### Guidance on MI Supreme Court Decision Conducted by Greater Rochester Chamber of Commerce

LAMBERT LAW - Presenter

407 6<sup>th</sup> Street, Suite A

Rochester, MI 48307

(248) 642-7774

Brad@lambertplc.com



# The Decision - Summary



- ► EMA (1976 law) 7-0: Whitmer had no authority to issue EO's after 4.30.2020
- ► EPGA (1945 law) 4-3: Unconstitutional delegation of legislative authority to Executive. All Orders issued under EPGA legally invalid
- Viviano Concurs and joins the Majority result
- McCormack Dissents, joined by two other justices
- Bernstein Separate Dissent
- 71-page Opinion; referred from Federal Court

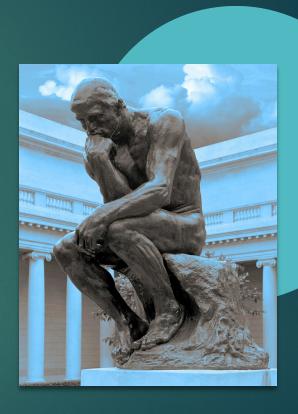
### Critical EPGA Factors

- ► EPGA must provide an **intelligible principle** to guide use of executive discretion
- Scope of the delegation important
  - Greater the impact, more guidance required
- Specificity of standards governing decisions
- Duration of the Delegation too indefinite
- Standard of Reasonableness illusory
- Standard of Necessity meaningless
  - Governor could order people to quit driving due to risks



# Concurring and Dissenting Opinions

- Viviano Concurrence: Court didn't need to decide constitutionality, EPGA n/a to Public Health
- McCormack Dissent: EPGA gives sufficient guidance. Orders striking a statute on these grounds are rare
- Bernstein Dissent: EPGA does not offend separation of powers
- The Majority responds to each opinion



# Where Does the Case go From Here

- ▶ No Automatic 21 day stay
- Reconsideration Motion 21 days
- Governor IC Motion for delay
  - ▶ UE beneficiaries
  - Needs transition time
  - ► Cites stay procedures
  - ► Concedes precedential effect is different
- ▶ Federal Sixth Circuit action pending
- Appeal to US Supreme Court



### OTHER LEGAL CASES

- ► The Legislature's Case is still pending for acceptance by the Supreme Court
- Manke (barber) controversy ongoing
- Even the referred Federal Case may yet be decided
- ► There are a plethora of other cases pending in courts across the state
- With actions like the recent Executive Orders, there will be more



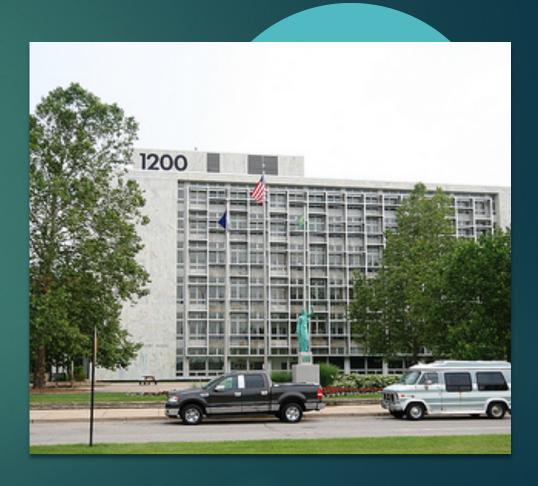


## Alternative Battlegrounds

- State Agencies already under way
  - ► MIOSHA
  - ▶ MDHHS
  - Rule Making is a complex process
  - Subject to JCAR
- Health Authorities have already acted
- Police Departments
- Public Pronouncements
- Buy time counter measures take time
- Business Owners Must be Vigilant

# Oakland County Local Health Order 2020-12

- ▶Issued October 3
- ▶Imposes Masks ala Whitmer EO 153
- ▶Standard Exceptions
- ► Challenges to Legality
  - ▶1978 Act much like invalid1945 Act
  - ▶ Vague standards of "necessity"
  - ▶ Control of epidemic required
  - ► Could be read to require impact on continued health care delivery
- ▶The Order is law until struck down



# Michigan DHHS Order 10.5.2020

### Ordering Terms

- ▶ Better written; explicitly invokes Statute
- Imposes Mask Requirements
- Same exceptions
- Adds Indoor Gathering Restrictions
  - Includes numerical restrictions
- ► Food Service Establishments
  - No dancing or mingling! God forbid!
  - Alcohol consumption at tables; 6 ft rule
- Explicit Sports Restrictions
  - ▶ Follow MDHHS Guidance
  - Guests of athletes only





# Michigan Rulemaking Process

This Summary illustrates the complicated process of enacting Agency Rules

### **Rulemaking Process Summary**

The process for creating, amending, and rescinding administrative rules is governed by the Administrative Procedures Act, 1969 PA 306, MCL 24.201 to 24.328. (Note this is an overview and does not include all required provisions). Revised April 2019.

P	F	P

- ▲ A department's Regulatory Affairs Officer (RAO) must submit a Request for Rulemaking (RFR) to the MOAHR to begin the rulemaking process.
- ▲ The MOAHR reviews and approves the RFR, and notifies the Joint Committee on Administrative Rules (JCAR).

### **Draft Rules**

- ▲ Rules are drafted and submitted by the RAO to the MOAHR to review for legal authority.
- ▲ The MOAHR approves the draft and notifies JCAR. The MOAHR sends the draft to the Legislative Service Bureau (LSB) for informal editing according to format and style requirements.
- ▲ The department makes the suggested LSB edits to the draft rules and sends to the MOAHR.



### RIS & Public

- ▲ A Regulatory Impact Statement & Cost-Benefit Analysis (RIS) is prepared by the department and sent to the MOAHR for approval 28 days prior to the public hearing. The MOAHR notifies JCAR.
- ▲ A Notice of Public Hearing is prepared by the department and sent to the MOAHR. The MOAHR notifies JCAR.
- ▲ The Notice is published in 3 newspapers, including 1 in the UP, not less than 10 days but no more than 60 days prior to the hearing.
- ▲ The MOAHR publishes the Notice and draft rules in the Michigan Register.
- ▲ The department holds a public hearing for public comment.



### **JCAR Report**

**JCAR** 

Hearing

- ▲ The RAO submits the final draft of the rules and the JCAR Report to the
- ▲ The MOAHR submits the final draft to LSB to formally certify the rules.
- ▲ The MOAHR legally certifies the rules and sends the JCAR Report, including the final draft of the rules, certifications, RFR, and RIS to JCAR.



- ▲ The JCAR Report and rules must be submitted to JCAR within 1 year after the public hearing, or there must be a subsequent public hearing.
- ▲ The JCAR Report summarizes the purpose of the draft rules and any comments made at the public hearing or submitted in writing.
- ▲ The rules must be before JCAR for 15 session days, unless JCAR grants a waiver of the remaining days.
- ▲ During those 15 days, JCAR may object to the rules, but then must introduce legislation within another 15 session days to stop or delay the rules.
- A Rules can be filed by the MOAHR with the Office of the Great Seal after 15 session days expire or after JCAR has waived the 15 session day requirement.



### Filing with Office of the **Great Seal**

- ▲ The department director confirms the intent to adopt the rules by submitting a Certificate of Adoption to the MOAHR.
- ▲ The MOAHR files the final rules with the Office of the Great Seal.
- A The rules may become effective immediately upon filing, or at a later date specified by the department in the rules.
- ▲ On the effective date, the MOAHR amends the Michigan Administrative Code to reflect the new language of the rules.

### Ongoing Compliance Protocols

- Right Now (10.6) Statewide—
  - ► COVID-19 occupancy limits per MDHHS
  - ► No employee check-in protocols
  - ▶ No COVID-19 reporting standards
  - ► Every Business can be open
  - ► No COVID-19 cleaning standards
- Still subject to Health Code Penalties
  - ▶ Are Police willing to enforce?
- Everyone is free to protect themselves





## LAMBERT LAW LEGAL SERVICES

- Employment Law
- Real Estate
- Business and Commercial
- Personal Injury (Dan)
- Estate Planning and Probate
- Intellectual Property
- ► Litigation in these disciplines

### THANK YOU!

▶We appreciate this opportunity to explore the legal challenges of meeting the reopening requirements in real time. Thank you for your attention to our presentations. We thank Alaina, Maggie and the Greater Rochester Chamber of Commerce for this opportunity.

