

DRAFT
FOR DISCUSSION ONLY

UNIFORM EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

RESERVED SECTIONS 11 AND 12

With Prefatory Note, Reporter's Notes, and Comments

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ON UNIFORM STATE LAWS

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June 14, 2007

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UNIFORM EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT

TABLE OF CONTENTS

Prefatory Note	1
Reporter's Notes	3
SECTION 11. CIVIL LIABILITY FOR VOLUNTEER HEALTH PRACTITIONERS; VICARIOUS LIABILITY	7
SECTION 12. WORKERS' COMPENSATION COVERAGE.....	15

UNIFORM EMERGENCY VOLUNTEER HEALTH SERVICES ACT

Prefatory Note

On July 13, 2006, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Emergency Volunteer Health Practitioners Act (UEVHPA). The UEVHPA promotes the establishment of a robust and redundant system to efficiently facilitate the deployment and use of licensed volunteer health practitioners to provide health and veterinary services in response to declared emergencies. The 2006 version of the UEVHPA includes provisions to (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 volunteer 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. Hodge, JG, Pepe, RP, Henning, WH. Voluntarism in the wake of Hurricane Katrina: The Uniform Emergency Volunteer Health Practitioners Act. *AMA Journal of Disaster Medicine and Public Health Preparedness* 2007; 1:1 44-50.

While adoption of the 2006 act will assist states in more effectively responding to future emergencies through the use of volunteers, two important topics were reserved for further consideration: (1) whether and to what extent volunteer health practitioners and entities deploying and using them are responsible for claims based on a practitioner's act or omission in providing health or veterinary services (Section 11); and (2) whether volunteer health practitioners should receive workers' compensation benefits in the event of injury or death while providing such services (Section 12).

The risk of exposure to liability for malpractice and the availability of workers' compensation benefits are matters of significant concern to all health practitioners. These issues, however, are particularly important to volunteers providing health or veterinary services amidst challenging and sub-optimal conditions during emergencies. During emergencies, health practitioners need to provide services without access to the resources that are customarily available. They may also have to practice outside their usual fields of expertise and be unable to take all actions reasonably necessary to treat individual patients because of the greater public health need to efficiently allocate scarce health care resources and reduce overall rates of morbidity and mortality. Practitioners face greater risks of physical and psychology injuries and death when providing services in emergency settings. In these circumstances, uncertainty regarding interstate variations in expected standards of care, limits of liability, and the availability of workers' compensation coverage may deter qualified practitioners from participating in emergency responses.

Even if practitioners are willing to serve, entities may be inhibited in deploying or using them by their own liability concerns. The American Red Cross (ARC) deploys thousands of volunteers each year in response to public health or other emergencies. In its pandemic flu planning guidance, the ARC states "[w]e are not able to commit Red Cross volunteers to local public health overflow facilities without appropriate worker protections, including *liability coverage and workers safety measures*." (emphasis added). American Red Cross. Pandemic

Influenza Planning Guidance: Update on Worker Safety; Additional Mass Care Planning Tools (2007). Following Hurricanes Katrina and Rita, the Medical Reserve Corps also reported that health professionals deployed to Red Cross shelters were unable to provide more than basic health services to shelter residents because of liability concerns. Medical Reserve Corps Response to the 2005 Hurricanes; Final Report, March 13, 2006; 18.

Many existing laws at the federal and state levels recognize the need to provide some liability protections or workers' compensation benefits for volunteers. All 50 states have entered into the Emergency Management Assistance Compact (EMAC) which provides immunity from negligence based liability claims to state and certain local government employees deployed by one state to another in response to disasters and emergencies. All states have also enacted an array of Good Samaritan Laws to protect spontaneous volunteers at the scene of local emergencies. Many other states have also granted immunities to other individuals, groups, and organizations engaged in disaster relief and civil defense activities. Unfortunately, the applicability of these laws to volunteer health practitioners as defined by the UEVHPA is often unclear, leading to a confusing patchwork of legal protections for volunteers in limited settings. Hodge, JG, Gable, LA, Calves, S. Volunteer health professionals and emergencies: Assessing and transforming the legal environment. *Biosecurity and Bioterrorism* 2005; 3:3: 216-223.

Underlying current liability protections are competing, legitimate interests. Volunteer health practitioners and the entities that deploy and use them must have appropriate inducements to provide services during emergencies without excessive concerns over liability. At the same time, persons receiving health services have an expectation of reasonable compensation for harms resulting from negligence. After extensive consultation, fact-finding, and discussion, the UEVHPA Drafting Committee concluded that without some liability protections, a significant risk exists that skilled, registered practitioners will be deterred from volunteering in emergencies and that adequate health services needed to reduce morbidity and mortality within affected populations may not be available.

This Act provides for some level of liability protection for volunteer health practitioners and the entities that use or deploy them in each adopting state under three increasingly robust sets of protections. The Act defers to individual States as to how much protection from liability should be provided. It provides three alternatives with respect to the degree of liability protection to be provided in recognition of the fact that existing empirical data are generally unavailable upon which to make firm judgments regarding (1) the actual impact of liability concerns upon rates of volunteerism; and (2) whether and to what extent volunteers have actually been subject to liability claims. By recommending that States select between one of three alternatives regarding the scope of liability protection, the Act endorses the concept that States should clearly define the scope of liability protections for volunteer health practitioners to reduce risk and uncertainty.

Section 11, Alternative A presents a clear statement of liability protection for individual practitioners and also insulates the entities that deploy and use them from vicarious liability for their acts or omissions in providing health or veterinary services pursuant to the UEVHPA. Alternative B insulates practitioners from the consequences of their acts or omissions, substituting the state instead under its tort claims act. It also provides for protection from

vicarious liability to all persons other than the state. Alternative C extends the protections provided to uncompensated volunteers by the federal Volunteer Protection Act, 42 U.S.C. § 14501 et seq., to uncompensated volunteer health practitioners under the UEVHPA. This Alternative does not address vicarious liability, leaving the matter to existing state law.

For each Alternative in Section 11, specific actions of volunteers are excluded from liability protections, including intentional torts or willful misconduct or wanton, grossly negligent, reckless, or criminal conduct. In addition, each alternative provides some liability protection for persons that operate, use, or rely upon information provided by a volunteer health practitioner registration system.

Concerning workers' compensation, after similar consultation, fact-finding, and discussion, the UEVHPA Drafting Committee concluded that as a last resort some level of workers' compensation protections should be provided to volunteers by each state adopting the UEVHPA. Thus, Section 12 provides that a volunteer health practitioner who provides health or veterinary services pursuant to the UEVHPA and who is not otherwise entitled to workers' compensation or similar benefits under the laws of any state, including the host state, are entitled to the same workers' compensation or similar benefits as employees of the host state. This includes medical benefits for physical or mental injury and benefits for loss of earnings, provided these benefits would be available to an employee of the host state.

Reporter's Notes

Numerous anecdotal accounts of how liability or workers' compensation issues limited volunteer participation arose, for example, during national and state responses to Hurricanes Katrina and Rita 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 focused on these key issues in the Fall, 2006. APHA requested over 10,000 of its members, including hundreds of licensed health practitioners, to complete the online, confidential survey.

Though subject to additional verification, the initial survey results provide new 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.

Initial survey 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. 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?," nearly 63% of respondents indicated it was "important" (29.5%) or "essential" (33.4%). The implications of these responses concerning one's potential liability as a prospective volunteer health practitioners are obvious: (1) practitioners covered by medical malpractice insurance enjoy some protection from plaintiffs' negligence claims seeking the practitioner's personal assets; and (2) liability claims may typically 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 for unknowing acts that exceed one's scope.

Two additional questions answered by all respondents, including clinicians, were designed to directly assess 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." Based on these 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.

Although the concerns regarding liability exposure among volunteer health practitioners and the entities that send, coordinate, or host them are significant, protecting these persons from liability is controversial. Following Hurricane Katrina, Congress unsuccessfully proposed legislation to provide stronger liability protections for volunteer health practitioners nationally. S. 1638. Hurricane Katrina Emergency Health Workforce Act of 2005; S. 2319. Hurricane Katrina Recovery Act of 2006.

Underlying the default patchwork of VHP liability and workers' compensation protections across states are competing, legitimate interests. VHPs and the entities that rely on them need to be able to provide services during emergencies without excessive concerns of post-emergency liability for mistakes or harms that may arise. At the same time, persons receiving health care services are normally entitled in non-emergencies to reasonable compensation for their injuries and losses that occur due to negligent or wrongful acts. Some commentators suggest that stripping these injured individuals of their claims against volunteer health practitioners is constitutionally unsound. Comments on the Draft Uniform Emergency Volunteer Health Services Act, Center for Constitutional Litigation, P.C., July 7, 2006.

Balancing the competing interests of volunteers and potential injured persons is paradoxical during public health emergencies which pose immediate and disabling threats to communal health. On one hand, individuals who are injured in the course of receiving medical treatment seemingly deserve some recourse. On the other hand, during emergencies, the

community needs VHPs to meet surge capacity. Without adequate liability or workers' compensation protections, however, the best available, trained, and capable volunteers may be deterred from serving. Lacking qualified volunteers, countless persons may go without adequate health services as hospitals, clinics, and other health facilities fail to meet surge capacity. Morbidity and mortality among individuals may be significantly increased by the lack of skilled, vetted VHPs. Collectively, the impact on the public's health and potential for significant societal costs in failing to provide incentives for VHPs to serve could be severe. Hodge, JG, Pepe RP, Henning, WH. Voluntarism in the wake of hurricane Katrina: The Uniform Emergency Volunteer Health Practitioners Act. *AMA Journal of Disaster Medicine and Public Health Preparedness* 2007; 1:1 44-50.

The basic rationale underlying Section 11 is that some significant degree of protection should be provided to volunteer health practitioners from civil liability claims and that the extent of exposure to liability claims should be clearly delineated. Alternatives A and B proceed from the assumption 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. Non-governmental volunteer health practitioners essentially undertake the same risks and provide the same services as their governmental counterparts. 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 when engaged in disaster relief activities (see discussion above in the Prefatory Notes). Many skilled, 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 during the emergency, even as patients demand services. Alternative C endorses the limited approach, as codified in the Federal Volunteer Protection Act, that liability protections should be provided only to uncompensated volunteers or those who are nominally compensated.

Underlying Section 12 is protection from another type of liability: *those risks to the health or life of the volunteers themselves that arise in response to emergencies*. Protecting volunteer health practitioners from these risks may be accomplished by providing them similar benefits as provided to employees through state workers' compensation systems. 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 benefits employers 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, and protect employers from civil lawsuits by adjudicating claims in special tribunals.

Concerning volunteer health practitioners, however, most workers' compensation systems have a major limitation: they do not typically cover the activities of volunteers (namely because volunteers are not defined as "employees," or are acting outside the scope of their employment when volunteering). 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.

Most 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. Who may constitute a "volunteer" varies from state to state, and may not include private sector volunteer health practitioners. Coverage may be limited to 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). Workers' compensation coverage in Kentucky extends 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 who are deemed government (i.e. public sector) employees receive workers' compensation medical benefits as the exclusive remedy for all injuries suffered. U.C.A. 1953 § 67-20-3(1)(a).

In these (and other) 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. 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.

1 **UNIFORM EMERGENCY VOLUNTEER HEALTH SERVICES ACT**

2

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

5 **Alternative A**

6 (a) Subject to subsection (c), a volunteer health practitioner who provides health or
7 veterinary services pursuant to this [act] is not liable for damages for an act or omission of the
8 practitioner in providing those services.

9 (b) No person is vicariously liable for damages for an act or omission of a volunteer
10 health practitioner if the practitioner is not liable for the damages under subsection (a).

11 (c) This section does not limit the liability of a volunteer health practitioner for:

12 (1) willful misconduct or wanton, grossly negligent, reckless, or criminal
13 conduct;

14 (2) an intentional tort;

15 (3) a claim for breach of contract;

16 (4) a claim asserted by a host entity or by an entity located in this or another state
17 which employs or uses the services of the practitioner; or

18 (5) an act or omission relating to the operation of a motor vehicle, vessel, aircraft,
19 or other vehicle for which this state requires the operator to have a valid operator's license or to
20 maintain liability insurance, other than an ambulance or other emergency response vehicle,
21 vessel, or aircraft operated by the practitioner while providing health or veterinary services or
22 transportation pursuant to this [act].

23 (d) A person that, pursuant to this [act], operates, uses, or relies upon information

provided by a volunteer health practitioner registration system is not liable for damages for an act or omission relating to that operation, use, or reliance unless the act or omission constitutes an intentional tort or is willful misconduct or wanton, grossly negligent, reckless, or criminal conduct.

[(e) In addition to the protections provided in subsection (a), a volunteer health practitioner providing health or veterinary services pursuant to this [act] is entitled to all the rights, privileges, or immunities provided by [cite state act].]

Alternative B

(a) Subject to subsection (c), a volunteer health practitioner who provides health or veterinary services pursuant to this [act] is not liable for the payment of a judgment based on an act or omission of the practitioner in providing those services and may not be named as a defendant in an action based on such an act or omission. However, a volunteer health practitioner is deemed to be an agent or employee of this state under [cite the state tort claims act] while providing health or veterinary services pursuant to this [act], and the state may be named as defendant and is liable for the payment of any judgment based upon an act or omission of the practitioner as provided in [the tort claims act].

(b) No person other than this state is vicariously liable for damages for an act or omission of a volunteer health practitioner if the practitioner is not liable for the payment of a judgment based on the act or omission under subsection (a).

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

- (1) willful misconduct or wanton, grossly negligent, reckless, or criminal conduct;
- (2) an intentional tort;

1 (3) a claim for breach of contract;

2 (4) a claim asserted by a host entity or by an entity located in this or another state
3 which employs or uses the services of the practitioner; or

4 (5) an act or omission relating to the operation of a motor vehicle, vessel, aircraft,
5 or other vehicle for which this state requires the operator to have a valid operator's license or to
6 maintain liability insurance, other than an ambulance or other emergency response vehicle,
7 vessel, or aircraft operated by the practitioner while providing health or veterinary services or
8 transportation pursuant to this [act].

9 (d) A person that, pursuant to this [act], operates, uses, or relies upon information
10 provided by a volunteer health practitioner registration system is not liable for damages for an
11 act or omission relating to that operation, use, or reliance unless the act or omission constitutes
12 an intentional tort or is willful misconduct or wanton, grossly negligent, reckless, or criminal
13 conduct.

14 [(e) In addition to the protections provided in subsection (a), a volunteer health
15 practitioner providing health or veterinary services pursuant to this [act] is entitled to all the
16 rights, privileges, or immunities provided by [cite state act].]

17 **Alternative C**

18 (a) Subject to subsection (b), a volunteer health practitioner who does not receive
19 compensation that exceeds [\$500] per year for providing health or veterinary services pursuant to
20 this [act] is not liable for damages for an act or omission of the practitioner in providing those
21 services. Reimbursement of, or allowance for, reasonable expenses, or continuation of salary
22 while on leave, is not compensation under this subsection.

23 (b) This section does not limit the liability of a volunteer health practitioner for:

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

(2) an intentional tort;

(3) a claim for breach of contract;

(4) a claim asserted by a host entity or by an entity located in this or another state which employs or uses the services of the practitioner; or

(5) an act or omission relating to the operation 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 providing health or veterinary services or transportation pursuant to this [act].

(c) A person that, pursuant to this [act], operates, uses, or relies upon information provided by a volunteer health practitioner registration system is not liable for damages for an act or omission relating to that operation, use, or reliance unless the act or omission constitutes an intentional tort or is willful misconduct or wanton, grossly negligent, reckless, or criminal conduct.

[(d) In addition to the protections provided in subsection (a), a volunteer health practitioner providing health or veterinary services pursuant to this [act] is entitled to all the rights, privileges, or immunities provided by [cite state act].]

Comment

1. Background and General Purpose.

The purpose of Section 11 is to extend civil liability protections to volunteer health practitioners providing health or veterinary services pursuant to this act. The bases for offering liability protections to volunteers of all types, not just in the health field, in emergencies are manifold. During emergencies, the assistance of volunteers is essential to emergency responses.

1 These efforts should be encouraged and facilitated. Accordingly, a state adopting this act should
2 consider the extent to which a volunteer’s personal exposure to liability for acts or omissions that
3 constitute ordinary negligence should be minimized.
4

5 Protecting emergency volunteers from civil liability is a consistent legal approach
6 reflected in numerous laws and policies. Health Resources Services Administration. Emergency
7 System for Advance Registration of Volunteer Health Professionals (ESAR-VHP): Legal and
8 Regulatory Issues and Solutions. Washington, DC: (May) 2006; 1-180. For decades, legislators,
9 policymakers, and judges have determined that there is a need to protect volunteers from liability
10 in certain settings. For example, health practitioners once faced potential liability for their
11 actions in responding to specific kinds of emergencies (*e.g.*, automobile accidents, drownings,
12 falls). Over time, legislators and courts began to reassess the appropriateness of the laws that
13 imposed liability for ordinary negligence. Every state now features a “Good Samaritan” law that
14 protects health-related volunteers attempting to render emergency first aid from malpractice
15 liability.
16

17 The federal government provides limited immunity for volunteers working for
18 government or nonprofit entities through the Volunteer Protection Act, 42 U.S.C. § 14501 et seq.
19 Further, all states have statutes protecting many types of volunteers from civil liability for
20 ordinary negligence that occurs during emergencies. Through the adoption of the Emergency
21 Management Assistance Compact (EMAC), all states have extended limited tort immunity to
22 governmental health practitioners providing interstate assistance in response to declared
23 emergencies. Article VI of EMAC provides that officers or employees of a party state rendering
24 aid in another state pursuant to the compact are considered “agents of the requesting state” for
25 tort liability and immunity purposes and provides that “no party state or its officers or employees
26 rendering aid in another state pursuant to [the] compact shall be liable on account of any act or
27 omission in good faith on the part of such forces while so engaged or on account of the
28 maintenance or use of any equipment or supplies in connection therewith.” “Good faith” does
29 not include “willful misconduct, gross negligence, or recklessness.” Though helpful for
30 protecting some volunteers, EMAC provisions only apply to “state forces,” generally meaning
31 state employees. Some states have expanded EMAC’s protections by incorporating volunteers
32 other than state agents and employees into their state forces through mutual aid agreements.
33 However, with limited exceptions private-sector volunteers and disaster relief organizations do
34 not enjoy the same protections and privileges provided by EMAC. At the local level,
35 municipalities may also offer explicit liability protections for volunteers via ordinance or
36 adoption of state standards.
37

38 The policy question is thus not whether volunteer health practitioners should be protected
39 from civil liability during emergencies, but rather the extent to which these protections may be
40 limited in the interests of assuring that individuals who may be harmed by the negligence of a
41 practitioner have legal recourse.
42

43 **2. Certain Conduct Not Protected.** 44

45 Section 11 offers three Alternatives to providing civil liability protections for volunteer
46 health practitioners and, in Alts. A and B, the entities that deploy and use them. In each

Alternative, liability protections apply only where health or veterinary services are provided pursuant to this act. These 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, the provision of administrative services). The protections are narrowly tailored and do not extend to conduct that exceeds a practitioner's scope of practice as it may be limited by the state or host entity (*see* UEVHPA Sections 4, 8). For example, a lab technician will be deemed to have exceeded the scope of practice of a similarly situated practitioner by performing unsupervised surgery on an individual during an emergency. Should harm to the patient result, the lab technician will not enjoy the liability protections provided by this act.

Each Alternative also contains a provision that limits protection to ordinary negligence. There is no protection for willful misconduct or wanton, grossly negligent, reckless, or criminal conduct, nor is there protection from intentional torts. Alts. A and B, subsection (c)(1) and (2), Alt. C, subsection (b)(1) and (2). This is consistent with the approach taken by other laws, including the federal Volunteer Protection Act. Hodge, JG, Bhattacharya, D, Garcia, A. Assessing criminal liability of volunteer healthcare workers in emergencies. *American Journal of Disaster Medicine* 2006; 1(1):12-17

Under Alts. A and B, subsection (c)(3), Alt. C, subsection (b)(3), volunteer health practitioners remain liable for their contractual breaches. Under paragraph 4 of the relevant subsection in each alternative they also remain liable for claims brought against them by host entities or entities in any state that employ them or use their services. The latter paragraph provides an avenue for host entities to seek redress against volunteer health practitioners 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. The paragraph should not be applied in a manner that exposes the practitioner to the very liability from which there is protection under subsection (a). For example, should a host entity be held vicariously liable for a negligent act committed by a protected volunteer health practitioner in a state that adopts Alt. C, the entity should not be permitted to assert an indemnification claim against the practitioner.

Pursuant to Alts. A and B, subsection (c)(5), Alt. C, subsection (b)(5), a volunteer health practitioner is not exempted from liability for acts or omissions relating to the operation of a vehicle for which the state requires the operator to have either a valid operator's license or liability insurance. The intent is to hold practitioners liable for a type of conduct that is generally outside the scope of their responsibilities as volunteers. Thus, a practitioner who negligently injures an individual in a vehicular accident during an emergency may be found liable for the harm, unless the practitioner was operating an ambulance or other emergency response vehicle to provide health or veterinary services or transportation related to those services.

3. Protected Conduct.

Subject to the exceptions for unprotected conduct discussed in Comment 2, each Alternative begins in subsection (a) with a statement of the level of protection from civil liability

1 being provided to volunteer health practitioners for acts or omissions that occur during the
2 provision of health or veterinary services pursuant to the Act. Alt. A(a) contains the broadest
3 protection, immunizing practitioners completely from ordinary negligence. The subsection is
4 limited to volunteer health practitioners and does not extend to host or other entities that may
5 deploy or use the practitioners.
6

7 Alt. A, subsection (b) provides all persons with protection from vicarious liability based
8 on conduct for which a practitioner is immune under Alt. A(a). This includes entities that
9 facilitate the deployment of practitioners (*e.g.*, state ESAR-VHP systems), entities that
10 coordinate their services (*e.g.*, disaster relief organizations, churches), entities that employ the
11 volunteers in non-emergencies (*e.g.*, hospitals, clinics), and host entities that actually use the
12 volunteers during emergencies. All of these persons are often concerned about their potential
13 liability in the deployment or use of volunteer health practitioners during emergencies. Even
14 though the law of the state might not hold them liable for the actions of an immunized volunteer
15 health practitioner, the affirmative statement precluding vicarious liability resolves confusion by
16 clearly protecting any person who may in perception or actuality be exposed to such liability.
17 This provides important incentives that will permit the broadest and most effective use of
18 available practitioners. However, the protection is limited to vicarious liability. Nothing in the
19 Act protects a person other than a volunteer health practitioner from liability for its own
20 negligence, including negligent supervision.
21

22 Alt. B, subsection (a) offers a different type of liability protection for volunteer health
23 practitioners than the immunity provided by Alt. A. It does not provide immunity for acts or
24 omissions but rather shields practitioners from certain consequences. Specifically, the
25 practitioners may not be named as defendants in an action based on their acts or omissions and
26 are not liable to pay a judgment based on those acts or omissions. Instead, they are deemed to be
27 agents or employees of the state for the purposes of its tort claims act, and it is the state that may
28 be named as defendant and that is obligated to pay a judgment. Volunteer health practitioners
29 are not protected from other consequences that may flow from a successful assertion of
30 negligence based on their conduct, such as licensing investigations and ethics reviews or
31 increases in their malpractice insurance premiums. Like Alt. A, Alt. B contains a provision
32 (subsection (b)) that provides protection from vicarious liability for all persons, except the state.
33

34 The approach of Alt. B is generally consistent with protections afforded state-based
35 volunteers through EMAC, but the following example illustrates how the two approaches differ.
36 Suppose that during a declared emergency in State X, registered volunteer health practitioners
37 and EMAC forces from State Y deploy to State X. Under Alt. B(a), State X would be liable for
38 the acts or omissions of the practitioners providing health or veterinary services under this act
39 whereas under EMAC State Y would be liable for the acts or omissions of members of its forces.
40 There are two principal reasons why Alt. B(a) grounds claims in the state that hosts the
41 practitioners regardless of the state from which they are deployed. First, by expressly stating that
42 claims may be brought against the host state, the Alternative is responsive to concerns about
43 providing liability protections for volunteer health practitioners without providing injured
44 individuals another source of recourse. Second, while many states may object to opening
45 themselves to potential, additional liability, in reality these states are better positioned to absorb
46 these claims. During emergencies, the influx of volunteer health practitioners to meet surge

1 capacity is quintessential to improving the health and safety of the state's residents. Any claims
2 that arise resulting from the acts or omissions of these volunteers are negligible compared to the
3 net gains received by the state from their presence and willingness to serve. As well, potential
4 federal emergency relief funds under the Robert T. Stafford Disaster Relief and Emergency
5 Assistance Act, 42 U.S.C. §§ 5121-5206 (2002), may be available to states during emergencies to
6 compensate for claims against the state.
7

8 Both Alts. A and B are premised upon the proposition that because all states have elected
9 to provide limited immunity from civil liability to state and local governments and their
10 employees deployed to other states in response to declared emergencies under EMAC, private
11 sector volunteers and organizations who supplement the efforts of government agencies and
12 employees at no costs to the taxpayers and operate subject to the direction and control of
13 emergency management officials deserve similar protections. In light of (1) the inability of
14 government agencies to directly marshal sufficient resources to respond to major disasters and
15 (2) this nation's long tradition of relying upon non-profit disaster relief organizations to provide
16 these resources, providing these organizations and their employees limited protection from civil
17 liability seems particularly appropriate. Alt. B differs from Alt. A principally concerning the
18 recognition of tort claim liability against the host state. Alt. B is appropriate in jurisdictions
19 desiring to provide some redress for individuals injured through the negligent delivery of
20 emergency health services and in states in which limitations on liability may face constitutional
21 impediments if an alternative source of redress for claims is not made available.
22

23 Some states considering Alt. B may be concerned about its fiscal impact. In February
24 2007, the Tennessee legislature introduced the UEVHPA and included a section on civil liability
25 that, although worded somewhat differently, had the same effect as Alt. B. Tennessee's
26 legislature required a fiscal note to address attributable costs of the bill. The estimated fiscal
27 impact was not significant as pertains to presumed increases to state or local government
28 expenditures. The state's fiscal note concluded that any increase in expenditures could
29 presumably be absorbed within existing state and local resources. The likelihood that federal
30 disaster relief funds will be available to offset any such costs also reduces their potential impacts
31 on existing state and local resources.
32

33 Alt. C, subsection (a) parallels the liability protections provided by the federal Volunteer
34 Protection Act, 42 U.S.C. § 14501 et seq. It thus applies only to volunteer health practitioners
35 who do not receive compensation in excess of [\$500] per year. "Compensation" for the purposes
36 of this subsection does not include reimbursement of, or allowance for, reasonable expenses, nor
37 does it include continuation of salary while on leave from an employer. The federal act provides
38 that no volunteer of a nonprofit organization or governmental entity is liable for harm caused by
39 an act or omission of the volunteer on behalf of the organization or entity if the volunteer was
40 acting within the scope of the volunteer's responsibilities in the organization or entity at the time
41 of the act or omission. 42 U.S.C. § 14503(a). This protection, however, only applies to
42 volunteers who are "properly licensed, certified, or authorized by the appropriate authorities for
43 the activities or practice in the State in which the harm occurred" and who practice "within the
44 scope of the volunteer's responsibilities in the nonprofit organization or governmental entity."
45 Under current law, significant issues may arise about whether an out-of-state practitioner is
46 properly licensed, certified, or authorized by the "appropriate authorities" of a state. Likewise,

1 under current law, when a volunteer is dispatched by a nonprofit organization or governmental
2 entity and practices in a health clinic or facility operated during a disaster by another host entity,
3 questions may arise about whether the volunteer is “acting within the scope of the volunteer's
4 responsibilities in the nonprofit organization or governmental entity.” Alt. C(a) is intended to
5 resolve such uncertainties.

6
7 Each Alternative also includes a subsection (Alts. A and B(d), Alt.C(c)) to exculpate any
8 person that “operates, uses, or relies upon information provided by a volunteer health practitioner
9 registration system” from liability for an act or omission relating to that conduct. A goal of the
10 Act is to require advance registration and deployment of volunteer health practitioners during
11 emergencies so as to ensure that skilled, pre-vetted volunteers are used. However, the exigencies
12 of the circumstances may result in unintentional miscommunications or misinformation
13 concerning prospective volunteers. Thus, a person who operates or uses a registration system or
14 relies on the information provided by a system is not liable for the harm caused by negligent
15 conduct that arises if the data about a volunteer registered with the system are inaccurate,
16 misstated, or miscommunicated. Of course, the protection provided by the subsection does not
17 apply to an intentional tort or to willful misconduct or wanton, grossly negligent, reckless, or
18 criminal conduct.

19
20 Finally, each Alternative contains a bracketed subsection (Alts. A and B(e), Alt. C(d))
21 that permits a state to extend the liability protections of other state laws to volunteer health
22 practitioners. For example, a state might have an act that provides protection only for volunteers
23 deployed by disaster relief organizations. This subsection would allow the state to extend the
24 protections of the act to volunteer health practitioners who provide health or veterinary services
25 pursuant to this Act. This subsection is consistent with the policy expressed in Section 9 of
26 UEVHPA 2006, where subsection (a) provides in part that “This [act] does not limit rights,
27 privileges, or immunities provided to volunteer health practitioners by laws other than this [act].”
28

29 **SECTION 12. WORKERS’ COMPENSATION COVERAGE.**

30 (a) In this section, “injury” means a physical or mental injury or disease for which an
31 employee of this state who is injured or contracts the disease in the course of the employee’s
32 employment would be entitled to benefits under the workers’ compensation[,occupational
33 disease,] or similar laws of this state.

34 (b) A volunteer health practitioner who provides health or veterinary services pursuant to
35 this [act] and who is not otherwise eligible for benefits for injury or death under the workers’
36 compensation[, occupational disease,] or similar laws of this or another state is deemed to be an
37 employee of this state for the purpose of receiving such benefits. Benefits under this subsection

1 for loss of earnings must be based upon the earnings of the practitioner for the previous calendar
2 year but may not be less than the minimum amount provided by the law of this state for loss of
3 earnings.

4 (c) The [name of appropriate governmental agency] shall adopt rules, enter into
5 agreements with other states, or take other measures to facilitate the receipt of benefits for injury
6 or death under the workers' compensation[, occupational disease,] or similar laws of this state by
7 volunteer health practitioners who reside in other states, and may waive or modify requirements
8 for filing, processing, and paying claims that unreasonably burden the practitioners. To promote
9 uniformity of application of this [act] with other states that enact similar legislation, the [name of
10 appropriate governmental agency] shall consult with and consider the approaches to filing,
11 processing and paying claims taken by agencies with similar authority in other states.

12 **Legislative Note:** *The bracketed term "occupational disease" should not be used in states that*
13 *do not have specific occupational disease laws.*

14 15 **Comment**

16 Section 12 is intended to provide redress for injuries or deaths incurred by volunteer
17 health practitioners providing health or veterinary services during an emergency. Subsection (a)
18 stipulates that "injury" for the purposes of this protection includes physical or mental injuries or
19 diseases for which an employee of the state, acting within the course of employment, would be
20 entitled to worker's compensation or similar coverage. Occupational diseases are sometimes
21 covered under legislation other than a state's basic workers' compensation statute, but however
22 allocated within the statutes a volunteer health practitioner is entitled to benefits if a state
23 employee would be so entitled.

24
25 Section 12 reflects policy decisions already made in 29 jurisdictions to provide some
26 level of workers' compensation coverage to volunteers responding to emergencies. While it is
27 uncertain how these laws are interpreted and applied in practice, currently nine states appear to
28 treat some or all volunteer health practitioners as state employees for workers' compensation
29 purposes; fourteen states authorize, but do not mandate, the extension of workers' compensation
30 benefits to volunteer health practitioners; two states provide for the temporary engagement of
31 emergency volunteers as state employees and provide compensation and benefits; three states
32 extend workers compensation benefits to volunteers providing emergency services regardless of
33 whether the services are provided in their home state or in another jurisdiction; and one
34 jurisdiction provides workers' compensation benefits under a mutual aid compact to duly

1 enrolled or registered volunteers when performing their respective functions at the request of the
2 state either within the state or extraterritorially. *See generally* Health Resources Services
3 Administration. Emergency System for Advance Registration of Volunteer Health Professionals
4 (ESAR-VHP): Legal and Regulatory Issues and Solutions. Washington, DC: (May) 2006;
5 Appendix E.
6

7 To remedy the lack of consistency and uniformity among the states, subsection (b) treats
8 volunteer health practitioners who are not otherwise eligible for workers' compensation benefits
9 through their employer or other sources, as employees of the host state for purposes of workers'
10 compensation claims. This approach has the advantage of treating all volunteers equally and
11 avoiding difficult issues associated with determining whether and to what extent the workers'
12 compensation systems of source states provide coverage for volunteers. It is based on the laws
13 of several states that require the state government to provide some coverage for the actions of
14 volunteers. For example, Wisconsin extends the definition of "employee" for workers'
15 compensation purposes to include all "emergency management workers" even if they are
16 volunteers, provided they have registered with the state's emergency management program.
17 Wis. Stat. §§ 102.07, 166.03 & 166.215. Connecticut, Illinois, and Ohio provide similar
18 protections to volunteers responding to emergencies. Conn. Gen. Stat. §§ 28-1, 28-14; 20 Ill.
19 Comp. Stat. 3305/10; Ohio Rev. Code Ann. §§ 4123.01 & 4122.033. Similarly, Washington
20 State provides workers' compensation coverage to volunteer emergency workers while registered
21 with an approved emergency management organization if injured in the course of performing
22 volunteer duties. Wash. Admin. Code 118-04-080. Minnesota provides workers' compensation
23 coverage to any volunteer registered with state or local government agencies. Minn. Stat. §
24 12.22, subd. 2a. Recently, New Mexico passed HB 605 to volunteer health professionals who
25 respond to emergencies within the state.
26

27 Subsection (b) further clarifies that benefits for loss of earnings must be based on the
28 earnings of the practitioner for the previous calendar year. Prospective volunteer health
29 practitioners may have substantial earnings in the prior year through their existing employers.
30 Others may be retired health professionals who no longer earn significant resources. The
31 subsection operates to compensate practitioners at an appropriate level if there is a loss of
32 earnings due to a covered injury. Regardless of actual earnings, however, a practitioner's benefits
33 may not be less than any minimum amount provided by the law of the state for loss of earnings
34 pursuant to the state's existing workers' compensation laws and policies.
35

36 Subsection (c) authorizes an appropriate governmental agency to adopt rules, enter into
37 agreements with other states, or take other measures to facilitate the receipt of worker's
38 compensation benefits by volunteer health practitioners who reside in other states. These
39 volunteers may find it administratively or logistically burdensome to pursue workers'
40 compensation benefits in the host state. Subsection (c) is intended to reduce these burdens by
41 instructing the host state to take active measures to waive or modify requirements for filing,
42 processing, and paying claims that unreasonably burden the practitioners. To promote
43 uniformity of application, these measures may be taken in consultation with other states that
44 enact similar legislation.
45

46 Some states may be concerned about their fiscal responsibilities in extending workers'

1 compensation benefits to volunteer health practitioners who may predictably be injured in
2 emergencies. While this approach may appear to expose host states to greater costs, expenses
3 associated with paying workers' compensation claims of this type during declared emergencies
4 may potentially be submitted for federal reimbursement under the federal Robert T. Stafford
5 Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5206 (2002). Existing state
6 laws cover intrastate volunteers in comparable circumstances. In Virginia, for example, volunteer
7 members of the Medical Reserve Corps are deemed state employees and their average weekly
8 wage is deemed sufficient to produce "the minimum compensation provided by this title for
9 injured workers or their dependents." Va. Code Ann. § 65.2-101.

10
11 Concerning potential fiscal impacts of this section, the fiscal analysis prepared for the
12 Tennessee legislature, which was considering a section on workers' compensation similar in
13 scope to Section 12, concluded that the fiscal impact was not significant such that any increase in
14 expenditures could presumably be absorbed within existing state and local resources.