

SUPPORT AGENCY DISASTER ISSUES

Texas Courts must be prepared to take immediate actions when called upon during a disaster or catastrophic event. Certain actions will require the courts to have quick access to legal information (Bench Books) and research in order to ameliorate correct and legal decisions. The following issues or causes of action (COA) were submitted by supporting agencies active in disaster. These identified issues/COA have been presented to the Supreme Court Task Force for Judicial Preparedness During Times of Emergency, in an effort to help prepare the courts with advanced information, and to provide an opportunity to be aware of possible issues before they arise.

I. State of Texas Interagency Continuity of Operations During a Pandemic Policy Issues to Consider 4-11-07 (1 DRAFT 5/18/2007)

1. ISSUE: DEDICATION OF STATE REVENUES CONSIDERATIONS: A policy that would allow state revenues generated from all sources to be temporarily reassigned to support essential services regardless of revenue dedication or intended purpose. The state would obtain waivers from the federal government to temporarily reassign federal funds.

2. ISSUE: PURCHASING PROTOCOLS CONSIDERATIONS: A policy to allow agencies to contract for essential goods and services without having to meet purchasing requirements e.g. competitive bidding, RFP, etc.

3. ISSUE: STATE AGENCY ESSENTIAL SERVICES CONSIDERATIONS: A policy that would provide consistent criteria for state agencies to use in identifying their essential functions. For example, the criteria for all state agencies' essential services may be "a direct public service or indirect service that is required to provide a direct service, the short-term (e.g. 3-6 months) cessation of which would affect the safety, health, and welfare of the public." Agencies should give consideration to a policy that would allow sub-recipient contractors who provide essential services but do not meet all contract deliverables and contract timelines to continue to receive available funding.

4. ISSUE: STATE AGENCY BUSINESS CONTINUITY PLANS CONSIDERATIONS: A policy that charges the leadership of state agencies with responsibility for developing and implementing Business Continuity Plans (BCPs) that contain strategies to minimize disruption of essential services that may occur in the event of a pandemic. Agency business continuity strategies related to a pandemic may include:

- Identifying the agency's essential functions/services
- Identifying essential personnel designated for emergency situations
- Instituting mandatory health and safety protocols
- Cross-training non-essential employees to provide essential services
- Developing "desk procedures manuals" in sufficient detail such that an employee who is unfamiliar with the job duties can follow the procedures in the manual and still accomplish the essential tasks without the benefit of extensive training
- Developing human resource policies to address compensation and sick leave
- Providing seasonal flu immunizations, and antivirals, at no charge to state employees
- Reconstituting non-essential services when emergency subsides.

5. ISSUE: UTILIZATION OF NON-ESSENTIAL PERSONNEL CONSIDERATIONS: A policy that would allow for the reassignment of well, non-essential personnel to essential services or functions on an interagency basis.

6. ISSUE: COMPENSATION FOR ESSENTIAL EMPLOYEES CONSIDERATIONS: A policy that would allow state agencies to provide the following compensation incentives to employees designated as essential staff during a pandemic.

- Allow FLSA-exempt employees to accrue state compensatory time without balance restrictions.
- Allow accrual of state compensatory time when employee works from home. (would require a waiver of Government Code 659.018)
- Relax the 12-month 'use it or lose it' rule for state compensatory leave (would require a waiver of Government Code 659.016)
- Allow for payment of state compensatory time accrued. (would require a waiver of Government Code 659.016)
- Provide flexible work hours, part-time work, compressed workweeks, and schedule adjustments on a 24/7 basis.
- When possible, employees may be allowed to tele-work.
- Employees would limit business travel to essential services.

7. ISSUE: COMPENSATION FOR ALL EMPLOYEES CONSIDERATIONS: A policy that would allow employees to continue to receive pay warrants at full salary when on extended emergency leave status i.e. for illness in family or if without childcare during a pandemic.

8. ISSUE: STAFFING ESSENTIAL POSITIONS CONSIDERATIONS: A policy to ensure the state can quickly fill vacant positions allow for the following:

- Consider the use of temporary workers to staff required functions (e.g., perpetual postings, retirees, temporary service providers, volunteers, etc.)
- Waive the Temporary Assignment Time Limit. Current law limits temporary assignments to a 6-month maximum limit (would require a waiver of Government Code, Section 659.260)
- Waive posting requirements and allow for immediate hiring (would require a waiver of Government Code, Section 256.024)
- Allow inter- and intra- agency management-directed transfers (MDT).

9. ISSUE: NON-ESSENTIAL ADMINISTRATIVE SERVICES AND PROCESSES CONSIDERATIONS: A policy that allows state agencies to discontinue non-essential administrative services and processes, if warranted, for the duration of the emergency.

Examples of non-essential administrative functions may include:

Employee Evaluations Program Audits
Position Audits Program Reviews
Service awards Sunset Reviews
Elective training Relocations/moves
Reorganizations

10. ISSUE: NUMBER OF FULL-TIME EMPLOYEES (FTE) CONSIDERATIONS: A policy that would waive the “Not to Exceed FTEs” in the General Appropriations Act so that agencies may exceed their authorized FTE cap in order to provide essential services during a pandemic. Agencies could exceed their authorized FTE cap specifically in small to mid-size agencies, when additional staff is hired to cover essential services for employees who are out on paid leave status (sick leave, vacation leave, etc).

11. ISSUE: EMPLOYEE ASSISTANCE PROGRAM (EAP) CONSIDERATIONS: A policy that would charge leadership at state agencies to provide an Employee Assistance Program (EAP) to help employees deal with grief and loss, stress and anxiety, depression and other concerns that affect the employee’s health and work performance. The primary goal of the program is to retain employees, increase productivity, and reduce related costs to the agency when employees cannot perform at their best. EAP services may also provide assistance to employers in dealing with emergency situations.

12. ISSUE: EMERGENCY LEAVE CONSIDERATIONS: A policy that would allow state agencies to grant emergency leave to employees who are ill, caring for family members who are ill, and/or caring for dependents when schools are closed and childcare is unavailable. The Texas Government Code, Chapter 661, authorizes the agency head to grant emergency leave for a death in the family or for other reasons when good cause exists.

13. ISSUE: REPORTING ABSENTEEISM CONSIDERATIONS: A policy that would charge state agencies with reporting lost work-time due to a pandemic and to institute leave reporting protocols to facilitate data acquisition. Special time-reporting codes may be needed to document and track absences; employees would notify agencies daily of absences.

14. ISSUE: NON-WELL EMPLOYEES CONSIDERATIONS: A policy that implements interagency workplace mitigation protocols during a pandemic when an employee at the worksite appears to be unwell.

15. ISSUE: STATE COMMUNICATION RESOURCES CONSIDERATIONS: A policy to ensure that state communication resources such as telephones, internet and email will be used only for essential functions during a pandemic. If agency business and community mitigation strategies are mandated, allow reimbursement for personal equipment-use expenses

16. ISSUE: PUBLIC HEALTH AND MEDICAL MESSAGES CONSIDERATIONS: A policy that charges the Texas Department of State Health Services (DSHS) with the task of coordinating the delivery of clear and consistent public health and medical messages to the public and government employees during a pandemic.

17. ISSUE: VOLUNTEER FIREFIGHTERS AND EMERGENCY SERVICES VOLUNTEERS CONSIDERATIONS: A policy that allows the state agency head to grant paid leave to a volunteer firefighter and an emergency medical services volunteer to respond to emergency situations. This leave would not be charged against the employee’s vacation or sick leave accruals. A state employee who is a volunteer firefighter or an emergency medical services volunteer is entitled to a paid leave of absence, not to exceed five working days in a fiscal year, to attend fire service or medical emergency services training conducted by a state agency or institution of higher education.

II. Attorney General of Texas (AG): Eugene A. Clayborn, Deputy Managing

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- **INDEX TO LITIGATION FORMS** (See attached "OAG Litigation Forms [1] and OAG Copy of State_Annex_H_appendix_7[1] to view copies of forms and State Annex H, appendix 7.1) Contents includes the following forms:

- A. COVER LETTER TO DISTRICT CLERK
- B. APPLICATION FOR ORDERS FOR MANAGEMENT OF A PERSON WITH A COMMUNICABLE DISEASE AND MOTION FOR ORDER FOR PROTECTIVE CUSTODY (QUARANTINE PERSON)
- C. ORDER OF PROTECTIVE CUSTODY
- D. ORDER APPOINTING ATTORNEY, PROVIDING INSPECTION, NOTICE, AND SETTING PROBABLE CAUSE HEARING
- E. ORDER OF PROBABLE CAUSE FOR PROTECTIVE ORDER
- F. ORDER OF COMMITMENT ON APPLICATION FOR TEMPORARY MANAGEMENT OF PERSON WITH COMMUNICABLE DISEASE
- G. ORDER OF COMMITMENT ON APPLICATION FOR EXTENDED MANAGEMENT OF PERSON WITH COMMUNICABLE DISEASE
- H. CERTIFICATE OF DISCHARGE
- I. CONTINUING CARE PLAN
- J. APPLICATION FOR RENEWAL OF ORDERS FOR MANAGEMENT OF A PERSON WITH A COMMUNICABLE DISEASE AND MOTION FOR ORDER FOR PROTECTIVE CUSTODY
- K. APPLICATION INJUNCTIVE RELIEF FOR THE HEALTH AND SAFETY OF THE PUBLIC (QUARANTINE PROPERTY)
- L. ORDER FOR THE HEALTH AND SAFETY OF THE PUBLIC ENJOINING PERSON WHO OWNS OR CONTROLS CONTAMINATED PEOPERTY
- M. APPLICATION INJUNCTIVE RELIEF FOR THE HEALTH AND SAFETY OF THE PUBLIC (QUARANTINE OF COMMON CARRIERS AND PRIVATE CONVEYANCE)
- N. ORDER FOR THE HEALTH AND SAFETY OF THE PUBLIC ENJOINING THE OWNER, OPERATOR, OR AGENT IN CONTROL OF CONTAMINATED COMMON CARRIER OR PRIVATE CONVEYANCE
- O. HEALTH AUTHORITY ORDER – See page 11 in *Communicable Disease Control Measures in Texas* at www.dshs.state.tx.us/compreg/ogc/cdmanual.pdf.

- P. HEALTH AUTHORITY'S AFFIDAVIT OF MEDICAL EVALUATION – See page 13 in *Communicable Disease Control Measures in Texas* at www.dshs.state.tx.us/comp/ogc/cdmanual.pdf.
- Q. COMMISSIONER'S DESIGNATION OF HEALTH FACILITY – See page 15 in *Communicable Disease Control Measures in Texas* at www.dshs.state.tx.us/comp/ogc/cdmanual.pdf.
- R. NOTICE TO PERSON WHO OWNS OR CONTROLS PROPERTY: QUARANTINE OF PROPERTY – See page 19 in *Communicable Disease Control Measures in Texas* at www.dshs.state.tx.us/comp/ogc/cdmanual.pdf.
- S. ORDER OF CONTROL MEASURES TO BE IMPOSED ON PROPERTY – See page 24 in *Communicable Disease Control Measures in Texas* at www.dshs.state.tx.us/comp/ogc/cdmanual.pdf.
- T. ORDER DECLARING AN AREA QUARANTINE – See page 31 in *Communicable Disease Control Measures in Texas* at www.dshs.state.tx.us/comp/ogc/cdmanual.pdf.
- U. ORDER FOR COLLECTION OF INFORMATION ON DETAINED COMMON CARRIER – See page 37 in *Communicable Disease Control Measures in Texas* at www.dshs.state.tx.us/comp/ogc/cdmanual.pdf.
- V. ORDER OF CONTROL MEASURE APPLIED TO COMMON CARRIER OR PRIVATE CONVEYANCE (INFECTED CARRIER)– See page 39 in *Communicable Disease Control Measures in Texas* at www.dshs.state.tx.us/comp/ogc/cdmanual.pdf.
- W. ORDER OF CONTROL MEASURE APPLIED TO COMMON CARRIER OR PRIVATE CONVEYANCE (CONTAMINATED CARGO)– See page 41 in *Communicable Disease Control Measures in Texas* at www.dshs.state.tx.us/comp/ogc/cdmanual.pdf.
- X. ORDER OF CONTROL MEASURE APPLIED TO COMMON CARRIER OR PRIVATE CONVEYANCE (CARGO CONTROL MEASURE)– See page 43 in *Communicable Disease Control Measures in Texas* at www.dshs.state.tx.us/comp/ogc/cdmanual.pdf.

- The following is my own opinion and not attributable to the Office of Attorney General of Texas:

Health & Safety Code § 81.151 requires that the OAG, upon request by DSHS, file applications for court orders managing property and persons involving communicable diseases. Also, municipal, county, and district attorneys, upon request from local authorities, may file applications for court orders managing property and persons involving communicable diseases.

However, the OAG's role in a Pandemic Influenza Response is much broader. For example, Appendix 7 (Section VI(B)(3)(d) to Annex H of the State Emergency Management Plan provides that the OAG (1) Provide legal counsel to local and state officials conducting or evaluating pandemic response operations and activities; (2) Provide legal assistance as

requested to state and local officials conducting pandemic emergency response operations, including, but not limited to restriction of movement of people, quarantine declarations, medical and liability claims, restriction of public access, suspension of public activities, indemnity issues, and obtaining court ordered control measures for individuals, property, or common carriers and conveyance.

III. CDC January 8, 2004 Page 1 of 4 Public Health Guidance for Community-Level Preparedness and Response to Severe Acute Respiratory Syndrome (SARS) Version 2 (This same checklist would apply to any pandemic disease including Pandemic Influenza)



SEVERE ACUTE RESPIRATORY SYNDROME

A. Supplement A: Command and Control

Appendix A2: Checklist of Legal Considerations for SARS Preparedness in Your Community

The global emergence of SARS-CoV presents challenges to the public health system at all levels of government. If SARS-CoV transmission recurs, the potential exists for implementation of isolation and/or quarantine within a given community. There is great variation among state and local laws regarding compelled isolation and quarantine.

The following checklist is a planning tool for lawyers highlighting the relevant partners, resources, planning considerations, due process considerations, and issues of legal liability and immunity that may arise in the context of any public health emergency whether natural or manmade. This checklist specifically addresses SARS. Next to each consideration are listed the legal partners (e.g., public health, hospitals, public safety, emergency management, judiciary) who may be called upon to address these considerations as part of the affected community's response. The challenge of the public health response is to protect the health of many, while safeguarding the rights of the individual. An integrated and coordinated response by attorneys at all levels in the community is essential to achieving this goal.

The checklist format is not intended to set forth mandatory requirements or establish a national standard for legal preparedness. Rather, each state and local jurisdiction should determine for itself whether it is adequately prepared for disease outbreaks in accordance with its own laws and procedures.

B. Planning Considerations

- Ensure that public health personnel have a basic understanding of the **intersection among federal, state, and local laws** regarding quarantine and isolation as they relate to international airports and interstate border crossings. [public health/public safety/emergency management]
- Where applicable, draft legal orders, motions, and templates authorizing **medical evaluation of non-compliant persons** who meet the SARS case definition and have symptoms of SARS-CoV disease. [public health/hospitals]
- Ensure that legal counsel has reviewed the feasibility of requiring persons to **self-monitor for medical conditions** (e.g., temperature checks) and (where applicable) drafted legal orders or agreements. [public health]
- Ensure that legal counsel has reviewed the feasibility of issuing “**exclusion**” **orders** (i.e., excluding contacts from using public transportation, attending public meetings) and, where applicable, drafted templates and legal orders. [public health/public safety/emergency management]
- Ensure the existence of a statute, regulation, or other administrative mechanism authorizing SARS isolation/quarantine. [public health/public safety/judiciary]
- Draft legal orders, motions, and templates for isolation/quarantine in **homes, hospitals, or other designated facilities**. [public health/hospitals/ emergency management/public safety]
- Ensure that legal counsel has reviewed the feasibility of using **electronic methods to monitor** suspected non-compliant individuals in home isolation and/or quarantine. [public health/public safety]
- Ensure that legal counsel has reviewed draft legal orders, motions, and templates to **quarantine facilities** and to credential ingress and egress into such facilities. [public health/public safety/emergency management]
- Ensure that legal counsel has reviewed the feasibility of using **faith-based organizations** to assist or provide services to persons in isolation and quarantine. [public health]
- Ensure that public health officials have reviewed the availability of workers’ compensation and/or other forms of **financial support** for persons unable to return to work because of a isolation/quarantine order. [public health]
- Ensure that legal counsel has considered whether the health department should issue documents designed to assist with **reintegration of persons** subject to isolation/quarantine order (e.g., letter to employer or school explaining that patient is no longer infectious). [public health]
- Ensure that legal counsel has reviewed agreements relating to **overtime and/or flexibility of hours** for staff during public health emergencies. [public health/ hospitals /public safety/emergency management]
- Ensure that legal counsel has a clear understanding of legal authorities relevant to **environmental remediation** of buildings. [public health/ hospitals/emergency management]

C. Partnerships/Outreach

- Assemble a **legal preparedness task force** with representation from public health, public safety, hospitals, emergency management, judiciary, and other relevant individuals and/or organizations at various levels of authority (federal, state, local, cross-border). [public health/public safety/hospitals/ emergency management/ judiciary]
- Establish procedures for **enforcement of isolation/quarantine orders**. [public health/public safety]

- Provide public safety personnel with **educational materials** relating to SARS and have a clear understanding for how to enforce an isolation/quarantine order. [public health/public safety]
- Ensure that procedures or protocols exist between hospitals and public health to manage a possible or known SARS case-patient who attempts to **leave the hospital against medical advice**. [public health/hospitals/public safety]
- Where applicable, draft memoranda of agreement (MOA) or understanding (MOU) to allow for the **loaning of facilities or other services** necessary to implement a quarantine and/or isolation order for person who cannot be isolated at home (e.g., travelers, homeless populations). [public health/ hospitals/emergency management]
- Ensure that judges and attorneys in the area, through **local bar organizations** or other entities, have received educational materials, training, or information related to SARS and the potential use of isolation/quarantine to interrupt disease transmission. [public health/judiciary]
- Ensure that legal counsel has reviewed and/or drafted **data sharing/data use/confidentiality agreements** related to sharing of confidential patient medical information between public health and other partners. [public health/hospitals/public safety/emergency management]
- Consider the implementation of a **“Forensic Epidemiology” training course** in the jurisdiction. [public health/public safety]

D. Due Process Considerations

- Draft legal orders and templates using terms such as “quarantine,” “isolation,” and “detention” **consistently**. [public health/judiciary]
- Ensure that legal counsel has reviewed all draft isolation/quarantine orders and forms, as well as applicable administrative hearing procedures, to ensure concurrence with **basic elements of due process** (e.g., adequate notice, opportunity to contest, administrative determination) [public health/judiciary]
- Ensure that procedures or protocols exist to ensure that persons subject to an isolation/quarantine order have **access to legal counsel**, if desired (e.g., list of attorneys willing to provide services at little or no cost). [public health/judiciary]
- Ensure that legal counsel has analyzed procedures needed to satisfy **due process** in **different isolation/quarantine scenarios** (e.g., “voluntary” home isolation, isolation in a guarded facility, exclusion from certain public activities). [public health/judiciary]
- Where applicable, ensure that public health officials have worked with the local court system to develop a 24/7 **“on call” list of judges or hearing officers** to review emergency requests for isolation/quarantine. [public health/judiciary]
- Ensure that public health officials have worked with the local court system to develop a **plan for hearing cases and/or appeals** for persons subject to isolation/quarantine orders (e.g., participation via telephone, video conference). [public health/judiciary]

E. Legal Resources and Statutes

- Ensure that legal counsel has reviewed and has a clear understanding of the **legal resources and tools** relevant to a community’s public health response. [public health/judiciary/emergency management]

Such resources and tools include:

- Draft Model State Emergency Health Powers Act
www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf
 - Emergency Management Assistance Compact (model agreement)
www.emacweb.org/EMAC/About_EMAC/Model_Legislation.cfm
 - Emergency Management Assistance Compact (as implemented in a state or jurisdiction)
 - Memorandum of Understanding for Establishment of Local Public Health Mutual Aid and Assistance System
www.publichealthlaw.net/Resources/ResourcesPDFs/MOU.pdf
 - American Bar Association Draft Checklist for State and Local Government Attorneys to Prepare for Possible Disasters
www.publichealthlaw.net/Resources/ResourcesPDFs/ABA_checklist.pdf
 - Buncombe County Health Center Forensic Epidemiology Quarantine Task Force Report www.phppo.cdc.gov/od/phlp/ (to be posted)
 - Communicable Disease Control Measures in Texas: A Guide for Health Authorities in a Public Health Emergency www.tdh.state.tx.us/ophp/phwd/commdis.htm.
 - Additional materials and resources may be posted at www.phppo.cdc.gov/od/phlp/
- Distribute draft letters or fact sheets to hospitals and other healthcare providers describing permissible uses and disclosures of health information for public health purposes under the **Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA)** (www.hhs.gov/ocr/hipaa/). [public health/hospitals]
 - Where applicable, ensure that legal counsel understands procedures for **declaring a public health emergency** (at various levels of government) and consequences of such a declaration. [public health/public safety/emergency management]
 - Ensure that legal counsel is familiar with the requirements of the **Emergency Medical Treatment and Active Labor Act (EMTALA)** (www.aaem.org/emtala/index.shtml) and has determined if such requirements have been incorporated into public health and hospital planning for SARS. [public health/hospitals]
 - Ensure that legal counsel has reviewed **hospital screening and admission procedures** for potential SARS patients (e.g., establishment of evaluation clinics for persons with SARS-like symptoms) for compliance with **EMTALA** [public health/hospitals]
 - Ensure that legal counsel has reviewed potential **EMTALA** implications of a **community-wide EMS protocol** for transport of SARS patients (e.g., protocol requiring transport of SARS patients to a hospital or facility other than the hospital that owns the ambulance). [public health/hospitals/emergency management]

F. Legal Liability and Immunity

- Ensure that legal counsel has reviewed the potential legal liability of implementing **“working” quarantine for essential service personnel**. [public health/hospitals]

- Ensure that legal counsel has reviewed the potential legal liability of housing SARS patients in **home isolation with non-exposed residents** subject to infection control precautions. [public health]
- Ensure that legal counsel has reviewed liability/immunity for **volunteers** providing assistance or services to persons in isolation/quarantine. [public health/emergency management]

IV. Department of Aging and Disability Services (DADS): Ken Owens, Director of General Council DADS.

The following are legal issues that may arise with DADS as a result of a disaster in Texas. Understand, a totally comprehensive list is not possible.

- A. Nursing facilities may choose to shelter some residents in place due to certain residents being too frail to travel. It may be that court orders would be issued to forcibly require the facility to evacuate all residents. If something were to happen to frail residents who were ordered to evacuate, I'm certain litigation would result. If frail residents are hurt that didn't evacuate and sheltered in place, then the state may also pursue this legally. Obviously that would not involve DADS directly, but we do require facilities to have a plan to evacuate and to provide standards of care. In that case, we could become involved via the regulatory requirements and the state prosecutor could look to DADS' regulatory requirements to establish that the facility violated its standard of care.
- B. DADS almost always evacuates state schools if there is any threat, and usually all consumers are moved. DADS would need to inform guardians and legally authorized representatives of the location of residents. There are occasional guardianship issues for clients in the state schools and for some elder care where we contract to provide the care, but typically those cases to my knowledge are not too common. (Glen Bason - Disaster Coordinator, Department of Aging and Disability Services)
- C. Anytime there are evacuations it is difficult to provide the same level of care. There is shock to the consumers when having to be moved, care while in transport can be hazardous and the accepting facility may not be able to provide the same level of comfort and care. There are some standards that DADS may need to relax because of this exigent situation.
- D. In the case of highly pathogenic outbreaks such as Pandemic Flu then both state schools and other types of care facilities regulated by DADS would limit access to facilities by family, vendors and control the ingress/egress of staff, caregivers and medical professionals. This would raise isolation and civil liberties issues and may require court orders to enforce certain social distancing laws.