



National Indian Health Board NATIONAL TRIBAL COVID-19 RESPONSE

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Overview of Public Health Emergency & Disaster-Related Legal Authorities Available to Tribes

I. FEDERAL LEGAL AUTHORITIES¹

Public Health Service (PHS) Act

The PHS Act forms the foundation of HHS' legal authority for responding to public health emergencies. It authorizes the Secretary to, among other things:

- Declare a PHE and respond accordingly, consistent with existing authorities; to assist states in meeting health emergencies; to [control communicable diseases](#); to maintain the Strategic National Stockpile; to provide for the operation of the National Disaster Medical System; to establish and maintain a Medical Reserve Corps;
- Lead all federal public health and medical response to public health emergencies and incidents covered by the National Response Framework; to direct the PHS and other components of the Department to respond to a public health emergency;
- Potentially provide targeted immunity for covered countermeasures to manufacturers, distributors, certain classes of people involved in the administration of a program to deliver covered treatments to patients, and their employees. The PHS Act was amended by the [Pandemic and All-Hazards Preparedness Act of 2006 \(PAHPA\)](#) by the [Pandemic and All-Hazards Preparedness Reauthorization Act \(PAHPRA\)](#) of 2013, by the 21st Century Cures Act of 2016, and most recently by the [Pandemic and All Hazards Preparedness and Advancing Innovation Act of 2019 \(PAHPAIA\)](#).

Application to Tribes: In addition to providing the Secretary with the authority to declare Public Health emergencies, the Act also provides the authority for the Public Health Service Commissioned Corps, which makes up a significant portion of those who work in the Indian Health Service (IHS) and Tribal facilities. It also authorizes the Secretary to maintain a national stockpile, a potential source of supplies for IHS and Tribal facilities during emergencies.

Legal Authority of the Health and Human Services (HHS) Secretary

The HHS Secretary is authorized to take the following additional actions when a Public Health Emergency is declared, including:

- Provide supplies, equipment, and services, and detail HHS employees to the recipients of such awards
- Access funds appropriated to the Public Health Emergency (PHE) Fund (when funds are so appropriated) to immediately respond to the PHE
- Enable the Centers for Disease Control and Prevention (CDC) Director to access the Infectious Diseases Rapid Response Reserve Fund (when funds are so appropriated) to prevent, prepare for, or respond to an infectious disease emergency

¹ Information in Section I is sourced from the U.S. Department of Health and Human Service (HHS) Office of the Assistant Secretary for Preparedness and Response (ASPR), <https://www.phe.gov/Preparedness/planning/authority/Pages/default.aspx> and <https://www.phe.gov/Preparedness/support/secauthority/Pages/default.aspx>



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- Grant extensions or waive sanctions related to deadlines for submitting data or reports required under laws administered by the Secretary
- Modify practice of telemedicine
- Allow State and local governments to access the General Services Administration Federal supply schedule when using federal grant funds
- Allow temporary reassignment of State and local personnel during a public health emergency
- Limit liability of volunteer health care professionals during the first 90 days of the PHE to the laws of the State to which the professional has been deployed to respond to the PHE and in which care is provided.

Application to Tribes: When the Secretary uses the PHE to declare a public health emergency, he opens up powers that he can exercise to the benefit of Tribes. A public health emergency opens up the possibility of HHS working with Tribes to modify the reporting requirements on grants, in order to lessen administrative burdens during times of disaster. It also opens up the possibility of repurposing some grants. When the President declares a federal emergency, the Secretary can then issue Section 1135 waivers, which allows the states to modify their Medicaid programs to be more flexible in responding to the disaster.

Social Security Act

The Social Security Act (SSA) authorizes HHS' Medicare, Medicaid, the Children's Health Insurance Program (CHIP), and social services programs. It authorizes the Secretary to temporarily modify or waive certain Medicare, Medicaid, CHIP, and Health Insurance Portability and Accountability Act (HIPAA) requirements when the Secretary has declared a public health emergency and the President has declared an emergency or a major disaster under the Stafford Act or national emergency under the National Emergencies Act.

Application to Tribes: The SSA is the enabling legislation behind Section 1115, Section 1915, and Section 1135 waiver. The Act contains provisions that allows the Secretary to modify the Medicaid program to respond to emergencies. Under a declared emergency, the SSA opens up avenues for the Medicaid program to be modified to help states and Tribes respond to disasters. For example, a Section 1135 waiver might enable a Tribal facility to hire a doctor that is licensed in another state in order to alleviate a provider shortage.

Federal Food, Drug and Cosmetic Act (FFDCA)

The FFDCA is the foundation for the Food and Drug Administration's authority and responsibility to protect and promote the public health by: ensuring the safety and effectiveness of human drugs, biological products, and medical devices; and ensuring the safety and security of our nation's food supply. Under certain conditions, it authorizes the Secretary to declare an emergency justifying emergency use authorization (EUA) of unapproved drugs, devices, or biological products, or emergency use authorization of approved drugs, devices, or biological products for an unapproved use.

Application to Tribes: The Secretary can use his power under an EUA to shorten or waive the approval process of necessary medication and equipment and help them get to Indian Country in a timely manner.



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Robert T. Stafford Disaster Relief and Emergency Assistance Act

At the request of a Chief Executive of an affected Tribe (or state Governor), the President may declare a major disaster or emergency if an event is beyond the combined response capabilities of Tribe/state/local governments. The emergency declaration allows federal assistance to be mobilized and directed in support of Tribal/state/local response efforts. Under the Stafford Act ([42 USC Chapter 68](#)). The President can also declare an emergency without a Gubernatorial request if primary responsibility for response rests with the federal government because the emergency involves a subject area for which the United States exercises exclusive responsibility and authority. In the absence of a specific request, the President may provide accelerated federal assistance and federal support where necessary to save lives, prevent human suffering, or mitigate severe damage.

Application to Tribes: The Stafford Act allows Tribes to seek states of emergency from the President and for the mobilization of resources through Federal Emergency Management Agency (FEMA) to help provide relief to the affected area. This allows Tribes to bypass states and receive aid directly. Tribes have used this in the past. For example, the very first tribe to directly receive aid under the Stafford Act was the Eastern Band of Cherokee Indians. In 2013, floods devastated their Tribal community and they were able to receive an emergency declaration from the President and aid from FEMA.

Pandemic and All-Hazards Preparedness Act (PAHPA)

In December 2006, Congress passed and the President signed the PAHPA, [Public Law No. 109-417](#), which broadly impacts HHS' preparedness and response activities. The Act amended the [Public Health Service Act](#) to establish new Assistant Secretary for Preparedness and Response (ASPR) at HHS; provided new authorities for a number of programs, including the advanced development and acquisitions of medical countermeasures; and called for the establishment of a quadrennial National Health Security Strategy. The purpose of the PAHPA is "to improve the Nation's public health and medical preparedness and response capabilities for emergencies, whether deliberate, accidental, or natural."

Application to Tribes: This PAHPA ensures that the federal government has the necessary resources to respond to pandemics. For example, it opens the door political subdivisions of states like towns or counties and even consortiums of states to apply for funding from the federal government. This may help Tribes that straddle state lines if their states work together to apply for funding.

Pandemic and All-Hazards Preparedness and Advancing Innovation Act (PAHPAIA)

On June 24, 2019, Congress passed and the President signed the PAHPAIA, [Public Law No. 116-22](#). The 2019 law amends the Public Health Service Act to build on work HHS has undertaken to advance national health security. Amendments include enhancing the authorities of the ASPR Secretary and the CDC Director to prepare for and respond to public health emergencies. PAHPAIA authorizes new public health and medical preparedness programs for regional health care preparedness and military and civilian partnerships; reauthorizes funding and enhances authorities for the [Hospital Preparedness Program](#), the Public Health Emergency Preparedness Cooperative Agreement program and other public health and medical preparedness programs. PAHPAIA also authorizes uses for the Public Health Emergency Fund when the Secretary declares a [public health emergency](#) or determines that there is a [significant potential](#) for a public health emergency and authorizes advance funding for buying medical countermeasures under the Project BioShield Act and to funding to support advanced research and development of potential medical



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countermeasures. PAHPAIA also amends the Federal Food, Drug & Cosmetic Act to enhance the authority of the U.S. Food and Drug Administration to support rapid responses to public health emergencies.

Application to Tribes: This Act authorizes use of the Public Health Emergency Fund, which opens up another source of funding for Tribes who may need help with the disaster.

II. WORKING WITH STATES²

The Chief Executive of a federally recognized Tribal government may request (through FEMA) that the President declare an emergency or major disaster for the Tribal government, or Tribal lands may be considered as part of a state's declaration request. However, a Tribe cannot receive identical assistance through both Tribal and state declarations for the same incident.³

Medicaid State Plan Disaster Relief State Plan Amendments (SPA)⁴

In response to a public health emergency or disaster, states may wish to revise policies in their Medicaid state plan related to eligibility, enrollment, benefits, premiums and cost sharing, and/or payments. For example, states may elect to use [Presumptive Eligibility](#) for expedient enrollment of individuals into coverage. During an emergency or disaster, the Medicaid agency can act as the qualified entity conducting presumptive eligibility determinations. **In March 2020, the Centers for Medicare & Medicaid Services (CMS) created a [Medicaid State Plan Amendment \(SPA\) template and instructions to assist states in responding to the COVID-19 national emergency](#).** This streamlined SPA template combines multiple, time-limited state plan options into one single template, eliminating the need to submit multiple SPA actions.

Application to Tribes: As participants in state Medicaid programs, Tribes are directly affected by what is contained in SPAs and should request an emergency consultation, where possible, and monitor state submissions and agency approval.

Children's Health Insurance Program (CHIP) Disaster Relief SPAs⁵

The Children's Health Insurance Program (CHIP) [Disaster Relief SPA](#) (PDF 188.43 KB) allows states to establish temporary adjustments that can be implemented during a disaster or public health emergency. Temporary adjustments can be made to enrollment and redetermination policies and to cost sharing requirements for children in families living

² Information in Section II is sourced, in part, from Medicaid.gov's Disaster Preparedness Toolkit for State Medicaid Agencies pgs. 3, 6-7 (Aug. 2018), <https://www.phe.gov/Preparedness/planning/authority/Pages/default.aspx>

³ Tribes are eligible applicants for the three types of assistance authorized under the Stafford Act: Individual Assistance, Public Assistance [emergency medical care and temporary medical facilities; supplying food, water, medicine, and other supplies], and Hazard Mitigation. Association of State and Territorial Health Officials (ASTHO), Emergency Authority and Immunity Toolkit, <https://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Authority-and-Immunity-Toolkit/Robert-T--Stafford-Disaster-Relief-and-Emergency-Assistance-Act-Fact-Sheet/>

⁴ CMS SPA resources, updated March 2020: <https://www.medicaid.gov/state-resource-center/disaster-response-toolkit/state-plan-flexibilities/index.html>

⁵ Source: <https://www.medicaid.gov/state-resource-center/disaster-response-toolkit/state-plan-flexibilities/index.html>



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and/or working in Governor or Federal disaster areas or areas impacted by a public health emergency. Once a state has an approved disaster relief SPA, in the event of a natural disaster or emergency, the State will notify CMS that it intends to provide temporary adjustments to its enrollment and/or redetermination policies and cost sharing requirements, the effective and duration dates of such adjustments, and the applicable Governor or federally declared disaster or emergency areas.

Application to Tribes: As participants in state Medicaid programs, Tribes are directly affected by what is contained in SPAs and should request an emergency consultation, where possible, and monitor state submissions and agency approval.

Verification Plan

States wishing to change their Medicaid and CHIP verification processes in response to a disaster must document those changes in an amended Verification Plan. These provisions would go into effect immediately. States submit an updated Verification Plan and no CMS approval is required. The flexibility under 42 CFR § 435.952(c) requires states to accept self-attestation when documentation is not available due to a disaster (unless the statute specifically requires documentation, as is the case for citizenship/immigration status). A state would not be required to amend its Verification Plan to utilize this authority but CMS recommends documenting the application of the flexibility and obtaining CMS concurrence in the event of a PERM review or other audit.

Application to Tribes: As participants in state Medicaid programs, Tribes are directly affected by what is contained in these plans.

Appendix K for Waiver Emergency Preparedness and Response (Amendment to 1915(c))⁶

Appendix K is a standalone appendix that may be utilized by states during emergency situations to request amendment to approved 1915(c) waivers. It includes actions that states can take under the existing Section 1915(c) home and community-based waiver authority in order to respond to an emergency. Other activities may require the use of various other authorities such as the Section 1115 demonstrations or the Section 1135 authorities. This appendix may be completed retroactively as needed by the state. [COVID-19 Specific Sample Appendix K Template](#). **CMS has approved Appendix K documents for 3 states in response to the COVID-19 pandemic: Pennsylvania, Washington, West Virginia.**

Application to Tribes: Many Tribes operate programs that offer home and community based supports and would be impacted by changes in a 1915(c) waiver in their state. A state can seek to change requirements for facilities and providers and these changes may open doors for Tribes. For example, an Appendix K may open doors for programs to be provided in the home by family members through modification of licensing requirements for providers and facilities. Tribes should request consultation as soon as possible and monitor the state waiver submission.

⁶ CMS guidance available HERE: <https://www.medicaid.gov/state-resource-center/disaster-response-toolkit/hcbs/appendix-k/index.html>



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1135 Waiver (New Fact Sheet Available [HERE](#))

Under Section 1135⁷ of the Social Security Act, the Secretary has the authority to temporarily waive or modify certain Medicare, Medicaid and CHIP requirements to ensure that sufficient health care items and services are available to meet the needs of enrollees in an emergency area. The Secretary may invoke 1135 Waiver authority when a declaration of emergency or disaster under the National Emergencies Act or Stafford Act and a Public Health Emergency Declaration under Section 319 of the Public Health Service Act have been declared. 1135 authority enables providers to furnish needed items and services in good faith during times of disaster and be reimbursed and exempted from sanctions (absent any determination of fraud or abuse). 1135 waivers typically end no later than the termination of the emergency period or 60 days from the date the waiver or modification is first published. [A Section 1135 Waiver COVID-19 State/Territory Request Template is available HERE](#). Since March 16, 2020, CMS has approved 1135 waivers for 2 states: Florida and Washington.⁸ **The CMS contact person for 1135 waivers is the State Medicaid lead or Jackie Glaze, Director of Medicaid & CHIP Operations Group: Jackie.glaze@cms.hhs.gov**

Application to Tribes: If a state seeks a Section 1135 waiver, Tribes are impacted by its provisions. Tribes may find themselves able to hire doctors from other states and their members will benefit from the increased flexibility in the program. However, Tribes may also be impacted by reimbursement arrangements made through the waiver so it is important that Tribes work with their states to make sure that Tribal specific provisions were included. Tribes should request consultation or emergency consultation to make sure the interests of Tribes are represented in these waivers. **CMS will soon issue COVID-19 Tribal Consultation guidance that discusses waiving or shortening the consultation period (and general public input) during the pandemic.**

1115 Demonstration

Under Section 1115 of the Social Security Act, the Secretary has broad, but not unlimited, authority to approve a state's request to waive compliance with certain provisions of federal Medicaid law and authorize expenditures not otherwise permitted by law. A waiver may be granted for an "experimental, pilot or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of the Medicaid program." To receive a Section 1115 demonstration, states must submit a demonstration request and agree on Special Terms and Conditions. States that have a federally declared disaster are deemed to meet budget neutrality. States may be exempt from the normal public notice process in emergent situations provided they meet 42 CFR § 431.416(g)(2). Disaster-related demonstrations can be retroactive to the date of the Secretary declared public health emergency.

COVID-19: 1115 Waiver Demonstrations. In an effort to assist states with addressing the COVID-19 public health emergency, the Centers for Medicare & Medicaid Services (CMS) developed Section 1115 demonstration opportunity available to states under title XIX (Medicaid) of the Social Security Act (the Act). Under this demonstration opportunity, effective retroactively to March 1, 2020 states may select from a variety of options to deliver the most effective care to their beneficiaries as a result of the COVID-19 public health emergency.

⁷ CMS 1135 Waiver at a Glance, <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/Downloads/1135-Waivers-At-A-Glance.pdf>

⁸ CMS Newsroom, <https://www.cms.gov/newsroom/press-releases/cms-approves-washington-states-request-1135-medicaid-waivers>



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The COVID-19 section 1115 demonstration opportunity makes available a number of authorities to assist states in enrolling and covering beneficiaries in Medicaid and to focus agency operations on addressing the COVID-19 pandemic. [COVID-19 1115 Section 1115 Waiver Demonstration Template](#).

Application to Tribes: Tribes are directly impacted by the provisions in 1115 demonstration projects. During an emergency, Tribes may benefit from certain provisions of a demonstration project, especially if it expands access to certain benefits. During an emergency, a state generally has to propose something that relates to the emergency. For example, a state cannot ask to impose work requirements through an emergency waiver. A state may however seek to expand the palate of benefits offered and the requirements to obtain them. Tribes should request emergency consultation and monitor state waiver submissions.

Responding to Specific Disaster-Related Problems

Bolstering Eligibility and Enrollment Processes

When a disaster hits, a state Medicaid agency's capacity to process applications and make eligibility determinations may become compromised. A number of strategies are available to support ongoing eligibility and enrollment during a disaster.

- States may:
 - Allow self-attestation for all eligibility criteria (excluding citizenship/immigration status) on a case-by-case basis for individuals subject to a disaster when documentation is not available.
 - Modify Medicaid/CHIP verification processes (e.g., accept self-attestation, adopt or increase reasonable compatibility thresholds).
 - Increase eligibility levels for specific categories within specific geographic regions. Extend redetermination timelines for current enrollees subject to a disaster to maintain continuity of coverage.
 - Adopt presumptive eligibility for eligible populations.

For more information on resources available to assist Tribes and states in their response to COVID19, please see [COVID-19 FAQs](#) from the Centers for Medicare & Medicaid Services.

TRIBE SPECIFIC AUTHORITIES

Declaration of Disaster

If a Tribal government anticipates that it will request a Stafford Act declaration independently of a state, then the Tribal government must activate a Tribal emergency plan. The emergency plan describes how a Tribal government will provide resources to satisfy unmet needs. More information is available [HERE](#).

Emergency Resolutions

NIHB created a template resolution for Tribes regarding COVID-19. The template may be shared, modified or edited to reflect the unique situation of a Tribal community. Please see the next page for a template.



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[Insert Name of Tribe] Resolution in Response to the 2019 Novel Coronavirus (COVID-19)

The [Insert Tribal Entity] Calls for Support in Preparation and Response of 2019 Novel Coronavirus (COVID-19)

WHEREAS, in December 2019 a new type of coronavirus (COVID-19) causing respiratory illness was first detected in Wuhan, Hubei Province, People's Republic of China that has since spread worldwide;

WHEREAS, the outbreak has been declared a public health emergency by the United States and many other nations worldwide, and declared to be a pandemic by the World Health Organization (WHO);

WHEREAS, person-to-person spread is rapidly occurring in the United States, several confirmed cases in Indian Country;

WHEREAS, American Indian and Alaska Native (AI/AN) communities are disproportionately impacted by health conditions which the Centers for Disease Control and Prevention (CDC) states put someone at an increased risk for a more serious COVID-19 illness, including respiratory illnesses, diabetes, and other health conditions;

WHEREAS, it has become increasingly clear that Tribal Nations require additional resources to protect and preserve the lives of our people;

WHEREAS, chronic underfunding of the Indian health system strongly contributes to the lack of readiness and availability of resources in our Tribal health systems to protect and preserve the lives of our people;

WHEREAS, the best hope of protecting our people and neighboring communities places great economic burden to the [insert name of Tribe], including the closure of government operations and Tribal enterprises;

NOW, THEREFORE BE IT RESOLVED, the [insert name of Tribe] calls on the federal government to honor its Treaty and Trust Responsibility to Tribes in this time of public health emergency and during future public health emergencies and crises;

BE IT RESOLVED, that [insert name of Tribe] calls on the federal government to send funding, technical assistance, medical countermeasures, pharmaceuticals, and personal protective equipment directly to



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Tribal governments so that Tribal communities are equipped to protect and prepare an appropriate response to the COVID-19 pandemic;

BE IT FINALLY RESOLVED, that [insert name of Tribe] believes that state and local governments should work in unity with Tribal governments when distributing much needed public health resources, whether or not our Tribal Nation is in a time of public health emergency.

CERTIFICATION

The foregoing resolution was adopted by the [insert name of Tribe], with quorum present, on [MONTH __, 2020].

[INSERT SIGNATURE]

[Name, Title of signer]