

LEGAL PERSPECTIVES

Legal Perspectives is aimed at informing healthcare providers, emergency planners, public health practitioners, and other decision makers about important legal issues related to public health and healthcare preparedness and response. The articles describe these potentially challenging topics and conclude with the authors' suggestions for further action. The articles do not provide legal advice. Therefore, those affected by the issues discussed in this column should seek further guidance from legal counsel. Readers may submit topics of interest to the column's editor, Lainie Rutkow, JD, PhD, MPH, at lrutkow@jhu.edu.

AN ASSESSMENT OF STATE LAWS PROVIDING GUBERNATORIAL AUTHORITY TO REMOVE LEGAL BARRIERS TO EMERGENCY RESPONSE

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Governors play a fundamental role in emergency preparedness and can help facilitate rapid responses to emergencies. However, laws that operate successfully under normal circumstances can inadvertently create barriers during emergencies, delaying a timely response. State laws could thus limit, or even prohibit, necessary response efforts. To combat this risk, legislatures have passed emergency powers laws in each state granting governors the authority to declare a state of emergency and to exercise certain emergency powers to meet the needs of the emergency. Researchers conducted a 50-state legal assessment, which identified and examined state laws that give governors the discretion to modify existing laws or create new laws to respond effectively to any type of declared emergency. This article outlines the findings of that assessment, which identified 35 states that explicitly permit governors to suspend or amend both statutes and regulations; 7 states in which governors are permitted to amend regulations during a declared emergency but are not explicitly authorized to modify or remove statutes; and 8 states and the District of Columbia that provide no explicit authority to governors to change statutes or regulations during a declared emergency. The article also provides examples of how this power has been used in the past to demonstrate the utility and scope of this authority in a variety of public health threats.

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G OVERNORS PLAY A FUNDAMENTAL ROLE in emergency preparedness and can help facilitate rapid responses to emergencies. During any type of emergency—including natural disasters, such as a flood or an earthquake; security threats, such as an act of terrorism; and infectious diseases, such as an influenza pandemic—a state government might need to provide services and resources that it otherwise could not provide because of restrictions in the state's laws. However, laws that operate successfully under normal circumstances can inadvertently create barriers during emergencies, delaying a timely response.¹ State laws could limit, or even prohibit, necessary response efforts.¹ To combat this risk, legislatures have passed emergency powers laws in each state granting governors the authority to declare a state of emergency.² These laws establish the circumstances that constitute an emergency, describe the process for issuing a declaration, and list certain emergency powers the governor may use to mitigate the threat.² To activate these extraordinary powers, governors must issue an emergency declaration—often through the issuance of an executive order or proclamation—that describes the threat, identifies which powers the governor will exercise, and specifies the manner in which these powers will be used. While some of these powers are specific to matters such as ordering evacuation or activating the national guard, some states have given governors the broad authority to remove all legal barriers to an effective response during a declared emergency.¹ Governors have used this power to change laws during an emergency for a variety of purposes, including removing time requirements to solicit bids when procuring resources, relaxing hospital licensure rules to create alternative treatment areas, and expanding healthcare providers' scopes of practice to allow paramedics to provide vaccinations.¹

Understanding the scope of governors' authority to remove legal barriers during declared emergencies is a key component of legal preparedness³ and can be a useful tool for intrastate, interstate, and national efforts to prepare for all large-scale emergencies.¹ The need to critically examine this issue arose from the Flu on Call[®] project, a national initiative led by the Centers for Disease Control and Prevention (CDC) in collaboration with United Way Worldwide and other partners. Flu on Call[®] aims to establish a national network of telephone triage lines, staffed by information specialists and medical professionals, to be used during a severe influenza pandemic to improve access to prescription antiviral medicines and reduce surge on healthcare facilities.⁴ The Flu on Call[®] telephone triage line, if adopted by states and activated during a pandemic, will enable callers meeting certain medical criteria to receive a prescription for medication over the phone from a registered nurse working under a protocol signed by a licensed physician (or other provider authorized to write prescriptions in the state).⁴ Yet, access to antiviral drugs during a pandemic is dependent on various statutory and regulatory authorities governing the healthcare system, including scopes of practice and prescription requirements, which can hinder

the prescribing procedure described above. Determining whether governors have the power to temporarily modify or suspend the application of any legal barrier during a declared emergency will inform Flu on Call[®] program planners and forecast the feasibility of increasing access to antivirals through streamlined prescribing practices.

To understand this legal landscape, researchers at CDC's Public Health Law Program and the Research & Evaluation Group at Public Health Management Corporation conducted a 50-state assessment, a type of legal epidemiologic study,⁵ to identify and examine state laws that give governors the discretion to modify existing laws or create new laws to effectively respond to any type of declared emergency, including gubernatorial authority to modify scope of practice statutes or regulations. This article outlines the findings of that assessment, which focused on laws that grant governors broad authority to suspend or change existing laws or create new laws during a declared emergency, and provides examples of how this power has been used in the past to demonstrate the utility of this authority in a variety of public health threats.

METHODS

To conduct a legal assessment of gubernatorial authority to remove legal barriers to emergency response, laws in all 50 states and the District of Columbia were systematically collected and analyzed using established legal epidemiology research methods.⁶ Researchers identified laws in Thomson Reuters Westlaw,⁷ an online legal research database, that indicated the types of emergency powers granted to governors during a declared emergency to alter a state's laws. For this assessment, "laws" that may be waived, changed, or created under a declaration were considered to encompass all types of legal authority in the state such as statutes, which are laws enacted by legislation, and regulations, which are nonlegislative, formal authority issued and enforced by state agencies and departments. Search terms included: "emergency powers," "governor," "authority," "suspend," "emergency," and "disaster." If laws internally cited or cross-cited to other provisions, researchers reviewed these provisions and determined whether they were relevant for inclusion. The table of contents of each state's laws also helped researchers identify the relevant context of each law. Any laws that appeared relevant from this search of the tables of contents also were collected.

Researchers only considered laws in the assessment if the laws were in effect as of June 21, 2017, and if they related to (1) powers granted to governors to suspend, amend, and modify existing law during a declared emergency, or (2) powers granted to governors to create new law during a declared emergency. The assessment excluded laws related to (1) powers granted to governors or other officials to amend, modify, or rescind existing law related to emergency management but not concurrent with an active,

declared emergency; (2) state administrative procedure acts, which can allow expedited rule-making activity that is unrelated to a response to a declared emergency; (3) state emergency plans, detailing the preparation for an emergency response or the activities undertaken during a declared emergency unrelated to altering state law; and (4) emergency powers granted to governors or other authorities that are unrelated to altering law, such as the authority to make funding determinations and requests.

While many types of emergency declarations exist in different states, such as a “state of emergency,” “public health emergency,” “catastrophic health emergency,” or a “state of war emergency,”^{1,2} researchers considered emergency powers under gubernatorial declarations broadly. As such, emergency suspension powers were included if they were activated only under an official gubernatorial declaration issued pursuant to procedures established in state emergency powers laws but did not distinguish between declaration types. Additionally, researchers made no distinction between states that authorized the suspension of laws generally from those that authorized the suspension of laws that “govern the operation of state business,” due to the broad nature of the term “state business,” which is not further defined in the applicable laws.⁸

Upon completion of the legal research, compiled laws were uploaded into LawAtlas.org,⁹ a content management software system for coding (ie, categorizing) and displaying legal text. Researchers analyzed the relevant laws in each

state and then developed coding questions to identify (1) whether state statutes grant the governor the power to change law during a declared emergency; (2) whether that power is to suspend, amend, or create law; and (3) whether the power to change law applies to statutes or regulations. Quality control measures were implemented to ensure coding integrity. Codes were applied to the laws by 2 raters. Raters discussed and validated codes; interrater agreement was achieved among the 2 raters.

RESULTS

A majority of states have broad statutes enabling the governor to temporarily change statutes or regulations during a declared emergency. In total, 42 states explicitly permit the governor to change statutes or regulations during an emergency (Figure 1). In 35 states, governors are explicitly permitted to suspend or amend both statutes and regulations that interfere with an efficient, effective response to an emergency (Figure 1).¹⁰ In 7 states (Idaho, Minnesota, New Hampshire, Oregon, South Carolina, South Dakota, and Wisconsin) governors are permitted to amend regulations during a declared emergency but are not explicitly authorized to modify or remove statutory requirements (Figure 1).¹¹ One state (North Carolina) specifically permits governors to create new statutes and regulations, and 2 states (Minnesota and New Hampshire) permit the

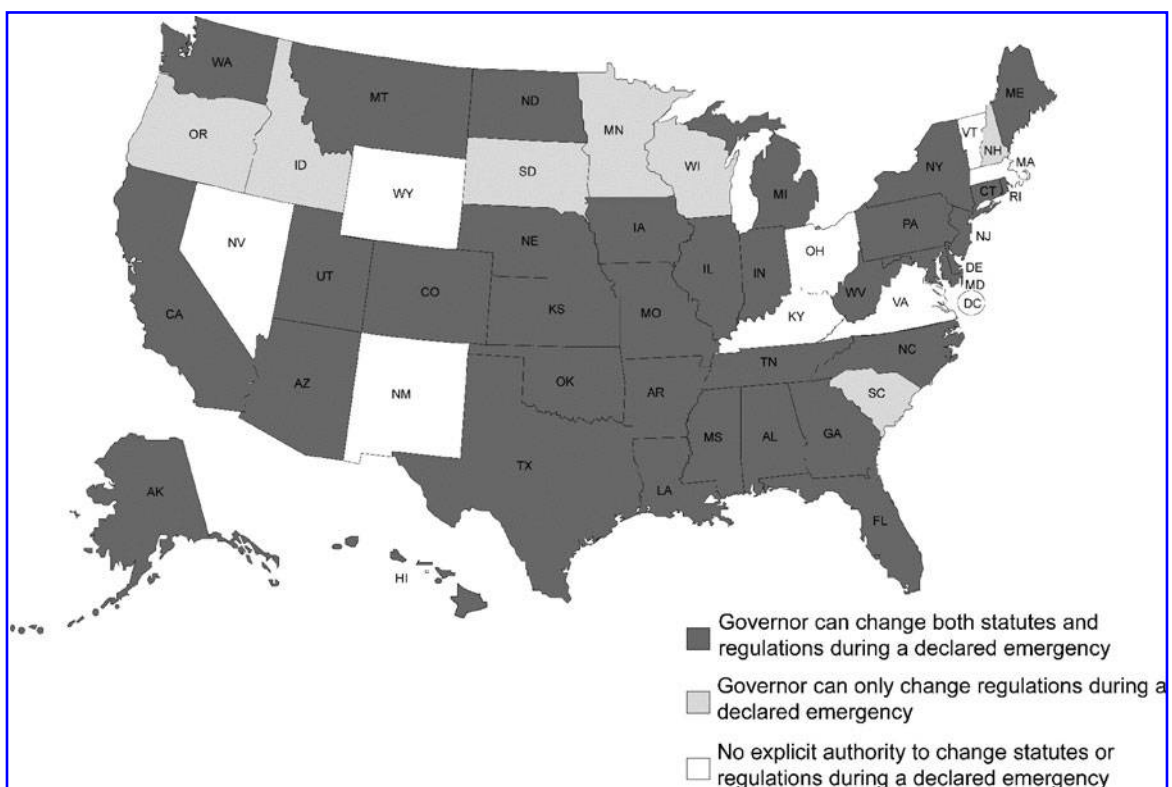


Figure 1. States that explicitly authorize governors to change statutes or regulations during a declared emergency

creation of regulations during emergencies.¹² Eight states (Kentucky, Massachusetts, Nevada, New Mexico, Ohio, Vermont, Virginia, and Wyoming) and the District of Columbia provide no explicit authority to the governor (or, in the case of the District of Columbia, the mayor) to change statutes or regulations during a declared emergency.

DISCUSSION

Granting governors the power to temporarily modify or suspend the application of laws during a declared emergency allows for an expeditious response to any disaster. The findings of this study can inform future emergency responses by indicating which state governors may remove legal barriers to an effective response, such as by enabling use of a telephone triage line to expand access to antiviral medications during a pandemic. Governors have used the power to alter a state's legal infrastructure during past emergencies to accomplish many necessary response activities. While the laws examined do not define what constitutes a legal barrier beyond laws that may "prevent, hinder, or delay necessary action in coping with the emergency,"^{8,10,11} the manner in which a state's legal infrastructure may be modified depends on the types of laws that can be changed. Past uses of gubernatorial emergency powers to change both statutory and regulatory requirements demonstrate their utility in a wide variety of circumstances, including natural disasters and infectious diseases and, more recently, the opioid epidemic.

In response to natural disasters, many governors have used the emergency suspension power to address legal barriers to the response. For example, in August 2017, Texas Governor Greg Abbott used his emergency suspension powers broadly to respond to then-Tropical Depression Harvey.¹³ In activating this power, Governor Abbott limited the otherwise broad suspension to "any regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder or delay necessary action in coping with this disaster ... upon written approval of the Office of the Governor [emphasis added]."¹³ Recognizing, however, that obtaining written approval might be time-consuming in certain instances, the emergency declaration included the caveat that "to the extent that the enforcement of any state statute or administrative rule regarding contracting or procurement would impede any state agency's emergency response that is necessary to protect life or property[,] I hereby authorize the suspension of such statutes and rules for the duration of this declared disaster."¹³ Governor Abbott's use of the suspension authority to respond to Hurricane Harvey demonstrates that governors in the 35 states where these powers apply to both statutes and regulations may exercise this authority broadly to all legal barriers, as well as specifically to matters of procurement within the same declaration.

Gubernatorial emergency powers to change both statutes and regulations have also proved useful in infectious disease emergencies and have served as a vital force-multiplier by expanding healthcare providers' scopes of practice to distribute medical countermeasures. For example, during the 2018 seasonal influenza epidemic, New York Governor Andrew Cuomo declared an emergency to ensure adequate distribution of influenza vaccine to children in the state.¹⁴ To accomplish the goal of vaccinating children, the governor suspended state statutes and regulations—which normally prohibit pharmacists from vaccinating children—to allow pharmacists already authorized to administer seasonal flu vaccines to adults to also vaccinate "individuals between six months and 18 years of age."¹⁴ This action mirrored Governor Cuomo's use of his suspension authority during the 2012-13 seasonal influenza epidemic, when he also suspended statutes and regulations to allow pharmacists to administer vaccines to children.¹⁵ Without these suspensions, the number of individuals in New York permitted to administer the seasonal flu vaccine to children would have been significantly reduced and fewer children might have been vaccinated.¹⁶

Recently, governors have also used emergency suspension powers to address the opioid epidemic in their states.¹⁷ In January 2018, Pennsylvania Governor Tom Wolf used his emergency powers to change statutes to combat Pennsylvania's opioid crisis. The governor authorized "the suspension of relevant regulatory statutes that agencies under my jurisdiction are authorized by law to administer or enforce as may be necessary to respond to the opioid crisis."¹⁸ Similar to the declaration for Hurricane Harvey in Texas, Governor Wolf included the requirement that "[a]ny regulatory statute that agencies under my jurisdiction desire to be suspended must be reviewed by the Governor's Office of General Counsel, and filed with the Opioid Unified Coordination Group."¹⁸ Contrary to the aforementioned example from Hurricane Harvey, Governor Wolf's declaration did not include the immediate suspension of any specific legal barriers. By using suspension powers, the governor enabled state agencies in Pennsylvania to take "urgent and expeditious" actions to address the state's opioid crisis.¹⁸

As demonstrated by these examples, a governor's ability to remove legal barriers can be vital to the efficacy and efficiency of emergency response. However, the extent to which this power can be used depends on whether the governor has been granted the power to change statutes or regulations. In the 7 states where the law explicitly allows the governor to change regulations only during a declared emergency, certain legal barriers may be immediately amended or suspended to aid in response activities, so long as those legal barriers are not statutes enacted by the state legislature. For example, during the H1N1 response, the governor of New York used emergency powers to change both statutes and regulations to immediately expand scopes of practice to allow "physician assistants, specialist assistants, dentists, certain dental hygienists, pharmacists, midwives,

podiatrists, and advanced EMTs ... to administer H1N1 and seasonal influenza vaccine after undergoing training and while working under the direction of the state or county health departments' mass vaccination clinics."¹⁹ On the other hand, responders in Minnesota, which limits its gubernatorial emergency suspension authority to regulations, had to wait for the legislature to create a new authority that allows "the commissioner of health to authorize any person, including, but not limited to, certain EMTs, dentists, pharmacists, podiatrists, and veterinarians, to administer vaccinations when a local board of health requests the commissioner's assistance to respond to events threatening public health."¹⁹ In the 7 states that permit changes only to regulations, or states where no authority to change statutes or regulations is expressly permitted, officials might have to rely on alternative legal arguments and mechanisms (eg, emergency rulemaking or licensure board orders) to overcome legal barriers to emergency response.^{1,19} However, these alternative mechanisms might not provide the necessary level of flexibility to account for unpredictable threats and unforeseeable legal barriers.¹

When considering the use of gubernatorial powers to remove legal barriers to emergency response, a number of practical and policy implications may also arise. As a practical matter, while the ability to remove legal barriers is a vital tool, governors cannot effectively implement this authority without incident management, programmatic, and administrative understanding of how to operate under an altered legal infrastructure "before the emergency occurs."¹ For emergency planners in the 35 states where governors can change statutes and regulations, establishing lines of communication with executive leaders and incorporating this power in planning and exercises can ensure it is used efficiently.¹ In the 7 states where the power to remove legal barriers is limited to regulations, the same coordination and preparation must occur, but with a careful eye toward the limitations on how the waivers can be used only for agency rules and how to address the statutory barriers that may remain in place.

In addition to practical challenges, removal of legal barriers can also give rise to policy concerns related to government overreach and the separation of powers.^{1,2,20} While addressing the best ways to allay these concerns is beyond the scope of this study, it is important to note that gubernatorial "waiver authority is triggered only pursuant to a formal declaration of emergency" subject to expiration and ratification requirements under state law, and that changing state law during an emergency does not affect "[f]ederal and state constitutional protections [and o]ther federal legal protections (e.g., Americans with Disabilities Act)."¹ Regardless of whether a state falls within the 35 states that can change statutes and regulations, or the 7 states that can change only regulations, anticipating the practical challenges of implementing an altered legal structure and addressing fears related to government overreach may be crucial to the successful removal of legal barriers in an emergency response.

LIMITATIONS

This legal assessment examined only the laws of the 50 states and the District of Columbia, because of the limitations of Westlaw and LawAtlas. Given the potential for wide-ranging emergencies in the 5 US territories and minor islands, such as the devastation of Hurricane Maria in Puerto Rico in 2017, inclusion of these jurisdictions would increase the value of this assessment. Research on the presence or absence of these laws did not include a systematic examination of any policies or processes states may have established to allow officials and attorneys to review and identify potential laws to create, amend, or suspend under gubernatorial emergency authorities. Additionally, researchers did not conduct any interviews with stakeholders to collect their perception on the use of gubernatorial power to change laws during declared emergencies. Further examination of the policies, practices, and perception of these legal authorities is needed to understand the full scope of their impact on emergency preparedness and response activities.

CONCLUSION

Understanding the scope of governors' emergency powers to remove legal barriers during declared emergencies is crucial for states' legal preparedness and can inform planners on the legal feasibility of strategies to prepare for large-scale emergencies, such as Flu on Call[®]. Emergency response planners in the 42 states with the authority to change statutes or regulations can look to past use of this authority to understand when and how the power to remove legal barriers can be used effectively.¹ However, only after the legalities and realities of changing law during a disaster are incorporated into state, interstate, and national preparedness and response activities will governors be able to adequately minimize the impact of legal barriers to emergency response.¹⁻³ For planners and policymakers in the 8 states and the District of Columbia that lack explicit authority for the governor to broadly change statutes or regulations during a declared emergency, it is vital that alternative means of removing legal barriers be considered.¹ If no such alternative waivers exist in these 9 jurisdictions, emergency planners may need to ensure that plans and exercises adequately anticipate potential legal barriers and develop strategies to minimize their detrimental impact on response activities.

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