

Do good, but do it right: Wyoming's Medical Volunteer Immunity Law Law's specific exceptions require Doctors to jump through some hoops

By Nick Healey
Dray, Dyekman, Reed & Healey, P.C.

Wyoming physicians almost invariably enjoy helping their fellow man or woman, and for most, financial reward is secondary to the reward of relieving a patient's suffering, without regard to the patient's financial resources.

Unfortunately, the perception (which is possibly a reality) lingers that most medical malpractice actions arise from treating patients with the least resources (who tend to be the most sick). Few Wyoming physicians would refuse a patient desperately needing care, whether they can pay or not. But while treating with no expectation of payment is one thing, courting a lawsuit is a risk few physicians are willing to take.

I. Wyoming encourages physicians to provide volunteer medical services, both in emergencies and to low-income uninsured patients.

Like many states, Wyoming encourages physicians and other healthcare professionals to provide volunteer medical services by statutorily shielding them from professional liability when doing so. Wyoming has two such statutes: Wyo. Stat. §1-1-120, providing broad immunity against liability for physicians rendering medical care at an emergency scene, and Wyo. Stat. §1-1-129, providing immunity for health care professionals providing medical services without expectation of payment (Wyoming's "Medical Volunteer Law"). Both laws are useful in providing liability protection to physicians seeking to provide medical assistance without expectation of payment. However, physicians should be aware that the immunity provided by Wyoming's Medical Volunteer Law is subject to prerequisites and exceptions to its broad liability protections. Wyoming physicians must be sure they comply with the law's requirements and don't fall prey to its exceptions, before providing volunteer medical services.

I. Immunity for Emergency Services.

Wyoming, like virtually all states, broadly prohibits lawsuits against physicians providing emergency medical care at the scene of an accident. Under American common law, no one (physicians included) has a "duty to rescue" (subject to narrow exceptions); however, a physician *assuming* the duty to rescue can be held liable for his or her negligence in effecting the rescue. Understanding that the threat of litigation may prevent those in the best position to help in a medical emergency (physicians) from rendering assistance, The Wyoming Legislature passed Wyo. Stat. §1-1-120(a), protecting physicians from rendering medical care at the scene of an emergency. These protections are broad, requiring only that the emergency care or assistance be rendered without compensation.

The statute does not explicitly state that the physician must not *expect* compensation when rendering the assistance, leaving some question whether this protects physicians who render assistance with the expectation of payment but are ultimately not paid.

However, a court would most likely interpret this as only protecting those who provide emergency care without expectation of payment.

II. Wyoming law provides immunity from liability for physicians providing volunteer medical services, but with some strings attached.

The Medical Volunteer Law, by way of contrast, is not limited to medical care rendered at the scene of an emergency. Instead, it prohibits claims against healthcare professionals (including physicians, physician assistants, nurses, pharmacists, dentists, dental hygienists, and optometrists) providing medical, dental, or other healthcare-related diagnosis, care or treatment to low-income uninsured persons on a volunteer basis, unless the healthcare professional's actions are willful and wanton.

A. Exceptions to the Medical Volunteer Law's immunity protection.

The coverage provided by the Medical Volunteer Law is broad, but there are several caveats that physicians should note. First, the liability immunity only extends to those medical professionals specifically named in the law. Notably, chiropractors, podiatrists and psychologists are not included, nor are medical assistants that are not nurses or physician assistants. Thus, physicians that have collaborative practices with chiropractors, podiatrists, and psychologists, or use medical assistants extensively in their practices, should consider how those practitioners will be treated under the Medical Volunteer Law, so as not to unintentionally expose themselves (or those practitioners) to liability when providing services at a nonprofit healthcare facility.

Second, the Medical Volunteer Law's protections only apply to services rendered at a "nonprofit healthcare facility", which only includes facilities that provide services solely to low-income uninsured persons. Notably, this definition does not include hospitals, or any other facility licensed under Wyoming law. A low-income medical clinic organized by a hospital, and conducted on hospital property, would likely not qualify under this requirement. Similarly, rural health clinics and federally qualified health clinics (or FQHC "look-alikes") may also not qualify, depending on how they are organized.

Third, "low-income uninsured person" is specifically defined under the law to include only persons with an annual income of less than 200% of the federal poverty threshold, that are not covered by Medicare, Medicaid or any other governmental healthcare program, and do not have private insurance (or their private insurance has denied coverage). Thus, physicians seeking to take advantage of the Medical Volunteer Law's protections (or the nonprofit healthcare facility at which the services are provided) must do some kind of "means testing" to ensure that they are truly treating "low-income uninsured persons" to be covered by this law's liability protections.

The law's liability protections also are unavailable for physicians if the medical care rendered involves an "operation", or delivering a baby, unless the operation or delivery is an emergency. "Operation" is broadly defined to include many common procedures "involv[ing] cutting" such as surgery, but also ionizing radiation treatment and

therapeutic (though not diagnostic) ultrasound. Injections are not included in the definition of “operation” except when performed in conjunction with a procedure that would otherwise be included in the definition of “operation”.

B. Required Notice Provisions.

Physicians must also be sure to meet the Medical Volunteer Law’s notice provisions before providing treatment to be covered by the law’s protections. Before any treatment is rendered, the physician must inform each low-income uninsured person of the provisions of the Medical Volunteer Law either personally, or in writing to be signed by the low-income uninsured person or someone on their behalf. The law also (puzzlingly) requires physicians to obtain the informed consent of the person, and a written waiver from the person. It is unclear, however, whether the “informed consent” required by the law is intended to be the patient’s informed consent to the treatment to be provided, or informed consent to being treated under the law’s provisions. The patient’s informed consent to medical treatment would be required in any event, and so this seems to merely restate what the law already requires. Likewise, if the “written waiver” required is a written waiver of any claims that the patient might otherwise bring (but for the law’s liability protections), the Medical Volunteer Law’s liability protections seem unnecessary. However, the law explicitly requires both of these to be obtained. Thus, physicians should ensure that these bases are covered as broadly as possible before rendering treatment.

Physicians also must ensure that the nonprofit healthcare facility meets specific requirements for the Medical Volunteer Law to apply, in addition to ensuring that the facility meets all requirements of a “nonprofit healthcare facility”. Nonprofit healthcare facilities at which services covered by the law are provided must maintain liability coverage of at least \$1 million per occurrence. This requirement is waived if all volunteer providers providing services at the facility maintain insurance in this amount. The nonprofit healthcare facility is then liable for the volunteer physician’s professional negligence, but only if, and only to the extent, it maintains such insurance.

Lastly, the services provided by the volunteer physician must be rendered at the facility pursuant to a written agreement between the facility and the volunteer physician, providing that the volunteer physician’s services are rendered under the facility’s control to the facility’s patients.

III. The Medical Volunteer Law leaves unanswered questions with respect to the scope of liability protection and its relationship to other Wyoming laws.

As with many measures prompted by good intentions, Wyoming’s Medical Volunteer Law leaves a number of unanswered questions, particularly with respect to the scope of the immunity provided for civil actions, and its relationship to other Wyoming laws, such as the Wyoming Medical Practice Act and Wyoming’s business entity laws.

A. The law is unclear whether a patient can still sue a volunteer physician for breach of contract based on the physician's negligence.

The Medical Volunteer Law's liability protections clearly apply to "tort actions", defined in the law as "a civil action for damages for injury, death or loss to person or property", and "other civil action[s]." Medical malpractice claims, the most common claims brought against physicians by patients, are clearly prohibited by the law. However, breach of contract claims are explicitly carved out of the "tort action" definition, making it unclear whether the Wyoming Legislature meant to protect volunteer physicians from being sued for breach of contract by a patient.

This physician-patient contractual relationship could form the basis for a patient to sue a physician notwithstanding the law's liability protections. The contractual relationship between the physician and patient is often overlooked, in light of the attention paid to the potential for being sued for medical malpractice. However, each physician-patient relationship also creates a contractual relationship between the parties, one term of which is an implied obligation on the physician's part to provide services to the prevailing standard of care. That relationship could form the basis of a patient's claim against the physician, though such a claim is uncommon.

It appears that all elements necessary for a contract to be formed between the volunteer physician and patient are present in the Medical Volunteer Law scenario, even though no payment is exchanged. Typically, contracts require an exchange of consideration between the parties; that is, the physician provides services while the patient (or his or her insurer) provides payment. In the situation described by the Medical Volunteer Law, the patient does not pay the physician. However, the law requires the patient to provide the physician with a waiver (presumably of the right to sue for medical malpractice), in exchange for the physician's agreement to treat the patient. Under traditional contract law principles, this relationship may create a contract, with the implied obligation on the physician's part to provide the services to the prevailing standard of care. If the physician fails to do so (and therefore is negligent), the physician may still be liable to the patient for breach of contract, and damages flowing from that breach in spite of the law's tort liability protections.

This result is most likely simply an unintended consequence of the law's requirement that the patient provide a waiver (presumably of claims that could otherwise be brought), and the ambiguity created by carving breach of contract actions out of the definition of "tort actions", while still including "other civil actions" in the law's immunity provision. However, an enterprising attorney may use that ambiguity as an opportunity to circumvent the law's seemingly broad prohibition on suing volunteer physicians for medical malpractice.

B. The law's requirement that the volunteer physician agree to provide services under the nonprofit healthcare facility's control may contradict other provisions of Wyoming law.

Generally, Wyoming law requires that physicians provide medical services at all times with their professional judgment unfettered by any other person's control. For instance, the Wyoming Limited Liability Company Act (as well as Wyoming's statutes governing corporations and registered limited liability partnerships) provides that any licensed professional practicing his or her profession through a limited liability company must "remain as fully liable and responsible for his professional activities, and subject to all rules, regulations, standards and requirements pertaining thereto, as though practicing individually rather than in a limited liability company."

The Medical Volunteer Law, in contrast, requires that the agreement between the volunteer physician and the nonprofit healthcare facility state that the facility controls the volunteer physician's practice. These two provisions are mutually exclusive; a physician cannot be subject to the facility's "control", while at the same time "fully responsible for his [or her] professional activities". The law's liability protections similarly contradict the LLC Act's requirement that any physician practicing through an LLC "remain as fully liable" as if practicing individually.

Lastly, there may be tension between the Medical Volunteer Law's obligation that the volunteer physician practice under the nonprofit health care facility's "control", and the Wyoming Medical Practice Act. Several provisions of the Medical Practice Act's definition of "unprofessional conduct" could be construed to prohibit a physician from ceding control of his or her practice to an unlicensed entity. Moreover, the Medical Volunteer Law's liability protections almost certainly do not protect a physician from being subject to disciplinary action by the Wyoming Board of Medicine, even for negligence that could not serve as the basis for a medical malpractice action under the law's liability protections. Therefore, it is important for physicians to remember that even if they cannot be sued for medical malpractice as a result of their volunteer practice under the Law, there are other legal restrictions that still must be observed.

IV. Conclusion

Wyoming law provides important liability protections for physicians that seek to do good works by providing care to low-income uninsured patients. However, those protections are subject to important exceptions and require physicians to jump through specific hoops to ensure they are covered by the law's protections. Physicians seeking to take advantage of the Medical Volunteer Law's protections should carefully evaluate their arrangements with nonprofit healthcare facilities, as well as make sure the nonprofit healthcare facility's practices comply with the law, to avoid being unable to rely on the law's protections. WM