

# Public Health Emergency Law

CDC Foundational Course for Front-line Practitioners

Developed by

**U.S. Centers for Disease Control and Prevention**



# Public Health Emergency Law

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- Unit 1: Course Introduction and Basic Concepts
- Unit 2: Legal Issues: Detecting and Declaring Emergencies
- Unit 3: Emergency Powers I: Protection of People
- Unit 4: Emergency Powers II: Management of Property
- Unit 5: Emergency Powers III: Mobilizing Professional Resources
- **Unit 6: Advanced Issues Seminar**



# Public Health Emergency Law

## CDC Foundational Course for Front-Line Practitioners

### **Unit 6** **Advanced Issues Seminar**



# Disclaimer

These course materials are for instructional use only and are not intended as a substitute for professional legal or other advice. While every effort has been made to verify the accuracy of these materials, legal authorities and requirements may vary from jurisdiction to jurisdiction. Always seek the advice of an attorney or other qualified professional with any questions you may have regarding a legal matter.



# Unit 6 Objectives

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By the end of this unit, participants will be able to:

1. Understand legal implications of public communications in public health emergencies
2. Describe approaches to managing legal liability
3. Understand steps required to retain eligibility for emergency-related cost reimbursement



# *Hypothetical Example (Cont.)*

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## Day 75

- Situations have emerged over the last several days that have not yet been covered in depth:
  - The media is running nightly investigative reports on “Why did this happen?” & “Could this have been prevented?”
  - State legislatures and U.S. Congress are calling hearings and introducing legislation
  - Agencies and suppliers are requesting reimbursement, but are being denied



# Objective 6.1

Understand Legal Implications of  
Public Communication in Public  
Health Emergencies



# Impact of Communications on Legal Preparedness

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- Public communication is vital to effective public health emergency legal preparedness
- Clear communication engenders trust, cooperation, and social cohesion
- Poor communication undercuts voluntary compliance; may lead to recourse of enforcement
- Poor communication may provoke litigation



# Coordinate Early & Often

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- The Communications Office and the Legal Office should coordinate...
  - *In the planning/preparedness phase*
  - *During the emergency response phase*
  - *In the after-action phase*



# 21<sup>st</sup> Century Communications & Media

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- Have transformed how emergency information is reported to the public and how the public responds
- Have created new ways to communicate with the public during an emergency, potentially:
  - *Reducing need for enforcement measures*
  - *Reducing exposure to legal liability*



# Essential Messages

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- Inform the public about:
  - The nature of the risk
  - What public agencies are doing
  - What the public can do to reduce risk
- To be avoided:
  - Messages without actionable detail
  - Multiple, inconsistent sources of information
  - Communication out of tune with the community's cultures and languages



# Objective 6.2

Describe Approaches to  
Managing Legal Liability



# Liability Overview

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*Public health emergency response requires rapid decision-making affecting many people across multiple jurisdictions.*

- Basic Principles
  - What is liability?
  - Why is it an important legal concept?
- Sovereign Immunity
- General Strategies for Risk Management



# Liability Basics – Being Liable

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*To be liable, a person or organization must:*

- Owe a duty to someone
  - Fail to fulfill the duty
- and*
- If a sovereign government  
Consent to be sued



# Liability Basics – Owing A Duty

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- Owing a Duty
  - From Constitution
  - From statutes
  - From common law
  - By agreement
    - Implied agreement*



# Minimizing Liability Based on Agreements

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- Explicit and Implied Agreements
  - Distinguish between “objectives” of action and “promises”; beware of boasts
  - State explicitly who any agreement is with: the “audience”
  - Avoid “Indemnities” – clauses agreeing to take responsibility for losses, damages, etc.



# Liability Basics – Standard of Care

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- Standard of Care
  - Strict liability
  - Negligence
  - Commission vs. omission
  - Warning/assumption of risk



# Liability Basics – Defendants

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- Who Can Be the Defendant?
  - Federal agencies (DHHS, DHS)
  - State: Governor, public health officer, hospitals
  - Local: Mayor, public health officer, hospitals
  - Physicians, nurses, hospital administrators
  - Volunteers
  - Media



# Liability Basics – Sovereign Immunity

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- Theory from the Middle Ages
  - *The King cannot be sued by his subjects without his consent*
- Generally, federal and state governments are sovereign and must consent to be sued
- Scope of immunity depends on laws passed in each state



# State Sovereign Immunity

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- States are sovereign: cannot be sued w/o waiver of sovereign immunity
- State laws generally don't waive immunity for “discretionary function or duty” or “governmental function”
- States differ in degree of immunity for local entities and public authorities



# General Strategies to Manage Risk

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- Beware of boasts
- Specify and limit the audience for any promises made in agreements; watch out for indemnities
- Structure a warning program to maximize “sovereign” protection
- Don’t guarantee accuracy; recognize uncertainty; disclose potential errors
- Contact an appropriate attorney



# Agency Attorney Role

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## During the Event...

- Advise to protect the agency
- Advise how to respond while minimizing liability
- **Note:** Things still need to be done even when some liability may exist
  - *Goal is to maximize effectiveness and minimize legal exposure*
  - *Can't let small liability issues preclude common-sense actions*



# Agency Attorney Role (Cont.)

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## Prospectively...

- A key role is to make sure that after-action reviews determine how to:
  - *Avoid similar future emergencies*
  - *Make future responses more effective*
- Use this proactive approach to:
  - *Look forward, rather than backward*
  - *Anticipate and address potential criticism*



# Objective 6.3

Understand Steps Required to Retain Eligibility for Emergency-Related Cost Reimbursement



# Need for Financial Preparedness

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## Recall -- During Response Phase:

- Everyone pitches in to save lives, protect property and protect public health and safety
- Financial concerns on back burner
- But major catastrophes have major cost and economic impact
- Reimbursement eligibility must be protected
  - There is a need for financial preparedness



# Federal Assistance

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- Federal assistance is technically a grant
  - Subject to all the requirements of federal grants
- Therefore, must document:
  - Activities of emergency personnel
  - Use of supplies and equipment
  - Expenses



# Stafford Act Declarations

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Remember:

Stafford Act assistance is available *ONLY* if  
President declares

- Emergency or Major Disaster
- Covering county in which costs are incurred



# Stafford Act – “Emergency Measures”

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## Eligible Stafford Act “Emergency Measures”:

- Overtime costs for PH, EM personnel
- Police overtime; National Guard mobilization
- Emergency purchase/lease of supplies, equipment
- Transportation, communications
- Provision of emergency medical care
- Manning “hot lines”, communications costs
- “but for test” – costs are eligible only if caused by event



# Stafford Act – Major Disaster

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If Stafford Act Major Disaster is declared:

- Cost of emergency measures **PLUS**
- Public Assistance
  - *Funding of at least 75% of cost of repair, reconstruction, replacement of public facilities damaged by a declared event*
- Crisis counseling
- Unemployment assistance
- Food Stamps
- Several other small programs



# Ineligible Costs

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Emergency impacts **NOT** likely eligible for federal reimbursement include:

- Lost revenues due to emergency
- Lost patients because
  - *Cancellation of optional procedures*
  - *Hospital designated as isolation facility*
- Lost wages



# Not Covered: For-Profit Entities

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- Federal grants are not available to for-profit businesses
- Their activities can be compensated only if under a contract by an “eligible” government or non-profit applicant
- Disaster loans may be available from SBA



# Insurance vs. Federal Assistance

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## “Duplication of Benefits” restrictions:

- Federal emergency assistance generally cannot be provided where assistance is available *“from insurance or any other source”*
- In public health emergency – diagnosis and treatment of cases and suspected cases is principal cost
- Insured patients have coverage available to pay some or all of these costs
- Plans for emergency medical examinations, surge hospital facilities must ensure capture of individual patient insurance information



# EMTALA Compliance

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- The Emergency Medical Treatment and Active Labor Act imposes two principal obligations on hospitals participating in Medicare:
  - To **screen** any individual appearing in emergency room to determine whether an “emergency medical condition exists” and
  - To **stabilize** individuals determined to have emergency medical condition before transferring or discharging the patient.

**PENALTY: lose Medicare eligibility**



# EMTALA Waiver

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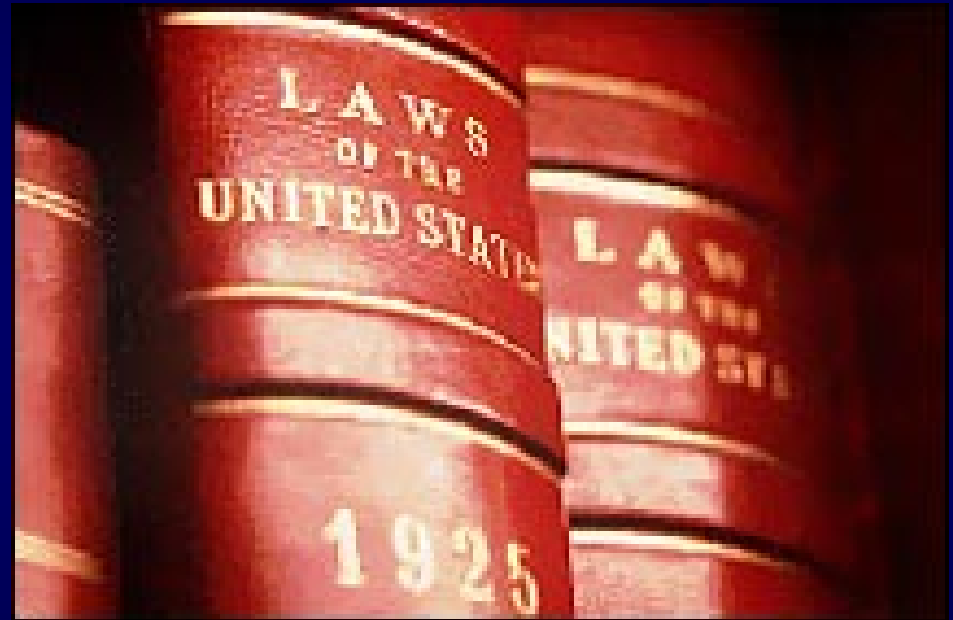
- In mass casualty event, hospitals may not be capable of screening or stabilizing all those who arrive in vicinity of emergency
- HHS has authority to waive EMTALA “screening” and “stabilizing” requirements
  - Waiver permitted during declared federal emergencies
  - Hospitals can’t discriminate based upon ability to pay
  - Waiver can be issued retroactively



# End: Unit 6

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For additional information on public health law visit the *CDC Public Health Law Program*



[www.cdc.gov/phlp](http://www.cdc.gov/phlp)

