



About the Print Version

The print version of the course includes all the substantive content from each screen. It does not include any of the quizzes at the end of each section or the final assessment.

Scope of Course

There is variation in ways that local and state governments and how public health entities can work with one another in emergencies because of differences in local laws and statutes. Because of that complexity, this module is intended as an overview which will address, and raise questions to consider in the planning and delivery of healthcare in large scale emergencies, across different jurisdictions. The module does not provide specific legal advice about handling public health emergencies in your region.

Learning Objectives

By the end of this training, you should be better able to:

- Identify key features of legal authority at different levels of government for responding to public health emergencies
- Describe potential or actual legal powers, responsibilities, and risks during declared emergencies
- Describe the legal questions relating to the use of medical or public health volunteers during emergencies

Target Audience

Public health practitioners from different states who work in or with emergency preparedness programs and the attorneys who work with them.

About this Course

The content for this course was developed in partnership with the Network for Public Health Law Western Region Office at the Sandra Day O'Connor College of Law, Arizona State University. It is part of a series of modules and resources funded by the Robert Wood Johnson Foundation to support public health law training.

A new strain of influenza is rapidly spreading across the United States. It spreads easily and has a high mortality rate. Cases have been reported in every state, and elected officials and the public are clamoring for a public health response. Questions immediately arise. Who is authorized to respond – local, state, tribal, or federal government? Who is in charge? How can volunteers help? Will they be liable for poor outcomes? Should schools and other public gatherings be closed? Should isolation and quarantine measures be implemented?

Introduction

During an emergency, what is your public health department legally **authorized** to do? What are you **required** to do? What **should** you do? And finally, which actions would be hard to justify legally or politically (what shouldn't you do)? For the rest of this course, we suggest you consider the framework: What can I do? What must I do? What should I do?

If not addressed, these questions can undermine effective response efforts. However, when understood and implemented appropriately, the law supports an essential framework for critical public health efforts.

This course will focus on a public health department's legal authority, powers and duties during emergencies. We will also discuss legal issues around social distancing measures, volunteer health practitioners, and liability issues.

While specific legal authorities may vary from state to state, or among local jurisdictions, this course focuses on a general understanding of applicable laws and how to use the law for the public's health. Throughout the course, you will be reminded to consult with the attorney for your jurisdiction for more definitive understanding and guidance. This course is intended to enhance your ability to identify and define legal issues.

Scope and Breadth of Legal Authority

Law has a critical role in emergency preparedness, as seen in the hypothetical influenza example introduced earlier. Legal preparedness requires public health officials and other partners to understand and incorporate law into emergency plans. In this section, we'll look at how the legal environment changes during an emergency. Specifically, we'll consider the legal effect of emergency declarations, the issues that emerge between different levels of government and partners, and the legal authority available for responding in the absence of a formal emergency declaration.

Laws affect emergency response at every level of government. They may:

- Define a "public health emergency"
- Assign responsibility for potential or actual harms that may arise
- Authorize various emergency responses, including exceptions from standard practices
- Create the infrastructure through which emergencies are prevented, detected, and addressed

In responding to public health emergencies, legal and public health professionals must work together in real-time to:

- Assess, apply, and monitor changing legal norms
- Identify legal issues
- Develop legal solutions
- Explain legal conclusions
- Collaborate with public and private sector partners

Can I, Should I, Must I?

There are three basic questions you should ask when presented with any legal decision.

“Can I?” asks whether there is specific legal authorization for an action and if so: Is it specific or general? Are there any legal restrictions or impediments? Though a matter of interpretation, these questions can often be answered before and during emergency events.

“Must I?” addresses instances where the law requires you to take specific action. While there are not very many of these requirements related to emergency preparedness, they are critically important. For example, failing to account for the needs of persons with disabilities while developing an emergency preparedness plan can represent unlawful discrimination.

“Should I?” is a question of practical discretion and professional judgment. Just because an act may be legal does not always mean it should be done. Consider issues related to available resources, feasibility, public acceptance, and other non-legal factors. For example, you may have authority to apply isolation and quarantine when there is a disease outbreak, but it is an extreme action that should be avoided unless all other options have been exhausted and the public health risk is substantial. When consulting with your attorney, remember that each of you may approach problems from different perspectives. As a public health official, your goal is to maximize protection of the public’s health using the authority and tools available. Your attorney wants to help you succeed, but also seeks to keep you out of legal trouble. The attorney’s role is to advise you of legal risks involved for various actions you are contemplating so you can weigh those risks and make the best decision.

During emergencies, keep these three questions in mind when you are deciding what actions to take.

Types of State and Local Public Health Laws

There are three predominant types of state and local public health laws pertaining to emergencies: state and local police powers, emergency management laws, and disease-specific laws.

These laws may have separate implementing regulations and procedures, but often overlap. They may also exist in different areas of state or local codes, leading to confusion during emergencies.

For example, state or local public health departments and departments of education may simultaneously be authorized to close schools. Emergency management departments and departments of health may be authorized to initiate curfews or other social distancing measures. These measures will be discussed in a later section.

Public health officials and other governmental agencies, as well as their attorneys, should understand the relationships among these entities and the laws which govern them prior to an emergency. Understanding the overlapping authority is crucial to an effective and fluid response.

Interjurisdictional Coordination

Collaborations and partnerships among federal, state, tribal, and local public health personnel are essential in public health emergencies. Some border states may even have response agreements with Canada or Mexico. Local government responders may obtain assistance such as additional personnel or resources from neighboring jurisdictions through interjurisdictional collaboration such as mutual aid agreements. In addition, if a local public health agency needs additional public health or medical resources, it can then request assistance from the state. The state distributes initial supplies to local agencies. If the state runs out of supplies and resources, it can request assistance from the federal government. The Centers for Disease Control and Prevention (CDC) distributes resources from federal medical resources to the states. One such resource is the Strategic National Stockpile.

Federalism & Preemption

While collaboration between governments at all levels is key to emergency responses, potential conflicts of federal, state, tribal nations, and local laws may arise.

Where federal and state or local laws conflict, federal law is supreme under the Supremacy Clause of the US Constitution. Federal authority, however, is limited to actions under the specific powers vested in Congress by the US Constitution. These include authority over interstate commerce, power to tax and spend, and Congress' unique authority to regulate in the interests of national security. While limited in scope, these federal powers often play a critical role in responding to emergency events.

States' public health emergency powers and duties are considerably broader. Unlike the federal government, states possess what is known as **police power**, which authorizes broad actions in the interest of public health, safety, and welfare. Note, however, that federal law may preempt state actions in some cases. For example, while states generally have the authority to isolate and quarantine those who may pose a public health threat due to communicable disease, federal law also grants isolation and quarantine authority to CDC to prevent the spread of communicable disease into the US or between states. In the event of a conflict between state and federal law, the federal authority is supreme.

State governments delegate some powers to local governments, which are ultimately responsible for emergency health responses on the front lines. The extent of this delegation varies greatly among the states. Local governments' specific legal authority depends on state and federal laws. However, their emergency management capabilities affect how governments at all levels must plan to coordinate efforts and available resources, and their initial response efforts impact developing circumstances during an emergency.

Police power is the authority states have to enact and enforce legislation and regulations to protect the welfare, health, and safety of the population.

Mutual Aid Assistance

Some emergencies require more personnel and resources than an individual jurisdiction may have available. In such cases, other jurisdictions can provide needed assistance. During Hurricane Sandy in 2012, for example, 2,500 personnel were deployed from 37 states to affected states under the **Emergency Management Assistance Compact (EMAC)**.

Interjurisdictional agreements and mutual aid agreements help reduce potential or actual conflicts during declared emergencies. They provide arrangements for the sharing of resources including personnel. These agreements may or may not be binding depending on how they are drafted and the intent of those executing them. The three agreement types described below are commonly used in emergency situations. However, governmental agencies can also establish mutual aid agreements across national borders or with private sector organizations.

The **Emergency Management Assistance Compact (EMAC)** is a mutual aid agreement that allows states to share resources after an emergency or disaster is declared. For more information, see the [EMAC website](#).

Interstate	Intrastate	Tribal Nations
<p>An interstate agreement is a legislatively-authorized contract among all states for sharing personnel and other resources.</p> <p>Emergency Management Assistance Compact (EMAC) assistance is triggered by</p> <ul style="list-style-type: none"> • Formal state declaration of emergency; and • Request for assistance 	<p>Intrastate agreements are represented by:</p> <ul style="list-style-type: none"> • State mutual aid legislation • Formal mutual aid agreements between local governments • Less formal “operational” mutual aid agreements for routine cooperation • Interjurisdictional Resolutions (e.g., standing committees to coordinate emergency plan and address potential conflicts) 	<p>Public health services may be delivered by tribal, county, state, and federal providers.</p> <p>Federally recognized tribes are sovereign nations. They are treated as independent governments. They are not generally subject to state or local public health laws. Mutual aid agreements between tribes and state or local health departments can facilitate the sharing of resources and information. There is a great deal of variability among tribal nations’ laws and resources, so consultation with a tribal law attorney is recommended when crafting agreements.</p> <p>More resources on tribal public health law are available through the Network for Public Health Law.</p>

Types of Declarations

During a crisis or event, public officials may need enhanced authority to respond. In many cases, a formal “declaration of emergency” may be required to activate the enhanced authority. The types of declarations available depend on state or local law and the nature of the crisis event. Decision makers will need to assess whether or not an emergency declaration is needed, as well as what type of declaration is appropriate.

All types of emergency declarations serve a similar purpose by formally recognizing the existence of circumstances that threaten public safety, health, or welfare and require an immediate, coordinated response. Emergency declarations alter the legal landscape by authorizing specific actions and powers that are not permitted in non-emergency circumstances, such as waiving or suspending provisions of existing laws, expediting use of government powers, or accessing emergency-specific funding and other resources.

Emergencies & Disasters

If an emergency declaration is warranted, a different type or category may be available depending on the jurisdiction. Many jurisdictions use either “emergency” or “disaster” to describe an event or threat that may result in substantial harm to people or property and requires comprehensive and timely response. A declaration of disaster, however, is often linked to causal events like tornadoes and floods or occurrences such as chemical spills and acts of terrorism. Typically, state legislatures give the governor broad authority to declare states of emergency or disaster. A governor is generally in charge of these declarations, but states may authorize other officials to make these declarations as well.

Some local governments may also declare an emergency, which may be subject to state-based limitations of powers. These limitations depend on the extent of local “home rule” and whether the local declaration (and the legal powers that flow from such a declaration) conflicts with superseding state or federal laws. Other public emergency declaration terms with specific definitions may also be used in some jurisdictions (e.g., “State of War Emergency”).

Public Health Emergencies

Some jurisdictions also allow for declaration of a **public health emergency**, which is defined more narrowly than an emergency or disaster. A public health emergency is an event or imminent threat of illness or health condition that (1) is believed to be caused by bioterrorism, an infectious agent or biological toxin, or a chemical attack or accidental release and (2) has a high probability of causing a large number of deaths, disabilities, or risk of substantial future harm. Although the two-part definition arguably provides additional guidance, a governor still has considerable discretion to decide what constitutes a “high probability” of a “large number” of deaths or disabilities.

All states authorize declarations of an emergency, disaster, or both. Over half authorize declaration of a public health emergency. Their public health emergency declaration laws and authority often rely on the recommendations found in the **Model State Emergency Health Powers Act (MSEHPA)**. As with other types of emergency declarations, authority to declare a public health emergency is generally a power of the

Home rule is the legal authority of local jurisdictions (e.g., cities, municipalities, counties) to adopt laws that govern their jurisdiction without conflicting with state or federal law. The extent of this authority is determined by state law, generally the state constitution. States with a high degree of home rule allow local jurisdictions significant leeway to regulate within their own borders. In states with less home rule, localities may be limited to regulating in specific sectors or on specific topics.

The **Model State Emergency Health Powers Act**, developed by the Centers for Law & the Public’s Health at Johns Hopkins and Georgetown Universities in collaboration with many partners, provides model statutory language state and local legislators and health officials can use as a guide for considering public health law reform in their jurisdictions.

governor (as recommended in the MSEHPA) in the states that have adopted this type of declaration, but states may authorize other officials to make these declarations as well.

Multi-Level Declarations

Officials at different levels of government can declare an emergency, disaster, or public health emergency. Declarations of emergency, disaster, or public health emergency generally grant special authority, power, and duties to officials.

The type of declaration or declarations issued may affect local jurisdictions by dictating some or all of the following:

- What additional resources may become available,
- Who may be granted authority to coordinate and direct response efforts,
- What legal or policy provisions may be temporarily waived or altered, among other changes to the legal landscape.

A geographic area requiring a disaster declaration might straddle towns or encompass county, state, or tribal lines. A local official might declare a state of emergency, then a state's governor declares one which covers several counties. Multiple emergency declarations might legally place two or more different agencies in charge of the response, and negotiation about who does what could interfere with timely response when a disaster occurs.

Emergency and Disaster Response

Even before an emergency or disaster is formally declared, there may be a need for local response efforts following a crisis. Existing state or local public health powers, flowing from multiple sources of law, may facilitate these efforts. For example, local health departments can educate the public on water-borne disease risks, injury prevention, and other topics. They can track injuries, disease, drinking water availability, and sewage and solid waste collection disruption. These routine interventions generally do not require a declaration of emergency. However, other powers (e.g., compelled evacuation) may require the enhanced authority provided by a formal declaration.

Enhanced Federal Powers

Federal officials may invoke additional, expedited powers to respond to emerging conditions like a novel influenza by declaring states of emergency. A public health emergency can be declared by the US Department of Health and Human Services. States of emergency may be declared by the President through authority of the federal **Stafford Act** with additional specifications from the **National Emergencies Act**.

While each of these declarations authorizes a variety of powers, when they are declared together, the Secretary of the Department of Health and Human Services can take additional steps, including:

- Specific Medicare/Medicaid requirements
- HIPAA Privacy Rule provisions

The **Stafford Act** provides statutory authority for most federal disaster response activities.

For more information see the Association of State and Territorial Health Officials' (ASTHO) **Stafford Act Fact Sheet**.

The **National Emergencies Act** regulates the US President's power when declaring a national emergency. It states that the extra powers of the president or executive branch granted by a declaration of a state of emergency expire two years after the declaration. It also requires the President to specify which powers will be invoked, such as seizing property or restricting travel.

- Requirements under Emergency Medical Treatment and Active Labor Act (EMTALA) to screen and stabilize patients presenting for treatment in hospital emergency rooms (discussed later)

Model State Emergency Health Powers Act

If you recall from the introduction, a new strain of influenza has been affecting the entire country, and is now spreading rapidly through your state. Resources are quickly being depleted. Local health care personnel are strained by the number of cases and infections within their own ranks. What powers do you need to respond effectively and protect public health? Could you use volunteers from other states? What authority do they have, and are they protected from potential liability to encourage their participation?

The issues presented in the scenario above, among others, may result in a declaration of emergency to provide necessary authority and protections. For example, 12 states formally declared emergencies in response to H1N1 in 2009-2010 to facilitate and prioritize their response efforts.

Many of these states base some or all of their emergency laws on the **Model State Emergency Health Powers Act (MSEHPA)**. The Model Act serves as a template and seeks to modernize and harmonize public health legal authority across jurisdictions. At least 40 states and the District of Columbia have adopted one or more of its provisions.

Under the Model Act:

Individuals have special protections and entitlements

State and local governments have specific, expedited powers to facilitate emergency responses

Volunteer and other responders may be protected from civil liability

Medical licensing and credentialing requirements may be accelerated or waived

Not all states have adopted all of the MSEHPA's recommendations. Please consult your local codes and legal counsel for the latest information about your area.

For information about the status of MSEHPA adoption in your state visit the **[Network for Public Health Law website](#)**.

Additional information about MSEHPA is available at **<http://www.publichealthlaw.net/ModelLaws/MSEHPA.php>**.

Liability

During emergencies, public health professionals and volunteers may be concerned that they may be liable for adverse events or for not providing their usual standard of care due to the overwhelming number of patients and inadequacy of resources.

Civil liability is the potential responsibility that a person or entity may owe for their actions, or failures to act, that result in measurable injuries or losses to others. A civil lawsuit may result in financial compensation for a loss or cost incurred, or may result

The **Model State Emergency Health Powers Act**, developed by the Centers for Law & the Public's Health at Johns Hopkins and Georgetown Universities in collaboration with many partners, provides model statutory language state and local legislators and health officials can use as a guide for considering public health law reform in their jurisdictions.

in an injunction prohibiting a future action. Fortunately, there are several liability protections under local, state, and federal laws to protect those assisting in emergency response efforts. These include:

- Governmental (sovereign) Immunity
- Good Samaritan Acts
- Volunteer Protection Acts
- **Federal PREP Act**

Government agencies may be protected from liability for the acts of their employees through **sovereign immunity** provisions or indemnification clauses in **mutual aid agreements**. Sovereign immunity differs among states, so be sure to consult your legal counsel. Government employees are not generally liable personally for actions within the scope of their jobs. Volunteers may not be liable if they are acting on behalf of the government during declared emergencies. Note that government employees and volunteers would not usually be protected against negligent acts.

Liability will be further discussed in the Response Activities and Volunteers sections of this module.

Summary

In this section, you learned to identify the role and relevance of law in preparing for emergencies. You should now be familiar with some of the differences between public health emergencies and other types of emergencies or disasters. Emergency declarations by one or several different government entities simultaneously can impact the responses and authority required of different public health agencies. The table below summarizes the types of emergency declarations and who can declare them.

Type of Declaration	Description	Authority
Emergency	Declaration following an event or threat that may result in substantial harm to people or property and requires comprehensive and timely response.	<ul style="list-style-type: none"> • Federal: Executive branch • State: Governor, or other official who has been granted authority
Disaster	A declaration following an event or threat that may result in substantial harm to people or property and requires a comprehensive and timely response. It is often linked to causal events such as tornadoes, floods, or occurrences such as chemical spills and acts of terrorism.	<ul style="list-style-type: none"> • Federal: Executive branch • State: Governor, or other official who has been granted authority

The Federal Public Readiness and Emergency Preparedness Act of 2005 (**PREP Act**) authorizes the Department of Health and Human Services Secretary to grant liability protection to individuals and entities (businesses and non-profits) for the use of covered counter-measures during a federally declared emergency.

Sovereign immunity protects the government through legal restrictions preventing lawsuits against the government in most circumstances.

Mutual aid agreements are advance legal agreements that can specify who is legally and financially responsible for the actions of volunteers and employees providing aid to another jurisdiction during an emergency.

Type of Declaration	Description	Authority
Public Health Emergency	A public health emergency is an event or imminent threat of illness or health condition that (1) is believed to be caused by bioterrorism, an infectious agent or biological toxin, or a chemical attack or accidental release and (2) has a high probability of causing a large number of deaths, disabilities, or risk of substantial future harm.	<ul style="list-style-type: none"> • Federal: Department of Health and Human Services • State: Some states authorize declaration of a public health emergency

There is a great deal of variability in the ways local and tribal authorities can make emergency and disaster declarations. Please consult your attorney for more information about the laws governing your locality.

The Model State Emergency Health Powers Act (MSEHPA) is intended to protect the health safety and well-being of citizens, by harmonizing public health legal authority across jurisdictions in emergencies. Finally, we discussed how identifying and understanding applicable laws is an important part of effectively dealing with public health emergencies.

Powers & Duties

Think back to our scenario of a severe influenza outbreak that is overwhelming health care personnel. Despite the best efforts of public health officials and volunteers, the influenza outbreak continues to spread. Children are especially vulnerable. There are calls for mandatory preventive treatment for children, but some parent groups and religious denominations object. The virus is easily spread, and some health professionals are recommending closing public gathering places such as shopping malls. Store owners claim this would deny them income and threaten the local economy. Whose interests should prevail? How should the competing interests be balanced?

In this section we will cover the balancing of public and individual interests during emergencies. Throughout the course of an emergency, there may be enhanced powers available to public health departments and others to act in the interest of the public’s health. There may be legal obligations for officials, as well as constitutional safeguards that limit government authority.

Balancing Public and Individual Interests in Emergencies

During an emergency or disaster that calls for action to minimize spread of disease, or allocation of scarce resources, officials may need to balance the interests of individuals with those of the public.

The following table shows examples of freedoms described in the United States Constitution we enjoy, but might be curtailed in emergencies.

Amendment	Constitutional Right	Emergency Response Considerations
1st	Freedom of assembly	Social distancing measures, such as limitations on public events or curfews, may limit the ability to interact and congregate with others.
4th	Freedom from unwarranted search and seizure	Enhanced inspection and investigation authority during an emergency may allow for searches and other actions without a warrant, which might otherwise be required.
5th	Compensation for governmental taking of property	During an emergency, the government may take essential goods from private entities for public use, but must compensate owners.
5th and 14th	Due process	Normal procedural protections such as advance notice or hearings may be temporarily reduced during an emergency, if necessary to protect the public.
14th	Equal protection	Officials may distinguish between different populations when allocating scarce resources, depending on specific, relevant criteria.

Due Process: Individual Protections and Rights

A vaccine is now available that provides excellent protection against the current flu outbreak. It is most effective in children, who are also the most likely to spread this illness to others in the community. Your department develops a mandatory vaccination plan for children in the community, but local parents object because they are unsure about the long-term safety of the vaccine. Can you require that their children receive the vaccination against the parents' wishes in order to protect the children and the community?

The government may not interfere with individuals' rights without adequate constitutional justification. This is known as **substantive due process**.

Procedural due process identifies the legal process that must be met – in other words “how” a government official or entity may go about interfering with individual rights. Government may not infringe on right to life, liberty, or property without appropriate

procedures and safeguards. The nature and scope of the deprivation and specific state and local requirements will determine which procedures (e.g., notice, hearing, right to present evidence) you should use.

Restrictions of due process should be rare and only for compelling reasons that could be justified to a court.

Fundamental rights (e.g., privacy, parental rights) receive the strongest legal protection. A fundamental right may only be infringed with particularly strong justification for the most important public interests—otherwise the infringement is unconstitutional.

Other rights that are considered less fundamental are also protected, but may be limited more readily for a legitimate public benefit. An example of a non-fundamental right that may be infringed in this context is **freedom of contract**. A non-fundamental right requires meeting less strenuous standards of justification, but infringement without meeting these standards is still unconstitutional. In all cases, government cannot act arbitrarily or capriciously, and must apply provisions equally and fairly to all individuals and groups.

Potential Emergency Powers

Government agencies may have enhanced powers to respond during a declared emergency in the interests of protecting the public's health. Some powers that public health officials may have during a declared emergency include:

- **Taking Private Property**
Local governments may be able to take private property quickly without advance due process or compensation.
- **Requiring Vaccination or Medical Treatment**
State or local public health authorities may be authorized to administer screening, testing, treatment, and vaccination. However, individuals can typically opt out.
- **Isolation and Quarantine**
Public health authorities can require people to submit to quarantine or isolation if exposed to or infected with an infectious condition.
- **Procuring and Allocating Resources**
Public health authorities may benefit from the temporary lifting of procurement requirements and the ability to quickly purchase supplies. They may also ration and prioritize who receives the supplies.

Additional Emergency Powers

Public health authorities have considerable additional public health powers in declared public health emergencies.

Public health agencies can conduct routine environmental health inspections of restaurants or other facilities to address a public health concern or nuisance. During an emergency, existing notice timeframes for these inspections may be reduced, and other procedural requirements may be waived completely, depending on the nature of the emergency and the specific laws of the jurisdiction.

Freedom of contract is the freedom to make contracts without unreasonable legal regulations.

Isolation and quarantine are public health practices used to stop or limit the spread of disease. Isolation is used to separate ill persons who have a communicable disease from those who are healthy. Quarantine is used to separate and restrict the movement of well persons who may have been exposed to a communicable disease to see if they become ill.
- CDC

In epidemiologic investigations, public health agencies determine the cause of potential or actual disease outbreaks and take measures to prevent morbidity and mortality. To make sure their investigations are accurate, agencies have access to identifiable health data and other private information (e.g., school absence records, over-the-counter medication sales, internet searches) without violating privacy laws. During a declared public health emergency, officials may have increased powers to track and conduct enhanced or expanded surveillance to better understand the epidemiology of a disease.

Some public health agencies also have specific authority to control and ensure safe disposal of human remains or infectious waste during declared emergencies.

Federal Emergency Medical Treatment and Active Labor Act (EMTALA)

The Federal Emergency Medical Treatment and Active Labor Act (EMTALA) applies to hospitals that:

- Accept Medicaid and Medicare
- Have an emergency department or offer emergency services

The Act requires that hospitals screen all patients who come to the emergency department regardless of their insurance status or ability to pay. If an emergency condition (including active labor) exists, the patient must receive sufficient treatment until he or she is stabilized.

During a federally-declared emergency, certain provisions of EMTALA can be waived under limited circumstances by a public health emergency declaration by the Secretary of the Department of Health & Human Services.

During the 2005 Hurricane Katrina disaster and the 2009 H1N1 epidemic, the Department of Health & Human Services issued temporary EMTALA waivers. In the case of H1N1, the waiver allowed hospitals and other emergency providers to temporarily divert patients presenting with flu-like conditions to other facilities on site or nearby.

For more information on limitations on waivers of certain provisions under an emergency declaration, see the [CMS Manual System Update](#) (July 16, 2010) at pp 10-14.

HIPAA

The Health Insurance Portability and Accountability Act (HIPAA) is a federal law that

You are a communicable disease investigator tracking an outbreak of Pertussis (whooping cough) in local elementary schools. You have asked local pediatricians to provide a weekly report about the children they have seen with Pertussis, but some of the doctors refuse to provide the requested information, saying it would violate federal patient privacy laws. Can you collect the information you need?

protects patient health data. Using its administrative authority under HIPAA, the Department of Health and Human Services (DHHS) created a set of national privacy standards for health information known as the Privacy Rule. These standards provide patients with more control over how their personal health information is used and disclosed.

What is covered under the Privacy Rule? **Protected Health Information (PHI)** includes 18 personal identifiers, such as name, telephone number, address, and medical record numbers.

Personal Identifiers

1. Names
2. All geographic identifiers smaller than a state, with limited exceptions
3. All elements of dates (except year) for dates directly related to an individual; and all ages over 89 and all elements of dates (including year) indicative of such age
4. Phone numbers
5. Fax numbers
6. E-mail addresses
7. Social Security numbers
8. Medical record numbers
9. Health plan beneficiary numbers
10. Account numbers
11. Certificate/license numbers
12. Vehicle identifiers and serial numbers (including license plate numbers)
13. Device identifiers and serial numbers
14. URLs
15. IP address numbers
16. Biometric identifiers, including finger and voice prints
17. Full face photographic images
18. Any other unique identifying number or characteristic

HIPAA applies to covered entities such as health care providers, health plans, clearinghouses, and their business associates. Agencies conducting public health activities such as surveillance are generally not considered covered entities. However, public health staff or departments that provide clinical health care services or other **covered functions** may be subject to the Privacy Rule. Because local public health authorities may have to rely on covered entities to provide identifiable health data, Privacy Rule implications may still arise even if public health authorities do not directly provide clinical care or similar services.

Not all public health agencies engage in covered functions, and would therefore not

Protected health information is all information related to physical and mental health conditions, provision of health care, and payment for health care that can be connected to a specific person.

Covered function - Under HIPAA, any function the performance of which makes the performer a health plan, a health care provider, or a health care clearinghouse.

be considered covered entities. Read more about [covered entities here](#) and on the next page. During an emergency, public health staff and departments may engage in covered functions. As a result, they should know how to determine whether these activities are subject to the Privacy Rule.

People must give written authorization for covered entities to use or disclose their PHI. However, there are some exceptions, as discussed below.

Public Health Exception

Covered entities may collect PHI or disclose it to local public health authorities without individual authorization:

- To prevent or control disease, injury, or disability
- For disease reporting and public health surveillance
- To notify persons exposed to communicable diseases
- To prevent serious threats to persons or the public
- To address specific issues in declared emergencies

These exceptions exist in normal circumstances (no declaration of emergency is needed to invoke these exceptions). In each state, there is a list of “reportable disease and conditions” that health care providers are required to report to the health department. The level of awareness and compliance with this state reporting requirement is often poor, but even in the absence of an emergency, health departments have the authority to collect information of public health value.

In a federally-declared emergency the federal Department of Health and Human Services may waive certain provisions of the HIPAA Privacy Rule. For example, DHHS Secretary Kathleen Sebelius issued a waiver to this effect for hospitals operating under emergency protocols following Hurricane Sandy in 2012.

Specifically, DHHS may waive sanctions and penalties for failing to:

- Obtain authorization to speak with family or friends involved in a patient’s care
- Honor requests to opt out of a facility directory
- Distribute notice of privacy practices
- Honor requests for privacy restrictions and confidential communications

Planning for Vulnerable Populations

Addressing the needs of people with physical, mental and behavioral health conditions may raise unique legal issues and considerations.

Physical and mental health conditions may equally constitute “disabilities” as defined by the federal Americans with Disabilities Act (ADA) and comparable state or local laws. Governments and emergency planners must address the needs of people with disabilities, or face potential legal liability. The US District Court of Central California **recently held** that the City of Los Angeles violated the ADA by failing to include plans to address the unique needs of individuals with disabilities in its comprehensive city emergency plan.

Communities Actively Living Independent and Free v. City of Los Angeles, Case #CV 09-0287 CBM (RZx) (C.D. Cal. (2011)).

Limiting the freedoms of individuals with mental health disabilities requires significant due process, but in emergencies expedited decisions may be necessary. Often the physical health impacts of public health emergencies dominate governmental efforts to respond. However, government agencies and their partners must also consider mental and behavioral health impacts on affected populations, specifically vulnerable populations like those with existing mental health conditions, children, and emergency responders (among others).

Among the legal issues you may encounter regarding people with special needs are:

- Specific legal duties regarding informed consent and protection of others
- Groups entitled to specific services or treatment
- Unique difficulties for counselors encountering patients during emergencies
- Legal issues regarding psychotropic medications and controlled substances

For more information about the City of Los Angeles case, please see the [legal brief](#).

Summary

In this section, we addressed the importance of balancing individual, constitutionally protected rights with the interests and safety of the public in an emergency. Certain legally-authorized emergency powers which restrict some individual rights may be permitted, for example, to administer widespread testing, screening, treatment and vaccinations. Public health officials must act with public safety foremost, but should incorporate privacy protections for individuals. And finally, emergency preparedness plans are required under the federal Americans with Disabilities Act (ADA) to address the needs of people with physical and mental disabilities.

Response Activities

In the previous section, we discussed how government agencies may have enhanced powers during declared emergencies, including taking private property and isolating infected individuals. In this section we will cover public health response activities. While social distancing measures such as isolation and quarantine may be effective, they must be implemented and enforced in accordance with the applicable laws. This section will cover response activities including:

- Social distancing
- Quarantine and isolation
- Managing scarce resources
- Standards of care

Social Distancing

H1N1 influenza first emerged in Mexico City in 2009. Despite significant uncertainty regarding the severity and rate of spread of the virus, officials acted quickly to limit its spread by closing schools and restaurants and canceling large public gatherings such as soccer games. According to some studies these measures may have cut transmission rates by one-third and hospitalization rates by nearly two-thirds.

In certain circumstances, these and other social distancing measures can effectively curtail rates of infection within a community by reducing the chances for mass spread of highly communicable conditions.

Social distancing measures should be tailored to maximize effectiveness while minimizing restrictions, whether implemented under regular public health authorities or during a declared emergency. For example, if an infectious disease has a higher impact on children, school closures may be an effective option. Additional social distancing measures available to government public health authorities include restrictions relating to health care facilities, transportation, and public areas.

Quarantine & Isolation

In response to SARS in 2003, public health officials in various countries implemented a wide variety of measures to prevent exposed individuals from spreading the disease, including: voluntary home confinement with telephone follow-up in Canada; confinement to military facilities, public housing centers, and a home for the elderly in Taiwan; and use of video surveillance and electronic tracking of individuals to monitor violation of quarantine in Singapore. Can you implement these or similar measures in your jurisdiction during an outbreak? What procedures would you have to follow?

Quarantine and isolation are highly restrictive social distancing measures that may be used only in certain circumstances when needed to protect individual or communal health.

During a declared public health emergency, public health agents may be authorized by state or local law to use available means to prevent the spread or transmission of infectious diseases.

Non-Emergency	Declared Emergency
<p>Due process may require:</p> <ul style="list-style-type: none"> • Notice • Hearing • Right to review (Appeal) <p>Equal protection may require:</p> <ul style="list-style-type: none"> • Similar treatment for like individuals • Avoidance of discrimination for protected classes 	<p>Expedited isolation and quarantine powers may be authorized so long as due process, equal protection, and other constitutional interests are respected to the extent possible.</p>

Compliance

A variety of approaches to compliance are available for disease control measures such as quarantine and isolation or social distancing. These compliance approaches include:

- Voluntary measures. For example, during the SARS outbreak in 2003, voluntary home quarantine was widely used by public health officials in Toronto, Canada.
- Creating conditions to encourage compliance. For example, guaranteed job security while staying home, or compensated sick leave.

- Seeking court-ordered enforcement. For example, an injunction. Contents of the order should include:
 1. Legal basis for the control measure
 2. Factual basis (public health justification)
 3. Action required
 4. Consequences for disobeying
 5. Provisions for review of control measures that deprive an individual of liberty or property
- Imposing penalties. For example, forcible detention, criminal sanctions, loss of business license, etc., for violation of court order.

For any enforcement measure, it is important to ensure that affected persons have appropriate access to the courts, but in a manner that does not expose others to potential harm. This may require making courts available outside of normal business hours, video communication with a person being kept in isolation, or other measures minimizing risk of transmission of disease at court or administrative hearings.

Additional Resource regarding voluntary measures: [Quarantine, Isolation and Other Legal Issues from the SARS Experience: Concerns for Local Health Officials](#)

Considerations

Consider multiple factors before determining that a specific disease control measure will be effective.

Evaluate factual basis for social distancing

- Is there an imminent threat to the public's health that warrants social distancing?
- What is the nature and scope of social distancing measures necessary to address the threat?
- What is the epidemiology of the disease? This will determine the appropriateness of the measures.

Consult with attorney to determine

- Nature and scope of authority to impose social distancing
- Procedures for imposing social distancing
- Limitations on authority to impose social distancing
- Constitutional considerations include
 - Freedom of religion
 - Equal protection
 - Freedom of movement
 - Privacy
 - Right to assemble

Evaluate practicality and feasibility of social distancing using potential measures, including resources needed to implement social distancing and to meet needs of individuals in quarantine or isolation.

Evaluate public acceptability of imposed measures, likelihood of cooperation, and resources to enforce measures when needed (and the consequences of enforcement).

Managing Scarce Resources

Essential supplies such as vaccines, ventilators, medications, blood products, and other resources may be scarce during an emergency. Who should have priority in receiving these resources? Should they go first to those most in need? Those with the best chance for meaningful recovery? The first to arrive? Essential health care personnel? Who makes these decisions?

There are few definitive answers to these questions, but efforts are underway nationally at the state and federal levels to develop emergency plans consistent with the Institute of Medicine's Crisis Standards of Care guidance, discussed on the next page, as well as other legal and ethical models.

For additional information, see the [Ethical Guidance for Public Health Emergency Preparedness and Response](#).

Standard of Care

In normal, non-emergency situations most states assess the **standard of care** a physician or practitioner must provide based on what a reasonable physician or practitioner with like training would do in similar circumstances ("reasonable physician" standard). A few jurisdictions use a standard of what the prevailing custom or practice for medical treatment is in a specific locale ("custom or practice" standard). Where a practitioner's actions (or inactions) fall below this standard and harm to the patient results soon after, a liability claim grounded in negligence may arise.

Crisis Standard of Care

In declared emergencies, as hospitals and practitioners shift to medical triage practices to meet patient surge capacity, the standard of care changes as well. The [Institute of Medicine](#) has referred to the prevailing standard in emergencies as "**crisis standard of care**." This means adapting the standard of care to screen and treat increasing numbers of patients using limited resources. Ongoing work by the Institute of Medicine seeks to clarify specific expectations and requirements toward implementing emergency health services during crises.

Practice & Dispensing Authority

Laws generally specify the types of procedures and services a licensed health care professional can provide in routine, non-emergency circumstances. Requirements vary across states, but tend to provide consistent standards for like professionals. During a declared emergency, however, when medical triage is essential, these restrictions may change temporarily with approval of state medical authorities.

These waivers are not meant to allow unskilled health care workers to serve in the

same roles as licensed health care practitioners. Nor do they go so far as to allow different classes of workers to absorb responsibilities typically reserved for specific personnel. For example, nurse practitioners are not authorized to practice medicine in declared emergencies like physicians. However, nurses may be authorized temporarily to perform specific functions outside their normal scope of practice under the supervision of physicians. One example of this kind of specific function is diagnosing and providing treatment for a specific infectious disease during an epidemic, using an approved protocol.

Emergencies may also require changes to rules regarding who is authorized to dispense medications. For example, waivers may permit practitioners licensed in other states to dispense medications during an emergency. Additionally, to facilitate quick distribution, public health officials may also partner with private sector businesses to distribute antibiotics or other medications to community members.

Emergency Use Authorizations

The US Food and Drug Administration (FDA) can permit the use of unapproved medical products (or unapproved uses of approved products) during a federally-declared state of emergency through an Emergency Use Authorization, if:

1. There is a serious or life-threatening disease or condition
2. An unapproved product appears potentially effective to diagnose, treat or prevent
3. The known and potential benefits outweigh known and potential risks
4. There is a lack of adequate and available approved alternatives
5. Necessary and appropriate conditions on use are established

The **Pandemic and All-Hazards Preparedness Reauthorization Act of 2013** clarified the FDA's authority to issue Emergency Use Authorizations in advance of a declared emergency if there is significant potential for a public health emergency that affects or has significant potential to affect national security or the health and security of US citizens abroad. For example, the FDA allowed the use of non-approved **CDC swH1N1 (swine) Influenza Real-Time RT-PCR test** for troops overseas to enable more rapid diagnosis. The FDA issued a similar Emergency Use Authorization in response to H7N9 in 2013.

See additional resources on this topic from the [FDA](#).

Liability

The federal **Public Readiness and Emergency Preparedness (PREP) Act** was used to provide liability protection for the manufacturing, testing, distribution, and dispensing of the 2009 H1N1 influenza vaccine. The 2005 Federal PREP Act 42 USC. § 247d-6d:

- Authorizes DHHS' Secretary to grant federal liability protection for the use of "**covered countermeasures**" during federally declared emergencies.
- Applies to individuals and entities (businesses and non-profits) who assist in the distribution of covered countermeasures.

The **Pandemic and All-Hazards Preparedness Reauthorization Act of 2013 (PAHPRA)** reauthorized the Pandemic and All-Hazards Preparedness Act of 2006. It also contains legal authorities to strengthen the preparedness for public health emergencies that involve chemical, biological, radiological, or nuclear agents, as well as emerging infectious disease threats.

Note that implementation of the 2009 H1N1 national vaccination initiative did not result in significant liability concerns. Prior to the PREP Act, however, liability issues did arise after some instances, such as the [swine flu](#) vaccination in 1976 and the smallpox vaccination in 2003.

To close some of the existing gaps in emergency liability protections for business and nonprofit entities, a majority of states feature laws or policies to protect entities voluntarily assisting with governmental emergency response efforts. For more information, see the [Trust for America's Health 2009 Report](#), pp 35-37.

Governments commonly ask individuals and entities during emergencies for their voluntary assistance by providing services or making their private facilities available to the community. In rare cases when a government uses emergency powers to completely take over a private facility, that government may be liable for property damages and injuries that take place while they control the facility.

Summary

In this section, you learned that you should use the least restrictive social distancing measures which do not interfere with individual rights. This standard applies even in emergencies. The options for social distancing range from voluntary home confinement to court-ordered enforcement and penalties. We discussed the ethical implications of managing and distributing supplies when resources are limited. You read about the expectations for standard of care, for example the “reasonable physician” standard for medical treatment, and the “crisis standard of care” to adapt the standard of care to screen and treat a large number of patients using limited resources. You also learned about protections for business and non-profit entities helping with emergency response efforts as implemented by the Federal Public Readiness and Emergency Preparedness Act.

Volunteers

Responding to a call for trained volunteers following a deadly tornado, a nurse practitioner from a neighboring state wants to assist your department's response efforts. She is licensed in her home state and is authorized to diagnose, treat, and issue prescriptions in many circumstances. However, she is not licensed in your state, which has a more restricted scope of practice for nurse practitioners. Can she participate in your response efforts and, if so, to what degree?

While volunteer health practitioners can provide critical medical services to meet patient surge capacity in declared emergencies, their deployment and use raise multiple legal issues which may be resolved through volunteer coordinating systems and emergency legal authorities.

Volunteer Registration Programs

Below are examples of two national programs that help support the deployment and use of volunteer health professionals to facilitate emergency responses:

Emergency System for Advance Registration of Volunteer Health Professionals

(ESAR-VHP): This is a national network of state-based volunteer registries. Health professionals can enter their licenses and credentials and have them verified before a disaster. This is a federally funded program supported by the Department of Health and Human Services. Each state may have a specific name for their registry.

Medical Reserve Corps (MRC): The Office of Civilian Volunteer Medical Reserve Corps, within the Office of the US Surgeon General, coordinates thousands of local MRC units across the country focused on providing services for local communities, but these volunteers can be deployed federally to other areas of need. The MRC recruits both medical and non-medical personnel.

Often, volunteer health professionals are listed in both MRC and ESAR-VHP programs. Federal organizational efforts have led state ESAR-VHP programs to coordinate closely with MRC units.

The Pandemic and All- Hazards Preparedness Reauthorization Act (PAHPRA) of 2013 authorized the US House and Senate Appropriations Committees to prioritize and provide resources for a number of programs including ESAR-VHP.

Licensing & Credentialing

The licensing of health professionals is a state-level authority, and there is considerable variation in how health professionals are licensed from state to state. State laws generally require that a health care professional be actively licensed by state licensing boards prior to providing medical services. During declared emergencies, however, several legal agreements and other laws may allow temporary waivers of licensure, certification, or permitting requirements for health care practitioners licensed in other jurisdictions. Each of these legal routes was used during Hurricane Katrina in 2005, for example, to mobilize tens of thousands of volunteers to affected hurricane states.

In addition to licensing requirements, volunteer health professionals may be limited by **hospital privilege** requirements in their ability to provide services in emergencies. However, during an emergency, hospitals or other health facilities may choose to waive these requirements through emergency or temporary privileges. The Joint Commission, which accredits most hospitals nationally, requires hospitals to include considerations for expedited privileging in declared emergencies as part of their emergency preparedness plans.

Liability

As discussed earlier, there are a variety of legal provisions that provide protection from liability for volunteers who participate in emergency response efforts.

For example, the federal **Volunteer Protection Act of 1997** shields volunteers working on behalf of non-profits and governmental entities, provided the volunteer is properly licensed or certified and is acting within the proper scope of his or her duties. Similar laws at the state level provide similar protections, and often broaden the classification of who is considered a volunteer.

Some liability protection laws may require volunteers to be vetted in advance through registration systems such as ESAR-VHP or the MRC, both discussed previously. Others,

Hospitals grant **privileges** to health care providers to practice at their facilities. This means that the provider has been granted permission to provide health care to patients based on verification of the provider's qualifications, certifications, and relevant experience.

such as the Emergency Management Assistance Compact (EMAC), temporarily “deputize” some private sector professionals as state agents during an emergency to provide them with liability protection.

Local and state liability protections can be complex. Consult with your attorney if questions arise.

Workers’ Compensation

Beyond liability concerns for harm to others, employees or volunteer health professionals may also be concerned legally about their own exposure to injuries or death related to their emergency response efforts. Federal and state-based workers’ compensation laws provide some protection for these individuals and their employers against these types of harms that occur at work.

In **non-emergencies**, workers’ compensation laws follow a simple rule—if you get hurt at work, the employer pays regardless of who is at fault.

During **declared emergencies**, however, application of workers’ compensation protections is less clear. To determine whether and how workers’ compensation protections may apply, you must consider:

- Who is an employee?
- Who is an employer?
- What is the scope of employment?
- When did the injury occur?

To the extent possible, you should address these questions in advance, prior to deploying volunteers. In most circumstances, volunteers would not have workers’ compensation protections. But during an emergency, in which volunteers may be acting on behalf of various governmental and non-profit entities, it may be less clear whether individuals are covered and who is responsible for the coverage. Forming mutual aid agreements between communities, states or adjacent countries can clearly establish workers’ status in advance so that everyone involved has the same understanding and expectations with regard to compensation for death or injury on the job.

For more information on workers’ compensation issues, see this [ASTHO fact sheet](#).

Summary

In this section, we discussed some implications of using volunteer health workers in a health emergency. Volunteer health workers may be needed to support response efforts outside the jurisdiction where they are licensed or certified. To protect these volunteers from liability and allow for rapid deployment, two programs exist to register health professionals: ESAR-VHP and MRC. The Volunteer Protection Act of 1997 shields many types of licensed professionals acting within the scope of their duties in an emergency.

We also learned that though hospital privileges are generally restricted for volunteer health professionals, during an emergency, some of these requirements may be waived, or temporary privileges granted. And finally, it’s important to know that some workers’ compensation protections may apply to volunteers in emergency conditions,

but it could depend on the cross-jurisdictional agreements and type of work being done.

Course Summary

Public health law, whether in an emergency or non-emergency situation, 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 and other safeguards effect what measures you 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.

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, you should know what powers the public health official will have, what the process is, when you can request assistance from other jurisdictions, and how you will handle volunteers.

In conclusion, the legal powers and authority granted to public health officials for emergencies may vary from state to state and among cities or counties. Seek advice from legal counsel in your jurisdiction when there are questions about how declarations of emergency will affect your ability to take action for the health and safety of your community.

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Project Team

Principal Content Developer

Daniel Orenstein, JD

Supporting Content Developers

James G. Hodge, Jr., JD, LL.M.
Susan Allan, MD, JD, MPH

Project Manager

Claire Huang, MPH

Instructional Designers

Leslie Wall

Amy VanFossen

Production

Sarah Paliulis

Amy VanFossen

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