

Liability issues facing Michigan primary health clinics: Considerations for employees and volunteers

Prepared with the assistance of Cicely Vaughn, Wayne State University Law Student

Issue

Purchasing malpractice insurance to cover employees and volunteers is a significant expense for free clinics. However, free clinics find it hard to recruit physician volunteers, because physicians are worried about exposure to medical malpractice claims. Physicians employed by a hospitals or managed care organizations may have malpractice coverage that covers them within the scope of their employment.¹ Physicians in these situations may have to obtain permission from their employers to have their malpractice insurance extended to cover their volunteer activities², pay for their own coverage or rely on the clinic to provide malpractice insurance. Physicians in private practice have malpractice insurance that usually follows them regardless of where they practice.³ However, these physicians might be concerned that their volunteer activities could result in increased premiums if there are claims filed against them.

Brief Summary of Michigan and Federal Law

The Michigan legislature and U.S. Congress have enacted several laws intended to reduce malpractice liabilities for health professionals providing medical care to uninsured patients. The Free Clinic Federal Tort Claims Act Medical Malpractice Program (42 U.S.C. 233(o)) provides free clinics with the best option for ensuring that volunteers providing patient care have malpractice coverage for their work at the clinic. 42 U.S.S. 233(o) requires clinics to file an application to have their volunteer health professionals “deemed” Public Health Service employees. “Deemed” volunteers have immunity from malpractice claims against them for incidents that occur during the scope of their volunteer service. A patient who wants to file a malpractice claim must file an administrative claim with the Department of Health and Human Services (HHS) naming U.S. as the defendant. 42 U.S.C. 233(o) eliminates malpractice concerns for health professionals who volunteer at free clinics. 42 U.S.C. 233(o) should assist free clinics in recruiting volunteers.

Michigan law (MCL 333.16277 and MCL 333.16185) and the Federal Volunteer Protection Act of 1997 (federal law) both limit the liability of volunteers by increasing the degree of negligence required to

¹ Paul A. Hattis MD, JD, MPH & Janet Walton, MA, Understanding Charitable Immunity Legislation: A Volunteers in Health Care Guide 8, available at, <http://www.volunteersinhealthcare.org/Manuals/Charit.Imm.Man.pdf>, (last visited August 4, 2006).

² *Id.*

³ *Id.*

Legal Lines

Legal Issues for Nonprofits

file a claim. These laws require a claimant to allege gross negligence instead of general negligence. Michigan law and the Federal Volunteer Protection Act of 1997 are not sufficient to eliminate physicians concerns of malpractice claims which might result from their volunteer activities. Federally Qualified Health Centers (FQHCs) and FQHC – Look Alikes do not rely on volunteers to provide patient treatment; therefore, they do not need to rely on the federal or state volunteer immunity laws.

FQHCs receive liability protection under the Federal Tort Claims Act for the acts and omissions of the entity, officers and employees. FQHC-Look Alike clinics often have an affiliation with a hospital or university that will provide the clinic with malpractice coverage. If an FQHC does not have an affiliation with an institution then the health center will have to purchase medical malpractice liability insurance to cover employees.

The health clinic should obtain liability coverage for the entity, which could be used if there is a claim that the health clinic was vicariously liable the medical negligence of a volunteer or employee. Free clinics, FQCH Look-Alikes, and low cost clinics all are responsible for obtaining adequate coverage for vicarious liability claims brought against the health center. The federal government will provide FQHCs with liability coverage for tort claims brought against the health center.

Table 1: Sources of Malpractice Liability Coverage for Health Clinics

Types of Health Clinic	The Organization	Employees providing Medical Care	Volunteers Providing Medical Care
FQHC	Federal government (42 U.S.C. 233g)	Federal government (42 U.S.C. 233g)	None – FQHCs rarely use volunteers to provide medical care.
FQHC Look - Alikes	Organization must obtain coverage	Organization must obtain malpractice coverage.	Organization must obtain malpractice coverage, but FQHC Look-Alikes rarely use volunteers to provide medical care.
Free Clinic	Organization must obtain coverage	Organization must obtain coverage	Federal government for “deemed” volunteers (42 U.S.C. 233(o))
Low Cost Clinic	Organization must obtain coverage	Organization must obtain coverage	Organization must obtain coverage or use physicians whose personal malpractice insurance covers their volunteer activities.

DISCUSSION OF RELEVANT MICHIGAN LAWS

Michigan's laws limiting liability for physicians who volunteer at community health clinics do not protect physicians against malpractice claims. Michigan's laws only increase the standard of negligence that the court uses to determine if the physician should be responsible for damages to the patient. This means that patients would have to claim and prove that the physicians' actions were grossly negligent. Requiring a higher standard of negligence might result in a lawyer advising their client not to pursue malpractice litigation against a physician covered under MCL 333.16277 and MCL 333.16184 - 333.16185. Michigan's laws do not provide enough protection to satisfy the physicians and clinics malpractice liability concerns.

A. MCL 333.16277 – Nonemergency health care; limitation on liability

MCL 333.16277 increases the level of negligence that must be proved for a malpractice claim against a licensed or registered health care professional who provided the claimant with uncompensated medical care. The claimant has to demonstrate that the health care professional's actions were the result of gross negligence, willful and wanton misconduct or were intended to injure the patient.⁴ This limitation on liability only applies if non-emergency medical care is "provided inside the premises of or as a result of a referral from either of the following:

- a) a health facility organized and operated for the sole purpose of delivering non emergency health care without receiving compensation"⁵ or;
- b) "[a]n entity that is not a health facility and that provides nonemergency health care to uninsured or under-insured individuals" through the use of volunteer health professionals who are not compensated.⁶

Prior to providing medical care to a patient the health professional must provide "the patient with a written disclosure statement that describes the limitation on the professional's liability and states that the patient received free medical care."⁷ The patient must sign a document to acknowledgement the receipt of the written disclosure.⁸ The limitation on liability will not apply to a patient who does not sign the acknowledgement document. If the patient refuses to sign the acknowledgment form then a health care

⁴ MCL 333.16277(1).

⁵ MCL 333.16277(2)(a).

⁶ MCL 333.16277(2)(b).

⁷ MCL 333.16277(3)(a).

⁸ MCL 333.16277(3)(b).

professional might have to make a difficult decision of providing treatment and increasing their liability or not providing treatment to the patient.

B. MCL 333.16184 - 333.16185 – Limited liability of retired physicians providing voluntary medical care

Retired physicians who are granted a special license to donate their medical skills to treat “indigent and needy individuals or individuals in medically underserved areas”⁹ receive limited liability protection. If both of the following apply, then the physician will only be liable if the physician is grossly negligent:¹⁰

- a) “the care is provided at a health facility or agency that provides at least 75% of its care annually to medically indigent individuals”¹¹; and
- b) the physician does not receive or intend to receive compensation for the care.¹²

MCL 333.16184 - 333.16185 will not eliminate the possibility that the volunteer will have to defend a malpractice claim.

DISCUSSION OF RELEVANT FEDERAL LAWS

The Free Clinic Federal Tort Claims Act Medical Malpractice Program (42 U.S.C. 233(o)) provides free clinics with the best option for ensuring that volunteers providing medical care to patients have malpractice coverage for their volunteer activities. FQHCs are covered by the Federal Tort Claims Act for the acts and omissions of the health center, employees, and officers related to federally funded activities. The Volunteer Protection Act protects those who volunteer for nonprofit and governmental organizations against claims of general negligence; however, volunteers can be liable for gross negligence.

⁹ MCL 333.16184(1).

¹⁰ MCL 333.16185(2)

¹¹ MCL 333.16185(1).

¹² MCL 333.16185(1).

A. Federal Tort Claims Act Coverage of Free Clinic Volunteer Health Care Professionals - 42 U.S.C.233(o)

42 U.S.C. 233(o) enables a free health care clinic to sponsor a health care professional to be “deemed” an employee of the Public Health service. This will allow the volunteer health professional to be eligible for Federal Tort Claims Act medical malpractice coverage. “FTCA deemed status provides the volunteer health care professional with immunity from medical malpractice lawsuits resulting from . . . medical , surgical, dental or other related functions within the scope of . . . work at the free clinic.”¹³ Patients that allege acts of malpractice against the “deemed” health care professional must file their claims against the United States.

1. Definition of a free health care clinic

42 U.S.C. 233(o)(3)(A) defines a free clinic as a health care facility operated by a nonprofit private entity that:

- Does not accept reimbursement from a third-party payor (insurance policy, health plan, or federal or state health benefits program);
- Does not impose charges on patients to whom service is provided. If a facility imposes charges on patients according to their ability to pay then the volunteer will not be covered for the specific services for which payment was received.
- Only accepts patient’s voluntary donations for health care services
- Is licensed or certified to provide health services.¹⁴

2. Requirements for the volunteer health professional that will be covered by 42 U.S.C. 233(o).

The volunteer health professionals must satisfy the following criteria:

- Provide health care services to patients at a free clinic or offsite programs /events offered by the free clinic;
- Be sponsored by a free clinic in the clinic’s Volunteer Free Clinic Deeming Application;
- Provide a health service that is covered under Medicaid
- Does not receive compensation for the services provided from a third party payor; and

¹³ Bureau of Primary Health Care (BPHC), Program Information Notice (PIN) 2004-24 (revised September 24,2004) 3-8, available at, <http://www.bphc.hrsa.gov/freeclinicsftca/application.htm>, (last visited August 4, 2006).

¹⁴ *Id.* at 1-2;42 U.S.C 233(o)(3).

- Is licensed or certified to provide the health care services.¹⁵

3. Coverage provided under 42 U.S.C.233(o) and the Volunteer Free Clinic Deeming Application

42 U.S.C.233(o) only covers medical negligence for volunteer free clinic health professionals that have been “deemed” a Public Health Service employee. This provision does not provide malpractice protection under the FTCA for other free clinic staff or the free clinic as a corporate entity.¹⁶

4. Procedures that free health clinics must follow to apply for malpractice coverage under 42 U.S.C. 233(o) for volunteers

The free clinic must complete a Volunteer Free Clinic Health Professional Deeming Application which can be found on the Bureau of Primary Health Care website, <http://www.bphc.hrsa.gov/freeclinicsftca/application.htm>. As part of the application process the clinic will have to provide proof of the volunteer’s qualifications to provide medical care (Credentialing).¹⁷ Free clinics must also identify the specific scope of the services that the health care professional will provide (Privileging).¹⁸ Once a clinic’s volunteer has been “deemed” the clinic will have to renew their deeming application each year.¹⁹ If the clinic needs to have additional volunteers “deemed” prior to the renewal date, then the clinic will have to submit a supplemental application.²⁰

5. Patient Notification of Limited Legal Liability of the FTCA deemed volunteer

The volunteer or the clinic must provide patients with written notification of the limitations of the legal liability before treatment is provided to the patient.²¹ Patients can be requested to sign the notice, which can be placed in their medical record.²² The deeming application contains a sample notice.²³

¹⁵ BPHC, PIN 2004-24 at 2.

¹⁶ *Id.* at 10-11.

¹⁷ BPHC, PIN 2004-24 at 3-8.

¹⁸ *Id.*

¹⁹ *Id.* at 10.

²⁰ *Id.*

²¹ *Id.* at 8.

²² *Id.* at 8, Appendix C.

²³ *Id.*

6. Procedures that patients must follow to file a malpractice claim against a FTCA deemed volunteer

A patient alleging malpractice by a FTCA “deemed” volunteer must file their claims against the United States. The claim must first be filed as an administrative claim with the Department of Health and Human Services (HHS). Once HHS receives a complaint they will determine if FTCA medical malpractice coverage applies to the claim. If HHS denies the claim or fails to act within six months then the patient can file suit in federal district court against the United States. These malpractice cases are defended by the Department of Justice. FTCA malpractice cases are not heard by a jury and no punitive damages are allowed.

7. Impact of 42 U.S.C. 233(o) on Free Clinics

Free clinics that apply to have their volunteers “deemed” will be able to significantly reduce the costs associated with providing malpractice coverage for volunteers. Assuring volunteers that they will not be named as a claimant for malpractice should help the clinics to recruit volunteer health care professionals.

B. Volunteer Protection Act (VPA) - 42 U.S.C. 14501-14505

The Volunteer Protection Act (VPA) was passed to limit the liabilities of volunteers of nonprofit and governmental organizations. The VPA protects volunteers against claims of general negligence. Therefore, a person bringing a claim against a volunteer can allege gross negligence, reckless misconduct, conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer or willful or criminal misconduct.²⁴ The VPA will not eliminate physician concerns of having to defend malpractice claims as a result of their volunteer activities.

²⁴ 42 U.S.C §14503.

C. Federally Supported Health Centers Assistance Act (FSHCAA) of 1992 and 1995 - 42 U.S.C. 233g

The Federally Supported Health Centers Assistance Act (FSHCAA) granted Federally Qualified Health Centers (FQHCs) medical malpractice liability protection through the Federal Tort Claims Act (FTCA). FSHCAA mandates that health centers, their employees, and eligible contractors are considered federal employees who are immune from suit.²⁵ As a result, the Federal government acts as the primary insurer for FQHCs.²⁶ The legislative intent of FSHCAA was to extend FTCA coverage to federally funded health centers to allow them to “redirect funds . . . spent on malpractice insurance premiums toward improving or expanding their services to their target populations.”²⁷ Only FQHCs clinics qualify for malpractice liability protection under 42 U.S.C. 233g. This means that the health clinic must receive federal funding under 42 U.S.C §254b.

FQHCs must apply to be “deemed” by HHS to be covered by the FTCA.²⁸ 42 U.S.C 233g provides Federal Tort Claims protection to officers and employees of a covered entity and contractors that are licensed health care practitioners.²⁹ The FTCA covers acts and omissions within the scope of employment of “deemed” individuals for claims of “personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions.”³⁰ However, only acts and omissions related to the grant-supported activity of the eligible entity are covered.³¹ “If a covered individual is providing services which are not on behalf of the covered entity, such as on a volunteer basis or on behalf of a third-party. . .whether for pay or otherwise,” then the related acts and omissions are not covered by under FTCA.³² FQHCs rarely utilize volunteers that provide patient treatment because of the federal requirements that they have to satisfy.³³ Almost all of the FQHCs in Michigan apply for Federal Tort Claim coverage.³⁴

²⁵ Bureau of Primary Health Care (BPHC), Federal Tort Claims Act and Health Centers: Medical Malpractice Liability Protection, available at, <http://bphc.hrsa.gov/risk>, (last visited on July 24, 2006).

²⁶ *Id.*

²⁷ *McLaurin v. U.S.*, 392 F.3d 774, 781(U.S. Appeal 5th Cir. ,2004) (citing H.R Rep. No. 102-823(II), at 6 (1992).

²⁸ Federal Register, May 8, 1995, Vol. 60, No. 88, 22532; 42 U.S.C §233(g).

²⁹ Federal Register, May 8, 1995, Vol. 60, No. 88, 22532. § 6.4.

³⁰ Federal Register, May 8, 1995, Vol. 60, No. 88, 22532. §.6.6b.

³¹ Federal Register, May 8, 1995, Vol. 60, No. 88, 22532. §6.6.

³² Federal Register, May 8, 1995, Vol. 60, No. 88, 22532. §6.6d.

³³ Kim Sibilsky, Executive Director of Michigan Primary Care Association, Okemos, MI, Interviewed on August 1, 2006.

³⁴ Kim Sibilsky, Executive Director of Michigan Primary Care Association, Okemos, MI, Interviewed on August 1, 2006.

CONCLUSION

Michigan law does not provide immunity to health clinic volunteers. Michigan law only increases the level of negligence that must be demonstrated by the patient. In Michigan health care providers who provide patients with free medical care are only liable for actions that are grossly negligent, not acts of general negligence. The Federal Tort Claims Act allows the federal government to assume the liability of FQHCs (the organization, employees, and officers) and qualified volunteers of free health clinics. The Volunteer Protection Act only increases the level of negligence for individuals that volunteer for nonprofit organizations.