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MEMORANDUM

Hurricane Katrina and Rita Responses – Legal Lessons

The hurricane season of 2005 has led to devastating outcomes in the Gulf coast states of Louisiana, Mississippi, Alabama, and Texas. Hurricanes Katrina and Rita produced an unprecedented loss of life and serious health consequences for thousands of persons in the affected areas. Federal, state, and local governments in partnership with private sector entities have engaged in significant response and recovery efforts to address the health effects of the hurricanes and their aftermath. This brief memo outlines and analyzes some of the legal challenges that have arisen during these health response efforts, particularly related to the deployment and utilization of volunteer health professionals (VHPs).

1. Deployment of VHPs: The ESAR-VHP system was designed to provide an expedited framework through which VHPs could be quickly mobilized at the state level and deployed to sites where they were needed. While thousands of VHPs eventually were sent to the Gulf Region to respond to Hurricanes Katrina and Rita, there were initially delays in deploying organized teams of VHPs that relate to legal uncertainties, including:

- **Authorization to deploy.** VHPs encountered conflicting messages about who had the legal authority to deploy them to the disaster-affected areas. Federal and state mechanisms were invoked to authorize deployments of VHPs, but confusion about who actually had the legal authority to deploy volunteers ultimately led to delays. Legal authorities [and prioritization] for volunteer deployment should be clarified for future response efforts.
- **State deployment of VHPs under the Emergency Management Assistance Compact (EMAC).** Legal questions arose regarding the inclusion of non-state employees in a state EMAC response. EMAC responses typically only allow the participation of health professionals who are already “state officials or employees.” Some states were able to include local government or private sector employees in their EMAC responses through volunteer services agreements (VSAs), memoranda of understanding (MOUs), or existing statutory mechanisms making these employees into temporary state employees for purposes of the emergency. States should be encouraged to plan for and draft VSAs and MOUs to allow for increased volunteer participation in EMAC response efforts. It may be wise to link these efforts to the operation of the state’s ESAR-VHP.
- **Federal deployment of VHPs.** Federal government efforts to staff Federal Medical Contingency Stations with private sector VHPs raised complicated legal questions. Several federal laws permit hiring of temporary disaster response personnel. The Department of Health and Human Services

(DHHS) established a program to recruit additional health care professionals and relief personnel workers to assist in the response efforts using Schedule A of the Excepted Service. Unfortunately, development of this system and the analysis of relevant legal issues took several days. These issues could have been worked out in advance to facilitate more rapid responses. As well, federal reliance on national laws to “federalize” volunteers discounted the significant uses of state ESAR-VHP and Medical Reserve Corps systems to provide vetted volunteers for state and federal response efforts.

- **Deployment of VHPs by non-government entities or self-deployment.** Many VHPs attempted to assist in the response efforts either spontaneously (i.e., on their own) or through non-governmental efforts (e.g., American Red Cross and other charitable organizations). While these VHPs were sometimes permitted to assist, multiple questions arose about their legal authority to provide health care and services in specific jurisdictions. The *Center* produced timely information regarding the legal framework for existing protections in affected states. However, increased coordination and development of MOUs between government and charitable entities are needed to more successfully respond during emergencies.

2. Declarations of emergency: Federal, state, and local governments declared states of emergency pursuant to the hurricanes. Emergency declarations serve many functions, including authorizing additional powers for governments to respond quickly and effectively. State emergency declarations may authorize the waiver of licensure requirements for VHPs and provide other legal protections for these responders. Unfortunately, anecdotal evidence suggests that a lack of understanding of these emergency powers and legal protections led to hesitation in the utilization of VHPs in the affected areas. Dual or multi-level declarations in some jurisdictions likely led to additional complications. The extent to which confusion about emergency legal powers contributed to delays in the health response to these hurricanes requires additional assessment.

3. Delivery of health care and services by VHPs (licensure requirements): Volunteers seeking to assist in the hurricane-affected areas are not allowed to provide health care and services without some assurances of their licensure and credentialing status. To legally provide health services, volunteers must typically be actively licensed in the state where they are providing services or receive an exemption from that state’s professional licensing requirements. Anecdotal evidence from the hurricane response efforts suggests that several legal issues arose in this context:

- **Federal VHPs.** VHPs who have been deemed qualified by the federal government may still need to be licensed to practice in a specific state, unless the volunteer works exclusively in a federal facility (e.g., VA hospital or more likely a Federal Medical Contingency Station) or is considered a federal employee.
- **EMAC VHPs.** VHPs who are participating as a part of an EMAC response will automatically be deemed as licensed in the state who requested assistance for the duration of the response.
- **State emergency declarations.** The state may suspend its licensure requirements through an emergency declaration or other provision (e.g., a ruling by the state licensing board). For example, Louisiana and Mississippi allow anyone with a license in another state to come in and practice under an emergency declaration. However, the applicability of licensure waivers depends on how state disaster declaration laws are written. As well, it should be noted that VHPs outside of official federal or state response efforts (including most volunteers with charitable organizations like the Red Cross) may only be exempted from licensure requirements under a state-initiated suspension of licensure requirements.

4. Civil liability protections: Several issues arose related to the civil liability of VHPs for acts of negligence or malpractice during an emergency response:

- **Federal liability protection.** Volunteers may receive immunity from civil liability claims under the Federal Tort Claims Act (FTCA) if they are considered Federal employees. The non-paid temporary federal employees appointed by DHHS under Schedule A of the Excepted Service will qualify for federal liability protection. However, delays in communicating this information to volunteers may have deterred some participation. Federal laws could also be restructured to provide broader liability protections for volunteers, regardless of whether they are viewed as federal employees. Emerging legislative proposals on Capitol Hill seek to accomplish this objective, although it remains to be seen whether there is sufficient political support for expansion of the FTCA.
- **State liability protection.** Volunteers rendering assistance pursuant to a state EMAC response are immune from liability for acts committed within the scope of their duties unless such acts are considered willful misconduct, gross negligence, or reckless. State emergency declarations may also provide immunity from liability for VHPs. Again, additional legal clarifications are needed to determine which VHPs are covered by these liability protections.
- **Community Health Center (CHC) employees.** During the response efforts, employees from CHCs in other states sought to transfer or loan their employees to CHCs in affected areas. DHHS determined that civil liability protection normally available to CHC employees would not extend to activities in another CHC. This policy should be reconsidered to allow CHC employees greater legal protection and flexibility to respond to emergencies while retaining liability protection.

5. Workers' compensation coverage: Volunteers were concerned about whether they would have workers' compensation coverage through federal or state law for injuries or death sustained during emergency response efforts. Typically, such coverage will not be available unless specifically authorized.

- **Federal coverage.** Volunteers who have been made intermittent disaster response personnel or non-paid temporary federal employees under Schedule A of the Excepted Service are covered by the Federal Employees Compensation Act (FECA). Despite the fact that volunteers are not being paid for their federal service, FECA will determine workers' compensation benefits based on a statutory formula that considers a volunteer's existing income and other factors.
- **State coverage.** For volunteers rendering assistance pursuant to a state EMAC response, workers' compensation coverage for injuries or death sustained by members of a state's emergency forces will be provided by their home state. To ensure that VHPs are covered regardless of their job status, laws should define VHPs as "employees" of the host jurisdiction during declared emergencies for the purposes of workers' compensation, provided that the VHPs are volunteering in some formal capacity. VHPs would thus be covered under the state's workers' compensation plan like any state employee. This would also eliminate concerns among the VHPs non-emergency employers that their workers' compensation plans may be impacted.

6. Reemployment protections: Reemployment protections require the volunteer's employer to hold their job for a specified duration. Limited reemployment protections are available under federal and state laws for some VHPs responding to natural disasters or other emergencies.

- **Federal Coverage.** Federal VHPs providing assistance as a part of the National Disaster Medical System or through the Public Health Service enjoy job protections under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Given the limited availability of these reemployment protections, federal lawmakers may want to consider establishing strong reemployment protections for all VHPs participating in emergency response efforts.

- **State Coverage.** Some states provide reemployment protection for state employees who provide disaster assistance to the American Red Cross under Disaster Service Volunteer Leave Acts. Typically, these statutes provide only limited reemployment protection for short periods of volunteer service (e.g., 2 weeks). Given their limited applicability, state lawmakers should consider developing more comprehensive reemployment protections for all VHPs.

Finally, we note that additional federal and state laws may apply, each of which are subject to interpretation by relevant federal and state agencies. For additional information, please see the *Center's* Hurricane Katrina and Rita legal resources, available at <http://www.publichealthlaw.net/Research/Katrina.htm>. Please also see the *Center's* scholarship, notably the recent article, [*Volunteer Health Professionals and Emergencies: Assessing and Transforming the Legal Environment*](#), *Biosecurity and Bioterrorism* 2005; 3:3 216-223, by James G. Hodge, Jr., Lance A. Gable, and Stephanie H. Cálves.

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