

Liability Protections for Emergency Volunteer Health Practitioners and Entities

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Background and Overview

Public health preparedness has emerged as a major issue in U.S. health policy. The concept of public health preparedness encompasses many facets; one of the most central capabilities in a prepared environment is the ability to rapidly deploy emergency health care responders both during an emergency and in its immediate aftermath. In a post-September 11 society, public officials have redoubled efforts to establish an emergency system capable of a high level of performance during emergencies, particularly in the provision of health care. During an emergency, a state government may need to call upon health care professionals, as well as public and private entities (particularly logistics firms, non-profits, hospitals, laboratories, and vaccine manufacturers) to meet a surge in need.

Federal law seeks to incentivize voluntary emergency health care responders by providing certain protections against legal liability in the event that an act of professional medical negligence is alleged. In 1997, Congress enacted the Federal Volunteer Protection Act (FVPA) which extends immunity protections to volunteers affiliated with non-profit organizations provided they do not receive compensation in excess of \$500 per year.⁵ Since 2002, federal law has extended the Federal Tort Claims Act (FTCA), which assures that health care professionals who volunteer during a federally declared Homeland Security disaster are covered under the Act so long as the individual is, or can be considered, a Federal employee.⁶ In extending the definition of a federal employee, the FTCA covers health care professionals who register with Emergency Management Assistance Compacts (EMAC) or Federal initiatives (e.g., National Disaster Medical System) for services rendered under these authorities.⁷ The 2006 Public Readiness and Emergency Preparedness (PREP) Act authorizes the Secretary of Health and Human Services to declare a public health emergency.⁸ The PREP Act provides immunity from tort liability to individual providers and entities involved in the development, manufacture, or other use of countermeasures (i.e., vaccines).⁹

At the same time however, these approaches have certain limitations. The FVPA excludes non-economic or punitive damages from its purview. The PREP Act is limited in that it requires an emergency declaration from the HHS Secretary that must be published in the Federal Register and only applies to those involved in the administration of countermeasures during said emergency. Similarly, FTCA coverage is limited because it is available only during a federally declared emergency; furthermore, it does not immunize the volunteer from liability but instead provides malpractice coverage through the public liability program. Thus, while FTCA guarantees a shifting of liability costs onto the federal government, the law does not provide true immunity for volunteer health care providers and offers no protections for entities. Under longstanding legal principles, entities may face legal liability in their own right or vicariously in connection with the provision of emergency care.

Individuals and entities working under emergency conditions can face numerous types of liability exposure, especially when working across state lines. Health care professionals may be

operating under difficult situations and with limited resources; they may face inadequate staffing and overwhelming demand.¹⁰ Businesses may not be able to maintain typical quality control standards in their efforts to meet demand for resources. During declared states of emergency, legitimate concerns about liability thus could deter or delay health care professionals and entities from fully participating in relief efforts.

In a recent survey conducted by the American Public Health Association, almost 60 percent of clinicians reported that having medical malpractice insurance coverage would be important (24.3%) or essential (35.4%) in their decision to travel out of state to provide assistance during an emergency. At the same time, almost 70 percent of respondents answered that immunity from civil lawsuits would be an important (35.6%) or essential (33.8%) factor in deciding whether to volunteer in an emergency.¹¹ Indeed, provider communities took note when in 2006, a cancer surgeon on the faculty of Louisiana State University School of Medicine along with two nurses were arrested and accused of killing four elderly patients under their care following Hurricane Katrina.¹² Although a grand jury refused to indict the surgeon for murder, cases such as this can generate widespread media interest and create a disincentive to healthcare volunteerism during a public health emergency.

As noted, while the FVPA, FTCA and PREP Acts provide some federal liability coverage, there is no uniform federal law that acts as a shield to liability for health care volunteers during declared public health emergencies.¹³ Good Samaritan laws, which exist in all 50 states and the District of Columbia, are narrow in scope and generally provide protection only for emergency aid at the scene of an emergency. Health care volunteers who provide non-emergency care at a facility following the acute phase of an emergency, for example, would likely not be protected by a state's Good Samaritan law.¹⁴ Furthermore, a Good Samaritan statute offers only an affirmative defense in a liability action; it is not a legal grant of immunity from suit.

In response to this gap in nature and scope of legal liability protection extended to volunteers, the National Conference of Commissioners on Uniform State Laws (NCCUSL), along with a number of health care professional organizations, developed the Uniform Emergency Volunteer Health Practitioners Act (UEVHPA). The Act offers model legislation to facilitate the deployment of health care volunteers during emergencies. The UEVHPA addresses a number of important issues, such as registration, licensing and accreditation of qualified health care volunteers for the purpose of swift and effective deployment.¹⁵ The UEVHPA also extends civil liability protections to registered health care volunteers similar to the immunity provided to state employees under the Emergency Management Assistance Compact (EMAC), as well as provision for workers compensation.

This memorandum reports on the extent to which, as of Fall 2008, states have either adopted UEVHPA or have legislated its elements in equivalent fashion.

Research Methods

This study was conducted using standard legal research techniques associated with statutory analysis. A research team consisting of an experienced lawyer and team members with experience in reading and interpreting statutory text assembled all relevant statutes and then assessed the statutes using methods of plain text analysis. Because of growth in the adoption of

UEVHPA and the comprehensiveness of the statute, researchers adopted the following three-tier approach to the review:

- 1) States adopting the UEVHPA or enacting its full equivalent, as measured by the terms of state statutory law
- 2) States whose laws offer some, but not all, of the emergency volunteer protections available under UEVHPA; and
- 3) States offering only minimal protections in the form of Good Samaritan Statutes

The “minimal protections” or “low” category represents those states with only Good Samaritan or similar laws under which volunteers may be provided with an affirmative defense, but not necessarily immunity from liability. The “some protections” or “medium” group of states extend protections to volunteers during times of emergency, but may not explicitly identify health practitioners, may require affiliation with a regional or local emergency compact, or may not provide coverage to volunteers in the event of injury during rendering of services. Finally, the “UEVHPA” or “high” protection states have adopted the model statute or all of its elements.

In addition, we examined state law to identify states that have enacted “volunteer entity” protections to incentivize emergency response by public and private actors. In assessing state law relevant to entity protections, we drew from model language developed by the Public/Private Legal Preparedness Initiative, a special undertaking of the North Carolina Institute for Public Health.¹⁶ Key elements of this model law are as follows: the establishment of a specific coverage trigger (e.g., a Gubernatorial declaration of a state of emergency); retroactive coverage that reaches pre-planning and training activities; and an approach to protection that follows the immunity model used for volunteers rather than the more limited, “affirmative defense” approach. State statutes that extended to entities what might be thought of as “property” immunity – that is, immunity with respect to injuries involving real or other property owned or controlled by an entity -- were not included. Rather, in order to qualify for designation, a state statute must have focused on protecting conduct undertaken by entities during an emergency.

KEY FINDINGS

Volunteer Health Provider Protections

Table 1, “Individual Volunteer Health Practitioner Immunity: Comparison of States,” depicts the results of our analysis of state laws regarding health care professional volunteers. As of October 2008, six states had officially codified the UEVHPA, thereby placing them in the highest category. By adopting the model act, these states ensured uniform designation, immunity, and worker’s compensation protections for volunteer health practitioners.

Thirty-three states and the District of Columbia fell within the “some protections” category, reflecting the most prevalent level of protection for volunteer health practitioners. In most cases, state statutes specifically referenced immunity protections for volunteers rendering services during emergencies. At the same time, the statutes frequently did not identify health practitioners as a specific covered class, made no reference to widespread emergencies or declared disasters, and did not extend state worker’s compensation in the event of injury during the rendering of services.

Eleven states fell into the “minimal protections” category. These jurisdictions offer volunteer health care professionals a traditional Good Samaritan defense, generally indicating by statute that volunteers who respond to any perceived emergency and act without expectation of compensation are not liable for harm in the absence of negligence. In two states (Maryland and Illinois), UEVHPA has been introduced but not enacted.¹⁷

Volunteer Entity Protections

Results are presented in Table 2, “States with Volunteer Entity Protections.” The table shows, as of October 2008, 19 states had extended some level of immunity to groups and/or organizations providing charitable, emergency or disaster relief services. At the same time, these statutes exhibit a wide degree of variation. For example, 12 state laws specify that the provision of services by a covered entity must come at the official request of a state political division; four states limit the role that a covered entity can play in the emergency (e.g., allowing only the provision of goods in response to a disaster); 12 state laws require that the service provided be without compensation; seven state laws limit the types of legal entities that can provide services (i.e., immunizing specific professional groups, such as architectural and engineering firms, rather than extending immunities to all corporate entities); and two states only extended legal protections to healthcare entities. Though Florida, Oklahoma, and Wyoming provide liability protection to real property owners who voluntarily offer their premises for disaster response purposes, they did not qualify for the summary table.

Discussion

The UEVHPA offers the most complete immunity protections for volunteer health practitioners.¹⁸ Because the model act includes a prospective designation process, licensing requirements, worker’s compensation, and immunity from liability, the UEVHPA sets forth an ideal set of conditions under which practitioners can render emergency care during disasters. By alleviating immediate concerns about personal safety and liability, the UEVHPA establishes a legal climate in which health care professionals are free to provide emergency care in areas under emergency or disaster declarations.

Whether or not a state has explicitly adopted the UEVHPA, most states now provide some level of protection to disaster relief workers during emergencies. At the same time, it is somewhat surprising that nearly a decade after September 11th, all states have not, at a minimum, incentivized volunteerism among health professionals by extending to such health professionals the level of immunity accorded a public official acting in an official capacity.

There are also significant variations in state laws. In many instances, these individual volunteer protections are enumerated within procedural, military, or formal emergency response statutes (i.e., EMAC), and the degree of specificity within these statutes varies. While some states extensively detail eligibility criteria for immunity (i.e., affiliation with an organization or government entity under a formal emergency compact agreement with the state), others go beyond this to require that services must be rendered without expectation of payment. Those states implementing EMAC programs tended to explicitly state a procedural process for commencing and ceasing emergency declarations, which directly affects the period of immunity extended to volunteers.

State efforts may increase. During summer 2008, Congress requested additional information regarding states' ability to meet surge capacity during mass casualty events. In its report, the Government Accountability Office (GAO) described four components necessary to meet surge demands: 1) increasing hospital capacity, 2) finding alternative sites once hospital capacity is reached, 3) registration and credentialing verification for volunteer health professionals, and 4) preparing altered standards of care to employ during emergencies.¹⁹ The GAO study suggests that ensuring adequate quantity and standard quality of emergency resources (i.e., volunteer health practitioners) are viewed as natural next steps in reinforcing the country's emergency response system.

Underlying these overall trends we found several noteworthy examples of state efforts to use their legal reforms to incentivize volunteerism. A number of these examples involve states whose laws are not among the most protective, but at the same time the states offer illustrations of the unfolding evolution of law in the field of public health preparedness. For example, in Arizona, state and local government agencies joined the Arizona Medical Association's Disaster Preparedness Task Force and collaboratively produced the "Disaster Preparedness and Awareness Guide for the Arizona Physician."²⁰ This guide educates physicians and other medical personnel in how to identify, prepare for, and respond appropriately to disaster situations. It explains the state registration and credentialing process for volunteer health care professionals and addresses liability protection and workers compensation. The Arizona Bureau of Public Health Emergency Preparedness displays a link to the guide on their website.

Colorado now hosts an annual educational seminar focused on legal issues in emergency management through their Division of Emergency Management during which they address issues of volunteer liability among other topics.²¹ Texas has focused on systematically registering and credentialing volunteers through their Disaster Volunteer Registry. The Texas State Disaster Volunteer Coordinator proposed a coordinated plan for phased-in online registration of health care workers, starting with physicians, nurses, EMTs, social workers, and then progressing to dentists, veterinarians, etc.²² The Coordinator's office has established links to the major medical and health professions licensing boards and plan to place their volunteer registry logo on key state health care organization websites. The registry website contains information regarding the state's civil liability statute.

Although not a government-based initiative, Wisconsin's Citizen Corps Council and Wisconsin Voluntary Organizations Active in Disaster (VOAD) offer examples of private partnerships with government programs. The organizations help local officials identify, develop and integrate volunteer organizations into emergency response plans. This initiative maintains a user-friendly website with volunteer registration instructions and easily accessible information on volunteer training, management, and liability.²³

Unlike volunteer practitioner laws, volunteer entity laws appear to be moving at a slower pace, signifying perhaps more limited consensus over whether, and under what circumstances, public and private actors should enjoy broad legal protections during times of emergency. Unlike protections for individual health care volunteers, most states have not established liability reforms aimed at incentivizing entity participation during times of national emergency. Those states that have enacted laws appear to emphasize discrete corporate activities within discrete sectors rather than broader legal interventions.

In 2008, Georgia was one of two states which passed additional liability protections for volunteer entities.²⁴ The successful passage of the Corporate Good Samaritan Act was due in large part to the action of a coalition which included such partners as the Georgia Division of Public Health, Georgia Emergency Management Agency, law enforcement officials, Business Executives for National Security, and the Georgia Chamber of Commerce. Georgia business leaders, under the direction of the Georgia Chamber of Commerce, were especially influential in enacting these protections.

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⁵ 42 U.S.C. §14501 *et seq.* (2006)

⁶ 28 U.S.C. §§ 1346(b), 2401(b), 2671-80. (2006)

⁷ Recruitment Information – National Disaster Medical System.

<<http://www.hhs.gov/aspr/opeo/ndms/join/index.html>> (Accessed October 25, 2008)

⁸ 42 U.S.C.A. §§ 247d-6d, 6e (LexisNexis 2008)

⁹ *Id.*

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¹⁷ Illinois (SB 2285), 2008; Maryland (HB 666), 2008

¹⁸ National Conference of Commissioners of Uniform State Laws. “Uniform Emergency Volunteer Health Practitioners Act.” <<http://www.uevhpa.org/DesktopDefault.aspx>> (Accessed September 10, 2008).

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