

COVID-19

Emergency Legal Preparedness Primer

As of April 8, 2020

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- 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

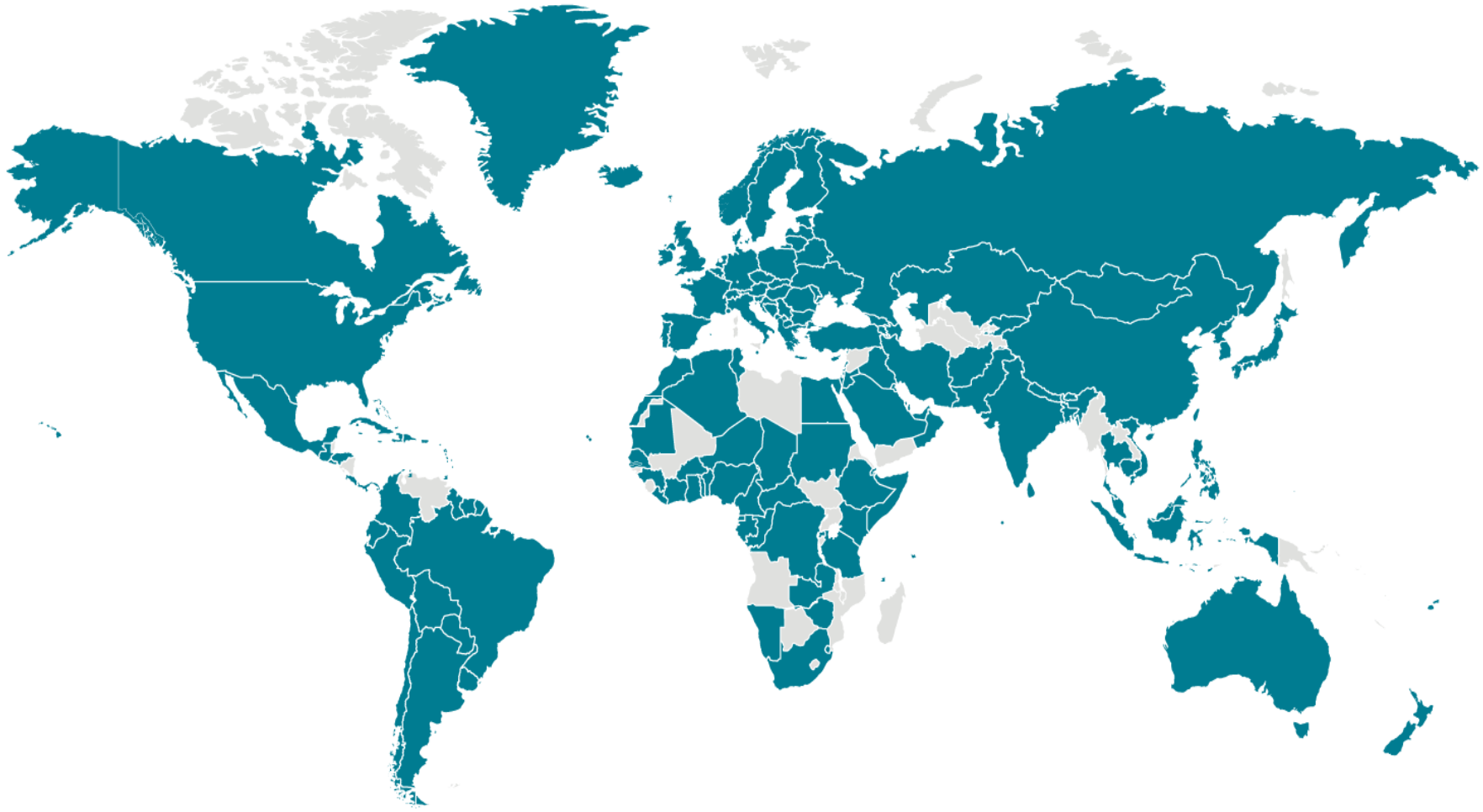
- Respiratory symptoms, fever, cough, breathing difficulties, aches, pains.
- In severe cases (~20%), infection can cause pneumonia, respiratory issues, kidney failure, and death.

Vaccines & Treatment

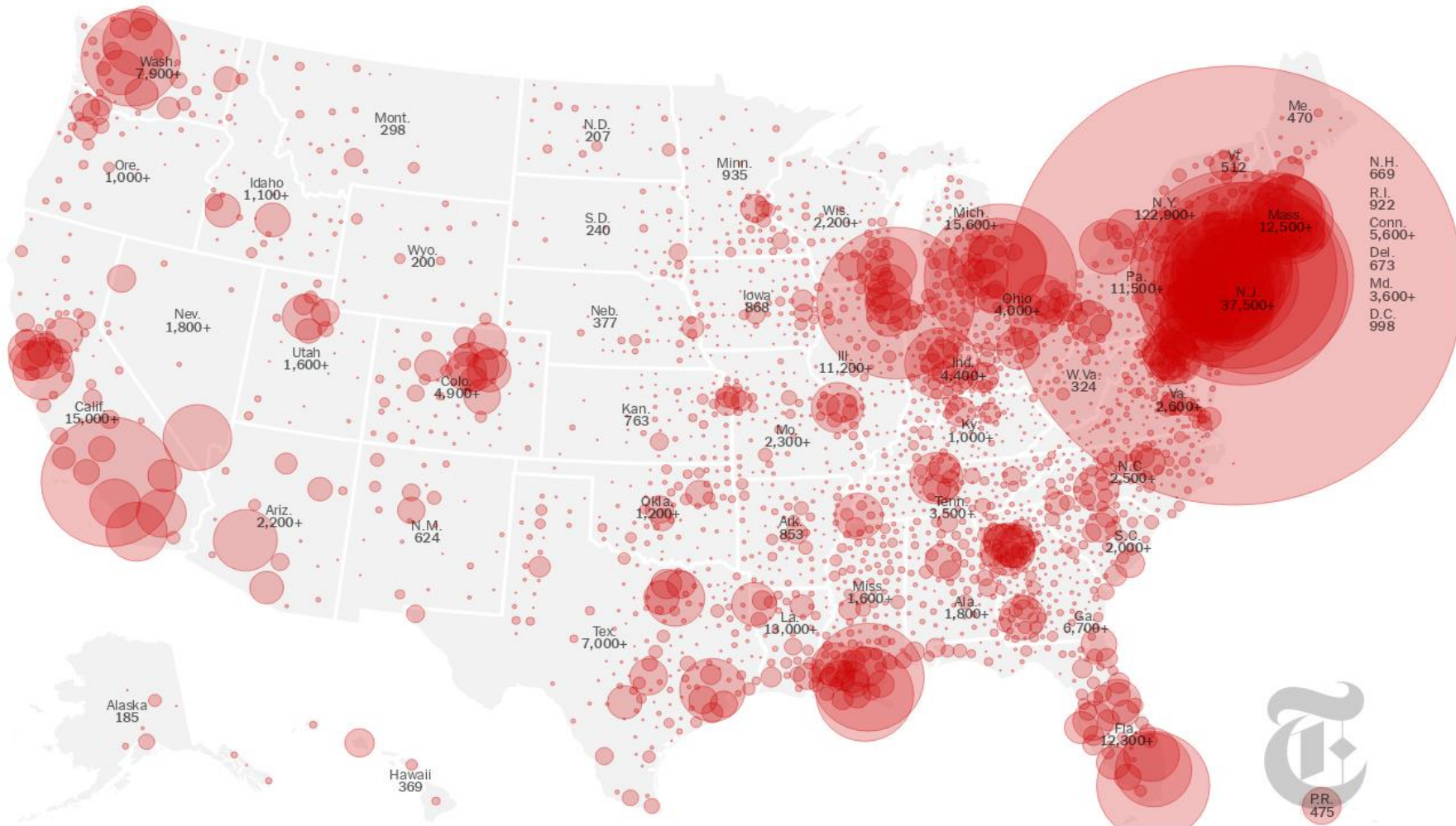
- Vaccine trials are underway, but no approved vaccine is anticipated for months.
- No efficacious treatments exist despite initial claims.

COVID-19 Global Distribution

Total Confirmed Deaths >: 83,568 = Mortality
Total Confirmed Cases: > 1,450,343 Rate 5.8%



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%)



Older Adults

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



People with Asthma



Groups at Higher Risk for Severe Illness



People with HIV

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 January 30, 2020	Emergency Declarations by Foreign Governments Ongoing
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

**HHS Public
Health
Emergency**

**Jan.
31**



**National
Emergencies
Act**

**Mar.
13**



**Stafford Act
Emergency**

**Mar.
13**



**Defense
Production
Act**

**Mar.
20**

FEMA



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)



FEMA

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

Select Congressional Responses

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

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

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

COVID-19 Stimulus Bill: Key Public Health Elements



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.

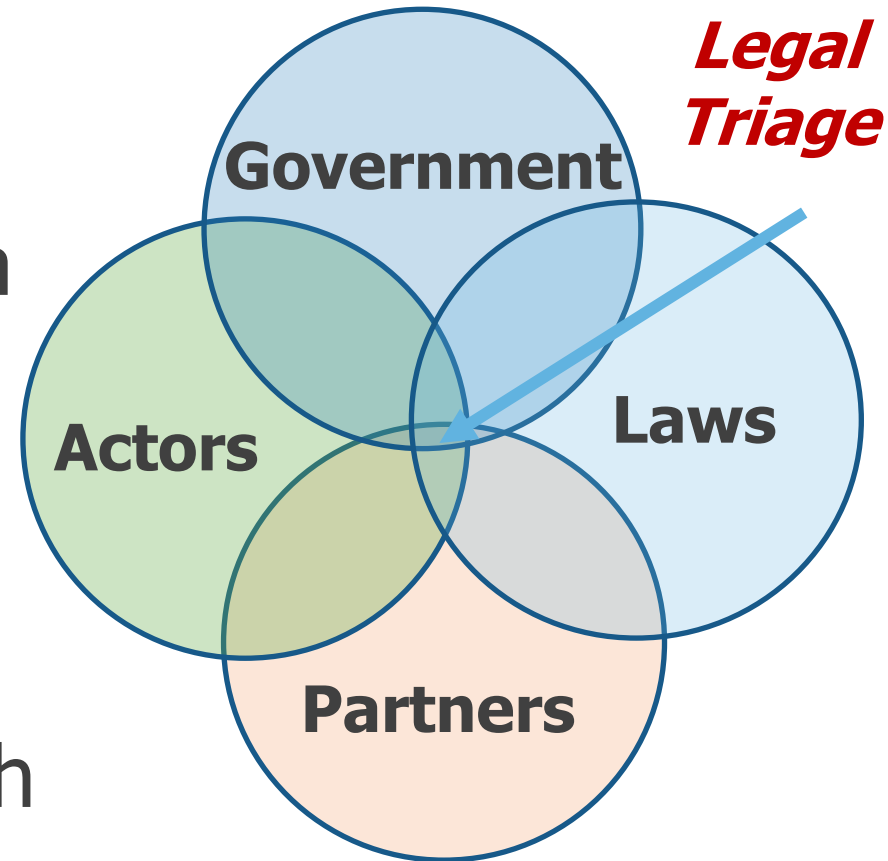
Select State Emergency Powers Explicitly Invoked by Declarations

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.*

Emergency Powers	A	A	A	C	C	C	D	F	H	I	I	I	K	L	M	M	M	M	N	N	N	N	O	O	P	R	T	V	U	W	W	W		
	K	Z	R	A	O	T	E	L	I	L	N	A	Y	A	E	D	A	I	J	M	Y	C	H	R	A	I	N	A	T	A	V	I		
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	■	■	■		■									■					■	■	■	■		■	■	■	■	■	■					■



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

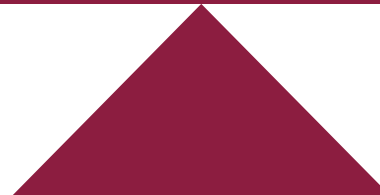


Balancing Individual & Communal Interests

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.”

Substantial change in usual healthcare operations and level of care due to a pervasive or catastrophic disaster.

Crisis Standards of Care

A Systems Framework for
Catastrophic Disaster Response

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](#)

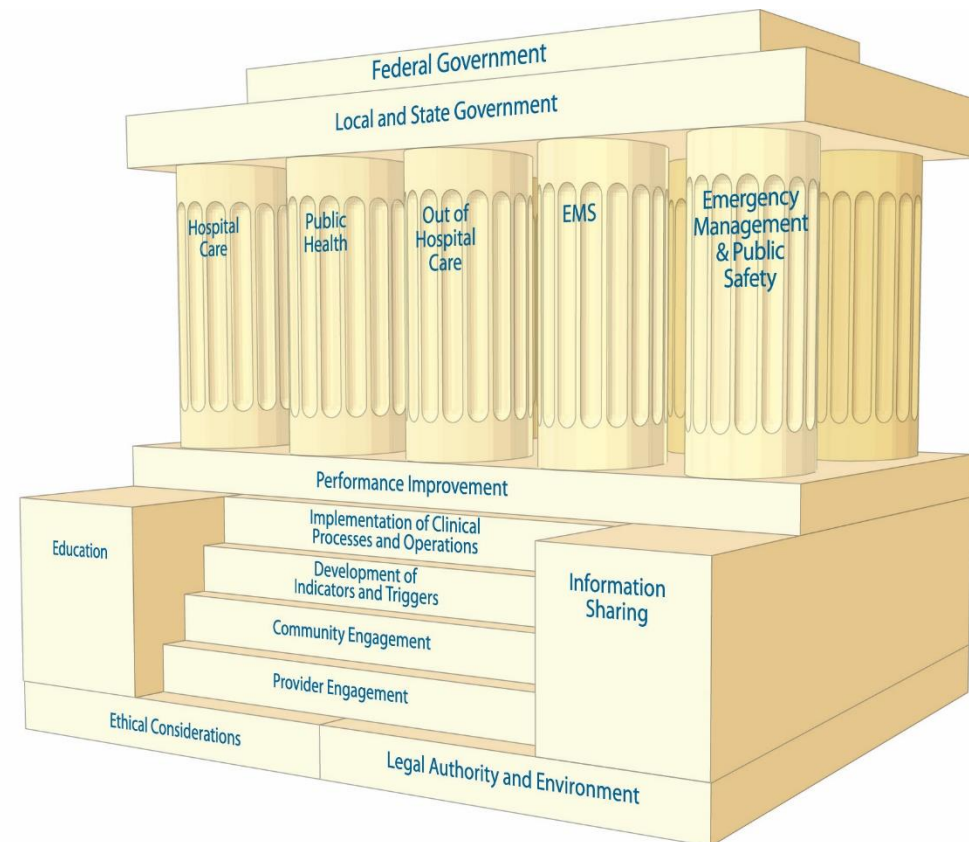
This rapid expert consultation responds to your March 25 request to provide a rationale for the implementation of crisis standards of care (CSC) in response to the COVID-19 outbreak. Also discussed are the broad principles and core elements of CSC planning and implementation. This discussion builds on 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 [Click on article image to access](#)

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**



U.S. Department of Health and Human Services

Office of Inspector General



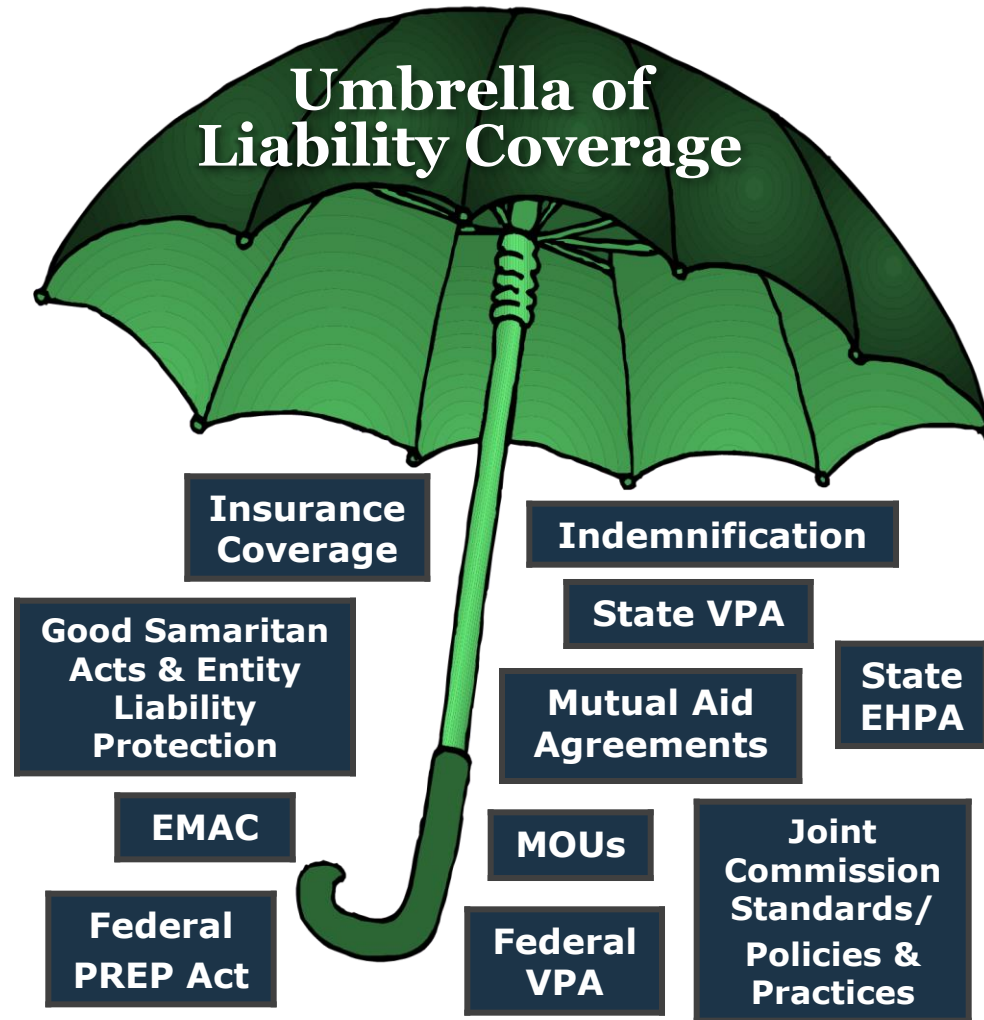
Hospital Experiences Responding to the COVID-19 Pandemic: Results of a National Pulse Survey March 23–27, 2020

“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?””

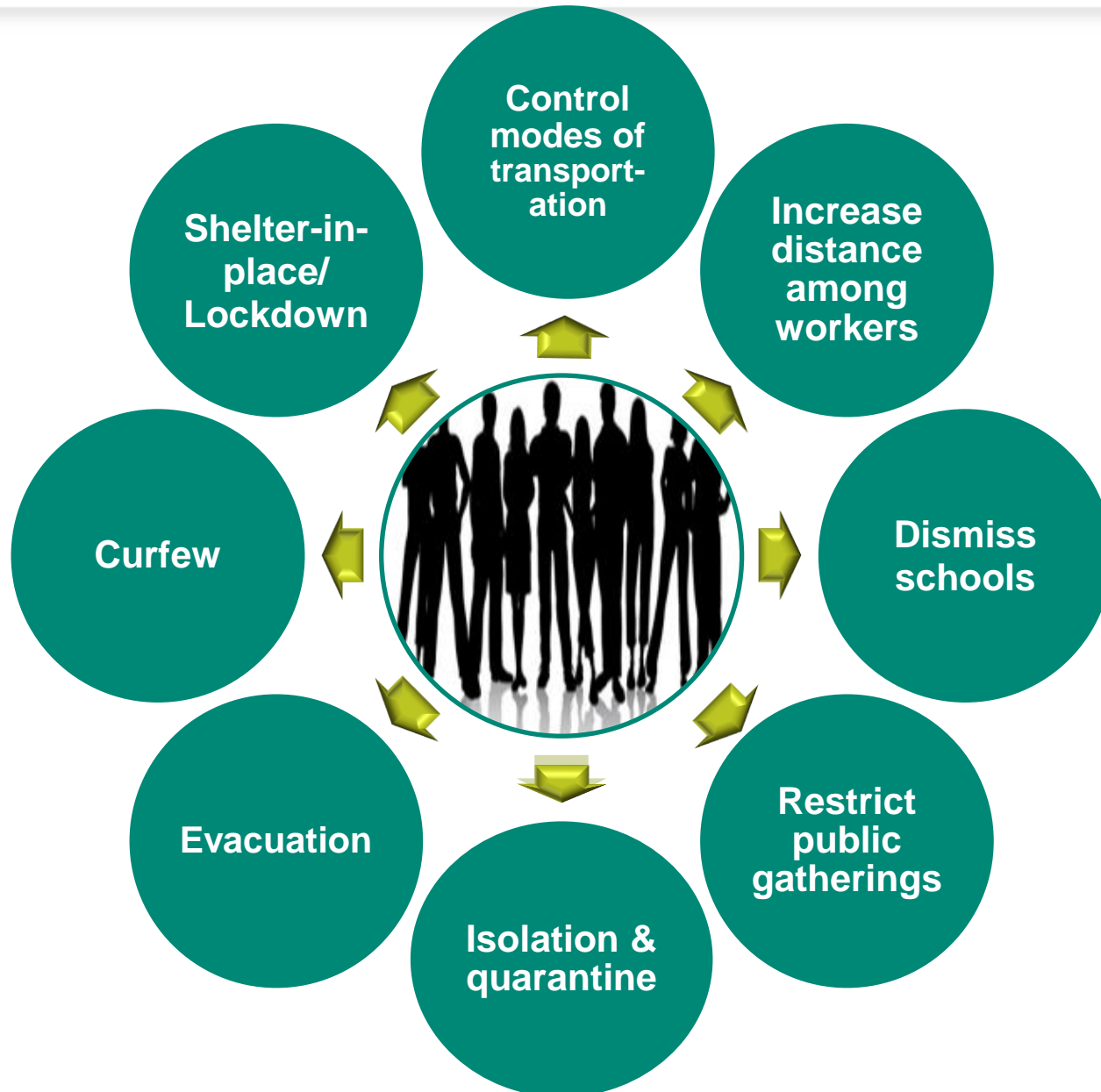
Emergency Liability Protections - Health Practitioners & Entities



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



Social Distancing Measures

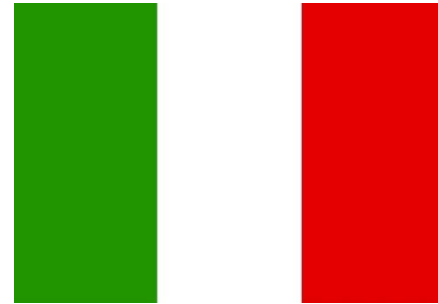


Jan. 31: Trump Administration bans foreign national travel for those who have been in China within the last 14 days and who pose a risk.

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

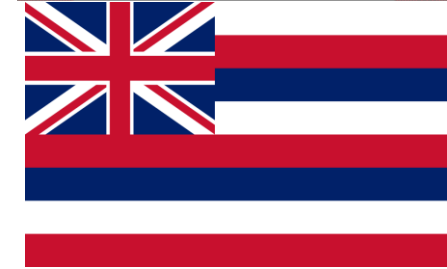
Mar. 19: U.S. closes border with Canada and Mexico to persons travelling for non-essential purposes, including tourism.



The New York Times

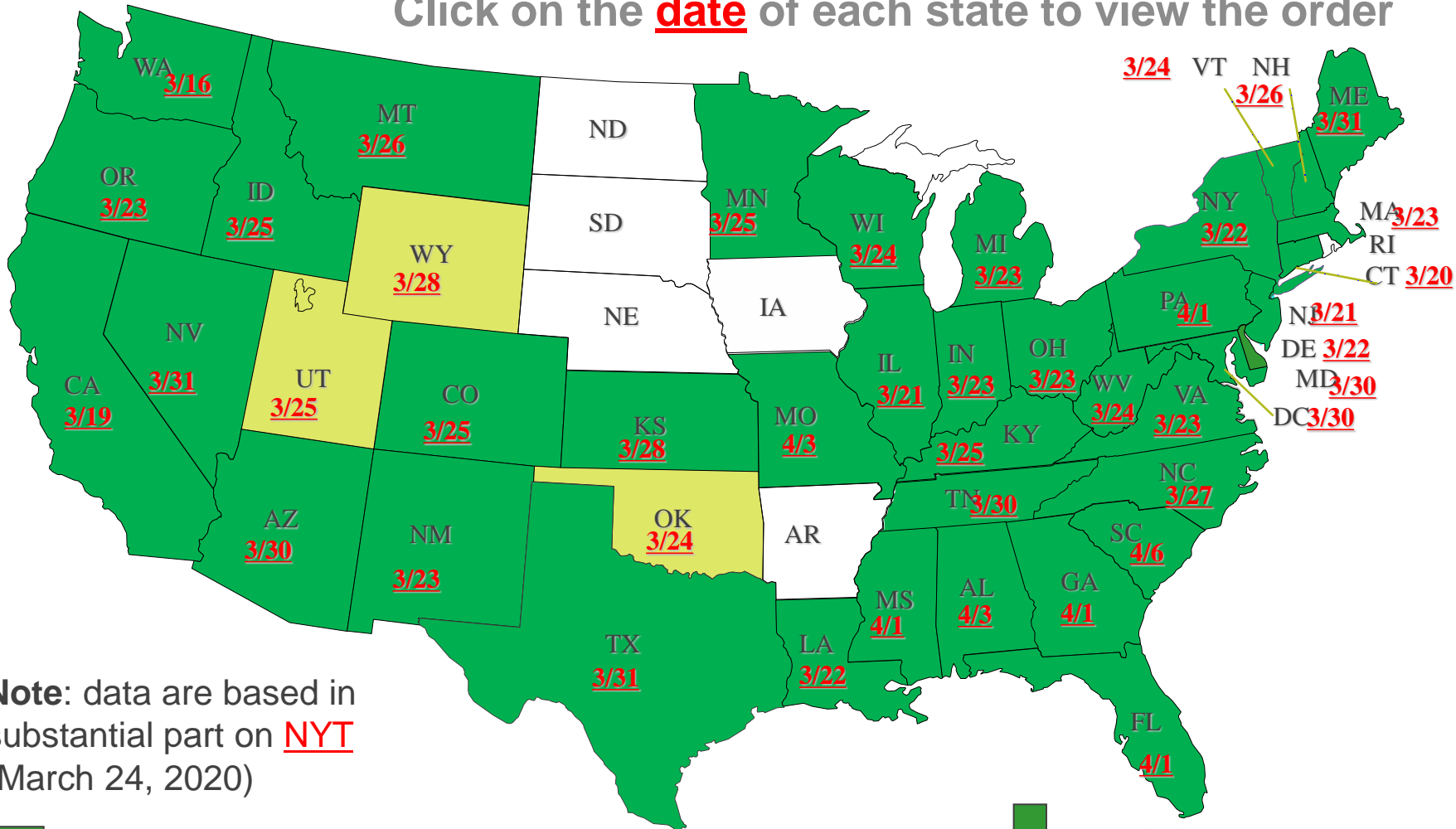
Mar. 26: “Governors Tell Outsiders From ‘Hot Zone’ to Stay Away as Virus Divides States”

- 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](#) (March 24, 2020)

- Shelter-in-Place or Stay Home Orders – **42 states**
- Shelter-in-Place or Stay Home Orders – **3 partial states**

- AK – Alaska **4/1**
- HI – Hawaii **3/23**
- PR - (Puerto Rico)
- VI - (U.S. Virgin Islands)

Select Components of State Shelter-in-Place & Stay Home Orders

Component	C	C	D	I	I	L	M	M	N	O	P	O	W
	A	T	E	L	N	A	A	I	Y	H	A	R	V
Restricts Gatherings of “Any Number of People” Outside Household Unit					■			■		■		■	■
Restricts Gatherings >10	■	■	■	■	■	■	■	■	■	■		■	■
Closes Non-Essential Businesses per CISA	■	■	■	■	■		■	■	■	■	■	■	■
Exempts Religious Establishments	■		■		■		■	■	■	■	■		■
Bans Leaving Homes for Non-Essential Purposes			■	■	■	■		■		■		■	■
No Non-Essential Travel			■	■	■					■		■	
Explicitly Addresses Homelessness			■	■	■					■			
Duration >2 Weeks	■	■	■			■		■			■	■	■
Allows for Reauthorization					■			■					
Opportunities for Additional Exceptions		■					■		■				
Criminal Penalties	■		■	■			■	■		■		■	
Limits Local Responses		■											

“Essential” v. “Non-essential” Businesses

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



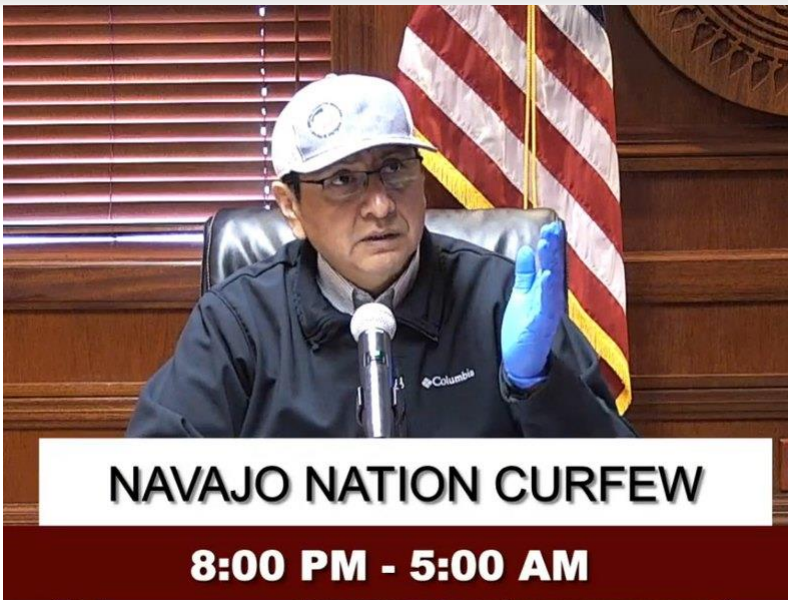
Virtual “Lock Down?”

OR

Public Health & Safety Zone?

U.S. Travel Restrictions & Lockdowns - **Constitutionality**

- ❑ **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

Closures & Cancellations



Places of Worship



Employers



Universities



Events



Sports



Festivals



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

Guidance as of 3/15/2020

Click on image to access

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

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

protecting vulnerable populations, hand hygiene, and social distancing. When feasible, organizers could modify events to be virtual.

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.

- 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

THE FIRST AMENDMENT
CONGRESS SHALL MAKE NO LAW RESPECT-
ING AN ESTABLISHMENT OF RELIGION, OR
PROHIBITING THE FREE EXERCISE THEREOF;
OR ABRIDGING THE FREEDOM OF SPEECH, OR
OF THE PRESS; OR THE RIGHT OF THE PEOPLE
PEACEABLY TO ASSEMBLE, AND TO PETITION THE
GOVERNMENT FOR A REDRESS OF GRIEVANCES.
PROTECT THE FIRST AMENDMENT, SUPPORT THE CBLDF

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



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.

**Communicable Disease Epidemiology
and Immunization Section**

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Seattle, WA 98104

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TTY Relay: 711

www.kingcounty.gov/health

Public Health
Seattle & King County



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.**”





Click on images to access

March 2020

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

[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 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**