

2001 DRAFTING REQUEST

Bill

Received: **01/17/2002**

Received By: **kenneda**

Wanted: **As time permits**

Identical to LRB:

For: **Frank Urban (608) 266-9175**

By/Representing: **Himself**

This file may be shown to any legislator: **NO**

Drafter: **kenneda**

May Contact: **Dick Sweet**

Addl. Drafters: **nelsorp1
mlief
rryan
malaigm**

Subject: **Health - public health
Military Affairs - emerg govt**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Urban@legis.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Bioterrorism; emergency health powers

Instructions:

See Attached

Drafting History:

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WISCONSIN LEGISLATURE

TO: REPRESENTATIVE FRANK URBAN

FROM: Richard Sweet, Senior Staff Attorney, Legislative Council; Robert Nelson, Senior Attorney, and Debora Kennedy, Managing Attorney, Legislative Reference Bureau

RE: Comparison of Model State Emergency Health Powers Act and Wisconsin Statutes

DATE: January 17, 2002

This memorandum summarizes provisions of the Model State Emergency Health Powers Act (Model Act) and compares them with provisions in Wisconsin law. The Model Act was prepared by the Center for Law and the Public's Health at Johns Hopkins and Georgetown Universities. The Model Act was prepared for the federal Centers for Disease Control and Prevention (CDC).

Article I of the Model Act contains nonsubstantive provisions, such as the short title, legislative findings, purposes, and definitions. The definitions will be discussed in the context of the substantive provisions to which they relate. The description of the remainder of the Model Act and comparable provisions in Wisconsin law were done as follows:

- Article II (reporting and tracking)--Richard Sweet
- Article III (declaration of an emergency)--Robert Nelson
- Article IV (control of property)--Debora Kennedy
- Article V (control of persons)--Richard Sweet
- Article VI (public information)--Richard Sweet
- Article VII (planning for public health emergency)--Robert Nelson
- Article VIII (financing and expenses)--Robert Nelson
- Article VIII (liability and compensation)--Robert Nelson
- Article VIII (reports)--Debora Kennedy

REPORTING AND TRACKING

Model Act

Article II of the Model Act requires health care providers, coroners, and medical examiners to report all cases of persons who harbor any illness or health condition “. . . that may be caused by bioterrorism, epidemic or pandemic disease, or novel and highly fatal infectious agents or biological toxins and might pose a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability.” In addition, pharmacists are required to report any unusual types of prescriptions or trends in visits that might be caused by any of the above. Specific prescription-related events that require a report are listed.

Veterinarians, livestock owners, veterinary diagnostic laboratory directors, and other persons having the care of animals are required to report animals having or suspected of having diseases that might be caused by any of the above.

These reports are to be made in writing to the public health authority. The term “public health authority” is defined in the Model Act to include both state and local health departments. The information to be reported is specified in the Model Act.

The public health authority is required to ascertain the existence of cases of an illness or health condition caused by any of the above; investigate all such cases for infection and to ensure that they are subject to proper control measures; and define the distribution of the illness or health condition. Specific duties include identifying all individuals thought to have been exposed, and counseling and interviewing those persons. In addition, the public health authority must, for examination purposes, close, evacuate, or decontaminate any facility, or decontaminate or destroy any material, when the authority reasonably suspects that the facility or material may endanger public health.

Public safety authorities that learn of a case of a reportable illness or health condition, an unusual cluster, or a suspicious event, are required to notify the public health authority. “Public safety agency” is defined as the state or local agency that acts principally to protect or preserve the public safety. If a public health authority learns of a case of a reportable illness or health condition, an unusual cluster, or a suspicious event that it reasonably believes has the potential to be caused by bioterrorism, must immediately notify the appropriate public safety authority, tribal authorities, and federal health and public safety authorities. Sharing of information is restricted to information necessary for the treatment, control, investigation, and prevention of a public health emergency.

Wisconsin Law

Wisconsin statutes require that any person licensed, permitted, registered, or certified under ch. 441 or 448, Stats., knowing or having reason to know that a person treated or visited has a communicable disease, or has died having a communicable disease, must report this to the local health officer. (Persons credentialed under those chapters are nurses, physicians, physician assistants, physical therapists, podiatrists, dieticians, athletic trainers, and occupational therapists.) The local health officer must report this information to the Department of Health and Family Services (DHFS) or direct the person to report to DHFS. In addition, the persons required to report must use ordinary skill in determining the presence of communicable diseases. The local health officer must order tests by the

State Laboratory of Hygiene or another certified laboratory if there is a dispute regarding disease determination, if the disease may have potential public health significance, or if more extensive laboratory tests will aid in the investigation. [s. 252.05, Stats.]

Each laboratory must report as prescribed by DHFS those specimen results that DHFS finds necessary for the surveillance, control, diagnosis, and prevention of communicable diseases.

In addition to these specific requirements, "(a)nyone" having knowledge or reason to believe that any person has a communicable disease must report the facts to the local health officer.

The statutes require that all reports be made within 24 hours, unless otherwise specified by DHFS, by telephone, telegraph, mail, or electronic means or by deposit at the office of the local health officer. A local health officer who receives a report must make a permanent record of it and, upon demand by DHFS, must transmit it to DHFS. DHFS may store the records and must treat them as patient health care records under the statutes requiring confidentiality of such records. When an outbreak or epidemic occurs, the local health officer must immediately report to DHFS and keep DHFS informed of the prevalence of the communicable disease in the locality.

For purposes of the above statutes, the definition of "communicable disease" is to be specified by DHFS by rule. [s. 990.01 (5g), Stats.] DHFS has done so in Appendix A to ch. HFS 145, Wis. Adm. Code, which specifies three categories of communicable diseases. Category I includes such diseases as Anthrax, plague, and smallpox, and reports must be made immediately, with a written report to follow within 24 hours. Category II and III communicable diseases must be reported within 72 hours.

While Wisconsin statutes provide generally for confidentiality of patient health care records, there are a number of enumerated exceptions. However, it does not appear that the exceptions are as broad as the provisions of Article II of the Model Act that allow for information sharing. [s. 146.82, Stats.]

The Wisconsin statutes require veterinarians to immediately report communicable diseases to the Department of Agriculture, Trade and Consumer Protection (DATCP). For purposes of the DATCP statutes, the DHFS definition of "communicable disease" does not apply. [s. 95.22, Stats.]

Discussion

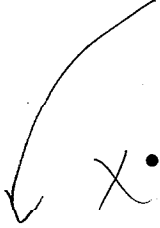
While Wisconsin laws require reporting of communicable diseases, there are several ways in which the laws differ from Article II of the Model Act, including the following:

- The statute that lists specific health care providers who are required to report is limited to providers credentialed under ch. 441 or 448, Stats. (e.g. nurses and physicians). The Model Act includes a broader definition of "health care provider" to include various types of health care facilities and also to include pharmacists, dentists, emergency medical technicians (EMTs), laboratory technicians, and ambulance and emergency medical workers. While these additional providers are arguably covered under the broader statute that requires "anyone" to report, consideration could be given to adding them specifically to the statute governing health care provider reporting.

252.05(1)

Use
Model Act
language;
don't report
names

- There is no specific requirement relating to pharmacists reporting in Wisconsin law, as there is in the Model Act. The Model Act lists four types of prescription-related events that require a report by pharmacists.
- While the Model Act provides for information sharing between various public agencies and public safety agencies, Wisconsin statutes on confidentiality may limit sharing of information. Also, it is not clear if the definition of "public safety authority" in the Model Act is primarily intended to cover law enforcement agencies or if other types of agencies are included.
- The Wisconsin statutes do not appear to have reporting requirements for coroners and medical examiners relative to communicable diseases. The Model Act has such requirements.
- Veterinarians are required to report communicable diseases under the Wisconsin statutes to DATCP. Under the Model Act, reports are made to public health agencies.



DATCP + *
DHFS
req. to
share this
info

DECLARING STATE OF PUBLIC HEALTH EMERGENCY

Model Act

Article III of the Model Act requires the Governor to declare a state of public health emergency if the Governor finds an occurrence or imminent threat of an illness or health condition, caused by bioterrorism, an epidemic or pandemic disease, or a novel and highly fatal infectious agent or biological toxin, that poses a substantial risk of a significant number of human deaths or permanent disabilities. The Governor is required to consult with the public health authority (which in the act is the primary state health agency or a local public health agency) before making the finding unless the situation calls for prompt and timely action. The declaration is made by an executive order that indicates the nature of the public health emergency, the area threatened, and the conditions that resulted in the public health emergency.

The declaration by the Governor activates the disaster response aspects of the state and local emergency plans in the affected area, and authorizes the deployment of any forces to which the plans apply and the use of any supplies, equipment, and facilities arranged to be made available under the act for the emergency.

The Governor may do all of the following during the emergency:

1. Suspend the provision of any regulatory statute prescribing the procedures for conducting state business, or the orders and rules of a state agency, if strict compliance would prevent or hinder necessary action by the public health authority to respond to the emergency.
2. Utilize all available resources of the state and its political subdivisions as are reasonably necessary to respond to the emergency.
3. Transfer the personnel or functions of state agencies to respond to the emergency.
4. Mobilize the organized militia into service of the state.
5. Provide aid to and seek aid from other states as provided by any interstate emergency compacts.

The Model Act requires the public health authority to coordinate all responses to the emergency, which includes having primary jurisdiction over all of the following:

1. Planning and executing public health emergency assessment, mitigation and preparedness response for the state.
2. Coordinating the state and local response to the emergency.
3. Collaborating with federal authorities, elected officials of other states, and private organizations and companies.
4. Coordinating recovery operations and mitigation initiatives after the emergency.

5. Organizing public information activities regarding the emergency response operations.

The act requires the issuance of special identification cards for all public health persons to wear while working during the emergency, which shall include the person's authority to exercise emergency powers during the emergency. The public health authority may request assistance from the public safety authority (law enforcement agencies) and the militia in enforcing any orders it issues under the act.

Finally, the Model Act requires the Governor to terminate the emergency after the illness or health condition that resulted in declaring the emergency has passed. The emergency automatically ends 30 days after its declaration unless the Governor renews the emergency. The Legislature may terminate the emergency 60 days after the Governor's declaration of a public health emergency, and that termination overrides any renewal by the Governor. Any order terminating an emergency must include the nature of the emergency, the area that was threatened, and the conditions that allow the termination.

Wisconsin Law

Under s. 21.11, Stats., the Governor may order into active service the national guard, or part of the national guard, in case of war, riot, public disaster, or to respond to a natural or man-made event. In addition, ch. 166, Stats., establishes the emergency management procedures that the state and its political subdivisions must follow in the case of an emergency.

The Governor is given the authority to proclaim a state of emergency for the state or any portion of the state if the Governor determines that an emergency exists from enemy action or from a natural or man-made disaster. A copy of the proclamation must be filed with the Secretary of State. The emergency may not exist for more than 60 days for an emergency resulting from enemy action and 30 days for any other emergency. The Governor may revoke the proclamation by a written order and the Legislature may revoke the proclamation by joint resolution. During the emergency, the Governor may do all of the following:

1. Declare the priority of emergency management contracts over other contracts.
2. Allocate materials and facilities.
3. Take, use and destroy private property for emergency management use.
4. Issue orders that he or she deems necessary for the security of persons and property.
5. Enter into contracts on behalf of the state to provide equipment and services on a cost basis for use in the emergency.
6. Issue orders and delegate authority to the administrator of the division of emergency management.

As part of the on-going emergency management procedure, the Governor reviews orders regarding emergency management areas and plans, determines the responsibilities of state agencies in respect to emergency management, including the utilization of personnel, facilities and equipment

before and during an emergency, enters into mutual aid agreements with other states, and accept gifts and grants for emergency management activities.

In addition to the Governor's responsibilities regarding emergency management, the Adjutant General has numerous duties in the area, including:

1. Developing a state plan of emergency management for the security of persons and property.
2. Providing statewide training programs to develop state and local emergency management proficiency.
3. Promulgate standards for local emergency planning programs.
4. Prescribing traffic routes and controlling traffic during an emergency.
5. Designating certain highways as closed to all but authorized vehicles during an emergency.
6. Providing funding from state appropriations for disaster recovery assistance.

Section 166.04, Stats., also allows the Governor to determine that a civil disorder or a threat to the safety of persons on state property exists, and after filing that determination with the Secretary of State, calls out the state traffic patrol or conservation wardens to respond to that disorder or threat.

Discussion

The Model Act allows the Governor to declare the emergency, while letting the Legislature terminate the declaration after 60 days. In Wisconsin, the emergency is declared by the Governor and may be terminated at any time by the Governor or by a joint resolution of the Legislature. The Wisconsin statute involves all types of emergencies, while the Model Act is concerned about public health emergencies.

The Model Act allows the Governor to suspend statutes and agency rules relating to state procedures if compliance would hinder the public health authority, which in Wisconsin may be a local public health agency, from responding to the emergency. Wisconsin law does not give the Governor that authority.

The Model Act places the power to coordinate the emergency response in the hands of the public health authority and gives that authority broad power, while in Wisconsin that authority is given to the Division of Emergency Management.

*Gov. to declare emergency + consult w/
DHFS shd. cooperate w/ other agencies*

CONTROL OF PROPERTY

Model Act

Article IV of the Model Act specifies special powers regarding the control of property for the public health authority during a state of public health emergency. With respect to dangerous facilities or materials, the Model Act authorizes the public health authority to close, direct, evacuate, or decontaminate any facility and to decontaminate or destroy any material. (Although the Act defines "health care facility" to include a nonfederal institution, building, or agency that is used to provide health services, medical treatment, or nursing, rehabilitative, or preventive care, the term "facility" is not defined.) With respect to facilities, materials, roads, or public areas, the public health authority may do all of the following: (1) take possession of, condemn, or otherwise procure, construct, lease, transport, store, maintain, renovate, or distribute materials (such as communication devices, fuels, food, and clothing); (2) require a health care facility to provide services or the use of the facility, including by transfer of the management and supervision of the health care facility to the public health authority; (3) control, by rationing, using quotas, prohibiting shipments, price fixing, and other means, the sale and dispensing of food, fuel, clothing, alcoholic beverages, firearms, explosives, and combustibles; and (4) control roads and public areas by prescribing routes, transportation modes, and destinations with respect to evacuation, and controlling entrance, egress, movement of persons, and occupancy of premises within a stricken or threatened public area.

The Model Act defines "infectious waste" as "biological waste" (blood and blood products, excretions exudates, secretions, other body fluids, and waste materials saturated with blood or body fluids), "cultures and stocks" (etiologic agents and associated biologicals, including specimen cultures, wastes from production of biologicals and serums, and discarded vaccines), "pathological waste" (biopsy materials and human tissues that emanate from surgical, autopsy, and laboratory procedures, animal carcasses exposed to pathogens in research, and bedding and other waste from the animals), and "sharps" (needles, scalpel blades, glass tubes, and syringes). The Act provides for safe disposal of infectious waste by authorizing the public health authority to: (1) adopt measures for disposal "as may be reasonable and necessary for emergency response"; (2) require businesses or facilities that deal with infectious waste and landfill businesses to accept the waste, including by transferring management and supervision to the public health authority; and (3) condemn or otherwise procure any business that deals with infectious waste and any landfill business, including by taking possession of it. Generally, the Model Act requires that all infectious waste containers be clearly identified as such.

With regard to the safe disposal of corpses, the public health authority may adopt and enforce measures, including embalming, burial, cremation, interment, and disinterment. Further, the public health authority may: (1) take possession or control of a corpse; (2) within 24 hours after the death of a person who dies of an infectious disease, order the disposal of the person's corpse; (3) compel mortuaries to accept corpses or provide the use of the mortuary, including by transferring its management and supervision to the public health authority; and (4) condemn or otherwise procure a mortuary and take immediate possession of it. Generally, the Model Act requires that every corpse be labeled before disposal and that corpses of persons who die of infectious disease be so tagged externally. Every person who disposes of a corpse must maintain a written record of each corpse, identifying information, and death and disposal circumstances; if the corpse cannot be identified, a qualified person must take fingerprints, make photographs, and collect a specimen of the corpse's DNA.

During a state of public health emergency, the public health authority may, under the Model Act, purchase and distribute antitoxins, serums, vaccines, immunizing agents, antibiotics, and other pharmaceutical agents or medical supplies that the public health authority determines are advisable without specific legislative authorization. (A "public health emergency" is defined as an occurrence or imminent threat of an illness or health condition caused by bioterrorism, epidemic or pandemic disease, or a novel and highly fatal infectious agent or biological toxin, or a natural disaster, that poses a substantial risk of a significant number of human fatalities or incidents of permanent and long-term disability.) If a state of public health emergency results in a statewide or regional shortage or threatened shortage of these health care supplies, the public health authority may control the sale and dispensing of the supplies by rationing, using quotas, prohibiting shipments, price fixing, and other means, and may give preference in rationing or distributing the supplies to health care providers, disaster response personnel, and mortuary staff. The public health authority may also take immediate possession of any health care supplies and procure, store, or distribute the supplies as necessary for reasonable response, although the public health authority may not hoard or prevent their fair and equitable distribution among other states that are simultaneously affected.

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The Model Act requires that just compensation be paid to the owner of a facility or material that is lawfully taken or appropriated by a public health authority, but not for facilities or materials that are closed, evacuated, decontaminated, or when there is reasonable cause to believe that they may endanger the public health. To the extent practicable consistent with the protection of public health, the public health authority must institute appropriate civil proceedings against property that is to be destroyed in accordance with state law or rules developed by courts. Property that the public health authority acquires through the proceedings must be disposed of by destruction as the court directs.

Wisconsin Law

- Wisconsin statutes do not confer specific powers on DHFS, a local health department, or a local health officer regarding the control of property that are similar to the Model Act. Instead, Wisconsin statutes give DHFS the very broadly drawn authority to "authorize and implement all emergency measures necessary to control communicable disease." [s. 252.02 (6), Stats.] Also, very broadly, DHFS may promulgate and enforce rules or issue orders for the quarantine and disinfection of "localities . . . infected or suspected of being infected by a communicable disease and for the sanitary care of jails, state prisons, mental health institutions, schools, hotels, and public buildings, and connected premises." [s. 252.02 (4), Stats.] Similarly, the duties and authority of a local health officer are very broad: "The local health officer shall promptly take all measures necessary to prevent, suppress, and control communicable diseases" [s. 252.03 (1), Stats.]; and "[L]ocal health officers may do what is reasonable and necessary for the prevention and suppression of disease." [s. 252.03 (2), Stats.]
- Wisconsin allows medical waste to be burned at a medical waste incinerator that is approved by the Department of Natural Resources (DNR), if the medical waste incinerator operator tests, under a timetable specified in the statutes, emissions of particulates, dioxins, ferans, arsenic, lead, hexovalent chromium, cadmium, mercury, and any other hazardous substance specified by DNR by rule and if an annual assessment and certain policies are followed. [ss. 285.53 and 287.07 (7) (c) 3., (8), Stats.] "Medical waste" is defined as "containers, packages and materials that contain infectious waste or that are from a treatment area and are mixed

with infectious waste.” [s. 287.07 (7) (c) 1. c., Stats.] Wisconsin also allows disposal of infectious waste in a solid waste disposal facility, if the container, package, or material that contains the infectious waste has been treated, under standards of solid waste management that are promulgated as rules by the DNR, so as to render the infectious waste noninfectious. [ss. 287.07 (7) (c) 2. b. and 289.05 (1), Stats.] “Infectious waste” is defined as “solid waste that contains pathogens with sufficient virulence and in sufficient quantity that exposure of a susceptible human or animal to the solid waste could cause the human or animal to contract an infectious disease.” [s. 287.07 (7) (c) 1. c., Stats.] Rules of DNR require sharps to be contained in rigid, puncture-resistant containers that are labeled with a visible bio-hazard emblem or with the visible words “bio-hazard,” “sharps,” or “infectious waste.” [s. NR 526.07 (1), Wis. Adm. Code.] Further, DNR rules require that any bag containing infectious waste be placed in a rigid container that is labeled with a visible bio-hazard emblem and the word “bio-hazard”. [Wis. Adm. Code, NR 526.07 (2) (c)] Other DNR rules apply to the storage and transfer of infectious waste. [s. NR 526.09, Wis. Adm. Code.]

- Wisconsin law with respect to the disposal of corpses requires the superintendent or other person in charge to notify a relative of any decedent who is an inmate of any state, county, or municipal institution and requires a public officer who has possession or disposition of a corpse to notify the decedent’s relative. If no relative is known or discoverable, the notice may be dispensed with. If the corpse is not disposed of by being claimed by a relative or friend, or by donation to the University of Wisconsin, the Medical College of Wisconsin, Inc., or an accredited school of mortuary science, the superintendent or public officer must bury it. [s. 157.02, Stats.] Regarding the duties of funeral directors, however, Wisconsin prohibits a public officer, employee, or officer of any public institution, or a physician from sending to a funeral director the corpse of a person without having first made inquiry as to the desires of the next of kin or any persons who may be chargeable with the funeral expenses. [s. 445.14, Stats.] Further, no person may engage in the business of a funeral director unless the person is licensed as a funeral director by the Funeral Directors Examining Board. [s. 445.04 (2), Stats.]
- Wisconsin law provides that, in an emergency, DHFS may provide those sick with a communicable disease with medical aid and temporary hospital accommodation. [s. 252.02 (2), Stats.] Drugs necessary for the treatment of tuberculosis must be purchased by DHFS and dispensed to patients through public health dispensaries, local health departments, physicians, or advanced practice nurse prescribers. [s. 252.10 (7), Stats.] In general, DHFS must carry out a statewide immunization program to eliminate mumps, measles, rubella, diphtheria, pertussis, poliomyelitis, and other diseases that DHFS specifies by rule, and to protect against tetanus. [s. 252.04 (1), Stats.]
- Wisconsin law provides that, if a public officer or a private person in charge of a building, vessel, conveyance, jail, state prison, mental health institution, or school fails to comply with a DHFS rule or order issued under the very broad authority that exists for DHFS with respect to communicable diseases, DHFS may appoint an agent to execute its rules or orders. The expenses of this agent are required to be paid by the governmental unit that employs the person, or by the state if the noncomplying entity is private. [s. 252.02 (5), Stats.]

- Wisconsin law provides for condemnation procedures generally and in matters having to do with sewers and transportation facilities; it has detailed provisions regarding determinations of just compensation, under which a court may consider the price and other terms and circumstances of any good faith sale or contract to sell and purchase comparable property. In addition, in determining just compensation, the property sought to be condemned must be considered on the basis of its most advantageous use, but only the use that actually affects the present market value. [s. 32.09 (1m) and (2), Stats.] Wisconsin law does not provide for exceptions to the payment of just compensation under condemnation procedures.

Discussion

Although DHFS and local health departments currently have very broad powers concerning the control of communicable disease, there is no specific authority for the actions with respect to the control of property that are specified in the Model Act. The statutes could be amended to provide this specific authority; authorized governmental actions such as price fixing that otherwise might be vulnerable to constitutional challenge might be exempted under the broad police power that is ascribed to public health activities, particularly in emergency.

Wisconsin laws differ from Article IV of the Model Act with respect to the treatment of infectious waste by all of the following:

- The Model Act authorizes the public health authority to adopt measures that may be reasonable and necessary for emergency response for disposal of infectious waste; Wisconsin law, which defines infectious waste more broadly than does the Model Act, has detailed standards and procedures for storage, transfer, and disposal of medical waste and infectious waste.
- The Model Act requires businesses and facilities to accept the waste, including by transfer of management and supervision to the public health authority; Wisconsin law prohibits disposal of medical and infectious waste except under the standards and procedures that are specified.
- The Model Act permits the public health authority to condemn or otherwise procure, including by taking possession, any business that deals with infectious waste and any landfill business; Wisconsin law has no similar provision.
- Both the Model Act and Wisconsin law require labeling of infectious waste containers.

Wisconsin law contains none of the powers specified in the Model Act with respect to safe disposal of corpses and appears to be in direct conflict with the Model Act's authorization for a public health authority to adopt and enforce embalming, burial, cremation, interment, and disinterment, to compel mortuaries to accept corpses, and to transfer mortuary management and supervision to the public health authority, insofar as that authorization would permit the public health authority to engage in the business of a funeral director. The conflicting provisions could, of course, be notwithstanding if Wisconsin statutes were amended to include the authorizations of the Model Act.

Although DHFS, under Wisconsin law, has general power in an emergency to provide those sick with a communicable disease with medical aid and temporary hospital accommodation, Wisconsin law

otherwise contains none of the powers specified in the Model Act with respect to authorization for the public health authority to purchase and distribute pharmaceutical agents or medical supplies. In addition, in Wisconsin, no public authority is empowered to expend public moneys without specific legislative authorization, although it is possible for the Legislature to appropriate moneys from the general fund as a "sum sufficient" for the purpose of the appropriation. [s. 20.001 (3) (d), Stats.] Wisconsin law also contains none of the powers specified in the Model Act for control by the public health authority of the sale and dispensing, rationing, distribution, and possession of the pharmaceutical agents and supplies. The statutes could be amended to provide this specific authority; authorized governmental actions such as price fixing that otherwise might be vulnerable to constitutional challenge might be exempted under the broad police power that is ascribed to public health activities, particularly in an emergency.

Wisconsin law has extensive condemnation procedures, but has none of the provisions of the Model Act that relate to an exception to the payment of just compensation for facilities or materials that are closed, evacuated, or decontaminated, or that endanger the public health. It is possible that creation of a statute that permits this exception would be in violation of Article 1, Section 13 of the Wisconsin Constitution, that prohibits the taking of a person's property for public use without just compensation.

CONTROL OF PERSONS

Model Act

Article V of the Model Act sets forth special powers during a state of public health emergency regarding control of persons. The Model Act provides that during a state of public health emergency, the local health authority must use every available means to prevent the transmission of infectious disease and to ensure that all cases of infectious disease are subject to proper control and treatment. During a public health emergency, a public health authority may do the following: (1) compel a person to submit to a physical examination or testing as necessary to diagnose and treat the person; and (2) require any physician or other health care provider to perform the medical examination or testing. Failure of the person to submit to the medical examination or testing, or failure of the provider to perform the medical examination or testing, is considered a misdemeanor. In addition, an order of the public health authority regarding these powers is immediately enforceable by any peace officer.

The Model Act provides for isolating or quarantining a person during a state of public health emergency. The needs of persons isolated or quarantined must be addressed in a systematic and competent fashion and, to the extent possible, the premises in which the persons are isolated or quarantined must be maintained in safe and hygienic manners, designed to minimize the likelihood of further transmission or harm. Adequate food, clothing, medication, and other necessities, and competent medical care, must be provided. The public health authority is given the power to establish and maintain places of isolation and quarantine, and to require isolation and quarantine of any person by the least restrictive means necessary to protect the public health. Failure of a person to obey the isolation or quarantine requirements is a misdemeanor. In addition, it is a misdemeanor for any person to enter an isolation or quarantine premises without the permission of the public health authority.

The Model Act also provides due process requirements relating to isolation or quarantining of a person. Prior to using these practices, the public health authority must obtain an *ex parte* court order, which the court must grant upon finding that probable cause exists to believe that isolation or quarantine is warranted. However, a court order is not necessary in advance if any delay in the isolation or quarantine would pose an immediate threat to the public health; in those cases, a court order must be obtained promptly following the isolation or quarantine.

Persons who are isolated or quarantined have the right to a court hearing to contest the order or to contest continued isolation or quarantine. At a hearing regarding continued isolation or quarantining, the public health authority must show that the continuation is warranted under the law. In addition, a person who is isolated or quarantined may request a court hearing for remedies regarding treatment and the terms and conditions of the quarantine or isolation. Judicial decisions regarding isolation and quarantine must be based on clear and convincing evidence and the person has the right to be represented by counsel or other lawful representative.

During a public health emergency, a public health authority may compel a person to be vaccinated or treated for an infectious disease. Vaccination or treatment may be performed by any qualified person authorized by the public health authority. However, vaccines or treatment may not be used if they are likely to lead to serious harm to the person. An order of the public health authority relating to these requirements is immediately enforceable by any peace officer.

A public health authority, during a state of public health emergency, may collect specimens and perform tests on any person or animal, living or deceased, and may acquire previously collected specimens or test results that are reasonable and necessary for emergency response. The Model Act contains requirements regarding marking, contamination, chain of custody, and criminal investigations relating to the specimens. Any business, facility or agency authorized to collect specimens or perform tests is required to provide such support as is reasonable and necessary to aid in a relevant criminal investigation.

Access to protected health information of patients under the isolation, quarantine, or care of the public health authority, is limited to those persons having a legitimate need to acquire or use the information for purposes of providing treatment or care to the person, conducting epidemiologic research, or investigating the causes of transmission. Protected health information may not be disclosed to others without informed consent, except as follows: (1) to the person; (2) to the person's immediate family members or life partners; (3) to appropriate federal agencies or authorities; (4) to health care personnel where needed to protect the life or health of the person; (5) pursuant to a court order or an executive order of the Governor to avert a clear danger to the person or the public health; or (6) to identify a deceased person or determine the manner or cause of death.

During a state of public health emergency, a public health authority is permitted to exercise emergency powers regarding licensing of health personnel, as follows: (1) appointing and prescribing the duties of out-of-state emergency health care providers as may be reasonable and necessary for emergency response; and (2) authorizing a medical examiner or coroner to appoint and prescribe the duties of emergency assistant medical examiners or coroners. Regarding emergency health care providers, the public health authority is permitted to waive licensing requirements and fees. An out-of-state emergency health care provider is not liable for civil damages as a result of medical care or treatment related to the emergency response unless the damages result from providing, or failing to provide, medical care or treatment under circumstances demonstrating a reckless disregard for the consequences so as to affect the life or health of the patient. A medical examiner or coroner may waive all licensing requirements or fees required by state law in appointing emergency medical examiners or coroners. In addition, an emergency assistant medical examiner or coroner acting without malice and within the scope of the prescribed duties is immune from civil liability in the performance of those duties.

Wisconsin Law

The statutes give DHFS broad authority to implement emergency measures. Under s. 252.02 (6), DHFS “. . . may authorize and implement all emergency measures necessary to control communicable diseases.”

Wisconsin statutes allow DHFS or a local health officer acting on behalf of DHFS to require isolation of a patient, quarantine of contacts, disinfection, or modified forms of these procedures as may be necessary and which are determined by DHFS by rule. [s. 252.06, Stats.]

Local health officers are required to immediately quarantine, isolate, impose restrictions or take other communicable disease control measures upon receiving a diagnostic report of a physician, notification or confirmatory report of a parent or caretaker, or a reasonable belief in the existence of a communicable disease. If the local health officer is not a physician, he or she must consult a physician

as speedily as possible where there is a reasonable doubt or disagreement in diagnosis and where advice is needed. If deemed necessary by DHFS or a local health officer for a particular communicable disease, all persons except the local health officer, his or her representative, attending physician and physicians and nurses, members of the clergy, members of the immediate family, and any other person having a special written permit from the local health officer, are forbidden to be in direct contact with the patient.

A local health officer is required to employ as many persons as are necessary to execute his or her orders and properly guard any place if quarantine or other restrictions on communicable disease are violated or intent to violate is manifested. Those persons are sworn in as quarantine guards, have police powers, and may use all necessary means to enforce the state laws for the prevention and control of communicable diseases, or the orders and rules of DHFS or any local health officer.

When a local health officer deems it necessary that a person be quarantined or otherwise restricted in a separate place, the officer must remove the person to this place if it can be done without danger to the person's health. When a person confined in a jail, state prison, mental health institute, or other public place of detention, has a disease that the local health officer or the director of health at the institution deems dangerous to the health of other residents or the neighborhood, the local health officer or director must order in writing the removal of the person to a hospital or other place of safety.

The statutes also provide that expenses for necessary medical care, food, or other articles needed for the care of the infected person must be charged against the person or whoever is liable for the person's support. The county or municipality in which a person with a communicable disease resides is liable for the following costs (unless payable through third-party liability or any benefit system): (1) the expense of employing guards; (2) the expense of maintaining quarantine and forcing isolation of the quarantined area; (3) the expense of conducting examinations and tests for disease carriers made under the direction of the local health officer; and (4) the expense of care provided to any dependent person, (defined as a person eligible for relief).

The statutes specify that no person who is knowingly infected with a communicable disease may willfully violate the recommendations of the local health officer or subject others to the danger of contracting the disease. No person may knowingly and willfully take, aid in taking, advise or cause to be taken, a person who is infected or suspected of being infected with a communicable disease into any public place or conveyance where the infected person would expose any other person to the danger of contracting the disease. [s. 252.19, Stats.]

If a teacher, school nurse, or principal of any school or day care center knows or suspects that a communicable disease is present in the school or center, he or she is required to at once notify the local health officer. Any teacher, school nurse, or principal may send home pupils who are suspected of having such a disease and, if they do so, must immediately notify the parents of the pupil. [s. 252.21, Stats.] In addition, DHFS has the authority to close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics. [s. 252.02 (3), Stats.]

Wisconsin's "Good Samaritan" law provides immunity from civil liability for any person who renders emergency care at the scene of an emergency or accident in good faith. However, this law does not apply to employees trained in health care or health care professionals who render emergency care for

compensation and within the scope of their usual and customary employment or practice at specified sites. [s. 895.48 (1), Stats.]

In addition, Wisconsin has adopted the Emergency Management Assistance Compact. [s. 166.30, Stats.] The Compact provides for mutual assistance among party states in managing any emergency or disaster that is declared by a Governor. One provision in the Compact states that when a person holds a credential issued by a party state, the person is deemed to be credentialed by the state requesting assistance to render aid to meet a declared emergency or disaster, subject to any limitations or conditions imposed by the Governor of the requesting state. Limitations on liability apply to party states and officers and employees of party states. A Web site related to the Compact indicates that Michigan very recently became the 43rd state to ratify the Compact (in addition to two U.S. territories); New York ratified it on September 17, 2001. [<http://www.nemaweb.org/emac/index.cfm>]

Administrative rules of DHFS describe "persons whose substantiated condition poses a threat to others" and "persons whose suspected condition poses a threat to others." The description of these persons in the rule refers to certain acts or omissions that increase the threat of transmission of disease to others. That section of the rule applies to all communicable diseases and any other infectious diseases which the chief medical officer of DHFS deems poses a threat to the citizens of Wisconsin. [s. HFS 145.06, Wis. Adm. Code.]

When it comes to the attention of specified state and local health officials that a person is known to have or suspected to have a contagious medical condition that poses a threat to others, the official may direct the person to comply with any of the following, as appropriate:

- HFS 145.06 (4) (a) Participate in a designated program of education or counseling.
- (b) Participate in a defined program of treatment for the known or suspected condition.
- (c) Undergo examination and tests necessary to identify a disease, monitor its status or evaluate the effects of treatment on it.
- (d) Notify or appear before designated health officials for verification of status, testing or direct observation of treatment.
- (e) Cease and desist in conduct or employment which constitutes a threat to others.
- (f) Reside part-time or full-time in an isolated or segregated setting which decreases the danger of transmission of the communicable disease.
- (g) Be placed in an appropriate institutional treatment facility until the person has become noninfectious.

If a person fails to comply with such a directive, the official who issued the directive may petition a court to order the person to comply. The petitioner must ensure that the petition is supported by clear and convincing evidence. Also, the respondent must be given the directive in writing, including

evidence that supports the allegation and must be afforded the opportunity to seek counsel. Finally, the remedy proposed must be the least restrictive on the respondent that would serve to correct the situation and to protect the public's health. [s. HFS 145.06, Wis. Adm. Code.]

Also, under the rules, enumerated health officials are allowed to direct persons who own or supervise real or physical property or animals and their environs, which present a threat of transmission of any communicable disease, to do what is reasonable and necessary to abate the threat.

Discussion

The ways in which Wisconsin laws differ from Article V of the Model Act include the following:

- The Model Act allows a public health authority, during a state of public health emergency, to require any physician or other health care provider to perform certain medical examinations or testing. Wisconsin law does not provide for this.
- The Model Act states that adequate food, clothing, medication, and other necessities, and competent medical care, must be provided during a period of isolation or quarantine. Wisconsin statutes state that expenses for necessary medical care, food, and other articles needed for the care of the person must be charged against the person or whoever is liable for the person's support.

- The Model Act states that no person, other than a person authorized by a public health authority, may enter an isolation or quarantine premises. Wisconsin law allows the local health officer, his or her representative, the attending physicians and nurses, members of the clergy, and members of the immediate family, to be in direct contact, in addition to any other person having written permission from the local health officer.

- The Model Act provides specific due process requirements for isolation and quarantine. The Wisconsin statutes dealing with this topic do not contain such provisions, although administrative procedures statutes dealing with the state and municipalities may allow for review. [chs. 68 and 227, Stats.] In addition, some court proceedings are provided for in DHFS's administrative rules in specified circumstances.

- Under the Model Act, a public health authority may, during a state of public health emergency, compel a person to be vaccinated or treated for an infectious disease. Wisconsin's administrative rules allow specified health officials to require a person who is known to have or suspected of having a contagious medical condition that poses a threat to others to participate in a defined program of treatment for the known or suspected condition. Unlike the Model Act, Wisconsin's rules are not limited to a state of public health emergency. However, Wisconsin's rules also provide for a court review of a directive ordering treatment when a person fails to comply with the directive; the Model Act does not do so. In addition, while Wisconsin's rules provide for required "treatment" for persons with contagious diseases, they do not provide for required vaccinations.

- While both the Model Act and Wisconsin statutes provide for confidentiality of patient records, the provisions differ to some extent. For example, the Model Act allows release of

In time of emergency DHFS will establish a quarantine premises

Rules in Emergency DHFS to promulg. rule that includes requires, vaccinations + specifies exceptions

Keep local health officer as DHFS or its agent

DHFS

protected health information held by a public health authority upon executive order of the Governor; Wisconsin law does not do so. In addition, the Model Act allows disclosure of such records to the person's immediate family members or life partners. Wisconsin's laws do not allow for release, without the patient's consent, to life partners or (with certain exceptions) to the person's immediate family members.

- The Model Act allows a health care authority, during a state of public health emergency, to appoint out-of-state emergency health care providers and to waive any licensing requirements or fees required by Wisconsin. Immunity from civil liability is provided. Wisconsin statutes provide for recognition of credentials issued by other states during an emergency if the other state is a party to the Emergency Management Assistance Compact. Also, emergency health care providers may receive protection under Wisconsin's Good Samaritan law under certain conditions.
- The Model Act allows a public health authority to authorize a medical examiner or coroner to appoint and prescribe the duties of emergency assistant medical examiners or coroners during a state of public health emergency. Immunity from civil liability is provided. Wisconsin law does not contain similar provisions.

PUBLIC INFORMATION

Model Act

Article VI of the Model Act requires a public health authority to inform the people of the state when a state of public health emergency has been declared or terminated, how to protect themselves, and what actions are being taken to control the emergency. The public health authority is required to provide information by all available and reasonable means calculated to bring the information promptly to the attention of the general public. In addition, if the public health authority has reason to believe that there are people who lack sufficient skills in English to understand the information, the public health authority must make reasonable efforts to provide the information in their language as well as in English. The provision of information must be made in a manner accessible to individuals with disabilities.

During and after a state of public health emergency, a public health authority is required to provide information about and referrals to mental health support personnel to address psychological responses to the public health emergency.

Wisconsin Law

There do not appear to be any similar provisions in Wisconsin law relating to public information provided during a public health emergency. However, DHFS does have a general duty to provide consultation, technical assistance and training regarding public health to local health departments, community organizations and others. [s. 250.04 (6), Stats.] In addition, local health officers have the duty to promote the spread of information as to the causes, nature and prevention of prevalent diseases, and the preservation and improvement of health. [s. 251.06 (3) (i), Stats.] DHFS also has the duty to print and distribute, without charge, to all local health departments and, upon request, to health care providers and facilities a chart that provides information about communicable diseases. [s. 252.05 (8), Stats.]

Discussion

Although DHFS and local health departments currently have duties with respect to provision of information about health, there does not appear to be a specific duty related to provision of public information during health emergencies. The statutes could be amended to provide such a duty to DHFS and local health departments.

PLANNING FOR PUBLIC HEALTH EMERGENCY

Model Act

The Model Act requires the Governor to appoint a public health emergency planning commission, consisting of public health agency staff and other persons chosen by the Governor. The commission is required to prepare a plan of how to respond to a public health emergency and give that to the Governor within six months after its appointment. The plan must include provisions dealing with communications with the population, coordinating of resources, locating, storing, maintaining and distributing essential materials, providing for operation of the judicial system, evacuating people and feeding and housing those persons, identifying and training health care providers, and providing guidelines for vaccination and treatment of persons involved in the health care emergency, for safe disposal of corpses and infectious wastes, and for management of persons isolated as a result of the emergency. The act requires the commission to review the plan every two years.

Wisconsin Law

The Adjutant General has the authority to develop and promulgate a state plan of emergency management for the security of persons and property. He or she must seek the advice of DHFS regarding the emergency medical aspects of the plan. The Adjutant General also furnishes training and standards for the emergency management programs of local units of government. The state is divided into emergency management areas and the Adjutant General has authority to appoint a head of each of these areas. That person shall exercise the power delegated to him or her by the Adjutant General. The local units of government must appoint a person to head their emergency management programs, and that person must develop the emergency management plan for the local unit of government. Each local unit of government must adopt an emergency management program that is consistent with the state plan.

Discussion

Wisconsin does not have any commission to review its state emergency management plan, and has no specific plan for medical emergencies. Rather, the state has a system composed of state and local staff who head emergency planning programs. Those programs have to be consistent with each other. The details of the plan suggested in the Model Act do not exist in the state statutes regarding the state emergency management plan. However, the Adjutant General must consult with DHFS regarding medically related emergency planning.

FINANCING AND EXPENSES

Model Act

The Model Act allows the Governor to transfer from any state fund available to the Governor the money necessary to meet the public health emergency. Those moneys must be repaid when money becomes available, such as through legislative appropriations. A transfer may be made under this provision only if an appropriation is not available to meet the emergency, an available appropriation is insufficient, or federal moneys require the use of state money. An expense may not be incurred against money transferred for the emergency unless the Governor approved the expense. The Model Act allows money authorized for a prior fiscal year to be used in a subsequent year and to apply to the fiscal year for which the money was authorized.

Wisconsin Law

Wisconsin does not allow the Governor to transfer money between appropriation accounts. That is done by the Legislature, through the Joint Finance Committee. Appropriations are established for the Department of Military Affairs for emergency management and disaster relief. Most of those appropriations are for a specific amount of money for each year, some for an amount for every year until changed, and some for whatever amount of money is necessary to meet the emergency (a sum sufficient appropriation). The statutes allow the Governor to contract with any person to provide emergency equipment or services on a cost basis. The Adjutant General may make payments from state appropriations to individuals and local governments for major disaster recovery assistance.

LIABILITY AND COMPENSATION

Model Act

Under Article VIII of the Model Act, the state and its political subdivisions are immune from liability for the death or injury to a person and for damage to property, if that death, injury, or damage results from complying, or attempting to comply, with the provisions of the act. The Governor, public health authority, and state officials are also immune in those situations, except in cases of gross negligence or willful misconduct. The act provides civil immunity for negligent acts to persons who, without compensation, allow the use of their property to shelter persons during a public health emergency. Civil immunity is also granted to persons who perform a contract under the provisions of the act during the emergency, and to persons who render assistance or advice at the request of the state or political subdivision related to the emergency. The latter two groups are not immune if their acts constitute gross negligence or willful misconduct. The immunities under the act do not apply to a person whose act or omission caused in whole or part the public health emergency.

The Model Act allows a person to receive compensation if the public health lawfully takes the person's private property authority for its temporary or permanent use during a public health emergency. No compensation is provided to a person whose property is closed, evacuated, decontaminated, or destroyed when there is reasonable cause to believe that the property may endanger the public health. An action to obtain compensation must be brought in the state court system. The amount of compensation is the same as provided in the nonemergency eminent domain procedure of the state, except that the compensation for medical supplies taken during the emergency are limited to the costs incurred to produce the item.

Wisconsin Law

Under Wisconsin's emergency management statutes, state or local emergency management agencies indemnify their employees against any tort liability to third parties incurred in the performance of their emergency management duties if the employee was acting in good faith and in a reasonable manner. There is similar language in the statutes dealing with nonemergencies, which requires the state and its political subdivisions to pay any judgment against an employee for acts committed while carrying out his or her duties. The costs of litigation are also covered if the employee was acting within the scope of his or her employment. Regional emergency response teams and local emergency management agencies, and their employees, are immune from civil liability when they are acting under a contract to respond to hazardous substance releases. Any person who provides equipment or services under the direction of the Governor or an emergency management agency during a state of emergency is immune from liability for the death or injury to any person or damage to property. This immunity does not apply if the person acted intentionally or with gross negligence. Immunity is also provided to property owners who allow their property to be used to shelter persons during an actual or practice attack if the owner does not receive compensation and makes known any hidden dangers or safety hazards.

During a state of emergency, if the Governor orders the taking, use or destruction of private property for emergency management purposes, that action is recorded and the record is evidence of a claim against the state. The person who has the claim seeks reimbursement from the State Claims

Board; using the same process as is available to anyone who has a claim against the state. During a state of emergency, the Governor may contract for equipment and services and the amount paid is based on the cost of the equipment or service. The statutes also limit the amount that may be recovered by any person for damages, injuries, or death. If the person who committed the act is a state officer, employee, or agent, the limit is \$250,000. If the person who committed the act is an officer, employee, or agent of a local unit of government, the limit is \$50,000.

Wisconsin is a party to the Emergency Management Assistance Compact, which in part provides that persons rendering aid in another state are immune from liability for acts or omissions performed in good faith in connection with the rendering of aid. The Compact says that good faith does not include willful, wanton, or reckless misconduct. The Compact requires each state to reimburse the state that provides aid for any loss or damage or expense incurred in the operation of any equipment and the provision of services related to rendering aid. An aiding party may assume those costs and may donate or loan equipment to the state in need of assistance. The Compact requires the Compact states to prepare a plan that includes each state's responsibility regarding any costs incurred if persons are evacuated from one state to another, including transportation, food, clothing, shelter and medical care costs.

Discussion

The Model Act has immunities similar to those provided in Wisconsin, although the act does not appear to cover employees of local governmental agencies and the types of behavior that void the right to immunity are somewhat different than in Wisconsin. The Model Act does not limit the amount that may be recovered from an emergency management employee as is done in Wisconsin, and says nothing about the payment of legal fees. The Model Act provides compensation to a person whose property is temporarily or permanently used by the public health authority during the emergency, while the same appears to apply in Wisconsin if the Governor orders the taking of property in an emergency. However, the Model Act requires court action to receive compensation, while in Wisconsin the person uses the claims procedure. The Model Act states that no compensation is available to a person for damages resulting from evacuation, decontamination, or destruction of property if the property may endanger public health. Wisconsin does not have a similar provision.

3 mo after public health emergency declared + 3 mo after is terminated

REPORTS

Model Act

to DHS

* The Model Act requires that the Governor transmit to the Legislature, not later than 90 days after enactment of the Act and every 12 months thereafter, a report that describes the detection and tracking efforts made, ~~public health emergencies declared,~~ emergency powers used, moneys transferred, and liabilities and expenses incurred under the Act.

Wisconsin Law

Wisconsin's law has no provisions similar to the Model Act's reporting requirements for public health emergencies.

Feel free to contact Richard Sweet at (608) 266-2982, Robert Nelson at (608) 267-7511, or Debora Kennedy at (608) 266-0137, if we can be of further assistance.

RNS:RPN:DAK;jal:tlu;rv

The Model State Emergency Health Powers Act¹

Draft as of December 21, 2001

A Draft for Discussion Prepared by:

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For the Centers for Disease Control and Prevention [CDC]

To Assist:

**National Governors Association [NGA],
National Conference of State Legislatures [NCSL],
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¹ Members of the National Association of Attorneys General (NAAG) also provided input and suggestions to the drafters of the Model Act. The language and content of this draft Model State Emergency Health Powers Act do not represent the official policy, endorsement, or views of the *Center for Law and the Public's Health*, the CDC, NGA, NCSL, ASTHO, NACCHO, or NAAG, or other governmental or private agencies, departments, institutions, or organizations which have provided funding or guidance to the Center for Law and the Public's Health. This draft is prepared to facilitate and encourage communication among the various interested parties and stakeholders about the complex issues pertaining to the use of state emergency health powers.

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