



# 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 HB 75](#) would fundamentally alter the general scope of public health authority by stripping local boards of health of their existing ability to issue orders and promulgate regulations. Others, including [Oklahoma Senate Bill SB 224](#) 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.

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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.

## 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.



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## IMPLICATIONS

In what is largely hasty policymaking, primarily driven by conservative industry and 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 April 5, 2021*) typify the changes being proposed.

- OK [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.
- In Missouri (House Bill 75) and Montana ([House Bill 121](#)), bills would take authority away from local boards of health and concentrate it in legislative bodies.
- 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.
- Florida [House Bill 945](#) imposes strict limits on the “duration, applicability, and scope” of local emergency orders that “limit the right of a resident” to gather, work, travel or engage in other activities during a declared emergency.
- Alabama [House Bill 168](#) would require county health officers to obtain written approval from the State Health Officer before issuing an order addressing a pandemic or outbreak of a disease.



## OTHER RESOURCES

- [Under the Cover of COVID: A Survey of 2020-2021 State Preemption Trends](#)
- [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](#)



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