

Authority of the Governor, State, and Local Government During Disasters and Emergencies

Questions and Answers^{1,a}

Statutory authority for actions taken during emergencies or disasters.

The Governor's Authority during disasters and emergencies is found in NCGS Ch.166A, Art. 1 and NCGS Ch. 14, Art. 36A. Specifically, NCGS Ch. 166A sets forth the "authority and responsibility of the Governor, State agencies, and local governments in prevention of, preparation for, response to and recovery from natural or man made disasters or hostile military or paramilitary action." NCGS Ch. 14, Art. 36A sets forth the authority and responsibility of local governments in response to riots or disorders that could arise in the event of an emergency or disaster. The Governor can only use the authority in Chapter 14 if local control of the emergency is insufficient. In addition, the State Health Director also has specific authorities to address public health emergencies found in NCGS Ch.130A, and the Secretary of Crime Control and Public Safety has authority for state emergency management activities under NCGS Ch.166A and §143B-476.

Would these statutory provisions apply in the event of a flu pandemic?

Yes. The statutes are written broadly enough to apply during a flu pandemic. The North Carolina Emergency Operations Center would be activated, and the State Emergency Response Team would coordinate the state's response as in any other natural disaster. For example:

- NCGS §166A-4(1) defines disaster as "An occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property *resulting from any natural* or man made accidental, military or paramilitary *cause*." NCGS §166A-6(a) gives the Governor or General Assembly the authority to declare a state of disaster.
- NCGS Ch. 14, Art. 36A authorizes local governments to enact ordinances to take certain actions in emergencies, including closing public places and restricting the movement of people in public places. NCGS §14-288.1(10) defines state of emergency as "the condition that exists whenever, during times of public crisis, disaster, rioting, catastrophe, or similar public emergency, public safety authorities are unable to maintain public order or afford adequate protection for lives or property, or whenever the occurrence of any such condition is imminent." NCGS §14-288.15(a) gives the Governor the authority to intervene only if the Governor determines that a

a Ms. Perry provided the following disclaimer: The information provided to the Task Force was not an official advisory letter or advisory opinion of the Attorney General, and has not been reviewed and approved in accordance with procedures for issuing an Attorney General's opinion. Additional information was provided by Jill Moore, JD, UNC School of Government. Specific information about the State Health Director's power quarantine and isolation authority was excerpted.²

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state of emergency exists and finds that local control of the emergency is insufficient. In those circumstances, he can exercise the authority needed to “assure adequate protection for lives and property.” NCGS §14-288.15(a).

What authority does the Governor have to protect the public during a flu pandemic?

The Governor has broad authority to protect the public during a state emergency or disaster. For example, some of the Governor’s powers include:

- Making, amending, or rescinding orders, rules, and regulations within the limit of authority conferred upon him, considering the policies of the federal government; NCGS §166A-5(1)a1.
- Delegating any authority vested in him; NCGS §166A-5(1)a2.
- Utilizing the services, equipment, supplies, and facilities of existing departments, offices, and agencies of the state and political subdivisions thereof. The officers and personnel of all such departments, offices, and agencies are required to cooperate with and extend services and facilities to the Governor upon request; NCGS §166A-5(1)a6.
- Coordinating the use of any private facilities, services, and property; NCGS §166A-5(3)f. and
- Taking actions and giving directions to state and local law enforcement officers and agencies as may be reasonable and necessary for the purpose of securing compliance with orders, rules, and regulations made pursuant to the emergency management act. NCGS §166A-6(b)(2).

Can the Governor take private property during an emergency caused by a pandemic flu?

The statutory authority is broad and includes the authority to take private property during an emergency. For example:

- The Governor has the authority to procure, by purchase, condemnation, seizure, or other means... facilities for emergency management without regard to limitation of existing law. NCGS §166A-6(c)(8).
- If the Governor or state seizes the property, then the individuals are entitled to compensation. NCGS §166A-11(a). The right to compensation for services or the taking or use of property only applies if it has been determined that the individual did not volunteer his or her services or property without compensation.
- Further, the individual or firm that owned the private property is not liable for the death or injury or any damage that occurs on the property if used during the emergency. NCGS §166A-15.

The statutes also give the Governor the authority to operate public utility and transportation services and facilities during a disaster. NCGS §166A-6(c)(3).

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In addition, the governor can forbid the importation of livestock and poultry into the state, if the livestock or poultry in other states are known to carry infectious diseases. NCGS §106-304. The State Veterinarian, with the approval of the Governor, also has the authority to inspect and quarantine animals in order to prevent and control contagious animal diseases. NCGS §106-399.4.

What authority does the Governor or state government have to compensate individuals during a pandemic? (eg, If the Governor closes schools or businesses to prevent the spread of disease, is there any capacity for the Governor to provide financial assistance to individuals who would be harmed by the loss of income?)

The state and federal government each have statutory provisions for assisting individuals during a disaster. The determination of whether it is primarily the state's responsibility to assist or the federal government's responsibility to assist depends on whether it is a Type I, II, or III disaster. State government has sole responsibility to assist individuals with a Type I disaster. The higher the disaster designation, the more the responsibility for assistance is shifted to the federal government.

- Type I disasters occurs when the Governor declares a disaster, but the President has not issued a major disaster declaration. NCGS §166A-6(a1)(1)
- Type II and Type III disasters are declared only when the President issues a federal major disaster declaration which triggers federal disaster assistance that can be provided by FEMA and SBA. The difference between Types II and III disasters depends on the extent of the assessed damage (with Type III being more significant amounts of damage). NCGS §166A-6(a1)(2),(3).

In Type I disasters, the *state* can help provide individual assistance including, but not limited to: temporary housing and rental assistance; medical or dental expenses; and funeral or burial expenses. NCGS §166A-6.01(b).

In Types II and III disasters, the *federal government* can provide assistance including, but not limited to: medical, dental and funeral expenses; personal property; transportation; and other expenses. 44 CFR §206.119(b)(c). In addition, the federal government can provide disaster unemployment assistance, home disaster loans, physical disaster business loans, or economic injury disaster loans. 12 CFR Part 123; 44 CFR §206.141.

Can the Governor require people to work during a pandemic flu emergency?

The Governor's authority to compel public employees to work during a pandemic is more clearly specified than his authority to compel private employees to work. For example, the Governor can:

- Utilize all available State resources as reasonably necessary to cope with the emergency, including the transfer and direction of personnel or functions of state agencies or units thereof for the purpose of performing or facilitating emergency services. NCGS §166A-6(b)(1).

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- In addition, if the Governor has determined that it is necessary to use the services of subunits of state government to protect the public during a disaster or emergency, the Secretary of Crime Control and Public Safety has the authority to “utilize and allocate all available state resources as are reasonably necessary to cope with the emergency or disaster, including directing of personnel and functions of state agencies or units thereof for the purpose of performing or facilitating the initial response to the disaster or emergency.” NCGS §143B-476(d).

There are no specific statutory references to requiring privately employed personnel to work during an emergency. However, the Governor does have broad authority to take necessary steps to promote and secure the safety and protection of the civilian population. NCGS §166A-6(c)(6). It is unclear whether the Governor could, or would, use this authority to mandate that privately employed individuals work during an emergency. This issue has never been tested in the courts of North Carolina.

Can the Governor control movement or restrict personal liberties during a pandemic flu?

During a state of disaster, the Governor, with the concurrence of the Council of State, may:

- Control ingress and regress of a disaster area, the movement of persons within the area, and the occupancy of premises therein. NCGS §166A-6(c)(1).

Additionally, if local control of an emergency is deemed insufficient to assure adequate protection of life and property, the Governor can impose prohibitions and restrictions in all areas affected by the emergency. NCGS §14-288.15(c).

Specifically, during a state of emergency when local control of the emergency is insufficient, the Governor can restrict:

- Movement in public places;
- The operation of offices, businesses, and other places where people congregate; and
- Other activities or conditions which may reasonably be necessary to maintain order and protect lives or property during a state of emergency. NCGS §14-288.12(b).

What happens if people don't comply with the Governor's orders?

In general, a person who fails to comply with the Governor's orders or proclamation after both an emergency has been declared and the local control of the emergency is determined to be insufficient is guilty of a Class 2 misdemeanor. NCGS §14-288.15(e). There are no specific penalties for noncompliance set out in NCGS §166A-1 et seq.

What authority is delegated to the State Health Director during an emergency or disaster?

The State emergency management program recognizes DPH as the lead technical agency for an influenza pandemic, coordinating the state's response under the

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North Carolina Emergency Operations Plan. Some of the responsibilities that the State Health Director will assume under the Emergency Operations Plan include:

- An epidemiological investigation of a ... biological agent;
- An examination and testing of persons and animals that may have been exposed to a ... biological agent;
- The procurement and allocation of vaccines and prophylactic antibiotics;
- The allocation of the National Pharmaceutical stockpile;
- The appropriate conditions for quarantine and isolation in order to prevent further transmission of disease;
- Immunization procedures; and
- The issuance of guidelines for prophylaxis and treatment of exposed and affected persons. NCGS §166A-5(3)b1.

In addition, the State Health Director has specific authority for isolation and quarantine under NCGS §130A-145. The following description explains the State Health Director's authority for isolation and quarantine:³

“Isolation authority” is the authority to limit the freedom of movement or action of a person or animal who has (or is suspected of having) a communicable disease or condition. G.S. 130A-2(3a). “Quarantine authority” most often refers to the authority to limit the freedom of movement or action of a person or animal that has been *exposed* (or is suspected of having been exposed) to a communicable disease or condition. However, quarantine authority may also be exercised to limit access by any person or animal to an area or facility that is contaminated with an infectious agent (eg, anthrax spores), or to limit the freedom of movement or action of unimmunized persons during an outbreak. G.S. 130A-2(7a). Quarantine and isolation authority may be exercised *only* when and for so long as the public health is endangered. Furthermore, isolation and quarantine authority should not be exercised unless all other reasonable means for correcting the problem have been exhausted and no less restrictive alternative exists. G.S. 130A-145(a). Quarantine or isolation orders cannot exceed 30 days if they limit freedom of *movement* or if they limit *access* to persons or animals whose freedom of movement has been limited. Note that this restriction does not apply to orders limiting freedom of *action*. If the 30-day period is inadequate to protect the public health, the local health director or state health director must seek an order extending the time period from the superior court. If the court determines by a preponderance of the evidence that the limitation of freedom of movement is reasonably necessary to prevent or limit the conveyance of a communicable disease or condition, the court shall continue the limitation for a period of up to 30 days (or up to 1 year in the case of tuberculosis). When necessary, the state health director or local health director may

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return to court and ask the court to continue the limitation for additional periods of up to 30 days each (or up to 1 year for tuberculosis).
G.S. 130A-145(d).

What protections apply to healthcare providers who provide care during an influenza pandemic?

In general, healthcare professionals must follow community standards of care when offering care to patients. The general standard of care, as defined by the North Carolina courts, requires healthcare providers who render services to patients to exercise their best judgment and reasonable care and diligence, and comply with “the standards of practice among members of the same healthcare profession with similar training and experience situated in the same or similar communities.” *Makas v. Hillhaven, Inc.*, 589 F. Supp. 736, 740 (D. N.C. 1984), citing: *Wall v. Stout*, 310 N.C. at 193, 311 S.E.2d at 577. While this has not been tested in the courts, the general standard of care language suggests that providers who are providing care during an influenza pandemic would be governed by the general standards of care provided by other practitioners in the community **during an outbreak**, not by the standards of care provided by healthcare practitioners in a nonemergency setting.

In addition, healthcare providers have narrowly defined statutory protections from immunity during normal working conditions. However, these protections generally only apply to volunteers or providers acting as “Good Samaritans”:

- Volunteer health providers who provide care at health departments, free clinics, and nonprofit community health centers have qualified immunity from liability as long as the provider receives no compensation for the medical services provided. NCGS §90-21.16. This immunity protects against negligence, but not against gross negligence, wanton conduct, or intentional wrongdoing. Healthcare providers working at their own places of employment also have qualified immunity when serving patients referred by the local health department or a nonprofit community health center, so long as the provider receives no compensation for those services.
- Similarly, healthcare providers who render aid or emergency treatment also have qualified immunity from liability when the “reasonably apparent circumstances require prompt decisions and actions in medical or other care, and ...delay in the rendering of treatment would seriously worsen the physical condition or endanger the life of the person.”
NCGS §90-21.14(a)(1),(2).

NCGS §1-539.10 also provides qualified immunity for volunteers engaged in providing emergency services without compensation. NCGS §1-539.11 defines “emergency services” as “the preparation for and carrying out of functions to prevent, minimize, and repair injury and damage resulting from natural or man-made disasters. . . . These functions include . . . medical and health services. . . .”

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Providers who receive pay for their services have qualified immunity if they are operating as emergency management workers. Emergency management workers are defined as any “person performing emergency health services under G.S. 90-12.2” [ie, when the Governor has declared a state of emergency] and government employees who are performing emergency management services “subject to the order or control of or pursuant to a request of the State government or any political subdivision thereof.” NCGS §166A-14(d). This statute’s definition of “emergency mgmt worker” was amended in 2006 to include “any health care worker performing health care services as a member of a hospital-based or county-based State Medical Assistance Team designated by the North Carolina Office of Emergency Medical Services.”

Under the statutes, emergency management workers are immune from liability for death or injury to a person or for damage to property as a result of any action taken to comply with the emergency management rules, regulations, or orders. The immunity applies to any emergency management personnel “performing emergency management services at any place in the state” and subject to the order or control or pursuant to a request of the state government or any political subdivision thereof. NCGS §166A-14(d). The protection does not apply to cases of willful misconduct, gross negligence, or bad faith. NCGS §166A-14(a).

Can the Governor waive health professional licensure laws during a pandemic?

The NC Board of Medicine has the authority to waive licensure rules during disasters and emergencies for physicians, physician assistants, and nurse practitioners.

In the event of an occurrence which the Governor of the State of North Carolina has declared a disaster or when the Governor has declared a state of emergency, or in the event of an occurrence for which a county or municipality has enacted an ordinance to deal with states of emergency under G.S. 14 288.12, 14 288.13, or 14 288.14, or to protect the public health, safety, or welfare of its citizens under Article 22 of Chapter 130A of the General Statutes, G.S. 160A 174(a) or G.S. 153A 121(a), as applicable, the Board may waive the requirements of this Article in order to permit the provision of emergency health services to the public. NCGS §90-12.2.

Under this statute, the NC Medical Board could waive the licensure rules, for example, to allow retired physicians to practice during an emergency. However, other healthcare professional licensure boards such as nursing and pharmacy do not have the same authority.

The Governor appears to have the authority to waive licensure rules for emergency management workers. Specifically, the emergency management act provides immunity for emergency management workers:

Any requirement for a license to practice any professional, mechanical, or other skill shall not apply to any authorized emergency management worker who shall, in the course of performing his duties as such, practice such professional, mechanical, or other skill during a state of disaster. NCGS §166A-14(c).

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The Governor also has the authority to waive state licensure requirements for emergency management workers who come to North Carolina to help during an emergency, if the person holds a license, certificate, or other permit in another emergency management compact state. NCGS §166A-45.

References

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