



TB and the Law Project

**TB Control and the Law
Frequently Asked Questions on Civil Commitment**

<p><i>How does the law differentiate among active TB, infectious TB, and TB infection?</i></p>	<p>Health and Safety Code §120110: * <u>Active TB</u> occurs if either of the following occur:</p> <ul style="list-style-type: none"> (a) A smear or culture taken from any source in the person’s body has tested positive for TB and the person has not completed the appropriate prescribed course of medication for active TB; or (b) There is a radiographic, current clinical, or laboratory evidence sufficient to support a medical diagnosis of TB for which treatment is indicated. <p><i>Comment:</i> Active TB is not necessarily in an infectious state.</p> <p>§120115: <u>Infectious TB</u> means active or suspected active TB in an infectious state.</p> <p>§120115: <u>Tuberculosis infection</u> is the latent phase of TB during which the infected person cannot spread TB to others.</p>
<p><i>How does the law define directly observed therapy (DOT)?</i></p>	<p>§120115: <u>Directly observed therapy</u> means the appropriately prescribed course of medical treatment for TB in which the medications are administered to the person or taken by the person under direct observation of a health care provider or designee.</p>
<p><i>What are the <u>mandatory</u> duties of the California Department of Health Services (CDHS or the department) regarding communicable disease control?</i></p>	<p>§120125: CDHS shall examine into the cause of communicable diseases.</p> <p>§120130: CDHS shall establish a list of reportable diseases. The department may adopt and enforce regulations for isolation and quarantine.</p> <p>§121350: CDHS shall maintain a program for the control of TB.</p> <p>§121357: CDHS shall be the lead agency for all TB control and prevention activities at the state level.</p> <p>§121358(b): CDHS shall work with local health jurisdictions to identify</p>

* All references are to the California Health and Safety Code unless otherwise specified.

	<p>detention sites for persistently nonadherent TB patients.</p> <p><i>Comment:</i> Mandatory duties are those that are <i>required</i> to be performed by the department.</p>
<p><i>What are the <u>discretionary</u> duties of the California Department of Health Services regarding communicable disease control?</i></p>	<p>§120135: CDHS may establish and maintain places of quarantine and isolation.</p> <p>§120140: When informed of a communicable disease, CDHS may take measures to ascertain the nature of the disease and to prevent its spread. The department may take possession of the body of a living person or corpse.</p> <p>§120142: The state director of CDHS may order examinations of persons in close contact with infectious TB patients and persons who are at heightened risk of TB. Orders of examination must be in writing.</p> <p>§120145: CDHS may quarantine, isolate, inspect, and disinfect persons, animals, houses, rooms, and other property whenever necessary to protect the public’s health.</p> <p>§120150: CDHS may destroy property if disinfection is not safe and when the property is an imminent menace to public health.</p> <p>§121375: CDHS may have access to all records of all institutions and clinics.</p> <p>§121390: CDHS shall lease facilities it deems necessary to care for persons with active contagious TB who violate quarantine or detention orders as provided in §§120280 and 121365.</p> <p>§121450: CDHS may distribute an annual subvention to be used for TB control according to the standards and procedures set by the department.</p> <p><i>Comment:</i> Discretionary duties are not <i>required</i> to be carried out by the health officer, but are performed using the best judgment of the health officer under the circumstances.</p>
<p><i>What are the <u>mandatory</u> duties of local health officers in TB control?</i></p>	<p>§121365: Local health officers must use every available means to ascertain the existence of, and immediately investigate, all reported or suspected cases of active TB in the jurisdiction, and to ascertain the sources of those infections. In carrying out investigations, health officers shall follow local rules and regulations, and those of the state health services department.</p> <p><i>Comment:</i> The mandatory duty is to investigate suspected cases and to</p>

	<p>follow all rules as established by local or state law or CDHS. There is no mandatory duty to treat persons with TB (see below).</p> <p>§121365: If a health order has been violated, the health officer shall advise the district attorney in writing, and shall submit to the district attorney the information in his or her possession relating to the subject matter of the order and to the violation(s).</p> <p><i>Comment:</i> Although a health officer is not required to issue health orders - even if a person is persistently nonadherent with examination or treatment guidelines (see below) - once a health order is issued, it becomes a mandatory duty of the health officer to report any violations of a health order to the district attorney.</p>
<p><i>What are the <u>discretionary</u> duties of local health officers in TB control?</i></p>	<p>§121365: The local health officer may issue any orders he or she deems necessary to protect the public health, and may make an application to a court to enforce those orders.</p> <p><i>Comment:</i> Issuing health orders is a discretionary duty of health officers. Health officers enjoy broad authority to issue any order they deem necessary to protect public health. Health officers can ask courts to enforce health orders through injunctions (i.e., court orders to compel or desist action), fines, or other equitable relief.</p> <p>§121366: Health officers may detain a persistently nonadherent patient in a hospital or other appropriate place for examination or treatment.</p>
<p><i>What behaviors can health orders compel?</i></p>	<p>§121365: Health orders may include, but are not limited to:</p> <ul style="list-style-type: none"> (a) An order authorizing the removal to, detention in, or admission into, a health facility or other treatment facility for the <u>examination of active TB</u> for a person who is unable or unwilling to submit to examination. (b) An order requiring a person who has active TB to <u>complete medical treatment and follow infection control precautions</u>. This section does not allow involuntary administration of medications. (c) An order requiring a person with active TB who is unable or unwilling to complete medication to <u>follow a course of directly observed therapy</u>. This section does not allow involuntary administration of medications. (d) An order authorizing the removal to, detention in, or admission into, a health facility or other treatment facility of a person if <i>both</i> are present: <ul style="list-style-type: none"> (1) The person has <u>infectious TB</u> or is substantially likely to have infectious TB; and (2) The local health officer finds that there is a <u>substantial</u>

	<p><u>likelihood that the person may transmit TB</u> because of the person's inadequate separation from others.</p> <p>(e) An order authorizing the removal to, detention in, or admission into, a health facility or other treatment facility of a person if <i>both</i> are present:</p> <p>(1) The person has <u>active TB</u> or has been reported to have active TB with no report that the person has completed prescribed medication; and</p> <p>(2) The local health officer finds that there is a substantial likelihood, based on the person's past or present behavior, that <u>the person cannot be relied upon to participate in or complete medical treatment and follow infection control precautions</u>.</p> <p>(f) An order for <u>exclusion from the workplace or any other place</u> the Health officer deems inadequate to protect against the spread of TB.</p> <p>(g) An order for the <u>isolation of persons with infections TB</u> to their home until they are no longer deemed infectious.</p> <p><i>Comment:</i> Again, these are discretionary duties and the authority of the health officer to issue health orders is not limited to the orders enumerated above.</p>
<p><i>What behavior indicates that a person is unlikely to be relied upon to complete medical treatment?</i></p>	<p>§121365(e)(2): The behavior may include, but is not limited to: refusal or failure to take medication, to keep appointments, to complete treatment, or to regard the infection control precautions.</p> <p><i>Comment:</i> These behaviors provide the evidence that a health officer will need in order to enforce health orders against a person. This specific, individualized type of evidence is a hallmark of procedural due process.</p>
<p><i>Is a court order needed for civil detention for examination or treatment?</i></p>	<p>§121366: Health officers may detain a person in a hospital or other appropriate location for examination or treatment <i>without</i> a prior court order <i>except</i> if the person requests release (see below).</p>
<p><i>How long can a person be detained for examination or treatment?</i></p>	<p>§121366: A local health officer may detain a person in a hospital or other appropriate location for examination or treatment up to 60 days without a court order. A court order must be obtained to hold the person longer than 60 days.</p> <p><i>However,</i> if at any time during detention, the person who is detained pursuant to §121365 (a), (d) or (e) requests release, the local health officer must make an application for a court order within 72 hours of the request. If the 72-hour period ends on a Saturday, Sunday or legal holiday, the request must be made by the end of the next business day.</p>

	<p>After a person’s request for release, detention shall not continue for more than 5 business days in the absence of a court order. If a court order authorizes continued detention, a health officer must seek further court review of the detention within 90 days following the initial or subsequent court order allowing detention.</p> <p>In addition, the following limits on detention apply:</p> <p>§121368 (a): If a person is detained solely for examination under §12165(a), the person shall be detained no longer than the minimum period of time to make a medical determination of whether the person has active or infectious TB.</p> <p>§121368(b): If a person is detained for treatment for infectious TB under §121368(d), the person may be detained only until he or she is no longer infectious or until the health officer ascertains that the person can be adequately separated from others to prevent the transmission of TB to others.</p> <p>§121368(c): If a person is detained for treatment for active TB under §121365(e), the person may be detained only until he or she has completed medical treatment.</p> <p><i>Comment:</i> This section of the statute interlaces discretionary and mandatory duties. It is discretionary whether a person with TB should be detained. However, once a person is detained, a series of mandatory obligations are triggered (e.g., court approval requirements and timelines) in order to ensure that procedural due process standards are met.</p>
<p><i>What information must all health orders contain?</i></p>	<p>§121367(a): All health orders, including orders for examination, treatment, directly observed therapy, detention, exclusion from work, isolation, or any other order issued by a health officer must include all of the following:</p> <ol style="list-style-type: none"> (1) The <u>legal authority</u> and particular sections of state law or regulations under which the order is issued; (2) An <u>individualized assessment</u> of the person’s circumstances or behavior constituting the basis for the issuance of the order. (3) The <u>less restrictive treatment alternatives</u> that were attempted and were unsuccessful, or that were considered and rejected with the reasons the alternatives were rejected. (4) The orders <u>must be in writing</u> and include the person’s name, the time period the order will be in effect, the location, the payer source if known, and other terms and conditions necessary to protect the public health. A copy of <u>the order must be served upon the person</u>.

	<p><i>Comment:</i> Again, while issuing a health order is a discretionary act, if it is issued, it is mandatory that the health order include certain information. These mandates safeguard the due process rights of the person by requiring the government (i.e., health officer) to provide justification for his or her actions that have the potential to infringe upon the person’s constitutional rights to privacy, bodily integrity, travel, etc.</p>
<p><i>What additional information must a detention order contain?</i></p>	<p>121367(b): In addition to the requirements that apply to the contents of all §121365 health orders, an order for detention shall do all of the following:</p> <ol style="list-style-type: none"> (1) Include the purpose of the detention; (2) Advise the person that he or she has the right to request release from detention by contacting the health officer or designee at the number provided, and that the detention shall not continue for more than 5 days after the request in the absence of a court order authorizing detention; (3) Advise that the local health officer can only detain the person up to 60 days without a court order; and that that further court review is required within every 90 days thereafter; (4) Advise the person that he or she has the right to retain or be appointed counsel, and that the counsel shall be notified if the person chooses to obtain counsel; (5) Provide a separate notice stating at least that the person has the right to: <ol style="list-style-type: none"> a. request release from detention; b. counsel; and c. supply the addresses of telephone numbers of not more than 2 individuals to receive notification of the person’s detention. <p><i>Comment:</i> Detention is one of the actions a health officer can take that most intrudes on a person’s constitutional right to liberty. This section of the statute serves to protect a person’s procedural due process rights by providing, for example, that the person is notified of his or her right to legal counsel and right to a review of the merits of a detention order by an impartial decision-maker.</p> <p>This section applies only to detention orders. Non-detention health orders (e.g., orders for examination, treatment, directly observed therapy, exclusion from work, and isolation) need not comply with §121367(b).</p>

<p><i>What must an application to a court for continued detention contain?</i></p>	<p>§121366: The health officer must prove the particularized circumstances constituting the necessity for the detention. The application must provide “clear and convincing” evidence. The application must also request an expedited hearing.</p> <p><i>Comment:</i> “Clear and convincing evidence” means that the evidence must show a high probability that the person is unable or unwilling to abide by examination or treatment orders. It is a tough evidentiary standard. A court must have a firm belief or conviction as to the truth of an allegation.</p>
<p><i>What constitutes a “local detention facility?”</i></p>	<p>The term “local detention facility” has the same meaning in Health and Safety Code §120115(h) as it does in Penal Code §6031.4. Penal Code defines “local detention facility” to mean any city or county or regional facility used for the confinement of persons, excluding those portions of the facility used to confine minors. Penal Code §6031.4. It may include a private detention facility under contract with a city or county if it is responsible for the custody and control of a prisoner. Penal Code §§6031.4(c) and 6031.6.</p> <p>A local detention facility may include a locked ward in a county hospital if the hospital has a contract with a city or county to provide for the custody and control of a prisoner.</p> <p>A home used pursuant to home isolation would not be considered a local detention facility, as the owner of the home is not under contract with a city or county to provide for the custody and control of a prisoner.</p>
<p><i>Does a person who is civilly detained have a right to legal counsel?</i></p>	<p>§121366: Any person who is subject to a detention order has a right to be represented by counsel. Upon request of the person, counsel must be provided.</p> <p><i>Comment:</i> The right to counsel is a hallmark of procedural due process.</p>
<p><i>Do health orders have to be in a native language?</i></p>	<p>§121369(a): For the purpose of health orders (§§121365 and 121367) and detention orders (§121366), language, visual, or hearing interpreters must be provided when necessary to ensure the person’s understanding of the health order.</p> <p><i>Comment:</i> The law does not require health orders to be written in a native language, so long as translators are provided. However, it would be prudent to supply written translations both to assure the patient’s comprehension and to have hard evidence that the patient was duly notified of the contents of the order.</p>

<i>Can patients be forced to take medications?</i>	§121369(b): The forcible administration of medications cannot occur without a court order.
<i>What religious rights do patients have to refuse examination or treatment?</i>	<p>§121370: No examination or inspection shall be required of any person who depends exclusively upon prayer for healing in accordance with the teachings of any well recognized religion. However, the compulsory reporting of TB, and isolation and quarantine shall apply if there is probable cause to suspect the person is infected with the disease in the communicable stage. So long as the person can be quarantined or isolated in his or her home or other suitable place of his or her choice, he or she will not have to submit to medical treatment or be confined in a medical institution.</p> <p><i>Comment:</i> A health officer might avoid an equal protection or First Amendment challenge by applying the religious exemption to a genuinely religious person regardless of whether the person seeking the exemption belongs to a “well recognized” religion.</p>
<i>What happens after detention?</i>	<p>§121361(a)(1): A health facility, a local detention facility, or a state correctional institution may not release persons known or reasonably believed to have active TB until a notification and written treatment plan has been received by the local health officer.</p> <p>§121361(a)(2): A person known or reasonably believed to have active TB may be discharged from a health facility only after notice is given to, and a reasonable treatment plan is approved by, the local health officer.</p>
<i>Can persons with active or infectious TB be detained in a jail or other correctional facility?</i>	§121358: Individuals detained through the TB program shall not reside in a correctional facility. In <i>Souvannarath v. Hadden</i> , 95 Cal. App. 4 th 1115 (2002), the court interpreted §121358 to mean that <i>civil detention</i> may not occur in a correctional facility. However, §121358 explicitly states that the statute “shall not be interpreted to prohibit the institutionalization of <i>criminals</i> with tuberculosis in correctional facilities.”
<i>What is the difference between a “state correctional institution,” a “local detention facility,” and a “penal institution?”</i>	<p>§120115(g) defines a “state correctional institution” to mean a prison, institution, or other facility under the jurisdiction of the Department of Corrections or the Department of the Youth Authority.</p> <p>§120115(h) defines a “local detention facility” to mean the same thing as provided in Penal Code §6031.4 (i.e., any city or county or regional facility used for the confinement of persons, excluding those portions of the facility used to confine minors).</p> <p>§120115(i) defines “penal institution” to mean either a state correctional institution or a local detention facility.</p>

	<p><i>Comment:</i> Confusion arises when the operative provisions of the TB control statute do not use these terms exactly as defined. For example, §121358 prohibits the detention of persistently nonadherent patients in “correctional facilities.” Does this mean a “state correctional institution,” a “local detention facility,” both, or something else entirely?</p> <p>The court in <i>Souvannarath v. Hadden</i>, 95 Cal. App. 4th 1115 (2002), interpreted §121358 to mean that persistently nonadherent TB patients may not be detained in a “jail.” While the court did not define the term “jail,” the court used the term as if it were synonymous with “correctional facility.” Therefore, it is prudent to assume that the term “correctional facility” means any place where people are confined awaiting trial or serving short sentences (i.e., all of the facilities defined in §120115(g) (h) and (i)).</p>
<p><i>What is the difference between civil and criminal detention?</i></p>	<p>Civil detention is a non-criminal action taken by a government against a private individual in order to protect the individual from him/herself or others. It is authorized by §121366, which allows for detention in a hospital or other appropriate place for examination or treatment of individuals who violate written health orders. According to <i>Souvannarath v. Hadden</i>, 95 Cal. App. 4th 1115 (2002), a jail or prison (i.e., a penal institution or correctional facility) may not be used for civil detention.</p> <p><i>Comment:</i> Criminal detention is a punitive action taken by a government against someone who has engaged in illegal activity, such as the violation of a health order issued pursuant to §121365. Criminal detention for violation of a TB-related health order is authorized by §120280. It allows detention in any appropriate facility, penal institution, or dwelling approved by the local health officer.</p>
<p><i>Does civil detention include detention in an unlocked or unsecured facility?</i></p>	<p>§121365 authorizes a health officer to issue an order for removal to, detention in, or admission into a health facility or other treatment facility. It is silent regarding whether these facilities should be locked and secured. Because §121365 provides only <i>examples</i> of the types of health orders a health officer may issue, a health officer has the discretion to determine whether or not the detention should be in a locked and secured facility.</p> <p>Furthermore, §121366 provides a health officer with summary enforcement authority to detain a person in a hospital or other appropriate place for treatment. This means the health officer can detain a person without a prior court order. Again, the statute is silent regarding whether the facility must be secured.</p>

	<p>While civil detention theoretically may include a detention in an unlocked or unsecured facility, the usefulness of such a detention order is questionable for a patient who already has demonstrated an unwillingness or inability to comply with voluntary health directives or less restrictive health orders such as directly observed therapy.</p>
<p><i>Are federal correctional facilities required to notify a health officer pursuant to §§121361 and 121362?</i></p>	<p>From a practical point of view, public health protection cannot be attained if federal facilities do not cooperate with fundamental TB control provisions as laid out in §§121361 and 121362. It is prudent of a health officer to have a memorandum of understanding with any federal facility within the health jurisdiction ensuring that the federal facility will abide by §§121361 and 121362. The memorandum of understanding is a contract that is legally enforceable.</p>
<p><i>Does an emergency room have to develop a treatment plan prior to releasing a patient known to have or suspected of having TB?</i></p>	<p>§121361(a)(1) prohibits a health facility from <i>discharging, releasing, or transferring</i> a patient known to have, or suspected of having, active TB until a notification and written treatment plan has been <i>received</i> by the local health officer. (Note that this section requires receipt by, but not approval of, the local health officer.)</p> <p>For the purposes of §121361(a), “health facility” is defined as “any facility, place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness . . . to which the patients are admitted for a 24-hour stay or longer . . .” See §§ 120115(j) and 1250. Therefore, so long as an emergency room is part of a “health facility” as defined in the statute, it would be prudent for the emergency room to follow the requirements set forth in §121361(a)(1) that the facility give notification and a written treatment plan to the local health officer. It is probably irrelevant that a given patient was never admitted to the hospital.</p>
<p><i>Does an emergency room have to obtain approval from a local health officer before releasing a patient known to have or suspected of having TB?</i></p>	<p>§121361(a)(2) prohibits a health facility from <i>discharging</i> a patient known to have, or suspected of having, active TB until a written treatment plan has been <i>approved</i> by a local health officer. The local health officer must review all treatment plans submitted for approval within 24 hours of receiving the plans. Presumably, this subsection would apply only to patients who have been admitted to a hospital, and not to patients simply treated in and released from an emergency room.</p>