

Michigan Public Health Law 101: Authority and Limitations

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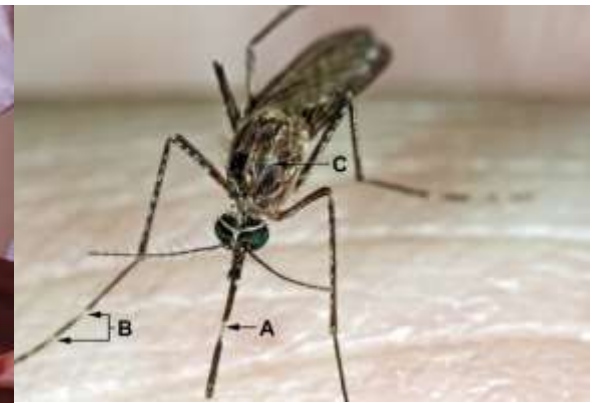
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Network for Public Health Law – Mid-States Region

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Law can protect the public

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



Outline

- **Overview of law and public health**
- **Sources of public health authority**
- **Michigan Public Health Code**
- **Public health law in practice**
- **Limitations on public health authority**

Overview of Law and Public Health

Overview: I

- **Law as foundation for public health action**
- **Tension between protecting community's health and intruding into personal liberties (e.g., stay-at-home orders)**
- **Public health law as cumulative body of constitutional doctrine, statutes, administrative regulations, executive orders**

Overview: II

- **Relationship between individual and government**
- **Relationship between individual and community**
- **Relationship between various levels of government**
- **Relationship between courts and other branches of government**

Policy Context

- **Social compact as basis for public health laws**
- **Public health as collective endeavor in age of individualism**
- **Public distrust of government/scientific denialism (vaccine protesters)**
- **Steady decline in public health workforce/investment**
- **Lack of public support/public health voice**
- **Political accountability**

Concepts: Federalism

- **States and federal government as co-equal units**
 - **Some powers explicitly federal (defense, nuclear power)**
 - **All powers not specifically federal are reserved for the states (public health)**
 - **Cooperative federalism (environment)**
- **Historical tension for control over policy**

Concepts: Preemption

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

Concepts: Governance

- Separation of powers
- Checks and balances
- Political accountability
 - **Exists at every level**
 - **Boards of Health**
 - **County Commissioners**

The Administrative Process

- **Functions**
 - Issuing regulations
 - Enforcement
 - Issuing policy guidance
- **Public hearings**
 - Generating community support
 - Identifying opposing arguments
 - Timelines
- **Judicial standards of review**

Public Health Remedies: I

- **Civil**
 - Tax
 - Licensure
 - Injunctions
 - Fines
- **Criminal**
- **Market-based**
- **Litigation**

Public Health Remedies: II

- **Traditional public health strategies**
 - Social distancing (e.g., quarantine/isolation)
 - Screening/contact tracing/reporting
 - Education
 - Moral suasion
- **Tradeoffs**

Justifying Public Health Intervention

- **Harm to self** (weakest justification)
- **Harm to others**
- **Protecting vulnerable populations**
- **Role of the market**
- **Role of litigation**

Public Health Intervention Matrix: Balancing Framework

Balancing Framework	Activity	Public Health Authority	Public Health Strategy	Justification	Political Feasibility
1) Nature of abridgement	Tobacco				
2) Extent of abridgement 3) Nature of the public health benefits/state's interest	Motorcycle/ Bicycle Helmets				
a) Compelling state interest?	Infectious Disease Pandemic				
b) Reasonable relationship c) Voluntary or involuntary risk? d) Least intrusive means?	Distracted Driving				
4) Cost of the public health intervention	Obesity				
5) Alternatives to the intervention?	Guns				
6) Extent of harm to third parties if no intervention	Football Concussions				
	Domestic Violence				

Sources of Public Health Authority

Sources of Public Health Authority

- Police powers
- *Jacobson v. Massachusetts*
- State Public Health Codes
- Common law (*parens patriae*)
 - State's inherent power/authority to protect vulnerable persons/populations

Police Powers: I

- **State sovereignty—10th Amendment**
- **Police powers**
 - **Provides for state/local public health authority**
 - **Inherent authority to enact laws, promulgate and enforce regulations**

“[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people...”

Police Powers: II

- **Broad delegation of authority to administrative agencies**
- **Broad discretion accorded to agency (e.g., whether/when to notify public of Legionella outbreak)**
- **Must follow administrative procedures**
- **Regulations must be within scope of legislation**

Jacobson v. Massachusetts

(U.S. Supreme Court, 1905)

- **City of Cambridge, MA, mandated smallpox vaccinations**
- **Reverend Henning Jacobson objected and brought 14th Amendment challenge**
- **Legal issue:**

“Is this statute . . . inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the State” (Justice Harlan)

Jacobson v. Massachusetts (1905)

- Individual liberty interests
- But “*...the rights of the individual...may...be subjected to such restraint...as the safety of the general public may demand*” (Justice Harlan)
- Essentially a balancing test—police power cannot be arbitrary or oppressive

Jacobson v. Massachusetts (1905)

- Deference to the legislature/regulatory agency
 - No absolute right to liberty
 - *“What the people believe is for the common welfare”*
- Guiding principles
 - Public health necessity
 - Reasonable means
 - Proportionality
 - Harm avoidance

Jacobson v. Massachusetts (1905)

- ***Jacobson*** remains a robust standard
 - ***South Bay Pentacostal Church v. Newsom***, 140 S.Ct. 1613 (2020), Roberts, C.J. Concurring
- But being challenged in current litigation

Michigan Public Health Code

Michigan Constitution

§ 51 Public health and general welfare.

The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.

Const. 1963, Art. IV, § 51, Eff. Jan. 1, 1964

Understanding a State's Public Health Code

- Basis for state/local action
- Limited (Missouri) vs. expansive (Michigan) codes
- Structure (state and local authority)
- Key sections
 - **Definitions**
 - **Scope of authority**
 - **Standards**
 - **Limitations**
 - **Authorizes actions to enforce standards / protect health**

Michigan Public Health Code

1978 PA 368, as amended

MCL 333.1101 et seq.

- **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.)

Structure of the Code

- » **LHD: Primary responsibility for health of people within its jurisdiction**
 - » Duty to protect health; power to investigate, prevent, and control disease and environmental factors
 - » “Local health officer” means the individual in charge of a local health department
- » **State & LHD: Parallel powers and responsibilities**

MCL 333.2235, 333.2413, 333.2415, 333.2417 333.2428, 333.2433, 333.2435

Structure of the Code

» State:

- » Provide leadership and specialized services
- » Take action regarding local matter if LHD unable or unwilling to respond
- » Respond to imminent danger / menace to public health anywhere in the state

MCL 333.2221, 333.2224, 333.2235, 333.2251, 333.2437

General authority to protect the public

Powers necessary and appropriate to perform their duties:

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



Health Officer takes action

- » **Order to Abate a Nuisance**
- » **Imminent Danger Order**
- » **Emergency Order to Control an Epidemic**
- » **Warning Notice to individual with hazardous communicable disease**
- » **Civil Penalties**
- » **Court action**



Health Officer determines:

- » That an imminent danger to the health or lives of individuals exists (MCL 333.2251, 333.2451)
 - » That control of an epidemic is necessary to protect the public health (MCL 333.2253, 333.2453)
 - » That a building or condition is a nuisance, unsanitary condition, or cause of illness (MCL 333.2455)
 - » That an individual is a “carrier” and a “health threat to others” (MCL 333.5203)
- and as a result, issues orders or takes other action

Imminent Danger Order (MCL 333.2451): A local 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
- The order **may**: (1) specify action to be taken or (2) prohibit the presence of individuals in locations or under conditions where the imminent danger exists
- **See also MCL 333.2251 (state authority)**

Emergency Order to Control an Epidemic (MCL 333.2453): **A local health officer may issue an order to protect the public's health during an epidemic.**

- Health officer determines that control of an epidemic is necessary to protect the public health
- Order may **prohibit gathering** of people “for any purpose” and **establish procedures** to follow to ensure continuation of essential public health services.
- **See also MCL 333.2253 (state authority)**

Procedures for the control of actual or suspected case of communicable disease

Local health officer may:

- » **Institute appropriate isolation or other precautions**
- » **Exclude individual from school or group programs who has a communicable disease or who lacks documentation of immunity or is otherwise susceptible to the disease until LHO deems that further risk of disease spread is unlikely**

Communicable Disease Rules, Mich. Admin. Code R. 325.175

Nonlegal response to protect the public

- » **Educating the public**
- » **Recommending voluntary measures (e.g. home quarantine)**
- » **Advisories and warnings**
- » **Directing pharma countermeasures**
- » **Providing health care delivery**



Medical Director's Role & Responsibilities

Medical Expertise and Direction

- Formulation of medical public health policy
- Advise LHO on matters related to medical specialty judgment
- Medical expert for enforcement, in court

Practice of Medicine

- Standing orders
- Diagnosis and treatment
- Development and implementation of medical policies and procedures

Duties Delegated by LHO

- “Local health officer” means the individual in charge of a local health department or his or her **authorized representative**

Imminent danger order used to address vaccine shortage



2004 seasonal flu vaccine shortage

State ordered all health care providers to limit influenza vaccinations to persons in high-risk categories

Imminent danger order used to prohibit occupancy

- » Vapor intrusion caused excessive levels of Tetrachloroethylene (PERC) in indoor air in homes and businesses
- » Local health department ordered affected properties to remain unoccupied until remediation plan implemented and air quality returned to safe levels

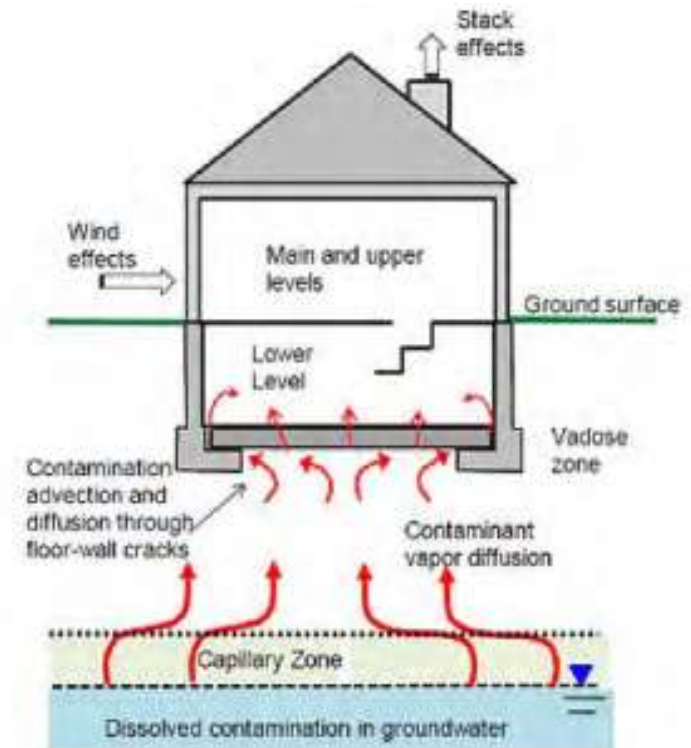


Figure 1-1 – Simplified Model of Vapor Intrusion

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 governing entity
- » Must be at least as stringent as similar state requirements
- » LHD regulations supersede conflicting local ordinances
- » Notice of public hearing required
- » Has force of law
- » Violation is a misdemeanor; may be enforced in court

Public Health Law in Practice

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?

Using law to protect the public's health

CAN I?

Legal question: Do I have authority?

POWER . . .

- » Do I have the power?
- » What is the scope of my power?
- » What interventions can I use?
- » Who else has power?

Using law to protect the public's health

SHOULD I?

Policy question: How should I exercise my discretion?

PROFESSIONAL JUDGMENT

Based on discretionary power ...

- Should I act?
- How should I act?
- When should I act?
- What should I consider in exercising my discretion to act, and the nature of my actions?
- What are the policy considerations?

Should I? Ethical Considerations

Autonomy

Respect for individual's right to make own choices

Non-Maleficence

First, do no harm

Beneficence

Do good

Justice

Treat all people equally and equitably

Law defines what an agency can do.
Ethics define what an agency should do.

Key Legal Issues: COVID-19

- » **Balancing individual freedom vs. public's health**
- » **Social distancing**
 - » Quarantine
 - » Isolation
 - » Masks
- » **Vaccination**
 - » Mandatory (≠ compulsory)
 - » Discretionary
- » **Due process**
 - » Individual
 - » Group

Key Legal Issues: COVID-19

» **First Amendment**

- » Freedom of assembly / speech
- » Free exercise of religion

» **Data**

- » Privacy
- » Security
- » Transparency

» **Feasibility of enforcement**

» **Non-delegation doctrine**

Key Policy Issues: COVID-19

» Continuity

- » Public health's COVID-19 decisions fall within traditional/routine public health practice
- » Lockdowns unusual, but all other actions taken have occurred many times in the past
- » A different scale this time—a once-in-a-century event unlikely to be replicated in our lifetimes

Limitations on Public Health Authority

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Police Powers ≠ Police State

Jurisdictional

Separation (branches)

Allocation (levels)

Assignment (agencies)

Territorial

Statutory

Pre-emption

Limitations on Public Health Authority

Police Powers ≠ Police State

Constitutional

Liberty

Due Process

Protection Against Search & Seizure

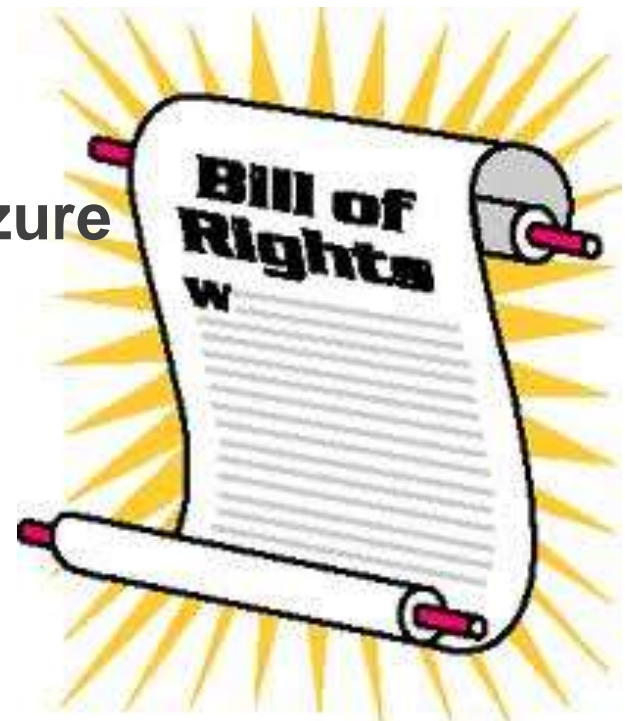
Equal Protection

Right to Privacy

Freedom of Association

Freedom of Religion

Just Compensation



Public Health Law and Policy: Limits to Legislative Intervention

- **May not be able to act quickly enough to mitigate public health emergencies**
- **May not have necessary public health expertise to craft responses to specific diseases/threats**
- **Cannot anticipate all public health threats—nature, scope, duration, severity**

Conclusion

- **Law as foundation**
- **Knowledge of Code essential**
- **Broad scope of authority remains, but requires judgment to use effectively**
- **Blurring of law, politics, and ethics**

Supporters



Robert Wood Johnson
Foundation

The Network for Public Health Law is a national initiative of the Robert Wood Johnson Foundation.