

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of) NOTICE OF ADOPTION OF
Temporary Emergency Rules I) TEMPORARY EMERGENCY RULES
through III pertaining to limiting)
COVID-19 exposure in assisted living)
facilities)

TO: All Concerned Persons

1. The Department of Public Health and Human Services (department) is adopting the following emergency rules in response to the present resurgence of COVID-19 cases in the state that has disparately impacted vulnerable populations in nursing and assisted living facilities. As of the date of this filing, there have been 82 cases in residents and 61 cases in staff of these facilities. These cases have led to 16 deaths.

2. While older adults and people of any age who have serious underlying medical conditions are at higher risk of severe illness from COVID-19, there is increased risk for those living and working in assisted living facilities due to proximity to other residents and difficulties in maintaining social distancing measures. A recent national analysis estimates that up to 40 percent of all deaths in the United States due to COVID-19 have taken place in resident populations of similar facilities.

3. On April 29, 2020, Governor Bullock announced an expanded testing framework to test 60,000 Montanans per month. Primary focus was given within this framework to vulnerable communities, and particularly assisted living facilities and long-term care facilities such as nursing homes, whose residents are at highest risk of COVID-19-related hospitalization and/or death. Most of these facilities have embraced expanded testing and thousands of tests are being conducted around the state each day. A number of facilities, however, have not participated in baseline or ongoing testing.

4. Montana's Phase I guidance for lifting the Stay at Home Directive and reopening non-essential businesses maintained a prohibition on visitation in nursing and assisted living facilities. With Montana recently entering Phase II of reopening, the prohibition on visitation in these settings was lifted on June 25, 2020, subject to stringent safety and health measures. In response to the upward trend of positive cases, the Directive implementing the limited visitation in nursing and assisted living facilities was modified on July 8, 2020, to condition any visitation upon adherence to strict testing, screening, physical distancing, sanitation, hygiene, and other infection control protocols. These emergency rules establish the protocols that are necessary to follow for any assisted living facility that wishes to allow visitation.

For the foregoing reasons, the department adopts these emergency rules. These rules will remain in effect no longer than 120 days after the date of adoption.

5. EMERGENCY RULE I provides definitions that apply to this rulemaking. These definitions are necessary to clarify that a standard has been established by the Centers for Disease Control and Prevention (CDC) for appropriate personal protective equipment. These definitions are also necessary to help operators of assisted living facilities understand that the rules apply to a broad definition of staff, and not just employees who have direct care responsibilities. These definitions are also necessary to establish that a satisfactory COVID-19 test must meet particular sensitivity and specificity requirements.

6. EMERGENCY RULE II is necessary to provide a baseline test for assisted living facility operators so that appropriate action can be taken before relaxing any restrictions on visitation. This emergency rule is also necessary to make sure that potential sources of new infection within the facility are regularly monitored via testing so that appropriate mitigation measures can be taken upon introduction of COVID-19 into the facility.

7. EMERGENCY RULE III is necessary to provide assisted living facility operators guidance on minimal universal source control measures to ensure that visitors and other people entering a facility cannot infect residents. This emergency rule is also necessary to establish that facilities may not allow visitation when there is insufficient staffing within the facility to ensure that these measures are adequately implemented.

8. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you require an accommodation, contact Heidi Clark at the Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

9. The emergency rules are effective July 13, 2020.

10. The text of the emergency rules provides as follows:

EMERGENCY RULE I DEFINITIONS As used in these emergency rules, the following definitions apply:

(1) "Appropriate PPE" means personal protective equipment when available and consistent with CDC guidance on optimization of PPE. A copy of CDC guidance "Considerations for Preventing Spread of COVID-19 in Assisted Living Facilities" may be obtained from the Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, or may be downloaded at the CDC website: <https://www.cdc.gov/coronavirus/2019-ncov/hcp/assisted-living.html>.

(2) "Assisted living facility" is defined at 50-5-101, MCA.

(3) "Staff" means all personnel working in the facility including, but not limited to, administrators, medical staff, employees, per diem staff, contractors with a regular presence in the facility, private duty patient or resident-contracted individuals, dietary, laundry and housekeeping personnel, and volunteers.

(4) "Test" means an authorized assay able to detect SARS-CoV-2 virus with greater than 95 percent sensitivity and greater than 90 percent specificity, such as a polymerase chain reaction test.

AUTH: 2-4-303, 50-5-226, MCA

IMP: 50-5-226, MCA

EMERGENCY RULE II COVID-19 TESTING REQUIREMENTS FOR VISITATION AND CASE NOTIFICATION (1) An assisted living facility may only allow visitors if the following COVID-19 testing requirements are met:

(a) the facility has received results of a baseline COVID-19 testing of all residents and staff showing no infection in the facility; and

(b) the facility has developed and implemented a testing plan that:

(i) upon identification of a resident or staff member with symptoms consistent with COVID-19 or upon a positive test for COVID-19, provides for all residents to be immediately tested and then re-tested weekly until all residents test negative;

(ii) provides for continued, weekly re-testing of all staff;

(iii) establishes a procedure for addressing residents or staff that decline or are unable to be tested (e.g., a symptomatic resident refusing testing in a facility with positive COVID-19 cases should be treated as positive); and

(iv) identifies an appropriately licensed practitioner who has issued an order for all testing that is within their scope of practice.

(2) All assisted living facilities must immediately, upon receipt of a positive COVID-19 test result of any staff or resident, notify the Quality Assurance Division, Licensing Bureau at (406) 444-1575; fax: (406) 444-1742; MTSSAD@mt.gov. This obligation is in addition to any communicable disease reporting duties to public health under ARM Title 37, chapter 114.

AUTH: 2-4-303, 50-5-226, MCA

IMP: 50-5-226, MCA

EMERGENCY RULE III COVID-19 UNIVERSAL SOURCE CONTROL REQUIREMENTS FOR VISITATION (1) An assisted living facility may only allow visitors if the facility has developed and implemented a written screening and control measure protocol for staff, residents, and all other persons entering the facility that includes:

(a) temperature checks screening for and excluding entry into the facility of any person with a temperature of 100.4 degrees Fahrenheit or greater;

(b) a questionnaire about symptoms or potential exposure and criteria for exclusion from entry into the facility;

(c) control measures must include the following:

(i) social distancing;

- (ii) hand hygiene (e.g., use of an alcohol-based hand rub upon facility entry);
 - (iii) all outside persons entering facility must always wear a cloth face covering or face mask;
 - (iv) all residents must wear a cloth face covering or face mask when in common areas or when attending trips away from the facility; and
 - (v) staff must wear appropriate PPE when they are interacting with residents.
- (2) An assisted living facility may not allow visitors when it is experiencing staffing shortages.

AUTH: 2-4-303, 50-5-226, MCA

IMP: 50-5-226, MCA

11. The rationale for the temporary emergency rules is as set forth in paragraphs 1 through 4.

12. It is presently unknown whether a standard rulemaking procedure will be undertaken prior to the expiration of these temporary emergency rules. The necessity and efficacy of these emergency rules will be continuously evaluated as the effort to combat the COVID-19 pandemic in Montana develops.

13. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in paragraph 8 or may be made by completing a request form at any rules hearing held by the department.

14. The bill sponsor contact requirements of 2-4-302, MCA, do not apply to this rulemaking.

/s/ Nicholas Domitrovich
Nicholas Domitrovich
Rule Reviewer

/s/ Sheila Hogan
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State July 13, 2020.