

NGA Public Health Leaders Call: Public Health Governance was the fourth session in a series facilitated by COVID Academy's **Margaret Bourdeaux, MD, MPH** and hosted by the NGA's **Brittney Roy, MPA**. These sessions aim to help state leaders craft public health system reforms by sharing lessons learned and emergent model practices from COVID-19 so that state public health systems can confront future public health crises.

The **Considerations for Governors** summarized below are based on session presentations by **Wendy Parmet, JD**, Distinguished Professor of Law and Professor of Public Policy and Urban Affairs at Northeastern University, **Anand Parekh, MD**, Chief Medical Advisor at the Bipartisan Policy Center, and **Lacy Fehrenbach, MPH, CPH**, Deputy Secretary for Prevention, Safety, and Health at the Washington State Department of Health.

Core considerations for governors highlighted during the session include:

1. **Clarifying public health authorities** and to all relevant stakeholders across public and private sectors and **collaborating** with important community figures to reinforce messaging.
2. **Bolstering state public health law capacity** so when emergencies occur, state leaders have the legal advising – and appropriate authority as written in legal statute – to prompt action that can adapt to the diverse needs of public health emergencies.
3. **Supporting and informing** the work of supra-state public health governance reform efforts (i.e. through the Uniform Law Commission, the COVID Commission, the National Network of Public Health Institutes, the Bipartisan Policy Center, the National Governors Association, etc.).

This brief was written and edited by **Flavia Chen, MPH, Anders Olsen, MPPc, MDc**, and **Margaret Bourdeaux, MD, MPH**.

Issue

With respect to public health, the [Association of State and Territorial Health Officials](#) (ASTHO) classifies states as practicing centralized/largely centralized-, decentralized/largely decentralized-, mixed-, or shared/largely shared governance, depending on whether local units are led by employees of state or local governments, or a mix of both, as well as by the distribution of powers over fiscal decisions, and the ability to issue public health orders.

Public health law and governance gained increased attention in the early 2000s because of the anthrax attacks and heightened risk of bioterrorism. In 2001, the Centers for Disease Control and Prevention (CDC) commissioned the [Model State Emergency Health Powers Act](#) (MSEHPA), which sought to provide a rubric with options for states updating emergency preparedness laws. While ultimately influential in catalyzing many states to undertake initiatives to update outdated state laws, the MSEHPA was not universally embraced, in part because of concerns that it granted extraordinary executive power to Governor's offices with insufficient checks to counteract possible infringements on civil liberties in service of public health.

Although a trend toward centralization of power through the delegation of broad authority to the Governor has been noted since the Cold War, a unresolved tension persists. Judicial deference historically grants public health powers to the local level, the justification being that those on the ground may need maximal flexibility to tailor responses to local conditions. The COVID-19 pandemic brought to light these lingering tensions over who has the authority to act in the face of a public health emergency that crossed jurisdictional boundaries – between levels of government, within state and local agencies, as well as

between states. A salient example includes the response by local authorities to control outbreaks in vulnerable communities such as among incarcerated individuals which at times placed public health authorities in tension with law enforcement. Fragmented lines of authority often forced communities to lean heavily on local responders, who were often short-staffed and insufficiently resourced to address the scale of COVID-19 outbreaks.

In response to perceived state overreach to the COVID-19 pandemic, several state legislatures initiated [legislation](#) seeking to limit or eliminate the emergency powers and public health authorities leveraged by governors and mayors to enact and enforce mitigation measures such as masking, social distancing, and vaccination requirements. Initially, courts upheld executive orders, accepting the precedent of broad delegations of authority. As the pandemic continued however, some state legislative bodies began to read emergency powers more narrowly, concerned with the risks of extending executive powers over a prolonged period.

The attempt to narrow Governors' emergency powers threatens to weaken public health governance by 1) hampering state's capabilities to adapt to novel COVID-19 variants and, 2) by potentially limiting public health powers for future pandemics that could present differently from COVID-19. Two years into the COVID-19 pandemic, states, nonprofits, and scholars alike are developing legal reform proposals to clarify and strengthen public health governance across the U.S.

Considerations for Governors

1. **Clarifying public health authorities** and to all relevant stakeholders across public and private sectors and **collaborating** with important community figures to reinforce messaging.

The COVID-19 pandemic has pushed the issue of public health governance to the fore. Governors' offices, state legislatures, agencies, and non-profits are engaging in the critical work of assessing COVID management and response with an eye to averting future public health emergencies.

Advisors should understand and be able to explain key similarities and differences between specific public health authorities and broader emergency authorities, and their respective application to (for example) geographically or temporally defined emergencies. While recognizing the legitimate concerns of absolute power, states must also recognize the tradeoffs of restricting emergency authority and the impact on response capabilities. Limiting authority without regard to the ecology or epidemiology of the emergency may have adverse effects when considering the ramifications for future pandemics.

The [Bipartisan Policy](#) Center report "Public Health Forward" recommends that the state leaders, "Review, evaluate, and modernize public health governance structures and statutory responsibilities." Bills seeking to limit state and local public health response threaten not only to hamper effective mitigation strategies but may also sow mistrust. With eroding public trust in government institutions, anti-establishment rhetoric directed at public health could cause significant and unintended damage to the health and safety of everyday citizens as COVID-19 continues and future pandemics arise. Fundamental to building and maintaining trust, the report authors argue the need for clear communication of the dynamic role of public health departments to state constituents and the public at large, especially during emergencies.

Processes to support the clarification of authorities and communication among and across stakeholders have been developed in multiple states, ranging from [Indiana](#) Governor Holcomb's Public Health Commission, to [New Jersey's](#) bill establishing the "Local and County Health Department Infectious Disease Preparedness Study Commission." Governors can also broker relationships between public agencies and private actors to foster collaboration.

- 2. Bolstering state public health law capacity** so when emergencies occur, state leaders have the legal advising – and appropriate authority as written in legal statute – to prompt action that can adapt to the diverse needs of public health emergencies.

The COVID-19 pandemic has tested the boundaries to state and local use of [executive powers](#) in a public health emergency. To better prepare for future public health emergencies, states should bolster [public health law](#) capacity.

Not all health departments have in-house legal counsel, leaving states without critical legal expertise during an emergency that demanded swift and broad actions. Some states, like Washington, built sustained relationships between department of health, the governor’s office, and the office of the Attorney General to help align public health orders with other state statutes. As a decentralized “home rule” state, Washington devolves most public health authorities the local level, but the state health official maintains the authority to step in and act as a local on a county basis as requested – typically during health events spanning multiple counties or overwhelm local authorities. During COVID, numerous locals requested a state-wide approach. Fostering a strong partnership with the Attorney General’s office helped ensure that the public health orders were written in a manner consistent with the authorizing environment for an emergency and the public health code.

Looking toward the future, state public health agencies should have access to – and funding to support – public health law expertise to both enable timely response to emergent situations, and to proactively review enabling statutes to ensure their ability to attend to 21st century public health threats. Because every state has unique public health statutes, establishing an in-house or contracted legal counsel is a crucial first step that Governors can take to plan for improving public health governance.

- 3. Supporting and informing** the work of supra-state public health governance reform efforts (i.e. through the Uniform Law Commission, the COVID Commission, the National Network of Public Health Institutes, the Bipartisan Policy Center, the National Governors Association, etc.).

The COVID-19 pandemic has increased the appetite for legislative and regulatory reflection and reform, in service of clarifying the distribution of powers and responsibilities in public health, as well as in crafting guardrails to prevent abuse. In addition to bolstering state public health law capacity, Governors may consider supporting and informing the work of supra-state public health governance reform efforts, such as the Uniform Law Commission, the COVID Commission, and endeavors like the [Commonwealth Fund](#) Commission on a National Public Health System. These endeavors all aim to ensure standardization and coordination in approaches across states so that the US can have a unified approach to a health crisis like COVID-19 in the future.

In particular, the [Uniform Law Commission’s Public Health Emergency Authorities Committee](#) “will draft model state legislation focused on the allocation of authority between state executive branch officials and the legislature (including with respect to preemption of local governments), and processes for the use of such authorities, in responding to public health emergencies including epidemics and pandemics.” The perspectives of state leaders—governors in particular—will be important to consider in this endeavor. As highlighted in the first consideration, Governors can play a major role in brokering relationships for their public health officials and authorities across the public/private sectors. This is particularly relevant during state budgetary processes where public health has often struggled to advocate for state allocations despite its work impacting nearly every branch of government and economic function within a state, as made evident by COVID-19.