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Legal and Regulatory Issues Concerning Volunteer Health Professionals

Legal Best Practices

Purpose. These Best Practices allow states to examine how other states have dealt with the legal and regulatory issues related to implementation and organization of a volunteer healthcare registration system.

Organization. These Best Practices present a series of examples of state law treatment of six broad subject categories that encompass the primary legal issues related to the establishment of a volunteer registration system: I. Emergency Health Powers Laws; II. Licensure and Credentialing Laws; III. Civil Liability Protections; IV. Workers' Compensation Protections; and V. Right to Reemployment Protections. Each of these categories includes a definition of the objectives of the state laws and the relevant statutory language. The toolkit is applicable to any registration system that facilitates the deployment of volunteer health professionals. Additional provisions of a model nature, which have been enacted in several states, are provided in the Model State Emergency Health Powers Act (MSEHPA). Relevant provisions of MSEHPA can be found online at <http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf>, and are discussed in sections 3.1, 3.2.1.4, and 3.3.1.4. of the ESAR-VHP Legal and Regulatory Issues Report, which can be found at <http://www.hrsa.gov/bioterrorism/esarvhp/legalissues.htm>.

Suggestions for Use. This document is designed for use by government officials at the state and local levels, their public and private sector partners, and others who are responsible for, or interested in, assessing legal preparedness concerning a registration system. Users should view the Best Practices as guides to the key legal issues within each topical area.

Disclaimer. Nothing within this document is meant to provide specific legal guidance or advice to any user of these documents. Rather, as noted above, the Best Practices are meant to serve as a helpful tool for assessing these legal issues within the user's specific jurisdiction. Legal advice on the issues discussed is necessarily fact-specific and may vary depending upon state or local law, and the specific circumstances involved. For specific requests for legal advice, individuals should contact their state's Office of the Attorney General or their institution's legal counsel.

I. EMERGENCY HEALTH POWERS LAWS

Objectives:

- To define the roles of the state Emergency Management Agency and other government actors in disaster and public health emergency response efforts.
- To clearly define the circumstances under which the state can declare a public health emergency or disaster.
- To define the roles volunteers in public health emergencies and disasters.
- To provide civil liability, workers' compensation, and licensure reciprocity protections for individuals providing assistance during a disaster or public health emergency.

STATUTORY ORGANIZATION

20 ILL. COMP. STAT. 3305/1, ET SEQ. (2005) – ILLINOIS EMERGENCY MANAGEMENT AGENCY ACT

- 3305/1. Short Title
- 3305/2. Policy and Purposes
- 3305/3. Limitations
- 3305/4. Definitions
- 3305/5. Illinois Emergency Management Agency
- 3305/6. Emergency Management Powers of the Governor
- 3305/7. Emergency Powers of the Governor
- 3305/8. Mobile Support Teams
- 3305/9. Financing
- 3305/10. Emergency Services and Disaster Agencies
- 3305/11. Local Disaster Declarations
- 3305/12. Testing of Disaster Warning Devices
- 3305/13. Mutual aid arrangements between political subdivisions and taxing districts
- 3305/14. Communications
- 3305/15. Immunity
- 3305/16. Professions, Trades and Occupations
- 3305/17. Authority to Accept Services, Gifts, Grants or Loans
- 3305/18. Orders, Rules and Regulations
- 3305/19. Utilization of Existing Agency, Facilities, and Personnel
- 3305/20. Emergency Management Agency; personnel; oath
- 3305/21. No Private Liability
- 3305/22. Political activities prohibited

KEY PROVISIONS

20 ILL. COMP. STAT. 3305/4 – DEFINITIONS

"Disaster" means an occurrence or threat of widespread or severe damage, injury or loss of life or property resulting from any natural or technological cause, including but not limited to fire, flood, earthquake, wind, storm, hazardous materials spill or other water contamination requiring emergency action to avert danger or damage, epidemic, air contamination, blight, extended periods of severe and inclement weather, drought, infestation, critical shortages of essential fuels and energy, explosion, riot, hostile military or paramilitary action, public health emergencies, or acts of domestic terrorism.

"Public health emergency" means an occurrence or imminent threat of an illness or health condition that: (a) is believed to be caused by any of the following: (i) bioterrorism; (ii) the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin; (iii) a natural disaster, (iv) a chemical attack or accidental release; or (v) a nuclear attack or accident; and (b) poses a high probability of any of the following harms: (i) a large number of deaths in the affected population; (ii) a large number of serious or long-term disabilities in the affected population; or (iii) widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.

20 ILL. COMP. STAT. 3305/5(f) - ILLINOIS EMERGENCY MANAGEMENT AGENCY

The Illinois Emergency Management Agency shall:

(1) Coordinate the overall emergency management program of the State.

(2) Cooperate with local governments, the federal government and any public or private agency or entity in achieving any purpose of this Act and in implementing emergency management programs for mitigation, preparedness, response, and recovery.

(2.6) Coordinate with the Department of Public Health with respect to planning for and responding to public health emergencies.

(6) Determine requirements of the State and its political subdivisions for food, clothing, and other necessities in event of a disaster.

(7) Establish a register of persons with types of emergency management training and skills in mitigation, preparedness, response, and recovery.

(8) Establish a register of government and private response resources available for use in a disaster.

(11) Develop agreements, if feasible, with medical supply and equipment firms to supply resources as are necessary to respond to an earthquake or any other disaster as defined in this Act. These resources will be made available upon notifying the vendor of the disaster. Payment for the resources will be in accordance with Section 7 of this Act. The Illinois Department of Public Health shall determine which resources will be required and requested.

(12) Out of funds appropriated for these purposes, award capital and non-capital grants to Illinois hospitals or health care facilities located outside of a city with a population in excess of 1,000,000 to be used for purposes that include, but are not limited to, preparing to respond to mass casualties and disasters, maintaining and improving patient safety and quality of care, and protecting the confidentiality of patient information. No single grant for a capital expenditure shall exceed \$300,000. No single grant for a non-capital expenditure shall exceed \$100,000. In awarding such grants, preference shall be given to hospitals that serve a significant number of Medicaid recipients, but do not qualify for disproportionate share hospital adjustment payments under the Illinois Public Aid Code. To receive such a grant, a hospital or health care facility must provide funding of at least 50% of the cost of the project for which the grant is being requested. In awarding such grants the Illinois Emergency Management Agency shall consider the recommendations of the Illinois Hospital Association.

II. LICENSURE AND CREDENTIALING LAWS

Objectives:

- To facilitate the participation of medical professionals properly licensed in other jurisdictions in emergency response efforts by waiving in state licensure requirements.
- To permit registered nurses and student nurses to provide a broader scope of medical care, outside the supervision of a physician during emergencies.
- To apply waivers of licensure requirements to volunteer health professionals.

N. H. REV. STAT. § 21-P:41 (2002) – IMMUNITY AND EXEMPTION

II. Any requirement for a license to practice any professional, mechanical, or other skill shall not apply to any authorized emergency management worker who shall, in the course of performing his or her duties as such, practice such professional, mechanical, or other skill during an emergency.

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.

IV. Dentists licensed in this state, nurses registered in this state, student nurses undergoing training at a licensed hospital in this state, or emergency medical care providers licensed under RSA 153-A, during any emergency, shall be regarded as authorized emergency management workers and while so engaged may practice, in addition to the authority granted them by other statutes, administration of anesthetics; minor surgery; intravenous, subcutaneous, and intramuscular procedures; and oral and topical medication under the general but not necessarily direct supervision of a member of the medical staff of a legally incorporated and licensed hospital of this state, and to assist such staff members in other medical and surgical procedures.

V. Any emergency management worker, performing emergency management services at any place in this state pursuant to agreements, compacts or arrangements for mutual aid and assistance, to which the state or one of its political subdivisions is a party, shall possess the same powers, duties, immunities, and privileges the worker would ordinarily possess if performing his or her duties in the state or political subdivision in which normally employed or rendering services.

Objectives:

- To provide broad licensure reciprocity to professionals holding out-of-state licenses assisting in emergency response efforts.
- To facilitate the use of out-of-state volunteers in emergency response efforts to increase emergency management capacity.

MINN. STAT. § 12.42 (2005) - OUT-OF-STATE LICENSE HOLDERS; POWERS, DUTIES

During an emergency or disaster, a person who holds a license, certificate, or other permit issued by a state of the United States, evidencing the meeting of qualifications for professional,

mechanical, or other skills, may render aid involving those skills in this state. The license, certificate, or other permit of the person, while rendering aid, has the same force and effect as if issued in this state.

Objectives:

- To utilize home state professional resources for emergency response efforts.
- To facilitate the use of professional resources from other jurisdictions, when the home state resources have been exhausted, by granting licensure reciprocity.

20 ILL. COMP. STAT. 3305/16 (2005) - PROFESSIONS, TRADES AND OCCUPATIONS.

If such disaster as is described in Section 4 occurs in this State and the services of persons who are competent to practice any profession, trade or occupation are required in this State to cope with the disaster and it appears that the number of persons licensed or registered in this State to practice such profession, trade or occupation may be insufficient for such purpose, then any persons who are licensed elsewhere to practice any such profession, trade or occupation may, if a member of a mobile support team or unit of another state rendering aid in this State pursuant to the order of the Governor of their home state and upon the request of the Governor of this State, or if otherwise requested so to do by the Governor or the Director of this State, during the time the disaster continues, practice such profession, trade or occupation in this State without being licensed or registered in this State.

III. CIVIL LIABILITY PROTECTIONS

A. Liability Protections for Volunteer Health Professionals Housed in Emergency Management Laws

Objectives:

- To provide volunteer health professionals with protection from civil liability for actions related to the performance of their volunteer duties.
- To provide individuals injured by a volunteer’s actions, which amount willful misconduct, with recourse for their injuries.

MICH. COMP. LAWS ANN. § 30.411(4) (2004) – EMERGENCY MANAGEMENT ACT, PERSONNEL OF DISASTER RELIEF FORCES, POWERS, DUTIES, RIGHTS, PRIVILEGES AND IMMUNITIES AND COMPENSATION.

A person licensed to practice medicine or osteopathic medicine and surgery, or a licensed hospital, registered nurse, practical nurse, dentist, veterinarian, or paramedical person, whether licensed in this or another state or by the federal government or a branch of the armed forces of the United States, or a student nurse undergoing training in a licensed hospital in this or another state, that renders services during a state of disaster declared by the governor and at the express or implied request of a state official or agency or county or local coordinator or executive body, is considered an authorized disaster relief worker or facility and is not liable for an injury sustained by a person by reason of those services, regardless of how or under what circumstances or by what cause those injuries are sustained. The immunity granted by this subsection does not apply in the event of a willful act or omission. If a civil action for malpractice is filed alleging a willful act or omission resulting in injuries, the services rendered that resulted in those injuries shall be judged according to the standards required of persons licensed in this state to perform those services.

MICH. COMP. LAWS ANN. § 30.402(F) (2004) – EMERGENCY MANAGEMENT ACT, DEFINITIONS

"Disaster relief forces" means all agencies of state, county, and municipal government, private and volunteer personnel, public officers and employees, and all other persons or groups of persons having duties or responsibilities under this act or pursuant to a lawful order or directive authorized by this act.

B. Liability Protections for Volunteer's Housed in Good Samaritan Laws

Objectives:

- To provide broad based civil liability protections to individuals who provide emergency medical care in order to encourage individuals to provide this type of care.
- To provide patients injured by egregious misconduct, which amounts to willful or wanton negligence, with a measure of recourse.

TEX. CIVIL PRACTICE & REMEDIES CODE ANN. § 74.151 (VERNON 2005) – LIABILITY FOR EMERGENCY CARE

(a) A person who in good faith administers emergency care, including using an automated external defibrillator, is not liable in civil damages for an act performed during the emergency unless the act is wilfully or wantonly negligent.

(b) This section does not apply to care administered:

(1) for or in expectation of remuneration, provided that being legally entitled to receive remuneration for the emergency care rendered shall not determine whether or not the care was administered for or in anticipation of remuneration; or

(2) by a person who was at the scene of the emergency because he or a person he represents as an agent was soliciting business or seeking to perform a service for remuneration.

(e) This section does not apply to a person whose negligent act or omission was a producing cause of the emergency for which care is being administered.

C. Liability Protection for Volunteers Through the Extension of State Sovereign Immunity

Objectives:

- To provide volunteers, including health professionals, emergency responders, and members of the Medical Reserve Corps, with immunity from liability for actions related to the performance of their volunteer duties.
- To provide for liability protection which is limited to the breadth of state sovereign immunity.

VA. CODE ANN. § 2.2-3605(D) (2005) – VOLUNTEER BENEFITS

. . . Volunteers in state and local service, including, but not limited to, any person who serves in a Medical Reserve Corps (MRC) unit or on a Community Emergency Response Team (CERT), shall enjoy the protection of the Commonwealth's sovereign immunity to the same extent as paid staff.

Virginia case law, Friday-Spivey v. Collier, 268 Va. 384, 601 S.E.2d 591 (2004), interprets these sovereign immunity protections with a four part test.

Volunteers will be protected under sovereign immunity if they meet the following:

1. The nature of the function performed by the employee is clearly defined and directed by a state agency;
2. The extent of the state's interest and involvement in that function is clearly defined;
3. Roles are clearly defined in terms of the use of judgment and discretion, and
4. The degree of control and direction exercised by the state over the employee must be clear.

IV. WORKERS' COMPENSATION PROTECTIONS

Objectives:

- To provide volunteer health professionals with workers' compensation protection for injuries sustained while providing assistance during an emergency or disaster.
- To define the party considered as the "employer" for purposes of workers' compensation protections.

MINN. STAT. ANN. 12.22, SUBD. 2A. VOLUNTEER PROTECTIONS.

(a) Individuals who volunteer to assist a local political subdivision during an emergency or disaster, who register with that subdivision, and who are under the direction and control of that subdivision, are considered an employee of that subdivision for purposes of workers' compensation and tort claim defense and indemnification.

(b) Individuals who volunteer to assist the state during an emergency or disaster, who register with a state agency, and who are under the direction and control of the state agency are considered an employee of the state for purposes of workers' compensation and tort claim defense and indemnification.

V. RIGHT TO REEMPLOYMENT FOR VOLUNTEERS

Objectives:

- To provide volunteers broad reemployment and wage protection for participating in disaster response efforts.
- To provide reemployment and wage protection to a broad range of types of volunteers.
- To facilitate multi-jurisdictional emergency response efforts by providing reemployment and wage protection to volunteers providing disaster assistance outside the state of Illinois.

5 ILL. COMP. STAT. 335/3 (WEST 2005) - DISASTER SERVICE VOLUNTEER LEAVE.

An employee of a State agency who is a certified disaster service volunteer of the American Red Cross or assigned to the Illinois Emergency Management Agency in accordance with the Illinois Emergency Management Agency Act, the Emergency Management Assistance Compact Act, or other applicable administrative rules may be granted leave from his work with pay for not more than 20 working days in any 12-month period to participate in specialized disaster relief services for the American Red Cross or for the Illinois Emergency Management Agency, as the case may be, upon the request of the American Red Cross or the Illinois Emergency Management Agency

for the services of that employee and upon the approval of that employee's agency, without loss of seniority, pay, vacation time, compensatory time, personal days, sick time or earned overtime accumulation. The agency shall compensate an employee granted leave under this Section at his regular rate of pay for those regular work hours during which the employee is absent from his work. For purposes of assessing State disaster response needs, requests made pursuant to this Act for services out-of-state shall be coordinated by the American Red Cross and the Illinois Emergency Management Agency through the Illinois State Emergency Operations Center. The Illinois Emergency Management Agency may consult with the Department of Central Management Services on leave issues that could impact the operations of State agencies under the Governor's jurisdiction. Leave under this Act shall not be unreasonably denied for services related to a disaster within the United States or its territories.