

Sentinel Surveillance of Emerging Laws Limiting Public Health Emergency Orders

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Introduction

Throughout the COVID-19 pandemic, legislators in almost every state have introduced bills that would limit state executive authority to respond to the current pandemic or future public health emergencies.¹ Between January 1, 2021, and May 20, 2022, one or more of these bills were enacted into law and became effective in 21 states.² Some of these laws prohibit governors or state health officials from taking action to enact measures to protect the public from the spread of deadly disease, including mandating the use of masks, requiring vaccination, or closing businesses, among others. Laws that restrict the authority of governors, state health officials and/or local health officials to act in times of emergency could significantly impact public health by limiting their ability to take actions necessary to respond to or mitigate crises in a swift and flexible way.³ Based on history, expertise, and existing research — which, as described below, is not yet conclusive or complete — there is reason to believe that laws limiting reasonable and expert public health authority may pose a preventable threat to life and health.

While these laws are dangerous for all people living in the United States, they are likely to have a particularly harsh effect on Black, Indigenous and other communities of color. COVID-19 has disproportionately impacted Black, Latinx, Indigenous, and Pacific Islander populations in the United States, both in terms of their health and economic well-being.^{4,5} These disparities arose because of historic and systemic racial injustices, with much broader impacts than those related to COVID-19.⁶ Laws that hinder the ability of state and local officials to respond to a public health crisis will likely have a disproportionate effect, particularly among the communities already facing disparate impacts on their health and equity.

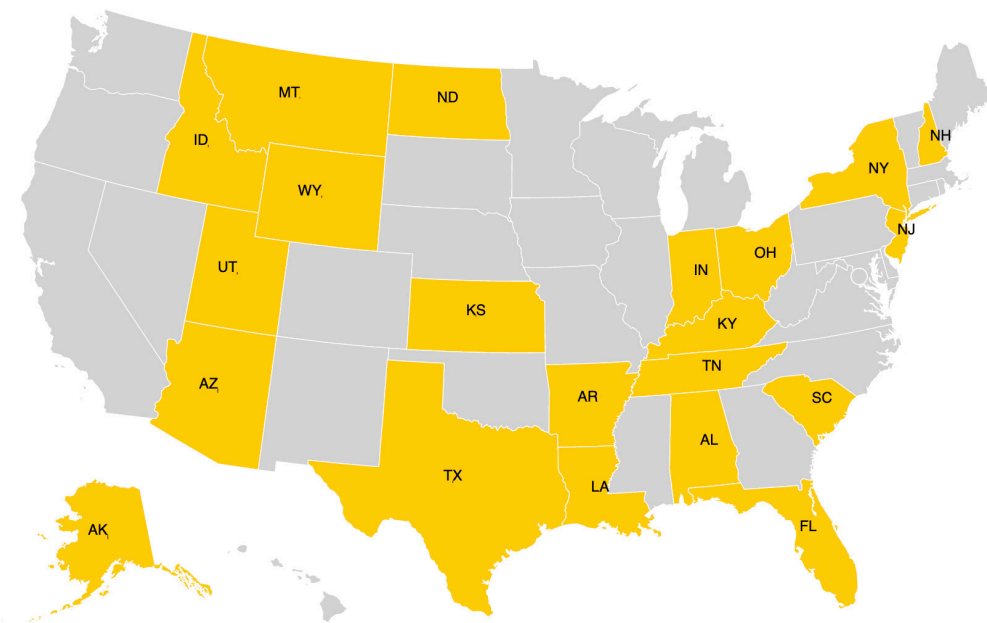


Figure 1. Twenty-one states have enacted laws limiting public health authority from January 1, 2021, to May 20, 2022.

Current Legal Landscape

In 2021, legislators in 47 states introduced bills to limit governors' or state health officials' authority during the COVID-19 pandemic or other emergencies, and legislators have continued to introduce similar bills in 2022.⁷ One or more of those bills have been enacted into law in 21 states, according to a legal scan conducted by the Center for Public Health Law Research.⁸

States have taken a variety of approaches to curbing public health authority. As of May 20, 2022, 21 states have a newly enacted or amended law in effect that limits state executive authority regarding public health orders: Alabama, Alaska, Arizona, Arkansas, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Montana, New Hampshire, New Jersey, New York, North Dakota, Ohio, South Carolina, Tennessee, Texas, Utah, and Wyoming.

The scan shows a sharp uptick in the enactment of these laws in the spring and early summer of 2021. Among the 21 states, 17 have limited both the governor's authority and the authority of a state health agency or official: Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Kansas, Kentucky, Montana, New Hampshire, New Jersey, North Dakota, Ohio, South Carolina, Tennessee, Utah, and Wyoming.

Fourteen states — Alabama, Arizona, Arkansas, Florida, Indiana, Kansas, Kentucky, Montana, New Hampshire, Ohio, South Carolina, Tennessee, Utah, and Wyoming — limited the governor's authority, the authority of a state health agency or official, and the authority of a local health agency or official.

Some laws limit the duration of a state of emergency or limit emergency orders to a specific number of days (as in Utah for example). Others require elected officials to approve health officer actions (as in North Dakota) or prohibit the governor or health officials from requiring COVID-19 vaccination (as in Tennessee).

Kansas was the first state in 2021 to pass a law limiting public health emergency orders. Kansas continues to be the only state to allow counties to issue a local order that is less stringent than a governor's order. The Kansas law also provides that such a local order will operate in the county in lieu of the governor's executive order.

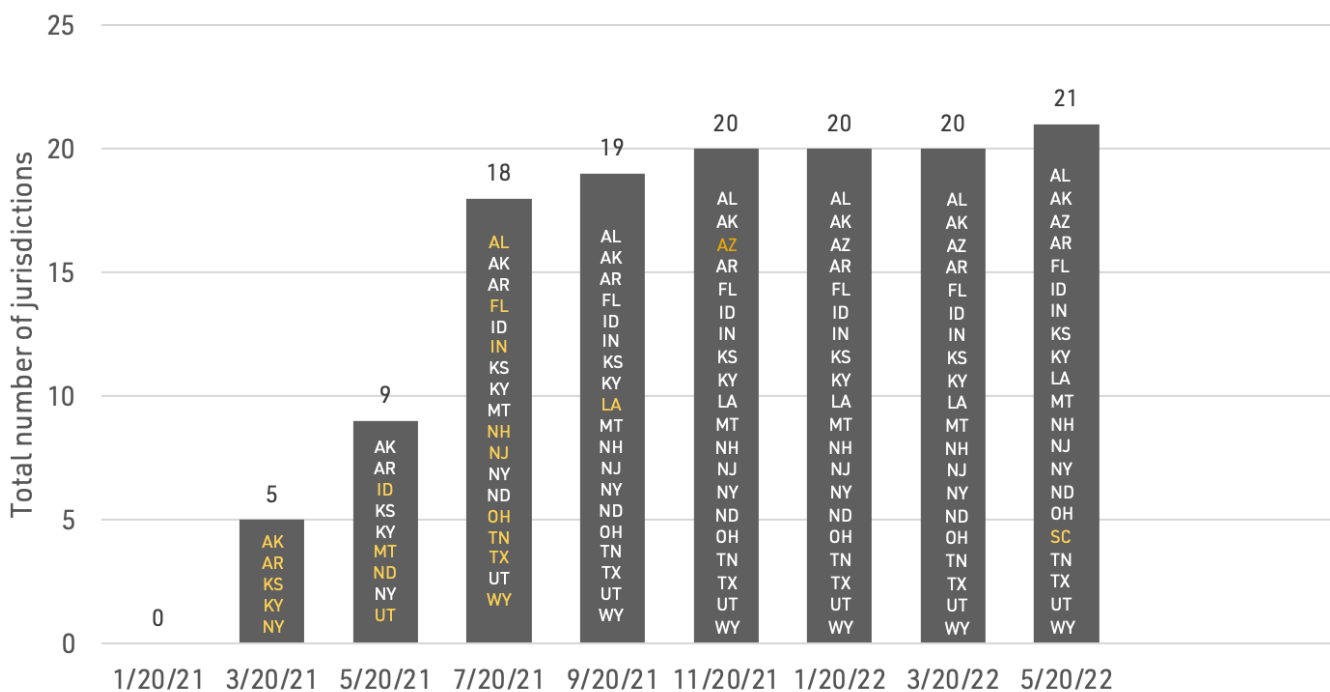


Figure 2. The progression of states limiting public health authority has increased by 21 from January 1, 2021, through May 20, 2022. States labeled in yellow enacted laws that were newly effective within the past two months as of the date indicated.

Utah is the only state that limited both state and local health officials in all the following areas: restricting the ability to issue emergency orders, limiting the duration of emergency orders, restricting the scope of emergency orders, and establishing that emergency orders may be terminated by legislature or another entity.

The data described here were produced using a novel legal mapping technique called sentinel surveillance of emerging laws and policies (SSELP), developed by the Center for Public Health Law Research, to track laws faster so researchers may more quickly evaluate the impact of these laws and policies on health, well-being, and equity.⁹

Evidence

No evaluations have been found examining the impact of laws limiting state executive authority regarding public health emergency orders. It is likely that evidence about the implementation and impact of these laws is lacking because of their recent enactment. There is some evidence that state-by-state differences in COVID-19 transmission and mortality rates are correlated with the state's partisan politics more generally.^{10,11,12} However, these correlations are not specific to laws limiting public health authority.

Additionally, there is some research indicating that the types of measures (e.g., mask mandates and business closures) restricted by these laws can be effective in slowing the spread of COVID-19,^{13,14,15,16,17,18,19} and that early adoption of quarantine and other control measures could prevent large rises in cases or death rates.²⁰ Yet existing research on the impacts of these policies on COVID-19 outcomes is incomplete, and insufficient to know with certainty precisely which policies work, and to what degree.^{21,22} One peer reviewed study examining the strength of evidence in the evaluation literature on COVID-19 policy impacts found that most studies failed to meet important design criteria for evidence rigorous enough to be actionable by policymakers.²³

It is therefore still too early to definitively assess the effectiveness of specific mitigation measures, or to draw firm conclusions about the optimal division of emergency powers among the branches of government. However, strong emergency powers have been built into U.S. public health law for centuries, and logic and experience suggest that rapid legal action is indispensable for an effective pandemic response.

Policy Recommendations

Legislative reforms are necessary to provide guidance and standards for protecting the public during future public health emergencies. However, these reforms should be the result of careful reflection, discussion, and collaboration among a range of stakeholders, including public health practitioners, lawyers, and policymakers, among others. Legislative changes should allow for nuanced responses to public health emergencies that are based on evidence and the expertise of trained public health officials, and that balance mitigation measures with individual rights. It is also critical that emergency measures be taken promptly without delay caused by unnecessary bureaucratic requirements.

The nature of, and risks presented by, public health emergencies vary. The next emergency, and those that follow, could pose considerably different risks than COVID-19 did, and might disproportionately affect populations that the coronavirus did not. Legislative reforms should consider that future public health emergencies will not mirror COVID-19. Reforms must provide public health officials with the authority and flexibility to order protective measures, based on their expertise, that address the particular threat posed.

Lindsay Wiley offers six principles consistent with public health experience and such evidence as we have, which could be useful for guiding conversations on legislative reform in this area:

1. Transparency should be mandated by the statute.
2. Health officials' authorized actions should have time limits but be renewable.

3. Statutes should authorize a scaled response.
4. Statutory standards should promote neutral orders that do not discriminate based on religion.
5. Statutes should require provision of supports, legal protections, and accommodations of safer alternatives.
6. Criminal enforcement against individuals should be authorized only if it is established as the least restrictive alternative to achieve compliance with orders.²⁴

States can also consider enacting laws to strengthen public health authority and infrastructure, following trends from some states during the COVID-19 pandemic. These could include establishing commissions or advisory bodies to make recommendations on emergency response efforts; strengthening local public health authority; and increasing transparency and accountability.²⁵

Research Agenda

The Center for Public Health Law Research dataset provides a high-level overview of laws that limit state executive authority regarding public health emergency orders, but it does not capture many details of these laws or legislation addressing other issues related to public health authority. A more extensive view of the legal landscape will support a broader understanding of this legislation and how it impacts health. The Center for Public Health Law Research, working with the Association of State and Territorial Health Officials, the Network for Public Health Law, and other partners associated with Act for Public Health, will publish six new datasets in Fall 2022 that will capture state bills limiting, shifting, or expanding public health authority, bills addressing public health authority measures and preemption, and bills attempting to limit the application of federal laws.

Additionally, more granular data on laws addressing executive authority related to emergency orders, created using policy surveillance, would provide useful details to evaluate the impact of such laws. Capturing the length of duration limits (e.g., 30 days), the types of provisions restricted in emergency orders (e.g., prohibitions on mask mandates), and the process by which a legislature may terminate an emergency order — would provide reliable legal data, facilitating evaluation of the health impacts of these laws. While this information is available in the legal text cited and linked in the existing CPHLR sentinel surveillance dataset, these features of the laws are not included as legal variables that can be queried, easily identified, or converted into numerical data.

More broadly, rigorous research is needed on the role of law in shaping the powers of public health agencies, and the emergency authority of governors, to evaluate the impact of these powers on public health.²⁶ Understanding whether varying levels and distributions of emergency power affect the timing or overall efficacy of responses to a public health crisis is critical to determining what changes should be made to laws governing public health authority.

Conclusion

Laws that limit state executive authority to respond to public health crises could have a significant negative impact on health. Throughout the COVID-19 pandemic, most states have introduced bills, some of which have been enacted, restricting the authority of a governor or state health official to act in a health emergency. These laws limit the duration of emergency orders, prohibit mask requirements, and allow legislatures to terminate emergency public health orders, among imposing other restrictions. They also impede the ability of a governor or state health official to respond to a health emergency in a quick and flexible manner. It is critical to know what the health impacts of these laws are, as well as what legislative reforms could be beneficial when it comes to executing public health authority in an emergency. This SSEL dataset provides a helpful overview of the policy landscape on this topic and lays a foundation for policy surveillance datasets that would create the legal data necessary to evaluate these impacts. ♦

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