



## GUBERNATORIAL EXECUTIVE ORDERS RELATED TO EXTENDING WORKERS' COMPENSATION COVERAGE

This memorandum provides information on the governor's authority to issue executive orders related to extending workers' compensation coverage.

### BACKGROUND

On March 25, 2020, Governor Doug Burgum issued Executive Order 2020-12, temporarily suspending specific provisions of North Dakota Century Code Title 65 to extend workers' compensation coverage to first responders and health care providers who contract Coronavirus (COVID-19). Executive Order 2020-12 became effective March 13, 2020, and:

- Allows first responders and health care workers who are exposed to COVID-19 in the course of employment to file a claim for workers' compensation coverage and be eligible for up to 14 days of wage replacement and medical coverage if quarantined;
- Provides workers' compensation benefit requirements for eligible first responders and health care workers;
- Provides wage replacement and medical benefits for compensable injuries suffered by first responders and health care workers who test positive for COVID-19 and can demonstrate the infection resulted from work-related exposure; and
- Applies to individuals working as paid or voluntary first responders and health care workers.

On April 16, 2020, the Governor issued Executive Order 2020-12.1 which further extended the workers' compensation coverage eligibility provided for first responders and health care providers under Executive Order 2020-12 to include funeral directors and other individuals employed in a funeral home.

On July 28, 2020, the Governor issued Executive Order 2020-12.2 which supplemented the workers' compensation coverage eligibility provided under Executive Order 2020-12.1 to include individuals employed to provide direct care, treatment, and services to individuals with intellectual or developmental disabilities.

### EXECUTIVE ORDER AUTHORITY

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. In times of disasters or emergencies, the governor has broad statutory authority under Chapter 37-17.1, the North Dakota Disaster Act. A "disaster" is defined in Section 37-17.1-04 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)**

A disaster or emergency must be declared by executive order or proclamation of the governor, pursuant to Section 37-17.1-05. Executive orders, proclamations, and regulations issued by the governor have the force of law. Once declared, the state of disaster or emergency continues until the governor determines the threat of an emergency has passed or the disaster has been dealt with to the extent the emergency conditions no longer exist. However, the Legislative Assembly by concurrent resolution has the power to terminate a state of disaster or emergency. Pursuant to Section 37-17.1-05(6), during times of emergencies, the governor's authority includes suspending 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.

## LIMITATIONS ON EXECUTIVE ORDER AUTHORITY

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 must 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>1</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>2</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>3</sup> Moreover, 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 it.<sup>4</sup> This likely would violate the veto provisions of Section 9 of Article V of the Constitution of North Dakota.

An executive order, like any exercise of the governor's authority, must be issued pursuant to constitutional or statutory authority.<sup>5</sup> The governor's constitutional authority is limited to executing or administering the laws of the state. A governor may not create laws or interpret laws without violating the separation of powers doctrine that precludes the exercise of those powers by anyone other than the legislative and judicial branches.

The governor's statutory authority for issuing executive orders is circumscribed to a handful of specific situations, which include times of disaster or emergency. As discussed previously, Section 37-17.1-05(6) authorizes the governor to:

[s]uspend 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. **(emphasis supplied)**

Century Code does not provide the definition of a "regulatory statute." The term briefly was mentioned in a 1958 case,<sup>6</sup> which noted Chapter 192, Session Laws N.D. 1919 was the first comprehensive regulatory statute pertaining to rates, charges, and services of public utilities. Interpreting the meaning of the term in relation to the governor's emergency powers seems to suggest regulatory statutes are those statutes that serve to regulate or prescribe the procedures for conducting state business. The governor's power to suspend regulatory statutes in North Dakota is narrower than the authority provided in comparable provisions in other states. For instance, the governor of Connecticut is authorized to "modify or suspend in whole or in part . . . any statute, regulation or requirement" the governor deems in conflict with the "efficient and expeditious execution of civil preparedness functions or the protection of the public health."<sup>7</sup> In addition, the governor of New York may, by executive order, "temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster."<sup>8</sup>

<sup>1</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>2</sup> *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008).

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

<sup>4</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>5</sup> *State v. Johnson*, 16 N.W.2d 873 (N.D. 1944); *Louisiana Hosp. Ass'n v. State*, 168 So.3d 676 (La. Ct. App. 2014); *Rapp v. Carey*, 375 N.E.2d 565 (Ct. App. N.Y. 1978); *O'Neil v. Thomson*, at 173 (invalidating executive orders that were not supported by constitutional or statutory authority); Gerald Benjamin et al., "Executive Orders and Gubernatorial Authority to Reorganize State Government," 74 *Alb. L. Rev.* 1613, 1614 (2010-11).

<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> *Conn. Gen. Stat. § 28-9(a)* (1975).

<sup>8</sup> *N.Y. Executive Law § 29-a* (1978).

An executive order issued outside constitutional or statutory authority "cannot be considered more than a directive from the governor to his subordinates in the executive branch for the carrying out of their official duties" and is unenforceable otherwise.<sup>9</sup>

### **EXECUTIVE ORDERS 2020-12, 2020-12.1, AND 2020-12.2**

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. To accomplish the purposes of Chapter 37-17.1, the governor is empowered to issue executive orders and proclamations and amend or rescind them. In acting to prevent injury or loss of life before it occurs, the governor necessarily must make a prediction about the imminence of the danger and the likelihood a disaster will in fact occur.

Courts have analyzed the validity of executive orders under a two-pronged determination.<sup>10</sup> First, whether the declaration of disaster constituted a "disaster" within the meaning of the statutory definition. Secondly, whether the governor's exercise of his emergency powers was authorized by law. The second prong involves two closely related inquiries:

- Whether the executive orders were rationally related to the legislative purpose of protecting the public; and
- Whether the executive orders were closely tailored to the magnitude of the disaster.

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 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 a "disaster" as defined under Section 37-17.1-04.

Chapter 37-17.1 does not permit any delegation of power to the governor to authorize any permanent actions taken by executive orders. Rather, Chapter 37-17.1 grants extraordinary power to the governor in time of emergency or disaster to protect the public. The Legislative Assembly has tasked the governor with the responsibility of minimizing or averting the adverse effects of a disaster or emergency.<sup>11</sup>

The purpose of the state's workers' compensation laws is to provide certain relief to workers who are injured in hazardous employment.<sup>12</sup> Title 65 provides for specific requirements, parameters, criteria, and time durations for the receipt of workers' compensation coverage benefits such as wage-loss benefits, medical benefits, including pharmacy, and permanent partial impairment benefits.

Executive Order 2020-12 expanded the pool of workers eligible for workers' compensation coverage by temporarily suspending certain statutes and administrative rules to reduce the risk of economic hardship to first responders and health care workers engaged in active response, recovery, and mitigation efforts during the COVID-19 epidemic. Executive Orders 2020-12.1 and 2020-12.2 added funeral directors; funeral home employees who provide for the care, removal, and final disposition of the deceased; and individuals employed to provide direct care and services to individuals with intellectual and developmental disabilities to the expanded pool of workers made eligible for workers' compensation coverage during the COVID-19 epidemic.

Section 37-17.1-05(6) authorizes the governor to suspend the provisions of any rule, statute, or regulations of any state agency, if strict compliance with the provisions would in any way prevent, hinder, or delay necessary action in managing the disaster. Therefore, if a regulatory statute is a statute that serves to regulate or prescribe the procedures for conducting state business and strict compliance with the statute would prevent, hinder, or delay necessary action in managing a disaster, the governor likely is authorized to suspend such a statute to minimize or avert the effects of a disaster.

Executive Order 2020-12 only covers first responders and health care workers who test positive for COVID-19 and can demonstrate the infection resulted from a work-related exposure. Executive Order 2020-12.1 extends Executive Order 2020-12 to expand workers' compensation coverage eligibility to funeral directors and other funeral home employees provided a funeral director or employee who tests positive for COVID-19 demonstrates the virus

<sup>9</sup> Kinder v. Holden, 92 S.W.3d 793, 807 (Mo. Ct. App. 2002) (internal citations omitted).

<sup>10</sup> County of Gloucester v. State, 132 N.J. 141 (1993).

<sup>11</sup> North Dakota Century Code Section 37-17.1-05(1).

<sup>12</sup> North Dakota Century Code Section 65-01-01.

resulted from exposure to a deceased individual who tested positive for COVID-19. Executive Order 2020-12.2 supplemented Executive Order 2020-12.1 by expanding workers' compensation coverage eligibility to individuals employed to provide direct care and services to individuals with intellectual and developmental disabilities provided the employee is exposed to or diagnosed with COVID-19 resulting from contact with an individual to whom services are being provided. Thus, the orders could be interpreted as being rationally related to the legislative purpose of protecting the public and being narrowly tailored to the magnitude of the disaster.

### POTENTIAL LEGAL ISSUES

Issues related to Executive Orders 2020-12, 2020-12.1, and 2020-12.2 which may be ripe for legal analysis include the potential need for judicial determination on whether:

- The orders violate the separation of powers doctrine by contravening or conflicting with enacted legislation; or
- The orders constitute legislation since the statutory eligibility requirements for workers' compensation coverage specifically have been defined and enacted by the Legislative Assembly.

In the last three legislative sessions (House Bill No. 1317 (2015), House Bill No. 1261 (2017), and House Bill No. 1456 (2019)), the Legislative Assembly considered bills that would have expanded various workers' compensation coverage and benefits received by volunteer firefighters, emergency or disaster volunteers, community emergency response team members, and volunteer health practitioners.

The bills sought to pay volunteer firefighters disability benefits based on the state's average weekly wage if their wages from primary employment were not insured or were lower than the state's average weekly wage. This would have created a base average weekly wage for these volunteers if those volunteers did not have coverage for their primary wages.

The bills also sought to apply a presumption of causation to certain situations. Generally, an injured employee is required to prove an injury arose from and was sustained in the course of employment. However, the presumption clause would presume certain conditions found in law enforcement officers and full-time paid firefighters were caused by their employment and the burden of proof is placed on Workforce Safety and Insurance and the employer to prove it was not. In other words, these conditions are presumed to be attributable to the workers' employment unless Workforce Safety and Insurance can prove they are not. The bills would have sought to use a similar presumption clause for volunteer firefighters, emergency or disaster volunteers, community emergency response team members, and volunteer health practitioners performing volunteer services if, within 24 hours of performing volunteer services or participating in training, they experience an injury due to heart attack or other heart-related disease, stroke, or physical injury caused by mental stimulus. The bills would have removed the requirement that unusual stress caused the conditions and presumes that employment caused the conditions.

Each of the aforementioned bills failed to pass the House of Representatives. Based on the legislative history of the bills, the primary reason for the lack of support for the bills appears to relate to the fact that law enforcement officers and full-time paid firefighters must currently undergo an annual medical examination to be covered under the presumption of causation statute. The bills would not have required volunteer firefighters, emergency or disaster volunteers, community emergency response team members, and volunteer health practitioners performing volunteer services with the same annual medical examination requirement. In addition, the bills would have provided volunteer firefighters disability benefits based on the state's average weekly wage even though there was not a wage loss from the voluntary position.

Executive Order 2020-12 does not contravene enacted legislation because the bills were not enacted. However, it could be argued Executive Order 2020-12 constitutes legislation because the order effectively creates a new and additional class of injured workers eligible for workers' compensation coverage when the Legislative Assembly has repeatedly and intentionally opted not to expand workers' compensation coverage for volunteer firefighters, emergency or disaster volunteers, community emergency response team members, and volunteer health practitioners. A counterargument likely would rely on the governor's statutory responsibility to minimize or avert the adverse effects of a disaster and the governor's authorization to suspend any statutes of a state agency if strict compliance with the statute would prevent, hinder, or delay necessary action in managing a disaster.<sup>13</sup>

Executive Orders 2020-12.1 and 2020-12.2 may contravene Section 65-01-02(11)(b)(1) since ordinary diseases of life to which the general public outside of employment are exposed specifically are excluded from the definition

<sup>13</sup> North Dakota Century Code Section 37-17.1-05.

of a "compensable injury" required for workers' compensation coverage eligibility. However, this argument hinges on two determinations. First, whether COVID-19 constitutes an "ordinary disease," and second, whether the governor's authorization to suspend any regulatory statutes of a state agency if strict compliance with the statute would prevent, hinder, or delay necessary action in managing a disaster includes undermining the Legislative Assembly's intentional exclusion of ordinary diseases as compensable injuries under Section 65-01-02(11)(b)(1).

### **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 forcing governors to take rapid action resulting in the issuance of executive orders at an unprecedented pace. The legislative and judicial response to the executive orders issued during the duration of the epidemic likely will provide ample precedence to outline the true boundaries of executive order authority.