

DRAFT
FOR DISCUSSION ONLY

Model Public-Health-Emergency Authority Act

Uniform Law Commission

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Model Public-Health-Emergency Authority Act

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Model Public-Health-Emergency Authority Act

Prefatory Note

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

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

By way of background, legal preparedness for public health emergencies has evolved in fits and starts over the last twenty years largely in response to major public health crises. Most notably, the anthrax scare following the 9/11 attacks prompted the federal government to fund a project at Georgetown University Law Center in 2001 to develop a model state law for public health emergency powers. This resulted in the 2001 Model State Emergency Health Powers Act (2001 Model Law), which a majority of states have adopted in substantial part. Yet, the 2001 Model Law addressed primarily executive branch authority to quarantine and isolate individuals during an emergency, and it did not address adequately or at all many of the actions that became necessary during the COVID-19 pandemic. In particular, the 2001 Model Law does not address the power of governors to issue orders designed to mitigate the effects of a novel contagious disease that has taken root in a population. Thus, governors and state officials often relied on old state statutes to respond to the COVID-19 pandemic. Those statutes authorized officials to take actions "necessary" to preserve public health. Such broad language, while valuable, provided little accountability or limitation, and it invited a wide variety of constitutional and administrative challenges to various orders issued during the pandemic.

The *Model Public-Health-Emergency Authority Act* builds on the framework of the 2001 Model Law, clarifying the kinds of orders that governors are authorized to issue during a public health emergency. At the same time, this *Model PHEA* imposes substantive and procedural guardrails as a check against arbitrary public health action. It does so by requiring governors to develop a record in support of any declaration of a public health emergency and in support of any public health order issued during the term of such a declaration. The *Model PHEA* also imposes a sunset provision on every public-health emergency declaration and public-health-emergency order, and it requires a governor to make a new record as a condition of renewing a declaration or an order.

1 The drafting committee believes that the *Model PHEA* strikes an appropriate balance
2 between empowering governors to take swift emergency action and holding governors
3 accountable for each such action. Yet, the Committee has faced some challenges. In particular,
4 the Committee found that differences in state constitutions prevented the Committee’s including
5 provisions authorizing state legislatures to terminate unilaterally a public-health emergency
6 declaration or any public-health-emergency order issued by a governor. For example, state
7 constitutions typically do not authorize legislatures to act with the force of law except by passing
8 legislation in both chambers, presenting that legislation to the governor for signature or veto, and
9 overriding any gubernatorial veto. Under such a state constitution, a statutory provision
10 authorizing a legislature to terminate a public-health emergency declaration or public-health-
11 emergency order by joint or concurrent resolution would amount to an unconstitutional
12 legislative veto.
13

14 This exact issue arose in Pennsylvania during the COVID-19 pandemic. In June 2020 the
15 Governor of Pennsylvania renewed an initial public-health emergency proclamation. A few days
16 later each chamber of Pennsylvania’s legislature, under an authorizing statute, approved a
17 concurrent resolution terminating the Governor’s proclamation. When leadership of the
18 legislature filed suit to enforce the resolution, the Governor petitioned the Pennsylvania Supreme
19 Court to immediately review the matter, and the Court granted the Governor’s petition. In *Wolf v.*
20 *Scarnati*, 233 A.3d 679 (Pa. 2020), the Court held that the Legislature’s resolution violated the
21 Pennsylvania Constitution’s requirement that every legislative “order, resolution, or vote . . . be
22 presented to the Governor” for approval or disapproval. Because the concurrent resolution
23 purporting to terminate the public-health emergency proclamation was not presented to the
24 Governor, the Court held that the resolution was void as unconstitutional. (The electorate of
25 Pennsylvania later approved a state constitutional amendment authorizing such a legislative
26 veto.)
27

28 Because state constitutions typically contain similar presentment requirements, this Act
29 does not authorize the Legislature to terminate the Governor’s declaration of a public-health
30 emergency unilaterally. Some states’ constitutions—like Pennsylvania’s now amended
31 Constitution—may permit such a legislative veto. Because this is a constitutional matter with
32 variation among the states, this Act does not create new legislative authority.
33

34 Instead, this Model Law promotes executive branch accountability in two ways. First, it
35 requires that a state legislature be in session or have an opportunity to be in session as a
36 condition of a governor’s power to renew a declaration of public-health emergency. Part-time
37 legislatures in about a dozen states are not empowered to call themselves into special session. In
38 those states, this Act incentivizes a governor to call a special legislative session so as to trigger
39 the governor’s authority to renew a declaration of public health emergency. A governor in such a
40 state may choose not to call a special session, in which case, the declaration and all of its
41 associated orders will expire, and the governor cannot reissue the same or similar declaration for
42 15 days. By assuring that a state legislature is in session at the time a declaration is renewed, the
43 Act triggers the political process as a check on gubernatorial authority. Once in session, state
44 legislatures may pass bills terminating or amending an ongoing declaration of public-health
45 emergency and present those bills to the governor who will be held politically accountable for
46 the decision to sign or veto such bills.

1 Second, this Model Law requires that a governor make a written report that is submitted
2 to the legislature and otherwise made publicly available. This creates a basis to challenge both a
3 declaration and each individual order on administrative grounds. For example, anyone with
4 standing may petition a state court to set aside a declaration of public-health emergency if the
5 circumstances do not meet the definition of a “public health emergency” or if the governor has
6 not met the procedural requirements for issuing or renewing such a declaration. Similarly,
7 anyone with standing may seek judicial review of a public-health-emergency order, alleging that
8 it is arbitrary or capricious where the administrative record is insufficient or otherwise fails to
9 support such an order.

Model Public-Health-Emergency Authority Act

Section 1. Title

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

Comments

The Act's title includes the word "model" and not the word "uniform" to signal that the Act accommodates key differences among jurisdictions with respect to their constitutions and legislative structure.

Section 2. Definitions

In this [act]:

(1) "Person" means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(2) "Political subdivision" includes a city, [county,] district, and any other local or regional governmental authority.

(3) "Public-health emergency" means an imminent threat or actual appearance of an infectious, biologic, radiologic, or chemical agent or toxin, regardless of cause, that poses a high probability of:

(A) a large number of deaths of individuals in the affected population;

(B) a large number of serious or long-term disabilities of individuals in the affected population;

(C) widespread exposure to the agent or toxin that poses a significant risk of substantial harm to a large number of individuals in the affected population; or

(D) a substantial adverse impact on the availability of medical, public health, or other emergency resources that could be affected by the public-health emergency.

(4) "Public-health-emergency order" means an order issued or renewed under this

1 [act].

2 (5) “Record” means information:

3 (A) inscribed on a tangible medium; or

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

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

9 **Comments**

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

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

16
17 3. The definition of “public-health emergency” is central to the operation of this Act. It
18 identifies the circumstances under which a Governor may issue a declaration of public-health
19 emergency, which then triggers the authority of the Governor to issue orders designed to protect
20 public health. The definition is designed to account for various agents and toxins that threaten or
21 harm public health. These include, without limitation, infectious agents that are communicable
22 among humans (e.g., COVID-19, measles, Ebola) infectious agents transmitted through insects
23 or other vectors (e.g., malaria). These also include, without limitation, toxins released into the
24 environment (e.g., chemical spill or nuclear accident). Additionally, these include, without
25 limitation, threats to public health associated with disasters or other emergencies, including,
26 without limitation, mold, vermin, or bacteria. The definition also requires that the agent or toxin
27 pose a high probability of one or more types of significant, population-level harm, meaning that
28 a single case of an infectious disease that is well-controlled and thus does not pose a high
29 probability of significant population-level harm would not meet the definition.

30
31 4. The definition of “public-health emergency” in this Act shares some of the elements of
32 the definition of “public health emergency” in the 2001 Model Law, parts of which have been
33 adopted by a majority of states. Yet, the definition here accounts for public-health preparedness
34 lessons learned since 2001. For example, the definition above recognizes that a public-health
35 emergency can exist when an agent or toxin poses a high probability of significantly straining
36 medical, public health, or other emergency resources.

37
38 5. The definition of “public-health emergency” in this Act also includes certain phrases

1 that appear in the definition as used in the 2001 Model Law, such as “affected population” and
2 “high probability.” In this Act, “affected population” refers to the set of individuals who are
3 likely or actually at risk of harm from the threatened or actual infectious, biologic, radiologic, or
4 chemical agent or toxin that may justify the declaration of a public-health emergency. In this
5 way, the size of the “affected population” is determined by the nature and scope of a particular
6 threat. While the nature and scope of a threat may result in the determination that the “affected
7 population” is the population of the state or of one or more political subdivisions of a state, the
8 “affected population” need not correspond to the boundaries of one or more political
9 subdivisions of a state. In this Act, the phrase “high probability” is intended to mean higher than
10 would reasonably be expected in the absence of the agent or toxin, the threat or presence of
11 which may justify declaring a public-health emergency.

12
13 6. The phrase “other emergency resources that could be affected by the public-health
14 emergency,” as used in subsection 3(D), refers to resources other than medical personnel,
15 facilities, services, or supplies and other than public health personnel, facilities, services, or
16 supplies and that are or may become appropriate for an adequate response to the risks posed by
17 the toxin or agent that may justify declaring a public-health emergency. The scope of what
18 constitutes “other emergency resources that could be affected by the public-health emergency”
19 will be determined by the nature of the relevant emergency. For example, safe drinking and
20 bathing water could constitute “other emergency resources that could be affected by the public-
21 health emergency” in the case of water contamination that meets the definition of a “public-
22 health emergency.”

23
24 7. Despite sharing some elements with the definition in the 2001 Model Law, the
25 definition of “public-health emergency” as used in this Act differs from the definition in the
26 2001 Model Law. Circumstances meet the definition of a “public-health emergency” regardless
27 of the cause of the emergency.

28
29 8. Unlike the definition in the 2001 Model Law, the definition of “public-health
30 emergency” as used in this Act does not refer to “disaster” or “natural disaster.” Instead, the
31 definition in this Act refers to “infectious, biologic, radiologic, or chemical agent or toxin,
32 regardless of cause.” This necessarily encompasses the threat of such toxins or agents when they
33 arise as part of a natural or non-natural disaster. For example, an “infectious, biologic,
34 radiologic, or chemical agent or toxin” would include a chemical leak resulting from a train
35 derailment or truck crash, and it would include bacteria, mold or vermin associated with a flood.
36 In this way, the Act addresses circumstances in which a threat to public health results from a
37 natural or non-natural disaster.

38
39 9. The definition of “public-health-emergency order” is an order issued by the Governor
40 under Section 6 of this Act and that complies with the requirements of Section 7 of this Act. The
41 Governor has the authority to issue a public-health-emergency order during the term of a
42 declaration of public-health emergency.

43
44 10. The definition of “record” is based on language currently used in uniform and model
45 laws drafted and approved by the Uniform Law Commission.

1 11. The definition of “State” is based on language currently used in uniform and model
2 laws drafted and approved by the Uniform Law Commission.
3

4 **Section 3. Relationship to Other State Law**

5 If a public-health emergency exists, this [act] creates the exclusive authority for the
6 [Governor] to respond to the public-health emergency. If an emergency exists other than a
7 public-health emergency, the [Governor] may respond as authorized by other law of this state. If
8 a public-health emergency and an emergency other than a public-health emergency arise out of
9 the same incident, this [act] shall provide the authority for the [Governor] to respond to the part
10 of such an incident that is a public-health emergency, and other law of this state shall provide the
11 authority for the [Governor] to respond to the part of the incident that is an emergency other than
12 a public-health emergency. State and local agencies and officials retain any authority granted to
13 them under other law of this state during a public-health emergency except as provided in
14 Section 9 of this [act].

15 **Comments**

16 This Section declares that, when circumstances meet the definition of a public-health
17 emergency, this Act controls over other state laws for the sole purpose of responding to the
18 public-health emergency. In particular, this Section controls over other statutes that authorize the
19 Governor to declare and respond to other kinds of emergencies. Circumstances may exist in
20 which a public-health emergency arises in connection with a different kind of emergency. For
21 example, a flood might result in bacteria, mold or vermin that pose a threat to public health and
22 that otherwise meets the definition of a “public-health emergency.” In such circumstances, the
23 Governor’s authority to respond to the part of the broader emergency that constitutes a “public-
24 health emergency” derives exclusively from this Act; meanwhile, the Governor’s authority to
25 respond to all aspects of the broader emergency other than the portion that is a “public-health
26 emergency” derives from other state law. This Section also clarifies that, except as provided in
27 Section 9, this Act does not suspend any authority granted to state and local agencies or officials
28 by other state law even during a declared public-health emergency. Instead, public health
29 officials retain any non-emergency authority granted to them under other state law to protect
30 public health unless preempted under Section 9.
31

32 **Section 4. Declaration of Public-Health Emergency; Renewal**

33 (a) The [Governor] may, by [executive order], issue a declaration of a public-health

1 emergency. An initial declaration of a public-health emergency may not have a term longer than
2 [90] days.

3 (b) Before a declaration of a public-health emergency issued under subsection (a) or
4 renewed under this subsection expires, and subject to subsection (c), the [Governor] may, by
5 [executive order], renew the initial declaration of public-health emergency. A renewed
6 declaration of a public-health emergency may not have a new term of longer than [90] days.

7 (c) The [Governor]'s authority to renew an initial or a previously renewed declaration of
8 a public-health emergency is subject to each of the following conditions:

9 (1) The [Governor] shall provide written notice in a record to the [Legislature]
10 before renewing an initial or a previously renewed declaration of a public-health emergency; and

11 (2) The [Legislature] is or will be in session, or the [Legislature] will have an
12 opportunity to be in session, not later than [5] days after the commencement of the renewed
13 declaration of public-health emergency.

14 (d) There shall not be any limitation on the number of times the [Governor] may renew
15 an initial or a previously renewed declaration of public-health emergency that has not expired if
16 the [Governor] determines that a public-health emergency continues to exist, and if the
17 [Governor] complies with subsection (c).

18 (e) An initial or a renewed declaration of public-health emergency expires at the end of
19 its term unless renewed or further renewed under subsection (b) or unless the [Governor], under
20 Section 5, terminates the declaration of a public-health emergency before the stated term expires.

21 (f) The [Governor] may issue a declaration of a public-health emergency identical or
22 substantially similar to an expired declaration of public-health emergency under subsection (a) if
23 at least [15] days have elapsed since the expiration of the declaration of a public-health

1 emergency.

2 (g) A declaration of public-health emergency under this section must specify:

3 (1) the nature of the public-health emergency;

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

6 (3) the duration of the declaration of the public-health emergency, which is [90]
7 days if a shorter term is not specified.

8 (h) A declaration of a public-health emergency issued or renewed under this section, and
9 each specification required by subsection (g) must be rationally based on evidence then-available
10 to the [Governor] about the nature of the agent or toxin giving rise to the public-health
11 emergency and the risk posed by the agent or toxin.

12 (i) Not later than [seven] days after issuing or renewing a declaration of a public-health
13 emergency under this section, the [Governor] shall create a report in a record describing the
14 evidence on which the [Governor] based the initial or renewed declaration and each specification
15 required by subsection (g). The report must include additional evidence the [Governor]
16 considered after making or renewing the declaration. The [Governor] shall not include in the
17 report information that is protected by law as confidential or privileged or that is otherwise
18 exempt from disclosure by law. The report must describe how the initial declaration or renewal
19 and each specification is rationally based on the evidence. The [Governor] shall make the report
20 publicly available and shall submit the report to the [Legislature].

21 (j) A declaration of a public-health emergency issued or renewed under this Section is not
22 subject to the rule-making procedures of [cite to state administrative procedure act].

23 **Legislative Note:** Change “Governor” to the appropriate title if the individual heading the state
24 is not the Governor. Change “executive order” to the appropriate term describing the

1 *mechanism the Governor uses to issue directives.*

2
3 *The word “Legislature” is bracketed in subsection (c)(1) because a State may need to specify*
4 *how the Governor will provide notice of renewal to the Legislature, including a procedure for*
5 *how the Governor will provide notice of renewal to the Legislature if and when the Legislature is*
6 *not in session.*

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

15 16 **Comments**

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

21
22 2. This section sets the process for the Governor’s declaring a public-health emergency,
23 which process is intended to promote accountability to the facts about the relevant agent or toxin
24 and the risks they pose to all or part of the state’s population as those facts are known at the time
25 the Governor declares a public-health emergency. Additionally, the process is intended to
26 promote transparency for and accountability to both the public and the Legislature through the
27 reporting requirement established in subsection (i).

28
29 3. Subsection (a) authorizes the Governor to issue an initial declaration of public-health
30 emergency and sets a maximum duration of its term.

31
32 4. Subsection (b) authorizes the Governor to renew an unexpired declaration of public-
33 health emergency and sets a maximum duration of its term. The Governor’s authority to renew a
34 declaration of public-health emergency applies not only to an initial declaration of public-health
35 emergency, but also to a previously renewed declaration of public-health emergency. This
36 subsection establishes that, unlike the Governor’s authority to issue an initial declaration of
37 public-health emergency, the Governor’s authority to renew a declaration of public-health
38 emergency is subject to one or more additional conditions set forth in subsection (c).

39
40 5. Subsection (c) creates two conditions on the authority of the Governor to renew a
41 declaration of public-health emergency. Subsection (c)(1) requires that the Governor notify the
42 Legislature prior to renewing a declaration of public-health emergency. This is intended to assure
43 that the Legislature is aware that the Governor intends to renew a declaration of public-health
44 emergency. Subsection (c)(2) additionally requires that the Legislature is in session at the time of
45 the Governor’s renewal or that the Legislatures wither will be in session or will have the
46 opportunity to be in session within 5 days of the day on which the renewed declaration takes

1 effect. This condition is intended to assure that the legislative branch has an opportunity to
2 consider and pass legislation related to the public-health emergency at the start of the term of the
3 renewed declaration of public-health emergency. This condition is particularly important for
4 States with part-time legislatures that lack the legal authority to call themselves into session. In
5 such a State, the Governor must exercise the Governor's discretion to call a special legislative
6 session if the Governor wishes to trigger the authority to renew a declaration of public-health
7 emergency under Subsection (c) prior to its expiration if the Legislature is not scheduled to be in
8 session within the first 5 days of the term of the renewed declaration. Alternatively, the Governor
9 of such a State may choose to allow the declaration of public-health emergency to expire, in
10 which case the Governor would be prohibited under Subsection (f) from issuing the same or
11 substantially similar declaration of public-health emergency for 15 days.

12
13 6. Subsection (c) does not create any power in the Legislature that does not otherwise
14 exist under other State law. For example, it does not authorize any legislature to call itself into
15 session. Nor does Subsection (c) authorize the Legislature to amend or terminate a renewed
16 declaration of public-health emergency. Additionally, Subsection (c) does not obligate the
17 Governor to sign any bills passed by the Legislature with respect to a renewed declaration of
18 public-health emergency whether passed during a regular or special legislative session.

19
20 7. Subsection (d) establishes that there is not a limitation on the total number of times a
21 Governor is authorized to renew a declaration of public-health emergency so long as the
22 underlying circumstances continue to meet the definition of a "public-health emergency" under
23 the Act and the Governor meets the requirements of and satisfies the conditions for each renewal.
24 The purpose of this provision is to assure that the Governor has the authority necessary to
25 address an ongoing public-health emergency and to assure that the Governor reassesses whether
26 a public-health emergency continues to exist.

27
28 8. Subsection (e) recognizes that a declaration of public-health emergency expires if not
29 renewed prior to the end of its term.

30
31 9. Subsection (f) establishes that the Governor's authority to issue an initial declaration of
32 public-health emergency that is identical or substantially similar to an expired declaration of
33 public-health emergency is triggered a certain number of days after the expired declaration of
34 public-health emergency reached the end of its term. This provision stands in contrast to
35 subsections (b) and (c) that, together, create the authority of the Governor to renew a declaration
36 of public-health emergency without any lapse in time if the Governor satisfies the conditions in
37 subsection (c). Subsection (f) applies when the Governor does not meet the conditions for
38 renewing a declaration of public-health emergency and therefore cannot renew such a declaration
39 before it expires. Subsection (f) imposes a waiting period on the Governor before the Governor
40 can issue another declaration of public-health emergency identical or substantially similar to the
41 expired declaration. This waiting period is intended to incentivize the Governor to choose the
42 renewal option under subsections (b) and (c), to specify the consequence of a Governor's failure
43 to meet the conditions of renewal, and to specify when the Governor's authority is reset so that
44 the Governor can protect the public health in the face of an ongoing public-health emergency.

45
46 10. Subsection (g) requires that a declaration of public-health emergency contain certain

1 information. This includes a statement specifying the nature of the public-health emergency
2 under subsection (g)(1). The Governor satisfies this standard by stating the nature of the public-
3 health emergency to the extent the nature of the emergency can be ascertained based upon the
4 information available to the Governor at the time the Governor makes the initial declaration or at
5 the time the Governor renews a previous declaration. Subsection (g)(2) requires that the
6 declaration of public-health emergency specify the geographic scope of the public-health
7 emergency, which may encompass all or part of the state. Subsection (g)(3) requires that the
8 declaration of public-health emergency specify the duration of an initial declaration or of a
9 renewed declaration, but this requirement applies only if the Governor sets a duration shorter
10 than the maximum duration permitted under subsections (a) or (b). If no duration is specified in
11 an initial or renewed declaration, then the declaration is deemed to have a duration of the
12 maximum length permitted under subsections (a) and (b).
13

14 11. Subsection (h) requires that a declaration of public-health emergency be “rationally
15 based” on information about the nature of and risks posed by the agent or toxin the threat or
16 presence of which justifies the declaration. This requirement is not intended to change any
17 applicable constitutional standard of review. It is intended to promote accountability and
18 transparency by creating a public record of the evidentiary basis for the Governor’s declaration,
19 which will protect against an arbitrary or capricious declaration. The obligation imposed on the
20 Governor to base an initial or a renewed declaration of public-health emergency on evidence of
21 the nature and risks of the relevant agent or toxin is limited to evidence “then-available” to the
22 Governor. Information about the nature and risks of a public-health threat may be scant at the
23 time the Governor initially determines that a declaration of public-health emergency is
24 warranted. For example, there may be little information about the nature and risks of a novel
25 virus that is spreading and harming all or part of a state’s population. In such a case, this section
26 requires only that the Governor account for the little information that is then-available when
27 assessing whether a public-health emergency exists and whether a declaration of a public-health
28 emergency is warranted. The Governor is not required to wait for more complete or definitive
29 evidence about the nature and risks posted by an agent or toxin before making those
30 determinations.
31

32 12. Subsection (i) requires that the Governor create a report within seven days of an
33 initial or renewed declaration of public-health emergency, which report describes the information
34 on which the Governor relied to make the initial or renewed declaration as well as a description
35 of how this information rationally led to the Governor’s decision to make the initial or renewed
36 declaration of public-health emergency. This section is intended to promote accountability and
37 transparency by creating a public record of the evidentiary basis for the Governor’s declaration,
38 which will protect against an arbitrary or capricious declaration. The seven-day period permitted
39 by this subsection between an initial or renewed declaration and the time by which the Governor
40 must complete the report balances the need for the Governor to declare or renew a public-health
41 emergency quickly and the need to promote accountability by creating a record describing the
42 information and reasons that justify the initial or renewed declaration. Subsection (i) also
43 requires that the Governor make the report publicly available and that the Governor submit the
44 report to the Legislature. Subsection (i) does not establish a particular method for how the report
45 is submitted to the Legislature. This is meant to accommodate different methods for filing the
46 required report. For example, a state may require one method for filing the report when the

1 Legislature is in session and a different method for when the Legislature is out of session. The
2 Act, under subsection (d), does not limit the number of times the Governor may renew a
3 declaration of a public-health emergency, but, under subsections (h) and (i), each renewal
4 imposes on the Governor the same procedural obligations as the initial declaration. This is
5 intended to require that the Governor reassess whether a public-health emergency continues to
6 exist given any new developments since the initial declaration and to require that the Governor
7 account for any new developments through the reporting obligation that is triggered upon each
8 renewal. By setting a maximum duration for initial or renewed declarations while also permitting
9 the Governor to renew a declaration without limitation so long as the procedural requirements
10 are met with each renewal, this section balances the need to empower the Governor to respond
11 effectively in the case of a public-health emergency of indeterminant duration with the need to
12 assure accountability and transparency each time the Governor extends the duration of a
13 declaration of a public-health emergency.

14
15 13. Subsection (j) exempts an initial or renewed declaration of public-health emergency
16 under this Act from any rule-making procedures that might otherwise apply under State law to
17 administrative statements of general applicability. Because a public-health emergency may
18 require quick action with respect to substantial parts or all of the population of a state, subsection
19 (j) exempts initial or renewed declarations under the Act from rule-making procedures that might
20 delay appropriate action and thereby permit unnecessary harm to public health. Subsection (j)
21 exempts initial or renewed declarations under this Act from any and all rule-making procedures,
22 including emergency rule-making procedures because, in most jurisdictions, even these
23 procedures can cause some delay in the effective implementation of administrative actions. This
24 Act imposes other procedural requirements that promote transparency and accountability while
25 still empowering the Governor to act quickly and broadly to a public-health emergency.

26 27 **Section 5. Termination of Declaration of Public-Health Emergency**

28 The [Governor] may terminate a declaration of a public-health emergency before its term
29 expires. The [Governor] shall do so by [executive order] in a record if the [Governor] determines
30 that the situation is no longer a public-health emergency and the determination is rationally based
31 on evidence then-available to the [Governor] about the nature of the agent or toxin giving rise to
32 the public-health emergency and the risks posed by the agent or toxin. The [Governor] shall
33 submit the record to the [Legislature] along with a description of the evidence relied upon and
34 the [Governor's] rationale that the situation is no longer a public-health emergency.

35 **Comments**

36
37 The Governor may terminate a declaration of a public-health emergency prior to the
38 expiration of the duration set by this Act or by the Governor in the terms of such a declaration if

1 and when the Governor determines that circumstances have changed such that they no longer
2 meet the definition of a “public-health emergency” as defined in this Act. When the Governor
3 terminates a declaration of a public-health emergency for this reason, this section requires that
4 the Governor have a rational basis for doing so and that the Governor articulates that rational
5 basis in a report filed with the Legislature and made publicly available. The purpose of this
6 requirement is to prevent the Governor from arbitrarily or capriciously terminating a declaration
7 of a public-health emergency prematurely.
8

9 **Section 6. [Governor’s] Authority: Declaration of Public Health Emergency; Public-**
10 **Health-Emergency Order**

11 (a) During the term of a declaration of public-health emergency, the [Governor] may
12 issue one or more public-health-emergency orders as specified in this section. An order applies
13 to all of part of a political subdivision or geographic area subject to the declaration.

14 (b) The [Governor] may issue any order in response to a public-health emergency
15 addressing:

16 (1) acquisition, stockpiling, commandeering, management, distribution, or use of
17 drugs, devices, equipment, or tests;

18 (2) acquisition, allocation, distribution, management, or spending of authorized
19 funds;

20 (3) zoning, operation, commandeering, use, or management of buildings, shelters,
21 facilities, or other physical space, and the management of any activities in those places;

22 (4) testing, isolation, quarantine, movement, gathering, evacuation, or relocation
23 of individuals;

24 (5) testing, isolation, quarantine, culling, movement, evacuation, relocation, or
25 management of plants or animals;

26 (6) management of state executive-branch operations, offices, agencies, or
27 programs;

1 (7) surveillance, monitoring, or assessment of the public-health emergency or any
2 of its effects in the state;

3 (8) suspension of the provisions of any statute, order, rule, or regulation if strict
4 compliance would hinder efforts to respond to the public-health emergency, or pose hardship or
5 undue risk for individual compliance;

6 (9) access to and security of means of digital connection or communication in
7 support of, but not limited to, commerce, employment, education, notifications, or warnings;

8 (10) assessment of and response to the nature, degree, and variation of harm
9 related to the public-health emergency, including the assessment of and response to the need for
10 food, clothing, housing, and other necessities of life;

11 (11) acquisition, allocation, distribution, or management of goods, services,
12 equipment, materials, or personnel;

13 (12) coordination or cooperation of state or local governmental entities, officials,
14 or employees with federal and other state authorities;

15 (13) public-health emergency planning, implementation of public-health
16 emergency plans, the coordination of public-health emergency plans or planning, or training to
17 implement or coordinate public-health emergency plans;

18 (14) making or performance of [executive branch] agreements;

19 (15) development, function, operation, use, assessment, or management of
20 warning or notifications systems;

21 (16) assessment, operation, or management of, or access to emergency services
22 including without limitation fire, police, or medial services;

23 (17) assessment, operation, or management of any form of public transportation;

1 and

2 (18) zoning, operation, commandeering, use, or management of parks and other
3 outdoor space, and the management of any activities in those places.

4 (c) In addition to and without limitation either to or by the authority to issue orders under
5 subsection (b), the [Governor] may issue any order to eliminate or reduce any of the risks of
6 harm posed by the public-health emergency or to eliminate, reduce, contain, or mitigate any of
7 the effects of the public-health emergency.

8 (d) A public-health-emergency order must be designed rationally to eliminate, reduce,
9 contain, or mitigate the risks posed by or some or all of the effects of the public-health
10 emergency.

11 (e) The [Governor] shall consider the following factors when issuing an order under this
12 section:

13 (1) the scope and degree of each risk of and each harm from the public-health
14 emergency that the order is designed to eliminate, reduce, contain, or mitigate;

15 (2) the likelihood based upon then-available information that the order will result
16 in the outcome it is designed to achieve;

17 (3) the proportion of the affected population that likely will benefit from the
18 outcome the order is designed to achieve;

19 (4) the likelihood that the order will benefit individuals in the affected population
20 who are most vulnerable because of age, disability, income and other financial resources,
21 education, employment, location, or race to the risks of or harms from the public-health
22 emergency that the order is designed to reduce, eliminate, contain, or mitigate;

23 (5) the burdens on the state and on individuals and businesses in the affected

1 population that are likely to result from issuing the order, including deaths, illnesses, injuries,
2 financial losses, job losses, business closures, depletion of available financial resources, and
3 other relevant health and economic burdens; and

4 (6) the likelihood that the order will disproportionately impose burdens on
5 individuals in the affected population who are vulnerable due to age, disability, income and other
6 financial resources, education, employment, location, or race.

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

9 (g) The [Governor] may renew an order issued under this section if the renewal complies
10 with Section 7.

11 (i) This section does not prohibit the [Governor] from delegating authority as authorized
12 by other law of this state.

13 **Comments**

14 1. As specified in subsection (a), the Governor's power to issue public-health-emergency
15 orders as described in this Section are triggered by the Governor's declaration of a public-health
16 emergency under this Act.

17
18 2. Subsection (b) authorizes the Governor to issue public-health-emergency orders in
19 response to a public-health emergency and that fall within one or more of the purposes
20 categorized in the subsection. The authority of the Governor to issue orders for one or more of
21 the categorized purposes must be read in conjunction with the requirement elsewhere in the
22 subsection that any such orders are "in response to the public-health emergency." Additionally,
23 the authority of the Governor under this subsection to issue orders for one or more of the
24 enumerated purposes must be read in conjunction with the requirement in subsection (d) that any
25 such order be designed rationally to eliminate or reduce the risks posed by the public-health
26 emergency or to contain or mitigate the effects of the public-health emergency. Moreover, the
27 authority of the Governor under this subsection to issue orders for one or more of the enumerated
28 purposes must be read in conjunction with the requirement in subsection (e) that the Governor
29 consider several factors relating to the benefits and burdens any order the Governor might issue.
30

31 3. The purposes categorized in subsection (b) that a public-health-emergency order might
32 serve are intended to encompass an array of actions Governors or executive branch officials
33 might rationally take in response to a public-health emergency. These include actions that

1 Governors have commonly taken in response to a public-health emergency, such as testing,
2 quarantine, isolation, and disease surveillance. They also include actions that a Governor might
3 take to respond to a novel public-health emergency or to a public-health emergency that lasts
4 beyond the short-term.

5
6 4. Subsection (b)(6) authorizes a Governor to issue public-health-emergency orders
7 addressing the management of “executive-branch” operations, offices, agencies, or programs.
8 The phrase “executive-branch” is intended to clarify that the Governor is not authorized by this
9 statute to interfere in the operation of the legislative and judicial branches.

10
11 5. Subsection (c) authorizes the Governor generally to issue public-health-emergency
12 orders designed to reduce, eliminate, contain, or mitigate the risks or the effects of the public-
13 health emergency even when the order does not serve one of the purposes enumerated elsewhere
14 in subsection (b). This more general authority is intended to assure that the Governor has the
15 authority needed to respond quickly and effectively to a wide range of public-health
16 emergencies, including those that might pose novel risks requiring a broader range of authority
17 than the enumerated purposes provide. Yet, even this more general authority is cabined by the
18 legislative requirement in subsection (d) that any such order be designed rationally to reduce,
19 eliminate, contain, or mitigate the risks or the effects of the public-health emergency.
20 Additionally, any order issued under this more general authority is subject to the procedural and
21 reporting requirements elsewhere in the Act.

22
23 6. Subsection (d) establishes any public-health-emergency order issued by the Governor
24 must be rationally designed to reduce, eliminate, contain, or mitigate one or more risks or one or
25 more effect of the underlying public-health emergency. This standard is intended to provide
26 legislative guidance to the Governor, to place a limitation on the scope of the Governor’s
27 authority to issue orders during a public-health emergency, and to prevent the Governor from
28 issuing arbitrary or capricious orders. This requirement must be read in conjunction with the
29 reporting requirements established in Section 7.

30
31 7. Subsection (e) requires that the Governor consider several factors as a condition of
32 issuing any order under the Section. The factors are intended to assure that the Governor account
33 for the likelihood that the order can achieve its goal, that the benefits and the burdens are
34 distributed fairly taking into consideration vulnerable individuals, and that the benefits of issuing
35 an order justify the burdens of doing so. The requirement that the Governor take these factors
36 into consideration is intended to provide additional legislative guidance to the Governor and to
37 prevent the Governor from issuing arbitrary or capricious orders. This requirement must be read
38 in conjunction with the reporting requirements established in Section 7.

39
40 8. Subsection (f) exempts orders issued under this Section from any rule-making
41 procedures that might otherwise apply under State law to administrative statements of general
42 applicability. Because a public-health emergency may require quick action with respect to
43 substantial parts of or all of the population of a state, subsection (f) exempts orders issued under
44 this Section from rule-making procedures that might delay action and thereby permit
45 unnecessary harm to public health. Subsection (f) exempts orders issued under this Section from
46 any and all rule-making procedures, including emergency rule-making procedures because, in

1 most jurisdictions, even these procedures can cause some delay in the effective implementation
2 of administrative actions. This Act imposes other procedural requirements that promote
3 transparency and accountability while still empowering the Governor to act quickly and broadly
4 to a public-health emergency.

5
6 9. Subsection (g) authorizes the Governor to renew an order, and it does not set a limit on
7 the number of times that an order may be renewed so long as a renewed order meets the same
8 standards that are required for an initial order.

9
10 10. Subsection (h) acknowledges that the Governor has authority elsewhere under State
11 law to delegate to others in the executive branch the power to issue orders under this Section.
12 While this subsection does not limit those to whom the Governor may delegate this power, it
13 anticipates that the Governor will delegate some or all of that power to one or more public health
14 officials.

15
16 11. An initial or renewed public-health-emergency order issued under this section may be
17 applicable to individuals, businesses and state or local governments as determined by the
18 Governor.

19 20 **Section 7. Requirements for Public-Health-Emergency Order**

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

22 (1) A declaration of a public-health emergency is in effect at the time the
23 [Governor] issues the order.

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

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

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

30 (3) The order is based on a consideration and of all of the factors under Section
31 6(e).

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

33 (5) The order identifies the date on which it will expire, unless renewed, and the

1 date may not be later than the expiration of the declaration of public-health emergency.

2 (6) The order states the governmental agency or official responsible for
3 administering each provision of the order. Failure of the order to name an agency or official does
4 not nullify the actions of the unnamed agency or official taken pursuant to the order.

5 (b) The [Governor], not later than [seven] days after issuing or renewing a public-health
6 emergency order, shall submit a report in a record describing the evidence on which the
7 [Governor] based the initial or renewed order. The report must include any additional evidence
8 the [Governor] considered after issuing or renewing the order. The [Governor] shall not include
9 in the report information that is protected by law as confidential or privileged or that is otherwise
10 exempt from disclosure by law. The report must describe how the initial or renewed order meets
11 each of the requirements under subsection (a)(2). The [Governor] shall make the report publicly
12 available and shall submit the report to the [Legislature].

13 **Comments**

14 1. Section 7 establishes substantive and procedural standards for any order issued under
15 this Act. It is intended to promote accountability to the facts related to the relevant agent or toxin
16 and the risks they may pose to all or part of the state's population as those facts exist at the time
17 the Governor issues or renews an order in response to a declared public-health emergency.
18 Additionally, the process is intended promote transparency for and accountability to both the
19 public and the Legislature through the reporting requirement established in subsection (b).
20

21 2. The requirement under subsection (b) that the Governor submit a report to the
22 Legislature does not establish a particular method for how that report is submitted to the
23 Legislature. This is meant to accommodate different methods for filing the required report. For
24 example, a State may require one method for filing the report when the Legislature is in session
25 and a different method for when the Legislature is out of session.
26

27 3. Subsection (a)(2) requires, among other things, that each order issued under the Act be
28 based on evidence about the nature of and risks posed by the agent or toxin the threat or presence
29 of which the order is designed to respond.. Additionally, subsection (a)(2) requires that an order
30 be rationally designed either to eliminate or reduce a risk posed by the public-health emergency
31 or to eliminate, reduce, contain or mitigate an effect of the public-health emergency. This
32 requirement is not intended to change any applicable constitutional standard of review. It is
33 intended to promote accountability and transparency by creating a public record of the

1 evidentiary basis for an order issued under this Act, which will protect against an arbitrary or
2 capricious declaration.

3
4 4. The requirement to base any order issued under this Act on information about the
5 nature and risks of the relevant agent or toxin is limited to evidence “then-available” to the
6 Governor. Information about the nature and risks of a public-health threat may be scant at the
7 time the Governor must respond to a public-health emergency. For example, there may be little
8 information about the nature and risks of a novel virus that is spreading and harming all or part
9 of a state’s population. In such a case, this section requires only that the Governor account for
10 the little information that is then-available when issuing or renewing an order to respond to the
11 declared public-health emergency. This Section does not require that the Governor wait for more
12 complete or definitive information about the nature or risks posed by an agent or toxin before
13 issuing any order.

14 15 **Section 8. Termination of Public-Health-Emergency Order**

16 A public-health-emergency order terminates when:

- 17 (1) the [Governor] terminates the order;
18 (2) the order expires; or
19 (3) the declaration of public-health emergency is terminated under Section 5.

20 **Comments**

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

23
24 2. Subsection (3) establishes that a public-health-emergency order terminates when the
25 declaration of public-health emergency terminates under Section 5. This provision reflects the
26 fact that the Governor’s power to issue any public-health-emergency order derives from a current
27 and effective declaration of public-health emergency. Because the Governor is authorized to
28 renew a declaration of public-health emergency under Section 4, the Governor may renew any
29 public-health-emergency orders under a properly renewed declaration of public-health
30 emergency. If, however, a declaration of public-health emergency expires, then any public-
31 health-emergency order expires as a result at the same time.

32 33 **Section 9. Conflict with Local Law**

34 A public-health-emergency order does not preempt an order, regulation, or ordinance of a
35 political subdivision, except to the extent the order, regulation, or ordinance of the political
36 subdivision conflicts with an order issued under this [act].

1 **Comments**

2 This section specifies that a public-health-emergency order issued by the Governor
3 preempts the law of a political subdivision only when there is a conflict between the public-
4 health-emergency order and the law of a political subdivision and only to the extent necessary to
5 resolve the conflict. This Section is intended to permit conflict preemption and not field
6 preemption of local law. This Section is not intended to alter the authority granted to a political
7 subdivision by other law of the State.
8

9 **Section 10. Judicial Review; Declaration of Public-Health Emergency; Public-**
10 **Health-Emergency Order**

11 (a) Any person with standing may file an action in a state court seeking to have a
12 declaration of a public-health emergency or all or part of a public-health-emergency order set
13 aside.

14 (b) In judicial review of a declaration of public-health emergency or all or part of a
15 public-health-emergency order, the following rules apply:

16 (1) The burden of demonstrating the invalidity of a declaration of public-health
17 emergency or all or part of a public-health-emergency order is on the party asserting invalidity.

18 (2) The court shall make a ruling on each material issue on which the court's
19 decision is based.

20 (3) The court may grant relief only if it determines that a person seeking judicial
21 review has been prejudiced by one or more of the following:

22 (A) the [Governor] erroneously interpreted the law;

23 (B) the [Governor] committed an error of procedure;

24 (C) the declaration of a public-health emergency or all or part of the
25 public-health-emergency order is arbitrary, capricious, an abuse of discretion, or otherwise not in
26 accordance with law;

27 (D) an agency determination of fact in a contested case is not supported by

1 substantial evidence in the record as a whole; or

2 (E) to the extent that the facts are subject to a trial de novo by the
3 reviewing court, the action was unwarranted by the facts.

4 (c) In making determinations under this section, the court shall review the governmental
5 record or the parts designated by the parties and shall apply the rule of harmless error.

6 (d) The court may delay temporarily setting aside a declaration of a public-health
7 emergency or all or part of a public-health-emergency order ruled to be invalid, and the court
8 shall exercise this discretion in a manner to reduce the likelihood of harm to public health that
9 could result by immediately setting aside a declaration or an order or part of an order.

10 (e) If a provision of a public-health-emergency order is held invalid, the invalidity does
11 not affect another provision or application that can be given effect without the invalid provision.

12 (f) This section supersedes other state law only if necessary to resolve a conflict with
13 State law or to carry out the purpose of this section.

14 **Comments**

15 1. This Section creates a right in anyone with standing to file an action in state court
16 seeking a court order setting aside the Governor's declaration of public-health emergency or
17 setting aside all or a portion of a public-health-emergency order issued by the Governor.

18
19 2. Subsection (b) sets the rules for judicial review of a declaration of public-health
20 emergency or a public-health-emergency order. This subsection was adapted from Section 508 of
21 the Revised Model State Administrative Procedure Act. Subsection (b)(3)(A) authorizes a court
22 to grant relief if it finds that the Governor has erroneously interpreted the law in the course of
23 issuing a declaration of public-health emergency or issuing a public-health-emergency order.
24 Subsection (b)(3)(A) is silent on the deference a review court will grant to the Governor's
25 interpretation of the relevant law so as to accommodate the standard of deference already in
26 adopted under existing State law, and this is true despite the preemption language in subsection
27 (f) of this Section. The arbitrary or capricious standard set in subsection (b)(3)(C) is the same as
28 the arbitrary or capricious standard set in the Revised Model State Administrative Procedure Act.
29 Requirements in this Act that the Governor rationally base a declaration or an order on the then-
30 available evidence of the public health risks and harms associated with the underlying public-
31 health emergency and the obligation of the Governor under this Act to make a report reflecting
32 the evidence and factors on which the Governor rationally based the Governor's declaration or

1 order are intended to assure that such declarations and orders are not arbitrary or capricious and
2 to assure that a record exists for the purposes of judicial review.

3
4 3. Subsection (c) requires a reviewing court to apply the harmless error rule. This
5 subsection was adapted from Section 508 of the Revised Model Administrative Procedure Act.
6 The harmless error rule is particularly important in the review of a declaration of public-health
7 emergency or a public-health-emergency order so as to avoid public health harm during an
8 emergency as a result of immaterial errors.

9
10 4. Subsections (d) and (e) grant discretion to a reviewing court to protect public health
11 during an emergency as much as possible even if the court finds that all or part of a declaration
12 of public-health emergency or a public-health-emergency order is invalid. Subsection (d)
13 encourages a reviewing court to delay temporarily setting aside an invalid declaration or order so
14 as to minimize the risk of public health harm that could result from doing so immediately.
15 Subsection (e) encourages a reviewing court to sever invalid provisions in a public-health-
16 emergency order from the remainder of such an order so as to minimize the risk of public health
17 harm that could result from setting aside the entire order.

18
19 5. Subsection (f) preempts state law of administrative procedure, but only to the extent
20 that such law conflicts with or otherwise interferes with achieving the purpose of Section 10 of
21 this Act.

22 23 **Section 11. Injunctive Relief**

24 The [Governor], or the governmental agency or official authorized to administer a public-
25 health-emergency order under Section 7, may seek injunctive relief to enforce a public-health-
26 emergency order.

27 ***Legislative Note:** With respect to the use of “Governor” insert appropriate state official*
28 *authorized to bring an action for the state.*

29 30 **Comments**

31 1. This section should be read in conjunction with Section 12. The Act does not authorize
32 criminal action against those who violate the terms of a public-health-emergency order.

33 34 **Section 12. Civil [Penalty][Fine]**

35 (a) Each governmental agency or official authorized to administer a public-health-
36 emergency order under Section 7 may impose a [penalty][fine] for a knowing violation of a
37 public-health-emergency order of not more than:

1 (1) \$[250] per violation as specified in the public-health-emergency order by an
2 individual, except by a public official acting in their official capacity; or

3 (2) \$[1000] per violation as specified in the public-health-emergency order by a
4 business.

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

6 **Comments**

7 1. This section should be read in conjunction with Section 11. The Act does not authorize
8 criminal action against those who violate the terms of a public-health-emergency order.

9
10 2. Subsection (a) establishes two different maximum levels of civil fines or penalties for
11 violations of public-health-emergency orders issued under this Act. One is for individuals, and
12 the other is for businesses. The amount for individuals is set lower than the amount for
13 businesses on the belief that a larger fine or penalty may be appropriate to incentivize
14 compliance by a business as compared to an individual.

15
16 3. Subsection (b) acknowledges that an action that violates a public-health-emergency
17 order issued under this Act might also violate other State law and may give rise to a different or
18 additional remedy not provided for under this Act. This subsection clarifies that it does not affect
19 the availability of any such remedies available through other state law. This is designed to
20 account for State and local agencies that administer business licensing laws that include their
21 own unique rights and remedies.

22 **Section 13. Private Right of Action**

23
24 Section 11 and Section 12 of this [act] do not create a private right of action.

25 **Comments**

26 This section clarifies that Sections 11 and 12 do not create any private rights of action.
27 Rather, Sections 11 and 12 authorize only certain public officials to take action against those
28 who violate a public-health-emergency order.

29 **Section 14. Relation to Electronic Signatures in Global and National Commerce Act**

30
31 This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National
32 Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or
33 supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices

described in 15 U.S.C. Section 7003(b).

Legislative Note: *It is the intent of this act to incorporate future amendments to the cited federal law. A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase “, as amended”. A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law should omit the phrase.*

The federal Electronic Signatures in Global and National Commerce Act, popularly known as "E-Sign", was adopted in 2000 to facilitate the use of electronic records and signatures in commercial transactions. Subject to exceptions not relevant here, E-Sign mandates the acceptance of electronic contracts and electronic signatures in interstate or foreign commerce. It largely tracks the Uniform Electronic Transactions Act, adopted by the ULC in 1999, but includes consumer consent provisions and prohibits state law from giving greater legal effect to any specific technology or technical specification. Under Section 102 of E-Sign, state legislation attempting to regulate electronic records and signatures can opt out of this pre-emption, allowing some modification to the federal law, so long as the State treats the records or signatures substantially in the same manner as they are treated by E-Sign. In order to take advantage of the exception to preemption, the state law must make specific reference to E-Sign as provided in Section ___. See 15 U.S.C. Section 7002(a)(2)(B).

Comments

This Section is included in keeping with the requirements of the Uniform Law Commission.

[Section 15. Severability

If a provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

Legislative Note: *Include subsection (b) only if the state lacks a general severability statute or a decision by the highest court of the state adopting a general rule of severability.*

Comments

This Section is included in keeping with the requirements of the Uniform Law Commission.

Section [16][17]. Effective Date

This [act] takes effect . . .