



Social Distancing Law Project

Legal Assessment Template

Overview

This Legal Assessment involves an analysis of your jurisdiction’s laws, regulations, policies, and plans related to social distancing measures. The purpose of the analysis is to identify the full range of all such legal authorities available to the public health agency of your jurisdiction, local public health agencies, and to the other agencies that would be involved in supporting social distancing measures against an influenza pandemic or a similar, highly virulent infectious disease. The senior legal counsel to your state or territory’s public health agency should conduct or supervise the Legal Assessment.

The results and findings of the Legal Assessment can be used for at least two important purposes. First, they will portray the relevant laws and legal authorities in your jurisdiction and thus offer a basis for identifying potential gaps, ambiguities, or opportunities for improving social distancing law. Second, as an inventory of your jurisdiction’s relevant public health laws they will serve as a critical, factual basis for the Legal Consultation Meeting.

This Legal Assessment Template contains a series of questions that are organized to aid legal counsel in identifying and characterizing the jurisdiction’s legal authorities that support key types of social distancing measures – restrictions on the movement of persons, interjurisdictional cooperation in restricting the movement of persons, closure of public places, dismissal of schools, and cancellation of mass gatherings – and in clarifying a number of critical operational issues associated with those measures.

Within each of these areas, questions are posed – both in the context of an officially declared public health emergency and in the absence of such a declaration – regarding the legal basis for activating a given type of social distancing, the locus of authority for exercise of those measures, procedures for their implementation, due process and other protections for those subject to the measures, and other related issues.

Customization

As you work through the specific questions below, consider whether there are additional social distancing measures available to your jurisdiction through existing legal authorities. Customize the template to address these measures as well.

Definitions

- “Legal authority” means any provision of law or regulation that carries the force of law, including, for example, statutes, rules and regulations, and court rulings.
- “Procedures” means any procedures established by your jurisdiction relating to the legal question being researched, regardless of whether the procedures have the force of law.
- “Restrictions on the movement of persons” means any limit or boundary placed on the free at-will physical movement of adult natural persons in the jurisdiction.
- “Closure of public places” means an instruction or order that has the effect of prohibiting persons from entering a public place.
- “Public place” means a fixed space, enclosure, area, or facility that is usually available for entry by the general public without a specific invitation, whether possessed by government or private parties.
- “Mass Gathering” means an assembly or grouping of many people in one place where crowding is likely, whether formal or informal, and whether for one day or many.
- “Person” means a natural person, whether or not individually identified.
- “Public health emergency” means any acute threat, hazard, or danger to the health of the population of the jurisdiction, whether specific or general, whether or not officially declared.
- “Superior jurisdiction” means the federal government in respect to a state, or a state in respect to a locality.
- “Inferior jurisdiction” means a state in respect to the federal government, or a locality in respect to a state government.

Sections

- I. Restriction on the Movement of Persons
- II. Inter-jurisdictional Cooperation and Restricting Movement of Persons
- III. Closure of Public Places
- IV. Dismissal of Schools

Questions

I. Restrictions on the Movement of Persons

A. Legal authorities to restrict movement of persons during a declared public health emergency

Identify the legal authorities that could enable, support, authorize, or otherwise provide a legal basis for any restrictions on the movement of persons during a declared public health emergency. List all legal powers, authorities, and procedures (including, but not limited to, police powers, umbrella powers, general public health powers, or emergency powers or authorities) that could be used to authorize specific restrictions on movement. (Examples: state's legal powers, authorities, or doctrines for quarantine (see also subsection I-C below), isolation, separation, or other orders for persons to remain in their homes.)

This set of questions includes all provisions of law or procedure that:

1. Regulate the initiation, maintenance, or release from restrictive measures, including, but not limited to:
 - a. Which official(s) are authorized to declare or establish such restrictions?
 - b. Which official(s) are authorized to enforce such restrictions?
 - c. What legal authorities exist for group quarantine?
 - d. What legal authorities exist for area quarantine?
 - e. What penalties, if any, are there for violations of restrictions on movement?
2. Provide any due process measures for a person whose movement is restricted.
3. Relate to how long such measures can last, whether and how they can be renewed, and the authority/process/notice requirements for ending the measures.
4. May create liability for ordering the restriction of movement of persons.
5. Would otherwise tend to limit the legal basis of the jurisdiction.

B. Sufficiency of legal authorities during a declared public health emergency

Assess the sufficiency of existing legal authorities to restrict the movement of persons during a declared emergency and identify any potential gaps or uncertainties in those powers and authorities.

1. Are there gaps or shortcomings in these legal authorities?
2. Are there uncertainties about the sufficiency of these legal authorities?
3. Do any existing legal provisions inhibit, limit, or modify the jurisdiction's legal authority to restrict the movement of persons? (Examples could include state administrative practice acts and specific provisions in law related to movement restrictions, among others.)

C. *Legal authorities specifically related to quarantine enforcement during a declared public health emergency*

With specific respect to quarantine orders, identify all state and/or local legal authorities to enable, support, authorize, or otherwise provide a legal basis for *enforcement* of individual and group quarantine during a public health emergency.

1. Do law enforcement agencies have legal authority to enforce quarantine orders issued by the jurisdiction's public health agency?
2. Do any laws prohibit or inhibit law enforcement agencies' enforcement of an official quarantine order?
3. Do law enforcement agencies have legal authority to enforce a quarantine order issued by the federal government?
4. Do any specific legal authorities prohibit or inhibit the use of law enforcement agencies to enforce a federal quarantine order?
5. What are the legal powers and authorities prohibiting or inhibiting the use of law enforcement to assist the federal government in executing a federal quarantine order?

D. *Sufficiency of legal authorities to enforce quarantine during a declared public health emergency*

Assess the sufficiency of legal authorities to enforce quarantine orders and identify any potential gaps or uncertainties in those powers and authorities.

1. Are there any potential gaps in those legal authorities?
2. Are there any uncertainties in those legal authorities?
3. Are there any other legal provisions not listed in I-C above that could inhibit, limit, or modify the jurisdiction's legal basis to restrict the movement of persons? (Examples could include state administrative practice acts and specific provisions in law related to quarantine, among others.)

E. *Legal authorities to restrict movement of persons in the absence of a declared public health emergency*

Identify legal authorities and procedures that could enable, support, authorize, or otherwise provide a legal basis for any restrictions on the movement of persons in the absence of a declared public health emergency? (Examples could include, among others, the jurisdiction's legal authorities and procedures for quarantine, isolation, separation, or other orders for persons to remain in their homes.)

The following questions address all provisions of law or procedure that regulate the initiation, maintenance, or release of persons from restrictions on movement, including, but not limited to:

1. Which officials are authorized to declare or establish such restrictions?
2. Which officials are authorized to enforce such restrictions?
3. What are the legal authorities for group quarantine?
4. What are the legal authorities for area quarantine?
5. What are the penalties, if any, for violations of restrictions on movement?
6. What due process measures are provided for those whose movement is restricted?
7. How long may such measures continue; can they be renewed; what are the legal and procedural requirements for ending the measures?
8. Are officials who order restrictions on the movement of persons at risk of legal liability?

F. *Sufficiency of legal authorities in the absence of a declared public health emergency*

Assess the sufficiency of the jurisdiction's legal authorities to restrict the movement of persons in the absence of a declared emergency, and any potential gaps or uncertainties in those powers and authorities.

1. Are there potential gaps in those legal authorities?
2. Are there potential uncertainties about those legal authorities?
3. Are there any legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to restrict the movement of persons? (Examples could include state administrative practice acts and specific provisions in law related to movement restrictions, among others.)

II. Inter-jurisdictional Cooperation and Restricting Movement of Persons

A. *Legal provisions/procedures for inter-jurisdictional cooperation on restricting the movement of persons during a declared public health emergency*

What provisions or procedures under law apply to giving and receiving assistance and otherwise working with other jurisdictions regarding restrictions of movement of persons during a declared public health emergency?

1. Provisions or procedures governing the relationships among superior jurisdictions? Among inferior jurisdictions?
2. Provisions or procedures governing the relationships between superior and inferior jurisdictions? (Include relationships among all levels of government)

and the federal government. See also section I-C above specifically related to quarantine orders.)

3. What is the legal authority of the jurisdiction to accept, utilize, or make use of federal assistance?

B. *Sufficiency of powers/ authorities to cooperate with other jurisdictions during a declared public health emergency*

Discuss the sufficiency of the authorities and powers to cooperate with other jurisdictions during a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.

1. Potential gaps?
2. Uncertainties?
3. Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to cooperate with other jurisdictions? (Examples: state administrative practice acts, specific provisions in law related to inter-jurisdictional cooperation.)

C. *Legal provisions/ procedures for inter-jurisdictional cooperation on restricting the movement of persons in the absence of a declared public health emergency*

What provisions or procedures under law apply to giving and receiving assistance and otherwise working with other jurisdictions regarding restrictions of movement of persons in the absence of a declared public health emergency?

1. Provisions or procedures governing the relationships among superior jurisdictions? Among inferior jurisdictions?
2. Provisions or procedures governing the relationships between superior and inferior jurisdictions? (Include relationships among all levels of government and the federal government. See also section I-C above specifically related to quarantine orders.)
3. What is the legal authority of the jurisdiction to accept, utilize, or make use of federal assistance?

D. *Sufficiency of powers/ authorities to cooperate with other jurisdictions in the absence of a declared public health emergency*

Discuss the sufficiency of the authorities and powers to cooperate with other jurisdictions in the absence of a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.

1. Potential gaps?
2. Uncertainties?

3. Legal provisions that could inhibit, limit, or modify the jurisdiction's legal basis to cooperate with other jurisdictions? (Examples: state administrative practice acts, specific provisions in law related to inter-jurisdictional cooperation.)

E. *Interagency/inter-jurisdictional agreements on restricting movement of persons*

Where available, identify and provide copies of all interagency and inter-jurisdictional agreements (both interstate and intrastate) relating to restrictions on the movement of persons during public health emergencies and the enforcement of such restrictions.

III. Closure of Public Places

A. *Legal powers/authorities to order closure of public places during a declared public health emergency*

What are the powers, authorities, or procedures to enable, support, authorize, or otherwise provide a legal basis for closure by state or local officials of public places (e.g., public facilities, private facilities, and business) during a declared public health emergency? For each of the jurisdiction's legal powers, authorities, and procedures including, but not limited to, umbrella, general public health, or emergency powers or authorities, that could be used to authorize, prohibit, or limit closure, please address the following issues:

1. What are the powers and authorities authorizing closure?
2. What are the powers and authorities prohibiting closure?
3. Who can declare or establish closure?
4. Who makes the decision to close a public place?
5. What is the process for initiating and implementing closure?
6. What is the process for enforcing closure and who enforces it?
7. What are the penalties for violating closure?
8. What are the procedural and due process requirements for closure?
9. Is compensation available for closure? If so, what is it?
10. How long can a closure last?
11. How can it be renewed?
12. Describe the authority/process/notice requirements for ending a closure.

B. *Sufficiency of powers/authorities to authorize closure of public places during a declared public health emergency*

Discuss the sufficiency of the authorities and powers to authorize closure of public places during a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.

1. Potential gaps?
2. Uncertainties?
3. Legal provisions that could inhibit, limit, or modify the jurisdiction's authority to close public places? (Examples: state administrative practice acts, specific provisions in law related to closure.)

C. *Legal powers/ authorities to order closure of public places in the absence of a declared public health emergency*

What are the powers, authorities, or procedures to enable, support, authorize, or otherwise provide a legal basis for closure by state or local officials of public places (e.g., public facilities, private facilities, and business) in the absence of a declared public health emergency? For each of the jurisdiction's legal powers, authorities, and procedures that could be used to authorize, prohibit, or limit closure, please address the following issues:

1. What are the powers and authorities authorizing closure?
2. What are the powers and authorities prohibiting closure?
3. Who can declare or establish closure?
4. Who makes the decision to close a public place?
5. What is the process for initiating and implementing closure?
6. What is the process for enforcing closure and who enforces it?
7. What are the penalties for violating closure?
8. What are the procedural and due process requirements for closure?
9. Is compensation available for closure? If so, what is it?
10. How long can a closure last?
11. How can it be renewed?
12. Describe the authority/process/notice requirements for ending a closure.

D. *Sufficiency of powers/ authorities to authorize closure of public places in the absence of a declared public health emergency*

Discuss the sufficiency of the authorities and powers to authorize closure of public places in the absence of a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.

1. Potential gaps?
2. Uncertainties?

3. Legal provisions that could inhibit, limit, or modify the jurisdiction's authority to close public places? (Examples: state administrative practice acts, specific provisions in law related to dismissal.)

IV. Dismissal of Schools

A. *Legal powers/ authorities to authorize dismissal of schools during a declared public health emergency*

What are the powers, authorities, or procedures to enable, support, authorize, or otherwise provide a legal basis for school closure by state or local officials (e.g., public schools, private schools, universities, day care centers) during a declared public health emergency? For each of the jurisdiction's relevant legal powers, authorities, and procedures including, but not limited to, umbrella, general public health, or emergency powers or authorities, that could be used to authorize, prohibit, or limit closure, please address the following issues:

1. What are the powers and authorities authorizing dismissal?
2. What are the powers and authorities prohibiting dismissal?
3. Who can declare or establish dismissal?
4. Who makes the decision to dismiss schools (i.e. to implement a declaration of dismissal)?
5. What is the process for initiating and implementing dismissal?
6. Are there plans in place to continue reduced and free lunches to students who receive those services while schools are open?
7. Are there plans in place to use school facilities and/or employees for other functions/services while classes are not in session?
8. How long can a dismissal last?
9. How can it be renewed?
10. Describe the authority/process/notice requirements for ending dismissal/reopening schools?

B. *Sufficiency of powers/ authorities to authorize dismissal of schools during a declared public health emergency*

Discuss the sufficiency of the authorities and powers to authorize dismissal of schools during a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.

1. Potential gaps?
2. Uncertainties?

3. Legal provisions that could inhibit, or restrict the jurisdiction's authority to dismiss schools? (Examples: state administrative practice acts, specific provisions in law related to dismissal.)

C. *Legal powers/ authorities to authorize dismissal of schools in the absence of a declared public health emergency*

What are the powers, authorities, or procedures to enable, support, authorize, or otherwise provide a legal basis for school dismissal by state or local officials (e.g., public schools, private schools, universities, day care centers) in the absence of a declared public health emergency? For each of the jurisdiction's legal powers, authorities, and procedures that could be used to authorize, prohibit, or limit closure, please address the following issues:

1. What are the powers and authorities authorizing dismissal?
2. What are the powers and authorities prohibiting dismissal?
3. Who can declare or establish dismissal?
4. Who makes the decision to dismiss schools?
5. What is the process for initiating and implementing dismissal?
6. Are there plans in place to continue reduced and free lunches to students who receive those services while schools are open?
7. Are there plans in place to use school facilities and/or employees for other functions/services while classes are not in session?
8. How long can a dismissal last?
9. How can it be renewed?
10. Describe the authority/process/notice requirements for ending dismissal/reopening schools?

D. *Sufficiency of powers/ authorities to authorize dismissal of public places in the absence of a declared public health emergency*

Discuss the sufficiency of the authorities and powers to authorize dismissal of schools in the absence of a declared public health emergency, and any potential gaps or uncertainties in those powers and authorities.

1. Potential gaps?
2. Uncertainties?
3. Legal provisions that could inhibit, limit, or modify the jurisdiction's authority to close schools? (Examples: state administrative practice acts, specific provisions in law related to dismissal.)

V. Cancellation of Mass Gatherings

(Please note that while the term ‘cancellation’ is used throughout this section, ‘postponement’ and ‘suspension’ of mass gatherings should also be considered. Cancellation and postponement are measures used before a gathering has started; whereas suspension is used when a gathering has already begun.

A. *Legal authorities to order cancellation of mass gatherings during a declared public health emergency*

Identify the legal authorities and procedures that enable, support, authorize, or otherwise provide a legal basis for state or local officials’ cancellation of mass gatherings (e.g., city-wide holiday celebrations, large sporting events, and large trade shows) during a declared public health emergency. For each of the jurisdiction’s relevant legal powers, authorities, and procedures—including, but not limited to, umbrella/overarching, general public health, or emergency powers or authorities.

1. Which officials are authorized to declare cancellations of mass gatherings?
2. Which officials are authorized to implement cancellations of mass gatherings?
3. What is the process for initiating and implementing cancellations of mass gatherings?
4. What is the process for enforcing cancellation; which officials are authorized to enforce cancellations of mass gatherings?
5. What, if any, are the penalties for violating cancellations of mass gatherings orders?
6. What procedural and due process requirements are associated with cancellations of mass gatherings?
7. Is compensation available for cancellations of mass gatherings? If so, what is it and how is it accessed?
8. How long can a mass gathering be suspended or postponed?
9. How can an order to suspend or postpone mass gatherings be changed, renewed or extended?
10. What legal authorities and procedures are associated with ending a suspension of mass gatherings order?

B. *Sufficiency of legal authorities to authorize cancellation of mass gatherings of public places during a declared public health emergency*

Assess the sufficiency of the jurisdiction’s legal authorities to cancel mass gatherings during a declared public health emergency and identify any potential gaps or uncertainties in those powers and authorities.

1. Are there potential gaps in those legal authorities?
2. Are there potential uncertainties in those legal authorities?

3. Are there any legal provisions that could inhibit, limit, or modify the jurisdiction's authority to cancel mass gatherings?

C. *Legal authorities to order cancellations of mass gatherings in the absence of a declared public health emergency*

1. Which officials are authorized to declare cancellations of mass gatherings?
2. Which officials are authorized to implement cancellations of mass gatherings?
3. What is the process for initiating and implementing cancellations of mass gatherings?
4. What is the process for enforcing cancellations of mass gatherings; which officials are authorized to enforce cancellations of mass gatherings?
5. What, if any, are the penalties for violating cancellation of mass gatherings orders?
6. What procedural and due process requirements are associated with cancellations of mass gatherings?
7. Is compensation available for cancellations of mass gatherings? If so, what is it and how is it accessed?
8. How long can a mass gathering be suspended or postponed?
9. How can an order to suspend or postpone mass gatherings be changed, renewed or extended?
10. What legal authorities and procedures are associated with ending a suspension of mass gatherings order?

D. *Sufficiency of legal authorities to cancel mass gatherings in the absence of a declared public health emergency*

Assess the sufficiency of the jurisdiction's legal authorities to cancel mass gatherings in the absence of a declared public health emergency and identify any potential gaps or uncertainties in those powers and authorities.

1. Are there any potential gaps in those legal authorities?
 2. Are there any potential uncertainties about those legal authorities?
 3. Are there any legal provisions that could inhibit, limit, or modify the jurisdiction's authority to cancel mass gatherings?
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