Due Process and Public Health

“The [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.”

Fifth Amendment to the U.S. Constitution

The Fifth Amendment to the United States Constitution contains the Due Process Clause, which limits the federal government’s actions in respect of liberty and property rights. The Fourteenth Amendment applies these limitations to state actions. Because local jurisdictions derive their power from the state, the limitations apply to actions of local government as well. In addition, the Fourth Amendment guarantees the “right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” This limitation applies equally to federal, state and local public health officials. Because searches and seizures in public health may invoke both due process and search and seizure concerns, this fact sheet addresses them together. Generally, adhering to due process requirements will assure that search and seizure protections are respected. Additionally, state constitutions may contain due process and search and seizure protections; these provisions may not limit the federal provisions but may provide more protection. Your local counsel can advise you on any unique state provisions.

Concerns about due process and the Fourth Amendment arise in many public health contexts. Most notable, these constitutional provisions must be considered when conducting inspections or administrative searches, seizing property, imposing penalties or otherwise depriving an individual of liberty.

Because due process is a flexible concept, the extent of process required varies greatly. At its highest, due process requires a full blown hearing; at the opposite end, an informal, non-adversarial review may be appropriate. In determining the extent of procedural safeguards that must be in place, public health officials should consider: 1) the nature of the private interest affected; 2) the risk of an erroneous decision; and 3) the fiscal and administrative burdens of providing procedural safeguards. State or local law may impose procedural requirements that exceed what is required by the Constitution. The constitutional requirements are the minimum that must be followed; a public health agency also must adhere to statutory or regulatory requirements in all circumstances.

Liberty Interests and Public Health

Liberty interests are invoked when the action of a public health official or department will interfere with an individual’s ability to move about freely or will invade the individual’s body in some way. The most severe actions, such as quarantine or civil commitment and forced medication, require a full blown hearing. In an emergency, an individual may be detained or medicated prior to a hearing, but the hearing should occur as soon as possible (generally within a few days). Intrusions into the body, such as a compulsory medical examination or testing, require some procedural safeguards (perhaps notice and an opportunity to be heard by an impartial decision maker).
but not a full hearing. And lesser forms of invasion, including disease surveillance, require only minimal safeguards to avoid abuse of discretion by administrative officials. A public health official considering action that would restrain the liberty or invade the body of an individual must adhere strictly to any statutory or regulatory requirements and exercise discretion in a fair and rational manner. It is always wise to seek advice of counsel before taking any significant action outside the ordinary course.

**Property Interests and Public Health**

Property, or economic, interests are also protected by the due process clause and the Fourth Amendment. In public health practice, this means there are procedural rules that apply to inspections, actions on occupational or business licenses and detention or seizure of goods. The constitutional protections apply to seizures based on civil and criminal law.

**SEARCH AND SEIZURE IN PUBLIC HEALTH PRACTICE**

Health departments conduct various types of inspections. Some of them require consent or a warrant but others are permitted by statute or regulation. Typically, a government agency is required to get owner consent or secure a warrant before entering onto the property of an individual or business entity to conduct a search.

Exceptions particularly relevant to public health practice exist. First, an individual or representative of a business may consent to a search; this is quite common with respect to health and safety inspections. Second, public health officials may conduct inspections without a warrant in an emergency, when there is a significant and imminent threat to public health. Third, public health staff may inspect areas of a business that are open to the public.

Perhaps most importantly, public health officials may conduct inspections of “pervasively regulated” businesses without a warrant. In these circumstances, the regulatory scheme may imply consent to inspections and searches or serve as notice of possible inspections and searches. These may be scheduled visits or random inspections. Warrantless inspections or searches of pervasively regulated businesses must adhere to the statutory procedures for such visits and must be conducted for the public health purpose underlying the regulatory scheme and by the agency with authority to conduct the inspection. For example, a restaurant may be subject to a warrantless inspection by the local health department’s enforcement officer to assure compliance with food safety laws, but such an inspection may not proceed if the purpose of the inspection is to secure evidence for a criminal proceeding.

In addition to allowing for inspections and searches, many public health laws permit the seizure and destruction of property. Often the statute dictates the procedures that the agency must employ in respect of due process and Fourth Amendment rights, allowing for immediate seizure and destruction in emergency scenarios. Typically, seizures require a modest level of due process, such as notice of the violation and an opportunity to be heard in opposition; a full trial is not necessary. The nature of the seized property should be considered. If perishable items are seized, the property owner should be heard quickly to avoid unnecessary spoilage. The same urgency may not exist with respect to seizure of non-perishable items. If the seizure and/or destruction is executed within the statutory requirements, the health department will not be liable for economic loss suffered by the property owner.

**LICENSE SUSPENSION OR REVOCATION**

Health departments may have authority to regulate licensees of certain businesses that impact public health. For example, a local health department may be responsible for regulating licensed food service establishments or tobacco retailers. A state health department may have authority to regulate dental hygienists or other health care professionals.

The license to operate a business or engage in an occupation may rise to the level of a property interest such that due process requirements must be met before a license may be suspended or revoked. To comply with these requirements, the agency should provide notice of the suspension or revocation, clearly setting out the basis for the action; give the licensee the opportunity to be heard; and provide for an appeal of the agency’s decision. A health department must strictly adhere to any statutory provisions for such actions. Most jurisdictions have adopted an Administrative Procedures Act or more specific procedural laws that explain which decisions may be appealed and how.

New York City’s Health Code, §3.03, provides that the Health Department “may seize, embargo or condemn any food, drug, device, cosmetic, article or thing that it determines (1) is unfit for human consumption or use; (2) is in a condition, kind, weight, quality or strength prohibited by this Code or other applicable law; (3) is not labeled as required by this Code or other applicable law; (4) contains false or misleading labeling; (5) is adulterated or misbranded; or (6) constitutes a danger or nuisance, or is otherwise prejudicial to the public health.” The seized property may be destroyed but any part of the seized property that is not in violation of the law or otherwise a threat to public health must be returned.
Conclusion

Public health officials should be aware of the limitations placed on their power by the Due Process Clause and the Fourth Amendment. Before taking any action that would interfere with an individual's liberty or invade bodily integrity or conducting inspections or seizing property, a public health official should verify that the law permits the planned action and that the individual is accorded the full array of due process protections. If the scope of an agency’s power is in doubt, or there are questions about the type of process that is due, the health official should consult legal counsel.

Resources

Goodman, R., et al., Law in Public Health Practice (2nd Ed. 2007).

The Network for Public Health Law

The Network for Public Health Law is a national initiative of the Robert Wood Johnson Foundation with direction and technical assistance by the Public Health Law Center at William Mitchell College of Law.

This document was developed by Kathleen Hoke, JD, Director of the Network for Public Health Law — Eastern Region and Mathew R. Swinburne, Staff Attorney, Network for Public Health Law — Eastern Region, University of Maryland Francis King Carey School of Law. The Network for Public Health Law provides information and technical assistance on issues related to public health. The legal information and assistance provided in this document does not constitute legal advice or legal representation. For legal advice, please consult specific legal counsel.
Overview of Food Safety

State and local public health authorities work with the federal government and the private sector to protect the public from disease spread through food consumption. Estimates indicate that every year 48 million Americans experience foodborne illness, which results in 128,000 hospitalizations and 3,000 deaths. Foodborne illness also has a considerable economic impact. A 2010 study revealed that foodborne illness costs the United States approximately $152 billion annually.

At the federal level, the United Stated Department of Agriculture (USDA) is responsible for ensuring the safety of the nation’s supply of meat, poultry and egg products while the Food and Drug Administration (FDA) is responsible for the safety of the remainder of our food supply. The Centers for Disease Control (CDC) is another important federal agency; it helps monitor and investigate foodborne illness outbreaks that cross state lines. These federal agencies work closely with state and local authorities to help address food safety.

This resource will discuss how state and local public health authorities address foodborne illness through disease surveillance, outbreak investigation and food safety control measures.

Disease Surveillance

Foodborne illness surveillance is the routine monitoring of diseases potentially spread through food. Surveillance is vital in detecting disease clusters and problems in the food supply chain. There are three basic forms of surveillance: (1) pathogen-specific surveillance; (2) complaint-based systems; and (3) syndromic surveillance.

- With **pathogen-specific surveillance**, healthcare providers and laboratories must report certain diseases to the public health authority. The list of reportable diseases, defined by state law, may vary by jurisdiction.
- **Complaint-based surveillance** relies on the public reporting possible foodborne illnesses directly to the public health department. Some jurisdictions, like Chicago, are taking advantage of social media to find and investigate food poisoning complaints.
- **Syndromic surveillance** uses individual and population health indicators to identify foodborne illness outbreaks before laboratory confirmation. Examples of these indicators include school absenteeism, sale of over-the-counter drugs, calls to poison control and emergency department chief complaints. This type of surveillance is usually automated.

Outbreak Investigation

Once food safety officials detect a foodborne outbreak, they initiate an investigation. The general goals of an investigation are to identify the (1) disease agent, (2) people at risk, (3) mode of transmission, (4) source of contamination, (5) potential for further transmission, and (5) disease control measures. These investigations will often include interviews of people affected, environmental health assessments of implicated facilities and informational tracebacks of food items through the distribution chain to determine the source of contamination. While conducting these investigative steps, food safety officials must consistently and accurately communicate with the public and other government agencies to help ensure the public’s safety.
Food Safety Control Measures

This section discusses the various control measures used to prevent a foodborne illness.

TRAINING
One way to help prevent outbreaks is to require all food service employees to undergo certified food safety training. For example, in Oregon, any person involved in the preparation or service of food in a restaurant or food service facility must complete a food handler training program.6

In addition, state and local authorities provide technical support and guidance documents to help food establishments and facilities comply with food safety protocols. For example, the Maryland Department of Health and Mental Hygiene provides guidance documents to help facilities create their Hazard Analysis Critical Control Point Plan (HACCP).7

LICENSING
State and local authorities can require licenses in order to operate food establishments. In applying for a license, a food establishment agrees to comply with the food safety regulations of the jurisdiction, allow inspection of its facility and pay any licensing fee. When licensing authority overlaps there is often reciprocity between the state and local government in their licensing requirements. For example, if a restaurant receives a license from the county health department, the state will recognize the license if local licensing requirements meet the state’s food safety standards.

INSPECTIONS
To help ensure food facilities are complying with food safety standards, state and local food safety officials have the authority to inspect these businesses. Officials have the authority to inspect several types of facilities e.g., food processing plants, grocery stores, hospital kitchens, food trucks, bakeries and restaurants.

Inspections must be conducted at a reasonable time. During the inspection, the inspector may examine and take samples of food, examine equipment and review records pertaining to the food and supplies used at the establishment. The inspector records observations and any violations of the jurisdiction’s food safety regulations. The inspector must provide a copy to the facility and also provide a timeline to remediate these violations. In some jurisdictions, violations may result in financial penalties that the establishment has to pay. Other jurisdictions issue letter grades based on inspection results for the public to use when making dining choices.

REVOKING LICENSE
A powerful tool available to a food safety authority is the ability to suspend or revoke a license to operate a food production facility or food service establishment because of food safety violation. Generally in such a case, an inspector must provide a written notice outlining the violations, an opportunity to remedy them and information about the right to a hearing to challenge the revocation. The due process required may vary depending on the seriousness of the violation and the jurisdiction. If a license is suspended or revoked, the party can apply to reinstate the license or apply for a new one. However, the violations that resulted in the loss of the license must be remedied.

DETENTION AND DESTRUCTION OF FOOD
Food safety authorities have the ability to detain food they reasonably believe is adulterated. Generally, the food must be marked as potentially unfit for consumption and include a warning that no one may remove or sell that food until given permission to do so. With detention, an entity has a set period of time to bring an administrative or legal action to resolve the issue. However, if food presents an immediate threat to human health, the food safety authority may have the power to destroy it immediately. For example, in Maryland, the health department considers food that “contains any filthy, decomposed, or putrid substance; is poisonous or otherwise would be injurious to health if consumed; or is otherwise unsafe” an immediate threat.8

EXCLUSION OF INFECTED EMPLOYEES
State and local authorities can help prevent the spread of foodborne illness by restricting the employment of food service workers suspected of carrying contagious diseases that can be spread in the course of their work. For example, if a waiter at a Portland, Oregon, restaurant has salmonella, the local health officer for Multnomah County, where Portland is located, has the authority to restrict the waiter’s employment in food service until the threat of spreading the disease has passed.9

To learn more about your food safety authority, contact your local counsel. The Council to Improve Foodborne Outbreak Response (CIFOR) also has useful food safety resources.10

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Endnotes


5 Id. at 103-126.


Overview of Nuisance Law

Private vs. Public Nuisance

In general, a nuisance is defined as a “condition, activity, or situation (such as a loud noise or foul odor) that interferes with the use or enjoyment of property...” The interference created must be unreasonable and substantial to qualify as a nuisance. When this interference affects the use and enjoyment of a single or small group of properties it is considered a private nuisance. A tree from one property that has fallen across the entrance of the neighboring driveway is an example of a private nuisance. However, when an activity unreasonably interferes “with a right common to the general public,” it is considered a public nuisance. For example, if the tree from the earlier scenario had fallen and blocked access to a public road it would be a public nuisance. At times, conduct may be both a private and a public nuisance if it causes both a particular harm to a specific property and a more generalized harm to the greater community.

A private nuisance is addressed by the affected individual bringing a tort claim against the perpetrator of the nuisance. In contrast, it generally takes a public official to initiate an action over a public nuisance.

Public nuisances are generally investigated by the local government. In some cases, it is the local health department or local law enforcement depending on the type of nuisance activity. However, jurisdictions vary in their enforcement personnel and some rely on building inspectors, civilian code enforcement officers or animal control officers. If legal action is required to abate the nuisance, it is generally the city attorney, county attorney or the attorney general that prosecutes the case. Nonetheless, some states, like Georgia, will allow an individual to bring a public nuisance claim if the government does not bring the claim and the individual has suffered some unique or special damage.

State and Local Law

Public Nuisance is a concept addressed through state and local law; there is variation in the structure and content between jurisdictions. To better understand public nuisance in your jurisdiction, it is critical to familiarize yourself with relevant state and local laws.

STATE LAW
States usually provide a general definition that captures threats to the public health, public safety, and public morality. For example California defines “public nuisance" as

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

These broad delegations of authority are meant to give the state the ability to adapt to new challenges. However, some states provide examples of activities that qualify as a nuisance. Listed below are a few examples of specified nuisances grouped in categories.
Health nuisance examples include public health threats such as breeding areas for flies, collection of sewage, water serving as a mosquito breeding area, rat harborage, bed bugs and other mediums of disease transmission. Noise pollution may also qualify as a public nuisance. However, there are state laws specific to noise pollution that may preempt attempts to address it as a public nuisance. Also, if noise pollution is specifically identified as a public nuisance, it is more likely to be addressed at the local ordinance level.

Moral nuisance is a nuisance that is “injurious to public morals.” These statutes often prohibit the public viewing of lewd movies, lewd publications, prostitution, illegal gambling and illegal drug use.

Drug nuisances prohibit all manner of drug activity. In a neighborhood, illegal drug use can have many of the same impacts as other traditional nuisance activities: decreased quality of life and property values. Nuisance law provides the government with an important tool in combating illegal drug activity, such as the ability to have the courts issue injunctions shutting down buildings or units connected to illegal drug activity.

Criminal gang activity is included in some jurisdictions definition of nuisance. In Shelby County, Tennessee, a gang was recently declared a public nuisance and an injunction was issued prohibiting gang members from congregating together.

Local Law

Local Governments play a critical role in addressing nuisance. Generally, any power local authorities exercise must be delegated from the state. States delegate considerable authority to local governments to address nuisances in their communities. For example, the state of New Hampshire has granted local health officers the ability to draft regulations for the “prevention and removal of nuisances, and such other regulations relating to the public health as in their judgment the health and safety of the people require.”

In defining nuisances, local governments follow the same approach as the state; there is usually a general definition of nuisance and many jurisdictions provide a non-exhaustive list of examples. For example, the Pennington Borough Board of Health, in New Jersey, adopted a nuisance ordinance that covers any “condition or act...deemed to be injurious, detrimental or a menace to the public health or environment...,” while providing 20 examples of prohibited activities.
Federal Protection of Personal Health Information

Personal health information is critical to the public health activities of state and local government, including disease surveillance and disease investigation. However, important federal laws affect how you may gather and disseminate this information. Under the Health Insurance Portability and Accountability Act (HIPAA), the U.S. Department of Health and Human Services (DHHS) created a set of national privacy standards for health information, known as the Privacy Rule. DHHS also created a set of security standard to help protect health information in its electronic form, the Security Rule. The Security Rule was strengthened by the passage of the Health Information Technology for Economic and Clinical Health Act (HITECH). In addition to these federal laws, it is important to be familiar with state privacy and security standards because some states provide greater protections than those required by the federal government.

Who is Covered by HIPAA?

HIPAA privacy regulations only apply to covered entities. To be considered a covered entity, your organization must fall into one of three categories: (1) a health plan—individual or group plans that provide or pay the cost of medical care; (2) a health care clearinghouse—billing services, re-pricing companies, community health information systems and other entities engaging in certain information processing; or (3) a health care provider—medical or health services (physicians, hospitals, clinics, dentists) that electronically transmit certain health information.1 For example, a local health department clinic that files electronic claims for health care services with Medicare and Medicaid is a covered entity. In addition, business associates, entities that use protected health information to perform certain work on behalf of covered entities, are also required to abide by the provisions of HIPAA.2 An organization can designate itself as a hybrid entity if it provides covered and non-covered functions.3 As a hybrid entity, the organization must separate its covered and non-covered functions for Privacy Rule and Security Rule purposes. For example, a health department may have a public health clinic that qualifies as a health care provider and an environmental health office. On its own, the environmental health office does not qualify as a covered entity. If the health department designates itself a hybrid entity, the environmental health office is not subject to Privacy Rule or Security Rule, even though the health clinic is covered.

To determine whether your organization is subject to HIPAA, you should consult with your counsel.

What Information is Protected?

HIPAA only protects information designated as protected health information (PHI). PHI includes individually identifiable information related to (1) past, present or future physical and mental health conditions; (2) provision of health care; and (3) payment for health care that identifies the individual or could reasonably be used to identify the individual.4

In addition, the Privacy Rule lists 18 personal identifiers, including names, telephone numbers, email addresses, social security numbers, medical record numbers and health plan beneficiary numbers.5 If any of these personal identifiers are present with medical information, they will trigger HIPAA’s privacy requirements.
It is important to note that the Privacy Rule applies to all forms of PHI—whether electronic, written or oral—of a covered entity.6

However, HIPAA excludes certain types of records from its definition of PHI, e.g., certain education records, employment records held by a covered entity in its role as an employer and records regarding a person who has been deceased for over 50 years.7

The privacy requirements of HIPAA also do not apply to de-identified health information—information that cannot be traced back to a certain individual easily. There are two ways to de-identify health information: (1) remove all of the 18 personal identifiers or (2) have a qualified expert formally determine that the information is de-identified.8

**Disclosing Information**

Generally, covered entities can only share PHI with the written authorization of the individual.9 However, there are several instances when covered entities can disclose PHI without the individual’s authorization. The primary situations are the broad categories of medical treatment, payment and health care operations. However, there are additional instances when covered entities can disclose PHI without authorization related to: public health; abuse, neglect or domestic violence; judicial and administrative proceedings; law enforcement; and research.10

The public health exemption is a broad provision that allows covered entities to provide PHI to public health authorities in an array of situations.11 Public health authorities are any federal, state, tribal or local agencies responsible for the public’s health under an official mandate.12 Information can be given to these authorities without the authorization of the patient for the purpose of preventing or controlling disease, injury or disability.13 This includes public health investigations and public health interventions. For example, a health care provider that is a covered entity can disclose PHI related to a communicable disease to the local health department to help with disease surveillance. The provider must record its disclosure because it may be required to provide the patient with an accounting of its disclosures in certain situations.14

There are strict guidelines to each of the permitted exceptions. Always consult with counsel when dealing with a HIPAA disclosure.

Even when the Privacy Rule permits use or disclosure of PHI, a covered entity must be careful of what information is disclosed. The Privacy Rule requires that a covered entity use, disclose or request the minimum amount of PHI necessary to meet the intended purpose.15

**Security Measures**

HIPAA’s Security Rule requires a variety of protections to prevent unauthorized access to electronic PHI. Both covered entities and their business associates must comply with these requirements.16 These protections are generally categorized as administrative, physical or technical safeguards.17 Required administrative safeguards include policies and procedures related to risk analysis and management, information access and security awareness and training programs.18 Physical safeguards include controlling facility access and implementing safeguards on workstations that access electronic PHI.19 Finally, technical safeguards include encryption of PHI and user authentication procedures.20

In addition, HITECH created new security breach notification provisions applicable to covered entities and their business associates. Generally, a breach is the unauthorized acquisition, access, use or disclosure of protected health information that compromises the security or privacy of the protected health information.21 A covered entity has a duty to inform the individual whose PHI has been compromised within 60 days and in writing.22

If there is insufficient or out of date contact information for more than 10 individuals affected by the security breach, additional requirements apply. The covered entity must post information about the breach on its website or through major publications and broadcast media and must designate a phone line for inquiries regarding the breach. If a security breach affects 500 or more individuals, the covered entity must notify major media outlets and DHHS.23 In the event that a business associate experiences a security breach, it must report the security breach to the covered entity with which it is working.24

States have their own security breach notification laws that may place additional security requirements on a covered entity.

**State Laws and Preemption**

States have their own laws regarding the privacy and security of health information. As a federal law, HIPAA preempts or supersedes these state laws when there is a conflict. However, HIPAA was meant to create a minimum standard of protection, so states are allowed to implement more stringent laws without being contrary to HIPAA.25

States often adopt more stringent protections for certain types of PHI. For example, in the context of legal proceedings, Florida only allows disclosure of substance abuse records pursuant to a court order.26 In contrast, HIPAA allows disclosure pursuant to court order or a subpoena, discovery request or other lawful process not accompanied by a court order, as long as the requesting party provides certain assurances to the covered entity.27 In this case, the more stringent state law
prevails over HIPAA’s requirements.

In addition, when a conflict between HIPAA and a state law arises, DHHS can exempt the state law from preemption in certain circumstances. Preemption is a complex topic; if preemption concerns arise, consult with your counsel.

Endnotes

1 45 C.F.R § 160.103(2013).
2 Id.
3 Id.
4 Id.
5 45 C.F.R. § 164.514(b)(2013).
6 Id.
7 Id.
8 Id.
17 45 C.F.R. §§ 164.308;164.310;164.312 (2013)
27 45 C.F.R. §164.512 (e) (2013).
Regulation of Synthetic Drugs

Synthetic Drugs and Impact on Public Health

Synthetic drugs are chemically produced and mimic or enhance the effects of illicit drugs. These drugs fall into two categories:

- **Synthetic cannabinoids**, also known as synthetic marijuana, are designed to elicit the same “high” that users get from the THC (tetrahydrocannabinol) contained in marijuana. The synthetic cannabinoid is sprayed onto plant material, which is dried for smoking or oral ingestion. These products are typically sold in retail stores as herbal incense, potpourri or herbal smoking blends.

- **Synthetic cathinones** function as synthetic stimulants, designed to affect the central nervous system similar to the impact of drugs such as cocaine and amphetamines. These drugs are laboratory produced. They are sold in powder form for snorting and may be injected intravenously or taken by mouth. These products are typically sold in retail stores as bath salts or jewelry cleaner.

Companies selling synthetic drugs as legal products, like incense or bath salts, attempt to avoid liability for harm from use of the products as drugs by labeling the products as not intended for human consumption. These labels have no impact on the applicability of local, state or federal laws that limit or prohibit the sale of synthetic drugs. Just like cocaine may not be sold as a kitchen cleaner, banned synthetic drugs may not be sold as incense. These labels do, however, hinder enforcement efforts as law enforcement and health officials may not be able to identify the products being used as drugs and creating public health problems.

Because they are relatively new and vary in chemical composition, there is limited research on the short-term and long-term health effects of these drugs and even less research on the impact on public health. The research and data available, however, give good reason for concern. Synthetic cannabinoids were originally produced to assist in research on the impact of cannabinoids on brain function and pain management. The effects of the synthetic drugs, however, may be ten times higher than of THC. For example, from 2010 to 2012, Poison Control Centers across the country received approximately 9,000 calls related to bath salt use and bath salts were responsible for over 20,000 drug-related emergency department visits in 2011. In 2010, synthetic cannabinoids led to over 11,000 emergency department visits, 75% of which involved patients between the ages of 12-29. Synthetic cannabinoids are popular among high school students. Evidence suggests that youth are the primary consumers of synthetic cathinones.

Popular synthetic cannabinoid product names include K2, Spice, Blaze and Black Mamba.

Popular synthetic cathinone product names include Ivory Wave, Bloom, Vanilla Sky and White Lightning.

Reported harmful effects of synthetic cannabinoids include nausea, increased agitation, elevated blood pressure and acute kidney injury.

Synthetic cathinones may cause chest pain, increased heart rate, hallucinations, paranoia and delusions; and they may create deep cravings like their natural counterparts.

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Federal Laws Applicable to Synthetic Drugs

Federal law—the Controlled Dangerous Substances Act—regulates the sale of a variety of drugs, including imposing prescription requirements for certain substances and banning the sale and use of others. The level of regulation is determined by the schedule on which the drug is listed. At the high end of the scale, Schedule I drugs present significant risk of addiction and serve no medical purpose; these drugs may not be sold or used. At the low end, Schedule V drugs present little risk of abuse and may be used effectively as medicine. Recognizing that chemical substances similar to controlled substances present health risks, Congress passed the Controlled Substances Analogue Enforcement Act of 1986, Subtitle E of the Anti-Drug Abuse Act of 1986 (P.L. 99-570). The Act includes in Schedule I drugs that are substantially similar to listed drugs; however, the definition of analogue drug is somewhat restrictive. In 2012, Congress passed the Synthetic Drug Abuse Prevention Act, Subtitle D of Title XI of the Food and Drug Administration Safety and Innovation Act (P.L. 112-144), directly adding several synthetic substances to Schedule I. The Drug Enforcement Agency has added more synthetic substances to Schedule I; these are temporary listings that must be approved by Congress within three years. As a result of these laws, those who produce, sell, use or possess many synthetic drugs may be subject to federal criminal prosecution.

For example, Ocean City, Maryland, a popular tourist destination that attracts teens and young adults, bans “cannabimimetic agents” as well as “noncontrolled substance[s] that the person reasonably believes is a hallucinogenic chemical substance.” Ocean City, Maryland, Code, Title IV, §§58-181 to 58-183.

State and Local Laws Applicable to Synthetic Drugs

States have also responded with legislation: 43 states have passed laws prohibiting certain synthetic cannabinoids and 44 states have passed laws prohibiting certain synthetic cathinones. Some state laws identify particular chemical compounds that are unlawful. For example, Arizona law contains an extensive list of prohibited chemical compounds. Arizona Revised Statutes, §13-1401. Other state laws use generic language so as to include any number of synthetic drugs. For example, Colorado law lists specific prohibited compounds but also prohibits cathinones generally, defined as “any synthetic or natural material containing any quantity of a cathinone chemical structure, including any analogs, salts, isomers, or salts of isomers of any synthetic or natural material containing a cathinone chemical structure.” Colorado Revised Statutes, §18-18-102. There is a trend toward these more generic definitions. As with federal law, these provisions typically add the new substances to existing prohibitions on production, sale, use or possession and require criminal prosecution for enforcement. The advantage of the generic definition is that the law is able to keep pace with the creativity of those manufacturing the products. With narrow definitions of prohibited drugs, manufacturers need only make a modest change to the chemical composition of the product to avoid regulation.

Local legislatures have also taken action, typically with respect to a particular product of concern. Some jurisdictions have taken action broadly or with respect to a particular retailer under the local jurisdiction’s nuisance abatement power. Because many states preempt local legislation of controlled dangerous substances to some extent, interested local policymakers should consult with counsel before pursuing legislation to better understand in what ways the local legislature may regulate synthetic drugs.

Public Health Response to Synthetic Drug Use

Federal and state laws prohibiting the production, sale, use or possession of synthetic drugs are an important element in the public health response to this burgeoning problem. But law enforcement officials face significant hurdles in pursuing criminal charges against those who sell synthetic drugs. Even with the generic or catch-all language, expert testimony about the chemical composition of the product and its effect on the human body are likely required. Additionally, labeled as legal products like incense or bath salts, enforcement officials struggle to identify and punish retailers. These difficulties coupled with the dynamic nature of these drugs require a public health response. Because synthetic cannabinoids and cathinones are relatively new products, informing the public about the risks of use is imperative. This includes incorporating information about synthetic drugs into youth drug education programs as well as broader public education so that retailers, parents and other adults are aware of these products. This is particularly true as many of the popular products are marketed in a deceptive manner, with labeling as herbal incense or bath salts not intended for human consumption. Assuring that the medical community and health departments are aware of the availability of these drugs and know how to treat a user is particularly important in communities in which the drugs are just starting to emerge. Supporting research into the effects of the drugs will contribute to the ability of the public health community to respond to this emerging and dangerous problem.
Sources


What is Public Health Law?

Definition

Public health law is a field that focuses legal practice, scholarship and advocacy on issues involving the government’s legal authorities and duties “to ensure the conditions for people to be healthy,”¹ and how to balance these authorities and duties with “individual rights to autonomy, privacy, liberty, property and other legally protected interests.”² The scope of public health law is broad. Public health law issues range from narrow questions of legal interpretation to complex matters involving public health policy, social justice and ethics.

Law as a public health tool

Legal tools such as statutes, regulations and litigation have played a vital role in historic and modern public health achievements including advances in infectious disease control, food safety, occupational health, injury prevention and emergency preparedness and response. For example, local governments have passed clean indoor air legislation to address tobacco as a health hazard, state courts have upheld vaccination mandates and federal regulations have established vehicle performance crash standards to promote motor vehicle safety.³

Sources of public health law

Legal authority relevant to population health comes from five basic legal sources and from every level of government.

- **Constitutions.** All government action to advance public health must be consistent with constitutional authority and constitutional protections of individual rights. In addition to the U.S. Constitution, which applies nationally, all 50 states and many tribal and territorial governments have adopted constitutions.

- **International agreements.** The President may bind the U.S. to international treaties and executive agreements that require creation of domestic laws, or that create law that is on par with federal statutes.⁴

- **Legislation.** The legislative branch (Congress, state legislatures and city councils and other local legislative bodies) creates policies and distributes public funds by enacting statutes, which are commonly called ordinances at the local level.

- **Regulations.** The executive branch (the President, governor, mayor, county executive and agencies such as departments of public health) may issue rules and regulations based on authority delegated by the legislature through statutes. Local boards of health are administrative bodies whose members are appointed or elected to lead, guide and oversee the delivery of public health services and activities in their local communities. The role boards of health play in public health generally depends on their legal authority and powers as defined in state statutes. In addition, executive branch officials are authorized to issue legally binding executive orders. Regulatory decisions, and the laws governing executive branch actions, are known collectively as “administrative law.”

- **Case law.** The judicial branch, through courts, resolves disputes and interprets laws, including balancing community needs with constitutionally-protected rights of individuals.⁵
State government police power

The U.S. Constitution reserves the primary power to regulate health, safety and welfare for the common good, often known as the “police power,” to the states through the 10th Amendment. Police power in this context does not refer solely to criminal law enforcement. Rather, police powers may be used by states to promote laws in the interests of the general welfare and health of society. Public health examples of government’s police power include laws authorizing: (1) isolation and quarantine; (2) community vaccination; (3) licensure of medical professionals; and (4) response to public health emergencies, such as bioterrorism or infectious disease outbreaks. Though broad, police powers may be limited by fundamental constitutional rights such as the right to privacy and freedom of expression, subject to a balancing of community and individual interests.

State police power, however, may be preempted when it conflicts with federal law. Although the states primarily address public health issues, the federal government can adopt public health laws pursuant to its powers to tax, spend and regulate interstate commerce. The Supremacy Clause of the U.S. Constitution states that the federal Constitution and federal laws override state and local laws. As long as the federal government has authority to create the law in question, federal law supersedes state law when conflicts arise. For Example, the Patient Protection and Affordable Care Act of 2010 (ACA) created nutrition labeling requirements for certain chain restaurants and vending machines that cannot be contradicted by state law.

Other levels of government also have substantial public health authority:

- **Local governments** in many states possess some police power delegated to them by the state government. Mayors, city and county councils and some local boards of health operate under this delegation of authority.

- **Tribal governments** possess independent authority to address public health concerns in their communities. They usually work with federal and state governments to provide public health services.

- **Federal government,** as mentioned earlier, has authority to act in the public health realm stemming mostly from its powers to tax, spend regulate interstate commerce and regulate in the interests of national security.

### Online Resources

The Network for Public Health Law, [www.networkforphl.org](http://www.networkforphl.org)
The CDC Public Health Law Program, [www.cdc.gov/phlp/](http://www.cdc.gov/phlp/)

Public Health Law Center, [http://publichealthlawcenter.org](http://publichealthlawcenter.org)
ChangeLab Solutions, [http://changelabsolutions.org/](http://changelabsolutions.org/)

### Endnotes

10. U.S. Const. art. VI, cl. 2.