



GUBERNATORIAL EMERGENCY POWERS

Overview

Under certain circumstances, each state allows its governor to declare a state of emergency, granting otherwise-unavailable executive powers until the emergency is over. These expanded powers sometimes overlap with legislative authority, such as suspending existing laws or creating temporary new laws.¹ They exist to give governors the ability to efficiently respond to a crisis, but raise questions about the balance of power between the legislative and executive branches. Legislative oversight of the executive branch differs state-by-state and has seen some major changes as a result of the emergency orders addressing the COVID-19 pandemic.

When COVID-19 first hit the United States in early 2020, all 50 states declared a state of emergency or public health emergency.² These emergency orders gave state executive branches powers that are not available at other times, such as the ability to implement lockdowns, quarantines and stay-at-home orders, to impose mask mandates, to require businesses to close or limit density and to relax certain licensing requirements. They also gave state governments flexibility in spending and allowed states to direct privately held medical equipment to where it was most needed.³ Some governors also used their emergency powers to implement bans on vehicle repossessions and foreclosures. Since these orders were put into place, there have been efforts to overturn them through lawsuits and attempts to limit the emergency powers of governors. In some cases, these attempts have been successful. Following the COVID-19 pandemic, many states are taking renewed looks at the emergency powers of their respective executives, with legislatures raising questions about the balance of powers between branches.

Repossession Bans

In response to the COVID-19 pandemic, 13 states⁴ and the **District of Columbia** implemented some form of repossession moratorium to help blunt the economic impact of health restrictions on borrowers. Five of these states asked financial institutions to voluntarily suspend repossessions during the pandemic. None of the moratoria are still currently active. The District of Columbia passed multiple emergency and temporary laws which outright banned repossessions during the District's public health emergency. On August 27, 2022, District of Columbia permanent law [B24-0357 / A24-0457 / L24-0154](#) took effect. The new law

¹ National Conference of State Legislatures, *Legislative Oversight of Emergency Executive Powers*, at <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx> (June 14, 2020).

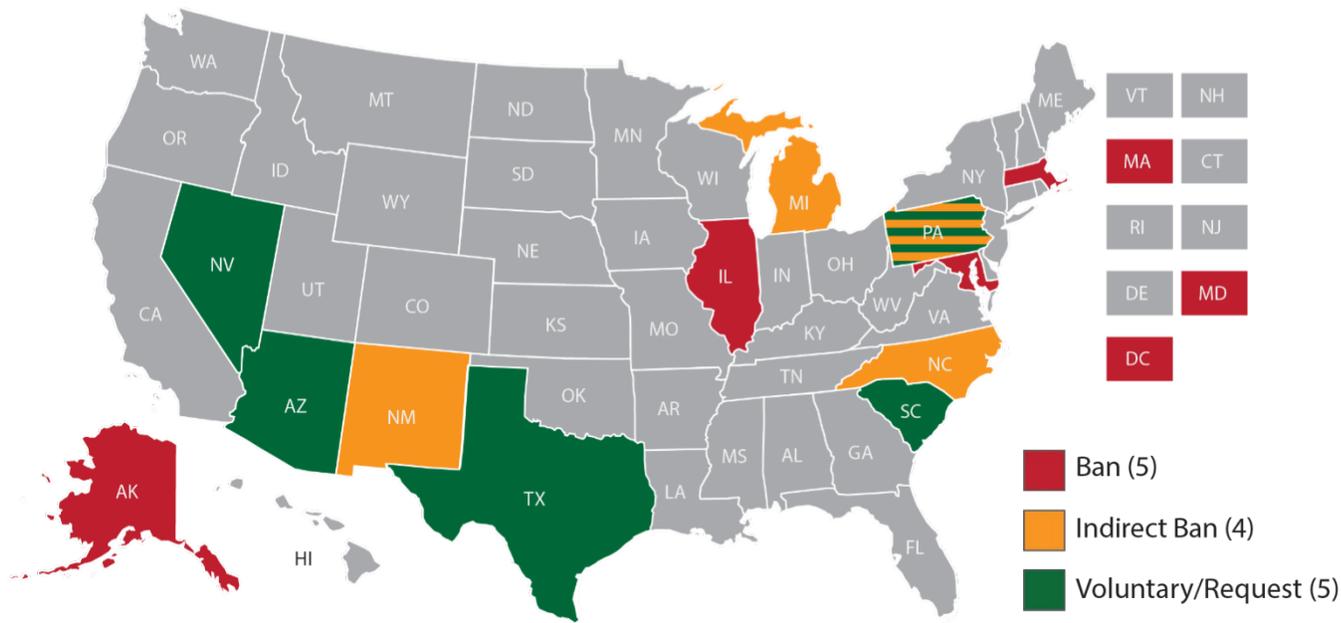
² Pew, *Most States Have Ended Their COVID Health Emergencies*, at <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/05/19/most-states-have-ended-their-covid-health-emergencies> (May 19, 2022).

³ *Ibid.*

⁴ These states were: **AK, AZ, CA, IL, MA, MD, MI, NC, NM, NJ, NV, SC** and **TX**.

implements a repossession ban for any future public health emergency declared by the District’s Mayor. **Nevada’s** [voluntary ban](#) remained active until May 2022, when the state of emergency ended.⁵ The repossession moratoria in **Arkansas, Arizona, California, Massachusetts, New Jersey, New Mexico, Pennsylvania, South Carolina** and **Texas** all expired by July 2021.⁶

Repossession Ban History



Four states that declared bans on vehicle repossession were ordered by governors through emergency powers. The **Illinois, Maryland, Michigan** and **North Carolina** governors declared either an outright ban or indirect ban on vehicle repossession. Although these emergency orders banned repossession of vehicles they did not place a moratorium on the payments or other financial obligations relating to vehicle finance. Consumers had the opportunity to pay and eliminate repossession orders on vehicles by the time the emergency order was lifted.

On March 26, 2020, Illinois Democratic Governor JB Pritzker issued [Executive Order 2020-16](#) to directly ban repossession for the duration of the health emergency. The ban on vehicle repossession expired in August 2020.⁷

⁵ Nevada Independent, *Sisolak to Lift COVID State of Emergency later This Month*, at <https://thenevadaindependent.com/article/sisolak-to-lift-covid-state-of-emergency-later-this-month> (May 6, 2022).

⁶ AFSA, *Repossession Moratoria*, at https://afsaonline.org/afsa_resource/repossession-moratoria-july-2021/ (July 2021).

⁷ Walinski & Associates, P.C., *Update: Illinois Suspends Vehicle Repossession by Auto Lenders*, at <https://www.walinskilaw.com/chicago-collections-lawyer/illinois-suspends-vehicle-repossession-by-auto-lenders> (December 2021).

Maryland Republican Governor Larry Hogan issued [Emergency Order 20-10-16-01](#) on October 16, 2020, to directly ban repossession until the state of emergency was terminated and the proclamation of the health emergency rescinded. Governor Hogan ended the COVID-19 state of emergency on July 1, 2021.⁸

On May 21, 2020, Michigan Democratic Governor Gretchen Whitmer issued [Executive Order 2020-96](#). This order indirectly banned vehicle repossession. The ban expired by June 22, 2021.⁹

North Carolina Democratic Governor Roy Cooper issued [Emergency Order 135](#) in April 2020 for an indirect ban on vehicle repossession. The ban expired by February 2021.¹⁰

In **New Mexico** and **Pennsylvania**, indirect bans on repossession were in place due to stay at home orders and limits on the operations of businesses deemed “non-essential” by the state’s executives. In both cases, despite state policies treating financial institutions as essential and exempt from business closure orders, repossession or towing agents were treated as non-essential and prevented from operating.

AFSA members in states that did not issue some form of repossession moratoria, universally and without any coordination, worked proactively with consumers during the coronavirus pandemic, many offering forbearance, halting collection efforts, and suspending vehicle repossessions across the country for a period of time. Non-voluntary bans on repossessions and bans on repossessions severely disrupted for months, or more than a year in the case of the District of Columbia, Maryland, Michigan and Nevada, the vehicle finance market. Repossession moratoria are a risk to creditors because they undermine the basic premise that payment of the obligation is secured by collateral. Except for similar constitutional concerns, repossession bans are not comparable to the foreclosure moratoriums that were also put in place during the pandemic because vehicles are depreciating assets and vehicle loans have a significantly shorter contract terms, meaning a lengthy moratorium represents a more significant portion of the length of the loan.¹¹

Legislatures, chambers of commerce and business owners in many states voiced unease with allowing governors sole control over the conduct of business during a health emergency and the consequences of restrictions on vehicle repossession, debt collection and other business functions.¹²

⁸ Steiner Law Group, *The End of the COVID-19 State of Emergency in Maryland*, at <https://www.steinerlawgroup.com/covid-19/the-end-of-the-covid-19-state-of-emergency-in-maryland/> (June 30, 2021).

⁹ Michigan.gov, Rescission of Emergency Orders, at [https://www.michigan.gov/coronavirus/resources/orders-and-directives/lists/executive-directives-content/rescission-of-emergency-orders-2#:~:text=I%20therefore%20order%20that%20the.Facilities%20\(October%2029%2C%202020\)](https://www.michigan.gov/coronavirus/resources/orders-and-directives/lists/executive-directives-content/rescission-of-emergency-orders-2#:~:text=I%20therefore%20order%20that%20the.Facilities%20(October%2029%2C%202020)) (June 17, 2021).

¹⁰ WITN Eastern North Carolina, *Repossessed: Pandemic-Related Moratoriums for Car Repos Expire*, at <https://www.witn.com/2021/02/04/repossessed-pandemic-related-moratoriums-for-car-repos-expire/> (February 4, 2021).

¹¹ AFSA, *Repossession Moratoria*.

¹² Maine Policy Institute, *Policy Brief #11 Scoring Emergency Executive Power in All 50 States*, at <https://mainepolicy.org/wp-content/uploads/EPv2-Final.pdf> (February 2022).

Legislatures Curbing Powers

In the wake of expanded emergency powers, some state legislators began pushing back in an attempt to reassert legislative authority and shift back the balance of power between the legislative and executive branches. In 2020, there were almost 1,000 lawsuits filed challenging governor's executive actions on COVID-19 policies in states such as **Colorado, North Carolina, Oregon** and **Pennsylvania**.¹³ Judges generally sided with the executive, although court rulings in **Michigan** and **Wisconsin** limited the governors' abilities to act alone. The Michigan Supreme Court ruled that the governor cannot extend an emergency declaration without the legislature's consent.¹⁴

Lawmakers have also attempted to reduce executive power through legislation. According to the National Conference of State Legislatures, 393 bills relating to legislative oversight of the executive were introduced in 47 states¹⁵ and the **District of Columbia** in 2020 and 2021. Thirty-six of these bills were enacted in 22 states¹⁶ and the District of Columbia.¹⁷ So far in 2022, 129 bills on this subject have been introduced in 34 states.¹⁸ Of these bills, five have been enacted so far in **Florida, New Hampshire, Virginia** and **Washington**.¹⁹ Some of these new laws give legislators more control over the length of an emergency declaration, while others give them oversight of federal emergency aid spending or allow them to convene the legislature into session in an emergency.²⁰

North Carolina is one state that has increased legislative oversight of the executive branch since the pandemic began. The state now requires a majority consensus of the Council of State²¹ after 30 days or a majority vote of the full legislature after 60 days to approve an extension of a state of emergency.²² **Ohio** limited the duration of a governor's state of emergency declaration to 90 days, while **Kentucky** limited its duration to 30 days. Ohio also now requires legislative

¹³ Pew, *GOP Lawsuits Restrain Governors' COVID-19 Actions*, at <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/11/17/gop-lawsuits-restrain-governors-covid-19-actions> (November 17, 2020).

¹⁴ *Ibid.*

¹⁵ Those states were: **AL, AK, AR, AZ, CA, CO, CT, DE, FL, GA, HI, ID, IL, IN, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VA, WA, WV, WI** and **WY**.

¹⁶ Those states were: **AK, AR, CO, CT, FL, ID, IN, KS, KY, LA, MD, MN, MS, MT, NH, NY, ND, OH, OK, PA, TN** and **UT**.

¹⁷ National Conference of State Legislatures, *COVID-19 Archive Database*, at <https://www.ncsl.org/research/health/covid-19-archive-database.aspx> (March 24, 2022).

¹⁸ These states are: **AK, AZ, CA, DE, FL, HI, IL, IN, KS, KY, MA, MD, MI, MN, MS, NC, NE, NH, NJ, NM, NY, OH, OK, OR, PA, RI, SC, SD, TN, VA, VT, WA, WI** and **WV**.

¹⁹ National Conference of State Legislatures, *State Action on Coronavirus*, at <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx> (September 15, 2022).

²⁰ Pew, *More States Rein in Governors' Emergency Powers*, at <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/17/more-states-rein-in-governors-emergency-powers> (June 17, 2021).

²¹ The Council of State includes the Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor and Commissioner of Insurance.

²² Maine Policy Institute, *Policy Brief #11 Scoring Emergency Executive Power in All 50 States*.

approval of any extension after 90 days. The Ohio legislature is also now permitted to terminate health department actions to prevent the spread of a contagious disease. **New Hampshire** also adopted a similar provision that allows the legislature to rescind the governor's emergency orders by a majority vote of both chambers.²³

The American Legislative Exchange Council (ALEC) has created a set of principles to inform emergency acts to “prevent future executive overreach at the state level and to facilitate legislative guidance.” The principles call for:

- An end to comprehensive emergency orders in favor of ones more tailored to each emergency;
- Authorization of gubernatorial powers where it makes the government response more efficient and eliminates barriers;
- Clearly defined gubernatorial emergency powers;
- A requirement for government officials to follow certain rulemaking processes before issuing an order;
- A limit to emergency declarations to 30-45 days before requiring legislative approval;
- Protection of individual and constitutional rights;
- A provision for those affected by government action to be heard in court and justly compensated for damages;
- Guarding the legislative authority to make law, particularly criminal law.

ALEC also created a model act, the [Emergency Power Limitation Act](#), that some legislators have used as a basis for their own legislative oversight bills. According to the National Association of County & City Health Officials, legislation in **Arizona, Idaho, Kentucky, Montana, North Dakota, Pennsylvania, Utah, Virginia** and **Washington** appear to be based on ALEC's model act.²⁴

Conclusion

Gubernatorial emergency powers granted to the executive are vast and have the potential to affect the business operations of AFSA members. During the COVID-19 pandemic, many state executives implemented vehicle repossession bans and foreclosure moratoria through powers granted to them by emergency declarations in the early months of the pandemic. These actions shone a new light on emergency powers and resulted in significant changes to the nature and scope of emergency declarations. Some states have limited the duration of states-of-emergency, while others have given the legislature more control over emergency aid spending or the power to rescind a declaration. With over 100 bills introduced this year addressing legislative oversight of the executive, this issue looks likely to continue to be prevalent in state governments in the coming years. AFSA will continue to monitor the subject, and the resulting consequences, particularly in the key areas of repossession or foreclosure moratoria.

²³ Ibid.

²⁴ National Association of County & City Health Officials, *Proposed Limits on Public Health Authority: Dangerous for Public Health*, at <https://www.naccho.org/uploads/downloadable-resources/Proposed-Limits-on-Public-Health-Authority-Dangerous-for-Public-Health-FINAL-5.24.21pm.pdf> (May 2021).