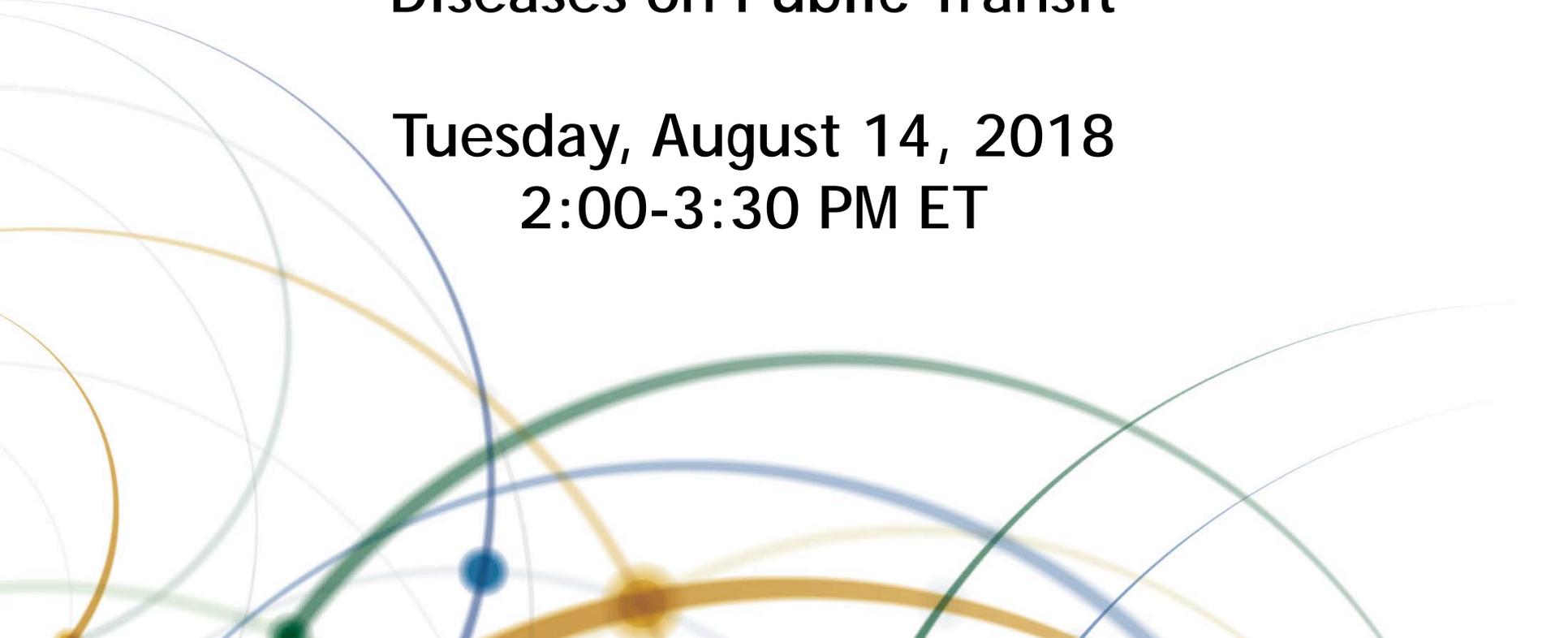


TRANSPORTATION RESEARCH BOARD

**Emergency Preparedness Against Infectious  
Diseases on Public Transit**

**Tuesday, August 14, 2018  
2:00-3:30 PM ET**



## Purpose

Discuss TCRP Legal Research Digest 50: Public Transit Emergency Preparedness Against Ebola and Other Infectious Diseases: Legal Issues

## Learning Objectives

At the end of this webinar, you will be able to:

- Identify the legal framework for emerging disease outbreaks and public health response, and analyze its impact on transit agencies' planning and response efforts
  - Assess existing agency disease outbreak protocols and policies, and evaluate whether those policies and procedures need updating
  - Recommend additional protocols, policies, considerations for transit agency emerging disease response planning
- 

# American Institute for Certified Planners

The American Institute for Certified Planners has approved this webinar for 1.5 Certification Maintenance Credits.

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# Continuing Legal Education (CLE) Credits

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Registered webinar attendees who sign in and view the entire webinar will receive a link to a certificate that they can fill out and provide to their board



# Public Transit Emergency Preparedness Against Ebola and Other Infectious Diseases

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LEGAL ISSUES



# Overview

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- Introduction
- Legal background
  - Overview of state powers
  - Overview of federal powers
  - Additional federal laws
- Legal considerations for specific response measures
  - Closures of major traffic generators
  - Full or partial suspension of service
  - Screening and prescreening
- Quarantine and isolation
- Employee protocols and work safety
- Infection control and disinfection measures
- CDC's Quarantinable Communicable Diseases Rule
- Conclusion
- Question and answer session

# I. Introduction

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## Public Transportation

- \$61 billion industry
- 400,000 employees
- 7,200 agencies in the U.S.
- Americans took 10.8 billion trips in 2014



# 2014 Ebola Outbreak

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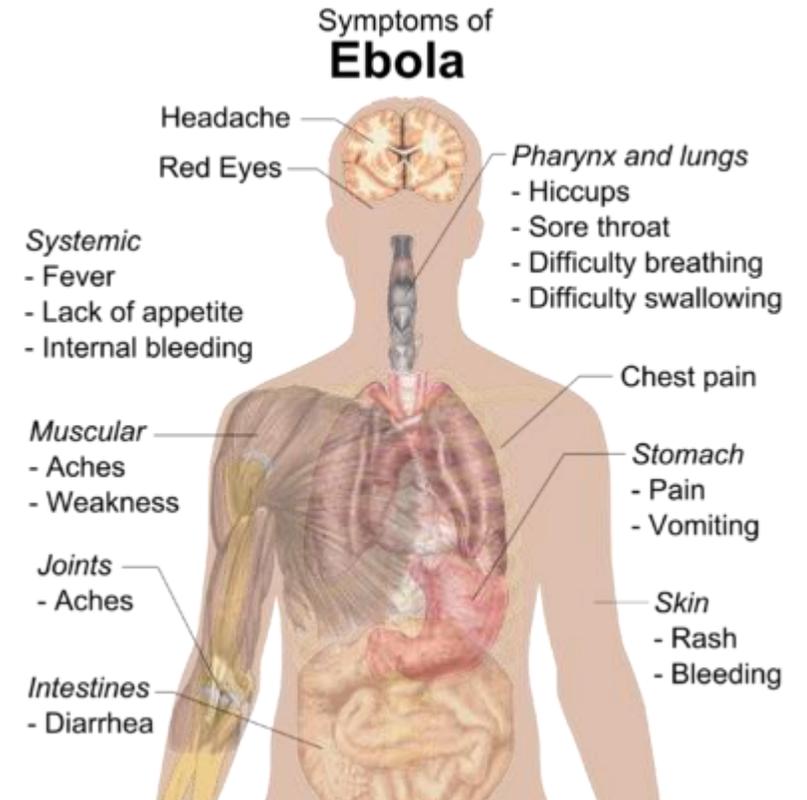
## Practical issues

- Effective disinfection of carriers
- Worker protection
- Handling infected or potentially infected passengers

Most agency protocols do not address widespread events

## Legal issues

- Involuntary quarantine – Kaci Hickox



# II. Legal Background

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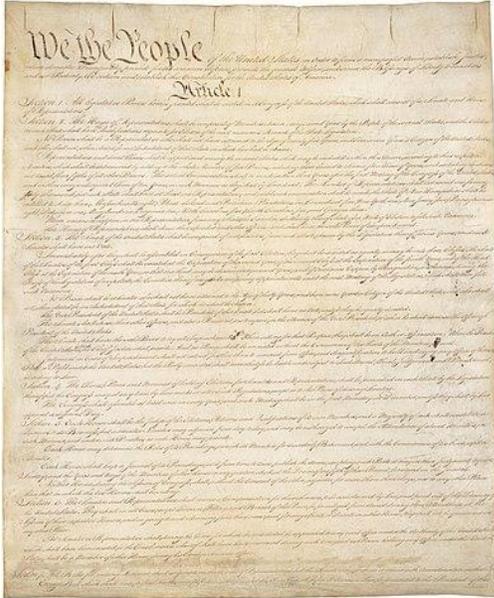
## State Powers

- Police Powers in the U.S. Constitution
- State Constitutional Powers
- State Statutory Powers



# Federal Powers

## Constitutional Authority



Presidential Powers and Policy Guidance

## HHS Secretary



# Federal Powers



**Transportation  
Security  
Administration**



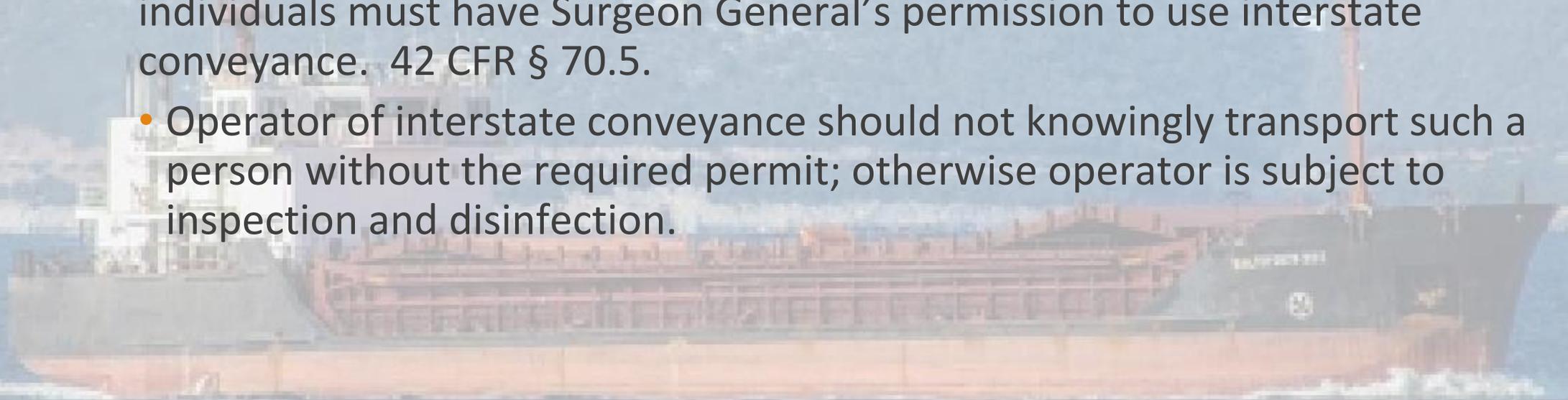
**Federal Transit  
Administration**



**CENTERS FOR DISEASE  
CONTROL AND PREVENTION**

## Federal Powers

- Federal public health laws with implications for transportation and commerce, and vice versa
- Master of vessel or other interstate conveyance must notify local health authority of suspected communicable disease. 42 CFR § 70.4.
- After exposure to certain diseases or during their communicable period, individuals must have Surgeon General's permission to use interstate conveyance. 42 CFR § 70.5.
- Operator of interstate conveyance should not knowingly transport such a person without the required permit; otherwise operator is subject to inspection and disinfection.



# Federal Laws at a Glance

- Public Health Service Act
- Public Health Security and Bioterrorism Preparedness and Response Act of 2002
- Pandemic and All-Hazards Preparedness Act
- Stafford Act
- Homeland Security Act of 2002
- Homeland Security Presidential Directive-5
- Presidential Policy Directive-8
- National Emergencies Act
- Commerce Clause
- Posse Comitatus Act
- Insurrection Acts
- Presidential Executive Order 13,295



# Federal Powers



Family and Medical Leave Act and Family Friendly Leave Act

## Airports and Air Travel

- The Air Carrier Access Act
- Federal Aviation Authority to Restrict Airport Access or Airspace
- Do Not Board List



## Fourth Amendment

- Prohibits unreasonable searches and seizures
- But searches carried out “in furtherance of” a statutorily valid “administrative purpose” do not require consent.
  - This includes security screenings in transportation settings, and probably public health emergency measures
- States allow health officials to conduct inspections without a warrant during a public health threat, even without a declared emergency.

Surveillance  
Stop-and-frisk  
Warrants  
Right  
Probable Cause  
Search  
Seizures  
Fourth  
Amendment  
Arrests  
Protection  
Seized  
Secure  
Wiretaps  
Unreasonable  
Houses  
Papers  
Persons  
Government

## Interaction of State and Federal Law

Substantial overlap, and sometimes one set of powers can fill the gaps in the other set.

### Conflict of State and Federal Laws

- Preemption
- But in practice, states may often implement stricter policies.



# III. Legal Considerations for Specific Response Measures



# III. Legal Considerations: Closures of Major Traffic Generators

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- Definition
- State Powers
- Case Study: 1918-1919 Influenza Pandemic
- Additional Legal Issues





- Major traffic generator = “a land use that generates a high traffic volume to and from the site, usually defined in terms of vehicles per hour or vehicles per day.”
- Major highway traffic generator = “either an urbanized area with a population over 100,000 or a somilar major concentrated land use activity that produces and attracts long-distance Interstate and statewide travel of persons and goods.”

# Closures of Major Traffic Generators

## State Governors' Powers

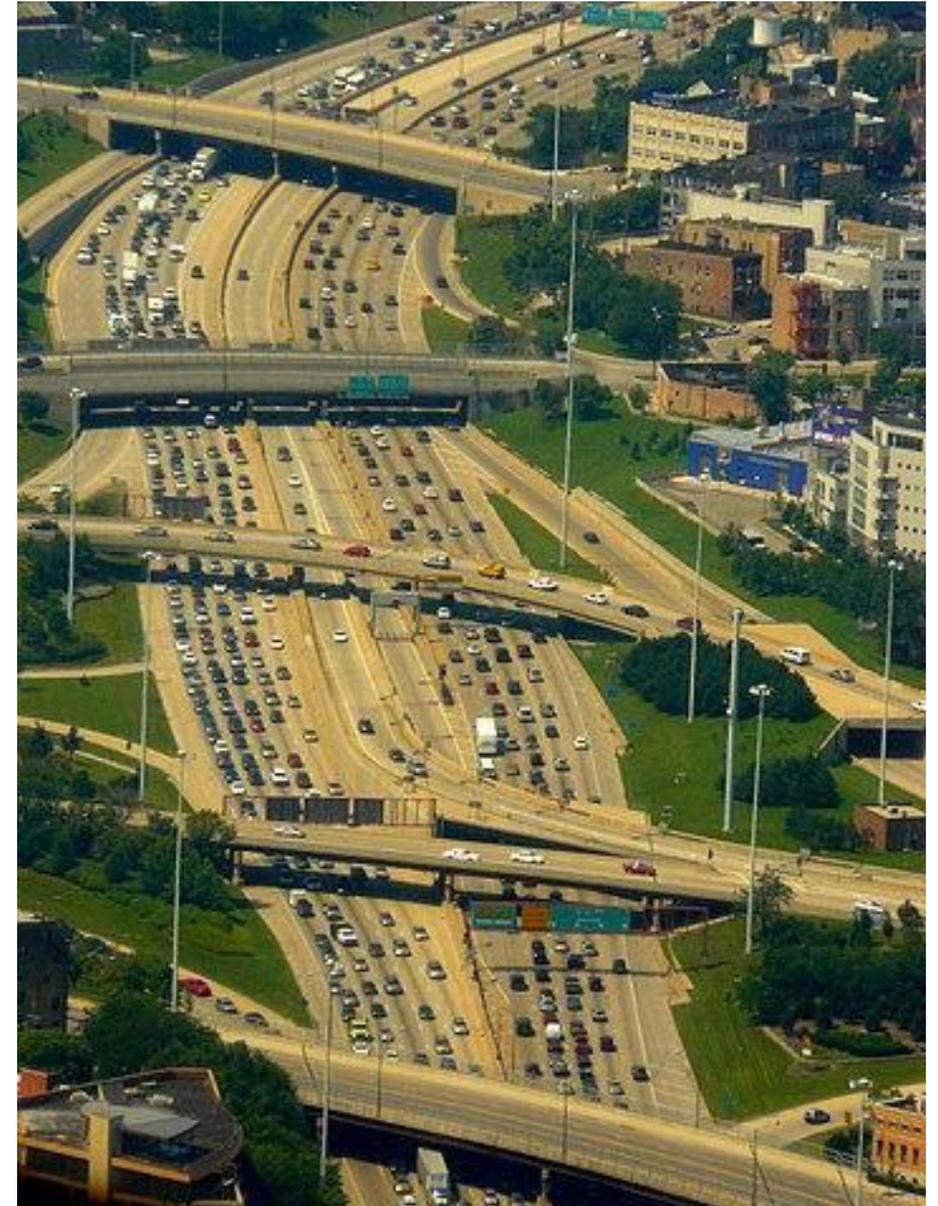
- Almost all state governors may control MTGs during an emergency
  - Idaho: if necessary to respond to an emergency, governor may suspend regulations that govern businesses
  - Illinois: governor may take possession of property, including vehicles such as airplanes and automobiles.
  - Michigan: governor may issue orders and regulations to control traffic, including public and private transportation as well as ingress and egress of persons and vehicles
  - Some states differentiate public and private.  
Delaware: during an emergency or disaster, the governor may “utilize any private, public or quasi-public property” necessary to cope with the incident
  - Delaware also allows its governor to close roads, but this is rare.



# Closures of Major Traffic Generators

## State Health Official's Powers

- Many state health officials or the state's Board of Health may control the spread of disease by restricting activity or closing facilities
- Limited: Illinois DOH may order a place closed and off limits to protect the public from a contagious disease.
- Broad: New Hampshire's health official may close and evacuate any public or private building accessible by the public. New Jersey's Health Commissioner may take possession of roads, public areas, and carriers.



## Closures of Major Traffic Generators

### State Transit Authorities or Transportation Departments

- Generally have power to close roads and highways for maintenance, accident investigation, or during weather emergencies.
- E.g., Colorado – the “department of transportation has authority to close any portion of a state highway to public travel.”



1918 AND 1919  
DEATHS FROM ALL CAUSES EACH WEEK  
EXPRESSED AS AN ANNUAL RATE PER 1000

## Closures of Major Traffic Generators: Case Study

### Public Health Policies and the 1918-1919 Influenza Pandemic

- Infected 500 million people, about 33% of world population
- At least 50 million died worldwide. 675,000 died in U.S.
- Vaccine developed later, so strategies included promoting hygiene, quarantine and isolation, and social distancing.
- Boston and Philadelphia – public gatherings banned; schools, saloons, theaters, and some stores were closed.
- New York and New Orleans – slower spread, so authorities relied on social distancing and staggered business operating hours.
- Some cities closed nonessential businesses.

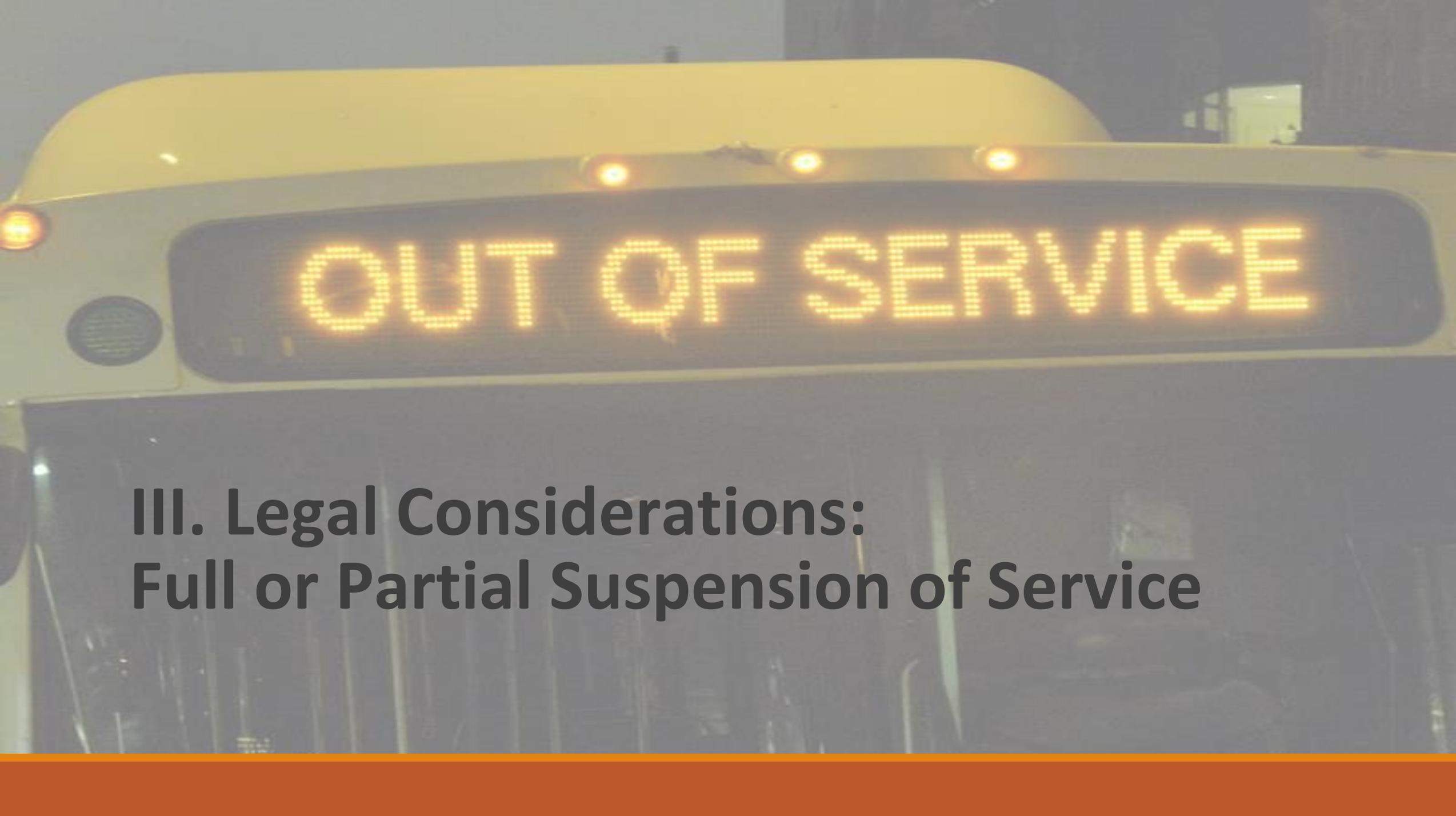


## Closures of Major Traffic Generators

### Additional Legal Issues

- Closure of businesses – issue of compensation for lost business
- Seizure or control of property – due process – 5<sup>th</sup> and 14<sup>th</sup> Amendments. E.g.:
  - Notice of right to counsel
  - Notice of reason for closure
  - Notice of order's duration



A close-up photograph of the top of a yellow bus. A digital display panel is illuminated with the words "OUT OF SERVICE" in bright yellow, pixelated characters. Above the display, three small, round lights are visible. The background is dark and out of focus, suggesting an indoor setting like a garage or depot.

**OUT OF SERVICE**

### **III. Legal Considerations: Full or Partial Suspension of Service**

## Full or Partial Suspension of Service

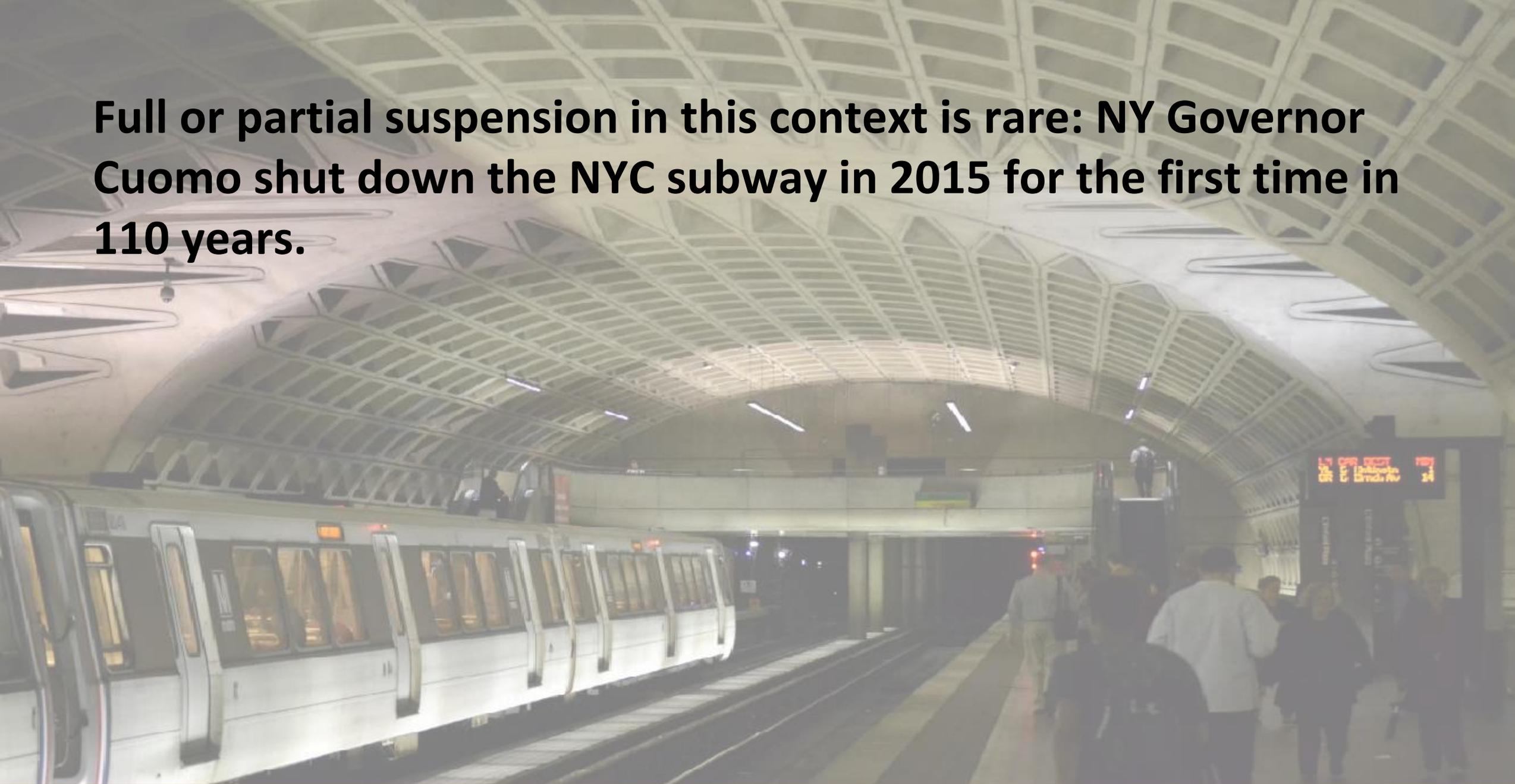
State transportation and transit agencies have the power to control or suspend services for regulatory violations or to protect public safety.

Partial suspension – target areas of an isolated IDO or areas with high transmission rate

Full suspension – closes all routes and carriers



**Full or partial suspension in this context is rare: NY Governor Cuomo shut down the NYC subway in 2015 for the first time in 110 years.**



## Full or Partial Suspension of Service

### State Powers

- Governors' Powers
  - Broad emergency powers likely extend to transit services
  - Some states are more explicit
  - Others have general provisions that may apply



# Full or Partial Suspension of Service

## Additional State Powers

- State Transit Authorities or Transportation Departments
  - Many departments have the power to suspend services if a carrier's safety or regulatory violation endangers health or safety.
- Governors typically hold the power to suspend services, but transit departments often advise or carry out orders during an emergency.





## Full or Partial Suspension of Service

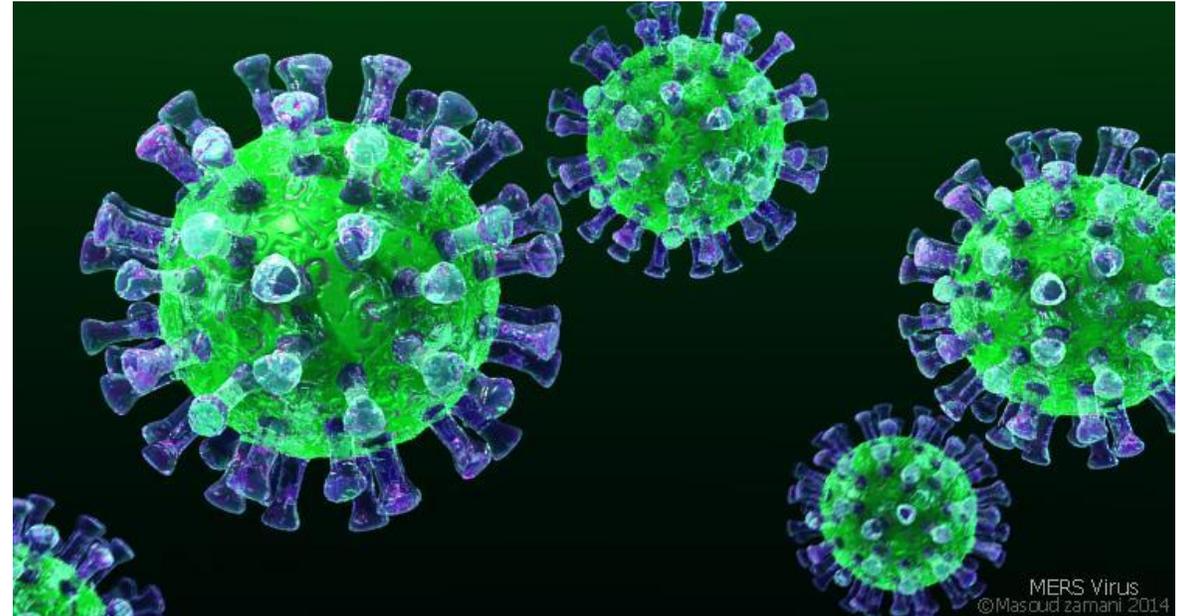
Additional Legal Considerations:

- Suspension of Service and Public Employees
- Civil Liberties

# Full or Partial Suspension of Service: Case Study

## 2015 Middle Eastern Respiratory Syndrome Outbreak in South Korea

- MERS identified in South Korea in 2015
- 186 cases, 36 died
- Quarantine and isolation for those exposed
- Social distancing
- Over 16,000 people quarantined
- Failure to comply = \$18,000 fine, up to 2 years in prison
- Thousands of schools closed until experts determined schools were not the locus of transmission
- Public transportation remained open but many voluntarily avoided public places





# III. Legal Considerations: Screening and Prescreening

# III. Legal Considerations: Screening and Prescreening

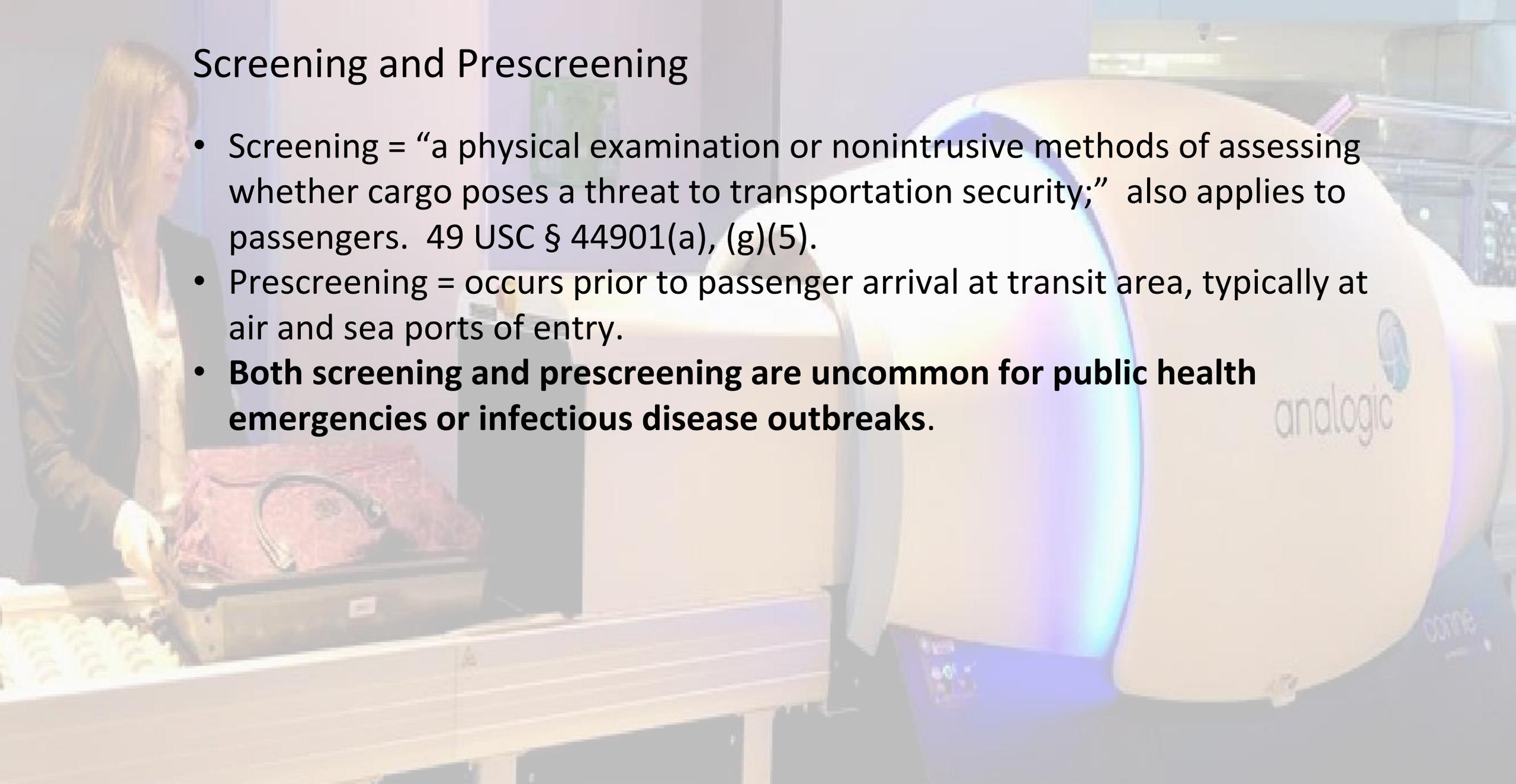
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- Definitions
- Screening
- Prescreening
- Additional Legal Issues
- Case Study: SARS



## Screening and Prescreening

- Screening = “a physical examination or nonintrusive methods of assessing whether cargo poses a threat to transportation security;” also applies to passengers. 49 USC § 44901(a), (g)(5).
- Prescreening = occurs prior to passenger arrival at transit area, typically at air and sea ports of entry.
- **Both screening and prescreening are uncommon for public health emergencies or infectious disease outbreaks.**



# Screening and Prescreening

## Additional Definitions

- Port/Point of Entry (“POE”) = designated place where an alien may apply for admission into the US.
- Public Transit



# Screening and Prescreening

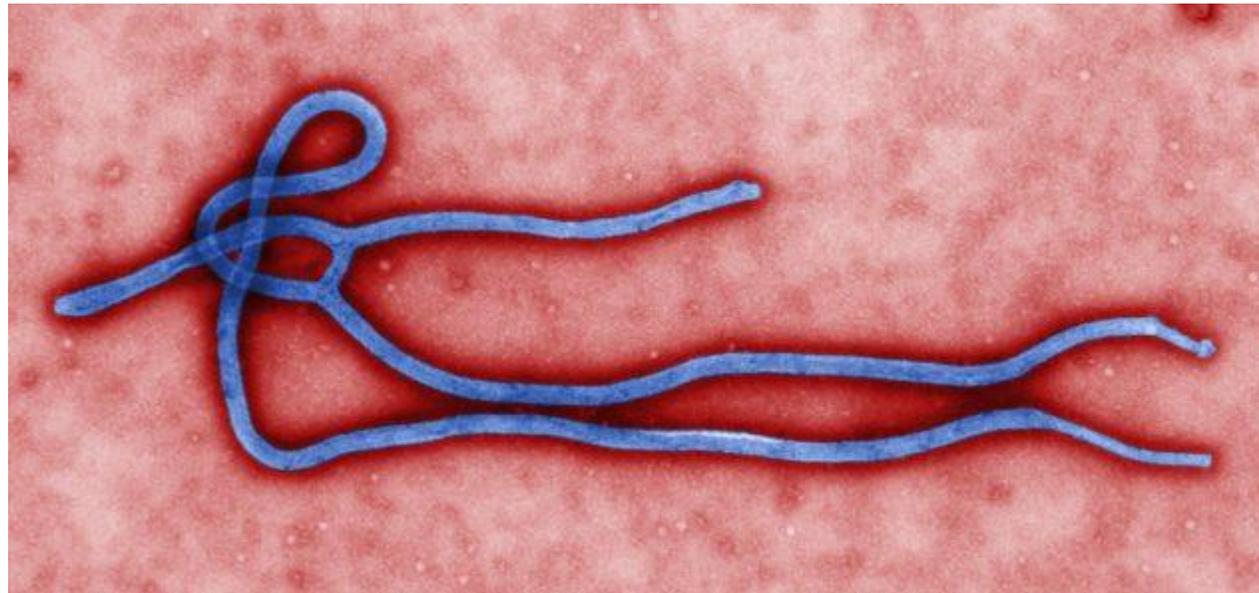
## Screening

- State Powers
  - Governors' Powers
    - Have limited ability to screen or prescreen in a declared emergency
  - State Health Officials' Powers
    - May control property or individuals as necessary to protect public health
  - Transportation-Specific Powers
    - State statutory guidance may provide for screening powers

# Screening and Prescreening

## Best Practices:

- Points of Entry Screening and Monitoring
- World Health Organization Guidance on POEs
- CDC



# Screening and Prescreening: Case Study

## Andrew Speaker and Drug-Resistant Tuberculosis

- CDC issued involuntary quarantine order after Speaker flew overseas while diagnosed with drug-resistant tuberculosis.
- Miscommunications and lack of coordination among Speaker, local and state health officials, CDC, CBP, and TSA. Speaker believed he was free to travel.
- Speaker was placed on the no fly list only after he returned.
- This led to the creation of the DNB list.







# Screening and Prescreening

## Additional Legal Issues

- Fourth Amendment
  - Administrative searches
  - Must be reasonable and serve a compelling government interest
- Screening for Department/Agency Employees
  - California – individuals who work with children, food, or prison inmates must be certified as free of TB
  - Under ADA, employer can request a medical exam in some situations.

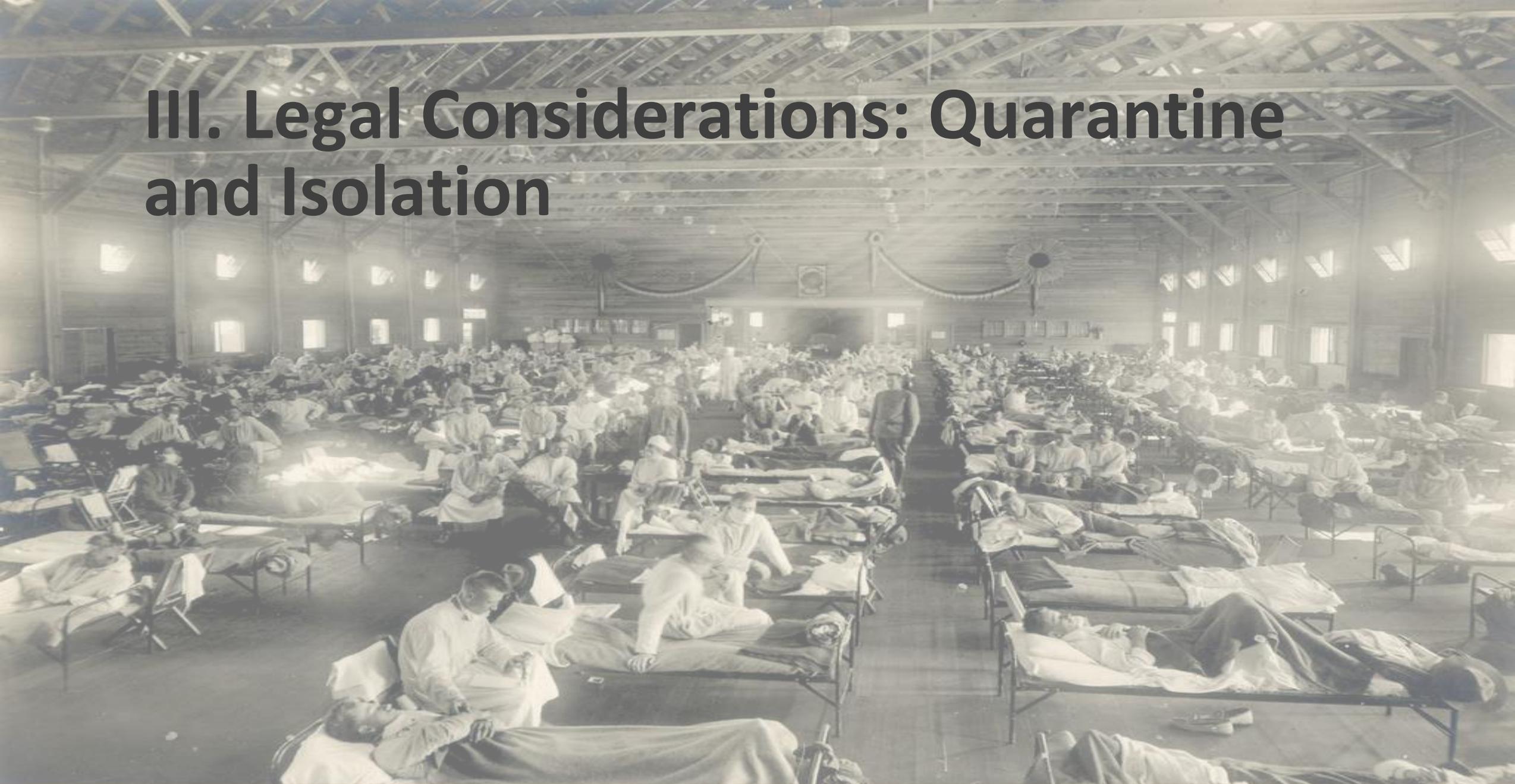
# Screening and Prescreening: Case Study

## Severe Acute Respiratory Syndrome (SARS)

- 2003 outbreak spread from Vietnam and Hong Kong to China, Singapore, and Canada
- WHO recommended airline passenger screenings.
- A review of Canada's implementation of screenings concluded that they are unlikely to determine who is incubating an infectious disease.
- WHO subsequently recommended educating air travel passengers about disease risks and medical help.



# III. Legal Considerations: Quarantine and Isolation



# III. Legal Considerations: Quarantine and Isolation

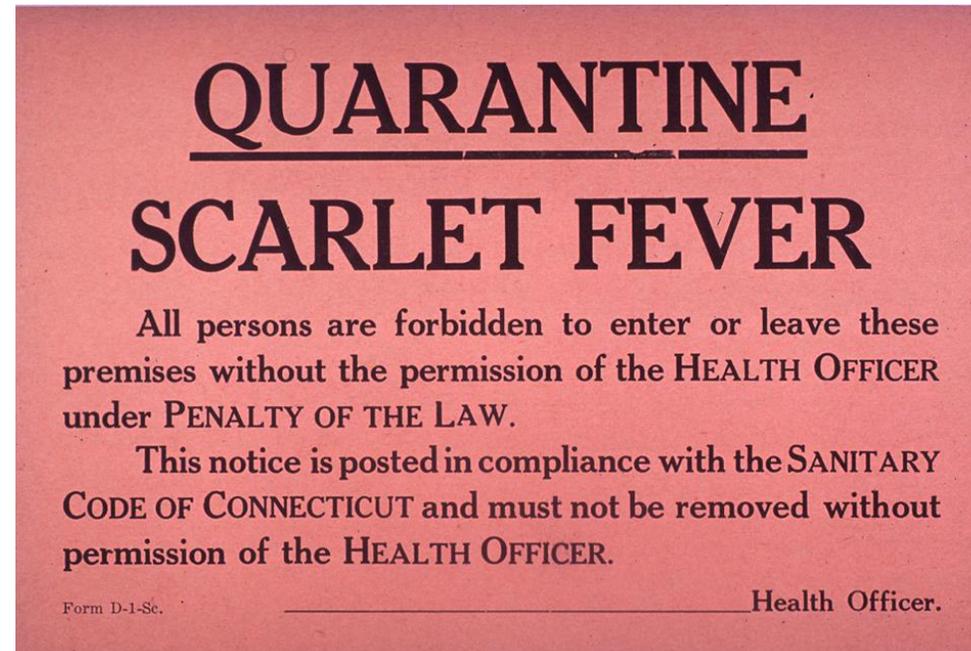
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- Definitions
- State Powers
- Federal Powers
- Additional Legal Issues
- Case Study: 2014 Ebola Outbreak



## Quarantine and Isolation

- *Quarantine* separates and restricts the movement of people who were exposed to a contagious disease to see if they become sick.
- *Isolation* separates sick people with a contagious disease from people who are not sick.



# Quarantine and Isolation

## State Powers

- Tenth Amendment Police Powers – states have broad powers to protect the health, welfare, and safety of the public. *Jacobson v. Massachusetts*.
- Governors' Powers
- State Health Official Powers
- Local Health Official Powers
- State Transit Authorities or
- Transportation Departments



# Quarantine and Isolation

## Federal Powers

- Commerce Clause - Public Health Service Act charges HHS Secretary with preventing the “introduction, transmission, and spread of communicable diseases in the United States.
- CDC - day-to-day duties and operates 20 quarantine stations at POEs and land border crossings
- EO 13,295 enumerates quarantinable diseases
- Federal quarantine orders are very rare
- 2017 Quarantine Rule
  - Expands federal quarantine power
  - Criticized as providing too few due process protections



**FEDERAL REGISTER**  
The Daily Journal of the United States Government



Rule

## Control of Communicable Diseases

A Rule by the [Health and Human Services Department](#) on 01/19/2017

PUBLISHED DOCUMENT		DOCUMENT DETAILS
	Start Printed Page 6890	<b>Printed version:</b> PDF
	<b>AGENCY:</b> Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).	<b>Publication Date:</b> 01/19/2017
	<b>ACTION:</b> Final rule.	<b>Agency:</b> <a href="#">Department of Health and Human Services</a>
		<b>Dates:</b> This rule is effective February 21, 2017.

# Quarantine and Isolation

	Federal	State
Source of Authority	Commerce Clause of U.S. Constitution	State Police Powers under Tenth Amendment to U.S. Constitution
Key Language	PHSA designates HHS Secretary responsible for preventing the “introduction, transmission, and spread of communicable diseases in the United States”	Governors have broad powers during declared emergencies, such as the power to “make, amend, and rescind all lawful necessary orders, rules, and regulations” related to the emergency.
Power to Quarantine / Isolate	CDC handles day-to-day functions of disease control and operates 20 quarantine stations at POEs and land border crossings.	Health Officials – statutory power to quarantine/isolate, often without declared emergency. Local Health Officials – parallel state official powers. State Agencies – transit authorities have very little power but may help implement governors’ orders



## Quarantine and Isolation

### Additional Legal Issues

- Civil liberties of employees – people isolated or quarantined cannot show up for work
- Civil liberties of passengers
- State and federal officials usually cooperate, but federal law preempts state law. However, state police powers generally remain intact.

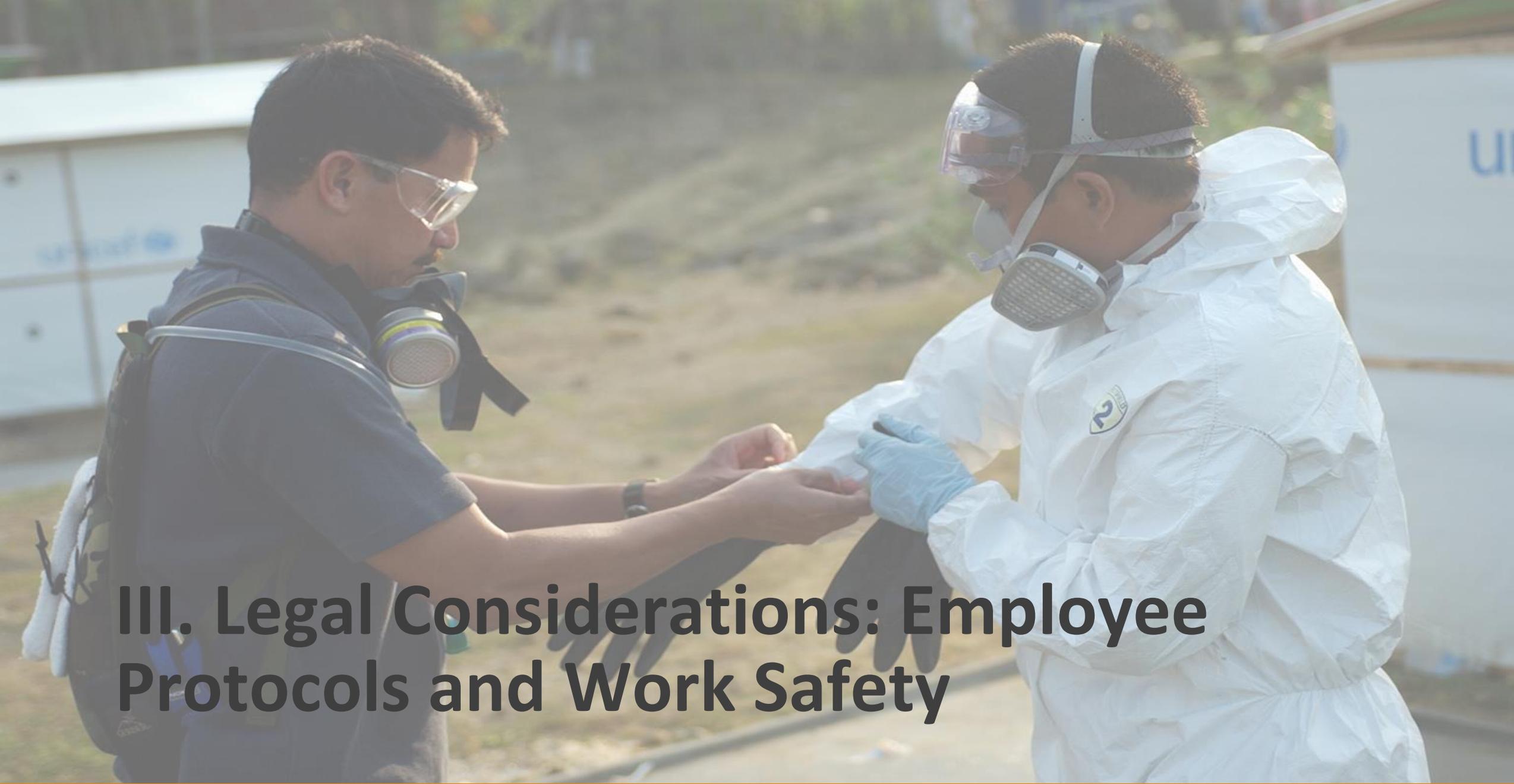
# Quarantine and Isolation: Case Study

## 2014 Ebola Outbreak

- 2 years and almost 30,000 cases. Only 4 cases reported in U.S.
- Governors of NY and NJ required 21-day quarantines for all healthcare workers returning from West Africa.
- Kaci Hickox, although mostly asymptomatic, was involuntarily quarantined in a hospital in Newark, NJ.
- CDC did not recommend quarantining asymptomatic individuals.
- Hickox sued, alleging violation of her constitutional rights and false imprisonment, arguing that the state did not use the least restrictive means necessary to monitor her condition.
- The settlement of the case authorizes anyone quarantined in NJ to contest the order.



Kaci Hickox



### **III. Legal Considerations: Employee Protocols and Work Safety**

# III. Legal Considerations: Employee Protocols and Work Safety

---

- Definitions
- Employee Refusal to Work During an Outbreak
- Transportation Protocols
- Case Study: Worker Absenteeism – Pandemic Flu Planning
- Employee Protection on the Job
- Additional Legal Issues



# Employee Protocols and Work Safety

## Definitions and Scope

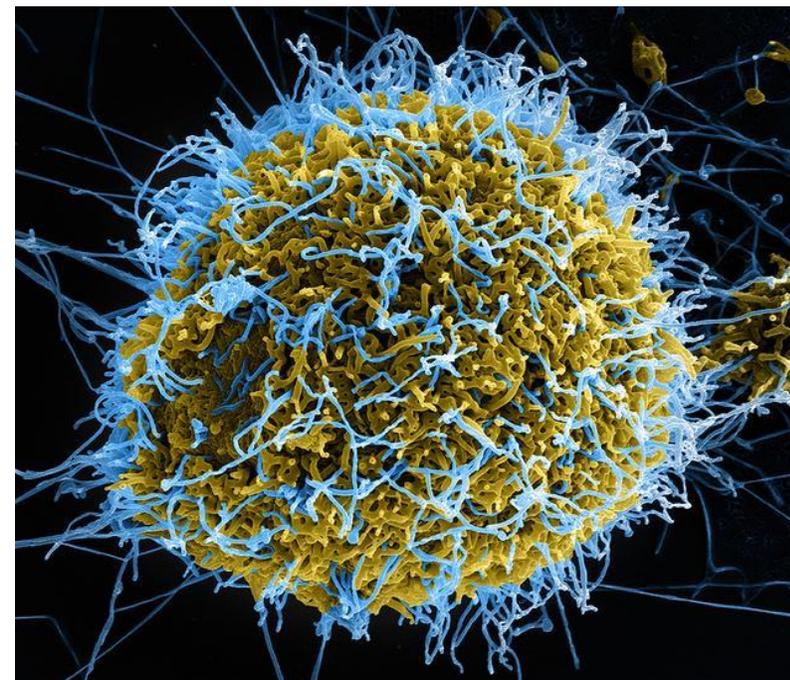
- Compulsory leave for employees with symptoms
- OSHA – employers must maintain a workplace free of recognized hazards
- Legal basis for compulsory leave



# Employee Protocols and Work Safety

## Employee Refusal to Work During an Outbreak

- OSHA allows employees to refuse to work if there is an objectively “reasonable belief that there is imminent death or serious injury.
- Overtime pay or compensatory time off required by Fair Labor Standards Act
- A transportation worker’s refusal to work could create liability for his or her employer under the ADA, which prohibits discrimination based on disability.
- FMLA and FFLA
- National Transit Systems Security Act – DOL prohibits public transportation agencies from punishing employees who refuse to work:
  - Because of safety or security hazards
  - In good faith
  - With no reasonable alternative



# Employee Protocols and Work Safety: Case Study

## Worker Absenteeism Example from Pandemic Flu Planning

- OSHA estimate: Expect up to 40% absenteeism during pandemic flu
- 2009 H1N1 outbreak
- DHS asked transportation agencies to coordinate with local governments on absenteeism
- WMATA public service announcements and disinfection
- OSHA recommended planning for downsizing as well as service surges



# Employee Protocols and Work Safety

## Employee Protection on the Job

- OSHA
- Personal Protective Equipment (“PPE”)
- Airline workers during Ebola





## Employee Protocols and Work Safety

### Additional Legal Issues

- Civil Liberties of Employees
- Civil Liberties of Passengers
- Containment of Disease



**III. Legal Considerations: Infection Control and Disinfection Measures**

# III. Legal Considerations: Infection Control and Disinfection Measures

---

- Definition
- Infection Control
- Social Distancing
- Monitoring and Tracking
- Interagency Coordination
- Disinfection Measures
- Legal Issues



# Infection Control and Disinfection Measures

- Infection Control = practices and precautions to minimize the risk of disease transmission.



- Disinfection = methods of cleaning, disinfecting, and sterilizing environments that have been exposed to infectious agents.



# Infection Control and Disinfection Measures

## Infection Control

- Dearth of law on specific infection control measures for transportation
- Need for transit infection control policies and protocols
- Personal Protective Equipment
- Social distancing
- Monitoring and tracking



# Infection Control and Disinfection Measures

## Interagency Coordination

- Local Level
- State Level
- Federal Level





## Infection Control and Disinfection Measures

### Disinfection Measures

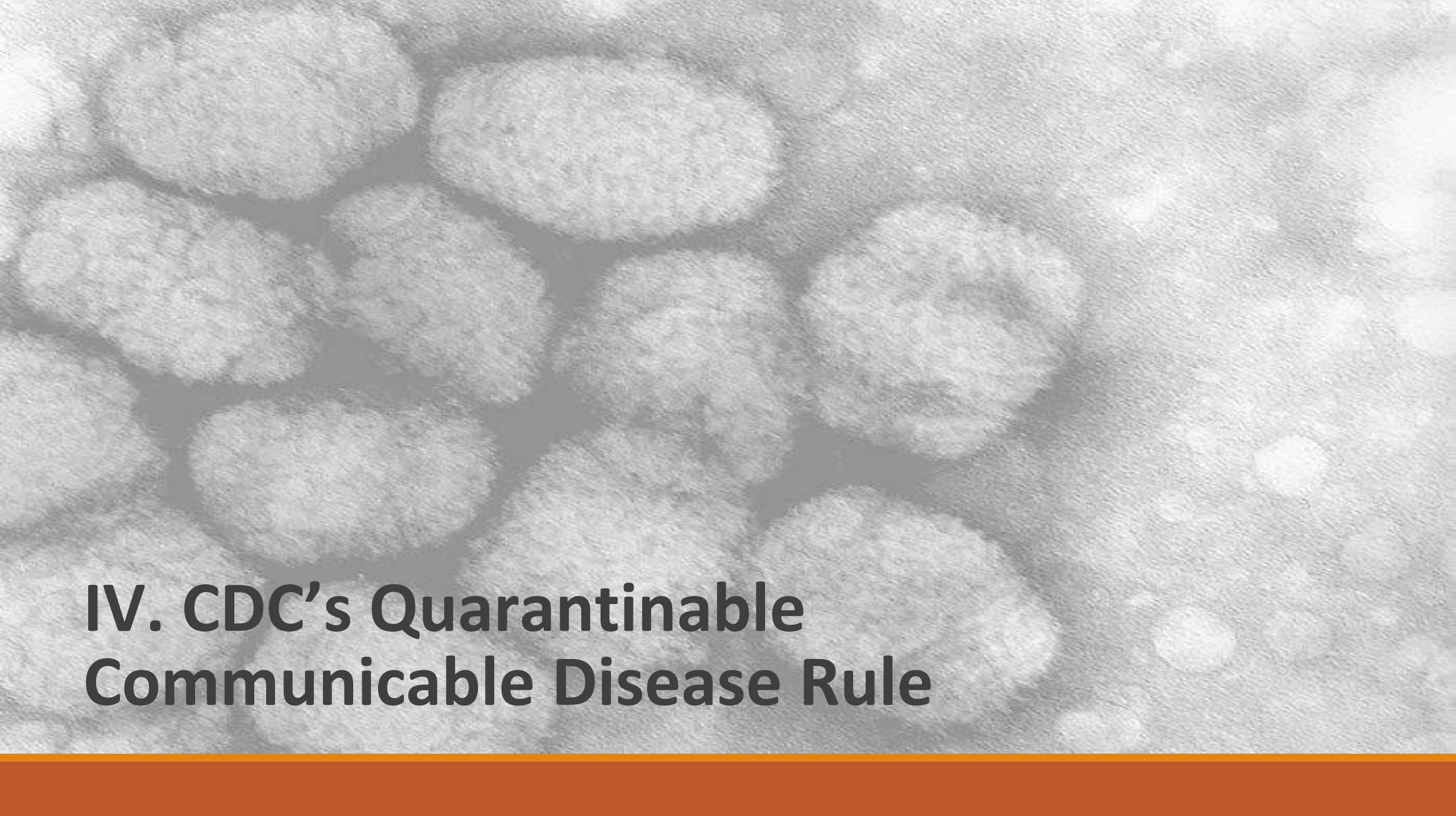
- Not much guidance for transit agencies
- Airlines get the most guidance.
- Public transportation (buses, rail, subway)



# Infection Control and Disinfection Measures

## Legal Issues

- Civil Liberties of Employees
- Civil Liberties of Passengers
- Containing Disease Spread

A grayscale, high-magnification microscopic image of biological tissue, likely showing a cluster of cells with distinct nuclei and cytoplasm. The cells are arranged in a somewhat regular pattern, with some showing more prominent nuclei than others. The overall texture is grainy and detailed, typical of a light micrograph.

## **IV. CDC's Quarantinable Communicable Disease Rule**



# FEDERAL REGISTER

The Daily Journal of the United States Government



Ⓡ Rule

## Control of Communicable Diseases

A Rule by the [Health and Human Services Department](#) on 01/19/2017



### PUBLISHED DOCUMENT

Start Printed Page 6890

#### AGENCY:

Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

#### ACTION:

Final rule.

### DOCUMENT DETAILS

#### Printed version:

[PDF](#)

#### Publication Date:

[01/19/2017](#)

#### Agency:

[Department of Health and Human Services](#)

#### Dates:

This rule is effective February 21, 2017.

## Quarantinable Communicable Diseases

- Cholera;
- Diphtheria;
- Infectious Tuberculosis;
- Plague;
- Smallpox;
- Yellow Fever;
- Viral Hemorrhagic Fevers (Lassa, Marburg, Ebola, Crimean-Congo, South American, and others)
- Influenza caused by novel or reemergent influenza viruses with pandemic potential;
- Severe acute respiratory syndromes



# FEDERAL REGISTER

The Daily Journal of the United States Government



® Rule

## Control of Communicable Diseases

“Both the domestic and foreign portions of this regulation include new proposed public health definitions; new regulatory language implementing HHS/ CDC’s activities concerning non- invasive public health prevention measures (*i.e.*, traveler health screening) at U.S. ports of entry and other U.S. locations (*i.e.*, railway stations, bus terminals); and provisions affording due process to persons served with a Federal public health order (*e.g.*, isolation, quarantine), including requiring that HHS/CDC explain the reasons for issuing the order, administrative processes for appealing the order, and a mandatory reassessment of the order.”



# FEDERAL REGISTER

The Daily Journal of the United States Government



Ⓜ Rule

## Control of Communicable Diseases

A Rule by the Health and Human Services Department on 01/19/2017

### **§ 70.10 Public health prevention measures to detect communicable disease.**

(a) The Director may conduct public health prevention measures at U.S. airports, seaports, railway stations, bus terminals, and other locations where individuals may gather to engage in interstate travel, through non-invasive procedures determined appropriate by the Director to detect the presence of communicable diseases.



# FEDERAL REGISTER

The Daily Journal of the United States Government



Ⓜ Rule

## Control of Communicable Diseases

A Rule by the Health and Human Services Department on 01/19/2017

The operator of any means of interstate traffic shall not "accept for transportation any individual the operator knows, or reasonably should know, to be under a Federal order of isolation, quarantine, or conditional release unless such an individual presents a permit issued by the Director [of the CDC]" or "a Federal conditional release order permitting such travel."



# FEDERAL REGISTER

The Daily Journal of the United States Government



® Rule

## Control of Communicable Diseases

A Rule by the Health and Human Services Department on 01/19/2017



PUBLISHED DOCUMENT

The CDC Director may require the operator to "submit the conveyance to inspection, sanitary measures, and other measures as the Director deems necessary to prevent the possible spread of communicable disease."



# FEDERAL REGISTER

The Daily Journal of the United States Government



Ⓜ Rule

## Control of Communicable Diseases

A Rule by the Health and Human Services Department on 01/19/2017

The CDC Director can also apply these restrictions to *intrastate* travel or to individuals under a state or local order "for quarantine, isolation, or conditional release" if there is a determination that there is "inadequate local control" to prevent the spread of communicable diseases, or if the State or local authority so requests it.



# FEDERAL REGISTER

The Daily Journal of the United States Government



® Rule

## Control of Communicable Diseases

A Rule by the Health and Human Services Department on 01/19/2017

The master or person in charge of vessels or any “conveyance engaged in interstate traffic, on which a case or suspected case of a communicable disease develops” must “notify the local health authority at the next port of call, station, or stop, and shall take such measures to prevent the spread of the disease as the local health authority directs.” Notification should occur “as soon as practicable.”

# Questions?

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# Today's Participants

*University of Maryland-Baltimore Center  
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