COVID-19: Legal Preparedness and Response

National Governors Association Briefing

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Primary Objectives

• Report on COVID-19 outbreak globally and domestically
• Assess emergency legal preparedness on select, key topics
• Identify potential legal risks & responsibilities in emergencies
• Address questions, comments, thoughts
Key Topics

1. Emergency declarations
2. Public health surveillance
3. Standard of care
4. Scope of practice
5. Vaccination & treatment
6. Social distancing powers
7. Control of property
8. Liability
9. Emergency ethics
10. Legal triage
Transmission

• Initially-infected persons in Wuhan, China were linked epidemiologically to a large seafood/animal market.
• Transmissible person-to-person with potential infectivity rate assimilating annual influenza.
• Asymptomatic persons can likely infect others (under review).
• Reproductive number $[R^0]$ estimated at 2.2 (similar to influenza).

Symptoms

• Respiratory symptoms, fever, cough, labored breathing & aches.
• In ~20% of cases, infection can cause pneumonia, respiratory issues, kidney failure & death (~2%).

Vaccines, Tests and Treatment

• No vaccines, commercial tests, or specific treatments.
Emerging Legal Issues

Full Article

US Emergency Legal Responses to Novel Coronavirus Balancing Public Health and Civil Liberties

With increasing numbers of cases of coronavirus disease 2019 (COVID-19) globally and in the United States, Health and Human Services (HHS) Secretary Alex Azar declared a national public health emergency on January 31. The emergency declaration of the HHS authorizes additional resources, enhanced federal powers, interjurisdictional coordination, and waivers of specific regulations. State and local public health emergency declarations are also likely. During crises, government has a special responsibility to thoughtfully balance public health protections and civil liberties.

Public Health Risk Assessment
While epidemiological data are evolving, human-to-human transmission of COVID-19 has been documented over an incubation period of 2 to 14 days. Based on available data, the case fatality rate appears lower than that associated with other novel coronaviruses (severe acute respiratory syndrome [SARS] and Middle East respiratory syndrome [MERS]), likely no more than 2%. China has reported the majority of cases and deaths, especially in Wuhan and surrounding Hubei Province. The US population currently is at low risk.

During crises, government has a special responsibility to thoughtfully balance public health protections and civil liberties.
Role of Laws in Emergency Preparedness & Response

- Define what constitutes an emergency
- Authorize the performance of emergency responses
- Assign responsibility for potential/actual harms that may arise
- Create the infrastructure for preventing & addressing emergencies
Public health authorities, powers, liabilities & immunities vary depending on the type of emergency declared at each level of government.

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1/31/2020: HHS Sec. Alex Azar declares national public health emergency

Public Health Service Act:

§ 319: declare a PHE for significant outbreaks of infectious diseases, bioterrorist attacks or other conditions.

§ 311: assist state/local authorities to prevent & suppress communicable diseases
State and Local Declared Emergencies

Santa Clara County – Local Health Emergency 2/10/2020

San Diego County – Local Health Emergency 2/14/2020
Balancing Interests in Emergencies

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

**Communal Interests**
- Surveillance
- Vaccination
- Isolation & Quarantine
- Curfews & Closures

State of Emergency
March 21, 2017: new regulations strengthen CDC’s authority to:

- conduct disease prevention measures at airports, seaports, bus terminals & other transportation hubs.
- subject travelers to observation, questioning, review of health & travel records or (in some cases) medical exams.
- issue orders for apprehension, isolation, quarantine, or conditional release of individuals reasonably believed to have a “quarantinable condition.”
- keep infected individuals from travelling (with exceptions) without a federal travel permit.
Constitutional Considerations

Freedom of Religion

Equal Protection

Freedom of Movement

Privacy

Right to Assemble
Confirmed measles cases in Eloy federal immigration detention center, Pinal County, AZ (2016).

2. Public Health Surveillance
PHE Reporting Requirements

• Enhanced data reporting authority
  – State & local laws/practices may authorize tracking & surveillance of specific, additional conditions

• Expanded surveillance
  – Authorized explicitly in some state laws (or generally in others), this type of syndromic surveillance may include data related to school absences or over-the-counter medication sales
Covered entities may disclose **protected health information (PHI)** without individual authorization to federal, tribal, state or local public health authorities:

- To prevent or control disease, injury or disability
- For disease reporting & public health surveillance
- To notify persons exposed to communicable diseases
- To prevent serious threats to persons or the public
- To address specific issues in declared emergencies

In a federally-declared **emergency** HHS may waive certain provisions of the HIPAA Privacy Rule.
6. Liability
Types of Civil Liability Claims

- Negligence/Malpractice
- Intentional Torts
- Privacy Infringements
- Misrepresentation
Umbrella of Liability Protections

- Federal VPA
- State VPA
- Good Samaritan Acts & Entity Liability Protection
- MOUs
- EMAC
- Federal PREP Act
- Joint Commission Standards/Policies & Practices
- Indemnification
- Insurance Coverage
- Mutual Aid Agreements
- State EHPA
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Questions, Comments, Thoughts

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