

March 10, 2004

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Bureau of Emergency Management
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Re: Liability And Benefits Questions Regarding Emergency Volunteers

Dear Jim,

The specific question you asked is: what happens in regards to workers compensation and liability if a local CERT is activated to assist with a local emergency, such as a major fire or accident? This would be a trained and officially sanctioned organization, but does it have the protection given to state emergency management workers if it is operating under local command and control? You also stated as an assumption that; “anyone acting as part of an emergency response effort under the direction of state emergency management is treated as a state employee for purposes of Workers Comp and liability.

There is no easy answer to the question that you have asked regarding workers compensation, as the statutes are not entirely clear on these issues. The liability issue is somewhat clearer. In this response I will review the statutes and the various possible applications. This review has general application to **all situations** involving volunteer emergency response workers, not just the issue of the CERTs. As this question has been asked in a number of ways concerning various volunteer activities connected with emergency management activities, you have requested an official Attorney General opinion be issued.

Applicable Statutes

The applicable statutes are RSA 21-P:35 (V) which define "emergency management"; RSA 21-P:41,(I),(III) and (VI) which define "emergency management worker," establish immunity from liability for all emergency management functions and define the rights to compensation of various types of emergency management workers; and RSA 108:3, Article VIII, which applies to out of state emergency management workers providing assistance under EMAC or NEAEMAC. These provisions are set out below.

RSA 21-P:35 (V). 'Emergency management' means the preparation for and the carrying out of all emergency functions, including but not limited to emergency response and training functions, to prevent, minimize, and repair injury or damage resulting from the occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including but not limited to fire, flood, earthquake, windstorm, wave actions, technological incidents, oil or chemical spill, or water contamination requiring emergency action to avert danger or damage, epidemic, air contamination, blight, drought, infestation, explosion, or riot.

RSA 21-P:41

I. All functions under this subdivision and all other activities relating to emergency management are hereby declared to be governmental functions. Neither the state nor any of its political subdivisions nor any agency of the state or political subdivision, nor any private corporations, organizations, or agencies, nor any emergency management worker complying with or reasonably attempting to comply with this subdivision, or any order or rule adopted or regulation promulgated pursuant to the provisions of this subdivision, or pursuant to any ordinance relating to precautionary measures enacted by any political subdivision of the state, shall be liable for the death of or injury to persons, or for damage to property, as a result of any such activity. The provisions of this section shall not affect the right of any person to receive benefits to which he or she would otherwise be entitled under this subdivision, under the workers' compensation law, or under any retirement law, nor the right of any such person to receive any benefits or compensation under any act of Congress.

III. As used in this section the term 'emergency management worker' includes any full or part-time paid, volunteer, or auxiliary employee of this state, other states, territories, possessions, the District of Columbia, the federal government, any neighboring country, or of any political subdivision of such entities, or of any corporation, agency or organization, public or private, performing emergency management services at any place in this state subject to the order or control of, or pursuant to a request of, the state government or any of its political subdivisions.

VI. Any emergency management worker shall:

(a) If the worker is an employee of the state, have the powers, duties, rights, and privileges and receive the compensation incidental to his or her employment;

(b) If the worker is an employee of a political subdivision of the state, whether serving within or without such political subdivision, have the powers, duties, rights, privileges, and immunities and receive the compensation incidental to his or her employment; and

(c) If the worker is not an employee of the state or one of its political subdivisions, be entitled to the same rights as to compensation for injuries as are provided by law for the employees of this state. The emergency management personnel shall, while on duty, be subject to the operational control of the authority in charge of emergency management activities in the area in which they are serving, and shall be reimbursed for all actual travel and subsistence expenses incurred under orders issued by the director.

RSA 108:3, Article VIII. Compensation

Each party jurisdiction shall provide for the payment of workers' compensation and death benefits to injured members of the emergency forces of that party jurisdiction or the representative of deceased members of such forces in case such members sustain injuries or are killed while rendering aid pursuant to this compact in the same manner and on the same terms as if the injury or death were sustained within their own party jurisdiction.

Analysis

Emergency management functions include training and exercise for disasters as well as the actual emergency response. RSA 21-P:35, V. Local emergency management ("EM") organizations are contemplated under RSA 21-P:39. These local organizations have jurisdiction only within their respective political boundaries. RSA 21-P:39. If a disaster or training exercise involve more than one jurisdiction, or if the disaster is so severe (although confined to one jurisdiction) that local resources will not be sufficient, the state will assume direct operational control. RSA 21-P:37.

It is my understanding that the Community Emergency Response Teams, ("CERTs") may be called upon to provide assistance either in a situation under local control or in a situation in which the state has assumed control. The issue of immunity from liability is an easier question than the question of right to compensation and employee benefits. In regards to immunity from liability, RSA 21-P:41 is very clear that **all** EM workers, as well as the political entity directing the emergency functions, are entitled immunity for any liability due to injury, death or property damage while performing EM functions.

The issue of workers compensation or other employment benefits and compensation is more complicated. RSA 21-P:41, VI divides EM workers into three categories and specifies different benefits for each. The following is a break down of the source of the benefits for each type of worker, **in the first instance**. After this analysis, there is still a question of whether the source of the benefits may have a claim for reimbursement of any benefits paid from another jurisdiction.

The first situation is if the EM worker is a state employee. A state employee, even if working under local direction, would be entitled to compensation and benefits **from the state**, the same as she/he receives for regular duties. RSA 94:3-c supports this as it provides

for up to 15 days paid leave for any state employee who is a certified disaster relief service volunteer to participate in specialized disaster relief service work. It should be noted that this section is limited to requests by the American Red Cross and that it specifically excludes state liability for workers compensation claims while the state worker is performing emergency functions. While these limits may be applicable to disaster services performed outside the United States and not subject to RSA 108-A, they are contrary to the provisions of RSA 21-P:41, VI (a) and RSA 108-A, Art. VIII.

Secondly, if the EM worker is an employee of any political subdivision, such as a city, town, county or the like, the EM worker has the right to receive the same compensation and benefits as are incidental to her/his regular employment, **from her/his political subdivision employer**, regardless of whether the EM functions are performed within or are performed outside her/his political subdivision.

Thirdly, if the worker is not an employee of the state or a political subdivision, such as an engineer, or nurse or other volunteer, the situation is more complicated. RSA 21-P:41, VI (c) states that they are entitled to "the same rights as to compensation for injuries as are provided by law for the employees of this state." It does not specifically state **who** is required to provide those benefits. It also provides that they shall be entitled to travel expenses and "subsistence expenses". It does say that they will be under the operational control of the authority in charge of EM activities in the area in which they are serving. This suggests that the responsibility for providing for workers compensation coverage and expenses rest **with the jurisdiction in charge of the EM activity**. If this is a local subdivision, then the responsibility would be local. If the state is in charge, it would be the state. This is also appropriate as any grants for training or disaster relief funds, to the extent available, would be available to the host or receiving jurisdiction.

RSA 21-P:40 provides for mutual aid arrangements between local organizations for emergency management. Presumably, these mutual aid arrangements include provisions governing reimbursement if one local jurisdiction sends its workers to a neighboring jurisdiction, much as RSA 108-A does for one state sending assistance to another. Assuming that such agreements are in place, the local sending jurisdiction would have a right to reimbursement from the local receiving jurisdiction for any compensation or benefits it was required to pay to its employees for services rendered outside of the sending jurisdictions boundaries. Unless the mutual aid plans or state plan require the local jurisdiction to reimburse the state for the services by state employees, it is doubtful that the state would have the right to reimbursement for any state employees services involved in responding to a local disaster.

A different issue arises if the CERTs or EM workers are part of a force supplied pursuant to a request for assistance under EMAC or NEAEMAC under RSA 108:3. These out of state (and possibly out of country) workers are entitled to the same immunity they would have in their **home** jurisdiction and are also entitled to workers compensation benefits from their **home** jurisdiction. Under Art. IX, workers compensation or death benefits are not subject to the reimbursement provision. Therefore a receiving jurisdiction would not be

responsible for reimbursement of workers compensation benefits if an out of state worker were injured while assisting a disaster in the receiving jurisdiction. If NH sent its CERTs' out of state in response to a call for assistance under RSA 108:3, the state would be responsible for the workers compensation of anyone sent to an out of state party jurisdiction to assist in a disaster.

Application

Applying these principles to a hypothetical CERTs situation would yield the following result:

Assuming the Manchester CERT included members that are employees of the state, the City of Manchester and the Elliot Hospital:

1. Assuming a disaster occurred in Manchester: The state would be responsible for the compensation and benefits for the state employees but Manchester would be responsible for the compensation and benefits for the City employees and at least for workers compensation and expenses for the Elliot Hospital employees. There would most likely be no right of reimbursement for Manchester.

2. Assuming a disaster in Nashua, with a mutual aid agreement providing for reimbursement in place and a request for aid to Manchester: The state would be responsible for the compensation and benefits for the state employees, Manchester would be responsible for the compensation and benefits for the City employees in the first instance but would have a right to reimbursement from Nashua, and Nashua (assuming it is in control of the local disaster) would be responsible for at least workers compensation and expenses for the Elliot Hospital employees.

3. Assuming a widespread disaster involving Seabrook Nuclear plant in which the State assumes control: The state would be responsible for the compensation and benefits for the state employees, Manchester would be responsible for the compensation and benefits for the City employees in the first instance but would have a right to reimbursement from the State, and the State would be responsible for at least workers compensation and expenses for the Elliot Hospital employees

Conclusion

I hope this answers the questions that you have asked. If there is any further question, please feel free to contact me.

Sincerely,

Nancy J. Smith
Senior Assistant Attorney General