



Public Health and the Law

**National Association of County and City
Health Officials**

Disclaimer

Please note that information provided in this exercise and curriculum does not constitute legal advice.

Always consult with legal counsel in your respective jurisdiction for specific legal advice.

Learning Objectives

- Train participants to incorporate law into emergency preparedness planning and response.
- Prepare participants to respond to changes in the legal environment during declared emergencies that impact the public's health.
- Provide participants with an understanding of potential legal powers and duties during declared emergencies.
- Identify potential legal risks and responsibilities during declared emergencies.

Brief Description of Exercise

Developing Factual Scenario

5 Core Legal Components

Learn: Address critical legal and policy topics

Review: “Key Points” discussed following each component

Apply: Discuss critical legal and policy topics based on the factual scenario

Core Legal Components

Core Component 1

- **Scope and Breadth of Public Health Legal Authority in Emergencies**

Core Component 2

- **Emergency Public Health Powers and Duties**

Core Component 3

- **Social Distancing Measures**

Core Component 4

- **Deployment and Use of Volunteer Health Practitioners**

Core Component 5

- **Liability Issues for Individuals, Volunteers, and Entities**



Introduction to Scenario

Scenario Day 1: “Novel Flu” Detected

Health Report: New Strain of Influenza, Potential Threat

The World Health Organization (WHO) is tracking the emergence of a new strain of influenza. Health officials are working to determine the epidemiology and international spread of the strain labeled “Novel Flu.”

The actual number of cases globally is currently unknown. However, due to its rapid spread in select locales, officials fear Novel Flu could have a major global impact.



Scenario Day 5: Novel Flu Fact Sheet

Key Novel Flu Facts

Transmission

- Easily transmitted from human to human through airborne means or other direct contact.
- Incubation of symptoms is estimated to be 48-72 hours.

Symptoms

- Flu-like symptoms (coughing, fever, aches) persist over 7-10 days for most persons.
- 10% of persons known to be infected may experience severe complications, including respiratory failure and death.

Vaccination and Treatment

- No vaccine available for at least 6 months.
- Treatment for *mild cases* is limited to antivirals and cold and flu medications.
- *Severe* cases require more aggressive care, including hospitalization and respirators.

Scenario Day 9: U.S. Travelers Confirmed to Have Novel Flu

- Several U.S. students recently returning from Europe following study abroad programs are confirmed by local, state, and federal public health authorities to have contracted Novel Flu.
- Each traveler returned to their home states, which include several populous states around the country.
- CDC has issued a national flu alert. Federal, state, and local authorities are monitoring additional suspected cases of Novel Flu in the U.S.





Core Component 1:

Scope and Breadth of Public Health Legal Authority in Emergencies

Learning Objectives:

1. Identify the role and relevance of law in emergency preparedness.
2. Define types of emergency declarations and their impact on response efforts and local practitioners' authorities.
3. Understand and anticipate the interaction between federal, state, and local laws in emergency planning and response.
4. Assess interjurisdictional legal issues underlying emergency planning and response.

The Role of the Law in Emergency Preparedness and Response

Laws pervade emergency response at every level of government:

Laws define what constitutes a public health emergency

Laws authorize the performance (or nonperformance) of emergency responses by multiple actors



Laws assign responsibility for potential or actual harms that may arise

Laws create the infrastructure through which emergencies are prevented, detected, and addressed

Types of State/Local Public Health Laws



Traditional, broad “police powers” authorizing health officers to protect the health and welfare of the community



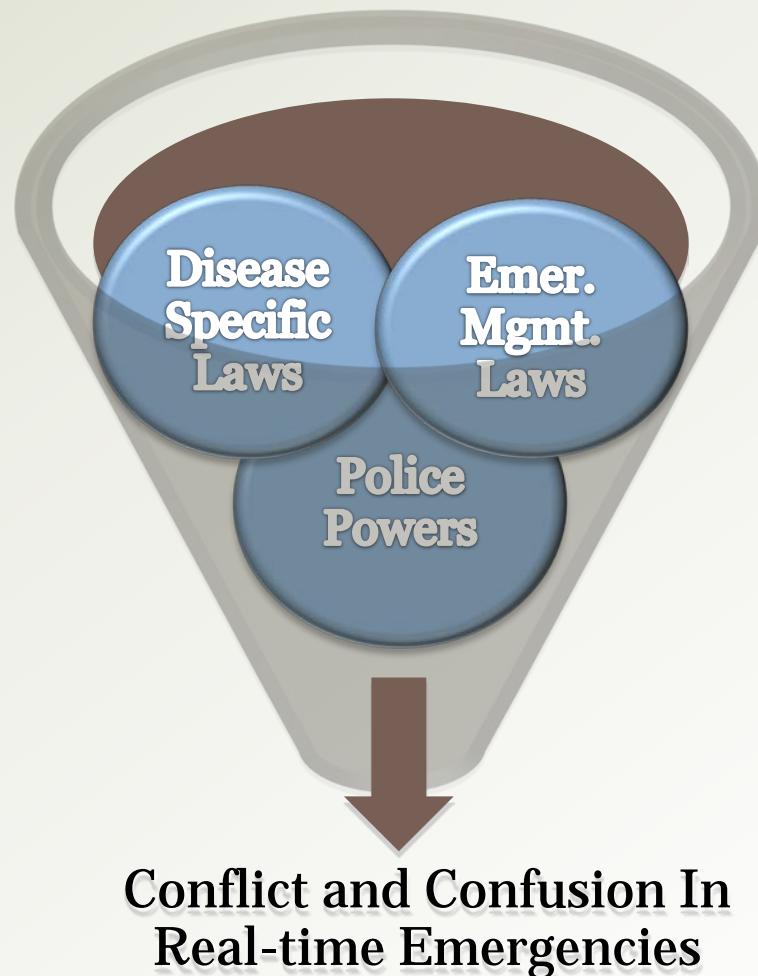
Disease-specific control laws (e.g., STD, TB, HIV/AIDS)



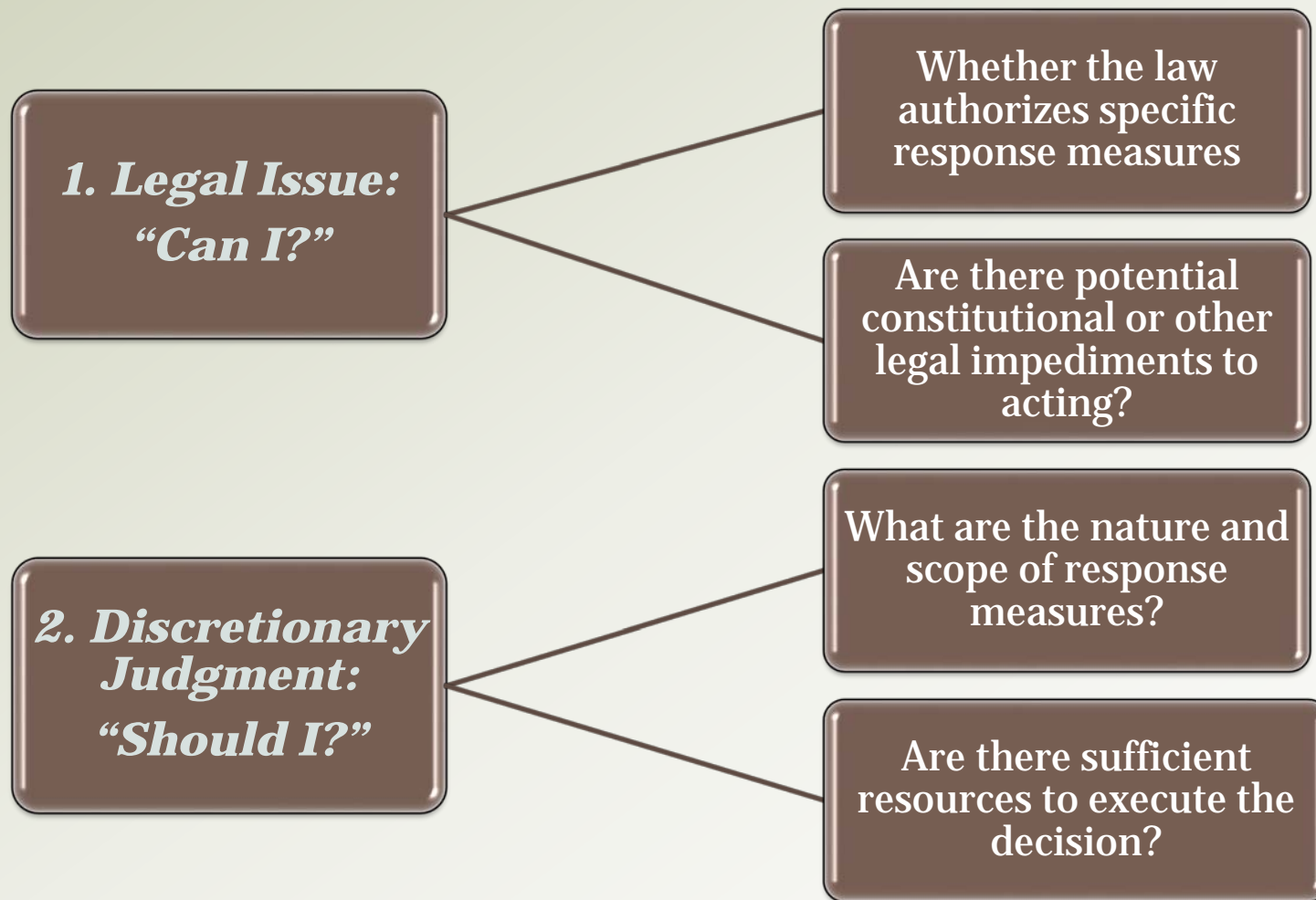
Emergency preparedness and management laws

The Challenge of Multiple State and Local Legal Powers

- State and local “police powers,” disease-specific laws, and emergency management laws often overlap.
- These laws may have separate implementing regulations and procedures.
- They may also reside in different areas of state or local codes, leading to confusion in application in emergencies.



Local Officials Must Determine:



Pre-declaration Local Responses

Local emergency preparedness and response efforts may be needed prior to an emergency declaration

- *Ex.* Many states and localities responded to the 2009/2010 H1N1 epidemic without an emergency declaration. Only 12 states actually declared any state of emergency.

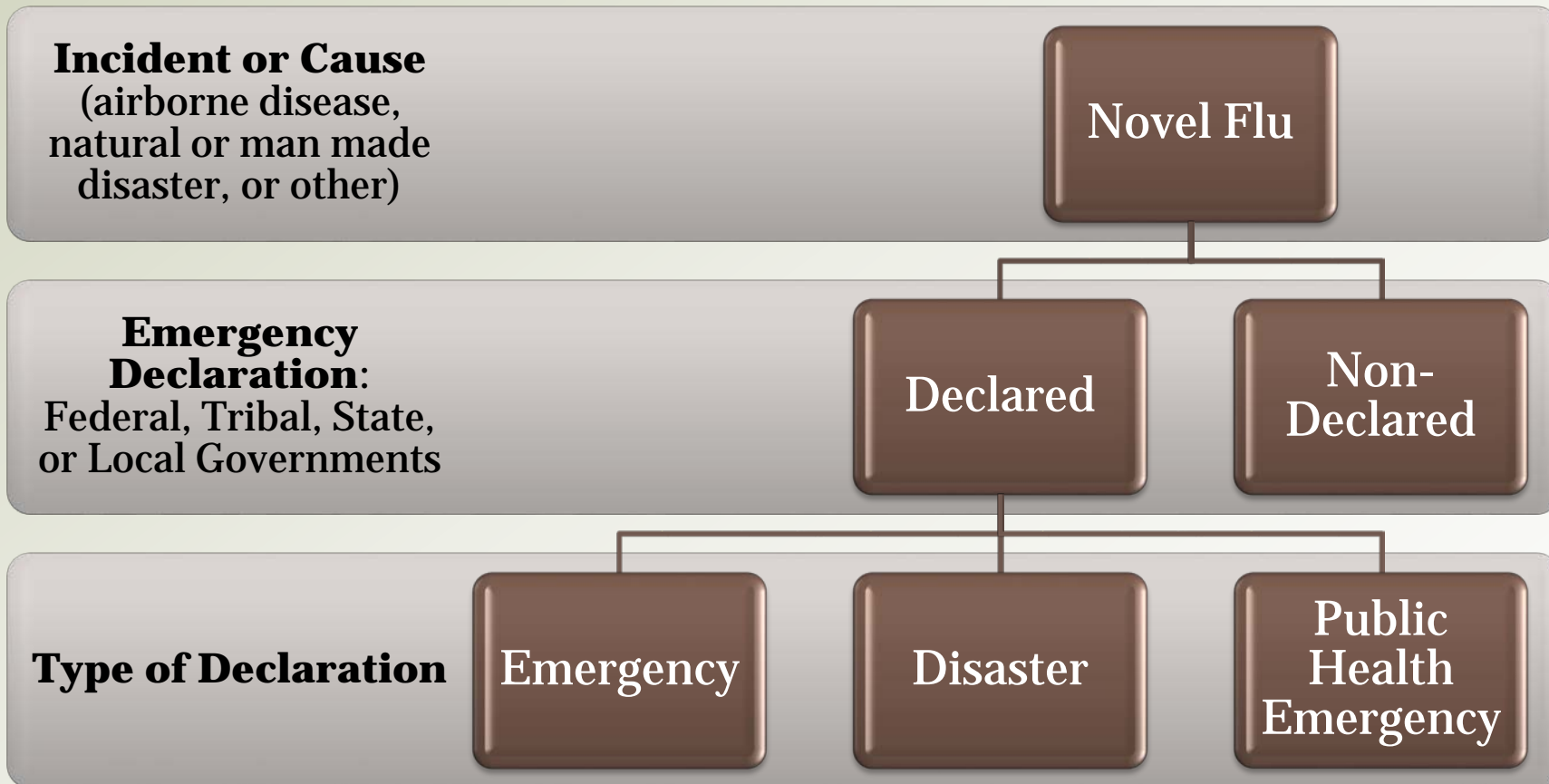
Routine public health powers may facilitate initial emergency response efforts prior to an emergency declaration

- *Ex.* A local health official may be authorized to implement some social distancing measures via routine public health powers (e.g. school closure).

Local public health powers may flow from state or local laws (statutes, regulations, judicial authorization, agreements).

- *Ex.* State law may authorize a local agency to make decisions on inherently local measures (e.g., home rule).

Types of Emergency Declarations



State Disaster and Emergency Declarations

Emergency

Example: “any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in **substantial injury or harm to the population** or substantial damage to or loss of property.” *Florida Stat. Ann. § 252.34(3) (2005).*

Example: Under Chapter 433 of the Texas Government Code, a mayor or governing body of a city can declare an emergency or may ask the governor to declare a state of emergency, and the governor would then be able to issue directives to help with the emergency.

Disaster

Example: “the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or man-made cause[s]. . . requiring emergency action.” *Tex. Gov’t Code Ann. § 418.004(1), (3) (Vernon 2003).*

State Public Health Emergency Declaration

Public Health Emergency ~ defined by statute in over half the states and selectively among local governments. Example:

“Public health emergency--An occurrence or imminent threat of an illness or health condition, caused by bioterrorism, epidemic or pandemic disease, or novel and highly fatal infectious agent or biological toxin, that poses a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability. Such illness or health condition includes, but is not limited to, an illness or health condition resulting from a natural disaster.” *Tex. Admin. Code tit. 25, § 101.1 Definitions (2004)*

Scope of Emergency Declarations

Once an emergency is declared, the legal landscape changes depending on the type of emergency declaration and its underlying causes



Hurricane Katrina



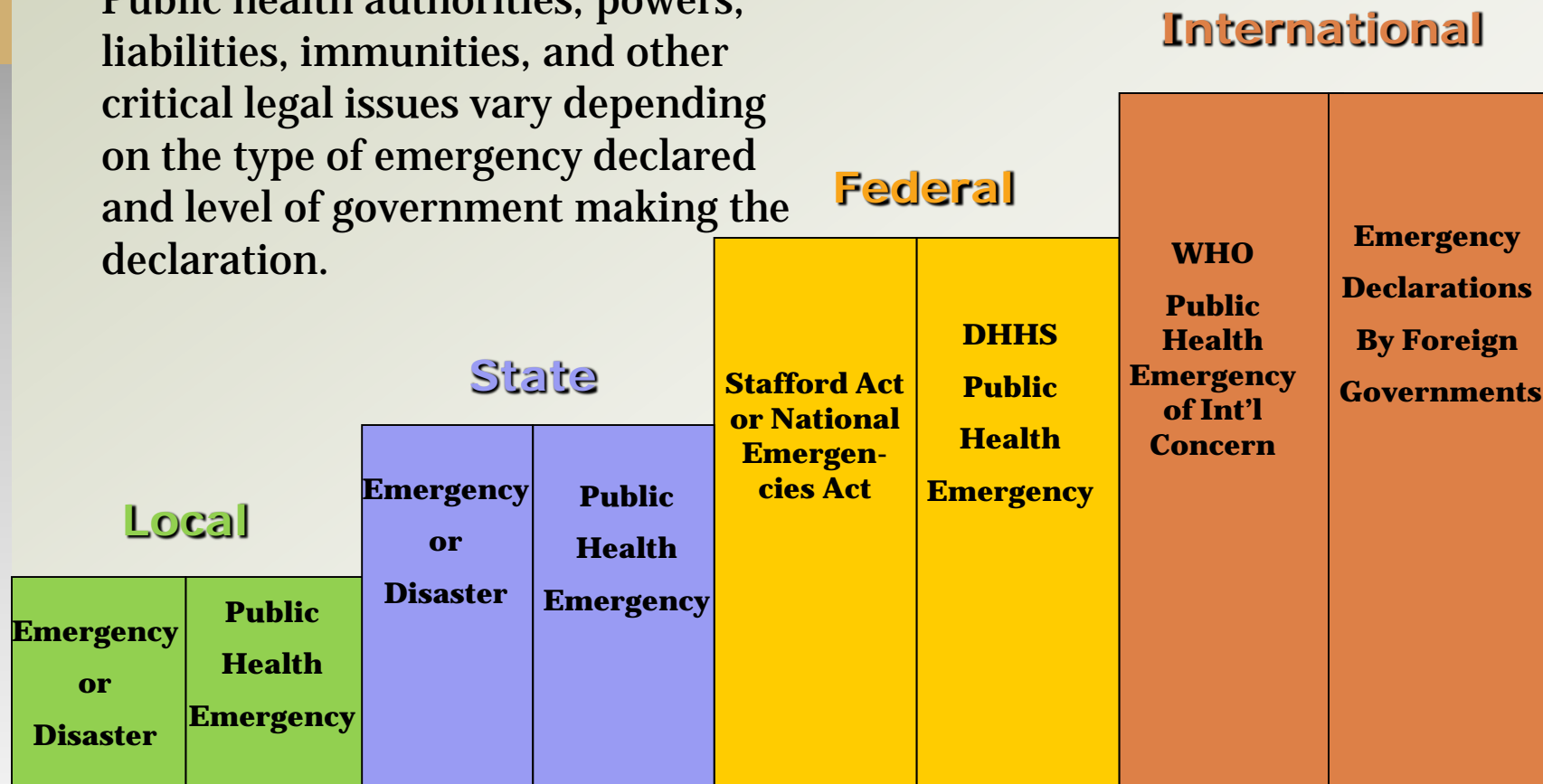
California Wildfires



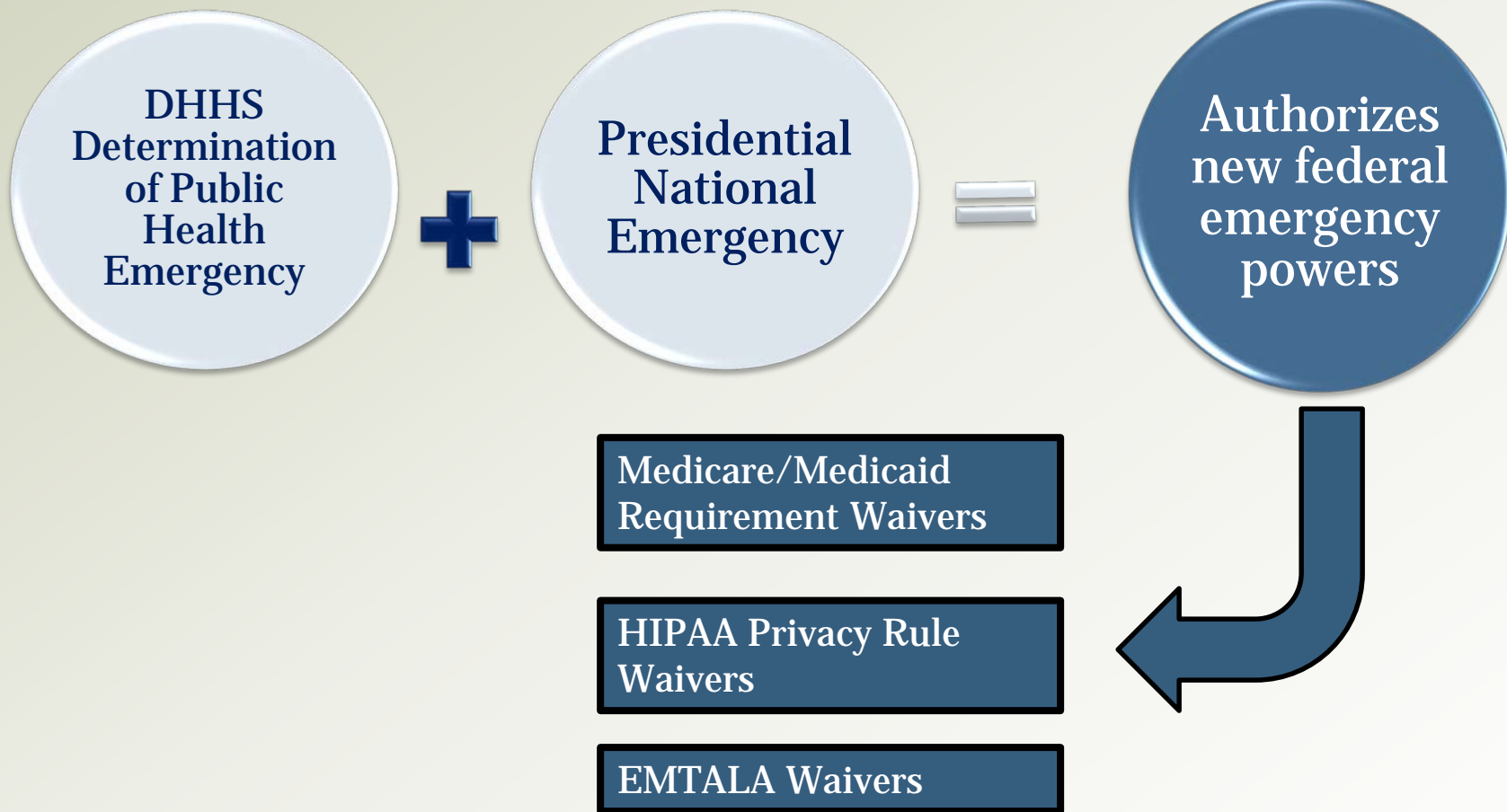
Pandemic Flu

Multi-level Emergency Declarations

Public health authorities, powers, liabilities, immunities, and other critical legal issues vary depending on the type of emergency declared and level of government making the declaration.



Enhanced Federal Powers



Model State Emergency Health Powers Act

Individuals are bestowed special protections and entitlements.



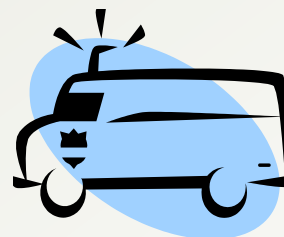
State and local governments are vested with specific, expedited powers to facilitate emergency responses.



Medical licensing and credentialing requirements may be accelerated or waived.



Volunteer and other responders may be protected from civil liability.



Local Emergency Declarations

State law may permit local governments to declare an emergency or public health emergency.

Example: In Texas municipalities, “a mayor or governing body of a city can declare an emergency or may ask the governor to declare a state of emergency.” Tex. Gov’t Code § 433.001.



Addressing Real-time Public Health Legal Issues

In responding to public health emergencies, legal and public health actors must work together in real-time to:

Assess, apply, and monitor changing legal norms

Identify legal issues

Develop legal solutions

Explain legal conclusions

Collaborate with public and private sector partners

Interjurisdictional Coordination of Emergency Response

Local emergency response efforts exceed local capabilities

Ex. Local health agency can no longer fulfill requests for medical resources.

Local government requests state assistance

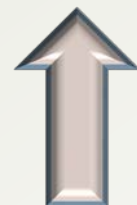
Ex. State distributes initial supplies to local agencies.

Emergency demands exceed state capacity

Ex. State can no longer supply local governments with medical supplies/resources.

States request assistance from federal agencies

Ex. CDC distributes resources from the Strategic National Stockpile to states.

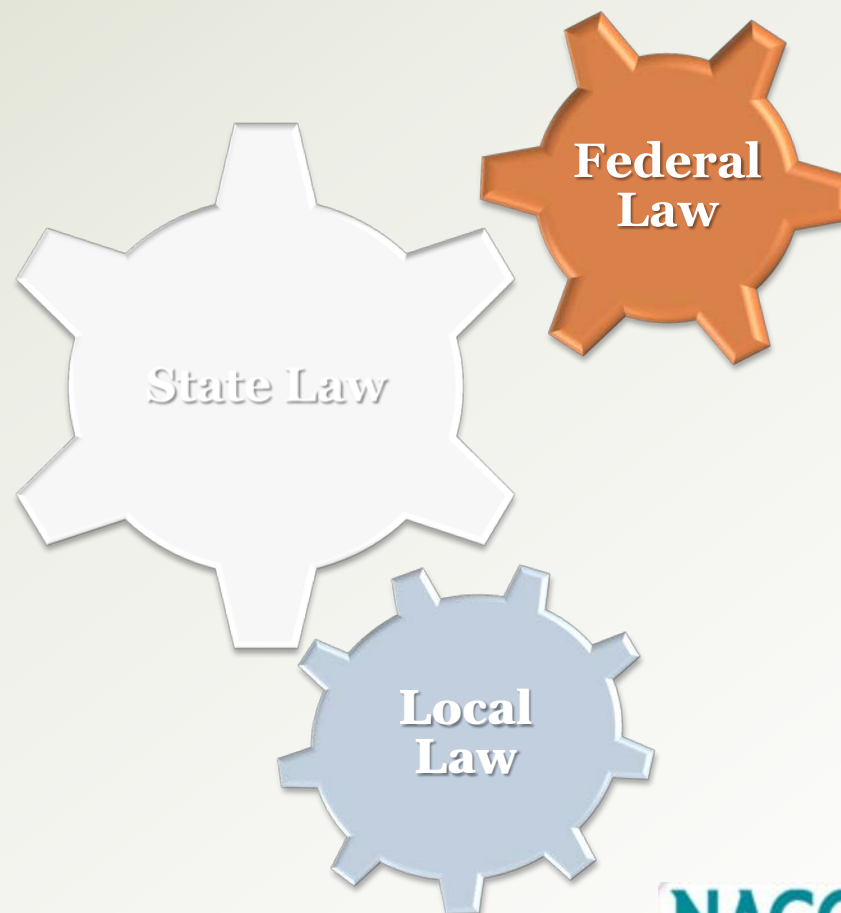


Federalism and Preemption: Legal Interaction Between Jurisdictions

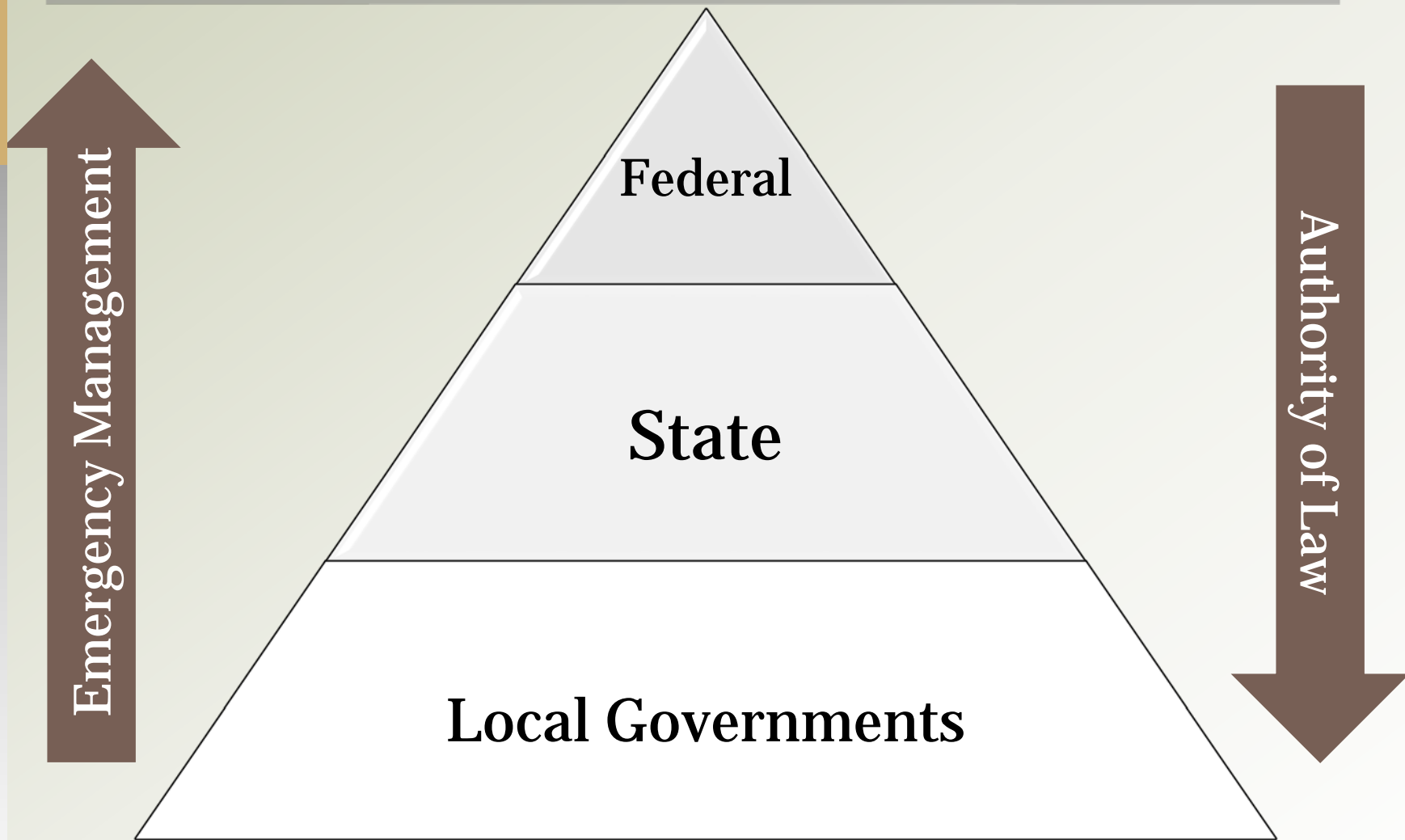
Emergency response efforts may be regulated by federal, state, and local laws.

Federal laws may preempt state law where federal and state laws regulate an activity.

The relationship between state and local laws depends on the degree of local “home rule” and centralization of public health authorities.



Federalism and Emergency Response



Mutual Aid Assistance

***Interstate:* Emergency Management Assistance Compact (EMAC)**

- Legislatively-authorized contract among all states for sharing personnel and other resources
- EMAC assistance triggered by
 - formal state declaration of emergency; and
 - request for assistance

Intrastate

- State mutual aid legislation
- Formal mutual aid agreements between local governments
- Less formal “operational” mutual aid agreements for routine cooperation
- Interjurisdictional Resolutions (e.g., standing committees to coordinate emergency plan and address potential conflicts)

Tribal Nations

- Public health services may be delivered by tribal, county, state, and federal providers
- As sovereign entities, tribes are not generally subject to state or local public health laws
- Mutual aid agreements between tribes and state/local health departments can facilitate the sharing of resources and information



Key Points: Legal Powers

Component 1

1. Law provides critical support for public health efforts and responses during declared emergencies.
2. Emergency declarations at any level of government affect the scope of public health powers, legal authorities, and protections.
3. Real-time emergency legal preparedness planning requires collaboration and decision-making among various stakeholders.
4. Integration of mutual aid agreements can clarify relationships between jurisdictions and prevent potential conflicts during an emergency.

Discussion: Early Stages of an Emergency

Component 1

Several cases of Novel Flu are already confirmed in the United States. While Novel Flu appears to be spreading, no cases to date have been confirmed in your locality. A neighboring local jurisdiction's health officer has indicated that she will act directly to prevent a potential outbreak of Novel Flu.

1. What legal issues should you consider (and who would you consult) to determine initial courses of action for combating the spread of Novel Flu in your jurisdiction?
2. What existing legal authorities do you have to respond to a potential epidemic?
3. What potential legal conflicts do you see arising concerning the neighboring jurisdiction's actions and how might these be resolved?





Core Component 2:

Emergency Public Health Powers and Duties

Learning Objectives:

1. **Employ response measures that balance individual rights and communal interests.**
2. **Identify legally-authorized emergency powers that can facilitate response efforts to limit mortality and morbidity during an emergency.**
3. **Exercise critical public health actions that incorporate privacy protections for individuals.**
4. **Implement emergency preparedness plans that are sensitive to mental and physical disabilities.**

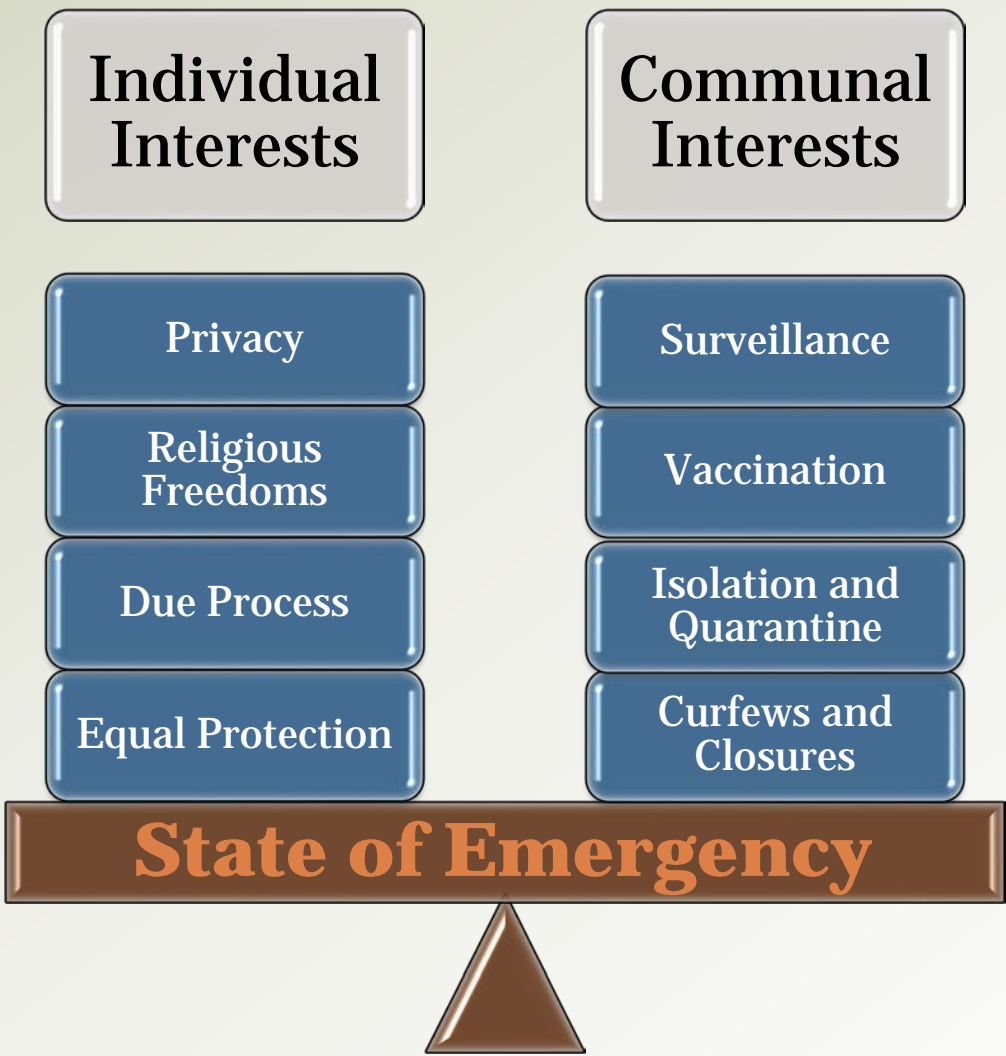
Scenario Day 15: Declaration of Emergency

Local Novel Flu Report

Local Public Health Agency

- CDC reports 100 cases of Novel Flu nationally and at least one reported death.
- The state's Health Department has confirmed approximately 12-15 cases in the state. Three of these cases are confirmed within this locality.
- Several in-state cases have resulted in serious complications, but no related deaths to date in-state.
- Your state and multiple local governments are now considering declaring a state of emergency, disaster, or public health emergency.

Balancing Communal and Individual Interests in Emergency Responses



Individual Protections and Rights - 1

Right to compensation for governmental takings of property

- *Example:* Government seeks to take possession of medical supplies for treating Novel Flu.

Freedoms of speech and assembly

- *Example:* Government imposes curfew measures that restrict an individual's right to assemble.

Equal Protection

- *Example:* Government restricts movement of persons in a particular neighborhood which solely affects racial or ethnic classes

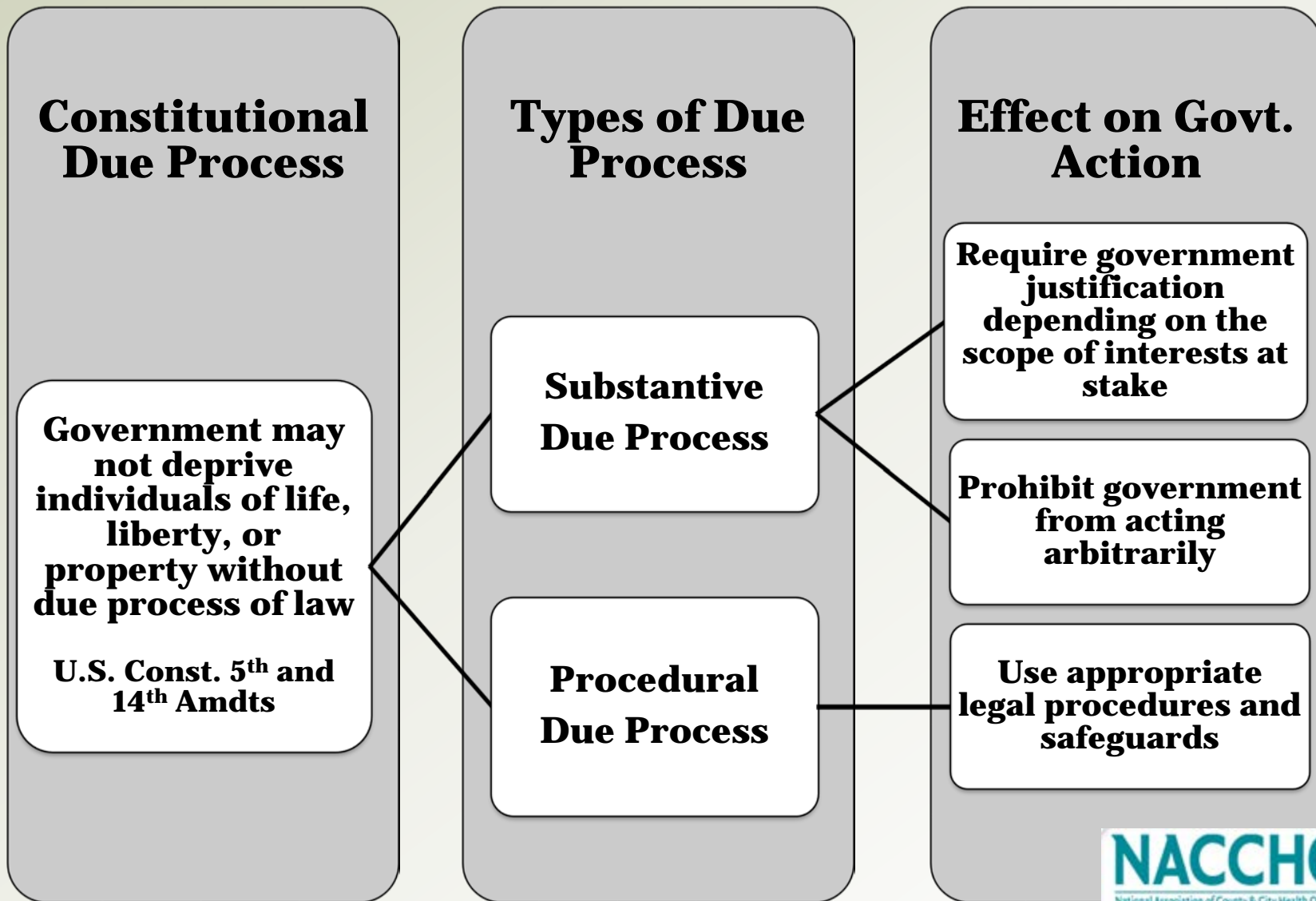
Freedom from unwarranted searches and seizures

- *Example:* Police and public health authorities search private homes or businesses to locate those infected with Novel Flu.

Rights to privacy, parental interests, property interests

- *Example:* Government attempts to mandate vaccinations to limit the spread of Novel Flu.

Individual Protections and Rights - 2



Potential Emergency Powers

During a Declared Emergency Public Health Officials May Have Enhanced Powers to Respond to the Crisis.



Take Private Property



Require Vaccination or Medical Treatment



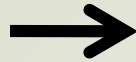
Procure and Allocate Resources



Waive Medicaid/Medicare Requirements

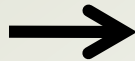


Real or Personal Property - 1



Local governments **may not** take an individual's property without providing:

- Just Compensation
- Notice and an opportunity to be heard



However, if one's property constitutes a **public nuisance** – government can abate the nuisance.

Declared Emergencies

Local governments may be able to take private property or abate public nuisances expeditiously without extensive, advance due process or compensation (if required).

Procurement and Resource Allocation



- Expedited purchase of various necessary medical and other supplies
- Temporary lifting of routine procurement requirements



- Ration existing supplies
- Take essential goods from private entities
- Control distribution to further public health purposes
- Preferences may be given to health care providers, emergency personnel, and other frontline responders without raising actionable discrimination

Medical Screening, Testing, Treatment, and Vaccinations

During a declared emergency, public health authorities may be authorized to administer additional medical screening, testing, and treatment.



- Must be conducted by a qualified person authorized by public health authority.
- Autonomous individuals may typically opt out of these public health interventions.
- A local public health authority, however, may require any non-consenting individual to submit to isolation or quarantine as needed.

MSEPHA § § 602,603

Additional Emergency Powers



Environmental Inspections

- To address a public health concern or a public nuisance.
- Random, periodic, or responsive to citizen complaints.
- May be conducted without significant, advance notice to negate a public health threat.



Epidemiologic Investigations

- To determine the cause of potential or actual disease outbreaks and implement control measures to prevent additional morbidity and mortality.
- Access to identifiable health data and other information can be enhanced without violating privacy laws to ensure accurate investigations.



Safe Disposal of Human Remains/Infectious Waste

- Specific authority to control and ensure safe disposal of human remains or infectious waste in some jurisdictions during declared emergencies

Scenario Day 17: Indicators of an Outbreak

- Media reports indicate that local pharmacies have experienced increased sales of medications related to Novel Flu symptoms.
- Current reports do not indicate whether the spike in sales is a result of increased cases of Novel Flu or if individuals are purchasing medications prior to experiencing symptoms.
- Local health officials are reviewing enhanced methods of tracking the potential outbreak.



Public Health Emergency Reporting Requirements

Enhanced data reporting authority

- State and local laws and practices may authorize tracking and surveillance of additional conditions

Expanded surveillance

- Authorized explicitly in some states' laws (and more generally in others), this type of surveillance may include data related to school absences, over-the-counter medication sales, and Internet searches

Additional surveillance may heighten health information privacy concerns



Privacy and Identifiable Health Information: HIPAA Privacy Rule -1

What is covered?

- **Protected Health Information (PHI)**
 - Individually identifiable health information
 - Used or disclosed by a covered entity in any form

Who is covered?

- **Covered Entities (CEs):** health care providers, health plans, health care clearinghouses, and their business associates
- **Local public health authorities** conducting public health functions are **not** covered (unless they are providing “covered functions.”)

General Rule:

- Uses or disclosures of PHI by CEs require individual written authorization, subject to key exceptions

Privacy and Identifiable Health Information: HIPAA Privacy Rule -2

Public Health Exception

CEs may disclose PHI without individual authorization to local public health authorities:

- To prevent or control disease, injury, or disability
- For disease reporting and 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** the federal Department of Health and Human Services may waive certain provisions of the HIPAA Privacy Rule.

Public Health Practice vs. Research

If a public health activity is/or becomes public health research, different legal requirements apply:

	Public Health Practice	Public Health Research
HIPAA Privacy Rule	CEs may disclose PHI to public health authorities without individual authorization.	CEs may not disclose PHI for research purposes without: <ul style="list-style-type: none"> · Individual authorization; or · Waiver by an IRB or Privacy Board.
Federal Common Rule	Does Not Apply	Requires: <ul style="list-style-type: none"> · IRB review of the research; and · Informed consent by research subjects.

Payment and Reimbursement

Medicaid Waivers During an Emergency

- Pursuant to a federal declaration of emergency and public health emergency, the Centers for Medicare and Medicaid Services (CMS) may waive certain Medicare/Medicaid rules and regulations.
- Waivers help ensure that patients receive care and allow for continued payments during an emergency.

Stafford Act/FEMA Reimbursement

- The federal Stafford Act authorizes the President and federal agencies to assist individuals and communities with the costs of emergency responses through the Disaster Relief Fund (DRF) and other programs.



Federal Emergency Medical Treatment and Active Labor Act

EMTALA

Applies to hospitals that:

- Accept Medicaid and Medicare
- Have an emergency department/offer emergency services

Requires that:

- Hospitals provide a medical screening examination to any patient who comes to the emergency department regardless of their insurance status or ability to pay
- If an emergency condition (including active labor) exists, the patient must receive sufficient treatment until he or she is stabilized

During a Federally-Declared Emergency:

- Certain provisions of EMTALA can be waived under limited circumstances by an emergency declaration by DHHS' Secretary



Mental Health Protections - 1

Public health emergency planning, mitigation, and response efforts must consider the physical and *mental* impacts of natural disasters, pandemics, and other emergencies, particularly on vulnerable populations.



Swine Flu Pandemic, 2009

<http://abnews.go.com/Health/SwineFlu/popup?id=7438550>



Hurricane Katrina, 2005

<http://www.hurricanekatrina.com/hurricane-katrina-pictures-3.html>



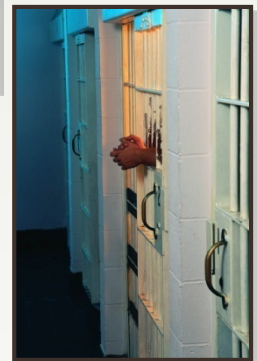
September 11, 2001

<http://nymag.com/news/articles/wtc/gallery/10.htm>

Mental Health Protections - 2

Legal Duties

- Informed consent among persons who may lack capacity
- Protect others from risks from individuals with mental health conditions



Entitlement to Treatment of Services

- Involuntarily confined (e.g., prison population)
- Governmental health program recipients

Scope of Counselor-Patient Relationships

- Limited knowledge of patient history
- Difficult to follow-up during and after emergencies



Access to Psychotropic Medications and Controlled Substances

- Federal Controlled Substances Act
- Limited opportunities to stockpile these medications



Key Points: Emergency Powers

Component 2

1. Emergency response measures must balance individual rights (e.g., right to liberty) with public health powers and protections (e.g., screening and treatment).
2. Appropriate and consistent use of legal powers during an emergency can help limit morbidity and mortality.
3. During a declared emergency, federal and state privacy law waivers may facilitate additional surveillance and screening efforts.
4. Emergency plans must address services to individuals with physical *and* mental/behavioral impairments.

Discussion: Local Impact of Novel Flu

Component 2

Multiple cases of Novel Flu are now confirmed in your locality, including at least two individuals who have suffered severe respiratory complications.

1. What potential measures are legally authorized to respond to the current state of Novel Flu in your locality?
2. What are the legal ramifications of a declaration of emergency or public health emergency on your ability to perform your duties?
3. What authority do you have to gain access to identifiable health data, and how can you best utilize this information to limit the spread of Novel flu?



Public Health Emergency Law Competencies



Core Component 3:

Social Distancing Measures

Learning Objectives:

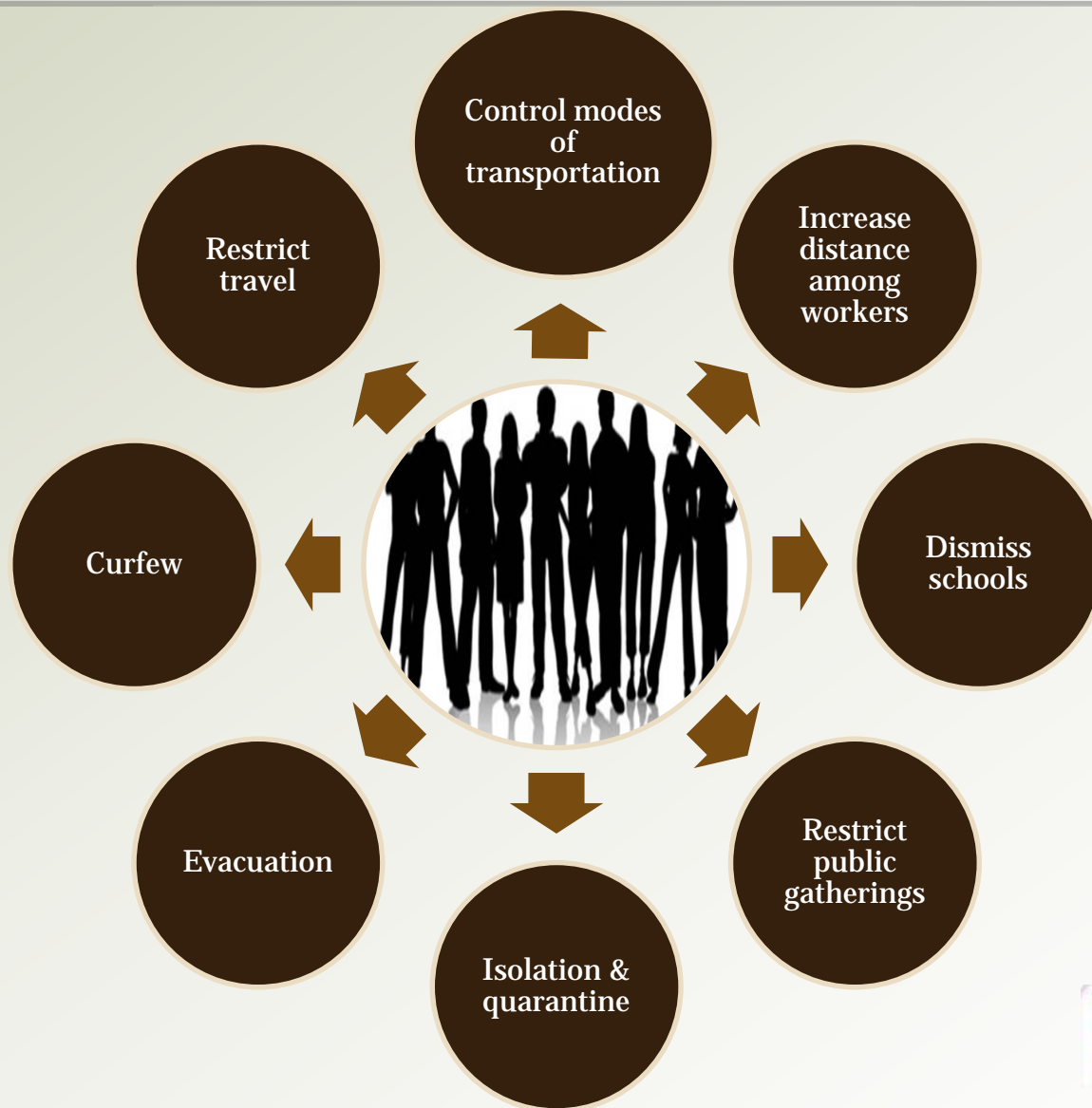
1. Determine appropriate social distancing measures in emergencies.
2. Understand and respond to potential impediments to effectuating social distancing measures.
3. Properly enforce social distancing measures using the least invasive means necessary.

Scenario Day 19: Transmission of Novel Flu

- CDC has determined that the spread of Novel Flu predominates among crowds and in enclosed spaces, especially schools.
- New information suggests that a virus can persist in an enclosed space for up to 7 hours.
- Transmission may also occur through direct contact.
- Individuals are contagious for 3-5 days from clinical onset in adults, and up to 7 days among young children.



Types of Social Distancing Measures



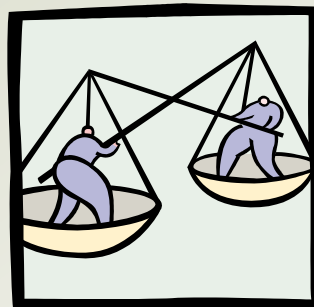
Considerations and Implementation of Social Distancing



Constitutional Impediments to Social Distancing Measures



Freedom of Religion



Equal Protection



Freedom of Movement



Privacy



Right to Assemble

Use of Social Distancing Measures



Stagger work schedules for public employees

Close schools with confirmed Novel Flu cases

Cancel any public event in cities with a high number of cases of Novel Flu

Require symptomatic individuals to stay at home until they are no longer a threat to infect others

Require or encourage those who are sick to delay or cancel travel plans

Quarantine and Isolation

Non – Emergency

- Due Process May Require:
 - Notice
 - Hearing
 - Right to review (Appeal)
- Equal Protection May Require:
 - Similar treatment for like individuals
 - Avoidance of discrimination for protected classes



Declared Emergency

- Expedited isolation and quarantine powers may be authorized so long as due process, equal protection, and other constitutional interests are respected to the extent possible.

Enforcing Social Distancing Measures



Voluntary Measures



Encourage Compliance



Court Orders Seeking Injunctions to Enforce Health Official's Order



Penalties

Enforcement mechanisms assume public health agencies and the courts are available without direct harm to infected individuals or potentially exposing others to Novel Flu.



Key Points: Social Distancing Measures

Component 3

1. Legal social distancing measures may help thwart the spread of communicable diseases during an emergency.
2. Legal protections, including individual rights, may limit the authority to implement social distancing measures in some cases.
3. While social distancing measures can be enforced through various means, local government actors should opt for the least invasive means necessary.



Discussion: Novel Flu in Schools and Community Centers

Component 3

Dozens of cases of Novel Flu have been reported in local schools and a local community center (facilitated by a church). Community members are concerned about the number of Novel Flu cases and the potential for severe complications.

1. What social distancing measures would be viable options to limit the spread of Novel Flu, and who has the authority to institute them?
2. What legal, political and economic considerations should be taken into account prior to effectuating social distancing measures?





Core Component 4:

Deployment and Use of Volunteer Health Practitioners

Learning Objectives:

1. Identify key volunteer health practitioners registration systems.
2. Understand legal issues underlying the deployment and use of out-of-state volunteer health practitioners during an emergency.
3. Assess how to effectively distribute necessary drugs and medical supplies in accordance with dispensing laws during an emergency.

Scenario Day **21**: Hospitals Face a Surge

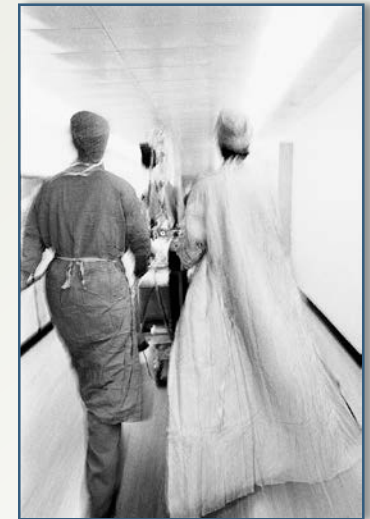
- Local hospitals report having to triage patients in response to a **surge** of individuals reporting symptoms of Novel Flu cases.
- **Secondary sites**, including temporary tents, are being considered by hospitals as screening locations.
- **Staff shortages** at local hospitals are reported as high as 30% of staff due to infections, concerns for family, and refusals to serve.
- Local authorities and hospitals seek **volunteer health practitioners (VHPs)** to fill personnel gaps.



Legal Requirements Supporting Emergency Medical Services



Licensing
Credentials
Privileges
Scope of Practice



Volunteer Registration Programs

State Emergency System for Advanced Registration of Volunteer Health Professionals (ESAR-VHP)

ESAR-VHP Programs Verify VHPs':

Identification

Credentials

Licenses

Accreditations

Hospital privileges

Local Medical Reserve Corps (MRC)

MRC Programs Assist With VHPs':

Approval

Credentialing (e.g., registering with ESAR-VHP program)

Training

Screening (background checks, medical assessments)

Licensing and Credentialing



EMAC & State–Level Agreements

- May increase ESAR-VHP, MRC, and other VHP registrants portability options



Reciprocity Agreements

- Exchanges of personnel even prior to an emergency declaration (e.g. Nurse Licensure Compact)



State Public Health Emergency Laws

- Waive requirements for professional licensure and certification during a declared emergency
- Recognize VHPs licensed or certified in other states

Hospital Privileges

General Privileges

- Authority granted to a physician by a hospital governing board to provide patient care in the hospital.
- Limited by the individual's professional license, experience, and competence.



Emergency Privileges

- Emergency privileges may be granted by a hospital governing board or CEO during declared emergencies regardless of the physician's regular assignment or status.
- Alternatively, temporary privileges may be granted to a VHP to provide health services for a limited period.

Health Care Scope of Practice

General Rule

- Scope of practice for each health care practitioner is defined under state law to specify the types of treatments, procedures, and services they can perform.

During an Emergency

- Professional scopes of practice may be altered or waived temporarily to facilitate emergency responses.

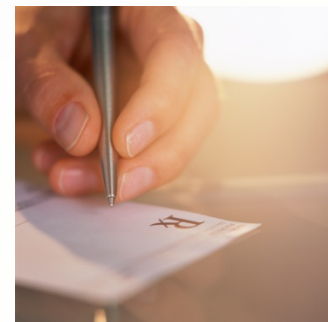
Dispensing Medicines and Drugs

Generally

- State-licensed pharmacists and supervised pharmacy interns
- Other licensed medical practitioners (MDs, DOs, PAs, RNPs) for conditions they are treating
- State or county public health facilities (without a prescription) if storage, safety, labeling, and record-keeping requirements are met

Declared Emergency

- Pharmacists and practitioners licensed in other states
- Other VHPs if licensing requirements are temporarily waived or scopes of practice are altered.



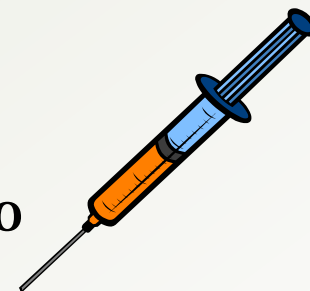
Emergency Use Authorizations



21 U.S.C. § 360bbb-3

May permit the use of unapproved medical drugs or devices during a federally-declared state of emergency through an Emergency Use Authorization (EUA), if:

- Serious or life-threatening disease or condition
- Unapproved product appears potentially effective to diagnose/treat/prevent
- Known and potential benefits outweigh known and potential risks
- Lack of adequate and available approved alternatives
- Necessary and appropriate conditions on use are established





Key Points: VHP Deployment

Component 4

1. ESAR-VHP and MRC register VHPs and verify their licensing and credentials.
2. Licensing, credentialing, privileging, and scope of practice requirements may be altered or waived for VHPs during declared emergencies.
3. Federal dispensing requirements may also be waived during declared emergencies.

Discussion: Hospital staff shortages

Component 4

Local hospitals have reported serious staff shortages and sought assistance from local public health authorities in requesting VHPs.

1. What are the potential legal and political consequences of utilizing VHPs in your jurisdiction?
2. How do these consequences change after the declaration of an emergency or public health emergency?



Core Component 5:

Liability Issues for Individuals, Volunteers, and Entities

Learning Objectives:

1. Understand general concepts of civil liability.
2. Identify critical liability risks for individuals, volunteers, and entities during declared emergencies.
3. Determine potential liability protections for individuals and entities that provide health services during declared emergencies.
4. Identify key legal issues relating to workers compensation for employees and volunteers providing health services during declared emergencies.

Scenario Day 30: Liability Risks

To: Tom Smith Tsmith@legalcounsel.com

Subject: Novel Flu Outbreak – Volunteer Assistance, Patient Death

Dear Tom:

Yesterday a Novel Flu patient treated by a volunteer at our hospital died.

His wife claims that he died due to the volunteer's negligence. She is consulting with an attorney to file a suit against the volunteer and our hospital.

Are we liable?! ~ Jennifer Anderson, CEO

Civil Liability

What is civil liability?

Civil liability is the potential responsibility that a person or entity may owe for their actions, *or failures to act*, that result in measurable injuries or losses to others.



Civil Liability: Theories & Examples

Negligence

- *Example:* A public health physician administers pain medication to a patient without knowing other medications the patient is taking. The patient suffers an adverse reaction.

Intentional Tort - Battery

- *Example:* A health care provider administers a procedure without patient informed consent .

Privacy

- *Example:* A public health clinic inappropriately discloses a patient's medical information without the patient's express authorization.

Misrepresentation

- *Example:* A nurse administers medical care knowing the patient (or the patient's health care surrogate) believes that the nurse is a physician.

Standard of Care in Emergencies

Standard of Care

Generally refers to the duty owed health care practitioners to their patients depending on the circumstances



Crisis Standard of Care



Adapt standard of care to screen and treat increasing numbers of patients with limited resources



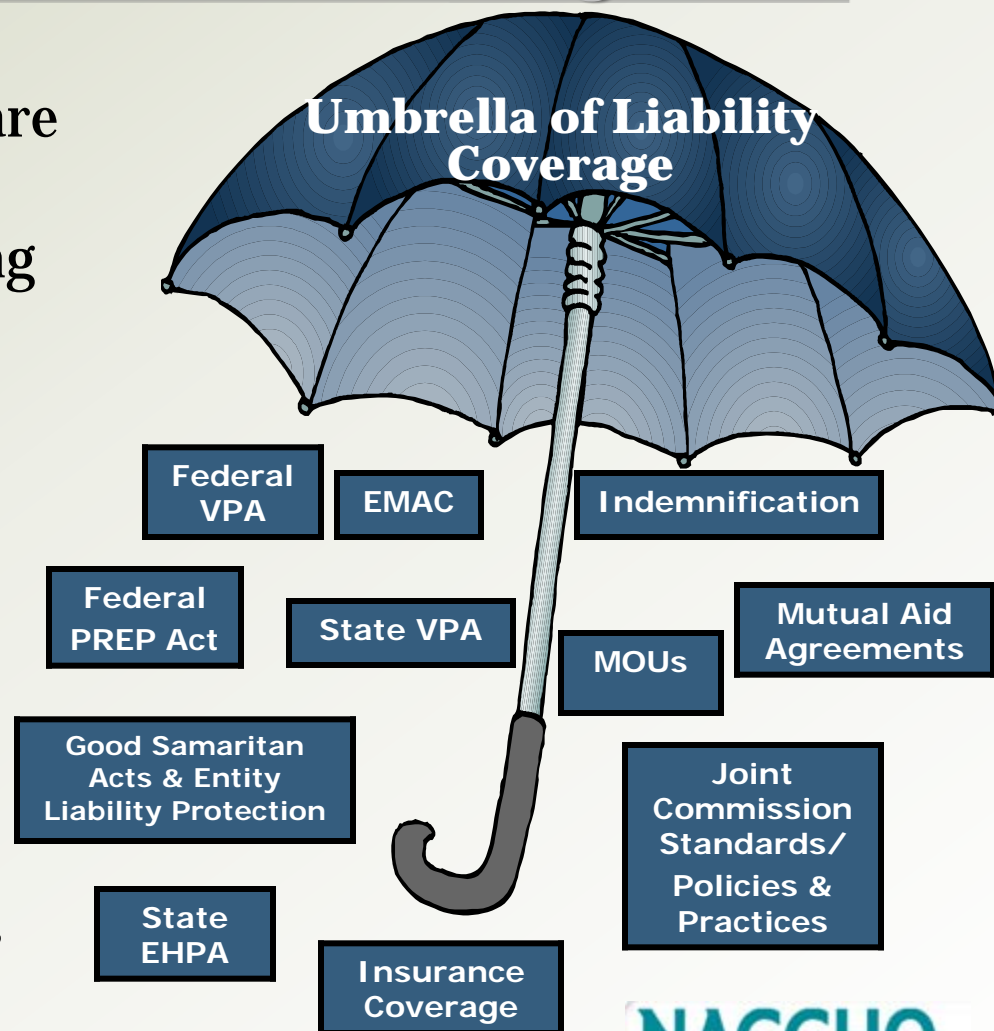
http://assets.nydailynews.com/img/2010/01/15/alg_chinese_team.jpg



Liability Protections for Health Practitioners and Entities in Emergencies

Despite liability risks, there are many legal protections from liability that may apply during emergencies. These include:

- Governmental (sovereign) Immunity
- Good Samaritan Acts
- Volunteer Protection Acts
- Federal PREP Act
- Entity Liability Protections



Governmental (Sovereign) Immunity

Government Agencies

- May be protected from liability for the acts of their employees through sovereign immunity provisions or mutual aid indemnification agreements

Government Employees

- Are not generally liable personally for actions within the scope of their employment

VHPs

- May not be liable if acting on behalf of government during declared emergencies

Gross negligence, or reckless, wanton, or intentional acts are typically outside the scope of protections

Good Samaritan Laws

- Codified in every state's statutes
- Essentially reduce the standard of care
- Generally apply to individual patient medical emergency situations—not necessarily declared emergencies
- Do not typically apply to employees or compensated volunteers
- Do not protect against wanton, willful, or egregious conduct



Federal Volunteer Protection Act

42 U.S.C. § 14503(a)

Volunteers
are
protected
from liability
so long as:

NOTE: *Entities are not covered.* Nonprofits and governments can still be liable for their own acts as a legally recognized entity.

**Actions were
within the
scope**

**Harm was not
caused by willful
or criminal
misconduct or
gross negligence**

**The volunteer
is properly
licensed**

Federal Public Readiness and Emergency Preparedness Act of 2005 (PREP Act) -1

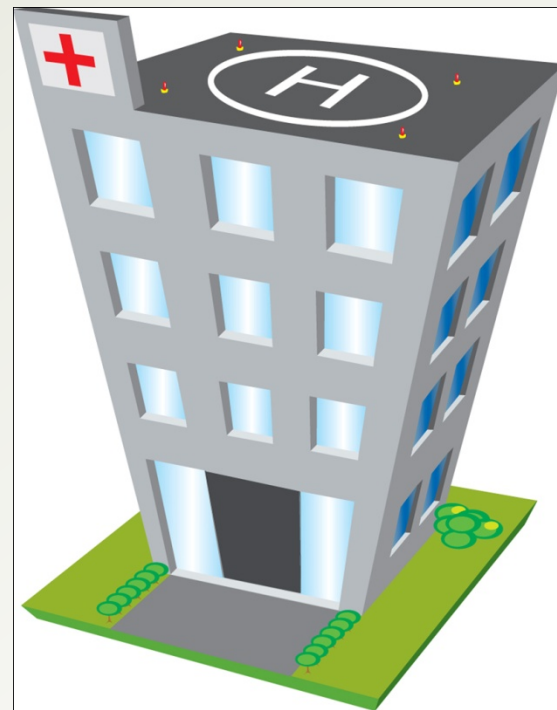
42 U.S.C. § 247d-6d

- Authorizes DHHS' Secretary to grant federal liability protection for the use of “**covered countermeasures**” during federally declared emergencies.
- Applies to individuals and entities (businesses and nonprofits) who assist in the distribution of covered countermeasures.
- PREP Act does not extend to traditional voluntary service assistance unconnected to a product such as:
 - Opening an overflow shelter; or
 - Providing meals to persons in home quarantine or isolation situations.



State-based Entity Emergency Liability Protections

- A majority of states feature laws or policies to protect entities voluntarily assisting with governmental emergency response efforts.
- 30 states (and DC) (as of Jan. 1, 2011) have either:
 - enacted entity liability laws; or
 - formally determined that their existing laws provide entity liability protections.
- 12 states have enacted specific legislative changes since 2007.



Liability Protections: Overview

	Emergency	Non-Emergency
Individuals (unpaid)	<ul style="list-style-type: none"> • State Emergency Laws 	<ul style="list-style-type: none"> • Volunteer Protection Act • Good Samaritan Laws
Individuals	<ul style="list-style-type: none"> • Sovereign Immunity • PREP Act 	<ul style="list-style-type: none"> • Sovereign Immunity (Government Employee)
Entity	<ul style="list-style-type: none"> • Sovereign Immunity • PREP Act • State-based Entity Liability Laws 	<ul style="list-style-type: none"> • Sovereign Immunity (Government Agency)

However:

- **Volunteer Protection Acts** generally apply only to individual volunteers for non profits/government entities
- **Good Samaritan Laws** apply where the response has not been prearranged
- **PREP Act** applies only to covered countermeasures
- **Sovereign Immunity** differs among states
- Protections do not apply to gross negligence or willful acts

Workers Compensation - 1

Non- Emergency

- Workers compensation programs and laws protect employees who are injured or killed at work
- **Simple rule:** *if you get hurt at work, the employer pays regardless of who is at fault.*

Emergency

- In declared emergencies, application of this rule is not so clear due to the limited extent of workers compensation coverage for employees and potential gaps concerning VHPs.

Workers Compensation - 2

Who is an employee?

- Unpaid individuals are not employees, and thus are not covered.
- Exceptions may apply to some VHPs according to state law

Who is the employer?

- May not be the employer in the “home” state
- The temporary “host” employer may be responsible

What is the scope of employment?

- Is a frontline responder who is on call 24/7 to respond to Novel Flu always “on the job?”

When did the injury occur?

- Timing of physical or mental injuries



Key Elements: Liability

Component 5

1. Individuals and entities may be liable for providing inadequate care to patients which falls below the prevailing standard of care.
2. Liability protections for individuals and entities may limit their risks in specific emergency situations.
3. Virtually no liability protections excuse willful or wanton conduct or acts of gross negligence.
4. Workers compensation laws vary between states, but may not apply uniformly to VHPs who are injured or killed while providing services during an emergency.

Discussion: Public Health Clinic Sued

Component 5

A local public health clinic faces threat of a lawsuit by a patient's wife following her husband's death. She claims injuries incurred by the patient while being treated for Novel Flu by a VHP at the clinic contributed to his death.

1. What liability protections may insulate the local public health clinic from a potential adverse judgment?
2. If a VHP is injured while providing services within the clinic, what legal issues are implicated as to whether the volunteer is entitled to workers compensation?

Conclusions



Comprehensive Take-Home Messages:

Component 1

- Law provides critical support for public health efforts and responses during emergencies.
- Emergency declarations at any level of government affect the scope of public health powers, legal authorities, duties, and protections.
- Interjurisdictional integration of mutual aid agreements can clarify relationships between jurisdictions and prevent potential conflicts during an emergency.



Comprehensive Take-Home Messages:

Components 2-3

- Emergency response measures must balance individual rights with governmental public health powers and protections.
- During a declared emergency, federal and state waivers of privacy laws may facilitate additional surveillance and screening efforts.
- Emergency plans and responses must address services to individuals with physical *and* mental impairments.
- Social distancing measures supported by law may limit the spread of communicable diseases during an emergency, but should be enforced by the least invasive means necessary.



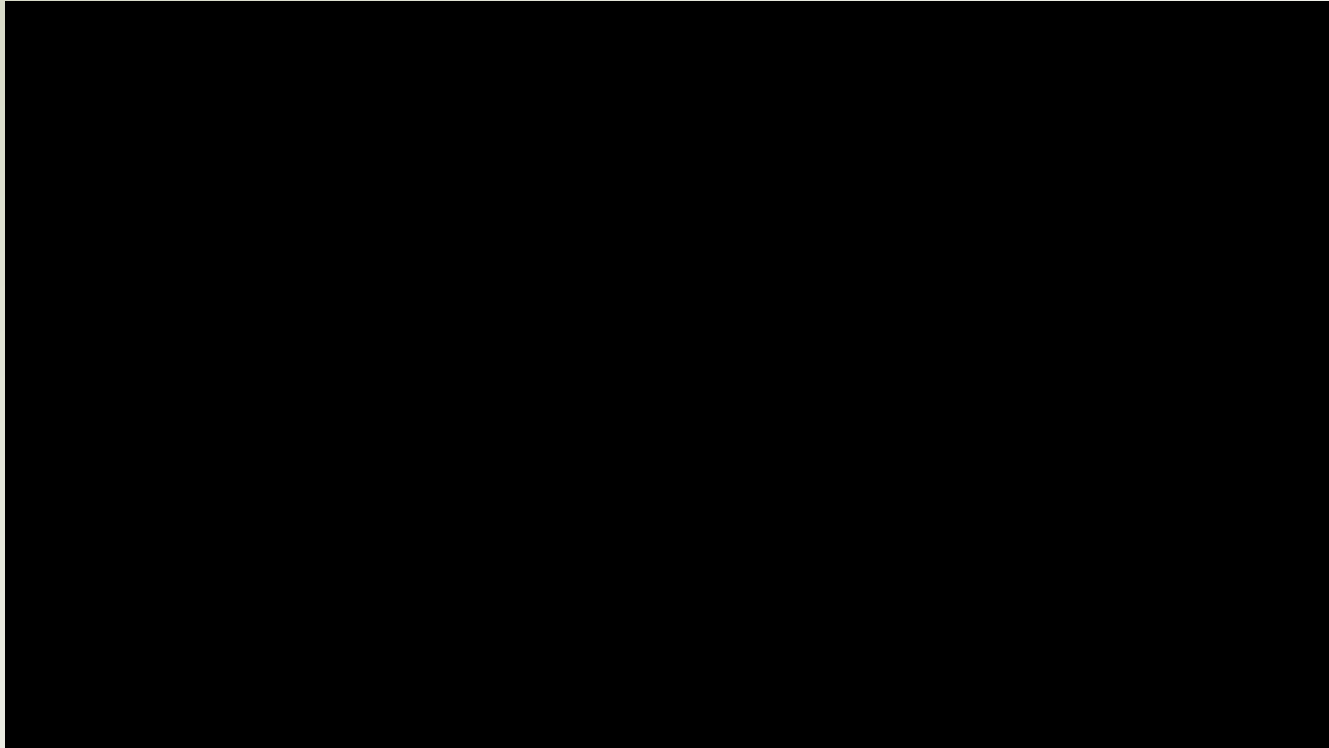
Comprehensive Take-Home Messages:

Components 4-5

- **Licensing, credentialing, privileging, and scope of practice requirements for VHPs may be altered or waived during declared emergencies.**
- **Prescription drug dispensing requirements may also be waived during declared emergencies.**
- **Individuals and entities may be liable for providing inadequate care to patients which falls below the prevailing standard of care.**
- **Liability protections for individuals and entities may limit their risks in specific emergency situations.**
- **Varying laws among states affect whether a VHP who is injured or killed while providing services during an emergency is entitled to workers compensation benefits.**



Closing Video



Acknowledgments

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For More Information and Resources:



Public Health Emergency Legal Preparedness Clearinghouse, Public Health Law Program
Available at: <http://www2a.cdc.gov/phlp/index.asp>



Public Health Preparedness Page
Available at: <http://naccho.org/topics/emergency/>

Public Health Law Network

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The Public Health Law Network connects and serves individuals and organizations committed to applying the law to improve public health. Working with and for public health practitioners, local, tribal, state and federal officials, lawyers, policy-makers and public health advocates, the Network delivers:

- Innovative legal technical assistance
- Training materials and programs on public health law
- Connections among the public health law field

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- Injury Prevention and Safety
- Public Health Agency Accreditation and Shared Service Delivery
- Public Health Statutes and Regulatory Information
- Tobacco Control
- Tribal Public Health Law
- Other

Frequently Asked Questions

Word from the Director
 Learn about the vision of the Network from Dan Stier, the Director of the Public Health Law Network - National Coordinating Center.

Public Health Events
 Learn about upcoming public health events.

875 Summit Avenue, St. Paul, MN 55105 651-695-7749 Sign up on our mailing list Email us Disclaimer Privacy

Network for Public Health Law
 Funded by the Robert Wood Johnson Foundation, the Network assists individuals and entities nationally on emergency preparedness and other public health law topics. *Available at:*

<http://www.networkforphl.org/>



Additional Resources - 1

Component 1: Scope and Breadth of Public Health Legal Authority in Emergencies

Hodge, JG, Anderson, ED. Principles and practice of legal triage during public health emergencies. NYU Ann. Surv. Am. L. 2008; 64(2): 249-291, accessible at <http://cstsp.aas.org/BiosecurityWorkshop2/NYS203.pdf>

Emergency Management Assistance Compact (EMAC) and related mutual aid resources, accessible at www.emacweb.org

National Incident Management System (NIMS) Resource Center, accessible at <http://www.fema.gov/emergency/nims/>

Menu of Suggested Provisions for Public Health Mutual Aid Agreements and Inventory of Mutual Aid Agreements and Related Resources, accessible at <http://www2.cdc.gov/phlp/mutualaid/mutualinventory.asp>

Additional Resources - 2

Component 2: Emergency Health Powers and Duties

The Model State Emergency Health Powers Act, Centers for Law and the Public's Health at Johns Hopkins and Georgetown Universities, accessible at

<http://www.jhsph.edu/bin/k/w/MSEHPA.pdf>

HIPAA Privacy Rule and Emergencies: HHS' Office of Civil Rights page on HIPAA and emergencies (includes a decision tool, a bulletin about applying HIPAA during Hurricane Katrina, FAQ document), accessible at

<http://www.hhs.gov/ocr/privacy/hipaa/understanding/special/emergency/>

CSTE Checklist and Report on Public Health Practice vs. Research, Council of State and Territorial Epidemiologists,

<http://www.cste.org/pdffiles/newpdffiles/CSTEPHResRptHodgeFinal.5.24.04.pdf>

Component 3: Social Distancing Measures

HHS Pandemic Influenza Plan, Supplement 8 Community Disease Control and Prevention, accessible at <http://www.hhs.gov/pandemicflu/plan/sup8.html>

Social Distancing Law Project, Centers for Disease Control and Prevention, accessible at

<http://www2a.cdc.gov/phlp/sdlp/>

Additional Resources -3

Component 4: Deployment and Use of Volunteer Health Practitioners

Emergency Systems for Advance Registration of Volunteer Health Professionals (ESAR-VHP) - Legal and Regulatory Issues, The Centers for Law and the Public's Health, accessible at <http://www.ct-esar-vhp.org/images/VolunteerRights&Responsibilities.pdf>

The Emergency System for Advance Registration of Volunteer Health Professionals, accessible at <http://www.phe.gov/esarvhp/pages/about.aspx>

Division of the Civilian Volunteer Medical Reserve Corps, accessible at <http://www.medicalreservecorps.gov/HomePage>

Component 5: Liability Issues for Individuals, Volunteers, and Entities

Liability Risks and Protections for Volunteer Health Practitioners in Emergencies (PPT webinar), accessible at http://www.networkforphl.org/_asset/5ywvc8/Western-Region---VHP-Liability-Webinar-12-2.pdf

Health Resources and Services Administration – Public Readiness and Emergency Preparedness Act, accessible at

<http://www.hrsa.gov/gethealthcare/conditions/countermeasurescomp/prepact.html>

Final Thoughts and Wrap-UP

1. What key legal and policy issues are most relevant to your locality regarding emergency preparedness?
2. What next steps can be taken to address legal gaps or issues?
3. Any final questions?

Thank you for participating in the Local Public Health Preparedness Law Training Curriculum and Exercise