

Hi, this is Chris Micheli with the Sacramento governmental relations firm of Aprea & Micheli and an adjunct professor at McGeorge School of Law.

Today's podcast is on the Governor's executive orders and looking at how far can they go. During the COVID-19 pandemic, Governor Gavin Newsom issued more than 30 executive orders to temporarily address different aspects of state law.

Pursuant to California Government Code Section 8558, the Governor can call a state of emergency when there's an existence of conditions of disaster or of extreme peril to the safety of persons and property within the state that are caused by conditions such as air pollution, fire, floods, storm, epidemic, riot, drought, cyber terrorism, sudden and severe energy shortage, plant or animal infestation or disease, earthquake, or other conditions other than conditions resulting from a labor controversy or conditions causing a state of war emergency.

Once the state of emergency has been declared by the Governor, state law grants enormous power to the state's chief executive. What exactly are the Governor's powers during the state of emergency?

Well, first, we can look at the California Constitution and statutes to find some guidance, but perhaps not find all the answers, including how far executive orders can go.

Turning to the constitutional provisions, Article V of the California Constitution deals with the Executive Branch of government, not only the Governor, but also other constitutional officers. Here, there are two provisions of Article V that speak to the governor's powers, Sections 1 and 7 of Article V.

Section 1 says that the executive power of the state is vested in the Governor and he or she must see that the law is faithfully executed. Section 7 provides that the Governor is the state militia's commander-in-chief and that he or she has the authority to use the militia to execute the laws.

The state constitution, of course, provides for three separate and equal branches of government. The legislative, the executive, and the judicial. This ensures our system of checks and balances in state government.

As the head of the executive branch of state government, the Governor has the requisite powers to utilize the national guard in an emergency and to ensure that state laws are complied with. The Constitution does not speak directly to a state of an emergency or of executive orders.

Let's turn to some of the statutory provisions. When we look at the statutes, we have to look at the Government Code and specifically the California Emergency Services Act, CESA.

CESA is found in the Government Code Title II, which deals with the government of the state of California. Then, we look at Division 1 Chapter 7 which provides the California Emergency Services Act.

It's found in quite a few Code sections beginning with 8550 and continuing all the way to 8669.7. In addition, we should look at Article III of Chapter 7, which provides for powers of the Governor. These are in sections 8565 through 8899.72 of the Government Code.

Let's look at the powers of the governor. Among the relevant provisions of the Government Code are 8567. This is the general provision of state law that provides for executive orders. It allows the Governor to add, amend, or repeal executive orders as well as regulations that are needed to carry out the California Emergency Services Act, CESA.

These executive orders take effect immediately. They remain in force until the state of emergency has ended. The question posed by this Code section is how broadly should this grant of authority be viewed and do other Code sections of CESA limit this broad grant of authority to the governor?

Next is Government Code section 8570. This section provides many of the specific actions that the Governor can take to mitigate the effects of a state of emergency. These actions are generally to be in accord with the state's emergency plan.

Next is Government Code section 8571. While the language of this Code section is broad, the statute does not provide the Governor with the power to suspend all laws. The important word in this statute, I believe, is the word suspend, which means that the power leads to an existing statute, not in position of a new obligation, for example.

Moreover, the statute, this Code section provides that the Governor may only suspend a regulatory statute or a statute prescribing the procedure for the conduct of state business. While this Code section of the Government Code does not define what is meant by a regulatory statute, it does not allow creation of new statutory obligations, in my mind.

A regulatory statute is generally one that regulates conduct. Because this Code section only allows the suspension by an executive order, I believe that the executive order relates to putting a temporary hold on a statute that regulates activity.

On the other hand, it does appear that the Governor has greater authority to suspend regulations related to the conduct of business by state agencies. Nonetheless, Government Code section 8571 specifically requires the governor to declare that strict compliance with this regulatory statute would in any way prevent, hinder, or delay the mitigation of the effects of the emergency.

Does this clause relate to suspending a regulatory statute, a statute prescribing conduct of state agencies, or both? Note, of course, that the Governor does not have the authority to suspend the California Constitution. Any rights contained in the state constitution as well as the federal one, for that matter, are still in full force and effect.

Let's turn to Section 8572. Here, when the governor calls a state of emergency, this Code section gives him or her the authority to commandeer or utilize any private property or personnel deemed by the governor to be necessary to carry out the responsibilities under CESA. However, the state is liable for the reasonable value of what it uses.

Let's now look at the states of emergency section of the Government Code within CESA. In addition to the provisions that we've just covered, Government Code Title 2, Article 13 of Chapter 7 provides for states of emergencies. These provisions are contained in Government Code sections 8625 and ending with 8629.

Section 8625 is the Code section that details the findings that are necessary to claim a state of emergency. 8626 of the Government Code provides a requirement that executive orders be in writing and be filed with the Secretary of State and that they take effect immediately and that they're widely publicized.

Government Code Section 8627. As you would expect, this Code section makes clear that the Governor has complete authority, it says, over state agencies and the ability to utilize police powers in order to ensure that the governor's executive orders and regulations are carried out.

One question that this Code section raises is, what's the meaning of the term police power? Generally, broadly defined, police power is the capacity of the state to regulate behavior and enforce order within its jurisdiction for the betterment of health, safety, and general welfare of its citizens.

Does the exercise of police power allow the governor to impose new burdens on businesses, for example? Or to adopt executive orders that do more than suspend regulatory statutes?

Next is Section 8627.5. Under this Code section, the Governor can add, amend, or repeal any executive orders and regulations during the state of emergency in order to temporarily suspend any state or local statute, ordinance, or regulation that imposes "non-safety" related restrictions on the delivery of specified items such as goods, pharmaceutical products, or others that are normally delivered through retail channels.

Note here that these executive orders and regulations cannot remain in effect for more than 60 days.

Next up is Government Code section 8628. Under this provision of law, the governor can exercise full direction over all state agencies and utilize all public employees and their equipment to perform any required duties that the governor determines to exist during an emergency. State personnel may be directed to provide services to local governments and use all of the funding that's allocated for these duties.

Next is Government Code section 8629. As you would expect, when the state of emergency ends, so does a governor's powers under CESA. This means that the executive orders will no longer be in force or effect once the emergency has been terminated.

Of note is that the end of the emergency occurs either by a gubernatorial proclamation or by a concurrent resolution passed by both houses of the legislature.

To return to our original question, it appears that the governor has substantial authority to suspend regulations of state agencies with very little limitation. However, can executive orders create, if you will, new law?

In other words, again, it's clear that executive orders can temporarily suspend obligations of state agencies. It's also clear that executive orders can temporarily relieve the regulated community from certain statutes, regulations, or ordinances.

What is not clear, however, is whether an executive order can impose new obligations. Does that require a statute? Only time will tell or an appellate court decision.

Hope you enjoyed this podcast on examining the reach of the governor's executive orders.
Thanks for joining.