
Major Trends in Public Health Law and Practice: A Network National Report

Public Health and the Law

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Introduction

Public health law research reveals significant complexities underlying the use of law as an effective tool to improve health outcomes across populations.¹ The challenges of applying public health law in practice are no easier. Attorneys, public health officials, and diverse partners in the public and private sectors collaborate on the front lines to forge pathways to advance population health through law. Meeting this objective amidst competing interests requires strong practice skills to shift through sensitive and sometimes urgent calls for action to address known threats to the health of individuals and the community. It also necessitates objective, timely information and national and regional legal support.

Since its inception in September 2010, the Network for Public Health Law (“Network”) has strived to provide this support to public health practitioners.² As of May 15, 2013, Network attorneys and partners have collectively answered over 1,200 confidential claims for legal technical assistance (TA) from requesters across the country on diverse topics in public health law. An assessment of TA claims data reveals core issues at the intersection of law and public health practice. For the first time, we report publicly on these major trends based on our analyses of real-time information from the field. Following a brief description of the roles and

functions of the Network, we introduce and explain our “Top 10” trends and conclude with analyses of future perspectives on the role of law in public health practice.

Public Health Legal Technical Assistance

With initial funding from the Robert Wood Johnson Foundation through its Public Health Law Initiative,³ the Network was launched to unite public health and legal practitioners in their application of law to protect the population’s health.⁴ To this end, Network attorneys and staff converge with public and private partners to create a community of actors motivated by their commitment to use law as a tool to improve health across communities. Along with extensive relationship-building efforts, the Network provides accurate, objective information and guidance on myriad public health legal topics.⁵ While many Network activities (e.g., conferences, blogs, articles) are proactive, others respond to identified needs of legal and other practitioners in the field.

Most prominent among these responsive activities are hundreds of TA requests. As illustrated in Figure 1, the pool of requesters is varied. It includes governmental, non-governmental, and private practice attorneys as well as public health officials and practitioners who may lack ready access to public health law attorneys

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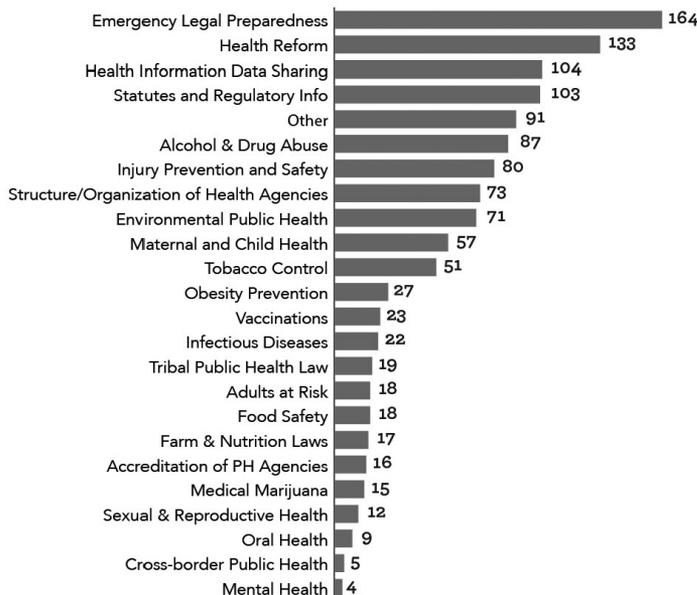
or seek objective guidance or input on national or regional developments. Network TA products range from briefings on specific legal or policy questions (e.g., memos on federal health information privacy reforms)⁶ to multi-faceted presentations involving numerous partners (e.g., public health law webinar series).⁷ Each of the Network's five regions reports TA claims through a centralized, searchable database. To preserve requesters' privacy, access to this database is limited to Network attorneys and staff, although many notable Network products are publicly available online in non-identifiable formats.⁸ In total, these claims comprise the largest collection of modern practice-based data on public health legal issues from a diverse sample of requesters in the United States. Corresponding analyses of these data, described below, portray the scope and breadth of major trends in domestic public health legal practice.

National Assessment of Public Health Law and Practice

Network TA requests span an array of public health law topics (see Figure 2 above). Some of these topics represent traditional, longstanding public health concerns (e.g., tobacco control, abatement of public nuisances, emergency preparedness). Others evince emerging issues of law and practice, such as (1) regulatory structures surrounding nascent medical marijuana programs;⁹ (2) policy interventions for bullying in school and the workplace;¹⁰ (3) obesity prevention; and (4) public health implications of

Figure 2

Network TA Requests by Topic



hydraulic fracturing, or "fracking," a process to extract natural gases from shale or other materials that carries environmental health impacts.¹¹ Each of these and other topical areas have garnered legal responses through the Network.

The core objective of our comprehensive assessment of the Network's TA claims, however, is to identify primary topical areas. This includes not only the volume of requests received in specific areas, but also the scope and depth of requesters' inquiries and the uptake and interest in concentrated proactive, efforts (as noted above). Through this extended analysis, we present ten major themes in

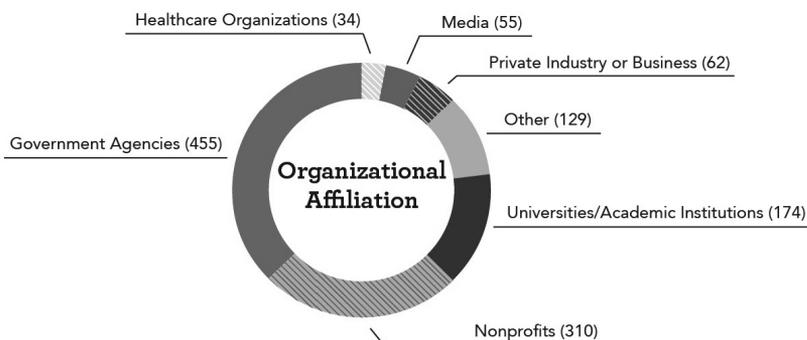
public health law, each of which may include multiple, bundled issues. These themes are presented below in no order of priority.

Affordable Care Act

Although the Patient Protection and Affordable Care Act (ACA)¹² was enacted in March 2010, many of its key provisions, including individual and employer health insurance mandates, do not go into effect until 2014 or later. Still, the ACA and its impact on public health garner a significant and vast array of TA requests. Led by the Network's Southeast Region in partnership with the National Health Law Program (NHeLP), Network personnel provided information and expert analysis regarding legal and policy issues at the heart of litigation surrounding the ACA. Following the U.S. Supreme Court decision in *National Federation of Independent Business v. Sebelius*¹³ in June 2012, a bevy of TA requests arose seeking expert interpretations of the Court's findings. Tracking of additional litigation surrounding the ACA is ongoing. Prolific, additional requests for guidance and presentations regarding ACA implementation predominantly focus on public health implications of federal

Figure 1

Network TA Requests by Organizational Affiliation



and state health insurance exchanges and expansion of states' Medicaid programs. Substantial requests concern other aspects of the ACA, notably including: (1) provisions on workplace wellness programs; (2) correlation with other federal health insurance, such as the Children's Health Insurance Program;¹⁴ (3) medical debt; (4) enforcement mechanisms; (5) medical homes; (6) dental health plans; (7) essential health benefits; (8) community health assessments; and (9) rehabilitative services.

munity-level interventions to address chronic diseases caused by tobacco exposure or other factors),²¹ and others, the Network and TCLC share information about developments in tobacco control in support of training, research, and litigation.

Emergency Legal Preparedness

Since the terrorist attacks in fall 2001, emergency legal preparedness has been a dominant area of public health legal theory and practice.²² Beyond the sheer number of

Health Information Privacy and Data Sharing

Technology is transforming public health through the migration of health information from paper to electronic systems.²⁹ Laws regulating health information have similarly evolved. Health information privacy and data sharing requests (104) comprise the third largest proportion of Network claims. Most inquiries involve application of the Health Insurance Portability and Accountability Act (HIPAA)³⁰ and its related Privacy Rule.³¹ Major

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Tobacco Control

Smoking and tobacco use continue to outpace all other preventable causes of death in the United States.¹⁵ In collaboration with the Tobacco Control Legal Consortium (TCLC),¹⁶ the Network supports the development, implementation, and defense of practical and effective legal strategies at all levels of government to address the health effects caused by tobacco use. Leading areas of legal TA on tobacco control include: (1) smoke-free and tobacco-free policies for indoor and outdoor sites, including workplaces, restaurants, bars, patios, casinos, schools and universities, foster care homes, correctional facilities, vehicles, beaches, and parks; (2) point-of-sale restrictions and regulation of the retail environment;¹⁷ (3) taxation of other tobacco products;¹⁸ (4) laws regulating products (other than tobacco cigarettes), such as water pipes, little cigars, snus, electronic cigarettes, and candy-like dissolvable tobacco products;¹⁹ and (5) smoke-free, multi-unit housing.²⁰ In addition to fielding frequent TA requests from health advocates, health departments, Community Transformation Grant awardees (who explore com-

related claims (164), however, is the breadth of specific requests. Leading themes include core guidance on: (1) the scope of emergency, disaster, and public health emergency declarations in response to diverse events ranging from pandemics to natural disasters;²³ (2) inter-jurisdictional coordination within and among governments responding to emergencies; (3) legal preparedness activities concerning implementation of crisis standards of care (as proposed by the Institute of Medicine in 2012);²⁴ (4) the use and deployment of health care workers via public and private sectors; and (5) balancing the interests of practitioners, patients, and entities concerning liability claims during emergencies. Equally noteworthy is the timing of these claims. Relevant requests tend to spike leading up to and during actual emergency declarations (e.g., Hurricanes Isaac²⁵ and Sandy [2012];²⁶ West Nile Virus [2012];²⁷ and annual flu [2013]²⁸). As a result, the Network's Western Region and others work in real-time to provide critical guidance and assistance specifically during emergencies.

themes include: (1) general compliance with the Privacy Rule and other HIPAA requirements; (2) public health agencies as hybrid entities; (3) public health and research distinctions and exemptions; (4) preemption of state privacy laws; (5) de-identification of protected health information; and (6) sharing of protected health information with outside entities.³² The 2012 release of the HIPAA omnibus final rule³³ generated multiple inquiries regarding its impact on public health agencies, leading the Network's MidStates Region to develop a comprehensive summary of key changes.³⁴ Other related TA areas include minors' rights to confidentiality, the privacy of data on health information exchanges, and screening newborn dried blood spot specimens (addressed in a six-part Network webinar series),³⁵ as well as interrelated issues concerning the Family Educational Rights and Privacy Act³⁶ and Freedom of Information Act.³⁷

Food Policy

As the United States grapples with repeated outbreaks of food-borne illness³⁸ and an epidemic of diet-related disease,³⁹ food policy has become

a key interest area for public health practitioners. Major legal themes of related TA requests received by the Network and its partner organizations, ChangeLab Solutions and the Public Health Law Center, include: (1) food access⁴⁰ and nutrition assistance;⁴¹ (2) school foods⁴² (e.g., farm to school,⁴³ standards for school lunches and competitive foods⁴⁴); (3) regulation of food and beverage marketing⁴⁵ (e.g., industry self-regulation,⁴⁶ marketing to children⁴⁷ and minorities,⁴⁸ First Amendment restrictions on government action⁴⁹); (4) labeling of packaged foods⁵⁰ and menus;⁵¹ (5) encouraging healthy foods⁵² (e.g., funds for supermarket development,⁵³ use of food stamps at farmers' markets,⁵⁴ healthy corner store programs⁵⁵); (6) discouraging unhealthy foods (e.g., sugar-sweetened-beverage taxes,⁵⁶ nutritional standards for toy giveaways⁵⁷ and government food-purchasing contracts,⁵⁸ reducing sodium intake⁵⁹); (7) food safety;⁶⁰ (8) aligning agricultural policy with the federal Dietary Guidelines for Americans⁶¹ (a key step toward healthier eating under the U.S. National Prevention Strategy⁶²); and (9) financial and technical resources available under the federal Farm Bill⁶³ and Child Nutrition Act⁶⁴ to build healthier food systems.⁶⁵ Passage of Mississippi's "Anti-Bloomberg" bill⁶⁶ and ongoing litigation over trans-fat bans,⁶⁷ sugary-drink size restrictions,⁶⁸ and food labeling⁶⁹ raise additional issues concerning preemption⁷⁰ and other limitations on state and local government authority⁷¹ to formulate effective food policy.

Vaccination Requirements and Exemptions

While the U.S. Supreme Court affirmed the constitutionality of mandatory vaccination requirements in 1905,⁷² related legal questions on how to balance individual freedoms and public health interests remain pervasive.⁷³ Modern themes of vaccination law and policy addressed through Network TA include: (1) childhood vaccination mandates enforced through school and daycare admission requirements;⁷⁴ (2) state- and

employer-based health care worker (HCW) vaccination mandates, including for annual influenza;⁷⁵ and (3) efforts to alter vaccine mandate exemptions. All states have mandatory childhood vaccination laws, but provisions vary considerably, particularly regarding exemptions for religious and personal beliefs.⁷⁶ Vaccination legal mandates for HCWs are less ubiquitous despite empirical evidence that they positively impact vaccination rates among these personnel.⁷⁷ Notwithstanding their prevalence and effectiveness, vaccination mandates pose challenges for public health practitioners. Novel diseases (e.g., H7N9 flu) and new vaccines (e.g., human papillomavirus) have stimulated debate in this area. The Network provides key research and guidance for legal and other practitioners charged with implementing, interpreting, or updating existing vaccination laws and policies or crafting new approaches to protect public health, including identifying various types of state laws that support or inhibit employer vaccination mandates and analyzing states' vaccination exemption procedures.⁷⁸

Drug Overdose Prevention

Drug overdose deaths nationally increased each year from 1999 to 2010 and became the leading cause of unintentional injury fatalities in the United States in 2009.⁷⁹ This surge is largely driven by prescription opioids, such as oxycodone and methadone, which have killed more Americans annually since 2008 than heroin and cocaine combined.⁸⁰ Opioid overdose can be quickly and reliably reversed by the timely administration of naloxone, an opioid antagonist, but the drug is often not on-hand when an overdose occurs.⁸¹ This is due in part to: (1) state laws that prohibit or discourage medical professionals from prescribing drugs to caregivers or other persons for use on at-risk individuals; and (2) existing criminal laws that can ensnare bystanders who call 911 to report an overdose.⁸² The Network has received TA requests from advocates, legislators, public health professionals, physicians, and others regarding legal interventions

to increase access to naloxone and other emergency care in the event of overdose. Fifteen states and the District of Columbia have modified existing laws or enacted new ones to encourage health care practitioners to prescribe the drug, and provide limited immunity to "Good Samaritans" who use it to save lives, call 911 to report an overdose, or both.⁸³ Similar legislation is pending in several other states. The Network provides information regarding the legal basis for these laws and other legal interventions to reduce fatal overdose, including a factsheet outlining characteristics of successful legislation.⁸⁴

Sports Injury Law and Policy

Legal approaches offer useful means to prevent and mitigate the effects of injury and violence stemming from multifarious causes including domestic or self-inflicted acts, vehicular accidents, and breaches in aquatic safety.⁸⁵ An emerging trend centers on adoption of state youth sports concussion legislation aimed at preventing the effects of Second Impact Syndrome.⁸⁶ In 2009, amid highly publicized cases of student athletes who died or suffered catastrophic injury after concussion, Washington passed its "Lystedt" law,⁸⁷ named for Zackery Lystedt, a 13-year-old football player who suffered a debilitating brain injury during a middle-school game.⁸⁸ As of December 31, 2012, similar legislation was in place in 42 states and the District of Columbia (with more states poised to follow).⁸⁹ These laws share three common requirements: (1) education of parents, athletes, and coaches on the dangers of concussion; (2) immediate removal from play of an athlete suspected of sustaining a concussion; and (3) return to play only upon clearance from a licensed health care provider.

The Network's Eastern Region monitors legislative and scientific developments,⁹⁰ and provides research and assistance on legislative components, including "return-to-play" provisions and who is authorized to make such assessments, "return-to-learn" provisions, and

mandatory periodic training for coaches and officials. It has also conducted an interview study exploring states' experiences with implementing youth sports concussion laws to identify factors that either promote or impede implementation and stimulate future policy evaluation studies.

Public Health Accreditation

Over the past decade, accreditation has become a primary focus for state, local, territorial, and tribal health departments across the country. The national Public Health Accredita-

standing (MOUs), contracts, or other legal tools to facilitate consolidation, support accreditation, and maintain departmental levels of authority and autonomy.⁹⁵

Maternal and Child Health

The role of law in maternal and child health has generated diverse requests for Network TA. For example, the Network responded to multiple claims concerning state legislation and case law governing newborn screening for certain medical conditions (included through the afore-

mentioned newborn screening webinar series).⁹⁶ A majority of Network claims encompassing maternal and child health policies focus on federal and state laws related to maternal breastfeeding. Most state laws specifically assure that women may breastfeed in public and private locations, and, correspondingly, also exempt breastfeeding from public indecency laws. A number of TA requests relate to mothers seeking legal support to express milk at work or school, or legal guidance to address instances when childcare providers refuse to serve children their expressed breast milk. Network attorneys have shared specific state rules governing circumstances in which a licensed facility must provide for the child's prescribed dietary needs or otherwise protect mothers.

Perspectives on the Future Role of Law in Public Health Practice

Our assessment of public health law practice trends based on technical assistance data "from the field" provides a gauge of existing and emerging areas of inquiry among public health attorneys, officials, and partners nationally. Collectively, the depth and range of TA claims suggest an expanding role for law in shaping the public health environment. While some may discount law as an effective intervention to promote the public's health, in reality it is increasingly integrated into core public health policies and decisions. In some instances, law is the principal means through which communal health objectives are possible, particularly when political or other forces thwart public health practices (e.g., related to tobacco control, STD prevention, or injury mitigation). Through active partnerships, the Network provides a receptive place for public health officials and others to hone their knowledge and skills in using law to achieve public health objectives with national or regional input. Correspondingly, public health actors better perceive how law may be a premier (or sometimes even exclusive) tool for change.

The future for use of law in public health practice is bright. At all levels of government there is great potential for law to intervene positively in response to a growing slate of new challenges. For example, the ACA and state laws are already a catalyst for improvements in mental health and education in the United States. Politically divisive public health issues, notably including gun control and cell phone use among drivers, must rely increasingly on statutory, regulatory, and judicial legal maneuvers to reduce related injuries and deaths. "Health in all policies" approaches

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tion Board (PHAB)⁹¹ and related state-based entities⁹² have worked to establish accountability and quality-improvement standards to assist governmental health agencies in meeting public health goals. The Network assists health departments to employ legal mechanisms (e.g., existing or new laws or state boards) to support accreditation.⁹³ It also helps local and tribal health departments that lack financial resources to seek accreditation. Governments attempting to assess and potentially reform their public health laws to achieve national accreditation have sought Network guidance to define their health department's public health responsibilities and authority.⁹⁴ Other health departments are considering consolidation in furtherance of accreditation, as well as their need to cost-effectively share services and data against a backdrop of ever-dwindling funds. These organizational shifts implicate a host of legal issues, including the need to use or reconfigure memoranda of under-

mentioned newborn screening webinar series).⁹⁶ A majority of Network claims encompassing maternal and child health policies focus on federal and state laws related to maternal breastfeeding. Most state laws specifically assure that women may breastfeed in public and private locations, and, correspondingly, also exempt breastfeeding from public indecency laws. A number of TA requests relate to mothers seeking legal support to express milk at work or school, or legal guidance to address instances when childcare providers refuse to serve children their expressed breast milk. Network attorneys have shared specific state rules governing circumstances in which a licensed facility must provide for the child's prescribed dietary needs or otherwise protect mothers.

Under the ACA, some employers must provide certain working mothers with reasonable unpaid break time and a place to express breast milk,⁹⁷ but it does not provide legal protections for women unable to

and the use of health impact assessments in furtherance of environmental health entail substantial legal support. Changing the built environment to improve health outcomes relies on communities' reconceptualization of local zoning laws to prioritize the public's health. In these and multiple other areas, the application of law is inextricably connected to the betterment of the public's health.

Of course, legal obstacles may also thwart progress on these or other issues. Constitutional rights and principles do not always give way to the public's health. Issues of federalism and preemption can hinder some legal innovations. Individual freedoms to speak commercially, bear arms, or act autonomously may limit specific public health efforts. Clearing a path for enhanced use of public health laws is not about ignoring or diminishing these protections. As with each of the major trends we have identified, the Network's objective is to partner with public health leaders to craft solid legal strategies that promote health for the good of the community while preserving the rights and interests of individuals.

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