COVID-19
Emergency Legal Preparedness Primer
As of June 26, 2020

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COVID-19 Epi Snapshot

Emergency Legal Preparedness/Response/Recovery
Federal | State | Tribal | Local

Public Health Emergency Powers

Constitutional & Other Challenges

Additional Resources/Ask the Network
Transmission

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

Symptoms

• Respiratory symptoms, fever, cough, breathing difficulties, chills, muscle pains, headache, sore throat & loss of smell/taste
• In severe cases infection can cause pneumonia, respiratory issues, kidney failure & death.

Vaccines & Treatment

• There are no effective treatments or vaccines although several options are under close review or early assessments.
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

Emerging Epidemiology Trends

Asymptomatic persons present real risks of infection

Antibodies may be insufficient to ward off additional infections

Vaccinations are still months away from mass use

Emerging new cases are rising from re-opening activities
COVID-19 Confirmed Cases & Deaths

Global Cases 9.65 million | Deaths: 490,632
U.S. Cases 2.47 million | Deaths: 126,644
U.S. Stats 26% all cases | 26% all deaths

CDC COVID Projections

Cumulative reported deaths

- Ensemble
- Individual models

Bands: 95% Prediction Intervals

April 15, May 01, May 15, June 01, June 15, July 01, July 15
Public health authorities and powers vary depending on the type of emergency declared at every level of government.
Federal Emergencies/Invocations

- **HHS Public Health Emergency**
  - Jan. 31

- **HHS PREP Act Declaration**
  - Feb. 4

- **Stafford Act Emergency**
  - Mar. 13

- **National Emergencies Act**
  - Mar. 13

- **Defense Production Act**
  - Mar. 20
Jan. 31: HHS Sec. Alex Azar declares national public health emergency effective as of Jan. 27

- Encourages interjurisdictional coordination
- Allows waivers of specific federal laws
- Authorizes real-time countermeasures through emergency use authorizations
- Supports social distancing measures

Apr. 21: Sec. Alex Azar renews PHE declaration for an additional 90 days
Mar. 13: President Trump declares dual emergencies via the National Emergencies Act and § 501(b) of the Stafford Act authorizing:

- Access to FEMA’s Disaster Relief Fund and reimbursement for eligible emergency protective response measures.
- Waivers under SSA § 1135 of select Medicare, Medicaid, S-CHIP, HIPAA Privacy Rule requirements
- Additional types of federal assistance to states & localities
Select Congressional Responses

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

3/27
Congress passes the CARES Act, the largest economic stimulus package in history, providing emergency financial aid for families and businesses

4/23
Congress passes $484 Paycheck Protection Program to support small businesses, health care & COVID testing

5/15
House passes HEROES Act providing more economic stimulus & funds for contact tracing

5/08
House introduces bill to study racial and ethnic disparities tied to COVID.
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 limited duration)
- In-state **licensure requirements** for health care workers
- **Participation restrictions** on Medicare, Medicaid, & S-CHIP
- Medicare Advantage **payment limitations**
- **Stark Law** sanctions

**April 15:** CMS updates waivers for health care providers re:

- **Telemedicine provisions**, facilitating Medicare services
- **Patient rights** surrounding access to medical records, visitation & seclusion
- **Physical environments** to allow care in non-hospital settings during surge
COVID State & Select Tribal/Local Emergency Declarations

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

Link [here](#) for updates re: jurisdictional requests for FEMA disaster relief
Initial Timing of State-based Emergency Declarations

For more information on the current status of state/territorial declarations, see the National Governors Association online resource.
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                      | AL | AR | AZ | CA | CO | CT | DE | FL | GA | HI | IA | ID | IL | IN | KS | KY | LA | ME | MI | MN | MO | MS | MT | NC | ND | NE | NH | NJ | NM | NY | OH | OK | OR | PA | RI | SC | SD | TN | TX | UT | VA | VT | WA | WV | WI | WY |
|---------------------------------------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|
| 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.
Emergency Preparedness and Response

Balancing Individual & Communal Interests

Individual Interests
- Privacy
- Due Process
- Religious Freedoms
- Equal Protection

Communal Interests
- Surveillance
- Treatment
- Isolation & Quarantine
- Curfews & Closures

Emergency Preparedness and Response
Select Structural & Rights-based 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
Emerging Legal Issues

- Testing/Screening/Treatment
- Emergency Powers - Triage
- Crisis Standards of Care
- Social Distancing Measures
- Surveillance & Reporting
- Privacy
- Liability & Insurance

Topics
Public Health Alerts
**March 3**: VP Pence: “Any American can be tested . . . subject to doctor’s orders.”

**March 21**: Some health officials restrict coronavirus testing to HCWs & hospitalized persons, saying “the battle to contain the virus is lost [as we move] into a new phase of the pandemic response.”

**April 11**: CMS issues guidance requiring insurers to cover diagnostic testing & related services with *no patient cost-sharing*.

**April 19**: Antibody tests key to reopening country are in high demand, yet tests’ *availability* and *inaccuracies* raise alarms.

**May 7**: AZ Gov. Ducey *withdraws access* by university researchers to select health data for in-state surveillance, then reverses decision.
Multiple states & localities issue requirements based on CDC recommendations to wear face masks in public places.

- **Localities in at least 35 states** require face masks to be worn by employees, customers, or others in public.
- **May 20**: Poll shows that 64% of respondents said everyone should be required to wear a mask; 33% said no.
- **June 17**: AZ Governor Ducey allows localities to set specific requirements for face masks. Multiple AZ cities, including Phoenix, Scottsdale, Mesa & Tucson, immediately respond.
- **June 18**: CA Governor Newsom orders state-wide use of face masks where social distancing cannot be assured.
- **June 22**: FL state representative joined business owners in a lawsuit against Orange County challenging Mayor Deming’s mask requirement as unconstitutional.
Contact tracing - efforts typically led by public health agents to ascertain specific contacts of persons infected with COVID-19 and notify them of potential exposure and seek testing.

States are hiring thousands for contact tracing activities within health agencies.

Apple & Google released Bluetooth technology on April 10 that sends automatic alerts to persons in range of COVID+ persons, raising privacy concerns.

New legislation in Kansas (June 5) restricts contact tracing to voluntary participants, provides strong confidentiality protections, and extensively limits liability.
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 paramedics.

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, or Sallie Milam, JD, CIPP/US/G, in our Network—MidStates Region
Substantial change in usual healthcare operations and level of care due to a pervasive or catastrophic disaster.
Select States’ COVID CSC Plans

Click on the **date** of each state to view CSC plans (where available)

*The date provided indicates when a state’s CSC plan was published, not necessarily activated.*
CSC Legal Issues

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

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

- Allocation
- Patient’s Rights
- Reimbursement
- Licensure
- Scope of Practice
- Civil Rights
- Duty to Care
- Uniformity
- Liability

Click on article image to access
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
- Dismiss schools
- Restrict public gatherings
- Isolation & quarantine
- Shelter-in-place/Lockdown
- Curfew
- Evacuation
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

See the National Conference of State Legislatures for a listing of state-based quarantine and isolation statutes.
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.

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.
Q & I Best Practices

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

- On what authority?
- By who specifically?
- At what governmental level?
- In what specific setting?
- For how long?

Government limits on assembly and speech are constitutional provided they are narrowly tailored to a substantial governmental interest & allow alternative channels for communication. *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984)
Mar. 29: Curfew order extends existing Stay at Home Order for the entire Navajo Nation. All persons, subject to some exceptions, must stay home from 8:00 p.m. - 5:00 a.m., 7 days a week.

May 5: Nearby Gallup, NM imposed strict confinement measures via use of “riot act” authorities allowed by NM Governor Michelle Lujan Grisham that ended on May 10, 2020.
Jan. 31: Trump Administration bans foreign national travel for those who have been in China within 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 U.K. & Ireland

Mar. 19: U.S. closes border with Canada & Mexico (through 7/20) to persons travelling for non-essential purposes (e.g. tourism).

Apr. 21: President Trump suspends limited immigration activities for 60 days initially, and extended to Dec. 31.

June 22: President Trump temporarily suspends foreign work visas through the end of 2020.
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 travelers postpone trips for 30 days and imposes 14 day quarantine on arrivals
- Alaska Governor Mike Dunleavy orders residents and others arriving in state to self-quarantine for 14 days

June 24: NY, NJ & CT Governors set 14 day quarantine requirement for persons returning or visiting from COVID “hotspot” states with > cases
June 23: Federal DOJ challenges constitutionality of HI’s 14-day quarantine order

Department of Justice
U.S. Attorney’s Office
District of Hawaii

FOR IMMEDIATE RELEASE

Department of Justice files Statement of Interest challenging the constitutionality of Hawaii Governor’s COVID-19 Order that effectively discriminates against out-of-state residents in a manner that harms Hawaii’s economy
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
Assessing the Consequences

Unemployment  Business Failures  Government Bailouts

Active Protests  Mental Health  Lost Lives
April 16: The White House releases guidelines for “Opening Up America Again,” a 3 phased approach for state/local officials to consider. States must first meet regional gating criteria:

- Downward trajectory of COVID illnesses reported 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”

April 21: U.S. Attorney General William Barr instructs U.S. Attorneys to litigate against states failing to comply with national re-opening strategies
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 Business

Light Retail

Salons & Barbers

Bars

Gyms

Restaurants
States reporting average daily increases in COVID cases as of June 25, 2020

26 Total States Report Increased Cases
## Permitting Delays
- **Nevada** is granting immunization extensions for the 2020-21 school year because the postponement of non-essential medical services halted necessary enrollment vaccinations. Students may enroll irrespective of immunization status.
- A **Tennessee school principal** stated that a grace period on the school’s immunization schedule may be given if parents demonstrate they attempted to catch their kids up on shots.

## Maintaining Immunization Requirements
- **Ohio schools** are requiring vaccination for the 2020-21 school year (like many school systems nationally).
- **Kentucky schools** require that records be up-to-date on required vaccines for the 2020-21 school year with exemptions for religious or medical reasons.

## Drive-thru Immunization Clinics
- **Cleveland County (NC) schools** are partnering with the county’s public health center to provide immunizations via drive-thrus.
- **Sweetwater County (WY) public health authorities** are offering a drive-thru immunization clinic for incoming 7th graders required to get Tdap and Meningococcal vaccines.
Legal Controversies

- Federal v. State
- State v. Local
- State v. Tribal
- Employee v. Employer
- Public v. Private Sector
**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*.
- Houses of worship may now open in limited capacity after being classified “essential” by President Trump.
**May 12:** Pennsylvania Governor Tom Wolf threatens multiple counties attempting to open businesses in contravention of existing state-level stay-at-home orders with denial of discretionary federal funds and various sanctions for offending businesses including loss of license and payment of unemployment benefits for employees unwilling to work for safety reasons.

**May 13:** Texas Attorney General issues [letter](#) to local officials in Dallas, Austin, and other municipalities to cease enforcement of multiple social distancing and preventive measures related to religious institutions, wearing of masks, and contact tracing efforts under threat of litigation.
May 13: In *Wisconsin Legislature v. Palm*, the WI Supreme Court determined that Department of Health Secretary Andrea Palm’s stay home “order” issued pursuant to Governor Evers’ emergency declaration was actually an unconstitutionally crafted “rule,” and consequentially nullified the order.
Reopening Communities

• **From May 1-10**, 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.
• With new guidance **issued May 27**, the St. Regis Mohawk Tribe (NY) remains closed with a curfew and quarantine restrictions as the region around it reopens.

Restricting Travel

• On **May 8**, SD Gov. Kristi Noem ordered checkpoints on state highways to be removed and requested Pres. Trump for federal assistance when tribes refused. The **Bureau of Indian Affairs plans to withdraw** law enforcement funding if checkpoints are not removed.

Reopening Casinos

• CT Gov. Ned Lamont recognized the Mashantucket Pequot and Mohegan Tribes’ sovereignty over the decision to **reopen on June 1** but warned of impacts of reopening casinos on state and tribal partnerships, as well as public health.
Public v. Private Litigation

**Friends of Danny DeVito v. Wolf** – On April 13, PA’s Supreme Court ruled that the temporary closure of non-essential businesses within the scope of the Governor’s emergency order did not constitute a taking.

**Poopy’s Pub & Grub v. J.R. Pritzker** - After Poopy’s held a large MMD party in violation of IL Gov. Pritzker’s stay-at-home order, its owner sued, alleging due process violations. As of June 14, Poopy’s has ignored 2 state cease-and-desist letters.

**Tesla Inc. v. Alameda County** - On May 9, Tesla sued Alameda County, CA alleging it violated principles of due process & equal protection by disallowing Tesla to operate its manufacturing plant. The case was dismissed after Tesla was allowed to do basic operations.

Employee Legal Claims

- **Workers compensation** - often exclusive remedy for workplace injuries
- **Wrongful termination** - e.g., employee faces adverse action for seeking protections
- **Discrimination** - e.g., persons are discriminated based on age, parenthood, health, sex, or other protected characteristics
- **Nuisance** - e.g., employer workplace hazards pose public or private nuisance. Recent judgement in Oakland against McDonald’s® requires new employee safety protocols to sustain reopening.
- **Negligence & intentional torts** - e.g., employer fails to implement CDC/OSHA safety measures
June 15: Public health officials are concerned about current or 2nd wave of cases related to multiple factors including:

- Widespread business re-opening practices in many states without plans to re-close upon a resurgence of cases;
- States’ rescinding stay-home and shelter-in-place orders;
- National protests concerning racial unrest over police violence;
- American’s active resistance to continued diligence re: social distancing and face mask requirements; and
- Political and other gatherings leading into national elections.
Since April, over 2 dozen state & local health leaders have “resigned, retired, or been fired” in multiple states.

In April & May, the Tri-County (CO) Health Department was vandalized on 3 different occasions (i.e., broken windows, spray painting vulgarities, harassing notes).

As of May 9, the residence of Ohio’s state health director was picketed. On June 11, armed protestors surrounded the property, lending to her resignation that same day.

As of June 8, the health officer of Orange County (CA) resigned after public meeting and social media threats.

As of June 22, L.A. County’s public health director received threats of being shot.
Thank You Contributors!

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

- **Ask the Network** re: questions/comments relating to this information or other legal preparedness & response efforts

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