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IMPORTANT CLIENT UPDATE

ENFORCEMENT OF MDHHS DIRECTOR'S ORDER (4/2/20)

The Director of the Michigan Department of Health and Human Services (MDHHS) has issued an Emergency Order that incorporates three of the Governor's Executive Orders (EO 2020-11, EO 2020-20, and EO 2020-21) pertaining to the current state of emergency, including those that prohibit certain public assemblages and business activity. The Governor's Executive Orders were issued under the authority set out in MCL 10.31 and MCL 30.405(1), for which a violation is a misdemeanor. MCL 10.33; MCL 30.405(3). The Executive Orders specifically state that violations of the Orders are misdemeanors.

Public Health Code

Under the Public Health Code, if the MDHHS Director determines that control of an epidemic is necessary to protect the public health, the Director has the authority by emergency order to prohibit the gathering of people for any purposes, and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. MCL 333.2253(1). A local health officer has the same authority to issue an emergency order to control an epidemic under MCL 333.2453.

A person who violates a rule or order of the MDHHS is guilty of a misdemeanor punishable by imprisonment for not more than 6 months, or a fine of not more than \$200.00, or both. MCL 333.2261. See also MCL 333.2443 (a person who violates an order of a local health officer is guilty of a misdemeanor).

Under MCL 333.1299, (1) a person who violates a provision of the Public Health Code for which a penalty is not otherwise provided is guilty of a misdemeanor, and (2) a prosecuting attorney or attorney general may prosecute a knowing violation of the Code, a rule promulgated under the Code, or a local health department regulation which is punishable by a criminal penalty.

Moreover, the Public Health Code "shall be liberally construed for the protection of the health, safety, and welfare of the people of this state." MCL 333.1111(2).

In light of the statutory authority of the MDHHS Director and a local health officer to issue emergency orders to control an epidemic by prohibiting the gathering of people, for which criminal penalties attach for which persons may be prosecuted, a liberal construction of the Code would be that local law enforcement agencies possess the authority to enforce violations of the emergency order as a criminal matter.

It should be noted that this criminal enforcement scheme is separate and distinct from the enforcement of violations of the Code involving civil penalties, for which a department representative issues a citation, and the alleged violator has a right to an administrative hearing. See MCL 333.2262 and MCL 333.2263.

Michigan Attorney General Guidance

The Michigan Attorney General has issued guidance to local law enforcement agencies upon their receipt of notice of a possible violation of Executive Order 2020-21 involving business activity. We have restated the substance of that guidance below:

Local Law Enforcement Steps

1. Step 1 – Determine if complaint alleges conduct or activity that, if true, could be a violation of the Governor’s Executive Order (EO 2020-11, EO 2020-20, or EO 2020-21) or the DHHS Order (April 2, 2020). Note: Being required to work is not, in and of itself, a violation, e.g. essential working in a critical infrastructure setting may be permissible.
2. Step 2 – If the complaint is facially valid, a law enforcement officer should investigate by visiting the site of conduct and attempt to confirm what activity is taking place. This often should include a dialogue with the business owner or other person with authority. If the owner provides the officers with a justification for operating under the EO, they should request the owner or person with authority be specific as to what provision of the EO allows them to remain functioning.
3. Step 3 – If the officer determines a violation is occurring, it is suggested the officer explain the scope of the order and request that the conduct violating the EO be voluntarily terminated.
4. Step 4 – If the owner or person with authority refuses to comply with a request to become compliant and the violation is clear, the officer could (a) cite the owner or person with authority under the statute, or (b) submit a report to the appropriate prosecuting official for review.

Prosecuting Attorney

5. The prosecuting official may choose to send the business a formal warning letter, prior to initiating a criminal case to maximize the opportunity for compliance—balancing time against the public health concerns presented by the ongoing conduct.

6. If the prosecuting official is unable to proceed with the case for some reason, the Attorney General will review, and the Criminal Trials and Appeals Division should be contacted at 517-335-7650.

Recommendation

It is our opinion that a Michigan Sheriff is authorized to enforce offenses that are designated as misdemeanors, including criminal violations of the Michigan Governor’s Executive Orders (EO 2020-11, EO 2020-20, and EO 2020-21) and the MDHHS Director’s Emergency Health Orders (April 2, 2020).

We recommend that the Sheriff’s Office respond to a complaint of a criminal violation, and issue appropriate warnings as to potential criminal sanctions. An appearance ticket as described in MCL 764.9a – 764.9g may be issued. We recommend consulting with the prosecutor as to whether a particular alleged violation would warrant arrest and criminal prosecution.

Should you have questions concerning this MDHHS Director’s Order, please do not hesitate to contact our Office.

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April 6, 2020

CITATION REFERENCES:

MDHHS Emergency Order:

https://www.michigan.gov/documents/coronavirus/DHHS_Order_Incorporating_EOs_into_epidemic_finding_final_4-2-20_002_685693_7.pdf

Governor Executive Orders:

EO 2020-11

<http://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-11.pdf>

EO 2020-20

<http://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-20.pdf>

EO 2020-21

<http://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-21.pdf>

Statutes:

MCL 10.31

<http://legislature.mi.gov/doc.aspx?mcl-10-31>

MCL 10.33

<http://legislature.mi.gov/doc.aspx?mcl-10-33>

MCL 30.405

<http://legislature.mi.gov/doc.aspx?mcl-30-405>

MCL 333.1111

<http://legislature.mi.gov/doc.aspx?mcl-333-1111>

MCL 333.1299

<http://legislature.mi.gov/doc.aspx?mcl-333-1299>

MCL 333.2253

<http://legislature.mi.gov/doc.aspx?mcl-333-2253>

MCL 333.2261

<http://legislature.mi.gov/doc.aspx?mcl-333-2261>

MCL 333.2262

<http://legislature.mi.gov/doc.aspx?mcl-333-2262>

MCL 333.2263

<http://legislature.mi.gov/doc.aspx?mcl-333-2263>

MCL 333.2443

<http://legislature.mi.gov/doc.aspx?mcl-333-2443>

MCL 333.2453

<http://legislature.mi.gov/doc.aspx?mcl-333-2453>

MCL 764.9a – 764.9g

<http://legislature.mi.gov/doc.aspx?mcl-175-1927-IV>