How This Guide Can Help Your Health Center:

Liability is a complicated and fluid issue. This report serves as a snapshot of liability issues relating to emergency preparedness and gives general coverage information relevant to Community Health Centers. This information is provided for general information only and may not resolve specific coverage issues for your Center or staff. It can, however, act as a starting point for your investigation into emergency response coverage issues. The Community Health Care Association of New York State (CHCANYS) encourages community health centers to further research these areas with general counsel.

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**FEDERAL TORT CLAIMS ACT (FTCA) COVERAGE**

**About FTCA Liability Coverage**

“FTCA coverage” refers to liability coverage under the Federal Tort Claims Act. Some quick facts about FTCA coverage include:

- FTCA is the predominant coverage under medical malpractice for health centers across the country—880 health centers (out of about 1,200) are now deemed under FTCA (and more are applying);
- Significant savings to the health center movement have been achieved—well over a billion dollars have been saved since the inception of the FTCA program.
- Coverage in emergency situations may depend on the location of the treatment site and/or the patient status of persons treated—see the “Recommendations” section below for tips on how to maximize your FTCA coverage during emergency response!
- There are several bills currently proposed in Congress that attempt to improve FTCA liability coverage during emergency response. These are currently going through various congressional committees.

**Who Is Covered Under FTCA**

The following persons are covered under FTCA: officers, the governing board, and employees of the covered entity. Specifically, all employees, full-time contractors working more than an average of 32.5 hours per week, and part-time contractors in the primary care specialties working less than an average of 32.5 hours per week are covered. Note that it covers individual providers; it does not cover corporations.

**Who Is Not Covered Under FTCA**

The following are not covered under FTCA: volunteers, residents who are not employees, providers billing directly (unless they meet the terms of PIN2001-11 on direct provider billing), part-time contractors not in the primary care specialties, contracts with corporations, sub-grantees (unless they go through an individual deeming process), and third parties. Also, activities outside of the scope of project or the scope of employment agreement are not covered.

**What Is Covered Under FTCA**

Coverage includes: medical malpractice, activities within the scope of project and the scope of the employment agreements taking place on or after the deeming date, formal cross-coverage arrangements with other providers in the community, and specific community activities that benefit health center patients or the community from which health center patients are drawn. Hospital rounds, if required for admitting privileges, can also be covered.

**Annual Renewal (“Deeming”)**
Coverage is on an annual basis so Centers must re-apply for deeming each year. There is an original deeming application that has to be submitted when coming on to FTCA for the first time. Then, there is a budget period of re-deeming that happens with each annual budget period renewal—that information goes in along with the application and is reviewed by the project officers. There is also a separate application that goes in on the service area competition (or what used to be called “competing continuation dates”).

Questions About Services To Non-Patients
If you have questions about services to non-patients, you can seek a written “Particularized Determination” from U.S. Department of Health & Human Services (HHS)/the Bureau of Primary Health Care (BPHC) regarding the activities that you have involving services to non-health center patients. They will send a written response that clarifies coverage in that specific instance. Please visit these agency websites for more information: http://www.hhs.gov/ and/or http://bphc.hrsa.gov/.

Current Issues In FTCA Coverage For Emergency Response

Problems With How FTCA Works In Emergency Situations
Problems with FTCA coverage may arise during emergency response since the scope of coverage in such circumstances is unclear. It is difficult to determine because of the way service sites and scope of service (especially to non-patients) are defined in the deeming documents.

Current Legislative & Policy Efforts To Resolve These Issues
The National Association of Community Health Centers (NACHC) is working with federal health agencies and with Congress to solidify FTCA coverage for emergency response.

There was a special Program Information Notice (PIN) created to address Hurricane Katrina coverage (http://bphc.hrsa.gov/pinspals/pins/2005-19.htm). However, some coverage questions are still not clear for Katrina response, especially in regards to crossing state lines. Providers also volunteered through the Health and Human Services Federal Katrina Volunteer Program, but that program had a specific set of conditions, whereas the goal is to improve coverage for all emergencies.

There are several bills currently in Congress that have the potential to address these issues long term. Bill H.R.3962 (http://www.govtrack.us/congress/bill.xpd?bill=h109-3962), a proposed amendment to the Public Health Service Act, would, if passed, clarify the conditions under which FTCA provides coverage in emergencies. It was sponsored by Congressman Schwartz (R-Michigan) (http://schwarz.house.gov/), who himself is a physician and whose center wanted to volunteer in the Katrina disaster and was unable to do so because of the lack of FTCA coverage. The set of proposed bills H.R.1313, S.1344, and S.1058, each entitled the “Community Health Center Volunteer Physician Protection Act of 2005,” all consist of similar provisions that would expand liability coverage for Health Centers and Health Center Staff when responding to emergencies, also by amending the Public Health Service Act. (See the Library of Congress’ online database of legislative information at http://thomas.loc.gov for details on the text and status of all four bills).
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Several New York State representatives have co-sponsored H.R.1313 and one has co-sponsored H.R.3962. All four of the above bills are currently in committee. Such legislation is sorely needed in order for providers to feel they can respond quickly and effectively to crisis situations outside of their regular workplace environments.

Recommendations For Your Risk Management

Recommendations for Managing Your Health Center’s FTCA Coverage
Select one staff member to be the FTCA coverage point person. They should keep all the relevant policy information, notices from the Bureau of Primary Health Care, a copy of the statutes and regulations, and be familiar with the claims process; they can then be used as a resource person by all other staff who encounter FTCA questions. Who the point person is may differ at each center: it could be the medical director, compliance officer, risk management officer, the CFO, or the general counsel.

Recommendations to Help Maximize Coverage During Emergency Response
To maximize your FTCA coverage possibilities, put wording in your deeming application/continuation/renewal paperwork for scope of services that incorporates the following: (1) make sure the description of sites and services in the scope of project describes something in a global, general way about what the expectation is of the center or what the center thinks it will be doing in terms of emergency response, (2) under “Sites” include wording such as “temporary emergency locations during declared emergencies.”

OTHER EMERGENCY RESPONSE COVERAGE

Medical Reserve Corps (MRC) Participation
Providers or other staff members may also be interested in contributing to emergency response through joining the Medical Reserve Corps (MRC). MRC teams at the state, county, and local levels generally have their own liability coverage arrangements. You should contact your local MRC coordinator to determine your coverage/your staff’s coverage should they participate in an MRC-led emergency response activity.

MRC at the Federal Level
The MRC program is not able to provide federal-level liability coverage. Liability protection standards require volunteer-based organizations to train their volunteers in accordance with all policies and procedures, particularly those intended to reduce the incidence of harm. Different localities are subject to different legal liability laws and standards. All volunteer organizations want to protect their volunteers; liability protection for volunteers is an advocacy issue and a reasonable concern for many MRC units.

Liability also is a highly complex area of the law, compounded by innumerable differences at the local level. Understanding and interpreting liability is based on individual cases and varied interpretations of the statutes in specific states. Because the rules and laws
vary, it is not possible for the federal MRC Program Office to provide information applicable to all 50 states and to all jurisdictions within them. Even within a specific jurisdiction and given a specific set of facts, no one can predict with certainty whether a liability suit will succeed. Some states offer greater protection to medical volunteers than others. Additionally, some response partners may be able to extend the liability and workers compensation privileges that normally apply to regular workers.

Therefore, providers who participate in the MRC should check with their local MRC coordinator to determine their coverage. For a listing of MRC Units, please visit: http://www.medicalreservecorps.gov/HomePage.

**County MRCs in New York State**

Some counties in New York State have adopted Public Officers Law Section 18 (“defense and indemnification of officers and employees of public entities”) or have adopted their own resolution or statute to provide liability coverage to volunteers. MRCs associated with such counties can benefit from this coverage. Other counties, however, have not adopted such laws or resolutions and therefore MRCs associated with those counties may have no liability coverage at all for their volunteers. Volunteers need to check with their individual MRC program to determine the status of liability coverage in their county. For more information on MRC Units in New York state, please visit: http://www.medicalreservecorps.gov/state.asp?state=40.

**New York City MRC**

New York City MRC volunteers are covered under General Municipal Law, Section 50-k, for volunteer work performed with the New York City Department of Health & Mental Hygiene (NYC DOHMH). This allows volunteers to be considered extensions of the City’s workforce, and would provide liability coverage to volunteers, regardless of whether or not their own malpractice insurance were used or not. Note, however, that NYC MRC volunteers are not covered by health insurance or worker’s compensation. For more information on the NYC MRC, please visit: http://www.nyc.gov/html/doh/html/em/mrc.shtml.

**New York State Department of Health Volunteer Program Participation**

Another option for liability coverage when volunteering with large-scale emergency response is to join the New York State Department of Health (DOH) Public Health Preparedness Volunteer Practitioner Database. If the New York State DOH activates and deploys volunteers from the New York State Volunteer Program, volunteers will be considered employees of the State and provided defense and indemnification under Public Officers Law Section 17 (“defense and indemnification of state officers and employees”). (Though note that if a volunteer has liability insurance, the volunteer must turn to their liability carrier in addition to the State for coverage; also, volunteers must be deployed by New York State DOH for coverage to apply.)

Physicians can sign up to participate in the New York State Volunteer Program through the Medical Society of State of New York (MSSNY) (http://www.mssny.org). Registered Nurses can sign up through the New York State Nurses Association (NYSNA).
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(http://www.nysna.org). Please note that all participants must have an active New York State Health Provider Network (HPN) account.

Smaller Emergencies: Cross-Coverage Agreements With Hospitals

Even when no large-scale emergencies take place, maximizing coverage for your staff is always a good idea. If your providers end up working on non-health center patients when on-call at a hospital (for example, OB/GYN staff), be sure to have written documentation of cross-coverage that states that each institution’s policy will cover the other’s staff in such incidences. The legal binding is strongest if the bylaws of the hospital require this kind of cross-coverage. If there is any difficulty in the hospital’s documentation of cross-coverage, there should, at minimum, be language in the contract with the provider that says “from time-to-time it is understood that you may be involved in the care of non-center registered patients” and a similar line in their job description.

CHCANYS would like to thank the National Association of Community Health Centers and the New York City Medical Reserve Corps for information they provided on liability issues incorporated into this report.