

## Key Emergency Authority and Immunity Concepts

### Executive Overview

This document provides a brief overview of important concepts related to emergency authority and immunity issues frequently queried by state health agencies. Additional details on these and other concepts are contained in other fact sheets in the *ASTHO Emergency Authority and Immunity Toolkit*.

#### Existing Authorities without an Emergency Declaration

State and federal officials generally have existing broad powers to address emergency situations by virtue of the statutory authorities granted to their position without having to formally declare a state of emergency. A state health officer's existing authorities generally include a broad grant of authority to, among other things, abate nuisances, investigate the causes of disease, and institute quarantine measures. Similarly, the HHS secretary has broad statutory powers to provide assistance to states and localities to address public health conditions. The determination to declare or not to declare an emergency has implications for the legal authorities and operational resources available to respond to an event. Instances like the 2009 H1N1 influenza pandemic, in which some jurisdictions did not declare a state of emergency while the federal government and other states did, caused confusion among healthcare providers, businesses, and the public. Either decision must be accompanied by clear communications about the rationale for the action and its implications for various stakeholders.

#### Emergency Declarations

An emergency declaration allows certain governmental officials to temporarily suspend governmental operations and implement response activities to address the emergency circumstances. The authority to declare an emergency is determined by law and reserved for a chief executive officer (e.g., the president, a governor) and key senior governmental officials (e.g., HHS secretary, a state health officer). In some states, local officials may be able to declare local emergencies. While unique to each state, generally the governor (or other official) may declare an emergency by issuing an executive order or other declaration that outlines the conditions giving rise to the emergency, the effective date and duration of the declaration, and the agency leading the response. Gubernatorial and other declarations may require legislative approval within a given time period or upon seeking renewal of the declaration.

#### Emergency Authorities

Both federal and state emergency declarations activate emergency authorities designed to facilitate the response to and recovery from the emergency event. A state emergency declaration triggers a number of authorities and actions by state or local governments, such as activation of state emergency response plans and mutual aid agreements; activation of state incident command systems and emergency operation centers; authority to deploy personnel, equipment, supplies, and stockpiles; activation of statutory immunities and liability protections for responders; and suspension or waiver of rules, regulations, and administrative procedures. In some states, an emergency declaration authorizes the waiver of specified statutory requirements.

#### Liability During Emergency Responses

Concerns about liability regularly arise during emergency response situations. Government employees, volunteers and healthcare providers, and entities such as businesses and nonprofits all worry about potential liability for their actions during an emergency. Persons or entities (e.g., businesses, nonprofits) are legally responsible for their own acts or omissions. Persons and entities can also be vicariously liable for the acts or omissions of another person with whom they have a particular legal relationship (e.g., employee, agent, officer). Persons and entities involved in emergency response activities could be liable under a number of legal theories; most commonly, for civil tort liability. A tort is an action in which an actor (a person or entity) either intentionally or unintentionally causes harm to another person or property. Intentional torts occur when an actor intends to harm a person or property. Unintentional torts occur when an actor harms another person or property but did not intend to harm.

Negligence is the most frequently identified unintentional tort and the legal theory most likely to arise from harms stemming from an emergency response. Negligence occurs when a person or entity with a duty to another fails in the performance of that duty, thereby causing harm to the other person. Within negligence there are a number of theories that could apply in the emergency response context: medical malpractice, failure to plan or prepare, breach of privacy and confidentiality, or premises

liability. A claim of gross negligence, which can also encompass willful or wanton conduct, can arise if the conduct or failure to act is so reckless that it demonstrates disregard for whether injury or harm will occur. A person or entity may assert a defense of immunity against a negligence claim.

## Immunity

There are traditional immunities in the law as well as newer immunity protections that have been developed over the last decade in federal and state law; together, these various laws form a patchwork of liability protections. These protections serve an important public policy function by ensuring that there are adequate numbers of medical, public health, and other individuals and institutions that are able to participate in preparedness and response efforts. Yet these protections can depend on the nature of the services provided by the person (volunteer vs. paid employee) and the extent of protections provided under the emergency response program the person is deployed under.

The defense of governmental or sovereign immunity is a traditional theory of immunity that has its roots in English common law. This doctrine holds that a government and employees and agents of the government cannot be sued for injuries that occur in the course of their official duties. This immunity, however, has been refined over time. In one approach, state and federal tort claims laws expressly allow governments to be sued like a private party with certain exceptions. In another approach, the overall concept of governmental immunity is retained but waived in some instances, such as when government employees have committed gross negligence, criminal acts, or violations of constitutional rights.

Over the course of the last decade, a number of federal, state, and model laws have been created or refined that provide immunity and other liability protections for specific individuals, entities, or classes of actors for their roles in preparing for or responding to an emergency. Such laws have addressed protections for volunteers—especially healthcare volunteers—and organizations and individuals involved in making or administering vaccines, drugs, and other countermeasures to public health emergencies. Some federal laws can confer federal immunity for activities conducted by state or local actors. State laws that trigger emergency authorities may also provide liability protections for volunteers and other responders. Mutual aid agreements in which jurisdictions agree to exchange assistance during emergencies can also provide a source of immunity if volunteers and other responders are deemed to be state employees eligible for governmental immunity.

## Workers' Compensation and Disability Resources

Volunteers and other responders who participate in emergency response events may be injured during their deployment. Depending on the circumstances, workers' compensation and other disability benefits may be available to provide payment for injuries received while participating in a response. These protections, however, are highly dependent on the nature of the services provided by the person (volunteer vs. paid employee) and an individual's access to alternative compensation mechanisms. Workers' compensation laws are enacted and administered by states. As such, each program is unique and the requirements for coverage and the types and amounts of benefits vary state to state. Some types of organizations or activities are exempted from coverage under state workers' compensation programs, including nonprofit, charitable, or religious institutions, small businesses under a specific size, and hazardous occupations. Some states also exempt domestic service, agricultural employment, casual laborers, and state and local employees. Some of these groups may be provided coverage through other mechanisms, such as disability insurance or union agreements.

Persons who act as volunteers in an emergency response scenario may not be eligible for coverage under a state's workers' compensation law because they are not considered to be employees while they are volunteering. Other considerations that can affect the determination of whether a person is eligible for workers' compensation include which state law applies in an interstate deployment, who is covered under a state's workers' compensation law, who the employer is during the deployment, and what scope of activities are covered during the deployment.

As an addition or an alternative to workers' compensation, an individual may have access to other sources of disability benefits. Some people may have coverage for work-related or non-work-related injuries through paid sick leave, temporary or short-term disability benefits/insurance, and long-term disability insurance. Not all persons have access to these additional resources, however, unless an employer offers them or a person obtains an individual disability policy. The specifics of a disability policy will dictate whether coverage is available only for work-related injuries or for non-work-related injuries that may occur during a volunteer emergency response deployment. Federal and state laws have created mechanisms or funds to compensate specific groups of people based on their occupation or involvement in a specific injurious event.

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