



1899 L Street, NW, Suite 1200
Washington, DC 20036

T 202.822.8282
F 202.296.8834

HOBBSSTRAUS.COM

March 13, 2020

GENERAL MEMORANDUM 20-007

Authorities and Considerations in Addressing the Global COVID-19 Outbreak in Indian Country

We are aware that Tribes have been following the development of Coronavirus disease 2019 (“COVID-19”) closely, and are concerned about addressing the issue in your communities. We know that this issue has already touched Indian Country with employees testing positive, Indian organizations cancelling national conferences, and Tribes declaring emergencies and restricting travel.

This memorandum discusses issues for tribal consideration, including how Tribes can act in their governmental authority to respond to public health emergencies like the current Coronavirus pandemic, options for Tribes in their role as employers and business operators, and information for Tribes who are also providing health care to their communities.

I. Tribal Governmental Authority in Public Health Emergencies

Tribes have inherent authority to take certain actions like making emergency declarations and creating entities needed to execute and enforce emergency preparedness and response laws. Specific mechanisms or legal authorities by which Tribes choose to delegate and exercise this authority will differ. However, all Tribes may consider declaring states of emergency in response to the COVID-19 outbreak and engage with state and federal officials in order to leverage resources.

A. Federal Assistance

Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”), the U.S. President may declare a major disaster or emergency in response to an event or threat that overwhelms state, tribal, local, or territorial governments. This triggers access to federal technical, financial, logistical, and other assistance to state, tribal, local, and territorial governments. Tribes may receive benefits under a Stafford Act declaration through two means. First, the Tribe’s highest ranking executive officer may request a Stafford declaration from the President directly by declaring a tribal emergency and making a formal request through the Federal Emergency Management Agency (FEMA). Second, when a Tribe’s land falls within a requesting state’s borders, that state’s governor may request a Stafford declaration. It is also important to note that a federal emergency declaration does not preempt a Tribe’s

authority to declare emergencies within its territory. Some Tribes have already issued emergency declarations for this pandemic.

Separately, section 319 of the Public Health Services Act authorizes the Secretary of the Department of Health and Human Services to declare a public health emergency and use the Public Health Emergency Fund for various purposes, including to allow Tribes to use federal supply schedules to respond to public health emergencies. A Tribe may also request the Secretary to issue a “temporary reassignment of federally funded health department personnel” to come to that Tribe’s aid. HHS Secretary Azar declared a public health emergency for Coronavirus on January 31, 2020. We are not aware that HHS has made any specific resources available to Tribes under this declaration, but Tribes should consider making such requests from the Department, as needed. There is a \$40 million set aside in the recently enacted Coronavirus Preparedness and Response Supplemental Appropriations Act (PL 116-123, signed March 6, 2020) for Tribes, tribal organizations, urban Indian health organizations, and health providers to Tribes for “surveillance, epidemiology, laboratory capacity, infection control, mitigation, communications, and other preparedness and response activities.” These entities are also eligible to apply for Public Health Emergency Preparedness (PHEP) grants and for preparedness costs incurred between January 20, 2020, and March 6, 2020.

On March 11, 2020, the House introduced a second relief proposal, the Families First Coronavirus Response Act. The bill would provide funding for emergency nutrition assistance through SNAP, food banks, school and adult care center meal assistance programs, and the Senior Nutrition Program; the administration of emergency paid sick leave; and emergency unemployment insurance, among other things. Section 108 of the bill, entitled Coverage of Testing for COVID-19 At No Cost Sharing for Indians Receiving Contract Health Services, provides that “American Indians and Alaskan Natives [will] not experience cost sharing for COVID-19 testing, including those referred for care away from an Indian Health Service or tribal health care facility.” Congress is considering this legislation; the House expects to pass the bill on Friday, March 13, but the Senate has not promised immediate passage.

B. Coordination with States

Intergovernmental agreements (IGA) may help Tribes and states coordinate their respective responses to the COVID-19 outbreak. IGAs “negotiated between a Tribe and a neighboring government to clarify . . . their legal relationship” in certain circumstances.¹ Thus, they may be especially helpful in public health emergencies where there is little time to resolve legal uncertainties regarding jurisdictional gaps or sovereignty. Of particular importance may be the Tribe’s authority to regulate or exclude

¹ Justin B. Barnard, *Responding to Public Health Emergencies on Tribal Lands: Jurisdictional Challenges and Practical Solutions*, 15 YALE J. HEALTH POL’Y L. & ETHICS 279 (2015).

individuals from Indian country or hold nonmembers who violate tribal public health and emergency response laws. There are several considerations about risk and balances of governmental power in these agreements, and we urge Tribes to obtain full legal review of any intergovernmental document.

C. Additional Considerations

Information sharing is critical to fighting the spread of COVID-19. To that end, Tribes should consider the best means of communicating scientifically accurate and up-to-date information on the disease, travel bans and advisories, and executive decisions and actions. While every Tribe's resources vary, Tribes may consider several outlets to share information with tribal citizens, particularly for tribal elders who are at high risk from the disease.

II. Potential Strategies as Employers and Business Operators

There are several resources at the federal government to prepare for and respond to the Coronavirus outbreak. The Department of Labor and Department of Health and Human Services have issued joint guidance on preparing workplaces for COVID-19 (<https://www.osha.gov/Publications/OSHA3990.pdf>). The CDC also has guidance for businesses and suggested strategies for employees (<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>).

Tribes and tribal businesses should consider creating planning and response teams that include personnel needed for effective response (e.g., executive leadership, IT support for telecommuting, human resources staff, facilities staff for cleaning and sanitation needs, and police or security). Tribal casinos should take special care to manage the expectations of customers and employees as state governments have begun banning large groups, or recommending telework. Gaming facilities with unionized workforces should be in close communication with union representatives, as necessary.

Tribes should also communicate to employees their efforts to contain and fight the spread of COVID-19 and also emphasize expectations that sick or potentially exposed workers stay home. Businesses across the private sector are reducing the risk of COVID-19 by providing increased opportunities for telecommuting, and tribally-owned and operated businesses should consider doing so as well to the degree that is workable.

Tribal businesses have authority to enact temporary personnel policies or practices to handle not only the disease, but economic or business conditions that are a fallout of public reaction. For example, Tribes or tribal entities can provide temporary paid-time-off (PTO) for sick hourly employees, PTO to all employees in the event of a shutdown, grants of annual or administrative leave (whether paid or unpaid), or pay/stipends in the event that there is a closure—some employers have been terming this

“catastrophe pay.” Tribes and tribal entities should be careful about how these policies are rolled out to employees, and should consult counsel to ensure a solution does not contravene any applicable wage or labor laws. Please note that each of these actions may be associated with tax consequences for both employer and employee.

When assessing whether to implement any affirmative policies, Tribes and tribal business will need to weigh the potential economic burdens with any intangible effects (such as employee morale or public relations), and the level of tribal resources. To the extent possible, tribal businesses may allow flexible work schedules and telecommuting as able, particularly for households with children when schools are closed.

Tribal businesses and employers may wish to take affirmative steps to enhance cleaning and disinfecting practices, particularly in high traffic or high risk areas, and employ strict food handling practices in any restaurants.

In the event of an exposure to Coronavirus, Tribes should be prepared to communicate to tribal members, the press, and public health officials about any protective measures or response. You may wish to engage state and county public health officials now, before any confirmed exposure has occurred.

The reality of this pandemic is that it may result in a shutdown of tribal government offices or even shutdowns of tribal businesses or gaming facilities. A shutdown may also be necessary simply for economic reasons. If a shutdown is warranted and necessitates layoffs or termination, Tribes should immediately work with their legal counsel regarding any needed action under the Worker Adjustment and Retraining Notification (WARN) Act, which “requires employers to provide written notice at least 60 calendar days in advance of covered plant closings and mass layoffs.” This notice may come later under emergency situations or when there are unforeseen business reasons (such as an immediate shutdown for medical concerns). This Act has thresholds of applicability, but may be triggered if a Tribe or tribal entity is forced to lay off a large part of or the whole workforce following a shutdown; counsel will be able to advise you regarding applicability of this law.

III. Tribes as Health Care Providers

When communicating information about COVID-19 to their citizens and employees, tribal HIPAA covered entities and their business associates must remain in compliance with HIPAA’s Privacy Rule. The Office for Civil Rights in the U.S. Department of Health and Human Services has issued a bulletin on the HIPAA Privacy Rule and COVID-19 (<https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>). The bulletin states that HIPAA covered entities may disclose protected health information without a patient’s consent to public health authorities, at the direction of a public health authority, to a foreign health authority so long as they are

working in collaboration, and to people at risk of contracting or spreading the disease. Additionally, if the situation constitutes a serious and imminent threat, “[h]ealth care providers may share patient information with anyone as necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public” so long as the health care provider remains compliant with the law. Typically, disclosing any identifiable information about the patient to a media outlet or others not involved in the patient’s care or notification is prohibited, unless the patient authorizes it.

We will continue to monitor and report various aspects of COVID-19. Please let us know if we may provide additional information regarding this rapidly developing situation.

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Inquiries may be directed to:

Geoff Strommer (gstrommer@hobbstrauss.com or 503-242-1745),

Elliott Milhollin (emilhollin@hobbstrauss.com or 202-822-8282), or

Adam Bailey (abailey@hobbstrauss.com or 916-442-9444).