REGION 1
Regional Disaster Health Response System

Changes in the Legal Landscape of Emergency Preparedness & Response Post COVID-19

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June 8, 2021

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Agenda

1. Review the role of law in public health emergencies
2. Assess prominent federal and state emergency declarations, laws, and policies stemming from the COVID-19 pandemic
3. Explore what specific legal changes mean for public and private sector healthcare entities in Region 1 in preparing for future emergencies or disasters
4. Identify additional challenges for legal reforms in the 21st century based on critical lessons learned

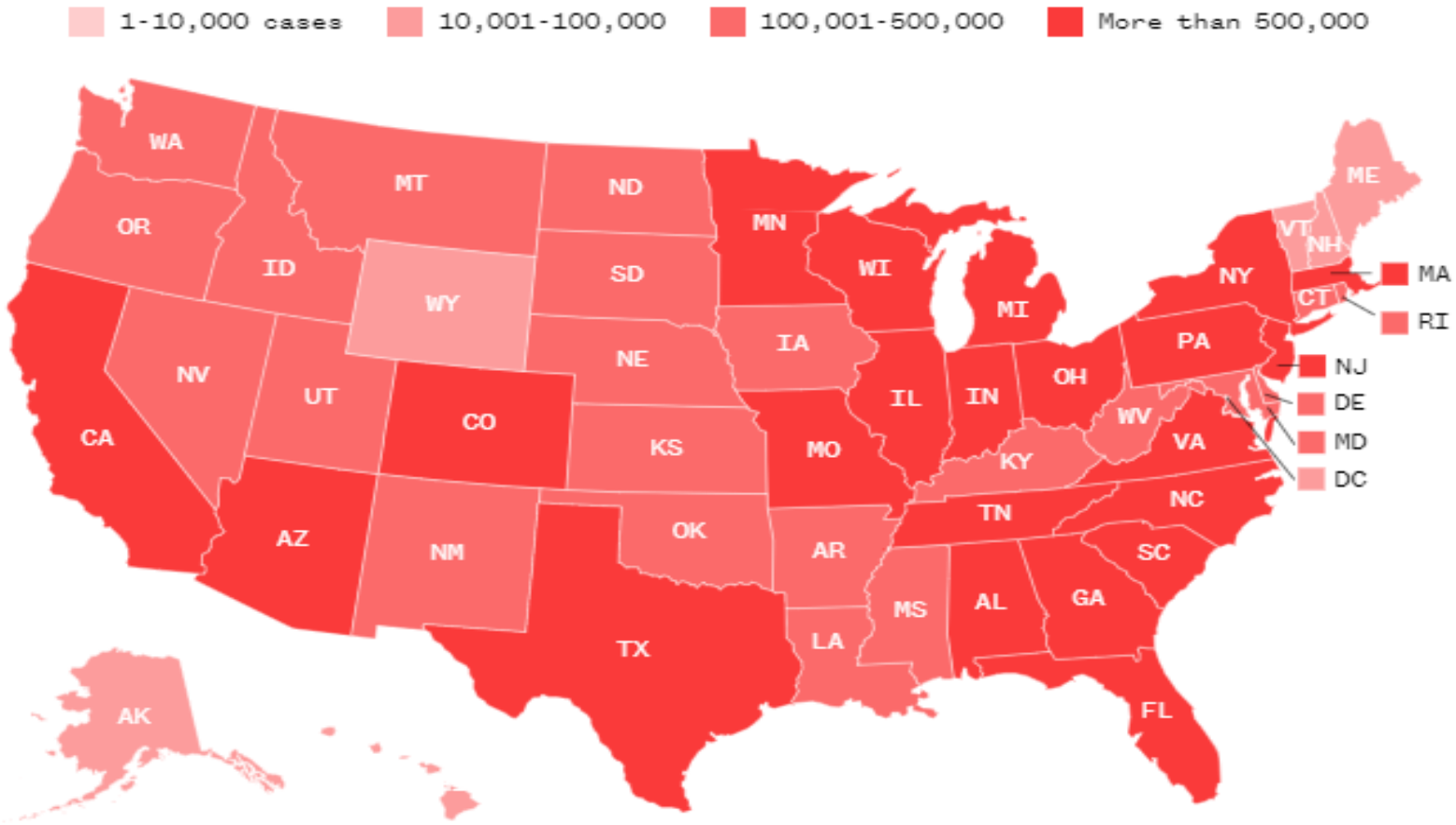
1. Review the role of law in public health emergencies

COVID-19 Confirmed Cases & Deaths

Global Cases 171.7 million | Deaths: 3,739,415

U.S. Cases 33.38 million | Deaths: 597,984

U.S. Stats 19% all cases | 16% all deaths



Role of Laws in Emergency Preparedness & Response

Define what constitutes an emergency

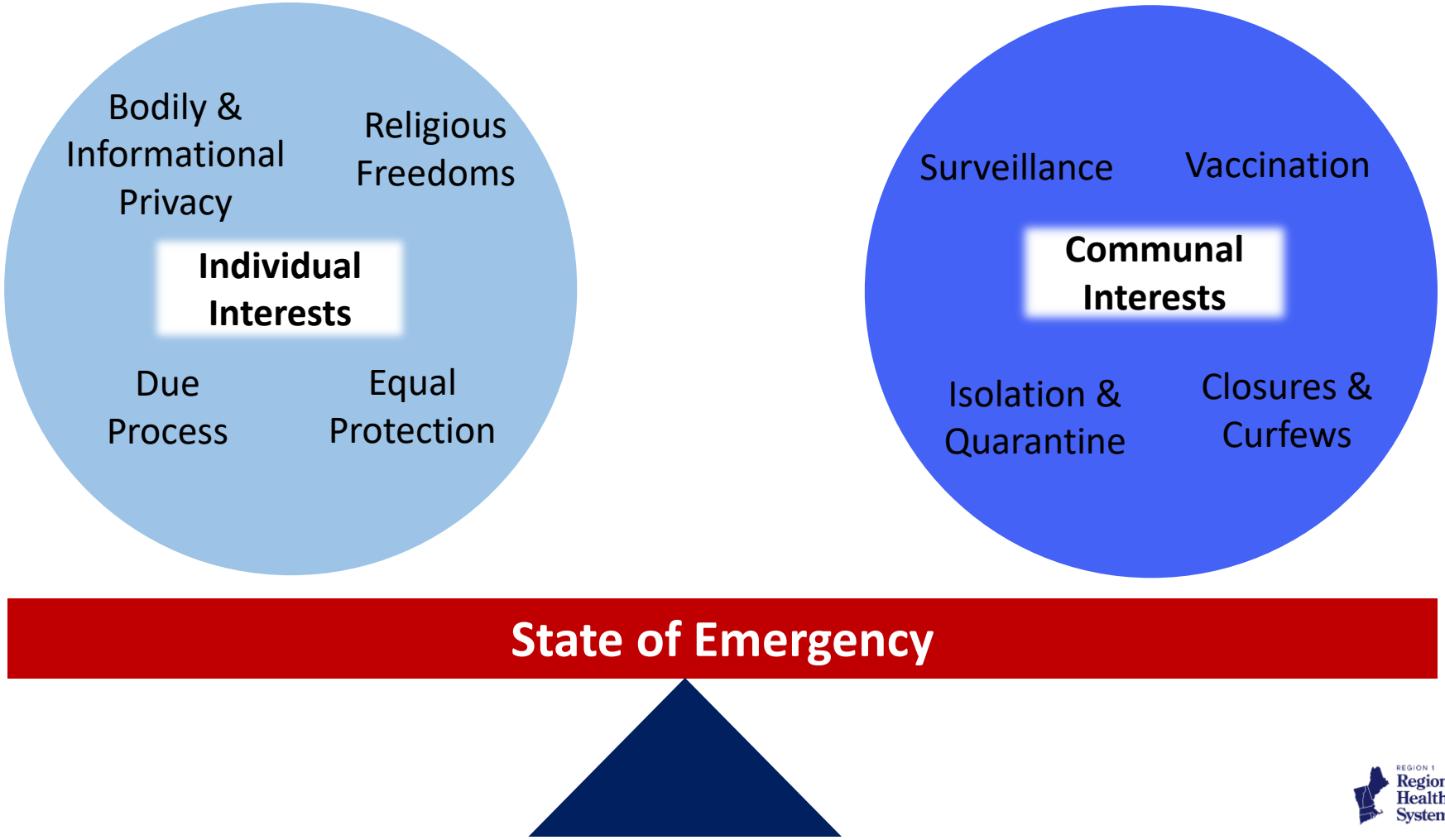
Authorize the performance of emergency responses

Assign responsibility for potential/ actual harms that may arise

Create the infrastructure for preventing & addressing emergencies

Core Law & Policy Issues

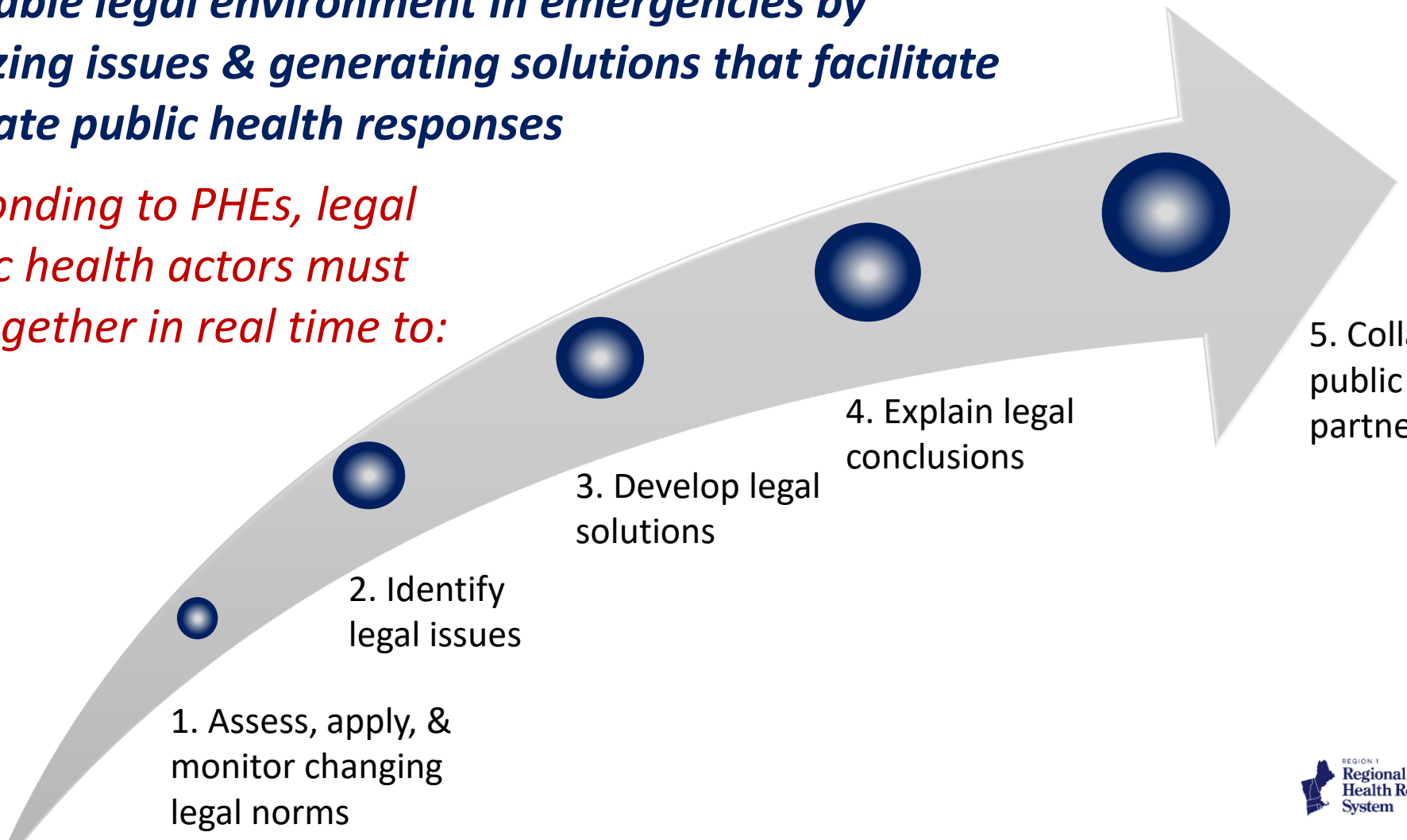
Balancing Legal Interests in Emergencies



Addressing Real-Time Legal Issues

***Legal Triage*: efforts among legal actors & others to build a favorable legal environment in emergencies by prioritizing issues & generating solutions that facilitate legitimate public health responses**

In responding to PHEs, legal & public health actors must work together in real time to:



Legal Triage in Practice

2. Assess prominent federal/state emergency declarations, laws and policies stemming from the COVID-19 pandemic

Unprecedented Emergency Declarations

Public health authorities, powers, liabilities & immunities vary depending on the type of emergency declared at each level of government

International	WHO Public Health Emergency of Int'l Concern January 30, 2020	Emergency Declarations by Foreign Governments Ongoing
Federal	Stafford Act or National Emergencies Act	HHS Public Health Emergency
State	Emergency or Disaster	Public Health Emergency
Local	Emergency or Disaster	Public Health Emergency

HHS Public Health Emergency

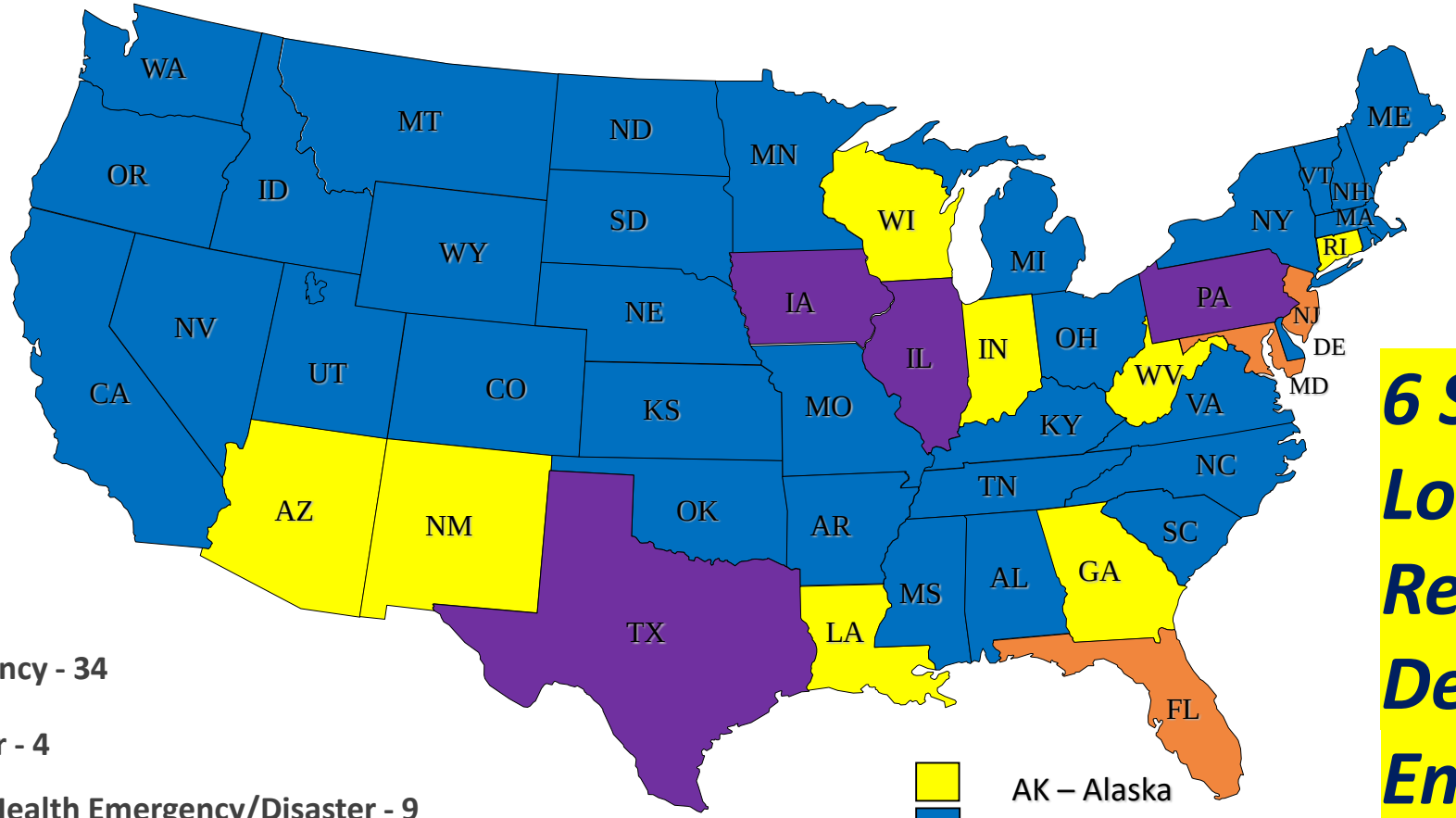
Jan. 31: HHS Sec. Alex Azar declared national public health emergency (effective Jan. 27, 2020; since renewed on 5 subsequent occasions, most recently April 21, 2021).

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

Federal Emergencies/Invocations - 2020

HHS Public Health Emergency	HHS PREP Act Declaration	Stafford Act Emergency	National Emergencies Act	Defense Production Act
Jan. 31	Feb. 4	Mar. 13	Mar. 13	Mar. 20

State-based Emergency Declarations



Emergency - 34

Disaster - 4

Public Health Emergency/Disaster - 9

Emergency + Public Health Emergency - 3

AK – Alaska
HI - Hawaii
PR - *(Puerto Rico)*
VI - *(Virgin Islands)*

6 States No Longer Remain in a Declared Emergency

Select State Emergency Declarations Powers

Emergency Powers	AK	AZ	AR	CA	CO	CT	DE	FL	HI	IL	IN	IA	KY	LA	ME	MD	MA	MI	NJ	NM	NY	NC	OH	OR	PA	RI	TN	VA	UT	WA	WV	WI
Altered Contracts | Procurements		■		■					■	■				■	■				■	■	■	■	■		■	■		■				
Emergency Plans | ICS		■		■	■			■		■		■	■	■		■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
Funding | Resource Allocation	■	■							■	■	■	■	■	■		■	■	■	■	■	■	■	■	■	■			■	■	■	■	
Intrastate Coordination	■	■	■	■	■	■			■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
Isolation | Quarantine		■	■		■	■		■						■							■											
Licensure Reciprocity		■		■					■											■	■	■					■					
Price Controls re: Gouging		■		■					■					■					■			■	■	■		■	■				■	■
Surveillance | Reporting		■		■				■														■										
Testing | Screening | Treatment		■			■										■			■		■	■	■	■	■			■					
Travel Restrictions			■	■		■		■						■					■			■	■									
Waivers | Suspensions		■	■	■		■								■					■	■	■	■		■	■	■	■	■				■

Major Enacted Federal Legislation

Families First

Mar. 18: Families First Coronavirus Response Act

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

CARES Act

Mar. 27: CARES Act

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

PPP & HEA

Apr. 24: Paycheck Protection Program & Healthcare Enhancement Act

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

Consolidated Appropriations Act, 2021

Dec. 27: President Trump signs $2.3 trillion CAA 2021 (largest stimulus package in history):

- Provides $900 billion in stimulus relief for COVID-19 & $1.4 trillion omnibus spending bill for 2021's federal fiscal year
- Supplements CARES ACT Paycheck Protection Program with additional $284.5 billion for PPP loans
- Expands Medicare access to mental health services via telehealth
- Mitigates cuts to physician payments & provides $3 billion in increased physician services
- Establishes a new Rural Emergency Hospital Medicare designation

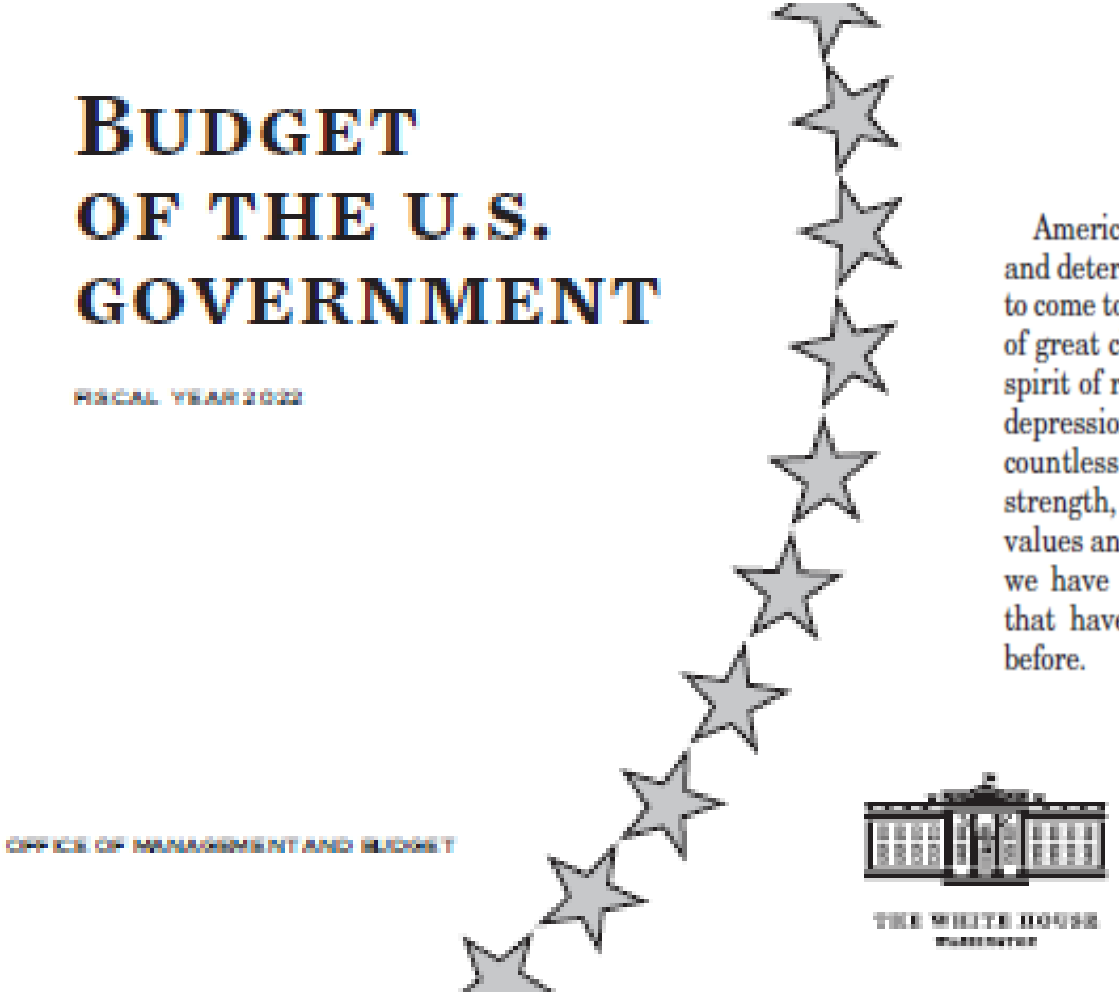
American Rescue Plan Act of 2021

The $1.9 trillion package includes:

- $1,400 stimulus checks to adults/children at certain income thresholds;
- $350 billion in support for state/local governments;
- $47.8 billion to detect & trace COVID-19 infections;
- $7.7 billion to establish, expand & sustain the public health workforce;
- $7.6 billion for community health centers
- $7.5 billion to CDC to promote, distribute, administer & track COVID-19 vaccinations;
- $6 billion for research, development, purchase of vaccines, therapeutics & other products; and
- $1.5 billion for block grants towards community mental health services

President Biden signs the American Rescue Plan Act of 2021.
Image: National League of Cities

President Biden's Fiscal Year 2022 Budget



CONFRONTING THE PANDEMIC AND RESCUING THE ECONOMY

America has always been defined by the grit and determination of its people, and our capacity to come together in common purpose at moments of great challenge. Across the generations, that spirit of resilience has seen us through war and depression, natural disasters and disease, and countless crises that have tested the Nation's strength, persistence, and commitment to core values and to one another. For more than a year, we have confronted a confluence of challenges that have called on that resilience like never before.

The broad failure to control the spread of COVID-19 in the months before the President took office had devastating and far-reaching consequences. Millions of students and parents were forced to navigate the challenges of remote learning—straining countless families and disproportionately affecting Black, Hispanic, Asian, and Native American students, as well as students with disabilities and English language learners. Disruptive changes in people's daily lives also took a significant toll on both mental and physical health.

President Biden's Fiscal Year 2022 Budget

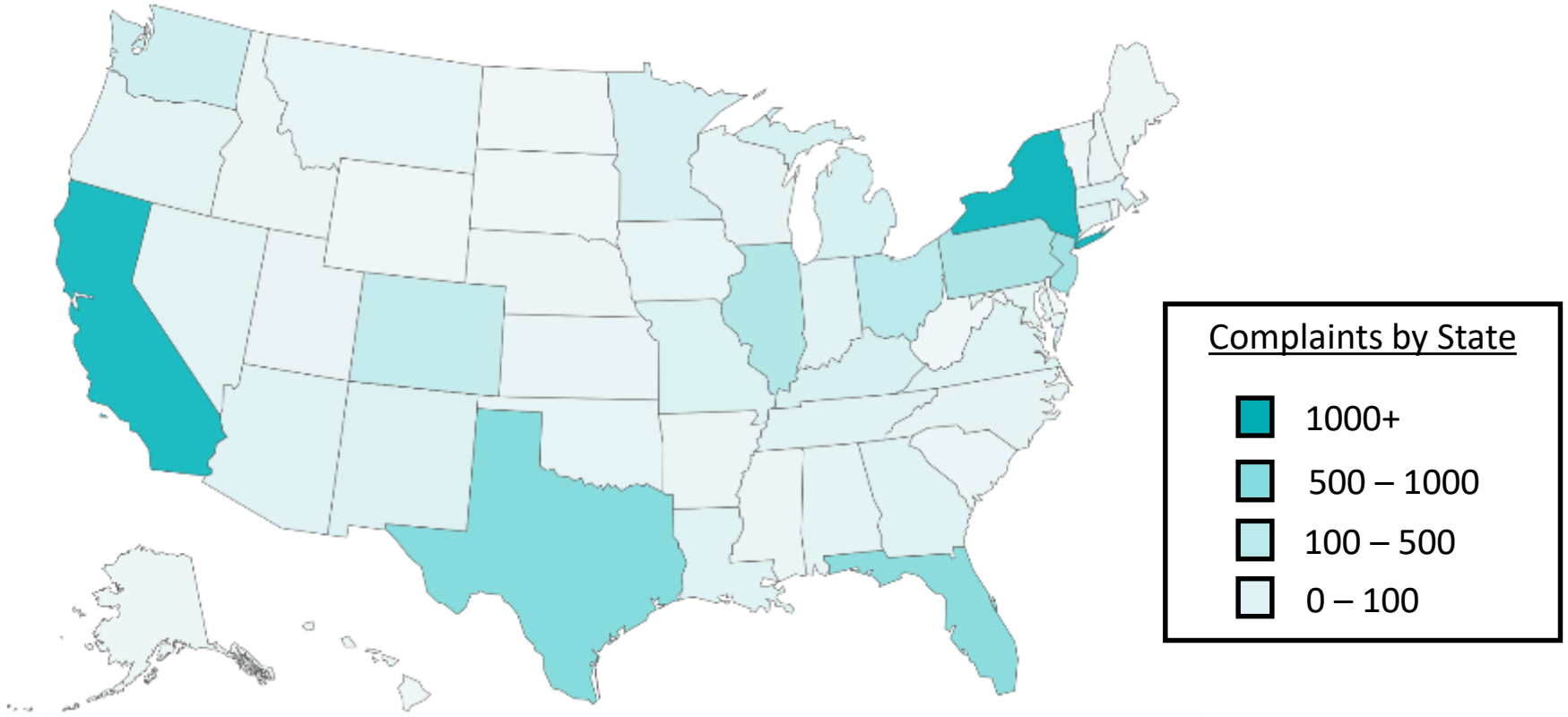
astho™

LEGISLATIVE ALERT

Select highlights of the President's budget proposal include:

- $400 million to CDC to create new, flexible funding to support core public health infrastructure and capacity nationwide, including a range of governmental improvements to address gaps in the current public health system and improve readiness for the next public health crisis.
- Expanding access to mental healthcare.
- Addressing racial disparities in healthcare overall.

COVID-19 Litigation Trends



10,600 total complaints filed as of May 22, 2021

Image Source: https://www.huntonak.com/en/covid-19-tracker.html

Judicial Approaches re: Direct Challenges to Public Health Authorities

CONSTITUTIONAL RE-BALANCING

Assessing the shifting nature of rights in emergencies by balancing alleged infringements against governments' compelling interests in protecting the public's health and safety.

Bayley's Campground, Inc. v. Mills,

D. Me. 2020, affirmed 1st Cir. 2021

"[W}hen one weighs competing interests . . . the presence of a major public health crises is a very heavy weight indeed and scientific uncertainties about the best response will afford the state some additional leeway to err on the side of caution . . ."

CONSTITUTIONAL SET-ASIDES

Determining whether specific rights (as articulated in non-emergencies) may essentially be set aside temporarily to the degree their recognition inhibits critical facets of emergency responses.

Binford v. Sununu

N.H, Mar. 25, 2020

"In an emergency situation, fundamental rights . . . may be temporarily limited or suspended."

SCOTUS - First Amendment Rights

South Bay I

May 29, 2020

Denied motion to enjoin CA Executive Order limiting attendance at places of worship

Roman Catholic Diocese v. Cuomo

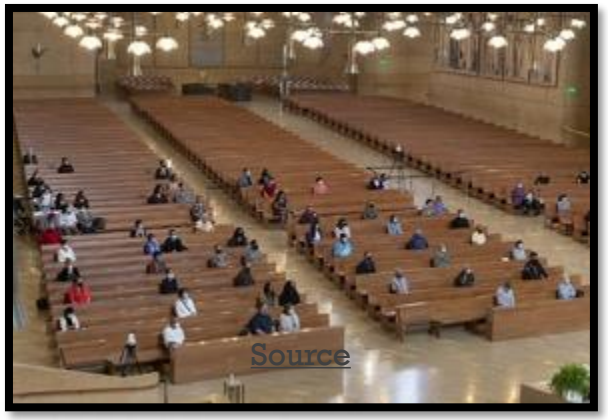
Nov. 25, 2020

Struck down an executive order impacting places of worship as contrary to the free exercise of religion

South Bay II

Feb. 5, 2021

Enjoined California from enforcing a ban on indoor worship



3. Explore impacts of legal changes on public & private sector healthcare entities in Region 1 in emergency preparedness & response

Core Health Law & Policy Issues

- Health Insurance
- Disability Protections
- Telehealth
- Drugs & Vaccines
- Liability Protections
- Health Equity & Disparities

Health Insurance Benefits

1. Families First & CARES Act require insurers & plans to provide specific COVID-19 tests & services at $0 cost to beneficiaries.

2. States can supplement these requirements through additional requirements applying to health insurers & ERISA plans.

3. HHS reports that "31 million Americans have health coverage through the Affordable Care Act – a record," plus reductions in uninsurance rates nationally.

4. Assuring even higher rates of uninsured is manifold (e.g., ACA support, public option), but politically tenuous & legally complicated.

Disability Protections

1. Employees testing + (or perceived as +) may not be fully protected via ADA.

2. NYC Commission on Health & Human Rights (& other entities) classify COVID-19 as a disability.

3. Major concerns arise over CSC medical allocation policies that exclude, disadvantage, or discriminate based on disabilities or age.

4. Emerging era of mental health impacts from months of social isolation substantiate additional legal reforms.

Telehealth

1. CARES Act, Telehealth Services During Certain Emergency Periods Act, & the Families First Coronavirus Response Act substantially fund telehealth services.

2. CMS legal waivers usher in a new array of telehealth services through multiple types of providers & settings.

3. Federal & state legal support for payment parity for onsite & telehealth services expands the availability of care for millions.

4. Efficacy of telehealth services long-term may be limited by interstate license challenges & regulatory issues post-emergency.

Drugs & Vaccines

1. Concerns over premature authorization & distribution of COVID-19 vaccines slow national vaccination efforts.

2. Questionable White House authority to override FDA guidelines re: vaccine EUAs fuels vaccine skepticism.

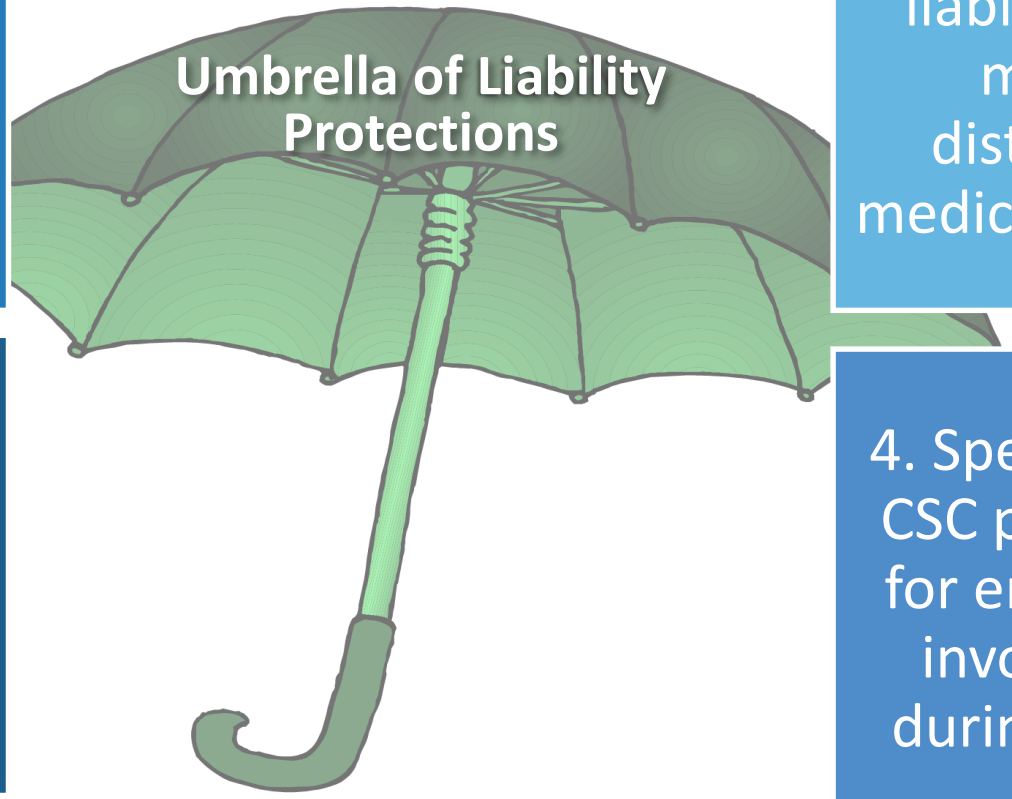
3. Claims that vaccination distribution plans should prioritize race/ethnicity because of historical injustices led to thorny constitutional objections.

4. Drug/vaccine approval and allocation processes are being re-assessed & rebuilt for the 21st century.

Liability Protections

1. Existing federal/ state laws are supplemented by COVID-19-specific protections providing immunity to HCWs.

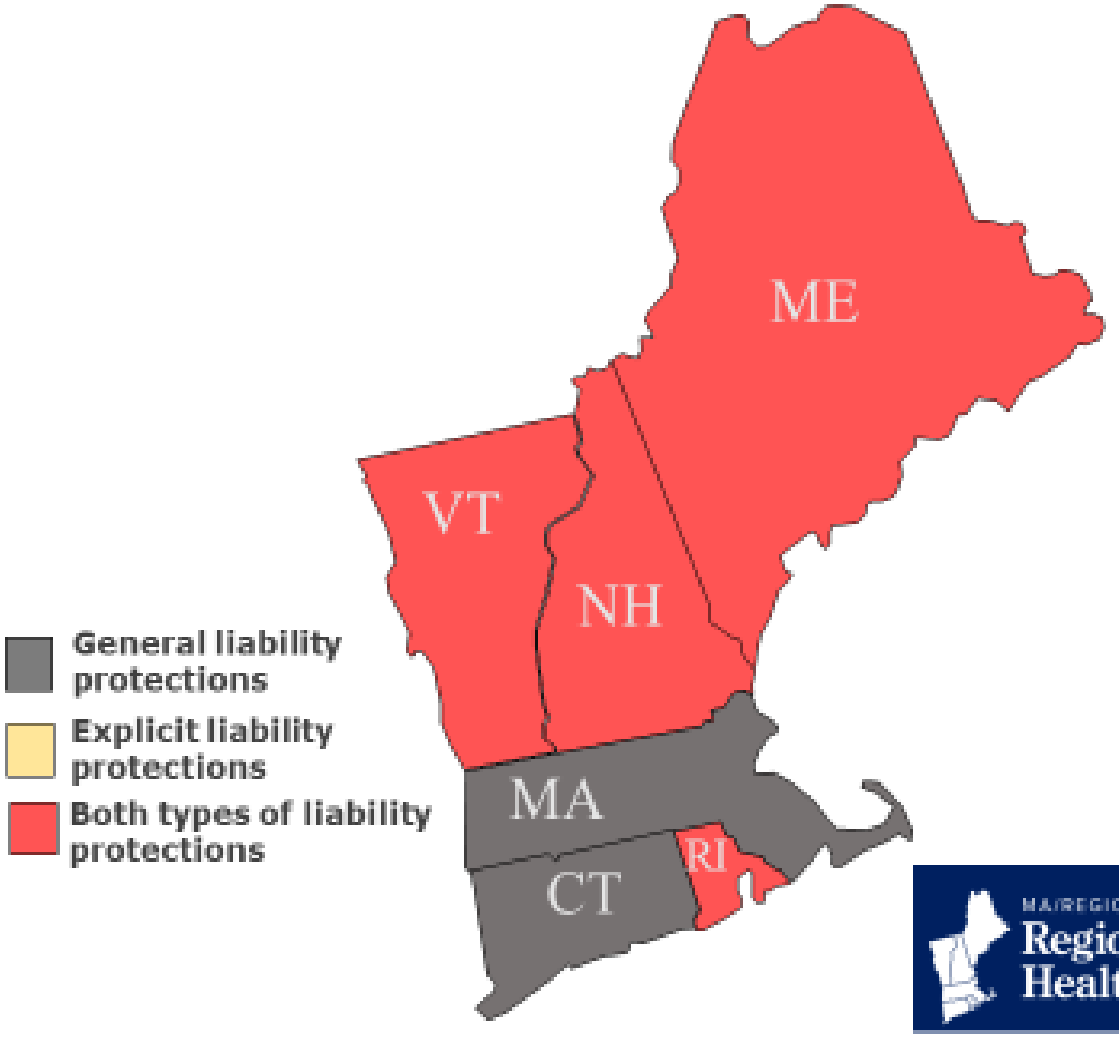
2. Federal CARES Act & Families First Act enhance liability protections for manufacturers & distributors of PPE & medical countermeasures.



3. PREP Act liability protections increasingly cover HCWs working under expanded scopes of practice.

4. Specific protections for CSC present new mantra for emergency decisions involving patient care during times of scarcity.

Region States Explicit Liability Protections

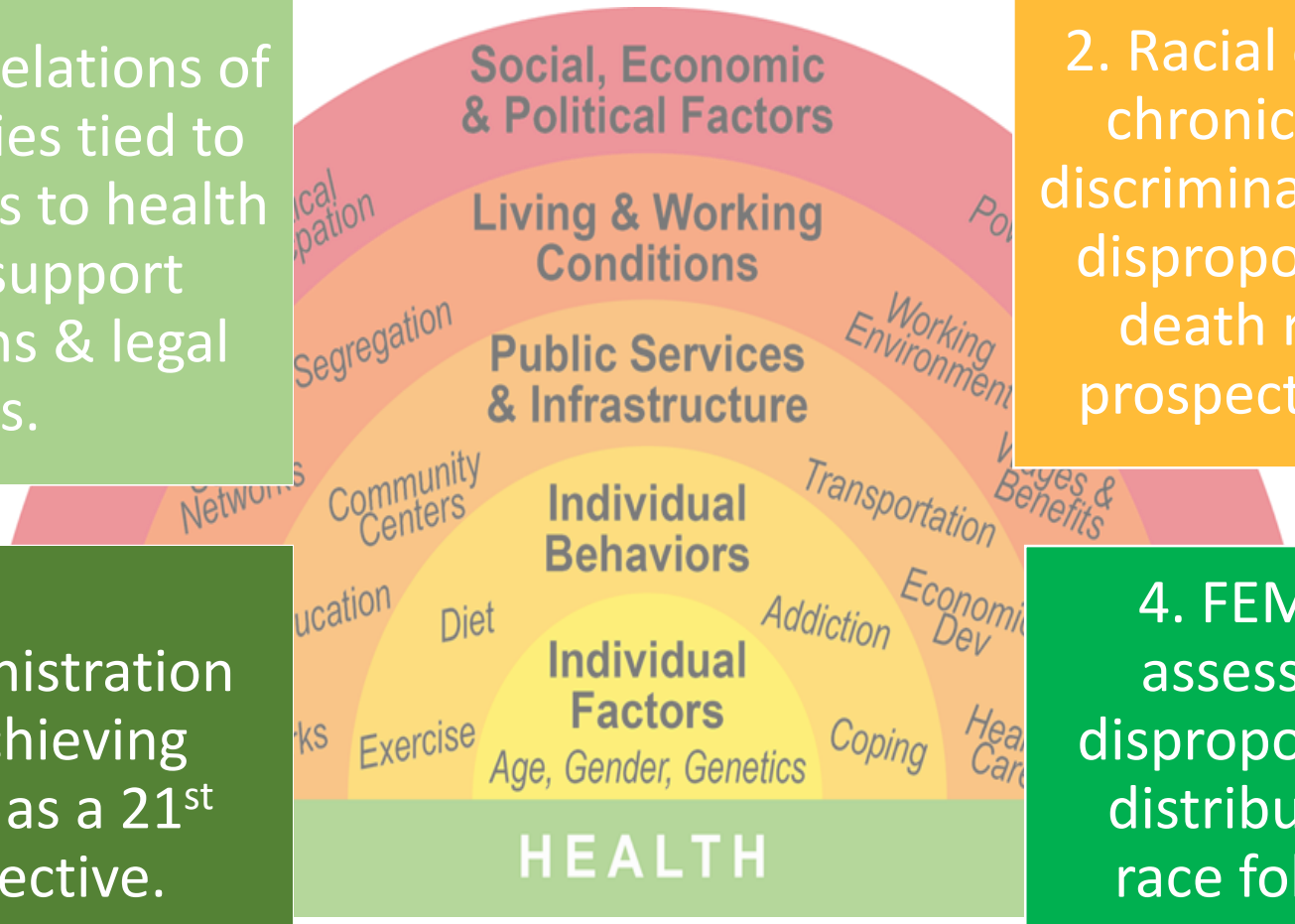


MA/REGION 1 PARTNERSHIP for Regional Disaster Health Response

Health Equity & Disparities

1. COVID-19 revelations of health disparities tied to multiple barriers to health care access support enhanced plans & legal reforms.

2. Racial disparities (e.g., chronic disease rates, discrimination) resulting in disproportionate COVID death rates raise the prospect of new claims.



3. Biden Administration prioritizes achieving health equity as a 21st Century objective.

4. FEMA review and assessment suggest disproportionate benefit distributions based on race following natural disasters.

4. Examine additional or forthcoming 21st century legal reforms based on critical lessons learned

Ongoing State Public Health Legal Reforms

Hodge JG, Piatt JL. COVID's counterpunch: State legislative assaults on public health emergency powers. BYU Journal of Public Law. 2021; __(__): ___ (*forthcoming*).

State Bill No. & Intro. Date	Key Provisions Inhibiting State or Local Public Health Emergency Powers	Status (as of 4/30/21)
Alabama SB 184 (2/3/21)	• Prevents county health officers during emergencies from issuing orders for the control of an epidemic/disease outbreak if the State Health Officer has issued a statewide order to control/prevent/minimize the epidemic/outbreak.	Pending action
Arizona SB 1719 (2/3/21)	• Requires the Governor to convene the state emergency council every 14 days after declaring a statewide emergency to avoid automatic termination of the order.	Pending action
Florida SB 1924 (3/10/21)	• Requires localities to prove that any PHE measures depriving constitutional rights/liberties, statutory rights, or property meet strict scrutiny. • Allows the Governor/Legislature to invalidate local orders at any time if they are determined to be unnecessarily restrictive. • Establishes automatic expiration of local orders after 10 days unless extended by the local governing body; after expiration, similar orders may not be issued in response to the same emergency.	Pending action
Indiana SB 48 (1/4/21)	• Limits orders or actions concerning communicable diseases issued by local health boards/officers to 14 days unless approved by the county/city executive; prevents issuance of similar orders unless approved as described. • Requires pre-approval of such orders by the county/city executive regarding mask wearing or social distancing related to COVID-19.	Inactive
Michigan SB 1253 (12/3/20)	• Prevents state or local health directors from restricting capacity at houses of worship during an epidemic emergency. • Limits state health director emergency orders to 28 days, requiring approval by both legislative houses for extension. • Allows businesses required to close to continue operating if they comply with each health/safety precaution required of open businesses.	Vetoed on 12/30/20
Missouri HB 308 (1/6/21)	• Exempts houses of worship from social distancing requirements in any order, rule, or regulation related to preventing the spread of infectious diseases issued by local health authorities or state departments of health or other departments.	Placed on inf. calendar
Montana HB 121 (1/6/21)	• Redefines "quarantine" & "isolation" to include only persons known to be infected with or exposed to a communicable disease. • De-authorizes local health boards from adopting necessary regulations for control of communicable diseases, sanitation in public & private buildings, etc., replacing this with the ability to merely propose such regulations for adoption by the local governing body.	Signed by Governor on 4/16/21
Ohio SB 22 (1/26/21)	• Creates a legislative health advisory committee with oversight authority over actions taken by the Governor or state agencies in emergencies. • Limits emergency declarations to 90 days, subject to extensions adopted by concurrent resolution of the legislature. • Empowers the legislature to rescind/invalidate administrative orders/rules promulgated in response to the emergency.	Vetoed on 3/23/21; passed 3/24/21
S. Carolina HB 3126 (1/12/21)	• Prevents state or local governments from accepting federal funds to enforce federal vaccine or mask mandates to minimize the spread of COVID-19 or other infectious diseases.	Pending action
Tennessee SB 1573 (2/11/21)	• Prevents business classifications into essential & nonessential categories for purposes of allowing some to remain open & others to close.	Signed by H. Speaker 4/30/21
Texas SB 1025 (3/18/21)	• Restricts power over operation/occupancy of businesses during a declared disaster/emergency, as well as renewal of declaration, to the legislature. • Limits the Governor's power to waive or suspend laws, including the Emergency Management & State of Emergency provisions. • Preempts local disaster declarations unless they are expressly authorized via a proclamation/executive order issued by the Governor.	Pending action
Utah SB 195 (2/16/21)	• Limits the duration of state or local emergency orders & allows the legislature or local governments to terminate respective orders. • Prohibits limits on religious gatherings that are more restrictive than other similar gatherings during emergencies. • Requires the Governor to provide advance notification during a long-term emergency before taking certain actions.	Signed by Governor on 3/24/21

Region 1 - State and Local Legislative Examples

Maine **HB608** (2/25/2021)

Requires the Governor to convene the Legislature if a declared emergency exceeds 30 days. Limits the Governor's authority to declare a state of emergency in a county.

(status: pending)

New Hampshire **HB389** (1/10/2021)

Establishes a joint legislative emergency executive order oversight committee during a declared emergency. Imposes a 21-day limit on emergency executive orders.

(status: pending)

Massachusetts **HB497** (3/29/2021)

Imposes a 30-day limit on emergency declarations, orders, and mandates.

(status: pending)

Rhode Island **SB255** (2/10/2021)

Limits Governor to a single 30-day renewal of an emergency declaration without a joint resolution of the General Assembly.

(status: pending)

State and Local Public Health Concerns

The Emergency Legal Preparedness Game is Changing

Biden-Harris Administration National Response Efforts

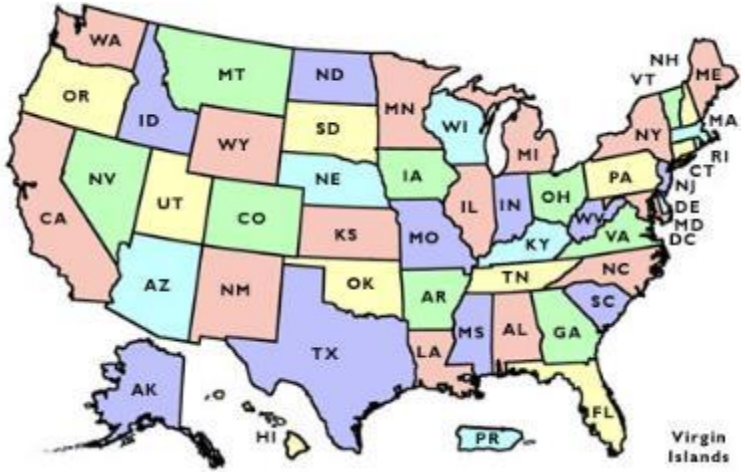
"There are moments in history when more is asked of us as Americans. We are in that moment now and history will measure whether we were up to a task. ***Beating this pandemic will be one of the most difficult operational challenges we have ever faced as a nation***."
Jan. 21, 2021

National Strategic Plan — 6 Primary Domestic Goals

"We can and will beat COVID-19. America deserves a response to the COVID-19 pandemic that is ***driven by science, data, and public health — not politics***."

1. Restore trust with Americans
2. Comprehensive vaccination campaign
3. Mitigate spread through public health standards
4. Expand emergency relief via DPA
5. Reopen schools, business & travel
6. Equity across racial, ethnic & rural/urban lines

Major Strategic Changes in Approach



Some Responsibility for:

- *Testing*
- *Screening*
- *Masks*
- *Vaccination*
- *Treatments*
- *Travel/Openings*

Shifts to:

In return for:

- *Science*
- *Guidance*
- *Data*
- *Best Practices*
- *Funding*

Shared with:

Strategic Legal Reponses

States' Interests

Non-cooperative Federalism

Public Health Sovereignty

Spending Power Limits

Allocations

Disability Discrimination

Age Discrimination

Equal Protection

8th Amendment Cruel & Unusual Punishment

Mobilizing Personnel

Enforcement

Moratoriums

Regulations

Mandates

REGION 1
Regional Disaster Health Response System

Questions, Comments, Thoughts?

THANK YOU!

To contact the Region 1 RDHRS:

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