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FISCAL IMPACT REPORT

SPONSOR <u>Baca/Gallegos</u>	LAST UPDATED <u>1/31/23</u>	ORIGINAL DATE <u>1/24/23</u>
SHORT TITLE <u>Emergency Powers Code Changes</u>	BILL NUMBER <u>Senate Bill 65/ec/aSHPAC</u>	ANALYST <u>Daly</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*

(dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Indeterminate but minimal	Indeterminate but minimal	Indeterminate but minimal	Indeterminate but minimal	Recurring	General Fund

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent version of this legislation.

Conflicts with House Bill 80 and House Joint Resolution 3

Sources of Information

LFC Files

Responses Received From

Department of Health (DOH)
 Homeland Security & Emergency Management Department (HSEMD)
 Administrative Office of the Courts (AOC)
 New Mexico Attorney General (NMAG)

SUMMARY

Synopsis of SHPAC Amendment to Senate Bill 65

The Senate Health and Public Affairs Committee amendment to SB65 changes the automatic termination date absent any legislative action of any Closure/Restrictive Order as described in the original bill from 45 to 90 days.

Synopsis of Original Senate Bill 65

Senate Bill 65 provides for automatic termination 45 days after issuance of a public health order issued pursuant to the Emergency Powers Code (EPC) and the Public Health Act (PHA) for any emergency that is used as the basis for an executive order of general applicability throughout the state or a portion of the state that closes any public place or limits or forbids gatherings of people (Closure/Restrictive Order). It also prohibits the renewal or amendment of such an order or the issuance of a new order for the same subject matter except by joint resolution of the Legislature. If the Legislature is not in session when an order expires, a majority vote of the Legislative Council would be required to continue the order in effect.

SB 65 also amends the Public Health Emergency Response Act (PHERA) to require a state of public health emergency declared in an executive order to specify whether a) the expected duration of the public health emergency is greater than 14 days for any Closure/Restrictive Order; or b) the expected duration of other public health emergencies is less than 30 days. The Secretary of DOH must transmit a copy of any Closure/Restrictive Order to the president pro tempore and the minority leader of the Senate, and to the speaker and minority floor leader of the House of Representatives. The PHERA amendments also impose the automatic termination of a Closure/Restrictive Order after 45 days, and provides that a renewal, amendment, or new declaration on the same subject matter requires the adoption of a joint resolution of the Legislature if it is in session or a majority vote by the Legislative Council if the legislature is not in session.

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

FISCAL IMPLICATIONS

Current statute limits emergency allocations to \$750 thousand for any type of emergency, but for years that limit has fallen short for public health emergencies that would be covered by SB65. The executive has routinely bypassed this limit by issuing a series of identical orders for \$750 thousand on the same day, effectively allocating millions to address a single disaster. In particular, the emergency costs related to the Covid-19 pandemic exceeded this limit at an even greater scale, and the governor issued several orders that outright exceeded the limit, including orders allocating \$10 million and \$20 million to the Department of Health.

SIGNIFICANT ISSUES

DOH provides this background on the recent public health emergency relating to Covid-19:

On March 11, 2020, Governor Michelle Lujan Grisham issued Executive Order no. 2020-004, which declared a state of public health emergency in the state of New Mexico concerning the novel coronavirus known as Covid-19. In recognition of the ongoing threat posed by the disease, the Governor had repeatedly extended the declared public health emergency by Executive Order.

During the course of the declared public health emergency, DOH issued numerous public health orders under the authority of various statutes, including both the PHA and PHERA. Earlier in the pandemic, those public health orders included directives commanding the closure of various public places, including certain businesses, and the public health orders previously included certain restrictions on public gatherings. The restrictions were adopted in consideration of the nature of Covid-19 and the manner in which Covid-19 is spread. The restrictions of the public health orders proved to be an essential component in the state's response to Covid-19, and were especially important tools for limiting spread when vaccines were not yet widely available.

SB65 would change the procedures currently authorized to address public health emergencies such as that arising from Covid-19, which changes DOH warns would “drastically restrict the ability of the Executive Branch to respond” to these types of emergencies. As a result, it advises:

Critical, time-sensitive public health decisions concerning the government's response to an epidemic, decisions that depend upon the expert opinions of medical professionals and epidemiologists, would become politicized, and the ability of the Executive branch to timely and appropriately respond to emergencies would be impaired. As SB65 is drafted, any such declarations or orders would last for no more than 45 days, and after that 45-day period, the Executive Branch would lose the ability to amend, extend, or renew the declaration or public health order. This approach would be both impractical and potentially dangerous to public health.

DOH concludes:

To appropriately respond to emergencies, the Executive Branch must have the autonomy to make independent, timely, scientifically based decisions that are not reliant upon the timelines and the politics of the legislative process. Under the separation of powers established by the New Mexico Constitution, the Governor is the chief executive of the state, and she possesses the inherent power to preserve and protect the health and welfare of the state. SB65 would contradict that constitutional framework, and could jeopardize the health and welfare of New Mexicans.

Similarly, HSEMD comments:

Legislative bodies manage budgets and make policies. Chief executives manage the staff and assets that are necessary to protect the health and safety of the public as well as private property. Additionally, health departments serve a vital role during health emergencies given their specific expertise, and that expertise should not be ignored or undermined.

CONFLICT

SB65 conflicts with HB80 as to the duration of certain public health emergency declarations under the PHERA. Under HB80, a declaration automatically terminates after 90 days, subject to a 60 day extension if no legislative action is taken in a special session called for that purpose; under SB65, declarations resulting in Closure/Restrictive Orders automatically terminate after 45 days without further action by the Legislature or the Legislative Council.

SB65 also conflicts with HJR3, which requires a three-fifths vote of each chamber of the Legislature to restrict, suspend or terminate a declaration of emergency; action by the Legislature under SB65 would be by simple majority of each chamber, or by majority vote of the Legislative Council.

TECHNICAL ISSUES

AOC calls attention to Section 24-1-3(E) NMSA 1978, which grants authority to DOH to “close any public place and forbid gatherings of people when necessary for the protection of the public health.” SB 65 does not amend this section of current law to impose the restrictions contained in this bill.

OTHER SUBSTANTIVE ISSUES

Both DOH and HSEMD express concern that the automatic termination provisions of SB65 could conflict with federal grant requirements and associated regulations in cases where the receipt of federal funds depends on the existence of a declared emergency.

NMAG reports the Covid-19 era executive orders have survived several judicial challenges. *See Grisham v. Romero*, 2021-NMSC-009 (holding in part that the governor is empowered by law to issue business restrictions and the public health orders were neither arbitrary nor capricious), *Grisham v. Reeb*, 2021-NMSC-006 (holding in part that DOH emergency orders were authorized by law), and *State v. Wilson*, 2021-NMSC-022 (holding in part that public health orders issued by DOH are a reasonable exercise of the State’s police power to protect public health).

AOC calls attention to a recent report issued by the National Conference of State Legislatures (NCSL) “Legislative Oversight of Emergency Executive Powers,” which comments:

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