

Ohio's Charitable Immunity Laws

History

Philanthropy and quiet charity have long been common characteristics of health care professionals, but in recent years barriers to these volunteer efforts have developed. Lawmakers have taken steps at both the federal and state levels to address the concerns of volunteer health care professionals who have found the potential risk of lawsuits and the cost of professional liability insurance to be deterrents to serving people who are uninsured and poor. This document focuses on efforts made in the Ohio General Assembly.

In Ohio the first steps toward providing immunity to volunteer health care professionals were made in 1995 in House Bill (HB) 218, which also made provisions for immunity for free clinics. All of these provisions were scheduled for repeal five years later. In 2000, HB 261 was adopted, without the scheduled repeal, therefore making the provisions of the original law permanent. In December 2003, the Ohio General Assembly approved Senate Bill 86, which extended the immunity provisions to volunteer health care professionals regardless of where they provide the service. In December 2004, the Ohio General Assembly approved Senate Bill 80 (SB 80), which included the provisions of Senate Bill 124 (SB 124). SB 124 was requested by the Ohio Association of Free Clinics and expanded the law to allow minor surgical procedures to be covered by the charitable immunity law. The changes made in SB 80 went into effect on April 6, 2005. In June 2005, a new free clinic medical liability reimbursement program was put in place as a part of the state biennial budget.

Which Health Care Professionals are Covered?

The following health care professionals are currently included in the law: physicians (including retired physicians who meet certain requirements outlined in ORC 4731.295), nurses (registered, advanced practice and licensed practical), physician assistants, dentists (including retired dentists who meet requirements outlined in ORC 4715.42) and dental hygienists, physical and occupational therapists, chiropractors, optometrists, podiatrists, dieticians, pharmacists, emergency medical technicians (basic, intermediate, and paramedic), respiratory care professionals and speech language pathologists and audiologists. (Please note that this is not a comprehensive list—see ORC 2305.234)

SB 80 changed the law regarding the issuance of a certificate to allow retired dentists to receive charitable immunity coverage. Previously, the law permitted the state dental board to issue such a certificate. Now the law requires the state dental board to issue the certificate within thirty days of receiving an application. Within ninety days of the effective date of this law the state dental board “shall make available through the board’s website the application form for a volunteer’s certificate...a description of the application process and a list of all items that are required”. (ORC 4715.42)

Definition of Immunity

Health care workers and professionals who are volunteers, nonprofit health care referral organizations and health care facilities or locations are generally “not liable in damages to any person or government entity in a tort or other civil action...unless the action or omission constitutes *willful or wanton misconduct*.” (ORC 2305.234)

Requirements for Free Clinics and Health Care Referral Organizations

“Nonprofit shelters or health care facilities” must register with the Ohio Department of Health (ODH) by January 1 of each year in order to be covered by the immunity provisions described in the law (ORC 3701.071). Although health care referral organizations are also eligible for charitable immunity, they are not required to register with ODH, unless the referral organization also qualifies as a nonprofit shelter or health care facility.

Which Patients are Included?

The immunity provisions described in the law only apply when care is provided to a person who is indigent and uninsured by the following definition: 1.) The person’s income is not more than 200% of the poverty line, 2.) The person is not eligible for any governmental health care program (for example, Medicaid, Medicare, Disability Medical Assistance), and 3.) The person either (a) does not have private health insurance, or (b) The person does have private health insurance, but the person’s plan denies coverage or is subject to insolvency or bankruptcy. (ORC 2305.234)

Which Procedures are NOT Covered?

Prior to the passage of SB 80, the “performance of an operation” or the “delivery of a baby” was not given the immunity provided to volunteer health care professionals, nonprofit health care referral organizations and health care facilities (such as free clinics, as long as they are registered with the Ohio Department of Health) under ORC 2305.234. SB 80 modified these exceptions.

First, SB 80 provides that, under the “performance of an operation” exception, the immunity is not available **only** if, at the time of an alleged injury, death, or loss to person or property, the health care professionals or workers involved are performing an operation to which any one of the following applies:

- (1) The operation requires the administration of "deep sedation" or "general anesthesia.”
- (2) The operation is a procedure that is not typically performed in an office.
- (3) The individual involved is a health care professional, and the operation is beyond the scope of practice or the education, training, and competence, as applicable, of the health care professional.

In other words, instead of all operations not being subject to immunity, now only operations falling under the three above definitions will not have immunity given to volunteer providers.

Secondly, the bill extends the exception from the immunity provisions from the “delivery of a baby” to also cover “any other purposeful termination of a human pregnancy.” As such, immunity is not provided under Ohio law for the delivery of a baby or any other purposeful termination of a human pregnancy (ORC 2305.234(F)(1)(c)).

Informed Consent

The health care professional is required to determine that the patient is mentally capable to provide informed consent, explain the provisions of this law to the patient and obtain the patient’s written consent. The written waiver must “state clearly and in conspicuous type that the person or other individual who signs the waiver is signing it with full knowledge that, by giving

informed consent to the provision of the diagnosis, care, or treatment, the person cannot bring a tort or other civil actions including an action...unless the action or omission of the health care professional constitutes willful or wanton misconduct". At least one free clinic has obtained a legal opinion stating that this consent form must be provided in the patient's primary language. If a patient is referred to a health care professional, the consent must be obtained at the health care professional's office, rather than by the referring organization. (ORC 2305.234)

Why Do Many Free Clinics Still Purchase Professional Liability Insurance?

Despite the provisions of Ohio's Charitable Immunity Law, many free clinics have opted to purchase professional liability insurance. One reason is that while the Charitable Immunity Law covers the clinic and volunteers, it does not cover any staff. Also, although the Charitable Immunity Law offers a clinic and its volunteers a defense, significant legal fees would be necessary if legal action were to occur. As a result, some clinics ask their volunteers to make sure that their own professional liability policies cover volunteer work as well as paid employment. This may not be feasible, though, if the healthcare professional is covered under a hospital or other institutional policy. In addition, retired health care professionals may not be inclined to purchase professional liability insurance when they are volunteering their services.

Regarding retired physicians, questions have arisen regarding whether tail coverage allows for volunteer efforts after retirement. According to an article written by Darryl Ranum, Vice President of Risk Management for OHIC Insurance Company:

"Retired physicians with OHIC tail policies are not restricted from providing volunteer services. Volunteer activities do not violate the terms of the tail coverage. It is important to note, however, that tail policies are extended reporting endorsements for the designated period of time when a physician was in practice and was covered by an OHIC policy. Tail policies do not cover healthcare services provided after a physician's retirement. Retired physicians who no longer carry medical malpractice insurance and desire to volunteer their services may be insured through free clinics or other non-profit healthcare organizations when OHIC Insurance Company provides the organization's liability insurance. OHIC Insurance Company's policy for free clinics usually can be endorsed to cover specific physicians or a designated number of physicians who volunteer and need medical malpractice insurance coverage."

New State Free Clinic Medical Liability Reimbursement Program

At the end of June 2005, the Ohio General Assembly completed work on the two year state budget bill. As adopted, this bill created a new State Free Clinic Medical Liability Reimbursement Program. An amendment, sponsored by Senator Ron Amstutz (R-Wooster) and Rep. Larry Flowers (R-Canal Winchester), allocated \$275,000 in State Fiscal Year 2006 and \$325,000 in State Fiscal Year 2007 to reimburse free clinics for medical liability insurance premiums. The coverage provided under the program is limited to claims that arise out of the diagnosis, treatment and care of patients of free clinics. Free clinics are defined by the following:

- Free clinics are nonprofit organizations (501 (c)(3)) that provide health care services for free or for a minimal administrative fee to individuals with limited resources.
- A free clinic facilitates the delivery of health care services through the use of volunteer health care professionals and voluntary care networks.

- Free clinics that request a minimal administrative fee do not deny services based on ability to pay the fee. Free clinics do not bill patients for services rendered.
- Free clinics do not perform operations.
- A clinic is not a free clinic if third party payers are billed and 25% or more of the clinic's revenue comes from third party payments.

Free clinics must provide several pieces of documentation to the Ohio Department of Health by January 31. ODH will then reimburse the clinic for up to 80% of its medical liability insurance premiums with a cap of \$20,000 per clinic. The clinic, its staff and volunteer health care professionals and health care workers may all be covered by the medical liability insurance policy.

For more information, please contact Amy Rohling McGee, Executive Director, Ohio Association of Free Clinics, 61 Jefferson Avenue, Columbus, Ohio 43215, (614) 221-6494, (614) 228-7445 (fax), arohling@ohiofreeclinics.org.

While this article addresses legal issues, it is not a legal opinion and the author is not an attorney. Consult an attorney that is knowledgeable about this topic before taking any action.

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[PLACE ON APPLICABLE HEALTH CARE PROVIDER'S LETTERHEAD]

**VOLUNTARY CARE
PATIENT CONSENT FORM**

Patient's Name _____
(last name) (first name) (middle initial)

Date of Birth _____ / _____ / _____

Social Security Number _____ Telephone Number _____

Home Address _____
(street address) (city/state/zip code)

I hereby consent to the provision of diagnosis, care, and/or treatment by **[insert name of health care provider]**, and I hereby acknowledge that such consent will remain in effect unless and until I cancel such consent in writing.

I hereby acknowledge and confirm that I am mentally capable of giving informed consent to the provision of the diagnosis, care and/or treatment and am not subject to duress or undue influence.

I HEREBY ACKNOWLEDGE AND UNDERSTAND THAT, BY SIGNING THIS VOLUNTARY CARE PATIENT CONSENT FORM, I AM GIVING INFORMED CONSENT TO THE PROVISION OF DIAGNOSIS, CARE, AND/OR TREATMENT BY [insert name of health care provider] AND CANNOT BRING A TORT OR OTHER SIMILAR ACTION, INCLUDING AN ACTION ON A MEDICAL, DENTAL, CHIROPRACTIC, OPTOMETRIC, OR OTHER HEALTH-RELATED CLAIM, AGAINST [insert name of health care provider] UNLESS THE ACTION OR OMISSION OF [insert name of health care provider] CONSTITUTES WILLFUL OR WANTON MISCONDUCT.

Signature of Patient or Person
Authorized to Consent*

Date

Relationship (if not Patient)

* If this Consent for Treatment is signed by someone other than the patient, it must be signed in the patient's presence.