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Michigan’s pandemic plan will cause legal fights

Current emergency protocols ignore hard lessons from the COVID lockdown

By Michael Van Beek | June 2025

There are many unanswered questions about the state’s response to the COVID-19 emergency five years ago. One thing is certain about the next pandemic, though: It will be mired in legal controversy.

If another pandemic panic arises, the state health department plans to run a repeat of its COVID-19 response. Citing a broadly worded public health law, the state health director will grant herself unilateral authority to issue orders that might restrict high school sports or mandate masks or ration medical services. The department will make up the details as it goes.

During the 2020-2021 lockdowns, these actions spurred years of legal struggles, and we can expect that to happen again during the next public health panic. This could be avoided, but that would require

the Whitmer administration to agree to constrain its own executive authority — an unlikely prospect.

The public health law Michigan officials will use is unconstitutional on its face. It gives the state health director dictatorial control during an epidemic. She alone decides when to grant herself emergency powers, and this authority lasts for as long as she wants. It’s as if the Legislature gave the director a blank check to do whatever she wants during a pandemic emergency.

During the COVID-19 crisis, Gov. Whitmer thought an obscure law from 1945 allowed her to regulate all of society for however long she wanted. The only limits to the governor’s powers were that her orders had to be “reasonable” and “necessary.”

The Michigan Supreme Court ruled this law unconstitutional because it gave unchecked

lawmaking authority to the executive branch. The Court said the Legislature cannot give away its power *carte blanche*.

The Supreme Court's ruling did not apply to the Public Health Code, however. That code it suffers from the same problems as the 1945 law. In fact, it contains fewer constraints than the 1945 law the Court found unconstitutional in 2020.

During the COVID-19 panic, the director stretched this power as far as it could go. The statute says she may "prohibit the gathering of people for any purpose," but it does not say what it means by "gathering." The director defined a gathering as any time two people not from the same household "are present in a shared space." This applies to virtually every social interaction, and the director took it upon herself to regulate each one.

The state's current pandemic plan, despite claiming to have incorporated lessons from the COVID-19 emergency, endorses giving the state health director full discretion again to regulate whatever she wants. Whoever is in charge during the next pandemic will need to make controversial decisions in real time. The department's plan is so poorly written that it provides virtually no useful guidance to public officials.

The state's plan claims it is "evidence-based," but it doesn't provide any evidence for supporting lockdown policies or handing unilateral control to an unelected health director. It cites a 2017 report from the U.S. Centers for Disease Control and Prevention, but that report does not even endorse broad business closures or stay-at-home orders. It recommends relying on voluntary compliance and remaining vigilant about the negative consequences of disrupting the daily lives of millions of people.

Michigan courts are aware of the legal contention related to this public health statute. Several lawsuits were filed against the law during the COVID-19 episode, citing its unconstitutional delegation of unchecked power to the health department. The Michigan Supreme Court, unfortunately, refused to hear these cases, claiming that they were moot. They reasoned that these issues are unlikely to surface again. Where they got their crystal ball, the justices did not say.

Even if the director orders less draconian mandates than Whitmer did during COVID-19, these mandates will face legal challenges. If the health director restricts access to medical services or closes schools and businesses, there will be lawsuits. If civil or religious rights are curtailed, a legal fight will ensue. Michigan's current pandemic plan keeps all these options on the table.

Michigan policymakers need to craft a functioning pandemic plan that settles these legal questions before the next pandemic arrives. It would be a shame if the Whitmer's administration's refusal to curtail executive authority paves the way for legal controversy and confusion during the next pandemic.

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