



**THRUN**  
LAW FIRM, P.C.

# Client E-Blast

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November 2, 2020

Re: October 29, 2020 MDHHS Order

Dear Retainer Client:

On October 29<sup>th</sup>, the Michigan Department of Health and Human Services (MDHHS) issued an [order](#) on gathering limits, face masks, and contact tracing obligations. The order replaces an October 9<sup>th</sup> MDHHS [order](#) on these topics, which was addressed in our October 12, 2020 [E-Blast](#).

The new MDHHS order applies statewide – there are no exceptions based on MI Safe Start Plan Regions. The order remains in effect until rescinded by MDHHS.

*Note that any requirement to wear a face mask discussed below is subject to face mask exceptions discussed in Face Masks Q&A 3, below. For a person claiming the medical exception, the inability to medically tolerate a face mask is not a “get-in-free” pass; instead, school officials may explore reasonable modifications to the face mask requirement to mitigate or eliminate significant risk to the health or safety of others. For example, a person who cannot medically tolerate a face mask might be able to medically tolerate a face shield.*

## Gathering Limits

### 1. *What is a gathering?*

A gathering is any occurrence, *either indoor or outdoor*, where at least two people from more than one household are in a shared space. This definition is identical to the definition of a gathering in the October 9<sup>th</sup> MDHHS Order, except that it clarifies that a gathering can occur indoors or outdoors.

### 2. *What types of gathering limits does the order impose?*

The October 29<sup>th</sup> MDHHS order sets default limits for indoor and outdoor residential and non-residential gatherings. Different gathering limits apply to organized sports gatherings and specified venues, such as recreational sports and exercise facilities.

### 3. *What are the default indoor gathering limits?*

- Residential gathering: up to 10 people.



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- Non-residential gathering in a venue without fixed seating: up to 50 people if attendance does not exceed 20 people per 1,000 square feet in each occupied room and attendees wear a face mask.
- Non-residential gathering in a venue with fixed seating: up to 500 people if attendance does not exceed 20% of the venue's seating capacity and attendees wear a face mask.

**4. *What are the default outdoor gathering limits?***

- Residential gathering: up to 100 people.
- Non-residential gathering in a venue without fixed seating: up to 1,000 people if attendance does not exceed 30 people per 1,000 square feet, including any distinct area within the event space, and attendees wear a face mask.
- Non-residential gathering in a venue with fixed seating: up to 1,000 people if attendance does not exceed 30% of the venue's seating capacity and attendees wear a face mask.

**5. *Are there exceptions to the default indoor and outdoor gathering limits?***

**Yes.** The limits do not apply in limited circumstances, including to students in a classroom setting, children in a daycare setting, and people traveling on a school bus.

**6. *What are the school's obligations for hosting a gathering subject to the default indoor and outdoor non-residential gathering limits?***

The school must:

- Limit attendance to the default gathering limits discussed above,
- Ensure that people who are not part of the same household remain 6 feet apart to the extent possible,
- Design the gathering to encourage and maintain physical distancing,
- Require each person to wear a face mask and deny entry to anyone who refuses to wear a face mask, and
- If attendees are seated at tables, limit seating to 6 people per table and space tables at least 6 feet apart.

**7. *What are the school's obligations for hosting a gathering subject to limits other than the default indoor and outdoor non-residential gathering limits?***

The school must require each person to wear a face mask and deny entry to anyone who refuses to wear a face mask. Additional requirements may apply depending on the gathering venue.



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**8. *What is an organized sports gathering?***

An organized sports gathering is a competitive athletic activity requiring skill or physical prowess organized by a sports organizer, which is an institution, association, or other organization that sets and enforces rules to ensure the physical health and safety of all organized sports participants.

**9. *What are the gathering limits for organized sports gatherings?***

Gatherings for the purpose of organized sports are prohibited unless the sports organizer ensures that the following requirements are met:

- For organized sport competitions, live attendance is limited to guests of athletes (with each athlete designating up to 2 guests), or the event complies with the default indoor or outdoor gathering limits,
- Each guest or attendee wears a face mask, and
- Unless able to consistently maintain 6 feet of physical distance (except for occasional and fleeting moments), each athlete wears a face mask when training, practicing, or competing in an organized sport.

**10. *What is a recreational sports and exercise facility?***

It is a location in which people participate in individual or group physical activity, including gymnasiums and fitness centers.

**11. *What are the gathering limits for recreational sports and exercise facilities?***

The gathering must not exceed 25% of the facility's total occupancy limit established by the State Fire Marshal or a local fire marshal, and the facility must have at least 6 feet of distance between each workout station.

**12. *Does the order prohibit workplace gatherings?***

**No.** The October 9<sup>th</sup> MDHHS Order prohibited workplace gatherings if:

- The gathering was not strictly necessary to perform job duties,
- Employees without a face covering could not stay 6 feet away from others, or
- Employees without a face covering occupied the same indoor shared space, such as a conference room, restroom, or hallway.

The October 29<sup>th</sup> MDHHS Order does *not* contain this prohibition. Workplace gatherings are, however, still subject to the default gathering limits discussed above.



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School officials are reminded that the Michigan Occupational Safety and Health Administration (MIOSHA) issued rules on October 14, 2020 that require each employer to adopt a policy that prohibits in-person work to the extent that the work can feasibly be completed remotely. The MIOSHA rules are discussed in more detail in our October 16, 2020 [E-Blast](#). This firm has drafted a remote work policy, which is available for a nominal flat fee. Please contact your Thrun labor attorney if you wish to discuss or purchase this policy.

***13. Are school board meetings subject to the default gathering limits?***

**Yes.** The order does not create an exception to the default gathering limits for school board meetings. Note, however, that Public Act 228 of 2020 (Senate Bill 1108) amended the Open Meetings Act (OMA) effective October 16, 2020, to allow school board meetings to be held electronically (in whole or in part) for any reason through December 31, 2020. The OMA amendments also allow school board meetings to be held electronically (in whole or in part) for specified reasons after that date. The OMA amendments are discussed at length in our October 16, 2020 [E-Blast](#).

**Face Masks**

***1. What is a face mask?***

The October 29<sup>th</sup> MDHHS order narrowly defines a face mask as a “tightly woven cloth or other multi-layer absorbent material that closely covers an individual’s mouth and nose.”

***2. Who is required to wear a face mask?***

Each person in a non-residential gathering must wear a face mask.

***3. Who is exempt from the face mask requirements in the order?***

The order lists various exceptions, including children under 5 years old (except those in a camp or a child-care organization, as discussed below), people who cannot medically tolerate a face mask, people who are eating and drinking, and people who are giving a speech and the audience is at least 6 feet away from the speaker. A special face mask exception applies to athletes participating in organized sports, as discussed in Q&As 5 and 6 below.

As mentioned previously, the claimed inability to medically tolerate a face mask is not a “get-in-free” pass; instead, school officials may explore reasonable modifications to the face mask requirement to mitigate or eliminate significant risk to the health or safety of others.

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**4. *Can school officials assume that someone who enters the school without a face mask is exempt from the face mask requirement?***

**No.** School officials may, however, accept a person's verbal representation that the person is exempt from the face mask requirement.

**5. *Do the face mask exceptions in the order apply to athletes in organized sports?***

**Yes.** The face mask exceptions in the MDHHS October 9<sup>th</sup> order did *not* apply to athletes in organized sports. Face mask exceptions in the MDHHS October 29<sup>th</sup> order, however, *do* apply to athletes in organized sports, as discussed in Q&A 3 above.

The MDHHS October 29<sup>th</sup> order also states that athletes in organized sports can satisfy the order's face mask requirement by complying with the "Additional Mitigation Measures for Safer Athletic Practice and Play" section in the [MDHHS Interim Guidance for Contact Sports](#).

**6. *What are the "Additional Mitigation Measures for Safer Athletic Practice and Play" in the MDHHS Interim Guidance for Contact Sports?***

The guidance states that there "are tightly defined circumstances in which safer athletic practice and play is possible without the use of face masks," which involves all of the following:

- COVID-19 testing of all active players should be conducted at least 6 times per week with a turnaround time fast enough to confirm negative results within a day of unmasked close contact.
- Players should not play or practice while symptomatic even with a negative COVID-19 test. They may return only when symptoms have resolved for more than 24 hours and with a negative COVID-19 test.
- Those who test positive should isolate and may not return to team play or practices for the duration of their infectious period as determined by CDC guidance.
- During the 2 weeks before and after events, athletes should have no social contact outside of teammates, team staff/coaches, or their households.
- Coaches, staff, and spectators should continue to use masks, and athletes should continue to use masks when not actively participating in play (including in locker rooms, on the sidelines, when entering or leaving the field).
- Team medical staff should have adequate capacity to follow-up on positive tests and maintain prompt follow-up for case investigation and full contact tracing (including affected contacts outside of the athletic team).
- Complete compliance is needed with local and state public health officials during the case investigation and contact tracing process, and with enforcement of quarantine and isolation requirements.



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***7. Are there special face mask rules for camps and daycares?***

**Yes.** The order imposes special face mask requirements on camps and “child care organizations,” as defined by the Child Care Organization Act. The Attorney General has opined that a school that operates a before and after school child care program is a “child care organization” for purposes of that program. (1984 OAG 6249).

Under the MDHHS order, camps and child care organizations must not permit gatherings unless face masks are worn by:

- All staff and children 2 years and older when on a school bus or other transportation provided by the camp or child care organization,
- All staff and children 4 years and older when in indoor hallways and common areas, and
- All staff and children 5 years and older when in classrooms and similar indoor settings.

**Contact Tracing**

***1. Are schools required to implement contact tracing protocols for gatherings?***

**It depends.** The October 29<sup>th</sup> MDHHS order requires contact tracing protocols for gatherings at certain facilities, including:

- Entertainment facilities (except outdoor, unticketed sporting events), such as arenas, concert halls, performance venues, sporting venues, stadiums, and theaters,
- Facilities where people participate in individual or group physical activity, including gymnasiums and fitness centers, and
- Facilities that provide barbering, cosmetology, massages, and other similar personal care services.

***2. What contact tracing protocols are required for gatherings at the facilities described immediately above?***

The facility must maintain accurate records to aid with contact tracing, including each patron’s entry date and time, name, and contact information. The facility must deny entry to any patron who does not provide, at a minimum, his or her name and phone number.



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**3. *Does the order require facilities to disclose gathered contact tracing information to their local health departments and MDHHS?***

**Yes - names and phone numbers.** Upon request, school officials must provide to their local health departments and MDHHS the names and phone numbers of people with possible COVID-19 exposure to aid in contact tracing and case investigation efforts.

Although the Family Educational Rights and Privacy Act (FERPA) generally prohibits disclosure of personally identifiable information (PII) from a student's education record without a parent/guardian's prior written consent, certain exceptions apply. The U.S. Department of Education's Student Privacy Policy Office (SPPO) issued an [FAQ](#) in March 2020, explaining that FERPA's "health or safety emergency" exception may allow school officials to disclose to a public health agency PII from a student's education records, without prior written consent, in connection with an emergency if the public health agency's knowledge of the information is necessary to protect the health or safety of students or other individuals.

School officials are also reminded that the October 6, 2020 MDHHS order, which we discussed in our October 12, 2020 [E-Blast](#), requires the posting of a public notice of probable or confirmed school-related COVID-19 cases. Specifically, within 24 hours of being notified by a local health department of a probable or confirmed COVID-19 case on school property or at a school function that may result in COVID-19 transmission or contraction (COVID Case), a school must post a public notice on a highly visible location on the school's website that covers the affected school location. The public notice must include new and cumulative COVID Case counts. The notice must also include the date that the local health department notified the school of the new COVID Case(s). The October 6, 2020 MDHHS order remains in effect until rescinded by MDHHS.

### **Enforcement**

**1. *Who enforces the MDHHS order?***

Local health departments and law enforcement officers may enforce the order within their jurisdictions.

**2. *What are the potential penalties for violating the order?***

A violation of a MDHHS order is a misdemeanor punishable by imprisonment for not more than 6 months, a fine of not more than \$200, or both. A violation is also punishable by a civil fine of up to \$1,000 for each violation or each day that a violation continues.



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### **Conclusion**

The legal landscape will inevitably continue to evolve at a rapid pace. We will keep our clients updated about MDHHS orders and other COVID-19 legal developments. Please check for any applicable local health department and municipal orders, as those orders may impose requirements that are more stringent than those in MDHHS orders. As always, please contact us with any questions.

### **Thrun Law Firm, P.C.**

*This client communication is intended to provide helpful information on school law topics and is not intended as legal advice or opinion for specific facts, matters, situations, or issues. Legal counsel should be consulted about the application of this information to a specific circumstance or situation.*