

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN ADMINISTRATIVE HEARING SYSTEM RULES

**EMERGENCY RULE
AMENDING RULE 101, R 792.10101**

Filed with the secretary of state on October 16, 2020

These rules take effect upon filing with the secretary of state and shall remain in effect for 6 months.

By authority conferred on the executive director of the Michigan office of administrative hearings and rules by section 33 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.233, and Executive Reorganization Order No. 2019-1, MCL 324.99923.

FINDING OF EMERGENCY

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. On March 10, 2020, Governor Gretchen Whitmer declared a state of emergency in response to the COVID-19 pandemic. On March 13, 2020, the President of the United States declared a national emergency in response to the COVID-19 pandemic. There is currently no approved vaccine for this disease, and it continues to remain a serious threat throughout the state of Michigan, with the number of confirmed cases at 134,656 and the number of confirmed deaths at 6,891, as of October 10, 2020.

On October 2, 2020, in *In re Certified Questions from the United States District Court, Western District of Michigan, Southern Division, (Midwest Institute of Health, PLLC v Governor)*, Docket No. 161492, ___NW2d __, __ Mich ___, Case No. 161492, the Michigan Supreme Court concluded that the Governor did not have authority under the emergency management act, 1976 PA 390, MCL 30.401 to 30.421, to issue or renew executive orders beyond April 30, 2020 related to the COVID-19 pandemic, nor did the Governor have such authority under the emergency powers of the governor act, 1945 PA 302, MCL 10.31 to 10.33, because the act unlawfully delegates legislative power to the executive branch in violation of the Michigan Constitution. The Court thus held that executive orders issued by the Governor in response to the COVID-19 pandemic, including those allowing for administrative hearings to be conducted remotely, now lack any basis under Michigan law.

To reduce the risk of both the transmission and a resurgence of COVID-19, and pursuant to MCL 24.248(1) and *Marc Slis, et al v. State of Michigan, et al*, __ NW2d __, __ Mich App ___, Case No. 351211 (May 21, 2020), these emergency rules are promulgated by the Michigan office of administrative hearings and rules (MOAHR) to allow administrative law judges (ALJs) who

October 12, 2020

conduct hearings on behalf of the Michigan Employment Relations Commission (MERC) and the Public Service Commission (PSC) to continue to remotely hold these hearings during the COVID-19 pandemic and throughout the post COVID-19 transition period.

Overview

In order to reduce the risk of both the transmission and a resurgence of COVID-19, MOAHR is able to conduct hearings by telephone or video conference as Rule 121 of the MAHS administrative hearing rules, Rule 792.10121, specifically authorizes MOAHR ALJs to "conduct all or part of a hearing by telephone, video-conference, or other electronic means." Rule 121 does not, however, apply to MERC or PSC hearings. Rule 101, R 792.10101(3) and (4), expressly state that the Michigan Administrative Hearing System rules do not govern proceedings before PSC or MERC, with the exception of provisions for disqualification and recusal of ALJs.

Since the start of the pandemic, MOAHR's ALJs have been remotely conducting hearings on behalf of PSC and MERC under the authority conferred upon MOAHR by emergency executive orders, including most recently Executive Orders 2020-186 and 2020-154. With the Michigan Supreme Court's recent invalidation of these emergency executive orders, MOAHR may be without authority to remotely conduct hearings on behalf of PSC and MERC, even with the stipulation of the parties. However, conducting these hearings in-person, particularly when the subject matter often involves multiple parties, attorneys, and witnesses, will unduly compromise the public health, safety, and welfare of all those in attendance, including immunocompromised individuals and other vulnerable individuals at enhanced risk of contracting COVID-19.

The Michigan Supreme Court's Administrative Order Nos. 2020-14 and 2020-19 authorize the continued use and expansion of remote hearings by trial courts throughout the State and, in doing so, Michigan has become a national model in how to provide access to justice during the pandemic. Allowing MOAHR to continue to remotely conduct hearings on behalf of PSC and MERC during the COVID-19 pandemic and throughout the return to full capacity period is consistent with the practices of our justice system. MOAHR therefore finds it necessary and proper to temporarily amend Rule 101, R 792.10101, of the MAHS administrative hearing rules.

An amendment to PSC's and MERC's existing rule sets would ultimately be prudent but would not occur in time to address the current situation. If the usual notice, hearing, and participation procedures of rulemaking were followed, numerous in-person hearings would be conducted during the delay, resulting in potential exposure to MOAHR's ALJs, parties, witnesses, attorneys, and other hearing participants. Promulgation of this emergency rule will immediately eliminate the risk of exposure to all participants in the hearing process. Thus, the preservation of the public health, safety, and welfare requires the promulgation of emergency rules as provided for in section 48 of the administrative procedures act of 1969 (APA), 1969 PA 306, MCL 24.248, without following the notice and participation procedures required by sections 41 and 42 of the APA, MCL 24.241 and 24.242.

Rule 1. Application of other rules.

These emergency rules, while in effect, supersede R 792.10101 of the Michigan Administrative Code.

Rule 2.

(1) These rules govern practice and procedure in administrative hearings conducted by the Michigan administrative hearing system under Executive Reorganization Order No. 2005-1, MCL 445.2021, Executive Reorganization Order No. 2011-4, MCL 445.2030, and Executive Reorganization Order No. 2011-6, MCL 445.2032.

(2) The rules in part 1 apply to all administrative hearings conducted by the hearing system, except hearings specifically exempted under MCL 445.2021, MCL 445.2030, and MCL 445.2032, and subject to prevailing practices and procedures established by state and federal statutes and the rules for specific types of hearings contained in parts 2, 3, and 5 to 19 of the rules.

(3) The rules in this part do not govern part 4 proceedings before the Michigan public service commission, except R 792.10106(2), (3), (4), (5), (6), and (7), provisions for disqualification and recusal of administrative law judges, and R 792.10121, provisions for telephone and electronic hearings.

(4) The rules in this part do not govern proceedings before the employment relations commission, except R 792.10106(2), (3), (4), (5), (6), and (7), provisions for disqualification and recusal of administrative law judges, and R 792.10121, provisions for telephone and electronic hearings.



October 13, 2020

Suzanne D. Sonneborn, Executive Director,
Michigan Office of Administrative Hearings
and Rules

Date

Pursuant to Section 48(1) of the administrative procedures act of 1969, 1969 PA 306, as amended, MCL 24.248(1), I hereby concur in the finding of the Michigan Office of Administrative Hearings and Rules that the circumstances creating an emergency have occurred and the promulgation of the above rules is required for the preservation of the public health, safety, and welfare.



October 15, 2020

Gretchen Whitmer, Governor

Date

CERTIFICATE OF APPROVAL

On behalf of the Legislative Service Bureau, and as required by section 45 of the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.245, I have examined the proposed emergency rules of the Department of Licensing and Regulatory Affairs, dated October 12, 2020, entitled "Emergency Rule Amending Rule 101, R 792.10101." I approve the rules as to form, classification, and arrangement.

Dated: October 13, 2020

LEGISLATIVE SERVICE BUREAU

By



Elizabeth R. Edberg,
Legal Counsel



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

ORLENE HAWKS
DIRECTOR

LEGAL CERTIFICATION OF RULES


I certify that I have examined the attached **emergency administrative rules**, dated October 12, 2020 in which the Department of Licensing and Regulatory Affairs proposes to promulgate emergency rules entitled “**Emergency Rule Amending Rule 101, R 792.10101.**”

The Legislative Service Bureau has approved the proposed rules as to form, classification, and arrangement.

I approve the rules as to legality pursuant to the Administrative Procedures Act, MCL 24.201 *et seq.* and Executive Order No. 2019-6. In certifying the rules as to legality, I have determined that they are within the scope of the authority of the agency, do not violate constitutional rights, and are in conformity with the requirements of the Administrative Procedures Act.

Dated: October 13, 2020

Michigan Office of Administrative Hearings and Rules

By: 
Katie Wienczewski,
Attorney