

Emergency Powers And The Effect Of Declaring Disasters

August 27, 2015

Presented For:

**Pennsylvania State Association of Boroughs
Annual PA Municipal Legal Update**

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Title 35 Health and Safety - Part V- Emergency Management Services

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The Governor's Right To Declare A Disaster Emergency

"Declaration of disaster emergency" - A disaster emergency shall be declared by executive order or proclamation of the Governor upon finding that a disaster has occurred or that the occurrence or the threat of a disaster is imminent. The state of disaster emergency shall continue until the Governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than 90 days unless renewed by the Governor. The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. Thereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency.

Title 35, Section 7301(c)

How Is A Disaster Emergency Defined?

"Disaster emergency" - Those conditions which may by investigation made, be found, actually or likely, to:

- (1) seriously affect the safety, health or welfare of a substantial number of citizens of this Commonwealth or preclude the operation or use of essential public facilities;
- (2) be of such magnitude or severity as to render essential State supplementation of county and local efforts or resources exerted or utilized in alleviating the danger, damage, suffering or hardship faced; and
- (3) have been caused by forces beyond the control of man, by reason of civil disorder, riot or disturbance, or by factors not foreseen and not known to exist when appropriation bills were enacted.

Title 35, Section 7102

Alternate Definitions Of A Disaster

"Man-made disaster" - Any industrial, nuclear or transportation accident, explosion, conflagration, power failure, natural resource shortage or other condition, except enemy action, resulting from man-made causes, such as oil spills and other injurious environmental contamination, which threatens or causes substantial damage to property, human suffering, hardship or loss of life.

"Natural disaster" - Any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life.

Title 35, Section 7102

"Resource shortage." The absence, unavailability or reduced supply of any raw or processed natural resource, or any commodities, goods or services of any kind which bear a substantial relationship to the health, safety, welfare and economic well-being of the citizens of this Commonwealth.

Title 35, Section 7102

How Is A Local Emergency Defined?

"Local emergency" - The condition declared by the local governing body when in their judgment the threat or actual occurrence of a disaster is or threatens to be of sufficient severity and magnitude to warrant coordinated local government action to prevent or alleviate the damage, loss, hardship or suffering threatened or caused thereby.

A local emergency arising wholly or substantially out of a resource shortage may be declared only by the Governor, upon petition of the local governing body, when he deems the threat or actual occurrence of a disaster to be of sufficient severity and magnitude to warrant coordinated local government action to prevent or alleviate the damage, loss, hardship or suffering threatened or caused thereby.

Title 35, Section 7102

Local Government Power To Declare A Disaster Emergency

"Declaration of disaster emergency" – A local disaster emergency may be declared by the governing body of a political subdivision upon finding a disaster has occurred or is imminent. The governing body of a political subdivision may authorize the Mayor or other Chief Executive Officer to declare a local disaster emergency subject to ratification by the governing body.

The declaration shall not be continued or renewed for a period in excess of seven days except by or with the consent of the governing body of the political subdivision. Any order or proclamation declaring, continuing or terminating a local disaster emergency shall be given prompt and general publicity and shall be filed promptly with the agency. The effect of a declaration of a local disaster emergency is to activate the response and recovery aspects of any and all applicable local emergency management plans and to authorize the furnishing of aid and assistance thereunder.

Affect On Power To Contract

"Contracts and obligations" - In carrying out the provisions of this part, each political subdivision shall have the power to enter into contracts and incur obligations necessary to disaster emergency management, response and recovery. Title 35, Section 7501(c).

"Temporary suspension of formal requirements" - Each political subdivision included in a declaration of disaster emergency declared by either the Governor or the governing body of the political subdivision affected by the disaster emergency is authorized to exercise the powers vested under this section in the light of the exigencies of the emergency situation without regard to time-consuming procedures and formalities prescribed by law (excepting mandatory constitutional requirements) pertaining to the performance of public work, entering into contracts, the incurring of obligations, the employment of temporary workers, the rental of equipment, the purchase of supplies and materials, the levying of taxes and the appropriation and expenditure of public funds. Title 35, Section 7501(d).

COUNTERTERRORISM PLANNING, PREPAREDNESS AND RESPONSE ACT, Act of Dec. 16, 2002, P.L. 1967, No. 227 35

Right To Quarantine

Section 301. Temporary isolation and quarantine without notice.

(a) Temporary isolation or quarantine - In the case of an actual or suspected outbreak of a contagious disease or epidemic due to an actual or suspected bioterrorist or biohazardous event, the Governor, in consultation with the Secretary of Health, may temporarily isolate or quarantine an individual or groups of individuals through a written order if delay in imposing the isolation or quarantine through judicial proceedings currently available to the department and local health departments would significantly jeopardize the department's ability to prevent or limit the transmission of a contagious or potentially contagious disease to others. This subsection shall not require a declaration of disaster emergency by the Governor in order to be effective.

Right To Quarantine

(b) Judicial review:

(1) After issuing the written order, the Department or local Health Department shall promptly file a petition with the court within 24 hours or the next court business day after the issuance of the order for a hearing to authorize the continued isolation or quarantine.

(2) The court shall hold a hearing on the petition not more than 72 hours after the filing of the petition to determine whether continued isolation or quarantine is warranted.

(3) Reasonable notice, either oral or written, stating the time, place and purpose of the hearing shall be given to the isolated or quarantined individual. The court may determine the manner in which the hearing shall occur, including through the use of closed-circuit television.

Right To Quarantine

(4) An isolated or quarantined individual is entitled to representation by legal counsel at all stages of any proceedings under this section and, if the individual is without financial resources or otherwise unable to employ counsel, the court shall provide counsel for him.

(5) If the court determines continued isolation or quarantine is warranted, the court shall so order the continued isolation or quarantine and shall fix the time and duration of the isolation or quarantine, which in no case shall exceed 30 days except as set forth in paragraph (6).

(6) Where an individual has been isolated or quarantined for a period of 30 days, the Department shall ask the court to review the order to determine if further isolation or quarantine is warranted.

(7) The Department or local Health Department shall provide the court with ongoing reports on the isolated or quarantined individual during the period of isolation or quarantine.

Right To Quarantine

(c) Relation to other laws - Nothing in this section shall be construed to limit the existing authority of the Secretary of Health or the Department or a local Health Department.

Section 302. Immunity from liability - The provisions of 42 Pa. C.S. § 8331 (relating to medical good Samaritan civil immunity), § 8332 (relating to nonmedical good Samaritan civil immunity) or § 8332.4 (relating to volunteer-in public-service negligence standard) shall apply to any person who provides assistance in carrying out the provisions of this chapter.

A Mayor's Emergency Powers Under The Borough Code

Emergencies:

(1) In addition to the power granted to Mayors by 35 Pa. C.S. Pt. V (relating to emergency management services) and in order to enable the Mayor to effectually preserve the public peace within the borough, the mayor shall have the power to prevent and suppress mobs, riots and unlawful and tumultuous assemblies.

(2) In the event that a state of emergency exists, a Mayor shall have the authority to request aid and assistance from law enforcement officers and agencies from a neighboring municipality.

(3) In response to a request of a Mayor made in accordance with this subsection, a municipal police officer shall, within the borough from which the request was made, have the power and authority to enforce the laws of this Commonwealth or otherwise perform the functions of that office as if enforcing those laws or performing those functions within the territorial limits of the officer's primary jurisdiction, subject to the limitations and conditions set forth in 42 Pa. C.S. §§ 8953(b), (c), (d) and (e) (relating to Statewide municipal police jurisdiction).

(4) If the Mayor considers that a state of emergency exists, the Mayor may issue a proclamation, which shall be in writing and posted in one or more conspicuous places and the contents of which shall be made available to all news media, declaring a state of emergency for a period not to exceed seven days unless sooner rescinded, modified or ratified or extended by resolution of council.

(5) The Mayor may prohibit in the proclamation for all or part of the borough:

(i) Any person being on the public streets or in the public parks or at any other public place during the hours declared by the Mayor to be a period of curfew.

(ii) The entry or departure of persons into or from any restricted area.

(iii) The sale, purchase or dispensing of any commodities or goods as designated by the Mayor.

(iv) The transportation, possession or use of gasoline, kerosene or other combustible, flammable or explosive liquids or materials except in connection with the normal operation of motor vehicles, normal home use or legitimate commercial use.

(v) Any other activities as the Mayor reasonably believes should be prohibited to help preserve life, health, property or the public peace.

(6) The proclamation shall describe the specific restricted area with particularity and shall specify the hours when restrictions are to be in effect.

(7) A person violating the proclamation of emergency commits a summary offense and shall, upon conviction, be sentenced to pay a fine not to exceed \$300 and costs or to a term of imprisonment not to exceed 30 days.

Council's Powers Under The Borough Code

(8) To provide against all hazards of war, terrorism and other disasters and their consequences, and for those purposes to have the power of eminent domain, to cooperate with any other unit and agency of government, Federal, State or local in every lawful way for purposes of defense against the hazards of war and terrorism and to further provide against the hazards of manmade or natural disasters in conjunction with the powers applicable to boroughs in 35 Pa. C.S. Pt. V (relating to emergency management services).

Police Issues

"Appointment of special police" - The Mayor may appoint special police during an emergency in which the safety and welfare of the borough and the public is endangered.

"Police force" - A police force organized and operating as prescribed by law, the members of which devote their normal working hours to police duty or duty in connection with the bureau, agencies and services connected with police protection work and who are paid a stated salary or compensation for the work by the borough. As used in this subchapter, the term shall not include any of the following:

- (1) Special police appointed by the Mayor to act in emergencies.
- (2) A person appointed solely for parking meter enforcement duties.
- (3) Special school police.
- (4) Extra police serving from time to time or on an hourly or daily basis.

This includes:

- (5) An auxiliary policeman appointed under the act of January 14, 1952 (1951 P.L. 2016, No. 561), entitled "An act providing for supplementing the police forces of cities, boroughs, towns and townships, for the appointment, powers and control of auxiliary police therein, and for the transfer during disasters and emergencies of such auxiliary police, members of the regular police forces, and police equipment thereof."

Nothing in this section shall be construed to prevent the appointment, without examination, of persons temporarily as police officers in cases of riot or other emergencies or as fire apparatus operators in emergency cases.

Practical Issues from a Labor Management Standpoint

The cost of any disaster can be measured, obviously in the cost of the human impact or property loss but also in the administrative costs to the Borough. Since 50-60% of a Borough's costs are tied to labor and employment costs, that seems like an area to which a Borough may wish to attend.

If you have a collective bargaining agreement, do you have a provision—like the provisions of Title 35, permitting the Borough special powers during an declared disaster or emergency?

Consider the impact of: 1) Overtime; 2) Call in; 3) Minimum manning; 4) Seniority; or 5) Scheduling change language.

Must we abide by our labor contract or our personnel manual?

A "force majeure" clause is one that sets out your rights and duties in the event of an emergency situation created by an unforeseeable force of nature (or the like). Whether a disaster triggers the force majeure clause in a contract, and the effect of that clause on the provisions of the contract, will vary significantly with each employer.

What if you have to generally close the Borough offices?

The Fair Labor Standards Act (FLSA) requires employers to pay nonexempt (hourly) employees only for hours that the employees have actually worked. Therefore, unless your CBA says differently, an employer is not required to pay nonexempt employees if the employer is unable to provide work to those employees due to a natural disaster. You may want to offer employees the option of using their vacation and leave balances during this period.

Some CBAs do provide for a guaranteed workweek.

For exempt employees, (e.g., those paid on a "salary basis") if such employees do not work at all during the particular workweek, you do not need to pay their salary for that workweek. But if such exempt employees work at some point during the workweek, they are generally entitled to their entire salary for that particular workweek.

One approach you might consider is requiring employees to use vacation or leave balances for the days not worked. The U.S. Department of Labor, however, has sometimes disapproved of employers forcing salaried-exempt employees to use vacation or leave balances for days not worked because of employer operations.

What about continuing benefits, including health care benefits, for employees who are not working over a longer period of time?

You need to check your plan document (if self-insured) or call the insurance company (if fully-insured) to determine how long employees who are not actively working may remain covered by your health plan. Once this period expires, insurance coverage must be terminated (unless the insurance company or self-insured plan otherwise agrees to waive its eligibility provisions), and a COBRA notice must be sent. If your plan is self-insured and if you decide to waive plan eligibility provisions, you must make sure stop-loss insurers are notified and agree to cover claims relating to participants who would otherwise be ineligible for coverage.

What happens to health coverage if employees are not working and unable to pay their share of premiums?

- In the normal course of events, health coverage will cease when premium amounts are no longer paid. However, several actions might be taken that would allow coverage to continue. First, the insurer providing the health coverage may voluntarily continue the coverage while the disaster is sorted out and the employer reopens its doors. More likely, the employer may make an arrangement with the insurer providing health coverage to pay the employees portion of premiums to keep coverage in place (at least temporarily) and possibly until the employer can reopen its doors.
- Each situation will be different, depending upon the insurer and the relationship between the employer and the insurer. Therefore, each fact situation will have to be individually investigated.

What are our obligations under the HIPAA privacy rules if we are contacted by officials asking for emergency personal health information about one of our employees?

- HIPAA privacy restrictions only apply to "covered entities" such as medical providers or employer-sponsored group health plans, and then only in connection with individually identifiable health information. Employers are not covered entities, so if you have medical information in your employment records, it is not subject to HIPAA restrictions. Nevertheless, disclosures should be made only to authorized personnel, and care should be taken even in disclosures to government personnel or other groups such as the Red Cross. Further, you should be careful not to release information to someone until you have properly identified them. You should treat all medical information as confidential, and afford it the same protections as those granted by HIPAA in connection with your group health plan.

On call time. An employee who is required to remain on call at the employer's premises or close by may be working while "on call" and the employer may be required to pay that employee for all of his time. For example, maintenance workers who remain on premises during a storm to deal with emergency repairs must be compensated, even if they perform no work, if they are not free to leave at any time.

Waiting time. If an employee is required to wait, that time is compensable. For example, if employees are required to be at work to wait for the power to restart, that is considered time worked.

Volunteer time. Employees are not volunteers if they perform the same services they are regularly employed to perform. They must be compensated for those services. Employers should generally be cautious about having employees "volunteer" to assist the employer during an emergency, if those duties benefit the employer and are duties regularly performed by employees.

Are "Volunteers" Considered Employees?

In determining whether a worker is a true volunteer, most states primarily consider whether the person is being compensated or will otherwise receive benefits. If you are compensating so-called "volunteer" workers and exercising control over their work, then it is likely that the state will consider them to be employees. The more compensation you provide and the more control you exercise, the more likely it is that they will be considered employees.

If workers are volunteers, they are not considered employees and therefore, are not covered by workers' compensation. For this reason, you need to take some preventive steps before accepting volunteers:

- Maintain a list of the people volunteering and *require each volunteer to sign a comprehensive release;*
- The release should identify the potential physical and psychological risks that the volunteer may encounter; and,
- No one should be allowed to volunteer unless they have signed a release.

What do we do about lost time records for work already performed but not yet paid?

Try to create the most accurate time records possible. There are two approaches to this problem. The first is to pay each employee based on the number of hours normally worked (assuming this information is available). The second is to ask each employee to estimate as accurately as possible the number of hours worked. The second approach is less likely to result in claims based on an under-payment of wages, but may be more cumbersome. Either way, you should obtain written authorization from the employee allowing you to make corrections (and possibly deductions from future wages) if more accurate time records become available.

We used electronic/computerized time clocks. How should we track time while those are disabled or unavailable?

You may record all hours worked by handwritten timesheets. Employers are not required to use time clocks under the FLSA. To ensure the accuracy of the timesheet, it is preferable that employees each fill out their own and record the actual times they start and stop work each day of the workweek. For example, IN - 8 a.m., OUT - 12 p.m., IN - 1 p.m., OUT - 5 p.m., rather than just listing 8 hours for the day.

Uniformed Services Employment And Reemployment Rights Act (USERRA)

For those employees who are also part of an emergency services organization (such as the National Guard or a Reserve unit), the USERRA may apply. USERRA prohibits discharging, denying initial employment, denying promotion or denying any benefit of employment because of a person's membership, performance of service or obligation to perform service in uniformed service.

While USERRA does require advance notice of military service, there is no time limit within which notice must be given; notice must simply be "timely." In the event of a hurricane or other natural disaster, there will be short notice. The notice may be written or oral and it may be provided by the employee or an appropriate officer of the military branch in which the employee is providing uniformed service.

Family And Medical Leave Act (FMLA)

Employees affected by a natural disaster are entitled to leave under the FMLA for a serious health condition caused by the disaster. Additionally, employees affected by a natural disaster who must care for a child, spouse, or parent with a serious health condition may also be entitled to leave under the FMLA.

Some examples of storm related issues might include absences caused by an employee's need to care for a family member who requires refrigerated medicine or medical equipment not operating because of a power outage.

Thank You!

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