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EMAC Volunteers: Liability and Workers' Compensation

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Abstract

The Emergency Management Assistance Compact (EMAC) provides a mechanism for states to assist each other during natural disasters and other emergencies. Congress ratified EMAC in 1996, and all 50 states and 3 territories have adopted it. EMAC allows a state affected by a disaster to request personnel and materiel from another state. For personnel requests, EMAC provides that the requesting state cover the tort liability and the responding state cover the workers' compensation liability. This article discusses the limitations of EMAC in deploying volunteers and how the Uniform Emergency Volunteer Health Practitioners Act and other provisions address those limitations.

Public health emergencies, including natural disasters such as tornados, hurricanes, floods, and forest fires, and man-made disasters, whether accidental or deliberate, can result in mass fatalities, injuries, and illnesses. These events create an upsurge in the need for health practitioners, but, unlike military, police, or fire resources, the government does not typically employ enough health professionals to meet a surge in demand, whether at the federal or state level. Therefore, reliance on volunteer health practitioners from the private sector is to be expected, and their availability should be facilitated. In an emergency that exceeds a state's capacity to respond, it may be necessary to move volunteer health practitioners across state lines. The Emergency Management Assistance Compact (EMAC) was designed to enable states with resources to efficiently send assets, including people, to a state in need by addressing legal issues in advance.¹ However, gaps left by EMAC have prevented the movement of volunteers, and specifically volunteer health practitioners (eg, doctors, nurses, veterinarians, and other health professionals), across state lines to deliver health services in response to emergencies, such as the hurricanes of 2005.^{2,3} The Uniform Emergency Volunteer Health Practitioner Act (UEVHPA) was drafted to address these gaps, but states have not adopted it consistently and instead must rely on a patchwork of state laws. This article describes EMAC's history, coverage and gaps created by EMAC with regard to volunteer health practitioners' liability and workers' compensation, how UEVHPA

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fills these gaps, alternative solutions states have adopted, and the role of mutual aid agreements in moving volunteer health practitioners across state lines during an emergency.

EMAC History and Overview

EMAC has roots in the Federal Civil Defense Act of 1950, which promoted the use of interstate mutual aid in response to emergencies. The legislation authorized the Federal Civil Defense Administrator to “assist and encourage the states to negotiate and enter into interstate civil defense compacts.”⁴ Despite minimal support and funding for civil defense, the Federal Emergency Management Agency (FEMA) administrator was granted similar authority in the Robert T. Stafford Disaster Relief and Assistance Act of 1994.⁵ Interest in civil defense was renewed following Hurricane Andrew in 1992 and the terrorist attacks of September 11, 2001.

Following Hurricane Andrew, Florida Governor Lawton Chiles, along with the Virginia Department of Emergency Services, worked with the governors of other southern states to develop the Southern Regional Emergency Management Assistance Compact (SREMAC); 17 states, the Virgin Islands, and Puerto Rico signed on to SREMAC in 1993.⁶

EMAC derived from SREMAC and was ratified by Congress in 1996.¹ All 50 states, the District of Columbia, Puerto Rico, Guam, and the US Virgin Islands have signed on to EMAC as members called “party states.” Although it is not a “uniform law,” EMAC has been enacted essentially intact by all party states.*

EMAC is administered by the National Emergency Management Association (NEMA). Use of EMAC has grown significantly, as have requests through EMAC for personnel. In 2001, New York requested 26 support staff from other states through EMAC to respond to the terrorist attacks; in 2005, 66,000 personnel were deployed under EMAC to respond to Hurricane Katrina.⁷

EMAC provides a framework for party states to share assets including personnel, resources, and services across state lines during response to a governor-declared emergency. The requesting state (also referred to as the receiving or accepting state) retains state sovereignty and continues to lead the emergency response. The sending state (also referred to as the assisting or rendering state) responds to the request to the extent that it can continue to be capable of protecting its own state in an emergency.⁸ EMAC does not replace federal support.

EMAC helps expedite the response because key legal issues between the requesting and sending states, such as licensure, liability, workers' compensation, and reimbursement, have been dealt with in advance of the emergency.

*“Uniform” and “model” laws are terms of art. The Uniform Law Commission’s website defines these terms as follows: “A uniform state law is a statute that has been promulgated by the Uniform Law Commission. Although other organizations may adopt the term ‘uniform’ when describing their own acts, generally, when the term ‘uniform’ is used, it is highly likely that it is a law that has been drafted and approved by the ULC. Besides uniform acts, the ULC also promulgates ‘model’ acts. A uniform act is one in which uniformity of the provisions of the act among the various jurisdictions is a principal and compelling objective. An act may be designated as ‘model’ if the principal purposes of the act can be substantially achieved even though it is not adopted in its entirety by every state.” [http://www.uniformlaws.org/Narrative.aspx?title=Frequently Asked Questions](http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions). Accessed June 10, 2013.

EMAC Coverage

EMAC's Article I provides that party states may request assistance under EMAC for response to any governor-declared emergency or disaster, whether natural or man-made. Almost any asset can be moved across states lines under EMAC, including personnel. Volunteers, specifically volunteer health practitioners, present unique concerns under EMAC. Many health practitioners, such as doctors, nurses, and paramedics, are required to be licensed to practice in their home state. EMAC Article V states that a person who holds a professional license, certificate, or other permit in the sending state will be deemed licensed, certified, or permitted by the requesting state. The governor of the requesting state may impose limitations or conditions on professional licenses, certificates, or permits through executive orders or other mechanisms.⁹

While the sending state commands emergency forces, functionally they are under the operational control of the requesting state according to EMAC Article IV.¹⁰ Under EMAC Article VI, "officers or employees" of the sending state are considered "agents of the requesting state for tort liability and immunity purposes." The sending state and its "officers or employees" cannot be held liable for their actions or omissions while assisting with the response. This provision excludes willful misconduct, gross negligence, or recklessness.¹¹ As outlined in EMAC Article VIII, party states must provide workers' compensation and death benefits to "members of emergency forces of that state" regardless of whether the injury occurred outside of the member's home state.¹²

While EMAC provides the groundwork, it anticipates supplemental agreements under Article VII. These mutual aid agreements can be drafted prior to an emergency, in contemplation of a future response, or at the time of the response to tailor the response to the needs of the party states at that time. Mutual aid agreements can restrict or expand the existing EMAC provisions or address legal issues not considered by EMAC.

EMAC Article IX says that the requesting state must reimburse the sending state for expenses incurred while responding under EMAC. The sending state may assume the costs or donate service in whole or in part. Mutual aid agreements may establish a different cost allocation between the sending and receiving states than what is outlined in Article IX, with the exception that the sending state cannot be reimbursed for costs associated with workers' compensation or death benefits as stated in Article VIII.

Gaps in Coverage

Under EMAC Article VI, the sending state and its "officers or employees" receive immunity from liability resulting from acts or omissions performed in good faith (ie, not willful misconduct, gross negligence, or recklessness).¹³ The officers and employees of the sending state are considered agents of the requesting state, and the requesting state may be vicariously liable (ie, the state can be held liable in place of an officer or employee on the theory that a principal is responsible for the acts of its agent). However, most healthcare practitioners are not government employees. Unless a sending state's laws deem volunteers to be employees for liability purposes, EMAC does not stand as a sufficient framework for deploying its volunteer health practitioners out of state because the sending state and its

volunteer health practitioners are exposed to liability, and volunteer health practitioners and other volunteers will likely not be deployed to render assistance. The requesting state will be deprived of much needed assistance.

Under EMAC Article VIII, a sending state must provide for the payment of workers' compensation and death benefits to "members" of the sending state's emergency forces who are injured or killed. Compensation must be made in the same manner as if the injury or death occurred in the sending state. EMAC does not clarify whether a volunteer, or, more specifically, a volunteer health practitioner, can be deemed a "member" of the sending state's emergency force and therefore entitled to workers' compensation. This may have a chilling effect on volunteer health practitioner and other volunteer recruitment. A receiving state may again be deprived of needed assistance from sending states.

Mechanisms to Address the Gaps

To address the liability and workers' compensation coverage issues for volunteer health practitioners left open by EMAC, the National Conference of Commissioners of Uniform State Laws (NCCUSL) approved and recommended that states enact the Uniform Emergency Volunteer Health Practitioner Act (UEVHPA) in 2007.¹⁴ UEVHPA is written from the perspective of a "receiving" state. It applies to volunteer health practitioners who are providing health or veterinary services for a host entity in a state that has declared an emergency during the pendency of such an emergency, and it allows volunteer health practitioners to practice in that state if they are licensed and in good standing in another state.¹⁵

To date, the UEVHPA has been enacted by 15 jurisdictions consisting of 13 states, the District of Columbia, and the US Virgin Islands. Although it is called a "uniform" law, it has been treated as a model law to the extent that enacting jurisdictions have often modified the suggested language in order to adapt it to particular circumstances or the jurisdiction's existing legal framework. To minimize confusion, we will refer to the NCCUSL version as the "model UEVHPA" or the "Act" and identify the enacted versions by state (eg, "the Indiana UEVHPA").

The Act applies to volunteer health practitioners who are registered with a qualified registration system providing a health or veterinary service for a host entity, which can be any legal or commercial entity, including corporations, governments, government subdivisions, agencies, or instrumentalities operating in the receiving state, in response to a declared emergency.¹⁶ Furthermore, an authorized agency of the receiving state, such as the emergency management agency, may incorporate volunteer health practitioners who are not officers or employees of the state or political subdivision into the emergency forces of the state, presumably even if they are from outside the state.¹⁷ Therefore, it would appear that a covered volunteer health practitioner must either be affiliated with some kind of disaster relief organization or government instrumentality authorized to operate in the receiving state, whether or not such host agency is from within the receiving state or outside the receiving state, or be incorporated into the emergency forces of the receiving state as set forth above. An unaffiliated or unincorporated individual who shows up spontaneously at a disaster site and helps would not be deemed a volunteer health practitioner under the Act.

Liability Protections Under the Model UEVHPA

With regard to liability of volunteer health practitioners, the Act offers 2 alternative versions of Section 11 for enacting jurisdictions to consider. Alternative A provides immunity from liability to volunteer health practitioners for their acts or omissions, excluding willful misconduct, intentional torts, breaches of contract, and others.¹⁸ Alternative A also provides that no person, such as a host entity, a sending state, or a requesting state, shall be vicariously liable for the acts or omissions of the volunteer health practitioners if the volunteer is not liable.¹⁹ Alternative B also provides immunity from liability to volunteer health practitioners, but suggests a monetary cap of \$500 on the amount of compensation the volunteer can receive for providing the voluntary services. Reimbursement of expenses or continuation of salary while on leave is not considered compensation. Again, the same exclusions apply.²⁰

Alternative A provides broader liability protection because it specifies that there is no vicarious liability and it does not have any limiting language based on monetary compensation. On the other hand, Alternative B clarifies that continuation of salary while on leave, a circumstance that may apply to volunteer health practitioners, does not constitute compensation. Both alternatives resolve the problem presented by EMAC because they clearly protect volunteers who are not “officers or employees” of the sending state; however, Alternative B restricts this protection to only those receiving less than \$500, which appears to be inconsistent with the general definition of volunteer health practitioners. The general definition specifies that “volunteer health practitioner” means “a health practitioner who provides health or veterinary services,” whether or not the practitioner receives compensation for those services.²¹

Parenthetically, a receiving state’s statutes may grant total immunity to the volunteer health practitioner with no vicarious liability exposure for the state (Alternative A), or it may grant immunity to the volunteer (no personal liability) with the state left responsible for defense and indemnification, for acts or omissions performed within the state (Alternative B). But a sending state may not unilaterally extend immunity to its volunteer health practitioners for acts performed and litigated outside of the state. It would be manifestly unjust for a person negligently injured in one state to have no recourse to the courts of that state solely because the laws of another state grant immunity to an allegedly negligent out-of-state actor. EMAC’s Article VI grant of immunity to the officers and employees of a sending state is effective because all states, including all possible receiving states, have enacted EMAC.

While a statute would likely be necessary to vest any kind of immunity on an individual or the state, it is possible that an administrative agency would have the inherent authority, or obligation, even without a specific statute, to extend defense and indemnification protections to its agents acting under its supervision and control either within or outside the state. For receiving states that have not enacted the UEVHPA, it may be worth exploring whether they could nevertheless contractually offer defense and indemnification to authorized in-state or out-of-state volunteers coming to their assistance and acting under their supervision and control. The ability to do so would need to be vetted and approved by the appropriate authorities. Of course, it is always better to have a comprehensive statute, such as the UEVHPA, that resolves these and other issues.

Workers' Compensation Protections

Regarding workers' compensation, Section 12 of the Act provides that a volunteer health practitioner who dies or is injured as a result of providing health or veterinary services pursuant to the Act is deemed an employee of the receiving state for the purpose of receiving workers' compensation benefits under the law of that state.²² Section 12 makes the receipt of such workers' compensation benefits contingent on the volunteer health practitioners' not being eligible for such benefits under the law of another state and on the volunteers' electing coverage under the receiving state's law.²³ If an injured volunteer health practitioner were eligible for workers' compensation benefits from the sending state (eg, because the law of the sending state extended the benefits to volunteer health practitioners), they could not receive benefits from the receiving state under Section 12.

Subsection (c) of Section 12 requires an appropriate agency of the receiving state to adopt rules, enter into agreements with other states, or otherwise facilitate the receipt of workers' compensation benefits by volunteer health practitioners who reside in other states. For states that have enacted the UEVHPA, a receiving state would be responsible for the payment of workers' compensation benefits to out-of-state volunteer health practitioners not otherwise eligible for such benefits. Therefore, the UEVHPA addresses the gap left open by EMAC Articles VIII and IX relative to volunteers. States considering adoption of UEVHPA must identify existing state statutory limitations on workers' compensation benefits to ensure consistency with UEVHPA.

Mutual Aid Agreements

Mutual aid agreements between states can be useful in addressing issues of interstate cooperation in circumstances that do not rise to the level of governor-declared emergencies.²⁴ As demonstrated in the state examples we set forth below, mutual aid agreements can be necessary to clarify matters that may arise in response to declared emergencies but which may be left open by EMAC and UEVHPA.

One potential obstacle to interstate mutual aid agreements that may appear burdensome to states is the Compact Clause of the US Constitution, which states, "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."²⁵ However, the Compact Clause's limitation is not as absolute as it may seem. In 1981, the US Supreme Court ruled in *Cuyler v Adams* that

Congressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause. Where an agreement is not "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States," it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent.²⁶

The Cuyler Court was quoting from *Virginia v Tennessee*, the seminal Supreme Court case on the Compact Clause. Most interestingly, in discussing what kinds of issues do not encroach upon federal authority, that 1893 decision stated:

So, in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of congress, which might not be at the time in session.²⁷

Accordingly, a strong argument can be made that the mutual aid agreements contemplated here do not encroach on federal authority, especially to the extent that they involve the use of volunteer health practitioners as state assets in emergencies. Even if responding to federally declared emergencies were deemed to be FEMA's responsibility, it is unlikely that states would be prohibited from entering into agreements for the use of their own resources, or those of their agreeable sister states, in response to strictly state-declared emergencies.

Alternatively, the 1996 congressional ratification of EMAC, including its Article VII, which recognizes the need for supplementary agreements among the states, provides another rationale for why actual congressional pre-approval of every interstate mutual aid agreement under these circumstances may be unnecessary. As the Supreme Court said in *Cuyler*, 449 US at 441, "Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined." EMAC Article VII could conceivably be viewed as constructive approval of these kinds of interstate mutual aid agreements by Congress, if approval were deemed necessary. In addition, if more concrete congressional approval is deemed advisable under the circumstances, the Stafford Act provides a mechanism to obtain such approval. Interstate emergency preparedness compacts can be transmitted to Congress, and its approval is deemed granted 60 days after its transmittal, but approval can be denied or withdrawn at any time.^{28,29} Of course, whether and what kind of approval would be necessary is subject to the legal evaluation and determination of appropriate authorities, such as state attorneys general or federal authorities.

Case Studies of State Laws

States have chosen different ways to address volunteer health practitioner liability and workers' compensation concerns. The descriptions below provide case study examples of how 4 states have addressed these issues. Two of the chosen states have enacted versions of UEVHPA (Indiana and Utah), and 2 have relied on other laws (New York and Florida). The states were chosen based on the variation in their treatment of UEVHPA, the authors' knowledge of the state laws, and the generous cooperation of the state public health attorneys.

Indiana

Indiana's UEVHPA, found at Chapter 3.5 of Article 14 of Title 10 of the Indiana Code, omits the liability and workers' compensation provisions of the model UEVHPA. Instead, provisions offering protection for volunteers are found in Indiana's Emergency Management and Disaster Law at Chapter 3 of Article 14 of Title 10 of the Indiana Code. These 2 bodies of law should be read together as encompassing the essence of the model UEVHPA.

Liability and workers' compensation as a sending state—Indiana Mobile Support Unit members (MSUMs) may be “unemployed, retired, self-employed, or employed.”³⁰ MSUMs are considered emergency management workers entitled to the rights and immunities of an employee, including immunity from liability and at least some workers' compensation benefits if they are not otherwise entitled to such benefits. For example, MSUMs working as authorized emergency management workers who are unemployed or self-employed volunteers may be limited to benefits covering medical treatment and burial expenses.³¹ Furthermore, MSUMs who are not employees of Indiana and are deployed outside the state under EMAC are considered employees of Indiana for purposes of the compact.³² Therefore, under EMAC, Indiana can deploy Indiana volunteer health practitioners to other states as employees of Indiana for purposes of EMAC and derive all of the liability protections of EMAC for the volunteers as well as for the state of Indiana. If the deployment were to a state that had enacted Alternative A of the model UEVHPA, then the receiving state would also be immune from liability. Consistent with the intent of EMAC Article VIII, Indiana volunteer health practitioners who are injured while deployed to another state, and who are not otherwise eligible for workers' compensation benefits, would be covered for medical treatment and burial expenses.

Liability and workers' compensation as a receiving state—The definition of an Indiana “emergency management worker” includes a volunteer of Indiana or of another state, US territory or possession, any neighboring country, or any agency or organization performing emergency management services in Indiana. The definition also includes a volunteer health practitioner registered under Indiana's UEVHPA provisions.³³ Accordingly, although applicability of liability and workers' compensation laws is heavily fact dependent, Indiana statutes place out-of-state volunteers rendering assistance in Indiana within the ambit of liability protections and the limited workers' compensation benefits offered to authorized emergency management workers under the Indiana Emergency Management and Disaster Law.³⁴

This array of statutory protections offers Indiana an excellent opportunity to enter into mutual aid agreements with a variety of jurisdictions, including states that have or have not enacted the model UEVHPA, clarifying responsibilities so as to minimize Indiana's exposure as a sending state. Mutual aid agreements can also offer Indiana protections and benefits to other states in order to encourage states to assist Indiana as a receiving state if the need arises.

Utah

Utah's version of UEVHPA is found in Chapter 49 of Utah's Health Code, Title 26 of the Utah Code. It provides, “An authorized representative of a party state may incorporate volunteer health practitioners into the emergency forces of Utah even if those volunteer health practitioners are not officers or employees of Utah...”³⁵ This language is similar, but not identical, to the language of the model UEVHPA, Subsection 9(b), which specifically references EMAC. Therefore, one would assume that the term “party state” here carries the same meaning as in EMAC. Clearly, this language authorizes a Utah representative to incorporate Utah volunteer health practitioners into the emergency forces of Utah. It is

reasonable to conclude that it also authorizes a representative of another state sending assistance to Utah, presumably with the affirmative authorization of Utah, to incorporate out-of-state volunteer health practitioners into Utah's emergency forces.

Liability as a sending state—Unlike Indiana, there is no express Utah provision deeming volunteer health practitioners to be employees for liability purposes. A volunteer health practitioner incorporated into the Utah emergency forces pursuant to the aforementioned subsection 301(b) can arguably be viewed as the functional equivalent of a Utah employee and, therefore, can be deployed outside of Utah with the immunity from liability provided by Utah law and extended out of state by EMAC Article VI.

However, there is no precedent for this sort of deployment by Utah. If Utah were to deploy a volunteer health practitioner incorporated into its emergency forces to a state that had enacted the UEVHPA, then that volunteer would be immune from liability pursuant to the receiving state's version of the model UEVHPA's Section 11 even if the volunteer were not deemed an employee of Utah under EMAC. But if Utah was asked to deploy a volunteer health practitioner incorporated into its emergency forces to a non-UEVHPA state, and did not want to rely on the possibility that the volunteer would be deemed a Utah employee for EMAC Article VI liability protection purposes, then it is likely that Utah would not deploy that volunteer unless Utah and the receiving state entered into a mutual aid agreement whereby the receiving state, pursuant to its own laws if possible, assumed responsibility for any liability that might result from the Utah volunteer's acts or omissions in the receiving state.

Workers' compensation as a sending state—Contrary to the provisions applicable to liability, the Utah UEVHPA considers a volunteer health practitioner to be a state employee for the purpose of receiving workers' compensation medical benefits and requires Utah to provide volunteers with workers' compensation benefits under the Workers' Compensation Act and the Utah Occupational Disease Act.³⁶ Therefore, Utah volunteer health practitioners incorporated into its emergency forces would be eligible to receive workers' compensation benefits under Utah law. This approach is consistent with EMAC because EMAC Article VIII provides coverage for "members of the emergency forces" and does not limit protection to "officers and or employees." If Utah deployed Utah volunteers incorporated into its emergency forces to a state that had enacted the model UEVHPA's Section 12, Utah's volunteers could not avail themselves of that other state's benefits because they would be eligible to receive Utah benefits.

Liability and workers' compensation as a receiving state—Utah provides immunity from civil liability to volunteer health practitioners providing health or veterinary services in Utah pursuant to the Utah UEVHPA. However, the Utah immunities' construct is different from either Alternative A or B of the model Act.³⁷ If the law of a state sending volunteer health practitioners to Utah viewed the volunteers as employees of the sending state, and the assistance was being provided under EMAC, then the volunteer health practitioners would be deemed agents of Utah, with the volunteers and the sending state protected from liability and Utah potentially responsible for liability resulting from the acts or omissions of the volunteers under EMAC Article VI.

As indicated above, Utah's UEVHPA is less clear on the question of "no vicarious liability" than is Alternative A of Section 11 of the model Act. Even if a sending state's law did not recognize volunteer health practitioners as employees and, therefore, EMAC immunity was not available under EMAC Article VI, Utah's UEVHPA provides immunity to out-of-state volunteers.³⁸ Accordingly, Utah may enter into mutual aid agreements with neighboring jurisdictions offering them liability immunity in order to encourage assistance if needed. Indeed, for the 2002 Winter Olympics, prior to Utah's enactment of its UEVHPA in 2008, Utah entered into mutual aid agreements with Colorado, Wyoming, New Mexico, and Arizona extending liability protection to volunteer health practitioners from those states.

While EMAC Article VIII makes a sending state responsible for payments associated with workers' compensation benefits to members of its emergency forces serving in another state, and EMAC Article IX makes those expenses nonreimbursable by the receiving state under EMAC, Utah's UEVHPA does allow it to cover out-of-state volunteer health practitioners for such benefits. Unlike the model UEVHPA's Section 12, which makes such coverage available only if the out-of-state volunteer health practitioner is not otherwise eligible for workers' compensation benefits, Utah's corresponding provision does not have such limiting language. Therefore, out-of-state volunteers could be eligible to receive Utah benefits whether or not they are eligible to receive workers' compensation benefits from the sending state. If a volunteer health practitioner is eligible for benefits from the sending state, he or she would have to elect which state's benefits to claim. Or a mutual aid agreement between such states could clarify the issue beforehand. Similar to the model UEVHPA's Subsection 12(c), Utah law requires Utah's Labor Commission to adopt rules, enter into agreements with other states, or take other measures to facilitate receipt of benefits by volunteer health practitioners who reside in other states.³⁹

New York

In the absence of a UEVHPA-like statute, it is likely that there are gaps related to liability or workers' compensation that may not be capable of being filled even with the creative use of existing laws and mutual aid agreements.

Liability protections as a receiving state—The New York State Defense Emergency Act (SDEA) provides immunity from liability to the "state, any political subdivision, municipal or volunteer agency, or another state or a civil defense force thereof or of the federal government or of another country or province or subdivision thereof, performing civil defense services in [New York State] pursuant to an arrangement, agreement or compact for mutual aid and assistance, or any agency, member, agent or representative of any of them...."⁴⁰ However, "civil defense" services are limited to those taken in preparation for, during, or in response to "attacks" such as the terrorist attack on the World Trade Center.

The New York State and Local Natural and Man-Made Disaster Preparedness Law (Disaster Law) extends the same powers, duties, rights, privileges, and immunities as are applicable under the New York SDEA to "disaster emergency response personnel."⁴¹ "Disaster emergency response personnel" include "agencies, public officers, employees, or affiliated

volunteers having duties and responsibilities under or pursuant to a comprehensive emergency management plan.”⁴² Therefore, it would seem that, as a receiving state, New York law provides immunity from liability to volunteer health practitioners, whether they are from New York or out-of-state volunteers, as long as they are properly affiliated disaster emergency response personnel.

Liability protections as a sending state—It is possible that New York volunteer health practitioners deployed out of state could be protected under the above-cited provisions of the Disaster Law if, for example, such out-of-state deployment were contemplated in the state’s comprehensive emergency management plan. In addition, the New York Public Officers Law requires the state to provide defense and indemnification to employees of the state and public entities, respectively.⁴³ The definition of “employee” in Section 17 includes “a volunteer expressly authorized to participate in a state-sponsored volunteer program,…” and Section 18 defines “employee” to include “a volunteer expressly authorized to participate in a publicly sponsored volunteer program…” It is unknown whether these provisions, intended for purposes of providing defense and indemnification, would be sufficient to deem New York volunteers deployed out of state as employees of the state for the purposes of EMAC Article VI liability protection to sending states. A mutual aid agreement, properly vetted by the attorney general and relying on these statutes for authority, could clarify this issue and articulate mutually agreeable terms consistent therewith.

Workers’ compensation as a receiving and a sending state—The New York SDEA specifies that “the provisions of this section shall not affect the right of any person to receive benefits to which he may be entitled under the workers’ compensation law, … nor the right of any person to receive any benefits or compensation under any act of congress or under any law of this state.”⁴⁴ New York’s Workers’ Compensation Law provides workers’ compensation benefits to “civil defense volunteers,” defined as members of the civil defense forces under the provisions of the SDEA who are volunteers serving without compensation “in the personnel of volunteer agencies.”⁴⁵ Viewing New York as a receiving state, it would appear, then, that volunteer health practitioners, whether from New York or not, who are personnel of volunteer agencies and provide services in New York related to an “attack” are eligible for workers’ compensation benefits. Whether such volunteer health practitioners responding to a natural or man-made disaster in New York would be eligible for such benefits by virtue of the Disaster Law’s extension of rights and privileges is unclear. If properly affiliated New York volunteer health practitioners were somehow incorporated into the emergency forces of New York and were deployed to another state pursuant to EMAC, it is possible that they would be deemed eligible for New York workers’ compensation benefits pursuant to EMAC Article VIII. Again, a mutual aid agreement could clarify these points.

Florida

Liability protections as a sending or receiving state—Florida Statutes Chapter 110 covers state employment, and Part IV of Chapter 110 relates to volunteers. “ ‘Volunteer’ means any person who, of his or her own free will, provides goods or services … to any

state department or agency, or nonprofit organization, with no monetary or material compensation.”⁴⁶ Section 110.504, relating to volunteer benefits, dictates that “Volunteers shall be covered by state liability protection in accordance with ... the provisions of Section 768.28.”⁴⁷ That section specifies that no officer, employee, or agent of the state shall be personally liable for acts or omissions performed in the course of employment or function, and that the exclusive remedy shall be an action against the government entity.⁴⁸ Therefore, volunteers, including volunteer health practitioners, providing services to a state agency would appear to be protected from personal liability, with the state being obligated to defend and indemnify the volunteer health practitioners. However, the above-cited section 110.504 also states that “Volunteers shall be covered by s. 768.1355, the Florida Volunteer Protection Act.”⁴⁹ That statute is inconsistent with the aforementioned Subsection 768.28(9) in that it not only exempts from protection acts or omissions of wanton or willful misconduct, as many other statutes do, but also limits protection to volunteers acting as an ordinary reasonably prudent person would have acted under the circumstances.⁵⁰ In effect, this language appears to exclude volunteer health practitioners committing acts of simple negligence from being protected. If true, this could severely restrict Florida’s ability to attract volunteer health practitioners, whether from Florida or from out-of-state, to its service and assistance. However, volunteers who are activated and deployed by the Florida Department of Health are agents of the state and may be protected from simple negligence pursuant to §768.28(9).

From a sending state’s perspective, Florida may be able to identify some mechanism that would allow Florida volunteer health practitioners to be deemed state employees for EMAC liability protection purposes, such as classifying them as “Other Personnel Services” employees. From a receiving state’s perspective, clarifying that volunteer health practitioners are protected from liability resulting from simple negligence would benefit Florida and greatly facilitate volunteers and other states coming to its aid. Properly vetted and duly authorized mutual aid agreements would seem to be indispensable in such a complicated statutory environment.

Workers’ compensation as a sending or receiving state—The aforementioned Florida Volunteer Benefits section makes clear that “Volunteers shall be covered by workers’ compensation in accordance with chapter 440.”⁵¹ Consistent with the above-cited definition of “volunteer,” Florida volunteer health practitioners providing services to a state agency in Florida would be covered for workers’ compensation benefits, and they would likely also be covered if they were providing services outside of Florida pursuant to EMAC if they were incorporated into Florida’s emergency forces. This statutory language might also cover out-of-state volunteers assisting a Florida state agency under EMAC if they were not otherwise eligible for workers’ compensation benefits. However, a mutual aid agreement would definitely be useful to clarify these and other complicated issues.

Conclusion

EMAC is a useful and necessary vehicle for interstate assistance, but it leaves gaps that must be addressed through supplementary agreements, as contemplated by Articles III and VII, particularly with regard to voluntary health practitioners. UEVHPA provides potential

solutions to many issues related to volunteer health practitioners, including liability protections and workers' compensation benefits, but variations among states that have enacted a version of UEVHPA, as well as the inevitable need for mutual assistance between UEVHPA and non-UEVHPA states, make mutual aid agreements that clarify respective rights and obligations, particularly with regard to these protections and benefits, useful and necessary tools.

States that have not enacted UEVHPA are nevertheless likely to have statutes that address emergency management issues, including liability protections and workers' compensation benefits, and they may even address volunteers to some degree. How these myriad provisions interact with EMAC and with the statutes of other states, whether UEVHPA or non-UEVHPA states, can present confounding and paralyzing dilemmas in a time of crisis. This makes the development of well thought out, legally vetted, and properly authorized mutual aid agreements before the fact imperative.

As with any contract, the purpose must be to clearly articulate the meeting of the minds and not to obfuscate apparently binding commitments. For example, an agreement that said, "Volunteer health practitioners shall be protected from liability in accordance with applicable provisions of law in the state of ..." leaves too many possibilities open to future interpretations. More clear and binding would be language such as, "It is the position of the state of X that volunteer health practitioners providing assistance in this state are [immune from liability or entitled to defense and indemnification] pursuant to the provisions of [identified statutes]. In reliance thereon, the state of Y hereby agrees to deploy its duly authorized volunteer health practitioners to render assistance in the state of X."

The interpretations of the various statutes presented above are not intended to provide definitive legal opinions but rather to point out language that might be considered in an effort to offer the greatest degree of liability protection and workers' compensation benefits to volunteer health practitioners. Using mutual aid agreements where possible, as an alternative to additional legislation, could facilitate these efforts and help achieve these goals. Although work has been published on mutual aid agreements and cross-jurisdictional coordination,^{29,52,53} further scholarship is needed to address the applicability and mechanics of mutual aid agreements to address the liability concerns of volunteer health practitioners and their relationship to EMAC.

It is assumed that augmenting and clarifying these protections and benefits in properly vetted and duly authorized and executed mutual aid agreements will maximize the availability and willingness of volunteer health practitioners to provide assistance in times of emergency.

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8. EMAC, *supra* note 1, Article IV.
9. *Id.* Article V.
10. *Id.* Article IV.
11. *Id.* Article VI.
12. *Id.* Article VIII.
13. *Id.* Article VI.
14. [Accessed August 28, 2013] Uniform Emergency Volunteer Health Practitioner Act: Summary. <http://www.uniformlaws.org/ActSummary.aspx?title=Emergency%20Volunteer%20Health%20Practitioners>
15. Uniform Emergency Volunteer Health Practitioner Act, *supra* note 2, §§ 3 and 6.
16. *Id.* at §§ 2(9), 2(5), 2(11), 3, 5. Qualified registration systems must include information about volunteer health practitioner licensure and good standing that can be accessed during an emergency. The Emergency System for Advance Registration of Volunteer Health Professionals (ESAR-VHP) is an example of one such registration system. Liability protections for spontaneous volunteers are not covered or anticipated by UEVHPA; however, spontaneous volunteers may have some liability protections under state Good Samaritan laws or other mechanisms. Liability protections for spontaneous volunteers are not specifically considered in this note.
17. *Id.* at § 9(b).
18. *Id.* at § 11(a) and (c) of Alternative A.
19. *Id.* at § 11(b) of Alternative A.
20. *Id.* at § 11(a) and (b) of Alternative B.
21. *Id.* at § 2(15).
22. *Id.* at § 12(b).
23. *Id.* at § (12)(b)(1), (2).
24. National Governors' Association Center for Best Practices. [Accessed August 28, 2013] Issue Brief: Beyond EMAC: legal issues in mutual aid for public health practice. Dec 17. 2005 <http://www.nga.org/files/live/sites/NGA/files/pdf/05LEGALISSUES.pdf>
25. U.S. Constitution, art. I, § 10, cl. 3.
26. *Cuyler v Adams*, 449 U.S. 433, 440, 101 S. Ct. 703 (1981).
27. *Virginia v Tennessee*, 148 U.S. 452, 518, 13 S. Ct. 728 (1893).
28. 42 U.S.C.A. § 5196(h).
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30. Ind. Code § 10-14-3-19(b).
31. *Id.* §§ 10-14-3-19(c)(2), 10-14-3-15(a) & (c).
32. *Id.* § 10-14-3-19(d).
33. *Id.* § 10-14-3-3.
34. *Id.* § 10-14-3-15(a), (c).

35. Utah Code § 26-49-301(2).
36. Id. § 26-49-601(2), (3).
37. Id. §§ 26-49-501, 58-13-2.
38. Id. §§ 26-49-203, 26-49-501, 58-13-2.
39. Id. § 26-49-601(6)(a)(1).
40. N.Y. Unconsol. Laws (SDEA) § 113(1).
41. N.Y. Exec. Law § 29-b(1).
42. Id. § 20(2)(g).
43. N.Y. Pub. Off. Law §§ 17, 18.
44. N.Y. Unconsol. Laws (SDEA) § 113(2).
45. N.Y. Workers' Comp. Law §§ 303, 302.
46. Fla. Stat. § 110.501(1).
47. Id. § 110.504(4).
48. Id. § 768.28(9).
49. Id. § 110.504(7).
50. Id. § 768.1355(1)(a).
51. Id. § 110.504(5).
52. Hogan RD, Bullard CH, Stier D, et al. Assessing cross-sectoral and cross-jurisdictional coordination for public health emergency legal preparedness. *J Law Med Ethics*. 2008; 36(Suppl 1):36–52. [PubMed: 18315750]
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