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Most of the following bills related to emergency declarations and legislative oversight were introduced in 2020.

Alabama (AL SB 334) - Introduced legislation stating that emergency declarations would terminate in 14 days instead of 60 days and granting the legislature the power to extend the emergency by proclamation, or if the Legislature is not in session, the President Pro Tempore of the Senate and the Speaker of the House of Representatives can extend the emergency by signing a joint proclamation. **(Status - Failed)**

Delaware (DE H 330) - A bill seeking to limit the term of an emergency but did not specifically call out natural disasters. The bill limits the Governor's authority to continue a state of emergency by requiring the General Assembly to adopt and set the time period for continuing the state of emergency at 30 days. **(Status – Failed)**

In **Michigan** , a number of bills were introduced stating the governor may declare a peacetime emergency, which may include an act of nature. When declared, the governor must immediately notify the majority and minority leaders of the senate and the speaker and majority and minority leaders of the house of representatives. A peacetime emergency must not be continued for more than five days unless extended by resolution of the Executive Council for up to an additional 25 days for a cumulative total of 30 days.

Additionally, by majority vote of each house of the legislature, the governor may extend a peacetime emergency beyond 30 days for up to an additional 14 days. For additional requests, the legislature by majority vote of each house may extend the peacetime emergency for up to an additional 14 days per request. If the governor determines a need to extend the peacetime emergency and the legislature is not in session, the governor must provide at least three to seven days (different bills) before the declaration lapses, to the majority and minority leaders in both houses of the legislature and issue a call to immediately convene both houses of the legislature.

Lastly, the governor shall not allow a peacetime emergency declaration to expire and declare a new peacetime emergency for the same emergency in an effort to avoid obtaining legislative

approval for an extension of a peacetime emergency as provided under this subdivision. **(Status - There were a number of bills introduced on this topic, and they either failed or were vetoed.)**

Minnesota (SB 4629 and HB 22) – A number of bills were introduced that would have required the governor to seek legislative approval to extend an emergency declaration longer than 5 to 7 days **(Status - Failed)**

Mississippi (SB 2791) - The governor is granted broad powers during an emergency. The Governor shall review the need for continuing the declaration of emergency impact area at least every thirty (30) days until the emergency is terminated, and shall proclaim the reduction of the emergency impact area or termination of the declaration of emergency impact area at the earliest date or dates possible. **(Status - Failed)**

Pennsylvania (SB 1166) – A constitutional amendment was introduced stating that a disaster emergency declaration may be declared by Executive Order or Proclamation of the Governor upon finding that a disaster threatens the health, safety or welfare of the Commonwealth. For disaster declarations issued by the governor, the general assembly shall provide for the manner in which each type of disaster shall be managed and a disaster emergency declaration shall be in effect for no more than 21 days, unless otherwise extended in whole or part by concurrent resolution of the general assembly. Upon expiration, the governor may not issue a new disaster emergency declaration based upon the same or substantially similar facts and circumstances without the passage of a concurrent resolution of the general assembly expressly approving the new disaster emergency declaration. **(Status - Enacted and Chaptered)**

In **Washington** (WA 5260) – This bill was introduced stating that the legislature finds that in response to issues arising from flooding events in 2007, the Revised Code of Washington (RCW) 43.06.220(2) was amended to explicitly authorize the governor to temporarily waive or suspend a set of specifically identified statutes. This amendment has become problematic for subsequent emergency response activities because it has inadvertently narrowed the governor's ability to waive or suspend statutes.

The legislature intends to allow the governor to immediately respond during a proclaimed state of emergency by temporarily waiving or suspending other statutory obligations or limitations prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance would in any way prevent, hinder, or delay necessary action in coping with the emergency. The RCW's were amended to allow:

(1) The governor after proclaiming a state of emergency and prior to terminating such, may, in the area described by the proclamation issue an order prohibiting:

(a) Any person being on the public streets, or in the public parks, or at any other public place during the hours declared by the governor to be a period of curfew;

(b) Any number of persons, as designated by the governor, from assembling or gathering on the public streets, parks, or other open areas of this state, either public or private; etc.

The bill goes on to say: No orders concerning waiver or suspension of statutory obligations or limitations may continue for longer than thirty days unless extended by the legislature through concurrent resolution. If the legislature is not in session, the waiver or suspension of statutory obligations or limitations may be extended in writing by the leadership of the senate and the house of representatives until the legislature can extend the waiver or suspension by concurrent resolution. **(Status - Enacted)**

EMERGENCY/DISASTER MANAGEMENT AND LEGISLATIVE OVERSIGHT OF EMERGENCY EXECUTIVE POWERS

KIM TYRRELL, ENVIRONMENT PROGRAM, NCSL

PAM GREENBERG, CENTER FOR LEGISLATIVE STRENGTHENING, NCSL | AUGUST 2020



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LEGISLATIVE OVERSIGHT OF EMERGENCY EXECUTIVE POWERS

PAM GREENBERG, CENTER FOR LEGISLATIVE STRENGTHENING, NCSL

FOR THE KANSAS SPECIAL COMMITTEE ON KANSAS EMERGENCY MANAGEMENT ACT | AUGUST 2020



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LEGISLATIVE OVERSIGHT OF EXECUTIVE EMERGENCY POWERS

AGENDA

I. State Constitutional and Statutory Provisions Related to Executive Emergency Powers

II. 2020 Emergency Orders and Legislation

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LEGISLATIVE OVERSIGHT OF EXECUTIVE EMERGENCY POWERS

AGENDA

I. State Constitutional and Statutory Provisions Related to Executive Emergency Powers

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LEGISLATIVE OVERSIGHT OF EMERGENCY EXECUTIVE POWERS

CURRENT CONSTITUTIONAL AND STATUTORY LANDSCAPE

Authorization for Executive Orders

- All fifty states provide authorization for governors' executive orders.
- Authorization is in state constitution and/or statute, by case law/common law, or implied.

Source: Book of the States, 2019, Council of State Governments

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LEGISLATIVE OVERSIGHT OF EMERGENCY EXECUTIVE POWERS

CURRENT CONSTITUTIONAL AND STATUTORY LANDSCAPE

Authorization for State of Emergency

- All fifty states authorize governors to declare a state of emergency.
- Executive powers expand under a state of emergency, including ability to suspend statutes and create new laws during the emergency.

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CURRENT CONSTITUTIONAL AND STATUTORY LANDSCAPE

Legislative Authority Over Emergency Powers

- Centers around the ability to cancel a state of emergency rather than individual executive orders.
- Exception: Puerto Rico – "The legislature shall pass judgment on the content of emergency executive orders and may delimit their scope through a concurrent resolution." 3 L.P.R.A. § 1942

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LEGISLATIVE OVERSIGHT OF EMERGENCY EXECUTIVE POWERS

CURRENT CONSTITUTIONAL AND STATUTORY LANDSCAPE

Termination of Emergency Orders by Legislature

- By majority vote of both chambers
- By a single chamber's resolution
- By a special jt. legislative committee/council if out of session

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CURRENT CONSTITUTIONAL AND STATUTORY LANDSCAPE

Time Limits on Duration of Emergency Orders

- Ranges from 2 to 60 days; most states: no specific time limit.
- Order terminates after the limit unless the legislature extends it. (6 states)

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CURRENT CONSTITUTIONAL AND STATUTORY LANDSCAPE

Authority to Call a Special Session

- Special session may be called by governor *or* legislature (36 states)
- Special session may be called only by governor (14 states)

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CURRENT CONSTITUTIONAL AND STATUTORY LANDSCAPE

Authority to Call a Special Session in an Emergency*

- Even in states where only the Governor may call a special session,
  - he/she is *required* to call a special session in an emergency, *OR*
  - the legislature is in session for most of the year.
- In Alabama, the legislature may declare a state of emergency and leaders may ask the governor to call the legislature into special session.

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CURRENT CONSTITUTIONAL AND STATUTORY LANDSCAPE

Limits on Emergency Executive Powers*

- U.S. Constitution, federal statutes and regulations, state constitutions
- State emergency management act provisions related to suspension of state statutes, regulations.

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AGENDA

II. 2020 Emergency Orders and Legislation

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LEGISLATIVE OVERSIGHT OF EMERGENCY EXECUTIVE POWERS

2020 EMERGENCY ORDERS

By State | By Classification | Concerning Reopening

Executive Orders — By State

ALABAMA

- State of Emergency declared
- Gov. Kay Ivey establishes Coronavirus Task Force
- Department of Public Health Order
- Supplemental State of Emergency: Coronavirus COVID-19
- Governor Ivey Issues Statement on Updated Public Health Precautionary Guidelines
- Governor Ivey Issues Statement on Updated Statewide Public Health Order
- Second Supplemental State of Emergency
- Third Supplemental State of Emergency
- Fourth Supplemental State of Emergency
- Gov. Ivey awards $9.5 million in broadband extension grants
- Sixth Supplemental State of Emergency
- Gov. Ivey Issues Stay at Home Order
- Seventh Supplemental State of Emergency
- Safer at Home Order
- Order of the State Health Officer Regarding Non-Congregate Sheltering
- Order of the State Health Officer Suspending Certain Public Gatherings
- Emergency Order of the State Health Officer
- Eighth Supplemental State of Emergency
- Ninth Supplemental State of Emergency
- Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19

Order 20-01

- Executive Order 20-79 Modifying the Suspension of Evictions and Writs of Recovery Due to the COVID-19 Peacetime Emergency
- Executive Order 20-80 Extending the Relief from Regulations for Motor Carriers and Drivers Operating in Minnesota Declared in Eos 20-24, 20-44, 20-60 and 20-76
- Executive Order 20-81 Requiring Minnesotans to Wear a Face Covering in Certain Settings to
- Executive Order 20-82 Authorizing and Directing the Commissione School Districts and Charter Schools to Provide a Safe and Effective Minnesota's Students during the 2020-21 School Year
- Executive Order 20-83 Extending the COVID-19 Peacetime Emerger Order 20-01
- Executive Order 20-84 Rescinding Emergency Executive Orders 20- Amending Emergency Executive Order 20-23

MISSISSIPPI

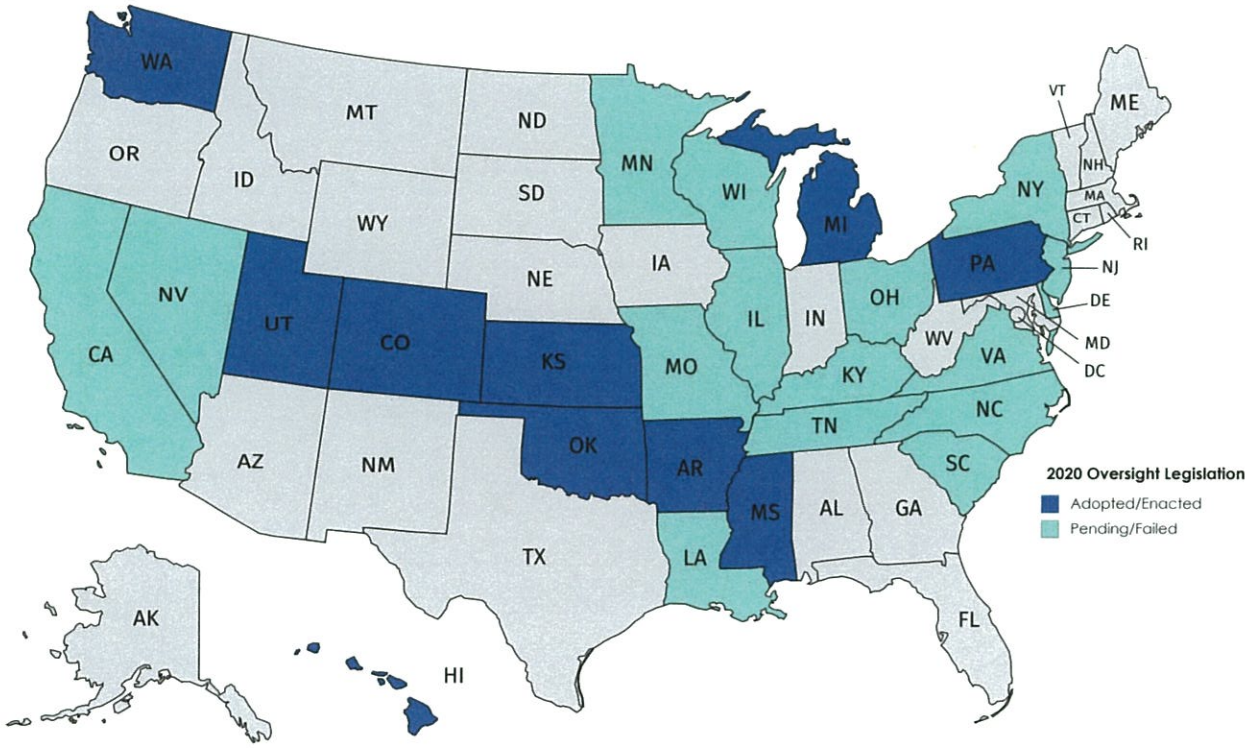
- State of Emergency declared
- Executive order No. 1457 Mississippi COVID-19 Preparedness and Committee
- Executive Order No. 1458 Ensures Paid Leave for State/Local Emp Essential Employees and also directs MDE to work on Distance Lea
- Executive Order No 1459 Activates the Mississippi National Guard units

Source: Council of State Governments, https://web.csg.org/covid19/executive-orders/

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LEGISLATIVE OVERSIGHT OF EMERGENCY EXECUTIVE POWERS

2020 LEGISLATION



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LEGISLATIVE OVERSIGHT OF EMERGENCY EXECUTIVE POWERS

2020 LEGISLATION

Types of legislative action related to executive orders:

- Limiting the duration of an emergency declaration before an extension is required.
- Requiring notice to legislatures or legislative leaders when issuing orders.
- Requiring prior notice before spending or transfer of funds.

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LEGISLATIVE OVERSIGHT OF EMERGENCY EXECUTIVE POWERS

2020 LEGISLATION

Significant 2020 enactments amend emergency management acts by strengthening legislative oversight:

- Colorado
- Utah
- Washington

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LEGISLATIVE OVERSIGHT OF EMERGENCY EXECUTIVE POWERS

2020 ENACTED LEGISLATION

Colorado H.B. 1426

- Governor must give notice of emergency executive orders to the general assembly.
- Sets regular meetings between governor and Legislative Council exec. comm. and Jt. Budget Committee following declaration of an emergency.
- Establishes oversight requirements regarding disaster spending.

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2020 ENACTED LEGISLATION

Utah H.B. 3005

- Governor cannot take "executive action" in response to epidemic/pandemic unless 24-hour advance notice given to Legislative Pandemic Response Team.
- Legislature may terminate executive action or directive of Governor by joint resolution at any time.

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2020 ENACTED LEGISLATION

Washington S.B. 5260*

- Governor may suspend statutory obligations or limitations for certain executive functions as specified
- Governor must provide notice to legislative leadership and local govts. when issuing orders to suspend statutory obligations.
- Removes provision that allowed the governor to prohibit the public possession of firearms during an emergency.

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LEGISLATIVE OVERSIGHT OF EMERGENCY EXECUTIVE POWERS

CURRENT CONSTITUTIONAL AND STATUTORY LANDSCAPE

Legislative oversight is a fundamental check and balance on government operations, and takes many forms:

- Standing and special committees
- Performance evaluation and audit agencies
- Legislative review of administrative rules
- Advice and consent

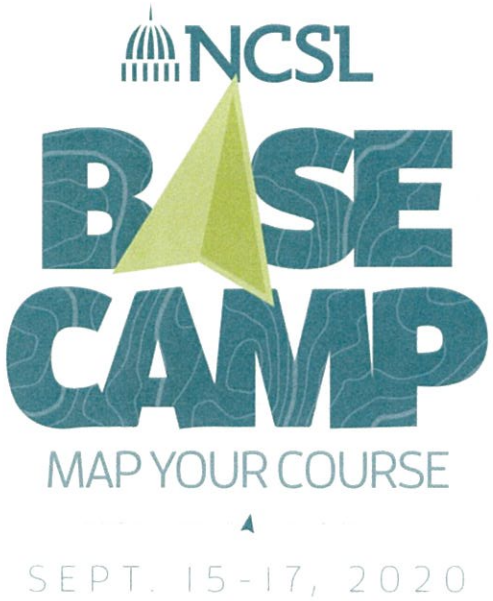
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NCSL Web Resources

- Legislative Oversight of Emergency Powers
- Continuity of Government in Constitutions

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Questions?

- Pam Greenberg, Center for Legislative Strengthening

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MEMORANDUM

To: Special Committee on the Kansas Emergency Management Act

From: Office of Revisor of Statutes

Date: August 21, 2020

Subject: History and Overview of the Kansas Emergency Management Act

History

Kansas has had statutes governing the management of emergency situations as far back as when the state began publishing statutes. The modern act's history goes back to 1951 when the Legislature passed the Kansas civil defense act of 1951. This act created a state civil defense advisory council and allowed each city and county to establish a local council of defense to prepare for and carry out all state emergency functions. In 1955, the Legislature passed HB 289 to provide for insurance for death or injury to volunteer civil defense workers (found at K.S.A. 48-922 today), and SB 271, which enacted the Kansas civil defense act of 1955. These statutes make up the sections found in article 9 of chapter 48 of the Kansas Statutes Annotated before the Kansas emergency management act.

In 1975, the legislature passed SB 70, the bill that enacted most of the sections of the Kansas emergency preparedness act, which would later become the Kansas emergency management act. The civil defense division created in 1955 was abolished and replaced with the division of emergency preparedness under the office of the adjutant general. The system of the governor declaring a state of disaster emergency by proclamation with possible ratification by the legislature and extension of time by the state finance council was put in place.

In 1994, the legislature passed HB 3055, primarily abolishing the division of emergency preparedness and replacing it with the division of emergency management. The bill also dealt with the issues of designating which county would be the disaster agency for a city overlapping into two counties and who would carry out the duties of the governor if the governor was unavailable.

In 2001, HB 2468 made changes concerning animal diseases. First, K.S.A. 48-924 was amended to provide a different timeline and extension process for state of disaster emergencies related to preventing the spread of contagious or infectious disease among domestic animals. Additionally, K.S.A. 48-925 was amended to clarify the authority of the governor to control ingress and egress of both persons and animals to and from a disaster area, the movement of persona and animals within the area and the occupancy by persons and animals of premises therein. In 2002, the Legislature passed SB 395, amending K.S.A. 48-924 again to expand the domestic animal state of disaster emergency declaration timeline and extension provisions to preventing the spread of contagious or infectious disease among plants, raw agricultural commodities, animal feed or processed food.

In a Special Session of the Legislature in 2020, HB 2016 was passed. That legislation made further changes to the act that are discussed in a companion memorandum ("Review of 2020 Special Session HB 2016").

Overview of the Act

There are a few sections in article 9 of chapter 48 of the Kansas Statutes Annotated before the Kansas emergency management act that relate to emergency management and deserve and brief summary. K.S.A. 48-904 provides definitions of terms used in the article; K.S.A. 48-905a creates the division of emergency management; K.S.A 48-907 outlines the duties and powers of the adjutant general; K.S.A. 48-911 authorizes the adjutant general to set up mobile support units to assist with emergencies; K.S.A. 48-912 gives the adjutant general investigation powers; K.S.A. 48-914 relates to the lease, sale or loan of state property to assist with emergency management; K.S.A. 48-915 provides immunity from liability in certain circumstances related to emergency management activities; K.S.A. 48-916 gives authority to accept services, gifts, grants and loans for purposes of emergency management; K.S.A. 48-917 disqualifies certain people from being able to be employed by emergency management organizations; and K.S.A. 48-919 authorizes the adjutant general to hire employees at the division of emergency management.

Below is an overview of the act as it exists today. The information that is stricken or in bold indicates those changes were made during the 2020 Special Session in HB 2016, which is summarized in a companion memorandum ("Review of 2020 Special Session HB 2016").

48-920: Provides the name of the act.

48-922: Allows the governing body of a city that has a disaster agency or is participating in an interjurisdictional disaster agency to purchase accident insurance to cover volunteer workers from injury or death. Purchasing this insurance does not waive the immunity of the city from a lawsuit provided for in K.S.A. 48-915.

48-923: Provides that nothing in the act shall be construed to (1) interfere with the course of a labor dispute; (2) interfere with disseminating news; (3) affect the jurisdiction or responsibilities of police forces and military; or (4) limit the authority of the governor to proclaim martial law or exercise other powers of the office.

48-924: Provides that the governor is responsible for meeting the dangers to the state and people presented by disasters. Upon a finding that a disaster has occurred, or the threat of one is imminent, the governor is required to issue a proclamation declaring a state of disaster emergency. This statute provides a set of rules for disasters related to the spread of disease among domestic animals, plants, raw agricultural commodities, animal feed or processed food. For any other state of disaster emergency, it shall continue until the governor finds that the threat or danger has passed, but no state of disaster emergency may continue for longer than 15 days unless ratified by concurrent resolution of the legislature, except that the governor may make specific application to the state finance council and with an affirmative vote of a majority of the legislative members, a state of disaster emergency may be extended once for a period not to exceed 30 days beyond the original 15-day period. The Legislature may, at any time, require the governor to terminate a state of disaster emergency by concurrent resolution. If the governor is out of state or has a constitutional disability, in the order of succession, others may issue a proclamation declaring a state of disaster emergency and may exercise the powers of the governor. If the governor becomes available again, the governor shall resume the powers of the office. A proclamation declaring a state of disaster emergency shall activate the disaster response and recovery aspects of the state. When the governor is advised that conditions indicative of a drought exist, the governor is authorized to declare that a state of drought exists for specific areas of the state or statewide and is required to immediately implement drought contingency plans.

48-924a: Provides a statutory continuation of the state of disaster emergency issued on May 4, 2007 for the disaster known as the Greensburg tornado.

48-925: During a state of disaster emergency, the governor shall be the commander-in-chief of the militia. The governor may issue orders that have the force and effect of law, and such orders will become null and void after the state of disaster emergency ends ~~unless ratified by concurrent~~

~~resolution of the legislature~~. **Within 24 hours of the issuance of an order pursuant to this section, the governor shall call a meeting of the state finance council for the purposes of reviewing such order.** Such orders may be revoked at any time by concurrent resolution of the legislature. This statute also specifies the other powers and duties the governor has during a state of disaster emergency and generally authorizes governor to perform and exercise other functions as necessary **that are in conformity with the constitution, the bill of rights and statutes of the state of Kansas. The governor does not have the power or authority to (1) seize ammunition or suspend or limit the sale, dispensing or transportation of firearms or ammunition; (2) modify any provision of the elections laws; or (3) prior to September 15, 2020, restrict businesses from operating or restrict the movement or gathering of individuals. A board of county commissioners may issue an order relating to public health that is less stringent than a statewide executive order if (1) the board consulted with the local health officer; (2) following consultation, the board finds the statewide order is not necessary to protect the public health and safety of the county; and (3) all other relevant findings support the board's decision.** All the changes reflected in bold or strike will expire on January 26, 2021.

48-926: Requires the division of emergency management to prepare and maintain a state disaster emergency plan and provides what the plan may include. This plan may be included in rules and regulations adopted by the adjutant general or in orders issued by the governor pursuant to K.S.A. 48-925.

48-927: Requires the division of emergency management to prepare a state resources management plan to include economic controls necessary to effectuate recovery from disasters. Such plan may be placed in effect by incorporating it into orders issued by the governor pursuant to K.S.A. 48-925.

48-928: Sets out the duties and responsibilities of the division of emergency management.

48-929: Requires each county to establish and maintain a disaster agency responsible for emergency management or to participate in an interjurisdictional disaster agency. The governor is required to determine which cities need their own disaster agency based on vulnerability and capability of response related to population size and concentration. The mayor of each city required to have a disaster agency and the chairperson of each board of county commissioners shall notify the division of emergency management of the manner in which the city or county is providing disaster planning and emergency services and identify the person who heads the agency responsible for such services. Local disaster agencies shall prepare and keep current a

disaster emergency plan in accordance with standards promulgated by the division of emergency management, which has been approved after examination and periodic review by the division of emergency management. The local disaster agency shall give all appropriate officials a written statement of emergency responsibilities and the disaster chain of command. Cities that extend into two counties may petition the board of county commissioners of both counties to designate one of the counties as the disaster agency for the city. If no agreement between the counties is reached, the adjutant general may designate the county.

48-930: If the governor determines that two or more adjoining counties would be better served by an interjurisdictional disaster agency, then the governor shall order the establishment of such agency. If the governor finds that counties have equipment or supplies necessary to provide mutual aid and have not made adequate provision for rendering aid for the emergency needs of the region, the governor may order the counties to participate into an interjurisdictional agreement without requiring the establishment of an interjurisdictional disaster agency. If the governor finds it would be desirable to establish an interstate mutual aid organization, the governor shall take action necessary to do that. If a state with which the governor wants to cooperate has not enacted the interstate civil defense and disaster compact, the governor may negotiate an agreement with such state, but it may only become effective if the text is submitted to the legislative coordinating council and neither house of the Legislature has disapproved it by resolution during the next regular session of the Legislature.

48-931: The division of emergency management shall take an integral part in the development and revision of legal and interjurisdictional disaster emergency plans. The division shall employ or secure the services of professional and technical personnel to provide assistance to local disaster agencies. The division shall seek the advice and assistance of local government, business, labor, industry, agriculture, civic and volunteer organization and community leaders.

48-932: Allows the chairman of the board of county commissioners or mayor of a city to declare a state of local disaster emergency. No such emergency shall be continued for more than seven days except with the consent of the board of county commissioners or governing body of the city. It also provides for contingencies if the chairman of the board of county commissioners or the mayor of a city is not available. Such a declaration shall activate the response and recovery aspects of local and interjurisdictional disaster emergency plans. No interjurisdictional disaster agency may declare a local disaster emergency unless expressly authorized by the agreement governing the agency. **A state of local disaster emergency may be reviewed, amended or revoked by the board of county commissioners or governing body of a city.**

48-933: Each person within the state shall act and manage affairs and property to assist and not detract from the ability of the state of meet disasters, including appropriate personal service and use or restriction of use of property. No personal services may be compensated except pursuant to statute or ordinance, and compensation for property shall only happen if the property was commandeered or used in coping with a disaster.

48-934: Law enforcement officers, military personnel and others authorized to assist during a state of disaster emergency shall have all powers, duties and immunities of peace officers and are immune from civil and criminal liability for acts reasonably done in the performance of their duties as long as they act without malice and without the use of excessive or unreasonable force. All personnel shall have the authority to enforce any ordinance of any municipality within the affected area.

48-935: Any ordinance authorizing the mayor or other persons to act during a state of disaster emergency shall be in full force and effect except to the extent they conflict with provisions of this act or of the state disaster emergency plans.

48-936: A person owning or controlling real estate who voluntarily and without compensation grants the use of the real estate for the purpose of sheltering persons during a disaster shall not be civilly liable for negligence to any person on such real estate while the real estate is used for that purpose.

48-937: The division of emergency management shall determine what is needed for rapid and efficient communications during a disaster and shall consider supplementing these resources or integrating them into a state or federal communications system. The division shall make recommendations regarding such systems to the governor.

48-938: When the president of the United States declares a major disaster to exist in the state, the governor is authorized to apply for, accept and disburse grants from the federal government.

48-939: A person who knowingly violates this act or rules and regulations or orders adopted pursuant to this act shall be **fined up to $2,500 per violation. Violations shall be enforced by the attorney general or the appropriate county or district attorney pursuant to chapter 60 of the Kansas Statutes Annotated. The attorney general or county or district attorney many bring an action to enjoin or obtain a restraining order against a person violating the act.**

HB 2016 Sec. 5: **Ratifies, continues and extends the current state of disaster emergency related to COVID-19 through September 15, 2020. The governor shall not proclaim a new state of disaster emergency related to COVID-19 during 2020 unless the governor makes**

specific application to the state finance council and an affirmative vote of at least six of the legislative members of the council approves the action by the governor.

HB 2016 Sec. 6: On and after September 15, 2020, during a state of disaster emergency, the governor may not order the closure or cessation of business or commercial activity for more than 15 days. At least 24 hours prior to issuing an order that closes businesses, the governor shall call a meeting of the state finance council for the purpose of consulting with the council. After an initial order providing for the closure of businesses for 15 days, the governor may not order the closure of business except upon specific application to the state finance council and an affirmative vote of at least six of the legislative members of the council. In this case, the governor may order the closure of businesses as approved by the council for specified periods not to exceed 30 days each. This section will expire on January 26, 2021.

HB 2016 Sec. 7: No executive order issued pursuant to this act that has the effect of closing public or private school attendance centers shall be effective unless affirmed by the state board of education. Prior to issuing any such order, the governor is required to submit the proposed order to the state board of education, which shall meet as soon as reasonably possible to review and vote on the proposed order.

Omnibus Governmental Response to 2020 COVID-19 Pandemic; HB 2016

HB 2016 creates and amends law and makes appropriations regarding the governmental response to the coronavirus disease 2019 (COVID-19) 2020 pandemic in Kansas, as follows.

Coronavirus Relief Funds

The bill appropriates the Coronavirus Relief Fund (CRF) in the Office of the Governor to provide relief for the effects of coronavirus in the state of Kansas in both fiscal year (FY) 2020 and FY 2021. Expenditures or transfers from the CRF require an affirmative vote of the Governor and a majority of the legislative members of the State Finance Council (SFC). The bill also permits the SFC to continue approving such requests during the Legislative Session.

In addition to the CRF funds, the bill applies the same approval process described above to any federal funds received under the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act, the Families First Coronavirus Response Act (Families First Act), the Paycheck Protection Program and Health Care Enhancement Act, and any other federal law that provides moneys to the state for aid for coronavirus relief. The bill permits any moneys from the federal government for coronavirus relief that are federally required to be deposited in a fund other than the CRF to be credited to such fund; however, uses of those funds are subject to approval by the SFC in the same manner.

The bill renders the provisions of the 2019 and 2020 appropriations bills that provide general authority for the Governor to approve expenditure of federal funds as null and void, as it relates to aid received for the purposes of federal coronavirus relief.

State of Disaster Emergencies, Kansas Emergency Management Act, and Authority of Local Officials

The bill creates and amends law related to state of disaster emergencies and the Kansas Emergency Management Act (KEMA), including the following provisions.

Ratification and Limitation of 2020 State of Disaster Emergencies

The bill creates a section of law ratifying and continuing from March 12, 2020, through September 15, 2020, the COVID-19-related state of disaster emergency declared by the Governor on March 12, 2020; ratified and continued by concurrent resolution through May 1, 2020; declared by proclamation on April 30, 2020; and extended by the SFC through May 26, 2020.

This section also prohibits the Governor from proclaiming any new COVID-19-related state of disaster emergency during 2020, unless the Governor makes specific application to the SFC and such action is approved by an affirmative vote of at least six legislative members of the SFC.

Closure or Cessation of Business or Commercial Activity

The bill creates a section of law effective on and after September 15, 2020, applicable during any state of disaster emergency declared under KEMA, prohibiting the Governor from ordering the closure or cessation of any business or commercial activity (for-profit or not-for-profit) for more than 15 days. At least 24 hours prior to the issuance of such order, the Governor must call a meeting of the SFC to consult with the SFC regarding the conditions necessitating the issuance of the order. After an order or orders have resulted in 15 days of such closures or cessation, the Governor may not order such closure or cessation except, upon specific application by the Governor to the SFC and an affirmative vote of at least six legislative members of the SFC, the Governor may order such closure or cessation of business or commercial activity, as approved by the SFC, for specified periods not to exceed 30 days each.

Any order violating or exceeding these restrictions will not have force and effect of law during the period of a state of disaster emergency and shall be null and void.

The provisions of this section expire on January 26, 2021.

Amendments to KEMA

The bill amends the section of KEMA allowing the Governor to declare a state of disaster emergency to specify this power is subject to the specific limits provided above regarding a COVID-19 new state of disaster emergency in 2020. The bill adds a provision stating the COVID-19 state of disaster emergency shall terminate on September 15, 2020, except when the Legislature is not in session, upon specific application by the Governor to the SFC and an affirmative vote of at least 6 legislative members of the SFC, this state of emergency may be extended for specified periods not to exceed 30 days each. No such extension shall continue past January 26, 2021.

The bill amends the section of KEMA governing the powers of the Governor during a state of disaster emergency to:

- Specify the orders the Governor may issue are to exercise the powers conferred in this section;
- Specify these orders may be issued during the state of disaster emergency ratified by the bill;
- Require the Governor to call a meeting of the SFC within 24 hours of the issuance of any such order, for the purposes of reviewing the order;
- Replace a provision allowing such orders to be ratified by concurrent resolution of the Legislature with a provision declaring such orders null and void after the period of a state of disaster emergency has ended;
- Remove references to proclamations;

- Amend a provision allowing the Governor to perform and exercise other functions, powers, and duties to specify these must be in conformity with the *Kansas Constitution* and *Bill of Rights* and with the statutes of the state of Kansas, except any regulatory statute specifically suspended under the authority of this section;

- State the Governor shall not have the power or authority to temporarily or permanently seize, or authorize seizure of, any ammunition, or to suspend or limit the sale, dispensing, or transportation of firearms or ammunition pursuant to this section's listing of powers or any other executive authority;

- State, notwithstanding any provision of this section to the contrary and pursuant to the Governor's state of disaster emergency proclamation issued on May 26, 2020, the Governor shall not have the power or authority to restrict businesses from operating or to restrict the movement or gathering of individuals. This provision expires on September 15, 2020;

- State the Governor shall not have the power under KEMA or any other law to alter or modify any provisions of the election laws of Kansas, including, but not limited to, the method by which elections are conducted or the timing of such elections;

- Require each order issued under the authority of this section to specify the provision or provisions by specific reference to each paragraph that confers the power under which the order was issued, and

- Allow the Board of County Commissioners of any county to issue an order relating to public health that contains provisions that are less stringent than the provisions of a statewide executive order issued by the Governor. Any Board of County Commissioners issuing such an order must make the following findings and include them in the order:

    - The Board has consulted with the local health officer or other local health officials regarding the Governor's executive order;
    - Following such consultation, implementation of the full scope of provisions in the Governor's executive order is not necessary to protect the public health and safety of the county; and
    - All other relevant findings to support the Board's decision.

Effective January 26, 2021, the bill returns this section to its previous version, removing the above amendments.

The bill amends the KEMA section making violation of KEMA or of any rule and regulation, lawful order, or proclamation made pursuant to it a class A misdemeanor to:

- Replace a "knowing and willful" intent requirement with "intentionally violates";

- Change the penalty from a class A misdemeanor to a civil penalty of up to $2,500 per violation, which may be assessed in addition to any other penalty provided by law;

- Direct enforcement of the section through an action brought under Chapter 60 of the *Kansas Statutes Annotated*, by the Attorney General or the county or district attorney in the county in which the violation took place, with any civil penalties recovered by a county or district attorney to be paid into the general fund of the county where the proceedings were instigated; and

- Allow the Attorney General or any county or district attorney to bring an action to enjoin, or to obtain a restraining order, against a person who has violated, is violating, or is otherwise likely to violate KEMA.

Authority of Local Officials

The bill amends a statute governing states of local disaster emergency to allow any state of local disaster emergency declaration to be reviewed, amended, or revoked by the Board of County Commissioners or the governing body of the city, respectively, at a meeting of the governing body.

The bill amends statutes regarding county boards of health and local health officers to clarify and standardize phrasing and to allow any order issued by the county health officer, including orders issued as a result of an executive order of the Governor, and orders on behalf of a county regarding the remediation of any infectious disease, to be reviewed, amended, or revoked by the Board of County Commissioners of the county affected by such order at a meeting of the board. Any order reviewed or amended by the board must include an expiration date set by the Board of County Commissioners and may be amended or revoked at an earlier date by a majority vote of the board. The bill removes provisions requiring payment of compensation out of the county treasury and allowing removal of the local health officer by the Secretary of Health and Environment (Secretary). The bill amends a statute governing home rule powers to prohibit counties from exempting from or effecting changes in these statutes.

School Closure

The bill creates a section of law providing that no executive order issued by the Governor pursuant to KEMA that has the effect of closing public or private school attendance centers in Kansas shall be effective unless and until the order is affirmed by the State Board of Education (SBE) by adoption of a resolution by a majority of the SBE's members. The Governor must submit the proposed executive order to the SBE before issuing the order and, upon receipt, the SBE must meet as soon as reasonably possible to review the order and, if a majority of the SBE's members determine the order is in the best interests of the students in Kansas, to adopt a resolution affirming the order.

COVID-19 Response and Reopening for Business Liability Protection Act

The bill creates the COVID-19 Response and Reopening for Business Liability Protection Act (Liability Protection Act), as follows.

Definitions

The bill defines the following terms: "adult care facility," "COVID-19," "COVID-19 claim," "COVID-19 public health emergency," "disinfecting or cleaning supplies," "healthcare provider," "person," "personal protective equipment," "product liability claim," "public health directives," and "qualified product."

Healthcare Provider Immunity

The bill states, notwithstanding any other provision of law except within this section, a healthcare provider is immune from civil liability for damages, administrative fines, or penalties for acts, omissions, healthcare decisions, or the rendering of or the failure to render healthcare services, including services that are altered, delayed, or withheld, as a direct response to any COVID-19 state of disaster emergency under KEMA.

This immunity applies to any claims for damages or liability arising out of or relating to acts, omissions, or healthcare decisions occurring during any state of disaster emergency pursuant to KEMA, related to COVID-19.

This immunity does not apply to civil liability when it is established that the act, omission, or healthcare decision constituted gross negligence or willful, wanton, or reckless conduct. This immunity also does not apply to healthcare services not related to COVID-19 that have not been altered, delayed, or withheld because of the COVID-19 public health emergency. The bill also states this provision applies retroactively to any cause of action accruing on or after March 12, 2020, and prior to the termination of the COVID-19 state of disaster emergency declared pursuant to KEMA.

Business Liability

The bill states that, notwithstanding any other provision of law, a person (or agent of such person) conducting business in Kansas shall be immune from liability in a civil action for a COVID-19 claim if such person was acting pursuant to and in substantial compliance with public health directives applicable to the activity giving rise to the cause of action when the cause of action accrued. This section expires on January 26, 2021, and the bill states this provision applies retroactively to any cause of action accruing on or after March 12, 2020.

Product Liability

The bill states that, notwithstanding any other provision of law, a person who designs, manufactures, labels, sells, distributes, provides, or donates a qualified product in response to the COVID-19 public health emergency shall be immune from liability in a civil action alleging a product liability claim involving the product if any of the above actions were taken at the specific

request of or in response to a written order or other directive finding a public need for a qualified product, issued by the Governor, Adjutant General, or Division of Emergency Management, and the damages are not occasioned by willful, wanton, or reckless disregard of a known, substantial, and unnecessary risk that the product would cause serious injury to others. The bill states this provision applies retroactively to any cause of action accruing on or after March 12, 2020.

Adult Care Facilities

The bill states that, notwithstanding any other provision of law, an adult care facility shall have an affirmative defense in a civil action for damages, administrative fines, or penalties for a COVID-19 claim if such facility is acting pursuant to and in substantial compliance with public health directives and the facility:

- Was caused, by the facility's compliance with a statute or rule and regulation, to reaccept a resident who had been removed from the facility for treatment of COVID-19; or

- Treats a resident who has tested positive for COVID-19 in such facility in compliance with a statute or rule and regulation.

This section defines "public health directives." The bill states this provision applies retroactively to any cause of action accruing on or after March 12, 2020, and prior to the termination of the COVID-19 state of disaster emergency declared pursuant to KEMA.

Other Provisions

The bill states that nothing in the Liability Protection Act creates, recognizes, or ratifies a claim or cause of action of any kind; eliminates a required element of any claim; affects workers' compensation law, including the exclusive application of such law; or amends, repeals, alters, or affects any other immunity or limitation of liability. The bill states this provision applies retroactively to any cause of action accruing on or after March 12, 2020.

COVID-19 Contact Tracing Privacy Act

The bill creates the COVID-19 Contact Tracing Privacy Act (Privacy Act), as follows.

The bill states the purpose of the Privacy Act is to protect the privacy of persons whose information is collected through contact tracing and the confidentiality of contact data. "Contact tracing" is defined by the Privacy Act to mean identifying persons who may have been exposed to an infected person for the purpose of containing the spread of COVID-19 by notifying the contact that the contact may have been exposed, should be tested, and should self-quarantine. The Privacy Act also defines "contact," "contact tracer," "COVID-19," "contact data," "infected person," "local health officer," "municipality," "Secretary," and "state" for this purpose.

The bill prohibits the State or any municipality, or any officer or official or agent thereof, from conducting or authorizing contact tracing, except whenever the Secretary or a local health

officer determines contact tracing is necessary to perform a public health duty assigned by statute to the official, the Secretary or local health officer may conduct or authorize contact tracing, as provided in the section.

Subject to the availability of appropriations, the Secretary or local health officer may employ, contract for, or engage contact tracers, and persons acting as contact tracers under this authority must meet the qualifications and training prescribed by rules and regulations adopted by the Secretary pursuant to authority provided by the Privacy Act. Until such rules and regulations are adopted, but not later than August 1, 2020, persons acting as contact tracers may act under the supervision of the Secretary and in compliance with the other provisions of the Privacy Act.

The bill requires each person acting as a contact tracer, before collecting any contact data, to execute under oath, on a form prescribed by rules and regulations of the Secretary, an acknowledgment of familiarity with the Privacy Act and the duties it imposes, including the duty of confidentiality. The state or municipal entity hiring, contracting with, or engaging the contact tracer must maintain a copy of the executed form for not less than one year after the person's duties as a contact tracer end, or pursuant to applicable records retention schedule, whichever is later.

The bill deems a contact tracer employed, contracted, or engaged by the Secretary a state employee under the Kansas Tort Claims Act and a contact tracer employed, contracted, or engaged by a local health officer an employee of the county under the Kansas Tort Claims Act.

The bill prohibits a contact tracer from disclosing the identity of an infected person to a contact, and only contact data specifically authorized by the Secretary pursuant to rules and regulations may be collected as a part of contact tracing. The Secretary, a local health officer, or a contact tracer is prohibited from producing data pursuant to a subpoena unless the subpoena is issued by a court and is accompanied by a valid protective order preventing further disclosure of such information.

The bill requires contact data to be:

- Used only for the purposes of contact tracing and not for any other purpose;
- Confidential and not disclosed, produced in response to any Kansas Open Records Act (KORA) request, or made public, unless the disclosure is necessary to conduct contact tracing; and
- Safely and securely destroyed when no longer necessary for contact tracing, pursuant to rules and regulations of the Secretary.

The bill states participation in contact tracing shall be voluntary, and no contact or infected person shall be compelled to participate in, nor be prohibited from participating in, contact tracing. Any contact or infected person who in good faith discloses to a contact tracer information requested by the contact tracer under authority of the bill is immune from civil, criminal, and administrative liability for such disclosure. No criminal, civil, or administrative liability shall arise against a contact or infected person solely due to the person's failure to cooperate in contact tracing conducted under the bill.

The bill prohibits contact tracing from being conducted through the use of any service or means that uses cellphone location data to identify or track, directly or indirectly, the movement of persons.

The bill states no third party shall be required to collect or maintain data regarding infected persons or contacts for the purpose of contact tracing. Contact tracers are prohibited from obtaining contact data related to an infected person or contact from any third party, except that contact data voluntarily collected or maintained by a third party may be obtained by a contact tracer only if the third party provides such information voluntarily and with the consent of the infected person or contact whose information is disclosed, or such information is provided pursuant to a valid warrant.

The bill permits a person to bring a civil action to enjoin violations of the Privacy Act, and a knowing violation of the Privacy Act is a class C nonperson misdemeanor. The bill deems contact data to be "personal information" within the meaning of the Kansas Consumer Protection Act statute governing requirements for holders of personal information. These remedies are in addition to each other and to any other available civil or criminal remedies.

The bill requires the Secretary to promulgate rules and regulations to implement, administer, and enforce the provisions of the Privacy Act prior to August 1, 2020.

The provisions of the Privacy Act expire on May 1, 2021.

Validity of Notarial Acts

The bill creates a section of law stating that notarial acts performed by a Kansas notary public while the personal appearance requirements are suspended pursuant to an executive order or other state law shall be valid as if the individual had met the personal appearance requirement, even if the individual failed to do so, as long as the notarial act fulfills all requirements prescribed by the executive order or other state law and all other requirements not relating to personal appearance.

First Responder Notifications

The bill creates a section requiring, during a COVID-19-related state of disaster emergency declared under KEMA, each local health officer to work with first responder agencies operating in the county to share information indicating where a person testing positive for, or under quarantine or isolation due to, COVID-19 resides or can be expected to be present. The bill requires the information to include the person's address and duration of any quarantine, isolation, or expected recovery period, as determined by the local health officer, and only be used for the purpose of allowing the first responders to be alert to the need for utilizing appropriate personal protective equipment during the response activity.

The bill requires the above information to be provided to the 911 call center serving the address provided and limits the 911 call center to disseminating the information only to first responders responding to the listed address.

The information shall not be a public record and is not subject to KORA. This records provision will expire on July 1, 2025, unless the Legislature reviews and reenacts the provision pursuant to the applicable section of KORA.

Adult Care Homes

The bill creates a section of law requiring the Kansas Department for Aging and Disability Services (KDADS) to take the following actions with regard to adult care homes:

- Promptly, and no later than 90 days following the effective date of the bill, make or cause to be made infection control inspections;

- Provide the necessary personal protective equipment, sanitizing supplies, and testing kits appropriate to the needs of each facility on an ongoing basis, based upon:

    - Current number of residents;
    - Current number of full-time and part-time staff members;
    - Number of residents and staff who have tested positive for COVID-19 in the last 14 days;
    - Ability to separate residents with COVID-19 from non-COVID-19 residents; and
    - Any other factors deemed relevant by the Secretary for Aging and Disability Services; and

- Ensure that infection prevention and control best practices and recommendations based upon guidance from the U.S. Centers for Disease Control and Prevention and the Kansas Department of Health and Environment (KDHE) are adopted and made available publicly.

Health Care

Telemedicine

The bill creates a section of law addressing telemedicine, including the following provisions.

The bill allows a physician to issue a prescription or order administration of medication, including a controlled substance, for a patient, without conducting an in-person examination of the patient.

A physician under quarantine, including self-imposed quarantine, may practice telemedicine.

A physician licensed in another state may practice telemedicine to treat patients in Kansas, if the physician advises the Board of Healing Arts (Board) of such practice in writing and in a manner determined by the Board and the physician holds an unrestricted license to practice medicine and surgery in the other state and is not the subject of any investigation or disciplinary action by the licensing agency. The Board may extend this provision to other healthcare professionals licensed and regulated by the Board as deemed necessary by the Board to address the impacts of COVID-19 and consistent with ensuring patient safety.

The bill requires a physician practicing telemedicine under this section to conduct an appropriate assessment and evaluation of the patient's current condition and document the appropriate medical indication for any prescription issued.

The bill specifies this section shall not supersede or otherwise affect the provisions of statutes governing performance of abortions or prohibition of abortions delivered *via* telemedicine.

The section defines "physician" and "telemedicine." The section expires on January 26, 2021.

Hospitals and Medical Care Facilities

The bill creates a section of law regarding hospital and medical care facility usage, including the following provisions.

The section allows a hospital to admit patients in excess of its number of licensed beds or inconsistent with its licensed classification of beds, to the extent the hospital determines is necessary to treat COVID-19 patients and to separate COVID-19 patients and non-COVID-19 patients. A hospital admitting patients in this manner must notify KDHE as soon as practicable, but prior authorization is not required.

The section allows a hospital to use non-hospital space, including off-campus space, to perform COVID-19 testing, triage, quarantine, or patient care, to the extent the hospital determines is necessary to treat COVID-19 patients and to separate COVID-19 patients and non-COVID-19 patients. The KDHE may impose reasonable safety requirements on such use to maximize the availability of patient care, and non-hospital space used in this manner is deemed to meet the requirements of a statute governing provision of services by a hospital consisting of more than one establishment. A hospital using non-hospital space in this manner must notify KDHE as soon as practicable, but prior authorization is not required.

The section allows a medical care facility to permit healthcare providers authorized to provide healthcare services in Kansas to provide healthcare services at such medical facility without becoming a member of the facility's medical staff.

"Hospital" and "medical care facility" have the same meanings as in statutes governing hospital and related facility licensing, inspection, and regulation.

The section will expire 120 calendar days after the expiration or termination of the state of disaster emergency proclamation issued by the Governor in response to the COVID-19 public health emergency, or any extension thereof.

Temporary Emergency License

The bill creates a section of law allowing the Board to grant a temporary emergency license to practice any profession licensed, certified, registered, or regulated by the Board to an applicant with qualifications the Board deems sufficient to protect public safety and welfare, within the scope of professional practice authorized by the temporary emergency license, for the purpose of preparing for, responding to, or mitigating any effect of COVID-19.

The section expires on January 26, 2021.

Temporary Licensure Measures for Additional Healthcare Providers

The bill creates a section of law, notwithstanding any applicable law to the contrary, allowing physician assistants (PAs) to provide healthcare services appropriate to such provider's education, training, and experience within a designated healthcare facility at which the PA is employed or contracted to work as necessary to support the facility's response to the COVID-19 pandemic without a written agreement with a supervising physician and the PA shall not be liable in any criminal prosecution, civil action, or administrative proceeding arising out of the lack of such written agreement.

The bill also allows advanced practice registered nurses (APRNs) and nurse anesthetists to provide healthcare services appropriate to each provider's education, training, and experience within a designated healthcare facility at which the provider is employed or contracted to work as necessary to support the facility's response to the COVID-19 pandemic without direction and supervision from a responsible physician. APRNs and nurse anesthetists providing health care under the provisions of this section shall not be liable in any criminal prosecution, civil action, or administrative proceeding arising out of a lack of direction and supervision from a responsible physician.

Licensed practical nurses (LPNs) are allowed to provide healthcare services appropriate to such provider's education, training, and experience within a designated healthcare facility at which the LPN is employed or contracted to work as necessary to support the facility's response to the COVID-19 pandemic without direction from a registered professional nurse (RN), and the LPN shall not be liable in any criminal prosecution, civil action, or administrative proceeding arising out of such LPN's lack of supervision from an RN. The bill allows an RN or LPN to order the collection of throat or nasopharyngeal swab specimens from individuals suspected of being infected by COVID-19 for purposes of testing.

The bill allows licensed pharmacists to provide care for routine health maintenance, chronic disease states, or similar conditions appropriate to such pharmacist's education, training, and experience within a designated healthcare facility at which the pharmacist is employed or contracted to work as necessary to support the facility's response to the COVID-19 pandemic without a collaborative practice agreement with a physician, and the pharmacist shall not be liable in any criminal prosecution, civil action, or administrative proceeding arising out of such pharmacist's lack of collaborative practice agreement with a physician.

The bill allows a RN or LPN who holds a license that is exempt, inactive, or has lapsed within the past five years from the effective date of the bill to provide healthcare services appropriate to the nurse's education, training, and experience, and the RN or LPN shall not be

liable in any criminal prosecution, civil action, or administrative proceeding arising out of such nurse's exempt, inactive, or lapsed license.

The bill authorizes a designated healthcare facility, as necessary to support the facility's response to the COVID-19 pandemic, to:

- Allow a student who is enrolled in a program to become a licensed, registered, or certified healthcare professional to volunteer for work within such facility in roles that are appropriate to such student's education, training, and experience;

- Allow a licensed, registered, or certified healthcare professional or emergency medical personnel serving in the military in any duty status to volunteer or work within such facility in roles that are appropriate to such military service member's education, training, and experience; and

- Allow a medical student, physical therapist, or emergency medical services provider to volunteer or work within such facility as a respiratory therapist extender under the supervision of a physician, respiratory therapist, or APRN. Such respiratory therapist extender is allowed to assist respiratory therapists and other healthcare professionals in the operation of ventilators and related devices and provide other healthcare services appropriate to such provider's education, training, and experience, as determined by the facility in consultation with such facility's medical leadership.

The bill allows a healthcare professional licensed and in good standing in another state to practice such profession in the state of Kansas. A license that has been suspended or revoked or a licensee who is subject to pending license-related disciplinary action is not considered to be in good standing. Any license that is subject to limitation in another state will be subject to the same limitation in the state of Kansas. Such healthcare professional shall not be liable in any criminal prosecution, civil action, or administrative proceeding arising out of such healthcare professional's lack of licensure in the state of Kansas.

The bill allows, subject to any terms and conditions established by the Secretary, a designated healthcare facility to use a qualified volunteer or qualified personnel affiliated with any other designated healthcare facility as if such volunteer or personnel was affiliated with the facility using such volunteer or personnel.

The bill allows a healthcare professional to be licensed, certified, or registered or to have such license, certification, or registration reinstated within five years of lapse or renewed by the applicable licensing agency of the state of Kansas without satisfying the following conditions of licensure, certification, or registration:

- An examination, if such examination's administration has been canceled while the state of disaster emergency proclamation issued by the Governor in response to the COVID-19 pandemic is in effect;

- Fingerprinting;

- Continuing education; and

- Payment of a fee.

The bill provides that a professional certification in basic life support, advanced cardiac life support, or first aid shall remain valid if such professional certification is due to expire or be canceled while the state of disaster emergency proclamation issued by the Governor in response to the COVID-19 pandemic is in effect.

Fingerprinting of individuals is not required as a condition of licensure and certification for any hospital, adult care home, county medical care facility, or psychiatric hospital.

The bill states "appropriate to such professional's education, training and experience," or words of like effect, shall be determined by the designated healthcare facility in consultation with such facility's medical leadership and defines "designated healthcare facility."

The provisions of the section expire on January 26, 2021.

Critical Access Hospitals

The bill amends the definition of "critical access hospital" in a statute governing rural health networks to add a provision stating that, prior to June 30, 2021, to the extent a critical access hospital determines it is necessary to treat COVID-19 patients or to separate COVID-19 patients and non-COVID-19 patients, the hospital is not limited to 25 beds, and a facility with an approved swing bed agreement is not limited to a combined total of 25 extended care and acute care beds or limited to providing acute inpatient care for a period of time that does not exceed, on an annual average basis, 96 hours per patient.

Court Videoconferencing

The bill amends a provision enacted in 2020 House Sub. for SB 102 that allows the Chief Justice of the Kansas Supreme Court to issue an order authorizing the use of two-way electronic audio-visual communication (videoconferencing) in any court proceeding, when the Chief Justice determines such action is necessary to secure the health and safety of court users, staff, and judicial officers, by removing language limiting application of this provision to periods during any state of disaster emergency under KEMA. [*Note:* Under continuing law, the provisions of this section expire on March 31, 2021.]

Sale of Alcoholic Liquor

The bill amends the statute governing removal of unconsumed alcoholic liquor from premises of a club or drinking establishment to allow legal patrons to remove from the licensed premises one or more containers of alcoholic liquor not in the original container, subject to the following conditions:

- It must be legal for the licensee to sell the alcoholic liquor;

- Each container of alcoholic liquor must have been purchased by a patron on the licensed premises;

- The licensee or the licensee's employee must provide the patron with a dated receipt for the alcoholic liquor; and

- Before the container of alcoholic liquor is removed from the licensed premises, the licensee or the licensee's employee must place the container in a transparent bag that is sealed in a manner that makes it visibly apparent if the bag is subsequently tampered with or opened.

These provisions expire on January 26, 2021.

Unemployment Compensation

The bill makes a number of temporary changes to the state unemployment compensation system in response to the COVID-19 pandemic.

The bill includes a policy statement that Kansas is committed to maintaining and strengthening access to its unemployment compensation system.

The bill provides that a claimant is not ineligible for benefits on the basis of not actively seeking work during a disaster emergency proclaimed by the Governor and in response to the spread of COVID-19 and the State has temporarily waived the work search requirement in compliance with the Families First Act.

Additionally, the bill waives the waiting week requirement for new claims filed from April 5, 2020, through December 26, 2020, in accordance with the Families First Act and the CARES Act.

The bill requires employers to provide any notifications to individuals in the service of the employer as required by the Secretary of Labor pursuant to the Families First Act.

For calendar year 2021, the bill limits unemployment contribution rates for employers to the standard rate schedule and prohibits an additional solvency adjustment.

The bill provides that benefits paid as a result of employees being discharged by an employer directly impacted by COVID-19 in accordance with the Families First Act will not be charged to the account of the contributing employer.

Under the bill, payments of unemployment compensation that are wholly reimbursed to a reimbursing employer by the federal government shall be charged for the purpose of such reimbursement under the CARES Act.

The bill also eliminates provisions prohibiting negative account employers from participating in shared work plans, but provides that shared work plans may be approved only if the Secretary of Labor determines the contributing employer does not adversely impact the

State's eligibility under Section 2108 of the CARES Act, which provides for federal reimbursement of certain shared work plan payments.

Severability Clause

The bill includes a severability provision stating if any portion of the act or application thereof to any person or circumstance is declared unconstitutional or invalid, such invalidity shall not affect other portions that can be given effect without the invalid portion or application, and such other portions shall remain valid and enforceable.

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MEMORANDUM

To: Special Committee on the Kansas Emergency Management Act

From: Office of Revisor of Statutes

Date: August 17, 2020

Subject: Review of 2020 Special Session HB 2016

Appropriations

Section 1 appropriates the coronavirus relief fund – federal fund of the governor's department as a no limit fund for fiscal year 2020. All disbursements and expenditures from such fund require state finance council approval. Section 2 is the same as section 1 but for fiscal year 2021. Section 3 appropriates any additional federal grant moneys under the federal CARES act to the coronavirus relief fund – federal fund of the governor's department. All disbursements and expenditures from such fund require state finance council approval. Section 4 provides that federal grants applied for and received by state agencies that concern federal moneys for coronavirus relief shall not be disbursed or expended without state finance council approval.

State of disaster emergency declarations and Kansas emergency management act

Section 5 ratifies, continues and extends the state of disaster emergency declared by the governor pursuant to K.S.A. 48-924 on March 12, 2020, through September 15, 2020. This section also requires the governor to receive approval from the state finance council for any new state of disaster emergency related to the COVID-19 health emergency during 2020. Section 6 provides limitations on closure or cessation of any business or commercial activity. On or after September 15, 2020, during any state of disaster emergency declared pursuant to K.S.A. 48-924, the governor shall not order the closure or cessation of any business or commercial activity for more than 15 days. At least 24 hours prior to the issuance of any such order, the governor shall call a meeting of the state finance council for the purpose of consulting with the council regarding the order. After an initial order providing for the closure or cessation of business or commercial activity has resulted in 15 days of closure, the governor shall not order further

closure except upon specific application by the governor to the state finance council and an affirmative vote of at least six of the legislative members of the council, the governor may order such closure for specified periods not to exceed 30 days each. This section expires on January 26, 2021.

Sections 32 through 36 amend statutes in the Kansas emergency management act. Section 32 amends K.S.A. 48-924 to provide that the state of disaster emergency described in section 5 will terminate on September 15, 2020, except that when the legislature is not in session, the governor may apply to the state finance council for an extension for specified periods not to exceed 30 days each. No such extension shall continue past January 26, 2021. Section 33 amends K.S.A. 48-925 regarding limitations and restrictions on the powers of the governor. The amendments clarify that the governor may issue orders to exercise the powers conferred by this section and provide that, within 24 hours of the issuance of any order, the governor shall call a meeting of the state finance council to review such order. All orders are null and void after the period of a state of disaster emergency has ended. Subsection (d) specifies that the governor shall not have the power to seize ammunition or to suspend or limit the sale, dispensing or transportation of firearms or ammunition. Subsection (e) provides that the governor shall not have the power to restrict businesses from operating or to restrict the movement or gathering of individuals as expressed in the governor's state of disaster emergency proclamation issued on May 26, 2020. Subsection (f) provides that the governor shall not have the power to modify or alter a provision of election law. Subsection (g) authorizes counties to adopt orders relating to public health that are less stringent than statewide executive orders and provides the findings the board of county commissioners shall make prior to adopting such order. Section 34 provides that on January 26, 2021, K.S.A. 48-925 returns to law as it was prior to the amendments made by section 33. Section 35 amends K.S.A. 48-932 to provide that state of local disaster emergencies may be reviewed, amended or revoked by the board of county commissioners or governing body of a city. Section 36 amends K.S.A. 48-939 to change the penalty for violation of the act, or any lawful order or proclamation issued under authority of the act, from a class A misdemeanor to a civil penalty not to exceed $2,500 per violation. Violations shall be enforced though a civil action or injunction brought by the attorney general or the appropriate county or district attorney.

County boards of health and local health officers

Section 37 amends K.S.A. 65-201 to provide that any order issued by the local health officer may be reviewed, amended or revoked by the board of county commissioners, and section

38 amends K.S.A. 65-202 to provide that any order issued by the local health officer regarding remediation of any infectious disease may also be reviewed, amended or revoked by the board of county commissioners. Section 25 amends K.S.A. 19-101a to provide that counties may not exempt themselves from the changes in sections 37 and 38.

School closures

Section 7 requires the governor to obtain state board of education approval prior to closing schools. Prior to issuing an executive order pursuant to K.S.A. 48-925 that has the effect of closing public or private school attendance centers, the governor shall submit the proposed executive order to the state board of education. The board shall meet as soon as reasonably possible to review the order and, if a majority of the members of the state board determines the order is in the best interests of the students in the state, adopt a resolution affirming the proposed executive order.

COVID-19 response and reopening business liability protection act

Section 8 names this act, and section 9 provides definitions for the act. Section 10 provides that healthcare providers are immune from civil liability for acts, omissions, healthcare decisions or the rendering of or the failure to render healthcare services as a direct response to a state of disaster emergency related to the COVID-19 public health crisis unless the act, omission or healthcare decision constitutes gross negligence or willful, wanton or reckless conduct or the healthcare services are not related to COVID-19 that have been altered, delayed or withheld as a direct response to the COVID-19 public health emergency. Section 11 provides that a person conducting business in this state shall be immune from liability in a civil action for a COVID-19 claim if the person was acting pursuant to and in substantial compliance with public health directives applicable to the activity giving rise to the cause of action. This section expires on January 26, 2021. Section 12 provides that a person who designs, manufactures, labels, sells, distributes, provides or donates a qualified product in response to the COVID-19 public health emergency shall be immune from civil liability in a civil action alleging a product liability claim if the product was manufactured, labeled, sold, distributed, provided or donated in response to a written order finding a public need for a qualified product issued by the governor, the adjutant general or the division of emergency management and the damages are not occasioned by willful, wanton or reckless disregard of a risk that the product would cause serious injury. Section 13 provides an affirmative defense to liability in a civil action for adult care facilities for

claims arising from exposure to COVID-19 if the facility: (1) (A) was caused to reaccept a resident who was removed for COVID-19 or (B) treats a resident who tested positive for COVID-19 in compliance with a statute or rule and regulation; and (2) is acting pursuant to and in substantial compliance with public health directives. Section 14 provides that the act does not create, recognize or ratify a claim or cause of action; eliminate a required element of a crime; affect workers' compensation laws; or affect any other immunity or limitation of liability. Section 15 provides that the business provisions of the act apply retroactively to any cause of action accruing on or after March 12, 2020, and the healthcare and adult care facility sections apply retroactively between March 12, 2020, and the end of the state of disaster emergency.

COVID-19 contact tracing privacy act

Section 16 enacts the contact tracing privacy act. The act prohibits the state or any local government from contact tracing except when the secretary of health and environment or local health officer determines contact tracing is necessary to perform a public health duty assigned by statute. The secretary or local health officer may employ, contract for or engage contact tracers as provided by this act and such tracers must meet the qualifications prescribed by the secretary. Tracers shall not disclose the identity of an infected person, and only data specifically authorized by the secretary may be collected. Participation in contact tracing shall be voluntary, and no contact or infected person shall be compelled to participate or be prohibited from participating in contact tracing. Contacts and infected persons are immune from civil, criminal and administrative liability if they disclose information to tracers in good faith. Contact tracing shall not be conducted through the use of any service or means that uses cellphone location data. No third party shall be required to collect or maintain tracing data, and contact data voluntarily collected or maintained by a third party may be obtained by a tracer only under certain circumstances. A person may bring a civil action to enjoin violations of this act, and a knowing violation is a class C misdemeanor. Contact data is personal information within the meaning of the Kansas consumer protection act. The secretary was required to promulgate rules and regulations to carry out this act by August 1, 2020. This section expires on May 1, 2021.

Employment security law (unemployment)

Section 27 amends K.S.A. 44-702, the employment security law policy statement. Section 28 amends K.S.A. 44-705, the eligibility requirements for benefits and to waive the work search requirement and the waiting week period for people seeking benefits. Section 29 amends

K.S.A. 44-709 related to the employer obligations and notifications. Section 30 amends K.S.A. 44-710 to implement employer contribution rate freeze. It also charges benefit payments to the accounts of contributing employers and provides for federal reimbursement to reimbursing employers. Section 31 amends K.S.A. 44-757 to make changes to the eligibility requirements to participate in the shared work plan.

Health and Healthcare

Section 20 authorizes the expanded use of telemedicine in response to the COVID-19 public health emergency and imposes requirements related to telemedicine. This section will expire on January 26, 2021. Section 21 makes changes to hospital admissions and allows for utilization of non-hospital space and medical care facility staff. This section shall expire 120 days after the expiration or termination of the state of disaster emergency. Section 22 allows the state board of healing arts to provide temporary emergency licenses for certain healthcare professions and allows the board to suspend certain licensing and practice requirements. This section expires on January 26, 2021. Section 23 allows certain healthcare service providers to provide services without the direction and supervision that would normally be required. This section expires on January 26, 2021. Section 39 amends K.S.A. 65-468 to suspend restrictions placed on critical access hospitals prior to June 30, 2021.

Adult care homes

Section 19 imposes new requirements on the Kansas department for aging and disability services related to providing personal protective equipment and ensuring infection prevention and control practices and recommendations are adopted and made available publicly. Promptly and in no case later than 90 days following June 9, 2020, the department is required to make or cause or be made infection control inspections in adult care homes.

Alcoholic liquor

Section 26 amends K.S.A. 41-2653 to provide for the sale of curbside alcohol and to authorize the temporary sale of alcoholic liquor for consumption off of certain licensed premises when certain requirements are followed. These new provisions will expire on January 26, 2021.

Courts

Section 24 amends Section 1 of 2020 SB 102 to authorize the use of two-way electronic audio-visual communication by courts to secure the health and safety of court users, staff and judicial officers. Prior to these amendments this could only be done during a declared state of disaster emergency.

First responders

Section 18 requires county health officers to share certain information with first responder agencies and 911 call centers. Such information will only be disseminated to first responders when responding to a call at the listed addresses to alert them to the need to utilize personal protective equipment.

Notarial Acts

Section 17 validates certain notarial acts performed while the requirements that a person must appear before a notary public are suspended.

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To: 2020 Special Committee on Kansas Emergency Management Act

From: Amanda L. Stanley, General Counsel

Date: August 26, 2020

Re: The Kansas Emergency Management Act

Before Kansas was even a state, there were already cities and counties. Today there are 625 cities ranging in population from 12 to almost 400,000. Unlike counties which serve as an administrative arm of the state, cities exist solely to provide the services requested by their residents. Cities are formed because a collective group of individuals decided that they wanted a higher level of service than was being provided by the county.

Structure of Cities

In Kansas, there are three class of cities. Cities of the 1st class have populations above 15,000, cities of the 2nd class have populations of more than 2,000 and less than 15,000, and cities of the 3rd class have populations of more than 250 and there must be at least 250 platted lots each of which is served by water and sewer lines.

There are multiple forms of government in Kansas cities. These include (1) Mayor-Council, (2) Commission, (3) Commission / Council-Manager, and (4) Unified Governments. Because of the various forms of government, each city's response to an emergency can look a little different.

Kansas cites perform a wide array of functions including general administration, public safety, utilities, infrastructure, parks and recreation, economic development, and other various services requested by the citizens in the community.

In Kansas, cities have constitutional home rule. Home rule, which was approved by the voters in 1960, gives cities the power to act on the unique needs and values of their communities. As has been made readily apparent during the Covid-19 pandemic, eastern Kansas is different from western Kansas. The 625 cities in our state vary widely in their views on smoking, zoning, public-private partnerships, alcohol sales, economic development, animals inside city limits, and emergency management. Home rule keeps the control of the community in the hands of its local citizens. In general, cities may act on any topic when state law is non-uniform or when there is no state law on a topic. Cities do not need enabling statutes in order to govern.

What is the League of Kansas Municipalities?

The League of Kansas Municipalities was created as an instrumentality of our member cites in Kansas in 1910 and was ratified by K.S.A. 12-1610e. The mission of the League is to strengthen and advocate for the interests of the cities of Kansas to advance the general welfare and promote the quality of life of the people who live within our cities. While you often only see us in the Capital, legislative advocacy is only a small part of what we do. Since 1910, the League has been a resource for cities across Kansas and has acted as a body to share ideas, interpret the law, and to facilitate communication between cities and the executive, legislative, and judicial branches of government. The core mission of the League is to serve as a collective resource for cities. This core mission has perhaps never been as vital as in the last six months as cities were forced to quickly adapt to a hopefully once in a lifetime pandemic with its ever-changing rules. In 2019, the League answered about 1500 legal calls from cities. In contrast, in 2020 we have already answered over 1700 legal calls -- most directly related to Covid-19. In addition to those calls, starting in March we have held weekly and even bi-weekly webinars watched by city officials from every part of the state to pass on the latest must know information and to explain recent executive orders and daily changing legal authorities. The League created a Covid-19 page on our website that was frequently updated with memos explaining changes at the federal and state level. Through it all, we have had a unique opportunity to see how the State's emergency management response to a disaster of this scale has worked at the local level. We truly appreciate how hard statewide officials in every branch of government have worked to mitigate Covid-19 in our community. The Governor has served in a unique movement in history, that no one saw coming, and has had to take decisive, and sometimes unpopular, action to save lives. The Legislature also took quick and decisive action to ensure necessary federal funding was in place, as well as passing other key pieces of legislation. The Chief Justice of the Supreme Court diligently worked to ensure the court system continued to function. Her office's communication with cities to make sure municipal courts had the tools they needed was invaluable. The Attorney General quickly reacted when cities requested guidance on the Open Meetings law with Emergency Rules and Regulations to help as local elected officials learned how to govern via Zoom. Our goal today is not to present the perfect solution to emergency management but to give you a broad perspective to consider as you look at changes to KEMA.

Current KEMA Structure and Cities

Under the current KEMA structure, a city's role is to participate in the county's comprehensive emergency management program. Cities are to first utilize their own resources and access mutual aid before requesting county aid. When dealing with traditional disasters, fires, floods, tornados, this structure makes a lot of sense. If a city has the resources to deal with the disaster initially, they do. If the city does not possess the resources in equipment, material, or funds to facilitate the

response or recovery operations of a natural disaster, the next logical step is to call in help. As the administrative arm of the State, the county serves as that next level of response. During any other natural emergency, the State Emergency Operations Command, counties, and cities follow the National Incident Management System (NIMS). NIMS provides a systemic, proactive approach to guide departments and agencies. There is a clear chain of command to allow all levels of government and nongovernment organizations to work together to quickly mitigate the effects of the disaster. Communication between the city, the county, and the state is essential.

COVID-19 Experiences

During the Covid-19 disaster, that traditional chain of command and necessary communication broke down.

Perhaps the breakdown is attributable to the scale of this particular disaster. When a tornado hits, maybe a few communities are affected, but the number is small enough to be able to effectively communicate necessary information. During Covid-19, every city and county was affected. Every city needed to know what was going on and the feedback received is that there were instances where counties could not quickly transmit that information from the State down to the city level. At times, it appeared as if there was no plan, leaving cities in the dark. Cities of all sizes were left trying to pull their own information from the county, state, and federal levels due to lack of briefings on the local response in order to address the rumors abounding in their communities. The lack of a statewide approach resulted in rural and suburban cities with council meetings lasting until midnight filled with angry citizens and an agitated business community demanding answers. Answers the city did not have because that is not traditionally a city's role.

Suggestions for Improvement

When statewide orders are issued, they should consider the structure of city and county government and the enforcement mechanism should be clearly spelled out. For instance, when an executive order was announced on face masks four days before the text of the actual order was available to cities, it led to confusion and anger. Citizens and businesses wanted, and needed, to know what would be required of them. The first place they turned was to their local elected officials who had no answers. After House Bill 2016 was adopted, the confusion was even worse for cities. First the city had to figure out the executive order, then the city had to figure out what the county was going to do, and then the city had to facilitate its own response often with very little time.

The cities that felt like they had the best response were in counties where all levels of government pitched in and practiced good old fashion Kansas teamwork. The county, city, school district, hospital, community college, and chamber of commerce operated as partners to address an unparalleled event. For example, in Cloud County where the City of Concordia is located, the city's

Economic Development Director and Chamber of Commerce took the lead on a county-wide effort to support local businesses (Caring for Cloud County) selling gift certificates for local businesses so the businesses could accept the cash now for operational expenses while they were shut down. Simultaneously, the Health Department Directors & County Health Officer took the lead on comparing state health orders to local data and needs and formulated local health orders. They also took the lead organizing a mobile testing site after an outbreak. Meanwhile, individual entities (County, Cities, School Districts, Hospital, Community College) refined and implemented their own response plans to keep their employees on payroll and continue business operations that supported community infrastructure while keeping their employees healthy and showing empathy for those with school age children and no access to childcare. The community recognized that the response was going to be a marathon and not a sprint and it would take everyone coming together to physically and economically survive it.

While cities appreciated that counties included them in the conversation, it often felt as though the city was a lone voice in a room full of county officials, and that the city perspective was ignored even where the bulk of the county residents live inside city limits. For example, in Seward County, 20,000 of the 23,000 residents live in Liberal but, under KEMA, Liberal had no formal role in the response to Covid-19 despite the massive policy implications of the response. Having a city-based emergency manager would have also been helpful during the 2017 ice storm when the City of Liberal was impacted much differently than the County and for a much longer duration. KEMA does make provisions for cities of the first class to have a bigger role in emergency management by allowing the Governor to designate certain cities to have a response plan. To date, no city in Kansas has been designated as such. When dealing with certain disasters, it makes sense for certain cities to have a more formalized role. Looking to the future, having some city-based emergency managers, educated in disaster preparedness and recovery would be beneficial.

Numerous cities highlighted in their comments the necessity when dealing with a long drawn out disaster of this magnitude of considering what is occurring in different parts of the State when issuing state-wide executive orders. There needs to be a way for different parts of the State to be treated differently. One city relayed that it was challenging to explain to citizens why they were on lockdown a full two weeks before a single case had been diagnosed in the entire county; however, allowing opt outs by individual counties has also not made a lot of sense in every instance. For example, we have cities that border and even straddle county lines. Masks orders in one county and not the other, or mask mandates adopted at different times with different rules, have left cities split in half. The same has occurred with other health orders. Under Sedgwick County's health order, bars were closed in Wichita, but the bars right across the street in Butler County stayed open. Cities struggled with canceling weddings at community centers while churches proceeded

with even larger celebrations right next door -- the only difference between the two buildings being the county line.

Perhaps when KEMA was originally enacted, it made sense for all 105 counties to be responsible for emergency management. Does that still make sense in 2020? The State of Kansas is divided geographically into seven Homeland Security Regions. These same regions are used for the Kansas mutual utility assistance program. With the ease of communication, and the changing technology landscape, maybe it is time to restructure our State's response into a seven-region structure. This would allow for a regional, and hopefully more efficient, approach to disaster management. This structure might also prove useful in traditional natural disasters. The massive flooding last year was not contained to one county. Droughts are rarely contained to one county. The largest fire in Kansas history occurred in March of 2017 and burned roughly 509,000 acres in 3 counties resulting in an estimated $44,650,000 in damage in Clark County alone. The very nature of a fire requires a regional approach. A new structure with a smaller number of professional emergency management directors might also be invaluable for cyber attacks which require a specialized expertise and are a growing disaster risk.

There was a lot of talk about enforcement yesterday and I would like to address some of the issues raised. Before House Bill 2016, enforcement of executive orders was through a criminal system. That set up issues for cities. K.S.A. 48-925(b) states that the Governor may issue orders and proclamations which shall have the force and effect of law during the period of a state of disaster emergency. Additionally, the statute allows the Governor to require and direct the cooperation and assistance of state and local government agencies and officials; however, the Governor's orders on mass gatherings and closing businesses did not direct local governments to actually enforce the orders. Instead, the orders contained language stating that "Law enforcement officers enforcing the orders should use their discretion and consider the totality of the circumstances as they determined appropriate enforcement action." The Governor repeated this during press conferences that enforcement of the orders was up to the discretion of the local units of government. Suddenly every city was placed in the position of deciding the constitutionality of the orders and if the locality should enforce it. When litigation ensued over the closure of a church in Junction City under Executive Order 20-25, in a motion to be dismissed from the case, the Governor argued that she lacked the power and authority to enforce her executive order and that the properly named party was the local government unit who actually enforced the order.

Who is ordering the enforcement might seem like a technicality; however, when dealing with executive orders affecting constitutional rights, it does matter for purposes of federal 42 USC §1983 claims if the local unit of government is acting on behalf of the state or using its own discretion. Under §1983 claim for deprivation of a constitutional right, the state is not a "person" but a city is

a "person." The Eleventh Amendment prevents states from being sued in federal court. By leaving the discretion to enforce state executive orders to local municipalities, that is opening the door for cities to be sued under §1983 claims.

Regardless of the disaster, or the specific policy being implemented, I'm not sure it is good public policy to have 105 counties and 625 cities deciding when it is optional to enforce an executive order. Add in competing advice from the attorney general and the governor's office and things get really messy for cities just trying to figure out what to do. When considering changings to KEMA, the legislature should make it clear that when a local unit of government is enforcing an executive order, the local unit is being directed to enforce the order rather than it being a discretionary policy choice.

After the passage of House Bill 2016, the enforcement confusion unfortunately did not go away. It simply changed. The changes to a civil structure in House Bill 2016 do make sense for closing businesses; however, the face mask executive order quickly showed that a civil penalty was not a system that will work well for enforcement of all executive orders. The best I had to tell cities when questioned on how this was supposed to work was to tell officers to request people wear the mask and if they refuse, and it was an extreme case, to take down the individual's information and make a report to the County Attorney who could choose to bring an action. The county health office orders on face masks were not any better for a city to figure out enforcement. Those orders were issued under a statute that has no penalty, KSA 65-202(c), so the best suggestion cities could come up with for enforcement was the UPOC failure to obey a lawful order.

Regardless of what enforcement scheme this committee comes up with, civil or criminal, a city's role should be clearly spelled out so there is no confusion at any level of government.

The Adjutant General yesterday asked that this committee remove his ability to enforce local ordinances. I would caution against that. While he discussed speeding tickets, when a tornado hits, and wipes out a police department, there are numerous local ordinances necessary to secure the immediate safety of the public. These include trespassing, criminal trespass, damage to property, disorderly conduct, just to name a few. While I suppose you could try to achieve initial securing of a site only using the district court system, the municipal system is likely going to be far more nimble in accomplishing what needs to occur.

Finally, our State needs to give more thought to communication before a disaster occurs. The League is probably the sole governmental organization in the State able to quickly reach the majority of cities in Kansas; however, you will not find a single mention of us in the State's 491-page Response Plan. We stand ready and willing to serve our purpose of advancing the general

welfare and promoting the quality of life of the people who live within our cities. Please use us for that.

After almost fifty years, it is appropriate to revisit the Kansas Emergency Management Act to ensure that it continues to meet the evolving needs of our state. The process should involve careful study to make sure the changes in response to Covid-19 do not cripple our state's response to the next flood, ice storm, tornado, earthquake, or even pandemic. Cities stand ready to engage in that thoughtful consideration.

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Testimony on the
Kansas Emergency Management Act

Presented to the 2020 Special Committee on the Kansas Emergency Management Act
By Kansas Attorney General Derek Schmidt

August 26, 2020

Chairman Patton, Vice Chair Rucker, and Members of the Committee:

Thank you for this opportunity to present testimony during your review of the Kansas Emergency Management Act, K.S.A. 48-920 et seq. Although other specific emergency statutes may come into play during COVID-19 or any other particular emergency situation, this statute is the principal legal foundation for the state's overall response to emergencies ranging from tornadoes to floods to wildfires to the spread of animal or human infectious and contagious diseases.[1] Overall, it has worked well for the more than 45 years it has been in effect and has provided the solid, familiar basis for state-local emergency planning and coordination of response throughout our state.

Having said that, there can be no reasonable question that the KEMA's unprecedented use during the COVID-19 response – unprecedented in its combination of geographic scope, duration and intrusiveness of emergency orders issued under its authority – has revealed concerns, gaps and shortcomings in the Act that should be addressed and decided by the Legislature to reduce the likelihood they will need to be addressed and decided by the courts.[2] So I commend the Committee for undertaking this important review.

While KEMA has many provisions, I intend to focus principally on those in K.S.A. 48-924 and K.S.A. 2019 Supp. 48-925, both as amended by 2020 Special Session House Bill 2016, Secs.32 and 33, through which the Legislature has delegated to a Governor the power to issue emergency orders that have the "force and effect of law." During the response to COVID-19, it has been the use of these delegated powers that has presented some of the most difficult legal and public policy questions about the extended and extensive use of the KEMA.

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[1] In specific emergency responses, other statutes also come into play. For example, in the current COVID-19 response, public health authorities in Chapter 65 also play an important role.

[2] Failure to address legal shortcomings or ambiguities in the KEMA is likely to invite legal challenges to the statute itself. The Office of the Attorney General currently is defending the KEMA against one lawsuit challenging the constitutionality of provisions of the statute. See *Eric S. Clark v. Governor Laura Kelly et al*, in the District Court of Franklin County, Kansas, Case No. 20-CV-000061.

suspended. While welcome, those new limitations added by HB 2016 shed little light on the boundaries of the power that the Legislature has delegated to a Governor through K.S.A. 48-925(c)(11), which continues to appear dangerously close to a constitutionally impermissible delegation to a Governor of the legislative power vested by our Constitution exclusively in the Legislature.

- In addition, the mechanism built into the KEMA for a legislative check on a Governor's use of the delegated emergency powers – the revocation of any order by concurrent resolution – is itself constitutionally suspect in light of Kansas Supreme Court case law decided after this statutory mechanism was enacted in 1974. In *State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, (1984) and *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cty./Kansas City, Kan.*, 264 Kan. 293 (1998), the Supreme Court held that similar legislative efforts in the context of regulations to delegate power to the executive branch but retain control over how the executive uses that power violate the separation-of-powers established by the Kansas Constitution and are invalid. While our Supreme Court never has squarely decided whether this same analysis applies in the context of delegation of emergency powers, the reasoning of those cases invalidating the use of concurrent resolutions to check the use of delegated regulatory power would seem logically to apply here with equal force. Consequently, this legislative oversight mechanism in the KEMA is constitutionally suspect.

- In K.S.A. 48-925(c)(1), a Governor is delegated the extraordinary power to suspend state statutes. But the plain text of that subparagraph limits that power only to suspending "regulatory" statutes that "prescrib[e] the procedures for conduct of state business, or the orders or rules and regulations of any state agency which implements such statute." The statute provides no definitions or other clues, however, as to what those limiting terms in fact mean. What distinguishes a "regulatory" statute that may be suspended from other sorts of statutes that may not? What distinguishes a statute that "prescribe[s] the procedures for conduct of state business, or the orders or rules and regulations of any state agency which implements such statute" that may be suspended from other sorts of statutes that may not? In Attorney General Opinion 2020-08, we had occasion to raise these issues. While we were unable to discern a clear line delineating the boundaries of power delegated to a Governor under K.S.A. 48-925(c)(1), we relied on common definitions of those terms to conclude that because K.S.A. 2019 Supp.72-1138– commonly known as the local school district home rule statute – *grants* power to *local* school boards it is neither "regulatory" nor does it "prescrib[e] the procedures for conduct of state business, or the orders or rules and regulations of any state agency which implements such statute." It would be helpful for the Legislature to clarify the boundaries of the power it is delegating in (c)(1).

- In addition, it would be helpful for the Legislature to require a Governor to state with specificity which statutes are intended to be suspended by any particular order that exercises the power delegated in (c)(1). Consider, for example, the text of the March 12, 2020, proclamation of a state of disaster emergency, which broadly declared that the Governor "hereby suspend the provisions of any regulatory statute prescribing the procedure for conduct of state business, or the order or rules and regulation of any state agency which implements such statute, if strict compliance with the provisions of such statutes, order or rule and regulation would prevent, hinder, or delay in any way necessary action in coping with the disaster as set forth in K.S.A. 48-925(c)(1)." So too with the text of Executive Order 20-59, which declares statutes to be suspended but does not specify

grants home rule authority to cities (Kan. Const. Art. 12, § 5), and in general that authority may be limited only by a uniform "enactment of the legislature." A Governor's emergency order exercising powers delegated by K.S.A. 48-925 is not itself an "enactment of the legislature." It is an order of the chief executive officer of the state. In other words, it appears doubtful whether a Governor's emergency order can preempt city home rule authority. Several of Governor Kelly's emergency orders in response to COVID-19 expressly purported to preempt local orders either entirely, see, e.g., Executive Order No. 20-16 (Establishing a statewide "stay home" order) and Executive Order No. 20-24 (Extending Executive Order 20-16), or in part, see e.g., Executive Order 20-18 (Temporarily prohibiting mass gatherings of more than 10 people) and Executive Order 20-25 (Temporarily prohibiting mass gatherings of more than 10 people to limit the spread of COVID-19 and rescinding Executive Order 20-18),[4] but did not address validly adopted local ordinances.

- HB 2016 established a mechanism by which local boards of county commissioners may review and adopt less-restrictive orders than a governor's emergency order relating to public health and a related mechanism by which those local boards may review and modify orders of local health officers. The public policy behind these provisions appears reasonable – to avoid one-size-fits-all orders that may be unnecessary in some parts of the disaster area and also to ensure that competing interests can be given consideration. If the Legislature intends to keep this basic policy in place, it should carefully review the text and operation of those provisions. For example, the statute authorizing "less restrictive" local orders never expressly states those less-restrictive local orders would replace the governor's order in that county (although the intent appears clear). Similarly, the current statutory language applies only to orders "relating to public health," which seems somewhat peculiar within the current architecture of the KEMA.

- Some consider the KEMA ambiguous as to whether a Governor may, in effect, circumvent a decision or action by the Legislature (or by operation of law) to end the state of disaster emergency. May a Governor declare sequential states of disaster emergency – perhaps each for the statutorily authorized 15 days – thereby avoiding the important limitations in the KEMA on a Governor's access to the delegated emergency powers? Although we doubt that end-run is legally permissible, clarifying the KEMA on that point may be advisable in order to avoid future disputes.

Broader Policy/Legal Questions Presented by using KEMA for Long-Term Responses

In addition to the specific legal questions and concerns above, I would raise several questions about the basic architecture of the KEMA that have arisen because of its unprecedented use during the COVID-19 pandemic:

First, is long-term access to these broad emergency powers as a substitute for legislative deliberations really wise or desirable in emergencies that may last for months or years? Most emergencies, e.g., tornadoes, floods, and wildfires are discrete, localized events that require a limited and targeted emergency response. But in the COVID-19 response, emergency powers have been used in an

[4] K.S.A. 48-935 is a uniform "enactment of the legislature" limiting ordinances that are in conflict with any provision of the KEMA or of the state disaster emergency plan or of the applicable local and interjurisdictional disaster emergency plans. However, the plain language does not prohibit a conflict with an executive order. Thus, the home rule power is not limited by a uniform enactment of the legislature.

Sixth, should the law require some sort of formal consultation procedure before (or immediately after) a Governor may proclaim a state of disaster emergency? Or before (or immediately after) a Governor may issue an emergency order pursuant to the KEMA? Under the House Bill 2016 amendments, a mechanism for post-issuance review by the State Finance Council of emergency orders has been established, until January 26, 2021. Is this the optimal mechanism? Or should some type of pre-issuance consultation be required?

Seventh, what mechanism should exist for revoking emergency orders issued by a Governor under authority of KEMA? The statute itself provides for revocation by concurrent resolution of the Legislature, and 2020 House Concurrent Resolution 5025 unsuccessfully attempted to provide for revocation by the Legislature Coordinating Council. But currently, no operable mechanism for revocation exists for most orders because the Legislature is not in session – even though legislative review and authority to revoke orders invoking emergency powers is a fundamental part of the architecture of the KEMA and plainly is a check the Legislature always has intended to exist in that statute. In that way, the status quo is inconsistent with the plain purpose of KEMA to authorize legislative revocation of a governor's use of delegated emergency powers.

Constitutional Amendment

A fundamental difficulty with relying upon the delegation of emergency power to a Governor to issue orders that have the "force and effect of law" as a principal means to manage long-lasting and widespread emergencies such as COVID-19 is that this method of lawmaking is fundamentally at odds with our system of self-government. As Justice Robert Jackson explained in his famous concurrence in the Steel Seizure Case that held unconstitutional President Truman's attempt to nationalize steel mills by use of emergency powers during the Korean War, "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and *that the law be made by parliamentary deliberations*."[6]

Therefore, while not part of KEMA, I encourage the Committee to review Article 15, Section 13, of the Kansas Constitution and to consider proposing modifications to that constitutional provision for consideration by Kansans as a constitutional amendment. That provision, which was adopted by Kansans in 1959 during the Cold War, provides:

> "Notwithstanding any general or special provision of this constitution, the legislature, in order to insure continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack, shall have the power and the immediate duty (1) to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and (2) to adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations including, but not limited to, the financing thereof. In the exercise of the powers hereby conferred the legislature shall in all respects conform to the requirements of this constitution except to the extent that in the judgment of the legislature so to do would be impracticable or would admit of undue delay."

[6] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655, (1952) (emphasis added).

Constitution? In what manner would the Legislature be able to meet during an emergency session – virtually or physically in a location other than Topeka? How would important rules and procedures, such as the requirement for a quorum, be satisfied?

Such a constitutional amendment also could authorize the Legislature by statute (a) to delegate emergency powers to a Governor – or to other state entities or officials, for that matter and (b) to retain the ability to oversee use of those powers, such as by rejecting emergency orders by concurrent resolution or by action of a designated legislative body such as the LCC. If this authority were constitutionalized, it would avoid the difficult nondelegation and separation-of-powers concerns currently present in the KEMA as discussed above.

Conclusion

The COVID-19 emergency – which continues – has brought to light numerous difficult legal and policy issues presented by extended reliance on emergency powers as a means of governing. I encourage the Legislature to give serious consideration to adjusting the system to reduce obvious legal ambiguities and constitutional defects but also to address more fundamental questions about how governmental decisions should be made during a time of long-lasting emergency. Many of these concerns can be addressed by statutory amendments to the KEMA or to other statutes, but some may require amendment to the Kansas Constitution.

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Laura Kelly, Governor

Testimony for the Special Committee on the Kansas Emergency Management Act
25 August 2020

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to be here today on behalf of the Adjutant General's Department. I would like to start by thanking the members of the Legislature, the Governor, as well as the people of Kansas who continue to support the men and women of the Adjutant General's Department who work tirelessly to keep you, your families and all Kansans safe.

The Kansas Emergency Management Act originates from World War II focusing on civil defense and the threat of nuclear attack. In 1974, civil defense shifted to an all-hazard focus and became the foundation for the Emergency Management Act as we know it today. However, many things have changed over the past four decades and there are several provisions in the Act that require updating to support the contemporary environment. This is evident as the State continues to respond to the COVID-19 pandemic, or when planning for the next major disaster.

With that in mind, the foundation of the State's emergency management program is based on the National Incident Management System and built on an all-hazard planning model. This provides a standardized and basic understanding of the mechanisms through which the State mobilizes and coordinates resources to support local emergency management efforts at all levels.

In 2013, the State of Kansas emergency management received accreditation and re-accreditation again in 2018. Emergency management accreditation represents a significant achievement in the fact that many agencies within the State took steps to document compliance with sixty-four international standards through a peer-reviewed on-site assessment by a team of Emergency Management Accreditation Program trained assessors. Accreditation recognizes the State's ability to bring together personnel, resources, and communications from a variety of agencies and organizations in preparation for and in response to a disaster at any time.

K.S.A. 48-904 defines a "disaster" as "the occurrence or imminent threat of widespread or severe damage, injury or loss of life or property resulting from any natural or manmade cause, including, but not limited to, fire, flood, earthquake, wind, storm, epidemics, contagious or infectious disease, air contamination, blight, drought, infestation, explosion, riot, terrorism or hostile military or paramilitary action."

To protect all Kansans from the effects of a disaster the Kansas Division of Emergency Management (KDEM) is statutorily charged to create a comprehensive emergency management system and to supplement and facilitate local efforts, before, during and after emergencies. This is done through the four phases of emergency management, which include mitigation, preparedness, response and recovery.

When disaster strikes, the Governor's declaration of emergency activates the response and recovery portions of the Kansas Response Plan as outlined in the Kansas Emergency Management Act. The Kansas Response Plan addresses disasters that could affect the State of Kansas. It also describes the basic strategies, assumptions, and mechanisms through which the State mobilizes resources to support local emergency management efforts. The Kansas Response Plan which is based on the fundamentals within the National Incident Management System, provides guidance and policy direction on interfacing with county emergency operation plans and the National Response Framework.

KDEM then coordinates actions in support of local governments in order to save lives, protect property and the environment, by maintaining a state of readiness to preserve and accelerate support and resources to communities when their own capabilities are exhausted. KDEM does this by procuring, stockpiling and deploying supplies, equipment, materials, capabilities and facilities to support local emergency management efforts.

By adopting the National Incident Management System the State's emergency management program is in compliance with national standards. It guides all levels of government, non-governmental organizations and the private sector to work together to prevent, protect against, mitigate, respond to, and recover from disasters.

No matter when or what type of disaster, the Adjutant General's Department will continue to respond accordingly with the utmost dignity and respect for our fellow Kansans through the authority of the Governor established in the Kansas Emergency Management Act. While some provisions within the Emergency Management Act require updating, any revisions made must not impede the ability of the State to respond to disasters, save lives, and protect property.

I look forward to working with the Legislature so together we ensure all Kansans are cared for before, during, and after any disaster. I stand ready to answer your questions.

Respectfully submitted by:

Maj Gen David Weishaar
Kansas Adjutant General
25 AUG 2020