



# **PARTNERSHIP *for*** **PUBLIC HEALTH LAW**

*Advancing Public Health Through Law*

## **Due Process and Public Health**

***“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.”***

*Fifth Amendment to the U.S. Constitution*

The Fifth Amendment to the United States Constitution contains the Due Process Clause, which limits the federal government’s actions in respect of liberty and property rights. The Fourteenth Amendment applies these limitations to state actions. Because local jurisdictions derive their power from the state, the limitations apply to actions of local government as well. In addition, the Fourth Amendment guarantees the “right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” This limitation applies equally to federal, state and local public health officials. Because searches and seizures in public health may invoke both due process and search and seizure concerns, this fact sheet addresses them together. Generally, adhering to due process requirements will assure that search and seizure protections are respected. Additionally, state constitutions may contain due process and search and seizure protections; these provisions may not limit the federal provisions but may provide more protection. Your local counsel can advise you on any unique state provisions.

Concerns about due process and the Fourth Amendment arise in many public health contexts. Most notable, these constitutional provisions must be considered when conducting inspections or administrative searches, seizing property, imposing penalties or otherwise depriving an individual of liberty.

Because due process is a flexible concept, the extent of process required varies greatly. At its highest, due process requires a full blown hearing; at the opposite end, an informal, non-adversarial review may be appropriate. In determining the extent of procedural safeguards that must be in place, public health officials should consider: 1) the nature of the private interest affected; 2) the risk of an erroneous decision; and 3) the fiscal and administrative burdens of providing procedural safeguards. State or local law may impose procedural requirements that exceed what is required by the Constitution. The constitutional requirements are the minimum that must be followed; a public health agency also must adhere to statutory or regulatory requirements in all circumstances.

The **high end** of the due process scale requires:

- a) written notice of the behavior or condition creating the risk, including reference to any relevant laws that are being violated;
- b) access to counsel (at the subject’s expense in a civil proceeding);
- c) a hearing before an impartial decision maker who was not involved in the action under review, with the opportunity to present evidence, make legal arguments and conduct cross-examination;
- d) a written decision; and
- e) the opportunity to appeal.

The **low end** of the due process scale allows for an administrative official to make a decision based on staff reports or similar information.

### **Liberty Interests and Public Health**

Liberty interests are invoked when the action of a public health official or department will interfere with an individual’s ability to move about freely or will invade the individual’s body in some way. The most severe actions, such as quarantine or civil commitment and forced medication, require a full blown hearing. In an emergency, an individual may be detained or medicated prior to a hearing, but the hearing should occur as soon as possible (generally within a few days). Intrusions into the body, such as a compulsory medical examination or testing, require some procedural safeguards (perhaps notice and an opportunity to be heard by an impartial decision maker)

but not a full hearing. And lesser forms of invasion, including disease surveillance, require only minimal safeguards to avoid abuse of discretion by administrative officials. A public health official considering action that would restrain the liberty or invade the body of an individual must adhere strictly to any statutory or regulatory requirements and exercise discretion in a fair and rational manner. It is always wise to seek advice of counsel before taking any significant action outside the ordinary course.

A civil commitment proceeding or order of isolation should contain almost all of the qualities of a criminal trial.

## Property Interests and Public Health

Property, or economic, interests are also protected by the due process clause and the Fourth Amendment. In public health practice, this means there are procedural rules that apply to inspections, actions on occupational or business licenses and detainment or seizure of goods. The constitutional protections apply to seizures based on civil and criminal law.

### SEARCH AND SEIZURE IN PUBLIC HEALTH PRACTICE

Health departments conduct various types of inspections. Some of them require consent or a warrant but others are permitted by statute or regulation. Typically, a government agency is required to get owner consent or secure a warrant before entering onto the property of an individual or business entity to conduct a search.

Exceptions particularly relevant to public health practice exist. First, an individual or representative of a business may consent to a search; this is quite common with respect to health and safety inspections. Second, public health officials may conduct inspections without a warrant in an emergency, when there is a significant and imminent threat to public health. Third, public health staff may inspect areas of a business that are open to the public.

There is no universal definition of pervasively regulated business. However, warrantless inspections are generally permitted with respect to (1) hazardous operations, such as mining or firearms sales; (2) licensed health care facilities, such as hospitals and nursing homes; (3) food manufacturing facilities and restaurants; and (4) child care facilities.

Perhaps most importantly, public health officials may conduct inspections of “pervasively regulated” businesses without a warrant. In these circumstances, the regulatory scheme may imply consent to inspections and searches or serve as notice of possible inspections and searches. These may be scheduled visits or random inspections. Warrantless inspections or searches of pervasively regulated businesses must adhere to the statutory procedures for such visits and must be con-

ducted for the public health purpose underlying the regulatory scheme and by the agency with authority to conduct the inspection. For example, a restaurant may be subject to a warrantless inspection by the local health department’s enforcement officer to assure compliance with food safety laws, but such an inspection may not proceed if the purpose of the inspection is to secure evidence for a criminal proceeding.

In addition to allowing for inspections and searches, many public health laws permit the seizure and destruction of property. Often the statute dictates the procedures that the agency must employ in respect of due process and Fourth Amendment rights, allowing for immediate seizure and destruction in emergency scenarios. Typically, seizures require a modest level of due process, such as notice of the violation and an opportunity to be heard in opposition; a full trial is not necessary. The nature of the seized property should be considered. If perishable items are seized, the property owner should be heard quickly to avoid unnecessary spoilage. The same urgency may not exist with respect to seizure of non-perishable items. If the seizure and/or destruction is executed within the statutory requirements, the health department will not be liable for economic loss suffered by the property owner.

### LICENSE SUSPENSION OR REVOCATION

Health departments may have authority to regulate licensees of certain businesses that impact public health. For example, a local health department may be responsible for regulating licensed food service establishments or tobacco retailers. A state health department may have authority to regulate dental hygienists or other health care professionals.

The license to operate a business or engage in an occupation may rise to the level of a property interest such that due process requirements must be met before a license may be suspended or revoked. To comply with these requirements, the agency should provide notice of the suspension or revocation, clearly setting out the basis for the action; give the licensee the opportunity to be heard; and provide for an appeal of the agency’s decision. A health department must strictly adhere to any statutory provisions for such actions. Most jurisdictions have adopted an Administrative Procedures Act or more specific procedural laws that explain which decisions may be appealed and how.

New York City’s Health Code, §3.03, provides that the Health Department “may seize, embargo or condemn any food, drug, device, cosmetic, article or thing that it determines (1) is unfit for human consumption or use; (2) is in a condition, kind, weight, quality or strength prohibited by this Code or other applicable law; (3) is not labeled as required by this Code or other applicable law; (4) contains false or misleading labeling; (5) is adulterated or misbranded; or (6) constitutes a danger or nuisance, or is otherwise prejudicial to the public health.” The seized property may be destroyed but any part of the seized property that is not in violation of the law or otherwise a threat to public health must be returned.

## Conclusion

Public health officials should be aware of the limitations placed on their power by the Due Process Clause and the Fourth Amendment. Before taking any action that would interfere with an individual's liberty or invade bodily integrity or conducting inspections or seizing property, a public health official should verify that the law permits the planned action and that the individual is accorded the full array of due process protections. If the scope of an agency's power is in doubt, or there are questions about the type of process that is due, the health official should consult legal counsel.

## Resources

Gostin, L. , PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (2nd Ed. 2008).  
Goodman, R., *et al.*, LAW IN PUBLIC HEALTH PRACTICE (2nd Ed. 2007).  
Grad, F., THE PUBLIC HEALTH LAW MANUAL (3rd Ed. 2005).  
Teitelbaum, J., Wilensky, S., ESSENTIAL READINGS IN HEALTH POLICY AND LAW (2009).  
Lopez, W., *et al.*, *Due Process and Public Health*, JOURNAL OF LAW, MEDICINE AND ETHICS, vol. 35, supplement 4, pp. 33-38 (December 2007).  
*Camara v. Municipal Court of San Francisco*, 381 U.S. 523 (1976).  
*See v. City of Seattle*, 387 U.S. 541 (1976).  
*New York v. Burger*, 482 U.S. 691 (1987).  
Pope, S., *et al.*, *Protecting Civil Liberties During Quarantine and Isolation in Public Health Emergencies*, LAW PRACTICE TODAY (American Bar Association, 2011), available at [www.americanbar.org/publications/law\\_practice\\_today\\_home/law\\_practice\\_today\\_archive/april11/protecting\\_civil\\_liberties\\_during\\_quarantine\\_and\\_isolation\\_in\\_public\\_health\\_emergencies.html](http://www.americanbar.org/publications/law_practice_today_home/law_practice_today_archive/april11/protecting_civil_liberties_during_quarantine_and_isolation_in_public_health_emergencies.html).



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