

First Supplement to Memorandum 2022-35

Emergency-Related Reforms: Informational Report (Emergency Powers of the Governor)

This supplement¹ will continue the discussion of different emergency law approaches that was started in Memorandum 2022-27. This supplement focuses on executive powers conferred by the primary emergency law.²

POLICY OBJECTIVES

Memorandum 2022-27 presented policy objectives for emergency laws.³ These objectives are used to analyze the different emergency law approaches presented in this study. The policy objectives (and a brief explanation of each) were reproduced in the main memorandum, but, for ease of reference, they are also listed (without explanation) below.

- *Certainty.*
- *Feasibility.*
- *Information Input and Output.*
- *Oversight.*
- *Speed and Nimbleness.*

The Oversight objective encompasses rules that delimit the scope and process for emergency powers (i.e., proactive oversight). This objective also includes mechanisms to identify, adjust, or override problematic misuse of (or failures to use) emergency powers (i.e., responsive oversight).

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See generally Memorandum 2022-27, pp. 3-5.

3. See *id.* at 2-3.

OPERATIONAL ELEMENTS

Memorandum 2022-27 also identified three main procedural steps in emergency law:

- (1) Establishment of a state of emergency.
- (2) Exercise of emergency powers during a state of emergency.
- (3) Termination of a state of emergency.

Memorandum 2022-27 addressed different approaches taken in laws relating to the establishment of a state of emergency.

After a brief discussion of the character of different types of emergency rules and powers, this supplement focuses on the emergency powers conferred on the Governor by the primary emergency law.⁴

In crafting a statutory approach to address the Governor's emergency authority, the questions to answer include:

- What emergency powers does the law confer on the Governor?
- Does the law include specific emergency powers (or limitations on emergency powers)? If so, what specific powers or limitations are included?
- Does the Governor need approval or concurrence prior to taking emergency actions?
- Are there specific notice requirements for the Governor's emergency actions?
- Do the Governor's actions expire (or require extension) after a specified timeframe?
- Can the Legislature make changes to or terminate an individual emergency action of the Governor?

CHARACTER OF RULES APPLICABLE DURING A STATE OF EMERGENCY

Typically, emergency laws grant the Governor special emergency powers to respond to the emergency and address conditions caused by the emergency. The emergency powers conferred on the Governor by the emergency law (and the related requirements for the exercise of these powers) will be discussed in this supplement.

Emergency laws generally also provide special financial rules for a state of emergency (e.g., for staff resources, appropriations, and expenditures). For

4. See generally *id.* at 3-5.

instance, California’s Emergency Services Act includes rules granting the Governor powers to commit state resources (including staff and funding) towards emergency needs.⁵ Emergency financial provisions will be discussed in future materials.

In addition to provisions providing general authority for executive action, some laws set forth rules that apply once a state of emergency is proclaimed. By prospectively enacting emergency rules, the Legislature can claim a greater role in setting out the emergency legal regime and could potentially limit the need for executive emergency action. However, given the unpredictable nature of emergencies and the associated practical limitations and consequences of changing emergency conditions, even prospectively established emergency rules could need to yield when emergency conditions demand it. Statutory rules that activate in a state of emergency will also be discussed in future materials.

EXECUTIVE AUTHORITY DURING A STATE OF EMERGENCY, GENERALLY

Generally, upon a state of emergency proclamation, the Governor is granted broad powers to respond to the emergency. Emergency laws typically include some more detailed provisions regarding the scope of the executive’s emergency authority (either providing specific authority for certain issues or limiting the broad authority conferred). These specific authorities and limitations may be combined to some extent (i.e., the description of a specific authority may be accompanied by related limitations or restrictions on the use of that authority).

The Governor’s emergency acts may or may not be subject to approval or disapproval by the Legislature (or a special executive or legislative committee).

In addition, the Governor’s emergency acts may be subject to time limits that may or may not be shorter than the state of emergency itself.

SUBSTANCE OF EXECUTIVE AUTHORITY

The emergency laws of different jurisdictions provide different levels of detail with respect to what a Governor can do in an emergency. Often, the laws provide broad grants of authority to respond to the effects of the emergency, which may or may not be supplemented with a specific (nonexclusive) list of powers or specific limitations or restrictions on the powers granted.

5. See Gov’t Code §§ 8628, 8628.5.

The primary questions to consider are whether to provide specificity about emergency powers and, if so, whether to specifically identify powers or limits on the power.

Broad Grant of Authority

As indicated above, emergency laws generally contain broad grants of authority that empower the executive to take necessary emergency actions. The discussion below provides examples of some of the broad grants of authority contained in different emergency laws.

Laws that grant the executive broad authority in a state of emergency help to ensure that the executive has the leeway to take necessary actions to respond to the emergency. Such broad grants of authority appear to further the following policy objectives:

- *Feasibility.* The Governor is broadly empowered to take necessary actions to address the emergency.
- *Speed and Nimbleness.* Where the Governor has broad authority to take emergency action, the Governor is empowered to respond to the emergency quickly and expeditiously.

However, broad grants of executive authority could be in tension with the following policy objectives:

- *Certainty.* Where the Governor is seeking to take emergency actions that are novel or with wide-ranging impacts, there may be questions about the limits of the Governor's authority under the broad grant.
- *Oversight.* Where the extent of the Governor's powers is not subject to clear guidelines, it may be difficult to assess whether the Governor's actions are beyond the scope of the granted emergency authority.

Broad Grants of Authority to Exercise Police Power

Often, the broad grants of authority in emergency laws include provisions that authorize the Governor to take actions necessary to effectuate the purpose of the emergency law.

In California, the Emergency Services Act includes broad grants of power for the Governor during a state of emergency. One provision provides:

[T]he Governor shall, to the extent he deems necessary, have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in

order to effectuate the purposes of [the California Emergency Services Act].⁶

Similarly, Arizona’s law grants the Governor the following power:

The governor shall have complete authority over all agencies of the state government and the right to exercise, within the area designated, all police power vested in this state by the constitution and laws of this state in order to effectuate the purposes of this chapter.⁷

And, Minnesota’s emergency law includes broad grants of emergency authority for the Governor, as follows:

[The Governor] has general direction and control of emergency management, (2) may carry out the provisions of this chapter, and (3) during a national security emergency declared as existing under section 13.21, during the existence of an energy supply emergency as declared under section 216C.15, or during the existence of an emergency resulting from an incident at a nuclear power plant that poses a radiological or other health hazard, may assume direct operational control over all or any part of the emergency management functions within this state.

...

[and the Governor may] make, amend, and rescind the necessary orders and rules to carry out the provisions of this chapter and section 216C.15 within the limits of the authority conferred by this section, with due consideration of the plans of the federal government and without complying with sections 14.001 to 14.69 [state Administrative Procedure Act], but no order or rule has the effect of law except as provided by section 12.32[.]⁸

Broad Grant of Authority Related to Waiver or Suspension of Laws

Many emergency laws also include a broad grant of authority permitting the Governor to waive or suspend laws.⁹

6. Gov’t Code § 8627.

7. Ariz. Rev. Stat. Ann. § 26-303(E)(1).

8. Minn. Stat. Ann. § 12.21(1), (3)(1). The referenced Section 12.32 is reproduced, in part, later in this memorandum. See text associated with *infra* note 89.

9. See generally G. Sunshine, et al., *An Assessment of State Laws Providing Gubernatorial Authority to Remove Legal Barriers to Emergency Response*, 17 Health Security 156 (2019), available at <https://www.nga.org/wp-content/uploads/2019/06/An-Assessment-of-State-Laws-Providing-Gubernatorial-Authority-to-Remove-Legal-Barriers-to-Emergency-Response.pdf> (assessment of 2017 laws found “35 states that explicitly permit governors to suspend or amend both statutes and regulations; 7 states in which governors are permitted to amend regulations during a declared emergency but are not explicitly authorized to modify or remove statutes; and 8 states and the District of Columbia that provide no explicit authority to governors to change statutes or regulations during a declared emergency”); Center for Law and the Public’s Health, Model State

In California, the Emergency Services Act provides that:

the Governor may suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency...where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency.¹⁰

Similarly, Florida law allows the Governor to:

[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of any state agency, if strict compliance with the provisions of any such statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency.¹¹

Some states' laws contain more detailed provisions identifying the circumstances where the use of this waiver/suspension power might be appropriate.¹² Washington law, for example, includes a list of specific topics where waiver or suspension of statutes is allowed,¹³ while also providing a broader authority to waive statutes under specified circumstances. That broader authority grants the Governor authority to waive or suspend:

[s]uch other statutory and regulatory obligations or limitations prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency if strict compliance with the provision of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency, unless (i) authority to waive or suspend a specific statutory or regulatory obligation or limitation has been expressly granted to another statewide elected official, (ii) the waiver or suspension would conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state, or (iii) the waiver or suspension would conflict with the rights, under the First Amendment, of freedom of speech or of the people to peaceably assemble. The governor shall give as much notice as practical to legislative leadership and impacted local governments when issuing orders under this subsection (2)(g).¹⁴

Emergency Health Powers Act (Oct. 23, 2001), § 303(a)(1), available at <https://biotech.law.lsu.edu/blaw/bt/MSEHPA.pdf> (hereafter, "MSEHP Act").

See also, e.g., Ariz. Rev. Stat. Ann. § 26-303(A)(1); 20 Ill. Comp. Stat. Ann. 3305/7(1).

10. Gov't Code § 8571.

11. Fla. Stat. Ann. § 252.36(6)(a).

12. For a different type of limitation on the use of this power, see *infra* note 48 and associated text (New York law requires "minimum deviation" from statutory requirements).

13. Wash. Rev. Code Ann. § 43.06.220(2)(a)-(f).

14. Wash. Rev. Code Ann. § 43.06.220(2)(g).

The policy analysis for these provisions is similar to the analysis for the broad grant provisions discussed above.

These provisions do not generally expressly address what the Governor can do to address situations where alternative measures can be taken to meet the overall aims and purposes of the law, even though strict compliance with the law may not be possible.¹⁵ In such a situation, it may be preferable for the statutory rules to be adjusted rather than suspended altogether.

The scope of the Governor's authority to issue quasi-legislative rules was at issue in a lawsuit in California. In that lawsuit, the plaintiffs, Assembly Members Gallagher and Kiley, challenged the Governor's authority to issue emergency orders related to the conduct of the 2020 election.¹⁶ The plaintiffs sought declaratory relief that the Governor's executive order was "void as an unconstitutional exercise of legislative power."¹⁷ On appeal, the court found that the Emergency Services Act's grant of police power provides the Governor with authority to issue quasi-legislative orders in an emergency.¹⁸

Inclusion of Substantively Specific Examples of Executive Authority

Emergency laws often do not rely exclusively on broad grants of executive authority, but also identify specific powers. This approach could be helpful by providing more direct, clear authority to take the specified emergency actions. The laws vary in the degree of detail and amount of specific provisions they contain.

15. Idaho's emergency law seems to be an exception. Idaho law expressly prohibits the Governor from "alter[ing], adjust[ing], or creat[ing]" any code provision. Idaho Code Ann. § 46-1008(8); see also *id.* § 46-1008(5)(a) (allowing Governor to "[s]uspend the provisions of any rules prescribing the procedures for conduct of public business that would in any way prevent, hinder, or delay necessary action in coping with the emergency.").

16. See *Newsom v. Super. Ct. of Sutter Cty.* (2021) 63 Cal.App.5th 1099, 278 Cal.Rptr.3d 397, *rev. denied* Aug. 11, 2021.

Specifically, the executive order at issue "affirms that all counties would mail eligible voters vote-by-mail ballots and provides for the use the Secretary of State's vote-by-mail ballot tracking system. It also provides additional terms related to the number and operation of polling places (including opening at least one polling place per 10,000 registered voters for four days) and vote-by-mail ballot dropoff locations, and it states in-person public participation in public meetings or workshops would not be required. The Executive Order identifies statutory provisions that are displaced pursuant to its provisions. ..." *Id.* at 1106.

17. *Id.* at 1105.

18. *Id.* at 1113-14. The Court of Appeal also concluded that this grant of quasi-legislative powers to the Governor in an emergency "is not an unconstitutional delegation of legislative power." *Id.* at 1118.

California’s emergency law, as indicated above, provides some broad grants of authority, but also includes a few provisions that provide or clarify specific executive emergency authorities.¹⁹

Several states’ emergency laws contain provisions that provide an illustrative list of executive emergency powers.²⁰ These laws generally make clear that the list of powers is not exclusive and, in some cases, may also include a broad catch-all provision.²¹

Regarding public health emergencies specifically, the most recent draft of the Model Public Health Emergency Authorities Act (“draft PHEA Act”) includes a list of specific powers. The draft PHEA Act’s purpose is described, in part, as “clarifying substantive and procedural limitations to a governor’s authority.”²² The provision that lists specific powers is intended to provide further guidance on what “kinds of orders [are] ‘necessary’ to respond to a public-health emergency:”

First, the subsection authorizes only those orders that are necessary to serve one of two general purposes: eliminating or reducing the risk that gave rise to the public-health emergency, or eliminating, reducing, containing or mitigating any of the effects of the public-health emergency. Second, subsection (b) also describes six exemplary categories of potentially necessary orders.²³

For the approach of providing specific examples of executive powers, certainty is the main policy objective at issue:

- *Certainty.* With respect to the specifically identified powers, the law provides clarity that the Governor has the authority to take such actions. However, even where the law is clear that the list is not

19. See, e.g., Gov’t Code §§ 8572 (“In the exercise of the emergency powers hereby vested in him during a state of war emergency or state of emergency, the Governor is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state and the state shall pay the reasonable value thereof....”); 8628.5 (related to services and reimbursement of community clinics and health centers during an emergency); see also text associated with *infra* note 60 (quoting the remainder of Government Code Section 8572).

20. See, e.g., Fla. Stat. Ann. § 252.36(6); Idaho Code Ann. § 46-1008(5), (6) (lists of emergency executive powers); Me. Rev. Stat. Ann. tit. 37-B § 742(1)(C); 1950 Mass. Acts ch. 639 (“Mass. Civil Defense Act”), § 7, available at <https://www.mass.gov/doc/chapter-639-of-the-acts-of-1950-civil-defense-act-mema-law/download>; 30 R.I. Gen. Laws Ann. § 30-15-9(e); Wash. Rev. Code Ann. § 43.06.220(1), (2); see also, e.g., MSEHP Act, *supra* note 9, § 303(a).

21. See, e.g., 30 R.I. Gen. Laws Ann. § 30-15-9(e)(13); Wash. Rev. Code Ann. § 43.06.220(1)(h), (2)(g).

22. See Prefatory Note of the July 8-14, 2022 Annual Meeting Discussion Draft of the Model Public-Health-Emergency Authority Act (June 28, 2022), available at <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e69f22d9-7bec-6a9d-981f-c0781a1dfbb8&forceDialog=0>.

23. *Id.* § 6 Comment 2.

exclusive, there may be questions about the Governor's authority to take actions that are similar to listed actions, but not on the list themselves.

The approach of listing specific powers would also appear to have ancillary effects on other policy objectives (e.g., oversight, speed, and nimbleness), but these effects relate to whether the statute provides sufficient certainty of the scope of the Governor's emergency authority.

The remainder of this section provides examples of some of the different types of specific powers granted in emergency laws.

Powers Related to Emergency Supplies or Services

Emergency laws may include express powers related to certain essential emergency supplies or services. Some of these may address the issue of possible shortages or unavailability expressly (see Maine's law below), but, in other cases, the law does not address the reason for the power.

For instance, California's emergency law provides that:

[the] Governor may make, amend, or rescind orders and regulations during a state of emergency that temporarily suspend any state, county, city, or special district statute, ordinance, regulation, or rule imposing nonsafety related restrictions on the delivery of food products, pharmaceuticals, and other emergency necessities distributed through retail or institutional channels, including, but not limited to, hospitals, jails, restaurants, and schools.²⁴

Although it is not express, this provision presumably is intended, at least in part, to avoid situations where necessary supplies are unavailable in an emergency due to challenges of complying with generally applicable regulations.

Other emergency laws take a similar approach, granting powers related to critical supplies and services, while not expressly connecting that power to the possibility of shortages. For instance, Alaska law empowers the Governor to "allocate or redistribute food, water, fuel, clothing, medicine, or supplies."²⁵ And, for public health emergencies specifically, the draft PHEA Act authorizes "the acquisition, stockpiling, distribution, or use of drugs, devices, equipment, or tests" and "the operation or management of buildings, shelters, or other physical space."²⁶

24. Gov't Code § 8627.5(a); see also Gov't Code § 8628.5, described in note 19 *supra*.

25. Alaska Stat. Ann. § 26.23.020(g)(10).

26. Draft PHEA Act, *supra* note 22, § 6(b)(1), (3).

In some cases, the law may expressly condition the power to apply in situations where the supplies or services might otherwise be unavailable. For instance, Maine’s emergency law empowers the Governor to, when “a shortage of critical material supplies appears imminent..., establish emergency reserves of those products necessary to ensure the health, welfare and safety of the people of the State.”²⁷ And, in Florida, one of the emergency powers conferred on the Governor is the power to “[a]uthorize businesses and their employees who sell commodities ... to exceed the times of curfews for the purpose of ensuring that the supplies of commodities are made available to the public”²⁸

The category of powers also includes provisions granting authority related to the provision of public utility and waste management services.²⁹

Powers Related to Gathering and Movement of People

Another specific power that is found in emergency laws relates to the gathering and movement of people. Such powers may be needed, for instance, to ensure the evacuation of areas that are under imminent threat (due to natural disasters or otherwise), to maintain routes of evacuation (or routes for emergency vehicle access), and to avoid assemblies that would require public safety resources that need to be dedicated to the emergency.

For example, Florida law includes a non-exhaustive list of emergency powers conferred on the Governor, which includes, in part, the powers to:

(e) Direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if she or he deems this action necessary for the preservation of life or other emergency mitigation, response, or recovery.

(f) Prescribe routes, modes of transportation, and destinations in connection with evacuation.

(g) Control ingress and egress to and from an emergency area, the movement of persons within the area, and the occupancy of premises therein.

...

27. Me. Rev. Stat. Ann. tit. 37-B, § 741(3)(F).

28. Fla. Stat. Ann. § 252.36(6)(m).

Commodity is defined as “any goods, services, materials, merchandise, supplies, equipment, resources, or other article of commerce, and includes, without limitation, food, water, ice, chemicals, petroleum products, and lumber necessary for consumption or use as a direct result of the emergency.” *Id.* § 501.160(1)(a).

29. See, e.g., *id.* § 252.36(6)(j), (n) (re utility services and hours of solid waste disposal facilities); Me. Rev. Stat. Ann. tit. 37-B § 742(1)(C)(13)(b) (re the suspension of residential electricity termination during the COVID-19 emergency); Mass. Civil Defense Act, *supra* note 20, § 7(b) (re public utility maintenance, extension, and interconnection).

(k) Take measures concerning the conduct of civilians, the movement and cessation of movement of pedestrian and vehicular traffic prior to, during, and subsequent to drills and actual or threatened emergencies, the calling of public meetings and gatherings, and the evacuation and reception of civilian population, as provided in the emergency management plan of the state and political subdivisions thereof.³⁰

Similarly, Washington’s law includes an illustrative list of things that the Governor can prohibit by order during a state of emergency, which includes:

(a) Any person being on the public streets, or in the public parks, or at any other public place during the hours declared by the governor to be a period of curfew;

(b) Any number of persons, as designated by the governor, from assembling or gathering on the public streets, parks, or other open areas of this state, either public or private;

...

(g) The use of certain streets, highways or public ways by the public[.]³¹

Power to Commandeer Private Property for Emergency Needs

Emergency laws may provide express power for the Governor to commandeer private property in an emergency. These provisions typically cite to generally applicable provisions governing compensation to the property owner whose property is taken.³²

For instance, Florida law allows the Governor to “[s]ubject to any applicable requirements for compensation under s. 252.43, commandeer or utilize any private property if she or he finds this necessary to cope with the emergency.”³³

Power to Regulate Alcohol, Explosives, and Firearms

Emergency laws may provide special authority for the Governor to regulate alcohol, explosives, and firearms during an emergency.³⁴ As described later in this memorandum, firearms may be the subject of both specific emergency authorities, as well as limitations on emergency authority.

30. Fla. Stat. Ann. § 252.36(6).

31. Wash. Rev. Code Ann. § 43.06.220(1).

32. See, e.g., Idaho Code Ann. § 46-1008(5)(d).

33. Fla. Stat. Ann. § 252.36(6)(d).

34. See, e.g., MSEHP Act, *supra* note 9, § 402(c) (granting a public health authority power, in a public health emergency, to “control, restrict, and regulate ... the use, sale, dispensing, distribution, or transportation of food, fuel, clothing and other commodities, *alcoholic beverages, firearms, explosives, and combustibles*, as may be reasonable and necessary for emergency response” (emphasis added)).

For example, Florida law grants the Governor power to:

[s]uspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles. However, nothing contained in [the main provisions of the emergency law] shall be construed to authorize the seizure, taking, or confiscation of firearms that are lawfully possessed, unless a person is engaged in the commission of a criminal act.³⁵

And, Washington law expressly allows the Governor to issue an order prohibiting:

(c) The manufacture, transfer, use, possession or transportation of a [M]olotov cocktail or any other device, instrument or object designed to explode or produce uncontained combustion;

(d) The transporting, possessing or using of gasoline, kerosene, or combustible, flammable, or explosive liquids or materials in a glass or uncapped container of any kind except in connection with the normal operation of motor vehicles, normal home use or legitimate commercial use;

(e) The sale, purchase or dispensing of alcoholic beverages[.]³⁶

Inclusion of Limitations or Restrictions on Executive Authority

In some cases, emergency laws provide broad grants of executive power, but also include restrictions or limitations on the executive's emergency authority. Some emergency laws may include general language restricting the scope of authority for emergency acts (or some subset of emergency acts) to only what is needed to address the emergency. Or, emergency laws include specific substantive limitations on emergency authority.³⁷ Examples of each of these are presented later in this discussion.

Concerns about the scope of emergency power appear to have motivated legislative or policy efforts in recent years to restrict the Governor's authority to act in an emergency.³⁸ Some of those efforts have included substantive limitations on the type of authority that the Governor can exercise.

35. Fla. Stat. Ann. § 252.36(6)(h).

36. Wash. Rev. Code Ann. § 43.06.220(1)(c)-(e).

37. See, e.g., Idaho Code Ann. § 46-1008(7), (8); Mont. Code Ann. § 10-3-102.

In the Montana code provision, subdivisions (5) through (15) were all recently added (during the COVID-19 pandemic). See 2021 Mont. Laws chs. 346 (§ 2), 504 (§ 8), and 515 (§ 1). Montana's provision applies to only to Parts 1 through 4 of the chapter (Chapter 3. Disaster and Emergency Services). Part 1 contains the general emergency law provisions that are the subject of this study.

38. See, e.g., discussion of Cal. SB 933, AB 1687, and AB 2212 in Memorandum 2022-21, p. 4.

See generally S. Quinton, *Lawmakers Move to Strip Governors' Emergency Powers*, Stateline, an initiative of The Pew Charitable Trusts (Jan. 22, 2021), available at <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/01/22/lawmakers-move-to-strip-governors->

The staff found several examples of limitations on emergency powers related to firearms or exercise of religion.³⁹ Less frequently, the staff came across limitations related to other constitutionally protected rights.⁴⁰ In some instances, these provisions may simply be reiterating otherwise applicable constitutional constraints that could override the Governor’s emergency authority regardless of what the statute purports to permit.⁴¹ However, the staff has not evaluated whether the statutory limitations are coextensive with constitutionally-protected rights, nor has the staff sought to evaluate whether emergency response actions would necessarily be subject to the same constitutional limitations as everyday governance.

The approach of identifying limits on the Governor’s emergency powers would seem to further the following policy objectives:

- *Certainty.* This approach makes clear that the Governor may not take the specified actions in response to an emergency.

However, in certain instances, the relationship of the limitations to the Governor’s general powers may be unclear. For instance, an evacuation order in response to a wildfire or similar threat could have the (indirect) effect of prohibiting physical attendance at certain churches or closing gun shops or shooting ranges in the area under threat of the wildfire (see Montana law restrictions related to firearms and religious services, reproduced below). Must the Governor consider these limitations when crafting general evacuation orders that would indirectly conflict with these limitations (by causing the businesses and religious facilities in the area to close)?

- *Oversight.* This approach provides a way for the Legislature to specify the limits of the emergency power in advance.

emergency-powers. See also generally, e.g., the descriptions of HB 1211 (Ark.), HB 2016 (Kan.), and HB 2463 (Pa.) at [https://ballotpedia.org/Changes_to_state_emergency_power_laws_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020-2022](https://ballotpedia.org/Changes_to_state_emergency_power_laws_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2022); Model Emergency Power Limitation Act prepared by the the American Legislative Exchange Council (ALEC), available at <https://alec.org/model-policy/emergency-power-limitation-act/>.

39. See generally, e.g., Ariz. Rev. Stat. Ann. § 26-303(L) (firearms); La. Stat. Ann. § 29:724(D)(4), (6) (firearms); N.D. Cent. Code Ann. § 37-17.1-05(10) (religion); Or. Rev. Stat. Ann. § 401.198 (firearms); Tenn. Code Ann. § 58-2-107(m), (n) (firearms and religion); Utah Code Ann. §§ 53-2a-214, 53-2a-219 (firearms and religion); W. Va. Code Ann. § 15-5-19a (firearms).

40. See, e.g., Gov’t Code § 8572 (press); Idaho Code Ann. § 46-1008(7)(a) (referencing constitutional rights and specifically noting right to peaceable assembly); Mont. Code Ann. § 10-3-102(1), (5)(b) (speech and assembly), (5)(c) (press); Wash. Rev. Code Ann. § 43.06.220(2)(g) (including limit related to First Amendment rights of speech and assembly).

41. See, e.g., Ariz. Rev. Stat. Ann. § 26-303(L) (“Pursuant to the second amendment of the United States Constitution and article II, section 26, Constitution of Arizona, and notwithstanding any other law, the emergency powers of the governor... do not allow the imposition of additional restrictions on the lawful possession, transfer, sale, transportation, carrying, storage, display or use of firearms or ammunition or firearms or ammunition components.”).

This approach seems to be in tension with the following policy objective:

- *Feasibility.* This approach poses a risk of prohibiting an emergency action that could be needed in certain types of emergencies. If, for instance, the emergency required changes to government operations (e.g., threats to government buildings, seismic safety issues in government buildings, wildfire or smoke impacts at government facilities), it may be necessary for the Governor to make changes to government operations.⁴²

The remainder of this section provides examples of some of the different types of limitations contained in emergency laws.

Limitation on Scope of Emergency Power

As indicated above, some emergency laws restrict the Governor's emergency power by including a type of 'narrow-tailoring' requirement (i.e., specifying that the effect of the Governor's action must be no greater than is necessary to address the emergency).

Such a requirement may apply broadly to all exercises of the Governor's emergency powers. For instance, in the context of public health emergencies, the draft PHEA Act seeks to "clarify[] the substantive and procedural limitations to a governor's authority."⁴³ The Act authorizes "only those orders that are necessary to serve one of two general purposes: eliminating or reducing the risk that gave rise to the public-health emergency, or eliminating, reducing, containing or mitigating any of the effects of the public-health emergency."⁴⁴ For public health emergencies, North Dakota's emergency law requires an emergency executive order "specifically address[] the mitigation of the declared state of disaster or emergency relating to public health."⁴⁵

Other states include limitations on the Governor's authority in their emergency laws more broadly. For example, Idaho law specifies that:

orders, proclamations, or rules must be essential to protect life or property from the occurrence or imminent threat of the state of disaster emergency threatening the safety of persons or property within the state and must be narrowly tailored to effectively protect life or property without placing unnecessary restrictions on the

42. See, e.g., Mont. Code Ann. § 10-3-102(5)(d) (Governor may not "prohibit, limit, or curtail ... the operation or functioning of the legislative branch, judicial branch, clerk of court, county commission, or city or town council"); see also *supra* note 37.

43. Draft PHEA Act, *supra* note 22, Prefatory Note.

44. *Id.* § 6 Comment 2.

45. N.D. Cent. Code Ann. § 37-17.1-05(7).

ability for a person or persons, regardless of job type or classification, to work, provide for their families, or otherwise contribute to the economy of the state of Idaho.⁴⁶

And, Rhode Island’s emergency law specifies that the Governor may exercise a list of emergency powers “subject to the [requirement for legislative approval beyond 180 days], limited in scope and duration as is reasonably necessary for emergency response.”⁴⁷

In other instances, the ‘narrow-tailoring’ requirement is limited to some subset of emergency powers. For example, New York’s emergency law includes a limitation on the Governor’s authority to waive or suspend laws. The limitation provides, in part, that orders suspending laws “shall provide for the minimum deviation from the requirements of the statute, local law, ordinance, order, rule or regulation suspended consistent with the disaster action deemed necessary.”⁴⁸

Limitation on Emergency Power Related to Firearms

Some emergency laws include special provisions limiting emergency authority as it relates to firearms (and ammunition).⁴⁹

For instance, some states expressly exclude firearms from the Governor’s authority to commandeer property during an emergency.⁵⁰

California’s emergency law includes a provision limiting emergency authority related to firearms. Government Code Section 8571.5 provides, in part, that “[n]othing in this article shall authorize the seizure or confiscation of any firearm or ammunition from any individual who is lawfully carrying or possessing the firearm or ammunition, or authorize any order to that effect....”⁵¹ Oregon law also contains a provision restricting seizure of firearms in an emergency.⁵²

Idaho and Montana both include somewhat lengthy provisions restricting emergency authority related to firearms. Idaho law prohibits the Governor from taking any of the following actions during a state of disaster emergency:

46. Idaho Code Ann. § 46-1008(1).

47. R.I. Gen. Laws Ann. § 30-15-9(e).

48. N.Y. Exec. Law § 29-a(2)(e); see also *id.* § 29-a(2)(b), (d).

49. See provisions cited in *supra* note 39.

50. See, e.g., Ariz. Rev. Stat. Ann. § 26-303(A)(2); La. Stat. Ann. § 29:724(D)(4).

51. Gov’t Code § 8571.5.

The remainder of the section states “... provided however, that a peace officer who is acting in his or her official capacity may disarm an individual if the officer reasonably believes it is immediately necessary for the protection of the officer or another individual. The officer shall return the firearm to the individual before discharging the individual, unless the officer arrests that individual or seizes the firearm as evidence pursuant to an investigation for the commission of a crime.” *Id.*

52. Or. Rev. Stat. Ann. § 401.198.

(a) Impose or enforce any additional restrictions on the lawful manufacturing, possession, transfer, sale, transport, storage, display or use of firearms or ammunition or their components or accessories, or otherwise limit or suspend any rights guaranteed by the United States constitution or the constitution of the state of Idaho, including but not limited to the right to peaceable assembly or free exercise of religion. The transport, storage, transfer, sale, commerce in, import and export of, distribution, repair, maintenance, and manufacture of firearms, ammunition, and related accessories and components, shooting ranges, and other goods and services directly related to lawful firearm possession, use, storage, repair, maintenance, sale or transfer, and training in the use of firearms are declared to be life-sustaining, essential businesses and services for the purposes of safety and security in times of declared emergency or any other statutorily authorized responses to disaster, war, acts of terrorism, riot or civil disorder, public health crises, or emergencies of whatever kind or nature;

(b) Suspend or revoke a license to carry concealed weapons or refuse to accept and process an application for a license to carry concealed weapons, except in accordance with the provisions of chapter 33, title 18, Idaho Code; or

(c) Notwithstanding the provisions of subsection (5) of this section, seize, commandeer, or confiscate in any manner any privately owned firearm, ammunition, or firearms or ammunition components that are possessed, carried, displayed, sold, transferred, transported, stored, or used in connection with otherwise lawful conduct.⁵³

Montana emergency law specifies that its main authorizing provisions should not be construed to confer upon the Governor (or other governmental agencies and officials) authority to take any of the following actions:

(7) prohibit, regulate, or curtail the otherwise lawful possession, carrying, sale, transportation, transfer, defensive use, or other lawful use of:

- (a) a firearm, including a component or accessory;
 - (b) ammunition, including any component or accessory;
 - (c) ammunition-reloading equipment and supplies; or
 - (d) a personal weapon other than a firearm;
- (8) seize, commandeer, or confiscate in any manner:
- (a) a firearm, including any component or accessory;
 - (b) ammunition, including a component or accessory;
 - (c) ammunition-reloading equipment and supplies; or
 - (d) a personal weapon other than a firearm;

53. Idaho Code Ann. § 46-1008(7)(a)-(c).

(9) suspend or revoke a permit to carry a concealed pistol issued pursuant to Title 45, chapter 8, except as expressly authorized in that chapter;

(10) refuse to accept an application for a permit to carry a concealed weapon, provided the application has been properly completed in accordance with Title 45, chapter 8;

(11) close or limit the operating hours of an entity engaged in the lawful selling or servicing of a firearm, including:

(a) a component or accessory;

(b) ammunition, including a component or accessory;

(c) ammunition-reloading equipment and supplies; or

(d) a personal weapon other than a firearm, unless the closing or limitation of hours applies equally to all forms of commerce within the jurisdiction;

(12) close or limit the operating hours of any indoor or outdoor shooting range;

(13) place restrictions or quantity limitations on an entity regarding the lawful sale or servicing of:

(a) a firearm, including a component or accessory;

(b) ammunition, including a component or accessory;

(c) ammunition-reloading equipment and supplies; or

(d) a personal weapon other than a firearm;⁵⁴

Limitation Related to Religious Services or Gatherings

Emergency laws may also include limitations on emergency authority related to religious services or gatherings. Examples of such provisions are provided below.

During the COVID-19 pandemic, there was an effort in multiple jurisdictions to enact “Religion is Essential” legislation.⁵⁵ Such legislation generally would designate religious services as essential services and would limit the authority of government to restrict religious services in a state of emergency. In preparing this memorandum, the staff did not review not-yet-codified provisions related to religion and emergency authority, nor did the staff review provisions codified separately from the state’s main emergency law.⁵⁶

Montana emergency law includes a limitation related to religious services and gatherings. Specifically, Montana emergency law specifies that it does not provide authority to “interfere with or otherwise limit, modify, or abridge a person’s

54. Mont. Code Ann. § 10-3-102(7)-(13); see also *supra* note 37.

55. “Religion is Essential” is in quotes as that phrase has been used either as a heading or as the short title for legislation in a few states. See, e.g., Ariz. HB 2507 (2022) (See heading for Article 11 in Section 1 of the bill); Cal. SB 397 (2021) (short title in Section 1 of the bill); Mont. SB 172 (2021) (short title).

56. See, e.g., Ariz. Sess. Laws 2022 ch. 181 (Ariz. HB 2507; provisions would be codified in Title 41 of the state code, while the state emergency law is found in Title 26).

physical attendance at a religious service or operation of a religious organization.”⁵⁷

North Dakota law specifies that an emergency order, proclamation, rule, or regulation may not:

a. Substantially burden a person's exercise of religion unless the order is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest;

b. Treat religious conduct more restrictively than any secular conduct of reasonably comparable risk, unless the government demonstrates through clear and convincing scientific evidence that a particular religious activity poses an extraordinary health risk; or

c. Treat religious conduct more restrictively than comparable secular conduct because of alleged economic need or benefit.⁵⁸

Tennessee law specifies that “[d]uring a state of emergency, major disaster, or natural disaster, the state, a political subdivision, or a public official shall not prohibit the operations of a church or religious organization for purposes of worship services.”⁵⁹

Limitation Related to Press and News Organizations

Emergency laws may include special rules restricting the emergency authority over the press or news services.

California law includes specific restrictions related to the use of news services to disseminate emergency communications. The provision provides in part:

Notwithstanding the provisions of this section [authorizing the Governor to commandeer or utilize private property or personnel], the Governor is not authorized to commandeer any newspaper, newspaper wire service, or radio or television station, but may, during a state of war emergency or state of emergency, and if no other means of communication are available, utilize any news wire services, and the state shall pay the reasonable value of such use. In so utilizing any such facilities, the Governor shall interfere as little as possible with their use for the transmission of news.⁶⁰

Montana emergency law specifies that its main authorizing provisions does not grant the Governor (or other governmental agencies and officials) authority to:

57. Mont. Code Ann. § 10-3-102(2); see also *supra* note 37.

58. N.D. Cent. Code Ann. § 37-17.1-05(10).

59. Tenn. Code Ann. § 58-2-107(n).

60. Gov’t Code § 8572; see also *supra* note 19 (reproducing the initial piece of Gov’t Code Section 8572).

interfere with dissemination of news or comment on public affairs. However, any communications facility or organization, including but not limited to radio and television stations, wire services, and newspapers, may be required to transmit or print public service messages furnishing information or instructions in connection with an emergency or disaster.⁶¹

Limitation Related to Other Constitutional Rights

Emergency laws also include limitations related to other constitutionally protected rights (e.g., speech, assembly).

For example, the Idaho provision quoted above (with respect to firearms limitations) contains a more general prohibition on emergency acts that would “otherwise limit or suspend any rights guaranteed by the United States constitution or the constitution of the state of Idaho, including but not limited to the right to peaceable assembly....”⁶²

Montana law specifies that it does not provide authority to “[p]rohibit, limit, or curtail ... rights of free speech or free assembly, including any rallies, gatherings and meetings, speeches, literature or sign distribution, and the display of signs.”⁶³

REQUIRED CONTENTS FOR EMERGENCY ORDERS

Emergency laws might specify the contents of the emergency order. On this topic, the issues to consider are whether to require specific items to be included in emergency orders (or some subset of orders) and, if so, what contents should be required.

For example, the draft PHEA Act requires that a public-health-emergency order state the “public-health goal it is designed to achieve” and identify “the date on which it will expire.”⁶⁴

Similarly, Connecticut law provides that an emergency order modifying or suspending statutory or regulatory requirements must specify the reason for the order, the statute to be modified or suspended, and the period for enforcement of the order.⁶⁵

In general, the primary policy objective furthered by this approach is:

61. Mont. Code Ann. § 10-3-102(1); see also *supra* note 34.

62. Idaho Code Ann. § 46-1008(7)(a).

63. Mont. Code Ann. § 10-3-102(5)(b) (This provision also specifies that “[a] person may be required to comply with neutral health, safety, or occupational requirements that are applicable to all organizations or businesses providing essential services.”); see also *supra* note 34.

64. Draft PHEA Act, *supra* note 22, § 7(a)(3), (4).

65. Conn. Gen Stat. Ann. § 28-9(b)(1).

- *Information Input and Output.* This approach promotes transparency and public understanding. This approach may be particularly beneficial in situations where the connection between the order and the emergency is not clear on its face (perhaps involving secondary or indirect effects of the emergency).

By requiring that such information be included in the order, this approach could have ancillary benefits for the oversight policy objective (e.g., by making it easier to assess the fit between the order and the goal it seeks to achieve and identifying the projected duration of the order).

PROCEDURAL REQUIREMENTS FOR EMERGENCY ACTS

The Governor’s emergency acts may be subject to procedural requirements, specifying, for example, notice obligations. Those requirements might come from general law (pertaining to executive orders or executive proclamations). This memorandum only addresses specific procedural requirements for emergency acts that are contained in emergency laws.

The questions to consider for this issue are:

- Should the emergency law require that emergency orders be distributed specifically to certain government officials or bodies? If so, who?
- Must an order be distributed to anyone in advance of the order taking effect?
- Must any information about the order (i.e., aside from the order itself) be prepared and provided to anyone?
- Should the emergency law specify requirements for the form, filing, or posting of emergency orders?

Notice Requirements

Most emergency laws include provisions related to the publication and distribution of emergency orders. In some cases, the notice requirements are very general ones that seek to ensure widespread distribution of the information. In other cases, the law provides a specific obligation to provide notice of the order to the Legislature (or certain legislative members or, in one case noted below, an “Executive Council”). Some laws include specific requirements related to the timing of the notice.

General Requirement for Widespread Distribution

As indicated above, emergency laws often provide, at a minimum, a general requirement that executive orders be distributed widely. In some cases, emergency laws may not include notice requirements specifically applicable to executive orders, but may instead rely on general laws requiring notice of executive orders.⁶⁶

For instance, California's Emergency Services Act expressly requires the Governor to "cause widespread publicity and notice to be given" to the issuance, amendment, or rescission of orders.⁶⁷

Similarly, in Iowa, the law provides that "[a]ll rules and orders promulgated under the [emergency] proclamation shall be given public notice by the governor in the area affected."⁶⁸

Some jurisdictions may provide more specific requirements to achieve the widespread distribution of orders. For instance, Connecticut law requires that certain orders related to a public health emergency "be (1) published in full at least once in a newspaper having general circulation in each county [and] (2) provided to news media...."⁶⁹

Ensuring general notice of emergency orders seems to be commonsense and unproblematic, as it is important to keep the people aware of emergency situations and emergency response activities.

The primary policy objective furthered by this approach is:

- *Information Input and Output.* This approach makes clear that there is a general obligation to provide notice of emergency orders.

This approach also has related ancillary benefits for the Oversight policy objective.

In some instances, this approach could be in tension with the following policy objective:

- *Feasibility.* Emergency conditions may impair communications and the ability to distribute notice. Often general requirements will not

66. See generally The Council of State Gov'ts., *The Book of the States*, vol. 53, 166-177 (Table 4.5) (2021), available at <https://issuu.com/csg.publications/stacks/46495f12f95847e6935d331969ed650a>.

67. Gov't Code § 8567(a); see also *id.* §§ 8627, 8627.5(a).

68. Iowa Code Ann. § 29C.3(2).

69. Conn. Gen Stat. Ann. § 19a-131a(c). The provision also provides that failure to take these actions does not impair the validity of such declaration or order. *Id.*

Connecticut law separately requires the Secretary of State to cause certain emergency orders (i.e., those modifying or suspending statutes, regulations, or requirements) to be printed and published in a newspaper of general circulation in each affected county within four days the order being filed with the Secretary of State. *Id.* § 28-9(b)(1). This provision similarly provides that a failure to publish does not impair the validity of the order. *Id.*

be problematic, as they are not overly prescriptive regarding the form or mechanism for notice. However, it is important to consider whether emergency conditions might affect the ability to provide the required notice.

Requirement for Orders to be Distributed to Governmental Body Before Taking Effect

Emergency laws may also require that executive orders be distributed to certain governmental bodies before taking effect (and, in some cases, the law may include an approval requirement or provide those entities with the power to preemptively respond to the proposed order).

In Minnesota, the law provides that, for executive orders to have the force of law, they must be approved by the “Executive Council.”⁷⁰ This pre-approval requirement is discussed separately later in this memorandum, but, since it necessarily includes distribution of these orders to the Executive Council, it is also noted here.

In Utah, the law provides that the Governor may not take executive action in response to a long-term state of emergency until the governor has provided notice of the proposed action to the “Legislative Emergency Response Committee” “no later than 24 hours before” the Governor issues the executive action.⁷¹ The law provides an exception to this notice requirement in exigent circumstances.⁷²

Such an approach may further the following policy objectives:

- *Information Input and Output.* This approach would ensure that the identified governmental bodies receive information about proposed actions. This approach provides a timeframe for the governmental body to act before the Governor takes a proposed action.
- *Oversight.* This approach could allow the governmental body to respond in advance to prevent proposed actions that are problematic or abusive.

70. Minn. Stat. Ann. § 12.32; see also *infra* note 90 and associated text.

71. Utah Code Ann. § 53-2a-215. A long-term state of emergency is one that either lasts longer than 30 days or that is declared, upon a finding of exigent circumstances, after expiration of a state of emergency, where the states of emergency are based on the same disaster or occurrence. *Id.* §§ 53-2a-203(6), 53-2a-206(3). The membership of the Legislative Emergency Response Committee includes: members of the Executive Appropriations Committee, 4-6 members from the House of Representatives appointed by the Speaker of the House of Representatives, and 4-6 members from the Senate appointed by the President of the Senate. *Id.* § 53-2a-218.

72. Utah Code Ann. § 53-2a-215(2)(a). (Governor must find that: “(i) there is an imminent threat of serious bodily injury, loss of life, or substantial harm to property; and (ii) compliance with [the notice requirement] would increase the threat of serious bodily injury, loss of life, or substantial harm to property.”).

However, such an approach would be in tension with the following policy objectives:

- *Feasibility.* Emergency conditions may impair communications and the ability to distribute notice. In those situations, it could be problematic to require that notice be provided in advance of the order taking effect.
- *Speed and Nimbleness.* This approach may preclude adjustments to proposed actions as conditions change or new information comes in. This approach would delay the issuance of orders, as the orders must be distributed to the identified government body in advance.

Requirement for Orders to be Distributed to Legislature or Specified Governmental Bodies

In some cases, emergency laws include a requirement that executive orders be distributed to a government entity or official, but do not necessarily require that the notice be provided in advance of the order being issued. Such a requirement could perhaps ensure that the governmental body receives specialized communication related to emergency orders (that may come through expected channels). This could result in lawmakers and governmental officials being made aware of emergency orders more quickly.

For instance, Arkansas law includes a requirement that public health emergency orders to be submitted to the Legislative Council⁷³ for review.⁷⁴ The wording of the provision suggests the orders would be issued before they are submitted for review.⁷⁵ The statute does not specify what the review process entails, nor does the statute expressly authorize the Legislative Council to act on orders, except in specified circumstances.⁷⁶

Utah law requires notice of orders related to the suspension of the enforcement of a statute to be provided to the speaker of the House of Representatives and the president of the Senate no later than 24 hours after the suspension takes effect.⁷⁷

73. The Legislative Council is an “ad interim committee of the General Assembly.” See Ark. Code Ann. § 10-3-301(a). The Legislative Council consists of “36 regular members - 20 House members and 16 Senators. In addition, there are 24 ex-officio voting members and 5 ex-officio non-voting members.” <https://www.arkleg.state.ar.us/Committees/Detail?code=000&ddBienniumSession=2021%2F2022F>.

74. See Ark. Code Ann. § 12-75-114(f)(1)(B). This provision applies to executive orders “issued to meet or mitigate dangers to the people and property of the state presented or threatened by a statewide state of disaster emergency related to public health.”

75. See *id.* § 12-75-114(f)(1).

76. See *id.* § 12-75-114(f)(2), (3). The Legislative Council is authorized to consider the renewal of orders when the emergency is itself up for renewal and to terminate orders issued after the emergency has been renewed.

77. Utah Code Ann. § 53-2a-209(4)(a)(v).

In Virginia, the law requires the Governor to transmit copies of all emergency orders to the members of the General Assembly.⁷⁸

Washington law requires the governor to “give as much notice as practical to legislative leadership and impacted local governments when issuing [certain orders related to the waiver or suspension of a statute, order, rule, or regulation].”⁷⁹

In general, executive orders must be distributed widely, so it is likely that the Legislature and affected local governments will be aware of and have access to emergency orders. For this reason, the benefits of this policy approach, which specifically requires distribution to those entities, may be limited.

In general, an express requirement for distribution of emergency orders to specified governmental entities and officials could further the following policy objectives:

- *Certainty.* This approach would make clear that orders must be specially communicated to the named governmental entity or official. This could, in turn, provide certainty about how the governmental entity or official would receive such information.
- *Information Input and Output.* This approach could improve distribution of emergency order information, both directly to the specified governmental entity or official and indirectly to those who might receive the information from the governmental entity or official.

To the extent that the emergency disrupts communications systems, this approach may be in tension with the following policy objective:

- *Feasibility.* Where this approach requires distribution to specifically identified people or entities, communications disruptions could hinder the ability to comply with the distribution rule. However, the approach could be drafted to require best efforts or to yield in situations where the emergency impedes the ability to comply.

Required Reporting for Emergency Orders

Emergency laws may require reporting for emergency orders.

78. Va. Code Ann. § 44-146.17:1.

79. Wash. Rev. Code Ann. § 43.06.220(2)(g). The orders subject to this requirement are those issued under the authority provided in this subsection, which provides broad authority to issue an order waiving or suspending statutory obligations or limitations “prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency if strict compliance with the provision of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency, [subject to specified limitations].” *Id.*

For example, the draft PHEA Act requires the Governor to, within seven days of issuing an order, prepare a report describing (1) the evidence on which the order and the determination of its necessity are based, (2) how the order and determination are rationally based on the evidence, and (3) any additional evidence considered.⁸⁰ This report must be submitted to the Legislature and made publicly available.⁸¹ The Comments to the draft Act specify that this reporting requirement is intended to “promote transparency for and accountability to both the public and the Legislature.”⁸²

Similarly, Utah law requires reporting to the “Legislative Management Committee” regarding the suspension or modification of specified statutes or rules.⁸³ The provision also authorizes the Legislative Management Committee, in reviewing the report, to make recommendations related to whether to continue the suspension, for how long, whether to terminate the suspension, or whether to call a special session of the Legislature to review the suspension.⁸⁴

This approach would seem to further the following policy objectives:

- *Information Input and Output.* As indicated in the draft PHEA Act comment quoted above, this approach would promote transparency and accountability. This approach would require that specified information about emergency orders be made available in a report.
- *Oversight.* This approach would facilitate oversight by making information on which decisionmaking is based available to the Legislature and the people.

This approach could be in tension with the following policy objectives:

- *Feasibility.* This approach could pose challenges where the emergency conditions are particularly acute. Report preparation requires resources and attention and diverts those resources and attention away from emergency response efforts.
- *Speed and Nimbleness.* This approach requires that time be devoted to drafting reports on emergency orders. This could cause delays as that work could consume resources that could otherwise be focused emergency response needs. Reporting requirements may also complicate the ability to change emergency orders quickly (as doing

80. Draft PHEA Act, *supra* note 22, § 7(b).

81. *Id.*

82. *Id.* § 7 Comment 1.

83. Utah Code Ann. § 53-2a-210(1); see also <https://le.utah.gov/committee/committee.jsp?year=2022&com=SPEMAN> (re Legislative Management Committee).

84. Utah Code Ann. § 53-2a-210(3).

so could require additional reporting), in response to newly-available information or changed emergency conditions.

Filing and Posting Requirements

Emergency laws may provide details about how orders should be filed, posted, and maintained by the government.

For instance, Connecticut law requires that certain orders related to a public health emergency “be ... posted on the state Internet web site.”⁸⁵

Florida law requires that all emergency orders issued by the Governor (or any other agency) be:

immediately filed with the Division of Administrative Hearings. Failure to file any such declaration or order with the division within 5 days after issuance voids the declaration or order. The division shall index all such declarations and orders and make them available in searchable format on its website within 3 days of filing. The searchable format must include, but is not limited to, searches by term, referenced statutes, and rules and must include a search category that specifically identifies emergency orders in effect at any given time. A link to the division’s index must be placed in a conspicuous location on the Division of Emergency Management’s website.⁸⁶

Massachusetts law requires that the Governor’s exercise of emergency powers be in “a writing signed by the governor and filed in the office of the state secretary.”⁸⁷

New York law requires that certain executive orders (those that suspend statutes, local laws, ordinances, rules, or regulations) be published in the “state bulletin” as soon as practicable.⁸⁸

Utah law requires a copy of emergency orders, rules, and regulations issued by the Governor be filed “as soon as practicable” with the Office of Administrative Rules.⁸⁹

The primary policy objectives furthered by this approach are:

- *Certainty.* This approach makes clear where emergency orders will be maintained and how they can be accessed by interested persons.

85. Conn. Gen Stat. Ann. § 19a-131a(c). The provision also provides that failure to take this action does not impair the validity of an order. *Id.*

86. Fla. Stat. Ann. § 252.36(3)(b).

87. Mass. Civil Defense Act, *supra* note 20, § 8.

88. N.Y. Exec. Law § 29-a(3).

89. Utah Code Ann. § 53-2a-209(2)(a).

- *Information Input and Output.* This approach provides details about where to access emergency orders.

This approach might be in tension with the following policy objectives:

- *Feasibility.* Where this approach has strict timelines or prescriptive formal requirements, emergency conditions may make it infeasible to satisfy those requirements. To address these concerns, the law could be crafted to provide flexibility in situations where the requirements cannot be satisfied due to emergency conditions.

INDEPENDENT AUTHORITY OVER INDIVIDUAL EMERGENCY ACTS

This discussion addresses the authority of an entity (or select group of people) to approve or respond to individual executive emergency actions.

Generally, the statutes that grant authority over executive action give that authority to the Legislature (or a subset of legislative members). However, in one state, Minnesota, the law empowers the “Executive Council” (a body comprised of the Governor, Lieutenant Governor, Secretary of State, State Auditor, and Attorney General)⁹⁰ with authority over emergency acts.

In thinking about whether and when to grant special authority to review emergency actions, there are several overarching questions to consider:

- What is the goal in providing independent authority to review emergency acts? And, given that goal, who should be granted the authority to review such acts?
- What options are available to the independent authority in responding to emergency acts? Can the independent authority change, limit, and/or terminate an emergency act?
- Are there certain situations (e.g., long-term emergencies, orders that suspend statutory requirements, or quarantine/isolation-type orders) for which additional review might be particularly desirable?

No Express Authority to Respond to Individual Emergency Acts

Some emergency laws do not expressly provide authority to respond to individual emergency acts.

California’s Emergency Services Act does not include rules for how the Legislature (or other entity) might respond to individual emergency actions taken by the Governor.

90. See <https://mn.gov/admin/about/executive-council/>. In Minnesota, the Governor and Lieutenant Governor are elected as a team and the Lieutenant Governor candidate is selected by the Governor candidate. See <https://nlga.us/research/methods-of-election/>.

Under the Emergency Services Act, the Legislature is not given a specific role in approving or reviewing specific emergency acts of the Governor. The only provision in the Emergency Services Act's article on states of emergency that expressly refers to the Legislature is the section governing termination of a state of emergency. That provision specifies that the Legislature can terminate the state of emergency by concurrent resolution.⁹¹

The approach of not granting any express authority to respond to emergency executive actions would appear to further the following policy objectives:

- *Certainty.* This approach would facilitate reliance on executive orders, without requiring further research to assess the order's validity (i.e., determining whether the order has been approved, terminated, or amended by a separate entity).
- *Feasibility.* This approach would not require emergency acts be approved by a multi-member body. Such approvals could be infeasible in an emergency, which may impair the ability of multi-member bodies to meet and conduct business.
- *Speed and Nimbleness.* This approach would allow the executive to act quickly and change course as the executive deems necessary. This could permit more agile emergency response.

However, this approach seems to be in tension with the following policy objectives:

- *Information Input and Output.* By allowing the executive to act alone, this approach does not ensure that different perspectives are taken into account in the decision-making process.
- *Oversight.* This approach does not provide a mechanism for a separate entity or officer to approve or respond to specific executive actions.

Approval of Individual Emergency Acts

Emergency laws can require that emergency acts receive approval by a separate entity or official before they take effect.

For instance, in Minnesota, the law confers authority on the Executive Council to approve emergency orders and rules. Specifically, the law provides:

Orders and rules promulgated by the governor under authority of section 12.21, subdivision 3, clause (1), when approved by the Executive Council and filed in the Office of the Secretary of State,

91. See Gov't Code § 8629.

have, during a national security emergency, peacetime emergency, or energy supply emergency, the full force and effect of law.⁹²

Although Minnesota confers this authority on an Executive Council, this authority could be conferred on a different multi-member body or another individual elected official. The policy analysis below assumes that this approach could confer approval authority on either an individual or an entity.

The approach of conferring authority to a separate entity or individual over the executive's orders and acts could further the following policy objectives:

- *Information Input and Output.* This approach helps to ensure that emergency executive acts are crafted in a manner that will receive approval from the necessary entity or official. This provides an opportunity for input from the entity or official.
- *Oversight.* This approach creates an opportunity for the entity or official to oversee and assess the appropriateness of emergency executive action.

However, this approach could be in tension with the following policy objectives:

- *Certainty.* From a process perspective, it may be difficult to know whether the order is valid unless the approval action is made in a verifiable way (e.g., filing with the Secretary of State in the Minnesota statute, above).
- *Feasibility.* Emergency conditions could prevent a multi-member body from meeting and taking action. Depending on how formal the multi-member body's processes are, this concern may be more or less acute (e.g., an email vote process may be more feasible than in-person meeting requirements).
- *Speed and Nimbleness.* This approach will necessarily include some delay, associated with seeking the necessary approval. That delay could vary depending on which official or entity issues the approval and whether emergency conditions impede the entity or official from acting.

Legislative Authority to Limit, Renew, or Terminate Individual Emergency Acts

Emergency laws may grant the Legislature (or some subset thereof) authority over individual emergency acts. As described below, some laws permit the Legislature to change or end individual orders at any time after the order has been

92. See Minn. Stat. Ann. § 12.32; see also *supra* note 90 and associated text.

issued, while other laws require legislative approval for the renewal of emergency orders.

As indicated above, California law does not include any specific provision conferring authority on the Legislature to take action on individual emergency acts of the Governor.

The approaches discussed below all appear to further the following policy objectives:

- *Information Input and Output.* By conferring authority on the Legislature to respond to individual emergency acts, these approaches provide the Legislature (and, through their elected representatives, the people) with the ability to respond to individual emergency acts.
- *Oversight.* These approaches allow the Legislature to exercise an oversight role with respect to individual emergency acts.

And, the approaches have mixed results with respect to the following policy objective:

- *Certainty.* These approaches provide more certainty regarding the Legislature’s authority with respect to individual emergency acts. However, where the Governor and Legislature have widely-different approaches to emergency response, conflicting actions from the Governor and the Legislature could lead to uncertainty and confusion.

Legislative Authority to Limit

Emergency law could empower the Legislature to limit the scope or application of an individual emergency order.

Montana law expressly authorizes the Legislature to condition or limit (as well as approve or disapprove) any executive order enacted based on a state of emergency by joint resolution.⁹³

In Puerto Rico, the law permits the Legislature to “pass judgment on the content of [emergency] orders and ... delimit their scope” by concurrent resolution.⁹⁴

The full scope of the Legislature’s authority under these provisions is not entirely clear. For instance, could the Legislature limit the scope of a statewide mask mandate order by limiting the mandate to only counties above a certain

93. Mont. Code Ann. § 10-3-303(5)(c), (d).

94. P.R. Laws Ann. tit. 3, § 1942.

population level, only counties where the infection rates exceed a certain level, or only certain specifically-identified counties (i.e., the following counties: ...)? Or, in a more extreme situation, could the Legislature “limit” a mask mandate order by changing it fundamentally to prohibit mask mandates statewide (i.e., eliminating the statewide rule, but leaving in place a provision of the order that prohibits local governments from enacting different mask rules than the state)?

In addition to the general policy effects noted above, this approach of authorizing the Legislature to limit individual executive acts would appear to further the following policy objective:

- *Speed and Nimbleness.* This approach provides the Legislature with more flexibility to respond to and adjust the Governor’s emergency orders.

Legislative Authority to Renew

The law may provide the Legislature with specific authority to decide whether to renew individual emergency orders.

Arkansas law provides that the “Legislative Council” considers the renewal of emergency orders related to public health (in conjunction with the renewal of the emergency proclamation).⁹⁵ The relevant provisions provide that:

(A) If the Governor seeks to renew a statewide state of disaster emergency related to public health under § 12-75-107(g), he or she may also request the renewal of an executive order or proclamation

....

(B) If the Governor requests the renewal of more than one (1) executive order or proclamation ..., the Legislative Council may consider each executive order or proclamation individually.

(C) If the Legislative Council does not deny the Governor's request to renew the executive order or proclamation by a majority vote of a quorum present prior to the expiration of the statewide state of disaster emergency related to public health, the executive order or proclamation shall be renewed for the same time period as the statewide state of disaster emergency related to public health.⁹⁶

This renewal authority is specifically tied to a situation in which the Legislature is necessarily considering the renewal of the state of emergency itself. The law

95. Ark. Code Ann. § 12-75-114(f)(2); see also *supra* note 73 (describing composition of Legislative Council).

96. *Id.* § 12-75-114(f)(2).

provides that emergency executive orders or proclamations otherwise run for the duration of the emergency.⁹⁷

In addition to the general policy effects noted above, the approach of authorizing the Legislature to renew emergency acts could be in tension with the following policy objective:

- *Feasibility.* For this approach, it is important to account for the possibility that the Legislature may be prevented from meeting or conducting business due to emergency circumstances. In the example cited above, Arkansas law requires an affirmative act by the Legislature to deny renewal of an emergency act.

Legislative Authority to Terminate

Emergency laws can also provide authority to the Legislature to terminate individual emergency acts by the Governor.⁹⁸ In some cases, the law may only allow the Legislature to terminate certain emergency orders (e.g., those issued in longer-term emergencies).⁹⁹

For example, the following states' emergency laws contain broad provisions that permit the Legislature to terminate individual emergency acts:

- Florida. ("At any time, the Legislature, by concurrent resolution, may terminate a state of emergency or any specific order, proclamation, or rule thereunder.")¹⁰⁰
- New Hampshire. ("The legislature may terminate a state of emergency or any emergency order issued thereunder by a majority vote of both the senate and the house of representatives.")¹⁰¹
- Ohio. (The General Assembly may, by concurrent resolution, "[r]escind, in whole or in part, any order or rule issued or adopted

97. *Id.* § 12-75-114(f)(1)(A).

98. Emergency laws may also confer legislative authority over emergency acts of local officers or entities or executive agencies. See, e.g., Utah Code Ann. §§ 26-6-3(3)(a) (legislative authority to terminate Department of Health order of constraint issued in response to communicable disease, epidemic infection, or health hazard), 26-6b-3(5)(a) (similar), 53-2a-216(1)(a), (b) (legislative authority to terminate local emergency acts); see also *id.* §§ 26-1-2, 26-6b-2.

99. For some laws that specifically identify certain classes of orders that the Legislature may terminate, it is difficult to discern the differences between the scope of the Governor's emergency powers to issue orders and the Legislature's authority to terminate such orders. See, e.g., Utah Code Ann. §§ 53-2a-216(1)(c)-(e) (Governor's emergency acts that may be terminated by Legislature); 53-2a-209 (cited provision in Section 53-2a-216(c), which appears to be the primary provision authorizing emergency orders generally); 53-2a-215 (cited provision in Section 53-2a-216(1)(e), which appears to be the primary provision authorizing emergency orders in long-term emergencies).

100. Fla. Stat. Ann. § 252.36(3)(a).

101. N.H. Rev. Stat. Ann. § 4:45(II)(c).

by ...[a] statewide elected officer in response to a state of emergency.”)¹⁰²

In addition, the draft PHEA Act includes a bracketed provision that identifies legislative termination as one way that a public health emergency order could be terminated.¹⁰³ The Comment to this provision notes that it does not create new authority and that states should decide whether to include the provision (based on whether it would be constitutionally permissible for the Legislature to terminate an executive order, other than by passage of a bill).¹⁰⁴

Other states’ laws contain more specific authority for the Legislature to terminate a certain class of executive orders or to terminate executive orders under certain conditions. These include:

- Arkansas. (After a statewide public health emergency has been renewed, “an executive order or proclamation to meet or mitigate dangers to the people and property of the state presented or threatened by a statewide state of disaster emergency related to public health..., the executive order or proclamation is subject to termination by the Legislative Council.”)¹⁰⁵
- New York. (“The legislature may terminate by concurrent resolution executive orders [suspending statutes, local laws, ordinances, rules, or regulations] at any time.”)¹⁰⁶

In addition to the general policy effects noted above, the approach of authorizing the Legislature to terminate individual emergency acts by the Governor appears to have mixed effects with respect to the following policy objective:

- *Speed and Nimbleness.* This approach may allow the Legislature more flexibility to respond to individual emergency acts that the Legislature finds problematic, but, to the extent that the emergency response becomes politically controversial, this approach could complicate the Governor’s ability to act quickly (particularly where legislative termination has a preclusive effect and emergency conditions change quickly).

102. Ohio Rev. Code Ann. § 107.43(C)(1).

103. Draft PHEA Act, *supra* note 22, § 8(4).

104. *Id.* § 8 Comment 2.

105. Ark. Code Ann. § 12-75-114(f)(3)(A); see also *supra* note 73 (describing composition of Legislative Council).

In Arkansas, a statewide state of emergency related to public health must be renewed no later than 60 days after the state of emergency proclamation. Ark. Code Ann. § 12-75-107(g)(3)(A).

106. N.Y. Exec. Law § 29-a(4).

Court Authority over Specific Emergency Acts

Emergency laws may provide for special court review of certain types of emergency acts.

For instance, Virginia law includes a provision (enacted during the COVID-19 pandemic) that provides:

In any case in which an order declaring a state of emergency relating to a communicable disease of public health threat... includes any measure that closes schools or businesses or restricts the movement of healthy persons within the area to which the order applies for more than seven days, all of the rights, protections, and procedures of Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of Title 32.1 shall apply.¹⁰⁷

The referenced Article 3.02 relates to quarantine and isolation orders issued in response to a public health threat. That article requires, upon issuance of an order, the filing of a petition seeking *ex parte* court review and confirmation of the order.¹⁰⁸ The law describes the required contents of the petition and a standard for the court's review.¹⁰⁹

In addition, the law provides an expedited appeal process for persons subject to quarantine and isolation orders to challenge those orders.¹¹⁰

107. Va. Code Ann. § 44-146.17:1.1.

108. *Id.* §§. 32.1-48.09(D), 32.1-48.012(D).

109. *Id.* §§. 32.1-48.09(E), (G), 32.1-48.012(F), (H).

“The court shall grant the petition to confirm or extend the quarantine upon finding probable cause that quarantine was the necessary means to contain the disease of public health threat and is being implemented in the least restrictive environment to address the public health threat effectively, given the reasonably available information on effective control measures and the nature of the communicable disease of public health threat.” *Id.* § 32.1-48.09(G); see also *id.* § 32.1-48.012(H) (similar for isolation order).

110. *Id.* §§. 32.1-48.010, 32.1-48.013.

In an appeal of an isolation order, the court is expressly permitted to:

(i) vacate or modify the order of isolation as such order applies to any person who filed the appeal and who is not, according to the record and the supplemental evidence, appropriately subject to the order of isolation; (ii) vacate or modify the order of isolation as such order applies to all persons who filed an appeal and who are not, according to the record and the supplemental evidence, appropriately subject to the order of isolation; (iii) confirm the order of isolation as it applies to any person or all appealing parties upon a finding that such person or persons are appropriately subject to the order of isolation and that isolation is being implemented in the least restrictive environment to address the public health threat effectively, given the reasonably available information on effective infection control measures and the nature of the communicable disease of public health threat; or (iv) confirm the order of isolation as it applies to all persons subject to the order upon finding that all such persons are appropriately subject to the order of isolation and that isolation is being implemented in the least restrictive environment to address the public health threat effectively given the reasonably available information on effective control measures and the nature of the communicable disease of public health threat.

Id. § 32.1-48.013(G); see also *id.* § 32.1-48.010(G) (similar for order of quarantine).

This approach of requiring court confirmation and providing for expedited court review would seem to further the following policy objectives:

- *Certainty.* This approach provides for a clear process and standards for court review of specified emergency actions.
- *Oversight.* This approach provides for court oversight of specified emergency acts.

This approach might be in tension with the following policy objective:

- *Feasibility.* Where there are expedited timelines for court review, these timelines may not be feasible in an emergency situation (e.g., Virginia law provides for a court hearing on an appeal within 48 hours, excluding weekends, holidays, and days the court is lawfully closed, of the petition filing).

DURATION OF EMERGENCY ORDERS

Different emergency laws may provide for a default duration for emergency orders (or some subset of emergency orders) issued by the executive.

In general, the California Emergency Services Act does not restrict the duration of emergency orders issued by the Governor, specifying only that the orders terminate when the emergency terminates.¹¹¹ However, California law includes a default 60-day duration for certain emergency orders (i.e., those temporarily suspending certain statutes, ordinances, regulations, or rules).¹¹²

Emergency Order Duration Tied to Duration of State of Emergency

Emergency laws may provide that emergency orders are in effect for the duration of the state of emergency (absent an act to terminate or change the order).¹¹³

111. Gov't Code § 8567(b) ("Orders and regulations, or amendments or rescissions thereof, issued during a state of war emergency or state of emergency shall be in writing and shall take effect immediately upon their issuance. Whenever the state of war emergency or state of emergency has been terminated, the orders and regulations shall be of no further force or effect.").

112. Gov't Code § 8627.5(b) (default duration of 60 days for orders that "temporarily suspend any state, county, city, or special district statute, ordinance, regulation, or rule imposing nonsafety related restrictions on the delivery of food products, pharmaceuticals, and other emergency necessities distributed through retail or institutional channels").

113. Although the end of the state of emergency is generally the outer bound for the duration of emergency orders, emergency laws permit certain types of emergency acts to extend beyond the emergency in rare cases. See, e.g., Vt. Stat. Ann. tit. 20 § 9(10), (11) (duration of 180 days beyond the state of emergency termination for special waivers or permits for site preparation, construction, and operation of certain electricity or natural gas facilities); see also generally Wis. Stat. Ann. § 323.12(5)(2) (defining "disaster period" to extend 60 days beyond the state of emergency for certain rules regarding out-of-state businesses assisting with disaster relief work).

For example, Puerto Rico law allows the Governor to issue orders “which shall be in effect for the duration of the state of emergency or disaster.”¹¹⁴ The Governor also has the power to amend and rescind orders, so the Governor can change or terminate orders as needed.¹¹⁵

As a default rule, one of the main benefits of this approach is that it provides for continuity in the absence of an affirmative act (i.e., an emergency order would not terminate due to inadvertence in renewing or extending the order). As such, the primary policy objective that would be furthered by the approach of providing that emergency orders last by default for the duration of the state of emergency is:

- *Certainty.* This approach would prevent situations where emergency orders lapse due to inadvertence or oversight.

Emergency Order Duration Must be Specified in Order

Different emergency orders may be intended to last for a brief period, while others may be expected to be needed for the duration of the emergency. The draft PHEA Act takes an approach that would address this situation, while providing flexibility in situations where orders need to be extended beyond their originally anticipated duration.

The draft PHEA Act requires that each public-health-emergency order identify “the date on which it will expire, unless renewed, and the date may not be later than the expiration of the declaration of public-health emergency.”¹¹⁶ Under the Act, the Governor is permitted to renew an order, so long as the renewed order “meets the same standards that are required for an initial order.”¹¹⁷

This approach of requiring each order identify a date of expiration (that is no later than the expiration of the emergency) would help to ensure that the duration of emergency orders does not extend beyond the time that those orders are needed for emergency response.

This approach would seem to further the following policy objectives:

- *Certainty.* This approach would require that the order include its expiration date. This would help provide certainty about the continued validity of the order on the face of the order itself.
- *Information Input and Output.* Where renewal of the order requires some additional process and notice requirements, this approach

114. P.R. Laws Ann. tit. 25, § 3650.

115. *Id.*

116. Draft PHEA Act, *supra* note 22, § 7(a)(4).

117. *Id.* § 6 Comment 6; see also *id.* §§ 6(e), 7.

will increase awareness of emergency orders and their continued operation.

- *Oversight.* This approach helps to ensure the duration of emergency powers is limited upfront. This is, in and of itself, a form of oversight. This approach could also help to focus oversight based on the expected duration of orders.

This approach could be in tension with the following policy objective:

- *Feasibility.* One challenge of this approach is whether the duration of the orders can be anticipated in advance. To the extent that the emergency is unpredictable (and orders must be renewed), this approach would require more administrative attention and additional work.

Default Duration for All Emergency Orders, With Executive Permitted to Extend

In some situations, the law may include a default duration for emergency orders generally, but permit the executive to renew the order as needed.

For instance, in Florida, the duration of orders, proclamations, and rules issued by the Governor under the emergency law is limited to 60 days.¹¹⁸ However, the law permits renewal of those orders, proclamations, and rules “as necessary during the duration of the emergency.”¹¹⁹

This approach of ensuring that the governor must take action to renew orders would further the following policy objectives:

- *Certainty.* Although there is a possibility of extension, this approach provides certainty around when emergency actions will be considered for renewal.
- *Information Input and Output.* This approach would likely include notice requirements for the renewal or extension of emergency proclamation.
- *Oversight.* This approach would require action to continue emergency orders, helping to ensure ongoing attention to the need for such emergency orders.

Default Duration for All Emergency Orders, With Extension Requiring Legislative Approval

Some jurisdictions require legislative approval for the extension of emergency orders beyond the default timeframe provided by law.

118. See Fla. Stat. Ann. § 252.36(1)(b).

119. *Id.* (for renewals, “the order, proclamation, or rule must specifically state which provisions are being renewed.”).

For instance, in the District of Columbia, orders are in effect for 15 days from signing, with the possibility of extension for 15 days on request of the Mayor and approval of the Council.¹²⁰ The law also addresses situations in which extenuating circumstances prohibit the convening of at least two-thirds of the Council. In that case, the Mayor must make a reasonable attempt to consult with Council members and may extend the emergency order for up to 15 days.¹²¹ For COVID, the District enacted a statute to extend specified emergency orders for 90 days. Beyond those 90 days, the orders could be extended for additional 15-day periods as specified above.¹²²

In Rhode Island, the law provides that the Governor’s emergency response powers “shall not exceed a period of one hundred eighty (180) days from the date of the emergency order or proclamation of a state of disaster emergency, unless and until the general assembly extends the one hundred eighty (180) day period by concurrent resolution.”¹²³

This approach would seem to further the following policy objectives:

- *Certainty.* This approach provides authority for the Governor to act initially and identifies the timeframe in which the Legislature needs to decide whether to continue the emergency acts.
- *Information Input and Output.* Where the renewal is considered by the Legislature, the information about the renewal would be considered and discussed publicly during the legislative process. Also, this approach permits the public, through their legislative representatives, to respond to emergency orders.

This approach has mixed results with respect to the following policy objective:

- *Oversight.* This approach provides a clear opportunity for the Legislature to respond to situations where the Governor is misusing emergency authority. However, this approach effectively empowers the Legislature to make decisions about emergency response beyond the default duration for the Governor’s emergency orders. This approach does not provide a mechanism to address failures of the Legislature to adequately respond to the emergency these situations.

This approach seems to be in tension with the following policy objectives:

120. D.C. Code Ann. § 7-2306(a), (b).

121. *Id.* § 7-2306(c).

122. *Id.* § 7-2306(c-1), (c-2).

123. R.I. Gen. Laws Ann. § 30-15-9(g); see also *id.* § 30-15-9(e) (allowing the Governor to exercise specified powers “limited in scope and duration as is reasonably necessary for emergency response”).

- *Feasibility.* This approach may be complicated where the emergency precludes the Legislature from taking action. In this situation, the need for renewal of emergency orders could be more acute. Some laws include special rules for such a situation (see Washington D.C. law discussed above and Washington law discussed in the following section). Such rules could reduce concerns about infeasibility.
- *Speed and Nimbleness.* This approach may be less nimble, as the Legislature would not necessarily be empowered to make changes or adjustments to emergency orders up for renewal or extension. Since the Governor needs legislative authority for renewal, it is unclear how to address situations where the emergency order in need of renewal should be changed.

Default Duration for Subset of Emergency Orders

An emergency law may provide a default duration for only a certain class or subset of emergency orders.

In New York, emergency orders involving the suspension of statutes, regulations, local laws, or ordinances may only be in effect for 30 days, with the Governor permitted to extend suspensions for additional periods (not to exceed 30 days each).¹²⁴

Similarly, in Washington, emergency orders waiving or suspending statutes may only continue for 30 days unless the Legislature extends the duration by concurrent resolution.¹²⁵ If the Legislature is not in session, legislative leadership can extend the orders, in writing, until the Legislature can act.¹²⁶

Both of these provisions focus on orders that affect laws that were enacted by the Legislature. For these orders, the Legislature may be particularly interested in ensuring that the duration of the order is kept to a minimum and that the statutory requirements are restored in force as soon as the emergency allows.

Limiting the duration of only a subset of orders could, assuming that the subset is clearly and appropriately defined, help to ensure that attention is focused on emergency orders of the greatest interest or concern.

Regarding the policy objectives, the greatest benefits of this approach involve:

- *Certainty.* This approach requires action on emergency orders at a specified time for those orders to continue in effect.
- *Oversight.* This approach can help to ensure that executive and legislative attention is focused on the specified emergency actions.

124. N.Y. Exec. Law § 29-a(2)(a).

125. Wash. Rev. Code Ann. § 43.06.220(4).

126. *Id.* § 43.06.220(4).

In general, this approach could permit either executive or legislative extension of such orders. As indicated above, New York and Washington laws differ in this regard. The preceding sections of this discussion describe how the different policies on who can extend orders fare with respect to the policy objectives.

EFFECT OF TERMINATION ON REISSUANCE OF EMERGENCY ACT

Many emergency laws do not expressly specify whether the termination of an emergency act (or the legislative failure to renew an emergency act) has any forward-looking effects. However, where the law permits the Legislature to renew or terminate specific emergency orders, the law may also expressly prohibit those orders from being reissued.

For example, in Ohio, the law provides:

If the general assembly rescinds an order or rule, or a portion thereof, the ... statewide elected officer shall not reissue that order or rule, the rescinded portion, a substantially similar order, rule, or portion, or any restriction contained in the rescinded order or rule or rescinded portion, for a period of sixty calendar days following the adoption of the concurrent resolution by the general assembly, except as provided in division (C)(3) of this section.¹²⁷

The referenced exception allows the Governor to request that the General Assembly authorize reissuance of the rescinded order or rule. The General Assembly may authorize the request by adoption of a concurrent resolution to that effect.¹²⁸

This approach of providing rules for the effect of termination of an emergency order would seem to further the following policy objectives:

- *Certainty.* This approach prohibits the Governor from reissuing a terminated order (or a substantially similar one) without legislative approval.
- *Oversight.* This approach gives the Legislature power to decide whether to reissue emergency orders that the Legislature has previously terminated.

This approach seems to be in tension with the following policy objectives:

- *Feasibility.* Depending on the nature of the emergency and the changing conditions (i.e., if the emergency would preclude the

127. Ohio Rev. Code Ann. § 107.43(C)(2).

128. *Id.* § 107.43(C)(3).

Legislature from conducting business), requiring legislative approval to reissue an emergency order could be problematic.

- *Speed and Nimbleness.* Where changing emergency conditions make it necessary to reinstitute emergency orders (or enact similar orders to those previously terminated), this approach could slow the process of issuing such orders.

NEXT STEPS

The staff will continue the analysis of different approaches to emergency powers and authorities, focusing on fiscal and funding rules and rules that activate in a state of emergency.

Respectfully submitted,

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