

Minnesota Crisis Standards of Care Framework

LEGAL AUTHORITY AND ENVIRONMENT¹

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Minnesota Crisis Standards of Care Framework: Legal Authority and Environment

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DISCLAIMER

The information contained in this Attachment does not constitute any official position of the Minnesota Department of Health (MDH). This Attachment is designed only as very brief, superficial, cursory information on complicated legal subjects; it is not intended, nor should it be construed as, legal advice. Legal advice on issues pertaining to emergency preparedness and response, and in particular pervasive or catastrophic events with public health ramifications including those with a medical surge component, is necessarily fact-specific and varies depending upon specific laws and specific circumstances. For legal advice, readers are encouraged to consult with an attorney of their choice.

Introduction

Public health preparedness is an ongoing priority for state and local public health agencies, health professionals, and others who may find themselves responding to a pervasive or catastrophic public health event with medical surge implications. These incidents have the capability of altering, not just the operational environment, but the legal environment as well. Any time that the focus shifts from individual to community benefit there is the potential for multiple legal issues to arise. One important consideration of public health preparedness is whether public health authorities are legally empowered to respond in the desired manners. This is important because of the potentially wide-ranging and unprecedented impacts of a pervasive or catastrophic event with public health ramifications and their potential to cross jurisdictional borders.

Purpose

The purpose of this Attachment is to provide a brief overview of some potentially applicable laws to give emergency management officials basic background information to assist when dealing with their own attorneys in emergency planning and response.

Scope

This Attachment will illuminate some Minnesota state and U.S. federal laws potentially applicable to the subjects of liability protection and resource allocation; it is beyond the scope of this Attachment and this Framework to conduct an exhaustive review of all State or federal laws that may be applicable in an emergency or disaster. There is no Minnesota statute that directly relieves health care providers responding to a disaster of liability for injury or death resulting from the delivery or withholding of health care;² likewise, MDH is not vested with the

² For example, a Virginia statute provides: In the absence of gross negligence or willful misconduct, any health care provider who responds to a disaster shall not be liable for any injury or wrongful death of any person arising from the delivery or withholding of health care when: (1) a state or local emergency has been or is subsequently declared in response to such disaster; and (2) the emergency and subsequent conditions cause a lack of resources, attributable to the disaster, rendering the health care provider unable to provide the level or manner of care that

legal authority to alter medical practice standards whether in a medical surge event or otherwise.

Background

As with emergency preparedness in general, legal preparedness activities may not anticipate all of the varying legal issues that might arise in a health-related disaster because emergencies, by their very nature, create unique and sometimes unexpected challenges. For example, the Minnesota governor is granted the legal authority to make an emergency declaration that could change the legal environment for the duration of the incident. Such a declaration may grant state government officials a wide range of expanded powers, which can facilitate rapid response efforts. Even with this ability to invoke extraordinary powers, existing law may present gaps and challenges. The role of the attorney representing emergency management is to address the challenges and ambiguities that arise in this altered legal environment.

One major challenge is convincing emergency planners to incorporate legal aspects into plans.

Recommendation: Emergency managers should review emergency and response plans and give thought to how responders will receive qualified legal advice to address the important yet unanticipated legal issues that will inevitably arise during a medical surge incident.

Addressing the challenges and ambiguities that arise in the altered legal environment during a pervasive or catastrophic public health event entails the practice of “legal triage,” which may be defined as the efforts of practitioners to prioritize legal issues in real-time and provide solutions that facilitate response efforts. This practice incorporates the concept that legal practitioners and others must be prepared to respond to those facets of emergencies that are not easily anticipated by existing legal structures, or for which existing statutes or other laws provide only flexible guidance, but not concrete authority or direction.

In an altered legal environment during any type of medical surge event, innovative, coordinated, and real-time response are all prerequisites to legal preparedness. Aspects of legal Crisis Standards of Care may include:

1. Establishing and implementing standards of care that apply in disaster situations under conditions of scarce resources,
2. Modification of the standards of professional care delivered in a pervasive or catastrophic public health event; and
3. Liability concerns when practitioners deviate from the “ordinary” standards of care.

Therefore, the role of the attorney in emergency response may be described as working with their clients to prioritize legal issues and provide real-time solutions that facilitate legitimate public health responses. In so doing, the lawyer must recognize that existing statutes or other laws may provide only flexible guidance, as opposed to concrete authority or direction. In an

otherwise would have been required in the absence of the emergency and which resulted in the injury or wrongful death at issue.

altered legal environment, innovative, coordinated, and real-time responses are all prerequisites to legal preparedness.

Of primary concern to many health care and public health professionals is their potential exposure to legal liabilities when extreme service demands, coupled with constrained supplies, prevents them from the degree and type of services and care they would otherwise provide.³ This, in turn, raises complex questions about responsibility, causation, and justice that are particularly difficult in the context of emergencies.⁴ Although lawsuits resulting from emergency planning or services rendered during a catastrophic public health event are rare, responders may be comforted in knowing what laws afford protections against lawsuits for death, personal injuries, or property damage that might be leveled against them for actions undertaken—or not undertaken—during a response.⁵ An additional concern for response planning is how responders and their families will receive compensation if they are injured or killed.⁶

Recommendation: Emergency planners should work with their attorneys to identify and discuss potential legal issues and legal authorities before disaster strikes.

To assist in that conversation, this Attachment will briefly review current liability protections and the ability to re-direct resources under current Minnesota law, and other laws that may apply in any event posing a threat to the public health will also be discussed.

Minnesota Law

³ Civil liability refers to the potential responsibility that an individual or entity owes for actions (or failures to act) that harm others. Civil liability may arise from a person's actions that breach or deviate from statutory, regulatory, or judicial requirements, or contractual obligations or policy statements. In other instances, a person's failure to act may injure others. In either scenario, if an aggrieved person can prove their case (in court or otherwise), the opposing party may be liable to provide monetary compensation for physical or mental injuries, property losses, or other damages.

⁴ Common questions raised by emergency responders concerning potential liability exposures resulting from emergency response activities include who may be liable; under what specific circumstances may civil liability be imposed; what protections from liability may exist, and whether liability protections under existing law apply during training exercises and other response situations in which a formal emergency declaration has not been issued.

⁵ For example, the elements of a negligence claim are (1) the defendant (the party sued) owed the plaintiff (the person bringing the claim) a duty of care; the defendant breached that duty; the plaintiff suffered injuries, and the defendant's breach of duty was the proximate cause of plaintiff's injuries. In like regard, a medical malpractice case may be simply described as a breach of the medical standard of care, which is defined as the type and level of medical care required in a specific circumstance, based upon the reasonable and common practice usually exercised by an ordinary member of the profession in good standing in a same or similar locality under same or similar circumstances. Because the legal standard of care is a flexible and fact-specific concept that ordinarily takes into account the circumstances under which care was provided, courts evaluating the conduct of a health care provider should take into account the particular circumstances surrounding an emergency event where resources may be scarce and health care systems and providers may be overwhelmed.

⁶ As will be demonstrated, often responders are considered employees of state or local government for purposes of workers' compensation benefits.

Minnesota Emergency Management Act (MEMA)

Authority

The primary source of State government’s authority to respond to any type of emergency or disaster, including those that threaten public health, is the Minnesota Emergency Management Act, or MEMA. MEMA is codified in Minnesota Statute chapter 12. The emergency powers provide by MEMA are purposefully broad so that they may be applied in any possible catastrophic situation. MEMA created the Division of Homeland Security and Emergency Management (HSEM) within the Minnesota Department of Public Safety.⁷ MEMA grants the governor widespread direction and control of emergency management within Minnesota,⁸ and provides the governor, other State officials, and emergency managers exemplary powers to prepare for, and respond to, an emergency or disaster.⁹

Disaster Declarations

Some, but not all, of the powers expressly provided by MEMA may only be exercised if the governor has issued a disaster declaration. MEMA provides the governor the authority to issue two types of emergency declarations. The first is a *national security emergency*, which the governor may declare when a major disaster from enemy sabotage or other hostile action within the United States or Minnesota is imminent.¹⁰ Otherwise, the governor may declare a *peacetime emergency* when any act of nature, technological failure or malfunction, terrorist incident, industrial accident, hazardous materials accident, or civil disturbance endangers life or property; and local government resources are inadequate to handle the situation.¹¹

⁷ Minn. Stat. §12.09. The duties of the Division of Homeland Security and Emergency Management (HSEM) under MEMA include coordinating State preparedness; developing and maintaining a comprehensive State emergency plan; providing guidance, information, and training to cities, counties, and townships; and coordinating volunteer resources. Under §12.351, HSEM may activate deployment of specialized emergency response teams.

⁸ Minn. Stat. §12.21, Subd. 1. MEMA defines “emergency management” as the preparation for and carrying out of emergency functions to prevent, minimize, and repair injury and damage from disaster including, without limitation... medical and health services... emergency human service... and other functions related to civilian protection, together with all other activities necessary or incidental to preparing for and carrying out these functions. See Minn. Stat. §12.03, Subd. 4 (emphasis added).

⁹ Under MEMA, a “disaster” is defined as a situation that creates an actual or imminent serious threat to the health and safety of persons, or a situation that has resulted or is likely to result in catastrophic loss to property or the environment, and for which traditional sources of relief and assistance within the affected area are unable to repair or prevent the injury or loss. Likewise, MEMA defines an “emergency” as an unforeseen combination of circumstances that calls for immediate action to prevent a disaster from developing or occurring. See Minn. Stat. §12.03, Subds. 2 and 3.

¹⁰ Minn. Stat. §12.31, Subd. 1. A declaration of a national security emergency lasts for a period of 30 days.

¹¹ Minn. Stat. §12.31, Subd. 2. A declaration of a peacetime emergency must not continue for more than 5 days unless extended by resolution of the State Executive Council, which may extend the declaration up to 30 days. Extending the declaration beyond 30 days requires legislative approval.

Unlike federal law,¹² Minnesota law does not expressly recognize the declaration of a “public health emergency,”¹³ although the broad definition of a peacetime emergency would very likely include any event which would typically be considered a public health emergency. The governor typically declares an emergency by issuing an executive order.¹⁴ An executive order issued pursuant to the governor’s expressed authority under MEMA, or any other emergency executive order issued to protect persons from an imminent threat to health and safety, is immediately effective.¹⁵

MEMA also authorizes a mayor or county board chair to declare a *local emergency*.¹⁶ The length of a local emergency declaration is 3 days, unless a longer period is approved by the governing body. The effect of declaring a local emergency is “invokes necessary portions of the response and recovery aspects of applicable local or inter-jurisdictional disaster plans, and may authorize aid and assistance under those plans.”¹⁷ MEMA also requires all political subdivisions in Minnesota to establish a local emergency management organization to perform emergency management functions, and counties are required to coordinate emergency management activities within their jurisdiction.¹⁸ MEMA specifically grants political subdivisions the authority to levy additional property taxes to pay expenditures incurred for emergency management purposes.¹⁹

Governor’s Powers

MEMA grants the governor many broad powers to plan for or respond to an emergency or disaster; only some are highlighted in this Section. For example:

- The governor is authorized to make, amend, and rescind necessary orders and rules to carry out MEMA’s provisions, within the limits of authority conferred by MEMA.²⁰
- All emergency management organizations within the State are required to execute and enforce the governor’s orders and rules made pursuant to MEMA’s authority.²¹

¹² As will be discussed later, §319 of the Public Health Services Act, 42 U.S.C. §247d(a)(2009), authorizes the Secretary of the United States Department of Health and Human Services (HHS) to declare a public health emergency if the Secretary determines that a disease or disorder presents a public health emergency otherwise exists.

¹³ Minn. Rule 4735.0110(1987) authorizes MDH to enter agreements with local boards of health to specify shared responsibility for collecting data and information pertaining to communicable diseases, and authorizes MDH to suspend such agreements in the event of a public health emergency. Minn. Rule 4735.0100 (1987) defines a “public health emergency,” only for purposes of Rule 4735.0110, as “an unanticipated and temporary condition threatening the health of a specific population such that the resources of one or more local boards of health cannot reasonably be considered adequate to respond to the emergency needs of the affected population.”

¹⁴ Governor executive orders are expressly authorized by Minn. Stat. §4.035.

¹⁵ Minn. Stat. §4.035, Subd. 2. By comparison, other Governor executive orders are effective 15 days after the order is filed with the Secretary of State and published in the State Register.

¹⁶ Minn. Stat. §12.29, Subd. 1.

¹⁷ Minn. Stat. §12.29.

¹⁸ Minn. Stat. §12.25.

¹⁹ Minn. Stat. §12.26.

²⁰ Minn. Stat. §12.21, Subd. 3(1).

²¹ Minn. Stat. §12.28.

- Orders and rules promulgated by the governor when approved by the Executive Council and filed with the Secretary of State have, during a national security, peacetime, or energy supply emergency, the full force and effect of law.²²
- The governor may procure supplies, equipment, and facilities.²³
- The governor may cooperate with the federal government, and other states, in matters pertaining to emergency management including accepting gifts and grants of services, equipment, or funds.²⁴
- The governor may disconnect utility services, order evacuations, order people into shelters, control traffic and other movements of persons and vehicles, and cancel public meetings and events.²⁵
- During emergency or disaster, the governor may enter contracts, incur obligations, and exercise powers in light of the exigencies without compliance with time-consuming procedures and formalities prescribed by laws pertaining to contract, employment, purchasing supplies and equipment, or budgeting.²⁶
- The governor may alter working hours of State employees, and transfer the personnel and functions of State agencies to perform or facilitate response and recovery activities.²⁷
- The governor may authorize the Commissioner of Education to close schools.²⁸
- The governor may cooperate with the president and federal agencies in matters pertaining to emergency management.²⁹
- The governor may take possession of fatalities and provide for their safe disposition including mass burial.³⁰

Cross-Border Licensure

Prolonged responses to an emergency or disaster create staffing shortages for responding agencies, which may be alleviated by allowing licensed professionals from other states and Canada to practice in Minnesota. MEMA authorizes the Governor, during a declared emergency, to authorize any person who holds a license, certificate, or other permit issued by another state, the District of Columbia, or a Canadian province for professional, mechanical, or other skills, to render aid involving those skills in Minnesota when such aid is needed to meet the needs of the emergency.³¹ The license, certificate, or other permit of the person, while rendering aid, has the same force and effect as if issued in Minnesota, subject to whatever limitations and conditions as the Governor may prescribe. For more information, see *Staff Augmentation* below.

²² Minn. Stat. §12.32.

²³ Minn. Stat. §12.21, Subd. 3(3).

²⁴ Minn. Stat. §§12.21, Subd. 3(7) and 12.22, Subd. 1.

²⁵ Minn. Stat. §12.21, Subd. 3(7) (iv) – (vi) and (9).

²⁶ Minn. Stat. §12.36. Minn. Stat. §12.37 provides the same authority to political subdivisions during emergencies or disasters.

²⁷ Minn. Stat. §12.21, Subd. 3(10) and (12).

²⁸ Minn. Stat. §12.21, Subd. 3(11).

²⁹ Minn. Stat. §12.21, Subd. 3(7).

³⁰ Minn. Stat. §12.381, Subd. 1.

³¹ Minn. Stat. §12.42.

Mutual Aid

MEMA addresses one tool commonly employed during an emergency to establish parameters of the legal landscape. The flow of personnel and supplies into areas impacted by a catastrophic public health event is often facilitated by pre-existing agreements for inter-jurisdictional assistance, known as mutual aid agreements. For example, MEMA authorizes mutual aid agreements between local emergency management organizations; between local emergency management or HSEM and emergency management in other states; and even between HSEM and emergency management organizations in Canadian provinces.³² Additionally, the Governor is granted specific authority to enter into mutual aid or other cooperative agreements with other states, tribal governments, and Canadian provinces.³³ Finally, under MEMA the Governor, upon request of another state, may dispatch Minnesota equipment and personal to that state as deemed necessary to respond to an emergency or disaster.³⁴

Even if no mutual aid agreement is in place, MEMA contains several provisions specific to the sharing of response equipment and personnel. The Governor has authority to direct the personnel, equipment, and supplies of police, fire, health, or other forces of one political subdivision to assist another in an imminent emergency.³⁵ In fact, MEMA dictates in carrying out its provisions, the Governor and the governing bodies of cities, counties, and towns shall utilize the services, equipment, supplies, and facilities of existing departments, offices, and agencies of the State and of political subdivisions “to the maximum extent practical.”³⁶

The receiving jurisdiction is obligated to reimburse the sending jurisdiction for supplies and personnel expenses, but the State will reimburse the sending jurisdiction for equipment loss or damage.³⁷ During an emergency, if one political subdivision requests assistance from another, the employees of the sending jurisdiction are considered to be acting within their scope of regular employment for the sending jurisdiction for purposes of worker’s compensation;³⁸ in contrast those same responders are considered employees of the receiving jurisdiction for purposes of tort claim defense, indemnity, and immunity.³⁹ The sending jurisdiction is financially liable for damage to its equipment⁴⁰, while the receiving jurisdiction must reimburse the sending jurisdiction for supplies used and compensation for the personnel sent to assist.⁴¹

³² Minn. Stat. 12.27, Subds. 1, 2, and 2a.

³³ Minn. Stat. §12.21, Subd. 3(5). Mutual aid agreements between states and Canadian provinces is the subject of the International Emergency Management Assistance Compact (EMAC), which provides legal protections to emergency management workers utilized by party states, in accordance with its provisions. Retrieved from [International Emergency Management Assistance Memorandum of Understanding](#) (July 18, 2000).

³⁴ Minn. Stat. §12.27, Subd. 4.

³⁵ Minn. Stat. §12.33, Subd. 1.

³⁶ Minn. Stat. §12.23.

³⁷ Minn. Stat. §12.33, Subds. 3 and 4.

³⁸ Minn. Stat. §12.331, Subds. 1 and 2(a) and (b).

³⁹ Minn. Stat. §12.331, Subd. 2(b).

⁴⁰ Minn. Stat. §12.331, Subd. 2(d).

⁴¹ Minn. Stat. §12.331, Subd. 2(e).

Commandeering

Under MEMA, any abled-bodied person may be required by the Governor, or State or local emergency management, to perform emergency management services under threat of criminal prosecution.⁴² The Act also provides that, when necessary to save life, property, or the environment during a declared emergency, the Governor, or state or local emergency management designated by the Governor, may commandeer motor vehicles, tools, appliances, medical supplies, personal property, or facilities.⁴³ In this regard; however, MEMA defines “medical supplies” as medication, durable medical equipment, instruments, linens, and other materials a health care provider deems not essential for the continued operation of the provider’s practice or facility. *It specifically excludes medication, equipment, or materials that is personal property used by individuals or borrowed, leased, or rented by individuals for purposes of treatment or care.*⁴⁴ Thus, emergency management is prohibited from commandeering medical supplies in use by individuals for purposes of medical care. Additionally, the State or local jurisdiction must pay the owners of commandeered property “just compensation” for its use and for any resulting damages.⁴⁵

Other Minnesota Statutes

Emergency Management Assistance Compact (EMAC)

Another law that assists stricken jurisdictions in receiving necessary personnel, equipment, and supplies is the Federal Emergency Management Assistance Compact (EMAC).⁴⁶ EMAC is an interstate mutual aid assistance agreement administered by the National Emergency Management Association (NEMA). When activated, EMAC provides for mutual assistance between states in managing any declared emergency or disaster.

The Minnesota Interstate Emergency Management Assistance Compact is codified at Minnesota Statute §192.89. When intra-state resources are insufficient, EMAC provides an avenue to deploy personnel and/or resources to the impacted states to ensure an efficient and effective response when the governor of the stricken state declares a state of emergency and requests aid. EMAC provides legally binding arrangements for reimbursement, liability protections, compensation for responders injured or killed, and recognition of professional licenses and certificates. All fifty states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have ratified EMAC.

The state-to-state assistance under EMAC includes the loan and delivery of state owned or controlled material, as well as personnel such as state or local government employees and health-related professionals. Thus, EMAC provides another legal basis for other states to

⁴² Minn. Stat. §12.34, Subds. 1(1) and 3. Any abled-bodies person who refuses to perform the required services is guilty of a misdemeanor and must serve a minimum of 10 days in jail.

⁴³ Minn. Stat. §12.34, Subd. 1(2).

⁴⁴ Minn. Stat. §12.03, Subd. 6a.

⁴⁵ Minn. Stat. §12.34, Subd. 2.

⁴⁶ Public Law 104.321, effective 1996. Retrieved from [The Emergency Management Assistance Compact](#)

augment Minnesota responders during an emergency or disaster in Minnesota, and also provides Minnesota responders called to serve in other stricken states protections against lawsuits and injuries received during the response. All EMAC requests are requested and go through MN HSEM.

Staff Augmentation

Licensed Professionals

Professional licensing requirements for health care professionals establish minimum competencies and prerequisites for entry into each health profession create mechanisms to grant licenses to qualified persons, and establish the scope of practice for each profession. Such licensing requirements are a function of state laws, and the qualifications and procedural requirements necessary for obtaining and retaining professional licenses varies from state to state. Typically, licensed health professionals may practice their professions anywhere within the state, which issued their license,⁴⁷ but those who practice without a license issued by the state in which they are rendering services may be subject to civil or criminal penalties.

Minnesota law specifically provides that the provisions of the Minnesota Nurse Practice Act “shall not prohibit the furnishing of nursing assistance in an emergency.”⁴⁸ Licensed nurses may practice across state lines under the Enhanced Nurse Licensure Compact Act, a model law currently adopted by 31 states with an additional 2 state to implement in 2020 or later (legislation passed).⁴⁹ For states that have entered the Compact, a license to practice registered nursing issued by a home state to a resident in that state will be recognized by other Compact-member state as authorizing a multistate licensure privilege to practice as a registered nurse in that state.⁵⁰ Minnesota has not yet adopted the Compact.

Additionally, to facilitate interstate sharing of health care personnel EMAC authorizes a requesting state to recognize out-of-state medical or other licenses for purposes of rendering aid during a declared emergency or disaster, subject to limitations imposed by the requesting state’s governing body. Persons holding an out-of-state license, certificate, or permit are “deemed licensed, certified, or permitted by the state requesting assistance” when deployed through EMAC.⁵¹

⁴⁷ For example, under Minn. Stat. §148.234 a nurse in Minnesota may perform patient care procedures and techniques on a patient in Minnesota at the direction of a physician licensed in another state provided that physician examined the patient in the State in which she or he is licensed.

⁴⁸ Minn. Stat. §148.271(1).

⁴⁹ NCSBN. *Nurse Licensure Compact (NLC)*. <https://www.ncsbn.org/nurse-licensure-compact.htm>, Accessed August 14, 2019.

⁵⁰ More information regarding the Nurse Licensure Compact may be found at [National Council of State Boards of Nursing](#).

⁵¹ EMAC Article V.

National Guard

The Minnesota Constitution also designates the governor as commander in chief of the State’s military force, the National Guard.⁵² The governor may employ the National Guard for defense or relief of Minnesota, or any other state; and to enforce laws and protect persons and property.⁵³ Additionally, National Guard members may be called into temporary active service in case of emergency or as otherwise authorized by the Governor.⁵⁴ Thus, the Governor has legal authority to deploy the Minnesota National Guard in response to an emergency or disaster.

Liability and Other Protections in Emergencies and Disasters

Liability

Medical malpractice and other forms of civil liability are situational. During an emergency or disaster, as in conventional operations, responders are held to the standard of care that a “reasonable responder” would have given in that same or similar situation accounting for the availability of resources. One factor in determining whether the “reasonable responder” standard was met is whether the responder was following previously-adopted operating plans or guidance. Having pre-existing operational plans for crisis situations may provide protections for responders, as well as the agencies that employ them. If these plans are reasonable, based on recognized guidance and best practices documents, and approved by the agency or, optimally, by multiple agencies it may be, in most situations, difficult to find liability if the responder’s actions conformed to the expectations of the plan. That said, in some cases a reasonable responder might be required to deviate from the requirements of the operational plan to do the best they could for their patient or community.

This also raises the issue of “duty to plan”. The failure to adequately plan for reasonable foreseeable results of anticipated catastrophic events has served as the legal basis for several successful lawsuits throughout the United States against both private medical care providers and government agencies.

Recommendation: Emergency managers should incorporate Crisis Standards of Care strategies into practice as extensions of current emergency operations or medical surge plans to protect their employees.

Individual Volunteer Protections

MEMA specifically provides several forms of liability protections for individuals and organizations who respond to an emergency or disaster. Regarding individual volunteers,

⁵² Minn. Const. Art. V, Sec. 3.

⁵³ Minn. Stat. §190.02.

⁵⁴ Minn. Stat. §190.08, Subd. 4.

MEMA states that persons will be considered employees of the State or the local government for purposes of workers' compensation and tort claim defense and indemnification if those persons:

- Volunteer to assist the State or a local government;
- During an emergency or disaster (not necessarily a declared one);
- Register with the State or local government; and
- Act under the direction and control of the State or a local unit of government.⁵⁵

Entity Liability Protections

Apart from protecting individual volunteers, MEMA's liability protections also extends to entities such as corporations, associations, businesses, nonprofits, and charitable organizations. Any entity, or an agent acting on its behalf who (1) volunteers without compensation; (2) to assist the State or a local jurisdiction; (3) during an emergency or disaster; who (4) previously registered with the State or local jurisdiction; and (5) acts under direction and control of the State or local jurisdiction; is not liable for civil damages or administrative sanctions as a result of good-faith acts or omissions by that entity or agent in rendering emergency care, advice, or assistance.⁵⁶

Temporary Care Facilities

Sometimes a flood or other natural disaster will require the residents and patients of a health care facility in harm's way to relocate to another facility, on a temporary basis, in another part of the State unaffected by the calamity. In that situation, MEMA provides that the Governor, during a declared emergency, may issue an emergency executive order when number of ill or injured in the hospital region exceeds the hospital or transport capacities in that region.⁵⁷ Most importantly, that statute also specifically provides that during the effective period of the executive order, responders in impacted regions acting consistent with emergency plans are not liable for civil damages or administrative sanctions resulting from good-faith acts or omissions in rendering emergency care, advice or assistance.⁵⁸ The scope and reach of this statutory liability protection; however, is subject to debate.

Good Samaritan Act

The Minnesota "Good Samaritan" statute requires persons at an emergency scene to stop and render reasonable assistance, which includes attempting to obtain help from law enforcement or medical personnel, if such reasonable assistance can be rendered without subjecting the

⁵⁵ Minn. Stat. §12.22.

⁵⁶ Minn. Stat. §12.22, Subd. 2b. For purposes of this statute, "entity" is defined by Minn. Stat. §12.03, Subd. 4e as including a firm, corporation, association, Limited Liability Company, partnership, limited liability partnership, nonprofit organization, or other business, religious, or charitable organization.

⁵⁷ Minn. Stat. 12.61, Subd. 2(a).

⁵⁸ Minn. Stat. 12.61, Subd. 2(b).

person to danger or peril.⁵⁹ Any person who renders emergency care, advice, or assistance at the scene of an emergency or during transit to a location where medical care can be received is not liable for any civil damages as a result of acts or omissions by that person in rendering the emergency care, advice, or assistance unless the person acts in a willful and wanton or reckless manner.⁶⁰ The protections under this law; however, are not available to anyone who receives compensation or has an expectation of compensation for rendering the assistance, or who otherwise renders emergency care during their course of regular employment.⁶¹ With that restriction, Minnesota’s Good Samaritan Act likely has limited applicability to many volunteer health professionals responding to an emergency or disaster.

Workers’ Compensation

Workers compensation laws provide a method by which employees are compensated for medical expenses, lost wages during recovery, retraining, and beneficiary death benefits for injuries received while on the job without regard to fault for the injuries.⁶² With regard to workers’ compensation benefits, the definition of “employee” under Minnesota law includes a voluntary uncompensated worker engaged in emergency management who is registered with the state or political subdivision and acting under the direction and control of, and within the scope of duties approved by, the state or political subdivision;⁶³ a volunteer uncompensated worker while volunteering services as a first responder or a law enforcement assistance organization acting under the supervision and authority of a political subdivision;⁶⁴ and a Minnesota Responds Medical Reserve Corps (MRC) volunteer responding at the request of or engaged in training conducted by MDH.⁶⁵

Minnesota State Tort Claims and Municipal Tort Claims Acts

Volunteers responding to an emergency or disaster may, under certain circumstances, be considered “employees” of a State governmental agency or of a municipality and may enjoy the liability protections and workers’ compensation benefits normally afforded government employees. Under Minnesota law, employees of the state and municipalities are provided protections against lawsuits arising from events that occur while acting within the scope of

⁵⁹ Minn. Stat. §604A.01, Subd. 1. A person who violates the law by failing to give reasonable assistance at the scene of an emergency is guilty of a petty misdemeanor.

⁶⁰ Minn. Stat. §604.01, Subd. 2(a).

⁶¹ Minn. Stat. §604.01, Subd. 2(a).

⁶² Workers’ compensation laws provide the method by which employees are compensated for medical expenses, lost wages, retraining, and beneficiary death benefits for injuries received while on the job without regard as to fault for causing the injuries. Minn. Stat. §176.021(1) provides employers are liable to pay compensation in every case of personal injury or death for an employee arising out of and in the course of employment.

⁶³ Minn. Stat. §176.011, Subd. 9(9); the definition of “emergency management” includes the “preparation for” and the “carrying out” of emergency functions including medical and health functions. See Minn. Stat. §12.03, Subd. 4.

⁶⁴ Minn. Stat. §176.011, Subd. 9(23).

⁶⁵ Minn. Stat. §176.011, Subd. 9(25).

employment. The Minnesota Tort Claims Act⁶⁶ provides the State will compensate anyone who suffers injury to or loss of personal property, personal injury, or death caused by an act or omission of a State employee acting within the scope of their employment,⁶⁷ subject to certain exclusions.

One of the liability exclusions under the State Tort Claims Act is immunity. The Act specifically provides the State and its employees are not liable for losses caused by the employee performing or failing to perform a discretionary duty.⁶⁸ In addition, the Act requires the State to defend, save harmless, and indemnify any employee in connection with any civil claim incurred by employee acting within scope of employment.⁶⁹ The Act also caps the total liability of the State and its employees on any tort claim to \$500,000.00 per person and \$1,500,000.00 for all claims arising from a single occurrence.⁷⁰ Employee of the State, for purposes of the State Tort Claims Act, includes all present or former employees or persons acting on behalf of the State in an official capacity, temporarily or permanently, with or without compensation.⁷¹

The Municipal Tort Claims Act,⁷² provides employees of a “municipality” immunity, indemnification, and tort liability limit protections similar to those under the State Tort Claims Act. For purposes of this statute, a “municipality” includes cities, counties, towns, public authorities, school districts, joint powers boards, and other political subdivisions.⁷³

MEMA provides that “nothing in this chapter shall be construed to remove any immunity from, defense to, or limitation on liability provided by the Minnesota Tort Claims Act, the Municipal Tort Claims Act, or other law.”⁷⁴

Legal Authorities of the Minnesota Department of Health

⁶⁶ Minn. Stat. §3.732 and §3.736. The doctrine of sovereign immunity precludes litigation against the State unless the State has consented to being sued, and the Minnesota Tort Claims Act describes the circumstances under which the Minnesota Legislature intended to waive sovereign immunity.

⁶⁷ Minn. Stat. §3.736, Subd. 1

⁶⁸ Minn. Stat. §3.736, Subd. 3(b). A “discretionary duty” is defined as one that involves “individual professional judgment that necessarily reflects the professional goals and factors of a situation.” In contrast, the Tort Claims Act generally does not afford protections against liability for ministerial acts, which are defined as a duty that is “absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.” See generally *Shariss v. City of Bloomington*, 852 N.W.2d 278, 281-82 (Minn. Ct. App. 2014), (citations omitted).

⁶⁹ Minn. Stat. §3.736, Subd. 9. Indemnification is the right of a person to be restored, in whole or in part, by another for a loss through payment, repair, or replacement. Thus, under the State Tort Claims Act, the State would step in and pay and damages an individual State employee would be court-ordered to pay if the employee was found liable for a claim that arose against the employee while she or he was acting in the scope of their employment.

⁷⁰ Minn. Stat. §3.736, Subd. 4(c) and (g).

⁷¹ Minn. Stat. §3.732, Subd. 1(2).

⁷² The Minnesota Municipal Tort Claims Act is codified at Minn. Stat. ch. 466.

⁷³ Minn. Stat. §466.01, Subd. 1.

⁷⁴ Minn. Stat. §12.22, Subd. 4.

The Commissioner of Health is directed by statute to take necessary steps to remediate the effects of a natural disaster to ensure public health is maintained.⁷⁵ In communities affected by a natural disaster, MDH may provide for the necessary assessment and evaluation of the current state of health care access, mental health concerns and needs, infectious disease concerns, indoor environmental quality, food safety, the safety of food, pools, and lodging, and public and private drinking water systems.⁷⁶

Mass Dispensing

Minnesota law grants specific powers to the Commissioner of Health to respond to mass events that negatively impact the public's health. The exercise of these powers by the commissioner does not depend upon a Governor's emergency declaration. For example, the commissioner may prescribe a legend drug by protocol for mass dispensing purposes if such action is necessary to protect public health and safety, and if (1) a local emergency was declared; (2) the Governor declared an emergency; (3) community health board requested assistance responding to a public health threat; or (4) a pandemic influenza, other life threatening disease, or other events require urgent treatment or prophylactic measures.⁷⁷ However, if the Strategic National Stockpile (SNS) is required for a response, the response typically must come from the Governor.⁷⁸ Governors are able to authorize other state officials to request assets from the SNS on their behalf.

When a legend drug or vaccine has been predetermined and delegated by a licensed physician, a registered nurse may implement that protocol and prescribe a legend drug or administer a vaccine when caring for a patient whose condition falls within the protocol and when that protocol specifies the circumstances under which that legend drug or vaccine may be administered or prescribed.⁷⁹

The Commissioner of Health may modify state drug labeling requirements, medical screening criteria and documentation where time is critical and such measures are most likely to ensure legend drugs reach the maximum number of persons in a timely fashion.⁸⁰ The Commissioner of Health may purchase, store and distribute vaccines, antitoxins, serums, immunization agents, antibiotics, antivirals, antidotes, pharmaceutical agents, and medical supplies to treat and prevent communicable disease.⁸¹

In response to Governor's declared emergency, declared local emergency, or request from a community health board to assist with event threatening public health, the Commissioner of Health may authorize any person to administer vaccinations or dispense legend drugs if

⁷⁵ Minn. Stat. §12A.08, Subd. 2.

⁷⁶ Minn. Stat. §12A.08, Subd. 1.

⁷⁷ Minn. Stat. §151.37, Subd. 2(b). This authority to prescribed legend drugs by protocol applies to the Commissioner of Health if the commissioner is a licensed practitioner, or otherwise to a licensed practitioner designated by the commissioner.

⁷⁸ CDC. Receiving, Distributing, and Dispensing Strategic National Stockpile Assets: A Guide for Preparedness, Version 11. Accessed September 27, 2019 at <https://www.hsdl.org/?view&did=799144>.

⁷⁹ Minn. Stat. §148.235, Subds. 8 and 9.

⁸⁰ Minn. Stat. §151.37, Subd. 2(b).

⁸¹ Minn. Stat. §151.37, Subd. 10.

necessary to protect public health and safety.⁸² This Authorization must be in writing and designate the category of persons authorized to distribute or dispense, state the required training and supervision of these new administrators and dispensers, and set forth the duration of the authorization. Any person so authorized by commissioner is not subject to criminal liability, administrative penalty, professional discipline, or other sanction for good faith performance of the assigned vaccination or drug dispensing duties.⁸³

In response to some incidents, the best way to protect the public health is to vaccinate as many people as quickly as possible. The Commissioner of Health may designate persons and entities to expedite legend drug dispensing when pandemic influenza, or other life-threatening disease or event, requires urgent treatment or prophylactic measures.⁸⁴ Alternative and expedited mass dispensing methods under this statute include distributing to household representatives, door-to-door distribution by the United States Postal Services, distribution by closed points of dispensing which distribute only to a limited; defined group, as well as by “any method the commissioner deems warranted.”⁸⁵ Any person or entity acting as a closed point of dispensing acting in good faith under an approved dispensing plan is not liable for civil damages or administrative sanctions for causing death, injury, or property damage.⁸⁶

Minnesota Responds Medical Reserve Corps (MRC)

Under Minnesota law, the Commissioner of Health may accept grants from HHS to implement and operate the emergency system for the advanced registration of volunteer health professionals, otherwise known as ESAR-VHP, in Minnesota.⁸⁷ The ESAR-VHP Program in Minnesota is known as the Minnesota Responds Medical Reserve Corps. The purpose of the MRC is to pre-identify, train, and organize volunteer medical and public health professionals to render services in conjunction with local emergency response programs. The Commissioner of Health may dispatch Minnesota Responds MRC volunteers from outside the jurisdiction of a community health board if the prevention, mitigation, response to, or recovery from, an actual or threatened public health event or emergency exceeds the capacity of the community health board.⁸⁸ The commissioner may also request Minnesota Responds MRC volunteers to respond to a request from another state through EMAC or a Canadian Province, a tribal government, or the federal government if the commissioner determines such a deployment is in the public interest.⁸⁹ A Minnesota Responds MRC volunteer responding to a request for assistance or training at the call of the commissioner must be deemed a State employee for purposes of workers’ compensation, as well as tort claim defense and indemnification under the State Tort Claims Act.⁹⁰

⁸² Minn. Stat. §144.4197.

⁸³ Minn. Stat. §144.4197.

⁸⁴ Minn. Stat. §144.4198, Subd. 2(a).

⁸⁵ Minn. Stat. §144.4198, Subd. 2(a).

⁸⁶ Minn. Stat. §144.4198, Subd. 3.

⁸⁷ Minn. Stat. §145A.06, Subd. 6(b). ESAR-VHP was established by U.S.C. Title 42, §247d-7b.

⁸⁸ Minn. Stat. §145A.04, Subd. 6c.

⁸⁹ Minn. Stat. §145A.06, Subd. 7.

⁹⁰ Minn. Stat. §145A.06, subd. 7(f)(1).

Isolation and Quarantine

MDH is also vested with the legal authority to isolate and quarantine persons with a communicable disease if isolation or quarantine is both effective and the least restrictive alternative to protect the public health.⁹¹

Federal Laws

Stafford Act

Perhaps the primary federal law pertaining to emergency response is the Robert T. Stafford Disaster Relief and Emergency Assistance Act.⁹² First enacted in 1988, the Stafford Act is the primary federal law providing authority to the federal government to support state and local disaster response and recovery efforts. Federal assistance, which may include personnel, equipment, technical support, coordination of disaster relief efforts, and financial disaster relief is triggered by a presidential declaration of an emergency or a major disaster.⁹³ The Stafford Act allows the president to provide any kind of federal assistance to protect and save lives, property, and public health and safety. Under the Homeland Security Act of 2002, as amended,⁹⁴ The Federal Emergency Management Agency (FEMA) is generally responsible for providing the federal response to major disasters including implementing relief available under the Stafford Act.

Public Health Services Act (PHSA)

Under the PHSA, as amended by the Pandemic and All-Hazard Preparedness and Advancing Innovation Act of 2019, the Secretary of HHS has broad discretion to declare a “public health emergency” if the Secretary determines that a disease or disorder presents a public health emergency; or that a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists.⁹⁵ If the Secretary declares a Public Health Emergency, the PHSA grants the Secretary authority to take such actions that may be appropriate to respond to the public health emergency such as making grants, providing awards for expenses, entering contracts, and conducting and supporting investigations into the cause, treatment, or prevention of the disease or disorder causing the public health emergency.⁹⁶

⁹¹ Minn. Stat. §§144419-.4196.

⁹² 42 U.S.C. §§5121-5206.

⁹³ Prerequisites to a presidential declaration include a state governor requesting the declaration, certifying federal assistance is necessary because state and local resources are insufficient, and activating the state’s emergency operations plan. Otherwise, the president may issue a declaration if accelerated federal assistance is required or the event primarily impacts areas of federal responsibility such as Tribal lands or military installations.

⁹⁴ P.L. 109-295; 6 U.S.C. §§311-321(j).

⁹⁵ Section 319 of the PHSA, 42 U.S.C. §247d. The Secretary is required to consult with various public health officials before making this determination.

⁹⁶ 42 U.S.C. §247(d)(a).

A Public Health Emergency declaration is a necessary step for the Secretary to take a variety of discretionary actions in response to the public health emergency. For example, after a public health emergency is declared the Secretary may (1) issue a “1135 waiver”;⁹⁷ (2) waive certain sanctions under the Health Insurance Portability and Accountability Act (HIPAA) for 72 hours;⁹⁸ and (3) waive certain requirements under the Emergency Medical Treatment and Active Labor Act (EMTALA).⁹⁹ Declaring a public health emergency may also serve as the basis for the Food and Drug Administration to issue an Emergency Use Authorization allowing the special use of drugs and other medical products, either allowing the use of unapproved medical products or the unapproved use of medical products, during an emergency.¹⁰⁰

The PHS Act, however, also grants HHS broad authority to assist states during an emergency even in the absence of a Public Health Emergency declaration. For example, HHS may, at the request of a state, extend temporary assistance including deploying approved medical countermeasures from the Strategic National Stockpile (SNS); deploying National Disaster Medical System teams; conduct research, surveillance, and investigations; and exercising federal isolation and quarantine authority.¹⁰¹

Public Readiness and Emergency Preparedness (PREP) Act

This federal law provides immunity for liability claims related to the administration and use of certain designated medical countermeasures.¹⁰² The PREP Act authorizes the Secretary of HHS to issue a declaration if the Secretary determines that a disease, condition, or public health threat constitutes a public health emergency, or poses a credible threat of a future public health emergency, and finds that the development and use of a medical countermeasure is desirable.¹⁰³ The Secretary would then issue a PREP Act declaration setting forth:

1. The medical countermeasures covered by the declaration;
2. The activities covered by the declaration, such as the manufacturing, testing, distribution, and administration of the covered countermeasures;
3. Categories of diseases, health conditions, or health threats for which administration of the covered countermeasures is recommended;
4. The effective time period of the declaration;
5. The populations of individuals and geographic areas to which the declaration applies;
6. Any limitations on the means of distributing the covered countermeasures; and

⁹⁷ 1135 waivers are discussed later in this Annex.

⁹⁸ The HIPAA sanctions and penalties the Secretary may waive include those pertaining to patient consent required for the disclosure of the patient’s s protected health information under certain circumstances.

⁹⁹ EMTALA is otherwise known as the “anti-patient-dumping law.” Following a Public Health Emergency declaration, HHS may waive EMTALA sanctions for re-directing a patient to another health care facility if the transfer is pursuant to a state emergency plan of if necessitate by the circumstances of the emergency.

¹⁰⁰ 21 U.S.C. §360bbb-03.

¹⁰¹ See *generally* §§301, 311, and 2812 of the PHS Act (42 U.S.C. §§241, 243, and 300hh-11).

¹⁰² Public Readiness and Emergency Preparedness Act. Pub. Law No. 109-148.

¹⁰³ A separate public health emergency declaration by HHS, a presidential declaration under the Stafford Act, or an emergency declaration by a state governor are not required for the liability protections under the PREP Act to become effective.

7. Persons identified as qualified to prescribe, dispense, or administer the covered countermeasures and thus subject to the PREP Act's liability protections; this could include manufacturers, distributors, program planners,¹⁰⁴ and those qualified persons who prescribe, administer, or dispense the covered countermeasures.

The PREP Act provides immunity for the persons and activities identified in the PREP Act Declaration against tort claims of loss caused, arising out of, relating to, or resulting from the administration or use of the covered countermeasures. The very broad PREP Act immunities apply to claims of death; physical, mental, or emotional injuries; illness; disability; medical monitoring; and loss or damage to property that have any type of causal relationship to the development, distribution, administration, or use of a covered countermeasure. The liabilities under the PREP Act also preclude any claims directly related to the administration or use of a covered countermeasure based on state law. Public health workers and volunteers could receive immunity for liability claims related to the administration and use of covered countermeasures covered under a PREP Act declarations if they are a covered person and their activities fall inside the scope of the declaration. PREP Act protections are limited to tort claims; and do not apply in cases of willful misconduct. The PREP Act also established a fund to provide financial compensation for injuries directly caused by administration or use of a covered countermeasure.

1135 Waiver¹⁰⁵

When the president declares a disaster or emergency under the Stafford Act and the HHS Secretary declares a public health emergency under Section 319 of the Public Health Service Act, the Secretary is authorized to take certain actions. For example, under section 1135 of the Social Security Act, the Secretary may temporarily waive or modify certain Medicare, Medicaid, and Children's Health Insurance Program (CHIP) requirements to ensure that sufficient health care items and services are available to meet the patient needs¹⁰⁶. Within the parameters of the emergency declaration, providers may be exempted from sanctions (absent any determination of fraud or abuse) for care provided that would not normally meet program standards but are justified in the circumstances. Examples of these 1135 waivers or modifications include:

- Conditions of participation or other certification requirements (such as requirements for inpatient care);
- Program participation and similar requirements;
- Preapproval requirements;

¹⁰⁴ Program planners include individuals, government agencies, private sector employees, and community groups and entities who supervise or administer a program to administer, dispense, distribute, provide, or use a covered countermeasure. Protected activities include establishing requirements, providing policy guidance, supplying scientific or technical assistance, or providing a facility for distribution.

¹⁰⁵ <https://www.cms.gov/About-CMS/Agency-Information/H1N1/downloads/requestingawaiver101.pdf>

¹⁰⁶ 42 U.S.C. §1320b-5. The requirements that may be waived include conditions of participation, pre-approval requirements for health care services, or the requirement that health care providers be licensed in the state in which they provide services.

- Requirements that physicians and other health care professionals be licensed in the State in which they are providing services, so long as they have equivalent licensing in another State;
- Emergency Medical Treatment and Labor Act (EMTALA) waivers for pre-planned referrals in pandemics or infectious disease events;
- Sanctions for certain physician self-referral violations as determined by Centers for Medicare and Medicaid Services (CMS) (“Stark Law”) 107;
- Performance deadlines and timetables may be adjusted (but not waived); and
- Limitations on payment for health care items and services furnished to Medicare Advantage enrollees by non-network providers.

The 1135 waiver authority applies only to federal program requirements and does not apply to State requirements for licensure or conditions of participation. A health care facility should consider requesting an 1135 waiver any time that facility feels they are providing the best care possible but cannot comply with specific CMS requirements. Waivers can be requested by a facility, health system, or MDH for a specific facility or a geographic area. The request is made to the regional CMS office who will review the situation and determine whether to grant a waiver and the effective time.

In addition to the 1135 waiver authority, Section 1812(f) of the Social Security Act authorizes the HHS Secretary to provide for skilled nursing facility coverage in the absence of a qualifying hospital stay, as long as this action does not increase overall program payments and does not alter the benefit’s “acute care nature” (that is, its orientation toward relatively short-term and intensive care).

Providers must resume compliance with normal rules and regulations as soon as they are able to do so, and in any event the waivers or modifications a provider was operating under are no longer available after the termination of the emergency period.

Federally certified/approved providers must operate under normal rules and regulations, unless they have sought and have been granted modifications under the waiver authority from specific requirements.

Further information on the 1135 Waiver process can be found at [TRACIE: Healthcare Emergency Preparedness Information Gateway, Healthcare-Related Disaster Legal/Regulatory/Federal Policy](#), topic collections (3/14/2016).

Conclusion

This Attachment provided examples of some Minnesota and federal laws potentially applicable to issues such as liability protection, resource allocation, and staff augmentation that could be anticipated during a pervasive or catastrophic event with public health ramifications that may result in Crisis Standards of Care. To prepare for such an event, MDH recommends:

¹⁰⁷ Centers for Medicare and Medicaid Services. (2015, January 5) Retrieved from [Physician Self Referral](#).

- 1. Emergency managers review emergency and response plans and give thought to how responders will receive qualified legal advice to address the important yet unanticipated legal issues that will inevitably arise during a medical surge incident.**
- 2. Emergency managers should work with their attorneys to identify and discuss potential legal issues and legal authorities before disaster strikes.**
- 3. Emergency managers should incorporate Crisis Standards of Care strategies into practice as extensions of current emergency operations or medical surge plans to protect their employees.**

Again, it is beyond the scope of this Attachment and this Framework to conduct an exhaustive review of all state or federal laws that may be applicable in an emergency or disaster. The purpose of this Attachment is to provide a brief overview of some potentially applicable laws to give emergency management officials basic background information to assist when dealing with their own attorneys in emergency planning and response.