 Liability Risks and Protections for Volunteer Health Practitioners in Emergencies

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Objectives

» Briefly review the legal landscape during declared emergencies

» Explain liability risks related to volunteer health practitioners (VHPs) and entities during declared emergencies

» Discuss potential legal theories and methods to protect VHPs and entities from liability

» Address your questions, comments, or thoughts
Disclaimer

Please note that information provided during this webinar does not constitute legal advice.

Please seek specific guidance from your legal counsel in your respective jurisdiction for direct, legal advice.
Laws During a Declared Emergency

Liability Risks and Protections for Volunteer Health Practitioners in Emergencies
Assessing the Role of Law in Emergencies

Laws pervade emergency responses at every level of government:

» They determine what constitutes a public health or other emergency

» They help create the infrastructure through which emergencies are detected, prevented, and addressed

» They authorize the performance (or nonperformance) of various emergency responses by a host of actors

» They determine the extent of responsibility for potential or actual harms that arise during emergencies
Assessing the Role of Law in Emergencies

Once an emergency has been declared, the legal landscape changes.
Multiple Levels of Emergency Declarations

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Liability Risks and Protections for Volunteer Health Practitioners in Emergencies
States That Define “Emergency” or similar term defined in state statutes - 39

Data current as of April 1, 2008
"Emergency" Defined - Arizona

"State of emergency" means “the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons or property within the state caused by air pollution, fire, flood or floodwater, storm, epidemic, riot, earthquake or other causes, except those resulting in a state of war emergency, which are or are likely to be beyond the control of the services, personnel, equipment and facilities of any single county, city or town, and which require the combined efforts of the state and the political subdivision.”

“Emergency” Defined - Arizona

“Local emergency” means “the existence of conditions of disaster or of extreme peril to the safety of persons or property within the territorial limits of a county, city or town, which conditions are or are likely to be beyond the control of services, personnel, equipment and facilities of such political subdivision as determined by its governing body and which require the combined efforts of other political subdivisions.”

"Disaster" or similar term defined in state statutes - 42

PR - (Puerto Rico)
VI - (U.S. Virgin Islands)

Data current as of April 1, 2008
“Disaster” Defined - Texas

"Disaster" means the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, other public calamity requiring emergency action, or energy emergency.

Tex. Gov’t Code Ann. § 418.004(1), (3) (Vernon 2003)
States That Define “Public Health Emergency”

“Public health emergency” or similar term defined in state statutes - 26

PR - (Puerto Rico)
VI - (U.S. Virgin Islands)

Data current as of April 1, 2008
“Public Health Emergency” Defined - Arizona

“A state of emergency or state of war emergency declared by the governor in which there is an occurrence or imminent threat of an illness or health condition caused by bioterrorism, an epidemic or pandemic disease or a highly fatal infectious agent or biological toxin and that poses a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability.”

States That Define “Public Health Emergency” and “Emergency” or “Disaster”

“Emergency”, “disaster”, and “public health emergency” (or similar terms) defined in state Statutes - 27

Data current as of April 1, 2008
Multiple Levels of Emergency Declarations

- Local emergency or disaster
- Local public health emergency
- State emergency or disaster
- State public health emergency
- Federal “FEMA” emergency
- Federal “DHHS” public health emergency
- International W.H.O. Public Health Emergency of International Concern (PHEIC)
- International Govts Emergency Declarations

Public health authorities and powers, actors, liabilities, immunities, and other critical legal issues vary depending on the type of declared emergency.
Liability Risks During an Emergency
What is Civil Liability?

Civil liability is the potential responsibility that a person or institution may owe for their actions, or failures to act, that result in injuries or losses to others.
Civil Liability: Who May Face Liability?

VHPs

Health care entities or employers that accept or provide VHPs

Persons or entities responsible for VHP registration systems
Civil Liability: Examples & Legal Theories

» A physician administers pain medication to a patient without knowledge of other medications the patient is taking, and the patient suffers an adverse reaction (Negligence)

» A health care provider administers a procedure without patient informed consent (Intentional Tort – Battery)

» A health care provider discloses a patient’s medical information without patient’s express permission (Privacy)

» A nurse administers medical care with the patient or others believing that she is a physician (Misrepresentation)

» A health care professional or entity refuses to provide health care services to a patient based on race, religion, or ethnicity because of limited resources (Discrimination)
Civil Liability – Health Care Entities: Theories of Liability

» **Respondeat Superior:** When an employer (as principal) may be liable for the acts of an employee (as an agent).

» **Ostensible Agency:** When an entity (as principal) may be liable for the acts of a non-employee (e.g., independent contractor) because a third party believes the non-employee acts on the entity’s behalf.

» **Corporate Liability/Vicarious Liability**
Risks of Civil Liability

Liability Risks to VHPs, Hospitals, and Employers
Liability Protections During Emergencies

Umbrella of Liability Coverage

- Federal VPA
- EMAC
- Mutual Aid Agreements
- MOUs
- Insurance Coverage
- JCAHO Standards/ Policies & Practices
- State EHPA
- Good Samaritan Acts
- State VPA
- Indemnification
Civil Liability - Volunteers

At the federal level, legislation concerning volunteer liability protections is constantly percolating.

The U.S. House of Representatives recently passed a bill to enable legal protections for VHPs working at community health centers (HR 1745, Family Health Care Accessibility Act of 2010).

The bill is presently before the Senate Committee on Health, Education, Labor, and Pensions for review and further action.

Civil Liability – Volunteers: Legal Protections

» Volunteer protection statutes
» Governmental (sovereign) immunity
» Good Samaritan laws
» Emergency statutes
» EMAC (Emergency Management Assistance Compact)
Civil Liability: Volunteer Protection Statutes

» Federal and state Volunteer Protection Acts
» No emergency required
» Apply to uncompensated volunteers for nonprofit and governmental entities only
» Do not apply to organizations
Civil Liability: Volunteer Protection Statutes

“[No] volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity.”

So long as:

(1) volunteer was acting within the scope of the volunteer’s responsibilities;
(2) volunteer was properly licensed, certified, or authorized;
(3) the harm was not caused by willful or criminal misconduct, gross negligence . . . ;
(4) the harmed was not caused by the volunteer operating a motor vehicle, vessel, aircraft, . . . .
Volunteer Protection Laws - Arizona

A volunteer is immune from civil liability in any action based on an act or omission of a volunteer resulting in damage or injury. The acts must be within the scope of the volunteer’s official functions and duties for a nonprofit corporation or nonprofit organization, hospital or governmental entity.

Civil Liability – Volunteers: Governmental (Sovereign) Immunity

» Scope of immunity determined by Tort Claims Acts
» May cover all government employees, including volunteers
» No emergency required
» Not absolute for egregious conduct
» Volunteers in non-government settings are not covered
Civil Liability – Volunteers: Good Samaritan Laws

» Codified in every state’s statutes

» Reduce the standard of care

» Emergency situation must exist, but there is no need for declaration

» Do not typically apply to employees

» May not apply for pre-arranged or compensated volunteers

» Not absolute for egregious conduct
Good Samaritan Law - Arizona

Health care providers licensed or certified to practice . . . in this state or elsewhere, or a licensed ambulance attendant, driver or pilot, or any other person who renders emergency care at a public gathering or at the scene of an emergency occurrence gratuitously and in good faith shall not be liable for any civil or other damages as the result of any act or omission by such person rendering the emergency care, or as the result of any act or failure to act to provide or arrange for further medical treatment or care for the injured persons.

Civil Liability – Volunteers: Good Samaritan Laws

» Provide immunity during declared emergencies explicitly or by converting VHPs into state employees

» Provisions can be broad, redundant, or vague

» Not absolute for egregious conduct

» Arizona - A person or health care provider undertaking any activity required by this article, . . . is immune from civil or criminal liability if the person or health care provider acted in good faith. Actions required by this article are presumed to be in good faith. Ariz. Rev. Stat. § 36-790 (2006)
Civil Liability - Volunteers

EMAC:

» Interpretation of statutory language - “officers or employees of the state” may only include certain volunteers

» Some states were able to expand the EMAC workforce during Hurricane Katrina emergency responses
Civil Liability – Health Care Entities

Immunity for health care entities:

» Less options than volunteers, although some may qualify for sovereign immunity.

» Health care entities that provide volunteers: unlikely to be liable for acts by their employees in other facilities or jurisdictions.

» Health care entities that accept volunteers: may be liable for actions that take place under their supervision depending on relationship with VHPs.
Entity Liability Protections - Arizona

Governmental Immunity of Public Entities:

This state and its departments, agencies, boards, commissions and all other political subdivisions are not liable for any claim based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty by any emergency worker, excepting wilful misconduct, gross negligence or bad faith of any such emergency worker, in engaging in emergency management activities or performing emergency functions pursuant to this chapter or title 36, chapter 6, article 9.

Ariz. Rev. Stat. § 26-314(A)
Entity Liability Protections - Nationally

UNC Gillings School of Global Health – Public/Private Legal Preparedness Initiative

Good Samaritan Entity Liability Protection: Tools for Advocates

» State level coalitions comprised of interested stakeholders from public health, emergency management, business and non-profit entities, professional associations, and academia seeking to provide “Good Samaritan Entity Liability Protection.”

» The Good Samaritan Entity Liability Protection: Tools for Advocates ~ contains materials that can be used by coalition members to generate entity liability protections.

» Available at: http://nciph.sph.unc.edu/law/tools/index.htm
Uniform Emergency Volunteer Health Practitioners Act (UEVHPA)
UEVHPA – Liability

Liability – offers 2 alternatives for protecting VHPs during emergencies

» Alternative A – individual and entity liability protection for VHPs

» Alternative B – individual liability protection for uncompensated VHPs based on Federal VPA

Worker’s Compensation – any VHP who is harmed or killed during emergency may elect worker’s comp protections of the host state as a payer of last resort
Workers’ Compensation Liability
Workers’ Compensation - 1

Who is an employee for the purposes of worker’s compensation?

» Absent a state law extending workers’ compensation to volunteers, unpaid individuals who respond to emergencies are not covered because they are not “employees.”

» Narrowly written laws that appear to cover VHPs may not apply if the (1) employer has option and decides to not cover volunteers or (2) volunteer is not appropriately registered.
Workers’ Compensation - 2

Who is the employer of volunteers?

» The employer from the “home” state is not likely to be responsible for injuries to volunteers because they are acting outside the course of employment (unless the employer offers to provide coverage).

» Temporary “host” employer may be the state or municipal government.

» Otherwise, the “host” institution may be responsible.
Workers’ Compensation - 3

When is a volunteer acting within the scope of her employment? A critical question even if coverage exists b/c such coverage only extends to acts generally within the scope of employment.

When is a volunteer “injured” in the course of emergency responses? Workers compensation only pertains to injuries that occur at work. Questions as to the timing of injuries may arise, especially among states that lack comprehensive occupational health provisions.
Questions and Comments

Please feel free to ask questions through the Chat Function on your Webinar screen:

» **What issues do you or your agency face during a declared emergency?**

» **What liability concerns do you have regarding deploying, using, or providing VHPs during an emergency?**
Contact

» Visit networkforphl.org

» Call us between 9 AM – 5 PM (AZ time) at 480-727-2092

» Email us at dorenstein@networkforphl.org