



The Network
for Public Health Law

Ideas. Experience. Practical answers.

Michigan Public Health Law Training

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The Network – Mid-States Region

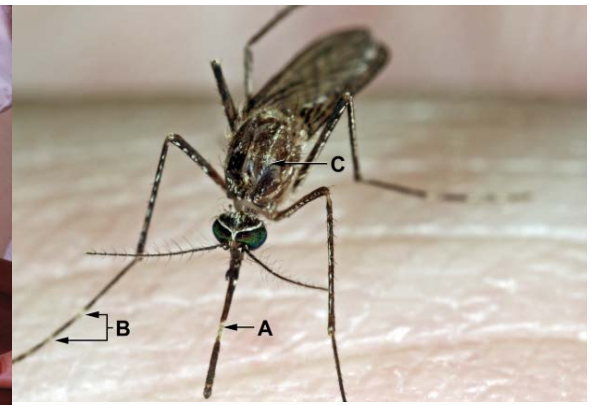
University of Michigan School of Public Health

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Newberry, Michigan

Law can protect the public

- Air quality
- Water quality
- Sanitation
- Injury prevention
- Safe food
- Workplace safety
- Environmental controls to prevent disease
- Mandatory vaccination



Contents

Organization of Public Health



The Local Health Officer



Protection against Liability

Learning Objectives:

1. **Describe the powers and responsibilities of Michigan's local public health departments to identify, investigate, and respond to public health threats.**
2. **Navigate situations in which a local public health department's jurisdiction overlaps with that of other local entities (e.g., another local health department, a city, or a township) or with that of a state department (e.g., MDHHS, MDARD, or MDEQ).**
3. **Identify opportunities for and define steps to adopting local public health regulations, and recognize potential barriers to adoption and effective enforcement.**
4. **Define the bounds of legally acceptable professional judgment and distinguish from instances involving an abuse of discretion.**

The Fine Print



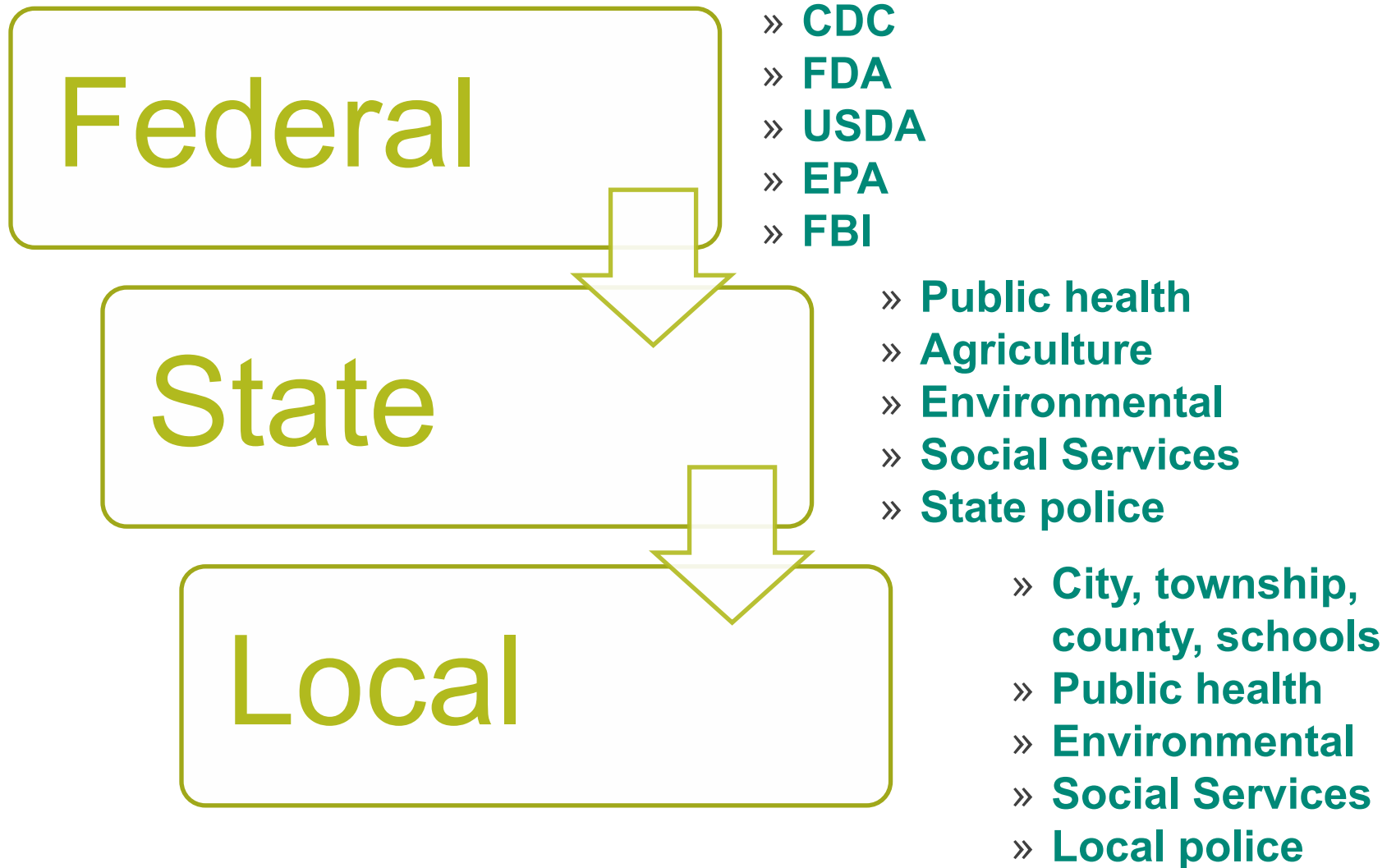
This presentation is for informational purposes only. It is not intended as a legal position or advice from the presenters or their employers.

For legal advice, attendees should consult with their own counsel.

Legal Framework....

complex
obsolete
PATCHWORK
INCONSISTENT
INADEQUATE
AMBIGUOUS
piecemeal
unclear
FRAGMENTED

Allocation of powers



Separation of powers

Branches

Legislative

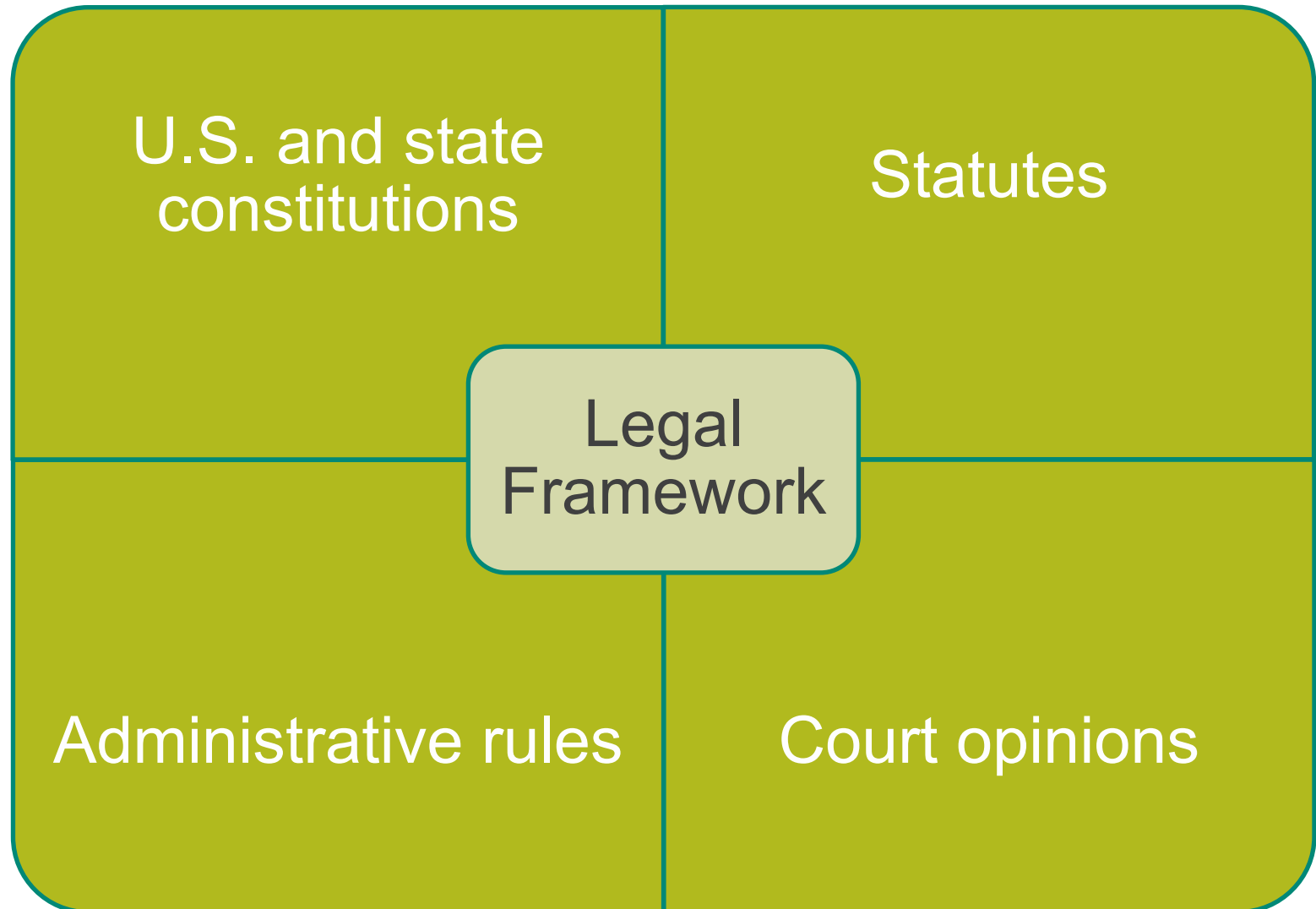
Make law;
Appropriate \$

Executive

Implement law;
Make law

Judicial

Interpret law;
Make law;
Protect from
other two
branches



Making Order out of Chaos

Using law to protect the public's health

CAN I?

- **Legal question:** Do I have authority?

MUST I?

- **Legal question:** Does law leave me no choice?

SHOULD I?

- **Policy question:** How should I exercise my discretion?



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Organization of Public Health in Michigan

Legal Framework for Routine Public Health Practice Emergency Response

U.S. Constitution



Providing for health and general welfare is state function (“police powers”)

Federal govt provides \$ with strings

Federal govt has authority to address cross-border threats and issues

Government has awesome powers AND MAJOR **RESPONSIBILITIES**

Liberty

Due Process

**Protection against search
and seizure**

Equal Protection

Right to privacy

Freedom of Association

Freedom of Religion

Just Compensation



Public Good vs. Individual

Quarantine, Isolation, & Immunization

The liberty secured by the Constitution on the United States to every person within its jurisdiction does not import an absolute right to each person to be, at all times and in all circumstances, wholly freed from restraint.

There are manifold restraints to which every person is necessarily subject for the common good.

Jacobson v Massachusetts, 197 US 11 (1905)

Statutes

Michigan Public Health Code

- **Article 2 Administration**
 - Part 22 State Health Department
 - Part 24 Local Health Departments
- **Article 5 Prevention and control of diseases and disabilities**
- **Article 9 Supportive personal services (covers immunizations)**
- **Article 12 Environmental health (smoke free law, pools, body art facilities, agricultural labor camps, etc.)**

Other statutes, e.g. the Food Act

Authority to protect the public (specific)

- » **Food Law of 2000**
- » **Safe Drinking Water Act**
- » **Housing Law of Michigan**
- » **Natural Resources & Environmental Protection Act**
- » **Local Ordinances**



Authority to protect the public (general)

Powers necessary and appropriate to perform their duties:

- » **Promote and safeguard the public health**
- » **Prolong life**
- » **Prevent and control health hazards**
- » **Prevent and control the spread of disease**



Administrative Rules

- **Department of Health & Human Services**
 - Communicable and Related Diseases
 - Blood Lead Analysis Reporting
- **Department of Agriculture**
 - Agricultural labor camps
 - Food safety
- **Department of Environmental Quality**
 - Hazardous Waste Management
 - Oil and Gas Operations
- **Local rules (e.g. sanitation codes)**

Local Health Department's Power to Adopt Rules

Michigan Public Health Code: MCL 333.2441-2442

- » **Adopt regulations that are necessary and proper**
- » **Must be approved by political agency**
- » **Must be at least as stringent as similar state requirements**
- » **LHD regulations supersede conflicting local ordinances**
- » **Notice of public hearing required**

The Power of Local Public Health

» **McNeil v Charlevoix County, MI S Ct (2009)**

(workplace smoking):

- Law to be liberally construed to protect the public
- PHC granted LHD power to adopt rules
- Does not matter that LHD does not have specific power to regulate smoking; has general powers, including power to adopt rules to properly safeguard the public health

» **Local government leads, state government follows**

- TOBACCO – Clean Indoor Air
- IMMUNIZATION – Waiver requirements

What is Preemption?

- **Higher level of government can preempt actions of lower level**
- **Congress can reserve power to the federal government**
- **State government can override local municipalities**

Who rules?

Local public health vs. cities, townships, school districts

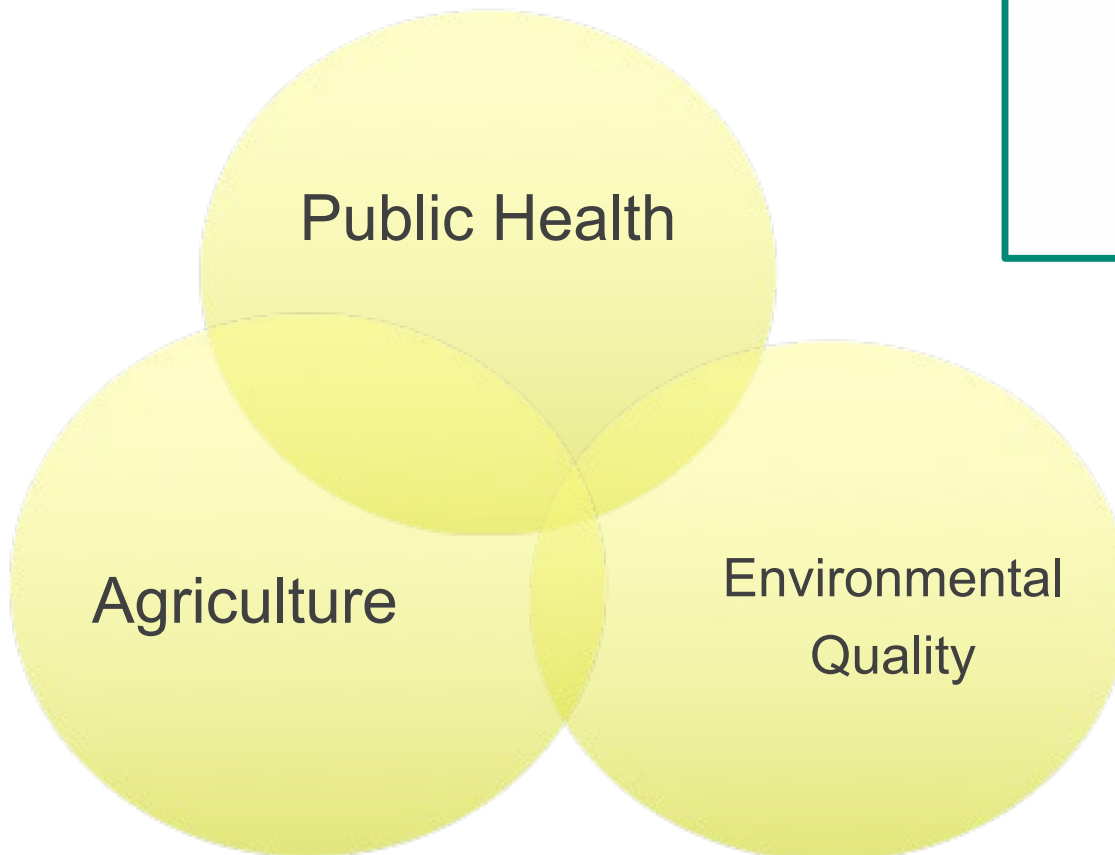
MCL 333.1115: A state statute, a rule of the department, or an applicable local health department regulation shall control over a less stringent or inconsistent provision enacted by a local governmental entity for the protection of public health.

Court Opinions

- **Hill v Board of Education, (Michigan Supreme Court, 1923)**

Court upheld authority of local health department to close a school because of disease outbreak even though the local school board disagrees.

Who does what when? Overlapping Powers



Examples:
Animal Control
Raw milk

Considerations:

- Specific vs general powers (MCL 333.1114)
- Tradition
- Best able / suited to address
- Agreement among agencies (e.g. emergency preparedness & response)



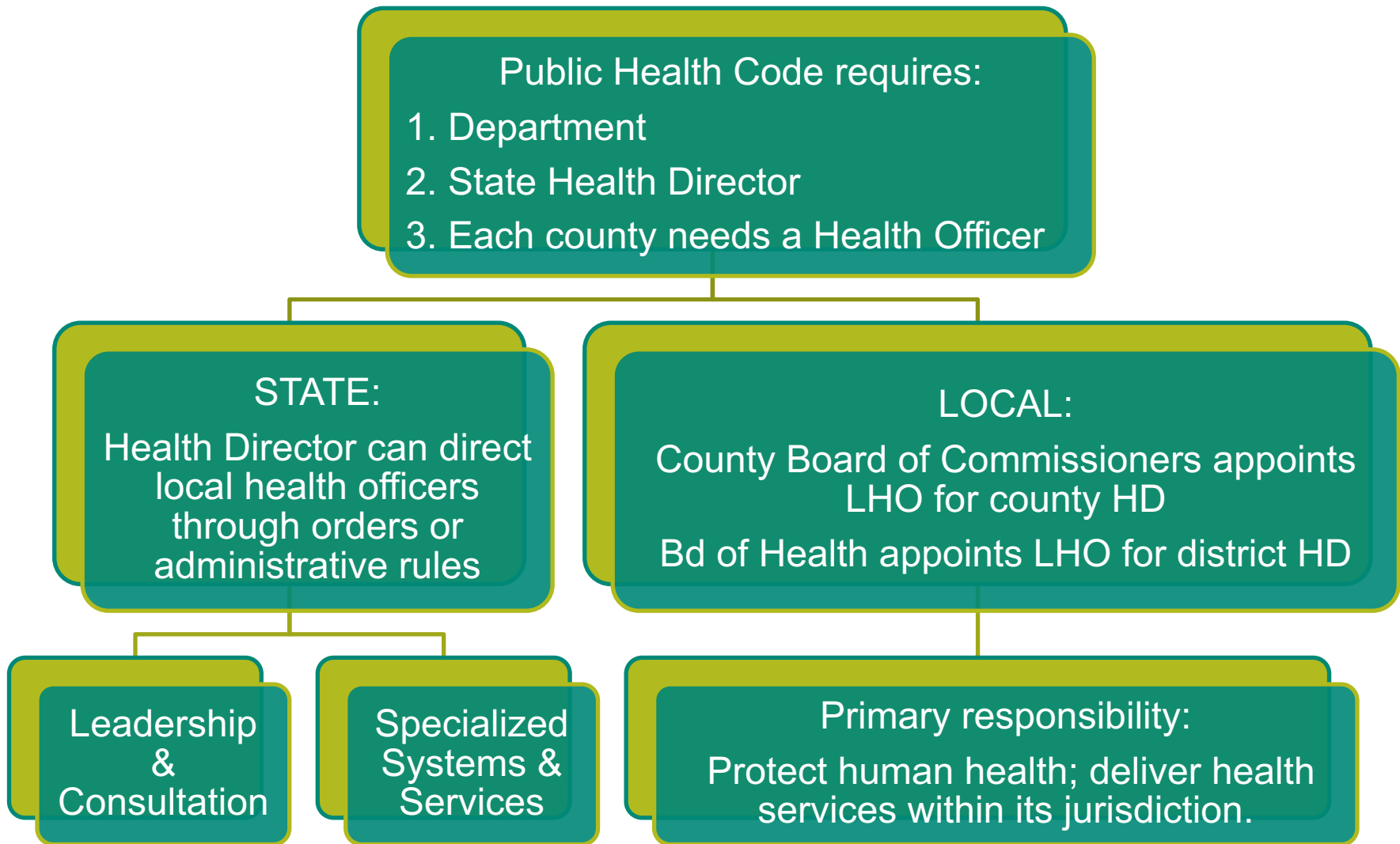
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The Local Health Officer

Roles, responsibilities, and powers

State & Local Authority



Using law to protect the public's health

CAN I?

- **Legal question:** Do I have authority?

MUST I?

- **Legal question:** Does law leave me no choice?

SHOULD I?

- **Policy question:** How should I exercise my discretion?

General Powers

Powers necessary and appropriate to perform their duties

- **Promote and safeguard the public health**
- **Prolong life**
- **Prevent and control health hazards**
- **Prevent and control the spread of disease**
- **Provide expertise and education regarding health**

Specific Powers and Specific Threats



- Food establishments
- Methamphetamine labs
- Clean indoor air (smoking)
- Body art facilities
- Public swimming pools
- Communicable diseases

What is the role of the Local Medical Director?

"Medical director" means a physician who qualifies as a medical health officer but who is employed ... to provide direction in the formulation of medical public health policy and program operation. **A medical director shall be responsible for developing and carrying out medical policies, procedures, and standing orders and for advising the administrative health officer on matters related to medical specialty judgments.**

Mich. Admin. Code R. 325.13001(d)

Exercise of power to protect public health



Identify



Investigate



Respond



Enforce



Public health authority to collect, use and disclose information

- **HIPAA does not impact public health information practices**
 - **Responsibility to protect privacy**



Reporting

- Pesticide poisoning test results
- Blood lead test results
- Disease reporting
- Heavy metal test results
- Chemical poisoning
- Methamphetamine labs

Gastrointestinal Illness Case Investigation
Campylobacter
Michigan Department of Community Health
Communicable Disease Division

Investigation Information					
Investigation ID 4287776673	Onset Date mm/dd/yyyy	Diagnosis Date mm/dd/yyyy	Referral Date mm/dd/yyyy 03/12/2013	Case Entry Date mm/dd/yyyy 03/12/2013	Case Completion Date mm/dd/yyyy
Investigation Status NEW			Case Status <input checked="" type="radio"/> Confirmed <input type="radio"/> Not a Case <input type="radio"/> Probable <input type="radio"/> Suspect <input type="radio"/> Unknown		
Patient Status OUTPATIENT	Patient Status Date mm/dd/yyyy 03/12/2013	Part of an outbreak? UNKNOWN	Outbreak Name	Case Updated Date mm/dd/yyyy 03/12/2013	
Patient Information					
Patient ID 4287776670	First BOB	Last BOBSON	Middle B		
Street Address 123 W MAIN ST					
City LANSING	Country Ingham	State Michigan	Zip 48933		
Home Phone 517-555-1212	Ext.	Other Phone	Ext.		
Parent/Guardian (required if under 18)					



Surveillance

Methods of surveillance:

- **Syndromic surveillance of hospital emergency departments**
- **Over-the-counter sale of drugs and medical devices**



The graphic displays two surveillance systems in Michigan. At the top left is the logo for the University of Michigan's Surveillance & Infectious Disease Epidemiology Center. To its right is the title "Surveillance Systems in Michigan". Below this is the "MIHAN" logo, which features the letters "MIHAN" in a serif font, a radio tower icon between the "I" and "N", and a map of Michigan to the right. Underneath "MIHAN" is the text "Michigan Health Alert Network". At the bottom left is the "MDSS" logo, featuring a globe with a purple outline and the text "MDSS" and "Michigan Disease Surveillance System". To the right of the MDSS logo is the title "Michigan Disease Surveillance System" and a "LOGIN HERE" button.

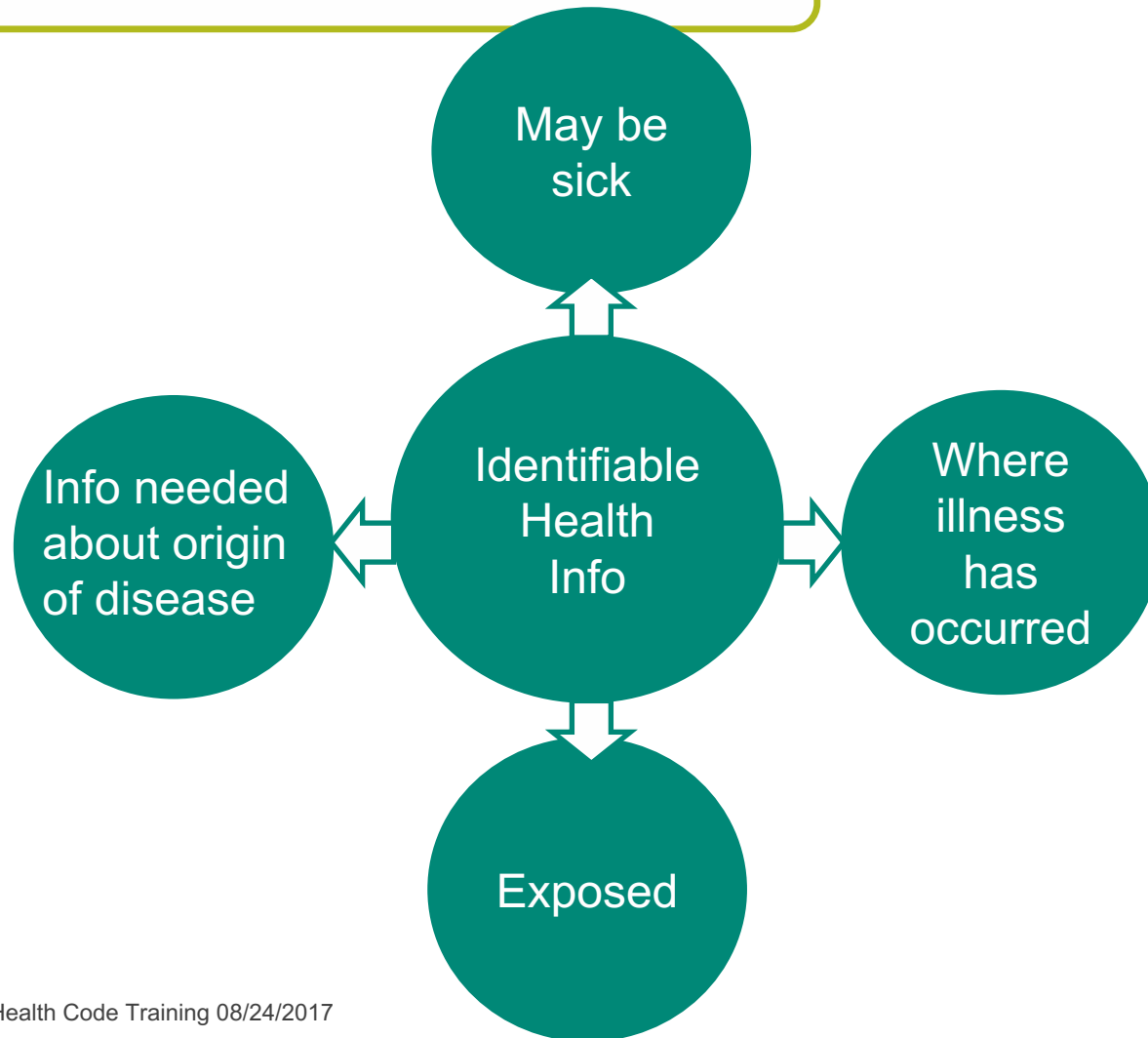
Inspect or Investigate



- Inspect or investigate “any matter, thing, premises, place, person, record, vehicle, incident, or event” to ensure compliance with law
- Review confidential information
- Obtain specimens
- Conduct contact investigations
- Notify exposed individuals



Identifiable health information





Health Insurance Portability and Accountability Act (HIPAA) and Public Health

HIPAA Privacy Rule: Recognizes the importance of health information to protect public health and allows:

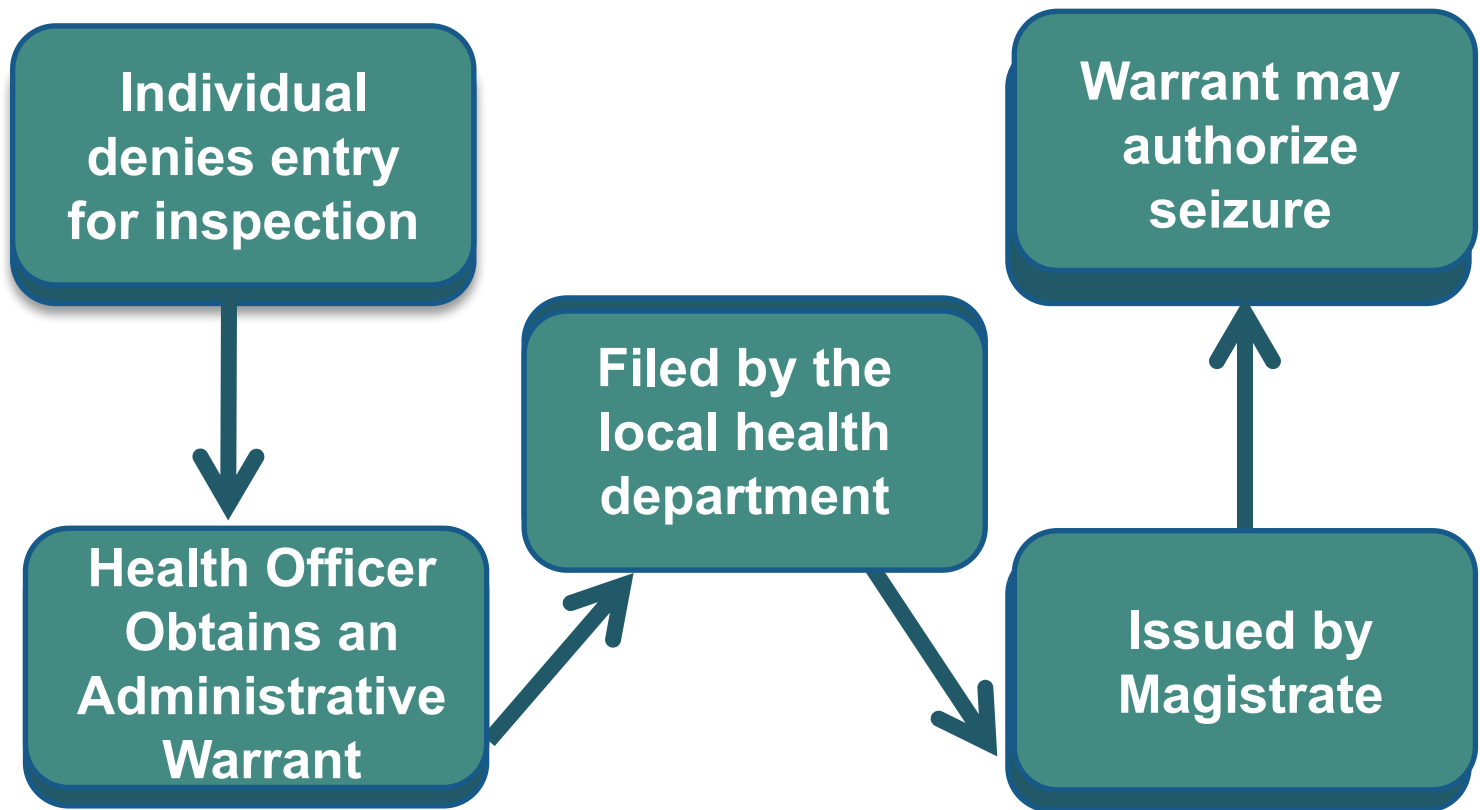
- Health care providers to provide confidential health information to public health investigators without patient's authorization

Public Health investigators need to:

- Show identification
- Explain their legal authority to access this information. (State Memo)
- Protect this personal health information received
 - This information is confidential and not open to public inspection, except in rare cases where it is necessary to protect the public.

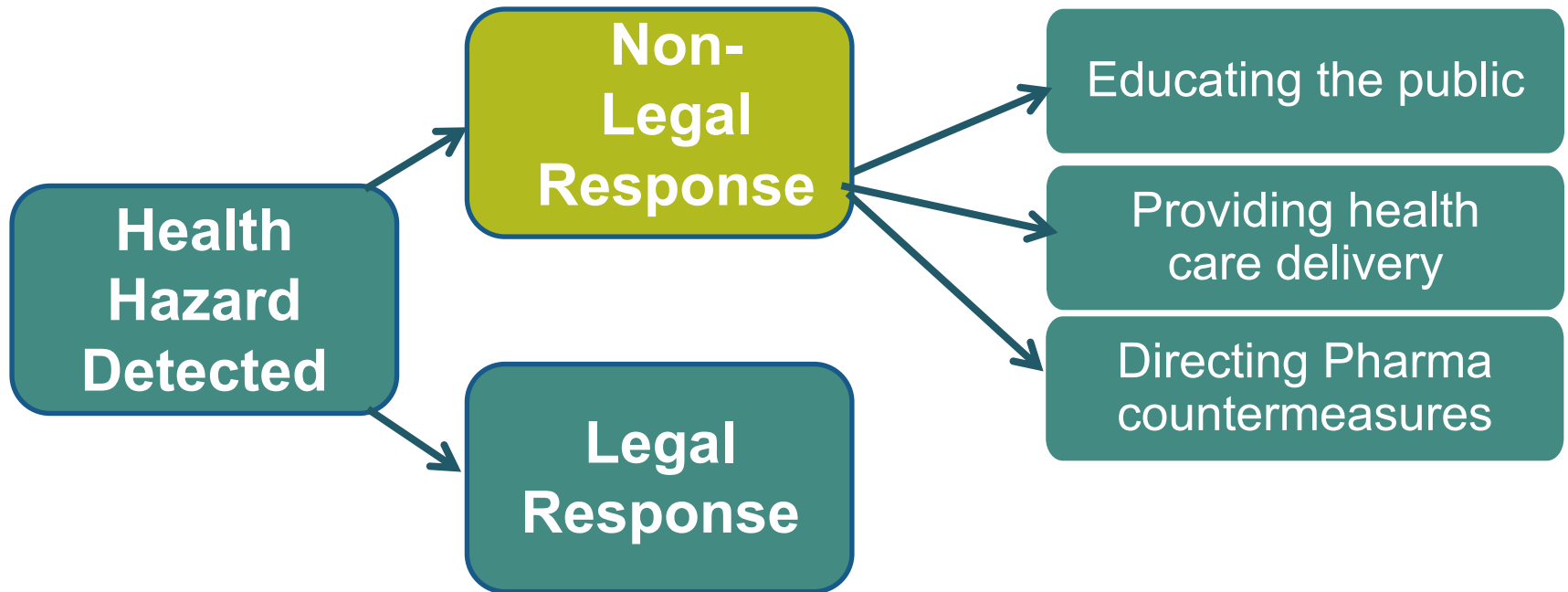


Inspection or Investigative Warrant



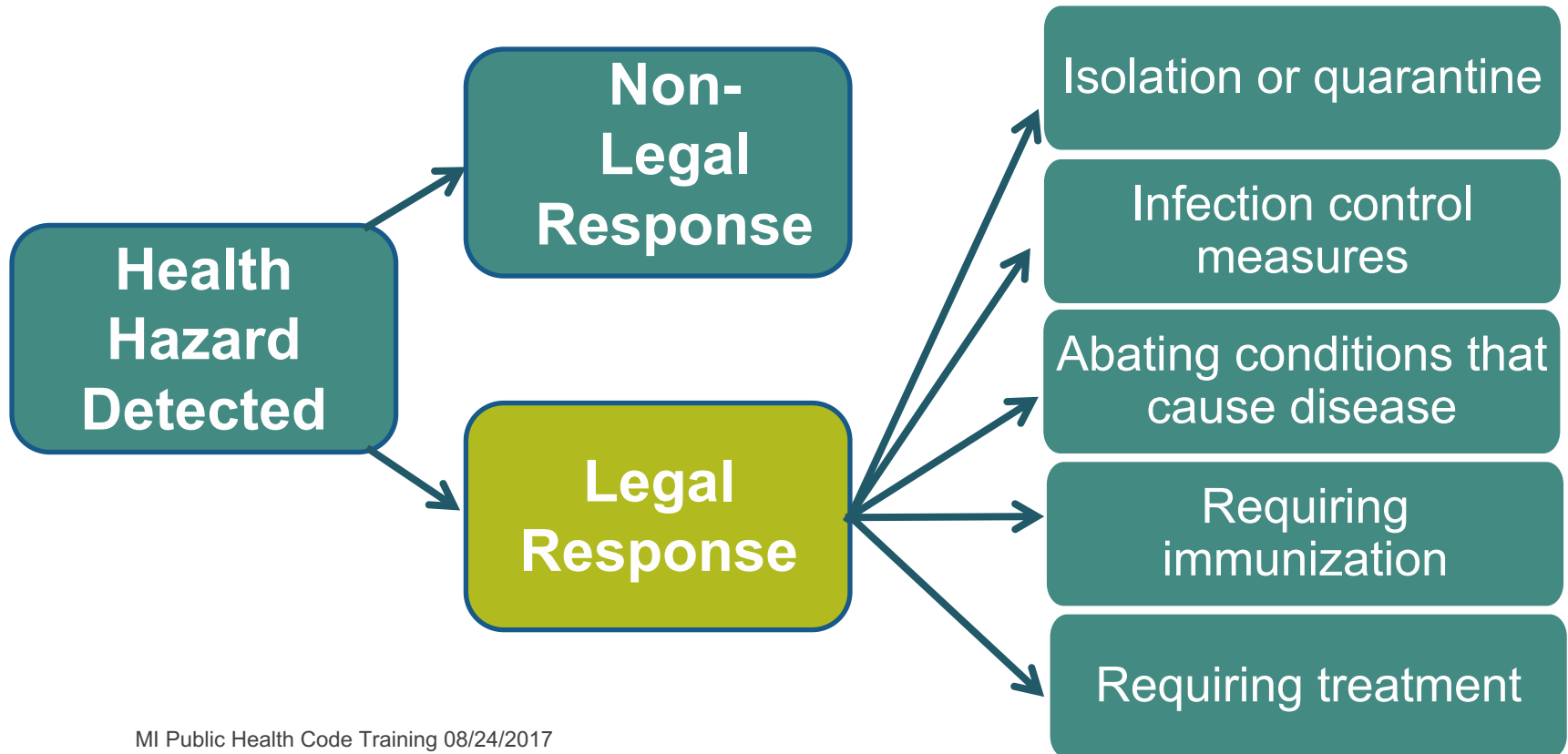


Public health responses to communicable disease & environmental hazards





Public health responses to communicable disease & environmental hazards





Response/Enforcement Options

- **Imminent Danger Order**
- **Order to Abate Nuisance**
- **Emergency Order**
- **Warning Notice**
- **Court Order**



Define: Imminent Danger Order

A local public health officer can issue an order to avoid, remove, or correct an imminent danger.

“Imminent danger” means a condition or practice which could reasonably be expected to cause death, disease or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures otherwise provided.



Example: **Imminent Danger Order**

During the 2016 recall of contaminated frozen strawberries (Hepatitis A) the St. Clair County Health Department used its authority to issue an imminent danger order requiring residents of impacted long term care facilities to be vaccinated against the Hepatitis A virus.



Key Elements of Imminent Danger Order

- 1. Determine “that an imminent danger to the health or lives of individuals exists in the area served by the local health department”**
- 2. Deliver to person or entity authorized or able to correct or resolve the danger**
- 3. Provide warning to affected individuals or post notice at site of danger**
- 4. Require immediate action and may specify action to be taken to resolve the danger**



Drafting an Imminent Danger Order



1. List the facts (as understood at the time)
2. Describe the condition or practice that exists
3. Explain why the condition or practice could reasonably be expected to cause death, disease or serious physical harm
4. Explain why and/or how the danger is imminent
5. Specify what corrective action is needed
6. Identify who is to make this corrective action
7. State what happens if the individual does not comply with order

Imminent danger orders

- 
- Powerful
 - Effective
 - Fast
 - Flexible

Do not require
declaration of
emergency!

Flu Vaccine Shortages

2004 seasonal flu
vaccine shortage

2009 H1N1
vaccine shortage



Flu Vaccine Shortages

» 2004 seasonal flu vaccine shortage

Flu Vaccine Order

- » 2004 seasonal flu vaccine shortage
- » Issued October 14, 2004
- » Ordered all health care providers to limit influenza vaccinations to persons in high risk categories
- » Violation: misdemeanor, fine, risk licensing action

Flu Vaccine Shortages

» 2009 H1N1 vaccine shortage

Provider agreements

- » Federal government controlled supply
- » Health care providers agreed to administer according to CDC priorities



Court Enforcement

If there is a failure to promptly comply with order



1. File petition with circuit or district court having jurisdiction
2. Request court to restrain the condition or practice which was determined to cause the imminent danger or
3. Request court to require action to avoid, correct or remove the imminent danger.



Define: Order to Abate a Nuisance

A local public health officer can issue an order “to avoid, correct, or remove, at the owner's expense, a building or condition which violates health laws or which the local health officer or director reasonably believes to be a nuisance, unsanitary condition, or cause of illness.”



Failure to Comply with Order



- ❖ The local health department may seek a warrant for the removal of the nuisance's cause, the unsanitary condition, or cause of illness.
- ❖ A court can make a finding that a public health law was violated or a nuisance may be injurious to the public health.
- ❖ If a court makes such a finding, it may order the removal, abatement or destruction of the violation or nuisance.
- ❖ The owner of the premises shall pay the expenses incurred.



Drafting an Effective Order to Abate Nuisance

- 1. List facts as the health officer understands them.**
- 2. Describe the building or condition of concern.**





Drafting an Effective Order to Abate Nuisance

3. Identify the health law(s) that this building or condition violates AND/OR explain why the health officer reasonably believes the building or condition to be a nuisance, unsanitary condition or cause of illness
4. Specify what corrective action is needed.





Drafting an Effective Order to Abate Nuisance

5. Identify the owner or occupant who is to make this corrective action.
6. Briefly state what happens if owner or occupant does not comply with order.





Owner Refuses to Pay Expenses

If the property owner refuses on demand to pay expenses incurred

- **The sums paid shall be assessed against the property and shall be collected and treated in the same manner as taxes assessed under the general laws of this state.**



Owner Not at Fault for Nuisance

- **An occupant or other person who caused or permitted the nuisance, unsanitary condition or cause of illness to exist is liable to the owner of the premises for the amount paid by the owner or assessed against the property.**
- **The owner may bring a court action to recover the payments.**

Public Health Nuisances

Public Health
Threat

Neighbor
Dispute

Does the activity concern
the public's health or is it
a private dispute?



Order to Control an Epidemic

A health officer may issue an order to control an epidemic if he or she determines that control of an epidemic is necessary to protect the public health.

The health officer may prohibit the gathering of people for any purpose, for example ordering a school to close and may establish procedures to be followed during an epidemic.



Order to Control an Epidemic

- **Issued by State Health Director or Local Health Officer**
- **Issued to a class or group of persons.**
- **Direct mass immunizations.**
- **Petition to compel compliance.**



Warning Notice

A health officer may issue a Warning Notice for the **involuntary detention** and treatment of an **individual** who is reasonably believed to be a **carrier** of a specific infectious agent or serious **communicable disease** and who is unable or **unwilling** to act in a way that doesn't put others at risk of exposure.



Court Order for Detaining, Transporting, Testing or Treating Carrier of Infectious Disease

Non-compliance with a Warning Notice requires a petition to the Circuit Court for an order requiring:

- Testing
- Treatment
- Education
- Counseling
- Commitment
- Isolation

In an
EMERGENCY



Straight to court >
hearing within 3
business days



Other enforcement measures

Ensure Compliance

Injunctive Relief

Restrain, prevent or correct violation of a law, rule or order that the health department has duty to enforce

Criminal Prosecution

May occur for violation of an order. If found guilty of misdemeanor and prosecuted, may be punishable by up to 6 months jail and/or a fine up to \$200.

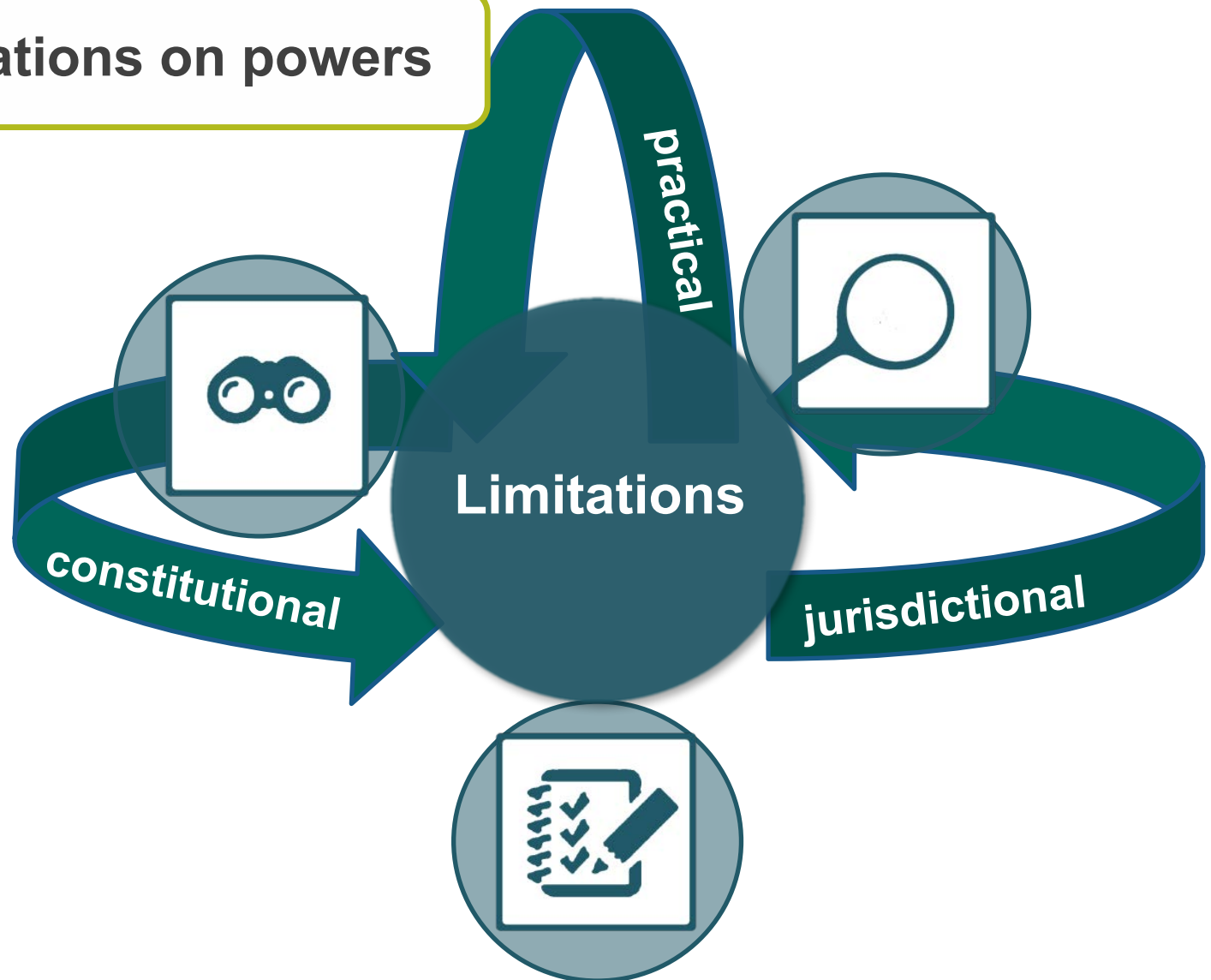
Administrative Enforcement

Enforce water codes, food safety and sanitation codes, Cases typically pertain to those that violate terms of license or permit. May result in Issue compliance order and admin. Fines. Courts may review health dept.

Selective Enforcement

- **When government officials such as police officers, prosecutors, or regulators exercise enforcement discretion, which is the power to choose whether or how to punish a person who has violated the law.**
- **The biased use of enforcement discretion, such as that based on racial prejudice or corruption, is usually considered a legal abuse and a threat to the rule of law. In some cases, selective enforcement may be desirable.**

Limitations on powers



Jurisdictional Limits

Define: **Jurisdiction**

Territorial limits in which an authority may be exercised.

Exclusive

Primary

Concurrent

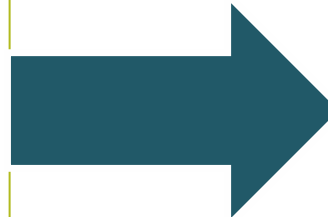
- **Local health officer's powers do not extend outside the local health department's boundaries**
- **Tribal land, federal land (if the state has relinquished control), to foreign diplomats, and to international travelers prior to entering the U.S. (i.e., before clearing customs).**

Statutory limitations

May limit the authority of the local health officer.

Public Health Code allows individuals to **refuse** immunizations

- Because of religious or other objections
- Refuse examination, testing or treatment based on personal beliefs.



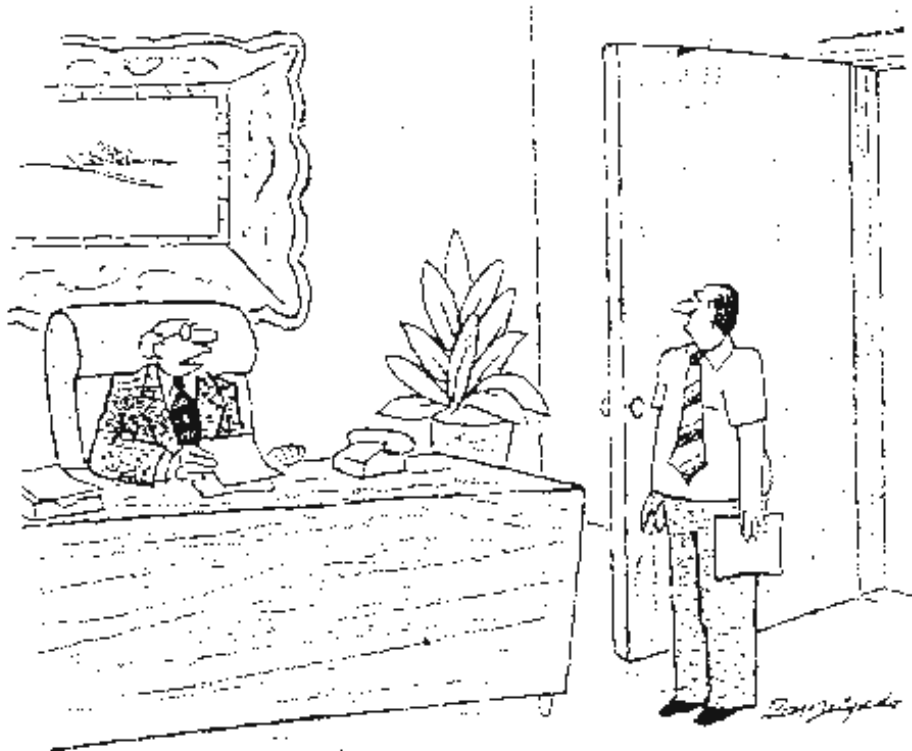
Impacts local health officer's

- Ability to issue Order to Control an Epidemic
- Issue court order detaining, transporting, testing, or treating a carrier of ID.

Practical Limitations

- ✓ **Available resources**
- ✓ **Department priorities**
- ✓ **Uniformity and Consistency**
- ✓ **Public Opinion**
- ✓ **Politics**
- ✓ **Issue of population health**

Resources?



“You have done so much with so little for so long that I’d like you to move on to doing everything with nothing.”



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Executive Decision-making

Can I? Must I? Should I?

Can I?

- » Do I have the legal authority?
- » What interventions can I use?

Must I?

- » Am I mandated to take action?
- » Am I mandated to take a particular action?

Should I?

- » What should I consider in exercising my discretion to act, and the nature of my actions?

[for health officials] “I” = “You”

Must I?

Mandatory functions

- » **Mandated by law**
- » **Mandated by funding source (\$ with strings)**

Discretionary functions

- » **Involves exercise of judgment or discretion**

For mandatory duties, often an agency has a great deal of discretion in determining *how* to fulfill its obligation

Mandatory + Discretion

Statutory powers and responsibilities

The Department of Public Health **shall:**

- Promote and safeguard the public health**
- Prolong life**
- Prevent and control health hazards**
- Prevent and control the spread of disease**

Should I?

Based on discretionary power: Must be used reasonably, impartially.

Policy considerations:

- » **Resources**
- » **Feasibility**
- » **Population health vs. private disputes**
- » **Impact**
- » **Priorities**

Uniformity & consistency

Strength of evidence, strength of legal authority

Public opinion

Politics

Doing “nothing” is doing “something” (risk assessment)

Making choices vs. abusing discretion

Consider facts, principles, and law

Be able to articulate basis for decision

Show that you considered/weighed alternatives

Does decision make sense?

Repeat: Doing nothing is doing something – make sure doing nothing is a conscious choice

Is it reasonable?

vs.

Decisions that are “arbitrary” and “capricious”

Arbitrary - not considered, ignores the facts, whimsical

Capricious - impulsive and unpredictable

Building support /Reducing exposure

Engagement (community, other govt entities)

Transparency

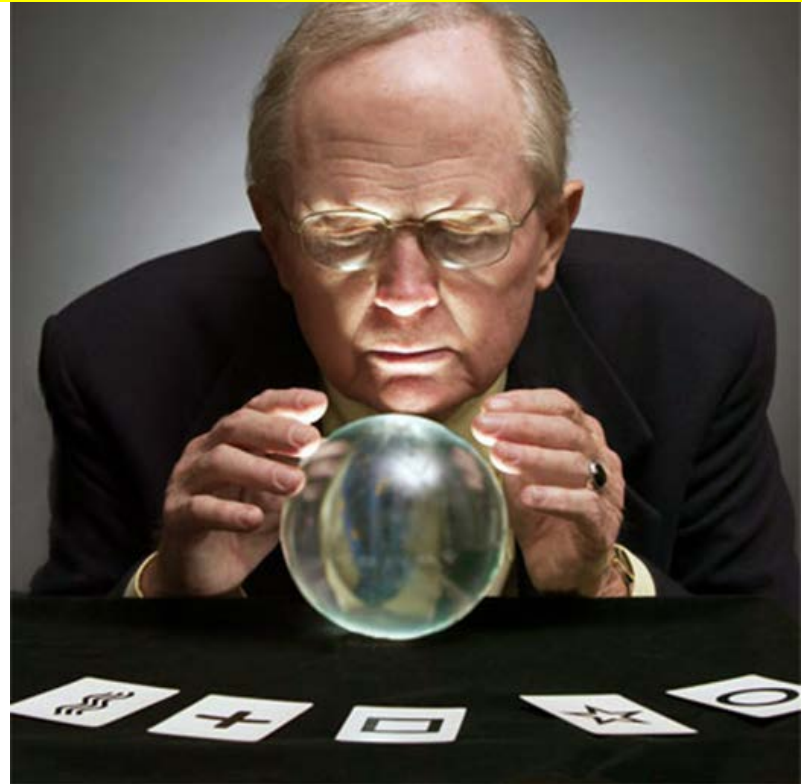
Risk communication

Documentation – important to document facts known at the time of decision and basis for decision

- **Avoid second guessing based on hindsight**
- **Documentation – practical challenges: How/where to document? Group decisions, evolving, iterative (not like a doctor making notes in patient's medical record of options considered and basis for choice)**

Hindsight is 20/20

It's easy to know the right thing to do after something has happened, but it's hard to predict the future.



... If only it were this easy

Protection against Liability

Tort liability, generally

1. Duty

2. Breach

- *Negligence*: reasonable person standard; failure to use “ordinary care”
- *Professional Negligence*: professional standard of care
- Distinguish from *gross negligence* and *willful and wanton misconduct*

3. Causation

4. Injury

Entity: Governmental Immunity

“Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a **governmental function.”**

MCL § 691.1407(1)

Exceptions (*i.e.*, gov’t may be liable):

MCL 691.1402 – Motor vehicles

MCL § 691.1406 – Public buildings

MCL § 691.1413 – Proprietary function

MCL § 691.1407(4) – Medical care

Exception: No Governmental Immunity for Medical Care

“*This act does not grant immunity* to a governmental agency or an employee or agent of a governmental agency *with respect to providing medical care or treatment to a patient.*”

Limited exceptions to the exception: care provided in a hospital owned or operated by the department of community health or department of corrections; care provided by an uncompensated search and rescue operation medical assistant or tactical operation medical assistant.

MCL § 691.1407(4)

Employees: Qualified Immunity

Governmental employees are **immune** from tort liability for injuries caused within the course of their employment if ALL of the following are met:

- a. The employee “is acting or reasonably believes he or she is **acting within the scope of his or her authority.**”
- b. “The governmental agency is engaged in the exercise or discharge of a **governmental function.**”
- c. The employee’s conduct “**does not amount to gross negligence** that is the proximate cause of the injury.”

MCL § 691.1407

Gross negligence is “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.”

State/Local Public Health Employees: Qualified Immunity

MCL 333.2228(2):

The director or an employee or representative of the department [of health and human services] is not personally liable for damages sustained in the performance of departmental functions, except for wanton and wilful misconduct.

MCL 333.2465(2):

A local health officer or an employee or representative of a local health department is not personally liable for damages sustained in the performance of local health department functions, except for wanton and wilful misconduct.

Willful and wanton misconduct may be found if “conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does.”

Highest Appointive Executive Official: Absolute Immunity

A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is **acting within the scope of his or her judicial, legislative, or executive authority.**

Limitations on Liability during Emergencies

- » **Standard of care considers the circumstances and limited resources**
- » **Certain individuals who render emergency care:**
 - » Nonemergency hospital staff who assist to respond to life threatening emergency
 - » Good Samaritan who renders care at the scene of an emergency
- » **Governmental sovereign immunity**
- » **Federal Volunteer Protection Act**
- » **Must act in good faith, without gross negligence or willful or wanton misconduct**

Limitations on Liability under the Public Health Code

Public Health Code

- » **First Responders / EMS Personnel**
- » **Representatives of MDCH or local health department**
- » **Mass immunization program volunteers**
- » **Special volunteer license**
- » **Volunteer health professionals who provide patient nonemergency care through facilities that treat uninsured/under-insured**

Limitations on Liability under Emergency Management Act

- » **Personnel of Disaster Relief Forces or private or volunteer personnel engaged in disaster relief activity** are immune from tort liability except for gross negligence.
- » **State Director of Emergency Management may issue a directive relieving donor or supplier of voluntary or private assistance from liability for other than gross negligence in the performance of the assistance.**

Limitations on Liability under Emergency Management Act

- » Health care provider who renders services **during a declared emergency** at request of gov't official “is considered an authorized disaster relief worker or facility and is not liable for an injury sustained by reason of those services, regardless of how or under what circumstances or by what cause those injuries are sustained.”
- » Applies to a hospital, M.D., D.O., medical resident, RN, LPN, DDS, DVM, RPh, student nurse, pharmacist intern, paramedic (licensed in any state or by federal govt)
- » Does not apply to willful or gross negligence

Limitations on liability during a public health emergency

Personnel deployed under EMAC:

- » **Considered agents of requesting state for tort liability & immunity**
- » **Immune from liability if act in good faith, without willful misconduct, gross negligence, recklessness**

Uniform Emergency Volunteer Health Practitioners Act

- » **Provides license reciprocity, including to private sector**
- » **Provides additional protections from liability, including for paid health practitioners**
- » **Provides workers compensation coverage**
- » **Enacted in 15 states, plus District of Columbia and U.S. V.I.**
- » ***Not enacted in Michigan***

Thank you!

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public health
I ♥ LAWYERS