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FOR DISCUSSION ONLY

UNIFORM EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

RESERVED SECTIONS 11 AND 12
March 2007 Drafting Committee Meeting Draft

With Prefatory Note and Comments

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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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, the 2006 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.

An Interim Draft was circulated for comment on January 8, 2007. The January 2007 Interim Draft presented a modified and somewhat improved version of Option A as presented in the September 2006 Discussion Draft. The Interim Draft was extensively discussed at the mid-year meetings of the American Trial Lawyers Association (recently re-named the American Justice Association) and at the mid-year meeting of the Torts and Insurance Practice Section of the American Bar Association. Comments regarding the Interim Draft focused on two separate issues. Some commentators objected to the provision of any liability limitations that exceed the scope of the Federal Volunteer Protection Act, while other commentators supported the scope of protection provided by the Interim Draft, but objected to provisions making host states responsible for negligence claims to the extent provided by state tort claims laws. Because of these comments, this draft presents two alternative versions of civil liability limitations. One approach mirrors the protections provided by the Federal Tort Claims Act, while the other provides a scope of coverage similar to the January Discussion Draft, but eliminates provisions making host states responsible for negligence claims.

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, which were circulated for comment in the January 2007 Interim Draft 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).

Most commentators reviewing the January 2007 Interim Draft generally supported the option of treating volunteers as employees of host states, subject to the right of volunteers to elect alternative forms of coverage that may otherwise be available, rather than making one source of protection primary to the other as a matter of law. This draft follows the consensus of recommendations received concerning the January 2007 Interim Draft.

SECTION 11. CIVIL LIABILITY FOR VOLUNTEER HEALTH PRACTITIONERS; VICARIOUS LIABILITY.

(a) In this section:

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

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

(b) A source, coordinating, or host entity is not liable for civil damages for acts or omissions relating to the operation or use of, or reliance upon information provided by, a registration system unless the acts or omissions constitute an intentional tort or are willful, wanton, grossly negligent, reckless, or criminal in nature.

(c) A source, coordinating, or host entity is not vicariously liable for acts or omissions of volunteer health practitioners undertaken pursuant to this [act] and within the scope of their responsibilities as volunteer health practitioners to the extent the practitioners are not liable for their acts and omissions as provided by this section.

(d) This section does not limit the liability of a volunteer health practitioner:

(1) for willful, wanton, grossly negligent, reckless, or criminal conduct;

(2) for an intentional tort;

(3) for damages for breach of contract not related to providing health or

veterinary services pursuant to this [act];

(4) by a source or host entity; or

(5) relating to the operation by the practitioner of a motor vehicle, vessel, aircraft, or other vehicle for which this state requires the operator to have a valid operator's license or to maintain liability insurance, other than an ambulance or other emergency response vehicle, vessel, or aircraft operated by the practitioner while responding to a request to provide health or veterinary services or transporting a patient pursuant to this [act].

ALTERNATIVE A

(e) Subject to subsection (d), a volunteer health practitioner who provides health or veterinary services pursuant to this [act] is not liable for civil damages for an act or omission within the scope of the practitioner's responsibilities.

ALTERNATIVE B

(e) Subject to subsection (d), a volunteer health practitioner who does not receive compensation in excess of [$1,000] for health or veterinary services provided pursuant to this [act] is not liable for civil damages for an act or omission within the scope of the practitioner's responsibilities. Reasonable reimbursement or allowance for expenses actually incurred does not constitute compensation under this subsection.

Comment

All states through the adoption of EMAC have accepted the dual propositions that (1) governmental health practitioners providing interstate assistance in responding to declared emergencies should enjoy limited protections from tort liability; and (2) persons injured by governmental health practitioners should have some reasonable ability to pursue tort claims to redress their injuries suffered as a result of acts of professional malpractice. Article VI of EMAC provides that officers or employees of a party state rendering aid in another state pursuant to the compact are considered "agents of the requesting state" for tort liability and immunity purposes and provides that "no party state or its officers or employees rendering aid in another state pursuant to [the] compact shall be liable on account of any act or omission in good

faith on the part of such forces while so engaged or on account of the maintenance or use of any equipment or supplies in connection therewith." The compact defines "good faith" to not include "willful misconduct, gross negligence, or recklessness." These provisions of EMAC generally apply, however, only to state employees deployed on an interstate basis in response to declared emergencies. While some states have expanded these protections to local government employees incorporated into "state forces" pursuant to mutual aid agreements, with very limited exceptions private sector volunteers and disaster relief organizations do not enjoy the same protections and privileges provided by EMAC.

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

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

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

A "source entity" is an entity that employs or uses the services of volunteer health practitioners (during non-emergencies) authorized to provide health or veterinary services pursuant to this [act]. In other words, source entities are the existing employers of volunteer health practitioners, or the entity in which the practitioner typically provides health services in non-emergencies. Source entities may deploy volunteer health practitioners directly, or via a coordinating entity, to a host entity during an emergency. Source entities are not typically engaged in the oversight or management of volunteer health practitioners during a declared

emergency and do not retain responsibility to verify the licensure status and good standing of the volunteers who provide health or veterinary services.

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

Subsection (c) provides vicarious liability protection for source, coordinating, and host entities for acts or omissions of their volunteer health practitioners to the extent volunteers are immune from claims as provided by Alternative A or B or subsection (e). While under the law of most jurisdictions vicarious liability does not apply to volunteers and does not apply to claims against employees immune from claims, these entities are nonetheless often concerned about their potential liability in the deployment or use of volunteer health practitioners during emergencies. To alleviate these concerns and thereby facilitate the full use of volunteer health practitioners, Subsection (c) provides comprehensive protection from vicarious liability. As discussed below, such protections are consistent with the legal nature of vicarious liability.

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

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

The primary issue in applying respondeat superior is whether an individual is a servant (e.g., employee) subject to the control of the master (e.g., employer), or an independent contractor. The employer's right to control is what distinguishes an employee from an independent contractor. Typically, entities are not held liable for the negligent actions of

independent contractors. Therefore, during an emergency, a hospital would not be vicariously liable for the acts or omissions of a volunteer health practitioner that provides health services to individuals or populations within the hospital provided that the volunteers were looked upon as independent contractors (and not as agents) of the hospital.

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

Subsection (d) provides exceptions to the protections from liability provided to volunteer health practitioners under subsection (e). The provisions of subsection (d) are based upon comparable provisions of the federal Volunteer Protection Act. 42 U.S.C. § 14503(a)(3) & (4). A volunteer health practitioner may be liable (1) for engaging in willful, wanton, grossly negligent, reckless, or criminal conduct, or for committing an intentional tort; (2) in an action for damages for breach of contract or an action brought by a source or host entity, other than for contracts related to the provision of health or veterinary services; and (3) for the operation of a motor vehicle or other craft for which the state requires the volunteer to hold a valid license or maintain liability insurance, other than an ambulance or other emergency response vehicle, vessel, or aircraft operated by a volunteer health practitioner responding to a request for health or veterinary services or transporting a patient. These exceptions may include situations in which a volunteer health practitioner exceeds the scope of practice requirements in the course of providing health or veterinary services. For example, a lab technician will be deemed to have exceeded the scope of practice of a similarly situated practitioner by performing surgery on an individual. A lack of education, training, and licensure will often be sufficient to constitute, at the very least, grossly negligent conduct pursuant to Subsection (d)(1). The fact that a volunteer practitioner exceeds the scope of practice, however, does not of itself constitute conduct for which liability protection is unavailable.

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

Subsection (d)(2)(A) exempts breaches of contract from the protection provided by

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

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

Section (d)(2)(C) exempts civil liability protections for injuries resulting from the operation of a non-emergency vehicle for which the host state requires the operator to hold a valid operator's license or maintain liability insurance, other than an ambulance or other emergency response vehicle, vessel, or aircraft operated by a volunteer health practitioner responding to a request for health or veterinary services or transporting a patient. The intent is to preclude liability protections for actions of volunteer health practitioners that are outside their scope of responsibilities as volunteers. Thus, a volunteer health practitioner driving an ambulance or other emergency vehicle transporting patients to a triage site is acting within the scope of his responsibilities, and may not be found liable for injuries resulting from a vehicular accident (provided he did not act willfully or engage in other misconduct). The same practitioner who finishes a shift as a volunteer at a host entity and has a vehicular accident driving across town later that evening to eat out at a restaurant is liable for damages caused by the negligent operation of the vehicle.

Two alternative versions of the liability limitations are provided by subsection (e). Alternative A is similar to the January 2007 Interim Draft, but eliminates provisions making host states liable for negligence claims. Alternative B parallels the limitations on liability provided by the federal Volunteer Protection Act. 42 U.S.C. § 14501 et seq.

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

Alternative A was drafted on the fundamental premise that all volunteer health practitioners responding to declared emergencies should be treated similarly, regardless of whether they are compensated state and local employees or private volunteers providing their services without charges to the host state.

Alternative B is intended to ensure that the protections provided by the federal Volunteer Protection Act clearly apply to volunteer health practitioners practicing in a state pursuant to this Act. The federal law provides that 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 if the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission. 42 U.S.C. § 14503(a). The protections provided by the federal law, however, only apply to volunteers who are “properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred” and who practice “within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity.” Under current law, significant issues may arise about whether an out-of-state practitioner is “properly licensed, certified, or authorized by the appropriate authorities” of a state. Likewise, under current law, when a volunteer is dispatched by a nonprofit organization or government entity and practices in a health clinic or facility operated during a disaster by another host entity, questions may arise about whether the volunteer is “acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity.” Alternative B of subsection (e) is intended to eliminate any such uncertainty.

SECTION 12. WORKERS' COMPENSATION COVERAGE.

(a) In this section:

(1) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(2) "Sign" means, with present intent to authenticate or adopt a record:

(i) to execute or adopt a tangible symbol; or

(ii) to attach to or logically associate with the record and electronic sound, symbol, or process.

(b) Unless subsection (c) applies, a volunteer health practitioner is deemed to be an employee of this state for purposes of workers' compensation coverage under [insert reference to state workers' compensation statute] for:

(1) injury to the practitioner which occurs while the practitioner is providing health or veterinary services in this state pursuant to this [act];

(2) the practitioner's death resulting from an injury described in paragraph (1); or

(3) injury to or death of the practitioner that occurs while the practitioner is traveling to or within this state to provide the services or from this state immediately after providing the services.

(c) A volunteer health practitioner who is licensed and in good standing in this state[, normally renders the principal part of the practitioner's services in this state,] and provides or travels for the purpose of providing health or veterinary services in another state pursuant to a law of that state that is substantially similar to Section 6(a) of this [act] may elect to receive workers' compensation benefits otherwise available to the individual under the law of this state or to be treated as an employee of this state for purposes of workers' compensation coverage

under [insert reference to state workers' compensation statute] for:

(1) injury to the practitioner which occurs while the practitioner is providing health or veterinary services in the other state pursuant to the law of the other state;

(2) the practitioner's death resulting from an injury described in paragraph (1); or

(3) injury to or death of the practitioner that occurs while the practitioner is traveling to or within the other state to provide the services or from the other state immediately after providing the services.

(d) To elect to receive workers' compensation benefits otherwise available under the law of this state or be treated as an employee of this state for purposes of workers' compensation coverage as provided in subsection (c), a volunteer health practitioner must send notice of the election in a signed record to the [Director of the Department of Industrial Relations] before the employee provides or travels for the purpose of providing health or veterinary services in the other state.

Comment

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

Over 40 states have statutorily extended workers' compensation coverage to emergency volunteers, principally through emergency or public health emergency laws. Emergency System for Advance Registration of Volunteer Health Professionals (ESAR-VHP) – Legal and Regulatory Issues, Presentation prepared by the *Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities* for the Department of Health and Human Services, Health Resources and Services Administration. This coverage, however, may be limited to, for

example, public sector volunteers, volunteers who are responding solely at the bequest of a state or local government, or volunteers working under the close direction of state or local governments in other jurisdictions. Alaska, for example, provides that any resident engaged as a civilian volunteer in an emergency or disaster relief function in another state or country who suffers injury or death while providing emergency or disaster relief services is considered an employee of the state. A.S. § 23.30.244(a). Coverage does not extend to volunteers who are otherwise covered by an employer's workers' compensation insurance policy or self-insurance certificate. A.S. § 23.30.244(a)(3).

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

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

Section 12 treats volunteer health practitioners as employees of the host state for purposes of workers' compensation claims. This approach has the advantage of treating all volunteers equally and avoiding difficult issues associated with determining whether and to what extent the workers' compensation systems of source states provide coverage for volunteers. While superficially this approach may appear to expose host states to greater costs, expenses associated with paying workers' compensation claims of this type during declared emergencies may potentially be submitted for federal reimbursement under the federal Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5206 (2002). In addition, by treating all volunteers as employees of the host state, section 12 avoids potential tort claims being asserted against the state such as those currently being litigated in the consolidated World Trade Center Disaster Site Litigation. In this case, more than 3,000 recovery workers have sought to recover damages from the City of New York and the Port Authority on the grounds that the defendants failed to properly enforce site safety standards relating to the use of respirators. On October 17, 2006, Judge Alvin Hellerstein of the Southern District of New York denied preliminary objections seeking to dismiss these claims on the grounds that the defendants were immune from the claims under various disaster management laws and as agents of governmental authorities entitled to assert governmental immunity. By expressly treating

volunteer health practitioners as state employees and applying workers compensation laws to such employees, Options AC may preclude the future assertion of such claims if brought by volunteer health practitioners, while guaranteeing injured volunteers access to health care and compensation for lost wages and earning capacity.

Section 12 is based upon the laws of several states that require the state government to provide some coverage for the actions of volunteer health practitioners. For example, Wisconsin extends the definition of "employee" for workers' compensation purposes to include all "emergency management workers" even if they are volunteers, provided they have registered with the state's emergency management program. Wis. Stat. §§ 102.07, 166.03 & 166.215. Connecticut, Illinois and Ohio provide similar protections to volunteers responding to emergencies. Conn. Gen. Stat. §§ 28-1, 28-14; 20 Ill. Comp. Stat. 3305/10; Ohio Rev. Code Ann. §§ 4123.01 & 4122.033. Similarly, Washington State provides workers' compensation coverage to volunteer emergency workers while registered with an approved emergency management organization if injured in the course of performing volunteer duties. Wash. Admin. Code 118-04-080; Maryland provides similar protections to civil defense workers. Md. Labor and Employment, § 9-232. Minnesota provides workers' compensation coverage to any volunteer registered with state or local government agencies. Minn. Stat. § 12.22, subd. 2a.

Because some volunteers may be employees otherwise eligible for workers' compensation benefits, section 12 gives employees the option of either being treated as employees of the host state or electing coverage otherwise available through their employer. The later alternative may be preferable from the perspective of wage indemnity benefits and may also provide more complete healthcare benefits than may be available under a host state's workers' compensation law.

SECTION 14. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., except that nothing in this [act] modifies, limits, or supersedes Section 7001(c) of that Act or authorizes electronic delivery of any of the notices described in Section 7003(b) of that Act.

SECTION 15. REPEALS.