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Research

Research Protocol for Sentinel Surveillance of Emerging Laws Limiting Public Health Emergency Orders

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Sentinel Surveillance of Emerging Laws Limiting Public Health Emergency Orders

I. **Sentinel Surveillance of Emerging Laws and Policies Methods**

The sentinel surveillance of emerging laws and policies (SSELP) project has been developed by the Center for Public Health Law Research (CPHLR) with support from the Robert Wood Johnson Foundation as a new legal mapping method intended to quickly capture and track emerging laws and legal innovations impacting public health. The primary goal of SSELP is the swift identification of novel legal approaches to instigate faster evaluation of laws and policies and their effects on health and health equity. The process aspires to establish the foundation for potential policy surveillance datasets, allowing researchers to determine priority candidates for future scientific legal mapping in a timely manner, which ultimately supports the creation of robust legal data that can be used to evaluate emerging laws and policies. The SSELP process also aims to provide a picture of the legal landscape and movement of these legal approaches more quickly across jurisdictions and over time.

The SSELP process involves researchers scanning the legal terrain to quickly track emerging legal approaches. Due to the emphasis on rapid tracking, the process involves limited quality control – only one researcher codes each jurisdiction, with a supervisor conducting spot checks of a small sample of the coding. Because this process aims to quickly track emerging legal changes on a particular topic at a high-level, SSELP identifies the most critical features of the laws. The end product of this process is an SSELP dataset. The data produced are not meant to be readily usable for evaluation due to the limited quality control measures, but are meant to provide a high-level overview of laws and policies that gives policymakers, advocates, researchers and others a snapshot of a new or rapidly evolving legal landscape. The relatively quick SSELP process aims to allow the datasets to be updated regularly to maintain data in near real-time.

II. **Policy Selection**
   a. **Policy Identification:** The CPHLR team was alerted to this topic by members of the Sentinel Surveillance Advisory Council as an emerging area of law with potential to impact public health.

   b. **Tracking Selection Guidelines:** The following guidelines were developed with assistance from the Sentinel Surveillance Advisory Council, and used to determine whether a law or policy is a priority candidate for SSELP tracking:
      i. **Accessibility of the law.** The law or policy is in written form that can feasibly be obtained for the included jurisdictions.
      ii. **Impact on health and equity.** The research team hypothesizes that the policy has or will have a significant impact on health, health-related services, or equity.
      iii. **Equity**. A law or policy that has an anticipated impact on equity (health equity, racial equity, etc.) will be a stronger candidate for tracking than those that do not.

iv. **Rapid policy diffusion.** The policy is spreading or has been endorsed or pushed by national organizations capable of promoting its spread. Factors may include when the law was passed, the number of jurisdictions that have the law, and scalability.

v. **Need for research.** There are important questions about the implementation and impact of the policy, and a publicly available dataset would facilitate such research.

vi. **Partnership potential.** There is a potential to collaborate with partners on some aspect of the SSELP process (e.g., research, coding, tracking, dissemination).

c. **Policy Selection:** After this topic was identified, the supervisor conducted brief background research to learn about the legal landscape and to evaluate the topic based on the guidelines above. The supervisor then wrote a brief informal memo describing the assessment. The team met and determined that laws limiting public health authority is a priority topic for an SSELP dataset.

III. **Date of Protocol:** May 2022

IV. **Primary Data Collection**
a. **Project Dates:** July 2021 – May 2022

b. **Dates Covered in the Dataset:** This dataset captures changes in the law in each jurisdiction included in this study from January 1, 2021 through May 20, 2022.

c. **Data Collection Methods:** The research team consisted of two legal researchers and one supervisor. The researchers reviewed Weekly Legislative Update reports provided to the team by its project partner, the Association of State and Territorial Health Officials (ASTHO). These reports identified state legislation in response to the COVID-19 pandemic since January 2021. One ASTHO report included bills identified as changing a governor's authority to respond to a public health emergency. A second report provided by ASTHO included bills identified as changing the authority of a state/territory health agency or official to respond to a public health emergency.

d. **Inclusion and Exclusion Criteria**
i. **The following laws were included:**
1. A new statute, or an amendment to an existing statute, that limits the authority of a governor regarding public health emergency orders.
2. A new statute, or an amendment to an existing statute, that limits the authority of a state health agency or state health official regarding public health emergency orders.

3. A new statute, or an amendment to an existing statute, that: 1) limits the authority of a local health agency or local health official regarding public health emergency orders; and 2) was enacted as part of a law that also limits the authority of a governor, state health agency, or state health official regarding public health emergency orders.

ii. **The following laws were excluded:**

1. Any new laws that limit state executive authority or local health agency authority that were not included in the Weekly Legislative Update reports created by ASTHO. Any such laws were not included in the initial dataset or the November 2021 update, but were included in the May 2022 update.
2. Executive orders
3. Case law
4. A law that requires a state health department to develop guidelines related to the restrictions on visitation that a nursing home may impose to address a health emergency (e.g., Maryland HB 983).
5. A law stating that "a person" may not require an individual to provide justification or documentation to support the decision to decline a COVID-19 vaccine (e.g., Alaska HB 76, Sec. 17).
6. A law that limits the ability of school districts to implement mask mandates (e.g., Okla. Stat. tit. 70, § 1210.190).

e. **Legal Text Collection:** The researchers reviewed the enacted bills in the ASTHO reports to identify which were in scope for this dataset. The researchers created a Master Sheet for each jurisdiction, in which they recorded the citation of any statute that was created or amended by the enacted laws that were in scope. The Master Sheet includes the citation, legislative history, and the effective date, for each statute.

The supervisor then created an Amendment Tracker for each jurisdiction, which captured the effective date, legislative history, and brief description of each amendment for all of the laws on the Master Sheet. The supervisor noted in the description whether the amendment was substantive or non-substantive.

The researchers collected the legal text for each iteration on the Master Sheet. The legal text was collected from state legislature websites.

V. **Coding**

a. **Development of Coding Scheme:** The supervisor conceptualized coding questions based on the background research conducted and review of the ASTHO reports, then circulated the questions to an internal team for review. When the questions were finalized, the supervisor entered the questions into MonQcle, a web-based software-coding platform. The team then used the developed question set with the collected law to select answers from the response set.

b. **Coding Methods:** Researchers coded responses based on objective, measurable aspects of the law. Caution notes were provided to explain any unique regulations and where the law was unclear.

Question-specific Coding Conventions:
Below is an explanation of the rules used when coding specific questions and answer choices. Note, only responses that require an explanation of the legal text used to code are listed. Other responses not requiring an explanation are not included here, but are included in the final dataset.

- o **Question 1: Is there a law that was passed since January 1, 2021 that limits state executive authority regarding public health emergency orders?**
    - "Yes" was coded when there is a state law in effect that was enacted on or after January 1, 2021, which limits the authority of a governor, state health agency, or state health official, regarding public health emergency orders.
- o **Question 2.1: How is the governor's authority limited?**
    - "Issuance of emergency order is restricted" was coded when the law places a restriction on the process for issuing an emergency order (e.g., an executive order or proclamation must be submitted to a Legislative Council for review).
    - "Duration of emergency order is limited" was coded when the law limits the duration of an executive order, or the governor's declaration of a state of emergency, to a specified time frame (e.g., 60 days).
    - "Emergency order may be terminated by legislature" was coded when the law explicitly states that the legislature may terminate a state of emergency, an emergency order, or an emergency proclamation issued by the governor.
    - "Scope of order is restricted" was coded when the law places a restriction on the substance of a governor's emergency order or proclamation (e.g., an order may not substantially inhibit the gathering of individuals; emergency plans may not compel a private business to deny a customer access to the premises; a statewide elected official may not mandate use of a face mask). This response was also coded when a law imposes a restriction on the geographic applicability of executive orders (e.g., orders are limited to areas affected by the communicable disease), or when the law prohibits a governor from altering or creating a statutory provision during a state of emergency. Additionally, this response was coded when a law places a requirement on a Governor in order to issue an executive order or proclamation closing or restricting a school or business due to an emergency (e.g. Fla. Stat. §252.36(1)(c)(1-2). This response was also coded if a law stated that an individual may not be required to receive a vaccine (e.g., Mont. Code §49-2-312; N.H. Rev. Stat. §141-C:1-a).
    - "Local orders may be less stringent than governor's order" was coded when the law allows a locality to issue an order related to public health that includes provisions that are less stringent than the provisions of an executive order issued by the governor (e.g., Kansas).

- o **Question 3: Does the law limit the authority of a state health official regarding public health emergency orders?**
  - ▪ "Yes" was coded when there is a law that limits the authority of a state health official, or when there is a law that limits the authority of a state health agency, regarding public health emergency orders.
- o **Question 3.1: How is the authority of a state health official limited?**
  - ▪ "Issuance of emergency order is restricted" was coded when the law places a restriction on the process for issuing a state health emergency order (e.g., an order must be submitted to a Legislative Council for review).
  - ▪ "Duration of emergency order is limited" was coded when the law limits the duration of an emergency order issued by a state health official or a state health agency to a specified time frame (e.g., 60 days).
  - ▪ "Emergency order may be terminated by legislature" was coded when the law explicitly states that the legislature may terminate an emergency order issued by a state health official or a state health agency.
  - ▪ "Scope of order is restricted" was coded when the law places a restriction on the substance of an emergency order issued by a state health official or a state health agency (e.g., an order may not substantially inhibit the gathering of individuals; emergency plans may not compel a private business to deny a customer access to the premises; a statewide elected official may not mandate use of a face mask). This response was also coded when a law imposes a restriction on the geographic applicability of an emergency order issued by a state health official or a state health agency (e.g., orders are limited to areas affected by the communicable disease). Additionally, this response was coded if a law stated that an individual may not be required to receive a vaccine (e.g., Mont. Code §49-2-312; N.H. Rev. Stat. §141-C:1-a).
- o **Question 4: Does the law limit the authority of a local health official regarding public health emergency orders?**
  - ▪ "Yes" was coded if the law limited the authority of a local health official (or health agency) specifically, or a local official (or agency) generally, regarding public health emergency orders.
- o **Question 4.1: How is the authority of a local health official limited?**
  - ▪ "Issuance of emergency order is restricted" was coded when the law places a restriction on the process for issuing a local health emergency order (e.g., an order must be submitted to a board of commissioners for review).
  - ▪ "Duration of emergency order is limited" was coded when the law limits the duration of an emergency order issued by a local health official to a specified time frame (e.g., 60 days).
  - ▪ "Emergency order may be terminated by another entity" was coded when the law explicitly states that another entity may terminate an emergency order issued by a local health official.
  - ▪ "Scope of order is restricted" was coded when the law places a restriction on the substance of an emergency order issued by a local health official (e.g., an order may not compel a private business to deny a customer access to the

premises; a local official may not mandate use of a face mask). This response was also coded if a law stated that an individual may not be required to receive a vaccine (e.g., Mont. Code §49-2-312; N.H. Rev. Stat. §141-C:1-a).

VI. **Quality Control**

For the initial dataset, the team did not do any independent research to verify the accuracy or completeness of the information in the ASTHO reports.

Minimal quality control measures were used to verify the accuracy of the data collection and coding process. After data collection and coding was complete for all jurisdictions, the supervisor spot-checked a sample of the Master Sheets and coded records as a limited quality control measure. The spot-check consisted of comparing the information contained in the ASTHO reports to the laws listed on the Master Sheet for a few jurisdictions to ensure all in-scope laws were captured for those jurisdictions. The supervisor also reviewed the information in the ASTHO reports for all of the jurisdictions with Master Sheets indicating there were no laws in scope to determine if any laws had been missed. The supervisor then reviewed the coded responses for a sample of jurisdictions to verify accuracy of the coding for those jurisdictions.

VII. **Tracking & Updating – November 2021 Update**

a. **Updates to Existing Laws:** The team searched Westlaw for amendments to the laws on the Master Sheet for each jurisdiction, and updated the Master Sheets to include amendments that became effective June 18, 2021 through November 5, 2021. The researchers then updated the Amendment Tracker for all jurisdictions with laws that were amended.

b. **ASTHO Reports:** ASTHO provided the team with updated reports identifying bills that changed a governor's authority, or the authority of a state/territory health agency or official, to respond to a public health emergency. The team reviewed the reports that were last updated November 5, 2021 for any enacted laws that were in scope, and became effective June 18, 2021 through November 5, 2021. Statutes added or changed by those laws were added to the Master Sheets. The researchers then updated the Amendment Tracker for all jurisdictions with new laws or laws that were amended.

c. **Passive Alerts:** The team signed up to receive daily automatic alerts on Westlaw and Google in order to monitor legislative activity regarding laws limiting public health authority.

In Westlaw, one researcher set up alerts for Enacted Legislation using the following search terms:

   i. "state of emergency"
   ii. disaster & emergency
   iii. requir! & vaccin!
   iv. mandat! & vaccin!

Another researcher set up Google alerts using the following term:

    v. law & limit & "public health"

The researchers reviewed results received from these alerts to determine if there were any laws in scope that were not included in the ASTHO reports. The researchers reviewed the first 50 results for each term, and included any laws that were in scope on an alert spreadsheet.

d. **Active Searches:** One researcher conducted a search for laws limiting public health authority by searching enacted legislation in Westlaw using the following search terms:

    i. health & emergency
    ii. declar! & emergency
    iii. requir! & mask
    iv. mandat! & mask

Another researcher conducted a Google search using the following search term:

    v. legislation & limit & "public health"

The researchers reviewed the first 50 results for each term, and included any laws that were in scope on the alert spreadsheet.

e. **Updating:** For each new iteration on the Amendment Trackers, the researchers added a record to the existing dataset in MonQcle, collected the legal text for each new (or newly amended) law using state legislature websites, then coded the new records based on the updated law.

For the November 2021 update, only in-scope laws from the ASTHO reports and amendments to laws in the initial dataset were built and coded. Laws found through passive alerts (paragraph c above) or active searches (paragraph d above) were not built or coded if they were not included in the ASTHO reports.

f. **Quality Control:** Minimal quality control measures were used to verify the accuracy of the data collection and coding process. After data collection and coding was complete, the supervisor spot-checked a sample of the Master Sheets and coded records as a limited quality control measure. The spot-check consisted of comparing the information contained in the ASTHO reports to the laws listed on the Master Sheet for a few jurisdictions to ensure all in-scope laws were captured for those jurisdictions. The supervisor also reviewed the information in the ASTHO reports for most of the jurisdictions with Master Sheets indicating there were no laws in scope or no updates to determine if any laws had been missed. The supervisor then reviewed the coded responses for a sample of jurisdictions to verify accuracy of the coding for those jurisdictions.

VIII.   Tracking & Updating – May 2022 Update

a. **ASTHO Reports:** ASTHO provided the team with a spreadsheet identifying bills that changed a governor's authority, or the authority of a state/territory health agency or official, to respond to a public health emergency. The team reviewed the spreadsheet that was last updated May 20, 2022 for any enacted laws that were in scope, and became effective November 6, 2021 through May 20, 2022. Statutes added or changed by those laws were added to the Master Sheets. The researchers then updated the Amendment Tracker for all jurisdictions with new laws or laws that were amended.

b. **Passive Alerts:** The team signed up to receive daily automatic alerts on Westlaw in order to monitor legislative activity regarding laws limiting public health authority.

   In Westlaw, one researcher set up alerts for Enacted Legislation using the following search terms:
   - i. "state of emergency"
   - ii. disaster & emergency
   - iii. requir! & vaccin!
   - iv. mandat! & vaccin!

   The researcher reviewed results received from these alerts to determine if there were any laws in scope that were not included in the ASTHO reports. The researchers reviewed the first 50 results for each term, and included any laws that were in scope on an alert spreadsheet.

c. **Active Searches:** One researcher conducted a search for laws limiting public health authority by searching legislation on openstates.org via a search tool in MonQcle using the following search terms:
   - i. emergency declaration
   - ii. mask mandate
   - iii. vaccine requirement

d. **Updates to Existing Laws:** The team searched Westlaw for amendments to the laws on the existing Master Sheet for each jurisdiction, and updated the Master Sheets to include amendments that became effective November 6, 2021 through May 20, 2022. The researchers then updated the Amendment Tracker for all jurisdictions with laws that were amended.

e. **Updating:** For each new iteration on the Amendment Trackers, the researchers added a record to the existing dataset in MonQcle, collected the legal text for each new (or newly amended) law using state legislature websites, then coded the new records based on the updated law.

f. **Quality Control:** Minimal quality control measures were used to verify the accuracy of the data collection and coding process. After data collection and coding was complete,

the supervisor spot-checked a sample of the Master Sheets and coded records as a limited quality control measure. The spot-check consisted of comparing the information contained in the ASTHO spreadsheet to the laws listed on the Master Sheet for eight jurisdictions (Arizona, Georgia, Maryland, Montana, New Hampshire, Utah, Vermont, & West Virginia). The supervisor then reviewed the coded responses for eight jurisdictions (Arizona, Florida, Kentucky, Montana, New Hampshire, South Carolina, Tennessee, & Utah) to verify accuracy of the coding for those jurisdictions.

IX. Time Tracking

As part of documenting and assessing the SSELP methods to determine the most useful and efficient process, the researchers and supervisor recorded the amount of time needed to complete each step of the process in an internal time tracking file.