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61 LAWS-General

Hon. Larry Frieman
State Representative, District 74
Louisiana House of Representatives
P.O. Box 94062
Baton Rouge, LA 70804

La. R.S. 29:724
La. R.S. 29:768

Discusses the Legislature's authority to terminate an emergency under the Louisiana Health Emergency Powers Act and the Louisiana Homeland Security and Emergency Assistance Disaster Act.

Dear Representative Frieman:

You have asked whether the Governor would be prohibited from declaring another public health emergency if the Legislature terminates the Governor's declaration of a public health emergency due to COVID-19.¹ For the reasons discussed below, the termination's effect on the Governor's powers is dependent on the conditions set by the Legislature. The Legislature has the discretion to establish the terms of the termination as well as a period during which no other declaration related to that specific public health emergency may be issued.² The Governor's authority to declare a subsequent public health emergency would only be restricted based on the limitations established by the Legislature, if any.

¹ On March 11, 2020, the Governor declared a statewide public health emergency due to COVID-19, pursuant to the Louisiana Health Emergency Powers Act, La. R.S. 29:760, *et seq.*, through April 9, 2020. Proclamation Number 25 JBE 2020. On April 2, 2020, the Governor renewed and extended the statewide public health emergency through April 30, 2020. Proclamation Number 41 JBE 2020. On April 30, 2020, the Governor renewed and extended the statewide public health emergency through May 15, 2020. Proclamation Number 52 JBE 2020. On May 14, 2020, the Governor renewed and extended the statewide public health emergency through June 5, 2020. Proclamation Number 58 JBE 2020. On June 4, 2020, the Governor renewed and extended the statewide public health emergency through June 26, 2020. Proclamation Number 74 JBE 2020. On June 25, 2020, the Governor renewed and extended the statewide public health emergency through July 24, 2020. Proclamation Number 83 JBE 2020.

On July 23, 2020, the Governor renewed and extended the statewide public health emergency through August 7, 2020, and declared a public health emergency pursuant to the Louisiana Homeland Security and Emergency Assistance Disaster Act, La. R.S. 29:721, *et seq.* Proclamation Number 96 JBE 2020. On August 6, 2020, the Governor renewed and extended the statewide public health emergency declared under both Acts through August 28, 2020. Proclamation Number 101 JBE 2020. On August 26, 2020, the Governor renewed and extended the statewide public health emergency declared under both Acts through September 11, 2020. Proclamation Number 110 JBE 2020.

² A public health emergency cannot last longer than 30 days unless the Governor renews the public health emergency. La. R.S. 29:768(A).

In order to answer your question, we need to examine the powers of the Governor and the Legislature relative to declarations of public health emergencies, emergencies, and disasters. The Legislature granted the Governor enumerated powers for declaring an emergency or disaster under two statutory schemes: The Louisiana Homeland Security and Emergency Assistance and Disaster Act, La. R.S. 29:721-739, and The Louisiana Health Emergency Powers Act, La. R.S. 29:760-772.³ These Acts delegate certain powers to the Governor to protect public safety and public health. Your question asks specifically about the Legislature's authority to terminate an emergency under the Louisiana Health Emergency Powers Act; however, because the current public health emergency is declared under the Louisiana Homeland Security and Emergency Assistance and Disaster Act *and* the Louisiana Health Emergency Powers Act we will discuss both below.⁴

The Louisiana Homeland Security and Emergency Assistance and Disaster Act, at La. R.S. 29:724(B) provides as follows relative to the authority of the Governor and the Legislature in the context of a disaster or emergency:

(1) A disaster or emergency, or both, shall be declared by executive order or proclamation of the governor if he finds that a disaster or emergency has occurred or the threat thereof is imminent. The state of disaster or emergency shall continue until the governor finds that the threat of danger has passed or the disaster or emergency has been dealt with to the extent that the emergency conditions no longer exist and terminates the state of disaster or emergency by executive order or proclamation, but no state of disaster or emergency may continue for longer than thirty days unless renewed by the governor.

(2) The legislature, by petition signed by a majority of the surviving members of either house, may terminate a state of disaster or emergency at any time. *This petition terminating the state of emergency or disaster may establish a period during which no other declaration of emergency or disaster may be issued.* Thereupon, the governor shall issue an executive order or proclamation ending the state of disaster or emergency.

(Emphasis added.)

³ In a public health emergency, these two acts create a combined statutory scheme that permits the Governor to take certain *enumerated* actions—but only those actions—by executive order or proclamation. *Neither* permits the Governor to make law with an Executive Order or Proclamation, *even during an emergency*. And because this legislative scheme is a derogation from common rights and procedures (*i.e.*, the ordinary means of creating law through the legislative process and promulgating regulations pursuant to procedures outlined in the Louisiana Administrative Procedures Act, subject to legislative oversight) it must strictly construed. See *e.g.*, *State, Dep't of Transp. & Dev. v. Estate of Griffin*, 95-1464 (La. App. 1 Cir. 2/23/96), 669 So. 2d 566, 568.

⁴ See Proclamation Numbers 96 JBE 2020, 101 JBE 2020, and 110 JBE 2020.

Similarly, the Louisiana Health Emergency Powers Act, at La. R.S. 29:768, provides as follows:

A. The state of public health emergency shall continue until the governor finds that the threat of danger has passed or the disaster or emergency has been dealt with to the extent that the emergency conditions no longer exist and terminates the state of public health or emergency by executive order or proclamation, but no state of public health emergency may continue for longer than thirty days unless renewed by the governor.

B. The legislature, in consultation with the public health authority, by a petition signed by a majority of the surviving members of either house, may terminate a state of public health emergency at any time. *This petition terminating the public health emergency may establish a period during which no other declaration of public health emergency may be issued.* Thereupon, the governor shall issue an executive order or proclamation ending the state of public health or emergency.

(Emphasis added.)

Next, we turn to the procedures established by the Legislature to terminate the declaration of disaster or emergency at any time for both the Louisiana Homeland Security and Emergency Assistance and Disaster Act and the Louisiana Health Emergency Powers Act.

The Louisiana Health Emergency Powers Act requires that the Legislature consult with the public health authority before terminating the declaration of public health emergency. La. R.S. 29:768(B). The statute provides that the Legislature must act “in consultation with the public health authority” (defined in La. R.S. 29:762(11) as “the secretary of the Louisiana Department of Health, or his designee, and the state health officer”). *Id.* Thus, the Legislature is required to consult with the Department of Health and the state health officer, but the law does not require the concurrence or agreement of those officers in order for the Legislature to proceed with termination.

Termination requires simply “a petition signed by a majority of the surviving members of either house.” *Id.* The Legislature has the authority to terminate a public health emergency at any time, and thus need not be in session for the petition to be valid. *Id.* In order to have a prospective effect, the petition *may* provide for a definitive period of time in which no other declaration of public health emergency may be issued. *Id.*

Upon a successful petition, “the governor *shall* issue an executive order or proclamation ending the state of public health or emergency.” *Id.* (Emphasis added). This portion of the law recognizes that the termination is not effective until the Governor acts in accord with the Legislature’s petition. The Governor’s action under La. R.S. 29:768(B) is not discretionary, and mandamus may be appropriate if the Governor fails or refuses to comply with the petition.

The Louisiana Health Emergency Powers Act does not include any provisions for the effect of a termination or for any additional powers granted to either branch of government in the wake of a termination. Nor is there any express authority for an emergency declaration by the Legislature. Upon termination of the power granted to the Governor during the declaration of an emergency, the authority of the branches returns to its normal state, save for the possibility that the Governor will be prohibited from declaring another state of public health emergency for the period of time provided for in the petition, if any. Any action by the Legislature during a public health emergency, or in the aftermath of their termination of same, would be undertaken under their ordinary authority and procedure.

The Legislature has essentially the same authority to terminate the state of disaster or emergency under R.S. 29:724(B)(2). The only procedural difference is that there is no requirement for the Legislature to consult with the public health authority prior to terminating a disaster or emergency declared pursuant to the Louisiana Homeland Security and Emergency Assistance and Disaster Act. Termination still only requires simply "a petition signed by a majority of the surviving members of either house." *Id.* The Legislature has the authority to terminate a disaster or emergency declared pursuant to the Louisiana Homeland Security and Emergency Assistance and Disaster Act at any time, and thus need not be in session for the petition to be valid. *Id.* In order to have a prospective effect, the petition may provide for a definitive period of time in which no other declaration of disaster or emergency under the Louisiana Homeland Security and Emergency Assistance and Disaster Act may be issued. *Id.* Upon a successful petition, "the governor *shall* issue an executive order or proclamation ending the state of public health or emergency." *Id.* (Emphasis added.)

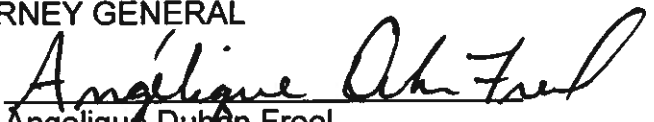
Considering the foregoing, it is the opinion of this office that the Governor's authority to declare a subsequent public health emergency will only be restricted based on the limitations established by the Legislature, if any. The Governor will not be precluded from declaring other emergencies, disasters, or both, unless the Legislature expressly restricts his authority to do so.

We trust this adequately responds to your request. However, if our office can be of further assistance, please do not hesitate to contact us.

Yours very truly,

JEFF LANDRY
ATTORNEY GENERAL

BY:


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