

OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY

DIRECTOR
Sharon L. Eubanks

DEPUTY DIRECTOR
Julie A. Pelegrin

REVISOR OF STATUTES
Jennifer G. Gilroy

ASSISTANT DIRECTORS
Jeremiah B. Barry Gregg W. Fraser
Christine B. Chase Duane H. Gall

PUBLICATIONS COORDINATOR
Kathy Zambrano



**COLORADO STATE CAPITOL
200 EAST COLFAX AVENUE SUITE 091
DENVER, COLORADO 80203-1716**

**TEL: 303-866-2045 FAX: 303-866-4157
EMAIL: OLLS.GA@STATE.CO.US**

MANAGING SENIOR ATTORNEYS
Michael J. Dohr Robert S. Lackner
Jason Gelender Thomas Morris

SENIOR ATTORNEYS
Jennifer A. Berman Nicole H. Myers
Brita Darling Jery Payne
Edward A. DeCecco Jane M. Ritter
Kristen J. Forrestal Richard Sweetman
Yelana Love Esther van Mourik

SENIOR ATTORNEY FOR ANNOTATIONS
Michele D. Brown

STAFF ATTORNEYS
Jacob Baus Shelby L. Ross
Conrad Imel Megan Waples
H. Pierce Lively

MEMORANDUM

TO: Executive Committee of the Legislative Council
FROM: Office of Legislative Legal Services
DATE: March 10, 2020
SUBJECT: Governor's Constitutional and Statutory Emergency Powers¹

Legal Question

What are the governor's constitutional and statutory powers in case of a declared emergency?

Short Answer

The governor's emergency powers under the constitution are limited, but he may cite to some of his general constitutional authority to support actions taken during an emergency. The governor's statutory emergency powers are significantly more extensive and include the ability to procure supplies of medicines and vaccines, quarantine persons and property, and transfer to the disaster emergency fund money appropriated for other purposes.

¹ This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

Discussion

1. Governor's Constitutional Emergency Powers

The state constitution specifically grants the governor emergency powers in only two places, only one of which is pertinent in this situation.² Under Article VIII, section 3 of the Colorado Constitution, if the governor determines that a disaster emergency exists that substantially affects the ability of the state government to operate in the city and county of Denver, the governor may declare a disaster emergency. After that, and after consulting with the chief justice of the Colorado Supreme Court, the president of the Senate, and the speaker of the House of Representatives, the governor may designate a temporary meeting location for the General Assembly. The General Assembly must then convene in the temporary meeting location, and it may pass a bill to designate a temporary location for the seat of government. The bill must include a date on which the temporary location of the seat of government expires. In this context, "seat of government" means the location of the legislative, executive, and judicial branches of the state of Colorado.

In addition to this power, the governor may cite to three general constitutional powers as authority for actions taken during an emergency. Article IV, section 2 of the Colorado Constitution states that the "supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed." While this is a broad grant of authority, it does not alone grant to the governor emergency powers that are not otherwise specified in the constitution or in statute.

Article IV, section 5 of the Colorado Constitution identifies the governor as the commander-in-chief of the state military forces and grants him the power to call out the militia to execute the laws, suppress insurrection, or repel invasion. If the governor thinks military assistance is necessary to execute emergency statutes or executive orders, or even that an emergency situation is creating or is likely to create an insurrection,³ he may choose to exercise his authority by activating the state military.

Article IV, section 9 of the Colorado Constitution authorizes the governor, on "extraordinary occasions" to convene the General Assembly in a special legislative

² Colo. Const. art. XXVIII, § 17, concerns a sole-source contractor who loses the eligibility to contract due to campaign finance violations and the Governor's ability to suspend the contractor's ineligibility during a declared state of emergency.

³ The U.S. Supreme Court has held that a governor's determination that a state of insurrection exists is conclusive of that fact. *Moyer v. Peabody*, 212 U.S. 78, 29 S.Ct. 235, 53 L.Ed. 410 (1909).

session. If the governor determines that statutory changes or funding is required to address an emergency situation, the governor may exercise his authority to call a special legislative session for these purposes.

2. Governor's Statutory Emergency Powers

Part 7 of article 33.5 of title 24, C.R.S., most fully addresses the governor's emergency powers. Under these statutes, the governor is responsible for "meeting the dangers to the state and people presented by disasters,"⁴ and the governor is authorized to issue executive orders, proclamations, and regulations, all of which would have the force and effect of law.⁵

In establishing the governor's emergency powers, the statute defines "disaster" as "the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural cause or cause of human origin, including but not limited to ... epidemic."⁶ "Emergency" is defined as "an unexpected event that places life or property in danger and requires an immediate response through the use of state and community resources and procedures."⁷ And "emergency epidemic" is defined as "cases of an illness or condition, communicable or noncommunicable, caused by bioterrorism, pandemic influenza, or novel and highly fatal infectious agents or biological toxins."⁸ Arguably, increasing numbers of COVID-19 cases qualifies as an emergency epidemic caused by a novel and highly fatal infectious agent.

If the governor finds that a disaster, including an emergency epidemic, has occurred or is imminent, he may issue an executive order or proclamation declaring a disaster emergency. The disaster emergency would continue until the governor issues a subsequent executive order or proclamation terminating it, but cannot continue longer than thirty days unless the governor specifically extends it. The general assembly may terminate a disaster emergency at any time by passing a joint resolution, which would require the governor to issue an executive order terminating the disaster emergency.

⁴ §24-33.5-704 (1), C.R.S.

⁵ §24-33.5-704 (2), C.R.S.

⁶ §24-33.5-703 (3), C.R.S.

⁷ §24-33.5-703 (3.5), C.R.S.

⁸ §24-33.5-703 (4), C.R.S.

If the governor declares a disaster emergency, the executive order or proclamation must specify the nature of the disaster, the area threatened, and the conditions that caused the disaster emergency or that would cause it to terminate. The governor must ensure that the executive order or proclamation is promptly and publicly disseminated and filed with the appropriate government agencies.

Specific to the current circumstances, the governor may convene the expert emergency epidemic response committee (committee) created in section 24-33.5-704.5, C.R.S., (see Attachment A) to assist him in determining whether to declare a disaster emergency. When convened by the governor, the committee will consider evidence presented by the chief medical officer of the department of public health and environment or the state epidemiologist that an emergency epidemic exists or is imminent. If the committee so finds, the executive director of the department of public health and environment must advise the governor to declare a disaster emergency.

After that, the committee will convene as often as necessary to advise the governor in issuing an executive order regarding reasonable and appropriate measures to reduce or prevent the spread of the disease or agent. The measures may include, but are not limited to:

- Procuring or taking supplies of medicines and vaccines;
- Ordering physicians and hospitals to transfer or cease admission of patients or to perform medical examinations of persons;
- Isolating or quarantining persons or property;
- Determining whether to seize, destroy, or decontaminate property or objects that may threaten the public health;
- Determining how to safely dispose of corpses and infectious waste;
- Assessing the adequacy and potential contamination of food and water supplies;
- Providing mental health support to affected persons; and
- Informing citizens how to protect themselves, what actions are being taken to control the epidemic, and when the epidemic is over.

The statute requires the committee to meet annually to review and amend a supplement to the state comprehensive emergency management program that addresses the public health response to acts of bioterrorism, pandemic influenza, and epidemics caused by novel and highly fatal infectious agents. The committee must

include in the supplement a proposal for the prioritization, allocation, storage, protection, and distribution of antibiotic medicines, antiviral medicines, antidotes, and vaccines that may be needed and in short supply in the event of an emergency epidemic.

The statute also requires each department that administers a publicly funded safety net program to develop and annually update a continuity of operations plan to establish procedures for the department's response to and continuing operations during an emergency epidemic.⁹

Declaring a disaster emergency of any kind gives the governor access to the disaster emergency fund.¹⁰ The stated legislative intent is that money required during a disaster first be paid from money regularly appropriated to state and local agencies. But if the governor finds that the demands in coping with a particular disaster are unreasonably great, the governor may make money available from the disaster emergency fund. And, if the money in the fund is insufficient, the governor "may transfer to the fund and expend money appropriated for other purposes."¹¹ The declaration of a disaster emergency also authorizes expenditures from the state emergency reserve fund created pursuant to Art. X, section 20 of the Colorado Constitution.¹²

Further, during any type of disaster emergency, the governor may:

- Suspend a statute that prescribes the procedures for conducting state business or the rules of any state agency, if strict compliance with the statute or rule would prevent or delay necessary action in coping with the disaster emergency;
- Use all available resources of the state government and of each political subdivision of the state as reasonably necessary to cope with the disaster emergency;
- Transfer the direction, personnel, or functions of state departments for the purpose of performing or facilitating emergency services;

⁹ §24-33.5-704.5 (2), C.R.S.

¹⁰ *See generally* §24-33.5-706, C.R.S.

¹¹ §24-33.5-706 (4)(b), C.R.S.

¹² §24-77-104 (3)(b), C.R.S.

- Subject to any applicable statutory requirements for compensation, commandeer or use any private property if necessary to cope with the disaster emergency;
- Direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if deemed necessary for disaster mitigation, response, or recovery, including preservation of life;
- Prescribe routes, modes of transportation, and destinations in connection with evacuation;
- Control ingress to and egress from a disaster area, the movement of persons within the area, and the occupancy of premises therein;
- Suspend or limit selling, dispensing, or transporting alcoholic beverages, firearms, explosives, or combustibles;
- Provide for the availability and use of temporary emergency housing; and
- Determine the percentage at which the state and a local government will contribute money to cover the nonfederal cost share required by federal law to receive federal disaster relief funds. The governor must notify the joint budget committee of the source and amount of state money to be contributed to cover a nonfederal cost share.

Declaring a disaster emergency activates the disaster response and recovery aspects of the applicable state, local, and interjurisdictional disaster emergency plans¹³ and authorizes the use of any forces to which the plans apply and the use or distribution of any supplies, equipment, and materials arranged to be made available in the case of an emergency. The governor may choose to convene a disaster policy group to coordinate policy-level decision-making and advise the governor.

The statutes¹⁴ also authorize the governor to direct the state departments in providing disaster relief. This relief may include:

¹³ The office of emergency management oversees the comprehensive emergency management program, including policies, plans, and procedures for emergency and disaster response. *See* §24-33.5-705, C.R.S.

¹⁴ §§24-33.5-1105 et seq., C.R.S.

- Aid in performing essential community services, public information and assistance in health and safety measures, technical advice on management and control, and reduction of immediate threats to public health and safety;
- Assistance in distributing medicine, food, and other consumable supplies or emergency assistance;
- Temporary housing for disaster victims;
- Debris removal; and
- Financial assistance to meet disaster-related necessary expenses or serious needs of individuals or families affected by the disaster up to \$5,000.

ATTACHMENT A

24-33.5-704.5. Governor's expert emergency epidemic response committee - creation. (1) (a) There is hereby created a governor's expert emergency epidemic response committee. The committee shall:

(I) Meet at least annually to review and amend, as necessary, the supplement to the state comprehensive emergency management program created in section 24-33.5-705 (2) that is concerned with the public health response to acts of bioterrorism, pandemic influenza, and epidemics caused by novel and highly fatal infectious agents; and

(II) Provide expert public health advice to the governor in the event of an emergency epidemic.

(b) (I) State members of the committee include:

(A) The executive director of the department of public health and environment;

(B) The chief medical officer of the department of public health and environment;

(C) The chief public information officer of the department of public health and environment;

(D) The emergency response coordinator for the department of public health and environment;

(E) The state epidemiologist for the department of public health and environment;

(F) The attorney general or the attorney general's designee;

(G) The president of the state board of health or the president's designee;

(H) The president of the state medical society or the president's designee;

(I) The president of the Colorado health and hospital association or the president's designee;

(J) The state veterinarian of the department of agriculture;

(K) The director of the division of homeland security and emergency management; and

(L) The executive director of the department of local affairs or the executive director's designee.

(II) In addition to the state members of the committee, the governor shall appoint to the committee an individual from each of the following categories:

- (A) A licensed physician who specializes in infectious diseases;
- (B) A licensed physician who specializes in emergency medicine;
- (C) A medical examiner;
- (D) A specialist in post-traumatic stress management;
- (E) A director of a county, district, or municipal public health agency;
- (F) A hospital infection control practitioner;
- (G) A wildlife disease specialist with the division of wildlife; and
- (H) A pharmacist member of the state board of pharmacy.

(III) The executive director of the department of public health and environment shall serve as the chair of the committee. A majority of the membership of the committee, not including vacant positions, constitutes a quorum.

(IV) The executive director of the department of public safety or the executive director's designee shall serve as an ex officio member of the committee and is not able to vote on decisions of the committee. He or she shall serve as a liaison between the committee and the emergency planning subcommittee of the homeland security and all-hazards senior advisory committee created in section 24-33.5-1614 (3.5) in the event of an emergency epidemic.

(c) The committee shall include in the supplement to the state disaster plan a proposal for the prioritization, allocation, storage, protection, and distribution of antibiotic medicines, antiviral medicines, antidotes, and vaccines that may be needed and in short supply in the event of an emergency epidemic.

(d) The committee shall convene at the call of the governor or the executive director of the department of public health and environment to consider evidence presented by the department's chief medical officer or state epidemiologist that there is an occurrence or imminent threat of an emergency epidemic. If the committee finds that there is an occurrence or imminent threat of an emergency epidemic, the executive director of the department of public health and environment shall advise the governor to declare a disaster emergency.

(e) In the event of an emergency epidemic that has been declared a disaster emergency, the committee shall convene as rapidly and as often as necessary to advise the governor, who shall act by executive order, regarding reasonable and appropriate measures to reduce or prevent spread of the disease, agent, or toxin and to protect the public health. Such measures may include:

- (I) Procuring or taking supplies of medicines and vaccines;
- (II) Ordering physicians and hospitals to transfer or cease admission of patients or perform medical examinations of persons;
- (III) Isolating or quarantining persons or property;
- (IV) Determining whether to seize, destroy, or decontaminate property or objects that may threaten the public health;
- (V) Determining how to safely dispose of corpses and infectious waste;
- (VI) Assessing the adequacy and potential contamination of food and water supplies;
- (VII) Providing mental health support to affected persons; and
- (VIII) Informing the citizens of the state how to protect themselves, what actions are being taken to control the epidemic, and when the epidemic is over.

(2) Each department that administers a publicly funded safety net program shall develop a continuity of operations plan. The plan shall establish procedures for the response by, and continuation of operations of, the department and the program in the event of an emergency epidemic. Each department shall file its plan with the executive director of the department of public health and environment and shall update the plan at least annually. In addition, notwithstanding section 24-1-136 (11), each department shall submit a report by March 1 of each year to the health and human services committee of the senate and the public health care and human services committee of the house of representatives, or any successor committees, regarding the status of the department's plan, as well as the status of any other plans or procedures of the department regarding emergency and disaster preparedness.