

SESSION OF 2021

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2416

As Amended by House Committee on Judiciary

Brief*

HB 2416 would create and amend law regarding the Kansas Emergency Management Act (KEMA).

***Review and Approval of Executive Orders
(New Section 1)***

The bill would create a new section in KEMA regarding the Governor's issuance of executive orders during a state of disaster emergency declared under KEMA. The bill would require, when the Governor determines it necessary to issue an executive order (EO) to promote and secure the safety and protection of Kansas civilians that is not expressly authorized by KEMA, the Governor make specific application to the Legislative Coordinating Council (LCC) for approval to issue an EO that is in conformity with the *Kansas Constitution* and *Kansas Bill of Rights* and Kansas statutes. The bill would require the application state the reasons the EO is necessary and include the language of the proposed EO.

The bill would require, not less than 24 hours prior to such application to the LCC, the Governor submit the proposed EO to the Attorney General, who would review the proposed EO and provide an opinion on its legality to the Governor and the LCC within 24 hours of receiving the EO and prior to the LCC meeting at which the application for approval of the EO will be submitted, unless circumstances of the disaster prevent such review.

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

Upon application of the Governor under the above provisions, the chairperson of the LCC would be required to call a meeting to take place within 24 hours to discuss the proposed EO. At such meeting, the Governor or Governor's designee would be required to appear and provide information related to the proposed EO. The bill would require an affirmative vote of five LCC members for approval of issuance of the proposed EO by the Governor.

If the LCC does not approve the proposed EO, the bill would allow the LCC, upon an affirmative vote of five members, to:

- Amend the proposed EO and submit it to the Governor to decide whether to issue the amended EO;
- Request the Governor bring a new proposed EO to the LCC for consideration within 24 hours; or
- Deny the EO and take no further action.

The bill would state an EO authorized by the LCC and issued by the Governor under these provisions:

- Would be null and void after the state of disaster emergency has ended;
- Could be revoked at any time by concurrent resolution of the Legislature;
- Could not exercise a statutory power in a way that does not conform with existing statutory requirements; or
- Could not criminalize conduct not otherwise criminal.

The bill would allow any party aggrieved by an EO issued under these provisions to file an action, within 30 days

after the issuance of the EO, in the district court of the county where the party resides or in Shawnee County District Court. Notwithstanding any order issued by the Chief Justice regarding deadlines or time limitations during a state of disaster emergency, the bill would require the court conduct a hearing within 72 hours of receiving a petition in such action. The bill would require the court to grant the request for relief unless the court finds the EO is narrowly tailored to respond to the state of disaster emergency and uses the least restrictive means to do so.

The bill would prohibit the Governor from exercising the powers expressly conferred by KEMA after the initial 30-day state of disaster emergency, unless the Governor is authorized to exercise such powers by the above provisions or by procedures provided elsewhere in the bill.

***Extension of State of Disaster Emergency and
Authorization of Governor's Use of Powers
(New Section 2)***

The bill would create a new section in KEMA allowing the LCC, during a state of disaster emergency when the Legislature is not in session or is adjourned during Session for three or more days, to extend the state of disaster emergency and authorize the Governor to use the powers expressly conferred by KEMA. Upon specific application by the Governor to continue the state of disaster emergency or for authorization to use the powers expressly conferred by KEMA, the chairperson of the LCC would be required to call a meeting to occur within 24 hours of receiving the application. The Governor could not exercise the powers expressly conferred by KEMA without authorization *via* the procedures provided elsewhere in KEMA when the Legislature is in session or by the procedures in this section when the Legislature is not in session or is adjourned during Session for three or more days.

At the LCC meeting, the Governor or Governor's designee would be required to appear and provide information regarding the application to extend the state of disaster emergency or to exercise the powers expressly conferred by KEMA.

By affirmative vote of five members, the LCC could:

- Extend the state of disaster emergency for a specific period of time as determined by the LCC; and
- If the state of disaster emergency is extended, authorize the Governor to continue exercising the powers expressly granted by KEMA during any period of the extension.

When determining whether to extend a state of disaster emergency and whether to authorize the Governor to continue exercising the powers expressly granted by KEMA, the LCC would be required to consider:

- The size, scope, nature, and likely duration of the disaster emergency;
- The risk to life and property posed by the disaster emergency;
- The number of Kansans affected by the disaster emergency;
- The benefits and assistance made available to the state from the federal government by the disaster emergency declaration;
- The economic effects of the disaster emergency declaration;
- The type of governmental response necessary to respond to the disaster emergency;

- The likelihood that the disaster emergency or its effects become worse without direct governmental intervention;
- Whether EOs are necessary to further the governmental response to the disaster emergency;
- Whether other means of governmental responses are more appropriate to respond to the disaster emergency; and
- The type of EOs proposed to be issued by the Governor.

Amendments Regarding the Legislative Coordinating Council (Section 3)

The bill would amend a statute regarding LCC authority to state the LCC shall have authority as to any matter provided by law and to require the LCC to meet as authorized by KEMA to discuss and approve extensions of a state of disaster emergency, authorize the use of powers expressly conferred by KEMA, and review proposed EOs as provided by KEMA.

Amendments to the Kansas Emergency Management Act (Sections 4, 5, and 6)

Responsibilities During State of Disaster Emergency (Section 4)

Current law states the Governor shall be responsible for meeting the dangers to the state and people presented by disasters. The bill would amend this provision to give the Governor and the Legislature this responsibility.

The bill would remove provisions allowing a state of disaster emergency to be declared in situations involving the

spread of a contagious or infectious disease among domestic animals, plants, raw agricultural commodities, animal feed, or processed food.

The bill would extend from 15 to 30 days the length of time a state of disaster emergency may continue unless ratified or extended, as provided by the bill.

The bill would amend this section to reflect the new procedure established by the bill allowing the LCC, instead of the State Finance Council, to extend a state of disaster emergency and would remove related expired provisions.

The bill would require a concurrent resolution ratifying a state of disaster emergency to state the duration of the extension of the state of disaster emergency and whether the Governor is authorized to exercise the powers expressly conferred upon the Governor under KEMA.

The bill would prohibit the Governor from issuing a subsequent proclamation declaring a state of disaster emergency for the same or similar disaster if the Legislature did not ratify and continue the original state of disaster emergency pursuant to this section or the LCC did not extend the original state of disaster emergency under the procedure established by the bill.

The bill would remove a reference in this section to the KEMA section extending the COVID-19 health emergency through March 31, 2021, and prohibiting the Governor from proclaiming any new state of disaster emergency related to the COVID-19 health emergency during 2020 or 2021 without approval of the legislative members of the State Finance Council.

Powers During State of Disaster Emergency (Section 5)

The bill would amend this section to add the term “executive” to those orders issued by the Governor under its

provisions and to reflect the new procedure established by the bill providing for LCC review of such EOs.

The bill would require an EO suspending the provisions of a regulatory statute or orders or rules and regulations implementing the statute specify each statute, order, or rule and regulation being suspended.

The bill would reword a provision allowing the Governor to perform and exercise other nonspecified functions, powers, and duties, subject to certain conditions, to replace the conditions with a requirement for authorization pursuant to the procedure established by Section 1 of the bill.

After the initial 30-day state of disaster emergency, if the state of disaster emergency is extended and the Governor determines it is necessary to exercise the powers expressly conferred in this section through the issuance of an EO, the bill would require the Governor to make specific application to the Speaker of the House of Representatives and the President of the Senate when the Legislature is in session, and to the LCC pursuant to the procedure established in Section 2 of the bill when the Legislature is not in session or is adjourned during Session for three or more days. When the Legislature is in session, authorization of the use of such powers by the Governor would be through concurrent resolution of the Legislature. When the Legislature is not in session, authorization would be as provided in Section 2 of the bill.

The bill would require the Governor, prior to issuing an EO pursuant to this section, to submit the proposed EO to the Attorney General, who would review the proposed EO for legality and provide an opinion on such to the Governor and the LCC within 24 hours of receipt of the proposed EO, unless the circumstances of the disaster prevent such review.

The bill would amend provisions regarding the powers of a board of county commissioners to issue an order relating to public health that includes provisions less stringent than a

statewide EO to specify that such orders may relate to the public health of humans that is not related to the food supply, and to state that such orders would operate in the county in lieu of the Governor's EO.

The bill would allow any party aggrieved by an EO issued under this section to file an action, within 30 days after the issuance of the EO, in the district court of the county where the party resides or in Shawnee County District Court. Notwithstanding any order issued by the Chief Justice regarding deadlines or time limitations during a state of disaster emergency, the bill would require the court conduct a hearing within 72 hours of receiving a petition in such action. The court would be required to grant the request for relief unless the court finds the EO is necessary to achieve an important interest related to the state of disaster emergency and is substantially related to such interest. If an EO has the effect of substantially burdening or inhibiting the gathering or movement of individuals or the operation of any religious, civic, business, or commercial activity, whether for-profit or not-for-profit, the bill would require the court grant the request for relief unless the court finds the EO is narrowly tailored to respond to the state of disaster emergency and uses the least restrictive means to do so.

School Closure (Section 6)

The bill would amend the section of KEMA prohibiting closure of schools by EO, unless affirmed by the State Board of Education, to remove a reference to private schools and specify that such EOs would only affect the operations of schools under the jurisdiction of the State Board of Education.

Conforming and Technical Amendments

The bill would make conforming and technical amendments throughout these KEMA sections to ensure consistency in statutory references and phrasing.

Kansas Intrastate Emergency Mutual Aid Act (Section 7)

The bill would amend the definition of “emergency responder” in the Kansas Intrastate Emergency Mutual Aid Act to include 911 dispatch center personnel.

Severability Clause (Section 9)

The bill would state the provisions of this act are severable, and that if any portion of the act or application to any person or circumstance is held unconstitutional or invalid, the invalidity would not affect other portions of the act that can be given effect without the invalid portion or application, and the applicability of such other portions of the act to any person or circumstance would remain valid and enforceable.

Amendment and Repeal of Additional Statutes (Sections 8 and 10)

The bill would amend a statute regarding the State Finance Council to remove a reference to the KEMA statute regarding responsibilities during a state of disaster emergency to reflect the other amendments made by the bill.

The bill would repeal a version of the KEMA statute regarding the powers of the Governor during a state of disaster emergency that would go into effect on March 31, 2021.

Effective Date (Section 11)

The bill would be in effect upon publication in the *Kansas Register*.

Background

The bill was introduced by the House Committee on Federal and State Affairs at the request of Representative Barker.

House Committee on Judiciary

In the House Committee hearings on February 24 and 25, 2021, a representative of the Kansas Chamber testified as a **proponent** of the bill. The Attorney General provided written-only proponent testimony.

A representative of the Governor's Office and a representative of the Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriffs Association provided neutral testimony. A representative of the Heartland Institute and a representative of the Kansas Justice Institute and Kansas Policy Institute provided written-only neutral testimony.

No other testimony was provided.

On March 1, 2021, the House Committee amended the bill to:

- Add 911 dispatch personnel to the definition of "emergency responder" in the Kansas Intrastate Emergency Mutual Aid Act;
- Extend the initial period of a state of disaster emergency from 15 to 30 days; and
- Make technical and conforming amendments.

Fiscal Information

No fiscal note was available when the House Committee took action on the bill.

Kansas Emergency Management Act; state of disaster emergency; Legislative Coordinating Council; executive orders; Attorney General