Department of Veterans Affairs

Memorandum

Date: March 24, 2020

From: Acting General Counsel (02)

Subj: Personal Liability of VA Health Care Workers

To: Under Secretary for Health

1. The COVID-19 crisis has raised concerns of Veterans Health Administration (VHA) health care providers of their potential personal liability related to being assigned to duties that may be temporarily outside the normal scope of their practice. This is to advise that there is no increased exposure to personal liability for VA employees due to altered assignments or altered standards of care that become necessary to deal with a pandemic such as the current one.

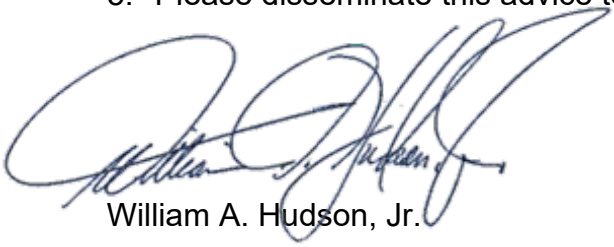
2. Federal employees are, by statute (commonly called the Westfall Act), immune from personal liability for common law torts, including negligence and malpractice, committed within the scope of their employment. Another Federal statute specific to VHA, 38 U.S.C. § 7316, similarly protects VHA health care employees from liability for malpractice or negligence in furnishing health care or treatment while in the exercise of that employee's duties If an employee is sued in such a case, upon the recommendation of the employee's agency (in VA, this is done by the Torts Law Group of the Office of the General Counsel), the United States Attorney will move to substitute the United States in place of the employee as the defendant in the suit. Following substitution, the case proceeds as if originally brought against the Government.

3. This is routinely what happens in these cases. Patients suing the Government for alleged medical malpractice occurring at VA medical facilities will occasionally name one or more VA health care workers as defendants. The employees' supervisor and facility will document the employment status of the individuals, notify the Torts Law Group, and the U.S. Attorney will proceed to have the individuals dismissed from the suit. Since at least the late 1970's and perhaps before, there has not been a medical malpractice award against a VA health care worker.

4. Altered assignments; e.g., assigning a dermatologist to provide triage for patients in an emergency room, would not take the physician outside the scope of their employment, even though outside the scope of their practice, because the physician would still be providing VA health care. The protection from liability would apply even if VA assigned employees to care for non-veterans; e.g., pursuant to a Stafford Act tasking, or in a non-VA facility under a sharing agreement. Similarly, so-called "altered standards of care" would not take a provider outside the scope of their employment. Nor would such altered or crisis standards, properly documented, necessarily create greater liability for

the Government, as the standard of care in a tort case includes consideration of the circumstances in which the care was provided. Moreover, we are confident that, in the event of a malpractice payment arising out of provision of care during the crisis, VHA's process for consideration of reporting providers to the National Practitioner Data Bank will make allowance for those circumstances.

5. Please disseminate this advice to your staff.



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