



AMERICAN BAR ASSOCIATION

**STATE AND LOCAL GOVERNMENT LAW
SECTION**

**DRAFT CHECKLIST FOR STATE AND LOCAL
GOVERNMENT ATTORNEYS TO PREPARE FOR POSSIBLE
DISASTERS**

**Task Force
on Emergency Management and Homeland Security**

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A CHECKLIST FOR STATE AND LOCAL GOVERNMENT ATTORNEYS TO PREPARE FOR POSSIBLE DISASTERS

Preface:

Last spring, the American Bar Association's Section of State and Local Government Law established a Task Force on Emergency Management and Homeland Security. The mission of the Task Force is *"To help state and local lawyers prepare for and respond to the legal issues their client jurisdictions face from threats due to both natural and non-natural disasters and emergencies."* Our target audience is broadly defined to include state and local government lawyers, including federal lawyers who work on intergovernmental issues and practitioners in law firms that service state and local governments and also academics in the field.

The Task Force recognizes that emergency management, and the legal issues generated by emergencies and disasters, are triggered by all hazards— including both non-natural "Homeland Security" threats and natural hazards of flood, fire, wind, earthquake, and disease. As a practical matter, a municipality's fire and police departments respond to all disasters and operate under emergency authorities that are activated regardless of cause. And while terrorist events using weapons of mass destruction raise unique issues (such as mass casualties, federal control over crime scenes, quarantines, and coordination of police with military and intelligence officials), a number of the legal issues generated by disaster preparedness and response are also independent of the cause. Nonetheless, the nation experiences— fortunately— far more natural disasters than the non-natural kind, and there is a real need of municipal attorneys for assistance in dealing with the 'old fashioned' kind. Finally, even though the federal government has sharply distinguished "crisis management" activities (e.g., efforts to detect, prevent, and apprehend terrorists) from "consequence management" activities (e.g., preparing for and responding to destruction resulting from a disaster), this Task Force includes expertise on all such elements, since as a practical matter state and local government attorneys do not have the luxury of specialization and have responsibility over a wide range of emergency responders.

On July 23, the Task Force met in Washington in a "brainstorming" session to develop its work plan. Joining the Section's Task Force were representatives of a number of other organizations with a strong interest in this project. Attending this session were representatives of the National Emergency Management Association (which represents the Directors of Emergency Management of the 56 states and territories in the Union); the National Governors' Association;

the National League of Cities; the Department of Defense, and the International CityManagers Association, and the International Municipal Lawyers Association.

Based on this session, the Task Force decided to focus its short term efforts on creating a comprehensive checklist of the types of legal issues that attorneys normally face when dealing with preparedness, response, recovery, and the mitigation/prevention of non-natural and natural disasters. An initial draft of this 'legal issues' checklist is attached.

Our longer-term hope is to expand this list from simply a *checklist* of issues to one that includes links to resources (key cases, sample contracts, summary analyses, experts willing to discuss issues) that are available with respect to those issues. We then would make this issues checklist and resource document broadly available to attorneys– perhaps through a web site. Finally, the Task Force will be developing/presenting training materials and programs on the legal and operational challenges of those attorneys who are charged to respond in the disaster environment.

This “**draft**” is being circulated as we begin to coordinate it with our partner organizations on the project – out of the firm belief that exposure to a variety of perspectives will help ensure that it is complete. We urge all of you who review it to write down your comments and send them either to Ernie Abbott, Task Force chair, at eabbott@fema-law.com, or to Otto Hetzel (who has labored as the principal draftsman of the Checklist) at otto@hetzelesq.com. We particularly encourage identification of missing issues that you have found important in the emergency management legal arena.

A final note on organization. This draft checklist is circulated with each issue numbered consecutively from 1 to 64. These numbers are provided at this stage solely to assist in matching comments with the issues to which comments on this draft are addressed. After the review of comments on this draft, and the addition of “missing issues,” the Task Force plans to reorganize the issues list by topic areas, and will likely change the numbering system to reflect the new organization.

Introduction

Before a disaster strikes, legal counsel should be prepared for the role they may be asked to play. Anticipating issues, policies, and legal questions that may arise, identifying the various actors with which they may be involved, and knowing how counsel may need to relate to and advise them are obvious starting points. The checklist that follows is organized to help counsel work through the issues and identify topics for researching the laws, systems, and policies that may arise in the context of an unnatural or a natural disaster.

Attorneys should try to determine in advance what roles they may be asked to play by their governmental clients and what is the likely scope of specific responsibilities particular clients may be looking to legal counsel to undertake. The tasks asked of counsel, at least to some extent, will be dependent upon the responsibilities that the government officials who are being advised are likely to be exercising. When a disaster strikes, unless some advance preparation has taken place, counsel may find that a number of the issues they are being asked to consider will be new to them. Moreover, the disaster may disrupt the infrastructure – such as working computers, telephones, and internet connections – that counsel would normally rely upon to research these issues. Given the scope of actions that could arise and the potential impact that terrorist-caused and major natural disasters may entail, preparation is essential. This checklist is clearly a work in progress, and the Task Force looks forward to suggestions and additions to the issues contributed from all who participate.¹

I. Prepare an Emergency and Disaster Response Handbook and Share It With Your Client

1. ***Research all relevant emergency powers for the jurisdiction.***
 - a. Research, using phrases such as “disaster or emergency” and (specific jurisdiction or level of jurisdiction, such as “state, municipal, county, or town).” This should yield the bulk of the various laws (and possible interpretations of them) that deal with what a jurisdiction can do in times of disaster.
 - b. Use Legal Indexes of Statutes - using the bound copies of the index to the general laws in your jurisdiction, look up such topics as *disaster*, *emergencies*, *war*, *civil defense* and the like. This search is likely to refer you to applicable laws as well.
 - c. Check Special Acts for the Particular Jurisdiction- many states pass special acts dealing with disaster responses.
 - d. Check with the State and Local Government Emergency Preparedness Agencies that may have already compiled many of these sources.
 - e. Check for Local Laws, Ordinances and Regulations on these Topics.
2. ***Compile a handbook containing legislative authority and judicial decisions relevant to the variety of issues, policies, and systems that could arise in emergencies and disasters, and keep it current.***

¹ The Task Force wishes to acknowledge with appreciation its use with his permission of the very thoughtful paper of James B. Lampke, Esq., Town Counsel-Town of Hull, Mass, he presented to the International Municipal Lawyers Association in April 2002, “Legal Issues For Municipal Counsel to Consider *Before* Disaster Strikes,” as a starting point for this checklist

Keep a copy (hard and on disk) on site at the office, but also at another location, offsite.

3. *Provide client contacts with copies of the materials for reference in advance as part of disaster crisis management.*
4. *Develop and maintain as part of your Disaster Response Handbook a list of resources where you can obtain legal assistance and information.*

Keep a master list in your notebook of names, addresses, telephone/fax numbers and email addresses of resources. One resource is the International Municipal Lawyers Association, which has a data bank of forms and materials submitted by members on disaster-related legal issues.

5. *Set up a portion of your Handbook to cover the various laws and related forms that deal with responding to disasters in your jurisdiction.*
6. *Have sample forms ready to cover any matters for which specific action cannot be taken beforehand to allow for rapid response to issues that can be anticipated.*
7. *Develop an appendix of forms and have them also on computer disk and CD so they can be readily adapted to any particular situation.*

Typical forms may include such matters as declarations of emergency, declaration of curfews, ban on liquor or gun sales, emergency petitions to a court, orders of closure, etc.

8. *Identify sources of information, best practices, model acts, and for other assistance with legal issues in your Handbook, regarding planning for and responding to disasters, from such national organizations as the National Governors Conference, the League of Cities, Conference of Mayors, National Association of Counties, the International Municipal Lawyers Association.*

II. Authorities Available to Jurisdiction to Protect Public Health and Safety

9. *Determine if the emergency authority currently provided and the powers that can be exercised under it are sufficient to deal with the potential scope and range of non-natural and natural disasters.*

Among the issues that must be determined is who has the authority to take action, for instance, to tear down dangerous buildings, to exceed appropriations, to hire more workers, etc. For example, the following questions need to be answered:

10. *In times of disaster, who is in charge--is it the elected official or the local governing body or board, or a previously appointed administrative professional?*

Who has authority: the County Executive, City or Town Mayor or Manager? Designated Emergency Preparedness Director? Police or Fire Chief? Mayor or City or Town Manager but only with approval of Council or Board of Selectmen?

11. *Must there be a declaration of an emergency before the person(s) with authority can act?*
12. *When do laws become effective?*

Are there provisions for emergency laws to become effective sooner than non-emergency laws? What are the steps? Does it make a difference if it is a state law or a local law? [There may be special posting requirements for emergency laws.] What procedures apply to renewing such provisions, if that becomes necessary?

13. ***Who has the authority to declare an emergency, and what laws, potential actions, and access to benefits are triggered as a result of who makes the declaration,*** . [What powers and authorities of your client jurisdiction are triggered by declarations by various officials -- Mayor; city or town Manager; Council or Board of Selectmen; Police or Fire Officials; State Officials; the Governor?]
14. ***What differences in declarations of an emergency apply for a local emergency, a state declared emergency, or a federally declared emergency?***

Different rules apply to each. [For instance, whether it is a local, state, or federal declared disaster may affect the availability of loans, grants, and reimbursements from state and federal government sources.² Depending on the particularities of the jurisdiction's laws, the nature of the designation may also affect the scope of authority and actions that can be taken. Knowing the difference in advance will minimize claims after the disaster is over.]

15. ***What issues of succession of governmental officials may arise in emergency situations that could have implications for government taking action, for instance, to declare an emergency?***

Determine if your state's constitution provide for the continuity of government in times of emergency? Are there succession powers and designations, and who makes those determinations?

16. ***If sufficient powers have not been provided, or are not clear, consider proposing necessary additional relevant authority to cover necessary responsibilities and tasks.***

17. ***Determine if powers are sufficient for public health and safety purposes in the context of the need for emergency responses.***

For instance, in times of disaster it often becomes necessary to require evacuations, quarantine areas, impose curfews, restrict persons from access to certain areas, including public thoroughfares and buildings. Also, it may seem advisable to impose other controls in such situations, such as banning sales of liquor and guns.

18. ***Determine who has the authority to make these decisions, what steps must be taken to do so, and what documents are required to record properly the actions taken .***

[From an attorney's perspective, necessary sample forms which can be readily adapted for these purposes should be prepared well in advance. Be aware of time limits and renewal procedures in drafting such documents.]

² It is critical, regardless of who declares the disaster or if it is declared at all, that such decisions be adequately documented, including the basis for all actions taken and the need for expenditure of funds for this purpose. After the dust settles and the affected jurisdiction begins to look at loans, grants, and reimbursements, unless careful records are kept all along, the task of documenting actions becomes much more difficult. A process needs to be established in the beginning, even if it as simple as keeping a log of all actions and assigning one or two persons to maintain it.

19. Determine if an evacuation plan exists, who determines the circumstances that can require population evacuations in the jurisdiction, and what grounds for evacuation are required.

Establish what facts must be shown to trigger an evacuation. Consideration should be given to whether the circumstances that may be specified are relevant to situations where non-natural disasters cause the need for evacuation. Further, you should determine what procedures apply to exercising such decisions and what, if any, limits on the scope of exercise of such police powers exist. Can there be forced evacuations and, if so, how are they to be implemented? [Laws vary widely in terms of whether the government can force people to leave their property. Even if a jurisdiction does not permit forced evacuations, it is a good idea to have ready a notice to give to property owner advising them of the risks involved and the fact that the government may not be in a position to rescue them as events progress.]

20. Determine what authority exists to restrict public access to residential areas and disaster sites, including even residents of such areas, and the circumstances that justify such actions.

Incidents of poisonous fumes from train wrecks or the potential of them and advancing brush fires have been grounds for forcing evacuations of nearby residential areas. State and local laws may vary considerably on authority to take such action.

21. Determine the scope and range of regulatory powers available to control operation of commercial establishments that may be required in emergencies and disasters, including access to and restrictions on use of food service establishments, grocery outlets, etc.

22. Determine the applicability of existing curfew provisions, if they exist, and what grounds or events are required to impose such controls in circumstances of emergencies and disasters and how they are to be documented.

For instance, what is the process to declare curfews and how are they to be justified?

23. To the extent that law enforcement powers may pertain to your client's, or your own role, determine if a relevant range of potential acts of terrorism are sufficiently covered under applicable criminal laws to enable public safety officials to exercise necessary powers to act.

24. Considering the potential issues that may arise under possible biochemical terrorism scenarios, determine if authority is sufficient to protect residents

For instance, can persons within the jurisdiction be required to undergo tests for possible exposure to toxic substances; can treatment to protect them be ordered and compelled, including, for instance, medication with protective agents that may involve injections or ingesting pills that may entail some risk; and can testing (possibly invasive) be ordered. Can use of various protective apparatus, such as biochemical breathing equipment and masks, be mandated?

25. Determine if a sufficient range of related public health powers is available to deal with preventive efforts or to control contamination, permit destruction of real and personal property that may constitute a potential hazard, and what obligation of compensation is required of government.

What is the process for Boards of Health, Governing Officials/Boards, Public Safety Officials, Building Commissioners, Fire Departments and others for making buildings or property safe or demolishing them and where can such debris be disposed of? [Inevitably, during an emergency situation, there will likely be a need for the government to take action to raze or board up

buildings or clear property due to health and safety reasons. Even in times of emergencies, there are special procedures that must be followed. A failure to follow the rules could lead to claims later on; even if the jurisdiction was justified in wanting to tear down a dangerous structure, a failure to follow the legal requirements in times of an emergency will likely make it liable for damages. Different rules may apply to different officials who all may be authorized to take such action. Know the differences and the rules.]

26. Review the jurisdiction's police power authority related to the following matters:

- a. ***Restriction and control of access to crime scenes or to areas subjected to biochemical incidents, having the potential of residual pollution of the area requiring abatement and cleanup.***
- b. ***Protection and control of access to infrastructure critical to functioning of government and generation and transmission of utilities, such as public buildings; transportation (including bridges, elevated highways, tunnels, and the like; water processing facilities; reservoirs; electrical and gas storage, generation and transmission facilities; or to other areas and systems subject to potential threats of harm.***

Determine the level of threshold authority available to protect critical sites of governmental and public utility infrastructure, through such measures as authority to search vehicles, detain persons near critical sites for questioning, and to restrict access to such critical areas, while addressing applicable First Amendment and privacy rights. For example, who has authority to impose emergency actions relative to water supplies and what actions may be taken. These could range from the need to limit water consumption or divert water from one area to another because of drought conditions or the need to protect water supplies, as well as other utilities, from corruption. Consideration will need to be given to handling situations where the water is not produced by the jurisdiction but, rather, is the property of a private utility.

- c. ***Imposition of security measures, such as searches and restrictions on access to public gatherings, including sports and entertainment events, or to certain areas requiring protection.***

What is the process to set up roadblocks and vehicle searches in certain areas?

What are the legal issues for taking action in stopping vehicles or people in public areas during an emergency? [Recently, for example, a Massachusetts District Court dismissed charges against a driver whose vehicle was stopped near a reservoir as part of a safety patrol, and non-related violations were found. The case is under appeal. The court took the action as it found that the post-September 11 safety checks did not warrant the search.]

27. What restrictions are there on emergency action in certain areas, i.e., private roads, wetlands, waterways, private lands, utilities easements, etc.?

Under the wetlands laws of some states, before emergency work can be done in a protected area, there must be approval of the emergency by the local agency having jurisdiction. Be familiar with the process for emergency work in such areas before you need to utilize it. Under what circumstances and conditions can entry be made on private property? Under what circumstances and conditions can private property-- both real and personal-- be taken or used during an emergency? What, if any, compensation may need to be provided the owner for the loss of use or damage to such property?

III. Surveillance Authority and Protection of Security Information

28. *Determine the jurisdiction's authority to conduct surveillance activities and identify potential legal issues that could arise.*

Surveillance activities of government already have triggered issues with respect to use of closed-circuit video cameras, photographs, and aerial surveillance, and the extent of authority for government to impose restrictions or sanctions based on such surveillance. Consideration will need to be given to possible damage claims that could be made as a result of governmental actions.

29. *Determine the jurisdiction's authority to institute record background checks on individuals, use of licensing documentation, and access to public safety information in facilitating responses to potential threats to public safety.*

30. *Determine what forms of communications during the onset of a disaster are available to jurisdictions that may be involved and develop strategies for ensuring coordination of communications in such circumstances.*

Various client communication systems need to be shared by different departments and units of government that must act in a coordinated fashion in disaster situations. These systems should include access to legal counsel to obtain advice on issues that are likely to arise during the course of events where guidance may be requested.

31. *Determine who has authority for your client to access and respond to various types of intelligence information from other levels of government.*

Those persons who are authorized to receive and responsible for actions upon receipt of communications from other levels of government regarding intelligence matters and how that responsibility will be designated officially need to be determined.

32. *Who is to have access to intelligence information, and how will such information be safeguarded from those without such authority or the need to know; and how will advance clearance to such communications be determined and documented.*

33. *Communication links and command authority need to be established with medical support systems, such as hospitals, doctors, emergency medical services, etc; how such communications will be safeguarded with these medical and health support systems needs to be determined.*

In an era of highly communicable diseases, bioterrorism is a potential basis for attacks on the population that will require careful management and difficult decisions regarding how information on conditions will be communicated.

IV. Intergovernmental Joint Powers Agreements and Actions.

34. *Determine the scope of existing joint powers agreements with other governmental bodies and determine if the powers are sufficient to cover issues that may arise in allocation of manpower and resources and to ensure cooperation necessary to respond effectively to various types of disasters.*

Be familiar with existing joint powers agreements and mutual aid agreements. For instance, if there are mutual aid agreements, how are they activated?

35. *Determine what existing policies and procedures have been agreed to by various governmental bodies, for instance, under emergency plans required of jurisdictions in some states, and more generally concerning potential exercise of joint responsibility for dealing with disasters and whether these powers are adequately documented regarding responsibility for responding to particular disasters.*
36. *Identify existing coordination requirements as between various levels of government in preparing for and responding to disasters and determine if they are adequate or improvements are required.*
37. *Review the jurisdiction's emergency plan and command structure for emergency management and the client's role in both in order to prepare to respond to client questions as to legal authority for carrying out various actions for which your client's jurisdiction has responsibility and to ensure effective cooperation between various governmental jurisdictions at all levels of government.*

V. Disseminating Critical Information to the Public

38. *Review the available communications systems to be used to convey information between government officials and the public for such matters as disaster alerts and management information, and determine how the authority to exercise such communications systems needs to be authorized and documented.*

Determine what procedures and legal approvals should be used in advance and during an emergency regarding who has authority and responsibility for determining when and what will be communicated to adequately alert and inform the public of potential disaster situations and conditions.

39. *Determine how dissemination of information to the public will be provided using cooperative local media outlets, radio, television, and cable technology for notifications as well as the use of various warning systems and alarms that may be available in a jurisdiction, such as sirens, loud speakers in public and commercial areas, etc.*
40. *Anticipate the parameters regarding sharing of intelligence and disaster information with the news media, the extent of access to be provided to the media or to any citizen to make inquiries of government officials or to obtain access to government documents and intelligence information or to sensitive records, including those maintained by medical facilities and health care professionals.*
41. *Determine how freedom of information and application of open meetings laws will be applied during periods of crisis management and planning and to governmental information sources.*

What are the effects of an emergency declaration or situation on open meeting laws, public records laws, and ethics laws, etc.? For example, what are the requirements to hold an emergency meeting? Are on site inspections considered meetings? [Typical open meeting laws provide exemptions for posting notices of meetings for emergencies. Know in advance what constitutes an emergency under the law and know what special steps must be taken.] Consider procedures needed to provide centralized and consistent treatment of these issues by governmental clients and to provide the media and the public in advance with information about how such matters will be handled.

VI. Establish Guidance for Administrators Regarding Administrative Functions During

Emergency and Disaster Crises

A. Fiscal and Budgetary Matters

42. *Determine what existing sources of funding can be used and what procurement requirements are applicable to emergency situations.*

For instance, who has authority to order emergency actions entailing governmental costs? Who determines the use and allocation of resources? What procedures must be observed and how are they to be documented? What restrictions or limitations apply to such actions? Decide whether existing special emergency authority in this regard is sufficient and propose changes if needed.

43. *Determine if current emergency procedures are sufficient to authorize funds and obtain access to budgetary resources that may be required, including whether normal limits and restrictions on spending will apply and who can make those decisions.*

The extent that supplemental approvals will be required should be determined as well.

B. Who Can Exercise Fiscal Authority and How

44. *Who has the authority to do what in times of disaster?*
45. *What limits are there on the authority of various boards, city council or executive officials in terms of exercising their typical authority?*
46. *Who has the authority to waive certain laws?*

Under disaster laws, some laws can be waived, but only upon prior action by designated officials. Determine if that authority exists in the jurisdiction, who can exercise it, and what must be done. [If a declaration must be made, have sample forms readily available that can be filled in with the details.]

47. *Is there authority to exceed appropriations and basically disregard set budgets when there is an emergency situation and who has the authority to do what is essentially emergency borrowing?*

What limits are there on what the money can be spent on? [Dealing with the issue of exceeding budgetary appropriations is often one of the first legal issues to arise. Some laws require there to be a vote of various governing board officials. Others may require the approval of state officials, the obtaining of which during disasters can be problematic. Some laws may restrict or limit funds exceeding a budget approval and how they can be spent. Knowing these limitations will be essential advice to your client.

48. *Determine how reimbursement for emergency expenditures for resources can be obtained, what procedures are required to obtain such funding, and from what sources of funds, and what restrictions apply.*

C. Contracting and Procurement Procedures

49. *Determine what contractual procedures will be applicable during an emergency that could allow for expedited procurement of necessary resources and personnel, including equipment, supplies, materials, food, shelter facilities, etc.*

Identify any special rules in contracting during times of a disaster and how they differ from the typical procurement rules. What triggers special contracting authority, if applicable. Is a declaration of disaster needed, and by whom? A related question is what rules for contracting and procurement are waived when there is an emergency?

What special actions must be taken to utilize the emergency rules (i.e., certain types of emergencies, who declares them, special filings of actions taken under emergency laws, limitations on whether the emergency work can only be so far as necessary to temporarily abate the emergency, etc., need to be determined. [Some laws limit the emergency contract work to only the least amount of work needed to abate the emergency. Some laws require approval from state officials before normal contract rules can be waived. There may also be special requirements for filing certifications with the state when there has been a contract entered into without the normal procurement process.]

Such special authority may be needed for :

- a. procurement of services, supplies and materials (especially food, shelter supplies, and medical supplies)
- b. public works projects (i.e., bridge repairs, road work, dams, etc.)
- c. public building projects (i.e., repairs, reconstruction, temporary structures, etc.)
- d. utility contracts (i.e., water, gas, etc.)

D. Handling Personnel Issues in an Emergency Situation

50. *Determine how personnel can be hired in an emergency, how compensation is determined, and what worker rights will apply where increased governmental staff resources must be provided at times of an emergency.*
51. *Identify what personnel rules apply in times of disaster, such as hiring procedures, liability for employee actions, actions available under mutual aid agreements, calculation of benefits, wage-hour limits, etc.?*

What special rules apply to personnel matters in times of emergencies? [In responding to an emergency, a jurisdiction will almost always need more employees than it typically has. It is critical to know beforehand how to hire people in an emergency, particularly in view of civil service or local personnel code requirements. Other issues that may be affected are whether medical examinations are needed for employees hired in an emergency. Administrators may need to exercise care regarding hiring of persons who would not have been hired under normal times who may gain preferences or access to benefits not normally available to them by suddenly responding to calls for emergency employees.

52. *Determine under what circumstances can emergency appointments be made, which in effect bypass normal hiring rules (civil service, collective bargaining, etc.)*

What restrictions are there on emergency employees performing the duties of other employees? [Some laws restrict, for example, police performing the duties of fire fighters. Are there emergency exceptions?] What special rules exist for calling into service employees who have already retired? [Retired employees may be a good source of additional workers when there is a disaster. However, there may be special restrictions on their returning to work, even in times of an emergency.] Other personnel issues can also arise. For instance, can an unpaid volunteer be considered an employee if they serve in an emergency situation? [Governmental jurisdictions even under normal times often survive on volunteers. Their assistance becomes even more

important during times of an emergency. However, there are a host of special problems and issues that arise with volunteers.]

53. *What special rules are there in terms of the number of hours/days an employee can work and how are those rules applied in times of emergency?*

Often state and federal laws limit the number of consecutive hours or days an employee can work. Special rules may apply in times of emergencies, however. What are the rules of the Fair Labor Standards Act and the Family Medical Leave Act concerning emergency situations? Are there comparable state laws to be considered? [See, for example, 29 CFR 553.25(c), regarding there being an exception to the rules on providing reasonable time off under the FLSA if there is an emergency situation.]

How does the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (38 USC 4301 et seq) affect employment practices when employees are called up for military duty?³ Are there comparable state laws to be considered? [Some key-- and not so key -- employees may be called up for reserve duty during the time the jurisdiction also needs them. There are special rules on how soon they must return to work following release from military service in order to maintain their rights to their positions.]

VII. Liability of Governmental Units in Emergency Situations

54. *Determine the extent of the municipality's potential for liability for injuries/medical expenses sustained by employees and volunteers or retirement/disability benefits for them in times of emergency.*

While there is usually little that can (and some would argue should) be done when people need to be saved from injury or death, administrators should at least know what the government's exposure will be if a volunteer is injured, the rescue of a victim fails, or a citizen's property is damaged. Other issues range from what is the jurisdiction's potential liability for benefits to an emergency employee or to a volunteer's family should the employee or volunteer die while serving in the emergency? Similarly, to what extent is the jurisdiction liable for injuries/medical expenses or personal property damages sustained by employees from other jurisdictions or for contributions to their retirement/disability benefits for those employees of other jurisdictions coming to its aid in an emergency?

55. *What are the special rules for dealing with hazardous substances in times of emergency?*

Are there environmental restrictions when taking action to dispose of materials, including debris, snow, water, etc.? Are piles of snow, which may have road salt or other chemicals mixed in, considered hazardous material for which special disposal rules apply? Environmental agencies have been known to cite (and fine) local governments for such acts as dumping snow (which has chemicals in it from the roads) into a body of water. Knowing where such material can be disposed of in advance could save a jurisdiction considerable costs if remediation becomes necessary, let alone embarrassment.

56. *Determine to what extent governmental liability will still apply in emergency and disaster management situations.*

³ The US Department of Labor website, www.dol.gov, at the Veteran's Employment and Training Services section, provides a wealth of information on this law, including downloadable/printable text.

For instance, to what extent is a jurisdiction liable for injuries/medical expenses/property damage *caused by* employees and volunteers in times of emergency? Further, will the employee or volunteer be indemnified for any damage or injury they may cause? What if they are performing a task which normally requires a special license and they do not have it because they are filling in during an emergency? Do these same rules apply and to what extent is a jurisdiction liable for injuries/medical expenses/property damage sustained or caused by employees from other jurisdictions or for contributions to their retirement/disability benefits as a result of those employees coming to the aid of another jurisdiction. [Typically, mutual aid agreements or laws provide that the entity providing the employees remains liable for payment, but the entity receiving the services has to reimburse the entity sending the help.]

57. *What special liability rules apply in emergency circumstances?*

For instance, what are the jurisdiction's special liability rules that might apply to doctors, nurses, and other health care professionals, or a "good Samaritan" who come forward to help people in times of emergency? [State laws often provide special exemptions to liability by doctors, nurses, people with CPR training, etc. Knowledge of the application of such rules is likely to affect whether a jurisdiction enlists the assistance of such professionals.]

58. *What are the liabilities a governmental jurisdiction faces when entering on private property or taking or using private property during an emergency?*

What state laws apply to government entering private property in times of an emergency can be critical regarding government liability. Those laws may be different if it is not a state-declared disaster. Photographs or videos taken of the area before or at least while work is being carried out may provide useful evidence to sustain government intervention. State eminent domain laws may also apply to such situations.

59. *Determine what laws are subject to suspension during times of emergency.*

For instance, how are laws regarding statute of limitations, Sunday or Blue Laws, waiver of minimum number of school days, local tax proceedings, and creditor/debtor laws affected by declarations of emergency? Special rules may even govern the use of vehicles (including all terrain vehicles and snow mobiles) in times of emergency. Often there are special rules for using such vehicles on public streets during an emergency if authorized by the appropriate official. Such vehicles may be the community's only source of transportation in some disasters.

Special laws concerning rebates on taxes paid for property damaged during a disaster may apply during emergencies. [Some states have laws that provide for rebate of taxes when property has been damaged and the taxes were paid on the pre-damaged value of the property.] Special laws concerning the value of property to be taken under eminent domain where the property was damaged in a disaster may apply. Similarly, access to state funding may apply in times of emergency or to the time for repayment of loans.

Disaster relief organizations may also receive special treatment under state laws.

Contract provisions can also be affected by definitions concerning Acts of God, disaster, emergency, etc. In some states, special laws establish a day or week for particular recognition of workers in disasters. Disasters can also affect issues in the administration of the criminal justice system in times of emergency. Some municipal counsel also handle criminal prosecutions, so counsel need to know the rules regarding the effect of a delay on bringing

someone before the court for bail or arraignment in times of an emergency, as well as the other nuances of criminal law in times of an emergency.

Insurance provisions can also be affected by disaster situations. Know before disaster strikes what your insurance policies provide for coverage in times of an emergency. Remember, an emergency declaration may be helpful in getting state or federal aid, but it also may affect the level of insurance coverage that can later be obtained from the carrier. Similarly, "force majeure clauses" in existing contracts may need to be evaluated when emergencies occur. [Many construction project contracts may provide for extensions of time and releases from liability if there is an enemy attack, act of God, or other force majeure occurrences. Many times these clauses are left in contracts with little thought to them. Since contractors can often obtain insurance to cover these contingencies, governments may want to consider excluding such clauses..

Access to governmental benefits may also be subject to disaster relief. [Following September 11, a number of bar associations and other legal agencies set up programs to help people deal with the paperwork needed for receiving benefits. There was, for example, an expedited process on receiving death certificates. Of course, it is important not to overlook appropriate verification requirements. It has been reported recently that a number of fraudulent cases have arisen involving people wrongly obtaining death benefits following September 11.]

VIII. Develop a Knowledge of Applicable Federal and State Government Laws, Regulations and Authority in Handling Disasters, Both Non-natural and Natural.

A. Key Federal Laws

60. *The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, et seq., as amended.*

This act deals with federally declared disasters and emergencies; it is a principal source of federal disaster assistance to state and local government in times of disaster.

- i. Direct Federal Assistance: FEMA coordinates all assistance provided directly by the federal government in response to declared disaster and emergencies.
- ii. Public Assistance Program: provides federal grants of "not less than 75%" of the cost of certain emergency costs and of the "repair, restoration, reconstruction, or replacement" of public facilities and certain non-profit facilities.
- iii. Individual and Housing Assistance: provides funding for, and in some cases supplies, temporary housing for displaced households; provides for federal funding of "immediate needs" of affected individuals and families.
- iv. Post-Disaster Mitigation Programs, particularly the Hazard Mitigation Grant Program
- v. Pre-Disaster Mitigation Programs; mitigation planning requirements and funding for pre-disaster mitigation
- vi. Emergency preparedness planning and exercising authorities.

General requirements that affect local government eligibility for funding:

- vii. Duplication of benefits
- viii. Ineligibility of for-profit businesses and the Legal Responsibility Doctrine

- ix. Federal Grant Administrative Requirements
- x. Distinction between “Costs” which can be eligible and “losses,” such as reduced revenues, which are not.

61. ***Small Business Administration***

- xi. SBA disaster loans for individuals and small businesses

62. ***Specific Departmental Emergency Programs***

- xii. ***Department of Health and Human Services***
- xiii. ***Department of Transportation***
- xiv. ***Housing and Urban Development***
- xv. ***Environmental Protection Agency***
- xvi. ***Department of Agriculture***

63. ***National Flood Insurance Program***

- xvii. Flood Plain Management

B. State Laws

64. ***For local government attorneys, become familiar with the State laws for dealing with emergencies on a statewide level and for local emergencies.***

For instance, know how the State militia or other such groups can be called in to help? [Usually the law provides that local officials may request the National Guard or militia to come and provide assistance; know if a legislative body must also approve.]