

COVID-19 Emergency Legal Preparedness Primer

As of March 9, 2020

James G. Hodge, Jr., J.D., L.L.M.

Peter Kiewit Foundation Professor of Law

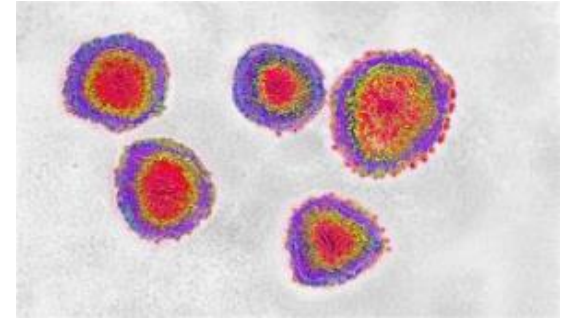
Director, Western Region Office, Network for Public Health Law

ASU Sandra Day O'Connor College of Law

james.hodge.1@asu.edu

- **Provide real-time information & objective guidance (not legal advice) on emerging issues of law and policy**
- **Serve as a quick briefing on core legal preparedness and response issues**
- **Connect users to available documents and materials via hyperlinks**
- **Create a template for presentations or legal assessments in your jurisdiction**
- ***Invite further questions or comments***

Brief Overview – COVID-19



International Response Efforts

U.S. Legal Preparedness/Response



Federal | State | Tribal | Local

Additional Resources



Questions & Comments

Transmission:

- Initially-infected persons in Wuhan, China are linked epidemiologically to a large seafood/animal market.
- Transmissible person-to-person with potential infectivity rate exceeding annual influenza.
- Asymptomatic persons may infect others.
- Reproductive number [R^0] estimated at 2.2.

Symptoms:

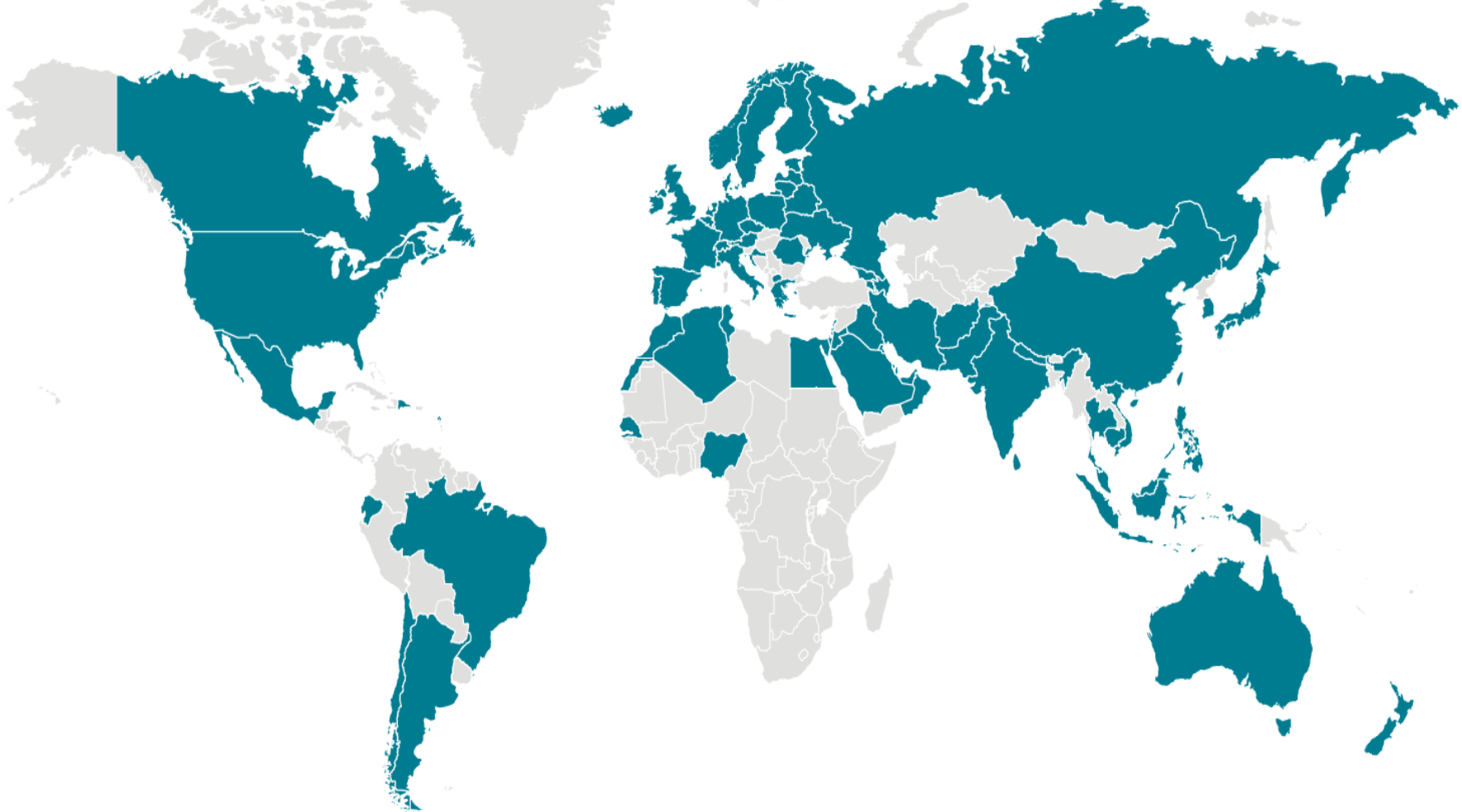
- Respiratory symptoms, fever, cough, breathing difficulties, aches, pains.
- In severe cases (~20%), infection can cause pneumonia, respiratory issues, kidney failure and death.

Vaccines, Tests & Treatment:

- No vaccines, rapid tests, or proven treatments are available.

Total Confirmed Deaths >: 3,800

Total Confirmed Cases: > 108,000



Jan. 30, 2020: WHO declares
a public health emergency of
international concern (PHEIC).



Organized Responses | Engage in containment, active surveillance, early detection, isolation & contact tracing

Data Sharing | Share data with WHO via IHR legal requirements

Prevention | Focus on reducing human infection/secondary transmission

Communication | Engage in multi-sectoral communication re: knowledge & research

Restrict Movement | Restricting movement of people/goods may be temporarily useful under limited response capacities or intense cases

Travel | Inform WHO about travel measures as required by the IHR

Discrimination | Avoid actions promoting stigma or discrimination

Developing Countries | Support LMICs to enable their responses & facilitate access to diagnostics, vaccines & therapeutics

Justification | Justify health measures significantly interfering with international traffic

Select International Emergency Declarations



Jan. 24

19 Chinese provinces -
highest level of public
health emergency



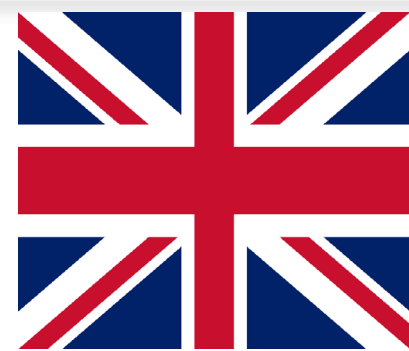
Jan. 25

Hong Kong State of
Emergency



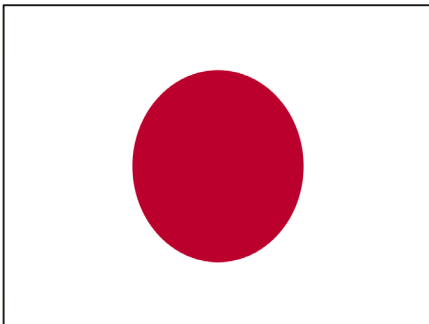
Jan. 31

Italy State of
Emergency



Feb. 10

COVID-19 a “serious
and imminent threat
to public health”



Feb.13

Invokes emergency
COVID-19 plan



Feb. 23

South Korea on
highest Level 4 alert



Feb. 24

Afghanistan State of
Emergency



Mar. 7

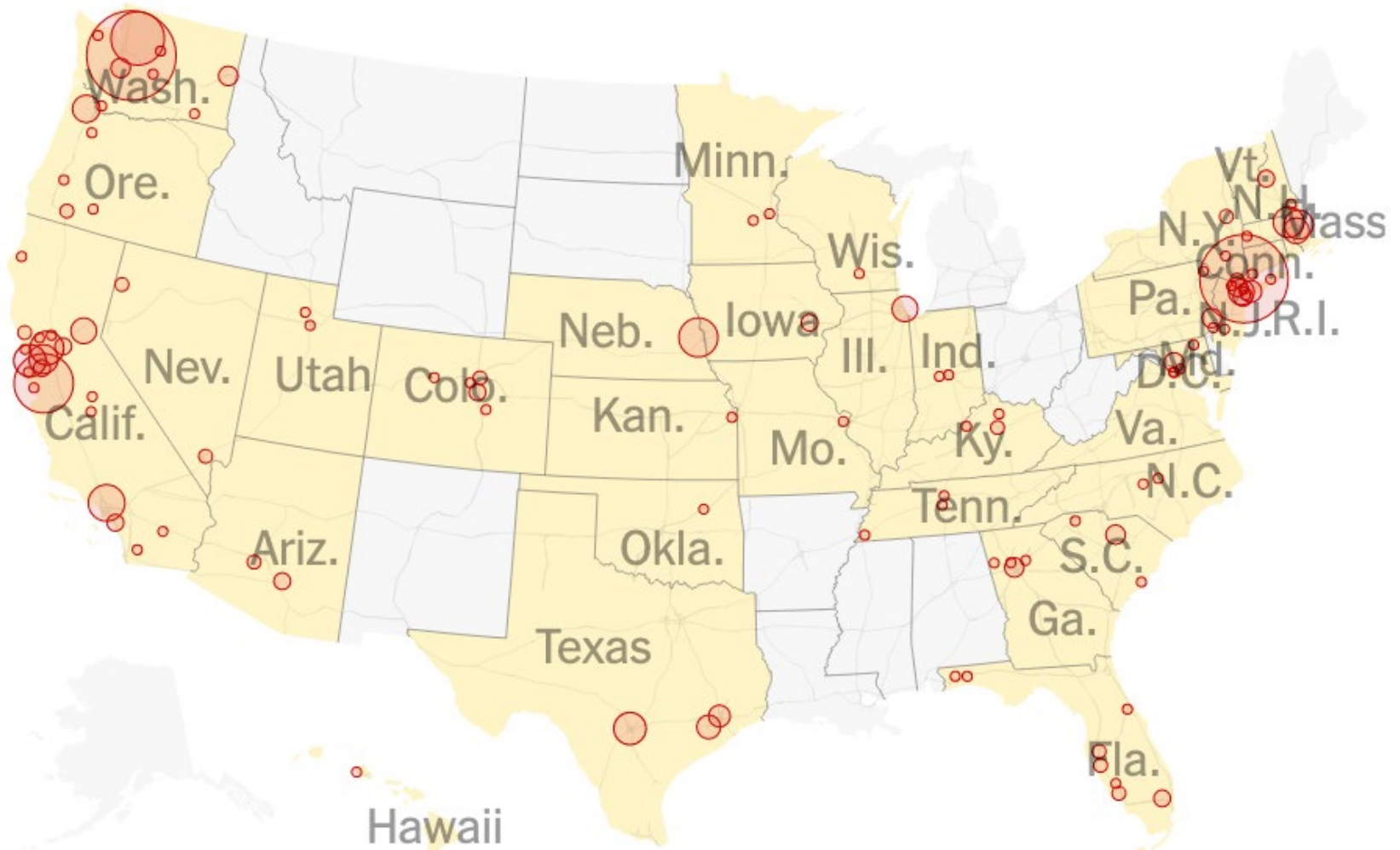
Philippines State of
Emergency

U.S. Legal Preparedness & Response Efforts



US Cases of COVID-19

Total Confirmed Cases: **564** Total Deaths: **22**



Jan. 22: *“We have it totally under control. It's one person coming in from China. It's going to be just fine.”*

Jan. 29: *Announces formation of the President's Coronavirus Task Force.*

Feb. 4: *“Protecting Americans' health also means fighting infectious diseases. . . .*

My administration will take all necessary steps to safeguard our citizens from this threat.”

Feb. 26: *“[W]e're ready to adapt and we're ready to do whatever we have to as the disease spreads. . . .”*

Appoints Vice President Mike Pence to lead national COVID-19 response efforts.



President Donald Trump



Vice President Mike Pence

Select Congressional Responses

3/4

House
introduces
“Coronavirus
Preparedness
and Response
Supplemental
Appropriations
Act”



3/4

Congress
passes \$8 bill
fund for
Emergency
COVID-19
response

2/13

Senators urge HHS
to establish
guidelines for how
state & local
governments are
reimbursed for
expense of
assisting federal
responses

2/6

Senators ask FDA if
it has “necessary
tools” to guarantee
“safety and supply
of pharmaceuticals,
food and medical
supplies . . . from
China”

2/6

Senators request
info. on VA health
care facilities’
preparation,
prevention,
diagnosis,
response
efforts

Federal Agency Coordination





Centers for Disease Control and Prevention

CDC 24/7: Saving Lives, Protecting People™

[Link here](#) for additional,
varied guidance and
resources

2/25/20

“Americans should brace . . . coronavirus [to] spread to [U.S.] communities . . . It's . . . a question of when. . . .”

2/12/20

CDC director: “At some point in time it is highly probable that we’ll have to transition to mitigation” as a public health strategy.”

2/5/20

Orders quarantine of 4 additional flights.

1/31/20

Orders 14-day quarantine of 195 Americans returning from Wuhan at U.S. military base in California.

1/23/20

Raised travel alert to highest Level 4.

1/21/20

Began entry screening of passengers on direct and connecting flights from Wuhan, China to 3 main ports of entry in the U.S.

1/20/20

Activated emergency operations center with Global Migration, Medical Care/ Countermeasures, and Epidemiology/Surveillance Task Forces.



Jan. 27: FDA announces key actions to advance development of COVID medical countermeasures

Emergency Use Authorization
of Medical Products and
Related Authorities

Guidance for Industry and Other Stakeholders

Feb. 4: FDA grants EUA for CDC's COVID-19 Real-Time PCR Diagnostic Panel.

Feb. 29: FDA releases **Policy for Diagnostics Testing in Laboratories Certified to Perform High Complexity Testing under CLIA prior to Emergency Use Authorization for COVID-19.**



Dr. Anthony Fauci,
Director, National
Institute of Allergy and
Infectious Diseases, NIH



March 3: “I don’t think that we are going to get out of this completely unscathed . . . [T]his is going to be one of those things we look back on and say ‘**Boy, that was bad.**’”

VIEWPOINT

US Emergency Legal Responses to Novel Coronavirus Balancing Public Health and Civil Liberties

[Click on image to access article](#)

Lawrence O. Gostin, JD
O'Neill Institute for
National and Global
Health Law,
Georgetown University
Law Center,
Washington, DC.

James G. Hodge Jr, JD,
LLM
Center for Public
Health Law and Policy,
Sandra Day O'Connor
College of Law, Arizona
State University,
Phoenix.

With increasing numbers of cases of coronavirus disease 2019 (COVID-19) globally and in the United States, Health and Human Services (HHS) Secretary Alex Azar declared a national public health emergency on January 31.¹ The emergency declaration of the HHS authorizes additional resources, enhanced federal powers, interjurisdictional coordination, and waivers of specific regulations. State and local public health emergency declarations are also likely. During crises, government has a special responsibility to thoughtfully balance public health protections and civil liberties.

Public Health Risk Assessment

While epidemiological data are evolving, human-to-human transmission of COVID-19 has been docu-

eral powers in response to COVID-19 beyond those used for previous health emergencies such as SARS, H1N1 influenza, and Ebola. The administration premised the exercise of federal powers on the need to avert "cascading public health, economic, national security, and societal consequences."⁴

Travel Warnings and Recall of Nonessential Personnel
Immediately following the emergency declaration of the HHS, federal agencies implemented travel warnings, entry bans, and border protections. On January 31, the State Department issued its strongest warning ("do not travel") applying to mainland China.⁵ Additional warnings may take effect with "little or no advance notice."⁵ Nonessential diplomatic, military, and other personnel



Balancing Individual & Communal Interests

March 2: Achieving A Fair and Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence & Other Federal, State and Local Leaders from U.S. Public Health and Legal Experts



Emergency Preparedness and Response

Constitutionality of Selected, Potential COVID Emergency Responses

Constitutional	Unconstitutional
Quarantine of individuals or groups suspected or known to be exposed to COVID	“Cordon sanitaire” or lockdown of groups or communities within or outside “hot zones”
Isolation of individuals who are known to be infected with COVID	Separation of persons based on mere suspicion of COVID infection without real-time confirmation
Travel recommendations to avoid specific U.S. jurisdictions based on known risks of infection	State or local travel bans or border closures that directly inhibit ingress or egress of U.S. citizens
Real-time medical triage decisions based on government recommendations grounded in epidemiologic and medical science	Real-time medical triage decisions based on specious grounds (e.g., race, ethnicity, religious affiliation, ability to pay)
Limited waivers of federal, state, or local statutory or regulatory laws impeding effective public health responses	Complete waiver of constitutionally-required due process, equal protection, or other rights
Reasonable testing or screening measures designed to mitigate exposure of others to COVID	Forced invasive testing of autonomous adults without a warrant based on probable cause
Accurate, real-time sharing of identifiable patient health information between medical & public health authorities for surveillance purposes	Mass publication of identifiable patient health information absent compelling circumstances
Government acquisition of critical resources or property from private entities sector with reimbursement	Government “taking” of private sector property or resources without “just compensation.”

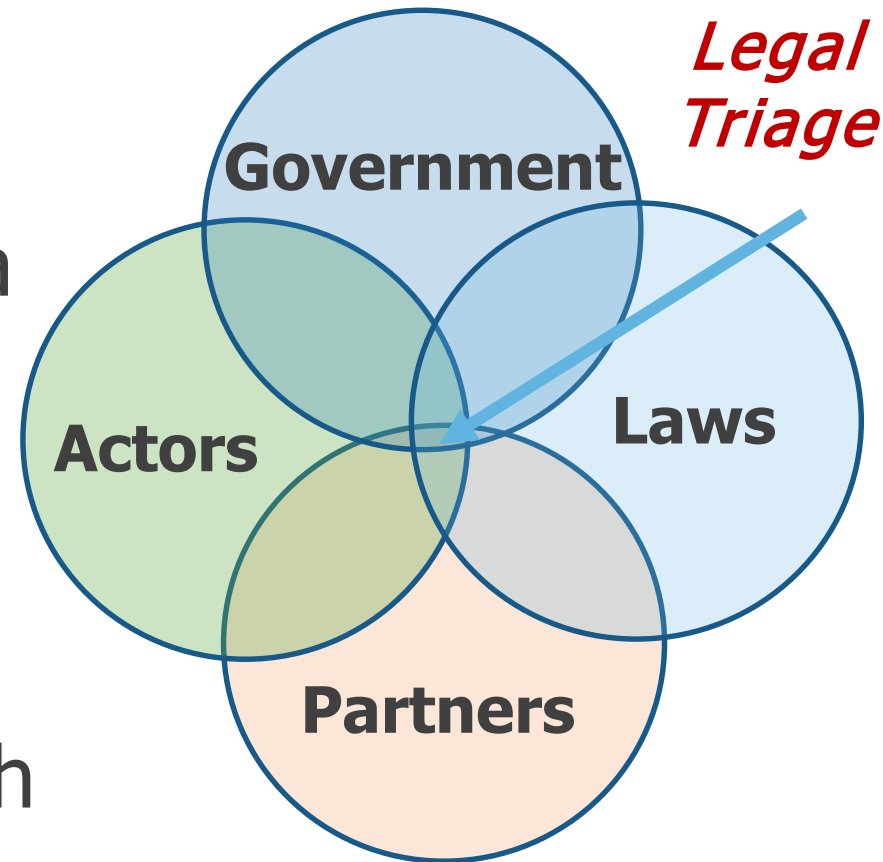
Multi-level Emergencies

Public health authorities, powers, liabilities & immunities vary depending on the type of emergency declared at each level of government

International	WHO Public Health Emergency of Int'l Concern	Emergency Declarations by Foreign Governments
Federal	Stafford Act or National Emergencies Act	HHS Public Health Emergency
State/Tribal	Emergency or Disaster	Public Health Emergency
Local	Emergency or Disaster	Public Health Emergency

Legal Triage In Emergencies

Legal Triage: efforts of legal actors & others during declared emergencies to build a favorable legal environment by prioritizing issues & solutions facilitating legitimate public health responses





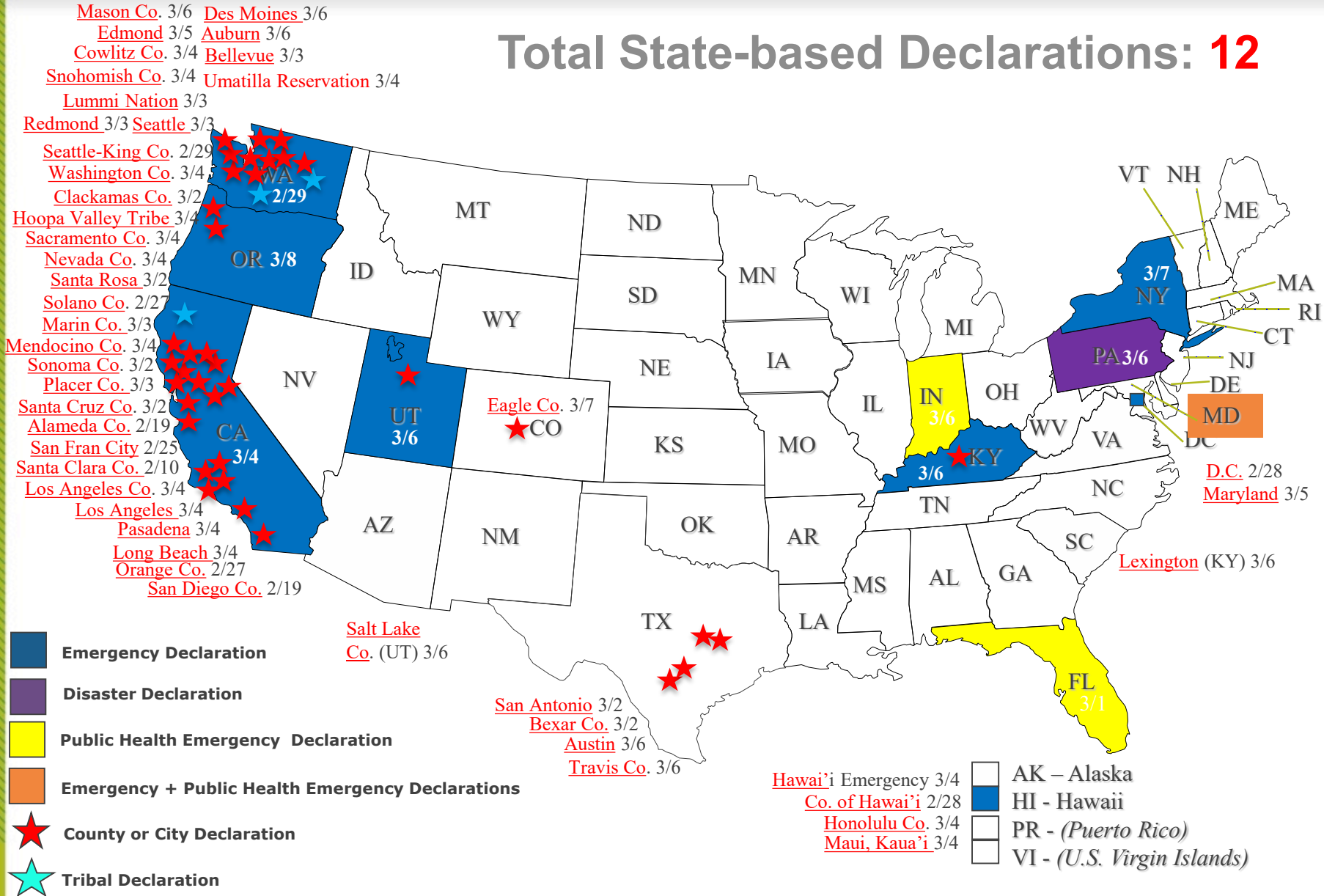
Jan. 31: HHS Sec. Alex Azar declares national public health emergency



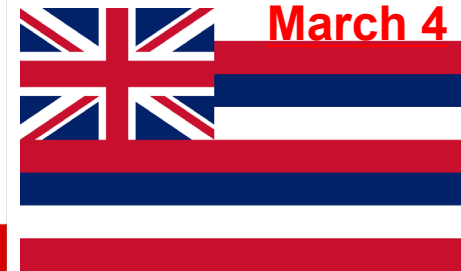
- Frees up federal resources
- Encourages interjurisdictional coordination
- Allows waivers of specific federal laws
- Authorizes real-time countermeasures through emergency use authorizations
- Supports social distancing measures (e.g., travel or border limits, quarantine)

COVID State and Select Local/Tribal Declarations of Emergency

Total State-based Declarations: 12



State-based COVID Emergency Declarations



Select State COVID Emergency Powers

Note: this table tracks select, express authorities referenced via state emergency declarations ([link](#) on each state acronym for access). Additional emergency powers may be authorized under state law through which the declarations are issued.

Emergency Powers	CA	FL	HI	IN	KY	MD	NY	PA	UT	WA
Contracts & Procurements	■		■				■	■		
Emergency Plans/ICS	■	■			■	■	■	■	■	■
Funding/resource Allocation			■	■	■	■	■	■	■	■
Intrastate Coordination	■		■	■	■	■	■	■	■	■
Isolation and Quarantine		■					■			
Licensure Reciprocity	■		■				■			
Price Controls	■		■							
Surveillance & Reporting	■	■								
Testing Screening Treatment							■			
Travel Restrictions	■	■								
Waivers & Suspensions	■						■	■		



March 2: Mayor Ron Nirenberg declares public health emergency for San Antonio for 7 days authorizing an array of public health powers as well as *prohibit entry into the city of any persons currently quarantined at Lackland military base.*

Select Local Emergency Authorizations

Locality	Date	Select Authorizations
<u>Clackamas County</u> (OR) Emergency	3/2/20	<ul style="list-style-type: none"> Establish emergency policies and protocols Recoup financial costs and redirect funds “Order such other measures as . . . immediately necessary for the protection of life and/or property.”
<u>County of Hawai'i</u> (HI) Emergency	2/28/20	<ul style="list-style-type: none"> Sponsor and enter into mutual aid programs Receive, expend & use contributions or grants; procure federal aid Relieve and suspend hardships and inequities or obstructions to public health, safety or welfare
<u>Solano County</u> (CA) Emergency	2/27/20	<ul style="list-style-type: none"> Department Operations Center to bolster identification & screening Collaboration with local, state, and federal agencies to implement containment efforts
<u>Orange County</u> (CA) Emergency	2/27/20	<ul style="list-style-type: none"> Reimbursements from county, state & federal partners if resources are exhausted Agency coordination & resource leveraging
<u>San Francisco City</u> (CA) Emergency	2/25/20	<ul style="list-style-type: none"> Mobilization of city resources & acceleration of emergency plans Streamlining staffing and coordination agencies city-wide
<u>San Diego County</u> (CA) Health Emergency	2/19/20	<ul style="list-style-type: none"> Reimbursement from state & federal governments Increasing resources such as beds at local hospitals
<u>Santa Clara County</u> (CA) Emergency	2/10/20	<ul style="list-style-type: none"> Leveraging state funds and mutual aid resources Increasing resources such as protective gear and training for healthcare workers



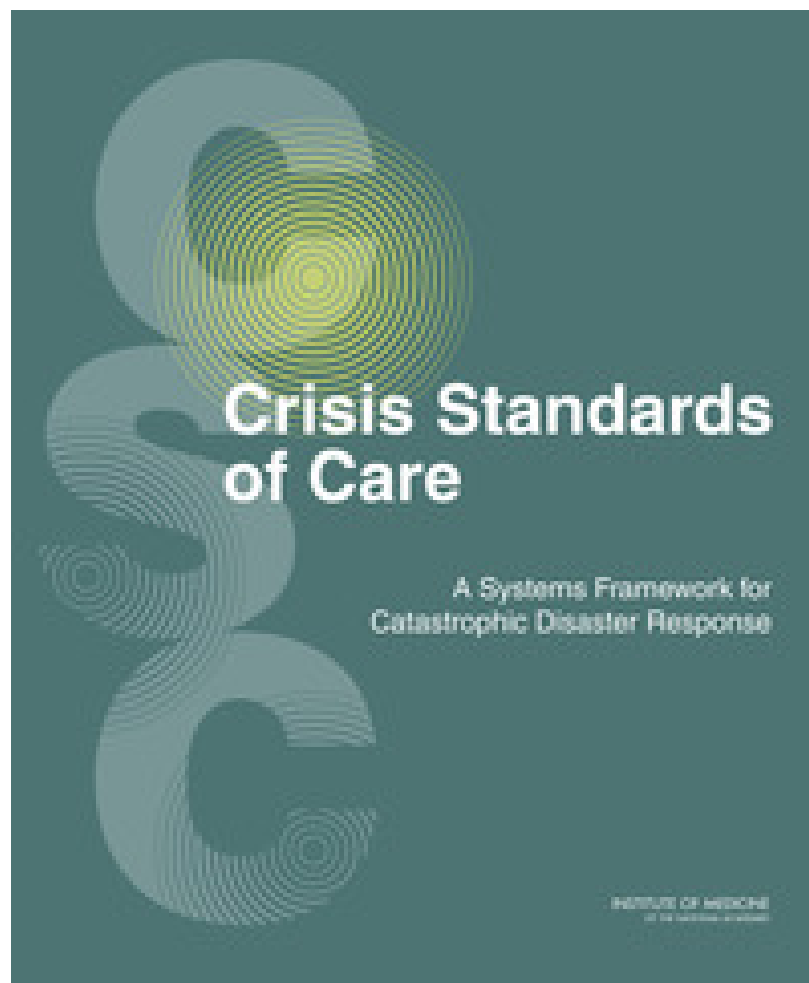
Steps Healthcare Facilities Can Take Now to Prepare for Coronavirus Disease 2019 (COVID-19)

Practical, Ethical, and Legal Challenges Underlying Crisis Standards of Care

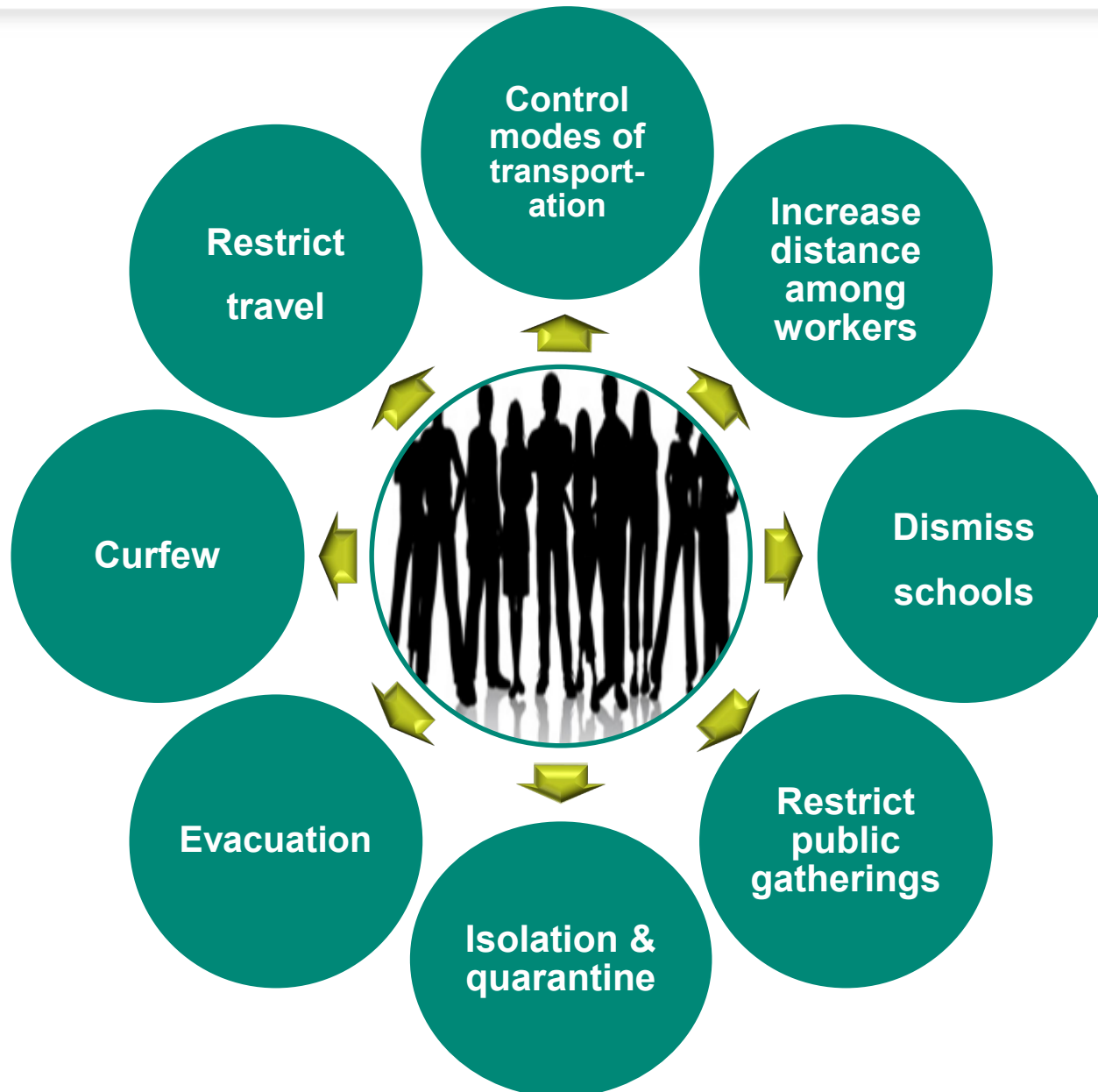
[Click on article image to access](#)

James G. Hodge, Jr., Dan Hanfling, and Tia P. Powell

Addressing critical questions is complicated by changing legal dynamics during crises. Emergency powers depend on the type and duration of governmental declarations, which, in turn, may advance or impede CSC implementation.

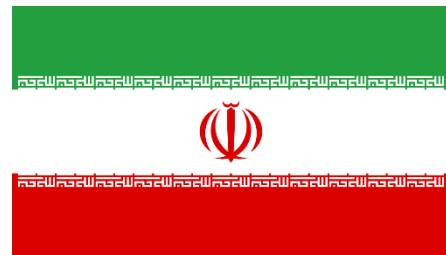
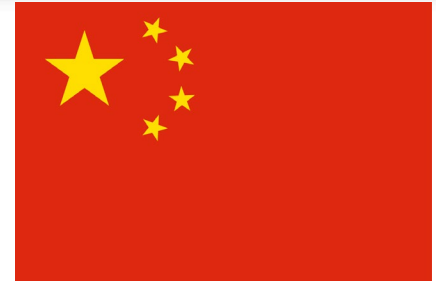


Social Distancing Measures

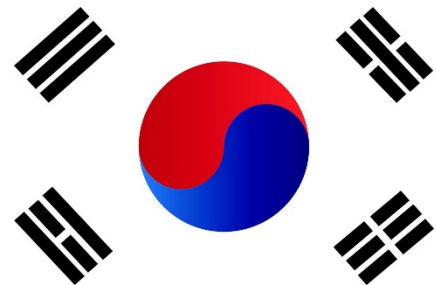


U.S. Foreign Travel Restrictions

Jan. 31: Trump Administration bans foreign national travel for those who have been in China within the last 14 days and who pose a risk.



Feb. 29: Administration bans foreign national travel for those who have been in Iran, as well as travel warnings re: Italy & South Korea.





March 8: Dr. Fauci intimates the possibility for regional lockdowns and recommends those at greatest risk (e.g., elderly, persons with chronic conditions) abstain from travel.

Select, constitutional implications of potential “lockdowns:”

- Sweeping limits on constitutional rights to travel face strict scrutiny to survive;
- State border closures (even in emergencies) subject to federal acquiescence;
- Municipal efforts to close borders subject to state interventions and overrides;
- “Cordon sanitaire” infringes substantive due process and equal protection rights that have negated prior attempts to lock down areas;
- Emergency powers allow for temporary closures, assembly limits, and evacuations, but lockdowns actually place many persons at greater risk of harm
- Less restrictive alternatives include:
 - Strong incentives or messaging to avoid travel;
 - Mass closures of schools and public places;
 - Private entity decisions to temporarily close;
 - Screening of persons arriving or departing from public places; and
 - Mass quarantine or isolation measures.

Select Closures & Cancellations



3/3: Young Israel of New Rochelle Synagogue (NY) closes



3/5: Amazon staff working from home (WA)



3/6: University of Washington suspends in-person class meetings



3/4: Ultra Music Festival (Miami) cancelled



3/5: Division III NCAA games cancelled/crowds banned



3/2: Microsoft MVP Global Summit cancelled (WA)

School Closures

Feb. 16: CDC issues initial guidance intimating school mitigation, including possible closures, may be warranted

Mar. 4: Northshore School District outside of Seattle announces plans to close for 2 weeks; multiple other districts close as well

THE LEGAL LANDSCAPE FOR SCHOOL CLOSURES IN RESPONSE TO PANDEMIC FLU OR OTHER PUBLIC HEALTH THREATS

James G. Hodge, Jr.

[**Click here to access article**](#)

- **Explicit authority to close schools in non-emergencies is lacking in many states;**
- **Significant variations exist regarding which levels of government and specific departments are authorized to close schools;**
- **Authority to close schools shifts dramatically once a state of emergency is declared; and**
- **Assessment criteria on the timing and appropriateness of school closure is largely absent**

Quarantine & Isolation

Quarantine

Separation from others of people exposed to a contagious condition prior to knowing if they may be ill or contagious



Isolation

Separation from others of people who are known to be infected, or capable of infecting others, with a contagious condition



For a listing of state-based quarantine and isolation statutes, see the [link](#) at the National Conference of State Legislatures

Federal Quarantine



Source: <https://www.pbs.org/newshour/health/cdc-issues-quarantine-orders-to-prevent-spread-of-novel-coronavirus>

Jan. 31: CDC Director Robert Redfield orders a 14-day quarantine of nearly 200 persons arriving at a U.S. military base in California 2 days prior on an evacuation flight from Wuhan, China.

As of February 10, 4 additional flights amassing more than 800 Americans are under quarantine at 4 military bases.



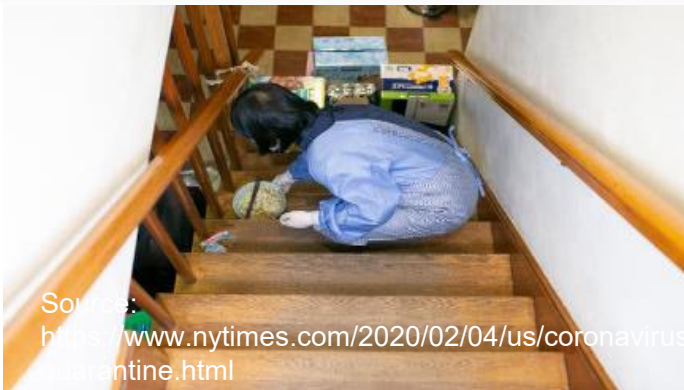
Source: <https://news.sky.com/story/coronavirus-why-did-542-people-fall-ill-during-the-diamond-princess-quarantine-11937541>

Feb. 17: CDC quarantines 2 flights of over 300 Americans returning from the Diamond Princess cruise ship (in Yokohama, Japan) at Travis and Lackland Airforce Bases.

Feb. 19: U.S. Daegu Army Base in South Korea imposes a self-quarantine of U.S. troop members attending a local church linked to COVID-19 infections.

Feb. 23: President Trump blocks plans to quarantine persons at federal facility in Anniston County AL, amid litigation.

Select State/Local Quarantines



Jan. 23: Health officials require at home-isolation of Texas A&M student.

Jan. 26: AZ Dept. of Health Services oversee home isolation of ASU student.

Feb. 4: VA Dept. of Health requires 4 students to self-monitor at home for 14 days with daily check-ins.

Feb. 11: GA state health officials require nearly 200 Georgians to self-monitor at home for 2 weeks.

Feb. 19: New York's Westchester County requires home quarantines of 26 people.

Mar. 2: In Oregon dozens of health care workers are placed on paid furlough and subjected to home quarantines.

Mar. 4: According to the CA Dept. of Health, more than 9,400 Californians have been asked to self-quarantine.

Quarantine & Isolation Litigation



Source: <https://www.ocregister.com/2020/02/22/why-here-costa-mesa-oc-officials-question-feds-plan-for-coronavirus-quarantine-site/>



Source: <https://www.expressnews.com/news/local/article/San-Antonio-to-feds-Keep-coronavirus-evacuees-in-15098761.php?/>

Feb. 28: After obtaining temporary restraining order to block the transfer of individuals exposed to or infected with COVID-19 to Costa Mesa, CA, feds drop their plans and case is dismissed.

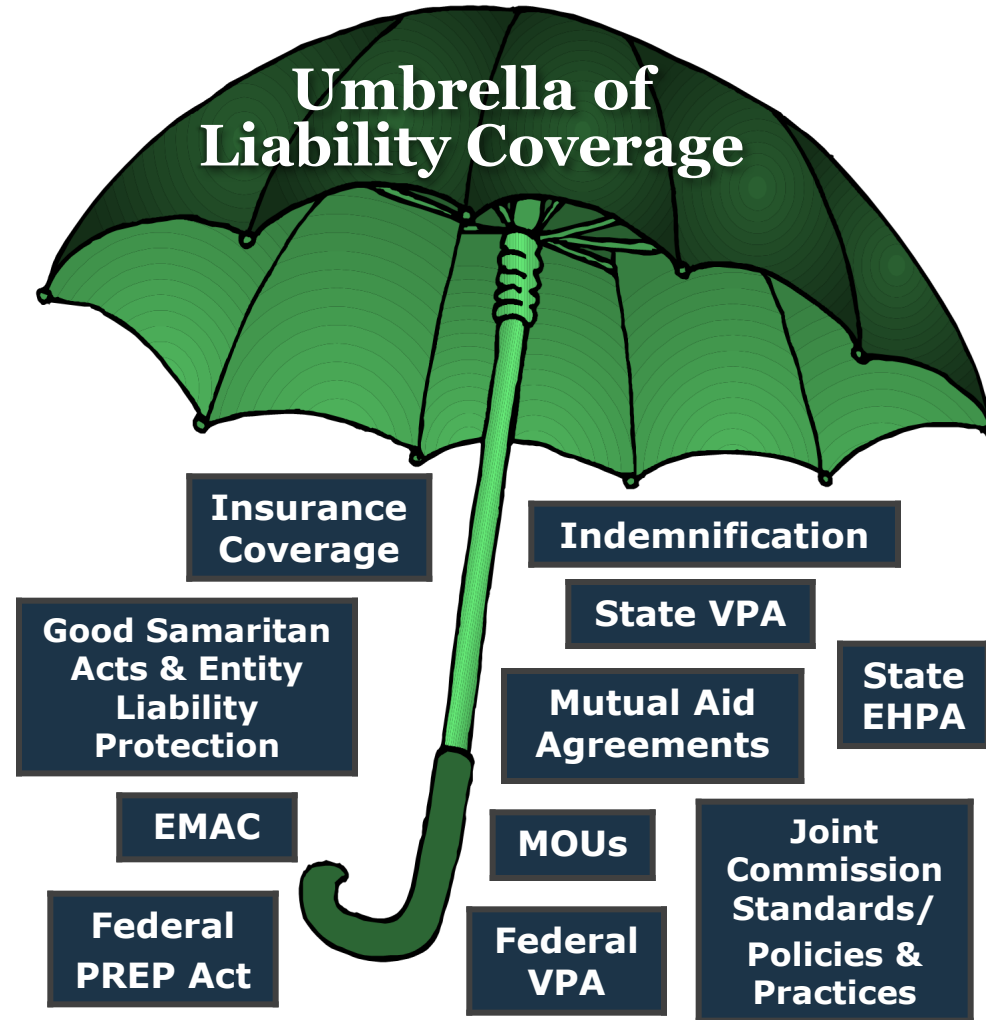
March 2: City of San Antonio sues in federal district court to attempt to block CDC from releasing 120+ COVID evacuees from quarantine at Joint Base San Antonio-Lackland. The motion was denied.

- **Negligence/Malpractice**
- **Intentional Torts**
- **Privacy Infringements**
- **Discrimination**
- **Breach of Contract**
- **Worker's Compensation**
- **Price Gouging**



Emergency Liability Protections - Health Practitioners & Entities

Despite risks, many legal liability protections apply in routine events & declared emergencies, especially concerning health care volunteers, workers, and entities.



Airport Preparedness & Response: Legal Rights, Powers & Duties

Legal Research Digest 34

AIRPORT PUBLIC HEALTH PREPAREDNESS AND RESPONSE: LEGAL RIGHTS, POWERS, AND DUTIES

This digest was prepared under ACRP Project 11-01, "Legal Aspects of Airport Programs," for which the Transportation Research Board (TRB) is the agency coordinating the research. Under Topic 09-01, this digest was prepared by Leila Barraza, Mel and Enid Zuckerman College of Public Health, University of Arizona, Tucson, AZ, and Elizabeth Hall-Lipsy, College of Pharmacy, University of Arizona, Tucson, AZ.

Background

There are over 4,000 airports in the country and most of these airports are owned by governments. A 2003 survey conducted by Airports Council International-North America concluded that city ownership accounts for 38 percent, followed by regional airports at 25 percent, single county at 17 percent, and multi-jurisdictional at 9 percent. Primary legal services to these airports are, in most cases, provided by municipal, county, and state attorneys.

Research reports and summaries produced by the Airport Continuing Legal Studies Project and published as ACRP Legal Research Digests are developed to assist these attorneys seeking to deal with the myriad of legal problems encountered during airport development and operations. Such substantive areas as eminent domain, environmental concerns, leasing, contracting, security, insurance, civil rights, and tort liability present cutting-edge legal issues where research is useful and indeed needed. Airport legal research, when conducted through the TRB's legal studies process, either collects primary data that usually are not available elsewhere or performs analysis of existing literature.

Foreword

Modern air travel has frequently been cited as a leading cause for the rapid spread of disease within countries and

internationally. Recent outbreaks of SARS, MERS, Ebola, and Zika have focused the debate on a number of issues surrounding air travel, including isolation and quarantine, restrictions on freedom of travel, and screening protocols. A number of issues expose the lack of clarity on the respective powers and duties of airport and airline personnel, governments (including federal, state, and local entities) and public health authorities, and the insufficient communication and coordination among local, state, national and international stakeholders.

Numerous legal issues are associated with these inherent challenges, but through planning and coordination with relevant stakeholders they can be addressed. This digest addresses the legal issues concerning the measures to detect communicable diseases, regulations to control communicable diseases, methods for decontamination, emergency legal preparedness, privacy, and potential sources of liability. This digest provides a checklist that airport attorneys and other staff can use to help prepare, plan, and coordinate with their partners in response to a threat of a communicable disease.

This legal digest provides the background on multimodal or intermodal facilities. The history of the laws, rules, and regulations in this area are provided, as well as case studies to assist airport operators in understanding and navigating the complexity of multimodal developments.



- Reporting of ill passengers
- Measures to detect communicable diseases
- Surveillance
- Non-invasive procedures
- Invasive procedures (with consent)
- Contact tracing
- Isolation & Quarantine

[Click on article image to access](#)

March 3: Vice President Pence announces massive expansion of who is eligible for COVID testing: “**Any American can be tested . . . subject to doctor’s orders.**”

- Availability
- Allocation
- Costs
- Reimbursements
- Applications – voluntary, mandatory, compelled



Source: <https://www.medpagetoday.com/infectiousdisease/covid19/85138>



Source: <https://www.nytimes.com/2020/02/29/health/fda-coronavirus-testing.html>



Ohio

**Department
of Health**

Jan. 24: Ohio Department of Health classifies COVID-19 a “Class A” condition for which “confirmed or suspected cases . . . must be reported immediately to the local health district”).”

Persons required to report include physicians, hospital administrators or others in charge of clinics/institutions/labs providing care or treatment, “**or any individual having knowledge of a person with nCoV.**”

February 2020

Office for Civil Rights, U.S. Department of Health and Human Services

BULLETIN: HIPAA Privacy and Novel Coronavirus



In light of the Novel Coronavirus (2019-nCoV) outbreak, the Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services (HHS) is providing this bulletin to ensure that HIPAA covered entities and their business associates are aware of the ways that patient information may be shared under the HIPAA Privacy Rule in an outbreak of infectious disease or other emergency situation, and to serve as a reminder that the protections of the Privacy Rule are not set aside during an emergency.

For additional expert analyses and guidance, contact Denise Chrysler, JD, and colleagues in our Network – Mid-States Region at dchrysler@networkforphl.org

[Latest Resources](#)

[Federal Public Health Emergencies](#)

[Social Distancing Powers](#)

[Liability of Health Care Workers and Entities](#)

[Hospital Emergency Legal Preparedness](#)

[State and Local Preparedness](#)

[Emergency Declarations and Powers](#)

[Mental and Behavioral Health Preparedness](#)

[Model Emergency Laws](#)

[Emerging Threats Preparedness and Response](#)

[Crisis Standards of Care](#)

[Public Health Emergency Ethics](#)

Access these Network materials by linking [here](#)

Acknowledgements

- Special thanks to **Claudia M. Reeves** and **Erica N. White** at the Network - Western Region Office for their research and assistance
- **Ask the Network** concerning questions or comments relating to this information or ongoing COVID-19 legal preparedness and response efforts
- **james.hodge.1@asu.edu** | @jghodgejr