COVID-19
Emergency Legal Preparedness Primer
As of April 8, 2020
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Contents

☐ COVID-19 Epi Insights
☐ Emergency Legal Preparedness/Response
  Federal | State | Tribal | Local
☐ Public Health Emergency Powers
☐ Constitutional & Other Challenges
☐ Additional Resources
☐ Questions/comments
Transmission

• Transmissible person-to-person with potential infectivity rate exceeding annual influenza.
• Asymptomatic persons may infect others.

Symptoms

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

Vaccines & Treatment

• Vaccine trials are underway, but no approved vaccine is anticipated for months.
• No efficacious treatments exist despite initial claims.
Total Confirmed Deaths ≥ 83,568 = Mortality Rate 5.8%
Total Confirmed Cases: > 1,450,343

Total Confirmed Cases > 402,460  Total Deaths > 12,908
People Who Are at Higher Risk for Severe Illness

Underlying health condition/Risk factor for severe outcomes from respiratory infection (% with condition)

- One or more conditions (37.6%)
- Diabetes (10.9%)
- Chronic lung disease (9.2%)
- Cardiovascular disease (9.2%)

8 out of 10 deaths reported in the U.S. have been in adults 65 years old and older

Multi-level Emergencies

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

<table>
<thead>
<tr>
<th>International</th>
<th>Stafford Act or National Emergencies Act</th>
<th>HHS Public Health Emergency</th>
</tr>
</thead>
<tbody>
<tr>
<td>WHO Public Health Emergency of Int’l Concern</td>
<td>Emergency or Disaster</td>
<td>Public Health Emergency</td>
</tr>
<tr>
<td>Ongoing</td>
<td>Emergency Declarations by Foreign Governments</td>
<td>January 30, 2020</td>
</tr>
</tbody>
</table>
Federal Emergencies/ Invocations

- **Jan. 31**: HHS Public Health Emergency
- **Mar. 13**: National Emergencies Act
- **Mar. 13**: Stafford Act Emergency
- **Mar. 20**: Defense Production Act

[Image of Donald Trump]
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)
Mar. 13: President Trump declares dual emergencies via the National Emergencies Act and § 501(b) of the Stafford Act authorizing:

- Access to FEMA’s $50+ billion Disaster Relief Fund and reimbursement for eligible emergency protective response measures.
- Waivers under SSA § 1135 of select Medicare, Medicaid, S-CHIP, HIPAA Privacy Rule
- Additional types of federal assistance to states & localities
3/27 Congress passes the **CARES Act**, the largest economic stimulus package in history.

3/14 **Families First Coronavirus Response Act** provides paid sick/quarantine time & other benefits.


3/4 House introduces "Coronavirus Preparedness and Response Supplemental Appropriations Act”

2/13 Senators urge HHS to establish guidelines for how state & local governments are reimbursed for expenses.
Mar. 18: Families First Coronavirus Response Act:

- Requires private health plans to provide no cost coverage for COVID-19 diagnostic tests
- Temporarily > federal portion of Medicaid
- Releases $ millions in assistance to domestic nutrition assistance programs (e.g., SNAP, WIC)
- Requires certain employers to provide employees 14 days of paid sick leave
- Releases an additional $1 billion in FY2020 emergency grants for unemployment insurance benefits
Mar. 27: Congress approves $2.2 trillion relief bill (largest stimulus package in history):

- Hundreds of billions $ in emergency funding
- Requires group health plans & insurance providers to cover testing, vaccines, and preventative services related to COVID-19 without cost sharing
- Establishes a Ready Reserve Corps to ensure deployable workers are available for COVID-19 response
- Provides explicit federal & state liability protections for volunteer HCWs assisting COVID-19 patients in good faith
- Authorizes disclosure of PHI to covered entities upon the one-time written consent of patient

Federal Agency Coordination
Mar. 13: HHS Sec. Azar issues § 1135 national waivers (retroactive effect on March 1) re:

- EMTALA sanctions for patient relocation purposes
- HIPAA Privacy Rule regulations for 72 hours following implementation of hospital disaster protocol
- requirements that health care workers hold licenses in the state where they are providing services
- certain conditions of participation in Medicare, Medicaid, and SCHIP
- Medicare Advantage payment limitations
- Stark Law sanctions

Mar. 17: CMS expands Medicare telehealth coverage to facilitate healthcare services without visiting physical facilities; clinicians may be paid for telehealth services for beneficiaries across the entire country.
COVID State and Select Tribal/Local Declarations of Emergency

Click on the date of each state to view declarations

Link here for updates re: jurisdictional requests for FEMA disaster relief
Select State Emergency Powers Explicitly Invoked by Declarations

**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.

| Altered Contracts | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| Procurements      |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Emergency Plans   | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| ICS               |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Funding | Resource Allocation | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| Intrastate Coordination | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| Isolation | Quarantine | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| Licensure Reciprocity | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| Price Controls re: Gouging | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| Surveillance | Reporting | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| Testing | Screening | Treatment | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| Travel Restrictions | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |
| Waivers | Suspensions | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ | ■ |

Note: Altered Contracts | Procurements

Additional emergency powers may be authorized under state law through which the declarations are issued.
Emerging Legal Issues

Topics

- Emergency Powers - Triage
- Crisis Standards of Care
- Social Distancing Measures
- Liability & Insurance
- Privacy
- Surveillance & Reporting
- Testing/Screening/Treatment
**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.
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
## Constitutionality of Selected, Potential COVID Emergency Responses

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

Substantial change in usual healthcare operations and level of care due to a pervasive or catastrophic disaster.
Mar. 28: National Academies issues rapid expert consultation on CSC implementation

The National Academies of
SCIENCES • ENGINEERING • MEDICINE

March 28, 2020

Click on image to access

This rapid expert consultation responds to your March 25 request to provide a rationale for the implementation of crisis standards of care (CSC) in response to the COVID-19 outbreak. Also discussed are the broad principles and core elements of CSC planning and implementation. This discussion builds on a 10-year foundation of three seminal reports on CSC issued in 2009, 2012, and 2013 by the Institute of Medicine, which are described in Appendix A at the end of this document.

This document is meant to provide principles and guidance. It is neither appropriate nor feasible for us to detail actual choices and preferences that apply to specific situations, each of which depends on the exigencies of the epidemic relative to locally available facilities, equipment, personnel and other needed resources. Rather, this document describes the basis upon which to carry out such decision-making whenever it has to happen.
Practical, Ethical, and Legal Challenges Underlying Crisis Standards of Care

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

- Coordination
- Allocation
- Reimbursement
- Licensure
- Scope of Practice
- Patient’s Interests
- Duty to Care
- Uniformity
- Liability
“Some administrators noted that with difficult decisions about ventilator allocation also come concerns about liability. . . [O]ne hospital administrator . . . conclud[ed] that: “Government needs to provide guidelines on ethics if health resources are limited and decisions need to be made about which patients to treat. Are physicians liable for their decisions if that happens?””
Despite risks, many legal liability protections apply in routine events & declared emergencies, especially concerning health care volunteers, workers, and entities.
Social Distancing Measures

- Control modes of transportation
- Increase distance among workers
- Shelter-in-place/Lockdown
- Dismiss schools
- Curfew
- Restrict public gatherings
- Evacuation
- Isolation & quarantine
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, Japan & South Korea.

Mar. 11: President Trump institutes 30 day comprehensive travel ban for non-Americans arriving from EU, including the U.K. and Ireland

Mar. 19: U.S. closes border with Canada and Mexico to persons travelling for non-essential purposes, including tourism.
U.S. Domestic Travel Restrictions

The New York Times

Mar. 26: “Governors Tell Outsiders From ‘Hot Zone’ to Stay Away as Virus Divides States”

- Florida Governor Ron DeSantis orders 14 day quarantine against anyone arriving from NY in prior 3 weeks
- Hawaii Governor David Ige recommends all travelers postpone trips for 30 days and imposes 14 day quarantine on arrivals
- Alaska Governor Mike Dunleavy orders anyone (including residents) arriving in state to self-quarantine for 14 days
State Shelter-In-Place or Stay Home Orders

Click on the **date** of each state to view the order

**Note:** data are based in substantial part on [NYT](https://www.nytimes.com) (March 24, 2020)

- **Shelter-in-Place or Stay Home Orders – 42 states**
  - AK – Alaska
  - HI – Hawaii
  - PR - (Puerto Rico)
  - VI - (U.S. Virgin Islands)

- **Shelter-in-Place or Stay Home Orders – 3 partial states**
  - CA
  - CT
  - DC
# Select Components of State Shelter-in-Place & Stay Home Orders

<table>
<thead>
<tr>
<th>Component</th>
<th>CA</th>
<th>CT</th>
<th>DE</th>
<th>IL</th>
<th>LA</th>
<th>MA</th>
<th>MI</th>
<th>NY</th>
<th>OH</th>
<th>PA</th>
<th>OR</th>
<th>WV</th>
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<tbody>
<tr>
<td>Restricts Gatherings of “Any Number of People” Outside Household Unit</td>
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<td>Restricts Gatherings &gt;10</td>
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<td>Closes Non-Essential Businesses per CISA</td>
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<td>Exempts Religious Establishments</td>
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<td>Bans Leaving Homes for Non-Essential Purposes</td>
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<td>No Non-Essential Travel</td>
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<td>Explicitly Addresses Homelessness</td>
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<td>Duration &gt;2 Weeks</td>
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<td>Allows for Reauthorization</td>
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<td>Opportunities for Additional Exceptions</td>
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<td>Criminal Penalties</td>
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<td>Limits Local Responses</td>
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- **CA**: California
- **CT**: Connecticut
- **DE**: Delaware
- **IL**: Illinois
- **LA**: Louisiana
- **MA**: Massachusetts
- **MI**: Michigan
- **NY**: New York
- **OH**: Ohio
- **PA**: Pennsylvania
- **OR**: Oregon
- **WV**: West Virginia
- **CISA**: Cybersecurity and Infrastructure Agency
### “Essential” v. “Non-essential” Businesses

<table>
<thead>
<tr>
<th>“Essential Businesses” Typically Include:</th>
<th>“Non-essential Businesses” Typically Include:</th>
<th>Exceptions Allowing for Continued Operations:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Healthcare providers</td>
<td>Theaters</td>
<td>Religious institutions (KS)</td>
</tr>
<tr>
<td>Food providers/grocers</td>
<td>Salons/Barbers</td>
<td>Gun shops (PA)</td>
</tr>
<tr>
<td>Food cultivation/agriculture</td>
<td>Gyms</td>
<td>Golf courses (AZ)</td>
</tr>
<tr>
<td>Social services/Daycare</td>
<td>Casinos</td>
<td>Construction (WA)</td>
</tr>
<tr>
<td>Veterinary clinics/pet stores</td>
<td>Concert venues</td>
<td>Federal critical infrastructure (HI)</td>
</tr>
<tr>
<td>Media</td>
<td>Shopping malls</td>
<td>Inventory companies (MI)</td>
</tr>
<tr>
<td>Pharmacies</td>
<td>Museums</td>
<td>Takeout restaurants (WV)</td>
</tr>
<tr>
<td>Convenience stores</td>
<td>Bowling alleys</td>
<td>Marijuana dispensaries (PA)</td>
</tr>
<tr>
<td>Sanitation</td>
<td>Racetracks</td>
<td>Liquor stores (NY)</td>
</tr>
<tr>
<td>Home/hardware stores</td>
<td>Sporting venues</td>
<td>Blood drives (AZ)</td>
</tr>
<tr>
<td>Educational institutions</td>
<td>Spas</td>
<td></td>
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<tr>
<td>Transportation/gas stations</td>
<td>Recreation centers</td>
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<tr>
<td>Warehousing/storage</td>
<td>Tattoo parlors</td>
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<tr>
<td>Post offices/shipping</td>
<td>Community pools</td>
<td></td>
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</tbody>
</table>
“Shelter in Place” Orders

Virtual “Lock Down?”

OR

Public Health & Safety Zone?
Substantive due process – hard to rationalize government responses restricting liberty that are not tied to known risks

Equal protection – explicitly tying travel restrictions to persons from specific regions of the U.S. raises questionable classifications

Right to travel – limiting ingress and egress, especially across state lines, implicates federal interests and fundamental rights

Fundamental rights – infringements require assessments of efficacious, less restrictive alternatives:
• Strong incentives/messaging to avoid travel;
• Closures;
• Screening, quarantine, isolation or other legit. measures
Mar. 29: Curfew order takes effect for Navajo Nation

- Public Health Order extends existing Stay at Home Order to set a curfew for the entire Navajo Nation: everyone must stay home from 8:00 p.m. - 5:00 a.m., 7 days a week
- Excludes essential employees reporting to or from duty, with official identification and/or a letter of designation from their essential business employer
Feb. 16: CDC issues initial guidance intimating school mitigation could include possible closures

Mar. 13: Multiple states (e.g., OR, IL, MD, NM) determine to close schools for select periods of time followed by extensive closures in most states for all of Spring term

The Legal Landscape for School Closures in Response to Pandemic Flu or Other Public Health Threats

James G. Hodge, Jr.
Guidance as of 3/15/2020

Large events and mass gatherings can contribute to the spread of COVID-19 in the United States via travelers who attend these events and introduce the virus to new communities. Examples of large events and mass gatherings include conferences, festivals, parades, concerts, sporting events, weddings, and other types of in-person events consisting of 10 or more people throughout the United States until April 30, 2020.

White House and CDC recommend no in-person events consisting of 10 or more people throughout the United States until April 30, 2020.

This recommendation does not apply to the day to day operation of organizations such as schools, institutes of higher learning, or businesses. This recommendation is made in an attempt to reduce introduction of the virus into new communities and to slow the spread of infection in communities already affected by the virus. This recommendation is not intended to supersede the advice of local public health officials.
Assembly Limits

• On what authority?
• By who specifically?
• At what level of government?
• In what specific setting or capacity?
• For how long?
• Consistent with 1st Amendment rights?
  • Free speech
  • Freedom to assemble
  • Freedom of religion
  • Reasonable limitations
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
**Jan. 31:** CDC 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.

**Feb. 10:** 4 additional flights amassing more than 800 Americans quarantined at 4 military bases.

**Feb. 17:** CDC quarantines 2 flights of over 300 Americans returning from the Diamond Princess cruise ship (in Yokohama, Japan) at Travis and Lackland Air Force 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.
Option A: Temporary Quarantine or Isolation w/ out Judicial Notice via Written Directive

Option B: Quarantine or Isolation w/ Judicial Notice

Agency petitions court for an order authorizing Q or I of an individual or group specifying:

- identity of the individual(s) or groups;
- premises subject to Q or I;
- date and time at which Q or I commences;
- suspected contagious disease;
- statement of compliance with conditions and principles; and
- statement of the basis upon which such intervention is justified.

Notice

- Hearing: held in proximity of petition, absent extraordinary circumstances.
- Order: if, by clear and convincing evidence, Q or I shown to be reasonably necessary to prevent or limit the transmission of a contagious or possibly contagious disease to others.
March 28, 2020

LOCAL HEALTH OFFICER

QUARANTINE DIRECTIVE
AND
ISOLATION ORDER

EFFECTIVE IMMEDIATELY, as Local Health Officer I hereby DIRECT and ORDER as follows:

QUARANTINE DIRECTIVE

Everyone with COVID-19 symptoms (fever, cough, and/or difficulty breathing) who has a test result pending, shall stay in a quarantine location (your home if you have one or in a government directed or publicly provided location if one is available) in accordance with CDC and Public Health guidance.

If your test result is positive, you must then remain in isolation.
Q & I Best Practices

- Safe, hygienic premises
- Monitoring & care
- Basic necessities
- Means of communication
- Least restrictive means
- Termination
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.”

Emerging issues include:
- Availability
- Allocation
- Costs
- Reimbursements
- Voluntary v. Mandatory testing

The Washington Post

March 21: “Health officials in [NY, CA] and other hard-hit parts of the country are restricting coronavirus testing to health care workers and people who are hospitalized, saying the battle to contain the virus is lost and we are moving into a new phase of the pandemic response.”
COVID-19 & HIPAA Bulletin
Limited Waiver of HIPAA Sanctions and Penalties During a Nationwide Public Health Emergency

The Novel Coronavirus Disease (COVID-19) outbreak imposes additional challenges on health care providers. Often questions arise about the ability of entities covered by the HIPAA regulations to share information, including with friends and family, public health officials, and

COVID-19 and HIPAA: Disclosures to law enforcement, paramedics, other first responders and public health authorities

Does the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule allow a covered entity to share the name or other identifying information of an individual who has been infected with, or exposed to, the virus SARS-CoV-2, or the disease caused by the virus, Coronavirus Disease 2019 (COVID-19), with law enforcement, paramedics, other first responders, and public health authorities without an individual’s authorization?

For additional expert analyses and guidance, contact Denise Chrysler, JD, and colleagues in our Network–MidStates Region at dchrysler@networkforphl.org
For More Information

Access these and other Network materials [here](#)
Acknowledgements

• Special thanks to Leila Barraza, JD, MPH, Sarah Wetter, JD, MPH, Claudia Reeves and Erica 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