

Liability, Immunity, and Workers' Compensation Issues in Public Health Emergencies

Issue Brief

Overview

Concerns about potential liabilities regularly arise during emergency response situations. Individual government employees, volunteers, and healthcare providers, as well as entities such as businesses and nonprofit organizations, worry about potential liability for their actions during an emergency. Liability occurs when a person or entity is found to be legally responsible for their actions or their failure to act. Volunteers and others participating in emergency response activities also raise questions about their ability to obtain coverage under state workers' compensation programs for injuries received while participating in the response.

Federal and state statutory protections against liability have been created to address the concerns of volunteers and others involved in emergency response, as well as to ensure that there are adequate numbers of medical, public health, and other individuals and institutions to participate in response efforts. These various laws work together to form a patchwork of liability protections. These protections, however, can be highly dependent on the nature of the services provided by the person (volunteer vs. paid employee) and the extent of protections provided under the program the person is participating in. This issue brief describes some of the possible theories of liability that could arise from emergency response activities and reviews liability protections and workers' compensation frameworks for individuals and entities. The brief is intended to provide general information on the topics presented and is not intended to provide legal advice.

Potential Areas of Liability

Individuals and organizations who participate in emergency response activities can potentially be liable under a number of theories of civil and criminal liability. While many of the parties and activities involved in emergency response are covered under one or more liability protections and waivers (see later sections in this issue brief), there remains the potential for liability, especially for egregious conduct or the particular circumstance of an emergency event and the response to it. This section identifies potential bases for liability, with

emphasis on civil liability issues. Within the emergency response context, civil liability claims are the most likely to arise, particularly negligence. Other potential civil liability claims discussed in the section include intentional torts, violations of statutory or regulatory requirements, strict liability, and constitutional violations. This section identifies potential theories of liability, but it should not be considered a comprehensive treatment of the theories listed or of all the potential areas for liability.

Direct and Vicarious Liability

Both individuals and organizational entities can potentially be held liable for their own actions, as well as the actions of another person or entity.

Direct Liability

Within the context of the law, liability (or direct liability) means that a person or entity is legally responsible for their actions or failure to act. In general, in order to prove a liability claim a plaintiff must show that the defendant had a duty not to harm the plaintiff but failed in this duty, which failure resulted in harm to the plaintiff. An individual person or an organizational entity like a corporation, hospital, nonprofit organization, or government may be held liable. A hospital, for instance, could be held liable for failing to protect the safety of its patients if a plaintiff can show that the hospital deviated from its standard of care, the hospital had actual or constructive knowledge of the problems giving rise to the injury, and there was a causal link between the hospital's conduct and the plaintiff's harm. As will be discussed below, determining what standard of care should apply during an emergency is an important consideration in assessing liability.

Vicarious Liability

Vicarious liability is a type of secondary liability. It occurs when a person or entity is held legally responsible for the actions, or failure to act, of another person with whom they have a particular legal relationship. This is primarily seen in the context of an employer being held responsible for the actions of its employee, which is also known as the legal principle of *respondeat superior*. Vicarious liability also extends to a corporation, nonprofit, or other entity for the acts or omissions of its

agents, like an officer or director. This occurs, for example, when an aid organization is sued for the negligent or intentional acts of a physician who is an employee or volunteer for the group.

Ostensible Agency

Some entities try to limit their potential for vicarious liability by designating persons as independent contractors rather than as employees or agents. This approach can be effective to limit liability; however, the courts can disregard the independent contractor relationship and find an entity vicariously liable through the legal principle of ostensible agency. This form of agency finds that an employer/principal can be liable for the actions of an independent contractor (or other non-employee/non-agent) if the employer/principal holds the contractor out as an employee or agent of the employer/principal and a third party believes that the contractor acts on the employer/principal's behalf.

Civil Liability

Civil liability is the most likely area in which liability issues arise in the emergency response context. Civil liabilities take a variety of forms—negligence, intentional harms (battery), privacy violations, discrimination, or misrepresentations by a volunteer or other responders. Liability extends to individual persons as well as organizational entities like corporations and nonprofits. As discussed above, entities may be found vicariously liable for the actions, or failures to act, of their employees, agents, officers, or directors. If a person or entity is found liable for causing the harm, the aggrieved party can seek monetary compensation and, in some instances, an injunction against current or future action by the liable party.

Intentional and Unintentional Torts

A tort is an action in which an actor (a person or entity) either intentionally or unintentionally causes harm to another person or property. A tort claim allows a person to sue the actor in civil court for the harm. This is contrasted with criminal charges in which the government prosecutes an actor/defendant or with contractual claims in which the parties to a contract sue over the terms of the contract. Unintentional torts occur when an actor harms another person or property through their actions but did not intend the harm. Negligence is the most common type of unintentional tort (see the discussion of negligence below).

Intentional torts occur when a person intends to harm a person or touches a person with the intent of harming them. Thus, battery is considered an intentional tort in addition to being a potential criminal violation. In the healthcare context, conducting a medical procedure on a patient without first obtaining the patient's informed

consent could be construed, among other things, as the intentional tort of battery. Other intentional torts include assault, conversion (i.e., theft), intentional infliction of emotional distress, fraud, misrepresentation, false imprisonment, and trespass.

Defenses to Intentional Torts

There are a number of potential defenses to intentional torts, two of which may be generally applicable in emergency response scenarios:

- ***Consent***—A person can give express consent through written or oral assent. Implied consent may be inferred from a person's actions. Thus, a person who gives informed consent before being given a vaccine or drug may be deemed to have assented to its administration. However, questions about whether consent was truly informed and if the treatment stayed within the bounds of the consent are questions that can arise in this scenario. Consent can also be implied in situations in which emergency medical treatment is provided to victims who are unconscious or unable to provide consent in the absence of a third party who is eligible to give consent on behalf of the victim.
- ***Necessity***—If committing an intentional tort is necessary to avoid a greater harm, then a defendant is justified in committing the tort. Public necessity, in which a defendant appropriates or harms the private property of another to protect the community, is a defense to liability. When the government takes or uses property, even if for public necessity, issues arise as to whether the taking or use of the property (real estate or personal property) is covered by sovereign immunity or subject to paying compensation to the property owner.

Negligence

Negligence is a type of tort law that addresses unintentional wrongful conduct that harms another. It is the theory most likely to be used to assert claims arising from emergency response situations. Negligence occurs when a person or entity fails to use ordinary care in their actions or by their failure to take action. Ordinary care generally means the amount of care that a reasonable person would take under similar circumstances. The standard of care applied to a physician or other person with specialized skills may be different than an ordinary care standard.

The specific elements of a negligence claim are: (1) the defendant owes the plaintiff a duty of care (including a duty of ordinary care); (2) the defendant breached that duty by failing to meet the applicable standard of care; (3) the defendant's actions resulted in harm to the

plaintiff; and (4) the defendant's breach of duty was the cause of the plaintiff's injury.

Determining the Standard of Care

The basic standard of care applied in negligence cases is determined by what a reasonable person would do in similar circumstances. Even outside of the context of a governmentally declared emergency, most states allow juries to consider whether or not a defendant was acting under emergency circumstances to determine whether the defendant's actions were reasonable. While assessing the reasonableness of a defendant's actions in light of emergency conditions will not necessarily be a complete defense to liability, it may help to reduce the judgment against a defendant. It also demonstrates that the concept of standard of care is already seen as a flexible one that can account for the circumstances under which the conduct occurs.

Determining the appropriate standard of care to apply during widespread or prolonged emergency events like a pandemic has been the subject of much discussion. These discussions have focused on trying to determine "altered," "disaster," or "alternative" standards of care for emergency and disaster situations. Federal and state governments, as well as other academic and private sector organizations, have created discussion and planning guides to engage stakeholders in addressing this sensitive but important issue.

Theories of Negligence

Within the area of negligence, there are a number of theories that could apply in the emergency response context.

- ***Medical Malpractice***—Healthcare professionals may be subject to medical malpractice claims, which are a type of negligence claim. The elements of proof for a medical malpractice claim are the same as for negligence: the healthcare professional owed a duty of care to the patient, which duty was breached by failing to use the knowledge and skills of the profession (standard of care), directly resulting in the injury to the patient. Failure to provide information upon which a patient can give informed consent can be a basis for malpractice.
- ***Scope of Practice***—A licensed healthcare provider such as a nurse or physician assistant may be subject to negligence claims for exceeding scope of practice by making decisions or undertaking tasks beyond what state law permits for their profession. Because states differ in how they define the scope of practice for a given profession (e.g., EMTs), questions about scope of practice frequently arise in mutual aid situations in which licensed healthcare professionals

are providing care in another state from the one in which they are licensed. Mutual aid agreements like the Emergency Management Assistance Compact (EMAC) help to resolve questions about scope of practice (see discussion below).

- ***Failure to Plan or Prepare***—Healthcare facilities like hospitals could face negligence charges based on the theory that they failed to plan or prepare for an emergency. With the large number of publications, planning guides, and other resources available to help healthcare facilities plan and exercise how they will respond to an emergency, any facility that fails to undertake emergency planning and keep those plans current, as well as conduct training and exercises with staff, may subject itself to potential negligence claims for failure to plan or prepare.
- ***Breach of Privacy and Confidentiality***—There are torts that address negligent violations of privacy and confidentiality, in addition to intentional breaches. Individuals and organizational entities could be liable for failing to take adequate precautions to protect patients' privacy and confidentiality during emergencies. There are federal statutes such as the Health Insurance Portability and Accountability Act (HIPAA) and Family Educational Rights and Privacy Act (FERPA), as well as state privacy and confidentiality statutes that can give rise to potential statutory and regulatory violations independent of tort-based privacy and confidentiality claims. A negligent breach of privacy and confidentiality could occur, for example, if patient records are left unattended and open to public view in an alternate care site used to triage victims of a disaster.
- ***Premises Liability***—Premises liability holds that a person or entity in possession of a premises or piece of land responsible for certain injuries to persons present on the land or premises. Traditionally a finding of premises liability turns on the whether the defendant was in possession of the premises and the status of the plaintiff. Possession is considered to be ownership of the premises or control of the premises (e.g., a company leasing a building). A plaintiff may be considered to be an invitee, a licensee, or a trespasser on the premises. An invitee is a person invited to be on the premises for the commercial gain or business purposes of the premises possessor. A licensee is a person invited to be on the premises with the express or implied permission of the premises possessor for a purpose other than the business or commercial interest of the possessor. A trespasser is person who does not have the express or implied permission of the possessor to be on the premises and is not performing any duty for the

premises owner. Possessors owe a duty of care to invitees and licensees, but generally not to trespassers. In some states, a general reasonable person standard has replaced the above traditional analysis based on the status of the person entering the premises. Under their standard, the premises possessor owes a duty of reasonable care to anyone entering the premises, regardless of their relationship to the premises possessor.

Concerns about potential liability based on premises liability can arise in the emergency response context in instances when facilities and properties are used for preparedness and response activities. This can include the use of hospitals, clinics, and other facilities (schools, convention centers, malls) for alternate care sites to triage and treat victims of an emergency. Businesses and other private property owners who volunteer use of their property as points of distribution (POD) for medicine and supplies also voice concerns about liability issues. This is especially true among those hosting “open” PODs in which members of the public will visit the property. “Closed” PODs serve a more narrowly defined population, such as the employees of a business hosting the POD, which can prevent or limit liability claims based on a theory of premises liability.

- **Negligence Per Se**—This theory allows a statute or regulation to be used to set the standard of care when determining negligence. In order to find negligence per se, the plaintiff must be in the category of persons the statute was intended to protect and the injury must be one that the statute was intended to prevent. Negligence per se is a subset of both negligence and statutory violations; however, all negligence claims do not require violation of a statute to be successful, and all violations of statutes do not constitute negligence per se.
- **Gross Negligence**—This is conduct or failure to act which is so reckless that it demonstrates disregard for whether an injury or harm will occur. Acts of gross negligence (also noted as willful or wanton conduct) are not covered under statutes that provide immunity or other liability protections to emergency response participants.

Defenses to Negligence Claims

There are several potential defenses to negligence claims, including contributory and comparative negligence, assumption of risk, and immunity.

- **Contributory and Comparative Negligence**—Contributory negligence occurs when a plaintiff’s

actions contributed to the harm. It acts as a complete defense to negligence such that a defendant will not be held liable for his or her actions because the plaintiff’s actions added to the harm. Because of the perceived harshness of this approach, most states have rejected contributory negligence and instead have adopted comparative negligence. With comparative negligence, the plaintiff may still be entitled to damages even if his action’s contributed to the harm; the amount of compensation awarded to a plaintiff may be reduced to account for role he or she played in causing the harm.

- **Assumption of Risk**—Traditionally, assumption of risk was seen as a complete bar to recovery if a plaintiff understood the risk and voluntarily assumed the risk. Express assumption occurs when a person agrees to accept a risk. Implied assumption of risk can occur when a person’s actions indicate he or she has accepted the risk, but has not specifically agreed to it. In some states, implied assumption of risk has been incorporated into the concept of comparative negligence, so it is no longer a complete bar to recovery but can reduce the amount, if any, awarded to the plaintiff.
- **Immunity**—Immunity protects defendants from potential tort liabilities. The most significant defense to negligence claims arising in the context of an emergency response scenario is the defense of immunity. Specific sources of immunity are discussed in detail later in this issue brief.

Strict Liability

Strict liability is another tort theory in which civil liability can arise. Strict liability occurs when the manufacture, possession, or use of inherently dangerous equipment or materials is sufficient to find the possessor/user liable for damages for the harm caused by the equipment or materials; no finding of intent, negligence, or fault is required for strict liability to attach. Strict liability most frequently arises in the context of defective manufactured products, but can also apply to items like inappropriately used explosives and toxic substances or the possession of wild animals. Potential claims against manufacturers of vaccines, drugs, or medical equipment used in public health emergencies could arise under the theory of strict product liability for defects in the design, manufacturing, or labeling of an item. From the perspective of persons and entities involved in most emergency preparedness and response situations, a strict liability claim is not likely to occur; however, as with all legal claims, the legal theories put forth and the outcome of a case depends on the facts in that particular case. The Public Readiness and Emergency Preparedness Act (PREP

Act) was enacted to provide immunity from tort liability for claims of loss caused by the manufacture, testing, distribution, administration, and use of countermeasures (see below).

Statutory and Regulatory Violations

Statutes and regulations establish legal requirements for persons and entities. Violations of statutes and regulations can give rise to charges made by a governmental entity of criminal, civil, and administrative wrongs. To the extent that federal and state governments have waived sovereign immunity, governments and officials in their individual capacities may be subject to lawsuits for statutory or regulatory violations. In addition to the right of parties to bring contractual and tort-based claims, state and federal laws may also specifically allow individual persons and entities to sue others based on violations of statutes or regulations (known as a private cause of action).

There are many potential areas in which state and federal statutory and regulatory requirements could be intentionally or inadvertently violated during an emergency response scenario. Governors have the authority to temporarily waive or suspend regulatory and potentially some statutory requirements during a declared state emergency. Similarly, the HHS secretary is authorized under Social Security Act (SSA) Section 1135 to waive certain requirements during public health emergencies. Under their waiver authorities, states can evaluate which requirements to retain and which to temporarily suspend to ease compliance and facilitate response and recovery efforts. Several potential areas in which claims arising from violations of federal and state statutes and regulations may occur during emergencies are discussed below. This discussion, however, does not represent a comprehensive treatment of these and other potential issues.

Federal Statutory and Regulatory Violations

Section 1983 Civil Rights Violation

42 U.S.C. Section 1983, which addresses civil actions for deprivation of rights, could be used as a basis to allege civil rights violations in the context of an emergency response scenario. Local, state, and federal officials can be sued in their individual capacities if they used their position to deprive individuals of their U.S. Constitutional and other legal rights. State governments as entities are protected from Section 1983 claims by the 11th Amendment to the Constitution, which prohibits lawsuits against state governmental entities by private individuals. Local governments as entities can be sued under Section 1983 because they are not covered by 11th Amendment protections.

Americans with Disabilities Act (ADA)

The Americans with Disabilities Act (ADA) prohibits discrimination based on disability in the areas of employment, public services, public accommodations, commercial facilities, transportation, and telecommunications. Specifically, ADA Title II (public services/transportation) and Title III (public accommodations/transportation) require that persons with disabilities be entitled to equal opportunity to access and benefit from these services. There is a private cause of action in the ADA, which has been interpreted by the U.S. Supreme Court to apply to state governments in spite of 11th Amendment immunity protections. Entities required to comply with the ADA can assert that accommodating persons with disabilities would cause an undue hardship, which generally means an imposition of significant difficulty or expense relative to the operation of a program or service. Where a particular accommodation would result in an undue hardship, an entity must determine if another accommodation is available that would not result in an undue hardship. The Pandemic and All-Hazards Preparedness Act (PAHPA) required, among other things, that the HHS secretary consider the needs of at-risk and special populations when planning for and responding to emergencies. Federal preparedness grants to states and localities require that the needs of at-risk and special populations are likewise considered in their emergency preparedness and response activities.

Emergency Medical Treatment and Active Labor Act (EMTALA)

EMTALA requires that hospital emergency rooms screen all patients who seek care for emergency medical conditions regardless of the patients' ability to pay or citizenship status. The act applies to hospitals that participate in Medicare and allows for administrative penalties and a private cause of action for individuals. When there has been a public health emergency determination under Section 319 of the Public Health Service Act, the HHS secretary can use SSA Section 1135 to temporarily waive or suspend certain EMTALA requirements. However, these waivers expire within 72 hours before full compliance is again required. When a public health emergency involves a pandemic infectious disease, waivers of EMTALA sanctions can extend through the duration of the public health emergency.

Health Insurance Portability and Accountability Act (HIPAA)

Among other things, HIPAA protects the confidentiality of a person's individually identifiable health information. HIPAA does not provide for a private cause of action to allow individuals the ability to sue directly; however, individuals can file a complaint with the HHS Office for Civil Rights, which will investigate the claim. HHS can seek

a range of enforcement mechanisms from voluntary compliance to monetary penalties, if warranted. During an emergency event it may not be possible for a hospital to adhere to some HIPAA privacy requirements. As with EMTALA, certain HIPAA requirements regarding patient information at hospitals operating under an emergency plan can be temporarily waived under SSA Section 1135 waiver. Again, however, these waivers expire within 72 hours before full compliance is again required.

State Statutory and Regulatory Violations

State Civil Rights and Anti-Discrimination Laws

States may have parallel statutory and constitutional protections that protect civil rights and prohibit discrimination by state or local officials. These state authorities could be used to claim a civil rights violation or disparate treatment during an emergency response.

State Professional Licensure Requirements

Each state determines the requirements for licensure and the permitted scope of practice for healthcare and other professions regulated by the state. Healthcare and other licensed volunteers (e.g., architects, engineers) who cross state lines to provide emergency services during a disaster could be found liable for unlicensed practice if they are not properly permitted to assist via a mutual aid agreement like the EMAC or through other emergency response mechanisms recognized by a state, such as the U.S. National Disaster Medical System.

Constitutional Violations

The U.S. Constitution, the Bill of Rights, and state constitutions identify fundamental rights that can give rise to claims if these rights are violated. Parties could assert constitutional claims against public officials and entities in addition to tort claims, including violations of the following rights:

- Freedom of speech and association (1st Amendment).
- Unreasonable searches and seizures (4th Amendment).
- Cruel and unusual punishment (8th Amendment).
- Due process (5th and 14th Amendments)—Prohibits federal and state governments from depriving persons of life, liberty, or property without due process of law.
- Equal protection (14th Amendment)—Violations in which a person or group of persons are denied equal protection under state and federal laws.

Parallel violations grounded on state constitutional claims, as well as on other claims specific to a state's constitution, should also be considered.

Criminal Liability

As with civil liability, both individuals and organizational entities can be liable for criminal sanctions based on their actions during an emergency response event. Criminal prosecutions of first responders, healthcare providers, and volunteers involved in emergency response activities are most likely to occur where there has been egregious or willful misconduct on the part of the actor. Ultimately, however, the decision to seek prosecution in any given situation is a matter of prosecutorial discretion and, where required, the decision of a grand jury to indict. Even where there are statutory liability protections available to emergency response participants, they generally exclude coverage for criminal acts, willful or wanton actions, and gross negligence.

Liability Protections and Immunities

While the foregoing list of potential theories of liability for various actors involved in emergency preparedness and response activities can seem daunting, there are significant sources of liability protection available at the state and federal levels. Many of these protections were newly developed or refined within the last decade. Others are fundamental principles of governmental immunity that continue to evolve as our understanding of modern emergencies likewise evolves. What has emerged is a mosaic of protections that can provide varying degrees of coverage: the extent to which liability protections are available to an individual, entity, or class will depend on the actor, the law providing the protections, and the circumstances surrounding a particular emergency response.

This section reviews available federal and state immunity and liability protections, highlights the actors covered, and discusses the types and extent of liability protections provided. This section provides an overview of potential liability protections; it is not intended to be a comprehensive listing or analysis of these or other available protections.

Federal Liability Protections and Immunities

Federal Governmental/Sovereign Immunity

The federal government's sovereign immunity has its roots in the English common law that became the foundation of the U.S. legal system as the nation developed. The common law doctrine of sovereign immunity holds that the "king"—the state—cannot commit an illegal act and therefore cannot be sued. This doctrine has been modified through court decisions and

laws like the Federal Tort Claims Act to allow suits against federal government employees and agents in certain circumstances. In the context of emergency response, one way to protect volunteers is to designate them as unpaid employees of the federal government. In doing this, the volunteers would be able to assert the liability protections afforded to federal employees.

Federal Tort Claims Act (FTCA)

The FTCA is generally the exclusive path by which individuals can seek compensation when injured by federal employees acting within the scope of their work. The FTCA immunizes federal government employees from tort liability by substituting the federal government as the defendant in certain types of suits brought against the federal government. Specifically, the act allows suits for “injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

Prior to filing suit under the FTCA, a claimant must present a claim to the federal agency under which the claim arises. If the agency denies the claim or fails to take action on it within a specified time period, a claimant can file suit in federal district court. If a suit is brought, the federal government stands in as the defendant in place of a federal employee sued for actions within the scope of employment. Lawsuits under the FTCA are decided by a judge rather than a jury. Coverage under the FTCA does not require that an emergency declaration be in place before immunity attaches.

- **Actors**—The FTCA covers all government employees, including volunteers; it does not cover volunteers in nongovernmental settings.
- **Protections**—The FTCA contains a number of exceptions under which the United States may *not* be held liable even though a private employer could be held liable under state law; among these exceptions are: (1) the performance of discretionary functions; (2) commission of intentional torts; (3) injuries sustained by military personnel incident to their service. Federal employees may still be sued for violating the U.S. Constitution or a federal statute that authorizes suit against an individual (see liability discussion above).
- **Relation to State Laws**—Federal employees are immune from suit under state tort law.

Volunteer Protection Act

The federal Volunteer Protection Act (VPA) provides immunity for volunteers of nonprofit organizations or governmental entities against claims of ordinary negligence. The act does not require that an emergency declaration be in place for its protections to apply.

- **Actors**—The VPA protects individual volunteers who are working without compensation and within their scope of responsibility for a governmental entity or nonprofit organization. VPA does not protect volunteers working in businesses (including for-profit hospitals) and organizational entities of any type (including nonprofit or governmental organizations) that use volunteers.
- **Protections**—The VPA shields volunteers from ordinary negligence. It does not protect volunteers from liability for: (1) actions beyond ordinary negligence (e.g., gross negligence); (2) actions for which the volunteer is not properly licensed or insured; (3) operation of a motor or other vehicle that requires a license and insurance; or (4) for any criminal conduct or civil rights violations. A plaintiff’s right to recover is limited to punitive damages from a protected volunteer; the VPA does not provide for payment of defense costs or payment of a judgment or settlement. The act also does not prohibit a nonprofit or governmental entity from suing its own volunteers.
- **Relation to State Laws**—The VPA expressly preempts state volunteer protection laws that provide *less* coverage than the VPA; states can adopt laws that provide greater protections than the VPA.

Public Readiness and Emergency Preparedness Act (PREP Act)

The Public Readiness and Emergency Preparedness Act of 2005 (PREP Act) authorizes the HHS Secretary to issue a declaration that provides immunity from tort liability for claims of loss caused by countermeasures (vaccines, drugs, products) against diseases or other threats of public health emergencies. The PREP Act added new authorities under the Public Health Service Act to address concerns about potential liability associated with the development and administration of countermeasures. A separate public health emergency determination under Public Health Service Act Section 319 or an emergency declaration under another statute is not required for PREP Act immunities to take effect.

- **Actors**—The PREP Act covers individual persons and entities. Covered persons may, at the secretary’s discretion, include manufacturers, distributors, program planners (i.e., individuals and entities

involved in planning and administering programs for distribution of a countermeasure), and qualified persons who prescribe, administer, or dispense countermeasures (i.e., healthcare and other providers), as well as the United States. Officials, agents, and employees of any of these entities or persons are also covered persons.

- **Activities Covered**—The immunity applies to the development, manufacture, testing, distribution, administration, and use of countermeasures.
- **Countermeasures Covered**—Countermeasures can include vaccines, drugs, or medical devices to be used against chemical, biological, radiological, and nuclear agents of terrorism, epidemics, and pandemics.
- **Protections**—The PREP Act provides immunity from tort liability (except for willful misconduct) for the condition or fear of death, physical, mental, emotional, injury, illness, or disability. Immunity includes covering claims for medical monitoring and the loss or damage to property, including business interruption. Claims must have a causal relationship to the development, distribution, administration, or use of the covered countermeasure. The PREP Act also authorizes an emergency fund, the Countermeasures Injury Compensation Program (CICP), to provide compensation for injuries directly caused by administration or use of a countermeasure covered by the HHS secretary’s declaration.

A PREP Act declaration by the HHS secretary only relates to providing immunity from liability for the covered persons and activities related to covered countermeasures. The act’s liability protections do not apply where the liability arose from willful misconduct. It also does not protect individuals who violate a person’s civil rights or who violate the ADA, among other exceptions. Furthermore, the PREP Act does not automatically protect everyone involved in a medical response to an emergency. Liability protection under the PREP Act is limited to a specific emergency and includes only the countermeasures and other conditions listed in the PREP Act declaration.

State Liability Protections and Immunities

State Governmental/Sovereign Immunity

State governments are immune from lawsuits under sovereign immunity conferred by the 11th Amendment of the U.S. Constitution. Like the federal government, some states have waived this immunity in certain circumstances through state tort claims or state claims

acts. These acts generally immunize government employees from tort liability for acts or omissions committed within their scope of employment. Some states cap the amount of money damages available from a judgment against the state and frequently prohibit the recovery of punitive damages against the state. Some states extend these protections to volunteers; others declare them unpaid state employees during an emergency.

State Tort Claims Acts

State tort claims acts are generally modeled after the FTCA and are the most common type of statutory waiver of sovereign immunity. These types of laws either abolish state sovereign immunity generally and provide immunity in only specific circumstances, or preserve sovereign immunity generally but identify certain exceptions in which immunity is waived.

State Claims Acts

State claims acts are contrasted with state tort claims acts. Claims acts limit state sovereign immunity by establishing procedures for making claims against the state, which are overseen by a special claims court. The claims courts are empowered to decide claims, limit the amount of damages, and find exceptions to liability.

Emergency Powers Statutes

State emergency laws can trigger additional powers, suspend certain administrative requirements, and provide or enhance liability protections to specified responders upon a gubernatorial declaration of emergency. These emergency statutes may include liability protections for specified groups of volunteers and other responders that are more tailored to their services (e.g., health, fire, law enforcement, or engineering). These statutes can extend the rights and immunities provided to governmental employees to volunteers performing work that is eligible for coverage under governmental immunity and state tort claims acts. There is a wide range in the types and degrees of coverage provided to volunteers under emergency powers statutes. The provisions can be broad or duplicative of other provisions in state law.

State General Volunteer Protection Statutes

All states have some statutory protections for volunteers. The federal VPA (see above) preempts state laws that are less protective than the VPA, but allows states to pass laws with greater protections. Generally, like the VPA, these statutes do not require that an emergency declaration be in place, apply to uncompensated individual volunteers for nonprofit and governmental entities only, and apply only to individual persons and not to organizations. However, because each state’s approach is different, it is important to identify what

actors, actions, and liability protections are covered and those that are not under a specific state's statute.

State Healthcare Volunteer Protection Statutes

Many states have also adopted specific liability protections for volunteer health professionals (VHPs) in addition to or to supplement their emergency powers and general volunteer protection statutes. Like the VPA, VHP protection statutes confer immunity to volunteers from civil liability provided that certain conditions are met and are not dependent on the existence of an emergency declaration.

Uniform Emergency Volunteer Health Practitioners Act (UEVHPA)

Some states have adopted the Uniform Emergency Volunteer Health Practitioners Act (UEVHPA), which is uniform model law adopted by the Uniform Law Commission. The UEVHPA was conceived as a way to further supplement the number of VHPs who can rapidly respond to emergency events, particularly since traditional mutual aid approaches were viewed as insufficient to rapidly deploy VHPs. The UEVHPA permits health professionals to register either in advance of or during an emergency to provide volunteer services in an enacting state. Under the UEVHPA, VHPs can register through governmentally established registration systems (e.g., ESAR-VHP or Medical Reserve Corps) or with registration systems established by disaster relief organizations, licensing boards, or national or multi-state systems established by associations of licensing boards or health professionals. UEVHPA liability protections become effective upon the state emergency declaration.

Good Samaritan Laws

Good Samaritan laws can provide liability protection to volunteers who are near an emergency event and respond to help victims. No formal emergency declaration or activation of the volunteer as part of an emergency response force is required for Good Samaritan liability protections to attach. Every state has a Good Samaritan statute, but the actors eligible for coverage and qualifying circumstances under which care is delivered varies. Generally, Good Samaritan statutes cover the spontaneous rendering of aid and reduce the standard of care that would normally be required of the person supplying aid (e.g., a doctor or nurse helping a victim at the scene of an accident) to account for the exigent circumstances in which the care is being delivered. These laws generally do not apply to employees on duty (e.g., EMTs) and may not apply for pre-arranged or compensated volunteers. Good Samaritan laws provide limited immunity from civil liability for ordinary negligence to protected volunteers; they do not provide payment for defense costs, judgments, or settlements. As with other volunteer

protection statutes, Good Samaritan laws do not cover egregious conduct.

Entity Liability Statutes

While liability protections for organizations and entities are generally less robust than they are for individuals, some entity protections exist and more have been developed in recent years in acknowledgment of the important role that businesses and nonprofit organizations play during emergencies. Removing the potential for liability for entities that assist in an emergency response is seen as a way to ensure their participation in a response and therefore make planning for and responding to an event more efficient.

- **The Public/Private Legal Preparedness Initiative—**There has been an effort in recent years to extend Good Samaritan liability protections to entities. The Public/Private Legal Preparedness Initiative comprises various state-level coalitions of interested stakeholders from public health, emergency management, business, nonprofit entities, professional associations, and academia seeking to adopt Good Samaritan entity liability protections. Sample legislation that amends a state's Good Samaritan law: (1) extends liability protection to cover business and nonprofit entities acting in good faith during an emergency; (2) links coverage to a gubernatorial emergency declaration; (3) applies coverage only where emergency activities are conducted in coordination with the state; and (4) includes coverage for pre-event planning and training activities that take place prior to the declared emergency.
- **Uniform Emergency Volunteer Health Practitioners Act—**Another effort to provide entity liability protection is contained in UEVHPA. UEVHPA offers two alternatives to states for protecting volunteer health professionals during emergencies: Alternative A grants individual and entity liability protections for volunteer health professionals. Alternative B grants protection only to individuals who are uncompensated volunteers based on the criteria in the federal Volunteer Protection Act.

Mutual Aid Agreements

Mutual aid agreements are mechanisms through which jurisdictions can provide assistance to other jurisdictions during emergencies. These agreements also generally include provisions for reimbursing expenses, providing liability protections to governmental personnel and volunteers who provide aid, and awarding compensation for injuries to personnel deployed under the agreement.

- **Emergency Management Assistance Compact—**EMAC is the most widely adopted mutual aid agreement in the United States; it has been adopted by all states, the District of Columbia, and some territories. Congress ratified EMAC in 1996. EMAC provides an organized structure through which a state can request aid from other states during an emergency. Under EMAC, when officers or employees of one state provide aid to another state, they are considered to be agents of the state receiving aid for tort and immunity purposes. Covered individuals and the state itself are immune from tort liability for acts or omissions committed in good faith while rendering aid or providing supplies and equipment. EMAC also provides reciprocity for individuals who hold a license, certificate, or other authorization to practice medicine or other skilled professions to provide those services in the receiving state, subject to any limitations imposed by the receiving state. EMAC only applies to persons properly dispatched in response to an EMAC request. Immunity protections and license reciprocity will not automatically extend to volunteers who provide services outside of EMAC. Volunteers would have to be made temporary government employees to be covered under EMAC.
- **Other Mutual Aid Agreements—**In addition to EMAC, emergency mutual aid agreements can exist between states and tribes, between individual states or groups of states, between localities in a state, or internationally. Depending on the particulars of the agreement, states may enter various mutual aid arrangements as another way to provide assistance to affected jurisdictions while providing liability protections to government employees and others participating in the response.

Workers' Compensation and Disability Issues

Government employees, contractors, and volunteers may be injured and disabled during the course of responding to an emergency. A person's ability to obtain workers' compensation for injuries or lost wages is a significant question for those responding to emergency events. In deciding the issue, a number of factors can affect the analysis such as the parameters of a state's workers' compensation laws, the person's status while responding (employee or volunteer), the systems or programs under which a person deploys, and events surrounding the injury. Sick leave and disability insurance may provide an additional or alternative source of compensation for persons involved in emergency response activities, although not all persons may have access to these mechanisms.

Workers' Compensation

Workers' compensation programs provide benefits to workers who are injured during the scope and course of their employment. Workers' compensation laws are enacted and administered by states. Every state, the District of Columbia, and the territories have a workers' compensation program. Each program is unique and the requirements for coverage and the types and amounts of benefits vary from state to state. Although state workers' compensation programs cover a majority of workers, certain types of organizations or activities are exempted from coverage under workers' compensation programs, including employees of nonprofit, charitable, or religious institutions; employees of small businesses under a specified size; and workers in hazardous occupations. Some states further exempt domestic service, agricultural employment, casual laborers, and state and local government employees. Some of these groups are provided coverage through other mechanisms such as disability insurance that is provided by an employer as a full or partial benefit or negotiated through union agreements.

Workers' compensation is primarily an employer-funded system. Workers' compensation laws require employers to purchase workers' compensation insurance policies through state-sponsored or commercial insurance providers or provide coverage through self-insurance in which the employer demonstrates to the state its financial ability to cover potential liabilities. Before the advent of workers' compensation laws, workers had to file tort claims against their employers in court to recover for injuries received on the job. The outcome of litigation was uncertain for workers, who could lose, and for employers, who could be subject to large judgments. Workers' compensation laws were seen as a way to make the outcome of incidents more predictable for all parties: workers' benefits would be paid without having to prove fault by the employer and the scope of potential liability for employers would be more clearly defined. State workers' compensation systems became the exclusive remedy for injured workers. State compensation programs are administered by various regulatory bodies in different ways, including departments or divisions of labor, insurance departments or commissions, or free-standing commissions or special boards. Workers' compensation is an important and significant source of insurance in the United States; only Social Security Disability Insurance (SSDI) and Medicare surpass state workers' compensation programs as a source of support for disabled workers.

Workers' compensation programs have some similarities and differences from SSDI and Medicare in several respects. Generally, workers' compensation: (1) covers

medical expenses for work-related injuries immediately after an injury; (2) provides short-term or temporary disability benefits (e.g., lost wages) after a waiting period of up to one week; (3) pays permanent partial and total disability benefits; (4) provides rehabilitation and re-training benefits for persons who cannot return to their prior careers; and (5) pays survivor benefits. Workers are immediately eligible for workers' compensation benefits from their first day of employment.

SSDI provides benefits to workers with long-term disabilities arising from any cause, not just those that are work-related. In contrast to workers' compensation, SSDI benefits require that workers have a substantial work history because SSDI is viewed as an earned right. SSDI benefits begin after a five-month waiting period; Medicare benefits begin twenty-nine months after the onset of a medically verified inability to work. SSDI only pays benefits when the nature of a person's disabilities make them unable to engage in substantial paid work, although SSDI continues to pay benefits even if there is some limited self-employment or other work to transition the person back into full-time work. Like workers' compensation, SSDI pays for rehabilitation services and survivor benefits to families of deceased workers.

Compensation Acts and Funds

There are federal and state laws that set up specific mechanisms or funds to compensate a specific group of persons based on occupation or involvement in a specific injurious event. Examples of such programs include:

- **The Federal Employees' Compensation Act (FECA)**—FECA provides workers' compensation to civilian federal employees who are injured or killed during the course of their duties. An injured employee, or the family of an injured employee, is entitled to coverage for medical services unless the injury was self-inflicted or occurred as a result of the employee's own willful misconduct, including the employee's intoxication. Volunteers who deploy under federal programs like the National Disaster Medical System are covered under FECA.
- **The Federal September 11th Victim Compensation Fund**—The fund, which is now closed, was provided as a no-fault alternative to tort litigation for individuals who were physically injured or killed as a result of the aircraft hijackings and crashes on September 11, 2001. The fund was designed to provide compensation for economic and noneconomic losses to individuals or relatives of deceased individuals arising from only physical injury or death; it did not cover other losses such as property loss.

- **New York State Workers' Compensation Board Claims for Participation in World Trade Center Rescue, Recovery, or Clean-Up Operations**—The New York state legislature enacted modifications to its workers' compensation laws to expand the time for a participant in World Trade Center rescue, recovery, or clean-up operations who suffered, or may suffer in the future, from a qualifying condition to file a claim for workers' compensation for lost wages and medical benefits and to permit the board to reopen claims previously denied as untimely.

There are other federal workers' compensation programs, including U.S. Department of Veterans Affairs' programs for military veterans; the Longshore and Harbor Workers' Compensation Act; Energy Employees Occupational Illness Compensation Program Act; and the Black Lung Benefits Act for coal miners suffering from black lung disease.

Sick Leave and Disability Insurance

Some workers may have coverage for work-related or non-work-related injuries through paid sick leave, temporary disability benefits, and long-term disability insurance. Companies typically provide sick leave and disability insurance voluntarily, although it can be a negotiated benefit through union contracts; it is mandatory in only a few states. These benefits may provide an additional or alternative source of compensation for persons involved in emergency response activities whose status or activities during a response may not qualify them or fully qualify them for a state's workers' compensation program. The outcome in a given situation depends on the particulars of a state's laws, the parameters of a disability policy, and the activities and role of the person while participating in the emergency response.

- **Sick Leave**—If a person has employer-provided sick leave, it typically covers the total amount of their wages for a few weeks. About a third of private sector employees are not provided paid sick leave.
- **Short-Term Disability**—Short-term disability benefits or disability insurance provides coverage for the period after sick leave benefits are exhausted and until long-term disability becomes available, if needed. Short-term disability benefits/insurance generally covers up to at least half of a worker's wages for up to six months. Private short-term disability insurance covers more than a third of private sector employees.
- **Long-Term Disability**—Long-term disability for persons deemed permanently unable to work usually

begins after a waiting period of up to six months or short-term disability benefits end. Long-term disability insurance generally replaces at least half or more of a disabled worker's wages until the person reaches retirement age. Private long-term disability insurance covers about a third of private sector employees; it is most commonly held by professional and management-level workers. The benefit an injured worker receives is generally reduced if the person receives workers' compensation or Social Security disability benefits.

While sick leave and disability insurance provide another avenue for benefits if a volunteer or responder is unable to qualify for coverage under a state's workers' compensation program, not all persons have access to these additional resources unless an employer offers them or a person obtains an individual disability policy. The specifics of a disability policy dictate whether coverage is available for only work-related injuries or will also cover non-work-related injuries (e.g., while volunteering during an emergency event).

Key Issues Regarding Workers' Compensation in Emergency Response

Because of the variability in state laws and other factors related to the activities and status of an individual participating in an emergency response, a single determination of eligibility for compensation is not possible. Instead, such an analysis must consider a number of factors when addressing workers' compensation issues within the context of an emergency response scenario.

Which state's law applies?

When a person responds to an emergency in another state, an issue can arise as to which state's workers' compensation law should apply if the responder is injured—the state receiving the aid (host state) or the injured responder's home state. Some deployment mechanisms and mutual aid agreements determine this issue in advance. EMAC stipulates that the state providing assistance (the home state) is responsible for paying compensation and death benefits in the same manner and terms as if the injury or death were sustained in the home state. UEVHPA, discussed above, also addresses workers' compensation issues. It provides that any volunteer health professional harmed or killed during an emergency may elect workers' compensation protections of the host state as a payer of last resort. State emergency response and other volunteer

protection statutes may require the issuance of a state or federally declared emergency before compensation coverage is available.

Who is covered under a state's workers' compensation law?

State workers' compensation laws can expressly exclude coverage for volunteers. In the absence of a state law extending workers' compensation to volunteers, unpaid persons involved in an emergency response are not covered because they are not "employees." Some state laws that address volunteer health professionals in emergencies may include compensation, but this benefit may be mitigated if coverage is optional and an employer exercises a right to opt out or if the VHP is not appropriately registered with a volunteer registration system recognized by the state.

Who is the employer?

Determining who the "employer" of a volunteer or other person deployed in an emergency response situation is can dictate both which state law applies (if it is an interstate deployment) and what entity, if any, is responsible for paying compensation to an injured responder. A volunteer's regular employer is not likely to be responsible for injuries to the volunteer because the volunteer is acting outside the course of his or her employment unless the employer offers to provide coverage. The hosting employer (which may be the state or municipal government where the volunteer is deployed) or the host institution (e.g., hospital) may be responsible for paying workers' compensation.

What scope of activities are covered?

Eligibility for workers' compensation benefits may be limited to injuries that occur within the scope of the responder's employment. Determining what activities are within that scope, especially since the activities may occur under extreme conditions, is important in assessing eligibility for coverage. Further, it may be necessary to determine if the injury occurred when the responder was actively engaged in the task for which they were deployed (e.g., providing healthcare, assessing sanitary conditions) as opposed to some other activity incident to the deployment (e.g., meeting, loading, training, cooking).

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