



About the Print Version

The print version of the module includes all the substantive content from each screen, except for the directions for the interactive graphics. It does not include the Check Your Understanding exercises or the final exercise.

What Is Public Health Law?

Vaccination, motor vehicle safety, drinking water fluoridation, healthier mothers and babies, safer workplaces—do you know how the law contributed to each of these? Of the ten greatest public health achievements in the 20th century, law reform or litigation contributed to most of them. As public health professionals and leaders, understanding public health law and how to use it is essential to protecting the public's health.

What is **public health law**? Broadly, it is the authority for and responsibility of organized society to ensure the best conditions for the population's health. Public health law also limits the state's power to constrain individuals' legally protected rights when promoting community health.

Public health law can be complex and ambiguous; it is a balancing act between promoting the health of the broader population while protecting individual liberties. In this module you will learn:

- Essential guidance on how to recognize legal issues, frame legal questions, and work effectively with legal counsel
- Key legal concepts, such as federalism, police power, and preemption
- Scope and limitations of a public health official's authority
- Essential aspects of public health law within the contexts of constitutional law, administrative law, property law, and public health emergency law

This module focuses on public health agencies and public health law. It does not cover instances when a public health official is individually liable for her acts. This may happen when the public official acts beyond the scope of her authority (an act that is considered to be "**ultra vires**"). When that happens, the public official is on her own and must hire her own lawyer

Note: Specific laws and procedures in your jurisdiction may be different from the examples in the module.

Duty, Authority & Limits

Federal, state, local, and tribal government has primary responsibility for the public's health. This duty faces a significant challenge: what may best serve the population may not always be in the interest of a particular individual. Within this context, as a public health official you will make decisions, enforce existing policy, or possibly develop new policy.

The core of public health law involves an assessment of **duty** (what govern-

Public health law: The legal powers and duties of the state to assure the conditions for people to be healthy, and the limitations on the power of the state to constrain the autonomy, privacy, liberty, proprietary, or other legally protected interests of individuals for the protection of promotion of community health (Gostin, 2008).

Ultra vires: Beyond the scope or in excess of legal power or authority.



ment *must* do), **authority** (what government is *empowered but not obligated* to do), and **limits** (what government is *prohibited* from doing).

But how do you know when you are dealing with a legal issue? When should you ask legal counsel for advice? What do you need to do before you meet with your lawyer? How do you frame a legal question? What are the best ways to work with legal counsel?

First, we'll discuss how to determine when to consult your agency's lawyer about a public health issue.



What Would You Do?

Your state legislature passed a law banning BPA (Bisphenol A) from products sold in the state. To enforce this statute, the legislature created a new program in your agency. Since money was tight this budget cycle, no funds were allocated to the new program for implementation. Does your new program still have to write regulations and enforce them?

- Yes
- No

What They Did

In Oregon, this particular situation happened to a local health department. The department's legal counsel advised them of the legal risk and likely outcome, if challenged, if the program wasn't implemented. The department ended up having to use funds from other programs to carry out the law.

Working with Legal Counsel

Develop a good relationship with your legal counsel to get the best legal advice. To accomplish this, we suggest that you:

- Establish and nurture a strong professional relationship with your legal counsel based on trust and effective and timely communication.
- Educate your legal counsel about your daily business and significant challenges that may involve periodic legal questions.
- Anticipate legal issues before they arise (when possible).
- Contact your legal counsel as soon as you can about any significant legal questions. Provide a meaningful opportunity for legal input before you make your decision. You should provide counsel with sufficient notice about the issue and, if possible, give counsel enough time to research and to discuss options with you. Be sure to frame your legal questions using the approach suggested before presenting them to your counsel.
- Be candid and give the lawyer all the facts, not just the ones that support the answer the you want. You can only get the best legal advice if your counsel has all the potentially relevant facts. If it ends up that your counsel needs to defend you or help fix something, your counsel will be unhappy if you withheld key information.

- Understand and always consider the differences in perspective between you and your legal counsel:

Public health official's perspective	Legal counsel's perspective
To protect the public's health using the authority and tools available within the limitations of the system.	To keep the public health official out of legal trouble. Lawyers think of the potential legal landmines within the context of our litigious legal system. They might have to provide legal representation to you or your agency if an issue is legally contested.



What Would You Do?

You want to facilitate sharing information about patients (including protected health information and demographics) among programs in your agency and health care providers outside your agency. Because the information you need to collect is very specific, you've hired a local software company to develop the new system. At what point should you have your legal counsel review the software program?

- Never—this doesn't involve legal
- Once the program is complete
- During beta testing
- Early in the process while writing the specifications for the program

What They Did

In Oregon, a public health agency developed a system for sharing information. In the final stages of developing the software, the agency found out that their method of sharing information violated confidentiality laws. Different pieces of collected information had its own unique confidentiality provisions. As a result, they had to redesign the software program. Had they consulted a lawyer earlier in the process, they would have saved money and time.

Legal Issues

You need to be able to anticipate and recognize significant legal issues that could spell trouble. Not doing this competently and consistently can create additional risk to the public's health and can jeopardize your effectiveness as a public health official. To help you identify legal issues needing immediate legal consultation, we have created the following checklist.

- Is there a reasonable chance that the public's health is or may be threatened?
- Is your ability and authority to address the situation unclear?
- Is there a remote possibility that the event or circumstance could expose the health department to potential liability, media attention, or political pressure?
- Would the cost of a prolonged court case outweigh the cost of consulting an attorney?

You should consult your attorney if you answer yes to any of these questions.

Caveat: Legal issues are rarely black and white. When in doubt, consult with your legal counsel; an ounce of prevention is worth a pound of cure. A lawsuit that could have been avoided or at least mitigated by timely legal consultation is far more expensive than the cost of a legal consultation that in hindsight may not have been necessary. The threat of getting sued, however, is not the only reason to understand your legal authority. Understanding the bounds of your authority will help you if you are faced with political pressure to take a particular action.

Framing Legal Questions

If the decision guide reveals that you should seek legal advice, you need to be able to frame your legal questions effectively. Prepare as best you can even if you don't know all of the issues. Poor or inadequate preparation may mean that you won't receive the best answer you could. During **unusual events**, involve legal counsel as early as possible, even if specific legal advice is not yet needed.

If you have time, review what you think is the applicable law and think through the situation as carefully as you can before you seek input from legal counsel. Then implement these three steps:

1 Determine desired public health outcome.

2 Determine the preferred pathway to achieve the outcome, or a couple of alternative pathways.

3 Frame your legal question by asking "How can I best accomplish X [the desired public health outcome] by Y [the preferred pathway] given my authority under the law?"

For example, in Oregon the agricultural industry threatened to go to the governor because they felt that a groundwater toxicology investigation might interfere with trade.

Listen to the audio clip of a call between Samantha, a public health official, and Claudia, her counsel. Did Claudia frame her question in an effective way?

Public health official (Samantha): Claudia, hello. This is Samantha.

Counsel (Claudia): Hi Samantha.

Samantha: I'm sure you are aware that Deboma county has several cases of that virulent strain of H1N1. Well, a few of our hospitals have some cases presenting with the virus. I'm worried that it will spread quickly if we don't do something proactive. Can I mandate that all health care workers get vaccinated?

Claudia: No. We might get sued by a health care worker. There's too much risk of us landing in court.

Samantha: Well, I need to do something. What can I do?

Asking your lawyer "Can I do this?" or "Do I have the authority to do this?" tends to shift the decision to your legal counsel, which is not appropriate. Your

lawyer might suggest taking a certain action to keep your agency out of court. However, this advice may be contrary to what you think is in the best interest of the public's health. Ultimately, the decision about how best to protect the public's health is yours, not your legal counsel's. Your decision should take into consideration all relevant information including advice received from legal counsel. Too many health officers give away the decision making authority to risk-adverse attorneys.

Listen to this conversation between Samantha and Claudia again to hear Samantha ask her question in a more effective way.

Public health official (Samantha): Claudia, hello. This is Samantha.

Counsel (Claudia): Hi Samantha.

Samantha: I'm sure you are aware that Deboma county has several cases of that virulent strain of H1N1. Well, a few of our hospitals have some cases presenting with the virus. I'm worried that it will spread quickly if we don't do something proactive. I'd like to require mandatory vaccinations for staff in high risk areas such as hospitals and schools. How feasible will this be given my authority under the law and prior legal rulings?

Claudia: Let me get back to you on this.

Summary

Understanding public health law will ensure that you are improving the health of the population while avoiding legal pitfalls. Recognizing legal issues, knowing how to frame questions to counsel, and effectively working with your lawyer will help you make an informed decision in response to a public health issue.

The next section covers core concepts and principles of public health law that may influence your authority to make decisions and take action on behalf of the public's health.

Key Principles

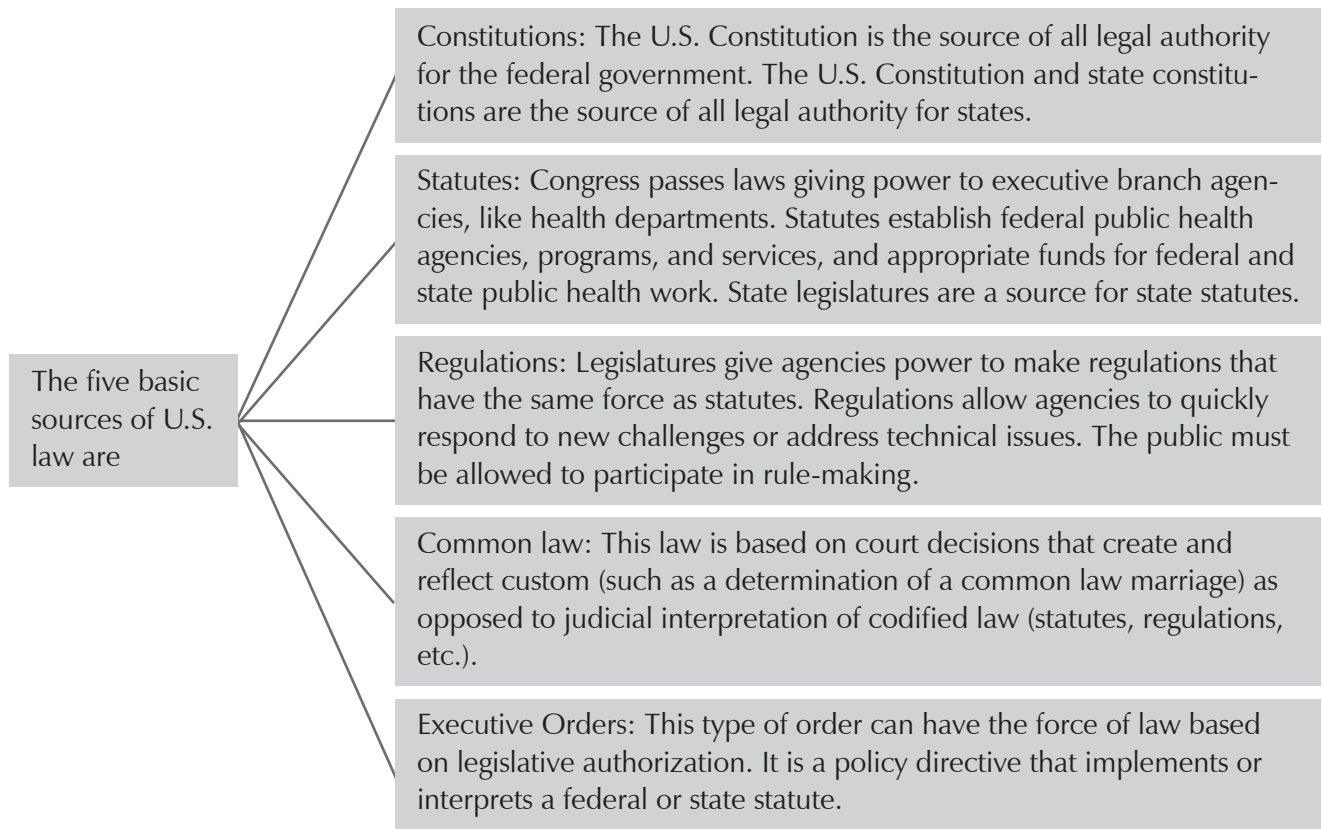
To be most effective as a public health official, you need to understand the key principles of public health law:

- Where public health statutes and rules come from
- How these laws and governing bodies affect your ability to address public health issues

Knowing these concepts gives you necessary background before you pose questions to your lawyer.

Sources of Law

To understand the source of your agency's power to address public health issues, you should know where public health's statutes and rules come from.



Distribution of Power Between Federal Government and States

Which federal and state laws apply to public health officials when making decisions about keeping the population healthy and safe? First, let's take a look at **federalism**, which is the relationship and distribution of power between individual states and the federal government. Federalism divides power into two levels of government: federal and state. The 10th Amendment of the U.S. Constitution provides every state with significant authority. Let's look closer at what kinds of power states have.

Police Powers

Police powers are the authority granted to individual states to enact legislation or regulations to safeguard the health, welfare, and morals of people within that state's jurisdiction. Examples of a state's exercise of police power to advance the public's health include:

- Childhood vaccinations as a condition for school entry
- Ban on distribution of free cigarette samples near schools
- Property seizure and destruction of toxic substances
- Involuntary detention of people with certain communicable diseases

In some cases, state and federal laws will provide authority, responsibility, or limitations on the same public health issues.



What Would You Do?

The Vaccines for Children (VFC) program is a federally funded program that provides vaccines at no cost to children who might not otherwise be vaccinated because they can't pay. The VFC program requires informed consent by the child's parent or guardian for every vaccine administered. How would your local health department meet this informed consent requirement?

- Require a one time written consent for vaccines requiring multiple doses
- Require written consent at each vaccination visit
- Require only oral consent

What They Did

With advice from their legal counsel, the health department in Denver determined that the parent or guardian need only give oral consent to meet this requirement. In a school based setting in which parents are often not present for each vaccination, the health department determined that one consent form signed in the beginning of the year was sufficient to cover each vaccine given throughout the year (even for vaccines requiring multiple doses).

Preemption


What happens when federal and state powers conflict? The **Supremacy Clause** provides that where a state and federal law conflict, the federal law preempts the state law (so long as the federal government had the authority to pass the law in question). Generally, **preemption** assures national uniformity and sets a minimal standard of protection, allowing state and local governments to enact greater levels of protection of the public's health. However, sometimes states are specifically prohibited by federal statute from enacting a standard that is either less or more strict than that set by federal law.

For example, national health care reform legislation (the Patient Protection and Affordable Care Act of 2010) established a new federal standard for menu labeling to be implemented by the states. The menu labeling provisions of the Affordable Care Act provide that the federal law will preempt any state or local law on the same subject matter that are not "identical to" the provisions of the Affordable Care Act. Although King County had passed one of the strictest menu labeling laws in the nation in 2008, it had to amend the regulation in 2010 to align with the national statute. In complying with the new national standards, some aspects of the King County law became more strict—like requiring restaurants to post calories on menu boards instead of in a separate place. Other aspects were relaxed—the federal statute did away with the county requirement to list nutritional content, such as salt, fat, and carbohydrates.

The basis of federal preemption is the supremacy clause of the U.S. Constitution (Article VI, clause 2).

Federal Functions	State/Local Functions
Threat spans states, regions, or entire country	Threat limited to county or single state
Solution beyond jurisdiction of individual states	Solution within jurisdiction of individual states
States don't have expertise or resources for an effective response	States have expertise and resources for an effective response

health threat




What Would You Do?

Your state legislature has passed a law regulating tobacco use. Details of the law include setting the taxation rates on tobacco products and prohibiting smoking in most public places and workplaces and requires that smoking occur a sufficient distance from buildings. The law also makes it illegal for anyone to sell or give tobacco, specifically cigars, cigarettes, or tobacco in any form, to minors under the age of 18. You and your city public health coworkers feel that the law does not go far enough in regulating tobacco. Would you pass an ordinance

- Banning e-cigarettes to minors?
- Clarifying the definition of “place of employment”?
- Adding a local tax on tobacco products?

What They Did

King County, Washington, passed a board of health resolution clarifying the state definition of “place of employment” and “public place” to make local tobacco regulation enforcement easier.

The legal counsel of the City of Spokane felt that state law preempted King County's ordinance and took a different approach. Youth reported that they could easily buy electronic cigarettes, despite the vendors denying that they sold e-cigarettes to minors. The health department set up a sting operation using youth to try to buy e-cigarettes. The majority of vendors sold e-cigarettes to the youth, which led to the Cities of Spokane and Spokane Valley and Spokane County writing an ordinance banning the sales of electronic cigarettes to minors.

Constitutional Protections for Individuals: The Bill of Rights

When deciding what actions will protect the public, you should keep in mind how these actions affect individual rights. The Bill of Rights—the first 10 amendments to the U.S. Constitution—is the primary source of individual liberties. State laws must meet U.S. Constitutional protections, and many state constitutions provide even more protection for individual liberties.

The table below lists individual protections provided by the U.S. Constitution relevant to public health, which may influence your decision.

Amendment	Protections	Example
1st	Guarantees freedom of speech, religion, and assembly	People can be exempt from getting vaccines if their religion forbids it.
4th	Guards against unreasonable search & seizure	The government can't conduct building code inspections without reason.
5th	Guarantees protection against deprivation of life, liberty, or property without "due process of law"	The government must fairly compensate landowners for environmental land-use restrictions that deprive land of all value.
14th	Applies the Bill of Rights to the states; guarantees additional protections	The First, Fourth, and Fifth Amendments must be applied and enforced in each state.

When dealing with public health crises, you will likely have to comply with the due process clause. The **due process clause** of the 5th Amendment of the U.S. Constitution (applicable to the states through the 14th Amendment) states that people should not be "deprived of life, liberty, or property without due process of law."



What Would You Do?

The tuberculosis (TB) clinic at your organization recently dealt with a family in which one of the grandparents had active pulmonary TB. Though the mother denied it, other family members said that several young children in the family had spent substantial time with the grandfather while he had symptoms of TB. The TB clinic asked the mother if they could evaluate her children as part of the contact investigation. The mother refused and reiterated that there had not been any contact between the grandfather and the children. What would you do?

- Trust the mother and not investigate
- Call Child Protective Services to negotiate with the mother
- Request a court order so that you can evaluate the children

What They Did

The TB clinic called Child Protective Services (CPS), who agreed that the children should be evaluated. CPS and the clinic proposed having the children's primary care provider instead of the TB clinic evaluate the children. Although the mother agreed with this plan, she did not actually show up for the appointment with the children's doctor. The fifth amendment of the Constitution guarantees protection against deprivation of life, liberty, or property without "due process of law." Given the severity of the risk to the children and their community, CPS obtained a court order to remove the children from the mother's care for the short time needed to complete the TB evaluation.

Jacobson v. Massachusetts

Public health law must maintain **constitutional balance**—that is, promoting the public good while protecting individual liberties.

This concept—and the entire field of public health law—came into focus in the early 1900s. The state of Massachusetts had enacted a law empowering municipal boards of health to require vaccinations if necessary for the public’s health or safety. A few years later, in response to a smallpox outbreak in the Boston area, the Cambridge Board of Health ordered all inhabitants of the city to be vaccinated against the disease. Reverend Henning Jacobson refused to get vaccinated, claiming that “a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every free-man to care for his own body and health in such way as to him seems best.”

A trial court convicted Jacobson and sentenced him to pay a fine of \$5. This decision was upheld by the Massachusetts Supreme Judicial Court and later by the **U.S. Supreme Court** (on February 20, 1905). Presiding Justice Harlan stated, “The safety and the health of the people of Massachusetts are for that Commonwealth to guard and protect. The legislature has the right to pass laws which... are adapted to prevent the spread of contagious diseases.”

Jacobson v. Massachusetts is widely regarded as the most important judicial decision in public health. This seminal case for public health powerfully illustrates constitutional balance and federalism. Justice Harlan displayed strong deference to public health agencies, granting them the authority to set public health policy, while also setting standards to safeguard individual freedoms.

Today, if an infectious disease outbreak occurs, you can refer to the key principles articulated by the *Jacobson* case when deciding whether to quarantine an infected individual who presents a threat to the public’s health. While the principle of this case is still relevant, to take these kinds of public health actions currently requires much more attention to due process.

In the 100 years following this decision, the case has been cited in 69 Supreme Court cases and numerous lower court cases to justify governmental action to protect the public’s health.

Civil v. Criminal Law in Public Health

Generally legal issues relevant to public health raise civil law actions (such as issuing fines or taking property). An individual usually does not have as many rights in a civil case as in a criminal case. For example, in civil cases individuals generally don’t have the right to appointed counsel, and public health officials do not need probable cause to search property.

By contrast, criminal cases have a different set of procedures. Individuals are at risk of losing more constitutionally protected rights and liberties (e.g., freedom from confinement), so people have the right to appointed counsel. Governmental officials generally need a search warrant based on probable cause before being able to search property. Although most public health cases are likely to be civil, some may be criminal (in cases of child abuse). If you do end up involved in a criminal case, you will probably work with a different set of attorneys.

For an example of how you may end up involved in a criminal case, listen to this audio clip of a call between Samantha, a public health official, and Claudia, her counsel.

Samantha (health officer): Hi Claudia. I have some reports of an HIV positive person who knows he is positive, but is refusing to practice safe sex. He has transmitted the disease to a few people that we know of so far. We've counseled him several times about the risk he is creating and that he has harmed others. He said he doesn't plan to change what he does—he doesn't like condoms. He says his HIV status is his private business and he doesn't intend to share his status with others. How can we prevent him from infecting more people?

Claudia: Would you say that the transmission could be called intentional or reckless?

Samantha: The people he infected claim that he did not disclose that he was positive. He admits he took no measures to protect them and doesn't intend to change.

Claudia: Under the laws of this state, this may be a criminal matter. I recommend we talk with the prosecuting attorney.

Summary

The key principles presented in this section help you understand where your legal authority comes from and what limitations you might face when responding to a public health issue. The U.S. Constitution, police power, statutes, regulations, and common law give you authority to make decisions. Federalism and preemption define the relationship between state and federal government; if there is a conflict, federal laws preempt state laws. In addition to understanding these key concepts, consider how your actions affect individual rights before taking any action. Remember, using the least intrusive approach to achieve your goal will help keep you out of court. Your legal counsel can advise you about potential legal problems you may need to take into consideration before making your decision about how to respond to a significant public health issue. When in doubt, consult with your legal counsel before taking action.

In the next section, you will learn what kinds of authority your agency has.

Administrative Law

Public health is a complex and highly technical field. Can you imagine if the state or federal legislature was responsible for all the decisions of each health department? It would be an extremely burdensome and time-consuming process. So governments have formed specialized entities—administrative agencies—to keep the population healthy and safe.

The legislation that created your agency gives you authority to make and enforce rules, regulations, orders, and decisions. This specific statute is referred to as the **enabling authority**. Administrative law is the body of law created by administrative agencies through rules, regulations, orders and decisions. Administrative law has no single source—it comes from statutes, regulations, and the constitution. It defines:

- Formation and organization of government agencies

- Powers that legislatures can delegate to government agencies, including public health officials
- Functioning and oversight of government agencies
- Agencies' abilities to make laws via rule-making procedures
- How courts review the actions of government agencies (judicial review)



What Would You Do?

The state legislature has just passed a law allowing people to opt out of having their vaccination records shared with the state vaccine registry. How would you fulfill the opt-out requirement?

- Provide written notification at each vaccine visit
- Provide oral notification at each vaccine visit
- Post a sign in the exam room

What They Did

Colorado law requires that people must be given the option to “opt-out” of having their vaccine records shared with the state registry. The health department in Denver oversees several community and school based health centers, in which they had to determine a policy for meeting the law’s requirement. In consultation with their legal counsel, they decided to post a sign in each exam room notifying patients of their “opt-out” right. This was deemed sufficient to meet the intent of the law. Providers are not required to explain this right verbally, and patients are not required to provide written or verbal notification that they were informed of their right.

Public Health Authority in the Northwest

As a local public health official, you should know whether the State or the local health department has primary authority. There are generally three types of public health authority in the U.S.

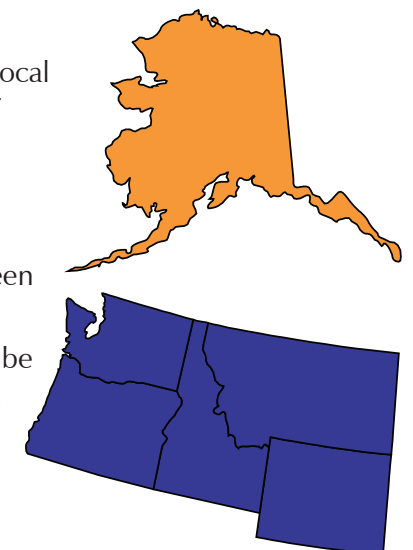
- **Centralized:** authority rests with the State
- **Decentralized:** authority delegated to the local health departments
- **A combination** of centralized and decentralized: authority shared between the state and local health departments

Even if your state has a decentralized system, some authority may either be reserved to the state or may be shared or overlap. In certain circumstances, such as a large, multi-county outbreak, the state might also have authority.

Your Agency’s Authority

Once you know what kind of authority your agency has, your agency’s power will fall into one (or a combination) of three categories:

- **Broad powers** give authority to agencies to carry out their functions (or missions). Also known as general grants of power, broad powers allow an agency to flexibly respond to problems.



- Centralized authority
- Decentralized authority
- Combination of centralized and decentralized authority

- **Specified powers** grant specific and limited powers to agencies. Specified powers reflect the legislature's determination to direct an agency to achieve **specific goals** and to limit changes in policy based on the circumstance.
- **Contingent powers** delegate either broad or specified powers only when triggered by a **specific event**.

You can find out which kind of powers your agency has by reading the enabling authority. Your lawyer can provide clarification if needed.



What Would You Do?

What does it mean when the state code says that you, as a public health official, have the authority to protect the public's health? Under this law could you

- Regulate tobacco advertising and use?
- Prohibit gangs from assembling in a public park?
- Prevent people from assembling during a disease outbreak?
- Make people get vaccinated?

What They Did

In 1987, the Public Health Council in New York, passed regulations prohibiting smoking in a wide variety of indoor areas that are open to the public, including schools, hospitals, auditoriums, food markets, stores, banks, taxicabs and limousines. The Council cited their broad grant of authority to deal with any matters of public health. The court ruled that the Council overstepped the boundaries of its lawfully delegated authority because the Council is an administrative, rather than a legislative body. "...the Council weighed the concerns of nonsmokers, smokers, affected businesses and the general public and, without any legislative guidance, reached its own conclusions about the proper accommodation among those competing interests." The court concluded that the Council's actions were ultra vires and that the regulations were invalid.

For example, the National Vaccine Injury Compensation Program was established through the National Childhood Vaccine Injury Act. This Act gave the Department of Health and Human Services (DHHS) responsibility to define which adverse events related to vaccine use are eligible for compensation.

Such events include a fiscal event (e.g., budget shortfall), external event (e.g., disease outbreak), or an event declared by the president or governor.

Rules and Regulations

Giving an agency rule-making authority allows the legislature to defer to that agency's expertise on that particular subject matter. **Rules and regulations** are legally binding and can have the same effect as a statute. If a rule or regulation conflicts with a corresponding statute, generally the statute prevails.

Rules help explain the law to agency officials and the public. For example, in addition to enacting minimum and maximum standards for nutritional labeling, the Affordable Care Act requires states to pass laws regarding implementation of a health insurance exchange by January 1, 2014. The Department of Health and Human Services (DHHS) has begun to issue regulations to explain these new legal requirements to affected federal and state agencies. These regulations also help explain the law to the public who will be affected by the new restrictions.

Rules and regulations mean the same thing and are used interchangeably.



What Would You Do?

Your city has an annual art fair, at which several street carts sell food and beverages. Health regulations state that all food vendors need a temporary restaurant permit. The penalty for selling food without a permit is \$500. Two 10-year-old boys are selling lemonade for 75 cents at the art fair. Should you:

- Shut them down
- Cite them for violating the regulation
- Consult with legal counsel before doing anything
- Do nothing

What They Did

County health inspectors shut down a seven-year-old girl's lemonade stand at an art fair because she did not have a temporary restaurant license (which cost \$120). Bloggers had a field day with this story, which also appeared in several newspapers, damaging the agency's reputation. If you as a public health official were presented with this scenario, you should consult with experienced legal counsel. Moreover, you should carefully consider all the ramifications involved in taking a restrictive enforcement approach. Legal consultation and careful consideration of the issue may help to avoid embarrassment and fallout that can adversely affect future public health interventions by your agency.

Administrative Enforcement

An administrative or a public health official may use various tools to enforce the agency's authority. These administrative enforcement tools are specifically authorized by statutes or regulations.

Enforcement Tool	Description	Examples
Permits & licenses	Assures compliance with public health standards. Must be issued fairly and all qualifying applicants must be treated equally.	Health facility licenses, individual health provider licenses, restaurant licenses, dog licenses, permits to ship food interstate
Inspections	Ensures residences and businesses comply with regulatory standards. Can be made randomly, on a regular periodic basis, or in response to citizen complaints.	Restaurant sanitation inspections, rodent inspections in warehouses, investigations of complaints about dangerous dogs

Administrative searches	Finds and eliminates threats to the public (that is, a specific type of inspection). If the resident or business owner consents to entry, a warrant is not required. Administrative search warrants are required to prevent unauthorized access or harassment by governmental officials, but do not require probable cause.	Surveillance of pharmacy records for antiviral prescriptions, pet store inspections to identify animals with potential infectious conditions
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Violations

If your agency finds any violations through an inspection or search, you should consider:

- **Administrative Orders:** Issue an inspection report if you find a violation from an inspection or search. Explain the violation and how to correct it. Explain the consequences of violating orders.
- **Court Orders:** Seek a court order if the individual does not comply with the administrative order. If the individual does not comply with the court's order, the court can then use its powers to impose fines, injunctions, or other measures (including threatening imprisonment for contempt). To protect the public's health and safety, courts can also issue orders that restrain an individual from engaging in certain conduct. For example, the court may assign someone to watch a person with TB receive her medical therapy, or prevent a typhoid carrier from working in food service.
- **Civil Penalties:** Fine or pull an establishment's license. For example, you may need to fine a restaurant for selling foods beyond the level of risk that the restaurant is authorized to sell.

Your attorney will file pleadings and documents on your agency's behalf if the action is more serious and the process is more formal. Some processes use administrative judges, common in state and federal hearings of enforcement of regulations. In a less formal process, you or your agency may be able to issue orders or notices of violation without the involvement of legal counsel.



What Would You Do?

A doctor calls you about a subcutaneous diphtheria patient who has not finished his course of treatment but is trying to sign himself out of the hospital. You are concerned that he could become communicable if he stops his treatment. What would you do?

- Tell the man to come in to be tested periodically.
- Ask a judge to hold the man in the hospital.
- Tell the hospital that there is no authority to hold the man and trust that the man will finish his course of treatment.

What They Did

A health director in Pierce County, Washington, received a call about a subcutaneous diphtheria patient wanting to leave the hospital before he finished his course of treatment. The health director was concerned that if the man did not finish his treatment, he could become communicable and pass the disease on to children. The director's legal counsel advised him to call a certain judge, who ordered the hospital to hold the patient until the course of treatment was finished.

Summary

Administrative law is the body of law created by administrative agencies in the form of rules, regulations, orders, and decisions. Administrative law governs most if not all aspects of agencies including formation and organization, function and oversight, rule-making, and judicial review. By using administrative tools such as orders, inspections, and searches your agency can enforce public health rules and regulations. However, the type of authority (decentralized, centralized, or a combination) and what kind of powers (broad, specific, or contingent) your agency has will define the scope of what you can do when dealing with a public health issue.

The next section discusses essential aspects of public health and property law that you need to be aware of in order to be most effective as a public health official.

Property

A landowner's private septic system leaches into neighboring well water and into adjacent freshwater streams that the county uses as a water source. Several neighbors and downstream residents begin to exhibit symptoms of wastewater-related diseases, like dysentery and gastroenteritis. The local hospital notifies your public health office of a possible connection between locally contaminated water and the illnesses. What do you do?

Governmental public health agencies, including health departments, generally have powers to take, destroy, or restrict property use if necessary to protect the public's health. When facing a pandemic influenza, you might have to commandeer medical equipment, supplies, or facilities so that you can treat all the sick people. In other situations, you might have to close buildings; prohibit access to land or airspace; confiscate and destroy property, including animals and crops; or regulate property use. Before you take action, you should know what specific measures are authorized, what legal procedures must be followed, and whether your agency is required to pay compensation. Answers to these questions are in the applicable law.

- Examples of other public health property issues you may face include:
- Contaminated food or drugs
- Diseased livestock
- A building that is a probable initial source of disease
- Shortages of vaccines, drugs, or other medical supplies

Governmental Power Over Property

Police power also gives the government authority to restrict the use of, encroach upon, or take over property. The government has this power regardless of whether an emergency has been officially declared. However, your agency must ensure due process before depriving individuals of their property interest. Except in urgent cases, due process generally requires adequate:

- Notice to the owner
- Opportunity for the owner to be heard before depriving him of his property

If you have any questions regarding any of the above concepts involving property, you are encouraged to consult your legal counsel before taking action to protect the public's health.

Takings Clause

Private property is also protected under the Takings Clause of the 5th Amendment of the U.S. Constitution (which applies to all the states by the 14th Amendment). The **Takings Clause** states, "...nor shall private property be taken without just compensation."

When does a governmental agency have to pay the property owner for taking action in response to a threat to the public's health? As a general rule:

- Government **does not need to pay** the owner when restricting the public from access to or use of dangerous property, since the property is considered a public nuisance. For example, if a public health agency declared a contaminated meth house a **public nuisance**, the agency would not have to pay the owner.
- Government **must pay** the owner fair market value of the property when using private property for a governmental purpose. In a pandemic influenza scenario, you might utilize a hotel as a quarantine facility. If the hotel owner can demonstrate lost revenue due to the agency's use, the owner may be able to recover the income lost from having no hotel guests during the quarantine.

Public nuisance: An activity or thing that affects the health, safety, or morals of a community, as opposed to a private nuisance, which harms only a neighbor or a few individuals.

Contaminated Private Property

When a property is contaminated or dangerous, public health agencies often become involved. For instance:

- **Contaminated property:** If health inspectors cite a restaurant for unsanitary conditions, a state or local health department can issue an administrative public health order to close that restaurant.
- **Dangerous property:** Administrative public health orders can also be issued to impound property if it is dangerous. Dangerous property can include a taco cart whose operator knowingly sells contaminated food, a meth contaminated automobile, or an unvaccinated stray dog who has bitten people.
- **Public nuisance:** Additionally, the health department can close a facility as a public nuisance; for example, if it is unsafe after a fire, earthquake, or storm. In the above cases, usually your agency would not have to provide compen-

sation to the owner. The property owner is responsible for keeping her property safe and suffers the risk of loss if it is not. However, exceptions that require compensation in certain cases may exist depending on the circumstances in your jurisdiction. Be sure to consult with your agency's legal counsel before you consider closing buildings or facilities or impounding property.

The owner can challenge in court an agency's actions to close, impound, or destroy her property. This usually happens through a due process hearing after the government takes possession of the property. If the court rules that your agency's action is unjustifiable, damages that your agency would have to pay could be awarded to the property owner.

If your agency determines that the property in question no longer poses a threat to the public's health, your agency can rescind the order for closure or impoundment. However, you should be convinced that the property is safe; if you are wrong, your agency may be liable if the reopened or released property is determined not to be safe.

Summary

To protect the public's health, your agency may take, destroy, or restrict property use. When depriving people of their property, you must follow due process. The Takings Clause also protects an individual's private property—stipulating that the government must pay the owner when taking her property. However, depending on the situation, your agency may not have to compensate the owner. Consulting with your lawyer will help you navigate through property law.

You will learn about essential aspects of emergencies in public health law in the next section.

Public Health Emergency Law

As a public health official, you should be legally prepared for an emergency. Recently passed emergency management laws may overlap with state powers (discussed under **broad powers**) and disease-specific control laws. Local, state, and federal laws may reside in separate sections of state codes and have separate implementing regulations and procedures. This can create confusion during emergencies, making it all the more important to have your agency's attorney involved in preparedness planning, response, and after-action review. To be legally prepared, you should:

- Understand the legal framework of emergency management
- Implement law-based action
- Coordinate across jurisdictions and sectors. Many jurisdictions have found it helpful to develop Memoranda of Understanding (MOUs) between public health and emergency management or homeland security to coordinate responsibilities ahead of time. Guidelines for writing an MOU is available in the resources section.

Broad powers give authority to agencies to carry out their functions



What Would You Do?

You've been asked to write an emergency response plan for potential disease outbreaks or disasters. Given that you will likely not have more funding and you may have fewer qualified and trained staff during the response, in your plan you should make sure

- All people get access to care equally
- Pay more attention to people with special needs, even if it means other people won't get access to care

What They Did

In Los Angeles County, some people with disabilities groups sued the health department for failure to adequately plan for people with disabilities during emergencies. The court agreed and ordered the Los Angeles Health Department to more systematically address the needs of persons with disabilities.

Role of the Attorney

Meaningful consultation with your legal counsel can keep your agency out of legal trouble, especially in emergency situations. Legal counsel can guide you to maximize the effectiveness of your response and minimize your legal exposure. Your agency's attorney can

- Make sure the agency has the necessary authority
- Assist in the development of emergency policies
- Anticipate and protect the agency against legal liability
- Give legal advice to shape response and recovery actions
- Protect against potential litigation
- Ensure that after-action reviews determine how to improve response procedures, develop needed legal improvements, and identify necessary legal competencies

Emergency Declarations

During emergencies where a formal declaration of an emergency is helpful or necessary, public health officials may be able to make emergency declarations or can request that authorized officials make emergency **declarations**, which are formal public announcements or determinations of legal importance. Declarations give additional authority and resources, such as using emergency funds. Depending on the event, government officials can tailor a declaration to the event (such as, influenza pandemic, fire, biological attack.) At the state level, two kinds of emergency declarations are common:

- **Public health emergencies:** This more restrictive type of declaration releases resources meant to handle an actual or potential public health crisis. A government official may declare a public health emergency when a state needs health care services to respond to a catastrophic event.

- **State of emergencies:** These are broader declarations that activate emergency plans and authorize deployment and use of personnel to address concerns that extend beyond public health. Declared for events like earthquakes, floods, and terrorist attacks, a state of emergency is usually independent of a public health emergency. This declaration triggers special powers to protect persons and property and to request aid from other states.

The authority to issue a declaration of a public health emergency may reside in the senior executive office (such as the governor or mayor), the governing board for the public health agency, or the public health officer. This authority may be separate from a general declaration of emergency. For example, at the state level in Oregon, only the governor can declare a general emergency for the state. Local county boards of commissioners can declare a local emergency. The public health director can declare a public health emergency, although the director must consult with the governor's office.

In addition to emergency declarations at the state level, there can also be declarations issued simultaneously at the federal level. Effective communication between the various public health officials during such emergencies is essential.

State Declarations

For a state declaration of a public health emergency, state law determines:

- Who can declare a public health emergency—usually the governor or a state/local public health officer
- What powers are conveyed
- How to make a declaration, including necessary information and procedures
- How long the declaration is in effect—a specified short period of time such as 60 days unless renewed

In some cases, a public official might also declare a state of emergency. Sometimes both a state of emergency and a public health emergency are declared at the same time. In these situations, tight coordination and communication are important for managing the situation and for minimizing any potential conflicts of power and authority.

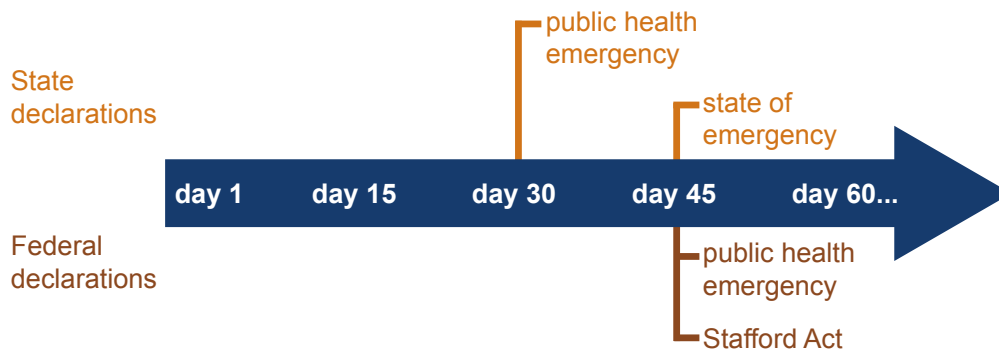
Federal Declarations

The federal government can also declare a public health emergency through the Secretary of Health and Human Services under **Section 319** of the federal Public Health Services Act.

If a situation is beyond the capability of state and local governments, a state governor can request a declaration of the **federal Stafford Act**. The Stafford Act gives the Federal Emergency Management Agency the authority and funds to assist state and local governments in responding to any type of catastrophic event.

Federal and state governments can make multiple declarations at the same time. For example, during an epidemic, state and federal agencies may issue declarations shown in the timeline below.

When such a declaration is made the Secretary may “take such action as may be appropriate to respond to the public health emergency.”



Summary

When deciding what action to take in an emergency, your agency's legal counsel can help you navigate the many federal, state, and local regulations and procedures that apply. Keeping your counsel in the loop and well informed will reduce potential legal problems.

A declaration of a public health emergency or state of emergency can release resources, such as health care personnel or funds. Before your public health agency makes a declaration, know what powers you as the public health official will have, what the process is, and how long the declaration will be in effect. Effective communication amongst all public health officials involved during a public health and/or state of emergency situation is essential.

Emergency Powers

During emergencies you may need to take steps that protect the health of the population at the expense of individual liberties. Police powers give your agency the authority to impose restrictions on private rights for the sake of public welfare, order, and security. In this section, we'll cover some measures you might take during emergencies that restrict individual freedom and property. These include:

- Social distancing
- Isolation and quarantine
- Vaccination

First we'll discuss social distancing.

Social Distancing

Social distancing implements non-pharmaceutical measures to stem the spread of epidemics.

Most social distancing measures rely on an informed public voluntarily complying with the recommendations of public health officials. Usually voluntary compliance is enough to slow the spread of illnesses to a manageable level. Sometimes social distancing measures are mandatory. For example, to prevent the spread of the communicable disease you may have to close schools and work places, cancel non-essential public events, or restrict travel. Even though you may have the authority to close schools and work places, people may gather on their own. Consider this aspect when making decisions about social distancing measures.

For more information on social distancing, you may be interested in the [Social Distancing Law Assessment Template](#) in the resources section.

Isolation & Quarantine

Isolation and **quarantine** are more restrictive forms of social distancing. Although the government has legal authority to require isolation and quarantine, public health officials must decide how to apply these measures fairly. Who will enforce isolation and quarantine? How much force will be used to make people comply? Since you may be in a position of making these decisions, you should know:

- When it's appropriate to issue isolation and quarantine orders
- How to initiate and implement isolation and quarantine orders in accordance with the law
- Which agency takes the lead on the initiation, implementation, and enforcement of an isolation and quarantine order

First we'll discuss when to issue the orders.

When to Initiate Isolation and Quarantine

Isolation and quarantine inherently restrict individual liberties. At what point during a public health emergency should you initiate isolation and quarantine measures? The Jacobson case established that public health powers must be exercised only when necessary to prevent an avoidable harm. Issuing an order of isolation and quarantine must only be done in the face of a demonstrable health threat and must **use the least restrictive means necessary**. Before giving an isolation or quarantine order, your agency needs to consider:

- Where will your agency confine people and how onerous are the restrictions on movement?
- How forceful or intrusive are the methods of enforcement?
- How many people will be confined?
- What are the logistical, social, political, and economic impacts?
- How can officials monitor the health status of quarantined populations and ensure that their basic needs are met?
- Are the benefits and burdens fairly distributed, particularly for the poor and ethnic minorities?

There may be state law that specifies required procedures and other conditions for isolation and quarantine.

How to Apply Isolation and Quarantine

Once you decide that it is the appropriate time to apply isolation and quarantine, you must ensure due process or you or your agency may end up in legal trouble. You can ask people to voluntarily comply with isolation and quarantine measures—in this case no laws or procedures are invoked. People who are involuntarily isolated or quarantined have legal rights. The basic due process is

Isolation: The separation and restriction of movement of persons diagnosed with a specific infectious illness in order to stop the spread of that illness.

Quarantine: The separation and restriction of movement of persons who are not yet ill, but who have been exposed or potentially exposed to an infectious agent and may become infectious.

- 1 Right to notice.
- 2 Right to counsel.
- 3 Right to hearing on request.
- 4 Right to adequate showing of a reasonable basis for detention supported by facts.
- 5 Right to appeal.



What Would You Do?

Trang, a Vietnamese immigrant in your jurisdiction, tests positive for TB. She stops taking her medicine regularly after a few weeks because she feels better and hates the side effects from the drugs. In addition Trang starts missing several appointments. You have one Japanese translator who speaks a little Vietnamese, who has tried to explain to Trang why she should finish her treatment program. After a few months a biopsy shows that she is multi-drug resistant. However a few weeks later her chest x-ray is clear. You think she is a health risk to the public and should be isolated, but your county has no TB isolation facilities. You decide to:

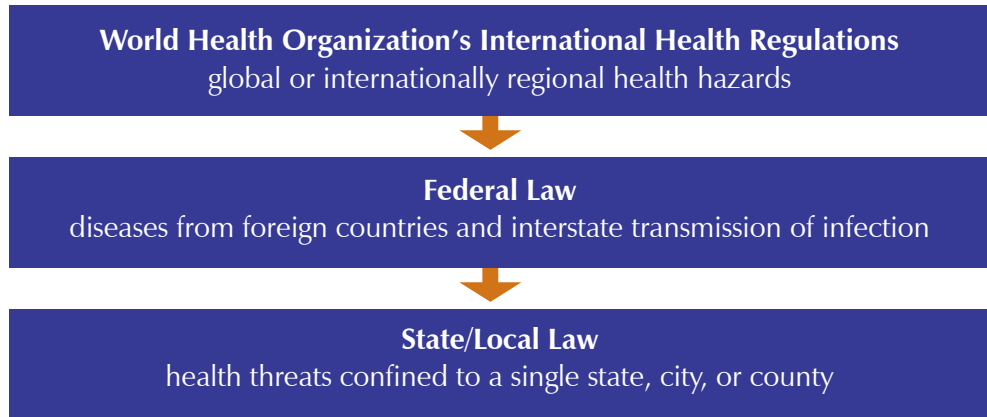
- Put Trang under house arrest
- Detain Trang in jail
- Send Trang to an isolation facility a few counties away

What They Did

In 1998, public health officials in Fresno County decided to put a Laotian woman in jail because she was not complying with the ordered treatment program. She spoke little English, and the health officials had no qualified translator to explain to her why she should follow the program. The officials did not follow due process: she was not told about her right to counsel or her right to a hearing. Furthermore, the officials left her in jail for 11 months before their legal counsel got involved and the court held a hearing. Fresno County had no isolation facilities and had put other noncompliant TB patients in jail. Although the state law allows local public health officers broad discretion to select the detention facility, the same law forbade the use of jails as a detention facility. The county had to pay the Laotian woman and her family \$1.2 million.

Levels of Authority

Even though all jurisdictions and levels of government can authorize quarantine measures, which agency issues the order and which legal rules apply depend on the situation. Generally, the hierarchy for health threats confined to a single state, city, or county is



The above schematic is a simplistic delineation of the levels of authority. Identifying the lead government official in a public health emergency is often more complicated. For example, for certain communicable diseases designated by a Presidential Executive Order—like SARS or pandemic influenza—the federal government can detain, examine, or conditionally release people suspected of being ill. DHHS can also help states enforce their quarantines.

It may be helpful to proactively develop a Memorandum of Understanding (MOU) to clarify agencies' roles, responsibilities, and authority before an emergency situation arises.

Vaccination

To prevent or slow down the spread of a contagious disease you might consider vaccination measures. If you take such measures, you may meet with resistance from the public arising from doubts about vaccination's safety and effectiveness and concerns about the loss of individual autonomy.

States have the authority to mandate vaccination in some circumstances. For example, each state has school immunization laws. The state's power to require children to be vaccinated as a condition of school entrance has been widely accepted and judicially sanctioned (upheld by the Jacobson case).

Listen to a call between Samantha, a public health official, and Claudia, her counsel.

Samantha: *Good afternoon, Claudia.*

Claudia: *Hello, Samantha. What can I do for you?*

Samantha: *We're getting a lot of cases presenting with H1N1. Unfortunately, we're short on those vaccines. Since the likelihood is extremely low that elderly people will die if they get H1N1, I'd like to limit vaccines to people who are more likely to die if they get it. Primarily pregnant women and children under 18. How can I legally restrict who doctors give the vaccine to?*

Claudia: *In our state you can't tell doctors who to give vaccines to. However, you can decide which medical practitioners will receive the vaccine.*

Emergency Governmental Control of Private Property

In a public health emergency, the state and federal government have the power to seize and use property, sometimes **without negotiation**. However, a governmental agency's decision to take over private property must be reasonable and necessary. Examples include:

- **Ordering a local facility to provide services.** This may even include transferring the management and supervision of the local health care or community facility to the county health department or State Department of Health for the duration of the emergency. For instance, Louisiana and New Orleans used the Superdome to house people who lost their homes in Hurricane Katrina. In this situation, state and local officials did not have to follow the usual due process requirements of notice and opportunity to be heard.
- **Seizing and using an individual's private property.** After Hurricane Katrina hit, public health officials commandeered taxis, shuttles, and private vehicles to transfer vulnerable people and supplies to the Superdome.

Caveat: Your governmental public health agency should only consider highly intrusive emergency measures like these as a last resort, and only after meaningful consultation with your agency's legal counsel. Emergency preparedness planning should identify the types of property that might be needed in such situations. Because the **Takings Clause** applies to state and local governments even in emergencies, your agency might have to compensate the property owner—depending on the circumstances.

Summary

During an emergency, you may have to take actions that limit people's freedoms so that you can protect the public's health. These measures could include social distancing, isolation and quarantine, or mandatory vaccinations. In addition, you might need to take control over private facilities. When responding to a public health emergency, apply the least intrusive approach and only use the most restrictive measures as a last resort. Because the stakes can be high in emergencies, you should consult with your agency's legal counsel throughout the entire process.

Module Summary

Understanding legal concepts and how they apply to public health agencies is crucial to protecting the public's health. You will be more effective as a public health official if you can recognize legal issues and effectively work with your attorney. Remember, asking how you can get to a desired outcome will help you get better legal advice.

Also, be sure to look at your state's public health statutes that relate to public health. Find out what rules and regulations are in place. If you don't understand a particular section, then meet with legal counsel to go over it.

Public health law is a balancing act between keeping the public healthy and protecting individual freedom. During an emergency, you may have to take actions that limit people's freedoms so that you can protect the public's health. Due process, the Takings Clause, and other safeguards effect what measures you

Even without negotiations, the right to due process still exists. But in certain circumstances, not much process may be due. The fundamental question is "What process is due?" How much, if any, notice and an opportunity to be heard is the person entitled to? In a situation where no negotiations are required, the individual may be entitled to very little process.

Takings Clause: "...nor shall private property be taken without just compensation." (Fifth Amendment of the U.S. Constitution, made applicable to the states by the 14th Amendment)

can take. When responding to a public health threat, apply the least intrusive approach and only use the most restrictive measures as a last resort. Because the stakes can be high, when in doubt consult with your agency's legal counsel.