

Governor's Executive Order Authority in South Dakota



ISSUE
MEMORANDUM
2021-xx

Introduction

Executive Orders – General Background

At the state level, an executive order is a directive issued by a governor, in his or her capacity as the chief executive. The authority to issue executive orders having the force and effect of law can be found in state constitutions and statutes.

Executive orders are most commonly used to:

- Trigger emergency powers during natural disasters, energy crises, and other situations requiring immediate attention;
- Call legislatures into special session;
- Create advisory, coordinating, study, or investigative committees or commissions; and
- Address management and administrative issues such as regulatory reform, environmental impact, hiring freezes, discrimination, and intergovernmental coordination.

Executive orders do not require any action by a state legislature in order to take effect. They are subject to the provisions of the United States Constitution, the applicable state constitution, and any applicable federal and state laws. As with presidential executive orders, they are also subject to judicial review and may be invalidated. Executive orders with the force and effect of law remain in effect until they have been revoked, been suspended, been canceled, been judicially declared unlawful, or expire.

This issue memorandum will examine the nature and scope of the executive order, as utilized in South Dakota. It will also address the constitutional and statutory authority for such orders, together with any attendant restrictions or limitations.

South Dakota Constitution—Powers of the Governor

Article II of the Constitution of South Dakota provides that the “powers of the government of the state are divided into three distinct departments, the legislative, executive and judicial; and the powers and duties of each are prescribed by this Constitution.” In the case of the “executive department,” Article IV § 1 of the Constitution vests the executive power of the state in the Governor. Thereafter, the Article delineates or describes both the powers and the duties of the Governor. Those include:

- Being responsible for the faithful execution of the law;
- Enforcing compliance with constitutional or legislative mandates;
- Restraining a violation of any constitutional or legislative power, duty, or right, by any officer, department, or agency of the state, or any of its civil divisions;
- Being commander-in-chief of the armed forces of the state;
- Calling out the armed forces of the state to execute the laws, to preserve order, to suppress insurrection, or to repel invasion;
- Commissioning all officers of the state;
- Giving the Legislature information concerning the affairs of the state and recommending measures considered to be necessary;

- Convening the Legislature or either house thereof alone in special session by a proclamation stating the purposes of the session;
- Filling a vacancy in office, unless there are other Constitutional or statutory provisions;
- Granting pardons, commutations, and reprieves;
- Suspending and remitting fines and forfeitures;
- Signing or vetoing bills; and
- Making such changes in the organization of offices, boards, commissions, agencies, and instrumentalities, and in the allocation of their functions, powers, and duties, as necessary for efficient administration.

The Constitution is silent as to the method by which such powers are to be exercised or such duties undertaken, with one notable exception. The last stated power contains a specific reference to an executive order. Article IV, § 8 provides the Governor with the power to make organizational changes, but then limits that power by reasserting the legislative role. Specifically, the Constitution states:

If such changes [in the organization of offices, boards, commissions, agencies, and instrumentalities] affect existing law, they shall be set forth *in executive orders*, which shall be submitted to the Legislature within five legislative days after it convenes, and shall become effective, and shall have the force of law, within ninety days after submission, unless disapproved by a resolution concurred in by a majority of all the members of either house.

Article IV, § 8 was not part of South Dakota's original constitution. It was proposed as part of a substantial rewrite of the entire executive article -- Article IV -- by SL 1972, ch. 1 and then submitted to and approved by the voters at the general election on November 7, 1972.

South Dakota Codified Laws—Executive Orders By The Governor

In addition to the gubernatorial powers and duties set forth in the Constitution, SDCL 1-7-1 provides that the Governor:

- (1) Shall supervise the official conduct of all executive and ministerial officers;
- (2) Shall see that the laws of the state are faithfully and impartially executed;
- (3) Shall make appointments and fill vacancies in the public offices as required by law;
- (4) Is the sole official organ of communication between the government of this state and the government of any other state of the United States;
- (5) Shall issue patents for land as required by law and prescribed by the provisions of this code;
- (6) May offer rewards, not exceeding one thousand dollars each, payable out of the general fund, for the apprehension of any convict who has escaped from the penitentiary or for any person who has committed or is charged with the commission of an offense punishable with imprisonment for life;
- (7) Is authorized to appoint a private secretary and to employ such clerks and stenographers as he shall deem necessary for the proper discharge of his official duties, each of whom shall serve during the pleasure of the Governor and receive such compensation as shall be provided by the Legislature; and
- (8) Shall have such other powers and must perform such other duties as are or may be devolved upon him by law.

While the section cited above includes no verbiage regarding how such duties or powers are or may be exercised, there are other statutory sections that do specifically reference executive orders. Some of those references include adjectives such as "appropriate," and adjectival phrases such as "adopted pursuant to the constitution,"



having "the force of law," and having a "continuing and statewide effect." Some direct the Governor to perform certain functions by executive order and others direct various entities to respond when such orders are issued.

SDCL §	SUMMARY OF STATUTES REFERENCING EXECUTIVE ORDERS
1-1-1.1	The Governor may, by <i>appropriate executive order</i> , accept retrocession of jurisdiction over certain lands, if offered by a federal authority.
1-1A-1	Any statute, rule, regulation, <i>executive order</i> , and office policy that is judicially determined to be contrary to the United States Constitution, is void.
1-1A-2	Any statute, rule, regulation, <i>executive order</i> , and office policy that is void under §1-1A-1, may not be enforced.
1-7-8	The Governor shall establish, by <i>executive order</i> , a procedure for the allocation of authority to issue bonds pursuant to certain federal law.
1-7-17	The Governor shall establish, by <i>executive order</i> , a procedure for the allocation or reallocation of volume or other bond issuance authority in satisfaction of requirements under certain federal law.
1-11-7	The Governor may, by <i>executive order</i> , direct the attorney general to investigate any office, department, bureau, board, commission, institution, or any other component part of the state government.
1-14-12	Authorizes the Bureau of Administration to carry out various functions required by statute, <i>executive order</i> , or administrative action.
1-15-1.4	References agencies and programs created by statute, <i>executive order</i> , and administrative action and placed under the Department of Corrections.
1-16B-49	Recognizes rights, powers, authority, privileges, functions, and other properties of the South Dakota Economic Development Finance Authority, whether derived under statute, by <i>executive order</i> , or otherwise.
1-26-1	Provides that the term "rule," for purposes of the chapter does not include <i>executive orders</i> issued by the Governor.
1-26A-1	Authorizes the Legislative Research Council to publish the Administrative Rules of South Dakota, and provides that the publication may also contain information concerning <i>executive orders</i> .
1-32-1	Provides that for purposes of chapters 1-32 through 1-47, the term "office" means the principal functional subunit within a division and is comprised of those agencies allocated to the office by law, <i>executive orders with the force of law</i> , or administrative action.
1-32-15	Authorizes the Governor, by <i>executive order</i> , to make changes to chapters 1-32 through 1-47, if there are conflicts with federal requirements that are a prescribed condition to receiving federal aid. Such changes will remain in effect until the last legislative day of the next legislative session or until the Legislature completes legislation addressed to the same question, whichever comes first.



1-36-5.1	Provides that the Department of Social Services consists of agencies and programs created by law, <i>executive order</i> , and administrative action, and placed within the department.
1-39-4	Provides that the Department of Game, Fish and Parks consists of the agencies named in the chapter and such other agencies created by law, <i>executive order</i> , or administrative action, and placed within the department.
1-44-3	Provides that the Department of Transportation consists of any agency that may be created by law, <i>executive order</i> , or administrative action and placed under the department.
1-45-4	Provides that the Department of Education consists of the various divisions and agencies created by law, <i>executive order</i> , or administrative action, and placed within the department.
2-13-2	Provides that the Legislative Research Council shall publish the session laws, the rules of court, and <i>executive orders adopted pursuant to the constitution</i> .
2-16-6	Provides that the Code Commission shall determine the contents of the code supplements and reprinted volumes, which shall include <i>executive orders enacted pursuant to S.D. Const., Art. IV, §8 and other executive orders with a continuing and statewide effect</i> .
5-18A-17.6	Provides that the term "state agency," does not include any authority created by the Legislature or <i>executive order</i> .
10-43-94	References the tax-exempt status of quasi-governmental organizations created by <i>executive order</i> .
10-45-13.5	References the tax exemption for certain gross receipts received by the state and political subdivisions including multi-county planning and development <i>districts, established pursuant to Executive Order 70-7, or its successor</i> .
10-46-70	References the tax exemption for certain gross receipts received by the state and political subdivisions including multi-county planning and development <i>districts, established pursuant to Executive Order 70-7, or its successor</i> .
11-11-45	References private activity bond limits allocated pursuant to an <i>executive order</i> of the Governor.
15-6-24(b)	References <i>executive orders</i> as the basis for intervention in a legal action.
18-6-2	Provides that for purposes of the chapter, the term "law" includes the federal or a state constitution, a federal or state statute, a judicial decision or order, a rule of court, an <i>executive order</i> , and an administrative rule, regulation, or order.
24-4-7	Provides that inmate labor may be used on any work by <i>executive order</i> pursuant to § 34-48A-5, at any place within the state.
24-14-1	Authorizes the Governor to delegate to the Board of Pardons and Paroles, by <i>executive order</i> , the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make recommendations.



24-14-5	Authorizes the Governor to delegate to the Board of Pardons and Paroles, by <i>executive order</i> , the authority to consider applications for clemency and make recommendations.
31-12-2	Provides that except for minimum maintenance roads established pursuant to § 31-12-46, no county highway system may be changed, altered, or modified except by authority of and in accordance with a written <i>executive order</i> of the Department of Transportation.
31-19-64	Provides that the Department of Transportation or the governing body of a political subdivision holding public highway right-of-way may convey the right-of-way by <i>executive order</i> or resolution.
34-48A-10	Provides that the Governor may, <i>by executive order</i> , issue special permits for the movement of persons, commodities, and equipment in the event of a disaster or impending disaster
34-48A-53	Provides that in accordance with the Uniform Emergency Management Compact, individuals who are licensed, certified, or permitted in one state may be deemed so qualified by a state requesting assistance to meet a declared emergency or disaster, subject to limitations and conditions as the Governor of the requesting state may prescribe by <i>executive order</i> or otherwise.
34-48A-54	Provides that in accordance with the State and Province Emergency Management Assistance of Understanding , individuals who are licensed, certified, or permitted in one jurisdiction may be deemed so qualified by the jurisdiction requesting assistance to render aid, subject to limitations and conditions as the requesting jurisdiction prescribes by <i>executive order</i> or otherwise.
36-18A-76	Limits the liability of architects and engineers for professional services rendered voluntarily or without compensation, at the request or approval of a national, state, or local public official in response to a declared national, state, or local emergency, provided the services are rendered within ninety days following the end of the declared emergency, unless extended by <i>executive order</i> of the Governor.
54-4-40	Provides that the state, any political subdivision of the state, and any quasi-governmental organization created by state law or an <i>executive order</i> of the state is exempt from the requirements of the chapter.

None of the 36 sections referenced above appears to establish statutory parameters governing the nature, scope, or duration of an executive order. Even the reference in SDCL 1-26-1 provides only that an executive order is not a "rule" for purposes of the Administrative Procedures Act.

Administrative Rules of South Dakota — Executive Orders By The Governor

The Administrative Rules of South Dakota contain only one reference to gubernatorial executive orders. [ARSD 24:52:12:01](#) includes executive orders in a list of publications that are considered to contain information of enduring value for research purposes and therefore requires that the orders also be produced on permanent paper.



Issuance of Executive Orders – Historical Perspective

Although statutory references to executive orders date back to at least the early 1930's, this memorandum will focus on the 47-year span beginning in 1973, *i.e.*, the year following the approval of the modern executive article, Article IV of the Constitution of South Dakota. From 1973 to 2020, the South Dakota Legislature enacted more than 15,000 bills and South Dakota Governors issued almost 800 executive orders. Some governors issued as few as three orders per year while others issued as many as 42, with the average annual number being approximately 17. The highest number of executive orders resulting from the constitutional requirement associated with executive agency reorganization came in 1980, during the Janklow administration. That number was 15.

The above-referenced 42 executive orders were issued by Governor M. Michael Rounds in 2010. None of Governor Rounds' executive orders from that year pertained to executive agency reorganization. Many of them, however, addressed flooding and other weather-related emergencies.

During her first year in office, Governor Kristi Noem issued 29 executive orders. As set forth below, one pertained to an executive reorganization, 18 were responses to weather-related events, three closed state offices in observance of certain traditional holidays, and the remaining 7 were a miscellany that ranged from appointing a state artist laureate to forming a hazard mitigation team.

2019-01	Executive Reorganization (transferred Office of Indian Education from the Department of Education to the Department of Tribal Relations and transferred various programs from the Department of Agriculture to the Office of Economic Development)
2019-02	Declaring a state of emergency and exempting the transportation and delivery of petroleum products from the federal motor carrier regulations from 2-25-19 through 3-22-19
2019-03	Declaring the offices of state government be closed on Good Friday and Easter Monday
2019-04	Declaring a weather-related state of emergency
2019-05	Declaring that the Big Sioux River, Skunk Creek, Split Rock Creek, and various tributaries are closed to all recreational use, including boating, kayaking, and swimming
2019-06	Declaring a state of emergency and exempting the transportation and delivery of emergency relief supplies from federal motor carrier safety regulations until the conclusion of the emergency, but no later than 4-30-19
2019-07	Declaring a no-wake zone applicable to various lakes
2019-08	Declaring that over-width application vehicles and planters are allowed on state trunk highways during nighttime hours from 5-1-19 through 6-15-19
2019-09	Declaring a state of emergency in multiple counties due to severe winter weather and flooding
2019-10	Declaring that all applications for executive clemency shall be addressed to and initially reviewed by the Board of Pardons and Paroles
2019-11	Declaring that any approved location where work is assigned to be performed by an employee of the state must be a drug free workplace
2019-12	Declaring that the South Dakota Advisory Council on Aging is reestablished and authorized to function
2019-13	Declaring a state of emergency due to a severe spring storm
2019-14	Declaring the offices of state government closed on (Friday) 7-5-19
2019-15	Declaring a state of emergency and exempting the transportation and delivery of aggregate, rock, sand, gravel, cement, asphalt binder, and construction equipment



	emergency relief supplies from federal motor carrier safety regulations until the conclusion of the emergency, but no later than 10-31-19
2019-16	Declaring that no state employee may carry a concealed pistol on the premises of the Veterans' Home, within the secured areas of all DOC facilities, on the premises of the HSC, or on the premises of the Developmental Center.
2019-17	Directing that Executive Order 2019-15 be rescinded on 7-2-19
2019-18	Realigning and directing the reaffirmation of planning district boundaries
2019-19	Declaring a state of emergency due to summer storms
2019-20	Declaring a state of emergency applicable to multiple counties due to severe storms, tornadoes, and flooding
2019-21	Declaring a state of emergency applicable to multiple counties due to severe storms, winter weather, and flooding
2019-22	Declaring a state of emergency applicable to multiple counties due to severe storms, tornadoes, and flooding
2019-23	Declaring that the Big Sioux River, Skunk Creek, Split Rock Creek, and various tributaries are closed to all recreational use, including boating, kayaking, and swimming
2019-24	Declaring the offices of state government be closed on the Friday after Thanksgiving and on (Monday and Tuesday) December 23-24, 2019
2019-25	Declaring a state of emergency applicable to multiple counties due to severe storms, tornadoes, and flooding
2019-26	Exempting the transportation and delivery of propane from the federal motor carrier safety regulations until the conclusion of the emergency but no later than 11-1-2019
2019-27	Appointing Dale Claude Lamphere as the state Artist Laureate until 7-1-2023
2019-28	Declaring a state of emergency applicable to Clay and Coddington Counties due to severe storms and flooding
2019-29	Forming a South Dakota Hazard Mitigation Team

During 2020, Governor Noem issued 34 executive orders. Those orders were used to:

- Preclude state agencies from contracting with entities that engaged in a boycott of Israel;
- Close state offices on Good Friday and Easter Monday;
- Establish the Commission on Child Support to review support obligation laws;
- Declare an emergency in Day County stemming from basin flooding and runoff conditions; and
- Establish the South Dakota Complete Census Committee.

The remaining 29 executive orders were used to address measures or matters related to COVID-19. They cited the authority vested in the Governor by the Constitution and laws of the state, and 24 of the orders specifically cited the authority provided by SDCL chapter 34-48A. That chapter pertains to emergency management and, in SDCL 34-48A-5, provides that the Governor, in the event of a disaster, war, act of terrorism, or emergency beyond local government capability:

- (1) May assume direct operational control over all or any part of the emergency management functions within the state which may affect all or any portion of the state;
- (2) May declare an emergency or disaster to exist in the stricken area and employ emergency management to assist local authorities to affect relief and restoration;
- (3) May call upon and use any facilities, equipment, other nonmedical supplies, and resources available from any source, other than personal or private funds, in order to carry out the purposes of this chapter by contributing to the expense incurred in providing relief in such amounts as the Governor



- shall determine. However, nothing in this subdivision may be construed to authorize the taking of firearms, as defined in subdivision 22-1-2(16), without the consent of the owner;
- (4) May suspend the provisions of any rules of any state agency, if strict compliance with the provisions of the rule would in any way prevent, hinder, or delay necessary action in managing a disaster, war, act of terrorism, or emergency, including fire, flood, earthquake, severe high and low temperatures, tornado storm, wave action, oil spill, or other water or air contamination, epidemic, blight, drought, infestation, explosion, riot, or hostile military or paramilitary action, which is determined by the Governor to require state or state and federal assistance or actions to supplement the recovery efforts of local governments in alleviating the damage, loss, hardship, or suffering caused thereby;
 - (5) May control the ingress and egress in a designated disaster or emergency area, the movement of vehicles upon highways within the area, the movement of persons within the area, and the occupancy of premises within the area;
 - (6) May procure, acquire, store, distribute, and dispense any pharmaceutical agents or medical supplies located within the state as may be reasonable and necessary to respond to the disaster, emergency, or act of terrorism;
 - (7) May appoint and prescribe the duties of such out-of-state health care providers as may be reasonable and necessary to respond to the disaster, emergency, or act of terrorism;
 - (8) May provide for the examination and safe disposal of any dead body as may be reasonable and necessary to respond to the disaster, emergency, or act of terrorism; and
 - (9) May provide for the protection, construction or reconstruction, repair, and maintenance of public or private transportation facilities.

SDCL 34-48A-5 does not address the manner or mode by which the Governor may exercise the granted powers. However, SDCL 34-48A-9 states that the Governor is "authorized and empowered to make, amend, and rescind the necessary orders to carry out the provisions of the chapter within the limits of the authority conferred upon him . . ." That legislative authorization existed since the enactment of 1949 HB 70, SL ch. 236, the "Civil Defense Act of 1949."

SDCL 34-48A-5 also states that the "the powers granted to the Governor . . . remain in effect for a period of six months and may be restored for one or more successive six-month periods by declaration by the Governor that the conditions permitting such powers persist." By implication, any orders issued under the emergency powers provisions would expire together with the Governor's authority -- i.e., at the conclusion of a six month period, if no "restoration" has been declared.

Conclusion

The Constitution of South Dakota vests executive powers in the Governor and delineates a number of powers and duties that are exclusively within the Governor's purview. With the exception of gubernatorially directed governmental reorganization efforts, the Constitution does not mention *executive orders* per se. While there are statutes providing that the executive order format is the manner or method by which certain legislatively-instituted requirements are to be effectuated, those statutes are likewise silent as to any durational or contextual parameters applicable to such orders.

Although legislative oversight of executive orders may be informally presumed and practically exercised during an ensuing legislative session, there is no statutory requirement or process for legislative oversight between the issuance of an order and the convening of the next legislative session. Whether or not such a requirement or process should be instituted, to accommodate executive orders that might be necessitated by existing or yet unknown circumstances, could be a matter for legislative consideration.



Draft

This issue memorandum was written by L. Anita Thomas, Principal Legislative Attorney, on August 31, 2021 for the Legislative Research Council. It is designed to provide background information on the subject and is not a policy statement made by the Legislative Research Council.

