

## COVID-19

# Emergency Legal Preparedness Primer

As of September 30, 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 and Day O'Connor College of Law

james.hodge.1@asu.edu



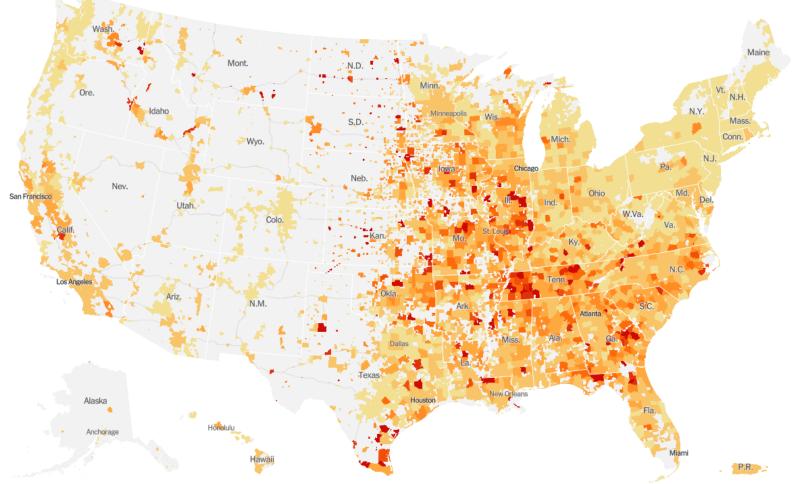


- □ COVID-19 Epi Trends
- □ Emergency Legal Preparedness/ Response/Recovery
  - Federal | State | Tribal | Local
- □ Public Health Emergency Powers
- □ Constitutional & Other Challenges
- □ Additional Resources/Ask the Network



### **COVID-19 Confirmed Cases & Deaths**

Global Cases 33.2 million | Deaths: 998,696
U.S. Cases 7.33 million | Deaths: 209,521
U.S. Stats 23% all cases | 21% all deaths





### **Emerging Epi & Medical Trends**



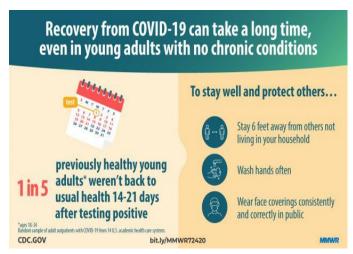
Asymptomatic persons could account for 40-45% of infections spread



Multiple potential vaccines are in Phase III clinical trials for safety & efficacy



Antibodies may be insufficient to ward off additional infections

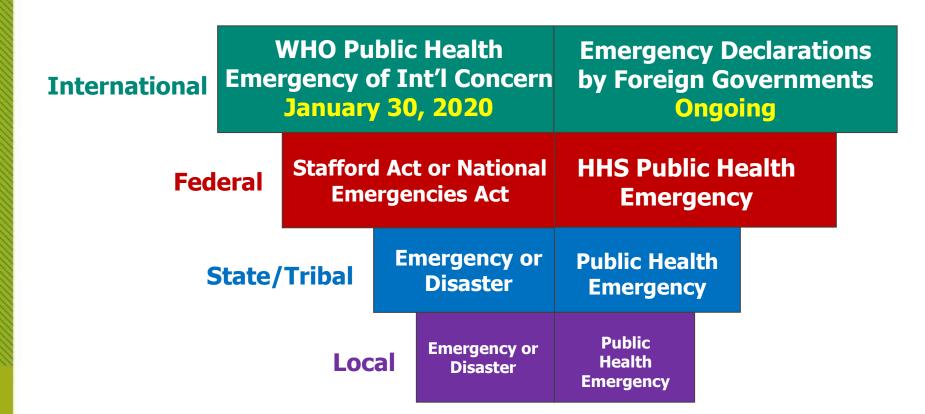


COVID-19 can cause milder outpatient illnesses among young adults & others



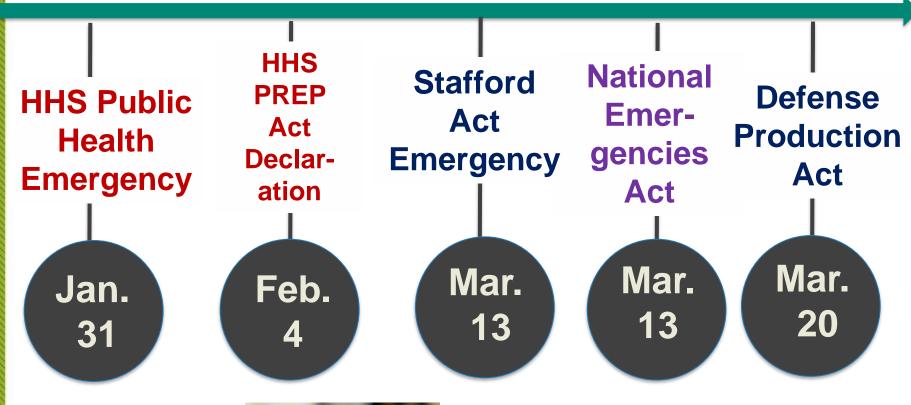
### **Emergency Declarations**

# Public health authorities & powers vary depending on the type of emergency declared at every level of government



#### The Network for Public Health Law

### Federal Emergencies/Invocations











### **HHS Public Health Emergency**

# Jan. 31: HHS Sec. Alex Azar declares national public health emergency effective as of Jan. 27

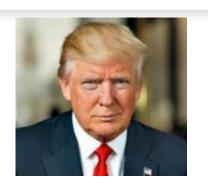


- Encourages interjurisdictional coordination
- Allows waivers of specific federal laws
- Authorizes real-time countermeasures through emergency use authorizations
- Supports social distancing measures

July 25: Sec. Alex Azar renews PHE declaration for 90 additional days.



### **National Emergencies**







Mar. 13: President Trump declares dual emergencies via the National Emergencies Act & § 501(b) of the Stafford Act authorizing:

- Access to FEMA's Disaster Relief Fund & 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 Bills**

#### 7/27

Senate proposes a
\$1 trillion relief bill
providing for a new
round of stimulus
checks, expanded
unemployment
benefits & additional
school funding.



#### 6/24

Emergency House
Protections & Relief
Act introduced to
prevent evictions,
foreclosures &
unsafe housing
conditions resulting
from COVID-19.

#### 6/24

Senate introduces a bill to provide funding to address health workforce shortages & disparities highlighted by COVID-19.

#### 6/22

House introduces a bill to require COVID-19 drugs developed with federal support to be affordable & accessible.

#### 5/15 House passes

HEROES Act
providing more
economic stimulus
& funds for contact
tracing



### **Major Enacted Federal Legislation**

#### **Families First**



# **Mar. 18:** Families First Coronavirus Response Act

- Private health plans must provide \$0 cost coverage for COVID-19 tests
- Temporarily increases federal portion of Medicaid
- Requires 14 days of paid sick leave for certain employees

#### **CARES Act**



#### Mar. 27: CARES Act

- Largest stimulus package in history
- Requires insurance providers to cover COVID-19 testing, vaccines & preventative services
- Protects volunteer HCWs
   from liability
- Authorizes PHI disclosure with written patient consent

#### PPP & HEA



Apr. 24: Paycheck
Protection Program &
Healthcare Enhancement
Act

- Additional funding for hospitals & HCPs
- Supports testing & contact tracing efforts
- Requires governors to submit 2020 testing plan
- HHS Secretary must report on testing, cases & deaths



### **Federal Agency Coordination**

#### Right click on each image to link to COVID-19 sites



























### **Emergency Waivers**

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



### Joe Biden's COVID Plan

### Restore trust & credibility in public officials

 Reinstate daily briefings, ensure decisions are made by public health officials & not politicians, restore the White House National Security Council for Global Health Security & Biodefense

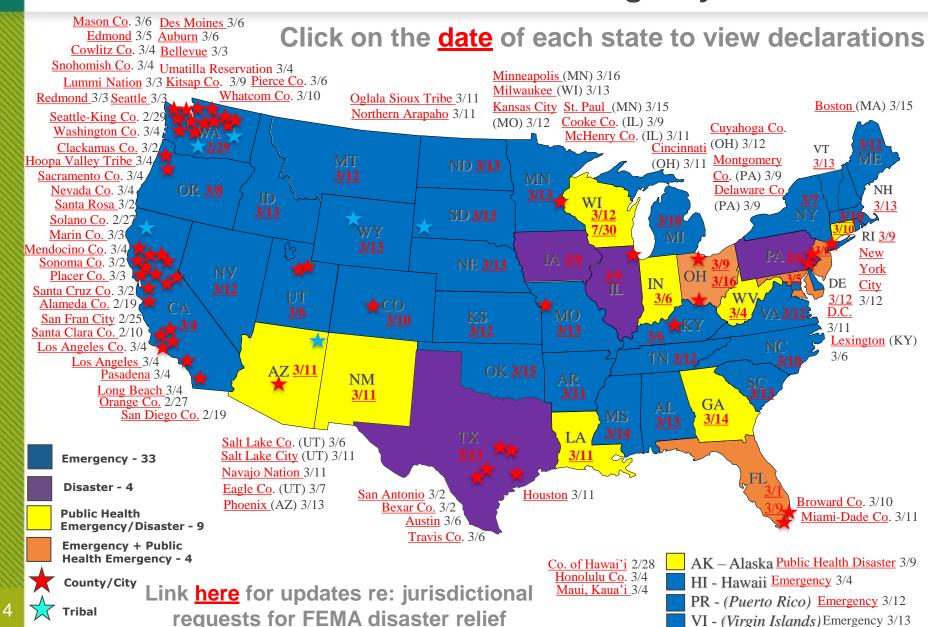


#### Effective national emergency response

- Make testing widely available, create more capacity for prevention, response & treatment, accelerate development of treatment & vaccines, provide timely data & information
- Eliminate cost barriers to prevention & treatment
  - Ensure everyone irrespective of insurance coverage has access to free testing, preventative services & vaccines.
- Support workers, small businesses & stabilize the economy
  - Provide guaranteed paid sick & care-giving leave, expanded unemployment relief & state/local emergency funds.
- Lead global responses to COVID-19
  - Create a Global Health Emergency Board, advance global pandemic preparedness



### COVID State & Select Tribal/Local Emergency Declarations





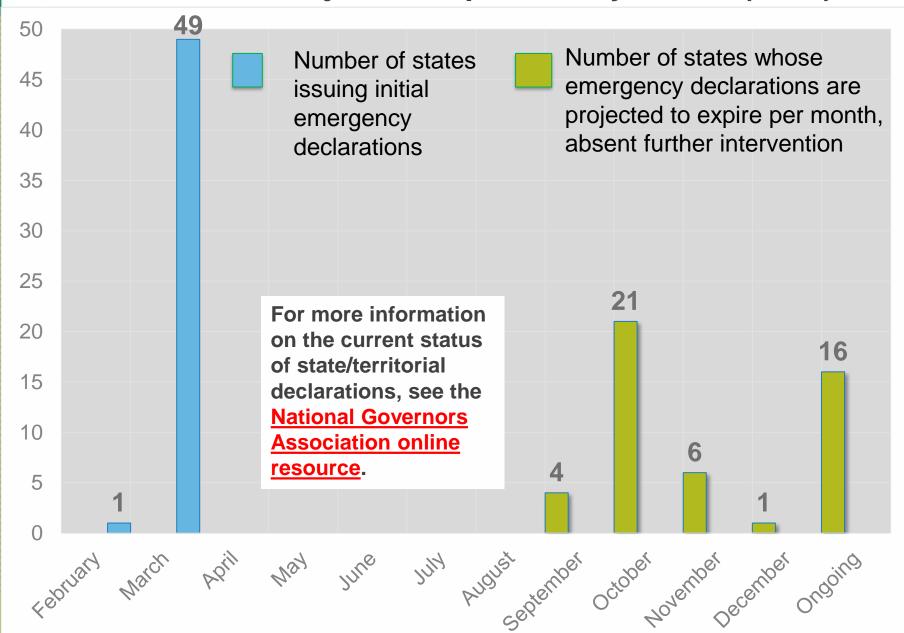
# Select State Emergency Powers Explicitly Invoked by Declarations

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.

No did in on 200 din din din din dingin in mondi di o diocidi dino no contrati																																
Emergency Powers	<u>A</u> <u>K</u>	<u>A</u> <u>Z</u>	<u>A</u> <u>R</u>	<u>C</u> <u>A</u>	<u>C</u> O	<u>C</u> <u>T</u>	<u>D</u> <u>E</u>	<u>F</u>	<u>H</u> <u>I</u>	<u>L</u>	<u>N</u>	<u>I</u>	<u>K</u> <u>Y</u>	<u>L</u> <u>A</u>	<u>М</u> <u>Е</u>	<u>M</u> D	<u>M</u> <u>A</u>	<u>M</u> <u>I</u>	<u>J</u>	<u>N</u> <u>M</u>	<u>N</u> <u>Y</u>	<u>N</u> C	<u>О</u> <u>Н</u>	<u>O</u> <u>R</u>	<u>P</u> <u>A</u>	<u>R</u> <u>I</u>	<u>T</u> <u>N</u>	<u>V</u> <u>A</u>	U T	<u>W</u> <u>A</u>	<u>w</u> <u>v</u>	<u>W</u> <u>I</u>
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																																



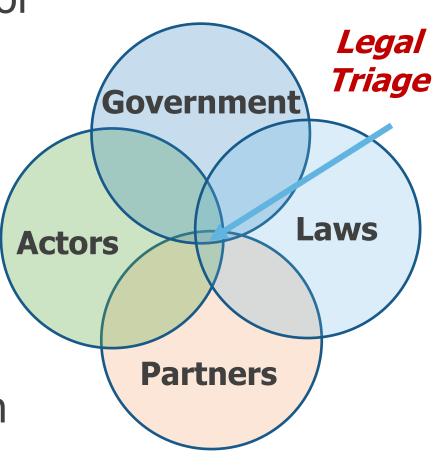
# **Emergency Declaration Initial Timing & Projected Expiration by Month (2020)**





### Legal Triage

**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**





## Select Structural & Rights-based

### **Constitutional Issues**



Separation of Powers



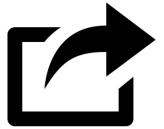
**Federalism** 



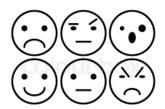
**Supremacy** 



**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** 

### The Network for Public Health Law Current & Emerging Legal Issues





### **Screening & Testing**

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** & **inaccuracies** raise alarms.

May 7: AZ Gov. Ducey withdraws access by university researchers to select health data for in-state surveillance, then reverses decision.







### **COVID-19 Vaccination Allocation**

#### Click on image to access



The National

SCIENCES Academies of | ENGINEERING

#### Committee on Equitable Allocation of Vaccine for the **Novel Coronavirus**

First Committee Meeting Public Agenda

Friday, July 24, 2020 4:30 p.m. – 5:30 p.m. ET Zoom Webinar

#### Meeting Objectives

Hold an open session to hear from sponsoring agencies on their perspectives of the statement of task

Friday, July 24, 2020



# National Academies Initial Vaccine Allocation Guidance

#### Phase 1

#### Phase 2

#### Phase 3

#### Phase 4

- High-risk workers in health care facilities
- First responders
- People of all ages with comorbid & underlying conditions at significantly higher risk
- Older adults living in congregate settings

- Critical risk workers
- Teachers & school staff
- People of all ages with comorbid & underlying conditions at moderately higher risk
- All other older adults
- People in homeless shelters & prisons

- Children
- Young adults
- Workers in essential industries

 Everyone else living in the US

The National Academies of SCIENCES • ENGINEERING • MEDICINE









### **Face Mask Requirements**



- Localities in 43 states & territories require face masks to be worn by employees, customers, or others in public.
- July 7: Freedom Foundation files lawsuit challenging the constitutionality of WA state mask mandate. On July 27, it sues Oregon re: its mask mandate.
- July 10: Judge rejects FL lawsuit challenging the constitutionality of Orange County's mask requirement.
- Aug. 13: GA Governor Kemp announces his office is dropping its case against the City of Atlanta re: its mask requirement.
- Aug. 13: Democratic Presidential candidate Joe Biden calls on states to craft face mask requirements.
- Aug. 20: NY Gov. Cuomo admits mask requirement should have been issued months earlier.



### **Contact Tracing**

Contact tracing - efforts typically led by public health agents to ascertain specific contacts of persons infected with COVID-19 & notify them of potential exposure & 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 bill signed into law in Kansas on June 8 restricts contact tracing to voluntary participants, provides strong confidentiality protections & extensively limits liability.







### **Data Sharing & Privacy**



#### 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 & guidance, contact Denise Chrysler, JD, or Sallie Milam, JD, CIPP/US/G, at the Network–MidStates Region



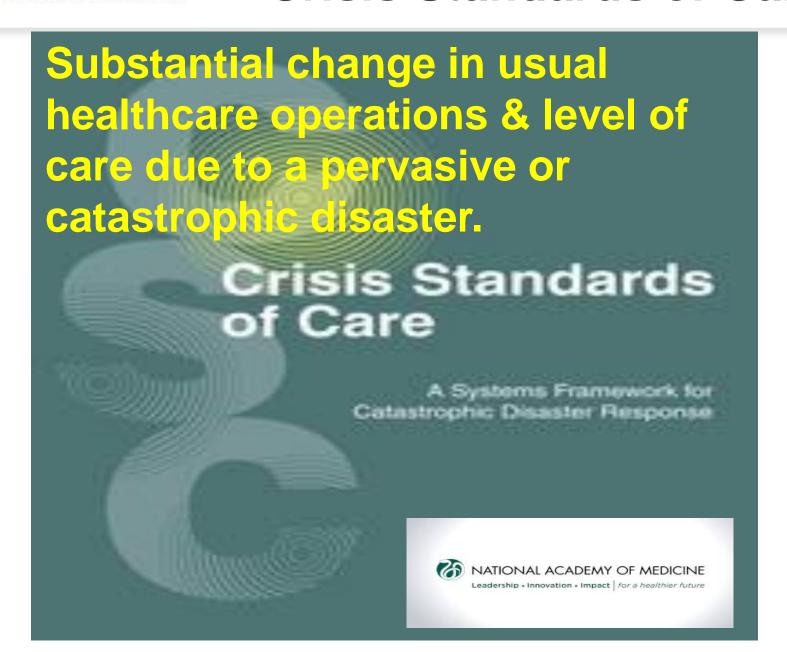
### The Network for Public Health Law CDC Moratorium on Evictions

### Sept. 2: CDC Director Dr. Robert Redfield signs declaration temporarily halting evictions.

- Order bans evictions of residential renters earning less than \$99k annually (\$198k jointly) through December 2020.
- Qualifying renters must present written declaration testifying to their circumstances to landlords
- Landlords who defy the moratorium may face criminal penalties
- CDC cites its authority under the Public Health Service Act § 361(42 U.S.C. 264) & an emergency action taken under 42 C.F.R. 70.2, "measures in the event of inadequate local control."
- Questions arise related to CDC's legal capacity to implement eviction limitations as a communicable disease control matter



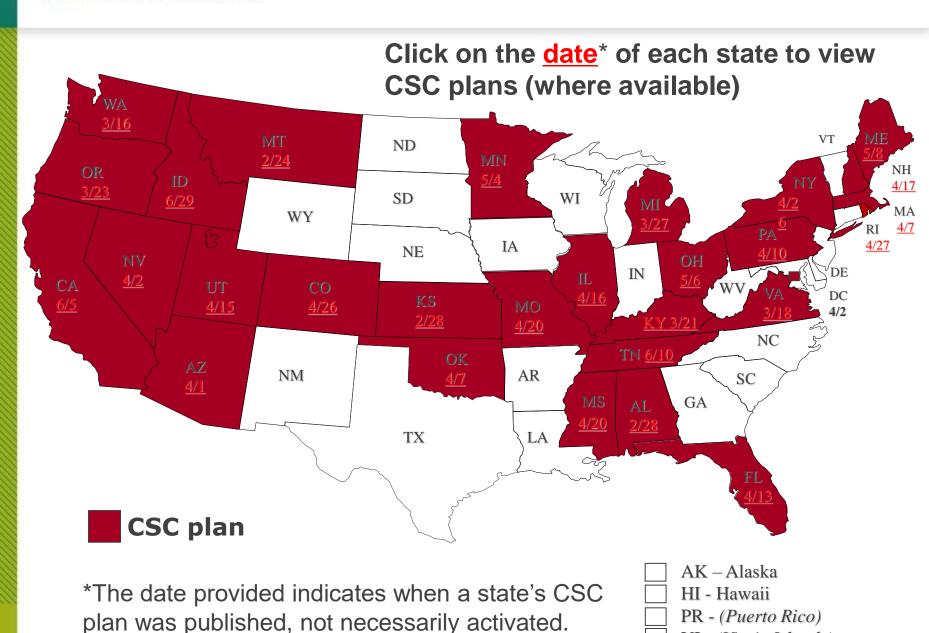
### **Crisis Standards of Care**





#### Select States' CSC Plans

VI - (Virgin Islands)



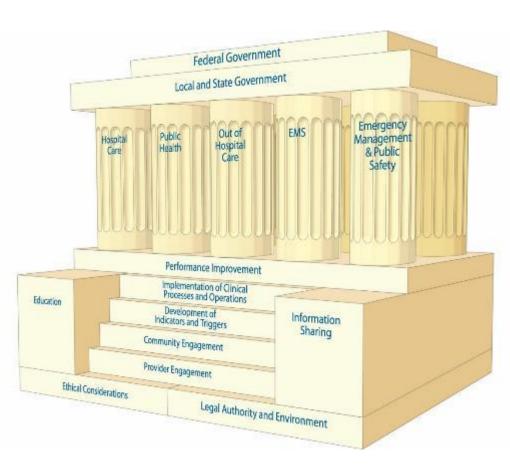


### **CSC Legal Issues**

#### 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

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



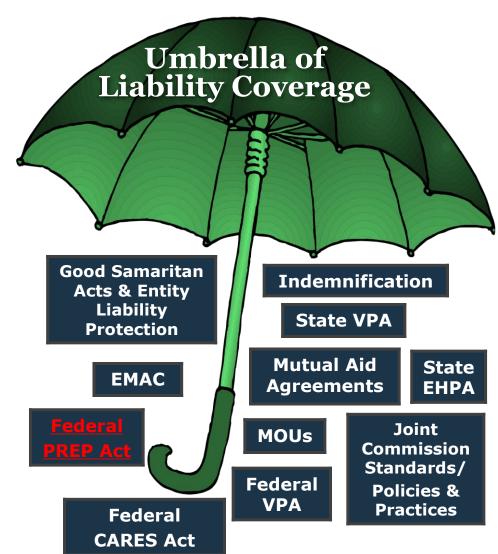


# **Emergency Liability Protections - Health Practitioners & Entities**



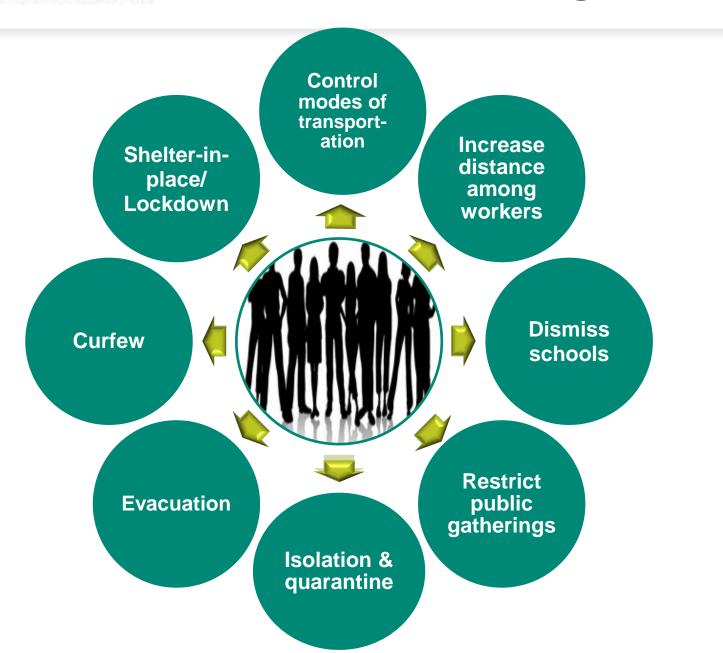


Despite risks, many legal liability protections apply in routine events & declared emergencies, especially concerning health care volunteers, workers & entities.





### **Social Distancing Measures**





### **Justifying Social Distancing**



Assess Epi



**Assure Mobilization** 



**Acquire PPE** 



**Find Treatments** 



**Develop Vaccines** 



Save Lives



### **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

#### **Best Practices**



Safe, hygienic premises



Monitoring & care



**Basic necessities** 



Means of communication Least restrictive means





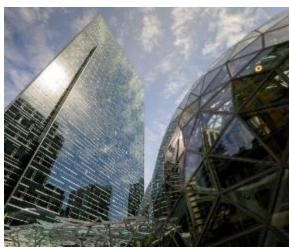
**Termination** 



### **Closures & Cancellations**



Places of Worship



**Employers** 



Schools & Universities





**Sports** 

Events

**Festivals** 



### **Curfews**







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 (ending on May 10).

Aug. 19: Puerto Rico Governor Wanda Vazquez imposes "Sunday" lockdown (in addition to weekly 10 pm – 5 am curfew across the territory).



### **Assembly Limits**

# THE FIRST AMENDMENT CONGRESS SHALL MAKE TO LAW MASSING THE ING AN ESTABLISHMENT OF RELIGION, OR

PROHIBITING THE OR ABRIDGING THE FREEDOM OF SPEECH, OR PERSON THE PERSON OF SPEECH, OR PERSON TO PETITION THE

PROTECT THE FIRST AMENDMENT, SUPPORT THE CBLD

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



Government limits on assembly & 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)



### **U.S. Foreign Travel Restrictions**

Jan. 31: Trump Administration bans foreign national travel for those who have been in China w/in last 14 days & 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 & extended to Dec. 31.

June 22: President Trump temporarily suspends foreign work visas through the end of 2020.











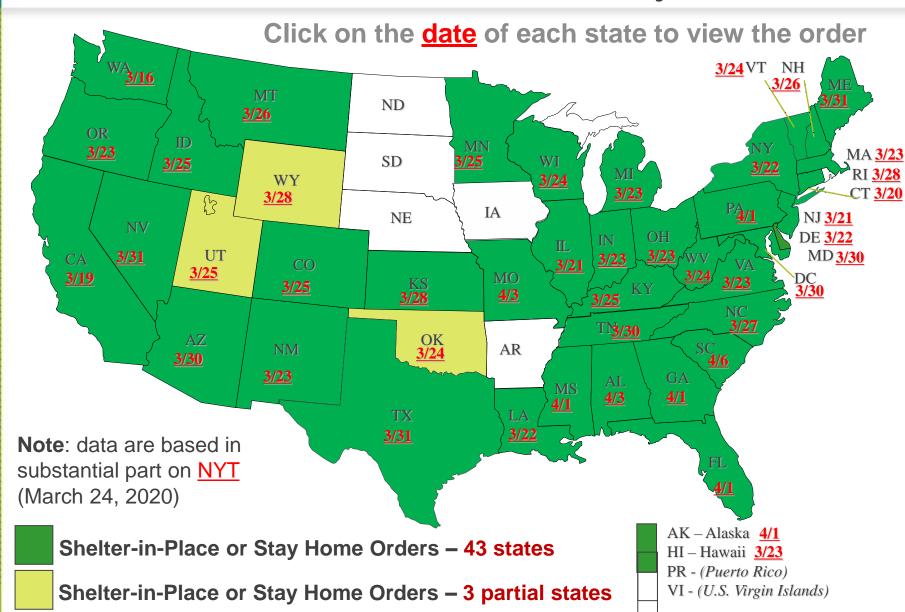
#### **U.S. Domestic Travel Restrictions**

# 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 & imposes 14 day quarantine on arrivals
- □ Alaska Governor Mike Dunleavy orders residents & 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
- ☐ July 3: U.S. federal district judge rules that Hawaii's quarantine is reasonable in a public health crisis, allowing the order to be implemented.



### State Shelter-In-Place or Stay Home Orders





### **Assessing the Consequences**



Unemployment





Business Failures Government Bailouts



**Active Protests** 



Mental Health



**Lost Lives** 



### **Re-opening Phases**

### Phase 1

### Phase 2

### Phase 3

- Vulnerable individuals shelter-in-place
- Practice social distancing & avoid socializing in groups >10
- Employers
   should
   encourage
   telework & most
   businesses
   remain closed
- Resume non-essential travel
- Schools, gyms & bars may re-open

- Vulnerable individuals may resume public interactions, with social distancing
- Large venues may reopen



### **Re-opening Efforts**



**Essential Business** 



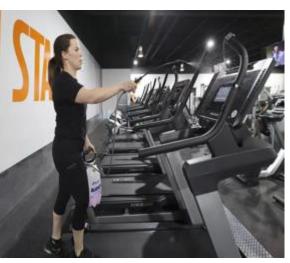
Light Retail



Salons & Barbers



Bars



Gyms



Restaurants



### **School Re-openings**

Multiple legal issues extending from school re-opening include: lawful authority to open (or not), liability claims (related to potential outbreaks), liability protections, discrimination, demands for tuition refunds, rights to education & teacher union disputes.









Aug. 19: Iowa's State Education Association & Iowa City Community School District sued Gov. Kim Reynolds & the state education department, arguing that state officials exceeded their authority by requiring in-person learning at least 50% of the time during any 2 week period.



Aug. 20: In Oregon, a federal district judge denied an emergency order sought by 3 Christian schools to reopen despite Gov. Kate Brown's orders keeping K-12 schools closed.



### **University Re-openings**







August 17: One week after re-opening, the University of North Carolina-Chapel Hill pivoted to online classes only following substantial COVID-19 outbreaks on campus.

**<u>August 19</u>**: Six days after reopening in-person classes, the University of Alabama reported 566 positive COVID-19 cases among students & faculty.

**September 4**: Florida State University reported that in a 7 day period ending Sept. 4, 21% of 3,429 COVID-19 tests administered came back positive.

**September 8**: After the Labor day weekend's spike in COVID-19 cases, Winona State University in Minnesota required the campus to quarantine for 2 weeks.



### **Special Thanks & More Information**



# COVID-19 Response and Recovery



- Access presentations and materials from the Network's COVID-19 Virtual Summit
- Special thanks to Claudia Reeves and Erica N. White at ASU's Sandra Day O'Connor College of Law for their contributions
- Ask the Network re: questions/comments on this or other legal preparedness & response efforts
- james.hodge.1@asu.edu | @jghodgejr