

Public Health Emergency Law In New Mexico

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What are Public Health Emergencies?

- **Stand-Alone Public Health Emergencies**
 - Public health emergencies without emergency conditions
 - E.g., epidemic or pandemic
- **Combined Public Health Emergencies**
 - Additional, complicating emergency conditions exist
 - E.g., earthquake/hurricane/tornado impacts water, sanitation and/or medical infrastructure

Relationship of Public Health to Medical Care

- Medical Care: treats individuals and contributes to the overall health of the community
- Public Health: protects the whole community and focuses on prevention
 - Protects air, water, and food quality
 - Controls disease outbreaks
 - Collects information on health needs
 - Provides accurate information to the community

Partners in Public Health Emergencies

PUBLIC HEALTH

- State and local agencies
- Federal agencies
- Public and private facilities
- Tribal public health

MEDICAL CARE

- Medical Personnel – public and private
- Hospitals
- EMS
- Health care insurers

Partners in Public Health Emergencies

- Law Enforcement
- Fire/Emergency Medical Services
- Food/Agriculture
- Judiciary/Legal System

Detecting Public Health Emergencies

Public Health Surveillance

- Mandatory reporting of “listed” diseases
- Mandatory reporting of:
 - Unusual symptoms
 - Evidence of unusual concentrations of symptoms
- Additional voluntary reporting
- Collecting information is still possible as long as the key rules are followed

Public Health Surveillance in New Mexico

- A physician or other person must promptly notify a public health official if she knows that a person is infected with a threatening communicable disease
- NMSA 1978 § 24-1-15(A).

Public Health Surveillance Activities include COLLECTING

- information
- Samples
- specimens
- Interviews with contacts
- Records
- FROM doctors, hospitals, insurance companies, laboratories and patients

Federal Public Health Partners

- Department of Health & Human Services
 - CDC, FDA, NIH, IHS and other agencies
 - US Public Health Service Commissioned Corps
 - Strategic National Stockpile (SNS)
- Department of Homeland Security
 - National Disaster Medical System (NDMS)

AND IN CATASTROPHIC HEALTH EMERGENCIES,

- Department of Defense
- Veterans Affairs

State/Local Public Health Structures

- Are all health services in one umbrella agency?
 - Public health
 - Mental health
 - Medicaid
 - EMS
- Officials involved from each of those agencies?

Public Health Coordination

- Agencies must work together for effective health care delivery in an emergency
- Coordination may be required across many local, state and federal agencies
- Public, private and non-profit entities face complex, different risks in emergencies
- Coordination with tribal governments

Basic Legal Challenge of Public Health Surveillance

- Information, samples, specimens, records, interviews with contacts may be highly confidential
- Information that allows individuals to be identified is subject to numerous legal protections in local, state and federal law
- Privacy rules apply before, DURING, and after a public health emergency

Privacy Basics

- Much information can be shared if stripped of personal identifiers – but also consider indirect identifiers (combination of variables)
- When individual patients/providers can be identified, information must be treated in confidential manner
- Privacy guided by HIPAA, Privacy Act, Freedom of Information Act, Public Health Service Act, New Mexico Inspection of Public Records Act

HIPAA Exemptions – Disclosure to Public Health Agencies

- Mandatory public health surveillance reporting is expressly permitted by HIPAA [the required by law exemption in 45 CFR 164.512(a)]
- Voluntary disclosures to public health agencies also permitted of “minimum necessary information to accomplish the purpose of the disclosure” [45 CFR 164.512(b)]

HIPAA Exemptions – Disclosure to Medical Examiners

- A covered health care provider may disclose protected health information to coroners and medical examiners for:
 - Determining the cause of death
 - Identifying the deceased person
 - For other duties authorized by law

HIPAA Exemptions – Disclosure to Law Enforcement

Disclosures by covered health care providers to law enforcement violate HIPAA unless:

- Pursuant to court order, subpoena or administrative order
- To help identify or locate a suspect, fugitive, or missing person, limited to:
 - Name, address, place of birth, SSN, blood type, type of injury, date/time of treatment/death, distinguishing physical characteristic

HIPAA Exemptions – Disclosure to Law Enforcement (cont'd)

- Disclosure provides relevant limited information about a suspected crime victim, and:
 - The individual agrees or agreement is not possible due to incapacity or other emergency
 - The information is not intended to be used against the victim
 - Law enforcement activities would be adversely affected by waiting for consent; and
 - Disclosure is in the best interest of the individual as determined by the health care provider

HIPAA Exemptions – Disclosure to Law Enforcement (cont'd)

- Reporting a crime in an emergency
 - A covered health care provider providing health care in a medical emergency may disclose information if it appears that the disclosure is necessary to alert law enforcement to the commission, nature, location, victims of a crime; and the identity, description, and location of perpetrator of a crime, except for abuse, neglect or domestic violence
 - Specific to a health care provider initiated report to law enforcement

Information Sharing: “Accounting”

Even when permitted to disclose PHI for public health or law enforcement purposes, there are accounting requirements

- 45 CFR 164.515, 164.528
 - When disclosure is made, covered entity must keep an “accounting” of the disclosure made and be able to give detailed information on disclosure on request
 - Exception: if public health or law enforcement requests the covered entity in writing not to alert patient to the disclosure, specifying:
 - Temporary time limit
 - Accounting would impede agency’s activities

Federal FOIA and Privacy Act

- Freedom of Information Act, 5 USC 5523
 - Federal officials must share agency records in their files unless exempted from FOIA
 - Specifically exempts personnel/medical files and similar files that would be a clear unwarranted invasion of personal privacy
 - Balancing test necessary: harm of invasion of privacy vs. public benefit of release
- Privacy Act: never prohibits a disclosure that FOIA requires

New Mexico Inspection of Public Records Act

- Public records defined in NMSA 1978 § 14-3-2
 - All books, papers and other documentary material made or received by any agency in connection with the transaction of public business and preserved by the agency
- General right to inspect records, NMSA 1978 § 14-2-1
 - Except records pertaining to physical or mental examination and medical treatment of persons confined to an institution
 - Except as otherwise provided by law (e.g., HIPAA or other confidentiality laws)

Declaring Public Health Emergencies in New Mexico

What are Declarations?

- Public Announcements
- Legal Determinations
 - Made by an authorized government official
 - Triggering special emergency powers
 - May allow expenditure of emergency funds

Importance of Declaration Differs in PH and EM Disciplines

- Public Health:
 - Declaration is frequently optional
 - Officials have strong powers to act without declaring “public health emergency”
 - “Public health emergency” declarations do not normally trigger availability of significant funds
- Emergency Management
 - Declaration is critical
 - Required to “turn on” emergency authorities
 - Required to make costs eligible for reimbursement

Measures Available Without “Emergency” Declaration

- Public health officials, both state and federal, generally can exercise principal health authorities to control communicable disease without “declaring” a public health emergency, including
 - Quarantine/isolation
 - Travel restrictions
 - Contact tracing
 - Inoculations/medical examinations

State Action Without Declaration

Broad authority granted to Secretary of Health and Department of Health under Public Health Act

NMSA 1978 § 24-1-1 *et seq.*

State Action Without Declaration

- Supervise health and hygiene of the people of New Mexico
- Investigate, control and abate the causes of disease, especially epidemics, sources of mortality and other conditions of public health
- Establish, maintain and enforce isolation and quarantine

State Action Without Declaration (cont'd)

- Close any public place and forbid gatherings of people when necessary for protection of public health
- Maintain and enforce rules for control of communicable diseases deemed to be dangerous to public health
- Maintain and enforce rules for immunization against diseases deemed to be dangerous to public health

State Action Without Declaration (cont'd)

- Inspect such premises or vehicles as necessary to ascertain the existence or nonexistence of conditions dangerous to public health or safety
- Request and inspect, while maintaining confidentiality, medical and clinical records reasonably required for quality assurance and quality improvement activities and for mortality review activities

State Action Without Declaration (cont'd)

- Enter into agreements with other states to carry out powers and duties
- Cooperate and enter into contracts or agreements with the federal government or any other person to carry out powers and duties

Federal Assistance Without Declaration

- Certain federal public health resources may be available even without federal emergency declaration:
 - National Disaster Medical System
 - Strategic National Stockpile
 - CDC assistance in epidemiological investigations

Declaring a Public Health Emergency in New Mexico

- Permitted by Public Health Emergency Response Act
- NMSA 1978 § 12-10A-1 et seq.
- Purpose of Act is to provide state with ability to manage public health emergencies in manner that protects civil rights and liberties of individual persons
- Prepare for public health emergencies
- Provide access to appropriate care for exposed or endangered persons in event of public health emergency

Enhanced Public Health Advisory

- Prior to occurrence of public health emergency, Governor may, after consultation with Secretary of Health, issue enhanced public health advisory
- Secretary of Health may use powers and duties conferred under Public Health Act to investigate the conditions leading to issuance of enhanced public health advisory
- Advisory shall be broadly disseminated in English, Spanish and other appropriate languages to the impacted population

Public Health Emergency Defined

“Public health emergency” means the occurrence or imminent threat of exposure to an extremely dangerous condition or a highly infectious or toxic agent, including a threatening communicable disease, that poses an imminent threat of substantial harm to the population of the state of New Mexico or any portion thereof

NMSA 1978 § 12-10A-3(G).

How is Declaration of Public Health Emergency Made in New Mexico?

- May be declared by Governor upon occurrence of public health emergency
- Prior to declaration, Governor shall consult with Secretary of Health
- Governor shall authorize Secretary of Health, Secretary of Public Safety and Director of Homeland Security to coordinate a response to the public health emergency
- Declaration made through executive order

Public Health Emergency Executive Order

- Must specify:
 - Nature of public health emergency
 - Political subdivisions or geographic areas affected by public health emergency
 - Conditions that caused public health emergency
 - Expected duration of public health emergency, if expected to be less than 30 days
 - The public health officials needed to assist in the coordination of a response to the emergency

Public Health Emergency Executive Order

- Terminated after the Governor determines, following consultation with Secretary of Health, that there is no longer public health emergency
- Terminated automatically after 30 days, unless renewed by Governor after consultation with Secretary of Health
- Secretary of Health shall consult with Secretary of Public Safety and Director of Homeland Security following termination of executive order to ensure public safety during termination procedures

STATE POWERS TO ACT IN A PUBLIC HEALTH EMERGENCY

Key Powers

- Ability to order mandatory:
 - Isolation/quarantine
 - Immunization, testing and other treatments
 - Evacuation/restrictions on travel
- Management of Property
 - Securing health care facilities for public use
 - Inspecting, regulating and rationing health care supplies
- Getting help/services of medical and emergency services professionals

State Powers

- Police power to protect public health and safety
- Subject to constitutional and statutory procedural protections

Quarantine and Isolation: Definitions

- Isolation:
 - Refers to the physical separation for possible medical care of persons who are infected or who are reasonably believed to be infected with a threatening communicable disease or potential threatening communicable disease from those who are healthy and the restriction of their movement to stop the spread of that illness [NMSA 1978 § 12-10A-3(F)]
 - FOR PEOPLE WHO ARE ILL
- Quarantine:
 - Refers to the precautionary physical separation and restriction of movement of persons who, while not yet ill or showing signs or symptoms, have been exposed to a threatening communicable disease or potentially threatening communicable disease [NMSA 1978 § 12-10A-3(I)]
 - FOR PEOPLE WHO HAVE BEEN EXPOSED BUT ARE NOT ILL

Quarantine and Isolation: Definitions

- Threatening communicable disease = disease that causes death or great bodily harm that passes from one person to another and for which there are no means by which the public can reasonably avoid the risk of contracting the disease
- Excludes AIDS or other infections caused by HIV
- NMSA 1978 § 12-10A-3(L)

Quarantine and Isolation

Under Public Health Emergency Response Act

When authorized?

When necessary to protect against the spread of a threatening communicable disease or a potentially threatening communicable disease to others.

Who orders?

- By public health order if delay in isolation or quarantine of person will significantly jeopardize ability to prevent or limit transmission of threatening communicable disease (temporary hold)
- Within 24 hours after issuance of public health order, by district court order upon *ex parte* application of the Secretary of Health

Quarantine and Isolation Under Public Health Emergency Response Act Procedural Requirements

- Application for ex parte order must be written
- Notice shall be given unless immediate and irreparable injury, loss or damage will result before an affected person can be heard in opposition to the application
- Evidence and testimony in support of application may be presented by telephone, fax, video equipment or other electronic communication methods
- Court must find that *clear and convincing evidence* exists to believe isolation or quarantine is warranted to respond to public health emergency

Quarantine and Isolation

Under Public Health Emergency Response Act

Procedural Requirements (cont'd)

- Ex parte order must be posted in public and accessible place
- Ex parte order must be served as soon as practicable to persons isolated or quarantined
- Person who is isolated or quarantined may request court hearing at any time prior to expiration of ex parte order
- Person shall not be isolated or quarantined longer than 5 days without court hearing to determine whether isolation or quarantine should continue
- Isolation or quarantine terminates automatically on expiration of date of court order, or before expiration of court order, on notice to the court, if Secretary of Health determines isolation or quarantine no longer necessary to protect the public

Quarantine and Isolation

Under Public Health Emergency Response Act

Procedural Requirements (cont'd)

- Person who is isolation or quarantined under temporary hold, ex parte order or court order may petition court to contest
- If petition filed, court must hold hearing within 3 business days after petition is filed
- Filing of petition does not stay order or hold
- Notice of hearing must be provided at least 3 days prior to hearing (using best means available, including posting)

Quarantine and Isolation

Under Public Health Emergency Response Act

Procedural Requirements (cont'd)

- Isolated or quarantined person has right to counsel, including the right, if indigent, to be represented by counsel designated by the court
- Court may order extension of isolation or quarantine if it finds, by clear and convincing evidence, that there is imminent health threat to others if isolation or quarantine is terminated
- Isolation or quarantine shall not continue longer than 30 days from date of order unless Secretary of Health petitions court for extension

Quarantine and Isolation

Under Public Health Emergency Response Act

Procedural Requirements (cont'd)

- Person isolated or quarantined may also challenge treatment or terms and conditions of isolation or quarantine
- Done by submitting request for hearing
- Court must fix date for hearing within 7 days of receipt of request
- If court finds that isolation or quarantine of person is not in compliance with PHERA, court may “fashion remedies appropriate to the circumstances of the health emergency”

Quarantine and Isolation Under Public Health Emergency Response Act Substantive Requirements

- Isolation or quarantine must be by the least restrictive means necessary to protect against the spread of a threatening communicable disease to others
- May include confinement to a private home or other private or public premises

Quarantine and Isolation Under Public Health Emergency Response Act Substantive Requirements (cont'd)

- Isolated persons must be confined separately from quarantined persons
- Health status must be monitored regularly to determine if continued isolation or quarantine is required
- Isolated or quarantined persons must be given a reliable means to communicate 24 hours a day with health officials and to summon emergency services

Quarantine and Isolation

Under Public Health Emergency Response Act

Substantive Requirements (cont'd)

- Needs of person are to be addressed in a systematic and orderly manner, including provision of adequate food, clothing, shelter, sanitation and, to extent of available resources, appropriate medication and treatment, medical care and mental health care
- Methods of communication made available to communicate with others, including family members, household members, legal representatives, advocates and the media
- Accommodations made for religious worship or practice and updates on status of public health emergency
- To extent feasible, forms are to be provided that document the person's consent or objection to isolation or quarantine

Quarantine and Isolation

Under Public Health Emergency Response Act

Substantive Requirements (cont'd)

- Isolated or quarantined person has right to refuse medical treatment, testing, physical or mental examination, vaccination, specimen collection and preventive treatment programs
- Household or family member of isolated or quarantined person has right to choose to enter isolation or quarantine area
 - May be required to sign consent form stating that member has been informed of potential health risks, isolation and quarantine guidelines and consequences of entering area
 - Shall not hold State responsible for consequences of entry
 - May be subject to isolation or quarantine as result of entry

Job Protection for Isolated or Quarantined Persons

- An employer or agent of employer is prohibited from discharging from employment persons who are placed in isolation or quarantine pursuant to the PHERA
- NMSA 1978 12-10A-16

Quarantine and Isolation Under Public Health Act

If person is infected with threatening communicable disease and has refused voluntary treatment, detention or observation, public health official may petition court for order to detain person until person is no longer contagious threat to public or person voluntarily complies with appropriate treatment and contagion precautions

Quarantine and Isolation Under Public Health Act (cont'd)

- Once petition is filed, court will immediately grant ex parte temporary order of protection to isolate person if there is probable cause to believe infected person poses a substantial threat to public health and safety
- Evidentiary hearing to be held within 5 days after granting temporary order of protection

Quarantine and Isolation Under Public Health Act (cont'd)

- Person held entitled to representation by counsel
- Court shall appoint counsel if court determines person cannot afford legal representation or if appointment required in the interest of justice
- Clear and convincing standard: whether person has not voluntarily complied or will not voluntarily comply with appropriate treatment and contagion precautions
- Order of detention reviewed every 90 days
- Order terminated and person released if no further risk of infecting others is posed, or evidence does not show under clear and convincing standard that person is infected with threatening communicable disease and will not voluntarily comply with appropriate treatment and contagion precautions

Quarantine and Isolation Under Public Health Act (cont'd)

- Court cannot order forcible administration of medications under these provisions
- Proceedings are not public and records are sealed

Federal Powers

Quarantine/Isolation

- Surgeon General/CDC, through its Division of Global Migration and Quarantine, is empowered to detain, medically examine, or conditionally release persons suspected of carrying certain communicable diseases [42 USC 264]
- Authority applies only if communicable disease has been designated in an executive order of the President
 - SARS was added to list in only 2 weeks
 - Avian flu was added to the list in April 2005
- Indian Health Service also has independent quarantine authority [42 USC 198 and 231]

Scope of Federal Power to Quarantine Individuals

- Interstate/International – persons entering:
 - Into the states or possessions from foreign countries, or
 - From one state or possession into any other state or possession
- Within a state, if individual is reasonably believed to be infected
 - If state/local disease control measures inadequate to control spread of disease
 - Generally close coordination between state and CDC

Federal Powers: Quarantine Procedural Requirements

- Federal statutes specify few procedural requirements for imposition
- Constitutional due process requirements would likely apply
 - Notice and hearing
 - Showing detention needed to protect public health
 - Right to counsel; reviewable final decision
- Provision for the following is required:
 - Access to food, water, medical supplies and treatment
 - Basic needs for survival

Federal Powers: Quarantine of International Goods

- Quarantine of goods permitted
 - Where “serious danger” of introduction of disease into US, from country or places, and
 - Danger is increased with entry into US of people or things
 - Surgeon General can prohibit entry of people or things from that country or place for such time as determined to be necessary
- Enforcement of quarantine laws
 - Fine of \$1,000
 - Imprisonment of not more than 1 year

Federal & State Powers: Quarantine of Agricultural Goods

- Quarantine of Goods
 - Federal powers covered by US Dept of Agriculture (USDA) and the FDA
 - Covered by state departments of agriculture and related agencies
- Enforcement of Quarantine Laws
 - By these same agencies
 - In conjunction with law enforcement, if necessary

Federal Powers: Quarantine of Travel

- 42 CFR § 70.3
- Prohibits a person who has a communicable disease from, during the communicable period:
 - Traveling from one state or possession to another
 - Without a permit from the health officer of the state, possession or locality of destination, if such permit is required under the law applicable to the place of destination

State Authority to Mandate Medical Examination and Testing

- In public health emergency, medical examinations and tests may be performed by qualified persons authorized by Secretary of Health
- Refusal of medical examination or testing that results in uncertainty regarding whether person has been exposed or is infected with threatening communicable disease or is otherwise danger to public health may result in isolation or quarantine

State Authority to Require Vaccination in Public Health Emergency

- Vaccination to prevent infection or spread of threatening communicable disease may be performed under authority of Secretary of Health
- Isolation or quarantine may be sought for persons who are unable or unwilling for reasons of health, religion or conscience to undergo vaccination
- May vaccinate minor under 18 years of age unless minor or his representative presents certificate of physician that vaccination would seriously endanger minor's life or health

Mandatory Vaccination: Historical Background

- *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)
 - 1902 smallpox outbreak in Cambridge, MA
 - Conviction for refusal to be vaccinated
 - Police power embraces “reasonable regulations” to protect public health and safety
 - “Upon principle of self defense, community has a right to protect itself against an epidemic disease”

Federal Powers: Vaccination

- No existing general authority for federal government to mandate vaccination
 - DoD and State Department can require vaccination of servicemen after following specified procedures
- Smallpox Emergency Personnel Protection Act of 2003 [Pub. Law 108-20 April 30, 2003]
 - Encourages vaccination by providing liability protection (for some of those vaccinating) and
 - Compensation for injuries caused by vaccination

Mandatory Treatment: Recent Case

- *Best v. Bellevue Hospital*, 2003 WL 21518829 (SDNY July 2003); 2003 WL 21767656 (SDNY July 2003), *aff'd in part, vacated in part, dismissed in part*, 2004 WL 2166316 (2d Cir. 2005) [ALL UNPUBLISHED]
- Facts
 - TB patient confined when sought to leave hospital/refusing TB treatment
 - Filed suit against Health department and hospitals
- Health Department ultimately prevailed (4 hearings, 7 administrative and state and federal judicial orders over 2 years)
- Federal court generally described constitutional standards to be met before an individual may be detained:
 - Right to a particularized assessment of an individual's danger to self or others
 - Right to less restrictive alternatives

Mandatory Treatment in Public Health Emergency: State Powers

- Treatment of person who is exposed to or infected with threatening communicable disease may be administered by public health official
- Treatment shall be approved pursuant to FDA regulations
- Isolation or quarantine may be sought for persons unwilling, for reasons of health, religion or conscience, to undergo treatment

Managing Private Property In Health Emergencies

Access Control vs. Use

- Property relevant to public health emergencies in 2 basic ways:
 - *Access Control*: Government may need to close, confiscate, deny access to, evacuate people from, prevent sale or use of real or personal property because unsafe, or for police activity
 - *Use*: Government may need to use private property in order to respond to emergency
- Law treats access control measures to protect public health and safety very differently than use measures

Management of Property: Closing Facilities

- State or local authorities can close a facility or impound contaminated property by:
 - Issuing administrative orders (e.g., closing restaurants for unsanitary conditions)
 - Using general legal powers to control epidemics or determination that there is a public nuisance (e.g., condemning property as unsafe after fire, earthquake, storm damage)
- Not normally required that public health emergency be declared to take these steps

Emergency Use of Private Facilities In Public Health Emergency

- PHERA authorizes Secretary of Health, in coordination with Secretary of Public Safety and Director of Homeland Security, to:
 - Utilize, secure or evaluate health care facilities for public use
 - Inspect, regulate or ration health care supplies

Emergency Use of Private Facilities In Public Health Emergency (cont'd)

- Health facility is defined as:
 - Facility licensed by State under Public Health Act
 - Non-federal facility or building, whether public or private, for-profit or nonprofit, that is used, operated or designed to provide health services, medical treatment, nursing services, rehabilitative services or preventive care;
 - A federal facility, where the appropriate federal entity provides consent;
 - Laboratories, research facilities, pharmacies, laundry facilities, health personnel training and lodging facilities, patient, guest and health personnel food service facilities and office buildings, when used for, or in connection with, health-related activities

Emergency Use of Private Facilities In Public Health Emergency (cont'd)

- State is required to pay just compensation to owner of health facility that is taken or appropriated for temporary or permanent use during public health emergency
- Amount of compensation calculated in same manner as taking of property pursuant to non-emergency eminent domain procedures
 - Amount of compensation shall include lost revenues and expenses incurred due to the taking or appropriating of property

Emergency Use of Private Facilities In Public Health Emergency (cont'd)

- Attorney General shall make preliminary determination of whether or not compensation is due
- Owner may appeal preliminary determination pursuant to rules promulgated by Attorney General
 - Rules shall include owner's right to speak at appeal and owner's right to present facts pertinent to appeal to hearing officer appointed by attorney general
- Decision of attorney general shall be subject to appeal to district court pursuant to NMSA 1978 39-3.1.1
- To extent practicable, prior to the taking or appropriation of property, Attorney General shall institute civil proceedings against the property to be taken or appropriated in accordance with Eminent Domain Code, or other applicable laws or rules

Emergency Regulation of Health Care Supplies in New Mexico

- If public health emergency results in statewide or regional shortage of health care supplies, Secretary of Health may control, restrict, and regulate the allocation, sale, dispensing or distribution of health care supplies
- Includes medication, durable medical equipment, instruments, linens or any other material that may be needed in a public health emergency, including supplies for preparedness, mitigation and recovery

Emergency Regulation of Health Care Supplies in New Mexico (cont'd)

- Same compensation procedures as for taking of health care facilities applies