



## AUTHORITY TO RESTRICT BUSINESS OPERATIONS DURING A STATE EMERGENCY

This memorandum addresses whether the governor or the State Department of Health has the authority to restrict private business operations during a state-declared disaster or emergency; whether the governor or the State Department of Health has the authority to create restrictions that are not in statute or administrative rule; whether the State Department of Health has the authority to restrict private business operations through the use of the emergency rule process or other method; and whether occupational and professional boards have the authority to restrict or regulate private business operations through the use of the emergency rule process or other method.

### GUBERNATORIAL AUTHORITY

#### Background

As the chief executive of the state, the governor has the responsibility to ensure the state's business is well administered pursuant to Section 7 of Article V of the Constitution of North Dakota. The governor also serves as the commander-in-chief of the state's military forces and may mobilize those forces to execute laws and maintain order. The governor has broad statutory authority under North Dakota Century Code Chapter 37-17.1, the North Dakota Disaster Act, to minimize or avert the adverse effects of a disaster or emergency. A "disaster" is defined in Section 37-17.1-04(2) as:

[T]he occurrence of widespread or severe damage, injury, or loss of life or property resulting from any natural or manmade cause, including fire, flood, ... **epidemic** ... or cyber attack which is determined by the governor to require state or state and federal assistance or actions to supplement the recovery efforts of local governments in alleviating the damage, loss, hardship, or suffering caused thereby. **(emphasis supplied)**

An "emergency" is defined in section 37-17.1-04(4) as:

[A]ny situation that is determined by the governor to require state or state and federal response or mitigation actions to protect lives and property, to provide for public health and safety, or to avert or lessen the threat of a disaster. Emergencies require an immediate supplement to local governments or aid to critical industry sectors that provide essential lifeline services.

Pursuant to Section 37-17.1-05(6)(a), during times of disasters or emergencies, the governor may suspend the provisions of any **regulatory** statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in managing a disaster or emergency.

Century Code does not provide a definition of "regulatory statute" or "state business" as used in Section 37-17.1-05(6), nor do North Dakota Attorney General opinions. However, North Dakota Supreme Court cases provide some guidance regarding the meaning of "regulatory statute." In 1943, in *State v. Cromwell*, the court said:

[A]s we have said above, a regulatory statute enacted in the exercise of the police power must be reasonable. Its real purpose must be to protect the public health, morals or general welfare, and it must be reasonably required and suited to attain that purpose. It cannot masquerade as an exercise of the police power and arbitrarily invade personal rights or private property. It cannot disregard the constitutional guaranties. And, whether it does so, is a question for the courts to determine.<sup>1</sup>

In a 1957 case, *Fairmont Foods Co. v. Burgum*<sup>2</sup>, the court reiterated the nexus among regulatory statutes, police powers, and the public welfare. Specifically, the court said:

<sup>1</sup> 72 N.D. 565, 578 (N.D. 1943). This language also is quoted in *Northern Pac. Ry. Co. v. Warner*, 77 N.D. 721, 732-3 (N.D. 1950).

<sup>2</sup> 81 N.W.2d 639, 646 (N.D. 1957).

It is true, of course, that the legislature may, under the police power of the state, enact fair and reasonable regulations governing trade practices employed by those engaged in an industry affected with a public interest; but such regulations must not be arbitrary and discriminatory so as to interfere with legitimate property rights. Such regulations must have a real and substantial relation to some objectionable activity which is detrimental to the general welfare of the public. The governing principle to be followed by legislatures in the enactment of regulatory statutes is stated in *Chicago, B. & Q. Ry. v. State of Illinois*, supra, as follows:

If the means employed have no real, substantial relation to public objects which government may legally accomplish, if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action.

In *State v. McDowell*<sup>3</sup>, the court said "we must keep in mind that [Section] 6-08-16 [prohibiting writing checks with insufficient funds] is a regulatory statute passed **for the public welfare** to help facilitate transactions in commercial business activities.<sup>4</sup> **(emphasis added)** In a 1989 opinion<sup>5</sup> discussing the *McDowell* language, the court looked to the United States Supreme Court's comments on "regulatory or public welfare offenses" for guidance in analyzing regulatory statutes. The opinion quotes the following language from a United States Supreme Court case:

These ... [public welfare offenses] do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty.... **While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. (emphasis added)**

The term "regulatory statute" also was mentioned briefly in a 1958 North Dakota Supreme Court case,<sup>6</sup> which noted 1919 Session Laws Chapter 192, was the first comprehensive regulatory statute pertaining to rates, charges, and services of public utilities. Another North Dakota Supreme Court case makes a distinction between regulatory statutes and statutes that "prescribe the power which electrical co-operative has...."<sup>7</sup>

Several other states have statutes similar to Section 37-17.1-05(6), and case law from other states may be instructive in defining the term "regulatory statute." In Pennsylvania, courts define the term as "the result of the exercise of the state's police power to enact regulations to promote the public health, morals or safety, and the general well-being of the community."<sup>8</sup> In Maryland, a court indicated a licensing statute is "regulatory in nature" if it is "for the protection of the public...."<sup>9</sup> These concise summations are consistent with North Dakota case law.

Under Section 37-17.1-05(6)(g), the governor may control the ingress and egress in a designated disaster or emergency area, the movement of persons within the area, and the occupancy of premises in the area. The North Dakota Supreme Court has not defined or addressed the limit or extent to which this law may be used by the governor during a state-declared disaster or emergency. However, Pennsylvania has a similar provision.<sup>10</sup> The Supreme Court of Pennsylvania recently ruled that considering Coronavirus (COVID-19) cases were reported in all counties in Pennsylvania, the nature of the virus, and the manner in which the virus is transmitted, any location where two or more people can congregate is within the disaster area and therefore subject to the governor's authority to control ingress and egress, the movement of persons, and the occupancy of premises within the entire state.<sup>11</sup>

Similar to the Pennsylvania law, Section 37-17.1-05 authorizes the governor to direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if necessary for the preservation of life or other disaster or emergency mitigation, response, or recovery,<sup>12</sup> and to control ingress and egress in a

<sup>3</sup> 312 N.W.2d 301 (N.D. 1981).

<sup>4</sup> Similarly, in *State v. Johnson*, 88 N.W.2d 209 (N.D. 1958), the North Dakota Supreme Court said statutes limiting the manner in which public dances could be held were "regulatory statutes."

<sup>5</sup> *State v. Nygaard*, 447 N.W.2d 267, 269-70 (N.D. 1989).

<sup>6</sup> *State ex rel. Pub. Serv. Comm'n v. Montana-Dakota Utilities Co.*, 89 N.W.2d 94, 97-98 (N.D. 1958).

<sup>7</sup> *Lillethun v. Tri-County Elec. Co-op., Inc.*, 152 N.W.2d 147 (N.D. 1967).

<sup>8</sup> E.g., *Commonwealth v. CSX Transp., Inc.*, 639 A.2d 1213, 1214 (Sup. Ct. Pa. 1994).

<sup>9</sup> *DeReggi Const. Co. v. Mate*, 747 A.2d 743, 746 (Ct. Spec. App. Md. 2000).

<sup>10</sup> 35 Pa.C.S.A. § 7301(f)(7).

<sup>11</sup> *Friends of DeVito v. Wolf*, No. 68 MM 2020, 2020 WL 1847100, (Pa. Apr. 13, 2020).

<sup>12</sup> N.D. Cent. Code § 37-17.1-05(6)(e).

designated disaster or emergency area, the movement of persons within the area, and the occupancy of premises therein.<sup>13</sup>

While the Pennsylvania decision is not binding on North Dakota, it may be used as a persuasive frame of reference to analyze similar provisions between the states. An argument could be made the governor's authority to control the movement of individuals and the occupancy of premises within a disaster or emergency area includes restricting or limiting the operations of businesses within the disaster or emergency area. This raises the legal argument of whether an executive order that imposes restrictions on operations unrelated to ingress and egress qualifies as an authorized control on the occupancy of business premises within a disaster or emergency area or whether such a restriction extends beyond the statutory authorization.

### Limitations

The authority of a governor to issue legally enforceable executive orders may be limited by state and federal law. To be legally enforceable, a gubernatorial executive order may not be preempted by federal law, may not constitute legislation or contravene enacted legislation, and must stem from a provision of the constitution or a statute.

An executive order is invalid under the Supremacy Clause of the United States Constitution if the order is preempted by federal law.<sup>14</sup> The Supremacy Clause preempts a state law or gubernatorial executive order if:

1. Congress expressly displaces state law;
2. Congress intends federal law should regulate a particular legislative field exclusively; or
3. State and federal law conflict.<sup>15</sup>

Under Section 1 of Article III and Section 13 of Article IV of the Constitution of North Dakota, all legislative power, except that reserved to the people, is vested in the Legislative Assembly. An executive order that legislates or contravenes enacted legislation would violate the separation of powers doctrine.<sup>16</sup> Additionally, if an executive order is contrary to enacted legislation, the executive order effectively would constitute a veto without giving the Legislative Assembly an opportunity to override the veto.<sup>17</sup> This likely would violate the veto provisions of Section 9 of Article V of the Constitution of North Dakota.

### Analysis

The broad purpose of Chapter 37-17.1 is to provide for the health, safety, and welfare of the people of the state by reducing vulnerabilities of people and communities of this state to damage, injury, and loss of life and property resulting from natural or manmade disasters or emergencies.<sup>18</sup> To accomplish the purposes of the chapter, the governor is authorized to issue executive orders and proclamations and amend or rescind these orders and proclamations. In acting to prevent injury or loss of life via the issuance of executive orders, the governor necessarily makes a prediction about the imminence of the danger or the likelihood the danger will in fact worsen.

Chapter 37-17.1 does not authorize the governor to make permanent an action taken via executive orders. Rather, the chapter grants extraordinary power to the governor in times of emergency or disaster to protect the public. Under Section 37-17.1-05 the Legislative Assembly has tasked the governor with the responsibility of minimizing or averting the adverse effects of a disaster or emergency.

In analyzing the validity of executive orders in the case of disasters, courts have used a two-pronged determination.<sup>19</sup> First, whether the declaration of disaster constitutes a "disaster" within the meaning of the statutory definition. Secondly, whether the governor's exercise of emergency powers was authorized by state law. The second prong involves two closely related inquiries, whether the executive orders were rationally related to the

<sup>13</sup> N.D. Cent. Code § 37-17.1-05(6)(g).

<sup>14</sup> *Duke Energy Trading and Marketing, L.L.C. v. Davis*, 267 F.3d 1042 (9<sup>th</sup> Cir. 2001) (federal energy law preempted executive order); *New Hampshire Health Care Ass'n v. Governor*, 13 A.3d 145, 163 (N.H. 2011) (federal Medicaid law preempted executive order).

<sup>15</sup> *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008).

<sup>16</sup> *Fletcher v. Com.*, 163 S.W.3d 852 (Ky. 2005).

<sup>17</sup> *O'Neil v. Thomson*, 316 A.2d 168, 173 (N.H. 1974) (an executive order that frustrates legislation would have the effect of a line item veto without giving the legislative body an opportunity to override it).

<sup>18</sup> N.D. Cent. Code § 37-17.1-02(1).

<sup>19</sup> *County of Gloucester v. State*, 132 N.J. 141 (1993).

legislative purpose of protecting the public, and whether the executive orders were closely tailored to the magnitude of the disaster.<sup>20</sup>

As referenced previously, the statutory definition of "disaster" under Section 37-17.1-04, includes the occurrence of widespread injury, or loss of life resulting from any natural or manmade cause such as an epidemic. On March 13, 2020, President Donald Trump declared a national emergency due to the growing COVID-19 crisis in the United States. Governor Doug Burgum declared a state emergency on March 13, 2020, in response to the public health crisis resulting from COVID-19. Thus, the declaration of emergencies on the national and state level due to the rapid spread of COVID-19, could be considered an "emergency" as defined under Section 37-17.1-04 because the governor determined state and federal action was needed to avert or lessen the threat of COVID-19.

In the case of a disaster or emergency, the governor is expressly authorized to suspend or limit the sale, dispensing, or transportation of alcoholic beverages.<sup>21</sup> Additionally, many private businesses within the state are subject to either state licensure to conduct business or are subject to statutes or rules adopted by various state agencies or occupational or professional boards which regulate the manner in which business must be conducted. However, any executive order issued impacting business operations during a state-declared disaster must be rationally related to the legislative purpose of protecting the public and be closely tailored to the magnitude of the disaster.

Since the governor's authority under Section 37-17.1-05(6)(a) is limited to suspending the provisions of a regulatory statute, any executive order that restricts or limits the manner in which a private entity may conduct business during a state-declared disaster or emergency is not suspending a regulatory statute but is an unauthorized enactment or amendment of a regulatory statute or rule.

Section 37-17.1-05(6)(a) authorizes the governor to suspend the orders, rules, or regulations of any state agency if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in managing a disaster or emergency. This authority includes suspending rules and regulations adopted by an occupational or professional board since boards are included under the definition of "agency" as the term is used for rulemaking purposes.<sup>22</sup> This means any rule or regulatory guidelines adopted by an occupational or professional board, may be suspended by the governor during a state-declared emergency.

Section 37-17.1-05(6)(a), however, does not authorize the governor to amend existing agency rules or adopt new rules under which the agency or board must comply. If during a state-declared emergency, the governor amended a rule adopted by an agency or board or adopted a new rule on behalf of an agency or board, the governor would exceed the statutory authority granted under Section 37-17.1-05(6)(a) and in essence have circumvented statutory compliance with the rulemaking procedure.<sup>23</sup>

The clear language of Section 37-17.1-05(6)(g) only authorizes the governor to impose restrictions on private businesses relating to either the ingress or egress of people within the business or business premises or related to the occupancy of the business, such as occupancy of the business or the hours of the business. An executive order imposing a business restriction unrelated to the ingress and egress of the people in the business or on the business premises would exceed the authority granted to the governor under Section 37-17.1-05(6)(g).

## STATE DEPARTMENT OF HEALTH'S AUTHORITY

### Background

The State Department of Health's mission is to improve the length and quality of life for all North Dakotans.<sup>24</sup> The department consists of the Health Council, a state health officer, section chiefs, directors of divisions, and other employees of the department.<sup>25</sup>

The state health officer is the administrative officer of the State Department of Health and is appointed by the governor.<sup>26</sup> The state health officer's statutory duties include enforcing all rules and regulations as adopted by the Health Council<sup>27</sup> and issuing orders relating to disease control measures deemed necessary to prevent the spread

<sup>20</sup> *Id.*

<sup>21</sup> N.D. Cent. Code § 37-17.1-05(6)(h).

<sup>22</sup> N.D. Cent. Code § 28-32-01.

<sup>23</sup> *Id.*

<sup>24</sup> <https://www.health.nd.gov/mission-values-purpose>.

<sup>25</sup> N.D. Cent. Code § 23-01-01.

<sup>26</sup> N.D. Cent. Code § 23-01-05.

<sup>27</sup> N.D. Cent. Code § 23-01-05(1).

of communicable disease.<sup>28</sup> The state health officer also may apply to the district court in a judicial district in which communicable disease is present for an injunction canceling public events or closing places of business.<sup>29</sup> To utilize the authority to close businesses, the state health officer must establish to the district court that the closure of businesses is necessary to prevent or minimize the spread of the communicable disease.<sup>30</sup>

The Health Council serves as the State Department of Health's governing and advisory body. The Health Council's duties include establishing standards, rules, and regulations found to be necessary for the maintenance of public health, including sanitation and disease control.<sup>31</sup>

### Limitations

An administrative regulation may not exceed statutory authority or supersede a statute, and a regulation that goes beyond what the Legislative Assembly authorized is void.<sup>32</sup> Whether an administrative agency has acted within its statutory authority is a question of law, ripe for judicial determination.<sup>33</sup> Courts typically give deference to properly adopted administrative rules and regulations unless the rules or regulations:

- Produce an absurd result;
- Are arbitrary and capricious; or
- Are inconsistent with statutes covering the same subject matter.<sup>34</sup>

As an administrative agency, the Health Council has the power to adopt emergency rules<sup>35</sup> but a rule is invalid unless adopted in substantial compliance with Chapter 28-32.<sup>36</sup>

### Analysis

Chapter 28-32 sets out the requirements for administrative rulemaking. The only provisions of Chapter 28-32 which apply only to emergency rules are contained in Section 28-32-03. Any emergency rulemaking the Health Council finds necessary must first be approved by the governor.<sup>37</sup> Then the Health Council may declare the proposed rule to be an interim final rule effective on a date no earlier than the date of filing with the Legislative Council of the notice required by Section 28-32-10.<sup>38</sup> One of the statutory grounds authorizing a proposed rule be given effect on an emergency basis is if imminent peril threatens public health, safety, or welfare, which would be abated by emergency effectiveness.<sup>39</sup>

The Health Council may adopt rules and regulations necessary for the maintenance of public health, including disease control. The state health officer may issue orders relating to disease control measures deemed necessary to prevent the spread of communicable disease and also may enforce the rules and regulations adopted by the Health Council. The Health Council shall comply with the notice requirements of Section 28-32-10 when adopting emergency rules and shall provide notice to the chairman of the Administrative Rules Committee of the emergency status, declared effective date, and grounds for emergency status of the rules under Section 28-32-03(2). Upon receipt of notice of emergency rule adoption, the Legislative Council publishes the notice and emergency rules on the Legislative Assembly website.

If an imminent peril threatens public health, the position could reasonably be taken that the Health Council is authorized to issue an order or propose a rule that is given effect on an emergency basis which places reasonable restrictions or limitations on the operations of private businesses during a state-declared disaster or emergency related to a communicable disease. However, any rule given effect on an emergency basis may not produce an absurd result, be arbitrary and capricious, or be inconsistent with statutes covering the same subject matter.

<sup>28</sup> N.D. Cent. Code § 23-01-05(12).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> N.D. Cent. Code § 23-01-03(3).

<sup>32</sup> *Little v. Traynor*, 1997 ND 128, 565 N.W.2d 766.

<sup>33</sup> *Sloan v. North Dakota Workforce Safety & Ins.*, 2011 ND 194, 804 N.W.2d 184.

<sup>34</sup> *Little v. Traynor*, 1997 ND 128, 565 N.W.2d 766.

<sup>35</sup> N.D. Cent. Code § 28-32-03.

<sup>36</sup> N.D. Cent. Code § 28-32-13.

<sup>37</sup> N.D. Cent. Code § 28-32-03(1).

<sup>38</sup> *Id.*

<sup>39</sup> N.D. Cent. Code § 28-32-03(2)(a).

The Health Council may restrict business operations that relate to disease control measures deemed necessary to prevent the spread of communicable disease. However, the Health Council only may adopt such rules through the emergency rule process.

An alternative method of placing restrictions on private businesses is the state health officer may apply to the district court in a judicial district in which a communicable disease such as COVID-19 is present for an injunction canceling public events or closing places of business.

### **OCCUPATIONAL AND PROFESSIONAL LICENSING BOARD AUTHORITY**

Title 43 provides for the establishment of various licensing boards for certain occupations and professions. The chapters in Title 43 establishing a board within a specific occupation or profession provide for the board's powers, rulemaking authority, and scope of regulatory enforcement. Chapter 28-32 sets out the requirements for administrative rulemaking and defines an "agency" as each **board**, bureau, commission, department, or other administrative unit of the executive branch of state government.<sup>40</sup> (**emphasis supplied**). Therefore, the emergency rules process for administrative agencies provided for under Section 28-32-03 applies to occupational and professional boards that have been statutorily authorized to adopt rules. If an occupational or professional board determines emergency rulemaking is necessary because an imminent peril threatens public health, safety, or welfare and the threat would be abated by emergency effectiveness, the board, with the governor's approval, may propose a rule be given effect on an emergency basis.

An emergency rule proposed by an occupational or professional board may not exceed statutory authority or supersede a statute. An administrative rule that exceeds the authority granted by the Legislative Assembly is void.<sup>41</sup>

### **CONCLUSION**

The COVID-19 epidemic, which has permeated every state in the nation, likely will result in a wave of changes to state constitutions and statutes. The COVID-19 epidemic is resulting in governors taking rapid action resulting in the issuance of executive orders at an unprecedented pace. The legislative and judicial response to the executive orders issued and administrative rules adopted during the duration of the epidemic likely will provide ample precedence to outline the true boundaries of executive order and administrative rule authority.

Based on this analysis, the referenced statutory provisions, case law from other jurisdictions, and the limited North Dakota judicial guidance issued for interpreting the limits of the governor and the State Department of Health's statutory authority during a state-declared disaster or emergency, the following conclusions could be:

1. The governor may restrict private business operations during a state-declared disaster or emergency via executive order if the restriction relates to the disaster or emergency and either:
  - a. Suspends the provisions of a regulatory statute; or
  - b. Controls the ingress and egress in a designated disaster or emergency area, the movement of persons within the area, and the occupancy of premises in the area;
2. The State Department of Health, through the Health Council and the state health officer, may create restrictions not in statute in limited circumstances through the adoption of administrative rules and orders but the rules or orders may not be in direct conflict with enacted statute;
3. The State Department of Health, through the state health officer, may apply to the court for an injunction canceling public events or closing places of business if necessary to prevent or minimize the spread of communicable disease;
4. The State Department of Health, through the Health Council, may restrict private business operations with the use of the emergency rule process if an imminent peril threatens public health; and
5. An occupational or professional board may restrict or regulate private business operations with the use of the emergency rule process if an imminent peril threatens public health and the threat is within the board's statutorily authorized scope of regulation.

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<sup>40</sup> N.D. Cent. Code § 28-32-01(2).

<sup>41</sup> Little, 565 N.W.2d at 775.