Events

About

Community

VIP Text Club

Catering Info

Create a Page

Like Share ...

The Iron Pig Smokehouse-Gaylord

Yesterday at 1:37 PM · 🌐

Try one of our Smokehouse Pizzas! Small flatbread, large flatbread, or gluten-free options Broccoli/Cheddar or Cauliflower.

Order online at [www.ironpigsSmoke.com](http://www.ironpigsSmoke.com) for pickup, curbside, delivery (w/contactless option), or you can order ahead for skip the line service!

We also have amazing Order-at-the-table technology that also allows you to skip the line, keep a tab open to order more food, and of course contactless payments!



Start Order Send Message

Hours 11:00 AM - 11:00 PM

Open Now

Popular hours



Page Transparency

See More

Facebook is showing information to help you better understand the purpose of a Page. See actions taken by the people who manage and post content.

Page created - March 6, 2017

People



14,729 likes

7,759 visits

Pages Liked by This Page



Johnny's Soup Kitchen



Isabella's Copper Pot

Places · Gaylord, Michigan · Caterer · The Iron

147

23 Comments · 12 Shares

See more of The Iron Pig Smokehouse-Gaylord

See more of The Iron Pig Smokehouse-Gaylord on Facebook

Log In

or

Create New Account





The Iron Pig  
Smokehouse-  
Gaylord  
@ironpigsmoke

Home

Reviews

Photos

Posts

Videos

Events

About

Community

VIP Text Club

Catering Info

Create a Page

Like Share ...

View more comments

2 of 79

The Iron Pig Smokehouse-Gaylord

January 23 at 1:08 PM  
Order ahead [www.ironpigsmoke.com](http://www.ironpigsmoke.com)



284

8 Comments 40 Shares

Like Comment ...

Start Order

Send Message

Hours 11:00 AM - 11:00 PM  
Open Now

Popular hours



Page Transparency

Facebook is showing information to help you better understand the purpose of a Page. See actions taken by the people who manage and post content.

Page created - March 6, 2017

People



14,729 likes

7,759 visits

Pages Liked by This Page

Johnny's Soup Kitchen

Isabella's Copper Pot

See more of The Iron Pig Smokehouse-Gaylord on Facebook

Log In or Create New Account

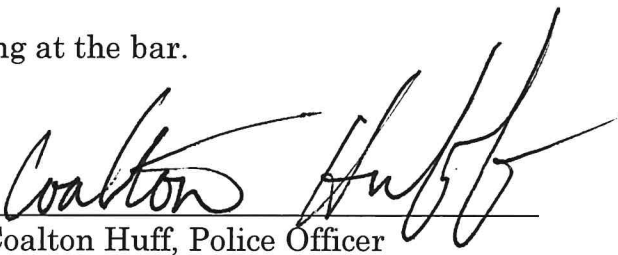
...from the local community experience! No waiting in line. Thank you for the monthly support! Facebook © 2021

# Exhibit 11

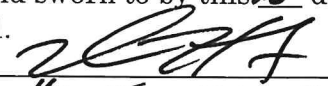
## AFFIDAVIT OF COALTON HUFF

I, Coalton Huff, employee of the Gaylord Police Department, swear and attest under penalty of perjury as follows:

1. I am over the age of eighteen and have personal knowledge of the facts stated in this affidavit and, if called as a witness, I am competent to testify accordingly.
2. I am currently employed as a police officer by Gaylord Police Department.
3. On January 21, 2021 at approximately 7:40 p.m., I, along with another officer, visited the Iron Pig Smokehouse located at 143 West Main Street in Gaylord, Michigan.
4. Upon entering the restaurant, we made contact with the manager working and she advised that the owner, Ian Murphey, was not there. I informed the manager that my Chief of Police, Chief Claeys, asked us to request that Iron Pig Smokehouse follow the order of the Michigan Department of Agriculture and Rural Development.
5. While at the Iron Pig Smokehouse, I observed three groups of people eating at tables within the restaurant. There were between three and five people eating at each table. Also, there were two people eating at the bar.

  
Coalton Huff, Police Officer  
Gaylord Police Department

Subscribed and sworn to by this 26<sup>th</sup> day of  
January 2021.

  
Travis Hewitt, Notary Public  
Otsego County, Michigan

My commission expires: 11/1/25  
Acting in the county of Otsego

Travis Hewitt Notary Public Otsego County, Michigan My Commission Expires: 11/1/2025
---

# Exhibit 12



## COVID-19

[MENU >](#)

# Considerations for Restaurant and Bar Operators

Updated Dec. 16, 2020



As restaurants and bars resume and continue operations in some areas of the United States, CDC offers the following considerations for ways in which operators can reduce risk for employees, customers, and communities and slow the spread of COVID-19. Restaurants and bars can determine, in collaboration with [state, local, territorial, or tribal health officials](#), whether and how to implement these considerations, making adjustments to meet the needs and circumstances of the local community. Implementation should be guided by what is feasible, acceptable, and tailored to the needs of each community. These considerations are meant to supplement—**not replace**—any state, local, territorial, or tribal health and safety laws, rules, and regulations with which businesses must comply.

Guidance for customers on reducing the risk of spreading COVID-19 when dining at a restaurant can be found [here](#).

## Guiding Principles to Keep in Mind

The more an individual interacts with others, and the longer that interaction, the higher the [risk of COVID-19 spread](#). Masks may reduce the risk of COVID-19 spread when they are consistently used by customers and employees, especially when social distancing measures are difficult to maintain. The risk of COVID-19 spread increases in a restaurant or bar setting as interactions within 6 feet of others increase, as described below. Masks may reduce the risk of COVID-19 spread when worn in any of these risk scenarios.

- **Lowest Risk:** Food service limited to drive-through, delivery, take-out, and curbside pick up.
- **More Risk:** Drive-through, delivery, take-out, and curbside pick up emphasized. On-site dining limited to outdoor seating. Seating capacity reduced to allow tables to be spaced at least 6 feet apart.
- **Higher Risk:** On-site dining with indoor seating capacity reduced to allow tables to be spaced at least 6 feet apart. And/or on-site dining with outdoor seating, but tables **not** spaced at least six feet apart.
- **Highest Risk:** On-site dining with indoor seating. Seating capacity **not** reduced and tables **not** spaced at least 6 feet apart.

COVID-19 is mostly spread when people are physically near (within 6 feet) a person with COVID-19 or have direct contact with that person. When people with COVID-19 cough, sneeze, sing, talk, or breathe, they produce **respiratory droplets**. Infections occur mainly through exposure to respiratory droplets when a person is in close contact with someone who has COVID-19.

There is evidence that under certain conditions, people with COVID-19 seem to have infected others who were more than 6 feet away. This is called airborne transmission. These transmissions occurred within enclosed spaces that had inadequate ventilation. Available data indicate that it is much more common for the virus that causes COVID-19 to spread through close contact with a person who has COVID-19 than through airborne transmission.

Respiratory droplets can also land on surfaces and objects. It is possible that a person could get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or eyes. Spread from touching surfaces is not thought to be a common way that COVID-19 spreads.

Fortunately, there are a number of actions operators of restaurants and bars can take to help lower the risk of COVID-19 exposure and spread. Personal prevention practices (such as [handwashing](#), [staying home when sick](#), and [wearing masks](#)) and workplace prevention practices, like environmental [cleaning and disinfection](#), are important principles of preventing the spread of COVID-19.

## Promoting Behaviors that Reduce Spread



Restaurants and bars may implement several strategies that reduce the spread of COVID-19 among employees and customers.

- **Staying Home when Appropriate**

- Educate employees about when they should [stay home](#) and when they can return to work.
  - Actively encourage employees who are sick or have recently had a [close contact](#) with a person with COVID-19 to stay home. Develop policies that encourage sick employees to stay at home (for example, sick leave) without fear of reprisal, and ensure employees are aware of these policies. See the Maintaining Healthy Operations section below for suggestions.
  - [Employees should stay home](#) if they have tested positive for or are showing COVID-19 [symptoms](#).
  - Employees who have recently had a [close contact](#) with a person with COVID-19 should also [stay home and monitor their health](#).
  - CDC's criteria can help inform when employees may return to work:
    - [If they have been sick with COVID-19](#)
    - [If they have recently had close contact with a person with COVID-19](#)

- **Masks**

CDC recommends [masks to reduce the risk of COVID-19 spread](#). Masks are currently recommended for employees and for customers as much as possible when not eating or drinking and when social distancing measures are difficult to maintain. [These masks](#) (sometimes called cloth masks) are meant to protect other people in case the wearer is infected. They are not appropriate substitutes for masks used by workers for personal protective equipment (PPE) such as surgical masks or respirators. (More information on masks used for PPE can be found [here](#).)

- Consider requiring the use of [masks](#) among all staff. Masks are **most** essential in times when physical distancing is difficult. Information should be provided to staff on [proper use, removal, and washing of masks](#).
  - Note: Masks should not be placed on:
    - Babies and children younger than 2 years old
    - Anyone who has trouble breathing or is unconscious
    - Anyone who is incapacitated or otherwise unable to remove the mask without assistance
  - Employees should avoid touching their masks once they are on their faces. Employees should wash their hands with soap and water for at least 20 seconds after touching masks on their faces.




- **Hand Hygiene and Respiratory Etiquette**

- Require frequent employee [handwashing](#) (e.g. before, during, and after preparing food; after touching garbage) with soap and water for at least 20 seconds and increase monitoring to ensure adherence.
- Ensure gloves are worn by employees when they are completing these activities:
  - Removing garbage bags or handling and disposing of trash
  - Handling used or dirty food service items
  - [Cleaning and disinfecting](#) surfaces; read and follow the directions on the label to ensure safe and effective use of disinfectant.
- Employees should always wash their hands with soap and water for at least 20 seconds after removing gloves.
- Encourage employees to cover coughs and sneezes with a tissue (or use the inside of their elbow). Used tissues should be thrown in the trash and hands washed immediately with soap and water for at least 20 seconds.
- If soap and water are not readily available for handwashing, use hand sanitizer that contains at least 60% alcohol.
- Employees should avoid touching their eyes, nose, and mouth with gloved or unwashed hands.

- **Adequate Supplies**

- Ensure adequate supplies to support [healthy hygiene](#) Supplies include soap, hand sanitizer containing at least 60% alcohol (placed on every table, if supplies allow), paper towels, tissues, disinfectant wipes, [masks](#) (as feasible), and no-touch/foot pedal trash cans.

- **Signs and Messages**

- Post [signs](#) in highly visible locations (e.g., at entrances, in restrooms) that [promote everyday protective measures](#)  for both employees and customers and describe how to [stop the spread](#)  of germs such as by [properly wearing a mask](#)  and [properly washing hands](#).
- Include messages (for example, [videos](#)) about behaviors that prevent spread of COVID-19 when communicating with vendors, staff, and customers (such as on business websites, in emails, and on [social media accounts](#)).

- Communicate the prevention steps the restaurant or bar is taking and any changes in protocols on business websites, in emails, and on social media accounts.
- Find free CDC print and digital resources at the [bars and restaurant page](#), as well as on CDC's [communications resources main page](#).

## Maintaining Healthy Environments

Restaurants and bars may implement several strategies to maintain healthy environments.

- **Cleaning and Disinfection**

- **Clean and disinfect** frequently touched surfaces (e.g., door handles, cash registers, workstations, sink handles, bathroom stalls) at least daily, and as much as possible. Clean shared objects (e.g., payment terminals, tables, countertops/bars, receipt trays, condiment holders) between each use.
  - Continue to follow all required safety laws, regulations, and rules.
  - Use products that meet [EPA disinfection criteria](#) [✉](#) and that are appropriate for the surface. Allow the disinfectant to remain on the surface for the contact time recommended by the manufacturer. **Always read and follow the directions on the label** to ensure safe and effective use.
  - When cleaning and disinfecting, wear gloves appropriate for the disinfectant being used. Additional personal protective equipment may also be needed.
  - Establish a disinfection routine and train staff on proper cleaning timing and procedures to ensure safe and correct application of disinfectants.
  - Wash, rinse, and sanitize used or dirty food contact surfaces with an EPA-approved food contact surface sanitizer. If a food-contact surface must be disinfected for a specific reason, such as a blood or bodily fluid cleanup or deep clean in the event of likely contamination with SARS-CoV-2, use the following procedure: wash, rinse, disinfect according to the label instructions with a product approved for food contact surfaces, rinse, then sanitize with a food-contact surface sanitizer.
  - Ensure that cleaning or disinfecting product residues are not left on table surfaces. Residues could cause allergic reactions or cause someone to ingest the chemicals.
- Develop a schedule for increased routine cleaning and disinfection.
- Ensure [safe and correct use](#) and storage of disinfectants to avoid food contamination and harm to employees and other individuals. This includes storing products securely away from children.
- Use gloves when removing garbage bags or handling and disposing of trash. [Wash hands](#) after removing gloves.

- **Shared Objects**

- Discourage sharing of items that are difficult to clean, sanitize, or disinfect.
- Limit any sharing of food, tools, equipment, or supplies by staff members.
- Ensure adequate supplies to minimize sharing of high-touch materials (e.g., serving spoons) to the extent possible; otherwise, limit use of supplies and equipment by one group of workers at a time and clean and disinfect between use.
- Avoid using or sharing items that are reusable, such as menus, condiments, and any other food containers. Instead, use disposable or digital menus (menus viewed on cellphones), single serving condiments, and no-touch trash cans and doors.
- Use touchless payment options as much as possible, if available. Ask customers and employees to exchange cash or card payments by placing on a receipt tray or on the counter rather than by hand to avoid direct hand to hand contact. **Clean and disinfect** frequently touched surfaces such as counters, or hard surfaces between use. If pens are needed for some purposes, disinfect between uses and/or encourage customers to use their own pens.
- Use disposable food service items (e.g., utensils, dishes, napkins, tablecloths). If disposable items are not feasible or desirable, ensure that used or dirty non-disposable food service items are handled with gloves and washed, rinsed, and sanitized to meet food safety requirements. Change and launder linen items (e.g., napkins and tablecloths) after each customer or party's use. Employees should [wash their hands](#) after removing their gloves or after handling used food service items.
- Avoid use of food and beverage utensils and containers brought in by customers.

- **Ventilation**

As noted above, available data indicate that it is much more common for the virus that causes COVID-19 to spread



through close contact with a person who has COVID-19 than through airborne transmission. There is evidence that under certain conditions, people with COVID-19 seem to have infected others who were more than 6 feet away. This is called airborne transmission. These transmissions occurred in indoor spaces with inadequate ventilation. In general, being outdoors and in spaces with good ventilation reduces the risk of exposure to the virus that causes COVID-19.

- Ensure that [ventilation systems operate properly](#) and increase circulation of outdoor air as much as possible, for example by opening windows and doors and prioritizing outdoor seating. Do not open windows and doors if doing so poses a safety or health risk to customers or employees (e.g., risk of falling or triggering asthma symptoms).
- Consider improving the [engineering controls](#) using the building ventilation system. Consult with experienced heating, ventilating, and air-conditioning (HVAC) professionals when considering changes to HVAC systems and equipment. This may include some or all of the following activities:
  - Increase total airflow supply to occupied spaces, whenever feasible.
  - Increase outdoor air ventilation, using caution in highly polluted areas. With a lower occupancy level in the building, this increases the effective dilution ventilation per person.
  - Disable demand-controlled ventilation (DCV) controls that reduce air supply based on occupancy or temperature during occupied hours.
  - Open minimum outdoor air dampers to reduce or eliminate HVAC recirculation, if practical. In mild weather, this will not affect thermal comfort or humidity. However, this may be difficult to do in cold, hot, or humid weather.
  - Improve central air filtration to MERV-13 or to as high as possible without significantly diminishing design airflow.
- Inspect filter housing and racks to ensure appropriate filter fit and check for ways to minimize filter bypass.
- Check filters to ensure they are within service life and appropriately installed.
- Consider running the HVAC system at maximum outside airflow for 2 hours before and after occupied times.

Additional guidance can be found in [Ventilation in Buildings](#) and [ASHRAE Standard 62.1, Ventilation for Acceptable Indoor Air Quality](#).

- **Water Systems**

- To minimize the risk of [Legionnaires' disease](#) and other diseases associated with water, [take steps](#) to ensure that all water systems and features (e.g., sink faucets, decorative fountains, drinking fountains) are safe to use if there has been prolonged facility shutdown.

- **Modified Layouts and Procedures**

- Change restaurant and bar layouts to ensure that all customer parties remain at least 6 feet apart (e.g., removing tables/stools/chairs, marking tables/stools/chairs that are not for use).
- Limit seating capacity to allow for [social distancing](#).
- Offer drive-through, curbside take out, or delivery options as applicable. Prioritize outdoor seating as much as possible.
- Ask customers to wait in their cars or away from the establishment while waiting to pick up food or when waiting to be seated. Inform customers of food pickup and dining protocols on the business's website and on posted signs.
- Discourage crowded waiting areas by using phone app, text technology, or signs to alert patrons when their table is ready. Avoid using "buzzers" or other shared objects.
- Consider options for dine-in customers to order ahead of time to limit the amount of time spent in the establishment.
- Avoid offering any self-serve food or drink options, such as buffets, salad bars, and drink stations. This limits the use of shared serving utensils, handles, buttons, or touchscreens and helps customers to stay seated and at least 6 feet apart from people who do not live in their household.

- **Physical Barriers and Guides**

- Install physical barriers, such as sneeze guards and partitions, particularly in areas where it is difficult for individuals to remain at least 6 feet apart. Barriers can be useful in restaurant kitchens and at cash registers, host stands, or food pickup areas where maintaining physical distance of at least 6 feet is difficult.
- Provide physical guides, such as tape on floors or sidewalks and signage, to ensure that individuals remain at least 6 feet apart. Consider providing these guides where lines form, in the kitchen, and at the bar.

- **Communal Spaces**

- Close shared spaces such as break rooms, if possible; otherwise stagger use, require mask use, and [clean and disinfect](#) between use.
- Consistent with applicable law, develop policies to protect the privacy of persons at [higher risk for severe illness](#) in accordance with applicable privacy and confidentiality laws and regulations.

## Maintaining Healthy Operations

Restaurants and bars may consider implementing several strategies to maintain healthy operations.



- **Protections for Employees at Higher Risk for Severe Illness from COVID-19**
  - Offer options for employees at [higher risk for severe illness](#) (including older adults and people of all ages with certain underlying medical conditions) that limits their exposure risk (e.g., modified job responsibilities such as managing inventory rather than working as a cashier, or managing administrative needs through telework).
  - Consistent with applicable law, develop policies to protect the privacy of persons at [in accordance with applicable privacy and confidentiality laws and regulations](#).
- **Regulatory Awareness**
  - Be aware of local or state policies and recommendations related to group gatherings to determine if events can be held.
- **Staggered or Rotated Shifts and Sittings**
  - Rotate or stagger shifts to limit the number of employees in the restaurant or bar at the same time.
  - Stagger and limit dining times to minimize the number of customers in the establishment.
  - When possible, use flexible worksites (e.g., telework) and flexible work hours (e.g., staggered shifts) to help establish policies and practices for social distancing (maintaining distance of approximately 6 feet) between employees and others, especially if social distancing is recommended by state and local health authorities.
- **Gatherings**
  - Avoid group events, gatherings, or meetings where social distancing of at least 6 feet between people who do not live in the same household cannot be maintained. See the Modified Layouts and Procedures section above for suggestions on social distancing.
- **Travel and Transit**
  - Encourage employees to use transportation options that minimize close contact with others (e.g., walking or biking, driving or riding by car—alone or with household members only).
  - For employees who commute to work using public transportation or ride sharing:
    - Ask employees to follow the CDC guidance on how to [protect yourself when using transportation](#) and to [wear masks on public transportation](#).
    - Ask them to [wash their hands](#) as soon as possible after their trip.
    - Consider allowing employees to shift their hours so they can commute during less busy times.
- **Designated COVID-19 Point of Contact**
  - Designate a staff person for each shift to be responsible for responding to COVID-19 concerns. All staff members should know who this person is and how to contact them.
- **Communication Systems**
  - Put systems in place for:
    - Consistent with applicable law and privacy policies, having staff self-report to the establishment's point of contact if they have [symptoms](#) of COVID-19, a positive test for COVID-19, or were exposed to someone with COVID-19 within the last 14 days in accordance with [health information sharing regulations for COVID-19](#) [\[PDF\]](#) (e.g. see "Notify Health Officials and Close Contacts" in the [Preparing for When Someone Gets Sick](#) section below), and other applicable privacy and confidentiality laws and regulations.
    - Notifying staff, customers, and the public of business closures, and restrictions in place to limit COVID-19 exposure (e.g., limited hours of operation).
- **Leave (Time Off) Policies**
  - Implement flexible sick leave policies and practices that enable employees to stay home when they are sick, have been exposed, or are [caring for someone who is sick](#).



- Examine and revise policies for leave, telework, and employee compensation.
- Leave policies should be flexible and not punish people for taking time off and should allow sick employees to stay home and away from co-workers. Leave policies should also account for employees who need to stay home with their children if there are school or childcare closures, or to care for sick family members.
- Develop policies for return-to-work after COVID-19 illness. CDC's [criteria to discontinue home isolation](#) can inform these policies.
- **Back-Up Staffing Plan**
  - Monitor absenteeism of employees, cross-train staff, and create a roster of trained back-up staff.
- **Staff Training**
  - Train all employees in safety actions.
  - Conduct training virtually, or ensure that [social distancing](#) is maintained during training.
- **Recognize Signs and Symptoms**
  - Conduct daily health checks (e.g., temperature screening and/or [symptom checking](#)) of staff safely and respectfully, and in accordance with any applicable privacy laws and regulations.
    - Consider using examples of screening methods in CDC's [General Business FAQs](#) as a guide.
- **Support Coping and Resilience**
  - Promote employees eating healthy, exercising, getting sleep, and finding time to unwind.
  - Encourage employees to talk with people they trust about their concerns and how they are feeling.
  - Consider posting signs for the national distress hotline: call or text 1-800-985-5990.

## Preparing for Sick Employees

Restaurants and bars may implement several strategies to prepare for when someone gets sick.


- **Advise Sick Employees of Home Isolation Criteria**
  - Communicate to sick employees that they should not return to work until they have met CDC's [criteria to discontinue home isolation](#).
- **Isolate and Transport Those Who Are Sick**
  - Make sure that employees know they should not come to work if they are sick, and they should notify their manager or other designated COVID-19 point of contact if they become sick with COVID-19 [symptoms](#), test positive for COVID-19, or have been [exposed](#) to someone with COVID-19 or have been exposed to someone with COVID-19 symptoms or a confirmed or suspected case.
  - Immediately separate employees or customers with COVID-19 [symptoms](#) (i.e., fever, cough, shortness of breath). Individuals who are sick should go home or to a healthcare facility, depending on how severe their symptoms are, and follow [CDC guidance for caring for oneself and others](#) who are sick.
- **Clean and Disinfect**
  - Close off areas used by a sick person and do not use these areas until after [cleaning and disinfecting](#) them.
  - Wait at least 24 hours before cleaning and disinfecting. If 24 hours is not feasible, wait as long as possible. Ensure [safe and correct use](#) and storage of [cleaning and disinfection products](#) , including storing them securely away from children.
- **Notify Health Officials and Close Contacts**
  - In accordance with state, territorial, tribal, or local laws, restaurant and bar operators should notify [the health officials](#) in their jurisdiction and staff immediately of any case of COVID-19 among employees, while maintaining confidentiality in accordance with the [Americans with Disabilities Act \(ADA\)](#) .
  - Advise those who have had [close contact](#) with a person diagnosed with COVID-19 to stay home and [self-monitor for symptoms](#), and follow [CDC guidance](#) if symptoms develop. Critical infrastructure workers may refer to [CDC Guidance for Critical Infrastructure Workers](#), if applicable.
  - Consider collaborating with health officials in your jurisdiction to determine whether and how to implement employee [COVID-19 testing strategies](#) and which one(s) would be most appropriate for your circumstances.

## Communication Resources

RESTAURANT AND BARS FOLLOW THESE 5 SAFETY STEPS  
to keep us all healthy


RESTAURANTS AND BARS  
Reduce the Spread of COVID-19

Letter for staff



### 5 Safety Steps for Staff

Restaurants and Bars: follow these 5 safety steps to keep us all healthy


[Download](#)  [PDF – 290 KB]



### Assess Your Risk


Use this graphic to assess risk

[Download](#)  [image 586 KB]



### Letter to Staff Template

Send out a customized letter to your staff to inform them about steps taken to protect them.

[Download](#)  [DOC – 64 KB]



### Daily Checklist for Managers of Restaurants and Bars

Managers can use this helpful checklist

[Download](#)  [PDF – 1 page]

## Other Resources

- [Latest COVID-19 information](#)
- [Cleaning and Disinfection](#)
- [Guidance for Businesses and Employers](#)
- [COVID-19 Prevention](#)
- [Handwashing information](#)
- [Face coverings](#)
- [Social Distancing](#)
- [COVID-19 Frequently Asked Questions](#)
- [Frequently Asked Questions for Businesses](#)
- [Persons at higher risk](#)
- [Managing Stress and Coping](#)
- [HIPAA and COVID-19](#) 
- [CDC communication resources](#)
- [Community Mitigation](#)

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