

Model Public-Health Emergency Authority Act

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES



WITH COMMENTS

Copyright © 2023
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

October 3, 2023

ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 132nd year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- ULC statutes are representative of state experience because the organization is made up of representatives from each state, appointed by state government.
- ULC keeps state law up to date by addressing important and timely legal issues.
- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service and receive no salary or compensation for their work.
- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.
- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

Model Public-Health Emergency Authority Act

The committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:

Diane F. Boyer-Vine	California, <i>Chair</i>
Heidi Tseu	District of Columbia, <i>Vice Chair</i>
William W. Barrett	Indiana
Rex Blackburn	Idaho
David B. Dove	Georgia
Abbe R. Gluck	Connecticut
Alberto R. Gonzales	Tennessee
David H. Hallock	Virginia
Cara L. Jenkins	California
Andrew Kasper	North Carolina
Lawrence R. Klemm	North Dakota
Othni J. Lathram	Alabama
Mark H. Ramsey	Oklahoma
Candace M. Zierdt	North Dakota
Patricia Brumfield Fry	Missouri, <i>Division Chair</i>
Dan Robbins	California, <i>President</i>

Other Participants

Robert Gatter	Missouri, <i>Reporter</i>
Wendy K. Mariner	Massachusetts, <i>American Bar Association Advisor</i>
Meryl J. Chertoff	District of Columbia, <i>American Bar Association Section Advisor</i>
William C. McKinney	North Carolina, <i>American Bar Association Section Advisor</i>
John J. Stieff	Indiana, <i>Style Liaison</i>
Tim Schnabel	Illinois, <i>Executive Director</i>

Copies of this act may be obtained from:

Uniform Law Commission
111 N. Wabash Ave., Suite 1010
Chicago, IL 60602
(312) 450-6600
www.uniformlaws.org

Model Public-Health Emergency Authority Act

Table of Contents

Prefatory Note.....	1
Section 1. Title.....	4
Section 2. Definitions.....	4
Section 3. Relationship to Other State Law	7
Section 4. Declaration of Public-Health Emergency; Renewal; Report	9
Section 5. Termination of Declaration of Public-Health Emergency; Report	16
Section 6. Public-Health Emergency Order; Renewal.....	17
Section 7. Requirements for Public-Health Emergency Order; Report.....	23
Section 8. Termination of Public-Health Emergency Order.....	25
Section 9. Conflict with Local Law	26
Section 10. Judicial Review	26
Section 11. Injunctive Relief.....	27
Section 12. Civil [Penalty][Fine]	28
Section 13. Private Right of Action	29
Section 14. Relation to Electronic Signatures in Global and National Commerce Act.....	29
[Section 15. Severability].....	30
Section 16. Effective Date	30

Model Public-Health Emergency Authority Act

Prefatory Note

The *Model Public-Health Emergency Authority Act* is designed to improve the preparedness of states for public-health emergencies. Specifically, this act clarifies the powers of a Governor to declare a public-health emergency and to issue orders in response to that emergency. Simultaneously, this act establishes measures to promote a Governor's accountability to the Legislature and to the public at large. The goal of this act is to empower a Governor to act quickly and decisively while also clarifying substantive and procedural limitations to a Governor's authority.

Under long-established legal precedent, each state has the police power to protect the health, safety, and welfare of its population. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). This is a sovereign power that was not delegated to the federal government under the federal Constitution when the Republic was formed. State governments rely on the police power to protect public health in both normal and emergency times. The police power is broad, encompassing a wide variety of public-health measures. Thus, it is the foundation for state statutes and regulations that authorize executive-branch agencies and officials to quarantine and isolate people and to take any and all other actions reasonably necessary to prevent the introduction or spread of infectious diseases. For example, in the seminal case of *Jacobson v. Massachusetts*, the Supreme Court of the United States upheld the authority of an executive-branch agency for the City of Cambridge to require individuals, under state legislation, to be vaccinated when "necessary for the public health or safety." 197 U.S. at 25-30. These powers are limited, of course, by individual rights under state and federal constitutions.

This project emerged from the uncertainties in state law that the COVID-19 pandemic made acutely apparent. These legal uncertainties contributed to the decision of many individuals, businesses, and some legislatures to file lawsuits challenging the statutory and constitutional authority of Governors and other executive officials to respond to the risks posed by the pandemic. Moreover, these same uncertainties have resulted in state legislation clawing back core public-health emergency powers from Governors and executive-branch officials. Consequently, Governors and health officials in many states may no longer have legal authority to protect public health adequately during the next emergency, and the legal precedents and legislative examples from those states undermine the legal and political reliability of public-health emergency powers in all states. This act provides a more secure legal foundation for Governors to respond to future public-health emergencies, and it better protects against executive-branch overreach by setting substantive and procedural standards and assuring an opportunity for Legislatures to participate in policymaking during a prolonged emergency.

By way of background, legal preparedness for public-health emergencies has evolved in fits and starts over the last twenty years largely in response to major public-health crises. Most notably, the 9/11 attacks prompted the federal government to fund a project at Georgetown University Law Center in 2001 to develop a model state law for public-health emergency powers. This resulted in the 2001 Model State Emergency Health Powers Act released in December 2001 (2001 Model Law), which a majority of states have adopted in substantial part.

Yet, the 2001 Model Law addressed primarily executive-branch authority to quarantine and isolate individuals during an emergency, and it did not address adequately or at all many of the actions that became necessary during the COVID-19 pandemic. In particular, the 2001 Model Law does not address the power of Governors to issue orders designed to mitigate the effects of a novel contagious disease that has taken root in a population. Thus, Governors and state officials often relied on old state statutes to respond to the COVID-19 pandemic. Those statutes authorized officials to take actions “necessary” to preserve public health. Such broad language, while valuable, provides little accountability or limitation, and so it invites a wide variety of constitutional and administrative challenges to various orders issued during an emergency.

This act clarifies the kinds of orders that Governors are authorized to issue during a public-health emergency. It also imposes substantive and procedural guardrails as a check against arbitrary public-health action. It does so by requiring Governors to develop a record in support of any declaration of a public-health emergency and in support of any public-health emergency order issued during the term of such a declaration. Additionally, this act creates a sunset provision on every public-health emergency declaration and order, and it requires a Governor to make a new record as a condition of renewing a declaration or an order.

The Uniform Law Commission believes that this act strikes an appropriate balance between empowering Governors to take swift emergency action and holding Governors accountable for each such action. Yet, the Commission faced some challenges. In particular, differences in state constitutions made it impracticable for the Commission to include provisions authorizing state legislatures to terminate unilaterally a public-health emergency declaration or order issued by a Governor. For example, state constitutions typically do not authorize legislatures to act with the force of law except by passing legislation in both chambers, presenting that legislation to the Governor for signature or veto, and overriding any gubernatorial veto. Under such a state constitution, a statutory provision authorizing a Legislature to terminate a public-health emergency declaration or public-health emergency order by joint or concurrent resolution would amount to an unconstitutional legislative veto.

This exact issue arose in Pennsylvania during the COVID-19 pandemic. In June 2020 the Governor of Pennsylvania renewed an initial public-health emergency proclamation. A few days later each chamber of Pennsylvania’s Legislature, under an authorizing statute, approved a concurrent resolution terminating the Governor’s proclamation. When leadership of the Legislature filed suit to enforce the resolution, the Governor petitioned the Pennsylvania Supreme Court to immediately review the matter, and the Court granted the Governor’s petition. In *Wolf v. Scarnati*, 233 A.3d 679 (Pa. 2020), the Court held that the Legislature’s resolution violated the Pennsylvania Constitution’s requirement that every legislative “order, resolution, or vote . . . be presented to the Governor” for approval or disapproval. Because the concurrent resolution purporting to terminate the public-health emergency proclamation was not presented to the Governor, the Court held that the resolution was void as unconstitutional. (The electorate of Pennsylvania later approved a state constitutional amendment authorizing such a legislative veto.)

Because state constitutions typically contain similar presentment requirements, this act does not authorize the Legislature to terminate the Governor’s declaration of a public-health

emergency unilaterally. Some states' constitutions—like Pennsylvania's now amended Constitution—may permit such a legislative veto. Because this is a constitutional matter with variation among the states, this act does not create new legislative authority.

Instead, this act promotes executive-branch accountability in two ways. First, it requires that a state Legislature be in session or have an opportunity to be in session as a condition of a Governor's power to renew a declaration of public-health emergency. In states with full-time legislatures and in states with part-time legislatures that are authorized to call themselves into special session, this condition is always satisfied. Part-time legislatures in about a dozen states, however, are not empowered to call themselves into special session. In those states, this act incentivizes a Governor to call, or offer legislative leadership to call, a special legislative session to trigger the Governor's authority to renew a declaration of public-health emergency. A Governor in such a state may choose not to call a special session, in which case, the declaration and all its associated orders will expire, and the Governor cannot reissue the same or similar declaration for a specified number of days. By assuring that a state Legislature is in session or will have an opportunity to be in session at the time a declaration is renewed, this act triggers the political process as a check on gubernatorial authority. Once in session, state legislatures may pass bills terminating or amending an ongoing declaration of public-health emergency and present those bills to the Governor who will be held politically accountable for the decision to sign or veto such bills.

Second, this act requires that a Governor make a written report that is submitted to the Legislature and otherwise made publicly available. This creates a basis to challenge both a declaration and each individual order. For example, anyone with standing may petition a state court to set aside a declaration of public-health emergency if the circumstances do not meet the definition of a public-health emergency or if the Governor has not met the procedural requirements for issuing or renewing such a declaration. Similarly, anyone with standing may seek judicial review of a public-health emergency order, alleging that the record is insufficient or otherwise fails to support such an order.

In addition to considering this act, state legislatures addressing emergency preparedness should also consider other acts adopted or amended by the Uniform Law Commission to better account for emergency conditions. These include the Uniform Emergency Volunteer Health Practitioners Act, the Uniform Electronic Wills Act, the Model Public Meetings During Emergencies Act, and the Revised Uniform Law on Notarial Act.

Model Public-Health Emergency Authority Act

Section 1. Title

This [act] may be cited as the Model Public-Health Emergency Authority Act.

Comment

This act's title includes the word "model" and not the word "uniform" to signal that this act accommodates key differences among jurisdictions with respect to their constitutions and legislative structure.

Section 2. Definitions

In this [act]:

(1) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(2) "Person" means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(3) "Political subdivision" includes a city, [county,] district, and any other local or regional governmental authority.

(4) "Public-health emergency" means an imminent threat or actual appearance of an infectious, biologic, radiologic, or chemical agent or toxin, regardless of cause, that poses a high probability of:

(A) a large number of deaths of individuals in the affected population;

(B) a large number of serious or long-term disabilities of individuals in the affected population;

(C) widespread exposure to the agent or toxin that poses a significant risk of substantial harm to a large number of individuals in the affected population; or

(D) a substantial adverse impact on the availability of medical, public

health, or other emergency resources.

(5) “Public-health emergency order” means an order issued or renewed under this [act].

(6) “Record” means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(7) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

Legislative Note: *A state that uses a different term for “county” should insert that term in the brackets in paragraph (3). If a state does not have a governmental unit corresponding to a county, it should delete the bracketed term.*

Comment

1. The definition of “electronic” is based on language currently used in uniform and model laws drafted and approved by the Uniform Law Commission.

2. The definition of “person” is based on language currently used in uniform and model laws drafted and approved by the Uniform Law Commission.

3. The definition of “political subdivision” is based on language currently used in uniform and model laws drafted and approved by the Uniform Law Commission.

4. The definition of “public-health emergency” is central to the operation of this act. It identifies the circumstances under which a Governor may issue a declaration of public-health emergency, which then triggers the authority of the Governor to issue orders designed to protect public health. The definition is designed to account for various agents and toxins that threaten or harm public health. These include, without limitation, infectious agents that are communicable among humans (e.g., COVID-19, measles, Ebola) and infectious agents transmitted through insects or other vectors (e.g., malaria). These also include, without limitation, toxins released into the environment (e.g., chemical spill or nuclear accident). Additionally, these include, without limitation, threats to public health associated with disasters or other emergencies, including, without limitation, mold, poisonous or disease-carrying vermin, or bacteria. The definition also requires that the agent or toxin pose a high probability of one or more types of

significant, population-level harm, meaning that limited cases of an infectious disease that is well-controlled and thus does not pose a high probability of significant population-level harm would not meet the definition.

5. The definition of “public-health emergency” shares some of the elements of the definition of the same term in the 2001 Model Law, parts of which have been adopted by a majority of states. Yet, the definition here accounts for public-health preparedness lessons learned since 2001. For example, the definition above recognizes that a public-health emergency can exist when an agent or toxin poses a high probability of significantly straining medical, public health, or other emergency resources.

6. The definition of “public-health emergency” also includes the phrases “affected population” and “high probability.” “Affected population” refers to the set of individuals who are likely or actually at risk of harm from the threatened or actual infectious, biologic, radiologic, or chemical agent or toxin that may justify the declaration of a public-health emergency. In this way, the size of the “affected population” is determined by the nature and scope of a particular threat. While the nature and scope of a threat may result in the determination that the “affected population” is the population of the state or of one or more political subdivisions of a state, the “affected population” need not correspond to the boundaries of one or more political subdivisions of a state. The phrase “high probability” is intended to mean significantly higher than a baseline that would reasonably be expected either in the absence of or given the already endemic prevalence of the agent or toxin, the threat or presence of which may justify declaring a public-health emergency. So, for example, deaths or disabilities caused by common tobacco use could not constitute a public-health emergency when the number of deaths or disabilities that occur are about what would be expected given the baseline incidence of deaths and disabilities that happen year-to-year from tobacco use. Meanwhile, when, as a result of opioid use, a significant spike in deaths occurred above the baseline of what would be expected, this would have constituted a public-health emergency if all other elements of the definition of public-health emergency were also satisfied.

7. The phrase “significant risk of substantial harm” in subsection 4(C) of the definition of public-health emergency is intended to capture a broader set of harms than a large number of deaths (subsection 4(A)) and a large number of serious or long-term disabilities (subsection 4(B)), which could occur as a result of exposure to the agent or toxin giving rise to the emergency. This includes, without limitation, illness that is unlikely to result in either death or disability. For example, a highly transmissible, novel flu might not pose a significant risk of either death or disability, but it might pose a significant risk of causing thousands of individuals in the affected population to miss weeks of work or school.

8. The phrase “other emergency resources,” as used in subsection 4(D), refers to resources other than medical personnel, facilities, services, or supplies and other than public-health personnel, facilities, services, or supplies and that are or may become appropriate for an adequate response to the risks posed by the toxin or agent that may justify declaring a public-health emergency. The scope of what constitutes “other emergency resources that could be affected by the public-health emergency” will be determined by the nature of the relevant emergency. For example, safe drinking and bathing water could constitute “other emergency

resources that could be affected by the public-health emergency” in the case of water contamination that meets the definition of a “public-health emergency.”

9. The underlying cause of the emergency is not relevant to the determination of whether a public-health emergency exists. So, for example, if the threat of presence of a deadly infectious virus meets the definition of a public-health emergency, it does not matter whether the threat or presence of the virus was caused naturally or by an act of terrorism or by any other means.

10. While the definition of “public-health emergency” does not refer expressly to “disaster” or “natural disaster,” it encompasses a public-health emergency arising out of any disaster. The definition refers to “infectious, biologic, radiologic, or chemical agent or toxin, regardless of cause.” This necessarily includes the threat of such toxins or agents when they arise as part of a natural or non-natural disaster. For example, an “infectious, biologic, radiologic, or chemical agent or toxin” could include a chemical leak resulting from a train derailment or truck crash, and it could include bacteria, mold, or poisonous or disease-carrying vermin associated with a flood. In this way, this act addresses circumstances in which a threat to public health results from a natural or non-natural disaster.

11. The definition of “public-health emergency order” in subsection 5 refers to an order issued by the Governor under Section 6 of this act that complies with the requirements of Section 7 of this act.

12. The definition of “record” is based on language currently used in uniform and model laws drafted and approved by the Uniform Law Commission.

13. The definition of “state” is based on language currently used in uniform and model laws drafted and approved by the Uniform Law Commission.

Section 3. Relationship to Other State Law

(a) This [act] creates the exclusive emergency authority for the Governor and any state or local official or agency to which the Governor has delegated authority to respond to a public-health emergency.

(b) The Governor may respond to an emergency other than a public-health emergency as authorized by other law of this state.

(c) If a public-health emergency and an emergency other than a public-health emergency arise out of the same circumstances:

(1) this [act] authorizes the Governor to respond to the part of the circumstances

that is a public-health emergency; and

(2) other law of this state authorizes the Governor to respond to the part that is an emergency other than a public-health emergency.

(d) Except when acting under a delegation by the Governor of authority under this [act], and except as provided in Section 9, during a public-health emergency, state and local agencies and officials retain their authority under other law of this state.

Comment

1. This section declares that, when circumstances meet the definition of a public-health emergency, this act applies to actions taken in response to the public-health emergency by a Governor or by state or local officials or agencies to which a Governor delegates the Governor's authority under this act. As a result, this act controls over other law of this state, including but not limited to other law of this state empowering a Governor to respond to a variety of emergencies, but this act controls only with respect to actions responding to the public-health emergency.

2. Circumstances may exist in which a public-health emergency arises in connection with a different kind of emergency. For example, a flood might result in bacteria, mold, or poisonous or disease-carrying vermin that pose a threat to public health and that otherwise meets the definition of a public-health emergency. In such circumstances, the Governor's authority to respond to the part of the broader emergency that constitutes a public-health emergency derives exclusively from this act; meanwhile, the Governor's authority to respond to all aspects of the broader emergency other than the portion that is a public-health emergency derives from other law of this state.

3. Subsections (a) and (d) clarify that this act provides the exclusive authority for actions by the Governor and by any state or local official or agency to which the Governor has delegated authority to respond to the public-health emergency. One purpose of this language is to distinguish between (1) actions taken in response to a public-health emergency by state or local agencies or officials on behalf of the Governor pursuant to a gubernatorial delegation and (2) actions taken in response to a public-health emergency by state or local agencies or officials independent of the Governor and pursuant to other law of the state. When a state or local agency or official acts in response to a public-health emergency pursuant to a gubernatorial delegation of authority, this act applies pursuant to subsection (a). When, however, a state or local agency or official acts in response to a public-health emergency without a gubernatorial delegation and under authority granted by other law of this state, this act does not apply pursuant to subsection (d). So, for example, if a Governor declared a public-health emergency based on the appearance of a novel airborne virus and initially issued only one order, which required hospitals and clinics to stockpile anti-viral medications, and if a local school board—without a delegation of authority under this act to it by the Governor and pursuant to authority granted to it under other law of this

state —issued an order requiring that individuals wear masks when in school buildings in the board’s district for two weeks, this act would not apply to the local school board’s order.

4. Subsection (d) also clarifies that Section 9 will preempt any action taken by a state or local agency or official in response to the emergency only when that action conflicts with a public-health emergency order issued under this act.

Section 4. Declaration of Public-Health Emergency; Renewal; Report

(a) The Governor may, by [executive order] in a record, issue a declaration of a public-health emergency if immediate action is appropriate to eliminate or reduce a risk of harm posed by the public-health emergency or to eliminate, reduce, contain, or mitigate an effect of the public-health emergency. An initial declaration of a public-health emergency may not have a term longer than [insert a number in the range of 45 to 90] days.

(b) Before a declaration of a public-health emergency issued under subsection (a) or renewed under this subsection expires, and subject to subsection (c), the Governor may, by [executive order] in a record, renew the declaration. A renewed declaration of a public-health emergency may not have a term longer than [insert a number in the range of 45 to 90] days.

(c) The Governor may renew an initial or previously renewed declaration of a public-health emergency only if:

(1) the Governor provides notice in a record to the [Legislature] before the Governor renews the declaration; and

(2) the [Legislature] is or will be in session, or the [Legislature] will have an opportunity to be in session, not later than [five] days before the renewal takes effect.

(d) If the Governor determines that a public-health emergency continues to exist and subsection (c) is satisfied, there is not a limit on the number of times the Governor may renew an initial or previously renewed declaration of a public-health emergency that has not expired.

(e) An initial or renewed declaration of a public-health emergency expires at the end of

its term unless renewed or further renewed or unless the Governor, under Section 5, terminates the declaration of a public-health emergency before its term expires.

(f) The Governor under subsection (a) may issue a declaration of a public-health emergency identical or substantially similar to an expired declaration of a public-health emergency if at least [15] days have elapsed since the expiration of the declaration.

(g) A declaration of a public-health emergency issued or renewed under this section must specify:

- (1) the nature of the public-health emergency;
- (2) the political subdivision or geographic area subject to the declaration, which may include the entire state;
- (3) the duration of the declaration; and
- (4) why immediate action is appropriate under the circumstances.

(h) A declaration of a public-health emergency issued or renewed under this section and each specification required under subsection (g) must be rationally based on evidence then available to the Governor about the nature of the agent or toxin giving rise to the public-health emergency and the risk posed by the agent or toxin.

(i) Not later than [seven] days after issuing or renewing a declaration of a public-health emergency under this section, the Governor shall:

- (1) prepare a report in a record describing the evidence on which the Governor based the initial or renewed declaration and each specification required by subsection (g); [and]
- (2) make the report publicly available[; and
- (3) submit the report to the [Legislature] at or before the time the report is made publicly available].

(j) The report under subsection (i) must include any additional evidence the Governor considered after making or renewing the declaration. The Governor shall exclude from the report information protected by law as confidential, privileged, or otherwise exempt from disclosure. The report must describe how the initial declaration or renewal and each specification required under subsection (g) is rationally based on the evidence.

(k) A declaration of a public-health emergency issued or renewed under this section is not subject to the rule-making procedures of [cite to state administrative procedure act].

Legislative Note: *In subsection (a), a state that does not use executive orders should insert the appropriate term describing the mechanism used to issue an executive-branch directive and should make this change elsewhere in this act.*

In subsection (a), a state should choose a maximum number of days an initial declaration of a public-health emergency may last. The maximum number of days may be from 45 to 90.

In subsection (b), a state should choose a maximum number of days a renewed declaration of a public-health emergency may last. The maximum number of days may be from 45 to 90.

The maximum number of days under subsections (a) and (b) may be the same or different.

In subsections (c)(1) and (i)(3) and elsewhere in this act, a state where the state-level legislative body is not called “Legislature” should insert the appropriate word.

In subsection (i)(3), a state may want to insert existing procedures, if any, for how a Governor will submit the report to the Legislature, or a state may decide to eliminate subsection (i)(3) because the Governor is required to make the report publicly available.

Comment

1. This section addresses the declaration of a public-health emergency by the Governor. Such a declaration is central to the operation of this act because the declaration triggers the Governor’s power to issue public-health emergency orders under Section 6 of this act.

2. This section sets the process for the Governor’s declaring a public-health emergency, which process is intended to promote accountability for the facts relied upon about the relevant agent or toxin and the risks they pose to all or part of the state’s population as those facts are known at the time the Governor declares a public-health emergency. Additionally, the process is intended to promote transparency for and accountability to both the public and the Legislature through the reporting requirement established in subsections (i) and (j).

3. Subsection (a) authorizes the Governor to issue an initial declaration of public-health emergency and identifies a range within which a state may set the maximum duration of its term. If a Governor issues a declaration of public-health emergency under this subsection and does so using an executive order, the order shall be filed as required by other law of this state addressing executive orders. Subsection (a) sets a condition on the Governor's authority to declare a public-health emergency; the Governor's authority is triggered only "if immediate action is appropriate to eliminate or reduce a risk of harm posed by the public-health emergency or to eliminate, reduce, contain, or mitigate an effect of the public-health emergency." The Governor satisfies this condition by determining that a wait-and-see approach is too risky or otherwise is ill-suited to the circumstances. This does not require that the Governor establish that one or more actions are necessary. Rather, it is sufficient for the Governor to determine that, given the risks and uncertainties of an evolving emergency, it is prudent for the Governor to make an initial declaration or renew a previous declaration so as to take or continue even precautionary action to protect public health.

4. Subsection (b) authorizes the Governor to renew an unexpired declaration of public-health emergency and sets a maximum duration of its term. The Governor's authority to renew a declaration of public-health emergency applies not only to an initial declaration of public-health emergency, but also to a previously renewed declaration of public-health emergency. This subsection establishes that, unlike the Governor's authority to issue an initial declaration of public-health emergency, the Governor's authority to renew a declaration of public-health emergency is subject to one or more additional conditions set forth in subsection (c).

5. Subsection (c) creates two conditions on the authority of the Governor to renew a declaration of public-health emergency. Subsection (c)(1) requires that the Governor notify the Legislature prior to renewing a declaration of public-health emergency. This is intended to assure that the Legislature is aware that the Governor intends to renew a declaration of public-health emergency. Subsection (c)(2) additionally requires that the Legislature is or will be in session, or will have the opportunity to be in session, for a specified number of days before the day on which the renewed declaration takes effect. This condition is intended to assure that the legislative branch has an opportunity to consider and pass legislation related to the public-health emergency at the start of the term of the renewed declaration of public-health emergency. This condition is particularly important for states with part-time legislatures that lack the legal authority to call themselves into session. In such a state, if the Governor wishes to trigger the authority to renew a declaration of public-health emergency under subsection (c) prior to its expiration and if the Legislature is not scheduled to be in session for a specified number of days prior to the start of the term of the renewed declaration, the Governor may do so by exercising the Governor's discretion to call—or at least to offer to legislative leadership to call—a special legislative session. This special legislative session may be limited to addressing the renewal of the declaration of public-health emergency or orders issued pursuant to the declaration. If a Legislature will not be in session and cannot call itself into session, and if the Governor does not provide the Legislature with an opportunity to be in session, then the Governor's authority to renew a declaration of public-health emergency is not triggered. Alternatively, the Governor of such a state may choose to allow the declaration of public-health emergency to expire, in which case the Governor would be prohibited under subsection (f) from issuing the same or substantially similar declaration of public-health emergency for the number of days specified in

subsection (f).

6. Subsection (c) does not create any power in the Legislature that does not otherwise exist under other law of this state. For example, it does not authorize a Legislature to call itself into session. Nor does subsection (c) authorize the Legislature to amend or terminate a renewed declaration of public-health emergency. Additionally, subsection (c) does not obligate the Governor to sign any bills passed by the Legislature with respect to a renewed declaration of public-health emergency whether passed during a regular or special legislative session.

7. Subsection (d) establishes that there is not a limitation on the total number of times a Governor is authorized to renew a declaration of public-health emergency so long as the underlying circumstances continue to meet the definition of a public-health emergency and the Governor meets the requirements of and satisfies the conditions for each renewal. The purpose of this provision is to assure that the Governor has the authority necessary to address an ongoing public-health emergency and to assure that the Governor reassesses whether a public-health emergency continues to exist.

8. Subsection (e) recognizes that a declaration of public-health emergency expires if not renewed prior to the end of its term.

9. Subsection (f) establishes that the Governor's authority to issue an initial declaration of public-health emergency that is identical or substantially similar to an expired declaration of public-health emergency is triggered a certain number of days after the expired declaration of public-health emergency reached the end of its term. This provision stands in contrast to subsections (b) and (c) that, together, create the authority of the Governor to renew a declaration of public-health emergency without any lapse in time if the Governor satisfies the conditions in subsection (c). Subsection (f) applies when the Governor does not meet the conditions for renewing a declaration of public-health emergency and therefore cannot renew such a declaration before it expires. Subsection (f) imposes a waiting period on the Governor before the Governor can issue another declaration of public-health emergency identical or substantially similar to the expired declaration. This waiting period is intended to incentivize the Governor to choose the renewal option under subsections (b) and (c), to specify the consequence of a Governor's failure to meet the conditions of renewal, and to specify when the Governor's authority is reset so that the Governor can protect the public health in the face of an ongoing public-health emergency.

10. Subsection (g) requires that a declaration of public-health emergency specify certain information. This includes a statement specifying the nature of the public-health emergency under subsection (g)(1). The Governor satisfies this standard by stating the nature of the public-health emergency, to the extent the nature of the emergency can be ascertained based upon the information available to the Governor at the time the Governor makes the initial declaration or at the time the Governor renews a previous declaration. Subsection (g)(2) requires that the declaration of public-health emergency specify the geographic scope of the public-health emergency, which may encompass all or part of the state. Subsection (g)(3) requires that the declaration of public-health emergency specify the duration of an initial declaration or of a renewed declaration. Finally, subsection (g)(4) requires that the declaration of public-health emergency explain why, under the circumstances, immediate action is appropriate to respond to

the emergency that is the basis for the declaration. The Governor satisfies this requirement by explaining why a wait-and-see approach is too risky or otherwise ill-suited to the circumstances and why, based upon the information available to the Governor at the time, it is prudent for the Governor to make an initial declaration or renew a previous declaration so as to take or continue even precautionary action to protect public health.

11. Subsection (h) requires that a declaration of public-health emergency be “rationally based” on information about the nature of and risks posed by the agent or toxin the threat or presence of which justifies the declaration. This requirement is not intended to change any applicable constitutional standard of review. It is intended to promote accountability and transparency by creating a public record of the evidentiary basis for the Governor’s declaration, which will protect against an arbitrary or capricious declaration. The obligation imposed on the Governor to base an initial or a renewed declaration of public-health emergency on evidence of the nature and risks of the relevant agent or toxin is limited to evidence “then available” to the Governor. Information about the nature and risks of a public-health threat may be scant at the time the Governor initially determines that a declaration of public-health emergency is warranted. For example, there may be little information about the nature and risks of a novel virus that is spreading and harming all or part of a state’s population. In such a case, this section requires only that the Governor account for the little information that is then available when assessing whether a public-health emergency exists and whether a declaration of a public-health emergency is warranted. The Governor is not required to wait for more complete or definitive evidence about the nature and risks posted by an agent or toxin before making those determinations.

12. Subsection (i) requires that the Governor prepare a report within a specified number of days of an initial or renewed declaration of public-health emergency. The report must describe the information on which the Governor relied to make the initial or renewed declaration as well as a description of how this information rationally led to the Governor’s decision to make the initial or renewed declaration of public-health emergency. This section is intended to promote accountability and transparency by creating a public record of the evidentiary basis for the Governor’s declaration, which will protect against an arbitrary or capricious declaration. The specified time period permitted by this subsection between an initial or renewed declaration and the time by which the Governor must complete the report balances the need for the Governor to declare or renew a public-health emergency quickly and the need to promote accountability by creating a record describing the information and reasons that justify the initial or renewed declaration. Subsection (i) also requires that the Governor make the report publicly available.

13. Subsection (i) creates an option for a state to require that the Governor, in addition to preparing a report and making it publicly available within a specified number of days of declaring or renewing a declaration of a public-health emergency, also submit the report to the Legislature at or before the time the Governor makes the report publicly available.

14. Subsection (j) clarifies the contents of the Governor’s report in three ways. First, it requires that the Governor include in the report evidence on which the Governor relied to determine that a public-health emergency exists, including any “additional evidence” that may have come to light after the Governor declared the public-health emergency and before the

Governor has made publicly available the report required under subsection (i). Yet, this requirement no longer applies once the Governor has made the report publicly available. In that way, subsection (j) does not require the Governor to continuously update the report with new information. So, for example, a Governor might declare a public-health emergency on January 1 because there is an unusually high number of deaths that have resulted from a novel virus. On January 3 the Governor is preparing the report required under subsection (i), but the Governor has yet to make that report publicly available. On January 3, the Governor learns that infections with the virus are so widespread as to risk depleting certain medical resources, which new evidence further supports declaring a public-health emergency. Under subsection (j), the Governor would include in the report both the unusually high number of deaths from the virus and the fact that infections with the virus are causing certain medical resources to be depleted. On January 5, the Governor makes the report publicly available, and the Governor's obligation under subsection (j) to include "additional evidence" in the report ends. Second, subsection (j) clarifies that the Governor is not required to include in the report any information that is protected from disclosure by other law. Whether information is privileged, confidential, or otherwise exempt from disclosure and what, if any, exceptions may apply is determined by other law. So, for example, if other law declares that any personal information (e.g., name, address, medical history) contained in a medical record is confidential, the Governor is not required, under subsection (j), to include it in the report. Third, subsection (j) clarifies that, in the report, the Governor must explain how a declaration of a public-health emergency is rationally based on the evidence shared in the report.

15. This act does not limit the number of times the Governor may renew a declaration of a public-health emergency, but, under subsections (c) through (j), each renewal imposes on the Governor the same procedural obligations as the initial declaration. This is intended to require that the Governor reassess whether a public-health emergency continues to exist given any new developments since the initial declaration and to require that the Governor account for any new developments through the reporting obligation that is triggered upon each renewal. By setting a maximum duration for initial or renewed declarations while also permitting the Governor to renew a declaration without limitation so long as the procedural requirements are met with each renewal, this section balances the need to empower the Governor to respond effectively in the case of a public-health emergency of indeterminant duration with the need to assure accountability and transparency each time the Governor extends the duration of a declaration of a public-health emergency.

16. Subsection (k) exempts an initial or renewed declaration of public-health emergency from any rule-making procedures that might otherwise apply under state law to administrative statements of general applicability. Because a public-health emergency may require quick action with respect to substantial parts or all of the population of a state, subsection (k) exempts initial or renewed declarations from rule-making procedures that might delay appropriate action and thereby permit unnecessary harm to public health. Subsection (k) exempts initial or renewed declarations from any and all rule-making procedures, including emergency rule-making procedures because, in most jurisdictions, even these procedures can cause some delay in the effective implementation of administrative actions. This act imposes other procedural requirements that promote transparency and accountability while still empowering the Governor to act quickly and broadly to a public-health emergency.

17. When identifying the date on which an order will expire, a Governor may do so by identifying a specific date or a descriptive date. For example, a Governor might state that a particular order “expires either on [month/day/year] or upon termination of a federal declaration of public-health emergency, whichever occurs earlier.”

Section 5. Termination of Declaration of Public-Health Emergency; Report

(a) If the Governor determines that a public-health emergency no longer exists, the Governor may terminate a declaration of a public-health emergency before its term expires.

(b) If the Governor terminates a declaration of a public-health emergency under subsection (a), the Governor must do so by [executive order] in a record. The termination must be rationally based on evidence then available to the Governor about the nature of the agent or toxin giving rise to the public-health emergency and the risks posed by the agent or toxin.

(c) At the same time the Governor issues an [executive order] under subsection (b), the Governor shall:

(1) prepare a report in a record describing the evidence on which the Governor relied and the Governor’s rationale that a public-health emergency no longer exists; [and]

(2) make the report publicly available[; and]

(3) submit the report to the [Legislature]].

(d) The Governor shall exclude from the report under subsection (c) information protected by law as confidential, privileged, or otherwise exempt from disclosure.

Comment

The Governor may terminate a declaration of a public-health emergency prior to the expiration of the duration set by this act or by the Governor in the terms of such a declaration if and when the Governor determines that circumstances have changed such that they no longer meet the definition of a public-health emergency. When the Governor terminates a declaration of a public-health emergency for this reason, this section requires that the Governor have a rational basis for doing so and that the Governor articulates that rational basis in a report made publicly available and, if a state so chooses, submitted to the Legislature. The purpose of this requirement is to prevent the Governor from arbitrarily or capriciously terminating a declaration of a public-health emergency prematurely. If a Governor terminates a declaration of public-health

emergency under this section and does so using an executive order, the order shall be filed as required by other law of this state addressing executive orders.

Section 6. Public-Health Emergency Order; Renewal

(a) During the term of a declaration of a public-health emergency, the Governor may issue one or more public-health emergency orders under this section. An order may apply to all or part of a political subdivision or geographic area subject to the declaration.

(b) The Governor may issue an order in response to a public-health emergency addressing:

(1) acquisition, stockpiling, hoarding, commandeering, distribution, management, or use of drugs, devices, equipment, or tests;

(2) acquisition, allocation, distribution, management, or spending of authorized funds;

(3) zoning, operation, commandeering, management, or use of buildings, shelters, facilities, parks, outdoor space, or other physical space, and the management of activities in those places;

(4) testing, isolation, quarantine, movement, gathering, evacuation, or relocation of individuals;

(5) testing, isolation, quarantine, culling, movement, evacuation, relocation, or management of plants or animals;

(6) management of state executive-branch operations, offices, agencies, or programs;

(7) surveillance, monitoring, or assessment of the public-health emergency or any of its effects;

(8) suspension of a provision of any statute, order, rule, or regulation if strict

compliance would hinder efforts to respond to the public-health emergency or pose undue hardship or risk;

(9) access to and security of electronic communication in support of activities, including commerce, employment, education, notifications, and warnings;

(10) assessment of and response to the nature, degree, and variation of harm related to the public-health emergency, including the need for food, clothing, housing, and other necessities of life;

(11) acquisition, allocation, distribution, or management of goods, services, equipment, materials, or personnel;

(12) coordination or cooperation between or among federal, state, tribal, or local governmental entities, officials, employees, or authorities;

(13) public-health emergency planning, implementation, coordination, or training;

(14) making or performance of executive-branch agreements;

(15) development, function, operation, use, assessment, or management of warning or notification systems;

(16) assessment, operation, or management of, or access to, emergency services, including fire, police, and health-care services; and

(17) assessment, operation, or management of public transportation.

(c) The Governor also may issue any order to eliminate or reduce a risk of harm posed by the public-health emergency or to eliminate, reduce, contain, or mitigate an effect of the public-health emergency, including an effect attributable to the response to the public-health emergency. The Governor's authority under this subsection is not limited by the Governor's authority to issue a public-health emergency order under subsection (b).

(d) A public-health emergency order must be designed rationally to eliminate, reduce, contain, or mitigate a risk of harm posed by, or an effect of, the public-health emergency.

(e) When issuing a public-health emergency order, the Governor, based on then available information, shall consider:

(1) the scope and degree of each risk of harm posed by, and effect of, the public-health emergency the order is designed to eliminate, reduce, contain, or mitigate;

(2) the likelihood that the order will result in the outcome it is designed to achieve;

(3) the proportion of the affected population that likely will benefit from the outcome the order is designed to achieve;

(4) the likelihood that the order will meet the needs of, or disproportionately burden, individuals in the affected population who are particularly vulnerable to the risks of or harm from the public-health emergency because of unique characteristics, including age, gender, disability, income and other financial resources, education, employment, location, and race; and

(5) the burdens likely to result from issuing the order, including deaths, illnesses, injuries, financial losses, job losses, business closures, depletion of available financial resources, and other relevant health and economic burdens.

(f) A public-health emergency order is not subject to the rule-making procedures of [cite to state administrative procedure act].

(g) The Governor may renew a public-health emergency order if the renewal complies with Section 7.

(h) The Governor may delegate authority as authorized by other law of this state.

Comment

1. As specified in subsection (a), the Governor’s power to issue public-health emergency orders as described in this section is triggered by the Governor’s declaration of a public-health emergency.

2. Subsection (b) lists categories of orders the Governor is authorized to issue. Rather than list specific authorized orders (e.g., an order temporarily closing a school or business; an order requiring masks indoors), subsection (b) authorizes the Governor to issue orders that fall into one or more of the topical categories described in the subsection. So, for example, under the appropriate factual circumstances, the Governor would be authorized under subsection (b)(3) to issue an order temporarily closing a school because the order would address the “management of buildings...and...of activities in those places.” Similarly, under the appropriate factual circumstances, the Governor would be authorized under subsection (b)(1) to issue an indoor mask order because such an order would address the “use of devices [or] equipment.”

3. Subsections (b) and (c) each separately describe the authority of the Governor to issue public-health emergency orders. Subsection (b) describes specific categories of orders the Governor is authorized to issue. Meanwhile, subsection (c) describes the general authority of the Governor to issue orders to reduce, eliminate, contain, or mitigate the risks or the effects of the public-health emergency even when the order does not serve one of the purposes enumerated in subsection (b). This act deliberately separates the description of these two independent powers to increase the likelihood that courts will treat them as severable and will interpret them as independent powers. To further clarify that subsections (b) and (c) describe independent powers and that the list of categories in subsection (b) does not limit the scope of authority under subsection (c), subsection (c) includes the statement that the “authority under this subsection shall not be limited by the Governor’s authority to issue a public-health emergency order under subsection (b).” During the COVID-19 pandemic, some courts treated as inseverable general and specific powers to issue emergency public-health orders that appeared in the same statutory provision. See, e.g., *In re Certified Questions*, 958 N.W.2d 1, 25 (Mich. 2020) (after ruling that general statutory authority of Governor to take all “reasonable” and “necessary” actions to address an emergency violated separation of powers doctrine, and despite rules of construction to preserve statutory language when possible, holding that specific authority for Governor to issue emergency orders about traffic, building occupancy, and liquor sales, are not severable from general authority appearing in same statutory provision). Similarly, when a broad grant of public-health authority appears in the same statutory subsection as specific statements of authority, some courts have interpreted the specific powers as examples that constrain and limit the broad grant of power. See, e.g., *Corman v. Acting Sec’y of Pennsylvania Dep’t of Health*, 266 A.3d 452, 478-485 (Pa. 2021) (holding statute empowering public-health official to order “isolation,” “quarantine,” or “any other appropriate control measure” does not authorize that official to issue a mask mandate because requiring people to wear masks without first finding that they have been exposed to COVID-19 is not sufficiently similar to “isolation” and “quarantine,” which terms narrow actions that constitute “other appropriate control measures” under the statute); *James v. Heinrich*, 960 N.W.2d 350, 360–61 (Wis. 2021) (holding statute authorizing public-health official to “take all measures necessary to prevent, suppress and control communicable diseases” does not empower official to close schools because Legislature must have meant to exclude that power when, in same provision, legislature authorized official to “inspect schools” but remained silent about closing schools); *Health Freedom Def. Fund, Inc. v.*

Biden, 599 F. Supp. 3d 1144, 1157 (M.D. Fla. 2022) (holding statutory authority for CDC to regulate as “necessary” to prevent the spread of disease permits only actions such as “sanitation” and “disinfection” listed as specific measures authorized in the same provision, and the phrase “and other measures” may only include actions “akin” to the measures such as “sanitation” and “disinfection” that are expressly authorized).

4. Subsection (b) authorizes the Governor to issue public-health emergency orders in response to a public-health emergency and that fall within one or more of the purposes categorized in the subsection. The authority of the Governor to issue orders for one or more of the categorized purposes must be read in conjunction with the requirement elsewhere in the subsection that any such orders are “in response to the public-health emergency.” Additionally, the authority of the Governor under this subsection to issue orders for one or more of the enumerated purposes must be read in conjunction with the requirement in subsection (d) that any such order be designed rationally to eliminate or reduce the risks posed by the public-health emergency or to contain or mitigate the effects of the public-health emergency. Moreover, the authority of the Governor under this subsection to issue orders for one or more of the enumerated purposes must be read in conjunction with the requirement in subsection (e) that the Governor consider several factors relating to the benefits and burdens of any order the Governor might issue.

5. The purposes categorized in subsection (b) that a public-health emergency order might serve are intended to encompass an array of actions Governors or executive-branch officials might rationally take in response to a public-health emergency. These include actions that Governors have commonly taken in response to a public-health emergency, such as testing, quarantine, isolation, and disease surveillance, and the suspension of statutes, rules, or regulations concerning professional licensure or those concerning requirements for personal appearance. They also include actions that a Governor might take to respond to a novel public-health emergency or to a public-health emergency that lasts beyond the short-term.

6. Subsection (b)(6) authorizes a Governor to issue public-health emergency orders addressing the management of “executive-branch” operations, offices, agencies, or programs. The phrase “executive-branch” is intended to clarify that the Governor is not authorized by this statute to interfere in the operation of the legislative and judicial branches.

7. Subsection (c) authorizes the Governor generally to issue public-health emergency orders designed to reduce, eliminate, contain, or mitigate the risks or the effects of the public-health emergency even when the order does not serve one of the purposes enumerated elsewhere in subsection (b). This more general authority is intended to assure that the Governor has the authority needed to respond quickly and effectively to a wide range of public-health emergencies, including those that might pose novel risks requiring a broader range of authority than the enumerated purposes provide. Yet, even this more general authority is cabined by the requirement in subsection (d) that any such order be designed rationally to reduce, eliminate, contain, or mitigate the risks or the effects of the public-health emergency, and by the requirement that the Governor consider each of the substantive factors listed in subsection (e). Additionally, any order issued under this more general authority is subject to the procedural and reporting requirements elsewhere in this act.

8. Subsection (c) states that the “Governor’s authority under this subsection shall not be limited by the Governor’s authority to issue a public-health emergency order under subsection (b).” This wording is intended to clarify that the general power described in subsection (c) is independent of and should not be interpreted as constrained by the specific categories of powers listed in subsection (b). It is intended to avoid interpretations made by some courts of public-health statutes during the COVID-19 pandemic. For example, some courts ignored general statements of public-health authority when they appeared in a statute together with specific statements of authority. See *James v. Heinrich*, 960 N.W.2d 350, 360–61 (Wis. 2021) (holding statute authorizing public-health official to “take all measures necessary to prevent, suppress and control communicable diseases” does not empower official to close schools because legislature must have meant to exclude that power when, in same provision, legislature authorized official to “inspect schools” but remained silent about closing schools); *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1157 (M.D. Fla. 2022) (holding statutory authority for CDC to regulate as “necessary” to prevent the spread of disease permits only actions such as “sanitation” and “disinfection” listed as specific measures authorized in the same provision, and the phrase “and other measures” may only include actions “akin” to the measures such as “sanitation” and “disinfection” that are expressly authorized). Other courts construed specific statements of public-health authority in a statute to limit the scope of general statements of public-health authority in the same statute. See e.g., *Corman v. Acting Sec’y of Pennsylvania Dep’t of Health*, 266 A.3d 452, 478–485 (Pa. 2021) (holding statute empowering public-health official to order “isolation,” “quarantine,” or “any other appropriate control measure” does not authorize that official to issue a mask mandate because requiring people to wear masks without first finding that they have been exposed to COVID-19 is not sufficiently similar to “isolation” and “quarantine,” which terms narrow actions that constitute “other appropriate control measures” under the statute).

9. Subsection (d) establishes any public-health emergency order issued by the Governor must be rationally designed to reduce, eliminate, contain, or mitigate one or more risk or one or more effect of the underlying public-health emergency. This standard is intended to provide guidance to the Governor, to place a limitation on the scope of the Governor’s authority to issue orders during a public-health emergency, and to prevent the Governor from issuing arbitrary or capricious orders. This requirement must be read in conjunction with the reporting requirements established in Section 7.

10. Subsection (e) requires that the Governor consider several factors as a condition of issuing any order under the section. The factors are intended to assure that the Governor account for the likelihood that the order can achieve its goal, that the benefits and the burdens are distributed fairly taking into consideration vulnerable individuals, and that the benefits of issuing an order justify the burdens of doing so. The requirement that the Governor take these factors into consideration is intended to provide additional legislative guidance to the Governor and to prevent the Governor from issuing arbitrary or capricious orders. This requirement must be read in conjunction with the reporting requirements established in Section 7.

11. Subsection (f) exempts orders issued under this section from any rule-making procedures that might otherwise apply under state law to administrative statements of general applicability. Because a public-health emergency may require quick action with respect to

substantial parts of or all of the population of a state, subsection (f) exempts orders issued under this section from rule-making procedures that might delay action and thereby permit unnecessary harm to public health. Subsection (f) exempts orders issued under this section from any and all rule-making procedures, including emergency rule-making procedures because, in most jurisdictions, even these procedures can cause some delay in the effective implementation of administrative actions. This act imposes other procedural requirements that promote transparency and accountability while still empowering the Governor to act quickly and broadly to a public-health emergency.

12. Subsection (g) authorizes the Governor to renew an order, and it does not set a limit on the number of times that an order may be renewed so long as a renewed order meets the same standards that are required for an initial order.

13. Subsection (h) acknowledges that the Governor may have authority elsewhere under state law to delegate to others in the executive branch the power to issue orders under this section. This subsection does not limit those to whom the Governor may delegate this power because a variety of agencies and officials may be appropriate to involve in response to a public-health emergency.

14. An initial or renewed public-health emergency order issued under this section may be applicable to individuals, businesses, and state or local governments as determined by the Governor.

Section 7. Requirements for Public-Health Emergency Order; Report

(a) A public-health emergency order is effective only if:

(1) a declaration of a public-health emergency is in effect at the time the Governor issues the order;

(2) the order is based on evidence then available to the Governor about the nature of and risk posed by the public-health emergency, and the order is rationally designed to:

(A) eliminate or reduce the risk of harm giving rise to the public-health emergency; or

(B) eliminate, reduce, contain, or mitigate the effect of the public-health emergency;

(3) the order is based on a consideration of all of the factors under Section 6(e);

(4) the order states the goal it is designed to achieve;

(5) the order identifies the date on which it will expire, unless renewed, and the date is not later than the expiration of the declaration; and

(6) the order identifies the governmental agency or official responsible for administering each provision of the order.

(b) An action taken under a public-health emergency order by an agency or official not identified in the order under subsection (a)(6) is not invalid solely because the agency or official was not identified.

(c) Not later than [seven] days after issuing or renewing a public-health emergency order, the Governor shall:

(1) prepare a report in a record describing the evidence on which the Governor based the initial or renewed order; [and]

(2) make the report publicly available[; and

(3) submit the report to the [Legislature] at or before the time the report is made publicly available].

(d) The report under subsection (c) must include any additional evidence the Governor considered after issuing or renewing the order. The Governor shall exclude from the report information protected by law as confidential, privileged, or otherwise exempt from disclosure. The report must describe how the initial or renewed order meets the requirements under subsection (a)(2)(A) or (B).

Comment

1. Section 7 establishes substantive and procedural standards for any order issued under this act. It is intended to promote accountability to the facts related to the relevant agent or toxin and the risks they may pose to all or part of the state's population as those facts exist at the time the Governor issues or renews an order in response to a declared public-health emergency. Additionally, the process is intended to promote transparency and accountability to both the public and the Legislature through the reporting requirement established in subsection (c).

2. Subsection (c) creates an option for a state to require that the Governor, in addition to preparing a report and making it publicly available within a specified number of days of issuing or renewing a public-health emergency order, also submit the report to the Legislature at or before the time the Governor makes the report publicly available.

3. Subsection (d) clarifies the contents of the Governor's report in three ways. First, it requires that the Governor include in the report the evidence on which the Governor relied to issue or renew a public-health emergency order, including any "additional evidence" that may have come to light after the Governor issued the order and before the Governor has made publicly available the report required under subsection (c). Yet, this requirement no longer applies once the Governor has made the report publicly available. In that way, subsection (d) does not require the Governor to continuously update the report with new information. Second, subsection (d) clarifies that the Governor is not required to include in the report any information that is protected from disclosure by other law. Whether information is privileged, confidential, or otherwise exempt from disclosure and what, if any, exceptions may apply is determined by other law. Third, subsection (d) clarifies that, in the report, the Governor must explain how an order issued by the Governor meets the requirements in subsection (a)(2).

4. Subsection (a)(2) requires, among other things, that each public-health emergency order be based on evidence about the nature of and risks posed by the agent or toxin the threat or presence of which the order is designed to respond. Additionally, subsection (a)(2) requires that an order be rationally designed either to eliminate or reduce a risk posed by the public-health emergency or to eliminate, reduce, contain or mitigate an effect of the public-health emergency. This requirement is not intended to change any applicable constitutional standard of review. It is intended to promote accountability and transparency by creating a public record of the evidentiary basis for an order, which will protect against an arbitrary or capricious order.

5. The requirement to base any order on information about the nature and risks of the relevant agent or toxin is limited to evidence "then available" to the Governor. Information about the nature and risks of a public-health threat may be scant at the time the Governor must respond to a public-health emergency. For example, there may be little information about the nature and risks of a novel virus that is spreading and harming all or part of a state's population. In such a case, this section requires only that the Governor account for the little information that is then available when issuing or renewing an order to respond to the declared public-health emergency. This section does not require that the Governor wait for more complete or definitive information about the nature or risks posed by an agent or toxin before issuing any order.

6. When identifying the date on which an order will expire, a Governor may do so by identifying a specific date or a descriptive date. For example, a Governor might state that a particular order "expires either on [month/day/year] or upon termination of a federal declaration of public-health emergency, whichever occurs earlier."

Section 8. Termination of Public-Health Emergency Order

A public-health emergency order terminates at the time the first of the following occurs:

- (1) the Governor terminates the order;
- (2) the order expires;
- (3) the Governor terminates the declaration of a public-health emergency; or
- (4) the declaration expires.

Comment

1. This section identifies the different ways that a public-health emergency order is terminated.

2. Paragraph (3) establishes that a public-health emergency order terminates when the declaration of public-health emergency terminates under Section 5. This provision reflects the fact that the Governor's power to issue any public-health emergency order derives from a current and effective declaration of public-health emergency. Because the Governor is authorized to renew a declaration of public-health emergency under Section 4, the Governor may renew any public-health emergency orders under a properly renewed declaration of public-health emergency. If, however, a declaration of public-health emergency expires, then any public-health emergency order expires as a result at the same time.

Section 9. Conflict with Local Law

A public-health emergency order does not preempt an order, regulation, or ordinance of a political subdivision, except to the extent the order, regulation, or ordinance conflicts with the public-health emergency order.

Comment

This section specifies that a public-health emergency order issued by the Governor preempts the law of a political subdivision only when there is a conflict between the public-health emergency order and the law of a political subdivision and only to the extent necessary to resolve the conflict. This section is intended to permit conflict preemption and not field preemption of local law. This section is not intended to alter the authority granted to a political subdivision by other law of the state.

Section 10. Judicial Review

(a) A declaration of a public-health emergency or all or part of a public-health emergency order is subject to review as an [executive order] under other law of this state.

(b) The governmental records supporting a declaration of a public-health emergency or a

public-health emergency order include a report or record prepared in accordance with Section 4(i), 5(c), or 7(c). The court shall review the governmental records or the parts designated by the parties. The court shall apply the harmless error rule.

(c) If a provision or application of a public-health emergency order is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.

Comment

1. This section declares that actions taken under the authority granted by this act are subject to judicial review under any other law of this state empowering the state judiciary to review orders issued by a Governor. In some states this could be based on quo warranto or mandamus petitions. In other states, this might occur under a state's administrative procedure code. Standing, finality, and ripeness are determined by existing legal standards in each state.

2. Subsection (b) requires a reviewing court to apply the harmless error rule. The harmless error rule is particularly important in the review of a declaration of public-health emergency or a public-health emergency order so as to avoid public-health harm during an emergency as a result of immaterial errors.

3. Subsection (c) encourages a reviewing court to sever invalid provisions in a public-health emergency order from the remainder of such an order so as to minimize the risk of public-health harm that could result from setting aside the entire order.

4. To reduce the likelihood of harm to public health that could result by immediately setting aside a declaration of a public-health emergency or all or part of a public-health emergency order ruled to be invalid, a reviewing court may exercise any discretion it is allotted to delay temporarily setting aside the declaration or all or part of the order.

Section 11. Injunctive Relief

The [Governor], or the governmental agency or official responsible under Section 7 for administering a public-health emergency order, may seek injunctive relief to enforce the order.

Legislative Note: *Insert in the brackets the term for the appropriate state official authorized to bring an action for the state.*

Comment

This section uses the phrase “injunctive relief” to include both a court-ordered act and a

court-ordered prohibition of an act. This section should be read in conjunction with Section 12. This act does not preclude remedies available under other law as specified in Section 12(c).

Section 12. Civil [Penalty][Fine]

(a) Subject to subsection (b), each governmental agency or official responsible under Section 7 for administering a public-health emergency order may impose a civil [penalty][fine] for a knowing violation of the order of not more than \$[250] per violation.

(b) A [penalty][fine] under subsection (a) may not be imposed on a government or governmental subdivision, agency, or instrumentality or on a public official acting in an official capacity.

(c) This section does not affect a right or remedy available under other law.

Comment

1. This section should be read in conjunction with Section 11.

2. Subsection (a) establishes a maximum level of a civil fine or penalty for violations of public-health emergency orders against a person. There is no distinction between a person who is an individual or a person that is a business entity. Any fine or penalty imposed under subsection (a) is subject to existing procedural requirements applicable to the governmental agency or official imposing the fine or penalty, including the requirements of due process.

3. Subsection (b) specifies that governmental agencies and officials are not subject to a fine or penalty under subsection (a) while acting in their official capacities.

4. Subsection (c) acknowledges that an individual, business, or other person who knowingly violates a public-health emergency order, in addition to being subject to a fine or penalty, may also be subject to other consequences under other law. The governmental agency or official responsible for administering an order may be authorized under other law to take actions other than the civil fine or penalty described in this section, and subsection (c) does not displace or supersede that authority. Similarly, governmental agencies or officials other than the agency or official responsible for administering a public-health emergency order also may be empowered under other law of the state to pursue a remedy or otherwise take action against a person who knowingly violates a public-health emergency order, and subsection (c) does not displace or supersede that authority. Likewise, subsection (c) does not displace or supersede any criminal law of the state; nor does it interfere or limit the authority of a prosecutor to pursue appropriate criminal charges available under other law of the state against a person who knowingly violates a public-health emergency order.

Section 13. Private Right of Action

Sections 11 and 12 do not create a private right of action.

Comment

1. This section clarifies that Sections 11 and 12 do not create any private rights of action for individuals or entities. Rather, Sections 11 and 12 authorize only certain public officials to take action against those who violate a public-health emergency order. Although Section 12 authorizes certain public officials to impose a civil fine or penalty on a person for each violation of a public-health emergency order, it does not directly or indirectly empower any private person to pursue a monetary remedy against another person who has violated a public-health emergency order. Although Section 11 authorizes certain public officials to seek injunctive relief against any person in violation of a public-health emergency order, it does not directly or indirectly empower any private person to pursue injunctive relief against another person who has violated a public-health emergency order.

2. Section 13 does not affect the right of a person under Section 10 to challenge the legality of a declaration of public-health emergency or all or part of a public-health emergency order under other law, including other law of the state authorizing the challenge of orders issued by a Governor.

Section 14. Relation to Electronic Signatures in Global and National Commerce Act

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

Legislative Note: *It is the intent of this act to incorporate future amendments to the cited federal law. A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase “, as amended”. A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law should omit the phrase.*

Comment

The federal Electronic Signatures in Global and National Commerce Act, popularly known as “E-Sign”, was adopted in 2000 to facilitate the use of electronic records and signatures in commercial transactions. Subject to exceptions not relevant here, E-Sign mandates the acceptance of electronic contracts and electronic signatures in interstate or foreign commerce. It largely tracks the Uniform Electronic Transactions Act, adopted by the Uniform Law Commission in 1999, but includes consumer consent provisions and prohibits state law from

giving greater legal effect to any specific technology or technical specification. Under Section 102 of E-Sign, state legislation attempting to regulate electronic records and signatures can opt out of this preemption, allowing some modification to the federal law, so long as the state treats the records or signatures substantially in the same manner as they are treated by E-Sign. In order to take advantage of the exception to preemption, the state law must make specific reference to E-Sign as provided in this section. See 15 U.S.C. Section 7002(a)(2)(B).

[Section 15. Severability

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

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

Section 16. Effective Date

This [act] takes effect . . .