

## Coronavirus White Paper

This White Paper outlines the Department of Veterans Affairs (VA) authorities for handling various aspects of a Coronavirus Disease 2019 (COVID-19) outbreak.

### VA authority to treat patients

#### **1) What is VA's authority to treat patients without a declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act)?**

VA's authority to treat patients is limited to Veterans with certain exceptions. The authority in 38 U.S.C. § 1784, often referred to as the humanitarian care authority, provides the "Secretary may furnish hospital care or medical services as a humanitarian service in emergency cases, but the Secretary shall charge for such care and services." Additionally, under 38 U.S.C. § 1784A, if any individual comes to a hospital requesting medical examination or treatment, the hospital must provide a medical screening examination to determine whether or not an emergency medical condition exists. However, provision of medical care and services is limited to such medical examination and such treatment as may be required to stabilize a medical condition and the Secretary shall charge for any care or services provided. 38 U.S.C. § 1784A(a) and (d). In sum, although VA has the authority to treat non-Veterans in emergency cases, VA must charge for the services rendered.

VA also has authority to furnish hospital care and medical services to individuals responding to, involved in, or otherwise affected by a disaster or emergency in which the National Disaster Medical System (NDMS) established pursuant to section 2812 of the Public Health Service Act is activated by the Secretary of Health and Human Services. 38 U.S.C. § 1785 (implemented by 38 C.F.R. § 17.86). NDMS may be activated without a Stafford Act declaration. The cost of any care or services furnished under section 1785 to an officer or employee of a department or agency of the United States other than VA or to a member of the Armed Forces must be reimbursed. 38 U.S.C. § 1785(d)(1). If NDMS is activated without a Stafford Act declaration, VA must seek reimbursement for the care provided under 38 U.S.C. 1785 to individuals who are not otherwise eligible for hospital care or medical services at VA expense. 38 C.F.R. § 17.86(e). Section 205 of the Further Consolidated Appropriations Act, 2020, P.L. 116-94.

Finally, during and immediately following a national emergency in which the National Disaster Medical System (NDMS) established pursuant to section 2812 of the Public Health Service Act is activated by the Secretary of Health and Human Services that involves the use of the Armed Forces in armed conflict, the Secretary may furnish hospital care, nursing home care, and medical services to members of the Armed Forces on active duty. 38 U.S.C. 8111A. The Department of Defense shall reimburse VA for the cost of any care or services provided. *Id.* at (c).

#### **2) What is VA's authority to treat patients with a declaration under the Stafford Act?**

The Stafford Act is the primary source of VA's authority to respond to disasters and emergencies. 42 U.S.C. § 5121 et. seq. Following a Presidential declaration of a major disaster or emergency pursuant to the Stafford Act, the Department of Homeland Security (DHS) Federal Emergency Management Agency (FEMA) is responsible to direct the responses of Federal agencies. FEMA may issue a Mission Assignment to direct VA to use its resources in support of State, local, tribal, and territorial government assistance efforts, with or without reimbursement. 42 U.S.C. §§ 5170a, 5192; 44 C.F.R.

§ 206.2(a)(18). Section 205 of the Further Consolidated Appropriations Act, 2020 specifically permits VA to provide care to non-VA beneficiaries who received hospitalization or examination pursuant to the Stafford Act without reimbursement to VA.

If VA is not given a mission assignment under the Stafford Act, following the declaration of a major disaster or emergency pursuant to the Stafford Act, VA has authority to furnish hospital care and medical services to individuals responding to, involved in, or otherwise affected by the major disaster or emergency. 38 U.S.C. § 1785 (implemented by 38 C.F.R. § 17.86). However, care provided under 38 U.S.C. § 1785 must be reimbursed. In these cases, VA seeks reimbursement from the individual who received care if the individual is not otherwise eligible for hospital care or medical services at VA expense.

38 U.S.C. 8111A authorizes VA to provide hospital care, nursing home care, and medical services to members of the Armed Forces on active duty during a major disaster or emergency declared by the President under the Stafford Act that involves the use of the Armed Forces in armed conflict. The Department of Defense shall reimburse VA for the cost of any care or services provided. 38 U.S.C. § 8111A(c).

### **Quarantine and Isolation**

#### **3) What is VA's authority to quarantine or isolate patients?**

If a VHA practitioner seeks to isolate or quarantine a VA patient, the Federal government's isolation or quarantine authority ("isolation" separates sick people with a contagious disease from those who are not sick; "quarantine" separates and restricts the movement of people who were exposed to a contagious agent, but are not yet ill, for monitoring) may eventually be involved; however, the authority to involuntarily isolate or quarantine an individual will likely be determined, at least initially, by state law. There is significant variation among states regarding isolation and quarantine laws. Some states have laws that include specific, detailed procedures and provisions to impose and enforce mandatory isolation and quarantine, while other states have broader, more outdated laws and regulations. Further, some localities within states have laws applicable to quarantine and isolation. Tribes also have police power authority to take actions that promote health, safety, and welfare and may enforce their own isolation and quarantine laws within tribal lands.

There is authority for some Federal agencies to take actions pertaining to quarantine and isolation. The Surgeon General, with the approval of the Secretary of the Department of Health and Human Services (HHS), has statutory authority to make and enforce regulations to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States, or from one state or possession into another. 42 U.S.C. § 264; 42 C.F.R. Part 70, *Interstate Quarantine*. The Federal government's authority to act under this statute is limited to communicable diseases identified by the President. Severe acute respiratory syndromes, which include COVID-19, are communicable diseases identified in the relevant Executive Orders.

Special quarantine powers are also available in a time of war. 42 U.S.C. § 266. The Secretary of HHS, in consultation with the Surgeon General, is authorized to promulgate regulations providing for the apprehension, examination, and detention of individuals reasonably believed infected with a communicable disease listed in the Executive Orders, if they present a probable risk of infection to the Armed Forces or its suppliers. 42 U.S.C. § 266.

#### **4) What is VA's authority to quarantine and isolate VA employees?**

The authorities for isolating and quarantining VA patients also apply to quarantining and isolating VA employees. For those VA employees who are not yet sick with the coronavirus but are exposed to patients in a healthcare setting that are infected with the virus, CDC's recommendations appear to be largely clinical with bioethical considerations. For clinicians with medium to high exposure risk, the CDC's Interim Guidance for Risk Assessment and Public Health Management of Healthcare Personnel with Potential Exposure in a Healthcare Setting to Patients with 2019 Novel Coronavirus recommends that they be excluded from work for 14 days after last exposure.<sup>1</sup>

### **Acquisitions**

#### **5) What emergency acquisition authorities are available to meet contracting needs when certain emergency situations set forth in 41 U.S.C. § 1903(a) and Federal Acquisition Regulation (FAR) 18.001(b) and (d) are determined by the Senior Procurement Executive (or designee) to be triggered?**

Acquisition flexibilities are available to meet contracting needs when certain emergency situations set forth in 41 U.S.C. § 1903(a), and FAR 18.001(b) and (d) are determined by the Senior Procurement Executive (or designee) to be triggered. These emergency situations include, *inter alia*, defense against or recovery from cyber, nuclear, biological, chemical, or radiological (CNBCR) attacks and/or presidential declarations of a national emergency or major disaster.

Contracting Officers should be reminded that even absent a presidential emergency declaration/CNBCR attack, the FAR provides authority to expedite the awarding of contracts in numerous ways. For example, when there is an unusual and compelling urgency, such that the Government would suffer serious injury if normal processes were followed, Contracting Officers may waive many contracting requirements, including the requirement for System for Award Management registration prior to award, the need to synopsis notice prior to award, and any requirement for full and open competition. These acquisition flexibilities, and several others, are outlined in FAR Subpart 18.1 – Available Acquisition Flexibilities (see FAR 18.101-18.127).

In the event of a CNBCR attack or to support the response to an emergency or major disaster, FAR 18.202 provides acquisition flexibilities specific to these types of situations. The flexibilities increase the dollar thresholds for micro-purchases and simplified acquisitions and allow for the treatment of certain items/services as commercial items. In addition, if the Head of the Contracting Agency (HCA) determines the acquisition is to be used to facilitate the defense against or recovery from a cyber, nuclear, biological, chemical or radiological attack, Contracting Officers may treat any acquisition of supplies or services as an acquisition of commercial items (See FAR 12.102(f)(1) and 13.500(c)).

Preference will be given to local organizations, firms, and individuals when contracting for major disaster or emergency assistance activities when the President has made a

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<sup>1</sup> The full Interim Guidance for Risk Assessment and Public Health Management of Healthcare Personnel with Potential Exposure in a Healthcare Setting to Patients with 2019 Novel Coronavirus can be accessed at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-risk-assesment-hcp.html>.

declaration under the Stafford Act. The preference may take the form of local area set-asides or an evaluation preference. (See, FAR 18.203, FAR 6.208 and Subpart 26.2.). Under § 5150 of the Stafford Act (FAR Subpart 26.2), contracts pertaining to “debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities” give preference “to the extent feasible and practicable” to contractors residing, or doing business, in the affected area. The preference is given through a “local area set-aside” or an “evaluation preference.” A set-aside may be limited to firms within a specific geographic area identified in the RFP to compete (within the declared disaster area) and can be further set-aside for small business concerns.

## **Personnel Authorities**

### **6) What is the Authority of VA officials to compel staff to come to work to assist in their usual roles and perform additional functions?**

For both Title 38 and Title 5 employees, management may direct healthcare workers to deploy in support of VA’s emergency mission. 5 U.S.C. § 7106(a) permits management to assign work to bargaining unit employees. In making such an assignment, impact, and implementation bargaining may be required. See 5 U.S.C. § 7106(b). However, given the emergent situation, bargaining may not be feasible. Furthermore, for employees appointed under 38 U.S.C. § 7401(1), bargaining over such an assignment would be precluded pursuant to 38 U.S.C. § 7422. Of note, it does not appear that there are any legal authorities related to assigning non-bargaining unit employees in such circumstances.

VA policy dictates that full-time physicians, dentists, podiatrists, chiropractors, and optometrists are expected to be continuously subject to call 24 hours a day, 7 days a week. See VA Handbook 5011, pt. I, para. 3(e)(3). Full-time nursing staff may be mandated to work overtime in emergency situations if (a) the work is a consequence of an emergency that could not have been reasonably anticipated; (b) the emergency is non-recurring and is not caused by or aggravated by inattention or lack of reasonable contingency planning; (c) management has exhausted all good faith and reasonable attempts to obtain voluntary workers; (d) the nurse staff have critical skills and expertise that are required for the work; and (e) the work involves work for which the standard of care for a patient assignment requires continuity of care through completion of a case, treatment, or procedure. See VA Handbook 5011, pt. I, para. 3(e)(3). For Title 5 employees previously approved annual leave may be cancelled and an employee directed to return to work in unusual or emergency situations. See *id.* at pt. III, ch. 2, para. 3(f). Finally, for “critical” employees and employees at VAMCs, domiciliaries, and outpatient clinics, VA policy requires that these employees are required to be at work regardless of any announced emergency situations (e.g. closure of Federal facilities, etc.) or any general dismissal authorization. See VA Handbook 5011, pt. III, ch. 2, para. 12(u)(2).

## **VHA Disaster Response Policy**

### **7) Does VHA have policies on responding to disasters?**

VHA policy for responding to disasters is found in Handbooks and Directives in the 300 Series. Specifically, the 300 Series contains VHA Directive 0320 Comprehensive Emergency Management Program; VHA Directive 0320.01 Veterans Health Administration Comprehensive Emergency Management Program (CEMP) Procedures; VHA Directive 0320.02 Disaster Emergency Medical Personnel System (DEMPS) Program and Database; VHA Directive 0320.04 Department of Veterans Affairs and Department of Defense Contingency Plan; and VHA Directive 0320.06 First Receivers Decontamination Program.

**Office of General Counsel  
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