

North Carolina public health law before and after COVID-19

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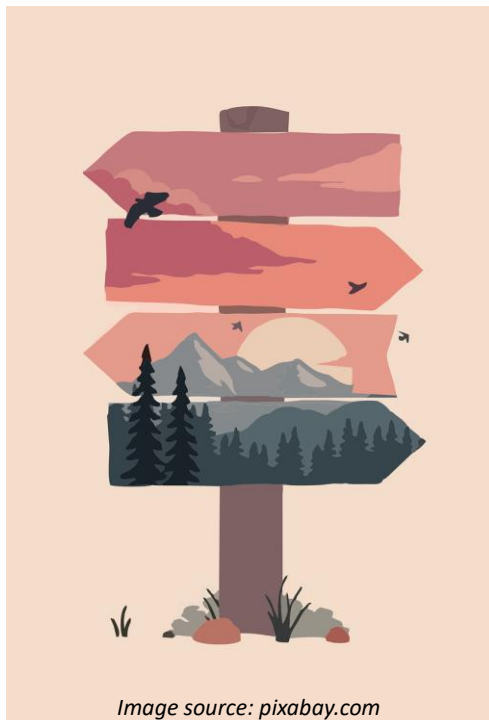


Image source: pixabay.com

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Road map

Overview: NC Law in a Public Health Emergency

Changes to NC Emergency & Public Health Laws

- Emergency management
- Public health
 - Isolation and Quarantine
 - Imminent Hazard
 - COVID Vaccination

National Trends in Legislation and Litigation

NC law in a public health emergency

Public health law

Detect cases/outbreaks in community

Investigate cases/outbreaks

Identify communicable disease control measures

Use public health remedies to control disease and enforce public health laws

Manage individually identifiable health information

Emergency management law

State of emergency declarations

Emergency restrictions ordered by Governor or cities/counties, such as:

- Business closures or restrictions
- Face covering requirements
- Mass gathering limits

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Image source: pexels.com

Changes to
N.C.'s
emergency
and public
health laws

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Emergency management law (G.S. Ch. 166A)

S.L. 2021-180, SEC. 19E.6
(EFFECTIVE 1/1/23)

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Definitions (G.S. 166A-19.3)

Statewide emergency area – Any emergency area applicable to two-thirds or more of the counties in this state (67 counties)

Council of State – The NC Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, Commissioner of Insurance

Concurrence of Council of State – The consensus of a majority of the Council of State prior to the Governor exercising an emergency power or authority that requires the concurrence of the Council State. Consensus must occur within 48 hours of Council of State being contacted. A member who doesn't respond is deemed to have concurred.

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Limitations to Governor's authority

Duration of a declaration of a statewide state of emergency (2/3 or more of counties affected) – G.S. 166A-19.20

- Governor's authority to declare a statewide state of emergency without concurrence of Council of State limited to **30 calendar days**
- Statewide state of emergency may be extended for an additional 30 calendar days with concurrence of Council of State (total of **60 calendar days**)
- General Assembly must authorize any statewide state of emergency that extends **beyond 60 calendar days**
- Governor cannot evade these requirements by issuing multiple orders that when combined affect 2/3 or more of counties



Image source: pixabay.com

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Limitations to Governor's authority (cont.)

Governor's orders imposing prohibitions and restrictions in a local emergency area – G.S. 166A-19.30

- During a declared state of emergency, Governor has authority to act in a local area if local efforts are inadequate and certain other conditions are met.
- As of Jan. 1, 2023, law requires Council of State to concur in any emergency orders issued by the Governor that impose prohibitions and restrictions in a local emergency area. Any such orders expire in accordance with timelines set for statewide declarations of emergency (60 days).



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Public health law (G.S. Ch. 130A)

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Isolation & quarantine definitions (G.S. 130A-2)

Isolation

- Limit on freedom of movement or freedom of action of a person **infected or suspected to be infected**

Quarantine

- Limit on freedom of movement or freedom of action of a person **exposed or suspected of having been exposed**
- Limit on access to an **area contaminated with infectious agent**
- Limit on freedom of movement or action of an **unimmunized person when immunizations required to control outbreak**

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HEALTH DEPARTMENT LETTERHEAD

COVID-19 (Coronavirus Disease 2019) ISOLATION ORDER

COVID-19 is a respiratory virus that can cause illness including fever, cough, shortness of breath, chills, muscle pain, sore throat, new loss of taste or smell, or other symptoms listed here: <https://www.cdc.gov/coronavirus/2019-nCoV/symptoms.html>. In some patients COVID-19 causes severe illness and death. It is passed from person to person, including by coughing or sneezing. On January 30, 2020, the World Health Organization declared COVID-19 a Public Health Emergency of International Concern. On January 31, 2020 the U.S. Department of Health and Human Services declared a public health emergency in the United States for COVID-19. On March 10, 2020, Governor Cooper declared a state of emergency in North Carolina due to COVID-19. On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. On March 13, 2020 the President of the United States declared that the COVID-19 pandemic in the United States constitutes a national emergency. The primary mode of transmission of COVID-19 in the community is from person-to-person. Preventing the spread of COVID-19 is critical to protecting the public's health. The further spread of COVID-19 in the community could have severe public health consequences.

You have been diagnosed or are reasonably suspected to be infected with the virus that causes COVID-19. Your infection requires public health restrictions under this order to prevent further spread of infection. You must comply with this order until you meet the requirements for discontinuation of isolation, outlined below, that indicate you are no longer at risk for spreading the virus to others.

I, _____, Health Director of _____ Local Health Department, pursuant to authority vested in me by North Carolina General Statute (G.S.) 130A-145, issue this isolation order to _____ (person's name) (Date of Birth: ____/____/____).

REQUIREMENTS OF THIS ORDER

Restrictions of Movement:

Remain at (address) _____ until the following conditions for discontinuation of isolation are met, as provided in guidance from the Centers for Disease Control and Prevention (available at <https://www.cdc.gov/coronavirus/2019-nCoV/how-to-discontinue-isolation-in-home-patients.html>): At least 3 days (72 hours) have passed since recovery, defined as resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms (e.g., cough, shortness of breath); AND EITHER

1. At least 10 days have passed since symptoms first appeared; OR

2. You have received two negative results of an FDA Emergency Use Authorized COVID-19 molecular assay for detection of SARS-CoV-2 RNA from two consecutive respiratory specimens collected 24 hours apart.

If you plan to move to a new address or leave the county, you are required to obtain approval from the _____ Local Health Department at (____) _____.

Required Actions:

Contact the health department immediately if you develop new or worsening symptoms like fever, cough, or shortness of breath.

If medical evaluation is needed, seek medical care. Before seeking medical care, call ahead and get instructions from the provider before arriving at the medical office, clinic or hospital. If EMS transport is indicated, it should occur with you notification to Emergency Medical Services (EMS) and with all recommended infection control precautions in place. Next notify the _____ Local Health Department at (____) _____.

If a medical emergency arises and you need to call 911, inform the First Responders that you have or are suspected of having COVID-19. Next notify the _____ Local Health Department at (____) _____.

Adhere to all guidance from the Center for Disease Control and Prevention for persons with suspected or confirmed COVID-19 that is provided with this isolation order and found at <https://www.cdc.gov/coronavirus/2019-nCoV/need-to-quarantine.html> and <https://www.cdc.gov/coronavirus/2019-nCoV/you-are-at-risk-when-ask.html>.

Keep a log of visitors to your home using the form provided. Notify any visitors to your home of your isolation status.

Other requirements: _____

4 June 2020

Image source: NC Division of Public Health website (June 2020)

Isolation & quarantine orders (G.S. 130A-145)

Who may order: Local health director or State Health Director

When order is authorized: when and so long as public health is endangered, all other reasonable means for correcting the problem exhausted, and no less restrictive alternative exists

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Other requirements: _____

4 June 2020

Image source: NC Division of Public Health website (June 2020)

Isolation & quarantine orders (G.S. 130A-145) (cont.)

Time limit on orders limiting freedom of movement: Maximum of 30 calendar days (less if 30 days is not scientifically supported). If longer period of time is needed to protect public health, health director must institute action in Superior Court seeking extension.

Person subject to order limiting freedom of movement may seek court review by instituting action in Superior Court:

- Hearing within 72 hours (excluding Saturdays & Sundays)
- Person entitled to appointed counsel if indigent
- Court shall reduce or terminate the limitation unless it determines by preponderance of evidence that limitation is reasonably necessary to prevent or limit spread of disease

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Changes to G.S. 130A-145: Classes & categories (S.L. 2021-180, sec. 19E.6; S.L. 2022-74, sec. 9G.8)



Image source: pixabay.com

State Health Director or a local health director may order isolation or quarantine for a **class or category of persons** for **up to:**

7 days, if order applies statewide (affecting 2/3 or more of counties).

30 days, if order applies less than statewide.

Local health director authority limited to local jurisdiction, so local health director cannot issue statewide order on their own. ***But*** if a combination of orders from State and/or local health directors amounts to statewide coverage, then it's treated as a statewide order.

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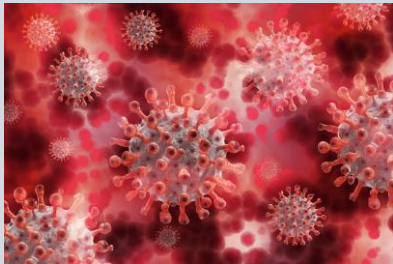
Changes to G.S. 130A-145: Classes & categories (cont.)

After health director's initial order, period of isolation/quarantine for a class or category of persons may be extended for **up to 30 days** at a time.

Method for seeking extension depends on whether order applies statewide.

- **Statewide:** State Health Director must notify Governor, Governor must obtain concurrence of Council of State, and institute an action in Superior Court for approval of the extension.
- **Less than statewide:** State Health Director or local health director may institute an action in Superior Court for approval of the extension.

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Images: pixabay.com

Imminent hazard

Definition: “a situation that is likely to cause an immediate threat to human life, an immediate threat of serious physical injury, an immediate threat of serious adverse health effects, or a serious risk of irreparable damage to the environment if no immediate action is taken.” G.S. 130A-2.

Authority: Certain state and local public health officials may order the abatement of imminent hazards. G.S. 130A-20.

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Image source: pexels.com

Imminent hazard orders and the pandemic

Imminent hazard authority was used in different ways at different times:

- To close restaurants and bars in spring 2020
- To cancel events that exceeded statewide gathering limits
- To order public places to require customers/guests to wear masks indoors

A provision in the 2021 state budget limited or prevented some of these uses of imminent hazard authority beginning in 2023 (see S.L. 2021-180, sec. 19E.6)

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Changes to G.S. 130A-20 (S.L. 2021-180, sec. 19E.6)

Local imminent hazards

- Local health director may order abatement of an imminent hazard on a “specific identified” property.

Statewide imminent hazards (*statewide* means 2/3 or more of counties)

- State Secretary of Health & Human Services may determine that a class or category of properties constitutes a statewide imminent hazard and order owners, operators, or other persons in control of such properties to abate the hazard for a period of up to 7 days.
- Secretary’s order valid for up to 7 days; may be extended for up to 30 days at a time with notice to Governor and concurrence of Council of State.

Secretary of Environmental Quality’s imminent hazard authority

- State Secretary of Environmental Quality may use imminent hazard authority to enforce the provisions of Ch. 130A Art. 9 (Solid Waste Management) and Art. 10 (NC Drinking Water Act) in accordance with the provisions that apply to the HHS Secretary’s authority.

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Imminent hazard and the courts

Summer 2020: statewide emergency orders imposing mass gathering restrictions were in effect

Secretary of HHS issued imminent hazard order to close a speedway that continued to operate in violation of orders

Speedway owner claimed violation of constitutional rights; Court of Appeals said owner had stated “colorable” claims so case could go forward

State appealed to NC Supreme Court, case heard in November 2023, no decision as of April 12 2024

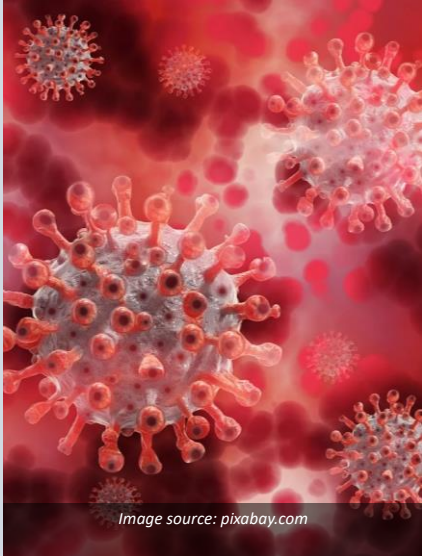
Whether case will ultimately affect state or local public health imminent hazard authority is TBD, no changes yet

Kinsley v. Ace Speedway Racing Ltd., 284 N.C. App. 665 (2022), *disc. rev. allowed*, 883 S.E.2d 455 (2023).



Image source: pixabay.com

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COVID-19 vaccinations

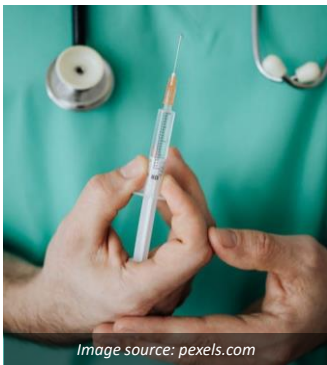
After vaccinations became available, some public and private entities required employees or other persons to show proof of COVID-19 vaccination for various purposes.

A provision in the 2023 NC budget bill prohibited most public and some private entities from imposing COVID-19 vaccination requirements, effective January 1, 2024.

The provision applies only to COVID-19 vaccines; no other vaccines are affected.

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Prohibitions on COVID-19 vaccination requirements (S.L. 2023-134, sec. 5.8 (effective 1/1/24))



Employees (G.S. 143-162.10; 130A-158.3; 153A-465; 160A-499.10)

NC state and local government agencies may not deny or refuse employment to a person, or discharge a person from employment, because of the person's refusal to obtain or provide proof of COVID-19 vaccination.

NC state and local government agencies may not discriminate or take retaliatory action against an employee because the employee threatens or files a claim or complaint, or initiates an inquiry or other proceeding, or testifies or provides information related to this prohibition.

There are exceptions for certain employees of NCDHHS state operated healthcare facilities, entities that receive federal funding that is conditioned on COVID-19 vaccination of employees, and employees, volunteers, trainees, vendors, or students in facilities certified by CMS.

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Prohibitions on COVID-19 vaccination requirements (S.L. 2023-134, sec. 5.8 (effective 1/1/24)) (cont.)

Students (G.S. 130A-152(f))

The following entities may not require students to provide proof of COVID-19 vaccination or to obtain COVID-19 vaccination: the Commission for Public Health, public school units, community colleges, constituent institutions of the University of North Carolina, and any private colleges or universities that receive state funds.

There is an exception if COVID-19 vaccination is required for the student to participate in a program of study or fulfill educational requirements that require working, volunteering, or training in facilities certified by CMS.

Other individuals (G.S. 130A-158.3, 153A-465, 160A-499.10)

State or local public health officials and agencies may not require any person to provide proof of COVID-19 vaccination or to obtain COVID-19 vaccination.

Counties may not require any person to provide proof of COVID-19 vaccination or to obtain COVID-19 vaccination.

Cities may not require any person to provide proof of COVID-19 or to obtain COVID-19 vaccination.



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NC Minor's Consent Law

According to the CDC, in 2022 all 50 states and D.C. allowed minors to consent to certain health services

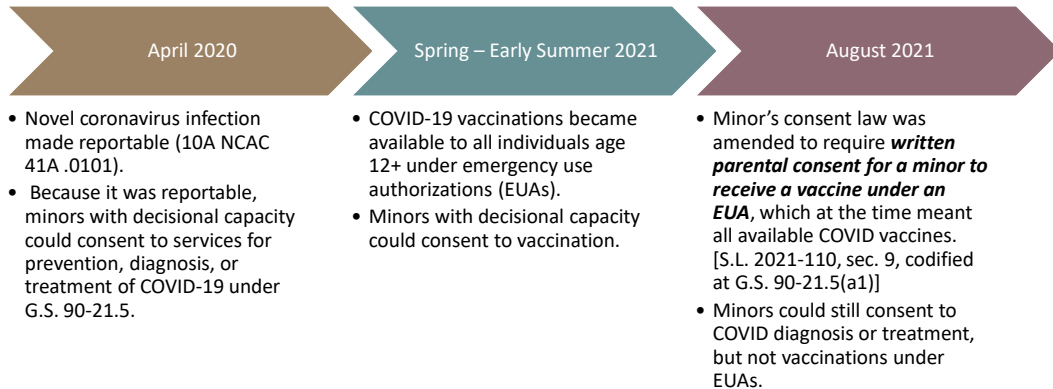
- NC minor's consent law is found at G.S. 90-21.5(a)

G.S. 90-21.5(a) allows an unemancipated minor with decisional capacity to consent, on their own, to receive medical health services for the "prevention, diagnosis and treatment" of:

- Venereal diseases/other reportable diseases
- Pregnancy
- Abuse of controlled substances/alcohol
- Emotional disturbance

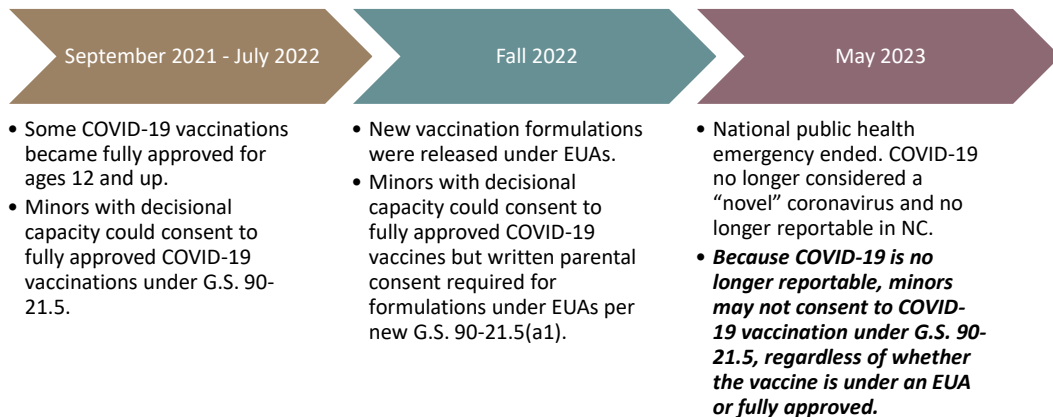
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Timeline: Consent for COVID-19 vaccines for minors under age 18



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Timeline: Consent for COVID-19 vaccines for minors under age 18



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April 2024: Parental consent is required for COVID-19 vaccines for minors under age 18

Minor may not consent to their own COVID-19 vaccination under the minor's consent law, because it is no longer a reportable disease.

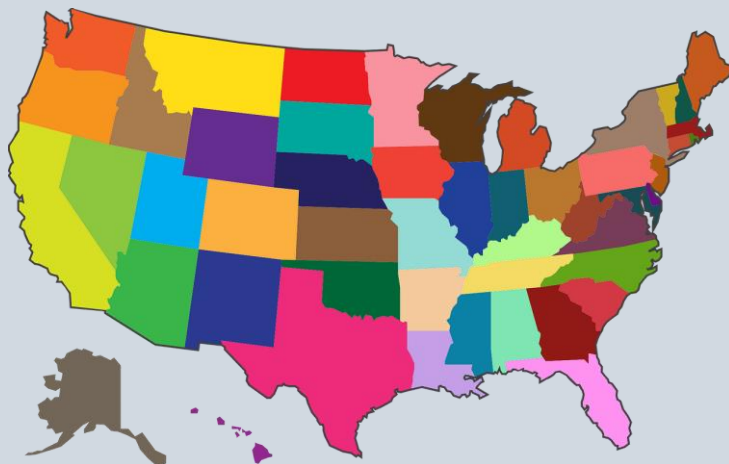
Written or documented consent must be obtained from the minor's parent, guardian, or person standing in loco parentis. G.S. 90-21.10A, 90-21.10B.

- If the specific vaccine to be given is under an EUA, the consent must be written. G.S. 90-21.5(a1).

A minor who is a parent may give written or documented consent to their child's COVID-19 vaccination. G.S. 90-21.5(b); 90-21.10B.



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National trends

Image source: pixabay.com

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Trends in state legislation

An analysis of 185 state laws enacted across the United States from January 1, 2021 to May 20, 2022 identified new legislation in five categories:

10	Prohibitions on face mask requirements
60	Prohibitions or limitations on requirements to provide proof of vaccination or obtain vaccination
61	Limitations on the emergency authority of the Governor or public health officials
7	Transfer of public health authority from local to state, or from agencies to elected officials
37	Limitations on other public health emergency measures (such as business closures)

The Network for Public Health Law, *State Laws Limiting Public Health Protections: Hazardous for Our Health* (October 2022), available at <https://www.networkforphl.org/wp-content/uploads/2022/11/Analysis-of-State-Laws-Limiting-Public-Health-Protections-1.pdf> (accessed 10/12/23).

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COVID-19 in the courts: Findings from a study of 1000+ court cases, March 2020-July 2022*

THE PUBLIC HEALTH MEASURES MOST FREQUENTLY CHALLENGED WERE:	THE MOST COMMON CLAIMS WERE:
<ul style="list-style-type: none"> Social distancing measures Mask requirements Vaccination/proof of vaccination requirements 	<ul style="list-style-type: none"> Violation of due process Violation of equal protection Violation of the First Amendment's free exercise of religion clause Exceeding of scope of authority by public health or emergency officials Improper administrative processes

*Parmet, WE & Khalik F. Judicial Review of Public Health Powers Since the Start of the COVID-19 Pandemic: Trends and Implications. *Am J Pub Health*. 2023;113(3):280-287.

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Implications for public health practice*

Don't assume that courts will give public health the benefit of the doubt when it comes to questions about exercises of legal authority.

Take special care when issuing orders that may affect religious practices or beliefs.

Rulemaking may be a potential way to clarify issues and avoid legal liability, especially as a pandemic or other emergency continues, to allow the public to weigh in.

Recognize both the extent and the limits of public health legal authority: don't be afraid of issuing orders when necessary, but don't forget that persuasion is also a potent power.

*Parmet, WE & Khalik F. Judicial Review of Public Health Powers Since the Start of the COVID-19 Pandemic: Trends and Implications. *Am J Pub Health*. 2023;113(3):280-287.

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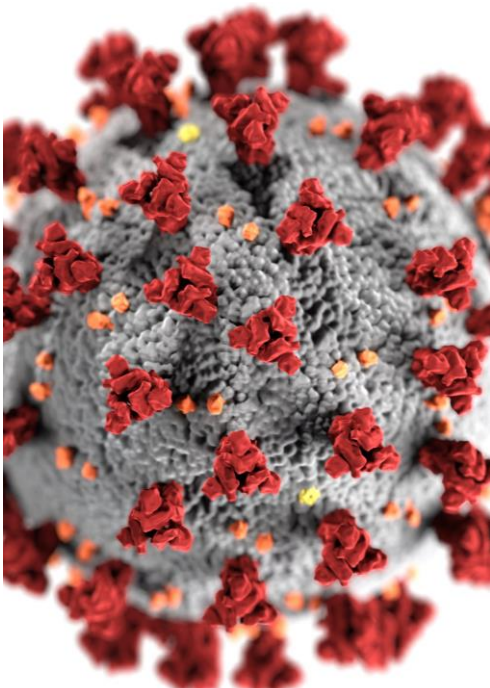


Image source: pexels.com

Public health legal authority after COVID

How will legislation and litigation affect:

Balance of individual vs. community interests generally

Balance when individual has particular rights or interests that are legally protected, such as religious beliefs or the parent-child relationship

Authority of executive branch (administrative agencies) vs. legislative and judicial branches

Which evidence and expertise will be considered relevant to exercise of legal authority

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References

North Carolina Session Laws (available at <https://ncleg.gov/Laws/SessionLaws>)

N.C. Sess. L. 2021-110 (H 96), sec. 9.

N.C. Sess. L. 2021-180 (S 105), sec. 19E.6.

N.C. Sess. L. 2022-74 (H 103), sec. 9G.8.

N.C. Sess. L. 2023-106 (S 49), Part III.

N.C. Sess. L. 2023-134 (H 259), sec. 5.8.

North Carolina General Statutes (available at <https://ncleg.gov/Laws/GeneralStatutes>)

N.C. Gen. Stat. Ch. 90, Art. 1A.

N.C. Gen. Stat. Ch. 130A, Arts. 1, 2, and 6.

N.C. Gen. Stat. Ch. 166A, Art. 1A.

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References

Books and Articles

Jill D. Moore, *North Carolina Communicable Disease Law*. University of North Carolina School of Government; 2017.

Wendy E. Parmet, *Constitutional Contagion: Covid, The Courts, and Public Health*. Cambridge University Press; 2023.

Parmet, WE & Khalik F. Judicial Review of Public Health Powers Since the Start of the COVID-19 Pandemic: Trends and Implications. *Am J Pub Health*. 2023;113(3):280-287.

Kirsten Leloudis, Consent to Care for Minor Patients: An Update on the Legal Landscape After S.L. 2023-106, Part III. *Health Law Bulletin No. 92*. University of North Carolina School of Government; 2024.

Other Resources

Network for Public Health Law, Website: Resources on Public Health Authority, at <https://www.networkforphl.org/resources/topics/public-health-authority/> (accessed 4/12/24).

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