

Guidance on MI Supreme Court Decision

Conducted by Greater Rochester Chamber of Commerce

LAMBERT LAW - Presenter

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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 Concurr and joins the Majority result
- ▶ McCormack Dissents, joined by two other justices
- ▶ Bernstein Separate Dissent
- ▶ 71-page Opinion; referred from Federal Court

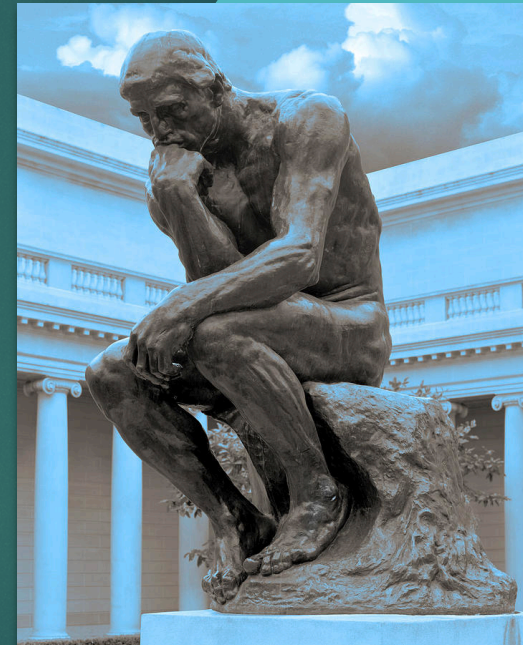
Critical EPGA Factors

- ▶ 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



THE STAR WARS SAGA CONTINUES

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

STAR WARS
THE EMPIRE STRIKES BACK
WARS

Starring
MARK HAMILL · HARRISON FORD · CARRIE FISHER
BILLY DEE WILLIAMS · ANTHONY DANIELS

Co-starring DAVID PROWSE · KENNY BAKER · PETER MAYHEW · FRANK OZ

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 invalid 1945 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

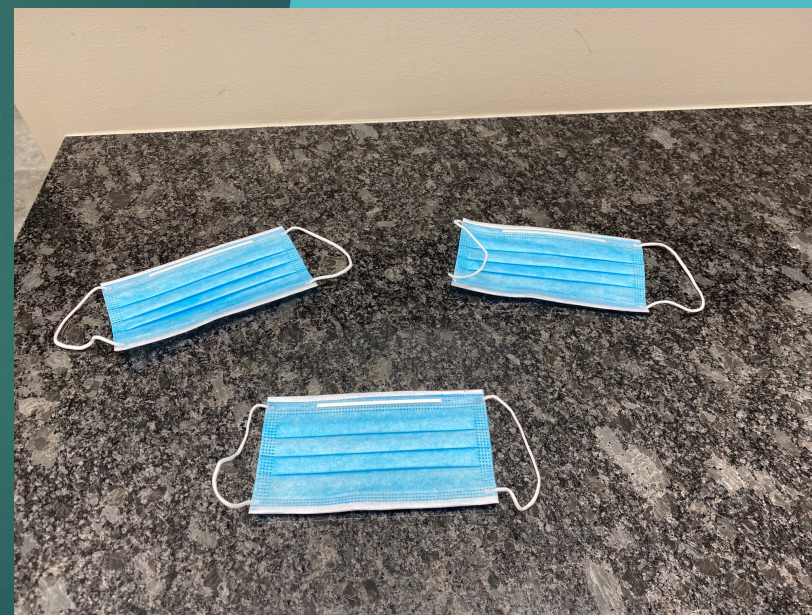


Michigan DHHS Order 10.5.2020

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

The Subject du jour

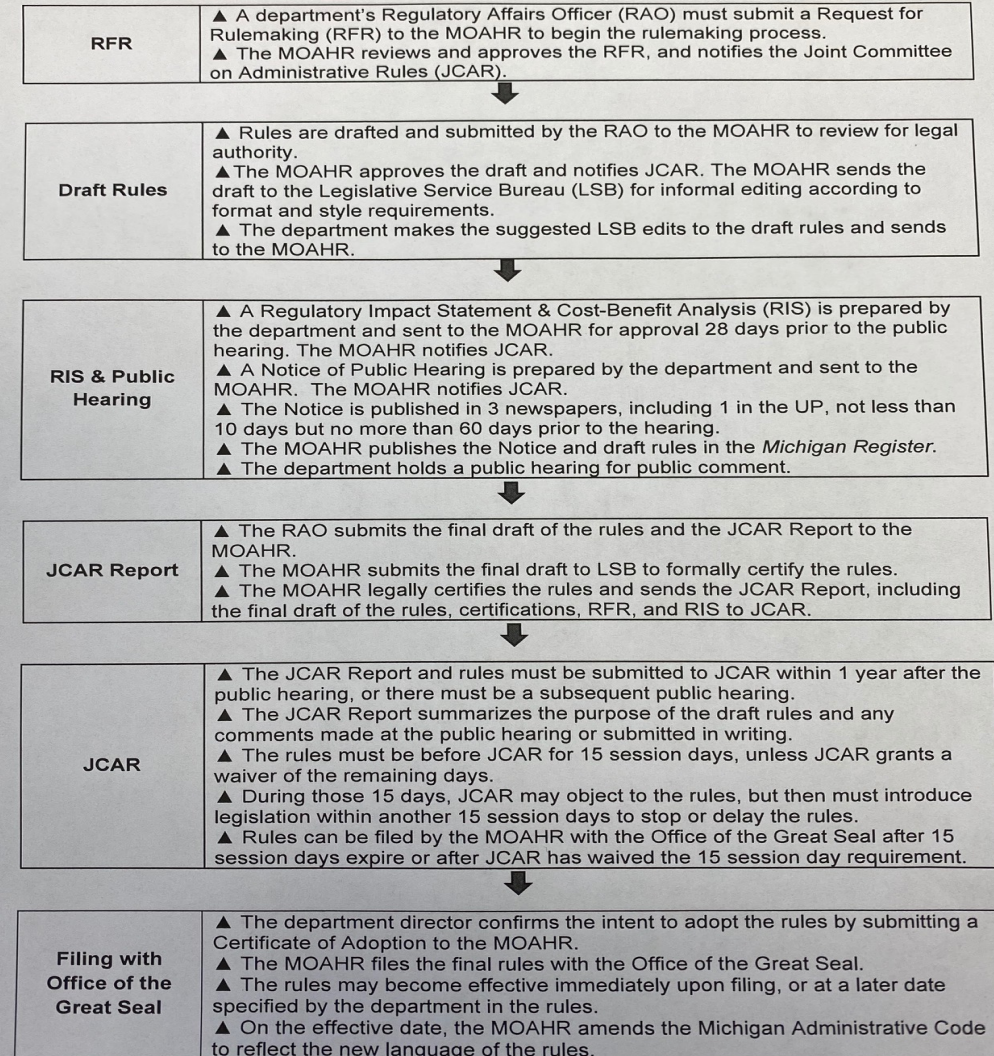


Michigan Rulemaking Process

This Summary illustrates the complicated process of enacting Agency Rules

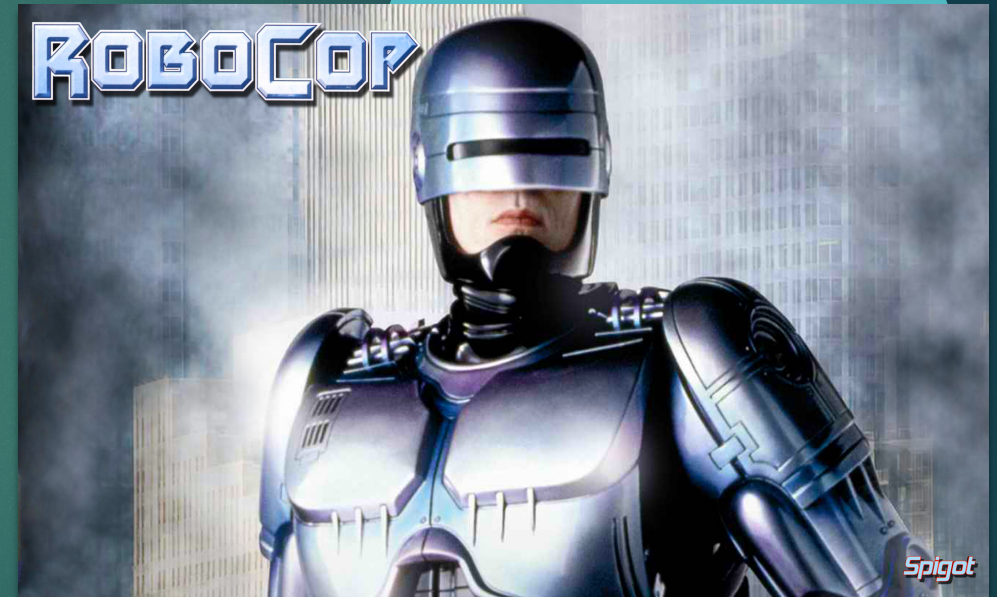
Rulemaking Process Summary

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.



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.

