

To: ULC Drafting Committee on Public Health Emergency Authorities

From: Diane Boyer-Vine, Chair
Heidi Tseu, Vice Chair
Rob Gatter, Reporter

Date: October 27, 2021

Re: Outline of Issues for First Session

Project:

The ULC Scope and Program Committee approved the formation of a drafting committee to draft a model law related to public health emergency authorities. In drafting a model law, this Drafting Committee is to address the following topics recommended by the Study Committee on Public Health Emergency Authorities:

the allocation of authority between state executive branch officials and the legislature (including with respect to preemption of local governments) and the processes that should apply to the use of such authorities.

Background:

States derive from their police powers the general authority to act in ways designed to protect public health.¹ Typically, states assign public health powers to the executive branch in two ways. First, the duty and power to protect public health at all times is delegated to one or more administrative agencies (e.g., state and local departments of health).² Such statutes commonly include specific powers, such as the power to quarantine or isolate individuals. For example, Maryland statutes create the State's Department of Health led by the Secretary of Health, and among the Department's many delegated powers is the power to prevent and respond to infectious disease threats.³ These powers delegated under Maryland law include specific authority to disinfect housing and destroy any articles in a house so as to prevent the spread of disease,⁴ to remove individuals from homes or vessels,⁵ and to quarantine individuals.⁶ While such statutes authorize state and local public health agencies and officials to act in ways designed to *prevent* the introduction or an infectious disease into a community, such statutes generally do not identify specific actions health officials may take to *mitigate* the effects of a disease that has

¹ Jacobson v. Massachusetts, 197 U.S. 11 (1905).

² Each state delegates by statute public health powers to a state agency and, in the vast majority of states, to local agencies as well. In most states, local public health matters fall under the jurisdiction of decentralized local public health agencies, but in some states public health authority is centralized in a state agency and local public health matters are addressed through regional and local offices of the state agency. See Association of State and Territorial Health Officials, 2019 Governance Survey and Dashboard, available at <https://www.astho.org/profile/#openModal2>.

³ See Md. Code Ann., Health-Gen. sec. 2-101, 2-102, 18-101 through 18-103, and 18-201 through 18-216.

⁴ See Md. Code Ann., Health-Gen. sec. 2-210(a).

⁵ See Md. Code Ann., Health-Gen. sec. 2-211.

⁶ See Md. Code Ann., Health-Gen. sec. 2-213 (authorizing Governor to quarantine).

taken hold in a population. To account for actions that may become necessary and yet are not specifically identified, state statutes commonly delegate to state officials a general power to act as needed to prevent the spread of a disease. Again using Maryland as an example, a statute in that State delegates general powers to the Secretary of Health to create regulations and to take other actions necessary to protect the public from infectious diseases.

- (a) The Secretary shall adopt rules and regulations necessary to prevent:
 - (1) The introduction of an infectious or contagious disease into this State or other disease that endangers public health in this State; or
 - (2) The spread of an infectious or contagious disease or other disease that endangers public health in this State.
- (b) When the Secretary has reason to believe that an infectious or contagious disease or other disease that endangers public health exists within the State, the Secretary shall:
 - (1) Investigate the suspected disease; and
 - (2) Act properly to prevent the spread of the disease.⁷

Second, legislation in most states grants Governors extraordinary powers to protect public safety during a declared disaster or emergency where the definition of “disaster” or “emergency” is broad enough to include public health crises. So, for example, a Colorado statute authorizes the Governor to declare a “disaster emergency,” which triggers the Governor’s power to issue executive orders to “meet the dangers to the state and people presented by disasters” or to otherwise “cope” with the disaster.⁸ Under Colorado’s statute, “disaster” means

the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural cause or cause of human origin, including but not limited to fire, flood, earthquake, wind, storm, wave action, hazardous substance incident, oil spill or other water contamination requiring emergency action to avert danger or damage, volcanic activity, epidemic, air pollution, blight, drought, infestation, explosion, civil disturbance, hostile military or paramilitary action, or a condition of riot, insurrection, or invasion existing in the state or in any county, city, town, or district in the state.⁹

Furthermore, “emergency” means “an unexpected event that places life or property in danger and requires an immediate response through the use of state and community resources and procedures.”¹⁰

Statutes delegating emergency powers to governors generally do not list powers that are specific to preventing or mitigating the effects of an infectious disease that has taken hold of a community. Rather, they grant general powers to issue executive orders as needed to respond to

⁷ Md. Code Ann., Health-Gen. sec. 18-102. Nearly identical authority is delegated to state health officers as well. See Md. Code Ann., Health-Gen. sec. 18-208(a)(1).

⁸ Colo. Rev. Stat. sec. 24-33.5-704.

⁹ Colo. Rev. Stat. sec. 24-33.5-703(3).

¹⁰ Colo. Rev. State. Sec. 24-33.5-703(3.5).

and mitigate harm to individuals or property, to act as commander-in-chief with respect to emergency response, and to suspend or otherwise change state statutes or regulations.¹¹

During the SARS-CoV-2 (“COVID”) pandemic, state executive officials have relied on each of these kinds of statutes to take actions designed to mitigate the effects of the pandemic. These included closing schools and businesses, mandating masks, and restricting the size of gatherings. Local officials relied on state delegations of general police powers as well as delegations of public health powers to take similar actions. In many instances, states have preempted local actions taken in response to the pandemic.

A model law drafted by this Committee, if and when adopted by a State, will amend or replace parts of these pre-existing statutes as well as those that delegate police powers and public health powers to political sub-divisions and local agencies. In so doing, the Committee must account for the different approaches states’ laws take with respect to public health and local governance.

Drafting Issues:

As the Committee identifies a model distribution of public health emergency powers between executive and legislative branches, it should address the following issues:

- Whether the model law should list specific mitigation powers, and, if so, which mitigation powers should be included (e.g., allocation of personal protective equipment, mask mandates, vaccination mandates, distinguishing between essential and non-essential businesses and workers, school and business closures, limits to the size of gatherings, substantive factors for distinguishing between essential and non-essential businesses and workers)?
- If the model law lists specific mitigation powers, should it also group authorized mitigation measures by any differences in their burdensomeness, and, if so, should the model law also require that the governor, state administrative agencies, and other state executive branch officials deploy the least burdensome measures unless there is a rational basis for concluding that a more burdensome measure will be more effective in protecting public health?

¹¹ Gregory Sunshine et al, *An Assessment of State Laws Providing Gubernatorial Authority to Remove Legal Barriers to Emergency Response*, 17 *Health Security* 2:1 (2019). For example, Conn. Gen. Stat. Ann. § 28-9(b)(1) authorizes the governor during a declared emergency to “modify or suspend . . . any statute, regulation or requirement . . . whenever the Governor finds such statute, regulation or requirement . . . is in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health.” During the COVID-19 pandemic, Connecticut’s Governor relied on this power when he issued an executive order setting new limitations on the authority of licensed bars to sell alcohol, effectively amending a state statute related to the sale of alcohol by licensed bars by adding additional restrictions. A bar owner challenged the Governor’s authority to issue the order, arguing, among other things, that the order violated separation of powers principles, including the state’s non-delegation doctrine. The Supreme Court of Connecticut ruled unanimously that the Governor’s order was in keeping with emergency powers authorized by the statute and that the Governor’s actions were not unconstitutional. See *Casey v. Lamont*, ___ A.3d ___, 338 Conn. 479 (2021).

- Whether and, if so, what procedural or substantive guardrails the model law should attach to the use of specific mitigation powers (e.g, 30-60 day sunset requirements with the authority to renew, obligation to provide a written scientific rationale for any order issued under a broadly worded delegation of authority, obligation to state one or more goals and/or measurable end-points that would terminate an order, etc.)?
- Whether the model law should retain a broadly worded delegation of public health authority (e.g., “actions necessary for the protection of public health”) to supplement any specific powers and thereby account for the wide variety of actions a governor or state agency or executive official might need to take with respect to future public health crises?
- Whether and, if so, what procedural or substantive guardrails the model law should attach to the use of broadly worded public health power so as to avoid the risk that the delegation of such plenary power is found by a court to be inconsistent with the separation-of-powers (e.g, 30-60 day sunset requirements with the authority to renew, obligation to provide a written scientific rationale for any order issued under a broadly worded delegation of authority, obligation to state one or more goals and/or measurable end-points that would terminate an order, etc.)?
- Whether the model law should specify the power of state and local administrative agencies or officials to issue public health orders of general applicability and to do so without following the standard or emergency rulemaking procedures that might otherwise apply under a state’s administrative procedures act, and, if so, whether the model law should attach any conditions or limitations to that power (e.g., an obligation for the relevant agency or official issuing an order of general applicability to propose simultaneously the same action as a rule that would proceed through an emergency or standard rule-making process)?¹²
- How should the model law account for the fact that powers relevant to a public health emergency are delegated through various statutes, including statutes granting emergency powers to governors as well as statutes granting public health powers to one or more state agencies and state officials?
- How should the law account for religious freedoms and public health restrictions on houses of worship (e.g., expressly addresses places like “houses of worship” or activities like “attending worship services,” or refer only to rational assessments of transmission risks associated with various forms of activity without regard to its relationship to attending worship services)?

¹² Most APAs define an “order” as an administrative action imposing obligations on a specific person, and they define a “rule” as an administrative action imposing obligations that are generally applicable to groups of individuals. Preserving public health often requires quickly imposing obligations on all individuals or businesses in a state, county or city (e.g., a mask or vaccine mandate, school closures, limits to business operations), and time does not permit issuing orders to individuals or businesses one by one. Yet, acting through an order is more efficient than acting through a rule because even emergency rulemaking procedures may still require that certain procedural steps be satisfied before an emergency rule can become effective.

- Should the model law address enforcement of mitigation action, and, if so, what modes of enforcement should be authorized or prohibited under the model law (e.g., civil fines, administrative business sanctions, criminal fines, and/or non-monetary criminal punishment), and what, if any, standards for enforcement should be set (e.g., no criminal punishment except in cases where other sanctions have not or cannot work)?
- Whether and, if so, how should the model law clarify that emergency powers granted by statute to a governor and triggered by a declared state of emergency may be used only for the purpose of preventing or mitigating the direct health and safety effects of the triggering disaster, leaving to the legislative branch the task of addressing any statewide economic recovery?
- Whether and, if so, how should the model law define “public health emergency”?
- Whether the model law should identify one or more checks on the power of a governor to declare and prolong a period of emergency that has triggered emergency gubernatorial powers, and, if so, what one or more checks on that power should the model law identify (e.g., an express right of state legislative chambers to petition a state’s highest court to review whether sufficient grounds continue to exist in support of a declaration of emergency) given that purely legislative resolutions may violate presentment and veto clauses in state constitutions?

As the Committee identifies a model for state preemption of local public health powers during an emergency, it should address the following issues:

- Whether and, if so, how the model law should clarify that powers granted by statute to governors, state agencies or state executive branch officials may be used during a public health emergency only for the purpose of preventing or mitigating the direct health and safety effects of the emergency (e.g., statutory language defining limitation of authority, including recitations of legislative purpose in the statute, and/or listing in statute factors agency or official must account for or findings that must be made in support of any such administrative actions)?
- Whether and, if so, how the model law should clarify that, when a governor, state agency, state executive branch official, or local government acts in response to a public health emergency, any such action must account for and have a reasoned basis in the relevant and available public health evidence about the nature of the emergency and the likelihood that the action will be effective in mitigating the public health effects of the emergency?
- Whether and, if so, how the model law should clarify that any action taken by a governor, state agency or state executive branch official does not preempt local governmental actions unless and only to the extent that those local governmental actions directly conflict with the express terms of the action taken by the state agency or executive branch official, and that local governments retain their authority to impose laws that are more protective of public health and safety than those imposed by such state agencies or officials?

- Whether and, if so, how the model law should clarify that a governor, state agency or state executive branch official may not declare that local public health actions are preempted, but, instead, may preempt local public health actions only by taking one or more actions designed to protect public health, which actions create a direct conflict with the express terms of local law?
- Whether and, if so, how the model law should clarify that powers granted by statute to a governor, state agency or state executive branch official do not include the power to suspend state statutes and regulations that delegate general authority to local governments to promote and protect public health and safety in their local jurisdictions?
- Whether and, if so, how the model law should clarify that a court should weigh most heavily the goal of securing public health and safety if and when that court rules on any motion for temporary injunctive relief from any action taken by a governor, state agency or state executive branch official pursuant to delegated public health powers?