Executive Decision Making for COVID-19: Incorporating Equity Considerations

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SUMMARY. Executive decision-making is the crux of using law to achieve public health objectives. But if the goal of executive decision-making is only to achieve immediate public health objectives, such as a rapid reduction in communicable disease, progress toward the important long-term objective of achieving health equity may suffer if vulnerable populations are left further behind. To the extent possible, the actions necessary to promote public health during a pandemic, such as stay-at-home orders and restrictions on businesses, should attempt to produce equitable results, or at least avoid exacerbating existing inequities. In this Chapter, we examine how governors and other state decision-makers have used their legal authority to mitigate the inequitable effects of COVID-19. We begin with an overview of the executive decision-making tool for public health officials that was introduced in Chapter 7 in Assessing Legal Responses to COVID-19: Volume I. Then we describe where considerations of equity fit into this model. Next, we briefly review how the eight states considered in Volume I, Chapter 7, have responded to the COVID-19 pandemic since July and examine their efforts to support vulnerable populations in their responses. In responding to a pandemic, we conclude that health officers first need to determine what options among potential actions are needed to protect the public’s health. As much as possible, equity should be included in weighing the options and evaluating trade-offs.

Introduction
Chapter 7 in Assessing Legal Responses to COVID-19: Volume I focused on how public health officials exercise their professional judgment in working with elected officials to mitigate the spread of COVID-19. It explained the legal authority for COVID-19 stay-at-home orders, as well as political and judicial constraints on an executive’s ability to take such action. It further analyzed eight states’ responses to the COVID-19 pandemic, with particular attention paid to the role of politics and science in the decisions made. This Chapter adds new analysis and recommendations to the original chapter. It again focuses on how public health officials exercise their judgment in responding to COVID-19, but with a specific focus on health equity. It should be noted that the allocation of vaccines presents unique issues beyond the scope of this chapter. (For more information on the allocation of scarce medical resources, such as vaccines, see Chapter 24 in Assessing Legal Responses to COVID-19: Volume I.)

The Executive Decision-Making Tool
As discussed in Volume I, Chapter 7, executive decision-makers — public health officials, including governors acting to respond to the pandemic, and agencies — have considerable discretion under most state public health and emergency response codes in which their decisions must be made. To exercise its broad grant of authority, officials and agencies must ask three key questions: Can I? Must I? and Should I?

Can I? focuses on whether the public health official or agency has the legal authority to act, and if so, in what way. These actors’ public health authority is based on the police power, which provides the authority for states to protect the public’s welfare, safety, and health (Jacobson v. Commonwealth of Massachusetts, 1905).

Must I? asks whether there are legal requirements, including funding source directives, that mandate action and define how the public health official or agency must act. Usually, the official or agency has considerable discretion in deciding how to fulfill its obligations.

Should I? is a policy question requiring the official or agency to determine whether and how to exercise discretionary authority. Discretionary authority must be used reasonably and impartially, never in an arbitrary and capricious manner.
To meet the need for simple, step-by-step guidance to aid public health officials faced with these difficult decisions, the Public Health Executive Decision-Making Tool, also described in Volume I, Chapter 7, provides a template to support executive decision-making when confronting a public health threat (Chrysler et al., 2021). The tool outlines a clear approach for analyzing a public health threat as it unfolds and for documenting the decision-making process. As further expanded on in Volume I, Chapter 7, the tool’s steps are to assess the situation, evaluate the threat, discuss mitigation, assess the level of certainty, and communicate.

In implementing this approach, executives have various health equity frameworks to use. For instance, the Network for Public Health Law has developed an approach that complements our Executive Decision-Making Tool (Network for Public Health Law, 2020). Another viable option is “An Equity Lens Tool for Health Departments” (Human Impact Partners, 2020).

**Executive Decision-Making, Ethics, and Equity**

When considering *Should I?*, executive decision-makers take into account many considerations, including politics and science. Whether the proposed action is ethical is also an important factor to consider in determining if the decision-maker should take a given public health action. Public health officials and agencies have an ethical obligation to ensure that they take into account the effects of their potential actions on vulnerable populations, such as low-income individuals, racial and ethnic minorities, and individuals with disabilities for which health and health care disparities exist (Artiga et al., 2020).

This consideration of ethics fits into the Executive Decision-Making Tool in both the evaluate the threat and the discuss mitigation steps. The potential disproportionate impact of the threat on vulnerable populations should be determined, as should the potential disproportionate impact of mitigation options on different populations.

In analyzing an action, equity considerations fall primarily under the public health ethics value of distributive justice. Distributive justice “requires that the risks, benefits, and burdens of public health action be fairly distributed, thus precluding the unjustified targeting of already socially vulnerable populations” (Gostin & Berkman, 2007). It requires the executive to “act to limit the extent to which the burden of disease falls unfairly upon the least advantaged and to ensure that the burden of interventions themselves are distributed equitably,” as well as to ensure that public health benefits are allocated fairly (Gostin & Berkman, 2007).

Despite this ethical obligation, when urgent and immediate public health action is required, ensuring an equitable distribution of risks, benefits, and burdens may not be possible. First, an action that has an inequitable distribution of risks, benefits, and burdens may be required to avoid (further) endangering the public health. For example, in the context of COVID-19, stay-at-home and business- and school-closure orders may burden low-income individuals disproportionately, but not instituting such orders risks increased spread of COVID-19. Second, public health officials and agencies must sometimes choose between two options, each of which inequitably burdens different populations or that burdens the same populations in different ways. Continuing from the previous example, while stay-at-home and closure orders may burden certain populations, the increased spread of COVID-19 that would occur in the absence of these orders may itself have a disparate impact on the same — or other — vulnerable populations. Third, actions to ensure equitable distribution of benefits and burdens may not be legal, as they may violate the Equal Protection Clause, which requires equal treatment as distinct from equitable treatment. Because of this, a governor likely could not order the closure only of those businesses that could afford such closure.

For these reasons, while ethical considerations should be included in the process of executive decision-making, they cannot be expected to dictate results. Since the law can play a role in furthering equity, it will be important to conduct post-pandemic studies to determine whether and how the various COVID-19 orders addressed equity considerations.

**Executive Decision-Making and Equity: COVID-19**

In this section, we first provide a brief update on the COVID-19 response of each state considered in Volume I, Chapter 7 (Alabama, Arizona, Colorado, Florida, Maine, Michigan, Texas, and Wisconsin). We then focus on how these states have used their legal authority to address equity issues that have resulted from the COVID-19 pandemic.

**Analysis**

**Response updates.** As discussed in Volume I, Chapter 7, each of the aforementioned eight states issued emergency orders in March 2020 and, by the first week in April, had issued stay-at-home orders. Each state except Michigan (which is operating under a state health department epidemic order) is still operating under a governor-declared emergency (National Governors Association, 2020).

Since July, all eight states first experienced periods either of declining COVID-19 case rates followed by a period of relative case stability or of stability at relatively low case rates and then experienced a gradual but dramatic increase in cases (Allen, 2021). Most states responded to this increase, some more quickly than others, by mandating additional restrictions (see National Academy for State Health Policy, 2020). In some states, the governor imposed stricter measures, such as lowering gathering and occupancy limits (e.g., in Maine) or by placing stronger mitigation requirements on outdoor gatherings (Arizona). Some states’ extant orders had built-in restrictions that triggered stricter measures when various thresholds were met, such as in Texas and Arizona. Colorado’s governor instituted a new phased reopening system with such built-in restrictions.

However, two of the four states in which Republicans control both the executive and legislature have acted contrary to data indicating increasing COVID-19 cases (see National Academy for State Health Policy, 2020). Alabama’s governor issued an order on November 5, 2020, removing occupancy limits for certain businesses and excepting certain businesses from social distancing requirements, despite a seven-day case average that had been overall increasing.
since mid-October. Also in November, the governor of Florida extended his September order placing the state into phase three of the state's recovery plan. This action eliminated the restrictions from phases one and two and permitted all businesses to operate and restaurants to operate at least at 50% capacity regardless of local laws; Florida's seven-day case average had been increasing since mid-October.

**Actions taken to promote equity.** It is undeniable that COVID-19 has had devastating and disproportionate effects on racial and ethnic minorities and other vulnerable populations. It is equally undeniable that the pandemic has exacerbated existing health care inequities. For example, the widely used business closures and restrictions have especially affected low-wage workers who experienced high levels of job loss. As a consequence, many low-wage workers have been unable to afford adequate housing and food. School closures and virtual learning almost certainly have had a profound and negative effect on students who require more intensive or unique education services (American Public Health Association, 2018).

States can also take actions to help ameliorate some of these negative effects and to address disparities that are a factor of race or ethnicity. Of the eight states discussed above, the four states with Democratic governors have developed groups or programs focusing on equity issues in the context of COVID-19; additionally, the majority of the states have participated in at least one such program (National Governors Association, n.d.). Each of the states has also, to varying degrees, taken other actions to help further health equity.

**Alabama**

Alabama’s executive branch participates in the Reskilling and Recovery Network, a program aimed at increasing workers’ skills to help them obtain employment and addressing equity issues (National Governors Association, n.d.). Gov. Kay Ivey prevented enforcement of evictions and foreclosures due to nonpayment during her stay-at-home order, permitted release of certain individuals from county jails, permitted summonses and complaints instead of custodial arrests for certain offenses, and allocated CARES Act funding to provide internet access to low-income children for distance learning. The state health officer permitted in-person programs provided by boards of education for children of first responders, health care providers, and certain essential workers when in-person classes were otherwise prohibited. Alabama has also ensured that those unable to work as result of COVID-19 can file for unemployment benefits and expanded a program providing children with two free meals a day during the summer to the duration of school closures.

**Arizona**

The Arizona executive has been involved in equity-promoting projects, such as the Black Arizona COVID-19 Task Force and the Reskilling and Recovery Network. Gov. Doug Ducey has delayed enforcement of evictions if individuals meet certain COVID-19 related criteria: exempted from his stay-at-home order individuals who are homeless or whose homes are unsafe; required schools to provide on-site learning to students who need somewhere to go during the day; and included as essential operations organizations that provide social and charitable services for vulnerable populations and home-care services and day-care providers for essential workers.

**Colorado**

In April 2020, Colorado instituted the COVID-19 Health Equity Response Team in order to “focus specifically on tackling . . . inequities to prevent the gaps from widening and ultimately saving lives;” it also participates in the Reskilling and Recovery Network. Gov. Jared Polis has ordered limits on evictions, foreclosures, and public utility disconnection; expedited the processing of unemployment insurance claims; and provided stimulus payments to qualified individuals.

**Florida**

Florida Gov. Ron DeSantis has suspended laws providing causes of action for mortgage foreclosures, as well as for residential evictions related to non-payment of rent as a result of COVID-19; included as essential businesses those that provide services to vulnerable individuals, child-care providers for essential workers, and home-care providers; and allocated CARES Act funding for rent and mortgage assistance. The Department of Economic Opportunity suspended several requirements for eligibility for unemployment benefits. The Florida Department of Education, in its school reopening order, ordered school districts to work to identify students with IEPs and students who are English-language learners who may have regressed while schools were closed and to consider compensatory and/or additional services for them.

In spite of these actions, Florida has had some equity failures: it took five weeks for government leaders to conduct completely bilingual briefings, and a county commissioner whose district includes a majority–Hispanic ZIP code stated that “we had to fight to get [COVID-19] testing in that neighborhood” (Santich & Chen, 2020).

**Maine**

Maine instituted a COVID-19 Health Equity Improvement Initiative, in which the state reimburses community-based organizations in minority communities that work to educate on COVID-19 and its prevention in culturally sensitive ways and to provide services related to COVID-19. Gov. Janet Mills also suspended the limits on the timeframe in which children could stay in emergency or homeless children's shelters and expanded the age range of individuals who qualified to stay in such shelters, extended the statutory interest-free grace periods and repayment period for loans for employees whose income was reduced as a result of COVID-19, expanded the period of general assistance benefits and suspended the work-search requirement as a condition of receiving such benefits, implemented eviction protections, and implemented a rental relief program, providing rental assistance of up to $1,000 per month.

**Michigan**

Michigan Gov. Gretchen Whitmer created the Michigan Coronavirus Task Force on Racial Disparities to study COVID-19 racial
disparities, make recommendations to address racial and other disparities in the COVID-19 pandemic and other pandemics, and perform community and stakeholder outreach. She also ordered employer-provided migrant housing camps to take certain actions to help prevent COVID-19 in migrant and agricultural workers; expanded unemployment benefit eligibility; prohibited employers from firing or retaliating against individuals with COVID-19, symptoms of COVID-19, or potential exposure to COVID-19 who did not go to work during specified periods during their illness or quarantine; and ordered restoration of public water supply service to residences where such service had been terminated due to failure to pay bills. The state’s department of health later continued migrant and agricultural worker protections; it also required the state to house and meet the basic needs of homeless individuals affected by COVID-19 and for individuals with unstable housing.

**Texas**

Texas participates in the Reskilling and Recovery Network. Gov. Greg Abbott included as essential services those that provide necessities and social services to needy individuals and waived, for COVID-19–related services, the health-care service fees that incarcerated individuals ordinarily have to pay. Other state agencies implemented rental and public utility assistance and eviction diversion programs. However, the governor prevented local jails from releasing inmates for non-health-related reasons, which was contemplated in an effort to reduce jail populations to prevent the spread of COVID-19, in a variety of circumstances. Further, Black state lawmakers have been pushing for actions to address inequities, for example, for the state to gather information on COVID-19 disparities, but one Black state representative said that “[i]t’s like [myself, my colleagues, and people of color] don’t exist” (Barragán, 2020).

**Wisconsin**

Wisconsin’s Just Recovery for Racial Equity initiative was instituted to provide grants to community-based organizations and support COVID-19 response and recovery and resiliency building in communities of color. The state also is a member of the Reskilling and Recovery Network. Gov. Tony Evers has also banned evictions due to failure to pay and foreclosures and allocated CARES Act funding to a rental assistance program. State agencies ensured that the families of children who would have received free or reduced lunch at school received benefits during the time in which schools were closed, that the work requirement and monthly premiums for the state’s Medicaid program for adults with disabilities who work or want to were removed; and that monthly premiums were also removed for children and childless adults who are enrolled in the state’s health insurance program for low-income individuals.

**Discussion**

Just as states have varied widely in their COVID-19 responses, they have varied in their efforts to promote health equity during the pandemic. In some states, governors aggressively provided relief to vulnerable populations; in others, state agencies did more of the work. The states in our sample varied in the priority given to remedying inequity. Methods of promoting equity differ, ranging from providing direct monetary assistance to those in need to ensuring that the children of essential workers have a place to go while their parents work.

Public health science must always drive executive decision-making in mitigating a pandemic. The primary duty is to prevent the spread of disease. In addressing the immediate need to mitigate a disease outbreak, executive decision-makers should also take into account existing health disparities among vulnerable population groups. As the examination above shows, there are numerous ways in which states can take complementary actions to provide relief to those who bear a disproportionate share of the impact of such restrictions. They have an ethical duty to do so. In addition, some states have focused resources on racial and ethnic minorities who face worse outcomes from COVID-19 itself, while others, like Florida, may need to improve their efforts in this area. This type of action not only promotes equity; it can also help slow the spread of disease.

Resource constraints likely pose the biggest obstacle to providing relief to populations in need. In the case of COVID-19, the federal government provided states with inadequate funding to provide vulnerable populations all the assistance they need. States cannot depend solely on federal funds to ensure that their residents are not unjustly burdened by a pandemic and the state response to it — they must think creatively about what they can do during every step of their response to promote equity.

In responding to a pandemic, we conclude that health officers first need to determine what actions among potential actions are needed to protect the public’s health. As much as possible, equity should be included in weighing the options and evaluating trade-offs. For public health measures to be successful, basic needs should be met and people must be treated fairly vis-à-vis others. COVID-19 demonstrates the limits of achieving equity when only some people are sacrificing for the common good. Equity demands either that sacrifices are distributed fairly or that those who sacrifice are made whole. To address the equity challenge, it is crucial that health officers work with those who have access to the resources needed to address inequities created by or the measures used to control a pandemic.

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Recommendations for Action

State and local governments:

- Governors should incorporate equity considerations into their decision-making and address the needs of vulnerable populations and instruct public health and other officials to do the same.

- States and localities should collect and analyze complete and accurate COVID-19 morbidity and mortality data by race, ethnicity, age, and socioeconomic status.

- Public health officials, when planning for public health emergencies, should include equity considerations as an essential concern and advocate that all parts of state and local government plan in advance actions they could take to help ameliorate inequitable effects arising from public health emergencies.

- Public health officials, when responding to public health emergencies, should consider how already-existing disparities may cause outcomes to be worse in certain populations and work to reduce this inequitable distribution of outcomes.

- After-action reports should examine how equity considerations can be incorporated into epidemic response policies and practices.
About the Authors

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References


