COVID-19: Navigating Public Health Emergency Legal Responses Underlying Re-opening State/Local Economies

1:00 – 2:00 p.m. EST | May 28, 2020
How to Use WebEx Q & A

1. Open the Q&A panel
2. Select “All Panelists”
3. Type your question
4. Click “Send”
Moderator

**Emily Carey**, Legal Researcher, Network for Public Health Law — Western Region Office and Center for Public Health Law and Policy at Arizona State University

- J.D. Candidate, ASU Sandra Day O’Connor College of Law
- Research interests/areas of expertise:
  - Reproductive rights
  - Opioid crisis
  - Vaccination policy
Presenter

James G. Hodge, Jr., Director, Network for Public Health Law - Western Region; the Peter Kiewit Foundation Professor of Law and Director, Center for Public Health Law and Policy, ASU Sandra Day O’Connor College of Law

▪ J.D., Salmon P. Chase College of Law (KY)
▪ LL.M., Georgetown University Law Center
▪ Research interests/areas of expertise:
  ▪ Emergency Legal Preparedness & Response
  ▪ Vaccinations
  ▪ Preemption
  ▪ Emerging Infectious Diseases
  ▪ Constitutional Rights and Structural Principles
Presenter

Sarah Wetter, Consultant, Network for Public Health Law—Western Region; Fellow, O’Neill Institute for National and Global Health Law at Georgetown University

- J.D., ASU Sandra Day O’Connor College of Law
- M.P.H., Johns Hopkins Bloomberg School of Public Health
- Research interests/areas of expertise:
  - Emergency legal preparedness
  - Health information exchange
  - Obesity prevention and control
  - Health data sharing
  - Public health preemption
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Law Fellow, O’Neill Institute
Georgetown University Law Center
Consultant, Network - Western Region Office
Contents

• COVID-19 Pandemic – Quick Glimpse of Social Distancing Efforts
• Emerging Re-opening Efforts Among States, Tribes, & Localities
• Legal and Policy Controversies, Cases & Issues
• Potential Actions & Resolutions in Promotion of the Public’s Health
• Questions/comments
Michelle Notrica, PharmD, JD, MPH
Claudia Reeves, ASU JD Candidate
Elyse Pendergrass, ASU JD Candidate
Hanna Reinke, ASU JD Candidate
Emily Carey, ASU JD Candidate
Claudia Reeves, ASU JD Candidate
COVID-19 Confirmed Cases & Deaths

U.S. Stats: 31% all global cases | 29% all global deaths

U.S. DEATHS NEAR 100,000, AN INCALculABLE LOSS

They Were Not Simply Names on a List. They Were Us.

Numbers alone cannot possibly convey the anguish the coronavirus has caused in America, whether it is the number of patients treated, jobs interrupted or lives saved. So the news of the deaths attributed to the virus, The New York Times reported, is a daunting and unending toll on the nation and the world. The 1,000 people here reflect just 1 percent of the total. Some were mere numbers.

patriot News

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UNPRECEDENTED RESPONSES
Public health authorities and powers vary depending on the type of emergency declared at every level of government.

<table>
<thead>
<tr>
<th>International</th>
<th>WHO Public Health Emergency of Int’l Concern</th>
<th>January 30, 2020</th>
<th>Emergency Declarations by Foreign Governments</th>
<th>Ongoing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>Stafford Act or National Emergencies Act</td>
<td>March 13, 2020</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>HHS Public Health Emergency</td>
<td>January 31, 2020</td>
<td></td>
<td></td>
</tr>
<tr>
<td>State/Tribal</td>
<td>Emergency or Disaster</td>
<td>Public Health Emergency</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Local</td>
<td>Emergency or Disaster</td>
<td>Public Health Emergency</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
COVID State & Select Tribal/Local Declarations of Emergency

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

**Emergency** - 33

**Disaster** - 4

**Public Health**

**Emergency/Disaster** - 9

**Emergency + Public Health Emergency** - 4

**County/City**

**Tribal**

Link [here](#) for updates re: jurisdictional requests for FEMA disaster relief

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**AK** – Alaska **Public Health Disaster** 3/11

**HI** - Hawaii **Emergency** 3/4

**PR** - (Puerto Rico) **Emergency** 3/12

**VI** - (Virgin Islands) **Emergency** 3/13

---

**Mason Co.** 3/6  **Des Moines** 3/6

**Edmond** 3/5  **Auburn** 3/6

**Cowitz Co.** 3/4  **Bellevue** 3/3

**Snohomish Co.** 3/4  **Umatilla Reservation** 3/4

**Lummi Nation** 3/3  **Kitsap Co.** 3/9  **Pierce Co.** 3/6

**Redmond** 3/3  **Seattle** 3/3

**Seattle-King Co.** 2/29  **Washington Co.** 3/4  **WA**

**Clackamas Co.** 3/2

**Hoopa Valley Tribe** 3/4

**Sacramento Co.** 3/4  **Nevada Co.** 3/4  **Santa Rosa** 3/2

**Solano Co.** 2/27  **Marin Co.** 3/3

**Mendocino Co.** 3/4

**Sonoma Co.** 3/4  **Placer Co.** 3/3

**Santa Cruz Co.** 3/2  **Alameda Co.** 2/19

**San Fran City** 2/25  **Santa Clara Co.** 2/10

**Los Angeles Co.** 3/4

**Los Angeles** 3/4  **Pasadena** 3/4

**Long Beach** 3/4  **Orange Co.** 2/27

**San Diego Co.** 2/19

**Salt Lake Co.** (UT) 3/6  **Salt Lake City** (UT) 3/11

**Navajo Nation** 3/11  **Eagle Co.** (UT) 3/7

**Phoenix** (AZ) 3/13

**San Antonio** 3/2  **Bexar Co.** 3/2  **Austin** 3/6  **Travis Co.** 3/6

**Co. of Hawai’i** 2/28  **Honolulu Co.** 3/4  **Maui, Kaua’i** 3/4

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**Minnesota** (MN) 3/16  **Milwaukee** (WI) 3/13

**Kansas City** (MO) 3/12  **St. Paul** (MN) 3/15  **Cooke Co.** (IL) 3/9  **McHenry Co.** (IL) 3/11  **Cincinnati** (OH) 3/11

**Cuyahoga Co.** (OH) 3/12  **Montgomery Co.** (PA) 3/9  **Delaware Co.** (PA) 3/9

**Boston** (MA) 3/15

**VT** 3/13

**NH** 3/13

**RI** 3/9

**New York City** 3/12  **D.C.** 3/11

**Lexington** (KY) 3/6

**Broward Co.** 3/10  **Miami-Dade Co.** 3/11
Rescinded or Lapsed Emergency Declaration[s]
**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.
Social Distancing Measures

- Control modes of transportation
- Increase distance among workers
- Shelter-in-place/ Lockdown
- Evacuation
- Curfew
- Dismiss schools
- Restrict public gatherings
- Isolation & quarantine
Select Social Distancing Measures

- Quarantine
- Isolation
- Curfews
- Travel Restrictions
- Assemblies
- Evacuations
Closures & Cancellations

Places of Worship  Employers  Universities

Events  Sports  Schools
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
“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>
</tr>
<tr>
<td>Transportation/gas stations</td>
<td>Recreation centers</td>
<td></td>
</tr>
<tr>
<td>Warehousing/storage</td>
<td>Tattoo parlors</td>
<td></td>
</tr>
<tr>
<td>Post offices/shipping</td>
<td>Community pools</td>
<td></td>
</tr>
</tbody>
</table>
Justifying Social Distancing

Assess Epi
Assure Mobilization
Acquire PPE

Find Treatments
Develop Vaccines
Save Lives
Assessing the Consequences

Unemployment

Business Failures

Government Bailouts

Active Protests

Mental Health

Lost Lives
Where We Stand Nationally

Public Health & Safety

Economic Interests
April 16: White House releases guidelines for state/local officials to consider in re-opening based on regional gating criteria:

- Downward trend of COVID illnesses w/in 14 days
- Downward trajectory of cases or positive tests w/in 14 days
- Hospitals must treat all patients outside CSC or implementation of a “robust reporting system”
Re-opening Phases

**Phase 1**
- Vulnerable individuals shelter-in-place
- Practice social distancing and avoid socializing in groups >10
- Employers should encourage telework and most businesses remain closed

**Phase 2**
- Resume non-essential travel
- Schools, gyms, and bars may re-open

**Phase 3**
- Vulnerable individuals may resume public interactions, with social distancing
- Large venues may reopen
Re-opening Efforts

Essential Businesses

Light Retail

Salons & Barbers

Bars

Gyms

Restaurants
Legal Controversies

Federal v. State

State v. Local

State v. Tribal

Employee v. Employer

Public v. Private Sector
Array of Constitutional Issues

- Separation of Powers
- Federalism
- Supremacy
- Preemption
- Judicial Deference
- Freedom of Expression
- Freedom of Assembly
- Freedom of Religion
- Due Process
- Right to Privacy
- Equal Protection
- Right to Travel
- Right to Bear Arms
- Cruel & Unusual Punishment
- Takings
• **Liberate PA!**
  — President Trump claims Gov. Wolf is making “no effort” to reopen the economy

• **My state, my decision**
  — NY Gov. Cuomo rebukes the President’s claim of “total authority”

• **MI Attorney General’s Letter to President Trump**
  — In a visit, the President blatantly disregards MI’s mask policy

• **Houses of worship are “essential”**
  — President Trump threatens to “override” governors if they do not immediately open houses of worship

• **Bailey v. Pritzker**
  — DOJ submits statement of interest, accusing IL Gov. Pritzker’s stay home order extension as an unconstitutional overreach of state emergency powers
May 19: A high ranking DOJ official sent a letter to California Governor Newsom, threatening to intervene if CA does not alter its stay home order and re-opening policy.

- While restaurants and malls can open in phase 2, religious entities cannot do so until phase 3.
- DOJ characterizes this deferential treatment as unconstitutional pursuant to [*Lukumi v. City of Hialeah*](https://example.com).
- Houses of worship may now open in limited capacity after being classified “essential” by President Trump.
Financial Feuds
- PA Governor Wolf threatened leaders across several counties that moved to reopen as the state maintained its stay home orders with denial of discretionary federal funds and various sanctions for offending businesses.

Face Mask Requirements
- TX Lieutenant Governor Dan Patrick denounced a local official’s executive order requiring Harris County constituents to wear face masks, calling the order “the ultimate government overreach.”

Reopening Entertainment & Recreation
- NV Governor condemns Las Vegas Mayor Carolyn Goodman for her plans to reopen the city, claiming residents must not be “used as a control group.”

Battle over Nonessential Businesses
- NM Supreme Court ruled against a local mayor seeking to re-open non-essential businesses.

Constituent Health Concerns
- Georgia mayors speak out against Governor Kemp’s preemptive order allowing businesses to reopen, fearing for their constituents’ safety.
Wisconsin Supreme Court Rejects Stay-Home Order | Mayors Refuse to Comply

- Madison Mayor Satya Rhodes-Conway refused to comply with the WI Supreme Court’s ruling that the state’s stay-home order is unconstitutional on procedural grounds.
- Milwaukee Mayor Tom Barrett ordered the stay-home order to remain in effect.

BREAKING: "Safer at Home" guidelines will remain in effect in Madison & Dane County. Public Health Madison & Dane County @PublicHealthMDC has issued a local public health order to keep it in place until May 26th. #COVID19
Reopening Communities

- NM Gov. Michelle Lujan Grisham invoked emergency powers to lock down the City of Gallup to stop tribal members (largely from Navajo Nation) from spreading COVID to state residents.
- St. Regis Mohawk Tribe in NY remains closed with a curfew as the region around it reopens, preventing visitors from entering the community.

Restricting Travel

- SD Gov. Kristi Noem ordered checkpoints on state highways to be removed and requested Pres. Trump for federal assistance when tribes refused.

Reopening Casinos

- CT Gov. Ned Lamont recognized the Mashantucket Pequot and Mohegan Tribes’ sovereignty over reopening decisions but warned of impacts of reopening casinos on state and tribal partnerships, as well as public health.
Michigan Warns Tribal Casinos of Reopening Penalties

- Island Resort & Casino, owned by Hannahville Indian Community (HIC), planned to reopen May 16, before Gov. Whitmer’s stay at home order expires on May 28.
- MI AG Dana Nessel threatened civil and criminal penalties pursuant to state executive orders for casino employees and patrons who are not tribal members and remain subject to state law.
- HIC set a new tentative reopening date for June 1
Friends of Danny DeVito v. Wolf
Poopy’s Pub & Grub v. J.R. Pritzker
Tesla Inc. v. Alameda County
House of Pain Gym v. St. Louis County
Open Our Oregon v. Kate Brown
"The Gym" (Victorville, California) reopened May 1 against CA Governor Newsom’s executive order, and was cited 2 days later. The owners have no plans of shutting down and are willing to risk it all to stand on their constitutional rights. “We the People,” they assert, “was founded on the fact that WE are the ones in control…”
Potential legal claims for employees:

- **Workers compensation** - typical and often exclusive remedy for workplace injuries
- **Wrongful termination** - e.g., employee faces adverse action for seeking protections
- **Discrimination** - e.g., persons are fired/discriminated against on basis of age, parenthood, health status, or other protected characteristics
- **Public nuisance** - e.g., *Rural Community Workers Alliance v. Smithfield Foods, Inc.* (Missouri)
- **Negligence & intentional torts** - e.g., if employer fails to implement CDC/OSHA safety measures
May 19, 2020: McDonald’s employees filed a class action in an Illinois circuit court against the fast food chain as it prepares to reopen certain dining rooms. Plaintiffs seek injunctive relief, alleging McDonald’s breached its duties to provide employees with masks, hand sanitizer, and gloves, and to inform employees when staff tested positive for COVID-19.
Potential Actions & Resolutions

• Forthcoming litigation could redefine civil liberties during emergencies
• Preemption issues could shape governmental emergency roles
• Officials may seek to address inequities tied to reopening
• Legislation to immunize businesses from COVID claims could place employees at risk
Questions

- Please share your questions/comments via the “Chat” function

  - james.hodge.1@asu.edu | @jghodgejr
  - swetter@asu.edu

- For more information & ongoing updates, check out the COVID-19 legal information at the Network for Public Health Law
How to Use WebEx Q & A

1. Open the Q&A panel
2. Select “All Panelists”
3. Type your question
4. Click “Send”
Thank you for attending

For a recording of this webinar and information about future webinars, please visit networkforphl.org/webinars

COVID-19: Innovations in Nutrition Programming to Address Food Insecurity
1:00 – 2:00pm EST | June 4

COVID-19: Real-Time Guidance, Resources and Information
View resources & request assistance at networkforphl.org/covid19