

## **Risk Management Policies: Referrals to Specialty Care**

Note: these are general risk management guidelines. Health Centers should seek the advice of an attorney to adopt specific risk management policies and procedures that address their unique needs.

**BACKGROUND:** Health Centers can reduce their liability for lawsuits by ensuring they are eligible for coverage by the Federal Tort Claims Act (FTCA), which offers protection akin to medical malpractice insurance to federally-funded Migrant and Community Health Centers. Since Health Centers are required to refer patients to medically-necessary specialty care services that are not within their capacity to provide, it is important to be consider the Health Center's coverage and potential exposure in the event that problems arise connected to the referral.

### **CONSIDERATIONS:**

- The Health Center must reapply yearly for “deemed” status under the Federally Supported Health Centers Assistance Act (FSHCAA) of 1992 and the FSHCAA of 1995, which extend FTCA coverage to eligible Health Centers.
- To qualify for FTCA coverage, an activity must be approved in the annual grant application (i.e., the activity must be within the Health Center's federally-approved “scope of project”).
  - Referrals for medical and other health-related services (including specialty referrals when medically indicated) are required, and thus are within the Health Center's scope of project.
  - However, while the referral itself is within the scope of project, the health care that the patient receives pursuant to the referral will not be part of the scope of project unless it is a service that the Health Center is approved to provide (i.e., the service is within the scope of project).
  - A Health Center may add a new service to its scope of project by applying for and receiving approval from a HHS Grants Management Officer.
- For referrals to be entitled to FTCA coverage, they must be made pursuant to a formal written referral agreement under which the Health Center maintains responsibility for the patient's treatment plan and will be providing and/or paying or billing for appropriate follow-up care based on the outcome of the referral.
  - The formal written referral agreement should describe the manner by which the referral will be made and managed, and the process for referring patients back to the Health Center for follow-up care.
  - The agreement should also ensure that the provider of the referral services will provide the services in a timely manner and make the services accessible and acceptable to the population to be served by the center, and should establish rates and methods of payment for the referral services.

- If the Health Center will be paying for part or all of the referral services with Section 330 grant funds, then the referral agreement must be a contract that complies with the Office of Management and Budget's Uniform Administrative Requirements for Awards and Subawards to Institutions of Higher Education, Hospitals and Other Non-Profits ("OMB Circular A-110"), codified at 45 C.F.R. 74. For more guidance on the contents of formal written agreements, including the requirements of OMB Circular A-110, please see Farmworker Justice's guideline, *Effective MOUs and Contracts*.
- For a Health Center to be eligible for FTCA coverage, the health care provider(s) making the referral must have been acting within the scope of their employment (e.g., their employment responsibilities).
  - Health Centers should ensure that each health care provider's employment responsibilities are clear from his/her job description, which includes employment agreements and contracts for services. These written descriptions should detail the duties of the individual, including the type of services to be provided and the location where the services will be delivered. These written descriptions should be clear enough that, if needed, they could be used to determine whether a health care provider acted within his/her scope of employment.
  - Trainings for health care providers should remind them that they are not to engage in activities outside their scope of employment. Rather than making a referral that they are not authorized to perform, they should seek out someone who is authorized to make the referral.
  - Health care providers should not be permitted to moonlight<sup>1</sup> on the Health Center premises, because such activity is outside the health care provider's scope of employment.
  - Health Centers may want to consider how they expect health care providers to respond to emergencies. If health care providers are to be authorized to act outside their normal duties in an emergency situation, this authorization should be included in their job description, including their employment agreement or contract for services. Trainings for health care providers should provide instructions for how they should respond to emergencies, including whether they should ever engage in the provision of medical, surgical, dental, or related services that are outside their employment responsibilities.
- Health Centers may be eligible for FTCA coverage in circumstances where the individual health care provider(s) are not eligible. However, if the Health Center wants to increase

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<sup>1</sup> Moonlighting is defined as engaging in professional activities outside the health care provider's employment responsibilities to the Health Center.

the likelihood that FTCA coverage will extend to the provider to whom it refers a patient, all of the following must apply:

- The Health Center must have a contract with the provider.
- The provider must be providing a service that is within the Health Center's approved grant application (i.e., within scope of project). If the Health Center wants to add a service to its scope of project, it can be added by receiving approval from a HHS Grants Management Officer.
- The provider must have been acting within his scope of employment for the incident that requires FTCA coverage. The provider also must have been performing a medical, surgical, dental, or related function.
- Additionally, if the provider bills the patient directly, (1) the provider must report the billing to the Health Center, (2) the provider must transfer all funds received directly to the Health Center within a reasonable period of time, and (3) the provider's contract must authorize this billing arrangement. This means that the provider must remit the entire payment to the Health Center, even if the Health Center may end up paying some of it back to the provider per their contract.
- FTCA coverage can extend to fulltime contractors (who work 32.5 or more hours per week). FTCA coverage can also extend to part-time contractors (who work less than 32.5 hours per week), but only for those who work in the fields of family practice, general internal medicine, general pediatrics, or obstetrics and gynecology for incidents involving the provision of medical, surgical, dental, or related services. However, in order for a full-time or part-time contractor to be eligible for FTCA coverage, the contract and all payments must be between the Health Center and the individual provider, rather than through a corporation or a professional association.
- FTCA coverage does not extend to volunteers, interns, residents, medical students, and providers contracted under another corporation or employed by another corporation. Similarly, contractors of the Health Center who would otherwise be eligible for FTCA coverage will not be entitled to such coverage if they are moonlighting or volunteering outside the capacity of their employment at the Health Center.