Navigating the Legal Framework for State Foodborne Illness Surveillance and Outbreak Response: Observations and Challenges

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Introduction

For at least the past 15 years, food safety stakeholders across all levels of government have recognized the critical role that state and local agencies play in our nation’s food safety system. State and local agencies are the first responders to foodborne outbreaks and have primary responsibility for keeping their residents safe from foodborne disease through effective surveillance and rapid response to outbreaks. They also conduct the vast majority of food safety inspections across the nation’s restaurants, grocery stores, and other food service and food retail establishments.

Recent efforts among industry and government officials alike have focused on creating a more integrated, prevention-oriented food safety system. The Food Safety Modernization Act, the first major overhaul of the nation’s food safety laws since the 1930s, now mandates that most sectors of the food industry put preventive controls in place, changing the emphasis of what the FDA does from response to prevention. The Act also recognizes the integral role that state and local agencies play in detection and response to outbreaks of foodborne illness, and calls for increased training and expanded laboratory capacity for effective surveillance and response at the state and local levels.

Working toward a goal of better integration among all levels of government, as well as uniformity to improve surveillance and response in multijurisdictional outbreaks, food safety stakeholders and national experts have recognized the important role of law in providing the authority that states and localities need to carry out these public health responsibilities. However, state laws pertaining to foodborne illness surveillance and outbreak response are often outdated and do not reflect, for example, current needs with regard to information exchange and investigation, particularly in the case of the ever-more-common multistate foodborne outbreak. While other factors — such as state and local policies and resources — are certainly large contributors to the success of a state’s surveillance and outbreak response program, a state’s legal framework for conducting these activities serves as the core for how the state’s program actually operates.

Policymakers and food safety stakeholders need to be able to compare their own legal authorities with those of other states that are considered leaders in foodborne illness surveillance and outbreak response, and to assess how recommended legal provisions, such as those currently under development through the Council to Improve Foodborne Outbreak Response, might best be incorporated into a state’s legal infrastructure.

Yet, there was no mechanism to allow researchers and policymakers to easily review and compare state level regulations and legislation pertaining to foodborne illness surveillance and response.

Over the past year, we have developed a database of state legal provisions relating to foodborne illness surveillance and response that will be available for use by any interested researcher or decision maker. Though limited to state laws, the database includes information about key legal authorities necessary for conducting foodborne illness surveillance and outbreak response, and requirements for reporting several of the most common foodborne diseases. This commentary will discuss some of the overarching themes we have encountered throughout our review of state laws.
and development of the database, and highlight key initial findings that may have important implications for food safety stakeholders.

**Overview of the Legal Landscape**

Determining what constitutes a “foodborne illness surveillance and response law” was our first challenge in building the database. A wide variety of laws impact how a state detects and responds to cases of foodborne disease, making it difficult to draw a defined line between food regulatory laws aimed at prevention of foodborne illness, and food-related public health laws aimed at detecting and responding to suspected response activities. Public health agencies generally oversee surveillance and outbreak response through the work of state epidemiologists and are also often responsible for conducting inspections (or delegating authority to the local public health agency) of restaurants and other food service establishments. Meanwhile, state departments of agriculture are typically responsible for conducting inspections of grocery stores and food manufacturing and processing plants. However, this general framework varies in some states. For example, in New Hampshire, the Department of Health and Human Hygiene has regulatory authority over grocery stores and some food

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or confirmed cases of foodborne disease. Food safety laws span the farm-to-table continuum, ranging from required preventive controls on the farm and in manufacturing and processing plants, to food storage and preparation laws at restaurants and other food retail and service establishments, to the surveillance, detection, and response to outbreaks of foodborne illness. At every step along this continuum, laws include provisions relating to the prevention and control of foodborne illness, whether among employee food workers or consumers.

For each state, laws were identified through Lexis Nexis, Lexis Academic Universe, and Westlaw using approximately 40 search terms relevant to foodborne illness surveillance and outbreak response; some additional laws were identified through independent state legal databases where laws were not available elsewhere, and through a review of state statutory and administrative codes’ tables of contents. Upon reviewing the laws identified in our searches, we found that the vast majority of relevant laws are typically located in two different sections of states’ statutes and regulations — those pertaining to the authorities of the state’s department of health and those of the state’s department of agriculture (with statutes most often providing general frameworks for agency authorities, and regulations providing the details about how agencies, reporting entities, and food establishments are to carry out surveillance and processing facilities; in Florida, the Department of Business and Regulation has regulatory authority over restaurants.

Within these primary statutory and regulatory sections, laws are usually grouped into major subsections. For public health agency authorities, those subsections — particularly within a state’s regulations — often are (1) reportable conditions (or more generally, communicable diseases), which govern surveillance, reporting, and outbreak response of foodborne and other communicable diseases, and (2) food service or sanitation, which provides laws relating to food storage and preparation, management training in foodborne illness, food worker hygiene and illness, and inspection and enforcement in food service establishments (often collectively referred to as the state’s “food code”). Some states include food retail such as grocery stores within this section as well. As discussed in more detail below, in many states, responsibility for carrying out several of these laws rests with local public health agencies instead of the state agency.

For authorities pertaining to state departments of agriculture, these laws are often grouped into general provisions relating to food retail, manufacturing and processing plants, and many sections specific to individual commodities, such as dairy, eggs, juice, meat and poultry, shellfish, etc. Each of these sections often provides requirements for management training, food worker illness, and inspection and enforcement
Initial Observations and Challenges

Importance of Definitions
As with most types of laws, definitions of certain terms play an important role in determining the scope of the state or local agency’s authority to conduct foodborne illness-related activities and to require reporting from various entities. For example, almost every state includes a definition of “foodborne outbreak” (or “foodborne disease outbreak”) within their public health regulations, yet the definition varies across states and in what the state requires for a reported illness to be considered foodborne. While most states use a broad definition mirroring that in the 2009 FDA Food Code (i.e., the occurrence of two or more cases of a similar illness resulting from the ingestion of a common food), some states use a more restrictive definition, requiring that the two or more cases experiencing illness be unrelated or reside in different households. Some states also explicitly require that epidemiological analysis implicate food as the source of the outbreak. How a state defines “foodborne outbreak” is important for several reasons, including how quickly and how much investigation is required in determining whether reported cases or clusters are foodborne, how cases are attributed as being foodborne for statistical and surveillance purposes, and in determining a state or local agency’s priorities in responding to the outbreak.

Variability in Reportable Foodborne Diseases and Specimen Submissions
In order to carry out effective surveillance and respond quickly to foodborne outbreaks, state and local agencies are reliant on physicians, laboratories, and other entities to report cases of foodborne disease and submit patient specimens (typically stool samples) to the state public health agency. However, state laws vary widely with regard to reporting and specimen submission requirements, despite the importance of such information for purposes of determining the cause of the foodborne disease outbreak and implementing appropriate control measures.

As with other communicable diseases, foodborne illnesses fall within a state’s reportable disease laws, though states vary with regard to the specific foodborne diseases listed as reportable. While only a handful of states list “foodborne illness” or “foodborne outbreak” as a distinct reportable condition, other states include foodborne outbreak in a catchall “outbreak” category; all states also list individual pathogens which may be foodborne. Reportable disease lists also typically include whether reporting entities must submit a patient specimen to the state public health agency. In most states, reportable disease lists are included within the text of their regulations (many are also included on state websites), with authority given to the state public health agency to update the list under certain conditions — either unilaterally when necessary to protect the public’s health, or through legislative approval. While each state has the legal authority to determine which diseases are reportable and require specimen submissions within the state, the variability that exists amongst states leads to incomplete reporting, compromised surveillance, and decreased ability to detect, determine the extent of, and respond to, outbreaks of foodborne disease across the U.S. While uniform mandatory reporting requirements across all states would go a long way towards solving this problem, such an initiative would not likely receive unanimous state support due to differences in priorities, laboratory and health staffing capacities, and funding limitations. Nevertheless, states should be cognizant of how their reportable disease requirements compare with those of other states — particularly those that are considered “leaders” in foodborne illness surveillance and outbreak response — and seek to achieve as much uniformity as possible without sacrificing efficiency under existing resource limitations.

Broad vs. Specific Authority
While some state laws include authorities explicit to foodborne outbreak reporting, investigation, and response, most states frame their legal authority for foodborne illness surveillance and outbreak response in general terms that provide broad authority for these activities relevant to all communicable diseases. Anecdotal reports from state epidemiologists, health inspectors, and other public health officials suggest that this broad, generalized authority is typically sufficient in allowing agencies to conduct both their necessary day-to-day surveillance and emergency outbreak response functions. However, there are some instances where more specific authority is important. For example, having access to restaurant credit card receipts in the case of restaurant-based outbreaks, or grocery store shoppers cards in the case of illnesses associated with particular store products, would enable state and local epidemiologists to quickly track down exposed individuals and identify the food vehicle involved in an outbreak. While officials are currently often able to obtain this information through their general authorities, not all establishments have been willing to share their data, primarily citing concerns over patron privacy. Having specific legal authority to access this type
of information for defined public health emergencies such as outbreaks of foodborne illness may help speed the process of obtaining this information and encourage cooperation from more establishments, allowing for more efficient and comprehensive outbreak response.

**State vs. Local Authorities**

Another feature of state foodborne illness surveillance and response laws is their variability in assigning responsibilities to local health officers. While some state laws vest authorities over foodborne surveillance and response primarily to the state public health agencies, most states delegate to local agencies responsibilities such as collecting reports of foodborne illness, both from consumer complaints and reporting entities, investigating potential outbreaks of foodborne illness, and conducting inspections of food retail and service establishments. Where such authority is delegated, statutes and regulations allow for varying degrees of concurrent authority, with some specifically allowing either the state or local health officer to act, while others provide that the state may step in where the local health officer is unavailable.

This loose “sharing” of authority between different agencies at times leads to confusion between state and local officials over who is in charge during a foodborne outbreak investigation, which can create inefficiencies and slow the response effort. This problem is heightened in large multistate outbreaks where several states and federal agencies are involved with multiple players trying to take a leading role. The state-local division of authority can be especially difficult for states that include local “home rule” jurisdictions that may have their own system of investigation and response, and their own priorities in how to address outbreaks of foodborne illness. Given that local agencies serve at the front lines of public health prevention and response and are closest to the communities that the public health system serves, allowing local agencies to have some degree of flexibility and independent legal authority to carry out their activities as they see necessary remains important; however, with the ever-increasing risk of multi-jurisdictional outbreaks, state and local agencies should work closely together to ensure that their policies and procedures for surveillance and outbreak response are consistent and coordinated, and will help rather than hinder response efforts in widespread outbreaks. Adopting uniform laws and policies, such as those proposed by CIFOR, would help to make surveillance and response efforts more consistent and efficient across jurisdictions.

Adopting Federal Model Codes

Another difficulty in navigating through state foodborne surveillance and outbreak response laws is understanding how the state integrates relevant federal laws and model legal provisions into its own laws. One prominent example is the FDA’s Food Code for food retail and service establishments, such as grocery stores and restaurants. The Food Code, which has been modified four times since its initial release in 1997, provides model legal provisions for things such as food temperature control, preparation, and managing with food handler illness, and represents the FDA’s “best advice” to state and local governments for a uniform system of food service and retail food safety regulation. Although all states have now adopted some version of the Food Code into their own laws, which iteration the state uses varies considerably. Moreover,
while some states have adopted the Food Code in its entirety, others have adopted only select provisions of the code, or have substituted their own provisions on certain issues. Because many states do not include the text of the adopted Food Code provisions within their laws, conducting a basic review of the state's foodborne illness surveillance and outbreak response laws pertaining to food service and retail establishments can be a cumbersome and confusing process.

Conclusion
As we near completion of our review and analysis of state foodborne illness and response laws, we find it ever more important for food safety officials, policymakers, and researchers to understand the key role that laws play in a state's ability to effectively and quickly detect and respond to outbreaks of foodborne illness. There appears to be wide variation in the legal infrastructure for foodborne disease reporting and outbreak response across states, and as outbreaks become more widespread and involve multiple jurisdictions, it is critical for food safety stakeholders to (1) know the legal authorities under which each state operates and how to work within those authorities, (2) know how to assess the relevance of particular state authorities and how they may impede or promote efficient and effective surveillance and outbreak response, and (3) use that knowledge to determine if a state's legal authorities should be updated or strengthened. We hope the database we have created will provide a starting point for these discussions and analyses.

The database will be available for public use in 2013, and will be hosted by the Robert Wood Johnson Foundation's Public Health Law Research Program website.

Acknowledgements
This work was funded by a grant from the Public Health Law Research Program of the Robert Wood Johnson Foundation. Jenna Burton, Christopher Chadwick, Nisha Puntambekar, Brent Keller, Jonathan Matthews, Daniel Musher, and Morgan Kaminski assisted in creating the database, pulling appropriate legal authorities, coding, and entering data. We are very grateful for their assistance.

References
3. Id.
5. See Taylor, supra note 4.
10. See Council to Improve Foodborne Outbreak Response, supra note 4.