
State Government & Tribal Relations Committee

HB 1029

Brief Description: Concerning orders and rules during a state of emergency.

Sponsors: Representatives Walsh, Klippert, Boehnke, Eslick, Young, Graham, Kraft, Barkis and Sutherland.

Brief Summary of Bill

- Requires that a proclamation by the Governor of a state of emergency identify the area of the state where the emergency exists, the facts giving rise to the emergency, and be issued on a county-by-county basis.
- Requires that an order issued by the Governor in response to a proclamation of a state of emergency be narrowly tailored using the least restrictive means to accomplish a compelling government interest.
- Modifies the duration of, and the extension process for, a state of emergency and orders issued by the Governor after proclaiming a state of emergency.
- Authorizes a person to seek judicial review to determine whether the facts identified as giving rise to the state of emergency proclamation constitutes a circumstance addressed in current law.
- Specifies that an emergency rule adopted by an agency during a state of emergency is time-limited to 30 days after the emergency ceases to exist.
- Implements requirements for and sets time limits on emergency orders and policies issued by the Secretary of Health or local health officers in response to a proclaimed state of emergency.

Hearing Date: 2/8/21

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

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Background:

The Governor's Emergency Powers.

The Governor has authority to proclaim a state of emergency when a public disorder, disaster, energy emergency, or riot exists within the state and it affects life, health, property, or the public peace. An emergency proclamation permits the Governor to exercise the office's emergency powers. These emergency powers fall into two general categories: the power to prohibit certain activities; and the power to waive or suspend certain statutory or regulatory provisions of law.

The activities that the Governor may prohibit in the area affected by the emergency include:

- being in a public place during the hours declared to be a period of curfew;
- assembling or gathering in public streets, or public or private parks or open areas;
- the use of certain streets, highways, or other public ways; and
- other activities that the Governor reasonably believes should be prohibited to help preserve and maintain life, health, property, or the public peace.

The Governor's power to waive or suspend provisions of law includes both statutes and agency rules. Specifically, the Governor may waive or suspend statutory and regulatory obligations or limitations that prescribe the procedures for conduct of state business, and the Governor may waive or suspend state agency orders, rules, or regulations—but only if the following conditions are met::

- strict compliance with the statute, order, rule, or regulation that would in any way prevent, hinder, or delay necessary action in coping with the emergency;
- authority to waive or suspend a specific provision has not already been expressly granted to another statewide elected official;
- the waiver or suspension would not conflict with federal requirements for federal funds to the state; and
- the waiver or suspension would not conflict with First Amendment rights to freedom of speech or peaceable assembly.

The Governor may also waive or suspend statutory obligations or limitations concerning:

- liability for participation in interlocal agreements;
- inspection fees owed to the Department of Labor and Industries;
- application of the Family Emergency Assistance Program;
- regulations, tariffs, and notice requirements under the jurisdiction of the Utilities and Transportation Commission;
- application of tax due dates and penalties relating to the collection of taxes; and
- permits for industrial, business, or medical uses of alcohol.

The Governor may impose the authorized restrictions for a length in time, with conditions and exceptions, and in areas of the state as he or she deems necessary. A state of emergency terminates when the Governor proclaims that the emergency is over. The Governor must

terminate the state of emergency proclamation when order has been restored in the affected area.

Extension of the Governor's Emergency Order.

An order of the Governor that waives or suspends statutory or regulatory provisions is time-limited to 30 days, unless the order is extended by the Legislature. If the Legislature is in session, it may extend a Governor's order through concurrent resolution. If the Legislature is not in session, the Senate majority and minority leaders, the Speaker of the House of Representatives, and the minority leader of the House of Representatives may extend the Governor's order in writing.

Penalties.

Under sentencing laws, crimes are classified as a felony, gross misdemeanor, or misdemeanor. A gross misdemeanor is punishable by up to 364 days of imprisonment and a fine of up to \$5,000. A misdemeanor is punishable by up to 90 days of imprisonment and a fine of up to \$1,000.

The willful violation of a provision of an order issued under the Governor's emergency powers is a gross misdemeanor.

Rulemaking.

The Administrative Procedures Act (APA) requires agencies to follow certain procedural requirements when proposing and adopting rules of general applicability. The rulemaking requirements apply to any state department, board, commission, or officer with rulemaking authority. Generally, rulemaking is required for any agency order, directive, or regulation that subjects a person to a penalty or sanction, sets out agency procedures; determines a benefit of privilege; or involves regulating licensing or commercial activity.

An agency must follow certain procedural requirements before a rule can be adopted, such as providing notice and an opportunity for public comment. An agency may dispense with the general procedural requirements and adopt, amend, or repeal any rule on an emergency basis if an agency makes certain findings based on good cause. For example, an agency may adopt, amend, or repeal any rule on an emergency basis if the agency finds good cause that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that compliance with the general procedural requirements would be contrary to the public interest.

Actions by the Secretary of Health and Local Health Officers.

The Secretary of Health (Secretary) is the executive head and appointing authority of the Department of Health (DOH). The Secretary's responsibilities include:

- strictly enforcing all laws, rules, regulations, and orders of the State Board of Health for the protection of the public health;
- enforcing public health laws of the state and rules and regulations promulgated by the DOH when an emergency exists and the local board of health fails to act;
- investigating outbreaks and epidemics of disease that may occur;

- assuming the same authority as the local health officer when in an emergency and the safety of the public demands it; and
- taking measures as necessary to promote the public health and participate in health educational training or training activities.

Local health officers act under the direction of the local board of health and are legally qualified physicians who have been appointed as the health officer for the county or district public health department. A local health officer's duties include:

- enforcing the public health statutes; rules of the State Board of Health and the Secretary; and local health rules, regulations, and ordinances;
- taking action as necessary to maintain health and sanitation supervision over their jurisdiction;
- controlling and preventing the spread of any dangerous, contagious, or infectious diseases that may occur within their jurisdiction; and
- taking measures as necessary to promote the public health and participate in health educational training or training activities.

Summary of Bill:

The Governor's Emergency Powers.

A proclamation of a state of emergency by the Governor must identify the area of the state where the emergency exists. Proclamations must be issued county-by-county; a single proclamation may not contain areas that reach beyond the boundaries of a single county. If the identified area includes multiple counties, the Governor may issue separate proclamations for each impacted county to address simultaneous emergencies arising from the same set of facts constituting the emergency.

A proclamation of a state of emergency must also identify the specific facts giving rise to the emergency as well as the specific facts that will constitute order being restored in the affected area. The facts giving rise to a proclamation of a state of emergency may not include circumstances addressed in existing statute or regulations. A person may seek judicial review in superior court of the appropriate county to determine whether the facts, as stated in the proclamation as constituting the emergency, is a circumstance addressed in existing law. Such a judicial determination voids the proclamation of emergency.

A state of emergency terminates when the Governor proclaims that the emergency is over, or 14 days after the proclamation of a state of emergency is signed by the Governor unless extended by the Legislature; whichever is earlier. If the Legislature is in session, the proclamation may be extended by concurrent resolution. If the Legislature is not in session, the state of emergency may be extended in writing by the leadership of the Senate and the House of Representatives until it can be extended by concurrent resolution. "Leadership" includes the majority and minority leaders from each chamber.

After proclaiming a state of emergency, if the Governor prohibits other activities outside of the

specific activities under statute, the activities prohibited must be those that the Governor reasonably believes must be prohibited to help preserve and maintain life, health, property, or the public peace.

Orders establishing prohibitions in the affected area and orders concerning waiver or suspension of statutory obligations or limitations must be narrowly construed and use the least restrictive means to accomplish a compelling government interest to protect the public.

Extension of the Governor's Emergency Order.

An order of the Governor that prohibits certain activities, or waives or suspends statutory or regulatory provisions, is time-limited to 14 days unless the order is extended or modified by the Legislature. If the Legislature is in session, it may extend a Governor's order through concurrent resolution. If the Legislature is not in session, the Senate majority and minority leaders, the Speaker of the House of Representatives, and the minority leader of the House of Representatives may extend or modify the Governor's order in writing for up to 30 days, until the Legislature can extend it by concurrent resolution.

Penalties.

The willful violation of a provision of an order issued under the Governor's emergency powers is a misdemeanor.

Rulemaking.

Within three days of adopting an emergency rule during a proclaimed state of emergency, an agency must provide an opportunity for oral comment and notice of the hearing. An emergency rule adopted during a proclaimed state of emergency is time-limited to 30 days after the state of emergency is terminated.

Actions by the Secretary of Health and Local Health Officers.

When the Secretary exercises the same authority as the local health officer for reason of an emergency concerning the safety of the public health, the Secretary may only do so when in a proclaimed state of emergency. An emergency order or policy issued by the Secretary in response to a proclaimed state of emergency must identify the area of the state where the emergency exists. A single proclamation may not contain areas that reach beyond the boundaries of a single county. If the identified area includes multiple counties, the Secretary may issue separate proclamations for each impacted county to address simultaneous emergencies arising from the same set of facts constituting the emergency.

Any emergency order issued by the local health officer, or emergency order or policy issued by the Secretary, must be narrowly tailored, using the least restrictive means to accomplish a compelling government interest to protect the public.

An emergency order issued by the local health officer, or emergency order or policy issued by the Secretary, is time-limited to 14 days unless the order or policy is extended or modified by the Legislature. If the Legislature is in session, it may extend or modify an order or policy through

concurrent resolution. If the Legislature is not in session, the Senate majority and minority leaders, the Speaker of the House of Representatives, and the minority leader of the House of Representatives may extend or modify the order in writing for up to 30 days, until the Legislature can extend the order or policy by concurrent resolution.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill contains an emergency clause and takes effect immediately.