



November 4, 2020

Hon. Xavier Becerra
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Anabel Renteria
Initiative Coordinator

Dear Attorney General Becerra:

Pursuant to Elections Code Section 9005, we have reviewed the proposed statutory initiative (A.G. File No. 20-0004) related to limiting government powers during a public health emergency.

BACKGROUND

Government Authorized to Respond to Emergencies. Existing law in California provides the state and local governments with powers to respond to emergency situations to mitigate the impacts of emergencies that threaten the lives and safety of people and property. These powers generally become available once a disaster has been declared. However, state law also allows local governments to respond to some public health emergencies through orders that do not require a disaster declaration.

Government Authorized to Declare Emergencies Under Various Conditions. The Governor can declare a state of emergency when the Governor finds that there exist conditions of extreme peril to the safety of persons and property caused by various conditions such as fire, flood, storm, earthquake, and epidemic. In the past several years, for example, the Governor has declared a state of emergency related to public health issues. This includes emergency declarations related to the novel coronavirus disease 2019 (COVID-19) in 2020, Hepatitis A in 2017, H1N1 influenza virus in 2009, and the West Nile virus in 2007.

Similarly, local governments can declare a local state of emergency. In recent years, local governments have declared local emergencies to respond to the above diseases as well as emergencies from various toxic hazards. In particular, after major wildfires, local governments have declared local public health emergencies in order to quickly access burned private properties to facilitate the removal of household toxic materials. Local emergencies have also been declared to respond to other toxic contaminants that pose a risk to public health, such as petroleum seepage, lead contamination, and asbestos.

State and Local Governments Have Significant Powers During a State of Emergency.

During a declared state of emergency, the Governor and local governments have significant powers that allow the government to respond quickly to circumstances that threaten the lives and safety of people and property. (Local laws and regulations can also govern the specific ways in which communities respond to emergencies.)

Some of the major emergency powers provided in existing state law include:

- ***Redirecting State Resources.*** The Governor can direct state agencies to use personnel, equipment, and facilities to respond to a declared emergency, including redirecting funding provided for other purposes to instead respond to the emergency. The Governor can also spend any legally available funds in the state treasury to respond to an emergency. Under some circumstances, the state and local governments receive reimbursements from the federal government for certain eligible emergency costs within a specified federal and state cost share.
- ***Issuing Emergency Orders.*** The Governor has the authority to issue and enforce orders and regulations. Local governments can issue emergency orders and regulations to respond to a local emergency.

During past declared public health emergencies, the Governor and local governments have used the above authority to mitigate the spread of disease and protect communities from toxic contamination. Examples of major actions taken in past emergencies include:

- Requiring infected individuals to quarantine themselves to prevent the spread of illness.
- Waiving certain state requirements and restrictions that exist on medical facilities to allow hospitals to quickly expand their capacity to treat additional patients.
- Establishing alternate hospitals to handle a potential surge in patients by waiving certain contracting requirements.
- Spending funds to purchase personal protective equipment, such as masks, gloves, and gowns to be distributed to hospitals, schools and others.
- Prioritizing the distribution of a vaccination to high-risk populations.
- Issuing stay at home, or shelter in place, orders.
- Accessing private properties to clean up toxic contaminants.
- Preventing people from accessing hazardous areas until the public health issue is addressed.

Some Local Public Health Orders Can Be Issued Without Declared Emergency. Local governments can also issue public health orders without declaring an emergency to respond to less serious or more contained public health issues. For example, if restaurants do not comply with all health and safety requirements for food preparation to prevent the spread of foodborne

illnesses, they may be issued public health orders to meet the requirements under a specified time frame.

Proposal

Prohibits Use of Emergency Powers to Respond to Public Health Emergencies. This measure would prohibit the Governor and local governments from using emergency powers to respond to public health emergencies, such as redirecting state resources and issuing emergency orders. The measure defines public health emergencies to include epidemics, outbreaks of infectious disease, or other similar conditions that threaten public health. The measure would allow the state and local governments to have an advisory role during public health emergencies and allow them to issue informational public health guidance, but they could not enforce specific requirements.

Accordingly, the state and local governments would be unable to use emergency powers to take most of the actions taken to respond to past public health emergencies, such as requiring infected individuals to quarantine; facilitating increased hospital capacity; or redirecting state personnel, equipment, and funding to respond to an outbreak. Similarly, the measure would prohibit local governments from using emergency powers to facilitate the clean-up of toxic contamination that poses a public health hazard.

Prohibits Certain Local Public Health Orders. This measure would also prohibit local governments from responding to a public health issue that meets the conditions of a public health emergency even if an emergency is not declared. However, this measure does not define what types of public health issues are subject to this prohibition. It is possible that this measure could be interpreted to prohibit local governments from issuing certain local health orders, such as those issued to prevent the spread of foodborne illnesses.

Fiscal Effects

Unknown Fiscal Effect on the State and Local Governments. This measure could impact both the state and local government costs and revenues in different ways. However, the actual fiscal impact is unknown and would depend on numerous factors that are difficult to predict. These include the type of public health emergencies that will be experienced in the future, as well as the frequency and severity of those emergencies. The fiscal impact would also depend on the extent to which the prohibitions on the state and local government response activities results in public health emergencies being more widespread, lasting for a longer amount of time, resulting in a greater number of deaths, or having other consequences.

For example, the measure could reduce costs by preventing the state and local governments from incurring costs related to prohibited response activities, such as procuring additional hospital space. On the other hand, the limits on the state's ability to respond could result in more severe public health emergencies, resulting in reduced business activity and tax revenue. In addition, the limits on response activities could mean the state and local governments qualify for less federal disaster assistance funding. This is because such funding is often received only if the state or local governments engage in response activities that could be prohibited by the measure.

Summary of Fiscal Effect. This measure would have the following major fiscal effect:

- Unknown, but potentially significant, fiscal effect due to the state and local governments being restricted in responding to public health emergencies.

Sincerely,

Gabriel Petek
Legislative Analyst

Keely Martin Bosler
Director of Finance