

# The Royal Power of Gubernatorial Executive Orders

State governors wield the power to set public policy without the involvement of the legislature through the use of executive orders. Those actions can come quickly and bring significant changes, particularly in times of emergency, as clearly demonstrated during the coronavirus pandemic.

## Executive Order Authority Narrow but Consequential

Governors derive their power to issue executive orders—either explicitly or implicitly—from their state constitutions, statutes or case law. In most states, that power is authorized for a limited set of purposes, which typically include establishing advisory committees and commissions, creating and reorganizing state agencies, managing state personnel and responding to public emergencies. In a handful of states, executive orders are also subject to review by the legislature.

But although they don't go through the traditional lawmaking or executive agency rule-making process, when issued in accordance with the legal sources authorizing them, executive orders have the force of law, and are treated that way by the executive branch agencies tasked with implementing them. What's more, executive orders have been used to make major policy changes, including ending capital punishment, restoring voting rights to former felons, setting greenhouse gas emission goals and mandating that health insurance covers telemedicine.

## Use of Executive Orders Encouraged by Partisan Gridlock

Executive orders have become a normal part of the state policymaking process. "In today's hyper-partisan political climate, some governors see them as the only way to move certain issues forward" said State Net Capitol Journal™ Managing Editor Rich Ehsen, who's been reporting on the nation's governors on a weekly basis for nearly two decades.

"It's become such a zero-sum game that governors are taking action through executive order because lawmakers can't or won't," he said.

As an example, Ehsen pointed to former Illinois Governor George Ryan's executive order in 2000 declaring a moratorium on capital punishment. With no lawmaker wanting to appear soft on crime, there was little appetite for that idea in the state's General Assembly at the time. Legislation was eventually passed in the state abolishing the death penalty in 2011. But it was Ryan's action that "got the ball rolling," Ehsen said.

## Executive Order Authority Expansive in Emergencies

Governors' executive order power is at its peak during natural disasters and other states of emergency, which governors themselves have the authority to declare. At such times, governors can unilaterally suspend regulations and statutes and effectively enact new ones, at least temporarily, if necessary.

Governors' emergency power isn't completely unchecked. Governors generally can't confiscate citizens' firearms, for example, or use their emergency authority to give themselves more power than that granted by their state. Some legislatures also have even greater oversight authority during emergencies many of them have limited the length of declared emergencies to 30 days, and most can end an emergency with a simple majority vote of both chambers. But with states needing to respond to emergencies more quickly than the legislative or executive agency rulemaking process (with public notifications and hearings) allows, governors have retained their expansive emergency authority.

Governors have made full use of that power during the coronavirus pandemic. In the first six months of the public health emergency, issued nearly 3,000 executive orders, more than triple the 945 issued in the first six months of 2019 and even topping the roughly 2,300 in total they issued that entire year, according to data compiled by the State Net® services.

The expansion of executive order activity during the pandemic has been a matter of scope as well as volume. Governors have addressed everything from the wearing of face masks and business closures to eviction moratoriums, safety precautions for nursing homes, authorization for health care facilities to implement “alternative standards of care” plans, school closures, civil immunity from COVID-19-related lawsuits, election procedures, correction facility visits and the extension of tax filing deadlines.

"Even issues that had failed to make headway « state legislatures for years, like telehealth and distance learning, suddenly became priorities " said State Net Capitol Journal's Ehsen.

The emergency declarations themselves have also necessitated action, both directly and indirectly. For instance, some of the declarations have allowed health care professionals licensed in other states to

provide care temporarily. Other declarations have empowered state insurance agencies to issue bulletins prohibiting insurers from canceling policies while the state of emergency remains in effect.

A number of pandemic-related executive orders—and even governors’ authority to issue them—have been challenged in court, in at least a couple of instances, successfully. Virtually every state has also considered, and more than half have enacted, legislation curbing gubernatorial emergency authority. It remains to be seen whether those actions will return the volume of executive orders to pre-pandemic levels.

**Key takeaway:** Keeping on top of the significant changes executive orders bring can be challenging, especially during state emergencies.

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