

REINHART

WHA/HRSA Legal Hotline

8/29/05

Attorneys:

Jeffrey P. Clark
Thomas R. Hefty
Amy L. Jerdee
Matthew K. McManus

1000 North Water Street
P.O. Box 2965
Milwaukee, Wisconsin
53201-2965
414-298-1000
800-553-6215

22 East Mifflin Street
P.O. Box 2018
Madison, Wisconsin
53701-2018
608-229-2200
800-728-6239

W233 N2080
Ridgeview Parkway
P.O. Box 2265
Waukesha, WI
53187-2265
262-951-4500
800-928-5529

483 North Mulford Road
Rockford, IL
61107-5191
815-484-1900
800-840-5420

HOSPITAL LIABILITY PROTECTION AND FUNDING FOR EMERGENCY PREPAREDNESS

On December 17, 2003, President Bush issued Homeland Security Presidential Directive 8 ("HSPD-8"), which establishes policies for preventing and responding to terrorist attacks, major disasters, and other large-scale emergencies. HSPD-8 defines the term "first responder" as:

those individuals who in the early stages of an incident are responsible for the protection and preservation of life, property, evidence and the environment, including emergency response providers as defined in section 2 of the Homeland Security Act of 2002 as well as emergency management, public health, clinical care, public works, and other skilled support personnel (such as equipment operators) that provide immediate support services during prevention, response, and recovery operations.

The term "emergency response providers" is defined in the Homeland Security Act of 2002 as "Federal, State, and local emergency public safety, law enforcement, emergency response, emergency medical (including hospital emergency facilities), and related personnel, agencies and authorities."

There is no specific federal designation that an individual employee of a hospital is a "first responder." Instead, by virtue of actions taken, a hospital or individual may qualify as a first responder. This publication provides a general overview of: (1) the general liability issues facing a hospital or individual acting as a first responder; and (2) federal funding sources for hospitals for emergency preparedness.

A. Do First Responders Receive Any Special Legal Protections?

First responders are not granted specific liability protections under federal law for acting as a first responder. Hospitals and individuals engaging in first responder activities have the same legal liability exposure as entities that are not first responders. However, as discussed in Chapter 2 of the Wisconsin Hospital Association Hospital's Guide For Mass Casualty Events, located at "[http://www.wha.org/disasterPreparedness/mass casualty.aspx](http://www.wha.org/disasterPreparedness/mass%20casualty.aspx)"

www.wha.org/disasterPreparedness/mass_casualty.aspx (“Guide for Mass Casualty Events”), there are some protections available for hospitals and individual health care providers. This section highlights some of those protections.

1. Hospitals and Other Entities. In general, hospitals are expected to provide medical care and services that a similarly situated hospital in the same or a similar community would provide. This general standard of care applies in any emergency situation. No laws specifically immunize hospitals from potential liability arising out of actions taken by its personnel while responding to an emergency. Hospitals are expected to provide appropriate medical treatment in accordance with the customary standard of care in the community and the standards created by organizations such as Occupational Safety and Health Administration (“OSHA”) and the Joint Commission for Accreditation of Healthcare Organizations (“JCAHO”).

Under the OSHA requirements, each employer is required to provide its employees with a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm to employees. OSHA has issued a best practices document for the protection of healthcare workers during mass casualty incidents. This document focuses on those workers considered “first receivers” of patients exposed to chemical, biological, or radiological materials.

Similarly, if a hospital is accredited by JCAHO, it is required to meet the JCAHO standards applicable to mass casualty events. The JCAHO standards require that hospitals engage in certain emergency preparation activities, such as planning and drills. JCAHO also requires hospitals to have a process for credentialing health care professionals during an emergency event.

Wisconsin law does provide for hospital immunity for emergency staff privileges granted during a declared state of emergency (Wis. Stat. § 50.36(3d)(b)). This immunity is discussed in more detail in Chapter 2 of the Guide for Mass Casualty Events.

2. Individuals. An individual health care provider is expected to deliver medical services in conformance with the standard of care that any other provider in similar circumstances would exercise. Negligence occurs when an act or omission deviates from the standard of care. The Wisconsin civil jury instruction establishes that a doctor is required to use the degree of care, skill, and judgment which reasonable doctors would exercise in similar circumstances (WIS JI-CIVIL 1023). A discussion of the standard of care in mass casualty events in Wisconsin may be found in Chapter 7 of the Guide for Mass Casualty Events. Note that the standard of care in mass casualty events may be altered by the surrounding facts and circumstances. To address this, the United States Department of Health and Human Services Agency for Healthcare Research and Quality (“AHRQ”) released Altered Standards of Care in Mass Casualty Events in April of 2005. This AHRQ publication describes altered standards of medical care in a mass casualty event. In any case, individual health care providers may be immune from liability when responding to an emergency under either of the following two laws:

(a) Wisconsin Good Samaritan Law. Under Wisconsin law, an individual who renders emergency care at the scene of an emergency is provided immunity from civil liability for his or her acts or omissions in rendering such emergency care (Wis. Stat. § 895.48). This law does not extend to employees trained in health care who render emergency care for compensation and within the scope of their usual employment. Thus, an EMT responding to the scene of an accident while on duty is not protected by this statute, but he or she would likely be protected if volunteering as part of a disaster assistance team.

(b) Federal Volunteer Protection Act of 1997. The Federal Volunteer Protection Act of 1997 (42 U.S.C. 1450, et seq.) protects individuals from liability for their acts or omissions when volunteering for a nonprofit organization. Volunteers are protected under this statute if the following requirements are met: (1) the volunteer is acting within the scope of his/her responsibilities; (2) the volunteer is properly licensed, certified or authorized (if required); (3) the harm is 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 acts or omissions of the volunteer; and (4) the harm is not caused by the volunteer operating a motor vehicle. Only individuals who do not receive more than \$500 per year from the nonprofit organization, beyond reimbursement for actual expenses incurred, qualify as volunteers under this Act.

B. What are the Potential Funding Sources Available to Hospitals for Emergency Preparedness?

The federal government provides financial grants to the states to support the nation's preparedness for mass casualty events. Grant funding is distributed based on a hazard vulnerability analysis that attempts to distribute more money to areas with a greater threat of a mass casualty event. As a condition for the receipt of federal preparedness funds, beginning on October 1, 2005, hospitals must adopt and use the National Incident Management System ("NIMS") as developed by the U.S. Department of Homeland Security ("DHS"). NIMS includes standards such as organizational structures, communications systems and the use of plain language in an emergency response situation in an attempt to integrate effective practices into a unified framework for incident management. Hospitals must comply with NIMS by September 30, 2006 to receive federal preparedness funds. The expectation is that a revised version of the Hospital Emergency Incident Command System ("HEICS"), which is a crisis management plan for hospitals to use in coordinating their own response to a disaster, will be recognized as compatible with NIMS such that HEICS compliance will be equivalent to NIMS compliance. However, this recognition has not yet occurred.

1. U.S. Department of Homeland Security. DHS, through its Office for Domestic Preparedness, is a major source of funding pursuant to the Homeland Security Grant Program ("HSGP"). More information on the Office for Domestic Preparedness may be found at <http://www.ojp.usdoj.gov/odp>. Each state has one State Administrative Agency ("SAA") authorized to apply for federal funding through the HSGP; no other entity may apply for HSGP grants. Wisconsin's primary SAA is David Steingraber, the Executive Director of the Office of

Justice Assistance. Funds received from the HSGP are distributed by the SAA to local units of government and other designated recipients of the funding.

2. Health Resources and Services Administration. The Department of Health and Human Services Health Resources and Services Administration (“HRSA”) administers grants for hospital preparedness that only states are eligible to receive. The National Bioterrorism Hospital Preparedness Program within HRSA coordinates the distribution of these grants. HRSA policy requires that at least 80% of the awards to the states go directly to hospitals. Wisconsin's HRSA grant money flows through the Wisconsin Department of Health and Family Services, Division of Public Health. The Wisconsin HRSA grant coordinator is Dennis Tomczyk, the Director of the Hospital Bioterrorism Preparedness Program. More information on the HRSA National Bioterrorism Hospital Preparedness Program may be found at www.hrsa.gov/bioterrorism.

An example of the types of projects eligible for DHS or HRSA grants is reimbursement for the cost incurred by a hospital in con-



© Reinhard Boerner Van Deuren s.c. 2002
All Rights Reserved

This communication may be considered advertising in some jurisdictions.