

TRIBAL LEGAL PREPAREDNESS

Tribal Public Health Emergency Preparedness
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BUILDING LEGAL PREPAREDNESS

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STRENGTHENING TRIBAL SOVEREIGNTY



FOR TODAY...

- Frequently, tribal, state, and local emergency officials face legal questions when preparing for and responding to emergencies.
- Understanding applicable tribal, federal, and state law and incorporating legal authorities into comprehensive emergency management planning activities is critical to effective preparation for emergency response.
- We will give a broad overview of the Association of State and Territorial Health Officials (ASTHO) online Legal Preparedness Toolkit that can be used by tribal public health officials, clinic employees, tribal council, and tribal attorneys to better understand these legal authorities.

Overview of ASTHO Legal Preparedness Toolkit

The Association of State and Territorial Health Officials (ASTHO) has developed the following series of toolkits that address the key information needs of public health officials in understanding and using legal authorities to prepare for and respond to public health emergencies:

1. Emergency Authority & Immunity Toolkit
2. Emergency Use Authorization Toolkit
3. Emergency Volunteer Toolkit
4. Public Health & Information Sharing Toolkit
5. Public Health & Schools Toolkit
6. Scope of Practice Toolkit

<http://www.astho.org/legal-preparedness-series/>

Tribal Legal Preparedness Key Concepts*



Emergency Authority

- Authority w/out Declaration
- Tribal Emergency Declarations
- Stafford Act Emergency Declarations

Scope of Practice

- Meeting staffing demands during an emergency
- Modification of scope of practice requirements
- Potential liability issues

Volunteers

- Non-health professionals vs health professionals
- Emergency System for Advance Registration of Volunteer Health Professionals (ESAR-VHP)

Schools

- Tribal government authority
- School closure
- Social distancing

Emergency Use Authorization

- The special use of drugs and other medical products during certain types of emergencies.

*These 5 key concepts are part of the Association Of State And Territorial Health Official <http://www.astho.org/legal-preparedness-series/>



Tribal Emergency Authority

Tribal Authority
w/out a Tribal
Declaration

Tribal
Emergency
Declarations

Stafford
Emergency
Declarations



Federal case law and statutes recognize a tribal government's inherent authority to govern their people.

“The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial...”

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)

Tribal Authorities without Emergency Declaration



Tribal Officials have broad powers to address emergency situations **without** having to declare an emergency such as:

- Abate nuisances
- Investigate the cause of diseases
- Institute quarantine measures

Emergency Declaration under Tribal Law



Tribal officials can use tribal constitutions and codes to declare emergencies on their tribal lands.

Standing Rock Sioux Declared Emergency under Tribal Constitution

- Under Standing Rock Sioux Tribe's constitution, Article IV, Section 1(c)(j)(o), the tribe has the authority "to safeguard and protect general welfare, property, cultural and natural resources of the Standing Rock Sioux Tribe.
- In 2013, based on this constitutional provision, the tribal chairman declared a state of emergency as a result of flash flooding that threatened roads, homes, and the tribe's irrigation system.
- The declaration authorized resources and personnel to respond and directed the tribe to use resources in coordination with federal, state, and local government agencies.

Cited in "Emergency Declarations and Tribes: Mechanisms Under Tribal And Federal Law," Gregory Sunshine, JD and Aila Hoss, JD.
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4703113/>



Tribal Emergency Declaration under the Stafford Act



In 2013, the **Stafford Act** was amended to provide federally recognized tribal governments the option to request a Presidential emergency or major disaster declaration independently of a state.

Important Tribal Documents for Declaring Emergencies



- **Tribal Emergency Plan** (Stafford Act requires tribe to confirm it has activated its emergency plan)
- **Tribal Mitigation Plan**
- For example plans see <https://aihc-wa.com/aihc-tribal-community-emergency-preparedness-toolbox/section-iii-resources/>.

Scope of Practice



- A government may find it necessary to modify the scope of practice for some of their regulated professions to meet increased demand for important services during an emergency.
- The need to supply sufficient numbers of healthcare practitioners to satisfy increased patient demand during a public health emergency is the driving force behind allowing temporary changes to practice requirements.

<http://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Scope-of-Practice-Toolkit/Scope-of-Practice-Issues-in-Public-Health-Emergencies-Fact-Sheet/>

Scope of Practice



- Modifying scope of practice can be accomplished by expanding or altering the scope of activities a practitioner is allowed to engage in and by removing or adding conditions on the permitted activities.
- This approach can be controversial and issues regarding liability and immunity will need to be addressed. A Tribe considering a modified scope of practice provision in their plan should consult with IHS and/or review their compact/contracts with IHS

<http://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Scope-of-Practice-Toolkit/Scope-of-Practice-Issues-in-Public-Health-Emergencies-Fact-Sheet/>

Differentiating Volunteers



- Non-health professionals vs. Health Professionals
- Health professional volunteers are often referred to as volunteer health professionals (VHPs)
- Important distinction because federal and tribal law may apply to one but not the other
- Generally, emergency response volunteers are recruited, trained, and mobilized through a registration and verification system; others may volunteer during an emergency without prior registration and verification

See ASTHO <http://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Volunteer-Toolkit/Key-Emergency-Response-Volunteer-Concepts/>

Volunteer Registration and Verification of Credentials, Licenses, and Privileges



- Registration databases can be used to track volunteer information, verify volunteer credentials, and ensure the competency of volunteers. These systems may also notify volunteers of a disaster or emergency and help with volunteer mobilization.
- The Emergency System for Advance Registration of Volunteer Health Professionals (ESAR-VHP) provides a national network of state registration and verification systems which must be accessible to tribes
- Volunteer verification systems ensure that VHPs are licensed or privileged health professionals, thereby guaranteeing that the VHPs are qualified and competent to provide health services during an emergency

See ASTHO <http://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Volunteer-Toolkit/Key-Emergency-Response-Volunteer-Concepts/>

Volunteer Liability

- Volunteers and the entities that recruit, deploy, and manage them are subject to liability
- A volunteer is legally responsible for his or her own acts or omissions and can face civil tort liability or criminal penalty
- Agencies, organizations, and entities that recruit, deploy, and manage volunteers may also be liable for tortious acts and can be vicariously liable for a volunteer's acts or omissions. A tort occurs when a person intentionally or unintentionally causes harm to another person or property. Intentional torts occur when a person or property is purposefully harmed. Unintentional torts occur when a person or property is inadvertently harmed.

From ASTHO <http://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Volunteer-Toolkit/Key-Emergency-Response-Volunteer-Concepts/>

Volunteer Liability Protection and Immunity

- Tribal sovereign immunity protects a tribal government and its employees and agents from suit for injuries that occur in the course of their official duties. A tribe may restrict tribal sovereign immunity by allowing the tribe to be sued within certain limitations or waiving sovereign immunity in certain cases (e.g., with the commission of gross negligence, criminal acts, or a violation of constitutional rights).
- Tribal laws may also provide liability protections for volunteers. Such protection may depend on the nature of the services provided and the emergency response program through which the volunteer is deployed.
- Mutual aid agreements can also provide a source of immunity if volunteers are deemed to be tribal employees eligible for governmental immunity.

See ASTHO <http://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Volunteer-Toolkit/Key-Emergency-Response-Volunteer-Concepts/>

Schools



Tribal Government Authority to Act in Tribal Schools

- Depending on the tribe, a tribal health, education, and emergency management department/commission can have exclusive or shared authority to institute varying public health measures in schools.
- This authority could be used as the basis to institute public health measures in a school absent a public health emergency. During emergencies, public health officials typically gain additional authorities, including potentially the ability to close schools and enforce other social distancing measures.

See <http://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Public-Health-and-Schools-Toolkit/Public-Health-and-Schools-Authority-Issues-and-Concepts/>

Schools



Scope of Authority

Legal authorities that support public health measures in schools include but are not limited to:

- (1) protecting public health and safety;
- (2) controlling and preventing the spread of communicable diseases;
- (3) instituting quarantine and isolation measures;
- (4) canceling school and other community activities;
- (5) closing schools and other public facilities; and
- (6) using additional powers activated by an emergency declaration.

See <http://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Public-Health-and-Schools-Toolkit/Public-Health-and-Schools-Authority-Issues-and-Concepts/>

Emergency Use Authorization



An Emergency Use Authorization (EUA) under Section 564 of the Federal Food, Drug, and Cosmetic Act

- allows for the special use of drugs and other medical products during certain types of emergencies.
- EUA permits the use of unapproved medical products (drugs, biologics [e.g., vaccines], and devices [e.g., diagnostics]) or the use of approved medical products in unapproved ways to diagnose, treat, or prevent serious diseases or conditions caused by chemical, biological, radiological, or nuclear agents.

Taken from <http://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Use-Authorization-Toolkit/Key-Emergency-Use-Authorization-and-Medical-Countermeasures-Laws-and-Programs/CBRN>) agents.

Emergency Use Authorization



An Emergency Use Authorization (EUA) under Section 564 of the Federal Food, Drug, and Cosmetic requires:

- (1) the determination by any of the U.S. secretaries of Health and Human Services (HHS), Homeland Security, or Defense that an emergency exists;
- (2) the declaration by the HHS secretary of an emergency justifying the authorization under FD&C Act §564; and
- (3) the issuance of an EUA by the Food and Drug Administration (FDA) commissioner upon a finding by the FDA that specified criteria have been met.

Taken from <http://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Use-Authorization-Toolkit/Key-Emergency-Use-Authorization-and-Medical-Countermeasures-Laws-and-Programs>

Emergency Use Authorization



Example EUA Language in Tribal Medical Countermeasures Plan

Adherence to Emergency Use Authorization

[TRIBE] will adhere to any Emergency Use Authorization (EUA) issued during a public health emergency. An EUA is issued by the U.S. Food and Drug Administration (FDA) to allow either the use of an unapproved medical product or an unapproved use of an approved medical product in certain types of emergencies.

See AIHC Model Tribal Medical Countermeasures Plan, pg. 11

Steps for Tribal Emergency Legal Preparedness

1. Identify the benefits to your community for strengthening your legal preparedness
2. Seek a tribal council mandate to complete this work and include the tribal council in the process/work being done
3. Identify an existing commission/committee or form a new taskforce to address legal preparedness for your tribe. Members should include representatives from the tribes' legal department, tribal council members, health clinic, school, courts, law enforcement, etc.

Steps for Tribal Emergency Legal Preparedness Cont.

4. Use the AIHC Toolbox to identify the current gaps in your existing emergency preparedness system. See <https://aihc-wa.com/aihc-tribal-community-emergency-preparedness-toolbox/section-ii-where-you-are-where-you-want-to-be-and-how-you-plan-to-get-there/>
5. After identifying needed codes, plans, and resolutions, look to other tribal jurisdictions, tribal organizations, etc. who may have examples/models to start with. See <http://www.ncai.org/policy-research-center/initiatives/projects/tribal-public-health-law>
6. Identify the process required for putting the codes, plans, and resolution into effect
7. Being the process of formal adoption of the codes, plans, and resolutions