

The Public-Health Emergency Authority Act:

A Framework for Unchecked
Gubernatorial Power

By Don Grande

Public health emergency declarations and the policies that flow from them are fresh in the minds of the American public, with the actions taken by federal, state, and local governments during the COVID-19 pandemic continuing to be fiercely debated. Substantial questions remain concerning the source and accuracy of public health information used to justify the response to the pandemic, and over the costs and benefits of the policies imposed by government at all levels.

Despite these concerns, the Uniform Law Commission has introduced a model bill—the Public-Health Emergency Authority Act (PHEAA)¹—and recommended its enactment by every state legislature in the United States. This model act would give a governor and state health officials sweeping authority during a declared public health emergency with minimal, if any, input by the legislature.

ULC Background

The Uniform Law Commission (ULC)—also known as the National Conference of Commissioners on Uniform State Laws—was created more than 130 years ago with the purpose of researching, drafting, and promoting the enactment of uniform state laws where uniformity is “desirable and practical.”²

The organization is comprised of lawyers, judges, legislators, 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.³ According to the ULC’s website, it “provides states with non-partisan, well-conceived and well-drafted legislations that brings clarity and stability to critical areas of state statutory law.”⁴

In July 2021, the ULC formed a drafting committee on public health emergency authority. It subsequently presented the PHEAA at the ULC’s annual meeting in July 2023, during which the ULC ultimately approved the PHEAA for distribution to state legislatures.⁵ The PHEAA seeks to expand upon the Model State Emergency Health Powers Act,⁶ which was funded by the federal government and developed by the Centers for Disease Control and Prevention, Georgetown University, and Johns Hopkins University in the wake of the September 11, 2001 terrorist attacks.

However, as the prefatory note of the PHEAA drafting committee explains, “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

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Uniform Law Commission

all many of the actions that became necessary during the COVID-19 pandemic.”⁷ To correct this perceived deficiency, the goal of the PHEAA “is to empower a Governor to act quickly and decisively while also clarifying substantive and procedural limitations to a Governor’s authority.”⁸

The language within this model legislation pays little consideration to the fact that unilateral executive authority during the COVID-19 pandemic was often wielded based upon deeply flawed information and questionable sources. The true targets of the PHEAA are the handful of state legislatures that pushed back against the “consensus” and challenged gubernatorial authority throughout the pandemic. True to its name, the ULC seeks uniformity: the inherent

uniformity of executive authority without legislative interference.

The PHEAA⁹

The PHEAA’s definition of “public-health emergency,” found in Section 2 of the Model Act, is broad and non-exclusive. The Act states that such an 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; (D) substantial adverse impact on the availability of medical, public health, or other emergency resources.” The drafting committee’s comments state this definition “accounts for public-health preparedness lessons learned since 2001.” The “lessons” to which the comments refer become clear as one reviews the Act.

Section 3 of the Model Act gives the governor exclusive emergency authority, and allows the governor to delegate that authority to any state or local officials and agencies.

Section 4 of the PHEAA explicitly states that a declaration of a public health emergency is not subject to the typical rule-making procedures within the state. The Act provides the governor with the authority to issue a public health emergency declaration lasting from 45 to 90 days. To renew the declaration prior to its expiration, the governor is required to provide notice to the legislature, as long as the legislature is in session or will “have an opportunity to be in session” no later than five days before the renewal takes effect. Pursuant to the drafting committee’s comments,

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the committee considered whether to require the legislature to ratify a renewal of the declaration, but ultimately determined that this would unduly limit the governor’s authority.

Moreover, the PHEAA puts no limit upon the number of times a declaration can be renewed, subject to the requirements listed above. In addition, if the governor does not want to comply with the

forementioned stipulations, the governor can issue the same or a similar order by waiting 15 days after the expiration of the prior order. There is no limitation upon re-issuing such declarations, either.

Once an emergency is declared, the governor is required to issue a report to both the public and the legislature containing the evidence and information the governor relied upon to issue the declaration. While this provision is intended to be an

important safeguard against abuse of gubernatorial authority, this provision would be quite easy to meet, in practice.



The information required to be disclosed is limited to what is “then available” to the governor. Further, the drafting committee provides guidance if the emergency stems from something new or novel.

According to the committee: “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.”

To provide a relevant present-day example, nations are currently considering a pandemic treaty with the World Health Organization (WHO) that would grant the WHO the authority to declare pandemics.¹⁰ Under the PHEAA, a pandemic declaration issued by the WHO would provide sufficient justification for a governor to declare a public health emergency.

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World Health Organization

Section 6 of the Model Act sets out 17 broad categories that can be addressed in an emergency declaration, including:

- (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, evacuation, or relocation of individuals;
- (5) testing, isolation, quarantine, culling, movement, evacuation, relocation, or management of plants or animals;
- (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;
- (11) acquisition, allocation, distribution, or management of goods, services, equipment, materials, or personnel.

In case the 17 categories are not sufficient, Section 6(c) states: “The Governor also may issue any order to eliminate or reduce a risk of harm posed by the public-health emergency...”

A public-health emergency declaration under the PHEAA could be terminated only by an act of the governor or the expiration of the declaration’s term. The legislature would not have a meaningful role to play once the Act is in effect.

Summary and Comment

This Model Act does not apply any of the lessons learned during the COVID-19 pandemic related to the source and veracity of the information relied upon to justify governmental action. It also does not address concerns over the negative consequences and costs inflicted by such actions.

This Model Act is intended to limit the role of state legislatures in addressing public-health emergencies. The committee’s prefatory note points to “uncertainties” in certain states over the authority to issue public-health orders. The committee states, “Moreover, these same uncertainties have resulted in state legislation clawing back core public-health emergency powers from Governors and executive-branch officials.”¹¹ The intent is quite clear.

The purported guardrails and accountability sections of the bill would provide little, if any, protections in practice. Experience from the recent pandemic shows just how easily government officials can justify wide-ranging state actions.

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The enumerated categories that could be addressed during an emergency declaration under the PHEAA are broad and sweeping. The potential for unwarranted restrictions on individuals and small businesses is very high.

As it currently stands, the PHEAA would provide broad authority to the governor and any delegated authorities to implement and enforce state action with little accountability or oversight. As such, it would behoove legislators to carefully review this Model Act and the drafting committee’s comments

before acting upon this legislation.

Endnotes

- 1 National Conference of Commissioners on Uniform State Laws, “Model Public-Health Emergency Authority Act,” Final Act with Comments, October 3, 2023, https://www.uniformlaws.org/committees/community-home/librarydocuments?attachments=&communitykey=7a88c160-5910-4e41-9dff-018a850ef3b2&defaultview=&libraryentry=b141a455-7df9-4544-b77d-018a86091a1f&libraryfolderkey=&pageindex=0&pagesize=12&search=&sort=most_recent&viewtype=row
- 2 National Conference of Commissioners on Uniform State Laws, “Model Public-Health Emergency Authority Act.”
- 3 National Conference of Commissioners on Uniform State Laws, “Model Public-Health Emergency Authority Act.”
- 4 Uniform Law Commission, “About Us,” [uniformlaws.org](https://www.uniformlaws.org/aboutulc/overview), accessed December 7, 2023, <https://www.uniformlaws.org/aboutulc/overview>.
- 5 Katie Robinson, “ULC 2023 Annual Meeting Highlights,” Uniform Law Commission, August 2, 2023, <https://www.uniformlaws.org/discussion/ulc-2023-annual-meeting-highlights>
- 6 Johns Hopkins University, “The Model State Emergency Health Powers Act,” publichealth.jhu.edu, December 21, 2001, <https://publichealth.jhu.edu/sites/default/files/2023-06/msehpa.pdf>
- 7 National Conference of Commissioners on Uniform State Laws, “Model Public-Health Emergency Authority Act.”
- 8 National Conference of Commissioners on Uniform State Laws, “Model Public-Health Emergency Authority Act.”
- 9 Most citations within this section refer to: National Conference of Commissioners on Uniform State Laws, “Model Public-Health Emergency Authority Act.” Any additional citations are otherwise noted.
- 10 World Health Organization, “DRAFT: Negotiating Text of the WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response (WHO Pandemic Agreement),” healthpolicy-watch.news, October 16, 2023, https://healthpolicy-watch.news/wp-content/uploads/2023/10/advance-DRAFT_Negotiating-Text_INB-Bureau_16-Oct-2023.pdf
- 11 National Conference of Commissioners on Uniform State Laws, “Model Public-Health Emergency Authority Act.”

Don Grande is an attorney in private practice focusing in the areas of business law, trust and estate law, real property, mineral law, and qualified retirement plan (ERISA) law. Don has also acted as local counsel in Pro-Life litigation in North Dakota. Prior to opening his law firm, Don worked for 20 years in banking and trust sector. Don is active in public policy, primarily at the state level, on issues related to law, individual rights, and small business. Don has been married to Bette for 43 years and they have 3 children and 4 grandchildren.



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