

# Help Ensure That Public Health Professionals Can Continue to Protect Community Well-Being

How communities can identify, understand, and resist potential legislative and other legal limitations on their traditional public health powers

## What do public health professionals do?

We all want to live in communities where **everyone** has what they need to live healthy, happy lives. Public health professionals in state and local agencies use their governmental powers and resources to protect and promote health and well-being for all. This includes **routine actions** like inspecting to promote safety in our homes and restaurants; preventing illnesses through education and services; providing vaccines; reducing incidents of injury and violence in our neighborhoods; supporting moms and babies in their early days; and counteracting the harmful influence of commercial tobacco companies on our kids!<sup>1</sup> The public health workforce must also prepare for and respond to **emergencies** that threaten our health and safety, such as natural disasters, security threats, and infectious diseases like COVID-19.<sup>2</sup>

## Where do public health powers come from?

Governmental public health powers are rooted in states' authority to take actions that will protect residents' health and safety – the *police power* reserved to them in the US Constitution. Elected officials in state legislatures delegate some of this authority to state and/or local agencies like health departments.<sup>3</sup> These agencies maintain expertise in public health and familiarity with community needs and conditions so that they can respond quickly and flexibly to public health threats.<sup>4</sup> Local health departments also tend to be

staffed by residents and function with input from local residents on community-specific goals and needs. States may also give some authority to other agencies and departments, such as schools and boards of medicine, to protect health in their respective spheres.

## What is a state of emergency?

To allow quick response to public health threats like the COVID-19 pandemic, we also have laws that authorize the declaration of a state of emergency to provide our health officials with extra powers – such as the power to temporarily suspend or modify laws – during a declared emergency.<sup>5</sup> Emergency powers are typically granted to executive branch officials – such as governors or public health officials at state or local levels – who are better equipped to act quickly and decisively than legislative bodies.<sup>6</sup>

## What is happening to public health authority in some legislatures?

As part of an ongoing backlash against COVID-19 public health responses, some state legislatures with an anti-regulatory agenda have proposed (and some have passed) bills to take public health powers away from state and local public health officials and staff. Even though public health professionals often live closer to the communities they serve, keep up with the latest health research, and have more information on the goals and needs of nearby residents, these agenda-driven legislatures are trying to limit the tools and processes that health officials can use to do their job, during COVID-19 and beyond, by taking the following actions:

### 1 Preempting lower-level government actions.

Preemption is a legal tool used by a higher level of government to limit or even eliminate the ability of a lower level of government to regulate a specific issue.<sup>7</sup> For more on types of preemption and how they work, see Fundamentals of Preemption. Some states have used preemption to dictate what local public health officials can and cannot do in response to COVID-19, but the effects can extend far beyond pandemic response activities. For messaging guidance on preemption of public health authority, see Preemption of Public Health Authority.

### 2 Broadening exemptions from public health measures.

Some state legislatures are creating new loopholes to sidestep life-saving public health rules (like masking and vaccination

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#### PREEMPTION: EXAMPLES

Iowa HF 847 prohibits counties and cities from imposing mask mandates more stringent than the state's mandate.

West Virginia HB 4012 prohibits a state or local government official or entity from requiring proof of COVID-19 vaccination as a condition to enter the premises of public buildings.

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requirements) that are broader than medical reasons or other traditional exemptions. For example, [Utah SB 2004](#) creates an exemption from employer COVID-19 vaccination mandates for employees objecting due to religious or “personal” belief. Many of these bills would limit health officials’ efforts to track the spread of illness and implement related response measures. Some bills would also limit the ability of residents to voluntarily coordinate illness notifications with the help of existing government infrastructure.

### 3 Shifting authority between government entities.

Some state legislatures are redistributing public health emergency response powers, shifting authority from the executive branch to the legislative branch and from public health agencies to other government entities. These shifts can take public health matters away from those equipped with the expertise and experience required to quickly evaluate and respond to them. Moving public health decisions to a legislature can risk politicizing decisions that should be based on the latest local events and data. In some cases, this could mean inserting a new layer of government approval before officials can take certain urgent actions. For example, [Arkansas HB 1547](#) requires state medical facilities to obtain approval from a legislative council before imposing a COVID-19 vaccination mandate. Requiring these additional approvals can delay or even prevent seasoned public health officials from responding adequately to urgent needs in their communities.

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#### SHIFTING AUTHORITY: EXAMPLES

##### **Executive → legislative:**

[Ohio Substitute SB 22](#) provides that a state of emergency declared by the governor expires after 90 days unless extended through a concurrent resolution adopted by the legislature.

##### **Public health → other:**

[Kansas SB 40](#) prohibits state and local health departments from taking emergency actions that affect school operations, reserves the power to take such actions to local boards of education, and mandates expedited procedures for public grievances against such actions.

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#### “Chilling” legislation: Liability for adverse consequences

Some legislatures have proposed bills to create a chilling effect on disease control measures by public health officials and even employers, schools, and businesses. Chilling occurs when a law does not prohibit certain actions, but it makes them so risky that officials no longer want to take them. For example, South Carolina [H 4545](#) and [H 4764](#) would have allowed any public, nonprofit, or private entity to be held civilly liable for any adverse health consequence,

loss of income, or other “consequential damages” (or losses) suffered as a result of a mandatory COVID-19 vaccine policy or practice. These bills would have exposed decision makers, both public and private, to unprecedented legal risk in order to constrain the actions they might take in response to COVID-19. These South Carolina bills didn’t pass, but even unsuccessful legislation can change the conversation about how the risks and costs of illness should be allocated.

## What is happening to public health authority in some courts?

In addition to legislative proposals to limit public health authority, some legal challenges have called on courts to examine or reexamine questions about the scope and exercise of public health and emergency powers. For background on common legal challenges to agency regulations, see [Public Health Regulations](#).

While most courts are siding with public health in these COVID-19 response cases, some judges have decided to change long-established public health practices and requirements. In this subset of decisions, three notable trends have implications for officials exercising public health authority, now and in the future:

### 1 Narrowing agency power.

Some courts are narrowing their interpretations of the scope of public health and emergency powers delegated from the legislature to public health agencies, including the processes they can use to make decisions. For example, the Wisconsin Supreme Court held that the broad powers delegated to the state health department do not include the authority to issue a statewide stay-at-home order during a declared public health emergency without complying with slow and cumbersome rulemaking procedures.<sup>8</sup> This decision does not align with long-standing public health legal procedures – not to mention common-sense reasons – that enable public health officials to respond more quickly during emergencies than during their usual, day-to-day activities.

### 2 Increasing “free exercise” review.

Prior to the pandemic, “free exercise” or religious liberty challenges to public health orders usually failed unless the order specified or targeted a religion or religious entity or practice. The judiciary now looks more favorably on religious liberty claims, including in cases where the health order at issue did not identify or single out religious worship. For example, the Supreme Court ruled in 2021 that a California order limiting the number of people who could gather in a private home violated the religious liberty of plaintiffs who wanted to hold a Bible study group in a private home.<sup>9</sup>

### 3 Raising evidentiary standards.

Some courts are requiring public health agencies to articulate ever more precise justifications in support of policy decisions, particularly when plaintiffs allege that public health orders have implicated certain fundamental rights, such as religious liberty.

## What are the implications for public health practitioners?

While most of the country still has legislatures and courts working to facilitate public health responsiveness to COVID-19 and preserving broader public health authority, in places experiencing the legislative and judicial backlash described earlier, there are significant implications for public health officials' ability to perform basic duties and respond to future emergencies. For example, limitations on public health authority could...

### Jeopardize health and safety by politicizing decision making and hindering efforts to address health disparities

- Shifting authority from public health agencies to legislative or other government bodies sidelines evidence-based approaches and expertise and may politicize decision making. Public health is best served when decisions are driven by experts and experience rather than politics.
- Limiting public health authority can thwart efforts to address health disparities and advance health equity for all. This point is particularly important for communities facing the most dramatic inequities related to COVID-19 and other health outcomes, such as BIPOC groups, LGBTQ+ people, immigrants, older people, and women. For more on the equity effects of these limitations, see the fact sheet [Why Keep Public Health Powers Close to Local Communities?](#)

### Thwart life-saving efforts by limiting the efficacy of public health measures, subjecting emergency responses to cumbersome legislative process, and increasing costs and delays

- Broadened, vague exemptions limit the efficacy of public health measures. The ability to implement life-saving countermeasures while balancing competing priorities is necessary to protect public health during infectious disease outbreaks and other emergencies.
- Shifting authority from executive to legislative bodies ties up emergency responses in cumbersome legislative processes. Speed and flexibility are critical for effective responses to rapidly evolving conditions in order to inform and protect residents during an emergency.
- The risk of litigation increases costs and delays, hampering effective responses to public health emergencies and threats.

## Impinge on local democracy by shifting power away from local officials and experts, and chilling their ability to respond to local events and data

- Preemption impinges on local democracy. Local control enables decision making by the officials who are closest to the people they represent and tailoring of public health responses to unique local conditions.
- Legislative and judicial rollbacks of public health authority may have a chilling effect on public health officials, inhibiting their day-to-day activities as well as robust responses to future public health emergencies and threats.

## Where do we go from here?

Community-based organizations, local institutions, government partners, and community members have many ways to help ensure that public health professionals can continue to protect and promote well-being for all:

- **Talk about these issues!** Engage partners and learn more about how these shifts in public health authority might affect our communities.
- Show up for local officials and their efforts to improve health outcomes – by sharing resources, supporting initiatives, or engaging in public meetings.
- Reach out to elected officials. Even those who must **refrain from lobbying** have ways to share information and data with decision makers. It is important that legislators know how their decisions might affect the lives of their constituents.

If you are interested in sharing your experiences and learning more about public health authority, please explore **Act for Public Health**, which includes additional research and resources, as well as opportunities for **technical assistance** and other partnerships.

# Act for Public Health

An initiative of the Public Health Law Partnership



Act for Public Health, an initiative of the Public Health Law Partnership, provides law and policy research, analysis, and expertise in support of public health authority. This group of public health organizations and experts is applying their decades of experience in public health law and policy work to preserve public health authority and infrastructure wherever challenges arise.

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