

Liability protection when practicing during a disaster: How the laws work



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What you need to understand before offering to provide services during a disaster

Disasters—both natural and human-caused—can strike at any time, causing severe trauma for those impacted. Disasters may create circumstances where the need for mental health resources could exceed capacity, and hospitals and clinics would be unable to meet the needs of the affected communities. As psychiatric clinicians, we may want to provide our services in such situations; however, we are still at risk for civil, criminal, or constitutional liability claims against us if we fail to meet our legal obligations related to psychiatric practice. Ideally, whether we live and work in an area affected by a disaster or volunteer from other states, we should be able to care for patients without fear of facing unreasonable liability risks. Although an exhaustive list of all relevant federal and state laws and regulations is beyond the scope of this article, here I discuss some of the federal and state laws and regulations that could provide protection from these risks, and some limitations of liability protection.

A familiar list of liability concerns

From a liability perspective, what should we be aware of when practicing during disasters? The same liability concerns we have during our day-to-day practice also exist during disasters, especially when there are suboptimal or adverse outcomes. Negligence, practicing without a proper

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Liability concerns you may face when practicing during a disaster

During disasters, changes in the usual standard of practice may be necessary to save as many lives as possible, and when resources are scarce, the focus of mental health services could shift from individualized patient care to those who are most in need. Examples of potential liability concerns clinicians may face in such situations include:

Negligence. Clinicians may have to provide emergent care for patients that may result in an adverse outcome. Examples include applying a tourniquet to a patient's badly injured limb without their consent, and then that patient loses their limb, or administering the COVID-19 vaccine to a patient because of significant clinician shortages, and then that patient develops complications. These scenarios could possibly give rise to ordinary negligence claims of practicing outside the usual scope of practice, especially for a clinician who does not have liability protections.

Practicing without the proper state medical license. When out-of-state clinicians come to a facility that needs emergency assistance, they can face liability concerns for practicing without a properly recognized state

medical license.¹ Because care is deemed to have been provided where the patient was physically present when services were provided, liability can occur when providing services to patients in a state where the psychiatrist does not have a medical license. An example of this would be a psychiatrist in South Carolina who provides telehealth services to patients in a Florida community ravaged by a hurricane when the psychiatrist does not have a Florida medical license.

Abandonment. When we take a confirmatory step to provide care to an individual, it may create a clinician-patient relationship and a duty on behalf of the clinician within the applicable standard of care.² With disasters, the customary expectations and parameters associated with clinician-patient relationships can change. We may have to cease treating some patients so that we can focus our time or resources elsewhere, which could open up liability concerns regarding claims of abandonment.¹ At times, we may refuse to treat patients outright, creating conflicts with the Emergency Medical Treatment & Active Labor Act (EMTALA) and its state counterparts.

state medical license, and abandonment are among the liability concerns that we could face when practicing during a disaster (Box^{1,2}).

Liability protections

There are no comprehensive national liability protections for all practitioners during disasters.¹ Limited immunity is often provided through a patchwork of federal and state laws and regulations, which can be complex and are often modified. This immunity depends on several factors, such as applicable regulations, the type of services that are provided, and whether the clinicians are volunteering their services (ie, they are not being paid for providing services).² There is usually no immunity due to willful or wanton acts, gross negligence, providing care while intoxicated, or criminal acts.²

Federal laws and regulations

Most of the federal laws that provide liability protections are activated once a disaster

is declared. However, some laws provide liability protections without requiring such declarations. Additional federal laws and regulations that provide additional liability protections, especially to volunteers, can be enacted after disasters occur.

Federal Tort Claims Act

The Federal Tort Claims Act (FTCA)³ protects federal government employees from tort liability by substituting the federal government as the defendant in certain types of suits brought against the federal government. These suits may involve injury, loss of personal property, personal injury, or death by the negligent or wrongful act or omission of any federal government employees while acting in the scope of their office or employment.^{3,4} It does not require that an emergency be declared before immunity is conferred. FTCA covers all federal government employees, including volunteers.⁴ In the context of an emergency response, volunteers can assert the liability protections afforded to federal employees if they are designated as unpaid employees of the

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The Volunteer Protection Act provides liability protections to uncompensated volunteer health professionals

federal government.⁴ Federal employees are immune from suit under state tort law.⁴

Volunteer Protection Act

The Volunteer Protection Act (VPA) of 1997⁵ provides liability protections to uncompensated volunteer health professionals (VHPs) who perform services for nonprofit organizations or government entities against claims of ordinary negligence committed within the scope of their volunteer responsibilities.⁴ It does not require that an emergency be declared before immunity is conferred. Although VHPs are not liable for economic damages caused by providing medical care within the scope of their volunteer responsibilities, this exemption does not extend to non-economic damages, such as losses for suffering and mental anguish.⁵ VPA does not protect VHPs working in businesses (including for-profit hospitals) and organizational entities of any type (including nonprofit or governmental organizations) that use VHPs.⁴

VPA only protects VHPs practicing with a license as required by law in the state where the harm occurred, unless state authorities allow for licensure exceptions. VPA overrides state laws that are inconsistent with VPA, unless those state laws provide greater liability protection for VHPs.⁴ However, VPA protections are limited. VPA protects only volunteers, not clinicians working in their regular nonemergency roles and capacities.⁶ A nonprofit or government agent can still bring civil claims against VHPs.⁶ VPA does not override certain state laws that put conditions on volunteers, such as risk management requirements, vicarious liability, and a financially secure form of recovery for intended victims.⁶

Health Insurance Portability and Accountability Act

The Health Insurance Portability and Accountability Act (HIPAA) of 1996,⁷ specifically Section 194, extends eligibility for FTCA liability protections to VHPs at qualifying free clinics, provided the clinic sponsors the VHPs by applying to the Health Resources and Services Administration.⁸ It does not require that an emergency be declared before immunity is conferred.

Public Readiness and Emergency Preparedness Act

The Public Readiness and Emergency Preparedness (PREP) Act of 2005⁹ authorizes the US Department of Health and Human Services (HHS) Secretary to issue a declaration that provides immunity to VHPs from tort liability for claims of loss caused by the use of authorized countermeasures (eg, vaccines) against diseases or other threats of public health emergencies.⁴ A separate emergency determination under Public Health Service Act Section 319 or another statute is not required for PREP Act immunities to take effect.⁴ The PREP Act covers individual persons and entities involved in the manufacture, testing, distribution, administration, and use of covered countermeasures.⁴

PREP Act immunity is not absolute and does not protect against claims of willful misconduct, violation of the Americans with Disabilities Act (ADA), or other civil rights violations.⁴ Liability protection under the PREP Act is limited to a specific emergency and includes only the countermeasures and other conditions listed in the PREP Act declaration by the HHS Secretary.⁴

State laws and regulations

States have a variety of standing liability protections that could apply to VHPs who provide care in an emergency. Some states have crafted executive orders to be put into effect during a disaster. Most of these executive orders, which can include extending liability protections, are similar to what other states have done by adopting model acts such as Model State Emergency Health Powers Act.⁶ These orders are not actually laws; they only become effective when the governor signs them at the time of the disaster. These orders also are time-limited and must be reissued in subsequent disasters.

State tort claims acts and state claims acts

Similar to the federal government, some states have waived sovereign immunity in certain circumstances through state tort claims or state claims acts.

State tort claims acts either abolish state sovereign immunity generally and provide immunity only in specific circumstances, or

preserve sovereign immunity generally but identify certain exceptions in which immunity is waived.⁴

State claims acts limit state sovereign immunity by establishing procedures for making claims against the state.⁴ These acts typically immunize state government employees from tort liability for acts or omissions committed within the scope of their employment.⁴ Some states extend these protections to volunteers, and some states declare volunteers to be unpaid state employees during an emergency, which allows volunteers to assert the liability protections afforded of state employees.⁴

Emergency power statutes

State emergency laws can trigger additional powers, suspend certain administrative requirements, and provide or enhance liability protections to specified groups of volunteers and other responders upon a gubernatorial declaration of emergency.⁴ These statutes can extend the rights and immunities provided to governmental employees to volunteers performing work that is eligible for coverage under governmental immunity and state tort claims acts.⁴ There is a wide range in the types and degrees of coverage provided to volunteers under emergency powers statutes, and these provisions can be broad or duplicative of other provisions in state law.⁴

State volunteer protection statutes

All states have some statutory provisions for volunteers. Similar to the VPA, these state volunteer protection statutes generally do not require that an emergency be declared, apply to uncompensated individual volunteers for nonprofit and government entities only, and apply only to individuals and not to organizations.⁴ Many states have adopted specific liability protections for VHPs in addition to or to supplement their emergency powers and general volunteer protection statutes.⁴ These statutes confer immunity from civil liability provided that certain conditions are met and are not dependent on the declaration of an emergency.⁴ Each state statute differs in regard to who receives immunity, which acts are immune from liability, and what liability protections are available.

Good Samaritan laws

All 50 states and the District of Columbia have enacted Good Samaritan laws. These laws, which do not need an official declaration of an emergency in order to be applicable, generally protect VHPs from liability when volunteering in good faith and without compensation at the scene of an emergency.² Good Samaritan protections may also apply to care provided by VHPs in a hospital if the VHP is not on duty and does not charge a fee.² However, the effect and scope of Good Samaritan laws vary dramatically from state to state. Some states include hospital settings as an emergency scene in their statutes, while others expressly exclude hospitals from their statutes.⁶ Some state statutes only include declared emergencies, while others are drawn to broadly cover all emergency situations.⁶

Limitations. Many Good Samaritan statutes apply only to volunteers, and not all states have statutes that allow clinicians to be designated as such,⁶ so receiving compensation would take a clinician outside the scope of the statute. Further, most states only shield action taken at the scene of an accident, and immunity would not extend to a hospital emergency department, or in the aftermath of an emergency as normal conditions slowly return.⁶ Therefore, Good Samaritan liability protection would apply to the common scenario of assisting at the scene of a car crash, but not necessarily to treating individuals in the emergency department after a hurricane or during a pandemic.⁶ State laws vary considerably on what constitutes “good faith” and “without compensation,” which would determine whether protection applies for a clinician who is otherwise salaried in a regular job.¹

Mutual aid agreements

Mutual aid agreements are mechanisms through which jurisdictions can aid other jurisdictions during emergencies.⁴ These agreements also include provisions for reimbursing expenses, providing liability protections to governmental employees and volunteers who provide aid, and awarding compensation for injuries to personnel deployed under the agreement.⁴

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Many Good Samaritan statutes apply only to volunteers, and not all states have statutes that allow clinicians to be designated as such

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Liability protections offered by mutual aid agreements are not automatic and are limited in their applicability

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The Emergency Management Assistance Compact (EMAC), the most widely adopted mutual aid agreement in the United States, has been adopted by all 50 states, the District of Columbia, and some territories.¹⁰

It only becomes effective once an emergency has been declared. EMAC provides immunity to officers from the state that is rendering aid to the state requesting aid, in which officers are considered agents of the requesting state for tort liability and immunity purposes.⁸ These individuals, who must be properly dispatched in response to an EMAC request, are not to be held liable for acts or omissions rendered in good faith; however, EMAC does not provide liability protection for actions constituting willful misconduct, gross negligence, or recklessness.⁶ EMAC also provides reciprocity for individuals who are properly dispatched in response to an EMAC request who hold medical licenses to practice medicine in the receiving state, subject to any limitations imposed by the receiving state.⁴ Clinicians can familiarize themselves with a state's medical licensing requirements by reviewing that state's medical board website. For EMAC protections to apply, a state must make a request to another/other state(s) through EMAC, and such requests must be formally accepted by the rendering state.⁸ EMAC does not require participating states to actually provide aid.¹⁰

Non-volunteer health care clinicians

Non-volunteer (salaried or paid) health care clinicians are more likely to bear the brunt of providing care during a disaster, especially in the early stages before VHPs

Related Resources

- Federal Emergency Management Agency. <https://www.fema.gov/>
- Federation of State Medical Boards. <https://www.fsmb.org>

arrive; however, most legislation does not address the associated disproportionate liability risk burden of non-volunteer health care clinicians.^{1,11} As opposed to VHPs and government employees, non-volunteer health care clinicians performing their regular job duties during a disaster are generally not provided immunity from negligence by most legislation.^{1,6} One exception is the PREP Act, which provides immunity for all clinicians from claims that may arise from dispensing a specific countermeasure during a declared public health emergency.^{1,9} Some states have enacted the Model State Emergency Health Powers Act, which may offer immunity from negligence if the non-volunteer clinician is rendering care under contract with or at the request of a state¹; however, non-volunteer clinicians who practice from their office or a local hospital will not receive protection through these laws.¹ Good Samaritan laws may not apply unless care is provided at a scene of an emergency.

A few states have attempted to narrow this legislative gap by enacting laws that provide immunity more broadly for clinicians, regardless of their volunteer or compensation status.¹ Elements of these states' laws include acting in response to a declared emergency or disaster in which there is a recognized depletion of resources attributable to the disaster, at express or implied request of the state government, and consistent with emergency plans.¹

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Bottom Line

There are potential liability risks when treating patients during a disaster. Statutory protections that limit liability may be enacted when the US President or a state Governor declares an official state of emergency. Although some federal and state laws and regulations provide liability protections during these situations, there is a discrepancy in the protections offered to non-volunteer vs volunteer clinicians.

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Non-volunteer clinicians performing their regular duties during a disaster are generally not provided immunity from negligence