



## **Medical Liability Reform Legislative Proposals Fact Sheet**

The Health Coalition on Liability and Access believes that medical liability reform *must* be included in any comprehensive health care reform bill considered by the US Congress. While the HCLA strongly supports comprehensive reforms that include reasonable limits on non-economic damages, which have a proven track record of success in states like California and Texas, the group also supports alternative federal reforms, as well as funding for states to consider other options.

The HCLA has prepared several legislative proposals to advance liability reform, and urges Congress to include these reforms during consideration of health care reform. In all cases, none of the proposals interferes with currently enacted state laws, nor do they impede the future enactment of more complete medical liability reforms at the state or federal level.

### Immediate Federal Reforms

#### **Certificate of Merit**

- Any medical liability lawsuit that is filed must be accompanied by a certificate or affidavit of merit.
- Failure to file the certificate of merit, or filing of an inadequate certificate of merit (according to the standards set forth) will result in the dismissal of the claim.

#### **Periodic Payment of Future Damages**

- Periodic payments of any medical professional liability award will be mandated, if future damages are at least \$50,000, in accordance with Uniform Periodic Payment of Judgments Act.
- This applies to any claims not having previously scheduled for trial or retrial as of the date of enactment.

#### **Limited Liability for Emergency Medicine and Disaster Volunteers**

- In any medical professional liability claim against a healthcare provider, either an individual or entity, for services or treatment provided in compliance with EMTALA, no liability may be found unless there is “clear and convincing evidence.”
- Any volunteer healthcare provider or entity offering services in a declared disaster area or to the victim of a declared disaster will not be held liable for any claims of medical malpractice.
- Exemptions include occasions where the act or omission was outside the scope of the provider or entity’s licensure (excluding care reasonably determined to save a life or prevent serious bodily harm), or was the result of willful misconduct.

#### **Expert Witness Requirements**

- Any individual who serves as an expert witness in a medical liability suit must meet standards of expertise and knowledge, as set forth by the law.

#### **Incident Resulting in Nonpayment by Medicare**

- The identification by the Center for Medicaid & Medicare Services (CMS) that a ‘Never Event’ or preventable error has occurred, and therefore resulting in nonpayment for the medical expenses associated with that error, is not de facto liability on the case of the provider.
- This ‘Never Event’ is not admissible as evidence in a medical liability trial to prove liability on behalf of a health care provider.

## State Reform Projects – via Federal Incentive Payments

Any state, geographic region or medical services system that implements one or more of the reforms listed below is eligible for additional federal health care funding. Many of the details are left up to the states to decide to allow for maximum flexibility.

### **Early Offers**

#### *Expedited Litigation Prevention*

- Provides a way to quickly resolve medical liability cases.
- Early offers may be provider or patient initiated, and include full economic damages, and in certain cases, non-economic damages.
- In each case, the opposite party must be given adequate time to respond to the offer.
- Evidence of an offer of settlement may not be introduced in legal proceedings, except to inform the presiding judge of an increased burden of proof if offer was rejected.
- Arbitration may be used to determine true cost of economic loss, appropriate attorney fees, and, if applicable, the percentage of responsibility attributable to each defendant joining the claim.
- Legal fees included in any early offer must be reasonable and based on an hourly rate.

#### *Early Disclosure and Compensation Program*

- Health care providers would be required to notify a patient of an error or adverse outcome within a limited amount of time.
- This notification is not an admission of liability, and providers offering compensation in good faith would be given immunity from liability.
- Payments for any non-economic damages would be based on a defined payment schedule made in conjunction with the state and the Department of Health and Human Services.

### **Health Courts**

- A forum allowing either a bench or jury trial, where medical liability lawsuits would be heard by judges specifically trained in medical liability matters
- The negligence standard would be the minimum threshold for compensatory damages
- Economic damage awards would not be limited, but non-economic damage awards would be based on a schedule
- Medical experts and expert witnesses would be required to meet specific qualifications.

### **Abiding by Proven Medical Practices**

- Program to assess the effectiveness of the use of evidence-based guidelines combined with liability protections.
- Participation would be voluntary, but participating physicians who utilize evidence-based guidelines should receive liability protections for diagnosis and treatment, in compliance with their guidelines.
- There is no presumption of negligence for participating physicians who do not adhere to guidelines.
- These evidence-based guidelines should be developed and disseminated by national medical specialty societies, or another public or private group that represents physicians.

***Medical liability reform is essential in bringing down health care costs and preserving patient access to care. HCLA urges Congress to consider these reforms and include them in forthcoming comprehensive health care legislation.***