

UNDER SECRETARY FOR HEALTH (USH) MEMORANDUM: REPRESENTATION FOR VA HEALTH CARE PROFESSIONALS BEFORE STATE LICENSING BOARDS

1. ISSUE: On occasion, U.S. Department of Veterans Affairs (VA) health care professionals have been summoned to hearings or other administrative proceedings before State licensing boards (SLB) for investigation or review of conduct that took place in the course of VA employment. In some instances, State action has been initiated against individual VA employees for following VA policies that conflict with State laws. State action has also been initiated to consider issues reflecting on the professional conduct or competence of an individual VA health care professional.

With the continued development and establishment of VA National Standards of Practice (NSP), concerns have been raised about the possibility of SLBs taking licensing actions against VA employees when an employee performs a task or service consistent with the NSP, but inconsistent with their State licensing requirements. This memorandum outlines the parameters for the Federal Government providing representation to VA employees before SLBs.¹ VA has determined that it is in VA's best interest to provide representation when the health care professional is practicing consistent with a NSP that was properly incorporated into the health care professional's privileges, scope of practice, or functional statement; absent misconduct, negligence, or inappropriate conduct from the professional. Thus, in cases involving conflicts between State licensing requirements and VA NSPs, this representation **will** be provided by VA or the U.S. Department of Justice (DOJ) depending on the specific facts and circumstances giving rise to the underlying action taken by the SLB.

2. AUTHORITY TO REPRESENT VA EMPLOYEES BEFORE SLB: VA has authority to provide, or pay for, representation before a SLB when the United States' interests are at stake along with the employee's personal interest, even where State action occurs after separation or retirement from VA employment. Such representation is appropriate where: 1) the employee's conduct was within the scope of employment (i.e., the conduct was in furtherance of, or incident to, the carrying out of official duties); and 2) where the representation would be in the Government's interest. Under similar circumstances, DOJ may also be available to provide individual capacity representation to VA employees upon VA's request.

¹ Additionally, VA employees are protected from personal liability for common law torts, including negligence and malpractice, committed within the scope of their employment under the Westfall Act and 38 U.S.C. 7316. When suit is filed against VA employees alleging negligent acts or omissions within the scope of their employment, upon recommendation of Torts Law Group of the Office of General Counsel (OGC), the United States Attorney will move to substitute the United States in place of the employee as the defendant in the suit. This process and further information on personal liability in common law torts is provided in OGC memo, Personal Liability of VA Health Care Workers dated March 24, 2020.

3. SITUATIONS WHERE VA EMPLOYEES MIGHT REASONABLY EXPECT TO BE REPRESENTED: Although there are no blanket guarantees of representation and each case will be evaluated on its individual merits, VA or DOJ will provide representation when the State's action is, in effect, a challenge to a VA policy or procedure, such as a NSP.

As stated above, the employee's conduct must be within the scope of employment. Performing a task, duty, or service that is included in the NSP for the employee's occupation that has been properly incorporated into the employee's privileges, scope of practice, or functional statement is within the scope of their employment. It is not necessarily within the scope of an employee's employment to perform a task, duty, or service that is either not within the NSP for the employee's specific occupation or has not been incorporated into the employee's privileges, scope of practice or functional statement.

In addition to employee's actions being within the scope of employment, representation must also be in the Federal Government's best interest. For example, it would be in the Federal Government's interest to represent a VA employee in a SLB proceeding reviewing the employee's failure to comply with State law, rules or policy, including State practice acts, where compliance would have conflicted with Federal law, rules, or policy, to include VA's NSPs. Such conflicts have, in the past, arisen involving such issues as procedures for obtaining consent, requirements for disclosure of information, and the writing of orders and prescriptions by non-physicians.

Representation may also be contingent upon conduct or professional competence. If VA has evaluated the health care professional's conduct or performance in question and determined that it is appropriate and consistent with VA policy and standards, VA or DOJ will provide representation. On the other hand, if VA concludes that the health care professional's conduct or performance was improper, negligent, or otherwise inappropriate, VA would conclude that it would not be in the Government's interest to provide representation.

Representation generally will not be authorized if the State action is based on a VA-initiated report to the SLB or if the health care professional has been the subject of corrective or disciplinary action (such as counseling or mandatory training) based on the same matter being reviewed by the State. Neither will representation be provided where the conduct in question occurs during non-VA private practice or otherwise outside the scope of the health care professional's VA duties.

4. AUTHORITY TO DETERMINE WHETHER IT IS IN VA'S INTERESTS TO REPRESENT: The question of whether it is in VA's interest to represent an employee will depend upon the circumstances of each individual case. The decision to pay legal fees in an administrative hearing is discretionary and is not a legal liability on the part of the Department.

The employee's supervisor makes a recommendation as to whether the employee's actions were within the employee's scope of employment and whether it would be in the interest of the VA to represent the employee. The VA medical facility Director will make a decision on the recommendation with the concurrence of the local Office of Chief Counsel and Torts Law Group (if the matter involves allegations of medical malpractice). The Office of Chief Counsel and Torts Law Group will determine whether representation will be provided by VA or whether a request for DOJ representation is appropriate.

If a decision is made to provide such representation, the health care professional must be told that if the health care professional's interests diverge from VA's interests at any time (e.g., if during the course of the hearing, VA determines that the health care professional's conduct was outside the scope of employment or otherwise inappropriate), VA and/or DOJ representation must cease.

5. CONCLUSION: VA has discretion to provide representation in certain circumstances where the conduct giving rise to the hearing took place within the employee's scope of employment, such as performing tasks or services consistent with a NSP, and where an administrative determination has been made that it would be in VA's interest to provide the representation.

6. RELATED ISSUES:

a. This memorandum is a follow-up to the March 24, 2020, Memorandum titled "Personal Liability of VA Health Care Workers" from Acting General Counsel to USH (ATTACHED). The attached memorandum ensures that VA employees are not exposed to increased personal liability due to assignment of duties temporarily outside the normal scope of their practice that become necessary to deal with the current pandemic.

b. Additional information can be found in OGC White Paper, VA Authority to Represent Practitioners Before State Licensing Boards, 1993 (ATTACHED).

7. CONTACT: Questions about the content of this memorandum may be referred to VA.NSP@va.gov.

8. RESCISSIONS: This memorandum updates and rescinds Information Letter 10-97-022, dated June 24, 1997, regarding this matter.



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Performing the Delegable Duties
of the Under Secretary for Health

May 26, 2022

USH MEMORANDUM

DISTRIBUTION: Emailed to the Veterans Health Administration (VHA) Publications Distribution List on May 26, 2022.

NOTE: All references herein to VA and VHA documents incorporate by reference subsequent VA and VHA documents on the same or similar subject matter.

ATTACHMENTS:



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