

PUBLICATION

Coronavirus: Nationwide Emergency Declaration – Access to Disaster Relief Fund

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On Friday, March 13, 2020, President Donald J. Trump declared a nationwide emergency under the Stafford Act. This unprecedented action allows Federal Emergency Management Agency (FEMA) to provide funding to state and local governments and eligible non-profit entities in response to the outbreak of the coronavirus (COVID-19). These entities, including non-profit hospitals, clinics, and nursing homes (among others), may receive Disaster Relief Funds appropriated by Congress to reimburse the cost of emergency measures to protect the public health and safety. Congress will enact, and the President will direct, additional measures within the next week. This article provides a summary of what we know to date as to what the emergency declaration means for eligible entities.

Nationwide Emergency Declaration Unprecedented. As indicated by the President and in guidance issued by FEMA regarding the declaration, this action is unprecedented. It was issued pursuant to Section 501(b) of the Stafford Act and required a determination that the primary responsibility for response to the pandemic rests with the federal government. While normally the states, and not the federal government, have primary responsibility for protecting the public health, the communicability of COVID-19 is threatening interstate commerce in a fundamental way, providing the needed justification for the federal government to take a lead role.

- 1. The Department of Health and Human Services Retains Lead Role.** FEMA has confirmed that Health & Human Services (HHS) will remain the lead agency directing the federal response and that FEMA's efforts will be in support of HHS and in coordination with state, tribal, and territorial governments. FEMA also confirms that it will not duplicate assistance provided by HHS, including the Centers for Disease Control and Prevention (CDC), or other federal agencies. This is consistent with FEMA's historical guidance on federal response to infectious diseases (see the Office of Response and Recovery Fact Sheet FP 104- 009-001, Infectious Disease Event.)
- 2. State by State Declarations: 75 Percent Federal Share.** Any support provided under FEMA's Public Assistance Program (the PA Program) will for now be provided at a 75 percent federal cost share. Assistance to eligible entities will require execution of a FEMA-State/Tribal/Territory Agreement, as applicable, including assurance that the 25 percent non-federal share will be contributed by other sources. To keep track of contributions of the non-federal share under these declarations, the "nationwide declaration" has been converted to 56 emergency declarations (EM-3427 (Washington) to EM-3483 (Nebraska), available [here](#).)
- 3. Federal Cost Share Could Change.** Under the Stafford Act, the President has the discretion unilaterally to increase this cost share to 100 percent, although there is very strong institutional bias within both FEMA and the Office of Management and Budget (OMB) that the federal share should be no higher than 90 percent.
- 4. Scope of Eligible Work and Costs.** Presently, there is little information regarding the scope of actions and funding that is contemplated under the nationwide declaration. FEMA's Declaration Fact

Sheet, available [here](#), states only that "eligible emergency protective measures taken to respond to the COVID-19 emergency at the direction or guidance of public health officials may be reimbursed under Category B of the agency's Public Assistance program." The individual state declarations confirm this and note expressly that the Individual Assistance Program has not yet been authorized.

5. **Traditional Category B Costs.** FEMA's guidance regarding the work and costs traditionally considered as eligible Category B work provides some insight into the type of funding that may be provided to eligible entities under the COVID-19 declaration. This may include work to slow transmission of the virus through isolation and treatment of patients who have contracted the virus, and through quarantine and social distancing measures. Eligible work may also include communications about public health risks, social distancing, and how to get tested for the virus. It may also include enforcement of social distancing measures (e.g., through activation of the national guard to enforce/administer gubernatorial orders closing schools, bars, restaurants, concerts, museums, and the like), construction of tent testing sites and tent systems to expand the capacity of hospitals, disinfection of facilities contaminated with the virus, and where necessary, delivery of food and medical supplies to those denied freedom of movement by public health orders. We expect FEMA to provide some guidance specifically targeted at COVID-19 response.
6. **Current FEMA Guidance on Eligibility of Medical Expenses.** Prior to the COVID-19 outbreak, FEMA had published guidance on which costs are, and are not, eligible for assistance when "the emergency medical delivery system within a declared area is destroyed, severely compromised or overwhelmed." The guidance emphasizes that FEMA funding is for "extraordinary" situations – which quite clearly describes the COVID-19 outbreak. FEMA's focus is on using funding only for temporary costs created by the declared event, such as "extraordinary costs associated with operating emergency rooms and with providing temporary facilities for emergency medical care of survivors...Costs are eligible for up to 30 days from the declaration date unless extended by FEMA."
7. **Consideration of Medicare, Insurance, and Other Sources of Funding.** The Stafford Act prohibits duplication of benefits by "any other program or from insurance or any other source." Thus, FEMA cannot provide funding for a cost that is eligible for reimbursement by Medicare or private insurance programs. FEMA must also carefully coordinate with HHS/CDC in providing funding. For example, in the Coronavirus Preparedness and Response Supplemental Appropriations Act, which became law on March 6, Congress appropriated \$2.2 billion for the construction, alteration, or renovation of non-federally owned facilities to improve preparedness and response capability at the state and local level. This Act also includes a general provision to allow funds to be used to reimburse state or local costs incurred for Coronavirus preparedness and response activities between January 20 and March 6. We anticipate significant additional funding to be provided by Congress in the weeks ahead – and FEMA will necessarily collaborate with agencies receiving the new funds to assure no duplication of benefits.
8. **Increased Operating Expenses and Loss of Income.** The social distancing measures needed to slow transmission of COVID-19 will substantially reduce economic activity and employment in at least the short run. For many state and local governments and non-profits eligible to receive grants from FEMA, this will result in substantial losses in fee and tax revenue. FEMA's PA Program generally does not fund "increased operating expenses" or lost revenue from reduced fees or taxes generated from economic activity. These impacts will be addressed at least partially by additional federal legislation.
9. **FEMA Guidance on Procurement for COVID-19.** Federal disaster assistance grants are subject to the federal grant regulations at 2 C.F.R. Part 200, including the procurement requirements found

within §§ 200.317-326. These regulations generally require competitive procurement of significant contracts unless "the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation." On March 17, 2020, FEMA issued guidance confirming that exigent and emergency circumstances currently exist. FEMA outlines, however, the minimum requirements that still apply in the accompanying Fact Sheet (both the memo and fact sheet are available [here](#)).

Recommended Actions for Affected Entities

State and local governmental entities and private non-profits providing critical services (e.g., utilities, hospitals, educational providers, emergency, and custodial care facilities) or essential social services may be eligible to receive state and/or federal resources and funding under the President's emergency declaration – and possible major disaster declarations that may follow.

The following are critical points to keep in mind:

- **Consult with your local and state emergency management authorities frequently regarding your needs and coordinated response efforts and resources.** These officials will have the most up-to-date information regarding the federal response and available resources and programs.
- **Document all work performed and costs incurred.** All affected entities should document work performed (including paid and volunteer assistance) and costs incurred (including copies of all receipts and time logs). These records can support insurance claims and will be required to support claims to FEMA for additional assistance.

Baker Donelson continues to monitor coronavirus developments and we will provide updates on Disaster Relief Funding as they become available. If you have any questions regarding this Alert or the impact of the coronavirus (COVID-19) on your organization, please contact [Ernest B. Abbott](#), [Wendy Huff Ellard](#), [Michelle F. Zaltsberg](#), or any member of [Baker Donelson's Disaster Recovery Team](#). Also, please visit the [Coronavirus \(COVID-19\): What you Need to Know](#) information page on our website.