

# **CRISIS EMERGENCY RISK COMMUNICATION**

**BE FIRST. BE RIGHT. BE CREDIBLE.**

## **CERC: Media and Public Health Law**



**U.S. Department of  
Health and Human Services**  
Centers for Disease  
Control and Prevention

Last Updated: 2014

# CERC: Media and Public Health Law

**The following chapter describes some of the most relevant laws and legal issues that relate to crisis and emergency risk communication (CERC) during public health emergencies, including:**

- Freedom of speech and the press
- Laws of defamation
- Copyright law
- The public's right to know
- Freedom of Information Act
- Health Insurance Portability and Accountability Act privacy regulations
- Public health laws
- Public health powers and liabilities
- State public health emergency powers

## Understanding the Legal Environment

During public health emergencies, it is essential for CERC communicators to be aware of the law and comply with it. A multitude of legal requirements may apply to CERC activities, including laws addressing access to information, privacy, and public health powers.

If you understand the content of relevant laws and how to apply them, you will be better able to make good communication decisions. You will be more skilled at determining what information can and cannot, and should and should not, be shared with the media and the public. You will also have a better understanding of the legal basis for decisions your organization may make—decisions you may have to explain to the public.

## Freedom of Speech and the Press

The United States Constitution grants strong protections for freedom of speech and the press. The First Amendment states: “Congress shall make no law ... abridging the freedom of speech, or of the press ...”<sup>1</sup>

Freedom of speech and freedom of the press have been recognized as fundamental rights, but they are not absolute. Laws can constitutionally limit speech and press activities if they meet a compelling state interest and are narrowly tailored to achieve that interest. There is no right to break the law to obtain or disseminate news.



## Espionage Law and the News Media

The Espionage Act of 1917 has been used to prosecute people who pass military secrets to other countries. In 1985, the act was used for the first time to prosecute and convict a government employee for disclosing information to the news media, rather than to agents of a foreign government.<sup>2,3</sup> The conviction was upheld on appeal. The Act is still being used in cases where government employees divulged classified information to the media or to others who are not authorized for classified information. In 2010, a government contract employee was indicted for releasing national defense information to a reporter<sup>4</sup> and, in the same year, charges were brought against several individuals in relation to the WikiLeaks scandal.<sup>5</sup> These developments could be seen as a warning to those who may be tempted to leak classified information to reporters, no matter their motives.

## Laws of Defamation

Knowledge of defamation law is important for those involved in any kind of public communication.<sup>6</sup> Any communicator who feels compelled to report, in tangible form or in a broadcast, that an identifiable person or business may be involved in illegal, unethical, immoral, or dishonest activity risks being sued for defamation.<sup>7</sup>

### Defamation

**Defamation is communication that does the following:**

- Exposes an individual (or organization) to hatred or contempt
- Lowers an individual in the esteem of others
- Causes an individual to be shunned
- Injures an individual in his business

**Defamation has two forms:**

- **Slander:** This is spoken defamatory communication in the presence of others. Slander is not published or broadcast.
- **Libel:** This is published or broadcast defamatory communication.

**The following conditions must be met before a statement is held legally libelous:**

- **Publication:** The defamatory statement must be published or broadcast.
- **Identification:** The communication must identify a person, persons, or entity by name or obvious suggestion.

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- **Fault:** The plaintiff has to prove that the defendant was negligent or reckless (i.e., that the defendant was at fault).
- **Falsity:** The statement must be false. True statements cannot be considered libel. In addition, the lie must be stated as fact.
- **Injury:** The defamatory statement has to have potential to cause injury. Injury is often assumed to have occurred if the statement insinuated a crime, a loathsome disease, immorality, or caused harm to one's business or job performance.

**Although any form of defamation is serious, libel is considered more serious than slander because libel is:**

- **Intentional:** Libel is more intentional than slander because the forethought involved in writing and editing precedes the deliberate act of publishing or broadcasting.
- **Widespread:** Libel is more widespread than slander because it reaches a much larger audience through publication or broadcast.
- **Permanent:** Libel is more permanent than slander because printed publications, broadcast audio recordings, and broadcast video recordings remain in existence, unlike the spontaneously spoken word.

The common law permits victims of harmful words to sue their detractors and recover sums of money for their loss of reputation. However, the First Amendment protects the media against libel actions brought by public officials, even when the official has been the victim of a lie.

Officials cannot recover damages unless they can prove that the publisher knowingly published a lie or showed reckless disregard for the truth.<sup>8</sup> Private individuals may have difficulty recovering damages for libel if the information revealed about them is a matter of public concern, a situation likely to be the case during public health emergencies.

## Retractions

One possible way to resolve an allegation of defamation is to publish a retraction. Laws vary by state, but in many states retractions are a partial defense, provided the retraction appears with the same prominence as the original. Some states have time limits for requesting and printing retractions. Other states allow media outlets to run retractions to avoid paying certain damages.



## Defamation and the Internet

The development of the Internet, social media, and other technological advances expands the ability to rapidly disseminate information online. The rapid spread of rumors and uncertain information could lead to defamation allegations. While there is little precedent in this context, online statements could constitute defamation. One court found that Internet service providers could not be held liable for defamation based on posts hosted on the server.<sup>9</sup>

## Defamation in Emergency Response

During emergency responses, anyone communicating information or reporting on events should use caution to avoid engaging in defamation. For instance, statements warning the public about a specific individual spreading an infectious disease or a business location that has been contaminated by toxic substances could give rise to libel allegations. However, so long as the information revealed is a matter of public concern, there will be a strong case against liability for libel. If feasible, anyone communicating information that could give rise to a defamation claim should consult with an attorney before releasing the information.

## Copyright Law

Copyright allows a writer, composer, artist, or photographer to own, control, and profit from the production of his or her work. Copyrighted material may not be republished without the copyright owner's permission. Often, you must pay to use the copyrighted work. Copyright law does not apply to the following:

- Facts
- Events
- Ideas
- Plans
- Methods
- Systems
- Blank forms
- Titles

The fact that copyrighted materials are located online does not allow use of those materials without the author's permission. Online materials retain their copyright protection. Users should assume that materials found online through the Internet or other online services are copyrighted unless they are clearly works of the U.S. government or otherwise noted to be in the public domain.

Works created by federal employees as part of their employment are considered works of the U.S. government.<sup>6,10</sup> Copyright protection is not available for these works in the U.S. The U.S. government may receive and hold copyrights transferred to it by assignment, bequest, or otherwise.



## Copyright Limitations: Fair Use

In general, the owner of the copyright has exclusive rights to the copyrighted work. However, the act permits “fair use” for certain purposes such as teaching, scholarship, or research. Fair use permits one author, composer, or artist to borrow limited amounts of material from another without seeking permission.

Consider the following factors to determine what constitutes fair use:<sup>11</sup>

- The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole
- The effect of the use upon the potential market for or value of the copyrighted work
- The nature of the copyrighted work, including whether the work is creative or factual

Examples of fair use by the government include the following:

- Photocopying where copies are distributed to a discrete and limited audience within the government, as opposed to copies that are sold or distributed broadly outside the government
- Copying that is done spontaneously for the purpose of facilitating an immediate and discrete objective, as opposed to the systematic archival copying of extensive materials for possible future use

## The Public’s Right to Know

When releasing information, elected officials and civil servants must weigh the public’s right to know against the need for national security and individual privacy. Citizens expect government officials to be transparent and accountable in their decisions. This is often referred to as a “right to know” about the government activities.

The public’s right to know generally is not recognized as a legal concept supported by the Constitution or an Act of Congress. Instead, it is a concept designed to promote trust and support of the government from those it governs.



## Emergency Planning and Community Right-to-Know Act<sup>12</sup>

This is one example where the public does have a legal right to know. This act imposes the following:

- Legally mandated reporting standards on facilities involved with hazardous chemicals.
- Emergency preparedness requirements on state, local, and tribal governments to plan for emergencies caused by the release of hazardous chemicals.

The public has the ability to access information regarding hazardous materials in their communities and the emergency planning that is in place should any spill or misuse occur. Similar reporting requirements exist in the Clean Air Act<sup>13</sup> and Oil Pollution Act.<sup>14</sup>

Keeping certain sensitive information secret is of utmost importance to the defense and operation of our government. The “need to know” concept is used to keep sensitive information in the hands of those whose duties require its use and away from potential U.S. enemies.<sup>6</sup>

Finding the balance between what the public has a right to know and what is in the best interest of national security can be difficult during an emergency. CDC has guidelines in place to help with these difficult decisions.

CDC will make available timely and accurate information—through proactive news releases or in response to specific requests—so that the public, Congress, and the news media may assess and understand its scientifically-based health information and programs. CDC uses the following principles:

- Final reports, information, and recommendations will be made fully and readily available.
- Communication will be open, honest, and based on sound science, conveying accurate information.
- Information will not be withheld solely to protect CDC or the government from criticism or embarrassment.
- Information will be released consistent with the Freedom of Information Act (FOIA).<sup>15</sup>
- Prevention messages will be based on supportable scientific data and sound behavioral and communication research principles. At all times, health messages will remain scientifically valid and accurate.



- CDC will honor embargo agreements with standards of peer-reviewed periodicals in the scientific and medical communities.
- Targeted health messages will be sensitive to language and cultural differences and community norms.

## Public Record Laws

Open meeting laws now in effect in every state have been enacted in an effort to end the practice of conducting public business behind closed doors. Statutes in all states give reporters and the public access to most state and local records and to meetings of deliberative bodies, including city and county councils, school boards, and the boards of trustees of state universities.<sup>16</sup>

Other kinds of records may or may not be freely available for public inspection. These include the following:

- Birth and death certificates
- Accident reports
- Complaints filed with police
- Welfare rolls

Access depends on whether a law defines them as public records, or whether courts applying common law, have defined them as such. These laws require legislative and administrative bodies to meet in public. Closed meetings can be permitted only for limited purposes. Most such laws define a public agency in broad enough terms to include any agency spending public funds.

Public records laws define a right of access for all persons, including journalists. The media are not granted any additional right of access beyond that of the general public to government materials. Legal precedent, however, supports the media's right to publish secret materials, if they can be obtained. For example, even when state laws prevent release of names of juvenile offenders, the Supreme Court has upheld that journalists can publish their names.

## Freedom of Information Act (FOIA)<sup>15</sup>

A fundamental principle of democracy is that citizens be informed about their government. FOIA ensures that the federal government provides the public with requested information to the maximum extent possible. All records in a federal agency's possession that are not already in the public domain, such as those available in the library or available from a clearinghouse, are subject to FOIA. The act requires that federal agencies make the following information available for inspection and copying:

- Decisions of administrative tribunals
- Policy statements
- Staff manuals of instruction affecting the public



The federal FOIA does not apply to state and local governments. Instead, state and local governments are covered by their own freedom of information laws, which vary from state to state and city to city. The federal FOIA also does not cover local branches of federal agencies.

FOIA cannot be used to obtain documentary information in the possession of the following persons or organizations:

- The President and his advisers
- Congress, its committees, and the few agencies under its direct control, principally the Library of Congress and the General Accounting Office
- The federal judicial system

No forms are necessary to request information under FOIA. Seekers need only write a letter with as much detail as possible about the records they want. Using FOIA to obtain a person's medical records is more difficult, and executive agencies are exempt.

These types of records may be particularly of interest during a public health emergency.

To request records on a minor (a person less than 18 years of age), the consent form must be signed by the minor's parent or guardian. The relationship between the minor and the person signing must be noted on the consent form.

Several types of information are exempt from FOIA requirements and can be withheld (in other words, not disclosed). If you intend to withhold information, it must fall under at least one exemption. Exemptions are categories of records that an agency is allowed to or must withhold from release.

Records withheld by CDC/Agency for Toxic Substances and Disease Registry usually fall into the following exemption categories:

- Records (including personnel, medical, and similar files) whose release would constitute a clearly unwarranted invasion of privacy.<sup>17</sup>
- Records containing confidential business information or inter- or intra-agency records of a pre-decisional nature, which typically contain the opinions, conclusions, or recommendations of the author(s) and are part of the decision-making or policy-making process of the agency (Additionally, trade secrets and commercial or financial information obtained with the assurance that it will be kept confidential are exempted from disclosure because they could cause substantial competitive harm if disclosed. This information includes secret formulas, customer lists, and sensitive financial information and potentially could encompass information about pharmaceutical products in short supply during an emergency.)
- Records whose release is prohibited by a law (other than FOIA).



A few additional FOIA exemptions<sup>18</sup> that may be relevant during and emergency are listed below:

- **Materials properly classified under executive order “to be kept secret in the interest of national defense or foreign policy:”** This includes information that could jeopardize national security. Documents properly classified as Top Secret, Secret, or Confidential are not releasable. The designation “For Official Use Only” is not a national security classification and cannot be used as the sole basis for withholding information.
- **Internal personnel rules and practices of an agency:** Reports related solely to the internal personnel rules and practices of an agency do not have to be released. This provision is designed to relieve the government of the burden of maintaining routine material for public inspection.
- **Certain agency memorandums and letters:** Memorandums and letters within or between agencies that would not ordinarily be available to outsiders except in connection with a lawsuit are exempt.
- **Investigatory records compiled for law enforcement purposes:** However, the law does require disclosure of records if they do not do the following:
  - Interfere with an ongoing investigation
  - Identify confidential sources or methods of gathering information
  - Invade privacy
  - Interfere with a fair trial
  - Endanger lives
- **Certain information regarding wells:** Geological and geophysical information and data, including maps, that concern wells are exempt.

In response to FOIA requests, agencies may delete information from documents they send to the seeker if that information clearly would invade an individual’s privacy. They must explain such deletions in writing. The agency also may refuse to release information that it believes to be covered by one of the exemptions. However, even when documents are withheld, the agency is required to describe them in a general way and give its reasons for denying access to them. Such a report is called a Vaughn index.

Requests for information do not have to be justified. These requests must be decided upon within 10 working days. If the agency decides not to release information, the seeker is entitled to appeal to an agency review officer, and the appeal must be granted or denied within 20 working days. If the law is observed, the maximum delay is limited to 30 working days, or 6 weeks.

Because some agencies have been overwhelmed with large numbers of requests or requests for huge volumes of documents, the law permits a 10-day extension. Agencies are permitted to charge fees to recover direct costs, such as employee labor and copying costs required to fulfill the request. If a request is deemed to be in the public interest, the agency can reduce, or even waive, its fee.



## Privacy Act of 1974

The Federal Privacy Act of 1974 is designed to prevent disclosure by government agencies of personal data about employees and others.<sup>19</sup> It limits access to personal files collected by the government. Such files are defined as those that link an individual's name with "his education, financial transactions, medical history, and criminal or employment history."

The Privacy Act offers guidelines for providing required information without sacrificing a person's right to privacy. The following records concerning federal employees are a matter of public record and no further authorization is necessary for disclosure:

- Name and title of an individual
- Grade classification or equivalent and annual rate of salary
- Position description
- Location of duty station, including room number and telephone number
- Employee name in the case of accident or criminal charges, after next of kin has been notified
- An individual's current city and state of residence, in general
- Information on an individual's hospitalization or confinement while awaiting trial

In most circumstances, you may not release the following information:

- Age or date of birth
- Race
- Marital status and dependents
- Sex
- Street address or phone number
- Legal proceedings

The Privacy Act normally protects such personal information as medical records, pay records, age, race, sex, and family background. It is important to note, however, limitations of the Privacy Act:

- The Privacy Act does not apply when FOIA requires the release of information, and its reach is limited to federal information.
- Information held by the private sector, state government, and local government is not covered by the Privacy Act.
- Twelve exceptions allow disclosure, including a broad provision authorizing disclosure for any routine use compatible with the purpose for which the information was collected.<sup>20</sup>

In some cases, media representatives may insist on obtaining information protected or exempted by the Privacy Act. In these cases, consultation with a lawyer prior to disclosure is advisable.



## Sample Privacy Act Notification Statement

“The Centers for Disease Control and Prevention, an agency of the Department of Health and Human Services, is authorized to collect this information, including the Social Security number (if applicable), under provisions of the Public Health Service Act, Section 301 (42 U.S.C. 241). Supplying the information is voluntary and there is no penalty for not providing it. The data will be used to increase understanding of disease patterns, develop prevention and control programs, and communicate new knowledge to the health community. Data will become part of CDC Privacy Act System 09-20-0136, “Epidemiologic Studies and Surveillance of Disease Problems,” and may be disclosed: to appropriate state or local public health departments and cooperating medical authorities to deal with conditions of public health significance; to private contractors assisting CDC in analyzing and refining records; to researchers under certain limited circumstances to conduct further investigations; to organizations to carry out audits and reviews on behalf of HHS; to the Department of Justice for litigation purposes, and to a congressional office assisting individuals in obtaining their records. An accounting of the disclosures that have been made by CDC will be made available to the subject individual upon request. Except for these and other permissible disclosures expressly authorized by the Privacy Act, no other disclosure may be made without the subject individual’s written consent.”

In addition, the Privacy Act notification statement must appear on CDC forms which are used by states, hospitals, or other third-party suppliers of individually identified data to CDC if a full surname is present on the copy of the form that reaches CDC. The same prototype can be used if the last sentence is modified to read: “An accounting of such disclosures will be made available to the subject individual upon request.”

## Health Insurance Portability and Accountability Act (HIPAA) Privacy Regulations

The Privacy Rule established pursuant to the Health Insurance Portability and Accountability Act of 1996 imposes additional restrictions on disclosure of protected health information by covered entities:

- Individually identifiable health information generally may not be disclosed without consent.
- Covered entities are health-care providers, health plans, and health-care clearinghouses.

Most state and local health departments do not meet the criteria for a covered entity. However, to the extent these agencies provide direct health-care services to individuals and keep individual medical records in relation to these activities, the HIPAA Privacy Rule may apply to these records.



Even when the Privacy Rule applies, many exceptions to the consent requirement exist. For example, several exceptions would permit sharing for public health emergency purposes, including allowances to disclose without consent to comply with legally required disease-reporting obligations and to avert serious threats to health or safety.<sup>17</sup>

## Privacy: Legal and Practical Considerations

Nearly all states protect a right of privacy. The four kinds of invasion comprising the law of privacy include the following:

- **Intrusion upon the individual's physical and mental solitude or seclusion:** This includes actions such as eavesdropping or entry without permission into another's private space.
- **Public disclosure of private facts:** A disclosure of private fact occurs when some medium of communication disseminates personal information that the individual involved did not want made public. The information must be of a nature that would be offensive to a person of ordinary sensibilities. Truth is not an absolute defense against disclosure. If the facts at issue are held to be newsworthy, or are taken from public record of a court or other governmental agency, publication is not an invasion of privacy. Newsworthiness is information deemed to serve the public interest.
- **False light:** False light occurs if an individual is portrayed as something other than they are to the point of embarrassment. Knowledge of falsity or reckless disregard for the truth must be proven.
- **Appropriation:** This involves the unauthorized use of one person's name or likeness to benefit another.

## Working with Sensitive Information

Public Information Officers (PIOs) often have access to sensitive information. As a liaison to the press, PIOs must make decisions, in consultation with other emergency management officials, about the release of such data. Usually, these issues are evaluated in the clearance process, as described in Chapter 6. However, PIOs should consider the following before releasing information to the media:

- **Ability:** Do you have the information on the subject? You must physically have the information before you release it.
- **Competency:** Are you qualified to discuss the topic with the news media? If you are not the expert, find out who the expert is and arrange to have him or her brief the media.
- **Authority:** Do you have the authority to discuss the issue? It's always advisable to stay in close contact to your higher headquarters to coordinate your response and get its view of the big picture.
- **Security:** Is the information classified? The security limitation is most important because of the need to safeguard classified and sensitive data. But remember that the designation "For



Official Use Only” is not a national security classification and cannot be used as the sole basis for withholding information.

- **Accuracy:** Is the information accurate? PIOs have an obligation to provide accurate, factual information and to avoid speculation.
- **Propriety:** Is the information appropriate to the situation? Ensure that information released displays sensitivity and dignity. For example, do not release photographs of disease victims that could hurt family members.
- **Policy:** Do the policies of the agency permit release of this information?

## Public Health Laws

### Sources of Authority

Public health law primarily exists at the state and local levels of government, although federal law has an influence on public health authority as well. The following sections describe these legal considerations:

- State and local public health powers
- Limitations on public health powers, including those under federal law
- Relevant legal provisions and legal issues applicable to public health emergencies

*“A natural disaster is usually the legal purview of the local state and local responders, so the local governments are the ones that have the authority to carry that out with support of the federal government after an emergency declaration.”*

*RADM Thad Allen, Retired,  
Former Commandant,  
United States Coast Guard*

### State Public Health Powers

State governments (and, by delegation, their various subdivisions) possess the authority to enact and enforce public health laws under what is known as their police powers. This is a broad concept that encompasses the functions historically undertaken by governments in regulating society.

Police powers do not come from the U.S. Constitution. They are inferred from those powers traditionally possessed by governments and exercised to protect the health, safety, welfare, and general well-being of the citizenry. Under the federalist system established by the U.S. Constitution, police powers are not granted to the federal government. Instead they comprise a portion of the powers reserved for the states under the 10th Amendment.

Police powers have been used to uphold a wide variety of actions by the states, many quite broad in their reach and impact. Generally, such laws will be upheld if it can be shown that the laws are reasonable attempts to protect and promote the public’s health, safety, and general welfare and that



the laws are not arbitrary or impulsive attempts to accomplish such an end. These broad powers allow public health officials to act to protect public health and well-being during emergencies.

## Local Public Health Powers

Local health departments carry out activities under two types of authority:

- **Delegation of authority:** State legislatures commonly empower local health departments to carry out administrative functions of the state, such as the enforcement of the state public health code.
- **Home rule authority:** To avoid the need for specific authorization each time a new need arises, most states—either through legislation or by constitutional amendment—have given local governmental units the right of local self-governance. That means they have the right to make decisions concerning their own welfare.

These two approaches are relevant because they control the extent to which local health departments can act themselves to respond to public health threats.

In states that grant greater authority to local health departments, these local entities do not have to await state-level authorizations before taking public health actions. General grants of authority can at times serve as the basis for enacting ordinances in circumstances not specifically contemplated by the state legislature. For example, courts upheld the authority of the mayor of San Francisco to declare a “public health emergency” and authorize needle-exchange programs that were otherwise illegal under state law. The state of California later passed legislation supporting this interpretation of state law.<sup>21</sup>

City councils commonly develop their own local public health ordinances or health codes. This independent exercise of power is limited by the rule that localities may not assign responsibilities that are in conflict with state laws and regulations to local health departments. Thus, public health law is even more of a patchwork at the local level because health departments are responsible for local public health ordinances, but must also deal with enforcement authority, responsibility, and limitations established by state law.



## Law and Public Health Agencies

Public health functions may be divided among a number of governmental departments, such as health, environment, and registration. Public health authority is typically exercised by boards of health and public health agencies at the state and local levels. The jurisdiction and legal authority of these entities vary from state to state. The relationship between state agencies and local public health departments within each state is itself varied and complex.

All 50 states; the District of Columbia; and the territories of Guam, Puerto Rico, American Samoa, and the U.S. Virgin Islands have a state or territorial health agency. This section refers to them as a state health agencies, for brevity. Each state health agency is directed by a health commissioner or a secretary of health. Each state also has a chief state health officer, who is the top public sector medical authority in the state. The same person may fill both positions.

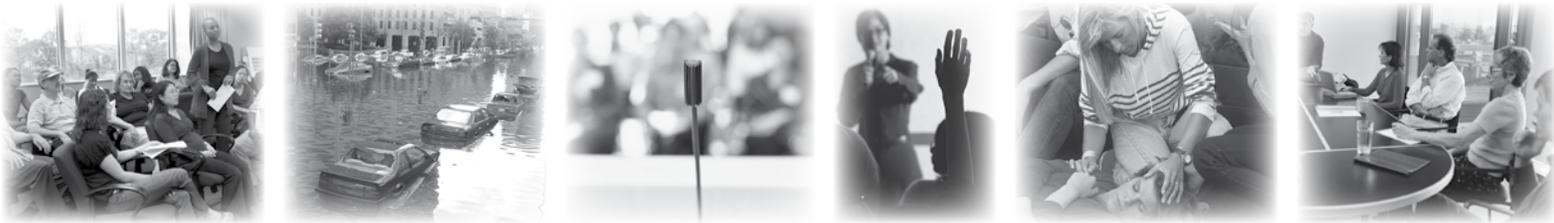
A state health agency is generally organized as one of the following:<sup>22</sup>

- An independent agency directly responsible to the governor or a state board of health (in 28 jurisdictions)
- A division within a superagency (in 23 jurisdictions)

About 2,794 local health departments operate in the United States. They are structured in one of the following ways:<sup>23</sup>

- Centralized at the state level, with the state agency operating whatever local health agency units exist within the state (in 28% of jurisdictions)
- Autonomous units, with local health agencies operating completely independently of the state health agency and receiving only consultation and advice from the state (in 37% of jurisdictions)
- Hybrid structures, in which some programs are operated entirely by the state, some programs are shared with the local health department, and some programs have the state act merely as an adviser to the local health department (in 35% of jurisdictions)<sup>22</sup>

These varying structures and relationships between state and local health agencies are relevant for two reasons. First, these structural relationships dictate the scope of authority and independence of the state and local health agencies to engage in public health activities and to respond to public health emergencies. Second, these relationships allocate responsibility for preparing for and responding to public health emergencies to the governing entities in each jurisdiction.



## Public Health Powers and Liabilities

### Interaction among Levels of Government

The public health activities of the various levels of government are often interrelated and legal authority for these activities may coexist. For example, a local health department may inspect local nursing home facilities and make enforcement recommendations to a state agency, which has final enforcement authority. At the same time, federal Medicare and Medicaid regulations may actually have the biggest governmental influence on the operations of these same regulated facilities.

In many instances, the federal government has the legal authority to preempt an area of public health regulation, denying regulatory authority to the states. Similarly, the states have authority to preempt all areas of public health regulation from local governments, denying county and municipal governments regulatory authority. The governmental level with highest authority has several options. It may do any of the following:

- Choose not to exercise its potential authority, leaving the lower levels of government the decision to adopt the legislation it deems appropriate
- Preempt the area, adopt legislation, and implement the program
- Preempt the area by adopting legislation and delegating the program's implementation to a lower government unit to run

### Limitations on Public Health Powers

Although the courts have interpreted state police powers broadly, government authorities do have limits placed on their powers. Limitations on state and federal powers are found in the following:

- The U.S. Constitution
- State constitutions
- Federal and state laws

The U.S. Constitution grants the federal government specifically enumerated powers, reserving all other powers to the states. The U.S. Constitution also describes a series of individual rights that must be protected. If public health laws or actions infringe on constitutionally protected individual rights, courts must balance between the collective needs of the community and the liberty of the individual. In general, courts traditionally have been very reluctant to invalidate these public health laws, even for the sake of protecting individual rights.



## Reality Check

The United States Supreme Court has upheld numerous public health laws at the state and local levels. The seminal 1905 decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), involved a challenge to a mandatory smallpox vaccination statute enacted by a local government:

- The Court applied the police powers broadly, finding that society can be “governed by certain laws for the common good” and that competing individual rights are not absolute.
- Since the Supreme Court decided the *Jacobson* case in 1905, it has broadened its recognition of individual rights.<sup>24</sup>
- The Supreme Court first recognized the broad right to privacy more than half a century after its *Jacobson* decision, and the recognition of that right has since been important in several of its decisions on public health issues.<sup>25,26</sup>

Nevertheless, compulsory examination, treatment, and quarantine powers have long been upheld by the nation’s courts as legitimate governmental requirements, despite their highly intrusive nature. During public health emergencies, these powers are even more likely to be upheld given the necessities of the situation.

## Constitutional Rights

The U.S. Constitution protects the individual from certain types of restrictive action by the federal government. Many public health laws have been challenged on the basis that they interfere with the civil liberties guaranteed by the Constitution. For example, several provisions of the First Amendment to the Constitution—rights to free exercise of religion, free speech, and free assembly—may be affected by public health powers.

- **Freedom of religion:** The First Amendment states that “Congress shall make no law... prohibiting the free exercise [of religion].”<sup>1</sup> When conflict occurs between a legitimate, otherwise valid law and a religious practice, the courts will look at the following:
  - The believer’s sincerity is reviewed, not the validity of the particular underlying religious beliefs.
  - How central or essential the practice at issue is to the particular religion.

Where the court finds a real conflict between religious belief and an otherwise valid law, it must weigh the competing social and individual interests.



Public health concerns have been deemed to outweigh individual interests in the area of compulsory vaccination. As the U.S. Supreme Court stated, “The right to practice religion freely does not include liberty to expose the community ... to communicable disease ...”<sup>27</sup> It should be noted, however, that states sometimes choose to provide an exemption in their vaccination laws for persons whose religious beliefs prohibit vaccination.

- **Freedom of speech:** Laws may also be invalidated because they conflict with another section of the First Amendment that protects the free communication of ideas: “Congress shall make no law ... abridging the freedom of speech, or of the press.”<sup>1</sup>

Laws can conflict with free expression and communication either directly or indirectly:

- A law making it a crime to publicly discuss the details of an emergency or disaster would be intentionally aimed at restricting communication and likely would be barred by the First Amendment.
- A law aimed at something other than communication, but restricting communication as a secondary or indirect effect might also be barred.
- A law compelling the disclosure of information may also face scrutiny, because the freedom of speech encompasses the freedom not to speak as well. For example, a law that requires health workers to disclose the names and medical information about their patients as part of a bioterrorism investigation could collide with their first amendment right of free speech, as well as legal obligations found in privacy and confidentiality laws.

The importance of an investigation may be determined to outweigh these concerns and laws such as these may be upheld.

- **Freedom of assembly:** A third section of the First Amendment protects “the right of the people peaceably to assemble.”<sup>1</sup> This provision can give rise to challenges against social distancing measures—such as mass home quarantine, road closures, and bans on public events—that may be used during a public health emergency.
- **Due process and equal protection:** The Fifth and Fourteenth Amendments to the U.S. Constitution protect individuals from being deprived by government of “life, liberty, or property, without due process of law.”<sup>1</sup>

Due process of law requires the government to uphold both procedural and substantive due process. Procedural due process demands that government provide fair procedures for individuals subject to law, which typically include the following:

- Notice
- Access to counsel
- A hearing by an impartial arbiter
- Ability to cross-examine
- Written opinion
- Option to appeal



In emergency circumstances, some of these robust procedural protections may be waived or delayed by a court. Substantive due process, by comparison, requires the government to justify government actions with sufficient reasons.

In an emergency context, due process rights are most relevant in circumstances where a person's liberty is restricted or property taken to further a public health goal.

The Fourteenth Amendment states, "... no person shall be denied equal protection of the laws."<sup>1</sup> Equal protection is an intricate concept that can be violated in two ways:

- The government may deny equality if its rules or programs make distinctions between persons who are actually similar in terms of any relevant criteria. For example, if a law restricted governmental job eligibility based on sex rather than training and ability, it would be denying equality in the application of law.
- The government may deny equality if it fails to distinguish between persons who are actually different in terms of relevant criteria. For example, a government program that provided free smoke detectors to the public would violate equal protection rights of persons with disabilities if it required them to appear personally at a government office to obtain one.

Equal protection does not require the same treatment in all instances. Government often classifies people into groups and treats the groups differently. For example, state laws prohibit alcohol and tobacco use for minors and some governments apply more stringent driver's license requirements to persons over 75 years of age. And several states restrict the driving privileges of persons suffering from certain medical conditions. Yet these distinctions have not been held to be violations of equal protection.

Government can differentiate between individuals and groups, and deprive them of liberty or property, if it has good reason to do so. Courts evaluate alleged violations of substantive due process and equal protection by balancing government actions with individual rights under the following three standards:

**Strict scrutiny:** The strict scrutiny standard applies when the law involves a "suspect classification," such as race, sex, or national origin. It also applies when the law affects a "fundamental right," such as interstate travel, voting, procreation, marriage, or free speech. The strict scrutiny standard is very difficult to satisfy. Under this higher standard, the government must show the following:

- A compelling state interest in applying the law unequally
- That the law is tailored narrowly to achieve that purpose

**Intermediate scrutiny:** The intermediate scrutiny standard applies when the law involves discrimination based on sex or against "illegitimate" children.<sup>28,29</sup> Under this higher standard, the government must show the following:



- An important state interest in applying the law unequally
- The law is substantially related to achieving that purpose

**Rational basis scrutiny:** The rational basis standard applies in cases that do not involve a “suspect classification” or a “fundamental right.” The standard is easily and routinely met. It simply requires that government offer some plausible basis for a law’s unequal application.

- **Taking of private property:** The Fifth Amendment also provides that no private property shall be taken for public use without just compensation. The Fifth Amendment prohibition applies to two types of property:
  - Real property, defined as land, buildings, and other real estate
  - Personal property, defined as everything that is subject to ownership, that is not considered “real property”

Many public health laws prohibit, ban, or otherwise regulate the possession or use of hazardous agents, products, and real estate. The government does so to protect the public’s health and safety. Such laws may substantially interfere with use and enjoyment of property.

Property taken during a public health emergency may give rise to governmental liability for the value of the property taken, or the government may avoid obligations to compensate people if the property is taken to prevent harm or avert a public nuisance.

## Public Health Officials’ Responsibilities and Liabilities

Public health authorities have broad legal authority giving them the power to institute a wide variety of measures to protect the public’s health and safety. Public health officials may have to consider the following questions:

- What does the law say about those responsibilities, and are they discretionary or mandatory?
- Can an individual or organization be forced to act?
- Can actions or failure to act be the source of legal jeopardy?
- What happens if actions result in harm?
- Can an individual or organization be sued for damages or threatened with criminal prosecution?



To be able to answer these questions, public health officials need to consider their responsibilities and liabilities:

- **Responsibilities:** State statutes that authorize public health officials to protect and enhance the public's health and safety outline a variety of functions. These functions are classified as either mandatory or discretionary:
  - **Mandatory functions:** These are duties that an agency must undertake by legislative mandate. The statute leaves no room for an agency to determine whether to carry out the function. Examples of mandatory functions include the following:
    - » Statutory requirements to maintain vital records
    - » Legal mandates to develop toxic air pollutant regulations
    - » Ordinances requiring agencies to hold "open or public meetings" and to make other information available to the public.
  - **Discretionary functions:** These are defined as duties involving the exercise of judgment or discretion in connection with planning or policy-making. Discretionary activities may include the following:
    - » Decisions to create a waste disposal site
    - » Management of natural resources
    - » Planning inspection and social service policies
    - » Allocating funds for inspection of nursing homes and day-care facilities

Health departments have a legal responsibility to carry out mandatory functions. However, they are allowed considerable latitude in how and when to carry out discretionary functions.

- **Liabilities:** Liability laws covering state and local health department agencies and employees vary considerably across the country.
  - **Liability of states and their political subdivisions:** In most, if not all, states and localities, government officials are, by statute, granted immunity from lawsuits arising from the exercise of their governmental functions. Most state governments may be held liable for negligence arising from the exercise of proprietary functions (services that must comply with professional standards of care, such as medical services). State laws generally take of two forms:
    - » Overall immunity is granted to the state, subject to specified exceptions. In such states, immunity is the general rule and the limited circumstances under which the state agrees to be sued are specifically described.



- » Immunity is the exception. State statutes following this model confer immunity on a limited basis as exceptions to a comprehensive scheme permitting lawsuits against the government. In such states, the doctrine of sovereign immunity is abolished and immunities are restored on a limited basis as deemed appropriate by state legislators.
- **Tort immunities:** The rules for governmental tort immunities of counties and municipal corporations usually take one of three forms, the first of which is the most common:
  - » The state tort claims act governs the tort immunities of its counties and municipal corporations.
  - » The state tort claims act expressly excludes political subdivisions from coverage; more limited immunities are usually provided to them under a separate tort claims act.
  - » In a small minority of states, the rules governing immunity for counties and municipalities remain defined by common law principles.

Regardless of the form they take, virtually all state tort claims acts do the following:

- » Retain immunity for essentially governmental functions
- » Waive immunity for negligence of governmental officers and employees acting within the scope of their employment
- » Establish procedures for filing claims against the government
- » Limit the amount of damages that may be recovered
- » Authorize governmental entities to purchase liability insurance
- **Negligence:** The term “negligence” means a failure to exercise reasonable care and caution. The standard by which the legal system judges “reasonable care” is often expressed as that which a “prudent” or careful person would do.
- **Liability for proprietary functions:** Public health agencies are often involved in the provision of clinical services through public health clinics, school health programs, and the like. In such situations, the public health clinician has a legal responsibility to provide care that meets the same high professional standards expected of private clinicians.

Failure to perform at this level of care and competency constitutes malpractice, that is, negligent performance by a professional that results in harm to the patient or client. In this situation, professionals who provide clinical services in health departments need malpractice insurance protection, which is usually provided by the employer (in this case, by the government).



- **Liability for governmental functions:** What about the public health professional's regulatory role? Certainly harm can result from the enforcement of public health laws. For example, a hotel commandeered during an infectious disease outbreak to house quarantined people will lose business during the event and afterward, perhaps running into the tens of thousands of dollars. The owner of the hotel is unlikely to be able to sue successfully for damages under tort law because virtually all states provide immunity from tort actions arising out of the performance of essential governmental functions.

In most states, the general rule is that governmental entities are immune from suit for torts committed by their officers and employees in performing basic governmental functions, unless liability is specifically permitted by statute, or the function, even though essentially governmental in nature, is official rather than discretionary. For the most part, the courts are extremely reluctant to impede the important work of governmental agencies by expanding the scope of their liability. For this reason, they often go to great lengths to define functions to fall within the scope of a state's immunity rules.

- **Liability of individual health officers—qualified immunity:** Injured persons who go to the time and expense of bringing a lawsuit will often name not only a governmental entity as a defendant but also the officers, agents, or employees who were involved in the incident. The latter may be sued in their official capacity as well as personally.

As a general rule, when a government employee performs duties in good faith and in a reasonable fashion, that employee is not personally liable for damages that may result from his or her acts. Judges understand that if people are made too fearful of the legal consequences of their actions, they will be timid and ineffectual in carrying out their duties—not a desirable state of affairs. Thus, the courts have fashioned legal doctrines that afford public health practitioners broad immunity from lawsuits.

This is qualified, not absolute, immunity. It only applies under circumstances where the government employee is acting in good faith within the scope of his or her authority. The principle would not hold in the following instances:

- » Gross and willful carelessness
- » Malicious, corrupt or criminal actions
- » Acts that went beyond the authority vested in the public health agency or the scope of employment

Going beyond an agency's appropriate authority may seem less clear-cut. But in fact, this problem would arise not from taking legitimate authority to excess, but rather from going off into completely unauthorized or clearly invalid areas, such as attempting to require participation in religious services by all nursing home residents.



- **Variations on the general rule:** State statutes vary widely in the amount of protection offered to individuals. In some jurisdictions health officials may be held liable for negligently performing ministerial, as opposed to discretionary, acts. For example, health officials may be personally liable for operating a motor vehicle in a negligent manner and for failing to follow authorized protocols in providing health services.
- **Other sources of immunity from liability:** Government employees and volunteers may be protected from liability through other statutory provisions specifically designed to vaccinate emergency responders and others acting for the public good.

The Volunteer Protection Act is a federal law enacted in 1996 that provides immunity for volunteers for harm caused by acts or omissions only if they were acting within the scope of their responsibility, properly licensed or certified, not receiving compensation, and not engaged in willful, criminal or reckless misconduct or gross negligence.

The Public Readiness and Emergency Preparedness Act of 2005 provides liability protection under federal and state law for manufacturers, administrators, and distributors of vaccines, and other “covered persons” as defined by the act, who prescribe, administer, or dispense “countermeasures.” Those protected under this act are provided immunity from claims of any type of loss due to countermeasures used when a public health emergency has been declared.

At the state level, Good Samaritan statutes, found in every state, provide immunity to individuals who attempt to rescue others in an emergency. The scope of these provisions varies, with some states excluding health professionals from this sort of protection. Some states have gone even further and have enacted specific immunity protections for volunteers during public health emergencies. The Uniform Emergency Volunteer Health Practitioners Act and the Emergency Management Assistance Compact provide templates for state laws granting volunteer health professionals from other states immunity to incentivize them to help without fear of liability and to create more uniformity and clarity in the protections that are provided to emergency volunteers.

- **Other legal protections from discrimination during emergencies:** Several other laws provide important protections during public health emergencies, including the following:
  - » **Americans With Disabilities Act:**<sup>30</sup> The Americans With Disabilities Act (ADA), originally passed in 1990 and amended in 2010, prohibits discrimination of persons with a disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunication. An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such impairment, or a person who is perceived by others as having such impairment. The regulations cover activities of the health department, whether provided directly or through contractual licensing or other arrangement.



Under Title II of the ADA, which applies to state and local governments, public health agencies must provide people with disabilities with an equal opportunity to utilize their programs, services, and activities. To meet these requirements, state and local government must meet certain architectural standards in the construction of new facilities. They are also required to ensure access to older and existing structures; however, they are not required to make changes that result in undue financial or administrative burdens. During an emergency, local governments and public health agencies are required to adhere to Title II in their response to the emergency, meaning that persons with disabilities are not to be discriminated against and are to receive proper communication and accommodation to be afforded the same safety and protection as persons without disabilities.

In 2011, Title II and Title III were amended to include requirements for service animals, use of wheelchairs, use of power mobility devices, effective communication, and examinations and courses. These requirements, like the 2010 amendments, came into effect on March 15, 2012.

In developing emergency preparedness, response, and communication plans, persons with disabilities may require certain accommodations to ensure they are receiving the same information and the same opportunities for protection from the consequences of the emergency. Key issues to be addressed will include the following:

- » Adequate planning for communication, notification, evacuation, transportation, and sheltering
- » Access to medications and back-up power
- » Access to mobility devices or service animals
- » Access to information

Information on how to include protections and planning for individuals with disabilities may be found at the ADA website, <http://www.ada.gov/emergencyprepguide.htm>, which offers a comprehensive guide on emergency preparedness.<sup>31</sup>

One example of preparing for disabilities involves hearing impairments. If a community's warning system involves the use of sirens, other types of warnings should be adopted as well to accommodate persons who cannot hear the sirens. Many of these issues can be managed quite easily by formulating an emergency response plan that takes into consideration the needs of persons with disabilities.



- **Civil Rights Act of 1964, Title VI:** The Civil Rights Act of 1964<sup>32,33</sup> prohibits discrimination based on race, color, or national origin. Section 601 of the act states:

No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Health departments have been challenged for discrimination based on national origin and limited English proficiency. A complaint was filed with the U.S. Office of Civil Rights by an Illinois resident on behalf of himself and other non- and limited-English-speaking persons, alleging that an Illinois county health department discriminated against them based on national origin. The complaint specifically alleged that the county denied or delayed their receiving services, required them to provide their own interpreters, and treated them in a discriminatory manner. As evidence of the latter, the complainants asserted that county officials made negative comments, had a hostile attitude, and assigned them to Spanish-speaking clinics.

As a result of the complaint, the Illinois county worked with the complainants and the U.S. Office of Civil Rights to hire interpreters, conducted sensitivity training for its staff, and reorganized delivery services to prevent segregation of Spanish-speaking persons. Similar claims could arise under this Act based upon discrimination perpetrated during the planning or implementation of a public health emergency response.

CDC has taken affirmative steps to ensure that emergency preparedness and other public health materials are equally accessible to members of the population who do not speak English fluently by producing materials in multiple languages. Additionally, materials have been developed to target different education levels to provide accessible and comprehensible materials for all members of the public.

## State Public Health Emergency Powers

Individual states possess the principal legal powers to control epidemics consistent with those described previously, but have had little experience using disease control laws in large-scale public health emergencies. Existing laws were crafted, in many cases, to deal with the outbreaks typical of the early 20th century.

As part of a broad effort to strengthen the country's preparedness for bioterrorism and other public health emergencies, many states revised their public health laws to modernize or augment emergency health powers. A number of states decided to adopt or modify the provisions contained in the Model State Emergency Health Powers Act.<sup>34</sup> According to the Center for Law and the Public's Health at Georgetown and Johns Hopkins (which drafted the Model Act), as of July 15, 2006, 44 states and the District of Columbia have introduced bills or resolutions based in whole or in part on the model law.<sup>35</sup>



This model law addressed a wide range of legal issues, including the following:

- Reporting of disease cases
- Quarantine
- Vaccination
- Protection of civil liberties
- Property issues
- Infectious waste disposal
- Control of health-care supplies
- Access to medical records
- Effective coordination with other state, local, and federal agencies

## Restrictions on Personal Liberty

The most relevant, and controversial, of the emergency powers are provisions that authorize restrictions on personal liberty (quarantine, isolation, travel restrictions, loss of privacy) and property (decontamination, use of supplies and facilities, disposal of remains). Once a public health emergency has been declared pursuant to the law, public health officials have increased authority to use their police powers to rapidly respond to emerging circumstances to protect the public's health.<sup>36</sup>

Restrictions on personal liberty imposed by public health officials can include the following:

- Quarantine and isolation
- Travel and trade restrictions
- Violations of privacy
- Social distancing measures
- Compulsory treatment

Quarantine and isolation powers, restrictions on movement of goods and people, and other compulsory measures exist under federal and state laws.

At the federal level, the Public Health Service Act grants the U.S. Public Health Service responsibility for preventing the introduction, transmission, and spread of communicable diseases from foreign countries into the U.S.<sup>37</sup> Under its delegated authority, the Division of Global Migration and Quarantine is empowered to detain, medically examine, or conditionally release individuals and wildlife suspected of carrying a communicable disease.

The list of diseases for which quarantine can be required is contained in an executive order of the president and includes the following:<sup>38</sup>

- Cholera
- Diphtheria
- Infectious tuberculosis
- Plague
- Smallpox
- Yellow fever
- Viral hemorrhagic fevers such as Marburg, Ebola, and Crimean-Congo hemorrhagic fever



In 2005, an executive order was signed adding **pandemic influenza** to the list.<sup>39</sup>

For ships and airplanes destined for the U.S., the captain or commander of the vessel must report recent deaths or illnesses among passengers on the vessel to federal authorities. The CDC Director may require detention of a carrier until the measures necessary to prevent the introduction or spread of a communicable disease have been completed.

The number of travelers and the speed of travel within and between nations have increased the opportunities for disease to spread from one country or continent to another. The outbreak of Severe Acute Respiratory Syndrome (SARS) during 2002–2003 posed a substantial challenge for national and international systems designed to control the spread of communicable diseases.<sup>40</sup> SARS emerged initially from China, but rapidly spread to 29 countries over several months. As a new communicable disease in human populations, initially there were no screening tests or treatments for SARS. Early infections resulted in high rates of illness and death.

Because of the risk of this new epidemic and the uncertainty surrounding its cause, source, and method of spread, many countries implemented quarantine and isolation for those exposed to or showing symptoms of SARS. The World Health Organization (WHO) endorsed the use of quarantine and isolation in these circumstances because of the following:

- SARS was new and novel.
- SARS was a pathogen that was highly able to cause disease.
- SARS had no treatment or containment alternatives at the time.

Canada used primarily voluntary quarantine measures to address possible SARS exposures. China, Taiwan, Hong Kong, and Singapore used more coercive mandatory quarantine orders that included harsh penalties and enforcement tactics.

Isolation typically occurred in hospital settings while quarantine most often was applied in a person's home. Many health-care workers treating infected patients were also subject to modified quarantine orders, allowing them to travel to and from work but otherwise limiting contact with others. Social distancing measures such as school and work closings were also implemented in some countries.<sup>35,38</sup>

While the U.S. was not significantly affected by the SARS epidemic, the lessons of this outbreak primed later responses to pandemic influenza in 2009. Additionally, a new emerging infectious disease like SARS would trigger the International Health Regulations, international standards for preventing the spread of infectious diseases. These standards allow WHO to declare an infectious disease a “public health emergency of international concern” and respond by providing assistance and making recommendations to affected countries.<sup>41</sup>



U.S. federal law also permits the Director of the CDC to take measures to prevent spread of diseases, when the Director determines that the measures taken by health authorities of any state or U.S. possession are insufficient to prevent the spread of communicable diseases from one state to another.<sup>7,42</sup> Measures may include the following:

- Inspection
- Fumigation
- Disinfection
- Sanitation
- Pest extermination
- Destruction of animals or articles believed to be sources of infection

A person who has a communicable disease during the period when the disease can be transmitted to other people can be restricted from traveling from one state or possession to another without a permit from the state or territorial health officer, or destination locality.

The person in charge of any conveyance, such as a bus, ship, or plane, that is engaged in interstate traffic on which a case or suspected case of a communicable disease develops is required, as soon as practicable, to notify the local health authority at the next port of call, station, or stop, and to take measures to prevent the spread of the disease as the local health authority directs.

State laws authorize quarantine and isolation powers. Most often these powers are explicitly granted in the state public health code, and courts have consistently upheld these powers as consistent with state police powers. The scope of state quarantine and isolation measures varies:

- Some states have broad powers that could be applied to any emerging infectious disease threat.
- Other states have regulations targeted to specific conditions.

More targeted quarantine and isolation measures, such as those that only apply to specific disease conditions, could cause problems. If new diseases emerge and threaten the public's health, it may not be clear whether public health officials could use quarantine and isolation rules to respond.

Constitutional limitations on the use of these coercive powers apply as well. Quarantine and isolation powers must comply with procedural and substantive due process provisions. Since deprivation of liberty involves a fundamental right, the government must demonstrate that it has a compelling interest and the power is being applied in a way that is narrowly tailored to achieve a public health goal.

Other uses of state police powers for community containment, such as social distancing, event cancellation, and related strategies, also may raise constitutional concerns. These, however, are less restrictive on liberties and therefore less likely to face strict scrutiny by a court.



## Restrictions on Property

Public health emergency powers may permit a range of action by state and local governments to restrict, secure, and manage property during an emergency response. Many situations might require property management in a public health emergency. Examples include the following:

- Decontamination of facilities
- Acquisition of vaccines, medicines, or hospital beds
- Use of private facilities for isolation, quarantine, or disposal of human remains

During the anthrax attacks in 2001, public health authorities had to close various public and private facilities for decontamination. Consistent with legal fair safeguards, including compensation for taking private property used for public purposes, clear legal authority is needed to manage property to contain a serious health threat.<sup>43</sup>

Once a public health emergency has been declared, some states allow authorities to use and take temporary control of certain private sector businesses and activities that are of critical importance to epidemic control measures. Authorities may take control of landfills and other disposal facilities and services to safely eliminate infectious waste. This could include bodily fluids, biopsy materials, syringes, and other materials that may contain pathogens that otherwise pose a public health risk. Health-care facilities and supplies may be procured or controlled to treat and care for patients and the general public. Areas normally accessible to the public may be closed to prevent additional exposures.

Whenever health authorities take private property to use for public health purposes, constitutional law requires that the property owner be provided just compensation. This means the state must pay private owners for the use of their property.

For situations in which public health authorities must condemn or destroy private property posing a danger to the public, such as equipment contaminated with anthrax spores or smallpox virus, no compensation to the property owners is required. States, however, may choose to make a fair compensation.

Under existing legal powers to abate public nuisances, authorities are able to condemn, remove, or destroy any property that may harm the public's health. Other permissible property control measures may include restricting certain commercial transactions and practices, such as price gouging, to address problems arising from the scarcity of resources that often accompanies public health emergencies.

While property control measures may generate controversy, they were created to provide public health authorities with important powers to more rapidly address an ongoing public health emergency. Because the application of law varies in different states, it is advisable to consult with an attorney to understand the applicable law in any particular jurisdiction.<sup>44</sup>



## **Modern Day Example of Emergency Response and Communication: H1N1**

Outbreaks of various flu strains have led to some of the changes and modern-day use of the public health powers discussed in this chapter. One of the first developments occurred in 2005 when an executive order was signed adding certain types of flu to the list of diseases to be quarantined. The language in the executive order specifically states: “Influenza caused by novel or re-emergent influenza viruses that are causing, or have the potential to cause, a pandemic.”<sup>39</sup>

The major utilization of these powers, however, occurred during the 2009 H1N1 outbreak, resulting in multiple states, the Food and Drug Administration, and the Department of Health and Human Services declaring public health emergencies.<sup>45</sup>

Once the virus was discovered, CDC took immediate action in beginning to track the disease and the possibility of its spread. After determining that the virus could spread between humans, vaccine work began. On April 25, 2009, under the rules of the International Health Regulations, the Director of WHO declared the outbreak a public health emergency of international concern. On April 26, 2009, the U.S. also declared a nationwide public health emergency.

WHO issued recommendations for the preventing the spread of, or contracting, this influenza virus on April 27, 2009. The recommendation included staying home if exhibiting symptoms of any kind to prevent spreading. WHO also advised taking antiviral medications if recommended by a doctor. On April 29, WHO declared a pandemic was imminent and requested countries implement their pandemic preparedness plans. The U.S. did so and CDC continued to communicate with the public, schools, and health-care professionals to provide information on how to deal with this particular flu strain.

Preventive measures were a key focus of pandemic response efforts, including developing a vaccine and impeding the spreading of the disease through social distancing. A number of local school districts, for example, closed schools and suspended group activities to attempt to stop the spread of the disease.

The H1N1 example shows that in a modern day pandemic, international cooperation, immediate and constant action, preparedness, and preventive measures are at the forefront of handling this type of public health emergency. Communication between countries, public health officials, local governments, health-care workers, schools, and the general public remains integral in these types of circumstances. Utilizing emergency preparedness plans, state emergency powers, and other relevant legal provisions may help contain the spread of infection and mitigate the scope of harm when this type of disaster strikes.



## **Conclusion**

This chapter outlined many of the important legal issues and requirements that may apply when using CERC during public health emergencies. Laws will greatly influence your communication activities and the actions of public health officials in emergency situations.

While this brief overview provides a general roadmap to relevant laws, it's important to consult with counsel during actual events to determine the specific legal obligations that must be followed.



## References

1. U.S. National Archives & Records Administration. The Bill of Rights: a transcription [online]. [cited 2012 Jul]. Available from URL: [http://www.archives.gov/exhibits/charters/bill\\_of\\_rights\\_transcript.html](http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html).
2. Gathering, transmitting or losing defense information, 18 USC sec 793 [online]. 2012. [cited 2012 Jul]. Available from URL: <http://uscode.house.gov/download/pls/18C37.txt>.
3. United States of America v Morison, 604 F Supp 655 [online]. District Court for the District of MD 1985. [cited 2012 Jul]. Available from URL: <http://frank.mtsu.edu/~lburriss/morison.html>.
4. United States v Kim, CR-10-225, joint status report [online]. District Court for the District of Columbia, 2010. [cited 2012 Jul]. Available from URL: <http://www.fas.org/sgp/jud/kim/030211-status.pdf>.
5. Calabresi M. WikiLeaks' war on secrecy: truth's consequences. Time Magazine World [online]. 2010 Dec 2. [cited 2012 Jul]. Available from URL: <http://www.time.com/time/magazine/article/0,9171,2034488,00.html?articleid=2034488?contentType=article?chn=world>.
6. Holsinger RL. Media law. New York (NY): McGraw-Hill; 1991.
7. CDCynergy. Legal issues you should know [online]. [cited 2012 Jul]. Available from URL: [http://www.orau.gov/cdcynergy/erc/Content/activeinformation/essential\\_principles/EP-legal\\_content.htm](http://www.orau.gov/cdcynergy/erc/Content/activeinformation/essential_principles/EP-legal_content.htm).
8. New York Times Co v Sullivan, 376 US 254 [online]. 1964. [cited 2012 Jul]. Available from URL: [http://scholar.google.com/scholar\\_case?case=10183527771703896207&q=New+York+Times+Co.+v.+Sullivan,+376+U.S.+254+%281964%29.&hl=en&as\\_sdt=2,11&as\\_vis=1](http://scholar.google.com/scholar_case?case=10183527771703896207&q=New+York+Times+Co.+v.+Sullivan,+376+U.S.+254+%281964%29.&hl=en&as_sdt=2,11&as_vis=1).
9. Zeran v America Online, Inc (AOL), 129 F.3d 327 [online]. 1997. [cited 2012 Jul]. Available from URL: [http://scholar.google.com/scholar\\_case?case=3112726467460676187&q=Zeran+v.+AOL,+129+F.3d+327+%281997%29.&hl=en&as\\_sdt=2,11&as\\_vis=1](http://scholar.google.com/scholar_case?case=3112726467460676187&q=Zeran+v.+AOL,+129+F.3d+327+%281997%29.&hl=en&as_sdt=2,11&as_vis=1).
10. USA.gov. Copyright and other rights pertaining to U.S. government works [online]. 2012 Apr 26. [cited 2012 Jul]. Available from URL: <http://www.usa.gov/copyright.shtml>.
11. The Library of Congress. U.S. Copyright Office. Copyright: fair use [online]. 2012 Jun. [cited 2012 Jul]. Available from URL: <http://www.copyright.gov/fls/fl102.html>.
12. U.S. Environmental Protection Agency (EPA). Emergency Planning and Community Right-To-Know Act (EPCRA) [online]. 2012 Jul 16. [cited 2012 Jul]. Available from URL: <http://www.epa.gov/oecaagct/lcra.html>.
13. U.S. Environmental Protection Agency (EPA). Clean Air Act [online]. 2012 Jul 16. [cited 2012 Jul]. Available from URL: <http://www.epa.gov/air/caa/>.
14. U.S. Environmental Protection Agency (EPA). Oil Pollution Act overview [online]. 2012 Jul 16. [cited 2012 Jul]. Available from URL: <http://www.epa.gov/oem/content/lawsregs/opaover.htm>.
15. U.S. Department of Justice. FOIA Resources. FOIA Statute [online]. [cited 2012 Jul]. Available from URL: <http://www.justice.gov/oip/foia-resources.html>.
16. FOIAdvocates. Requests/Appeals/Litigation. State public record laws [online]. 2012. [cited 2012 Jul]. Available from URL: <http://www.foiadvocates.com/records.html>.
17. U.S. Department of Health & Human Services (DHHS). Privacy Rule: HIPAA, 45 CFR 160;164 [online]. 2002 Aug 14. [cited 2012 Jul]. Available from URL: <http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/index.html>.



18. U.S. Securities and Exchange Commission. Freedom of Information Act exemptions [online]. 1999 Dec 1. [cited 2012 Jul]. Available from URL: <http://www.sec.gov/foia/nfoia.htm>.
19. U.S. Department of Justice. Privacy Act of 1974 [online]. 2011 Aug. [cited 2012 Jul]. Available from URL: <http://www.justice.gov/opcl/privacyact1974.htm>.
20. Solove DJ, Rotenberg M, Schwartz PM. Privacy, information, and technology. 2nd ed. New York (NY): Aspen Publishers; 2006.
21. Kaiser Family Foundation. Syringe exchange and AB 136: the dynamics of local consideration in six California communities. Report [online]. 2002 Feb 25. [cited 2012 Jul]. Available from URL: <http://www.kff.org/hivaids/6018-index.cfm>.
22. Association of State and Territorial Health Officials (ASTHO). State public health. Profile of state public health, volume one, pg. 7 [online]. 2009. [cited 2012 Jul]. Available from URL: <http://www.astho.org/Research/Major-Publications/>.
23. National Association of County & City Health Officials (NACCHO). The local health department workforce: findings from the 2008 national profile of local health departments [online]. 2010 May. [cited 2012 Jul]. Available from URL: [http://www.naccho.org/topics/infrastructure/profile/upload/NACCHO\\_WorkforceReport\\_FINAL.pdf](http://www.naccho.org/topics/infrastructure/profile/upload/NACCHO_WorkforceReport_FINAL.pdf).
24. Jacobson v Massachusetts, 197 US 11 [online]. 1905. [cited 2012 Jul]. Available from URL: [http://scholar.google.com/scholar\\_case?case=16169198038706839183&q=Jacobson+v.+Massachusetts,+197+U.S.+11+1905&hl=en&as\\_sdt=2,11&as\\_vis=1](http://scholar.google.com/scholar_case?case=16169198038706839183&q=Jacobson+v.+Massachusetts,+197+U.S.+11+1905&hl=en&as_sdt=2,11&as_vis=1).
25. Griswold v Connecticut, 381 US 479 [online]. 1965. [cited 2012 Jul]. Available from URL: [http://scholar.google.com/scholar\\_case?case=12276922145000050979&q=Griswold+v.+Connecticut,+1965&hl=en&as\\_sdt=2,11&as\\_vis=1](http://scholar.google.com/scholar_case?case=12276922145000050979&q=Griswold+v.+Connecticut,+1965&hl=en&as_sdt=2,11&as_vis=1).
26. Roe v Wade, 410 US 113 [online]. 1973. [cited 2012 Jul]. Available from URL: [http://scholar.google.com/scholar\\_case?case=12334123945835207673&q=Roe+v.+Wade,+410+U.S.+113+\(1973&hl=en&as\\_sdt=2,11&as\\_vis=1](http://scholar.google.com/scholar_case?case=12334123945835207673&q=Roe+v.+Wade,+410+U.S.+113+(1973&hl=en&as_sdt=2,11&as_vis=1).
27. Prince v Massachusetts, 321 US 158 [online]. 1944. [cited 2012 Jul]. Available from URL: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=321&invol=158>.
28. FindLaw for legal professionals. U.S. Constitution: Fourteenth Amendment. Section 1. rights guaranteed: the new equal protection. Classifications meriting close scrutiny: illegitimacy [online]. [cited 2012 Jul]. Available from URL: <http://caselaw.lp.findlaw.com/data/constitution/amendment14/31.html>.
29. Justia, Inc. US law: illegitimacy [online]. [cited 2012 Jul]. Available from URL: <http://law.justia.com/constitution/us/amendment-14/90-illegitimacy.html>.
30. U.S. Department of Justice. Americans with Disabilities Act of 1990, as amended [online]. 2009 Mar 25. [cited 2012 Jul]. Available from URL: <http://www.ada.gov/pubs/ada.htm>.
31. U.S. Department of Justice. Americans with Disabilities Act. An ADA guide for local governments: making community emergency preparedness and response programs accessible to people with disabilities [online]. 2008 Oct 9. [cited 2012 Jul]. Available from URL: <http://www.ada.gov/emergencyprepguide.htm>.
32. U.S. Department of Labor. Office of the Assistant Secretary for Administration and Management. Title VI, Civil Rights Act of 1964 [online]. [cited 2012 Jul]. Available from URL: <http://www.dol.gov/oasam/regs/statutes/titlevi.htm>.



33. National Archives and Records Administration. Teaching with documents: the Civil Rights Act of 1964 and the Equal Employment Opportunity Commission [online]. [cited 2012 Jul]. Available from URL: <http://www.archives.gov/education/lessons/civil-rights-act/>.
34. Gostin LO, Sapsin JW, Teret SP, Burris S, Mair JS, Hodge JG, et al. The Model State Emergency Health Powers Act. *JAMA* [online] 2002 Aug 7 [cited 2012 Jul];288(5):622–8. Available from URL: <http://academic.udayton.edu/health/syllabi/bioterrorism/7ModelState/msehpa.pdf>.
35. The Centers for Law & the Public’s Health. A collaborative at Johns Hopkins and Georgetown Universities. The Model State Emergency Health Powers Act (MSEHPA) [online]. 2010 Jan 27. [cited 2012 July]. Available from URL: <http://www.publichealthlaw.net/ModelLaws/MSEHPA.php>.
36. Gostin LO. Public health law: power, duty, restraint. 2nd ed. Berkeley (CA): University of California Press; 2008.
37. U.S. Public Health Service. Public Health Service Act. *Public Health Rep* [online] 1944 Jul–Aug [cited 2012 Jul];109(4):468. Available from URL: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1403520/?page=1>.
38. Revised list of quarantinable communicable diseases [online]. *Fed Regist* 2003 Apr 9;68(68):17255. [cited 2012 Jul]. Available from URL: <http://www.gpo.gov/fdsys/pkg/FR-2003-04-09/pdf/03-8832.pdf>.
39. Amendment to Executive Order 13295 relating to certain influenza viruses and quarantinable communicable diseases [online]. *Fed Regist* 2005 Apr 5;70(64):17299. [cited 2012 Jul]. Available from URL: <http://www.gpo.gov/fdsys/pkg/FR-2005-04-05/pdf/05-6907.pdf>.
40. Rothstein MA, Alcalde MG, Elster NR, Majumder MA, Palmer LI, Stone TH, et al. Quarantine and isolation: lessons learned from SARS. Louisville, KY: Institute for Bioethics, Health Policy and Law [online]. 2003 Nov. [cited 2012 Jul]. Available from URL: <http://www.iaclea.org/members/pdfs/SARS%20REPORT.Rothstein.pdf>.
41. World Health Organization (WHO). International Health Regulations (IHR). Ten things you need to do to implement the IHR. 1. Know the IHR; purpose, scope, principles and concepts [online]. [cited 2012 Jul]. Available from URL: <http://www.who.int/ihr/about/10things/en/index.html#whatismeant>.
42. McCormick E, Ransom MM, Kershner S, editors. Frequently asked questions about federal public health emergency law. Based on the April 28, 2009, teleconference “Federal public health emergency law: implications for state & local preparedness and response” and prepared by the Public Health Law Program, Centers for Disease Control and Prevention. Atlanta (GA): CDC [online]. 2009 Sep. [cited 2012 Jul]. Available from URL: <http://www.naccho.org/topics/infrastructure/PHLaw/upload/Microsoft-Word-FINAL-Public-Health-Emergency-Law-FAQ.pdf>.
43. Hodge JG, Gostin LO. The Model Emergency Health Powers Act: why is it important now? *NW Public Health* [online] 2002 Fall–Winter [cited Jul 2012] p. 16–7. Available from URL: [http://www.nwpublichealth.org/docs/nph/f2002/model\\_act\\_f2002.pdf](http://www.nwpublichealth.org/docs/nph/f2002/model_act_f2002.pdf).
44. Gable L, Hodge, JG. Public health law and biological terrorism. In: Lutwick LI, Lutwick SM, editors. *Beyond anthrax: the weaponization of infectious diseases*. New York (NY): Humana Press; 2009. p. 239–52.
45. CDC. The 2009 H1N1 pandemic: summary highlights, April 2009–April 2010 [online]. 2010 Aug 3. [cited 2012 Jul]. Available from URL: <http://www.cdc.gov/h1n1flu/cdcresponse.htm>.



## Resources

- CDC. Public health law. Publications and resources [online]. 2012 Jul 7. [cited 2012 Jul]. Available from URL: <http://www.cdc.gov/phlp/publications/index.html>.
- Centers for Law & the Public's Health. A collaborative at Johns Hopkins and Georgetown Universities. News and updates [online]. 2010 Jan 27. [cited 2012 Jul]. Available from URL: <http://www.publichealthlaw.net/>.
- Price BR. Copyright in government publications: historical background, judicial interpretation, and legislative clarification. *Military Law Review* [online] 1976;74:19–65 [cited 2012 Jul]. Available from URL: <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA392794&Location=U2&doc=GetTRDoc.pdf>.
- U.S. Department of Justice. What is FOIA? FOIA data at a glance—FY 2008 through FY 2011 [online]. [cited 2012 Jul]. Available from URL: <http://www.foia.gov/>.
- White House. President Barack Obama. The executive branch [online]. [cited 2012 Jul]. Available from URL: <http://www.whitehouse.gov/our-government/executive-branch>
- CDC. Public health law. Publications and resources [online]. 2012 Jul 7. [cited 2012 Jul]. Available from URL: <http://www.cdc.gov/phlp/publications/index.html>.