

D R A F T
FOR DISCUSSION ONLY

Model Public-Health-Emergency Authority Act

Uniform Law Commission

November 11 – 12, 2022 Drafting Committee Meeting

CLEAN DRAFT

Draft Edits to Section 4, Notes on Section 6



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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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November 8, 2022

Model Public-Health-Emergency Authority Act

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Model Public-Health-Emergency Authority Act

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1 **Model Public-Health-Emergency Authority Act**

2 **Prefatory Note**

3 The *Model Public-Health-Emergency Authority Act* is designed to improve the
4 preparedness of states for public health emergencies. Specifically, the Act clarifies the powers of
5 a governor to declare a public health emergency and to issue orders in response to that
6 emergency. Simultaneously, the Act establishes measures to promote a governor’s accountability
7 to the Legislature and to the public at large. The goal of the Act is to empower a governor to act
8 quickly and decisively while also clarifying substantive and procedural limitations to a
9 governor’s authority.

10
11 This project emerged from the uncertainties in state law that the ongoing COVID-19
12 pandemic has made acutely apparent. These legal uncertainties contributed to the decision of
13 many individuals, businesses and some legislatures to file lawsuits challenging the statutory and
14 constitutional authority of governors and other executive officials to respond to the risks posed
15 by the pandemic. Moreover, these same legal uncertainties have resulted in legislation in many
16 states clawing back core public health powers from governors and executive branch officials.
17 Consequently, governors and health officials in many states may no longer have the legal
18 authority needed to protect public health adequately during the next emergency.

19
20 By way of background, legal preparedness for public health emergencies has evolved in
21 fits and starts over the last twenty years largely in response to major public health crises. Most
22 notably, the anthrax scare following the 9/11 attacks prompted the federal government to fund a
23 project at Georgetown University Law Center in 2001 to develop a model state law for public
24 health emergency powers. A majority of states have adopted substantial parts of this 2001 model
25 law. Yet, the 2001 law addressed primarily executive branch authority to quarantine and isolate
26 individuals during an emergency, and it did not address adequately or at all many of the actions
27 that became necessary during the current COVID-19 pandemic. In particular, the 2001 law does
28 not address the power of governors to issue orders designed to mitigate the effects of a novel
29 contagious disease that has taken root in a population. Thus, governors and state officials often
30 relied on old state statutes to respond to the COVID-19 pandemic. Those statutes authorized
31 officials to take actions “necessary” to preserve public health. Such broad language, while
32 valuable, provided little accountability or limitation, and it invited a wide variety of
33 constitutional and administrative challenges to various orders issued during the pandemic.
34 The *Model Public-Health-Emergency Authority Act* builds on the framework of the 2001 law,
35 clarifying the kinds of orders that governors are authorized to issue during a public health
36 emergency. At the same time, this *Model PHEA* imposes substantive and procedural guardrails
37 as a check against arbitrary public health action. It does so by requiring governors to develop a
38 record in support of any declaration of a public health emergency and in support of any public
39 health order issued during the term of such a declaration. The *Model PHEA* also imposes a
40 sunset provision on every emergency declaration and emergency order, and it requires a
41 governor to make a new record as a condition of renewing a declaration or an order.
42 The drafting committee believes that the *Model PHEA* strikes an appropriate balance between
43 empowering governors to take swift emergency action and holding governors accountable for
44 each such action. Yet, the Committee has faced some challenges. In particular, the Committee

1 found that differences in state constitutions prevented the Committee’s including provisions
2 authorizing state legislatures to terminate unilaterally a public health emergency declaration or
3 any emergency order issued by a governor. For example, some state constitutions do not
4 authorize the legislature to act with the force of law except by passing legislation in both
5 chambers, presenting that legislation to the governor for signature or veto, and overriding any
6 gubernatorial veto. In those states, a statutory provision authorizing a legislature to terminate an
7 emergency declaration or order by joint resolution would amount to an unconstitutional
8 legislative veto.
9

10 Consequently, the Model Law requires that a governor make a record that is submitted to
11 the legislature and otherwise made publicly available. This creates a basis to challenge both a
12 declaration and each individual order on administrative grounds.
13 The Committee has identified other issues that it wishes to put before the entire Commission.
14 These include the following:
15

- 16 • Whether the definition of “public-health emergency” is sufficient generally, and, in
17 particular, whether “natural disaster” in the definition of “public health emergency” in
18 Section 2(5)) is too restrictive because it does not account for human-made disasters;
19
- 20 • Whether Section 3, which addresses the relationship of the Act with other state laws,
21 should be written in the negative to state that the Act does not supersede other state laws
22 except in the case of a direct conflict, in which case the Act supersedes other state law
23 only to the extent necessary to resolve the conflict;
24
- 25 • Whether Section 4(b)(5), which requires the governor to identify the public health
26 officials and experts with whom the governor consults, should be left as is, should be
27 expanded to require disclosure of every person the governor consults with, should be
28 replaced with a requirement that the governor consult with the head of the State’s primary
29 public health agency, or should be eliminated without any replacement;
30
- 31 • Whether the categories of public health emergency orders listed in Subsection (6)(b)
32 sufficiently describe the scope of authority a governor has to issue orders during a public-
33 health emergency, keeping in mind that these categories are designed to provide
34 examples of orders and are not designed to be an exclusive or exhaustive list of purposes
35 that emergency orders are designed to serve;
36
- 37 • Whether Section 6, which requires the governor to account for both the public health
38 benefits and the economic harms of an emergency order, should specify what is meant by
39 “public-health benefits” and “economic harms.”
40
- 41 • Whether Subsection 10(a), concerning the preemptive effect on local government of
42 public health orders issued by the governor, should include each of the alternatives (A, B
43 and C) listed there as options from which a state legislature would choose one.

1 **Model Public-Health-Emergency Authority Act**

2 **Section 1. Title**

3 This [act] may be cited as the Model Public-Health-Emergency Authority Act.

4 **Comments**

5 The Act’s title includes the word “model” and not the word “uniform” so as to signal that
6 the Act accommodates key differences among jurisdictions with respect to their constitutions and
7 legislative structure.

8
9 **Section 2. Definitions**

10 In this [act]:

11 (1) “Business” means a person other than an individual, public corporation, or
12 government or governmental subdivision, agency, or instrumentality.

13 (2) “Person” means an individual, estate, business or nonprofit entity, public
14 corporation, government or governmental subdivision, agency, or instrumentality, or other legal
15 entity.

16 (3) “Political subdivision” includes a city, [county,] district, and any other local or
17 regional governmental authority.

18 (4) “Public-health authority” means a state agency or agency of a political
19 subdivision authorized to protect or preserve public health and an individual authorized to act on
20 behalf the agency.

21 (5) “Public-health emergency” means:

22 (A) an imminent threat or actual appearance of an infectious, biologic,
23 radiologic, or chemical agent or toxin that:

24 (i) poses a high probability of:

25 (I) a large number of deaths of individuals in the affected

1 population;

2 (II) a large number of serious or long-term disabilities of

3 individuals in the affected population;

4 (III) widespread exposure to the agent or toxin that poses a

5 significant risk of substantial harm to a large number of individuals in the affected population; or

6 (IV) a substantial adverse impact on the availability of

7 medical, public health, or other emergency resources; and

8 (V) requires action to eliminate, reduce, contain, or

9 mitigate the probability; or

10 (B) the imminent threat or occurrence of a natural disaster that:

11 (i) poses a high probability of:

12 (I) a large number of deaths of individuals in the affected

13 population;

14 (II) a large number of serious or long-term disabilities of

15 individuals in the affected population;

16 (III) widespread exposure to the agent or toxin that poses a

17 significant risk of substantial harm to a large number of individuals in the affected population; or

18 (IV) a substantial adverse impact on the availability of

19 medical, public health, or other emergency resources; and

20 (V) requires action to eliminate, reduce, contain, or

21 mitigate the probability.

22 (6) “Public-health-emergency order” means an order issued or renewed under this

23 [act].

1 (7) “Record” means information:

2 (A) inscribed on a tangible medium; or

3 (B) stored in an electronic or other medium and retrievable in perceivable
4 form.

5 (8) “State” means a state of the United States, the District of Columbia, Puerto
6 Rico, the United States Virgin Islands, or any other territory or possession subject to the
7 jurisdiction of the United States.

8 **Comments**
9

10 1. The definition of “business” is based on language currently used in uniform and model
11 laws drafted and approved by the Uniform Law Commission.
12

13 2. The definition of “person” is based on language currently used in uniform and model
14 laws drafted and approved by the Uniform Law Commission.
15

16 3. The definition of “political subdivision” is based on language currently used in
17 uniform and model laws drafted and approved by the Uniform Law Commission.
18

19 4. The definition of “public-health authority” encompasses the variety of state and local
20 agencies and officials authorized by statute to act in any manner designed to protect public
21 health. When a public-health emergency requires a combination of state or local agencies or
22 officials to act in coordination with each other, each such agency or official is a public-health
23 authority.
24

25 5. The definition of “public-health emergency” is central to the operation of this Act. It
26 identifies the circumstances under which the Governor may declare an emergency, which then
27 triggers the authority of the Governor to issue orders designed to protect public health. The
28 definition is designed to account for various agents, toxins, and natural disasters that directly
29 threaten or harm public health. These include infectious agents that are communicable among
30 humans (e.g., COVID-19, measles, Ebola) infectious agents transmitted through insects or other
31 vectors (e.g., malaria). It also includes toxins released into the environment (e.g., chemical spill
32 or nuclear accident). Additionally, it includes the public health risks that can be associated with
33 natural disasters (e.g., mold, vermin, bacteria following severe flooding). The definition also
34 requires that the agent, toxin or natural disaster pose a high probability of one or more types of
35 significant, population-level harm, meaning that a single case of an infectious disease that is
36 well-controlled and thus does not pose a high probability of significant, population-level harm
37 would not meet the definition.
38

39 6. The definition of “public-health emergency” in this Act shares some of the elements of

1 the definition of “public health emergency” in the 2001 Model State Emergency Health Powers
2 Act (2001 MSEHPA), parts of which have been adopted by a majority of states. Yet, the
3 definition here accounts for public-health preparedness lessons learned since 2001. For example,
4 the definition above recognizes that a public-health emergency can exist when an agent, toxin, or
5 natural disaster poses a high probability of significantly straining medical, public health, or other
6 emergency resources.

7
8 7. In addition to sharing elements of the definition as it appears in the 2001 MSEHPA,
9 the definition of “public-health emergency” in this Act also includes certain phrases that appear
10 in the definition as used in the 2001 MSEHPA, such as “affected population” and “high
11 probability.” In this Act, “affected population” refers to the set of individuals who are likely or
12 actually at risk of harm from the threatened or actual infectious, biologic, radiologic, or chemical
13 agent or toxin or the natural disaster, which may justify the declaration of a public-health
14 emergency. In this way, the size of the “affected population” is determined by the nature and
15 scope of a particular threat. While the nature and scope of a threat may result in the
16 determination that the “affected population” is the population of the state or of one or more
17 political subdivisions of a state, the “affected population” need not correspond to the boundaries
18 of one or more political subdivisions of a state. In this Act, the phrase “high probability” is
19 intended to mean higher than would be reasonably expected in the absence of the agent, toxin or
20 natural disaster, the threat or presence of which may justify declaring a public-health emergency.

21
22 8. The definition of “public-health-emergency order” is an order issued by the Governor
23 under Section 6 of this Act and that complies with the requirements of Section 7 of this Act. The
24 Governor has the authority to issue a public-health-emergency order during the term of a
25 declaration of public-health emergency.

26
27 9. The definition of “record” is based on language currently used in uniform and model
28 laws drafted and approved by the Uniform Law Commission.

29
30 10. The definition of “State” is based on language currently used in uniform and model
31 laws drafted and approved by the Uniform Law Commission.

32 33 **Section 3. Relationship to Other State Law**

34 Except as provided in Section 10, this [act] supersedes other law of this state to the extent
35 the law conflicts with this [act].

36 **Comments**

37 This Section declares that the Act generally controls when there is a conflict between this
38 Act and other state laws, including other statutes that authorize the Governor to declare and
39 respond to other kinds of emergencies and statutes that authorize state and local officials and
40 agencies to protect public health whether or not a state of emergency exists. The Section also
41 specifies that the Act supersedes other state law only in the case of a conflict between the Act
42 and one or more other state laws and only to the extent necessary to resolve the conflict.

1 subsection (b) during the first [30] days after the previously renewed declaration of public-health
2 emergency has expired. The [Governor] may issue a declaration of public-health emergency that
3 is identical or substantially similar to a declaration of public-health emergency previously
4 renewed under subsection (b) during the first [30] days after its expiration if, at the same time,
5 the [Governor] calls a special legislative session of no more than [15] days for the purpose of
6 addressing the ongoing declaration of public-health emergency. A declaration of public-health
7 emergency issued under this subsection may last not longer than [60] days. The [Governor] may
8 renew a declaration of public-health emergency issued under this subsection for a period not
9 longer than [60] days if, at the time of such renewal, the [Governor] calls for a special legislative
10 session of no more than [15] days to address the ongoing declaration of public-health emergency.
11 There is no limitation on the number of times the [Governor] may renew a declaration of public-
12 health emergency under this subsection if, at the time of each subsequent renewal, the
13 [Governor] calls for a special legislative session of no more than [15] days to address the
14 ongoing declaration of public-health emergency.]

15 **Alternative C**

16 [(d) The [Governor] shall not renew a declaration of public-health emergency previously
17 renewed under subsection (b). Except as provided in this subsection and in subsection (e), the
18 [Governor] shall not issue a declaration of public-health emergency that is identical or
19 substantially similar to a declaration of public-health emergency previously renewed under
20 subsection (b) during the first [30] days after the previously renewed declaration of public-health
21 emergency has expired. The [Governor] may issue a declaration of public-health emergency that
22 is identical or substantially similar to a declaration of public-health emergency previously
23 renewed under subsection (b) during the first [30] days after its expiration if:

1 (1) the Legislature has formed a legislative council comprised of the majority and
2 minority leaders of each chamber of the legislature,

3 (2) the [Governor] has submitted to the legislative council the [Governor's]
4 proposed declaration of public-health emergency with a term of not longer than [60] days, and

5 (3) at least two members of the legislative council have approved the
6 [Governor's] proposed declaration of public-health emergency based on a vote of all members of
7 the legislative council, which vote shall occur not longer than [3] days from the day the
8 [Governor] submits the [Governor's] proposed declaration of public-health emergency to the
9 legislative council.

10 The [Governor's] proposed declaration of public-health emergency shall become effective if the
11 legislative council fails to hold a vote on the proposed declaration within [3] days from the date
12 the [Governor] submits the [Governor's] proposed declaration to the legislative council.

13
14 The [Governor] may renew a declaration of public-health emergency that was previously
15 renewed under subsection (b), or the [Governor] may issue a declaration of public-health
16 emergency that is substantially similar to a declaration of public-health emergency previously
17 renewed under subsection (b) at any time after the previously renewed declaration of public-
18 health emergency has expired if, prior to the renewal, the [Governor] has sought and received
19 approval of the renewal of a legislative council composed of the majority and minority leaders of
20 each chamber of the Legislature. There is no limitation on the number of times the [Governor]
21 propose or the number of times the legislative council may approve a declaration of public-health
22 emergency identical to or substantially similar to an expired declaration.

23 **End of Alternatives**

1 (e) The [Governor] may issue a declaration of public-health emergency identical or
2 substantially similar to an expired declaration of public-health emergency under subsection (a) if
3 at least [30] days has elapsed since the expiration of the expired declaration of public-health
4 emergency.

5 (f) An [executive order] under this section must specify:

6 (1) the nature and cause of the public-health emergency;

7 (2) the political subdivision or geographic area, which may include the entire
8 state, subject to the public-health emergency;

9 (3) the duration of the declaration of the public-health emergency if shorter than
10 the maximum duration permitted under this [act]; and

11 (4) each public-health authority responsible for responding to the public-health
12 emergency.

13 (g) A declaration of public-health emergency issued or renewed under this section, and
14 each specification required by subsection (f) must be rationally based on evidence then available
15 to the [Governor] about the nature of the agent, toxin, or natural disaster giving rise to the public-
16 health emergency and the risk posed by the agent, toxin, or natural disaster.

17 (h) Not later than [seven] days after issuing or renewing a declaration of public-health
18 emergency under this section, the [Governor] shall create a report in a record describing the
19 evidence on which the [Governor] based the initial declaration or renewal and each specification
20 required by subsection (b). The report must include any additional evidence the [Governor]
21 considered after making or renewing the declaration. The report must describe how the initial
22 declaration or renewal and each specification is rationally based on the evidence. The [Governor]
23 shall make the report publicly available and shall submit the report to the [Legislature].

1 (i) A declaration of a public-health emergency issued or renewed under this section is not
2 subject to the rule-making procedures of [cite to state administrative procedure act].

3 **Legislative Note:** Change “Governor” to the appropriate title if the individual heading the state
4 is not the Governor. Change “executive order” to the appropriate term describing the
5 mechanism the Governor uses to issue directives.

6
7 The word “Legislature” is bracketed in subsection (e) because a state may need to specify how
8 the Governor will submit the report required in that subsection. Whether a state specifies a
9 procedure for the Governor to submit this report when its Legislature is out of session and, if so,
10 which procedure it specifies will be affected by state law for calling a special session for the
11 Legislature. Because subsection (e) requires the Governor to make the report publicly available,
12 a state might choose to eliminate the requirement that the Governor submit the report to the
13 Legislature.

14 15 **Comments**

16
17 1. This section addresses the declaration of a public-health emergency by the Governor.
18 Such a declaration is central to the operation of this Act because the declaration triggers the
19 Governor’s power to issue orders under Section 6 of this Act.

20
21 2. This section sets the process for the Governor’s declaring a public-health emergency,
22 which process is intended to promote accountability to the facts related to the agent, toxin or
23 natural disaster and the risks they pose to all or part of the state’s population as those facts exist
24 at the time the Governor declares a public-health emergency. Additionally, the process is
25 intended promote transparency for and accountability to both the public and the Legislature
26 through the reporting requirement established in subsection (e). The reporting requirement,
27 among other things, obligates the Governor to identify those the Governor consulted as part of
28 determining whether or not a public-health emergency exists and whether or not a declaration of
29 a public-health emergency is warranted. This likely will include the State’s chief health officer.

30
31 3. Subsection (a) authorizes the Governor to issue an initial declaration of public-health
32 emergency and to renew a previously issued declaration of public-health emergency. Subsection
33 (a) should be read in conjunction with subsection (d), which sets a maximum term for an initial
34 declaration of public-health emergency and each successive renewed declaration of public-health
35 emergency.

36
37 4. Subsection (b) requires that the declaration of public-health emergency contain certain
38 information. This includes a statement specifying the nature and cause of the public-health
39 emergency under subsection (b)(1). As specified in Subsection (c), the Governor satisfies this
40 standard by stating the nature and cause of the public-health emergency to the extent the nature
41 and cause of the emergency can be ascertained based upon the information available to the
42 Governor at the time the Governor makes the initial declaration or at the time the Governor
43 renews a previous declaration. Subsection (b)(2) requires that the declaration of public-health
44 emergency specify the geographic scope of the public-health emergency, which may encompass

1 all or part of the state. Subsection (b)(3) requires that the declaration of public-health emergency
2 specify the duration of an initial declaration or of a renewed declaration, but this requirement
3 applies only if the Governor sets a duration shorter than the maximum duration permitted under
4 subsection (d). If no duration is specified in an initial or renewed declaration, then the
5 declaration is deemed to have a duration of the maximum length permitted under subsection (d).
6 Subsection (b)(4) requires that an initial declaration of public-health emergency or a renewed
7 declaration specify the one or more public-health authorities responsible for responding to the
8 public-health emergency. Subsection (b)(5) requires that the declaration identify the public-
9 health sources the Governor consulted when preparing an initial or a renewed declaration of
10 public-health emergency, which sources are likely to include state or local public-health officials
11 as well as other public-health experts. Subsection (b)(5) is designed to promote accountability
12 and transparency in the initial declaration and a renewal of public-health emergency.
13

14 5. Subsection (c) requires that a declaration of public-health emergency be “rationally
15 based” on information about the nature of and risks posed by the agent, toxin, or natural disaster
16 the threat or presence of which justifies the declaration. This requirement is not intended to
17 change any applicable constitutional standard of review. It is intended to promote accountability
18 and transparency by creating a public record of the evidentiary basis for the Governor’s
19 declaration, which will protect against an arbitrary or capricious declaration.
20

21 6. The obligation imposed on the Governor under this subsection (c) to base an initial or a
22 renewed declaration of public-health emergency on evidence of the nature and risks of the
23 relevant agent, toxin or natural disaster is limited to evidence “then available” to the Governor.
24 Information about the nature and risks of a public-health threat may be scant at the time the
25 Governor initially determines that a declaration of public-health emergency is warranted. For
26 example, there may be little information about the nature and risks of a novel virus that is
27 spreading and harming all or part of a state’s population. In such a case, this section requires
28 only that the Governor account for the little information that is then available when assessing
29 whether a public-health emergency exists and whether a declaration of a public-health
30 emergency is warranted. Subsection (c) does not require that the Governor wait for more
31 complete or definitive evidence about the nature and risks posted by an agent, toxin or natural
32 disaster before make those determinations.
33

34 7. Subsection (d) sets a maximum duration for an initial declaration of a public-health
35 emergency after which the declaration will expire unless the Governor renews the declaration. A
36 renewed declaration of public-health emergency is subject to the same maximum duration as an
37 initial declaration of public-health emergency. The Act does not limit the number of times the
38 Governor may renew a declaration of a public-health emergency, but each renewal imposes on
39 the Governor the same procedural obligations as the initial declaration. This is intended to
40 require that the Governor reassess whether a public-health emergency continues to exist given
41 any new developments since the initial declaration and to require that the Governor account for
42 any new developments through the reporting obligation that is triggered upon each renewal. By
43 setting a maximum duration for initial or renewed declarations while also permitting the
44 Governor to renew a declaration without limitation so long as the procedural requirements are
45 met with each renewal, this section balances the need to empower the Governor to respond
46 effectively in the case of a public-health emergency of indeterminate duration with the need to

1 assure accountability and transparency each time the Governor extends the duration of a
2 declaration of a public-health emergency.

3
4 8. Subsection (e) requires that the Governor create a report within seven days of an
5 initial or renewed declaration of public-health emergency, which report describes the information
6 on which the Governor relied to make the initial or renewed declaration as well as a description
7 of how this information rationally led to the Governor’s decision to make the initial or renewed
8 declaration of public-health emergency. The seven-day period permitted by this subsection
9 between an initial or renewed declaration and the time by which the Governor must complete the
10 report balances the need for the Governor to declare or renew a public-health emergency quickly
11 and the need to promote accountability by creating a record describing the information and
12 reasons that justify the initial or renewed declaration. Subsection (e) also requires that the
13 Governor make the report publicly available and that the Governor submit the report to the
14 Legislature. Subsection (e) does not establish a particular method for how the report is submitted
15 to the Legislature. This is meant to accommodate different methods for filing the required report.
16 For example, a state may require one method for filing the report when the Legislature is in
17 session and a different method for when the Legislature is out of session.

18
19 9. Subsection (f) exempts an initial or renewed declaration of public-health emergency
20 under this Act from any rule-making procedures that might otherwise apply under state law to
21 administrative statements of general applicability. Because a public-health emergency may
22 require quick action with respect to substantial parts or all of the population of a state, subsection
23 (f) exempts initial or renewed declarations under the Act from rule-making procedures that might
24 delay necessary action and thereby permit unnecessary harm to public health. Subsection (f)
25 exempts initial or renewed declarations under this Act from any and all rule-making procedures,
26 including emergency rule-making procedures because, in most jurisdictions, even these
27 procedures can cause some delay in the effective implementation of administrative actions. This
28 Act imposes other procedural requirements that promote transparency and accountability while
29 still empowering the Governor to act quickly and broadly if necessary to respond to a public-
30 health emergency.

31
32 **Section 5. Termination of Declaration of Public-Health Emergency**

33 (a) The [Governor] may terminate a declaration of a public-health emergency by
34 [executive order] in a record if the [Governor] determines that the situation is no longer a public-
35 health emergency and the determination is rationally based on evidence then available to the
36 [Governor] about the nature of the agent, toxin, or natural disaster giving rise to the public-health
37 emergency and the risk posed by the agent, toxin, or natural disaster. The [Governor] shall
38 submit the record to the [Legislature] along with a description of the evidence relied upon and
39 the [Governor’s] rationale that the situation is no longer a public-health emergency.

1 (b) A public-health emergency terminates when the term of the declaration set by the
2 [Governor] has elapsed or more than [60] days has elapsed since the [Governor] declared, or last
3 renewed the declaration of, the public-health emergency,

4 [(c) The [Legislature] may terminate the declaration of a public-health emergency.]

5 **Comments**

6
7 1. The Governor may terminate a declaration of a public-health emergency prior to the
8 expiration of the duration set by this Act or by the Governor in the terms of such a declaration if
9 and when the Governor determines that circumstances have changed such that they no longer
10 meet the definition of a “public-health emergency” as defined in this Act. When the Governor
11 terminates a declaration of a public-health emergency for this reason, subsection (a) requires that
12 the Governor have a rational basis for doing so and that the Governor articulates that rational
13 basis in a report filed with the Legislature and made publicly available. The purpose of this
14 requirement is to prevent the Governor from arbitrarily or capriciously terminating a declaration
15 of a public-health emergency prematurely.

16
17 2. Subsection (b) establishes that an initial or renewed declaration of public-health
18 emergency will terminate after 60 days.

19
20 3. Subsection (c) authorizes the Legislature to terminate the Governor’s declaration of a
21 public-health emergency at any time. Subsection (c) does not establish a procedure for how a
22 Legislature might do so because the constitutional authority for a Legislature to override the
23 Governor’s orders differs from state to state. Subsection (c) is bracketed because of the
24 likelihood that a state legislature lacks constitutional authority to terminate the Governor’s
25 declaration by any means other than bicameral passage of a bill, which is presented to the
26 Governor and is either signed into law or approved by the Legislature over a veto. Under some
27 states’ constitutions, a concurrent resolution is binding only when it relates to the internal
28 functions of the Legislature. In those states, a statutory provision authorizing the Legislature, by
29 concurrent resolution, to terminate the Governor’s declaration of a public-health emergency
30 would be an unconstitutional legislative veto. Some states’ constitutions may permit such a
31 legislative veto. Because this is a constitutional matter with variation among the states,
32 subsection (c) does not create new authority. Consequently, each state should decide whether to
33 include subsection (c).

34
35 4. When the Legislature acts to terminate a declaration of public-health emergency, it
36 should do so on the basis of a legislative record that justifies the conclusion that the
37 circumstances cited by the Governor in support of the declaration never existed or no longer
38 exist where such a legislative record sufficient to withstand the relevant constitutional standard
39 of review.

40 **Section 6. [Governor’s] Authority in Public-Health Emergency; Public-Health-**

1 **Emergency Order**

2 (a) After declaring a public-health emergency, the [Governor] may take action described
3 in this section relating to all of part of a political subdivision or geographic area subject to the
4 declaration.

5 (b) Subject to Section 4(b), the [Governor] may issue any order necessary to respond to a
6 public-health emergency so as to eliminate or reduce the risk of harm giving rise to the public-
7 health emergency or so as to eliminate, reduce, contain, or mitigate the effect of the public-health
8 emergency, including, but not limited to, an order addressing:

9 (1) the acquisition, stockpiling, distribution, or use of drugs, devices, equipment,
10 or tests;

11 (2) the acquisition, allocation, distribution, or spending of authorized funds;

12 (3) the operation or management of buildings, shelters, or other physical space;

13 (4) the movement or gathering of individuals;

14 (5) the management of state executive operations or programs; and

15 (6) the surveillance, monitoring, or assessment of the agent, toxin, or natural
16 disaster or any of its effects in the state.

17 (c) A public-health-emergency order must:

18 (1) be designed rationally to eliminate or reduce the risks posed to public health
19 by, or to mitigate some or all of the effects to public health from, the agent, toxin, or natural
20 disaster;

21 (2) minimize to the extent practicable the likely economic harm the order will
22 cause; and

23 (3) equitably distribute to the extent practicable the likely public-health benefits

1 and likely economic harms among the affected population.

2 (d) A public-health-emergency order is not subject to any rule-making procedures of
3 [cite to state administrative procedure act].

4 (e) The [Governor] may renew an order issued under this section if the renewal complies
5 with Section 7.

6 (f) This [act] does not prohibit the [Governor] from delegating authority as authorized by
7 other law of this state.

8 **Comments**

9 1. The powers described in this section are triggered by the Governor’s declaration of a
10 public-health emergency under this Act.

11
12 2. Subsection (b) authorizes the Governor to issue any order necessary to respond to a
13 declared public-health emergency. Subsection (b) clarifies in two ways the kinds of orders
14 included among those “necessary” to respond to a public-health emergency. First, the subsection
15 authorizes only those orders that are necessary to serve one of two general purposes: eliminating
16 or reducing the risk that gave rise to the public-health emergency, or eliminating, reducing,
17 containing or mitigating any of the effects of the public-health emergency. Second, subsection
18 (b) also describes six exemplary categories of potentially necessary orders. These categories are
19 not exclusive. An order that does not fall under any of the six categories described in subsection
20 (b) is authorized nonetheless under this subsection if it is “necessary” to eliminate or reduce the
21 risk created by the declared public-health emergency or to eliminate, reduce, contain or mitigate
22 any effect of the public-health emergency. The purpose of clarifying what constitutes a
23 “necessary” order during a public-health emergency is to promote accountability by providing
24 legislative guidance to the Governor about the scope of the authority granted under Subsection
25 (b).

26
27 3. The six exemplary categories of potentially necessary orders authorized under
28 subsection (b) are intended to encompass the most common actions Governors or executive
29 branch officials may take to end or mitigate the effects of a public-health emergency, including
30 but not limited to orders that require quarantine, isolation, individual and community testing,
31 masks or other face coverings, vaccinations, medical treatments, building closures or restrictions,
32 data collection and reporting, and social distancing. Additionally, the six exemplary categories of
33 potentially necessary orders authorized under subsection (b) are not limited to actions that the
34 Governor or executive branch officials have taken in the past to respond to a public-health
35 emergency that have already occurred; they also encompass novel actions that are necessary to
36 respond to a particular public-health emergency, especially when the public-health emergency
37 poses a novel risk.

38

1 4. Subsection (c) imposes three design requirements on any order issued under this
2 section. Not only must each order be designed rationally to reduce one or more risk posed by or
3 to mitigate one or more effect of the public-health emergency, it must also minimize economic
4 harm from the order to the extent practicable, and it must pursue equitable distribution of the
5 benefits and burdens of the order to the extent practicable. Among these three requirements, the
6 requirement under subsection (c)(1) that the order be designed rationally to reduce one or more
7 risk posed by or to mitigate one or more effect of the public-health emergency is primary. Unlike
8 the requirements in subsections (c)(2) and (c)(3), the requirement under subsection (c)(1) is not
9 qualified by the phrase “to the extent practicable.” Meanwhile, the requirements in subsections
10 (c)(2) and (c)(3) are each qualified by the phrase “to the extent practicable.” Thus, the Governor
11 must account for likely economic harms as well as inequities when designing an order to reduce
12 one or more risk posed by or to mitigate one or more effect of the public-health emergency, and
13 the Governor must make practicable adjustments to the design of such an order so as to minimize
14 the likelihood of economic harm as well as the likelihood of an inequitable distribution of the
15 benefits and burdens of the order on various subpopulations affected by the order, including
16 uniquely vulnerable subpopulations. Yet, subsections (c)(2) and (c)(3) do not require the
17 Governor to take any steps to minimize economic harm or to prevent or minimize inequities
18 when those steps are not practicable.

19
20 5. Subsection (d) exempts orders issued under this Act from any rule-making procedures
21 that might otherwise apply under state law to administrative statements of general applicability.
22 Because a public-health emergency may require quick action with respect to substantial parts or
23 all of the population of a state, subsection (d) exempts orders issued under the Act from rule-
24 making procedures that might delay necessary action and thereby permit unnecessary harm to
25 public health. Subsection (d) exempts orders issued under this Act from any and all rule-making
26 procedures, including emergency rule-making procedures because, in most jurisdictions, even
27 these procedures can cause some delay in the effective implementation of administrative actions.
28 This Act imposes other procedural requirements that promote transparency and accountability
29 while still empowering the Governor to act quickly and broadly if necessary to respond to a
30 public-health emergency.

31
32 6. Subsection (e) authorizes the Governor to renew an order, and it does not set a limit on
33 the number of times that an order may be renewed so long as a renewed order meets the same
34 standards that are required for an initial order.

35
36 7. Subsection (f) acknowledges that the Governor has authority elsewhere under state law
37 to delegate to others in the executive branch the power to issue orders under this section. While
38 subsection (f) does not limit those to whom the Governor may delegate this power, it anticipates
39 that the Governor will delegate some or all of that power to one or more public health officials.

40
41 8. An initial or renewed public-health-emergency order issued under this section may be
42 applicable to individuals, businesses and state or local governments as determined by the
43 Governor.

44
45 **Section 7. Requirements for Public-Health-Emergency Order**

1 (a) A public-health-emergency order must meet all of the following requirements:

2 (1) The [Governor] declared a public-health emergency under Section 4(a), and
3 the declaration is in effect.

4 (2) The order is rationally based on the evidence then available to the [Governor]
5 about the nature of and risk posed by the public-health emergency and the order is necessary to:

6 (A) eliminate or reduce the risk of harm giving rise to the public-health
7 emergency; or

8 (B) eliminate, reduce, contain, or mitigate the effect of the public-health
9 emergency.

10 (3) The order states the public-health goal it is designed to achieve.

11 (4) The order identifies the date on which it will expire, unless renewed, and the
12 date may not be later than the expiration of the declaration of public-health emergency.

13 (b) The [Governor], not later than [seven] days after issuing or renewing a public-health
14 emergency order, shall submit a report in a record describing the evidence on which the
15 [Governor] based the initial order or renewal and the determination that the initial order or
16 renewal is necessary under subsection (a)(2). The report must include any additional evidence
17 the [Governor] considered after issuing or renewing the order. The report must describe how the
18 initial order or renewal and the determination of its necessity are rationally based on the
19 evidence. The [Governor] shall make the report publicly available and shall submit the report to
20 the [Legislature].

21 **Comments**

22 1. Section 7 establishes substantive and procedural standards for any order issued under
23 this Act. It is intended to promote accountability to the facts related to the agent, toxin or natural
24 disaster and the risks they pose to all or part of the state's population as those facts exist at the
25 time the Governor issues an order in response to a declared public-health emergency.

1 Additionally, the process is intended promote transparency for and accountability to both the
2 public and the Legislature through the reporting requirement established in subsection (b).
3

4 2. The requirement under subsection (b) that the Governor submit a report to the
5 Legislature does not establish a particular method for how that report is submitted to the
6 Legislature. This is meant to accommodate different methods for filing the required report. For
7 example, a State may require one method for filing the report when the Legislature is in session
8 and a different method for when the Legislature is out of session.
9

10 3. Subsection (a)(2) requires, among other things, that each order issued under the Act be
11 “rationally based” on evidence about the nature of and risks posed by the agent, toxin or natural
12 disaster the threat or presence of which the order is designed to respond. The determination that
13 an order is necessary either to eliminate or reduce a risk posed by the public-health emergency or
14 to eliminate, reduce, contain or mitigate an effect of the public-health emergency must be
15 rationally based on such evidence. This requirement is not intended to change any applicable
16 constitutional standard of review. It is intended to promote accountability and transparency by
17 creating a public record of the evidentiary basis for an order issued under this Act, which will
18 protect against an arbitrary or capricious declaration.
19

20 4. The requirement to base any order issued under this Act on information about the
21 nature and risks of the relevant agent, toxin or natural disaster is limited to evidence “then
22 available” to the Governor. Information about the nature and risks of a public-health threat may
23 be scant at the time the Governor must respond to a public-health emergency. For example, there
24 may be little information about the nature and risks of a novel virus that is spreading and
25 harming all or part of a state’s population. In such a case, this section requires only that the
26 Governor account for the little information that is then available when issuing or renewing an
27 order to respond to the declared public-health emergency. This section does not require that the
28 Governor wait for more complete or definitive information about the nature and risks posted by
29 an agent, toxin or natural disaster before issuing any order.
30

31 **Section 8. Termination of Public-Health-Emergency Order**

32 A public-health-emergency order terminates when:

- 33 (1) the [Governor] terminates the order;
- 34 (2) the order expires; [or]
- 35 (3) the public-health-emergency declaration is terminated under Section 5[; or
- 36 (4) the Legislature terminates the order].

37 **Comments**

38 1. This section identifies the different ways that a public-health-emergency order is
39 terminated.

1 (a) A public-health-emergency order does not preempt an order, regulation, or ordinance
2 of a political subdivision that is more protective of public health than the order issued under this
3 [act]. An order issued under this [act] preempts any other order, regulation, or ordinance of a
4 political subdivision, only to the extent the order, regulation, or ordinance of the political
5 subdivision conflicts with the order issued under this [act].

6 **Alternative C**

7 (a) A public-health-emergency order does not preempt an order, regulation, or ordinance
8 of a political subdivision whether or not the order, regulation, or ordinance of the political
9 subdivision is equally protective of public health as the order issued under this [act].

10 **End of Alternatives**

11 (b) [Subject to subsection (c), an] [A] public-health-emergency order does not preempt
12 the authority of a political subdivision to issue or enforce an order, promulgate or enforce a
13 regulation, or make and enforce an ordinance except to the extent the authority of the political
14 subdivision conflicts with the order issued under this [act].

15 [(c) A public-health-emergency order does not preempt an action by, or authority of, a
16 political subdivision if the order functions only to restrict the ability of the political subdivision
17 to exercise its authority.]

18 **Legislative Note:** *Alternatives B and C allow a political subdivision to opt out of what the*
19 *Governor otherwise intends to be a statewide order during a public-health emergency.*
20 *Alternative B allows for a political subdivision to choose to be more protective of public health*
21 *than the Governor thought was justified in the Governor’s order. Determining which alternative*
22 *to adopt turns on the relative importance of preserving the power of the state to set statewide*
23 *standards during an emergency as compared to the importance of preserving the power of a*
24 *local government to set different standards during an emergency.*

25
26 *Subsection (c) reserves to the Legislature the power to amend the statutory authority of a*
27 *political subdivision to take action designed to protect public health. Subsection (c) prohibits the*
28 *Governor from using a public-health-emergency order to declare that a political subdivision is*
29 *stripped for the duration of a public-health-emergency of some part of the authority delegated by*

1 *statute to the political subdivision.*

2
3 **Comments**

4 1. This section creates three alternatives as to the preemptive effect on political
5 subdivisions of public-health-emergency orders issued by the Governor. A state legislature must
6 choose only one of these alternatives.

7
8 2. Under Alternative A, a public-health-emergency order issued by the Governor
9 preempts the law of a political subdivision only when there is a conflict between the public-
10 health-emergency order and the law of a political subdivision and only to the extent necessary to
11 resolve the conflict.

12
13 3. Alternative B is identical to Alternative A except that it saves from preemption any law
14 of a political subdivision that is more protective of public health than is the relevant public-
15 health-emergency order issued by the Governor. This Alternative is designed to allow a political
16 subdivision experiencing greater harm or risk from the public-health emergency as compared to
17 the rest of the geographic area subject to the declaration of public-health emergency to take steps
18 that are more protective than the steps taken by the Governor through a public-health-emergency
19 order.

20 4. Alternative C declares that a public-health-emergency order issued by the Governor
21 does not have any preemptive effect on the law of political subdivisions. This Alternative
22 permits political subdivisions remain in control of the orders, if any, they adopt in response to a
23 declared public-health emergency.

24
25 5. Subsection (b) clarifies that, despite any preemptive effect (under Alternatives A and
26 B) of a public-health-emergency order issued by the Governor, political subdivisions retain their
27 legal powers delegated to them under state law.

28
29 6. Subsection (c) limits the authority of the Governor to override the legal powers of a
30 political subdivision during a declared public-health emergency. It prohibits the Governor from
31 issuing an order under this Act that does nothing other than declare otherwise authorized actions
32 that a political subdivision cannot take. This subsection is designed to preserve for political
33 subdivisions the legal powers delegated to them by the Legislature absent either action by the
34 Legislature or a public-health-emergency order by the Governor taking some affirmative action
35 to protect public health that conflicts with the law of a political subdivision. This subsection is
36 bracketed because it is not necessary if a Legislature chooses Alternative C and because a
37 Legislature choosing Alternative A or B might not choose to restrict the Governor's actions in
38 this way during a declared public-health emergency.

39
40 **Section 11. Injunctive Relief**

41 The [Governor] may seek injunctive relief to enforce a public-health-emergency order.

42 *Legislative Note: Insert appropriate state official authorized to bring an action on behalf of the*
43 *state.*

1 **Comments**

2 1. This section should be read in conjunction with Section 12. Together they create the
3 forms of relief authorized under the Act. The Act does not authorize criminal action against those
4 who violate the terms of a public-health-emergency order.

5
6 2. This section does not create a private right of action.

7
8 **Section 12. Civil [Penalty][Fine]**

9 (a) The [court] may impose a [penalty][fine] for a knowing violation of a public-health-
10 emergency order of not more than:

11 (1) \$[250] per violation per day for a violation by an individual, except by a
12 public official acting in their official capacity; or

13 (2) \$[1000] per violation per day by a business.

14 (b) This [act] does not affect a right or remedy available under other law.

15 *Legislative Note: Insert either the court or an administrative agency or both depending on the*
16 *statutory authority granted to administrative agencies to levy a penalty or fine.*

17 **Comments**

18 1. This section should be read in conjunction with Section 11. Together they create the
19 forms of relief authorized under the Act. The Act does not authorize criminal action against those
20 who violate the terms of a public-health-emergency order.

21
22 2. Subsection (a) establishes two different maximum levels of civil fines or penalties for
23 violations of public-health-emergency orders issued under this Act. One is for individuals, and
24 the other is for businesses. The amount for individuals is set lower than the amount for
25 businesses on the belief that a larger fine or penalty may be necessary to incentivize compliance
26 by a business as compared to an individual.

27
28 3. Subsection (b) acknowledges that an action that violates a public-health-emergency
29 order issued under this Act might also violate other state law and may give rise to a different or
30 additional remedy not provided for under this Act. This subsection clarifies that it does not affect
31 the availability of any such remedies available through other state law. This is designed to
32 account for state and local agencies that administer business licensing laws that include their own
33 unique rights and remedies.

34
35 4. This section does not create a private right of action.

