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**MEMORANDUM**

**TO:** Legislative Emergency Epidemic Response Committee

**FROM:** Office of Legislative Legal Services

**DATE:** July 16, 2009

**SUBJECT:** Options for the emergency succession of legislators

Issue Addressed

Recently, the Legislative Emergency Epidemic Response Committee (LEERC or the "committee") requested research regarding options for the emergency succession of current legislators in the event of one or more vacancies arising out of a disaster. The intent of this memorandum is to give a brief overview of other states' laws addressing emergency succession in an attempt to provide LEERC members with several options so that the committee may recommend a plan to fill legislative vacancies arising out of a disaster. Please note: This memorandum does not provide information on every state that has an emergency succession plan, as many states have similar plans. Rather, this memorandum focuses on a handful of states that were chosen as examples of their respective types of plans.

Introduction

Though Colorado has a statutory process for filling routine legislative vacancies caused by circumstances such as the death or retirement of a member of the General Assembly, the state does not currently have a process in place for filling legislative vacancies arising out of a declared disaster emergency. Questions have been raised about whether the current process for filling vacancies, which is mostly driven by the state political parties, may be too cumbersome and time-consuming to be effective in the case of a disaster emergency. As such, it may be beneficial to create a separate process that allows for the appointment of temporary emergency successors in the event of the absence or death of a legislator during a declared disaster emergency. Such a process would allow the General Assembly to convene a quorum and conduct its business during such an emergency. The sections below provide a selection of legislation adopted in other states regarding legislative

temporary emergency succession. While most of the states' laws listed below contain contingencies for emergency succession in the event of an enemy attack, the succession provisions will suffice to provide guidance in cases of emergency epidemics as well.

#### Examples of Temporary Emergency Succession Acts in other States

Approximately fifteen states have enacted some type of temporary emergency succession act. As the examples below illustrate, the form of the different succession plans varies from a constitutional provision and a single statutory section to rather comprehensive acts that encompass entire emergency plans, which include provisions for legislative succession and changing the location of the legislature.

Among the states that have codified a succession plan, designation of temporary emergency successors by the legislator seems to be the most common procedure. Typically, pursuant to this type of succession plan, every state legislator is required to compile a list and designate the rank of a certain number of temporary emergency successors. This list is then filed with that state's secretary of state, who in turn gives notice of the filing to the governor and the designated officers of the state's legislative bodies.

A minority of states have chosen different designation methods. In California, if one-fifth of either house is unavailable, the remaining members choose emergency interim successors. In Kansas, political party committees of either the county or the senatorial district choose the successor to any unavailable legislator *after the legislator becomes unavailable*. Finally, New Mexico's plan calls for county commissioners to designate emergency interim successors for each legislator from that county.

#### *Alabama*

The act encompassing Alabama's statutory emergency succession plan is a comprehensive one; the act covers everything from legislative declarations and definitions to procedures that are to be followed once an emergency has been declared, including quorum and vote requirements.

Relevant to the committee's purposes, the Alabama act contains sections that specifically dictate how legislators' successors are designated; the status, qualifications, and terms of successors; and when the terms of successors become effective.

*Designation:* Each legislator is required to designate at least three emergency interim successors and specify their order of succession. It is the legislator's duty to review and revise the list of designations from time to time to ensure there are at least three qualified successors at any given time. The lists are filed with the secretary of state who in turn notifies the governor, the state's emergency management agency, the secretary of the senate, and the clerk of the house of representatives. *Ala. Code 1975 § 29-3-4, 29-3-6*

*Status, qualifications, and terms:* An emergency interim successor may assume the powers and duties, but not the office, of a legislator, although the successor must be *qualified* to hold the office of a legislator. The interim successor serves at the pleasure of the designating legislator in the event of the legislator's absence or at the pleasure of any subsequent incumbent of the legislative office in the event of a vacancy. *Ala. Code 1975 § 29-3-5*

*Assumption of powers and duties by successor:* If, in the event of an attack (as defined in an earlier section in the act), a legislator is unavailable, the highest available emergency interim successor on the list of designees exercises the powers and assumes the duties of the legislator (except for the power and duty to appoint emergency interim successors). The successor continues to exercise the powers and duties of the legislator until the incumbent legislator, an emergency successor higher in order of succession, or a legally qualified legislator appointed or elected to the vacant office can act. *Ala. Code 1975 § 29-3-11*

### **California**

California law relating to the emergency succession of legislators is located in both the California Constitution and state statutes; the constitutional provision is the enabling authority that allows the legislature to mandate how legislative vacancies will be filled in the event of a "war-caused or enemy-caused disaster in California". Pursuant to the state's constitution, at least one-fifth of the membership of either house must be killed, missing, or disabled in order to trigger the emergency succession process. The statute then specifies the process for filling such legislative vacancies as follows.

*Appointment by majority vote:* Whenever a war or enemy-caused disaster creates vacancies to the extent that one-fifth of the members of either house are unable to serve, the remaining members of the house

in which the vacancies exist, regardless of whether such members constitute a quorum, appoint by majority vote a qualified person as a *pro tempore* member to fill each vacancy. *CA GOVT § 9004*

*Qualifications of pro tempore members:* To the extent possible, the person appointed as a *pro tempore* member must be, as of the date of the disaster, a resident of the same district and a registered elector of the same political party as the last duly-elected member from such district. *CA GOVT § 9004*

*Terms of pro tempore members:* In cases where the original elected member is temporarily disabled or unable to serve, the elected member shall resume office when able, and the *pro tempore* member's duties and powers cease at that point. In all other cases, each *pro tempore* member shall serve until the next election of a member to such office as provided by law. *CA GOVT § 9004*

### ***Kansas***

Kansas' succession plan is included here because of its unique party-driven process. Unlike the other plans listed, emergency interim successors in Kansas are not chosen by legislators or by county commissioners, but rather by political parties. If the LEERC members wish to keep the political parties involved as they are in the vacancy process, Kansas' plan may be a good option.

*Designation:* If, in the event of an attack, a legislator is unavailable, an emergency interim successor is designated by either the *county committee* of the political party of which such legislator is a member (in cases where the legislator is from a representative or senatorial district that comprises only one county) or the *senatorial district committee* of the political party of which the legislator is a member (in cases where the senatorial district comprises more than one county). *KS ST § 48-1304*

*Assumption of duties by emergency interim successor:* If a legislator is unavailable in the event of an attack, the emergency interim successor assumes all powers and duties until the incumbent legislator or a legislator duly appointed or elected to the vacant office can act. *KS ST § 48-1310*

### ***New Mexico***

Not unlike Alabama, New Mexico's legislature has enacted a more comprehensive "Legislative Disaster Succession Act" consisting of eight comprehensive statutory sections ranging from legislative declarations to quorum and voting requirements. The sections of the act concerning legislative succession are summarized below.

*Designation:* The county commissioners of each county designate and rank five disaster successors for each legislator elected or appointed from that county. The commissioners have the power to change the designations, or the designees' order of succession, at will. The commissioners file the list of the designees with the secretary of state. *NM ST § 12-11-14, 12-11-15*

*When disaster successors may act:* Four conditions must be met before a disaster successor may act as a member of the legislature: 1) A disaster emergency must have been declared by either the President of the United States or the Governor of New Mexico; 2) the original legislator must be and remain unavailable; 3) all disaster successors with higher seniority on the designation list must be and remain unavailable; and 4) a successor to the office must not have been selected and qualified as provided by law other than the "Legislative Disaster Succession Act". *NM ST § 12-11-18*

*Term of the disaster successor:* The term of a disaster successor lasts as long as a state of martial law is declared to exist or until a duly elected or appointed legislature declares by joint resolution that the disaster emergency period has ended. The term also ceases upon the availability of the original legislator or a higher ranked successor. *NM ST § 12-11-18*

### ***South Carolina***

South Carolina has also enacted a broad "Emergency Interim Legislative Succession Act" that includes contingencies for changing the location of a session as well as procedures for designating emergency interim successors. Though South Carolina's process for designating emergency interim successors is similar to the process employed by Alabama (where the legislator is responsible for compiling a ranked list of potential emergency successors), it is included here because South Carolina's act also contains a clause described below that provides for the designation of emergency interim successors should the legislator fail to designate the adequate number

of successors.

*Designation:* Each member of the General Assembly is responsible for designating no fewer than three nor more than seven emergency interim successors. Legislators must review and revise the list of successors as necessary to ensure that there are at least three successors at all times. *SC ST § 2-5-30*

*Designation of successors when legislator fails to designate a sufficient number:* Prior to an attack, if a legislator fails to designate the required minimum number of emergency interim successors or, if for any reason, the number of successors falls below the minimum and remains below the minimum for a period of thirty days, the presiding officer of the same house as the legislator must promptly designate as many successors as are required to achieve the minimum number. No successor designated by the presiding officer may achieve a rank higher on the list than a successor designated by the legislator. Any successor designated by the presiding officer serves at the pleasure of the presiding officer, but the legislator for whom the successor is designated may change the rank of or replace the successor at the legislator's pleasure. *SC ST § 2-5-50*

*When successors may act:* If, in the event of an attack, a legislator is unavailable, the next available emergency interim successor highest in order of succession assumes the powers and duties of the legislator (except for the power and duty to appoint an emergency interim successor). The successor carries out the powers and duties of the legislator until the incumbent legislator, a successor higher in order of succession, or a duly-appointed or elected and legally qualified legislator can act. *SC ST § 2-5-110*

### Current Law and Options

#### *Current state of Colorado vacancy law*

As mentioned above, neither the Colorado Constitution nor the Colorado Revised Statutes contain provisions that specify how legislative vacancies could be filled in the event of a declared disaster emergency. In the absence of any such guidance, should a disaster emergency occur, legislative vacancies could only be filled according to current vacancy law, which is contained in section 1-12-203, Colorado Revised Statutes.

Section 1-12-203, C.R.S., specifies that any legislative vacancy is to be filled by either the representative district or senatorial district vacancy committee of the political party of which the legislator was a member. However, it is important to note that subsection (1) states that this process is only to be used for filling vacancies caused by the death or resignation of a member. There is no mention of, and the statute does not seem to envision, temporary vacancies occasioned by the unavailability of a member following a declared disaster emergency. Thus, it is doubtful that section 1-12-203, C.R.S., would apply in a situation where a member is temporarily unavailable following a disaster or epidemic, meaning the legislator's seat would remain unoccupied until the legislator returned to office or until a vacancy was declared due to the death or resignation of the unavailable legislator.

Because section 1-12-203, C.R.S., only applies to vacancies caused by death or resignation, any vacancy caused by the unavailability of a legislator after a declared emergency could not be filled until one of those two qualifying events occurs. In the event of a pandemic, attack, or natural disaster, the whereabouts or status of a missing legislator may not be known for some time. If a large number of members of either house is missing, quorum and vote requirements could be adversely affected, effectively disabling the general assembly.

Even if section 1-12-203, C.R.S., is triggered by the resignation or death of an absent member following a declared disaster emergency, it may be that the time process for filling such vacancies is too lengthy to be effective in an emergency situation. As the statute indicates, no vacancy committee may meet to appoint a successor until ten days after notice of the meeting is mailed to each member of the vacancy committee. Upon the selection of a qualified replacement at a meeting, the vacancy committee has thirty days to certify the selection to the secretary of state. The secretary of state then has two days to certify the name of the successor to the appropriate house of the general assembly which, in turn, has another thirty days to administer the oath of office to the designated replacement. Although it is doubtful that all the entities involved would take the full amount of time allotted by the statute to act, especially in an emergency situation, it is possible that the process could take up to two weeks.

Because of the above complications involved in applying current vacancy law to emergency succession following a declared emergency, the committee may wish to consider the options listed below.

*Comprehensive act containing all provisions related to a disaster emergency*

Of the states that have enacted some type of emergency succession act, the majority have codified a comprehensive plan that encompasses all legislative procedures related to an attack or emergency. The committee may wish to draft such a comprehensive plan that contains provisions concerning, among other things: legislative declarations; definitions; designation, status, qualifications, and terms of successors; changing the location of the legislative session; and quorum and vote requirements. The benefit of such a comprehensive plan would be that all relevant legislation would be located in one place in the statute, eliminating the need to search for the necessary provisions during a declared disaster emergency. Even if a comprehensive plan is pursued, however, LEERC members would still have to determine how the emergency successors would be designated. The sample measures from the different states contained above may help in this determination.

*Single statutory section speaking to the designation of emergency interim successors*

Alternatively, LEERC members may wish to draft a single statutory section that specifies only how emergency successors are to be designated, whether by individual legislators, political parties, county commissioners, or the remaining members of the General Assembly. Such an approach would leave all other current laws regarding quorum and vote requirements, location of legislative session, etc., in place. These other contingencies could be handled in later bills, by changes to the Joint Rules, or not at all.