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*Prepared by Community Legal Resources'  
Health Care Legal Team\**

## **EXECUTIVE SUMMARY: PROTECTION FROM MEDICAL MALPRACTICE LIABILITY WHEN SERVING THE UN/ UNDER-INSURED PATIENT POPULATION IN MICHIGAN**

### **INTRODUCTION**

Non-profit health care facilities have the challenge of recruiting physicians and other practitioners in the face of increasing concern about exposure to malpractice liability. The goal of this document is to inform physicians and other practitioners about what protection exists for them.

**Specifically, this document provides an overview of the scope of protection for:**

- a) employees,**
- b) volunteers,**
- c) retired physicians, and**
- d) physicians serving un/ under-insured patients in their own private practice.**

This document discusses the following statutes:

- a) Federal Tort Claims Act ("FTCA")
- b) Free Clinic FTCA
- c) Federal Volunteer Protection Act ("VPA")
- d) Michigan's "Good Samaritan", MCL 333.16277
- e) Michigan's law limiting liability for retired physicians, MCL 333.16185.

This document ends by addressing potential regulatory concerns and insurance issues.

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This document is intended to be a resource to physicians and other practitioners. Please note that this Executive Summary is the shortened version of a longer, more thorough document, and as such this Executive Summary does not contain a complete analysis of all details that will determine whether liability exists in a particular situation. If you have questions or would like more information on any of the topics discussed herein, please contact Community Legal Resources (CLR).<sup>1</sup>

**A. LICENSED HEALTH CARE PRACTITIONER EMPLOYEES AND INDEPENDENT CONTRACTORS OF FQHCs and OTHER NONPROFIT HEALTH FACILITIES**

***1. Federally Qualified Health Centers (“FQHC”)***

Physicians and other practitioners employed by an FQHC may be protected from malpractice liability under the Federal Tort Claims Act (“FTCA”) under certain circumstances. The FQHC must take certain actions for such protection to apply.

If applicable, the FTCA’s protection extends to any malpractice claim against the FQHC for services and activities that occurred within the FQHC’s “scope of project.”<sup>2</sup> More importantly for our purposes, the protection also extends to malpractice claims against the FQHC’s *employees* and *contractors* whose services at issue were within his or her scope of employment. Where FTCA coverage is applicable, the entity’s **employees and independent contractors are dismissed from the lawsuit and the federal government becomes the defendant.**

***2. Independent Contractors at FQHCs***

Although independent contractors are covered under the FTCA, additional requirements must be met before the FTCA protection is extended to the contractor. For example, depending on the contractor’s area of practice, there may be a minimum number of hours they volunteer at the FQHC for FTCA protection to apply.<sup>3</sup>

In addition, **there must be a written agreement between the independent contractor and the covered entity to provide medical services,**<sup>4</sup> and all payments for services must be made directly from the health center to the individual contractor.<sup>5</sup> Physicians and other practitioners who volunteer their services at an eligible FQHC are not covered by the FTCA.<sup>6</sup>

***3. FQHC Look-Alikes***

Because FQHC Look-Alikes do not receive federal funding, they are ineligible for malpractice protection under the FTCA. Their employed physicians and other practitioners are ineligible as well.

***4. Other Non-Profit Health Facilities***

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Like FQHCs, other public or non-profit private health centers that receive federal grants pursuant to the PHS Act<sup>7</sup> are eligible for coverage under the FTCA.<sup>8</sup>

## **B. VOLUNTEER HEALTH CARE PROVIDERS AT FQHCs, FQHC LOOK-ALIKES, LOW COST CLINICS and FREE CLINICS**

Physicians and other practitioners who volunteer their services at FQHCs, FQHC Look-Alikes, low-cost clinics, or free clinics may be protected from malpractice liability protection in certain circumstances under the following three federal or state laws.

### ***1. Federal Tort Claims Act (FTCA) Protection for Free Clinic Volunteers***

The Free Clinic Federal Tort Claim Act Medical Malpractice Program (“**Free Clinic FTCA Program**”)<sup>9</sup> provides immunity for medical malpractice claims to those health care practitioners that provide medical services on a volunteer basis in or on behalf of a free clinic. Both the clinic and the healthcare provider must meet certain requirements of the Department of Health and Human Services (DHS).<sup>10</sup>

These requirements include that the practitioner must be sponsored by an approved Free Clinic and deemed as a federal employee of the PHS. The “deemed” status applies for only one year and, therefore, must be renewed annually by the free clinic through the application process.<sup>11</sup> The practitioner is afforded immunity from medical malpractice lawsuits resulting from their medical, surgical, dental or related healthcare services that are within the scope of their work at the free clinic. Similarly to FQHCs, the practitioners are dismissed from the lawsuit and the federal government becomes the defendant. Unlike the protection afforded to the FQHC Corporation, the free clinic itself, and its clinical (non-professional) staff are not provided immunity under the FTCA.

Because FQHCs and FQHC Look-Alikes generally do not utilize *volunteer* health care professionals, the protections outlined in this section are not likely to apply to them.

### ***2. Volunteer Protection Act (VPA) – federal law***

While the previous section (C.1.) is applicable only to volunteers in free/ low cost clinics, the federal Volunteer Protection Act (“VPA”)<sup>12</sup> offers protections for any physicians or practitioners volunteering<sup>13</sup> at all nonprofit health facilities.

The VPA provides that no volunteer of a nonprofit organization<sup>14</sup> is liable for harm<sup>15</sup> caused by an act or omission of the volunteer on behalf of the entity if the following conditions, among others, are met:

- a) The volunteer was acting within the scope of his or her responsibilities<sup>16</sup>;

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b) The volunteer was properly licensed, certified or authorized; and

c) The harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer.

Unlike under the FTCA, the VPA does not provide that the practitioners are dismissed from the lawsuit and the federal government become the defendant. Rather, the VPA exempts practitioners from liability in the event of a lawsuit, if the practitioner proves the above conditions were met. VPA also makes it very difficult for a claimant to obtain punitive damages<sup>17</sup> or obtain non-economic losses against a volunteer.<sup>18 19</sup>

### **3. Michigan's Good Samaritan Law – MCL 333.16277**

Michigan law limits liability for health care practitioners who render non-emergency care on a voluntary basis (i.e., don't receive compensation).<sup>20</sup> They are not liable in a civil action for damages for acts or omissions in providing such care, unless the acts or omissions resulted from gross negligence or willful and wanton misconduct or were intended to injure the patient. This limitation on liability extends to dentists, physicians, registered nurses, licensed practical nurses and physician's assistants.

The limitation on liability applies *in, or as the result of a referral from*, (i) a health facility organized and operated for the sole purpose of delivering non-emergency care to uninsured or underinsured individuals, or (ii) an entity that is not a health facility and that provides non-emergency health care to uninsured or underinsured individuals.<sup>21</sup>

If, however, the non-emergency care is surgery that requires more than local anesthetic, the limitation on liability in MCL 333.16277 does not apply.

Before rendering the non-emergency care, the licensee or registrant **must provide the patient with a written disclosure describing the limitation on liability, stating that the health care is free and that compensation for the care will not be requested from any source, and the patient must sign an acknowledgement of receipt of the written disclosure.**

### **4. Conclusion**

The FTCA, VPA, and MCL 333.16277 each provide protection to physicians and other practitioners who volunteer their time at certain times and in certain situations. The parameters of these statutes offer broad protection, and sometimes several layers of protection, to providers who would like to volunteer their professional expertise to bring greater medical access to uninsured and/or under-insured individuals. The detailed provisions of each statute must be reviewed to determine conclusively whether or not liability applies in a given situation.

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### **C. LIABILITY PROTECTION FOR RETIRED PHYSICIAN AS VOLUNTEER**

There are two main protections for retired physicians acting as volunteers: the Volunteer Protection Act (VPA) and MCL 333.16184<sup>22</sup>. While the former applies to a variety of volunteers, the latter is specific to retired physicians.

#### **1. Federal Law – the VPA**

The VPA (described above in Section B.2.) protects volunteers of nonprofit organizations from liability for harm caused by an act or omission of the volunteer on behalf of the organization, as long as the statutory conditions are met. As mentioned in Section C.2., the VPA limits punitive damages and provides that volunteers are only liable for non-economic damages (*i.e.*, pain and suffering) for the proportion of harm for which the volunteer was responsible.

#### **2. Michigan Law – MCL 333.16185**

Michigan's special license program for retired physician volunteers provides broader liability protection than applicable federal laws. Retired<sup>23</sup> physicians who volunteer to provide medical care to health care facilities that serve medically indigent individuals may apply for a special volunteer license with the State of Michigan.<sup>24</sup> Once a retired physician has been issued the special volunteer license, the law provides that the retired physician will not be liable for personal injury or death that is caused by his or her professional negligence or malpractice. The physician, however, can still be held liable if the negligent conduct amounts to gross negligence.

Neither Michigan Law nor the VPA distinguishes between the types of nonprofit health facilities previously mentioned (FQHCs, FQHC Look-Alikes, free clinics and low-cost clinics). Therefore, the protection afforded in these two statutes applies regardless of which type of health facility the retired physician provides care in. Also, since each statute is independent of the other, both statutes would provide protection to a retired volunteer physician.

### **D. VOLUNTEER PHYSICIANS AND OTHER LICENSED HEALTH CARE PROFESSIONALS IN A PRIVATE PRACTICE SETTING**

Both the VPA and Michigan law (MCL § 333.16277) provide certain liability protections to physicians and practitioners who provide medical care without compensation in a private practice setting (*i.e.*, in a solo physician's or group practice's office).

#### **1. Federal Law – Volunteer Protection Act of 1997**

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To be covered by the limitation of liability offered by the VPA (described in Section B.2.), a physician or practitioner providing volunteer services in a private practice setting must be providing such services in his or her capacity as a volunteer of a nonprofit organization.

**2. Michigan Law – Limitation of Liability for Providing Non-Emergency Care on a Voluntary Basis – MCL 333.16277**

Section B.3. outlines the protection provided by this statute as well as the requirements therein. While a solo physician or group practice’s office would not qualify as a “health facility” as that term is defined under § 333.16277, such an office arguably could constitute an entity that provides non-emergency health care to the uninsured or underinsured through voluntary services of licensees or registrants.<sup>25</sup> Accordingly, it is likely that this statute offers liability protection to uncompensated practitioners in their private practice office. This has not been confirmed through any court rulings or Attorney General opinions.

**E. OTHER CONSIDERATIONS**

**1. Regulatory Considerations – Federal Anti-Kickback Statute**

Physicians and practitioners should be aware of the Federal Anti-Kickback Statute (“AKS”). The AKS provides for criminal penalties for individuals or entities that knowingly and willingly offer, pay, solicit, or receive payment in order to induce or reward the referral of business that can be reimbursed under any of the Federal health care programs.<sup>26</sup> This statute is extremely detailed; it is discussed in some detail in the attached detailed discussion document.

**2. Insurance Policies**

If a physician or other practitioner is defended by the federal government and/or receives immunity from suit under an applicable statute, there may not be a need to obtain additional professional liability insurance in such situation. However, it may still be necessary for the nonprofit health facility to obtain other types of insurance coverage.<sup>27</sup>

**However, physicians and other practitioners should obtain insurance policies where it is not clear that they have immunity from suit.** For these individuals, an inquiry should be made into whether their current professional liability insurance policies would provide coverage for these services or if there is additional coverage that may be available. The extent of coverage will most likely vary based on the individual professional liability policy.

Physicians and medical professionals who are employed by a hospital or other health care facility should contact their employer’s legal or risk management departments to determine if the hospital’s professional liability insurance policies provide coverage for services provided on a volunteer basis. Overall, physicians should consider the scope of their professional liability

insurance when providing care for medically indigent individuals outside of the scope of their regular practice.

## **CONCLUSION**

The goal of this document is to supply physicians and other practitioners with a summary of the extent to which they are protected from liability when serving the un/under-insured population. The applicable statutes provide substantial immunity from suit, but that immunity is not universal. Further, many of the statutes require various actions to be taken by the professional and/or his or her employer before the immunity is effective.

Because a physician or practitioner will not be able to be absolutely certain of immunity in all situations, he or she should consider obtaining insurance, whether it is through a hospital, nonprofit health facility, private insurance, or through a rider, to cover those situations where immunity does not apply. Because insurance varies on a case-by-case basis, it is prudent to check your insurance policy and speak with your insurance agent to discuss the specifics of your coverage.

Legislatures at the federal and state level understood and acted on the importance of creating protections for medical professionals serving the un/underinsured population. The statutes mentioned in this document reflect this. These statutes offer medical professionals the outlet they seek to serve a needy population while instilling confidence that they will be afforded some level of protection when serving that population.

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NONPROFIT ORGANIZATIONS ARE ENCOURAGED TO CONTACT  
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<sup>1</sup> [www.clronline.org](http://www.clronline.org); (313) 962-3171; ask for Leor Barak

<sup>2</sup> See 42 CFR § 6.6(d). “A Health Center's **Scope of Project** is the domain described in certain segments of its grant application and approved by the Bureau of Primary Health Care. Those segments include a description of the Health Center's populations served, the list of services provided, list of service delivery sites, Health Center affiliations and work plan. A Health Center can change its scope of project throughout its project period by adjusting those fundamental documents and seeking approval for such change from the Bureau of Primary Health Care.” Source: Clinician’s Handbook on the Federal Torts Claim Act (2<sup>nd</sup> ed), p 24 at [ftp://ftp.hrsa.gov/bphc/pdf/quality/2002clinicianhandbook.pdf](http://ftp.hrsa.gov/bphc/pdf/quality/2002clinicianhandbook.pdf) (last accessed May 27, 2008).

<sup>3</sup> Physicians and other licensed health care professionals acting as contractors may be covered under the FTCA if they perform an average of 32.5 hours or more of services for the FQHC per week. If, however, the physician or other health care professional is licensed or certified in the fields of family practice, general internal medicine, general pediatrics or obstetrics and gynecology, there is no minimum average work week requirement.<sup>3</sup>

<sup>4</sup> *Delvalle v. Sanchez*, 170 F. Supp.2d 1254 (S.D. Fla. 2001).

<sup>5</sup> *Miller v. Toatley*, 137 F. Supp.2d 724 (W.D. La. 2000).

<sup>6</sup> See 42 CFR § 6.6(c).

<sup>7</sup> See 42 USC §233

<sup>8</sup> See 42 CFR § 6.3(a). Specifically, recipients of funding under Sections 329, 340, or 340A of the PHS Act may similarly be “deemed” employees of the PHS and receive protection from malpractice liability to the extent the claims arise out of services rendered by the center and its eligible employees.

<sup>9</sup> Created in 1996 through Section 1294 of the Health Insurance Portability and Accountability Act (HIPAA), which amended section 224 of the Public Health Services Act, 42 USC § 233.

<sup>10</sup> Please see complete CLR memo for a list of the requirements, [www.clronline.org](http://www.clronline.org).

<sup>11</sup> The application and related information for the free clinic program is contained in PIN 2004-24, which is available on the HRSA/BPHC website at [ftp://ftp.hrsa.gov/bphc/docs/2004pins/2004-24.pdf](http://ftp.hrsa.gov/bphc/docs/2004pins/2004-24.pdf).

<sup>12</sup> See 42 USC § 14501, et seq.

<sup>13</sup> For purposes of the VPA, a “volunteer” is an individual performing services for a nonprofit organization or a governmental entity who does not receive: (i) compensation (except for reasonable reimbursement or allowance for expenses actually incurred), or (ii) anything else in lieu of compensation valued in excess of \$500 per year.<sup>13</sup> Volunteers include those who serve as directors, officers, trustees or direct service volunteers.

<sup>14</sup> Under the Act, a “nonprofit organization” means: (i) any 501(c)(3) organization which does not practice any action which constitutes a hate crime, or (ii) any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime. 42 USC § 14505(4).

<sup>15</sup> The term “harm” includes physical, nonphysical, economic and noneconomic losses. 42 USC § 14505(2).

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<sup>16</sup> The VPA does not define what is in the volunteer’s “scope of activity” for purposes of malpractice coverage.

<sup>17</sup> Punitive damages cannot be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer’s responsibilities unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed. *See* 42 USC § 14503(e)(1)

<sup>18</sup> “Noneconomic losses” include losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement and loss of enjoyment of life. 42 USC § 14505(3).

<sup>19</sup> *See* 42 USC § 14504.

<sup>20</sup> In this context, “compensation” means receipt of payment or expected receipt of payment from any source, including, but not limited to, receipt of payment or expected receipt of payment from a patient (or a patient’s parent, guardian or spouse) or from a public or private health care payment or benefits plan on behalf of the patient, or indirectly in the form of wages, salary or other consideration under an employment or services agreement. MCL § 333.16277(7)(a).

<sup>21</sup> *See* MCL § 333.16277(2).

<sup>22</sup> *See* MCL 333.16184

<sup>23</sup> A physician is retired if the physician’s medical license “has expired with the individual’s intention of ceasing to engage in the practice of medicine for remuneration.” *See* MCL 333.16184(4).

<sup>24</sup> A copy of the application is available at [http://www.michigan.gov/documents/mdch/mdch\\_voluteer\\_app\\_pkt\\_179241\\_7.pdf](http://www.michigan.gov/documents/mdch/mdch_voluteer_app_pkt_179241_7.pdf)

<sup>25</sup> An initial version of the bill that would eventually become MCL § 333.16277 specifically provided that the limitation on liability extended to non-emergency health care provided in the “office of a licensee.” A bill analysis prepared after the enactment of § 16277 nonetheless contemplates that the current version of § 16277 extends to physicians in their private offices. *See* Senate Fiscal Analysis, SB 30, January 15, 2003: “Providing immunity to those who offer charity care in their offices will increase access to care for the poor, just as it does in a free clinic. In either setting, the health professional is donating his or her time and expertise. In his or her own office, a physician also contributes the facility and staff. In addition, before a health professional provides free care to a patient in either a free clinic or a private office, the patient must be informed of the limitation on liability contained in the bill.”

<sup>26</sup> *See* 42 USC § 1320a-7b.

<sup>27</sup> Such types of insurance include general liability, and directors and officers liability.