

DRAFT  
FOR DISCUSSION ONLY

# UNIFORM EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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**RESERVED SECTIONS 11 AND 12**  
Interim Draft, January 8, 2007

*With Prefatory Note and Comments*

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January 8, 2007

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# **UNIFORM EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT**

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# **UNIFORM EMERGENCY VOLUNTEER HEALTH SERVICES ACT**

## **Prefatory Note**

On July 13, 2006, the Uniform Law Commission gave final approval to a version of the Uniform Emergency Volunteer Health Practitioners Act (UEVHPA) intended to promote the establishment of a robust and redundant system to quickly and efficiently facilitate the deployment and use of licensed practitioners to provide health and veterinary services in response to declared disasters and emergencies. The 2006 version of the UEVHPA contains provisions that (1) establish a system for the use of volunteer health practitioners capable of functioning autonomously even when routine methods of communication are disrupted; (2) provide reasonable safeguards to assure that health practitioners are appropriately licensed and regulated to protect the public's health, and (3) allow states to regulate, direct and restrict the scope and extent of services provided by volunteer health practitioners to promote emergency operations.

While immediate adoption of the 2006 version of the UEVHPA will assist states in more effectively responding to future emergencies and help alleviate significant deficiencies in this nation's current disaster response legal infrastructure, this version of the Act does not address two important topics that most groups and organizations engaged in the development of the UEVHPA indicated were critically important to the effective deployment and utilization of volunteer health practitioners. As currently drafted, the UEVHPA does not include provisions concerning (1) whether and to what extent volunteer health practitioners and organizations deploying and using these individuals are responsible for claims based on the volunteer's acts or omissions in providing health or veterinary services during emergencies; and (2) whether and how the volunteers may be protected in the event of their own injuries or deaths in responding to declared emergencies through workers' compensation benefits.

While the risk of exposure to liability for malpractice claims and the availability of workers' compensation benefits are matters of significant concern to all healthcare practitioners, these issues are of particular importance and relevance to volunteer health practitioners who may be needed to provide emergency health services to patients and the public in the midst of the challenging circumstances and the sub-optimal conditions that arise during emergencies. The potential for health-related liability claims of patients to arise, or for volunteer health practitioners to be injured or killed in service, are obvious factors that may impinge licensed practitioners to fully participate in emergency responses. Even if the volunteers are ready and willing to serve, the entities that host them or send them may have their own liability concerns, which may stifle volunteer participation.

Many existing laws at the federal and state levels recognize the need to provide some protections from liability or workers' compensation benefits for volunteers. Health Resources Services Administration. Emergency System for Advance Registration of Volunteer Health Professionals (ESAR-VHP): Legal and Regulatory Issues and Solutions, Health Resources and Services Administration (HRSA). Washington, DC: (May) 2006; 1-180. However, the applicability of these laws to volunteer health practitioners is sketchy. Existing laws create a

patchwork of protections that may apply to specific volunteers in limited settings. During emergencies, volunteer health practitioners or entities that host or send them may not know where their protections lie, or if they are protected at all. The net result is that some well-trained, motivated, and valued volunteer health practitioners may not be able to provide essential health services at a time when affected populations need them most.

Numerous anecdotal accounts of how liability or workers' compensation issues limited volunteer participation arose, for example, during national and state responses to Hurricane Katrina in 2005. There is, however, a lack of empirical evidence noting the significance of liability and workers' compensation protections to prospective and actual volunteers. To help address this gap, the Community Health Planning and Policy Development Section of the American Public Health Association (APHA) developed an electronic survey on these key issues in the Fall, 2006. APHA requested over 10,000 of its members complete the online, confidential survey, including hundreds of licensed health practitioners.

Though subject to additional verification, the initial survey results provide real data on volunteer attitudes on some key issues. There were 1,077 total respondents (773 female, 304 male). Direct health providers (or clinicians) accounted for 27.3% of the survey respondents (294 respondents), the majority of which included doctors (26.1%) and nurses (13.3%). Seventy percent of these respondents reported having six or more years experience in their field of employment. Approximately 12% of respondents indicated they were currently enrolled in an ESAR-VHP or other volunteer registry system.

In response to the following question, "As a clinician, to what degree does knowing that you have medical malpractice insurance coverage influence your decision to travel out of state to volunteer in a clinical capacity during an emergency?," nearly 60% of respondents indicated it was "important" (24.3%) or "essential" (35.4%). In response to the question, "As a clinician, how important is knowing one's scope of practice in a state other than one's home state in determining whether to travel out of state to volunteer in an emergency?," just under 63% of respondents indicated it was "important" (29.5%) or "essential" (33.4%). These questions were designed to assess how much importance a clinician assigns to medical malpractice coverage and scope of practice requirements in deciding whether to volunteer out-of-state. The implications to one's potential liability are obvious: (1) practitioners covered by medical malpractice insurance enjoy some protection from plaintiffs with successful claims in negligence seeking the practitioner's personal assets; and (2) liability claims may arise from practitioners who act outside their scope of practice. If practitioners cannot determine the applicable scope of practice for their profession in another state they may be opening themselves to liability even for unknowing acts that exceed one's scope.

Two additional questions answered by all respondents, including clinicians, provide a precise assessment of their concerns over liability and workers' compensation protections. When asked as a potential volunteer, how important is your immunity from civil lawsuits in deciding whether to volunteer during emergencies, almost 70% of respondents indicated it was "important" (35.6%) or "essential" (33.8%). Only 5.5% of respondents indicated that civil immunity was "not important," with the remainder (25%) saying it was "somewhat important."

Responding to the question, “As a potential volunteer, how important to you is your protection from harms (e.g. physical or mental injuries) . . . through benefits akin to worker’s compensation?,” 74.1% of respondents indicated it was “important” (44.7%) or “essential” (29.4%). Only 4.8% of respondents indicated that workers’ compensation benefits were “not important,” with the remainder (21%) saying it was “somewhat important.” Thus, based on these current survey results, nearly 70% of respondents (many of who are prospective or actual volunteer health practitioners) clarified that civil immunity and workers’ compensation protections are important or essential facets of their decision whether to volunteer during an emergency.

In developing the version of the UEVHPA presented to the 2006 Annual Meeting of the Uniform Law Commission, the Drafting Committee presented proposals to the Commission that would have granted volunteer health practitioners similar immunity from tort claims enjoyed by state employees deployed to emergency scenes through their jurisdictions pursuant to the Emergency Management Assistance Compact (“EMAC”). Furthermore, the draft version of the Act presented at 2006 Annual Meeting proposed treating volunteer health practitioners as employees of their home state for workers’ compensation purposes to the extent they did not have access to alternative sources of workers’ compensation coverage. Facing concerns that these proposals required more careful review by the states and members of the National Conference, however, it was decided to defer final action on these important topics until the next Annual Meeting of the National Conference in July 2007. The National Conference directed the Drafting Committee to further review, analyze and gather comments and recommendations regarding how to most effectively address these topics.

In response, the Drafting Committee circulated a Discussion Draft of amendments to UEVHPA in September 2006 that provided two alternatives for addressing the topic of volunteer liability. Option A in the September 2006 amendments provided that volunteer health practitioners are not liable for acts of ordinary negligence, but would be subject to claims based on willful, wanton, grossly negligent, reckless, criminal or intentional misconduct, and that host states would be subject to claims based on ordinary negligence to the same extent as provided by state tort claims acts. Option B in the September 2006 draft applied by reference (but without further explication or elaboration) the protections provided by EMAC, the Federal Volunteer Protection Act, and other pertinent state laws to volunteer health professionals and groups and organizations that deployed or used volunteer health practitioners to respond to declared emergencies. Option B was intended to provide similar liability protections to volunteers as Option A, but without creating a new body of law to articulate these principles.

After extensive discussion of these alternatives at an October 2006 meeting of the Drafting Committee hosted by the American Red Cross in Washington, DC, a decision was made to utilize an approach that expressly codified and defined the extent to which host states and volunteer health practitioners may be held liable. The Drafting Committee concluded that clear and explicit rules were preferable to the incorporation by reference of another body of law that might not be clearly understood or uniformly applied in the absence of its more careful explication. This draft presents a modified and somewhat improved version of Option A as presented in the September 2006 Discussion Draft.

The September 2006 Discussion Draft also addressed the issue of workers' compensation coverage for volunteer health practitioners. It provided that the host state must afford workers' compensation coverage to volunteer health practitioners that are not covered by workers' compensation insurance or other comparable coverage during their deployment and service as volunteers. Lacking detailed input from state emergency management and budgetary officials, the Drafting Committee decided at its October 2006 meeting to prepare a revised set of amendments that presents three options for providing workers compensation coverage to volunteer health practitioners. These options include (1) treating volunteer health practitioners in all circumstances as employees of host states for workers compensation coverage; (2) treating volunteer health practitioners as employees of host states for workers compensation coverage only if the volunteers do not have access to alternative sources of coverage; or (3) providing volunteer health practitioners who do have access to alternative sources of coverage as state employees, but limiting workers' compensation coverage to the costs of health care services (thus excluding, for example, indemnification for lost earning capacity as typically provided via workers' compensation). The goal in providing these alternatives is to solicit comments and recommendations from state officials, disaster relief organizations, volunteers and others affected by the UEVHPA on the most effective and practical approach to providing workers compensation coverage.

1                   **UNIFORM EMERGENCY VOLUNTEER HEALTH SERVICES ACT**

2

3                   **SECTION 11. CIVIL LIABILITY FOR VOLUNTEER HEALTH**  
4 **PRACTITIONERS; VICARIOUS LIABILITY.**

5                   (a) In this section:

6                         (1) “Coordinating entity” means an entity that acts as a liaison to facilitate  
7 communication and cooperation between source and host entities but does not provide health or  
8 veterinary services in the ordinary course of its activities as liaison.

9                         (2) “Source entity” means a person located in this or another state that employs  
10 or uses the services of volunteer health practitioners authorized to provide health or veterinary  
11 services pursuant to this [act].

12                   (b) Subject to subsection (c), volunteer health practitioners authorized to provide health  
13 or veterinary services pursuant to this [act] are not responsible for the payment of a judgment  
14 based on their acts or omissions in providing the services, nor shall they be named as defendants  
15 in an action based on such acts or omissions.

16                   (c) Notwithstanding subsection (b), this section does not apply to:

17                         (1) willful, wanton, grossly negligent, reckless, or criminal conduct of, or an  
18 intentional tort committed by, a volunteer health practitioner;

19                         (2) an action brought against a volunteer health practitioner:  
20                                 (A) for damages for breach of contract, other than for contracts related to  
21 the provision of health or veterinary services,

22                                 (B) by a source or host entity, or

23                                 (C) relating to the operation of a motor vehicle, vessel, aircraft, or other



1 vehicle by a volunteer health practitioner for which this state requires the operator to have a valid  
2 operator's license or to maintain liability insurance, other than an ambulance or other emergency  
3 response vehicle, vessel, or aircraft operated by a volunteer health practitioner responding to a  
4 request for health or veterinary services or transporting a patient.

5 (d) Source, coordinating, and host entities are not vicariously liable for the acts or  
6 omissions of volunteer health practitioners in providing health or veterinary services authorized  
7 pursuant to this [act].

8 (e) Source, coordinating, and host entities are not liable for civil damages for the  
9 operation of, or reliance upon information provided by, a registration system unless the acts or  
10 omissions constitute an intentional tort or are willful, wanton, grossly negligent, reckless, or  
11 criminal in nature.

12 (f) Notwithstanding subsection (b), volunteer health practitioners shall be considered  
13 agents or employees of this state under the [cite to state tort claims act] for purposes of  
14 recovering damages from the state based on their acts or omissions in providing health or  
15 veterinary services pursuant to this [act].

16 **Legislative Note:** Subsection (f) should be revised as necessary based upon the provisions of the  
17 state's tort claims act to provide for the award of damages by the state to individuals injured as  
18 a result of the negligent actions of volunteer health practitioners and to ensure that volunteer  
19 health practitioners will not be personally responsible for the payment of civil damages as  
20 provided by subsection (b).

## 21 22 **Comment**

23  
24 All states through the adoption of EMAC have accepted the dual propositions that (1)  
25 governmental health practitioners providing interstate assistance in responding to declared  
26 emergencies should enjoy limited protections from tort liability; and (2) persons injured by  
27 governmental health practitioners should have some reasonable ability to pursue tort claims to  
28 redress their injuries suffered as a result of acts of professional malpractice. Article VI of  
29 EMAC provides that officers or employees of a party state rendering aid in another state  
30 pursuant to the compact are considered "agents of the requesting state" for tort liability and

1 immunity purposes and provides that “no party state or its officers or employees rendering aid in  
2 another state pursuant to [the] compact shall be liable on account of any act or omission in good  
3 faith on the part of such forces while so engaged or on account of the maintenance or use of any  
4 equipment or supplies in connection therewith.” The compact defines “good faith” to not  
5 include “willful misconduct, gross negligence, or recklessness.” These provisions of EMAC  
6 generally apply, however, only to state employees deployed on an interstate basis in response to  
7 declared emergencies. While some states have expanded these protections to local government  
8 employees incorporated into “state forces” pursuant to mutual aid agreements, with very limited  
9 exceptions private sector volunteers and disaster relief organizations do not enjoy the same  
10 protections and privileges provided by EMAC.

11  
12 The proposed amendments adding Section 11 to the UEVHPA apply policies similar to  
13 those established by Article VI of EMAC to volunteer health practitioners and organizations  
14 engaged in the deployment and use of these volunteers. The rationale is that private sector  
15 volunteers and organizations providing vital health services during emergencies deserve the  
16 same protections and privileges as states and public employees whose resources and efforts they  
17 supplement and complement. While historically many private sector volunteer health  
18 practitioners have responded to emergencies regardless of their potential exposure to civil  
19 liability, volunteers and disaster relief organizations have consistently identified fears regarding  
20 potential exposure to liability claims as a major source of concern and anxiety when engaged in  
21 disaster relief activities (see discussion above in the Prefatory Notes). Many trained volunteers  
22 may not serve at all if liability protections do not exist. In addition, fears of exposure to tort  
23 claims have often limited the extent of health services provided.

24  
25 Section 11 was drafted on the fundamental premise that all volunteer health practitioners  
26 responding to declared emergencies should be treated similarly, regardless of whether they are  
27 compensated state and local employees or private volunteers providing their services without  
28 charges to the host state. Coextensively, Section 11 seeks to ensure that all persons injured as a  
29 result of the negligent or criminal acts or omissions of volunteer health services in providing  
30 health services have some access to tort claims, regardless of whether they were treated by state  
31 or local employees or private sector volunteers.

32  
33 Subsection (a) of Section 11 provides two critical definitions of terms used only in the  
34 section (and not in other provisions of the UEVHPA), namely “coordinating entity” and “source  
35 entity.”

36  
37 A “coordinating entity” facilitates the deployment of volunteer health practitioners during  
38 an emergency. Its function(s) may entail coordination, referral, or transportation of volunteer  
39 health practitioners between the source and host entities, or it may simply deal with host entities.  
40 For example, a state ESAR-VHP program may serve as a coordinating entity during an  
41 emergency by helping to deploy volunteer health practitioners to a host entity. As well, non-  
42 entities (e.g., hospitals, charities, churches) may help facilitate the use of volunteer health  
43 practitioners, without actually hosting them, to provide health or veterinary services. The  
44 purpose for defining this term is to recognize the important role of coordinating entities in  
45 helping to provide registered volunteers during emergencies (thus limiting the potential for

1 spontaneous voluntarism) and extend to these entities liability protections pursuant to subsection  
2 (e).

3  
4 A “source entity” is an entity that employs or uses the services of volunteer health  
5 practitioners (during non-emergencies) authorized to provide health or veterinary services  
6 pursuant to this [act]. In other words, source entities are the existing employers of volunteer  
7 health practitioners, or the entity in which the practitioner typically provides health services in  
8 non-emergencies. Source entities may deploy volunteer health practitioners directly, or via a  
9 coordinating entity, to a host entity during an emergency. Source entities are not typically  
10 engaged in the oversight or management of volunteer health practitioners during a declared  
11 emergency and do not retain responsibility to verify the licensure status and good standing of the  
12 volunteers who provide health or veterinary services.

13  
14 Subsection (b) provides that volunteer health practitioners that are authorized to provide  
15 health or veterinary services pursuant to the UEVHPA are not responsible for the payment of a  
16 judgment based on their acts or omissions in providing the services and may not be named as  
17 defendants in an action based on such acts or omissions. As used in this section, health or  
18 veterinary services encompass the provision of services that provide a direct health benefit to  
19 individuals or human populations or to animals or animal populations. These services may also  
20 include health-related activities that allow for the efficient provision of health or veterinary  
21 services. Examples include assistance in patient care where support staff are unavailable (e.g.,  
22 transporting a patient in the immediate vicinity where health services are being provided), and  
23 other activities that may be outside the typical scope of health or veterinary services, but are still  
24 conducive to the provision of patient care. Health-related services are distinguishable from  
25 services that are of a nonhealth-related nature and afford no direct health benefit to individuals or  
26 populations (e.g., the operation of a non-emergency motor vehicle, administrative services).  
27 Whether a service is health-related or nonhealth-related will depend largely on the circumstances  
28 and consideration for whether the acts or omissions are integral to the provision of direct health  
29 benefits.

30  
31 Subsection (c) provides exceptions to the protections from liability provided to volunteer  
32 health practitioners under subsection (b). A volunteer health practitioner may be liable (1) for  
33 engaging in willful, wanton, grossly negligent, reckless, or criminal conduct, or for committing  
34 an intentional tort; (2) in an action for damages for breach of contract or an action brought by a  
35 source or host entity, other than for contracts related to the provision of health or veterinary  
36 services; and (3) for the operation of a motor vehicle or other craft for which the state requires  
37 the volunteer to hold a valid license or maintain liability insurance, other than an ambulance or  
38 other emergency response vehicle, vessel, or aircraft operated by a volunteer health practitioner  
39 responding to a request for health or veterinary services or transporting a patient. These  
40 exceptions may include situations in which a volunteer health practitioner exceeds the scope of  
41 practice requirements in the course of providing health or veterinary services. For example, a lab  
42 technician will be deemed to have exceeded the scope of practice of a similarly situated  
43 practitioner by performing surgery on an individual. A lack of education, training, and licensure  
44 will often be sufficient to constitute, at the very least, grossly negligent conduct pursuant to  
45 Subsection (c)(1). The fact that a volunteer practitioner exceeds the scope of practice, however,

1 does not of itself constitute conduct for which liability protection is unavailable.

2  
3 Subsection (c)(1) restates the common exceptions to liability protections found in many  
4 volunteer protection acts (and other acts for that matter). Thus, if a volunteer health practitioner  
5 acts in a willful, wanton, grossly negligent, or reckless way, engages in criminal conduct, or  
6 commits an intentional tort, the practitioner does not enjoy any protection from relevant liability  
7 claims brought against the practitioner stemming from this conduct.

8  
9 Subsection (c)(2)(A) exempts breaches of contract from the protection provided by  
10 subsection (b), other than for contracts related to the provision of health or veterinary services.  
11 At its core, subsection (b) provides protection for personal liability arising from the provision of  
12 health or veterinary services. It does not protect a volunteer health practitioner from liability for  
13 actions based in contract, except for contracts related to the provision of health or veterinary  
14 services. Thus, if a volunteer health practitioner executes a valid contract to provide health  
15 services, the obligations imposed by that contract during non-emergencies may only be avoided  
16 if there is a valid excuse under the law governing the contract. For example, in *Sullivan v.*  
17 *O'Connor*, 363 Mass. 579, 296 N.E. 2d 183 (Mass. 1973), a doctor was found by a jury to have  
18 promised a particular result and was held liable for breach of contract even though the jury  
19 determined that he had not committed malpractice. As constructed, Subsection (c)(2)(A)  
20 provides protection to the doctor for the contract claim, but not for contractual obligations  
21 unrelated to the provision of health or veterinary services.

22  
23 Subsection (c)(2)(B) provides that a volunteer health practitioner is not afforded civil  
24 liability protection for an action brought by a source or host entity. This section is meant to  
25 ensure that direct claims against a volunteer health practitioner by a source or host entity are not  
26 foreclosed simply because the person is acting as a volunteer. It provides an avenue for source  
27 and host entities to seek redress against a volunteer health practitioner for misconduct that may  
28 not necessarily have a direct health effect on individuals or populations. Examples may include  
29 mismanagement of materials during a response effort or conversion of property or goods  
30 provided for the sole purpose of distribution to affected individuals or populations of an  
31 emergency. Such claims by the source or host entity against the volunteer health practitioner are  
32 allowed pursuant to Subsection (c)(2)(b) [and Subsection (c)(1) if the volunteer's actions  
33 constitute a crime or other willful misconduct]. Subsection (c)(2)(b) is not intended, however, to  
34 be an avenue for third-party claims that might indirectly expose the practitioner to the type of  
35 liability for which subsection (b) is intended to provide protection. For example, a plaintiff  
36 might file a claim against a hospital (as a host entity) for negligent supervision of a volunteer  
37 health practitioner. In response, the hospital might file a third-party claim against the  
38 practitioner. So long as the practitioner's conduct was not within Subsection (c), the practitioner  
39 would not be liable to the hospital.

40  
41 Section (c)(2)(C) exempts civil liability protections for injuries resulting from the  
42 operation of a non-emergency vehicle for which the host state requires the operator to hold a  
43 valid operator's license or maintain liability insurance, other than an ambulance or other  
44 emergency response vehicle, vessel, or aircraft operated by a volunteer health practitioner  
45 responding to a request for health or veterinary services or transporting a patient. This provision

1 is consistent with federal statutes that provide certain exceptions to civil liability protections  
2 afforded to volunteers (e.g., the federal Volunteer Protection Act, 42 U.S.C.S. § 14503(a)(4)).  
3 The intent is to preclude liability protections for actions of volunteer health practitioners that are  
4 outside their scope of responsibilities as volunteers. Thus, a volunteer health practitioner driving  
5 an ambulance or other emergency vehicle transporting patients to a triage site is acting within the  
6 scope of his responsibilities, and may not be found liable for injuries resulting from a vehicular  
7 accident (provided he did not act willfully or engage in other misconduct). The same practitioner  
8 who finishes a shift as a volunteer at a host entity and has a vehicular accident driving across  
9 town later that evening to eat out at a restaurant is liable for damages caused by the negligent  
10 operation of the vehicle.

11  
12 Subsection (d) provides vicarious liability protection for source, coordinating, and host  
13 entities for acts or omissions of their volunteer health practitioners. These entities are often  
14 concerned about their potential liability in the deployment or use of volunteer health practitioners  
15 during emergencies. To alleviate these concerns and thereby facilitate the full use of volunteer  
16 health practitioners, Subsection (d) provides comprehensive protection from vicarious liability.  
17 As discussed below, such protections are consistent with the legal nature of vicarious liability.

18  
19 Vicarious civil liability applies when an employer is responsible for the torts of its  
20 employees or agents, despite the fact that the employer itself may not have engaged in any  
21 negligent activities. Liability under this doctrine can attach pursuant to the theories of  
22 respondeat superior and ostensible agency.

23  
24 Respondeat superior provides for vicarious liability when a negligent health provider is  
25 an employee or an agent of an entity and has acted in the course of the employment. The theory  
26 presumes that the employer has control over, and is therefore responsible for the acts of, its  
27 employees. The extent of civil liability in such circumstances depends on the level of control  
28 exerted by the employer over the actions of the employee. In most jurisdictions, the employer  
29 will only be liable for acts of the employee undertaken within the scope of employment.  
30 Hospitals, for example, may be held liable for the acts of nurses, residents, interns, and certain  
31 behavioral health professionals since these health practitioners are often considered employees.  
32 Similarly, a physician who exercises control and authority over other health practitioners (e.g.,  
33 nurses, supporting staff, etc.) can be held liable for their negligence. In one case, a surgeon was  
34 vicariously liable for an error in a sponge count performed by the nursing staff after surgery,  
35 although the surgeon did not participate in the count. *Johnson v. Southwest Louisiana Ass'n*, 693  
36 So.2d 1195 (La.Appl.1997) (holding that the surgeon had a nondelegable duty to remove  
37 sponges from the patient's body).

38  
39 The primary issue in applying respondeat superior is whether an individual is a servant  
40 (e.g., employee) subject to the control of the master (e.g., employer), or an independent  
41 contractor. The employer's right to control is what distinguishes an employee from an  
42 independent contractor. Typically, entities are not held liable for the negligent actions of  
43 independent contractors. Therefore, during an emergency, a hospital would not be vicariously  
44 liable for the acts or omissions of a volunteer health practitioner that provides health services to  
45 individuals or populations within the hospital provided that the volunteers were looked upon as

1 independent contractors (and not as agents) of the hospital.

2  
3 The theory of ostensible (or apparent) agency imputes liability to entities where (1) the  
4 patient looks to the entity rather than the individual health practitioner to provide care, and (2)  
5 the entity holds the health practitioner out as its employee. Civil liability under the theory of  
6 ostensible agency is particularly relevant in emergency situations. When a patient enters the  
7 emergency room, he generally looks to the institution to provide him with care and has no  
8 knowledge of the nature of the employment relationship between the physician and the hospital.  
9 Moreover, by permitting the physician to practice in the emergency room, the hospital is holding  
10 out that individual as its employee. This scenario may not be applicable during an emergency  
11 for a number of reasons. First, the host entity is not expected to exert the same degree of control  
12 over the health practitioner tantamount to the normal operations of an emergency room. Also,  
13 volunteer health practitioners are not agents of an entity where no employment relationship  
14 exists between the entity and the practitioners, and where they are not presented as providing  
15 health services pursuant to a legal obligation (e.g., a duty to perform under a contract).

16  
17 Subsection (e) clarifies that source, coordinating, and host entities are not liable for civil  
18 damages for acts or omissions relating to the operation or use of, or reliance upon information  
19 provided by, a registration system. This provision supports the essential roles of these entities in  
20 the operation and use of registration systems and the critical need for these systems to effectively  
21 respond to emergencies. Provided that the acts or omissions that may lead to liability do not  
22 constitute an intentional tort or are not willful, wanton, grossly negligent, reckless, or criminal in  
23 nature, entities shall not be civilly liable.

24  
25 Subsection (f) provides protections for individuals injured by acts or omissions of  
26 volunteer health practitioners by providing that the state will compensate the individuals for  
27 injuries suffered to the same extent that the state would be liable for the actions of state  
28 employees under state tort claims acts. This subsection is intended to authorize an action to  
29 recover damages solely against the state. It does not authorize a right of indemnification by the  
30 state against the volunteer health practitioner or the filing of any action directly against the  
31 volunteer practitioner to the extent otherwise prohibited or restricted by this section.

## 32 33 34 **SECTION 12. WORKERS' COMPENSATION COVERAGE.**

### 35 **Option A**

36 A volunteer health practitioner who is providing health or veterinary services in this state  
37 pursuant to this [act], or who is traveling to or from this state to provide such services, shall be  
38 considered an employee of this state for purposes of workers' compensation coverage concerning  
39 any injury or death incurred in traveling or providing the services. Workers' compensation

benefits for volunteer health practitioners are limited to those benefits provided to state employees under the laws of this state.

### **Option B**

A volunteer health practitioner who is providing health or veterinary services in this state pursuant to this [act], or who is traveling to or from this state to provide such services, and who is not otherwise covered by workers' compensation insurance shall be considered an employee of this state for purposes of workers' compensation coverage concerning any injury or death incurred in traveling or providing services. Workers' compensation benefits for volunteer health practitioners are limited to those benefits provided to state employees under the laws of this state.

### **Option C**

A volunteer health practitioner who is providing health or veterinary services in this state pursuant to this [act], or who is traveling to or from this state to provide such services, and who is not otherwise covered by workers' compensation insurance shall be considered an employee of this state for purposes of any medical workers' compensation benefits concerning any injury incurred in traveling or providing the services. Benefits for volunteer health practitioners are limited to those medical benefits provided to state employees as part of their workers' compensation benefits under the laws of this state.

### **Comment**

Section 12 sets forth three options for providing workers compensation coverage to volunteer health practitioners. Workers' compensation is a no-fault system that provides an expeditious resolution of work-related claims. Injured workers relinquish their right to bring an action against employers in exchange for fixed benefits. This social welfare system is convenient to the employer by allowing for a predictable and estimable award. It is also in the interests of the workers since they are not required to demonstrate who is at fault; rather, a worker must only demonstrate that the injury suffered arose out of or in the course of employment. Workers' compensation programs thus protect employees from the harms (or deaths) they incur in the scope of their services. However, most workers' compensation systems

1 have a major limitation: they do not typically cover the activities of volunteers (namely because  
2 they are not defined as “employees,” or are acting outside the scope of their employment when  
3 volunteering).

4  
5 Over 40 states have statutorily extended workers’ compensation coverage to emergency  
6 volunteers, principally through emergency or public health emergency laws. Emergency System  
7 for Advance Registration of Volunteer Health Professionals (ESAR-VHP) – Legal and  
8 Regulatory Issues, Presentation prepared by the *Center for Law and the Public’s Health at*  
9 *Georgetown and Johns Hopkins Universities* for the Department of Health and Human Services,  
10 Health Resources and Services Administration. This coverage, however, may be limited to, for  
11 example, public sector volunteers, volunteers who are responding solely at the bequest of a state  
12 or local government, or volunteers working under the close direction of state or local  
13 governments in other jurisdictions. Alaska, for example, provides that any resident engaged as a  
14 civilian volunteer in an emergency or disaster relief function in another state or country who  
15 suffers injury or death while providing emergency or disaster relief services is considered an  
16 employee of the state. A.S. § 23.30.244(a). Consistent with Options B and C noted above,  
17 coverage does not extend to volunteers who are otherwise covered by an employer’s workers’  
18 compensation insurance policy or self-insurance certificate. A.S. § 23.30.244(a)(3).

19  
20 Who may constitute a “volunteer” varies from state to state, and may not include private  
21 sector volunteer health practitioners. For example, workers’ compensation coverage is provided  
22 in Kentucky pursuant to its mutual aid agreements with other states. Such protections extend to  
23 emergency management personnel (paid or volunteer) working for the state or local government.  
24 K.R.S. § 39A.260(3)-(4). Similarly, in Utah, volunteer health practitioners deemed government  
25 (i.e. public sector) employees would receive workers’ compensation medical benefits as the  
26 exclusive remedy for all injuries suffered. U.C.A. 1953 § 67-20-3(1)(a). In these states, coverage  
27 is thus limited to public sector employees working for the state or local governments. There is  
28 no indication that these protections would be afforded private sector volunteers. In sum, whether  
29 workers’ compensation coverage for emergency volunteers under state emergency or public  
30 health emergency law extends to volunteer health practitioners as defined in the UEVHPA varies  
31 across jurisdictions.

32  
33 Section 12 provides clearer avenues of redress for injuries incurred by volunteer health  
34 practitioners providing health or veterinary services during an emergency. Although volunteer  
35 health practitioners are not “employees” in the traditional sense, they may be exposed to many of  
36 the same risks of harm that are faced by employees of the host entity, state or local governments,  
37 or other employers in the course of providing health or veterinary services during an emergency.

38  
39 Each of the Options A, B, and C treat volunteer health practitioners as employees of the  
40 host state for purposes of workers’ compensation claims. This approach has the advantage of  
41 treating all volunteers equally and avoiding difficult issues associated with determining whether  
42 and to what extent the workers’ compensation systems of source states provide coverage for  
43 volunteers. While superficially this approach may appear to expose host states to greater costs,  
44 expenses associated with paying workers’ compensation claims of this type during declared  
45 emergencies may potentially be submitted for federal reimbursement under the federal Robert T.



1 Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5206 (2002). In  
2 addition, by treating all volunteers as employees of the host state, Options A-C avoid potential  
3 tort claims being asserted against the state such as those currently being litigated in the  
4 consolidated World Trade Center Disaster Site Litigation. In this case, more than 3,000 recovery  
5 workers have sought to recover damages from the City of New York and the Port Authority on  
6 the grounds that the defendants failed to properly enforce site safety standards relating to the use  
7 of respirators. On October 17, 2006, Judge Alvin Hellerstein of the Southern District of New  
8 York denied preliminary objections seeking to dismiss these claims on the grounds that the  
9 defendants were immune from the claims under various disaster management laws and as agents  
10 of governmental authorities entitled to assert governmental immunity. By expressly treating  
11 volunteer health practitioners as state employees and applying workers compensation laws to  
12 such employees, Options AC may preclude the future assertion of such claims if brought by  
13 volunteer health practitioners, while guaranteeing injured volunteers access to health care and  
14 compensation for lost wages and earning capacity.

15  
16 Option A is based upon the laws of several states that require the state government to  
17 provide some coverage for the actions of volunteer health practitioners. For example, Wisconsin  
18 extends the definition of “employee” for workers’ compensation purposes to include all  
19 “emergency management workers” even if they are volunteers, provided they have registered  
20 with the state’s emergency management program. Wis. Stat. §§ 102.07, 166.03 & 166.215.  
21 Connecticut, Illinois and Ohio provide similar protections to volunteers responding to  
22 emergencies. Conn. Gen. Stat. §§ 28-1, 28-14; 20 Ill. Comp. Stat. 3305/10; Ohio Rev. Code  
23 Ann. §§ 4123.01 & 4122.033. Similarly, Washington State provides workers’ compensation  
24 coverage to volunteer emergency workers while registered with an approved emergency  
25 management organization if injured in the course of performing volunteer duties. Wash. Admin.  
26 Code 118-04-080; Maryland provides similar protections to civil defense workers. Md. Labor  
27 and Employment, § 9-232. Minnesota provides workers’ compensation coverage to any  
28 volunteer registered with state or local government agencies. Minn. Stat. § 12.22, subd. 2a.

29  
30 Option B provides that the host state must afford workers’ compensation coverage to  
31 volunteer health practitioners that are not covered by workers’ compensation insurance or other  
32 comparable coverage during their deployment. Under this option, a volunteer health practitioner  
33 that has no other source of insurance for work-related injuries or death is entitled to the same  
34 workers’ compensation benefits as employees of the state. Accordingly, the host state’s law  
35 governs the grant of any workers’ compensation award to a volunteer and determines whether an  
36 employer, rather than the state, is mandated to provide workers’ compensation coverage. This  
37 section is not intended to supplant the workers’ compensation benefits that would otherwise be  
38 available to volunteer health practitioners provided by an entity or other person in the host state  
39 or the state from where they were deployed. Some employers, for example, may extend their  
40 workers’ compensation benefits to their employees who choose to volunteer outside the  
41 employer workplace during an emergency. In addition, some state laws may mandate workers’  
42 compensation coverage for individuals even when providing voluntary service away from their  
43 regular place of employment. Option B is only meant to afford workers’ compensation coverage  
44 when no other coverage applies and is not intended to allow redress for volunteer health  
45 practitioners who may attempt to circumvent the exclusive remedy provisions of workers’

1 compensation to pursue tort suits against a host entity.

2  
3 Option C is similar to Option B, but provides coverage only for the costs of medical care.  
4 Option C is based upon provisions of Texas statutory law that provides medical benefits, but not  
5 lost wages or disability benefits, for injuries sustained by volunteers not otherwise provided with  
6 workers' compensation benefits. Tex. Lab. Code, § 501.026. The purpose of Option C is to  
7 provide states with an option of providing some limited workers' compensation benefits for  
8 volunteer health practitioners so as to better control for potential costs. In short, to the extent  
9 that Option C provides limited workers' compensation benefits to volunteers, it may be more  
10 economical for states considering their potential actuarial risks. It may also, however, present a  
11 less favorable legal environment to attract skilled volunteer health practitioners to assist during  
12 emergencies as contrasted with Options A or B.