Risk Management & FTCA for Clinical Providers

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HISTORY OF THE FSHCAA (Federally Supported Health Centers Assistance Act)

Late 1980s – medical malpractice crisis similar to current situation.

Health centers in certain geographic areas having difficulty finding adequate coverage.

Studies commissioned showed health centers were lower risk for insurers.

FSHCAA enacted to provide medical malpractice liability insurance.

- 1992
- 1995
PRINCIPLES OF COVERAGE

• FSHCAA - Health Centers are eligible to be deemed “federal employees.”
• Provides immunity from lawsuit alleging medical malpractice.
• Plaintiff’s only remedy is claim under Federal Tort Claims Act (FTCA).
• Health Centers must apply to be “deemed.” If approved they are “federal employees” for purposes of medical malpractice.
• Only Section 330 grantees are eligible to participate.
PROGRAM BENEFITS

• Reduction or elimination of professional liability insurance costs.
• Immunity from lawsuit = better coverage
  – Private insurance typically has limits of $1 mil/$3mil.
  – No limits under FTCA.
PRINCIPLES OF COVERAGE

• Who is covered:
  – All employees, full time or part time.
  – Full time contract provider (over 32 1/2 hours per week).
  – Part time contract provider of services in the fields of family practice, ob-gyn, general internal medicine, or general pediatrics.
  – Contract must be between the deemed health center and the individual provider.
PRINCIPLES OF COVERAGE

• Scope of Project
  – Coverage is only for acts that are within the scope of employment of the covered individual.
  – No coverage for moonlighting.
  – Must be acting on behalf of the deemed entity.
  – PIN 2008-01.
PRINCIPLES OF COVERAGE

- No FTCA coverage for care to non-health center patients
- Except:
  - Secretary has pre-approved certain situations where care is delivered to non-health center patients.
  - These examples must be strictly interpreted. Health centers must be “painstakingly exact” to make certain that what they do “fits squarely” within the example.
  - Examples are found in September 25, 1995 Federal Register Notice and 42 C.F.R. Part 6 (and summarized in FTCA POLICY MANUAL).
PRINCIPLES OF COVERAGE

• Examples of care to non-health center patients that the Secretary has approved:
  – School based clinics
  – School-linked clinics
  – Health Fairs
  – Immunization campaigns
  – Homeless outreach
  – Periodic hospital call or emergency room coverage
  – After hours cross-coverage activities
  – Coverage for individual emergencies
How the Claims Process Should Work

- The patient files an administrative claim against the United States.
- DHHS reviews the claim and may deny it, pay it or offer a settlement.
- If DHHS denies the claim, the patient may file a lawsuit.
- If DHHS does not act on a claim within six months, plaintiff may file suit in federal court.
- When suit is filed, the case is transferred from DHHS to the Department of Justice (DOJ). DOJ may attempt to settle the suit, otherwise it will proceed in litigation, representing the United States in federal court against the plaintiff.
- If payment is made on an FTCA claim, the Medical Claims Review Panel determines whether the standard of care was met for purposes of NPDB reporting.
FTCA CLAIMS PROCESS

How the Claims Process Usually Works

- The patient files a medical malpractice lawsuit against the health center in state court (referred to as a “premature lawsuit”).

- The health center notifies DHHS Office of General Counsel (OGC) about the lawsuit and provides OGC with all of the necessary documentation.

- The health center proceeds in state court (motions to extend deadlines, etc…) while waiting for the OGC to verify the applicability of the FTCA to a particular claims.

- The DHHS verifies the applicability of the FTCA to a claims and refers the case to the DOJ, who assigns an Assistant U.S. Attorney to the case.
FTCA CLAIMS PROCESS

How the Claims Process Usually Works continued…

- The AUSA removes the case to federal court and files a motion to dismiss the case against the health center.
- The U.S. District Court dismisses the health center from the case and substitutes the United States as the defendant.
- The AUSA moves to dismiss the case against the United States for the patient failing to exhaust his/her administrative remedies.
- The U.S. District Court dismisses the case against the United States and the case proceeds as an FTCA claim as described in the “How the Claims Process Should Work” slide.
Touhy Regulation

- **HHS Touhy regulation** (45 CFR Part 2)(2008) prohibits Federal employees from giving testimony without prior approval from the HRSA Administrator.
- **Applies to** current & former employees and qualified contractors (covered under FTCA) regarding testimony for medical malpractice.
  - “Information acquired in the course of performing official duties or because of the person's official capacity” PIN 2011-01
Touhy Regulation (cont’d)

- **Applies to**: civil proceedings involving allegations of medical malpractice where you or the United States is not a party

- **Determination**: transmit subpoenas and requests for testimony to DHHS Office of the General Counsel (OGC) General Law Division (GLD)

- Health and Human Services Office of the General Counsel will arrange Department of Justice (DOJ) representation or will deny request for testimony
Touhy Regulation (cont’d)

• If HRSA denies or does not meet deadline:
  • Appear at stated time and place
  • Produce Touhy regulations
  • Respectfully decline to testify

• FTCA Manual, Pages 23-24

• Subpoenas and requests for testimony:
  ✓ DHHS Office of the General Counsel (OGC) General Law Division (GLD)
    Phone:  (202) 691-2369
    Fax:    (202) 619-2922
    E-mail:  HHS-FTCA-Claims@hhs.gov
Touhy Regulation (cont’d)

- **Does not apply to**: civil or criminal proceedings (personal or against DHHS), traffic accidents, crimes, domestic relations not involving professional services

- **Determination** – transmit subpoenas and requests for testimony to HHS OGC GLD

- HRSA Administrator (Mary Wakefield) will arrange DOJ representation or will deny request for testimony
Medical Claims Review Panel

- Activated after relief (payment) is provided by settlement or court judgment

- Provides review to determine if the National Practitioner Data Bank (NPDB) report is warranted

- May name an individual NOT named in the request for relief or suit
Key Link

  - FTCA Policies
  - Application Process
  - Particularized Determination
  - Health Center Claims
  - FTCA for Health Center FAQs
  - Risk Management Resources
Risk Management

A provider calls you after a patient has an unexpectedly bad outcome. What steps should you take with:

✓ The medical record?
✓ Your attorney?
✓ Risk management?
✓ Quality improvement?
Risk Management (cont’d)

Areas of Importance

• Quality Management
• Credentialing and Privileging
• Clinical Management
• Patient Records
• Patient Communications
• Incident Tracking and Reporting
Risk Management (cont'd)

Risk Concern Areas

- Use of protocols
- Medical record documentation
- Credentialing and privileging
- Referral issues
- OB/GYN, procedures, failure to diagnose
Protected Activities

- Federal law does not currently protect Peer Review, Quality Review activities protected in state courts
- You need to have a plan to protect your activity
- We need to see what can be done to provide protection for FQHC’s who are using FTCA
NACHC Risk Management Resources

• Clinical Issues/Risk Management
  http://www.nachc.com/clinicalriskmanagement.cfm

• ECRI Institute
  https://www.ecri.org/Pages/default.aspx

• Health Center Compliance.com
  https://www.healthcentercompliance.com/
FTCA: Final Words

• FTCA and solid Risk Management is A Winning Partnership

• An Effective Risk Management Program is:
  ✓ Structured
  ✓ Comprehensive
  ✓ Organization-wide
  ✓ Leader supported
  ✓ Legally sound
  ✓ “Top of Mind”