



DOING MORE WITH LESS

**PUBLIC HEALTH EMERGENCY
POWERS POST 2020**

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**STATE PUBLIC
HEALTH
EMERGENCY
POWERS**

**STATE DISASTER
STATUTE**

**PUBLIC HEALTH
STATUTE**

STATE: DECLARATION OF EMERGENCY

DECLARATION TRIGGERS
EMERGENCY POWERS

GOVERNOR

- HEALTH SAFETY AND WELFARE
- SUSPENSION OF REGULATORY STATUTE
PRESCRIBING PROCEDURES FOR STATE
BUSINESS

STATE HEALTH OFFICIAL

**PRE-PANDEMIC:
CHECKS ON
STATE
EXECUTIVE
EMERGENCY
POWERS**

STATE LEGISLATURE

- RENEWAL OF STATE OF EMERGENCY
- TERMINATION OF STATE OF EMERGENCY

JUDICIARY

- CONSTITUTIONAL VIOLATIONS
- BEYOND SCOPE OF STATUTE

**BACKLASH:
PRIMARY CAUSES**

**SOCIAL MITIGATION
ORDERS**

VACCINE MANDATES

MASK MANDATES

**BACKLASH:
SOME STATE
RESPONSES**

**AMENDED STATE
DISASTER OR
PUBLIC HEALTH
EMERGENCY
STATUTE**

PREEMPTIVE BANS

**STATE LEGISLATIVE
BANS**

**GOVERNOR
EXECUTIVE ORDERS**

STATE DISASTER/PUBLIC HEALTH EMERGENCY STATUTE CHANGES

LEGISLATIVE CHECKS

- Durational limitations
- Legislative Termination by Concurrent Resolution
- Renewal
- Local checks on emergency authority

SUBSTANTIVE LIMITATIONS

- Religious organizations as essential service
- Firearms exception

COVID-19

- Vaccine mandate ban*
- No executive action
- No Vaccine passports*
- No regulation of behavior

CURRENT CHECKS ON DURATIONAL LIMITS

Durational limitations

- pre-pandemic about 36 states had one – 30 days, 60 days, etc.
- added a durational limitation (AZ, KY, ND, OH, VA)
- states shortened duration of emergency declaration (TN)
- lengthened duration of emergency declaration (KS, RI)

Power to extend

- Governor
 - Pre-pandemic (AL, FL, MS, IN, NY, TN)
 - Current – additional states (AZ, AR)
- State legislature
 - Pre-pandemic (AL, AK, KS, MI, WA, WI)
 - Current - additional states (AZ, ND, OH, RI, UT)

STATE LEGISLATIVE CHECK: TERMINATION OF EMERGENCY DECLARATION

PRE-PANDEMIC:

- ABOUT 32 STATE LEGISLATURES TERMINATE DOE BY CONCURRENT RESOLUTION

CURRENT:

- TWO ADDITIONAL STATES (ND, OH)
- PA, KS, WI legislatures attempted to terminate by concurrent resolution during pandemic

POST 2020: SUBSTANTIVE LIMITATIONS ON EXECUTIVE POWERS DURING EMERGENCY

Religious organizations as “essential service”

- About seven states (ID, IN, KY, NH, ND, SC, TN)
- Essentially codifying Supreme Court decisions in *Roman Catholic Diocese v. Cuomo* and *Tandon v. Newsom*.

No authority to limit or restrict regulation of firearms

- About five states (ID, KS, KY, MT, WY)

WHERE DOES THIS MATTER

Emergency powers are discretionary. Public health officer or state/local executive must want to do something.



During heart of COVID:

Conflict in states with Blue Governor and Red State Legislature

Conflict in states with Red State Government and a Blue City/County (Austin, Miami)

NOT ALL LIMITATIONS ARE CREATED EQUAL: MORE WORKABLE LIMITATIONS

Duration of emergency declaration

- Most states have a durational check
- Review is largely a positive

Houses of Worship and Firearms

- Business closures and gathering restrictions still within most state executive emergency powers.
- Courts have largely upheld these types of restrictions when not implicating First Amendment Free Exercise Clause or Second Amendment rights.
- These orders can be drafted around any worship and firearm exceptions

NOT ALL LIMITATIONS ARE CREATED EQUAL: MORE PROBLEMATIC LIMITATIONS

Emergency Declaration Renewal by State Legislature Only

- About ten states
- MI and WI problem during 2020 and 2021
 - In re Certified Questions (MI 2020)
 - Fabick v. Evers (WI 2021)

COVID Only Restrictions

- Just a few affecting emergency powers but very restrictive (eg. AK and KS)
- Most COVID restrictions are bans on vaccine passports and vaccine mandate bans (not part of state disaster act or public health emergency act)

MICHIGAN: OCTOBER 2020 – NO STATE OF EMERGENCY

Social distancing orders

Worker's compensation for first responders testing positive for COVID

Additional licensing requirements for nursing home requirements

Suspension of law for licensing to administer testing

Electronic records for courts

MICHIGAN WORK AROUND: GOVERNOR LACKS EMERGENCY POWERS

Michigan OSHA

- Emergency Rule Promulgated to replace executive order on Workers Comp.

Department of Health and Human Services

- Director issued an order pursuant to Michigan statute: Replaced executive orders on gathering restrictions and face masks

State Legislature

- Passed Six bills

STATE AGENCY EMERGENCY RULE MAKING ALTERNATIVE

Most states provide a process for emergency rule making under state's administrative procedure act

Agency/director must be granted such authority via statute (aside from state disaster or public health emergency statute)

Process to issue without formal notice and comment procedures

- Finding of imminent peril to the public health, safety or welfare (or lost of federal funding to agency)
- Emergency rule lasts for a short duration depending upon state
 - Example: PA 180 days; WI 150 days, VA 6 months, NY 90 days
 - May be renewable once in some jurisdictions

OTHER EXAMPLES OF WHERE IT WORKED

VIRGINIA -- VOSH (Virginia Occupational Safety and Health Program)

- Adopted Emergency Standard to establish set of requirements for employers to control, prevent and mitigate spread of COVID-19 in the workplace.
- Took about six weeks from first notice date till effective date (June 12, 2020- July 27, 2020)
- Ten-day comment period
- Valid for six months

NEW YORK -- NYS Department of Health

- emergency regulations imposing gathering restrictions, face coverings, business operations
- Followed procedures for emergency rule
- Valid for 90 days; readopted (July 2020- May 2021)

WHERE IT MIGHT HAVE WORKED

PENNSYLVANIA

- Emergency regulation in lieu of Dept. of Health Order Mandating Face Masks in school
- PA Sup. Ct.— Corman V. Acting Secretary of Pennsylvania Dept. of Health -- yes

WISCONSIN

- Wisconsin Legis.V. Palm (Stay at home order) -- No
- Tavern League of Wis V. Palm (gathering restrictions) -- maybe

AGENCY EMERGENCY RULE-MAKING PROS AND CONS

PROS

- Typically, do not need a state declaration of emergency
- May have more constituent voices in the rulemaking process with a shortened comment and notice period
- May last longer than an executive order with a shorter duration period
- More expertise coming from agency

CONS

- May take a bit longer (a few more days or a month)
- Some states require impact studies or analysis -- eg. PA
- At least one state legislature has limited agency emergency rulemaking post 2020 (KY)

LOCAL GOVERNMENT EMERGENCY POWERS

LIMITATIONS

- State preemptive bans (Mask and Vaccine)
- Additional hurdles to extend local state of emergency

SOLUTIONS AND WORK AROUND

- Constitutional Home Rule
- Federal judiciary not in way of local/state vaccine mandates
- Executive Order bans – ultra vires



THANK YOU

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