



ANALYSIS OF EXECUTIVE ORDER 2020-06.4 REGARDING REGULATION OF BUSINESSES

This memorandum summarizes [Executive Order 2020-06.4](#)¹ regarding regulation of businesses as a result of the Coronavirus (COVID-19) pandemic and addresses which entity has the authority to issue such an order.

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 of emergency on March 13, 2020, in response to the public health crisis resulting from COVID-19. On March 19, 2020, Governor Burgum issued [Executive Order 2020-06](#), which restricted access to bars, onsite dining establishments, and recreational facilities. This order was expanded and extended by Executive Orders [2020-06.1](#), [2020-06.2](#), and [2020-06.3](#).

On April 29, 2020, Governor Burgum issued [Executive Order 2020-06.4](#), which provides:

1. Businesses closed under [Executive Order 2020-06.3](#) and referenced in paragraphs 2-8 below, may not reopen before 8:00 a.m. on Friday, May 1, 2020. Bars, breweries, restaurants and cafes that continued to provide off-sale, take-out, curbside, drive through or delivery services may not reopen for in-house dining or on-sale beverage service until after 8:00 a.m. on Friday, May 1, 2020.
2. On or after 8:00 a.m. May 1, 2020, salons operated by cosmetologists, nail technicians, estheticians, barbers and tanning studios may reopen under the following conditions: the ND Smart Restart: *Standards for All Industries* and the ND Smart Restart industry-specific standards: *Hair Salons, Nail Salons, Waxing Studios and other Cosmetology Related Services*, must be adopted and rigorously followed.
3. On or after 8:00 a.m. May 1, 2020, tattoo and body piercing salons may reopen under the following conditions: the ND Smart Restart: *Standards for All Industries* and the ND Smart Restart industry-specific standards: *Tattoo and body Piercing* must be adopted and rigorously followed.
4. On or after 8:00 a.m. May 1, 2020, massage therapy services may reopen under the following conditions: the ND Smart Restart: *Standards for All Industries* and the ND Smart Restart industry-specific standards: *Massage Therapists* must be adopted and rigorously followed.
5. On or after 8:00 a.m. May 1, 2020, health clubs and athletic facilities may reopen under the following conditions: the ND Smart Restart: *Standards for All Industries* and the ND Smart Restart industry-specific standards: *Fitness Centers* must be adopted and rigorously followed.
6. On or after 8:00 a.m. May 1, 2020, restaurants, bars, breweries, distilleries, food trucks and cafes may reopen under the following conditions: the ND Smart Restart: *Standards for all Industries* and the ND Smart Restart industry-specific standards: *Restaurants, Bars, Breweries, Distilleries and Food Trucks* must be adopted and rigorously followed.
7. On or after 8:00 a.m. May 1, 2020, movie theaters may reopen under the following conditions: the ND Smart Restart: *Standards for All Industries* and the ND Smart Restart industry-specific standards: *Movie theaters* must be adopted and rigorously followed.
8. North Dakota businesses that remained open throughout the pandemic, or businesses that voluntarily closed for a period of time are strongly encouraged to adopt the ND Smart Restart: *Standards for All Industries*.
9. Recreational and sports arenas, and music and entertainment venues will remain closed until further notice.
10. All state employees who have been teleworking since March 20, 2020, will continue to telework until further notice.

¹ <https://www.governor.nd.gov/sites/www/files/documents/executive-orders/Executive%20Order%202020-06.4.pdf>

11. Access to the North Dakota Capitol will continue to be limited to by-appointment only until further notice.
12. Access to all other state facilities will continue to be limited to by-appointment only until further notice.

The general and industry-specific North Dakota Smart Restart protocols² were released by Governor Burgum and Commissioner of Commerce, Michelle Kommer, on April 28, 2020. The protocols were developed by the Department of Commerce and six working groups representing businesses affected by [Executive Order 2020-06.3](#).

The North Dakota Smart Restart protocols include industry-specific standards as well as standards for all industries. The standards for all industries include adherence to Centers for Disease Control and Prevention (CDC) guidelines for businesses and employees, adherence to State Department of Health recommendations and resources for the public, compliance with a State Department of Health workplace assessment tool, limitations on gathering size, implementation of physical distancing, signage requirements, encouraging use of personal protective equipment, providing for hygiene and cleaning, developing policies and procedures for prompt identification and isolation of sick staff and customers, and encouraging customers to download the Care19 application to increase success levels with contact tracing. Industry-specific standards includes numerous mandatory regulations regarding occupancy limitations and sanitation and hygiene:

- Standards for bars and restaurants include limiting gathering size to 50 percent of normal operating capacity, limiting drink refills to clean, unused containers, and prohibiting hand-held entertainment or reservation notification devices.
- Standards for hair salons include employees must wash hands for a minimum of 20 seconds, enhanced cleaning protocols, and clients and employees should avoid bringing unnecessary personal items into the place of business.
- Standards for tattoo and body piercing include developing check-in and waiting areas that can accommodate physical distancing, holding initial planning consultations by video conference if available, and removing unnecessary decorations and waiting room items that cannot be sanitized.
- Standards for massage therapy include adjusting appointment times for enhanced cleaning between customers, providers are encouraged to wear eye protection during procedures that may have risk for aerosolization, and laundry should be stored in covered, sanitized containers that are clearly delineated clean versus soiled, and gloves should be worn when handling soiled laundry.
- Standards for fitness centers include limiting group fitness classes to one participant/staff per 100 square feet or 10'x10' grid layout if providing markers on floor areas, suspension or discontinuation of drop-in child care, and suspension of 24-hour facility use.
- Standards for movie theaters include limiting capacity to 20 percent of normal operating capacity, group size should be limited to 10 people, and providing sanitizing wipes for guests to wipe armrests, cupholders, or seats upon arrival.

GUBERNATORIAL AUTHORITY

Background

As the chief executive of the state, the governor has broad statutory authority under North Dakota Century Code Chapter 37-17.1, known as the North Dakota Disaster Act, to minimize or avert the adverse effects of a disaster or emergency. Generally, under Section 37-17.1-05(2) the governor is authorized to "issue executive orders and proclamations." Specifically, under 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. Additionally, 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 Chapter 37-17.1 may be used by the governor during a state-declared disaster or emergency. However, Pennsylvania has a similar provision.³ The Supreme Court of Pennsylvania recently ruled considering COVID-19 cases were reported in all

² <https://ndresponse.gov/sites/www/files/documents/covid-19/ND%20Smart%20Restart/Smart%20Restart%20All%20Industries.pdf>

³ 35 Pa.C.S.A. § 7301(f)(7).

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.⁴

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,⁵ and to control ingress and egress in a designated disaster or emergency area, the movement of persons within the area, and the occupancy of premises therein.⁶ Pennsylvania businesses have asked the United States Supreme Court to issue a stay of the governor's shutdown order.

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 a 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.

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.⁷ 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.⁸ 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.⁹ 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.

A reasonable interpretation of Section 37-17.1-05(2) is that this subsection authorizes the use of executive orders and proclamations as vehicles by which the governor may take action to minimize or avert the adverse effects of a disaster or emergency. Section 37-17.1-05(6) sets out powers of the governor during an emergency or disaster. Although the executive order is not clear on this matter, the two powers most likely the basis for the issuance of [Executive Order 2020-06.4](#) are Sections 37-17.1-05(6)(a) and 37-17.1-05(6)(g), authorizing suspension of regulatory statutes and restrictions on ingress and egress.

Suspension of Regulatory Statutes

The governor's authority under Section 37-17.1-05(6)(a) is limited to suspending the provisions of a regulatory statute; therefore, [Executive Order 2020-06.4](#), which restricts or limits the manner in which a private business may conduct business during a state-declared disaster or emergency is not suspending a regulatory statute, but is more likely an unauthorized enactment or amendment of a regulatory statute or rule.

⁴ Friends of DeVito v. Wolf, No. 68 MM 2020, 2020 WL 1847100, (Pa. Apr. 13, 2020).

⁵ N.D. Cent. Code § 37-17.1-05(6)(e).

⁶ N.D. Cent. Code § 37-17.1-05(6)(g).

⁷ Fletcher v. Com., 163 S.W.3d 852 (Ky. 2005).

⁸ 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).

⁹ N.D. Cent. Code § 37-17.1-02(1).

Section 37-17.1-05(6)(a) 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 adopted a new rule on behalf of an agency, the governor exceeded the statutory authority granted under Section 37-17.1-05(6)(a) and in essence, circumvented statutory compliance with the rulemaking procedure.¹⁰ Therefore, it is unlikely the governor issued [Executive Order 2020-06.4](#) under the authority of Section 37-17.1-05(6)(a).

Restrictions on Ingress or Egress

Section 37-17.1-05(6)(g) limits the governor's authority 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 business capacity or the hours of operation. An executive order imposing a business restriction unrelated to the ingress and egress of the people in the business or on the business premises likely would exceed the authority granted to the governor under Section 37-17.1-05(6)(g).

[Executive Order 2020-06.4](#) imposes mandatory regulatory restrictions on the reopening of businesses ordered closed by the issuance of Executive Orders [2020-06](#) and [2020-06.1](#). [Executive Order 2020-06.4](#) requires businesses adhere to the North Dakota Smart Restart guidelines establishing industry-specific standards before a closed business may resume business operations. Violation of the order is an infraction. The North Dakota Smart Restart guidelines include requiring:

- Tattoo and body piercing establishments to ensure proper sanitation technique training to all providers, remove unnecessary decorations and waiting room items that cannot be sanitized, prohibit noncommercially packaged foods and beverages from being served within the establishment, and encourage customers to download the Care19 application;
- Health and fitness centers to train staff to launder towels and to clean equipment;
- Hair, nail, and tanning salons, barbershops, and other cosmetology-related business employees to wash their hands for a minimum of 20 seconds between customers, offer alcohol-based hand sanitizer to customers, and covering porous surfaces with washable or disposable coverings;
- Massage therapists to remove unnecessary decorations and waiting room items that cannot be sanitized and removing oils and lotions from the treatment room;
- Restaurants and bars to use either single-use drink coasters or drink coasters made of a material that can be sanitized, eliminate self-service condiments, prohibit handheld entertainment or reservation notification devices, and require the closure of all restaurants for a minimum of 4 hours daily to deep clean; and
- Movie theaters to encourage using mobile applications and contactless purchasing and payment, prohibit drink or popcorn refills unless served in a clean unused container, and clean and disinfect high-touch surfaces in auditoriums.

Because of the clear statutory authorization provided by Section 37-17.1-05(6)(g), a reasonable argument could be made the governor can impose restrictions on business operations during a state-declared emergency relating to business capacity, spacing, decreasing congestion in the common areas of a business, and the development of check-in and check-out processes to manage physical distance between individuals within a business. However, a potential issue raised with the issuance of [Executive Order 2020-06.4](#) is whether the governor is authorized to impose restrictions relating to mandatory sanitization practices or prohibiting the use of certain equipment related neither to ingress and egress nor to the occupancy of premises.

For example, an argument could be raised that the restrictions imposed on various businesses exceed the governor's authority under Section 37-17.1-05(6)(g) because the restrictions impose mandatory business sanitization practices such as requiring the removal of unnecessary decorations that cannot be sanitized, eliminating self-service condiments, and requiring employees to wash their hands for a minimum of 20 seconds between customers. The sanitary requirements imposed via [Executive Order 2020-6.4](#) likely exceed the governor's statutory authority to control the ingress or egress of people within the business or the occupancy of the business under Section 37-17.1-05(6)(g) because the requirements could neither be interpreted as controlling when or the manner in which a patron may enter or exit a business nor relate to the occupancy within any business.

¹⁰ *Id.*

Another potential issue with [Executive Order 2020-06.4](#) is the criminal penalties that may be imposed for violations of the order. Executive orders issued under Chapter 37-17.1 have the force of law¹¹ and a violation of [Executive Order 2020-06.4](#) is an infraction subject to a \$1,000 fine.¹² Since the ND Smart Restart protocols have the force of law, the protocols may be unconstitutionally vague. A law is void for vagueness if the law lacks ascertainable standards of guilt.¹³ Void for vagueness means the law forbids or requires conduct so vague an individual of common intelligence must necessarily guess the law's meaning.¹⁴ Vague laws offend due process as they violate the two essential values of fair warning and nondiscriminatory enforcement.¹⁵ A law must meet two requirements to survive a void-for-vagueness challenge. First, the law must create minimum guidelines for the reasonable police officer, judge, or jury charged with enforcement of the statute; and second, the law must provide a reasonable person with adequate and fair warning of the proscribed conduct.¹⁶

For example, one of the ND Smart Restart protocols prohibits standing in bars. Analyzing this restriction under the void-for-vagueness, two-pronged requirement, the restriction most likely fails. First, the restriction does not provide a reasonable person with adequate and fair warning of the prohibited conduct. The restriction could prohibit an employee of the bar from working unless in a seated position. Likewise, the restriction may prevent a patron from standing to reach the patron's wallet, put on a jacket, entering and exiting the bar, participating in gaming activities such as darts and pool, and using the restroom. Second, the restriction could lead to discriminatory and inconsistent enforcement throughout the state, even when enforced by a reasonable law enforcement officer because of the vague conduct the restriction attempts to prohibit.

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.¹⁷ The department consists of the Health Council, a state health officer, section chiefs, directors of divisions, and other employees of the department.¹⁸

The state health officer is the administrative officer of the State Department of Health and is appointed by the governor.¹⁹ The state health officer's statutory duties include enforcing all rules and regulations as adopted by the Health Council²⁰ and issuing orders relating to disease control measures deemed necessary to prevent the spread of communicable disease.²¹ 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.²² 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.²³

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.²⁴

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.²⁵ 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

¹¹ N.D. Cent. Code § 37-17.1-05(2).

¹² <https://www.governor.nd.gov/sites/www/files/documents/executive-orders/Executive%20Order%202020-06.4.pdf>.

¹³ *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948).

¹⁴ *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

¹⁵ *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972).

¹⁶ *City of Belfield v. Kilkenny*, 2007 ND 44, 10, 729 N.W.2d 120.

¹⁷ <https://www.health.nd.gov/mission-values-purpose>.

¹⁸ N.D. Cent. Code § 23-01-01.

¹⁹ N.D. Cent. Code § 23-01-05.

²⁰ N.D. Cent. Code § 23-01-05(1).

²¹ N.D. Cent. Code § 23-01-05(12).

²² *Id.*

²³ *Id.*

²⁴ N.D. Cent. Code § 23-01-03(3).

²⁵ *Little v. Traynor*, 1997 ND 128, 565 N.W.2d 766.

- Are inconsistent with statutes covering the same subject matter.²⁶

As an administrative agency, the Health Council has the power to adopt emergency rules²⁷ but a rule is invalid unless adopted in substantial compliance with Chapter 28-32.²⁸

Analysis

Emergency Rulemaking

Emergency administrative rulemaking is one process the State Department of Health may use to regulate businesses in the case of an emergency or disaster. Under Section 23-01-03(3), the Health Council is directed to adopt rules and regulations necessary for the maintenance of public health, including disease control.

Chapter 28-32 sets out the requirements for administrative rulemaking. The only provisions of Chapter 28-32 which apply 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.²⁹ The Health Council then 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 28-32-10.³⁰ 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.³¹

The Health Council is required to comply with the notice requirements of Section 28-32-10 when adopting emergency rules and to 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 branch website.

If an imminent peril threatens public health, the position reasonably could 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.

State Health Officer Orders

Under Section 23-01-05(12), the state health officer is authorized to 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. Additionally, 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.

LOCAL BOARD OF HEALTH'S AUTHORITY

Pursuant to Section 23-07-06, local boards of health may adopt quarantine and sanitary measures to prevent the spread of a contagious or infectious disease if the board becomes aware of a case of such a disease within the board's jurisdiction. The authority provided to the board under Section 23-07-06 includes permitting the removal of an infected person from a home, implementing quarantine regulations on a home where an infected person is located, removing people in the neighborhood, and "other measures as it deems necessary for the safety of the inhabitants within its jurisdiction." Any quarantine measures adopted under Section 23-07-06 must be in compliance with Chapter 23-07.6, which addresses communicable disease confinement procedures.

A person who violates a quarantine law or regulation or who leaves a quarantine area without being discharged is guilty of an infraction.³² A person who violates or fails to obey any provision of Chapter 23-07, any lawful rule made by the State Department of Health, or any order issued by any state, district, county, or municipal health officer is guilty of an infraction.³³

²⁶ Little v. Traynor, 1997 ND 128, 565 N.W.2d 766.

²⁷ N.D. Cent. Code § 28-32-03.

²⁸ N.D. Cent. Code § 28-32-13.

²⁹ N.D. Cent. Code § 28-32-03(1).

³⁰ *Id.*

³¹ N.D. Cent. Code § 28-32-03(2)(a).

³² See N.D. Cent. Code § 23-07-21.

³³ See N.D. Cent. Code § 23-07-21.

Analysis

Pursuant to Section 23-07-06, a local board of health likely could adopt quarantine and sanitary measures to prevent the spread of COVID-19, such as the ones outlined in the ND Smart Restart protocols, and violation of such measures would constitute an infraction.

Given the global pandemic of COVID-19, the nature of how the virus can spread from person to person, and the number of documented cases, it is likely COVID-19 would qualify as a contagious or infectious disease. If a local board of health became aware of a case of COVID-19 within the board's jurisdiction, under the authority provided under Section 23-07-06, the board likely could adopt quarantine and sanitary measures to prevent its spread.

Although most of the local board of health's authority expressly outlined in Section 23-07-06 deals with implementing quarantine or sanitary measures in, or in close proximity to, a home where an infected person is located, it could be argued if a board is aware of a case of a contagious or infectious disease within the board's jurisdiction, the board has broad authority to implement quarantine or sanitary measures to prevent the disease's spread. This authority could be determined to be broad enough to encompass implementing sanitary measures to control the movement of individuals and the occupancy of premises or businesses within an infected area or to restrict or limit the operation of businesses within an infected area.

Further, under Section 23-35-08, a board of health may make and enforce an order in a local matter if an emergency exists. It also could be argued during a declared state of emergency, such as the state of emergency declared in response to the public health crisis resulting from COVID-19, a board of health could make and enforce an order relating to quarantine or sanitary measures in the board's jurisdiction.

OCCUPATIONAL AND PROFESSIONAL LICENSING BOARDS' AUTHORITY

Background

Title 43 provides for the establishment of various licensing boards for certain occupations and professions. The chapters in Title 43 establish a board within a specific occupation or profession and provide for the board's powers, rulemaking authority, and scope of regulatory enforcement. 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.³⁴

Analysis

In general, occupational and professional boards exercise the state's police power by furthering the health, safety, and welfare of the residents of the state. Some of the occupations and professions regulated under [Executive Order 2020-06.4](#) also are regulated by occupation and professional boards. For example, cosmetologists, estheticians, barbers, and massage therapists are regulated by occupational and professional boards. These boards address sanitation in each board's respective Administrative Rules.³⁵ It is likely these individual boards are authorized to adopt emergency rules to address sanitation to prevent the spread of COVID-19.

CONCLUSION

Although the governor is authorized to issue executive orders during a disaster or emergency, [Executive Order 2020-06.4](#) outlines numerous mandatory standards for specific industries that may exceed that authority [Executive Order 2020-06.4](#) was issued under the broad authority of Chapter 37-17.1, which authorizes the governor to issue executive orders to suspend regulatory laws or to restrict ingress or egress. However, it is not clear from the order which provisions of Chapter 37-17.1 the governor relies on in issuing the order. It is unlikely the order was issued to suspend a regulatory law. It is possible the order was issued under the authority to regulate ingress and egress; however, some elements of the protocol focus on sanitation and other factors and, as a result, may exceed the governor's authority to regulate ingress and egress. In addition to this authority granted to the governor, the State Department of Health, local boards of health, and occupational and professional boards may have the authority to regulate businesses in the case of an emergency or disaster, such as the COVID-19 pandemic.

³⁴ *Little*, 565 N.W.2d at 775.

³⁵ See N.D. Cent. Code § 14-02, N.D. Admin. Code Articles 32-02 and 49-03.

There are strengths and weaknesses to each of these avenues for regulating access and sanitation to businesses in the state. For example, the governor has the resources of the executive branch at the disposal of the office but is limited on the purposes for which executive orders may be issued. The State Department of Health has expertise in health-related matters but limited expertise in commerce-related issues. Local boards of health are well suited to address local issues but are limited in scope to the jurisdiction of the local board of health. Likewise, occupational and professional boards are well suited to address health-related issues unique to the profession regulated but are limited in scope.

One weakness of the method utilized to implement the ND Smart Restart protocol is the protocol is essentially a document imposing regulatory restrictions and which was created by working groups composed of members from the private sector. Adoption of the protocol did not comply with Chapter 28-32, the Administrative Agencies Practices Act, yet the protocol is intended to have the force of law. Violation of the protocol is an infraction, a criminal offense. Additionally, the protocol uses language like "should" and legally imprecise language and, therefore, may be vulnerable to a void-for-vagueness challenge. These are questions of law that would be most appropriately answered by a court or through legislation.