

Crisis and Emergency Risk Communication

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New And Emerging Issues In Public Health Law

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Legal Issues

- Homeland Security Act
- State Worker's Compensation Laws
- State and State Employee Liability Issues
- Model State Emergency Powers Act
- Freedom of Information Act
- Other Information Issues
- Issues of Most Likely Liability Potential

Section 304 Homeland Security Act

- Citation - P.L. 107-296
- Amends the Public Health Act
- Effective Date – January 24, 2003

Section 304 Homeland Security Act Purpose

- To alleviate liability concerns around smallpox vaccination
- Manufacturers and distributors
 - Health Care Entities
 - Federal Employees
 - State Employees
 - Officials, agents or employees of above entities
 - Recognized volunteers when acting as agent.

Section 304 Homeland Security Act "Trigger"

The "trigger" is a "declaration" by the Secretary of Health and Human Services that an "actual or potential bioterrorist incident or other actual or potential public health emergency makes advisable the administration of a covered countermeasure to a category or categories of individuals."

Section 304 Homeland Security Act Liability of United States

The United States government assumes liability as follows:

- There is a declaration by the Secretary.
- A countermeasure is administered to an individual by a “qualified person.”
- The individual is within the covered category or reasonably thought he was.
- The individual is injured in some way.

Section 304 Homeland Security Act Vaccinia Inoculation

- Vaccinia Inoculation is specifically mentioned as a potential “covered countermeasure” to prevent smallpox.
- Smallpox treatment would be covered.
- Treatments for vaccinia virus infection would be covered.

Section 304 Homeland Security Act Presumptions

- Individual received the inoculation and/or
- Individual contracts vaccinia virus within 30 days of the declaration period.
- Individual lives with or did live with another who received the inoculation.
- Presumptions are rebuttable.

Section 304 Homeland Security Act Exclusivity of Remedy

- Claim against the government is the “exclusive” remedy for vaccine-related injuries.
- Injured person files a claim with the appropriate agency.
- Individual can file suit in federal court if claim is denied.
- No other actions may be filed.

Section 304 Homeland Security Act Government May Recover

The Government may recover for claims paid out when the “qualified person” causing the injury:

- Fails to cooperate with the government in defense of the action, or
- Acted in a “grossly negligent” manner, or
- Engaged in reckless or illegal conduct, or
- Acted with “willful misconduct.”

Section 304 Homeland Security Act Liability Scenario

- Declaration by Secretary.
- Individual is inoculated.
- Individual becomes seriously ill.
- Individual or estate files suit against the entity and the “qualified person.”
- “Qualified person” or entity notifies US Attorney.
- Action is removed to federal court.
- United States is substituted as the defendant.
- “Qualified individual” cooperates with defense.

Worker's Compensation Issues

What happens to a healthcare worker who is pre-inoculated in the scope and line of duties and becomes seriously ill?

- Should first look to your state's worker's compensation laws.
 - How will this be viewed by the carrier?
 - How will this be viewed by the courts?
- Not directly compensated under Section 304 of the Homeland Security Act.
- Section 304 might theoretically apply if worker's compensation laws are not the "exclusive" remedy in your state.

State Liability Issues The Question

Question: May an action be maintained under state law for acts or omissions committed by a state employee or other person functioning within the scope and line of duties in connection with the Secretary's declaration under Section 304?

State Liability Issues The Answer

Such an action would be difficult to maintain.

- Section 304's "exclusivity."
- State's "Sovereign Immunity."
- State employee "qualified immunity."
- "Qualified immunity" of others acting on behalf of the state.

State Liability Issues The Exceptions

An action might be maintained if the employee or volunteer:

- Is not a member of the covered category; and
- Acts outside the scope and line of duties; or
- Acts maliciously, in bad faith or with wanton misconduct.

State Police Powers

Under "police powers", states may enact laws consistent with the Constitution of the United States and of the state to protect the public health, safety, welfare and morals.

The "Model State Emergency Health Powers Act" is intended to protect the public health by exercise of the state's police powers.

The "tension" in police power acts is always between the need to protect the people and the need to be consistent with the Constitution and especially with the Bill of Rights.

The "Model Act"

- Model State Emergency Health Powers Act. December 2001.
- Authored by Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities.
- Goal – in response to the events of September 11, 2001 to offer guidance to states in establishing a uniform set of state laws to deal with public health emergencies such as bioterrorist attacks.

The “Model Act”

- Adopted in various forms by more than 20 states.
- Alabama plans to propose its draft to the upcoming legislative session.

The “Model Act” Subjects Addressed

- Preparedness - comprehensive planning for a public health emergency;
- Surveillance - measures to detect and track public health emergencies;
- Management of property - ensuring adequate availability of vaccines, pharmaceuticals, and hospitals;
- Abatement of hazards to the public's health;
- Protection of persons - powers to compel vaccination, testing, treatment, isolation, and quarantine; and
- Communication - providing clear and authoritative information to the public.

Alabama’s Idea of The Model Act

Addresses a really serious “Public Health Emergency” defined as an imminent threat of an illness or health condition that will kill or injure large numbers of people or cause numerous long term disabilities and is believed to be caused by

- Bioterrorism;
- The appearance of a novel infectious agent;
- A natural disaster;
- A chemical attack or release; or
- A nuclear attack or accident.

Alabama’s Idea of The Model Act Issues Addressed

- Reporting of Incidents and follow up;
- Ability to share information;
- Access to and control of real property and facilities;
- “Takings” and destruction of property;
- Waste and human remains disposal;
- Control of health care supplies, rationing;
- Vaccination requirements;
- Acquiring, collecting and testing lab specimen.

Alabama’s Idea of The Model Act Issues Addressed - Continued

- Isolation and quarantine issues;
- Access to and disclosure of protected health information;
- Licensing and appointment of health care personnel;
- Paying for all this;
- Liability protections under state law.

Information Issues - FOIA

Will the Freedom of information Act apply to information obtained under a declaration by the Secretary or under state law?

Generally, FOIA applies strictly to federal agencies. Merely because the United States pays all the bills doesn't make the information you collect “agency information” subject to FOIA.

Federal agencies will make their own interpretations of FOIA issues. Refer to agency counsel.

Information Issues – State Laws

Alabama – all “public” information is public.
However, there are exceptions.

- Statutorily privileged information;
- Trade secrets;
- Information received in or with an expectation of confidentiality;
- Information commonly expected to be confidential;
- No statutory exception for medical records;
- Check you own state laws.

Information Issues – Example The State Plan

- The State Plan
 - Not released by CDC.
 - Certain portions redacted by Alabama because of “National Security.”
 - Location of Sites
 - Names, addresses and phone numbers of certain personnel

Information Issues Medical Information

- Treat medical information with the same care it receives in the clinic.
- Follow traditional guidelines for information release of identity of infected persons using redacted versions only.
- Exercise care with Social Security numbers.
- Information must be preserved in a secure manner.

Potential Liability Issues

- Negligence in handling information.
 - Section 304 gives no immunity.
 - State employee’s “qualified immunity” might not apply to negligence situations.
- Negligence at the vaccination site.
 - Security
 - Crowd control
 - Slip and falls
- Improper use of quarantine/isolation and false imprisonment issues.

Potential Liability Issues How to Head Them Off

- Have a plan to address these potential liability situations.
- Involve agency counsel on the planning and review at all phases.
- Don’t assume that merely because you are doing a noble thing, somebody won’t sue you.
- “Have a plan, work your plan, plan for the unexpected.” – Bryant.

Human Resources for Crisis Communication

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Take Off The Superhero Cape

- Responders potential secondary victims
- Responders risk stretching beyond limits
- Exhaustion, frustration, anger, guilt are expected
- After more than 24 hours without sleep, perform as if you are legally drunk

Personal Coping

- Recognize emotions will be high
- Eat nutritious food
- Take mental breaks
- Avoid lots of caffeine or alcohol
- Leave when your shift is over
- Exercise

Supervisor's Support

- Remind workers of value of their effort
- Insist they take meal breaks
- Make nutritious food and drink available
- Respond to timid requests for relief
- Encourage exercise
- Accept non-offensive "silliness"
- Insist workers take time to sleep

Human Resources Pre-Crisis

- Provide training
- Acknowledge levels of experience
- Maintain a registry of communicators
- Sample brochure and letter

Executing the Crisis Communication Plan

- Apply risk assessment tools
- Don't want uninformed fresh crew—stagger hours
- Relief for leadership too
- Work 12 hour days, never more than 16
- Require a day off after 10 days

Death, Dying, and Grief

- Bereavement—state of significant loss
- Grief—process to regain equilibrium after a loss
- Mourning—public expression of feelings of grief
- Anticipatory grief—before expected death of a loved one—projection of emotional pain

Grief in Context

- Circumstances of the death
- Nature of the relationship
- Experienced loss before
- Any secondary losses

Communication Roles

- Many players
- Changing environment
- Page 209, "Crisis and Emergency Risk Communication"

Media Law and Public Health Law

Right to Know versus Need to Know

- Public have a right to know about the government's activities
- Need to know is a concept used to keep sensitive information in hands of those who require its use and away from potential enemies of the U.S.
- Principles of communication regarding the public's right to know

CDC Principles of Communication

- Final reports/information made fully and readily available
- Communication will be open, honest and based on sound science
- Release information according to FOIA
- Information will not be withheld solely to protect CDC or the government from criticism or embarrassment

Before Releasing Information . . .

- Right of privacy
- Intrusion
- Public disclosure of private facts
- False light
- Appropriation

Before Releasing Information

- Ability
- Competency
- Authority
- Security
- Accuracy
- Propriety

Public Health Law

- Public health officials responsibilities
- Public health officials liabilities