

PUBLIC HEALTH EMERGENCY AUTHORITY

State Approaches and Impacts from COVID-19

In the aftermaths of the 2001 terrorist attacks, Hurricanes Katrina and Rita in 2005, and the influenza A (H1N1) pandemic in 2009, our nation has closely scrutinized the federal and state governments' public health authority and infrastructure to ensure adequate preparedness for future emergencies. Despite this scrutiny, considerable gaps have appeared as we continue to endure the COVID-19 pandemic, and unlike the near universal support from the public for government intervention following natural disasters, the nation has been divided about government actions to prevent and contain virus spread. Although the federal government is a critical partner for states during an emergency, it actually has limited public health power at its disposal. Instead, the preservation of the public health has historically been the responsibility of state and local governments. How state officials may use their public health authority, however, differs based on each state's laws. In this explainer, we describe the circumstances under which officials in Arkansas and select states may declare a public health emergency, the process for declaring a public health emergency, and the scope of the public health authority.

Introduction

The primary role of our public health system is to monitor, protect, and promote the health of the public. Many conventional state public health activities — testing water quality, conducting restaurant inspections, and monitoring for potential spread of communicable diseases — are largely unseen and perceived as uncontroversial by the general public. During an emergency, however, the expansive authority of states to protect the public's health is on full display, and precautionary public health measures such as mask mandates, event restrictions, and quarantines can be alarming, particularly given the rarity of infectious disease outbreaks in



modern times. Because of its more limited public health authority, the federal government heavily relies upon state action to prevent and control disease spread during an outbreak. As we have seen during the COVID-19 pandemic, states have a great deal of flexibility in using the public health tools available to them, but states must be careful to follow required procedures to initiate certain public health measures and ensure that those measures do not unconstitutionally violate fundamental rights.

Emergency Powers in Arkansas

The Arkansas Emergency Services Act of 1973 governs emergency declarations, including public health emergencies.ⁱ It is the responsibility of the governor under the act “for meeting and mitigating, to the maximum extent possible, dangers to the people and property of the state presented or threatened by disasters.” The term “disaster” is defined broadly to include infectious disease outbreaks such as COVID-19. The governor may issue “executive orders, proclamations, and regulations” under the act that “have the force and effect of law.” On March 11, 2020, Gov. Asa Hutchinson issued his first COVID-19 pandemic-related executive order, which declared a public health emergency and authorized the Arkansas Department of Health to take action to prevent virus spread.ⁱⁱ A later executive order issued by the governor on July 16, 2020, directed the Arkansas secretary of health to issue a public health directive requiring face coverings, with some exceptions, for the duration of the emergency.ⁱⁱⁱ

The act also permits the governor to suspend regulatory laws — other than laws defining the scope of the governor’s authority — that “would in any way prevent, hinder, or delay necessary action in coping with the emergency.” Gov. Hutchinson first used this authority on March 13, 2020, to enable better access to telemedicine by suspending requirements to establish a professional relationship with a physician through a face-to-face examination using audio-visual means.^{iv} He later issued an executive order waiving the requirement to submit a written request for an extension to file state income taxes and automatically extended the deadline for filing by three months.^v

An emergency declaration does not continue indefinitely once issued by the governor. It continues until the governor “finds that the threat or danger has passed” and terminates the



state of emergency or “emergency conditions no longer exist.”¹ The declaration must indicate the nature of the emergency, the areas threatened, and the conditions leading to the emergency. In any event, the state of emergency may not continue for longer than 60 days unless it is renewed by the governor. However, the General Assembly may terminate the state of emergency by concurrent resolution “at any time,” although it is unclear whether the Arkansas Constitution requires the General Assembly to be in session for the resolution to have any legal effect.

Emergency Powers in Other States

A number of states — Florida, Idaho, North Dakota, Pennsylvania, Rhode Island, and Indiana, for example — have laws similar to Arkansas’s that permit the legislature to terminate a state of emergency by concurrent resolution “at any time.”^{vi} A declared state of emergency in Louisiana may be terminated by a resolution of either chamber.^{vii} Some state laws require the legislature to consent to or affirm a declared state of emergency after a specified time. For example, South Carolina law automatically terminates a state of emergency after 15 days without “consent of the General Assembly.”^{viii} Some states, such as Arizona and California, compel the governor, if the legislature is not in session, to call a special session “for the purpose of legislating on subjects” related to the emergency within a certain time after an emergency declaration.

Model State Emergency Powers Act

After the terrorist attacks on September 11, 2001, the Centers for Disease Control and Prevention asked public health law experts to develop a model emergency powers act to provide state actors with the powers they need to detect and contain bioterrorism or a naturally occurring disease outbreak. The authors of the Model State Emergency Health Powers Act (MSEHPA) recognized the legislative patchwork that has developed over the years in state public health law and sought to encourage states to modernize those laws to reflect the vast changes that had occurred in public health science and constitutional law. Within a year after

¹ The latter provision appears to contemplate emergency disasters in which restoration of utility services would be required.



the model act's development, bills based on the MSEHPA had been introduced in 34 states, and 16 states had enacted a version of the act.^{ix}

Although Arkansas is not among the states that have adopted the model act, Arkansas's emergency powers statutes have some similarities, such as requirements for including rationale for the emergency in the executive order declaring the emergency and the ability of the governor to suspend laws that may hinder emergency response.^x Likewise, the model act permits the state legislature to terminate the state of emergency by a majority vote of both chambers. However, language in the model act requires a specific finding by the legislature "of the conditions that make possible the termination of the declaration."^{xi} The model act does not address procedures for convening the legislature if not in session. One notable difference in the model act is that the governor's declaration automatically terminates after 30 days unless renewed, compared to 60 days in Arkansas law.^{xii}

COVID-19 and Legislative Responses

Since the beginning of the COVID-19 pandemic, numerous state legislatures have sought additional oversight or restrictions of the emergency powers of the executive branch. For example, in Alabama the legislature convened to consider, but did not pass, a bill to automatically terminate a declared state of emergency after 14 days and to permit extension only by joint resolution of the legislature. Governors in Kansas, Michigan, and Louisiana have vetoed bills passed by their legislatures that would have weakened executive branch emergency powers. During a special session earlier this year, the Arkansas General Assembly enacted a law requiring that the release of any funds from the COVID-19 Rainy Day Fund have prior approval by the speaker of the House of Representatives, the majority party leader of the House, the minority party leader of the House, the president pro tempore of the Senate, the majority party leader of the Senate, and the minority party leader of the Senate.^{xiii} The Arkansas Legislative Council also reviews and approves of the distribution of funds flowing to the state from the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 following recommendations by a CARES Act advisory committee established by an executive order on March 30, 2020.^{xiv} Other states have passed legislation requiring regular situational and financial reporting to the legislature by the executive branch.



Roughly a dozen states currently have pending legislation that would restrict or require additional oversight by the legislature of executive branch emergency powers. In September, a group of Arkansas legislators filed a lawsuit seeking to invalidate public health directives authorized under executive branch authority.^{xv} That lawsuit has since been dismissed by a Pulaski County judge.^{xvi} When the Arkansas General Assembly convenes in January, legislators will likely consider a bill that would compel the governor to call a special session following a public health emergency declaration.

Conclusion

The COVID-19 pandemic has undoubtedly tested the preparedness of our public health system and the legal framework supporting it as well as the resilience of our nation to adhere to prolonged safety measures to protect the public health. As was true following natural disasters, terrorist attacks, and infectious disease outbreaks, states should carefully examine laws governing emergency powers to ensure that they have kept pace with and are guided by science. While legislatures have a role to ensure that emergency powers are not abused and that there are appropriate checks on executive branch powers, laws should maintain a careful balance so that the executive branch can move swiftly, decisively, and with a clear, singular voice in the event of a public health threat.

ⁱ Arkansas Code Annotated § 12-75-101, *et seq.*

ⁱⁱ Executive Order 20-03.

ⁱⁱⁱ Executive Order 20-43.

^{iv} Executive Order 20-05.

^v Executive Order 20-09.

^{vi} National Conference of State Legislatures. Legislative Oversight of Emergency Executive Powers. <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx>

^{vii} La. Stat. Ann. § 29:724.

^{viii} S.C. Code Ann. § 25-1-440 (a)(2).

^{ix} Gostin, L.O., Sapsin, J.W., & Teret, S.P. The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases. *JAMA*. 2002;288(5):622-628. <https://jamanetwork.com/journals/jama/article-abstract/195159>.

^x Model State Emergency Health Powers Act, Sections 402, 403(a)(1).

^{xi} Model State Emergency Health Powers Act, Section 405(d).

^{xii} Model State Emergency Health Powers Act, Section 405(b).

^{xiii} Act 1 of 2020, First Extraordinary Session.

^{xiv} Executive Order 20-11.

^{xv} Moritz, J. State lawmakers file to end state health emergency. *Arkansas Democrat-Gazette*. <https://www.arkansasonline.com/news/2020/sep/04/lawmakers-file-to-end-state-health-emergency/>.



^{xvi} DeMillo, A. Arkansas judge dismisses lawsuit challenging virus mandates. AP News. <https://apnews.com/article/virus-outbreak-arkansas-asa-hutchinson-lawsuits-little-rock-6964d63c1da3ccae9c99ab7958603a5a>.

