

Alert | New York Government Law & Policy



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NY Legislature ‘To Restore the Pre-Pandemic Balance of Power’; Restricts Governor’s Authority to Continue or Issue New Directives Without Legislative or Local Government Involvement

In March 2020, the New York State Legislature passed and the governor signed legislation authorizing “the governor to issue by executive order any directive necessary to respond to a state disaster emergency.” That statutory change, scheduled to sunset on April 30, 2021, expanded the governor’s traditional executive authority to issue orders suspending certain statutory or regulatory requirements, to also be able to “issue any directive during a state emergency.” Limitations on this authority included that: (i) any directive issued must “be necessary to cope with the disaster;” (ii) suspensions and directives could not be issued for more than 30 days at a time; and (iii) the legislature was empowered to “terminate by concurrent resolution” any of the executive orders (EO) issued.

The pandemic quickly escalated in New York and within days the governor issued an EO declaring a state disaster emergency due to the COVID-19 outbreak. Over the next year, the governor issued nearly 100 separate EOs to manage the state’s effort to contain the spread of coronavirus. In early 2021, however, after questions were raised regarding the Executive’s reporting of data regarding COVID-19 related deaths in New York nursing homes, the Legislature started to question whether the executive powers had grown too large. Exactly one year after the enactment of Chapter 23 of 2020, following several contentious weeks, with an increasingly more difficult dynamic between the New York State Legislature and Governor

Andrew Cuomo, Senate Majority Leader Andrea Stewart-Cousins and Assembly Speaker Carl Heastie introduced legislation to curtail those extraordinary powers.

S.5357 (Stewart-Cousins)/A.5967 (Heastie) – which passed both houses on March 5, 2021 – opens with a statement of legislative intent, reiterating the importance of the 2020 law but asserting that now, one year later, “the governor is adequately equipped with his previously existing emergency powers and with authorization to continue existing directive extension and modification powers” and that it is necessary “to restore the pre-pandemic balance of power,” between the two co-equal branches of government.

Although described by many as eliminating the governor’s COVID-19 related EOs, the 2021 legislation retains much of the active policy included as of the governor’s last EO. In fact, notwithstanding the legislation’s immediate effective date, the governor’s latest EO would automatically continue, as is, for 30 days following the adoption of the new law. Moreover, the governor would be able to extend or modify those directives, for as long as the state of emergency continues, provided that strict rules are followed:

1. The “new” EOs must pertain to a “public health directive related to the COVID-19 pandemic.” The law will define this phrase as a directive by the governor that is certified by the Department of Health (DOH) Commissioner as “address[ing] the spread and/or reduction” of COVID-19; pertaining to vaccine distribution/administration; or requiring face coverings.
2. In advance of extending or modifying the EO, the governor must provide five days’ notice, with a public health justification for the action, to “the relevant [legislative] committee chairs,” as well as the legislative leaders. The governor must also provide the certification from the DOH Commissioner as soon as possible, but before the modification or extension takes effect. The legislative chairs are to be afforded the opportunity to comment on the extension or modification but, at least initially, there will be no requirement that the governor take these comments into consideration.
3. If the directive affects only specifically identified municipalities, the governor’s notice shall be provided to the municipality’s chief executive officer and legislature. The local executive and legislative leaders will be afforded the opportunity to comment on any such directive; again, however, the governor need not address these comments before the initial issuance of the directive.
4. Directives may only be modified to the extent that there is a need to alter certain scope or metrics.
5. Directives cannot limit local governments from taking any actions that are not inconsistent with any EOs.
6. Directives that are issued cannot be extended or modified more than once, unless the governor “has responded” to timely submitted comments from the state legislature and/or the local public officials.

Notably, the legislation would expressly empower the legislature to terminate any gubernatorial directive by passing a concurrent resolution, and to terminate any declaration of a state disaster emergency by concurrent resolution. During the continuation of the emergency, the governor would be obligated to create a public, searchable online database compiling all of the COVID-19 related EOs issued since the beginning of the pandemic. The database will also track any new related EOs and shall be updated every 30 days to include the comments from the legislative committee chairs and municipal officials.

Prior to both houses passing S.5357/A.5967, Speaker Heastie stressed that the legislature “did not negotiate this bill with the governor.” The governor signed the bill Monday morning, March 8, after the bill passed both houses just before the start of the weekend.

What this means for prior directives and waivers included in the ongoing EOs remains unclear. At a minimum, it appears that any EO extended pursuant to EO 202.96 may continue through at least early April. From there, the governor will have the opportunity to continue to issue directives that are clearly tied to halting the pandemic. Regardless, the legislature is clearly re-asserting its authority and role by establishing this notice, review, and comment process.

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