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FISCAL IMPACT REPORT

SPONSOR Baca ORIGINAL DATE 03/30/21
 LAST UPDATED _____ HB _____

SHORT TITLE Termination and Renewal of Public Health Orders SB 4/ec

ANALYST Klundt

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Minimal				

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 New Mexico Attorney General (NMAG)
 Department of Finance and Administration (DFA)
 Department of Health (DOH)

SUMMARY

Synopsis of Bill

Senate Bill 4 (SB4) amends and enacts statutory sections within the Emergency Powers Code (EPC), the Public Health Emergency Response Act (PHERA), and the Public Health Act (PHA) as follows:

- SB4 enacts a statutory section within the EPC and the PHA to provide for automatic termination, 45-days after being issued, of a public health order issued pursuant to the EPC. SB4 prohibits a renewal or amendment of the order or the issuance of an order for the same subject matter except by joint resolution of the Legislature, or if the Legislature is not in session, by vote of the majority of the members of the New Mexico Legislative Council.
- SB4 amends PHERA to require a state of public health emergency declared in an executive order to specify whether the expected duration of the public health emergency is greater than 14-days for any emergency that is used as the basis for an executive order or general applicability throughout the state or a portion of the state and closes any public place or forbids or limits gatherings of people, and whether the expected duration of the public health emergency is less than 30-days for public

health emergencies than are not used as the basis for an executive order of general applicability throughout the state or a portion of the state and closes any public place or forbids or limits gatherings of people.

- SB4 requires transmission of copies of the declaration that closes public places to the people the Legislature. SB4 requires a declaration of a state of public health emergency requiring closure of public places to be terminated automatically after 45-days and provides that the public health emergency shall only be renewed or amended and a new public health emergency on the same subject matter shall only be declared by a joint resolution of the Legislature or, if the Legislature is not in session at the time the original declaration terminates for a period of time until the Legislature meets in session, by a joint statement that is transmitted as described in the amendment to the EPC.

This bill contains an emergency clause and would become effective immediately upon signature by the governor.

FISCAL IMPLICATIONS

On similar legislation introduced in during the 2020 regular session AOC reported there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and any challenges to the law and/or to terminations, renewals, amendments or declarations of public health orders and/or a state of public health emergency. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

On similar legislation introduced in during the 2020 regulate session DOH reported, “Under the separation of powers established by the New Mexico Constitution, the Governor is the chief executive of the state, and possesses the inherent power to preserve and protect the health and welfare of the state. SB4 would contradict that constitutional framework, and could jeopardize the health and welfare of all New Mexicans.”

On similar legislation introduced in during the 2020 regular session AOC reported, “ 1) Section 23-1-3(E) NMSA 1978 grants the authority to the Department of Health to “close any public place and forbid gatherings of people when necessary for the protection of the public health.” SB4 does not amend this statutory section to make it subject to any restrictions or requirements upon this authority as proposed in SB4.

On similar legislation introduced in during the 2020 regular session NM AG reported, “SB4’s title indicates that it relates only to public health, but the Emergency Powers Code addresses a host of other problems not directly related to the governor’s power to impose public health orders. The Emergency Powers Code consists of NMSA 1978, Chapter 12, Article 10 (the All Hazard Emergency Response Act), Article 11 (the Disaster Act), Article 12 (the Hazardous Materials Emergency Response Act) as well as Article 10A (the Public Health Emergency Response Act.) Adding new language to PHERA accomplishes the purpose of limiting the

governor’s discretion to close business and limit public gatherings without adding language to the Emergency Powers Code itself.”

On similar legislation introduced in during the 2020 regular session DFA reported, “The changes provided in this bill would be a significant departure from the current provisions of the Emergency Powers Code and the Public Health Act. Currently, the Governor has the authority to keep public health orders in place for the duration of a public health emergency. This bill would make it so that any public health order issued by the Governor that closed any public places or restricted gatherings of people could not extend beyond 45-days without approval by the Legislature or by three-fourths of legislative leadership.

The primary issue with the bill is its potential to stall governmental response to public health emergencies. By the plain text of the bill, any public health order that meets the stated criteria must expire within 45 days unless approved of by the Legislature or three-fourths of its listed leadership. This creates the potential for public health orders to expire while waiting for the Legislature to act, preventing the state from using the provisions of the Emergency Powers Code and Public Health Act to respond to an emergency. This situation seems particularly likely if the Legislature were in session when the Governor issued a public health order. Given the procedural issues of the Legislature, it would likely have to take up the contemplated joint resolution almost immediately and to the exclusion of other business if it were to pass the resolution through both houses within 14 days.

There are similar timing issues if the Legislature is not in session. The president pro tempore of the Senate, the minority floor leader of the Senate, the speaker of the House of Representatives and the minority floor leader of the House of Representatives would have to confer on the public health order, draft and review a joint statement, and send it back to the Governor, leaving time for the order to expire.

The bill also creates an uncertainty about who determines the emergency is over after legislative approval and which branch of government is charged with managing state response to the emergency while it is still active. The parts of existing Section 12-10A-5(D)—renumbered to (E) by the bill—imply that the Governor would still have the authority to terminate a public health order, but it does not directly give that same power to the Legislature.

There are also unanswered questions on the terms the bill uses. It is not entirely clear what the broad terms “portion of the state” and “any public place” specifically refer to. This could create a situation where there is a locally or regionally isolated public health emergency requiring closure of a limited number of public places, but it would still require legislative approval to keep an order in place. In these situations, the Legislature may not have the same motivation to meet its obligations within 14 days as it would in the case of a statewide, all-encompassing public health emergency like the state’s response to the Covid-19 pandemic.”

OTHER SUBSTANTIVE ISSUES

The National Conference of State Legislatures (NCSL) notes that, “Although governors need to be able to respond to emergencies quickly, legislatures have an important role in making sure these powers are not abused and that they do not undermine the separation of powers vital to our democratic system of government. Legislatures exercise several types of checks on state executives' emergency authority in ways that vary between states. However, some common features exist.

Statutes defining executive authority during an emergency cannot be modified by executive order. Kind of like the fictional rule that a genie's lamp can't be used to wish for more wishes, governors can't promulgate emergency rules that grant themselves authority beyond the statutory limits, even if they otherwise have the power to temporarily alter statutes. As a result, legislatures have the authority to legislate firm limits on emergency executive power. Several states impose specific limits on the exercise of emergency powers. Common restrictions include prohibiting governors from limiting freedom of the press or confiscating citizens' firearms. Additionally, constitutional limits on state authority and any guaranteed rights remain in full effect during an emergency.

Legislatures may retain the power to nullify an emergency proclamation by a resolution. In most cases, it takes a simple majority vote of both chambers. In Louisiana, an emergency declaration may be terminated by a resolution of either chamber. State laws may grant legislatures even greater oversight power by requiring legislative approval for an emergency to continue beyond a specified length of time. If a state's legislature is out of session during an emergency, some states will require the governor to call a special session. Alternatively, some statutes permit an interim committee or group of legislative leaders to extend or reject emergency proclamations.

See <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx>.

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