

D R A F T  
FOR DISCUSSION ONLY

# Public Health Emergency Authorities Act

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Uniform Law Commission

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March 29, 2022

## Public Health Emergency Authorities Act

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# **Public Health Emergency Authorities Act**

## **Table of Contents**

Section 1. Title .....	1
Section 2. Definitions.....	1
Section 3. Scope.....	3
Section 4. Public Health Emergency Declaration.....	3
Section 5. Termination of Public Health Emergency .....	5
Section 6. [Governor’s] Authority in a Public Health Emergency .....	7
Section 7. Requirements for an Emergency Public Health Order .....	7
Section 8. Renewal of an Emergency Public Health Order .....	9
Section 9. Termination of an Emergency Public Health Order .....	9
Section 10. Preemption of Local Public Health Powers .....	10
Section 11. Enforcement of an Emergency Public Health Order .....	10
Section 12. Judicial Review .....	11
Section 13. Relation to Electronic Signatures in Global and National Commerce Act.....	11
Section 14. Severability .....	11
Section 15. Effective Date .....	11

1                                   **Public Health Emergency Authorities Act**

2                   **Section 1. Title**

3                   This [act] may be cited as the Public Health Emergency Authorities Act.

4                   **Section 2. Definitions**

5                   In this [act]:

6                               (1) “[Governor’s] delegate” means a state official to whom, or state agency to  
7                   which, the [Governor] delegates some or all of the [Governor’s] authority under this [act].

8                               (2) “Emergency public health order” means a statement of general applicability  
9                   issued or renewed in a record during a public health emergency declared under this [act] that:

10                              (A) implements or prescribes law or policy in response to the public health  
11                   emergency giving rise to the declaration so as to mitigate the deleterious effects of the public  
12                   health emergency on the population subject to the order; and

13                              (B) complies with this [act].

14                   **Reporter’s Note:** this definition is based on the definition of “Rule” in the Revised Model State  
15                   Administrative Procedure Act. An open question is whether it will be necessary to distinguish  
16                   between emergency public health orders of general applicability from those addressing just one  
17                   person because different procedures for each might be called for.

18                              (3) “Person” means an individual, estate, business or nonprofit entity, or other  
19                   legal entity. The term does not include a public corporation or government or governmental  
20                   subdivision, agency, or instrumentality.

21                              (4) “Political subdivision” includes a city, [county], district, and any other local or  
22                   regional governmental authority.

23                              (5) “Public health authority” means [insert the title of the state’s primary public  
24                   health agency, department, division, or bureau], any local government agency that acts  
25                   principally to protect or preserve the public’s health, or any individual authorized to act on behalf  
26

of [the state’s primary public health agency, department, division, or bureau] or local government agency that acts principally to protect or preserve the public’s health.

**Legislative history:** duplicated from 2001 MODEL STATE EMERGENCY HEALTH POWERS ACT Section 104(l).

(6) “Public health emergency” means an occurrence or imminent threat of an illness or health condition that:

(A) is believed to be caused by any of the following:

- (i) bioterrorism;
- (ii) the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin; [or]

(iii) a natural disaster; [or]

[(iv) a chemical agent; or]

[(v) a nuclear attack or accident;] and

(B) poses a high probability of any of the following:

- (i) a large number of deaths in the affected population;
  - (ii) a large number of serious or long-term disabilities in the affected population;
  - (iii) widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population;
- or

(iv) a substantial and adverse impact on the availability of medical, public health, or other emergency resources.

**Reporter’s Note:** This definition duplicates the definition used in the 2001 Model State Emergency Health Powers Act. [cite.] Sub-section (2)(iv) does not appear in the 2001 MODEL STATE EMERGENCY HEALTH POWERS ACT and was added to account for the population

1 health threat caused by depleted health care resources (e.g., hospital beds, ventilators, ICU beds,  
2 nursing staff) during the COVID-19 pandemic, which—at times—substantially limited the  
3 general availability of health care services in many localities and states.

4  
5 (7) “Record” means information inscribed on a tangible medium or stored in an  
6 electronic or other medium and retrievable in perceivable form.

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

10 **Reporter’s Note:** Do we want to include federally recognized Indian tribes?

11 ***Legislative Note:** The state should change “Governor” to the appropriate title if the individual*  
12 *heading the state is not the Governor.*

### 13 14 **Section 3. Scope**

15 (a) This [act] supplements the [Governor’s] authority to declare or respond to an  
16 emergency under [cite statutes relating to the [Governor’s] general emergency powers authority,  
17 including 2001 Model State Emergency Health Powers Act to the extent adopted in a  
18 jurisdiction].

19 **[Reporter’s Note:** address possibility of conflicts between this Act and provisions of existing  
20 statutes and regulations?]

21  
22 (b) This [act] does not alter the authority delegated to a state or local public health  
23 official.

24 (c) This [act] does not supersede [cite to state Administrative Procedure Act], unless this  
25 [act] conflicts with [cite to state Administrative Procedure Act], in which case this [act] prevails.

26 ***Legislative Note:** The state should change “Governor” to the appropriate title if the individual*  
27 *heading the state is not the Governor.*

### 28 29 **Section 4. Public Health Emergency Declaration**

30 (a) The [Governor] may declare a public health emergency. Before such a declaration, the

[Governor] shall consult with the public health authority and may consult with any additional public health or other experts as needed. The [Governor] may declare a public health emergency without consulting with the public health authority or other experts when the situation calls for prompt and timely action.

**Reporter's Note:** In this subsection and subsection (b), we include this last sentence, which was part of the 2001 MODEL STATE EMERGENCY HEALTH POWERS ACT. But it does create a loophole. Do we want to include it?

**Legislative history:** duplicates 2001 MODEL STATE EMERGENCY HEALTH POWERS ACT section 401.

(b) The [Governor] may renew a declaration of public health emergency while a public health emergency continues. Before any renewal, the [Governor] shall consult with the public health authority and may consult with any additional public health or other experts as needed; however, the [Governor] may renew a declaration of a public health emergency without consulting with the public health authority or other experts when the situation calls for prompt and timely action.

(c) The [Governor] shall declare a public health emergency and shall renew the declaration, by an executive order, in a record, that specifies all of the following:

- (1) a description of the public health emergency;
- (2) the political subdivision or geographic area subject to the public health emergency;
- (3) the conditions that have brought about the public health emergency;
- (4) the duration of the public health emergency, if less than [30, 45, 60, 75, 90] days; and

**Reporter's Note:** Throughout the draft we have provided various numbers of days from which the committee can choose the best number to place within brackets.

1 (5) the public health authority responding to the emergency.

2 **Legislative history:** duplicates 2001 MODEL STATE EMERGENCY HEALTH POWERS  
3 ACT section 402.

4  
5 (d) Any initial or renewed declaration of public health emergency and each of the  
6 specifications required in subsection (c) shall be based reasonably in the best available evidence  
7 of the nature of the illness or health condition giving rise to the public health emergency and the  
8 risks it poses to population health.

9 (e) Not later than [3, 5, 7, 10] days of declaring a public health emergency, the  
10 [Governor] shall submit a report in a record to the Legislature describing the evidence on which  
11 the [Governor] based the declaration and each of the specifications required in subsection (c).  
12 The report must identify how the declaration and each specification is reasonably based on the  
13 evidence. The [Governor] shall make the report publicly available at the same time that the  
14 [Governor] submits the report to the Legislature.

15 **Reporter's Note:** this section does not come from the 2001 MODEL STATE EMERGENCY  
16 HEALTH POWERS ACT. It was created for this Act as a means of creating an official record of  
17 the scientific justification for a public health emergency declaration.

18  
19 **Legislative Note:** *The state should change "Governor" to the appropriate title if the individual*  
20 *heading the state is not the Governor.*

## 21 22 **Section 5. Termination of Public Health Emergency**

23 (a) A public health emergency declaration terminates upon the occurrence of any of the  
24 following:

25 (1) The [Governor] terminates the declaration of the public health emergency by  
26 executive order in a record upon a written finding that the situation no longer meets the  
27 definition of a public health emergency, if the finding is based reasonably on the best available  
28 evidence of the nature of the illness or health condition giving rise to the public health



1 emergency and the risks it poses to population health. The [Governor] shall submit the finding to  
2 the Legislature along with a description of the evidence relied upon and the [Governor's]  
3 rationale that the situation does not meet or no longer meets the definition of a public health  
4 emergency.

5 (2) The [30, 45, 60, 75, 90]-day duration of the declaration of a public health  
6 emergency lapse, unless renewed by the [Governor] under Section 4.

7 (3) The Legislature terminates the declaration of a public health emergency upon  
8 a finding that the situation does not meet or no longer meets the definition of a public health  
9 emergency. The finding must be based reasonably on the best available evidence of the nature of  
10 the illness or health condition giving rise to the public health emergency and of the risks it poses  
11 to public health.

12 (4) The [Governor] fails to submit the report required in Section 4(e).

13 (5) A court with jurisdiction issues an order that the declaration of public health  
14 emergency violates of the [state] Constitution or Constitution of the United States, exceeds  
15 statutory authority, or is otherwise arbitrary and capricious.

16 **Reporter's Note:** The 2001 MSEPFA has a provision that permits a bi-cameral legislative veto  
17 based only on a simple majority vote in each chamber of the state's legislature. I am concerned  
18 that such a provision is unconstitutional because it violates the conventional constitutional  
19 procedure for the creation of legislation by eliminating the requirement of gubernatorial  
20 signature or an override vote. So Section 4.d.iii requires a two-thirds majority vote in each  
21 chamber in order to emergency. This could create a discrepancy in states that have already  
22 adopted the 2001 MSEPFA and that also adopt this Act.

23  
24 The 2001 MSEPFA sets a 30-day sunset for declarations of public health emergencies. Because  
25 the Committee seemed to want to give flexibility to states, I have set it as a choice. This could  
26 create a discrepancy in states that have already adopted the 2001 MSEPFA and that also adopt  
27 this Act.

28  
29 **Legislative Note:** *The state should change "Governor" to the appropriate title if the individual*  
30 *heading the state is not the Governor.*  
31

1           **Section 6. [Governor’s] Authority in a Public Health Emergency**

2           (a) Upon the declaration of a public health emergency, the [Governor] and any  
3 [Governor’s] delegate may take any action described in this section with respect to the political  
4 subdivision or geographic area subject to the declaration.

5           (b) Subject to the specifications in Section 4(c), the [Governor] and any [Governor’s]  
6 delegate may issue one or more emergency public health orders to eliminate, contain, or mitigate  
7 the deleterious effects of a public health emergency on all or part of the state’s population. The  
8 [Governor] and any [Governor’s] delegate may issue one or more emergency public health  
9 orders as necessitated by the public health emergency, including orders related to:

- 10                   (1) vaccination;
- 11                   (2) the use of masks or personal protective equipment;
- 12                   (3) medical testing;
- 13                   (4) personal protective equipment, vaccines, tests, or medical treatments if scarce;
- 14                   (5) the operation of one or more businesses, schools, places of public  
15 accommodation, houses of worship, and any other place where individuals may gather;
- 16                   (6) the categorization of activities for the purpose of closing or imposing different  
17 restrictions by category;
- 18                   (7) the size of gatherings; or
- 19                   (8) physical distancing.

20 **Reporter’s Note:** I removed from the list of enumerated orders those relating to the isolation or  
21 quarantine of individuals because most states have statutes and regulations specific to the  
22 isolation and quarantine of individuals.

23  
24 **Legislative Note:** *The state should change “Governor” to the appropriate title if the individual*  
25 *heading the state is not the Governor.*

26  
27           **Section 7. Requirements for an Emergency Public Health Order**

1 (a) An emergency public health order issued under Section 6 must meet all of the  
2 following requirements:

3 (1) The [Governor] has declared a public health emergency under Section 4(a).

4 (2) There is a reasonable basis in the best available evidence about the nature of  
5 and the risks posed by the public health emergency for the [Governor] or the [Governor's]  
6 delegate to conclude that:

7 (A) the order can achieve one or more of the population health goals the  
8 order is designed to achieve;

9 (B) the order is not significantly less likely to achieve the population  
10 health goals the order is designed to achieve than potential alternative orders; and

11 (C) the order is not significantly more burdensome than are other potential  
12 alternative orders.

13 (3) The order states the population health goal it is designed to achieve and the  
14 standard that will be used to determine if and when that goal is achieved.

15 (4) The order states that it will expire [30, 45, 60] days after it becomes effective  
16 unless it is renewed by the [Governor] or the [Governor's] delegate.

17 (5) The order states that it will terminate before its expiration if the population  
18 health goal the order is designed to achieve is achieved.

19 (b) The [Governor] or the [Governor's] delegate shall, not later than [3, 5, 7, 10] days  
20 after issuing an emergency public health order under Section 6, submit a report in a record to the  
21 Legislature identifying the evidence about the nature of and the risks posed by the public health  
22 emergency on which the [Governor] or the [Governor's] delegate relied to issue the order. The  
23 [Governor] or the [Governor's] delegate shall make the report available to the public at the same

time the report is submitted to the Legislature.

**Legislative Note:** *The state should change “Governor” to the appropriate title if the individual heading the state is not the Governor.*

## **Section 8. Renewal of an Emergency Public Health Order**

The [Governor] or the [Governor’s] delegate may renew an emergency public health order [or set a long term limit in days] if the renewal complies with Section 7.

**Reporter’s Note:** The committee may want to set a long term limit in this section rather than allowing for an unlimited number of renewals.

**Legislative Note:** *The state should change “Governor” to the appropriate title if the individual heading the state is not the Governor.*

## **Section 9. Termination of an Emergency Public Health Order**

An emergency public health order issued or renewed under this [act] terminates upon the occurrence of any of the following:

(1) the [Governor] or the [Governor’s] delegate withdraws the order;

(2) the order expires without being renewed;

(3) the goal of the order is designed to achieve is achieved;

(4) the public health emergency declaration is terminated under Section 5;

(5) the Legislature terminates the order upon a finding that the order does not meet one or more of the standards in Section 7, and the finding is based reasonably on the best available evidence about the nature of and the risks posed by the public health emergency; or

(6) a court with jurisdiction issues an order that the order violates the [state] Constitution or Constitution of the United States, exceeds statutory authority, or is otherwise arbitrary and capricious.

**Reporter’s Note:** The committee needs to consider the policy of Section 9(5) and also whether we think it raises any constitutional concerns.

1 ***Legislative Note:*** *The state should change “Governor” to the appropriate title if the individual*  
2 *heading the state is not the Governor.*  
3

#### 4 **Section 10. Preemption of Local Public Health Powers**

5 (a) Subject to subsection (c), an emergency public health order issued under this [act]  
6 may not preempt any order, regulation, or ordinance of a political subdivision, unless and only to  
7 the extent that the local order, regulation, or ordinance conflicts with the emergency public  
8 health order.

9 (b) Subject to subsection (c), an emergency public health order issued under this [act]  
10 may not preempt the authority of any political subdivision to issue or enforce any orders, to  
11 promulgate or enforce regulations, or to make and enforce ordinances, unless and only to the  
12 extent that any such authority of a political subdivision conflicts with the emergency public  
13 health order.

14 (c) Notwithstanding subsection (a) or (b), an emergency public health order issued under  
15 this [act] may not preempt any action by, or authority of, a political subdivision if the emergency  
16 public health order functions only to restrict the ability of such a political subdivision to exercise  
17 its authority.

#### 18 **Section 11. Enforcement of an Emergency Public Health Order**

19 The [Governor] and any [Governor’s] delegate may enforce an emergency public health  
20 authority issued under this [act] through the following means:

21 (1) suspending, revoking, or otherwise limiting the business or professional  
22 license of, and imposing civil fines of not more than [\$250, \$500, \$1000, \$2500] on, any person  
23 with a business or professional license that violates an emergency public health order; and  
24 imposing a civil fine of not more than [\$25, \$50, \$100, \$250] on any individual who violates an  
25 emergency public health order.

1 **Reporter’s Note:** We have provided a range of dollar amounts from which the committee can  
2 choose one within the brackets.  
3

#### 4 **Section 12. Judicial Review**

5 Any person with standing may petition a court to set aside a declaration of a state of  
6 public health emergency or an emergency public health order on the ground that the declaration  
7 or the order violates the [state] Constitution or Constitution of the United States, exceeds  
8 statutory authority, or is arbitrary and capricious.

#### 9 **Section 13. Relation to Electronic Signatures in Global and National Commerce Act**

10 This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National  
11 Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or  
12 superseded 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices  
13 described in 15 U.S.C. Section 7003(b).

#### 14 **Section 14. Severability**

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

18 **Legislative Note:** *Include this section only if the state lacks a general severability statute or a*  
19 *decision by the highest court of the state adopting a general rule of severability.*  
20

#### 21 **Section 15. Effective Date**

22 This [act] takes effect . . .