AN EMERGING THREAT TO PUBLIC HEALTH AUTHORITY

INTRODUCTION
This spring, amid an ongoing pandemic, almost half of state legislatures are considering bills that could substantially limit state and local public health powers.

Some bills, such as Missouri Senate Bill 56, would fundamentally alter the general scope of public health authority by stripping county boards of health of their existing ability to issue orders and promulgate regulations. Others, like Michigan House Bill 6134, would stymie local efforts to respond to the pandemic, including by prohibiting localities from enacting mask mandates. Some of these bills are based on ALEC’s model Emergency Power Limitation Act and are part of a nationally coordinated and longstanding effort to limit local authority and advance an anti-regulatory agenda. Many of them will likely hamstring both immediate and future responses to public health threats.

This fact sheet summarizes this emerging threat to state and local public health authority and identifies some of the possible outcomes.

BACKGROUND
In the weeks and months following the outbreak of the COVID-19 pandemic, states and localities across the country declared emergencies, and governors, local governing bodies, and health departments issued orders and recommendations in an attempt to slow the spread of the virus, protect the public’s health, and save lives. While the goals of such actions were mostly accepted by the public, the tools used to achieve those goals were not. Public health edicts, including stay-at-home orders, face-covering mandates, and regulations temporarily banning in-person gatherings or shuttering businesses have been publicly contentious and led to vigorous debates in some states about the legality of government authority.

All three levels – federal, state, and local – and all three branches – executive, legislative, and judicial – of government have roles to play when it comes to protecting the public’s health. In the United States, state and local governments have expansive authority to promote public health, welfare, and safety, often referred to as “police power.” States and localities also have designated processes by which decisions can be made during public health emergencies, like the COVID-19 pandemic. The pandemic, however, has shown that these processes are not always clear cut, resulting in both confusion and controversy. Courts repeatedly have been called upon to help determine the limits of public health authority, but some state legislatures are now seeking to change the parameters of such authority through legislation.

NOTE: The information provided in this document does not, and is not intended to, constitute legal advice. Individuals and organizations should contact an attorney licensed to practice in their state to obtain advice with respect to a particular legal matter.
IMPLICATIONS

In what is largely hasty policymaking, primarily driven by reactionary forces such as industry and conservative interest groups, states are reexamining and reordering the distribution of public health power between different levels and branches of government. These efforts likely will have consequences that could change the contours of public health authority for years to come.

While many of the laws attempt to make general and long-lasting structural reforms to the distribution of power between state and local government and between governmental branches, their immediate effect will be to prevent actions that have been shown to slow the spread of COVID-19. Further, some of the proposed laws concentrate public health authority in state-level legislative bodies, which are less able to respond swiftly and in a tailored manner than local government and which lack the public health expertise of state or local health departments. These laws also are likely to have indirect effects by chilling action on the part of government officials who fear repercussions resulting from potential violations of the new laws.

Though this is not an exhaustive list, the below examples (as of February 1, 2021) typify the changes being proposed.

- Legislatures in Michigan, North Dakota, Ohio, Oklahoma, and South Carolina have introduced bills preempting localities from enacting mask mandates.
- Another bill in Oklahoma, House Bill 2504, would preempt all local health regulations that are more stringent than state health regulations, regardless of the needs of any specific community. It also requires approval of the State Commissioner of Health for any local rules or regulations regarding public health.
- In Missouri (Senate Bill 56) and Montana (House Bill 121), bills would take authority away from local boards of health and concentrate it in legislative bodies.
- Ohio House Bill 621 would allow businesses ordered to close by health departments to remain open if they “comply with any safety precautions” required of those businesses that have not been closed, regardless of any determination by government officials that such business may pose a unique risk.
- Texas House Bill 525 would prohibit government officials from limiting the operations of religious organizations in any way, regardless of any public health threat, including by requiring masking or social distancing or by limiting the capacity of indoor religious services.
- In Tennessee, House Bill 37 would prohibit any state or local government entity from classifying businesses as essential or nonessential for the purpose of allowing them to remain open or forcing them to close for any purpose.

OTHER RESOURCES

- Public Health Emergency Reform is Coming - These Six Principles Should Guide It
- Legal Protections for Public Health Officials During the COVID-19 Pandemic
- Assessing & Addressing Preemption: A Toolkit for Local Policy Campaigns