

How Recent Changes to Public Health Authority Affect Prevention of Infectious Diseases

Focusing on HIV, Viral Hepatitis, STDs & Tuberculosis



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This fact sheet is designed to help state and local public health officials, as well as other government authorities, understand how recent trends in state and local public health authority may affect the prevention, response to, and treatment of HIV, viral hepatitis, sexually transmitted diseases, and tuberculosis.

Introduction

Recent changes in public health authority may affect how health professionals can conduct work related to HIV, viral hepatitis, sexually transmitted diseases (STDs), and tuberculosis (TB), specifically in infectious disease prevention. To help practitioners understand these changes, this fact sheet is divided into two sections:

- 1 “Understanding Public Health Authority” defines public health authority and identifies the sources of authority for state, tribal, local, and territorial (STLT) public health agencies.
- 2 “Recent Developments and Their Potential Impact on HIV, Viral Hepatitis, STD, and TB Prevention” discusses how public health authority can change with new laws and court decisions. It provides examples of recent developments that could affect infectious disease prevention efforts across states, tribes, local jurisdictions, and territories. While these laws are typically not aimed at infectious disease prevention, they are part of broader shifts in public health authority that may pose challenges for health professionals serving their communities.



Understanding Public Health Authority

Why is public health authority important to public health practitioners in infectious disease prevention?

Public health authority is the legal power of a government entity to carry out actions to protect the public's health! It enables public health departments and agencies to create and enforce laws that regulate business and public life and to implement both preventive and emergency actions.²

Public health departments can exercise this authority to prevent infectious disease and to protect and promote health and well-being through several actions:

- Inspect and temporarily close businesses in response to outbreaks (e.g., hepatitis)³
- Prevent illnesses through education and services (e.g., public health campaigns to reduce spread of TB⁴ and HIV⁵)
- Provide and administer vaccines (e.g., hepatitis A/B vaccines)⁶
- Provide and administer disease testing and treatment^{7,8}
- Conduct disease surveillance and planning⁹

Public health professionals can also use this authority to prepare for and respond to emergencies that threaten the public's health and safety, such as natural disasters, security threats, and infectious diseases like COVID-19.¹⁰

Where does the authority of STLT health departments come from?






The Tenth Amendment of the US Constitution grants states all powers that are not explicitly given to or prohibited by the federal government. One authority specifically reserved for states is the power to take actions that protect public health, safety, and welfare. This is often referred to as the *police power*, though it does not directly relate to the powers of police departments.¹¹

States share their police powers with state agencies such as state health departments. They also delegate their powers to local governments, though the scope of local governments' police power authority varies greatly by state. In some states, such as Virginia and Maryland, local governments may only exercise powers explicitly granted to them by their state legislature;¹² while in other states, such as Massachusetts and California, local governments are generally authorized to enact laws without relying on a specific grant of power by the state legislature.^{13,14}

Public health authority enables public health departments and agencies to create and enforce laws that regulate business and public life and to implement both preventive and emergency actions.

Police powers are expansive and may be used to promote public health, safety, and welfare in a variety of arenas, such as licensing, inspection, zoning, workplace safety regulations, and quarantine and isolation.¹⁵ Table 1 lists some examples of how police powers are used to help prevent infectious diseases.

Table 1. How Police Powers Can Be Used in Public Health for Infectious Disease Prevention

Exercise of police power	Example of use by health departments
 Licensing	Licensing physical and mental health care providers who serve populations at the highest risk for HIV, viral hepatitis, STDs, or TB
 Inspection	Inspecting day care facilities to prevent hepatitis A
 Zoning	Determining where syringe service programs can be offered ¹⁶
 Workplace safety regulation	Creating and enforcing standards for working conditions in settings such as hospitals, nursing homes, and prisons to prevent spread of TB and hepatitis ^{17,18}
 Quarantine and isolation	Isolating individuals infected with TB or who are suspected of having an infection ¹⁹

Courts generally uphold actions like those listed in Table 1 as valid exercises of police power as long as the actions are reasonable and the benefits to many people are balanced against the rights of affected individuals.²⁰ This precedent was set in *Jacobson v. Massachusetts*, in which the US Supreme Court upheld Massachusetts' mandatory vaccination law as a lawful exercise of its police powers to protect the public's health.²¹

A subset of police power called *public health powers* is often delegated to government agencies with specialized public health expertise, including state and local public health departments. Public health agencies vary in structure and authority from state to state, but several activities are common among them:

- Collecting data to inform policy development and responses (e.g., HIV cluster detection and response strategies)²²
- Administering programs and providing services to reduce the spread of infectious disease (e.g., testing and treatment programs)²³
- Investigating and controlling the spread of infectious disease through quarantines²⁴ and business closures^{25,26}

TERRITORIAL AND TRIBAL PUBLIC HEALTH AUTHORITY

There are five major US territories: Puerto Rico, the US Virgin Islands, American Samoa, the Northern Mariana Islands, and Guam. These territories are controlled by the federal government but are given different degrees of self-governance over their internal affairs.^{27,28} Each territory has a unique history and legal relationship with the federal government.²⁹ Each has a governor, a legislature, and a health department to administer health services in the territory.^{30,31} Many territories, such as Puerto Rico and Guam, constitutionally require that the governor establish a public health agency or service, although the contours of that public health power are determined by the territorial legislature.³²

Tribal public health authority differs markedly from others; unlike state, territorial, and local governments, tribes are sovereign nations and have the inherent authority to “make their own laws and be ruled by them.”³³ This allocation of power is set forth in the US Constitution, treaties, statutes, and court decisions³⁴ and can only be superseded by the *plenary* (i.e., absolute) power of the federal government.³⁵ In contrast to states, tribes retain all powers except those prohibited by the federal government. Additionally, the federal government assumes an obligation to protect the tribes and provide services to promote tribal welfare.³⁶ These services may include health programs, such as those administered through the Indian Health Service, an operating division of the US Department of Health and Human Services. This obligation is known as the *trust doctrine*, *trust responsibility*, or *trust relationship*.

Tribes exercise their public health authority through tribal law in the form of constitutions, codes, cases, customary law, and intertribal coordination.³⁷ Tribes are increasingly exercising their sovereignty and assuming responsibility for health care and public health services previously administered through the Indian Health Service, which experiences chronic funding shortages and other challenges.^{38,39} However, the specific allocation of public health authority varies by tribe; powers may reside with tribal governments or organizations they designate.^{40,41}



Recent Developments & Their Potential Impact on HIV, Viral Hepatitis, STD & TB Prevention

While the use of public health authority to protect residents is a well-established government practice, the scope of authority can evolve through the actions and interplay of each of the three branches of government.

Legislatures can enact legislation to expand authority for new public health actions or restrict the future use of previously exercised authority. Judicial decisions can clarify whether a specific action undertaken pursuant to public health authority is within the scope of a state's police powers. They can also determine whether existing laws or recently passed legislation are constitutional and compatible with other laws. Courts can strike specific provisions of the laws or overturn them completely. These decisions create precedent and largely determine how the law might be applied in the future. Executive officials, such as governors, can also affect public health authority through executive orders, which allow them to address issues without directly involving the legislative or judicial branches. State executive orders are commonly used to expand public health authority, sometimes temporarily. They may be issued to respond to a public health emergency, establish new programs and entities, direct or reorganize public health-related agencies, or control state operations.⁴²

To determine whether and how a new law or ruling in your jurisdiction might affect public health authority, please consult an attorney.





New Laws

Though legislation has been introduced to both reduce and expand the scope of public health authority throughout US history, significant legislative activity occurred in response to the COVID-19 public health emergency. While some bills introduced in state legislatures aimed to expand public health authority, over 1,500 bills sought to limit the options and tools available to public health officials.⁴³ While most of these bills reducing public health authority failed to pass, many laws and state executive orders were enacted that affected public health. Table 2 presents examples of legislation and executive orders that affected public health in the following ways:

- Preempting or rolling back public health authority
- Shifting public health authority between government branches or entities
- Affecting vaccines specifically
- Affecting emergency powers specifically
- Expanding public health authority

While these laws were passed in response to the pandemic and often targeted public health officials' tools to address COVID-19, they may have spillover effects on HIV, viral hepatitis, STD, or TB prevention. Many of these laws limit the ability of public health officials to respond to other public health emergencies and carry out day-to-day public health activities.⁴⁴

Table 2. Examples of New Laws and Their Potential Effect on HIV, Viral Hepatitis, STD, and TB Prevention

Type of law	Description of new law	Example(s)	Potential effect on HIV, viral hepatitis, STD, and TB prevention
 Preempting or rolling back public health authority	Prevent a local government body from enacting certain public health-related laws or prevent local health officials from undertaking certain public health actions	<p>Oklahoma House Bill 2504 (enacted March 2021). Preempts local health departments from implementing regulations that are more stringent than the state's regulations.</p> <p>Tennessee House Bill 575 (enacted June 2021). Removes quarantine authority from local health departments.</p> <p>For a list of laws limiting public health authority, see the policy scan created by LawAtlas.⁴⁵</p>	Prevent a flexible response to an infectious disease outbreak. For example, a local health official might be preempted from using a more aggressive quarantine or business closure strategy than allowed by state law, even if they believe it is necessary to address a particularly large TB outbreak in their jurisdiction.
 Affecting vaccine requirements	Preempt vaccine mandates in various settings	<p>Montana House Bill 702 (enacted May 2021). Prohibits "discrimination based upon vaccination status or possession of an immunity passport by a person, employer, governmental entity, or public accommodation"</p> <p>For a list of legislation limiting the authority to require vaccines, see the policy scan created by LawAtlas.⁴⁶</p>	Disincentivize uptake of other vaccines that have been administered for decades (e.g., hepatitis A and B, HPV). These new laws might, for example, establish legal grounds that allow exemptions from mandatory vaccines.
 Shifting public health authority between government entities	Redistribute authority from state or local public health officials to state or local legislators	<p>Utah Senate Bill 195 (enacted March 2021). Allows the state legislature to terminate state health department orders and local legislatures to terminate local health orders during a public health emergency.</p> <p>For a list of legislation limiting emergency powers, see the policy scan created by LawAtlas.⁴⁷</p>	Restrict access to critical prevention services during an outbreak. Emergency orders have been issued to temporarily authorize syringe service programs during HIV outbreaks ⁴⁸ and to deploy vaccines in during hepatitis A outbreaks ⁴⁹ in states where such programs are otherwise prohibited. These laws may suppress such orders in the future.
 Expanding public health authority	Increase government capacity to perform public health actions	<p>Oregon House Bill 2927 (enacted July 2021). Enhances organizational independence of health agencies; appropriates money to and increases expenditure limitations during emergencies.</p> <p>For a list of state laws expanding or strengthening public health authority, see the policy scan created by LawAtlas.⁵⁰</p>	May allocate more autonomy, authority, and resources to health departments during public health emergencies, such as those declared during infectious disease outbreaks.

Recent Court Decisions

In addition to legislative proposals to limit public health authority, some legal challenges have called on courts to examine the scope and exercise of public health powers. In some jurisdictions, these challenges have resulted in decisions that change long-established public health practices.

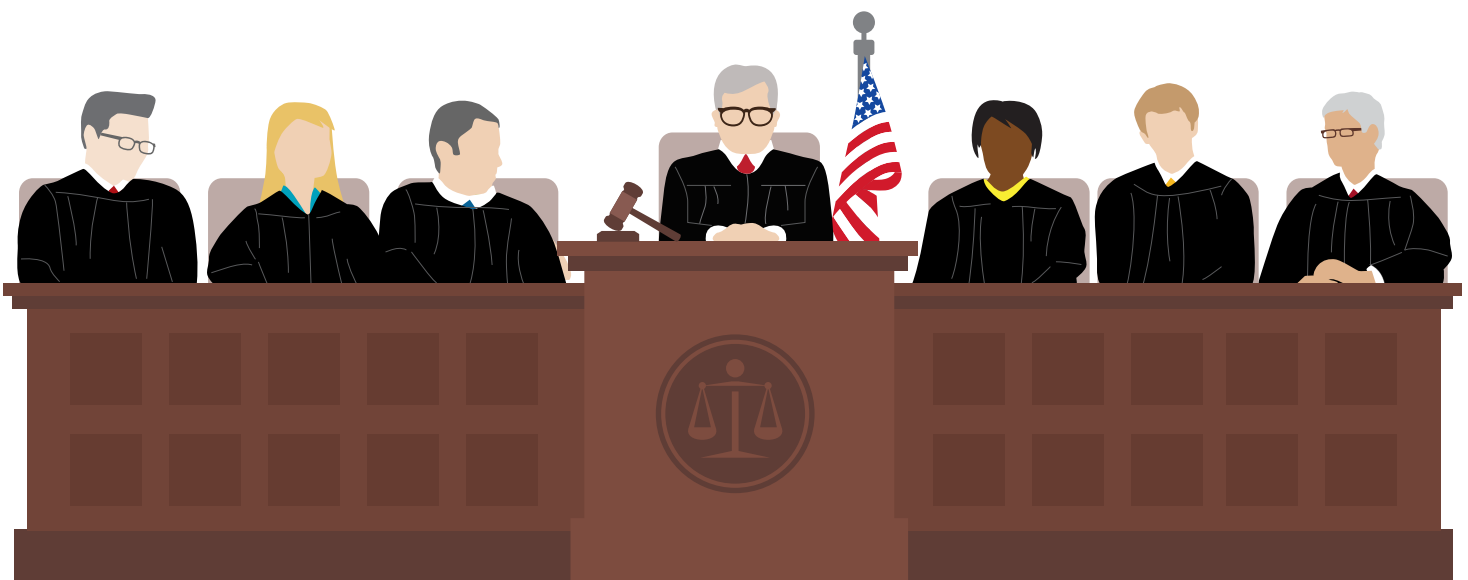
As mentioned earlier, courts are generally likely to uphold state and local government actions as valid exercises of police power if they are reasonably related to public health and safety and properly balance the common good against constitutionally guaranteed individual rights, such as due process, equal protection, and freedom of speech and religion.⁵¹ However, since the COVID-19 pandemic, there has been a shift in jurisprudence as some courts – including, at times, the Supreme Court – appear to be granting public health officials less deference.⁵² Many judicial decisions have departed from previously recognized public health principles by limiting public health authority and making it harder for public health regulations to withstand constitutional challenges based on free exercise of religion and other grounds.⁵³

Decisions That Narrow Public Health Authority

Some courts are narrowing their interpretations of the scope of public health and emergency powers delegated from legislatures to public health agencies. For example, the Wisconsin Supreme Court held that the state health department did not have the authority to extend a statewide stay-at-home order during a declared public health emergency; instead, such an order could only be issued if adopted through state administrative rulemaking procedures.⁵⁴

Nonetheless, in most jurisdictions, courts have upheld executive exercises of public health and emergency power.⁵⁵ For example, in *Grisham v. Romero*, the New Mexico Supreme Court found that the Public Health Emergency Response Act granted the governor broad authority to impose measures to protect public health.⁵⁶

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Decisions Determining How Constitutional Rights Interact with Public Health Authority

Public health interventions and actions instituted in response to the COVID-19 pandemic have led to numerous court challenges based on constitutional rights. Challenges to public health actions on “free exercise” or religious liberty grounds have been more successful than others.⁵⁷

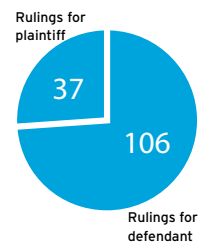
Prior to the pandemic, free exercise challenges to public health orders usually hinged on whether the order targeted a religion or religious entity or practice.⁵⁸ Some courts are now requiring that public health agencies articulate more precise justifications for policy decisions, particularly when those challenging the law allege that public health orders implicate certain fundamental rights, such as religious liberty.⁵⁹

A study found that among all challenges to public health authority and actions from March 2020 to July 2022, in at least 143 decisions, plaintiffs argued that restrictions on gatherings violated the free exercise clause of the First Amendment as well as, in some cases, statutory protections for religious liberty. Most courts rejected these claims, although courts ruled partially or fully for plaintiffs in 37 of the 143 decisions.⁶⁰

Furthermore, the Supreme Court has made clear that public health orders that are more restrictive of religious activities than comparable secular activities will be analyzed under a strict scrutiny standard of review.⁶¹ Courts must find that the law is the least restrictive means to achieve a “compelling” government interest; otherwise, the law will be found unconstitutional. Using strict scrutiny, the Supreme Court ruled in 2021 that a California order limiting the number of people who could gather in a private home violated the religious liberty of plaintiffs who wanted to hold a Bible study group in a private home.^{62,63}

Other constitutional challenges include those to public health actions on procedural due process, equal protection, takings, and Second Amendment grounds. Procedural due process claims under the Fourteenth Amendment concern the process that is owed to an individual who is subjected to a government order. These lawsuits include those filed by businesses challenging the process required of them during COVID-19–related business closures.⁶⁴ Equal protection challenges often argue that public health orders that closed or restricted some but not all businesses violated the Fourteenth Amendment’s guarantee of equal protection. Takings cases include arguments that COVID-19 orders, such as shutdown orders, violated the Constitution’s prohibition on taking property without just compensation. Lastly, Second Amendment litigation has been brought to challenge the closure of gun stores and shooting ranges for public health reasons.⁶⁵

Challenges to Public Health Authority Based on the Free Exercise Clause



What Can STLT Health Departments Do Next?

To understand how new laws and court decisions related to public health authority might affect HIV, viral hepatitis, STD, or TB prevention, public health agencies should seek to gain clarity on the specific changes in their jurisdiction and identify what public health powers and actions have been restricted or expanded, and to what extent. To do so, they should consult with legal counsel to explore the contours of the new laws and evaluate the legality of and risks associated with performing certain public health actions.

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