

The Social Distancing Law Project Template: A Method for Jurisdictions to Assess Understanding of Relevant Legal Authorities

Karen Leeb, JD, MLS; Denise Chrysler, JD; Richard A. Goodman, MD, JD, MPH

ABSTRACT

Methods: The Centers for Disease Control and Prevention and the Association of State and Territorial Health Officials selected 17 state and large local jurisdictions on the basis of their proximity to federal quarantine stations and collaborated with their state health department legal counsel to conduct formulaic self-assessments of social distancing legal authorities, create tables of authority, and test and report on the laws' sufficiency (ie, scope and breadth). Select jurisdictions also held tabletop exercises to test public health and law enforcement officials' understanding and implementation of pertinent laws. This report presents findings for Michigan, which completed the legal assessment and tabletop exercise and made several recommendations for change as a result.

Results: Officials in Michigan concluded that there are sufficient existing laws to support social distancing measures but that a spectrum of questions remained regarding implementation of these legal authorities. Based on the findings of this assessment, Michigan initiated actions to address areas for improvement.

Conclusions: The results of this project highlighted the value of integrally involving the state health department's legal counsel—those most familiar with and who advise on a given state's public health laws—in the periodic identification, assessment, and testing of the state's legal authorities for social distancing and other measures used in response to many public health emergencies.

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Key Words: social distancing law project, template, self-assessment, legal authorities, influenza, pandemic

Recent events have validated predictions that the recurrence of an influenza pandemic was not an issue of *if*, but of *when*. Nearly 100 years since the deadly 1918 influenza pandemic, health officials continue to monitor new and reemerging infections, such as influenza A (H5N1), for genetic and antigenic variation and for indications of more efficient human-to-human spread. Even if influenza A (H5N1) does not ultimately transform into a pandemic-causing virus, the risk of a pandemic has been considered inevitable and, with the widespread emergence of the novel influenza A (H1N1) virus in 2009, now realized. Responding to such events could require a spectrum of pharmaceutical and nonpharmaceutical interventions, including social distancing measures such as quarantine, isolation, closing businesses, and canceling public events. Such law-based and legally enforced communitywide infection control measures, however, have not been widely used in the United States since the first half of the 20th Century.¹ The continued threat of a widespread influenza pandemic, including influenza A (H5N1) and influenza A (H1N1), has necessitated taking a fresh look at these measures and their legal bases.²

The federal and state governments have shared interests in ensuring that public health professionals are

competent in the use of law to use social distancing measures. Two strategically significant documents—the National Strategy for Pandemic Influenza³ (dated November 2005) and the 2006 National Strategy for Pandemic Influenza Implementation Plan⁴ (dated May 2006) developed by the US Homeland Security Council—emphasized the important role that social distancing measures would have in helping to minimize the impact of pandemic influenza. The documents also highlighted the need for governments at all levels to assess their legal capacity to flexibly respond to shifting circumstances during a pandemic.⁴ In particular, the Homeland Security Council tasked the US Department of Health and Human Services with providing guidance to all levels of government “. . . on the range of options for infection control and containment, including those circumstances where social distancing measures, limitations on gatherings, or quarantine authority may be an appropriate public health intervention.”⁴

Despite the need for states to thoroughly and systematically review and test their relevant legal authorities, no method existed—only a tool for assessing legislative provisions more broadly, the Model State Emergency Health Powers Act.⁵ To address the mandates and

TABLE 1

Categories of Inquiry Included in the Legal Assessment Instrument and the Considerations That Applied to All Categories

Categories

Restrictions on the movement of persons (eg; group and area quarantine)
 Curfew authority
 Interjurisdictional cooperation and coordination for restricting the movement of persons
 Closure of public places
 Mass prophylaxis readiness (eg, blanket prescription orders, distribution of countermeasures)
 Other issues and concerns particular to the jurisdiction

Considerations for all categories

Questions considered during and absent declared emergencies
 Establishing and ordering measures
 Enforcement and penalties
 Duration of measures: ending and renewing
 Due process and potential liabilities
 Potential legal barriers
 Potential gaps or uncertainties

needs, the Centers for Disease Control and Prevention (CDC) created a method for states and other jurisdictions to assess their understanding of laws authorizing the use of social distancing measures in response to a pandemic of influenza or other communicable respiratory disease. The CDC's Public Health Law Program collaborated with the Association of State and Territorial Health Officials (ASTHO) to implement the method in 17 jurisdictions, chosen in part based on their proximity to CDC quarantine stations. This method, the Social Distancing Law Project (SDLP), was designed to help jurisdictions use a formulaic approach to assess their officials' understanding of law authorizing social distancing measures; the template for this assessment comprises a set of questions for conducting a structural review of relevant law, creating a table of authorities, and implementing a hypothetical scenario as a tabletop exercise for testing officials' understanding of pertinent laws. The military has used simulation games and exercises to improve its preparedness levels for centuries, a tool also adopted by the federal government in recent years to evaluate participants' understanding of their roles and responsibilities through tabletop exercises in preparedness.^{6,7} Other studies have illustrated the beneficial impact of tabletop exercises to improve participants' competencies for applying legal authorities for public health emergencies.⁸

In this article, we summarize the SDLP method and its implementation by 17 selected jurisdictions, and we report the experience of 1 participating jurisdiction (Michigan) that agreed to allow us to share its materials as a case example for other states and jurisdictions that may elect to use SDLP as a tool for addressing their legal preparedness for pandemic influenza. We also describe the SDLP template, the practical tool developed for the purpose of assisting other jurisdictions. The SDLP was designed to assist jurisdictions in addressing the 4 core ele-

ments of public health emergency legal preparedness as outlined in the National Action Agenda for Public Health Legal Preparedness⁹: laws and authorities essential for implementing social distancing measures; competencies to apply such authorities; cross-jurisdictional and cross-sector coordination; and information/best practices,² as integral facets of pandemic preparedness.

METHODS

The CDC identified the 17 participating jurisdictions by selecting from among states or territories that host or border jurisdictions with CDC quarantine stations. Generally, CDC quarantine stations are charged with responding to illnesses or deaths on airplanes or other conveyances at points of entry and working with federal, state, and local partners on preparedness activities related to quarantine and isolation. This selection criterion was important because it encompassed the roles of quarantine stations in pandemics, multijurisdictional issues, and the likelihood for strengthening interactions and coordination among the people involved in such a response. Practical constraints limited the implementation of the project's method to some jurisdictions having or bordering states with CDC quarantine stations (Alaska, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York State, Puerto Rico, Texas, Virginia, and Washington).

An important feature of this project was to engage key people (the state health official, state health agency legal counsel, and public health preparedness staff) to assess their jurisdictions' applicable laws. This approach maximized the identification and interpretation of these laws by the officials who bear primary responsibilities for these and other related functions (eg, implementation and enforcement within their respective jurisdictions). This approach also helped us comprehensively assess all relevant legal authorities authorizing the use of social distancing measures, including the authorities that are not traditional public health laws, such as curfew authorities, closure law, and certain aspects of takings (of private property).

The CDC specified 2 basic components for this project: First, each participating jurisdiction was to conduct a "legal assessment" of relevant, applicable laws. Second, a selected subset ($n = 11$) of the jurisdictions would follow the legal assessment by convening a legal consultation meeting. The purpose of the legal assessment was to create a consistent approach for all participating jurisdictions to identify and review their legal authorities to implement social distancing measures and to issue blanket prescriptions in the event of a pandemic, and begin identifying any gaps in or uncertainties regarding the sufficiency (ie, scope and breadth) of those authorities (Table 1).

Of the 17 jurisdictions, 11 also conducted legal consultation meetings (LCMs), partial- to full-day programs that combined presentation of the legal assessment results with a tabletop scenario designed to assist in assessing understanding and deter-

mining the sufficiency of the jurisdiction's legal authority for social distancing measures. (ASTHO was able to provide stipends to the participating states to help cover costs, without which the work would likely not have been completed on this scale and within the given time frame.) The CDC and ASTHO recommended that invited participants represent the sectors that would be involved in an actual event, including but not limited to state and local health officials and their counsel; governors and attorneys general and their counsel; state legislators, their staff, and counsel; other relevant state agencies (law enforcement, emergency response, homeland security, education, and transportation); state and local boards of health and education; the judiciary; tribal leaders and health officials and their counsel; CDC quarantine station representatives and other appropriate federal officials (eg, attorneys from the US Department of Health and Human Services); representatives of business and other key organizations (health care, hospitals, chambers of commerce); and members of the private bar (attorneys for health care entities and other private attorneys).

The CDC and ASTHO developed and provided participating jurisdictions with a template for the legal assessment questions to address the Homeland Security Council action items. The CDC also developed a hypothetical scenario that jurisdictions could adapt for use in the LCM exercises.¹¹ The ASTHO incorporated the legal assessment questions and a hypothetical scenario into a guidance document to help the participating jurisdictions with all aspects of the project, from building a project organizing team to developing after-action reports. To encourage participation in the project, the ASTHO and CDC agreed not to share jurisdictions' reports and results without their consent. At least 3 states have made some of their project materials and reports publicly available, including Michigan, which is featured here as a case study. (Georgia and Virginia have also shared materials publicly.)

RESULTS

Case Example: Social Distancing Law Project Results for Michigan

Officials in Michigan used the guidance from the CDC and ASTHO to conduct a legal assessment and an LCM. In summer 2007, the Michigan Department of Community Health (MDCH) established a 12-member project team to plan and implement the SDLP. Team members represented key MDCH functional and program areas (eg, epidemiology, surveillance, emergency preparedness, medical, and legal), the Michigan Department of Attorney General, and the Officer in Charge of the CDC Quarantine Station at the Detroit Metropolitan Wayne County Airport. The MDCH Legal Affairs Director, an attorney, served as project manager.

Legal Assessment

In addition to the attorneys, other project team members assisted in conducting research for, or prepared the legal assessment, or both, including emergency management staff, communicable disease staff, and a physician. Work was distributed

among committee members who identified information and prepared responses to questions about legal powers during and absent a declared emergency, relevant portions of the state's All-Hazards Response Plan,¹² Michigan's pandemic influenza plan,¹³ mutual aid agreements to facilitate multijurisdictional response, distribution of the Strategic National Stockpile,¹⁴ mass immunization, and antiviral administration.

The Michigan SDLP team reviewed numerous laws, response plans, and agreements in place to support effective response to pandemic influenza, including pharmaceutical, infection control, and social distancing measures. The MDCH deemed the assessment valuable in identifying areas of law that require further research and deliberation. Some issues were resolved by further research and improved understanding of legal principles. For example, as a result of the assessment, the Michigan team conducted further research and analysis to satisfy itself that the state and local health officers have authority to take necessary actions to protect the public's health on university campuses.

The exercise also led to the development of procedures, particularly for social distancing measures that implicate constitutional rights of due process, freedom of religion, and freedom of speech and assembly. In this regard, the Michigan Public Health Code does not specify procedures to provide due process when the state health director issues an emergency order that deprives individuals of their constitutional rights. Michigan has drafted potential rules to provide due process, which have been submitted for review by the Michigan Pandemic Influenza Coordinating Committee's Legal/Public Safety Subcommittee. Compensation for private property taken for the common good also surfaced as an issue needing further review.

The assessment highlighted the importance of policy and ethical considerations, as well as legal issues, in planning and implementing response measures to pandemic influenza. The Michigan team cited potential examples such as ordering businesses to close with resulting income losses to the business owners, and the loss of income for a single mother who has been directed into home quarantine because she was exposed to acutely ill passengers while on a commercial airliner, but she has no sick leave.

The assessment also helped the MDCH and others in identifying potential gaps in response plans involving particular law-based measures (eg, mass transit limitations and curfew) and some logistical challenges, including those associated with enforcement of measures. Some areas that were deemed in need of further review with other government partners included implementation of social distancing measures involving Michigan's public universities, which, under the state's constitution, are a "branch" of state government, autonomous within their own spheres of authority^{15,16}; on federal lands; and on Indian land. The written assessment provided a record of legal issues that have been and still need to be addressed, and represents a ref-

erence document available to staff and legal counsel and for local health departments and other partners in public health emergency preparedness.¹¹

Legal Consultation Meeting

The MDCH convened the LCM at the Detroit Metropolitan Wayne County Airport. This site was chosen because the federal quarantine station is located at the airport's McNamara International Terminal. Holding the LCM at this site also fostered participation by other key officials, such as the Wayne County Airport Authority, Transportation Security Administration, Federal Marshal, and their legal counsel. Participation by these officials was important because the hypothetical scenario implicated legal issues related to the arrival of 2 international flights with passengers potentially infected with and exposed to pandemic influenza.

The project team recruited a professor from the University of Michigan School of Public Health, Peter D. Jacobson, JD, MPH, a nationally recognized expert on public health law, to moderate the LCM. The 64 LCM participants comprised a diverse group of experts with perspectives in many relevant areas of public health (n = 20), emergency management (n = 21), public relations (n = 1), and law (n = 18), and other (n = 4).

During the morning session, speakers provided a review of relevant Michigan and federal laws that govern implementation of social distancing measures. The afternoon session was a tabletop exercise adapted from the scenario provided in the SDLP guidance document. Participants were assigned to breakout groups, each consisting of approximately 8 persons, to discuss the scenario. Before the LCM, participants were assigned to tables to ensure a mix of disciplines; each table's participants included, at a minimum, a legal expert and public health expert. Also before the LCM, table facilitators had been identified and were given an orientation to and instructions for managing the exercise discussion. Although the CDC-ASTHO template and guidance for LCMs suggest that the tabletop scenario and questions be revealed only sequentially as the problem unfolds, in Michigan, all participants were provided with the scenario and potential discussion questions in advance of the LCM to prompt advance consideration of the issues, legal authorities, and potential responses. The Michigan planning team believed that its approach would provide an effective means for improving legal preparedness competencies among public health professionals and their attorneys.

Discussion questions were divided into three sets, each of which was directed toward a consideration of relevant and underlying legal preparedness issues:

1. Actions and responses related to a detected increase of influenzalike illness in Michigan
2. Actions and responses related to the impending arrival of 2 international flights with passengers who may be infected with and passengers and crew potentially exposed to avian influenza

3. Responses and measures related to private and public gatherings to control the spread of pandemic influenza

The project team believed that it was crucial for LCM participants to discuss not only what government leaders “could” do (ie, actions and responses authorized by law), but also what they “should” do given the information available at each phase of the scenario. Thus, discussion questions required that participants specifically identify potential dangers or threats and the legal basis for response measures to address these dangers or threats; weigh pros and cons for each option, considering health, economic, and political implications; assess risk (eg, the risk of acting prematurely vs the risk of delay); and assess the practicality of obtaining compliance and enforcement. Participation by representatives of key sectors and organizations—such as law enforcement, the judiciary, the Governor's legal counsel, the Michigan Department of Civil Rights, and the Detroit Department of Transportation—helped to identify and define broader concerns, practical and logistical issues, and the impact of various response measures on vulnerable populations.

Between each segment, the moderator facilitated discussion among all participants about understanding and sufficiency of the law and potential concerns that need to be addressed. Additional feedback was obtained by note cards completed at tables as issues arose, evaluations that were completed by participants, and information collected by experienced evaluators who observed the exercise and filed an after-action report¹⁷ with the US Department of Homeland Security. Homeland Security Exercise and Evaluation Program (HSEEP) standards must be followed to meet requirements for public health emergency preparedness grants. For all such exercises, an after action report must be filed through the US Department of Homeland Security's portal.

We have summarized selected recommendations for follow-up through the Michigan Pandemic Influenza Coordinating Committee Legal/Public Safety Sub-committee (Table 2).

In Michigan, lessons learned from completing the LCM included the value of holding the meeting at the international terminal of the Detroit Metropolitan Wayne County Airport, which helped to engage airport staff who had limited knowledge of the role and powers of state and local public health departments, and enhance the urgency and reality of the scenario. In discussing the scenario, participants often identified multiple levels of government and agencies that were empowered to act to address the emergency. Holding the LCM at this location also permitted some LCM participants to tour and become acquainted with operations within the airport's quarantine station and associated screening areas.

DISCUSSION

Assessing the sufficiency of legal authorities for social distancing measures before a disaster occurs is of vital importance because legal questions and challenges commonly arise during *and*

after public health emergencies. Prior studies and exercises have called for an improved understanding of public health laws,^{18,19} but there have been limited means to assess the legal underpinnings for preparedness efforts owing, in part, to the enormity of the task. The SDLP method highlights the importance and potential benefits of having state legal counsel inventory and apply their state’s authorities before an emergency occurs. State legal counsel are the most familiar with these authorities and are in the best position to identify and analyze the laws and any potential gaps that might exist. Furthermore, by completing the assessment, counsel are better prepared to provide legal advice for using state law to respond to a public health emergency. Ultimately, this process benefits the state because it is the state’s legal counsel, not academics or national experts, who would provide legal support to state health departments during a public health emergency. Moreover, the recent novel influenza A (H1N1) response raised questions for many jurisdictions about the sufficiency of their legal infrastructure for mass pharmaceutical countermeasures, another of the topics for which the SDLP template may be used by states to address gaps in legal preparedness.

The SDLP method can also be adjusted to address other legal preparedness issues. The project team from Michigan noted that the method is scalable and flexible—that it can be repeated with different groups and different legal preparedness issues. Implementing the project method need not be costly: because this approach relies on “inside experts,” it is not necessary to pay “outside experts” for consulting or travel. Although the MDCH had already assessed and addressed several aspects of legal preparedness in a piecemeal manner, the method provided a framework to consolidate all of the legal work already completed through a structured and comprehensive assessment.

States that receive federal funding for pandemic influenza planning through Public Health Emergency Preparedness and Hospital Preparedness Program cooperative agreements are required to establish a pandemic influenza coordinating committee to articulate strategic priorities and oversee the development and execution of the jurisdiction’s operational pandemic plan.²⁰ Michigan has processed and pursued recommendations that resulted from completion of the SDLP through its established pandemic influenza coordinating committee, the Legal/Public Safety Subcommittee.

For the jurisdictions that held an LCM, working through a pandemic scenario with participation from all sectors involved in emergency response proved to be a practical and valuable means for increasing understanding and implementation of legal authorities. Jurisdictions that completed LCMs reported positive results and identification of potential gaps and communication issues across sectors, including law enforcement, emergency management, and public health. The LCMs were also a tool to increase participants’ competencies with regard to the relevant laws and their implications for emergency response efforts.

Although limitations on time and resources make such comprehensive endeavors difficult, this type of applied research project proved more valuable in terms of overall analysis and value for the participants as compared with a “black letter law” study conducted by people not directly working within each state. States that decide to adopt this approach will not face strict time limits faced by the SDLP states, but the need for financial and human resources will remain. The template developed by the ASTHO and CDC is intended to optimize streamlining of the process.

TABLE 2

Selected Recommendations Generated by the Michigan Social Distancing Law Project Legal Consultation Meeting to Strengthen Legal Preparedness for Pandemic Influenza in Michigan

Recommendation	Follow-up
Pursue legislation to improve enforceability of emergency orders issued by local health officers under the Public Health Code	Seek amendment to Public Health Code to make violation of local health officers’ emergency orders a misdemeanor. HB 4900 ¹⁰ has been introduced to so provide. This mirrors law that already makes violation of the state health officer’s emergency orders a misdemeanor.
Clarify Michigan law regarding medical and public health measures targeting unaccompanied minors (eg, quarantine, vaccination, medical care)	The Michigan Department of Community Health completed “Guidance of Unaccompanied Minors Who Present at Dispensing Sites” as an appendix to the State of Michigan Strategic National Stockpile Plan. ^a
Promote training of judiciary and stakeholders on legal authorities for social distancing	Michigan Supreme Court Judicial Institute hosted “Emergency Management Training and Webcast for Judges and Court Administrators” on September 25, 2008, covering legal authorities for social distancing and other response measures to a public health emergency. ^b
Establish an administrative process to provide due process for social distancing measures	Recommendation developed to amend communicable disease rules to provide due process; referred to the public safety and legal subcommittee of the Michigan Pandemic Influenza Coordinating Committee

^aThe State of Michigan Strategic National Stockpile Plan is not publicly available.

^bThis training is posted on the Michigan Judicial Institute’s secure Web site. It is password protected and not available to the public.

TABLE 3

Additional Legal Preparedness Resources and Tools

Resource	Link
American Health Lawyers Association: Pandemic influenza preparedness checklist	http://www2a.cdc.gov/phlp/docs/Pan-Flu08.pdf
Centers for Disease Control and Prevention (CDC) Public Health Law Program: Forensic Epidemiology 3.0: a case study on public health and law enforcement coordination for pandemic response	http://www2a.cdc.gov/phlp/phe1.asp
CDC Public Health Law Program: Guide to developing a memorandum of understanding for cross-sector implementation of community response measures	http://www2a.cdc.gov/phlp/emergencyprep.asp
CDC Public Health Law Program: National Action Agenda for public health legal preparedness	http://www2a.cdc.gov/phlp/summit2007.asp
CDC Public Health Law Program: Portfolio of public health law bench books	http://www2a.cdc.gov/phlp/port_bench.asp
Centers for Law and the Public's Health: Dismissal of school children in the context of pandemic influenza and other emergencies	http://www.publichealthlaw.net/Projects/panflu.php

States can stretch their limited time and resources by designing the LCM to meet exercise requirements for Public Health Emergency Preparedness and Hospital Preparedness Program cooperative agreements, which require that awardees conduct preparedness exercises to test capabilities. These exercises must comply with the Homeland Security Exercise and Evaluation Program²¹ standards for exercise planning and evaluation.²² The MDCH project team included its exercise coordinator, who ensured that the LCM met these standards. Thus, Michigan was able to count its LCM toward its exercise requirements.

The project method provides a vehicle for jurisdictions to address all 4 core elements of public health emergency legal preparedness⁹ in the context of law-based social distancing measures. The legal assessment and corresponding table of authorities ensure that sufficient legal authorities exist; the competencies of key people to apply those laws are tested in the legal consultation meeting—while simultaneously strengthening cross-jurisdictional and cross-sector coordination; and the information on lessons learned and best practices assists the participating state and other jurisdictions that want to conduct the project.

CONCLUSIONS

Michigan and the other participating jurisdictions found that they have sufficient, although not uniform, legal authorities to address pandemic influenza preparedness. Project jurisdictions also identified potential problem areas within their legal and operational capacities that they are now addressing. All states that participated in the original project reported that the exercise was beneficial to their preparedness efforts. Georgia found the method so valuable that it replicated the project at the local level in 3 jurisdictions. Virginia has posted the materials from its legal assessment and legal consultation meeting online to share with other interested jurisdictions.²³ Although every participating jurisdiction had a slightly different experience with the project, all reported that the exercise was valuable to their preparedness efforts. The specific examples from Michigan are generally representative of the kinds of issues and lessons learned in the other jurisdictions. The CDC and ASTHO agreed not to publish project materials and results without a jurisdiction's consent.

The ASTHO and CDC have provided a template for use by other jurisdictions interested in replicating the project, and they encourage states to explore the rewards of this method. Individual states, tribes, territories, and local jurisdictions can use the template as a tool to conduct assessments of their key officials' competencies for understanding the nature and status of their jurisdictions' laws for supporting implementation of response plans and law-based social distancing measures. At a minimum, we suggest use of the legal assessment component to create a systematic and comprehensive review of the applicable law consolidated in 1 document. Jurisdictions may also consider taking steps to ensure ongoing dialogue between the health and emergency officials who are charged with exercising legal authority for social distancing and other measures and their legal counsel to ensure clear understanding of the scope and limitations of these authorities.

We also suggest the use of the template in conjunction with other pandemic and related legal preparedness information resources and tools listed in Table 3.

About the Authors

Author Affiliations: Ms Leeb and Dr Goodman are with the Public Health Law Program, Office of Strategy and Innovation, Centers for Disease Control and Prevention; and Ms Chrysler is with the Michigan Department of Community Health.

Correspondence: Address correspondence and reprint requests to Richard Goodman, MD, JD, MPH, Public Health Law Program, Centers for Disease Control and Prevention, Mailstop D-30, 1600 Clifton Rd, Atlanta, GA 30333 (e-mail: rag4@cdc.gov).

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The Michigan project team members were as follows: Denise Chrysler, JD, Project Lead, Director, Office of Legal Affairs, MDCH; Deborah Garcia-

Luna, JD, MAHS, Project Co-Lead, Legal Analyst, Office of Legal Affairs, MDCH; Katherine Allen-Bridson, RN, BSN, CIC, Border Health Project Coordinator, MDCH; Peter Coscarelli, Acting Manager, Support Services Unit, Office of Public Health Preparedness, MDCH; Robert Ianni, JD, Division Chief, Tobacco and Special Litigation Division; Director, Homeland Security, Michigan Department of Attorney General; Karen Krzanowski, MA, MPH, PEM, State and Federal Policy Specialist and Emergency Management Coordinator, Office of Public Health Preparedness, MDCH; Corinne Miller, PhD, Director and State Epidemiologist, Bureau of Epidemiology, MDCH; Gabriel J. Palumbo, MBA, MPH, Officer in Charge, CDC Detroit Quarantine Station; Mary Grace Stobierski, DVM, MPH, Manager, Infectious Disease Epidemiology Section, MDCH; Ronald J. Styka, JD, Division Chief, Community Health Division, Michigan Department of Attorney General; Eden V. Wells, MD, MPH, Medical Epidemiologist, Bureau of Epidemiology, MDCH; and Marie Parker, Executive Secretary, Office of Legal Affairs, MDCH, in charge of assembling report and logistics.

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