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MEMORANDUM

Hurricane Katrina Response

Legal Protections for Federalized Volunteer Health Personnel under a Federal Declaration of Public Health Emergency

In response to the current and impending use of volunteer health professionals (VHPs) in the Gulf Coast Region impacted most significantly by Hurricane Katrina, the *Center for Law and the Public's Health* (*Center*) has drafted a brief summary of legal protections applicable to temporary volunteers with the Department of Health and Human Services (DHHS), pursuant to 42 U.S.C. 217b, under a federal Declaration of Public Health Emergency.

Disclaimer - *This information does not represent the official legal positions of federal, state, or local governments nor is it meant to provide specific legal guidance or advice. VHPs and their coordinators should contact their local, state or territorial legal advisors for specific legal guidance.*

Use of Volunteers by the DHHS

There are several avenues by which DHHS can accept the assistance of volunteer health professionals: (1) intermittent disaster response personnel under 42 USC § 300hh-11; (2) temporary volunteers, under 42 USC § 217b; and (3) Schedule A of the Excepted Service, under 5 CFR § 213.3102.

Intermittent Disaster Response Personnel 42 U.S.C. § 300hh-11

Intermittent disaster response personnel are typically appointed as members of the National Disaster Medical System. VHPs appointed through this mechanism are generally considered intermittent disaster response personnel, under 42 USC § 300hh-11, and enjoy corresponding legal protections from liability, workers compensation coverage, and waivers of state licensure requirements.¹

¹ More information about the legal protections available to intermittent disaster response personnel during a public health emergency can be found in the *Center's* memo on the issue, which is posted online at www.publichealthlaw.net/Research/Katrina.htm.

Temporary Volunteers 41 U.S.C. § 217b

The Public Health Service (PHS), a division of the DHHS, is empowered to accept “volunteer services,” under 42 USC § 217b. However, these provisions do not require PHS to accept volunteer services during a declared public health emergency or otherwise. The implementing regulations define “volunteer services” as follows:

- “individuals... whose services have been offered to the Government and accepted **under a formal agreement** on a **without compensation** basis for use in the operation of a health care facility or in the provision of health care.” [emphasis added] *See* 45 CFR § 57.2.
- The provision of health care only includes “services to patients in **Department facilities, beneficiaries of the Federal Government**, or individuals or groups for whom health services are **authorized under the programs of the Department**.” [emphasis added] *See* 45 CFR § 57.2.

The implication of these regulations is that PHS volunteers:

- must enter into a formal agreement for volunteer services;
- the services must be provided without compensation; and
- the volunteer would only be authorized to provide services to patients in specific settings or meeting specific criteria outlined by the Secretary of HHS.

The applicable regulations do not require that these temporary volunteers receive legal protections. Rather, the relevant regulations specify that volunteers whose services are offered and accepted **may** receive certain legal protections. *See* 45 CFR § 57.5. Potentially applicable provisions include:

- **Workers’ compensation** coverage for medical services for work related injuries (Subchapter I of Chapter 81 of Title 5 of the United States Code);
- **Protection from civil liability claims** under the Federal Tort Claims Act (Title 28 of the United States Code);
- **Coverage of travel and transportation expenses** (Section 5703 of Title 5 of the United States Code); and
- **Other benefits** as are authorized by law or by administrative action of the Secretary or his designee.

The regulations do not guarantee that these legal provisions will apply to volunteers. Therefore it may be necessary for the Secretary of Health and Human Services to explicitly guarantee their application.

A primary concern for volunteers will be whether the receipt of compensation in the form of travel expenses or other expenses related to the provision of volunteer assistance prevents them from being able to benefit from any available legal protections. The PHS does not define “compensation,” so it is not clear whether amenities provided to volunteers would jeopardize their volunteer status. However, an employee serving intermittently in Government service without pay may be allowed travel or transportation expenses while away from his home or regular place of business and at the place of employment or service. 5 USC § 5703.

Moreover, the issue of volunteers and compensation is addressed elsewhere in the regulations to the Fair Labor Standards Act (FLSA), 29 CFR § 553.106. Pursuant to this regulatory provision, several forms of compensation may be offered to volunteers of state and local governments without jeopardizing their status as volunteers, including paid expenses, reasonable benefits, nominal fees, or any combination thereof. These categories would cover the reasonable provision of meals, transportation, supplies, training, and other nominal fees. Absent other precedent, a similar standard may arguably apply to volunteers of the PHS.

Schedule A of the Excepted Service 5 CFR § 213.3102

Schedule A of the excepted service regulations permit the federal government to hire certain types of temporary employees. Under 5 C.F.R. § 213.3102(i)(2), individuals may be temporarily appointed by a federal agency as federal employees to meet critical hiring needs. Appointments last for 30 days and may be extended for an “additional 30 days when continued employment is essential to the agency’s operations. The appointments may not be used to extend the service limit of any other appointing authority. An agency may not employ the same individual under this authority for more than 60 days in any 12-month period.” 5 C.F.R. § 213.3102(i)(2).

Since these individuals are appointed as federal employees, they are entitled to liability coverage under the Federal Tort Claims Act (FTCA) and workers’ compensation coverage under the Federal Employees Compensation Act (FECA). The FTCA represents a limited waiver of federal sovereign immunity under which, with certain exceptions, the United States may be liable for the tortious conduct of its employees to the same extent as a private party. Since these volunteers are considered federal employees, the federal government may be held vicariously liable for their actions. In general, the FTCA is the exclusive remedy for individuals harmed by the negligence of employees of the federal government, including volunteers who by statute have been extended FTCA protection and are acting within the scope of their duties. Suits covered by the FTCA are limited to those which arise from “the negligent or wrongful act or omission of any employee of the Government . . . acting within the scope of his or her office or employment.” 28 USC § 1346(b).

Under FECA, federal employees are provided with workers’ compensation coverage for injuries sustained in the course of their employment, provided that the injury was not the result of willful misconduct, an intentional act, or the intoxication of the injured party. See 5 USCA § 8101, et seq. FECA is the exclusive remedy for the recovery of compensation for personal injury or death sustained by a federal employee in the course of his or her employment.

Employees appointed under Schedule A of the excepted service provisions are not considered members of the uniformed services and are, therefore, not entitled to federal legal protection of their re-employment rights.

In response to Hurricane Katrina, the DHHS has established a program to recruit additional Health Care Professionals and Relief Personnel Workers to assist in the response efforts. See U.S. Dep’t. of Health and Human Services, Health Care Professionals and Relief Personnel Worker Page, *available at* <https://volunteer.ccrf.hhs.gov/> (last visited Sept. 15, 2005). VHPs recruited through this program will be considered non-paid temporary federal employees under Schedule A of the Excepted Service. They are entitled to liability protection and workers’ compensation coverage through the federal government. However, they are not entitled to re-employment protection under federal law, and thus must use their

own vacation time from their regular job or seek some exemption from their regular employer in order to participate without fear of it affecting their current employment status.

We note that additional federal laws may apply, each of which are subject to interpretation by relevant federal agencies. We hope that this information is helpful.

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