



STATE OF INDIANA

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ATTORNEY GENERAL

December 4, 2017

OFFICIAL OPINION 2017-8

The Honorable James R. Buck
Indiana State Senate
200 West Washington Street
Indianapolis, IN 46204

RE: Legal Immunity for Members of the Indiana Guard Reserve

Dear Senator Buck:

You requested the opinion of the Office of the Indiana Attorney General ("OAG") as to the availability of protection from liability for members of the Indiana Guard Reserve ("IGR") when called up by the Adjutant General or the Governor. Specifically, you asked for a review of the provisions of Ind. Code § 10-16-8, *et seq.* as it applies to your general question of liability protection for IGR members.

QUESTION PRESENTED

What legal or other protections are available to IGR membership when performing voluntary services for the State of Indiana in support of the Indiana National Guard?

BRIEF ANSWERS

Health Protection: Legal authority for the Indiana Adjutant General to acquire group insurance on behalf of the IGR is clear and undisputed. There may be practical or fiscal barriers, such as cost and insurability, that might limit or prohibit the acquisition of adequate medical coverage for the IGR, but there is no legal impediment that would prohibit or thwart the effort.

Civil Immunity Non-Medical: Most members of the IGR are entitled to civil immunity from official actions that they perform in service to the State, even in a voluntary status, and they derive this protection from application of the Indiana Tort Claims Act ("ITCA"). However, physician members of the IGR, which were specifically identified in the opinion request, are not covered by the ITCA, and must look to other protections afforded to medical professionals generally in other areas of the Indiana Code.

Civil Immunity Medical: There is immunity available to medical professionals under Indiana law. This immunity is not a result of their status as members of the IGR, but rather is based on their status as members of the larger medical community.

Training: The immunities provided by the State for medical professionals revolve around emergencies, accidents, and disasters, and as a result do not extend to training or educational settings.

ANALYSIS

The IGR is a statutory construct governed by the provisions of Ind. Code § 10-16-8, *et seq.* Ind. Code § 10-16-8-1 provides in relevant part:

(b) The Indiana guard reserve shall be composed of officers, commissioned or assigned, and able bodied citizens who volunteer for service, supplemented, if necessary, by members of the militia enrolled by draft or otherwise provided by law.

(c) These forces:

- (1) are additional to and distinct from the Indiana national guard; and
- (2) shall be known as the Indiana guard reserve.

Ind. Code §10-16-8-2(b) establishes that the Adjutant General as the commanding officer of the IGR, and Ind. Code § 10-16-8-3 provides the Adjutant General with legal authority to pay for their general operational and training expenses.

Health Protections

Ind. Code §10-16-8-13 establishes the legal foundation for medical health coverage for IGR members:

The adjutant general of Indiana, with the approval of the governor, may procure a policy of group insurance for and covering members of the military forces of Indiana covering and insuring against any injury received or had by members from any accident while on drill or active duty.

The location of this particular section within Ind. Code Chapter 10-16-8 (IGR) indicates the group insurance referenced is meant for the benefit of IGR personnel. The statute is, however, discretionary and restricts consideration to group medical coverage and not for professional malpractice insurance.

The problem has not traditionally been a legal one; rather, it is OAG's understanding that this has been a fiscal and logistical problem, with few other statutory options. Past attempts at acquiring adequate medical coverage have met with little success due to two primary factors:

(A) Cost – the insurance policies that have been researched and considered in the past have proven to be cost-prohibitive when considering the budget restraints that the Adjutant

General's Office must operate within. The IGR does not receive an appropriation in the State Budget to support its operations, which means that the Adjutant General must fund the IGR's operations as part of the Adjutant General's general operating budget.¹ This circumstance has resulted in very little overall fiscal support for IGR operations generally, and even less so in acquiring group health insurance.

(B) Insurability – the most recent attempt at procuring a policy for medical coverage resulted in a proposed medical coverage policy that contained numerous exceptions which the policy would not cover, such as heart attacks, strokes, and embolisms. When considering the age and overall physical condition of the IGR's voluntary workforce, combined with the physical nature of IGR activities, it was determined that the policy would not provide adequate coverage to IGR members to justify the cost.²

Civil Immunity Protections – IGR Generally

The Indiana Tort Claims Act³ provides civil immunity protections to both governmental entities and to government employees acting within the scope of their employment. The ITCA provides some twenty-four specific examples of actions where immunity is applied when the actor is a governmental entity or employee. *See* Ind. Code § 34-13-3-3.

Pursuant to statute, the liability of the State in all cases is capped at \$700,000 per occurrence, or \$5,000,000 in the aggregate. *See* Ind. Code § 34-13-3-4.

A. Is the IGR considered a governmental entity?

As noted *supra*, the IGR is a statutory entity. As such, it is governed by Indiana statute.⁴ The payment of its operating expenses can be (and are) paid for out of State funds. Its commanding officer is a State employee and Agency Head. *See*, Ind. Code §§ 10-16-2-6, 10-16-2-9. The administration of the IGR is handled by the State's military department. *See* Ind. Code § 10-16-2, *et seq.*

These circumstances support a conclusion that the IGR, organizationally, is a "governmental entity," as defined at Ind. Code § 34-6-2-49(a), and would be entitled to civil immunity for those activities delineated in the ITCA.

¹ The Indiana State Armory Board "may contribute funds in support of...[t]he Indiana guard reserve," but it is not required to do so. Ind. Code § 10-16-3-2(2).

² The State generally may not purchase or maintain a policy of group insurance, with notable exceptions. *See* Ind. Code § 5-10-8-7. One of these exceptions includes health services for State employees through prepaid health care delivery plans. Ind. Code § 5-10-8-7(c). The General Assembly has extended discretionary participation in such State employee health plans to certain local governmental entities, such as the public schools. *See* Ind. Code § 5-10-8-6.7. There is no corresponding option for IGR members except that provided at Ind. Code § 10-16-8-13.

³ Ind. Code § 34-13-3, *et seq.*

⁴ Ind. Code § 10-16-8-2(a) allows promulgation of rules to govern the enlistment, organization, administration, equipment, maintenance, training, and discipline of IGR members. However, no rules exist for this purpose.

B. Are members of the IGR considered employees of the State?

The members of the IGR are volunteers pursuant to statute, are not compensated for their services, do not receive *per diem*, and are not included in the State's disciplinary process or retirement and pension programs. *See, e.g.*, Ind. Code §§ 10-16-8-1(b), 1016-8-14 (pay authorized for drills and instruction).

However, for purposes of the ITCA, the list of included (covered) individuals is specifically defined:

"Employee" and "public employee", for purposes of ...IC 34-13-3 ... mean a person presently or formerly acting on behalf of a governmental entity, whether temporarily or permanently or with or without compensation, including members of boards, committees, commissions, authorities, and other instrumentalities of governmental entities, volunteer firefighters (as defined in IC 36-8-12-2), and elected public officials.⁵

C. When are the activities of IGR members being conducted "on behalf of the State"?

The Indiana National Guard has a well-established process for placing its members into a State Active Duty status and thus establishing that its members are performing services on behalf of the State, and that process is supported in statute.⁶

The placing of IGR members into a State Active Duty status, however, is not supported by the applicable statutory framework,⁷ so the Indiana National Guard developed an alternative method for identifying IGR-specific mission sets and further established a process for notifying IGR leadership of opportunities where IGR membership could be utilized in support of State activities.

The Indiana National Guard vets IGR volunteer opportunities through its "J3" military directorate and issues a document called a "request for voluntary service" that is distributed through IGR leadership.

Through the application of this process, an IGR member receives a written document, similar in structure and content to a military order, establishing that the IGR member is performing voluntary services on behalf of the State. This process insures that the activities that the IGR member is performing has been vetted by the Indiana National Guard and that the State has awareness of the voluntary service and has accepted that service, thereby triggering the application of the ITCA and the immunity protections contained within it.

⁵ Ind. Code § 34-6-2-38(a). Ind. Code § 34-6-2-38(b)(3) excludes "a person appointed by the governor to an...honorary military position[.]" Members of the IGR are not gubernatorial appointees to honorary military positions. This would apply to appointees under Ind. Code § 10-16-2-5.

⁶ Ind. Code § 10-16-7-7.

⁷ Ind. Code § 10-16-7-2 defines "member" of the Indiana National Guard as a member of the National Guard, a member of a military reserve component, or a member of the retired personnel of the naval, air, or ground forces of the United States. As IGR membership does not require any military experience or affiliation. By statute, IGR members are "additional to and distinct from the Indiana national guard." Ind. Code § 10-16-8-1(c)(1). State Active Duty orders are not issued to members of the IGR.

D. Does the ITCA civil immunity protections include medical services?

It is apparent that the application of the ITCA will provide civil immunity protection to members of the IGR so long as the services they are providing have been vetted and authorized by the Indiana National Guard's J3 military directorate.

The ITCA's definition of employee, however, does not include licensed physicians performing medical services as an employee of a hospital.⁸ Additionally, medical services provided by IGR members would only be entitled to civil immunity if the specific act or omission is discretionary in nature and not ministerial.⁹

"Ministerial" acts are those acts that conform to an instruction or a prescribed procedure, and do not include the application of discretion or judgment on the part of the actor.¹⁰ As most medical procedures today typically do follow prescribed procedures and actions, it could be interpreted that medical services provided by IGR members are in fact "ministerial" in nature, and thus fall outside of the protections provided by the ITCA. This is buttressed by the language at Ind. Code § 34-13-3-3(7), declaring that "the provision of medical or optical care as provided in IC 34-6-2-38 [definition of "employee" and "public employee"] shall be considered as a ministerial act."

There are avenues outside of the ITCA that do establish civil immunity for medical providers that should be considered.

Civil Immunity Protections – Physicians and Other Medical Professionals

A. The "Good Samaritan" Law

Generally, health care professionals are afforded civil immunity when responding or reacting to emergency situations or accidents pursuant to Ind. Code § 34-30-12, *et seq.* The protection is relatively broad, and includes virtually all aid rendered by the health care provider or other person in response to the emergency or accident, except for those acts or omissions that are considered gross negligence or willful or wanton misconduct. *See* Ind. Code § 34-30-12-1(b).

The protections under the so-called "Good Samaritan" law include the application of automatic external defibrillators and the use of CPR. *See* Ind. Code § 34-30-12-(1)(c), (d),(e); Ind. Code § 34-30-12-2.

⁸ Ind. Code § 34-6-2-38(b)(4).

⁹ Ind. Code § 34-13-3-3(7).

¹⁰ There is no "bright line" between what might be a discretionary function or a ministerial act. Indiana employs a "planning/operational test" to distinguish a discretionary function from a ministerial act. Under *Peavler v. Monroe Co. Bd. of Comm'rs*, 528 N.E.2d 40, 47 (Ind. 1988), "decisions involving the formulation of basic policy" are "entitled to immunity" under the ITCA, whereas "decisions regarding only the execution or implementation of that policy" are "not entitled to immunity." The former would be discretionary functions; the latter would be ministerial acts. *Leo Machine & Tool, Inc. v. Poe Volunteer Fire Dep't*, 936 N.E.2d 855, 860 (Ind. Ct. App. 2010), quoting *Greathouse v. Armstrong*, 616 N.E.2d 364, 366-67 (Ind. 1993).

Potentially, IGR members who possess medical skills and licenses could perform emergency medical services at the scene of an accident or disaster and anticipate civil immunity for the services rendered based upon the protections afforded under Ind. Code § 34-30-12, *et seq.*

B. Emergency Conditions and Disaster Scenarios

Physicians licensed under Ind. Code § 25-22.5, *et seq.* are afforded immunity from civil liability under Ind. Code § 34-30-13-1.5 if:

- The physician is providing medical direction to another person certified to provide medical services under emergency conditions;
- If the services are emergency ambulance services or other services, including extrication and rescue services;
- The services are utilized in serving an individual's need for immediate medical care in order to prevent loss of life or aggravation of physiological or psychological illness or injury; and
- The direction is provided without compensation.

However, there will be no immunity from liability should injuries occur due to gross negligence or willful misconduct. *See* Ind. Code § 34-30-13-2.

Pursuant to Ind. Code § 34-30-13.5-1, should the Governor declare a disaster emergency,¹¹ either by executive order or by proclamation, licensed medical professionals (physicians and others) are provided civil immunity for medical services provided within the scope of the professional's license at the location at which the declared disaster occurred. The civil immunity applies to medical services provided either before or after the actual disaster emergency declaration from the Governor.

It should be noted that the civil immunity protections only apply to those medical services performed within the scope of the actor's medical license(s), and that any harm caused by the actor is not the result of gross negligence or willful misconduct.

As a licensed medical professional, the member of the IGR who provides medical services under emergency or disaster scenarios should reasonably expect civil immunity protections when providing medical or health-care services under those situations so long as the services are accompanied by an actual emergency declaration by the Governor.

C. Indiana's Health Care Volunteer Registry

Another civil immunity statute that covers medical professionals who provide medical services in a voluntary capacity is the Indiana Health Care Volunteer Registry found at Ind. Code § 25-22.5-15, *et seq.* and supported by Ind. Code § 34-30-13-1.2. The law provides civil immunity to licensed physicians, their assistants, dentists, nurses, advanced practice nurses,

¹¹ The Governor's declaration must be made in accordance with Ind. Code § 10-14-3-12.

optometrists, and podiatrists providing health care services within the scope of their professional licensure. There are, however, a few caveats that must be satisfied in order for the civil immunity to be conferred. The service must be:

- a. Voluntary
- b. Provided to another individual
- c. Without compensation
- d. Within the scope of the practitioner's license
- e. At a location listed on the Health Care Volunteer Registry found at Ind. Code § 25-22.5-15.¹²

Additionally, the medical professional must notify the individual receiving the service, prior to services being rendered, that the medical professional is immune from civil liability, and obtain a written waiver from the recipient of the service acknowledging that the medical professional is immune from civil liability. Finally, the medical professional must actually be registered on the Health Care Volunteer Registry in order to participate and benefit from the provided immunity. *See* Ind. Code § 34-30-13-1.2(a)(3)-(5).

For dentists, the provision of dental services must occur in a dental office. For physicians, the medical services provided must occur in a setting other than the physician's office, a State Department of Health certified or licensed facility, health care facilities or facilities whose primary purpose is to provide health care services. *See* Ind. Code § 34-30-13-1.2(b)(1), (2).

Similar to the immunity established under Ind. Code § 34-30-13.5, *et seq.*, the civil immunity protections only apply to those medical services performed within the scope of the actor's medical license(s), and that any harm caused by the actor is not the result of gross negligence or willful misconduct.

If an IGR member who performs medical services is listed on the Health Care Volunteer Registry, the IGR member could potentially provide voluntary medical services within the scope of his/her licensure and receive civil immunity for the services rendered if the services meet the requirements of Ind. Code § 34-30-13-1.2.

D. IGR Members as EMTs

Emergency medical technicians (EMTs) and paramedics are also afforded civil immunity under the provisions of Ind. Code § 16-31-6, *et seq.*, so long as their actions take place under actual emergency conditions. This protection does not extend to ambulance drivers who may be negligent in the operation of their vehicles.¹³

¹² The Registry is established and maintained by the Indiana Professional Licensing Agency under Administrative Rule, found at 810 IAC 2-1. The Administrative Rule provides that IPLA will maintain the Registry on its website, found at <https://www.in.gov/pla/3944.htm> (last visited November 29, 2017). This Registry identifies all eligible individuals who have signed up for the Registry. It also provides the process for registration, renewal, and removal of individuals licensed to provide health care services who intend to provide voluntary health care services.

¹³ Ind. Code § 16-31-6-1(b).

Additionally, Ind. Code § 16-31-6 also provides protections for EMTs in the use of defibrillators,¹⁴ overdose intervention drugs,¹⁵ and the application of advance life support techniques and procedures.¹⁶

Finally, the immunity provided under a Governor-declared disaster or emergency for physicians and other medical professionals is extended to cover paramedics, advanced emergency medical technicians, emergency medical technicians, or persons with equivalent certification or licensure from another state.¹⁷

All immunities provided by Ind. Code § 16-31-6 are limited to those acts that do not constitute negligence or willful misconduct on the part of the EMT.¹⁸

An IGR member who provides services as an EMT has civil immunity from liability, as established under Ind. Code § 16-31-6.

CONCLUSIONS

A member of the IGR is considered to be performing services “on behalf of” the State when such member is responding to a written request for voluntary service issued by the Indiana National Guard’s J3 military directorate.

When the IGR member is operating in this capacity, he/she could be included under a group insurance policy, if such a policy is acquired by the Adjutant General’s Office, in its discretion, for that purpose. Statutory provisions are not otherwise very specific in requiring coverage or providing other possible avenues to obtain group health insurance coverage.

In the area of civil immunity, if the IGR member is acting under a properly executed request for voluntary service, he or she should expect civil immunity as a “State Employee” under the provisions of the ITCA, unless the IGR member is a physician or other medical professional providing medical services. Such medical services are considered “ministerial acts” and are excluded from the coverage of the ITCA.

There are various civil immunity statutes outside of the ITCA that could be applied to an IGR member who renders medical or health care services within the scope his or her professional licensure. Those include the “Good Samaritan” Law, the Emergency Conditions and Disasters Statute, the Indiana Health Care Volunteer Registry, and the EMT Civil Immunity Statute. In these cases, the IGR member is entitled to immunity, not as a member of the IGR but as a member of the larger medical or health care community that renders aid to others in times of accident, emergency, or disaster.

¹⁴ Ind. Code § 16-31-6-2.

¹⁵ Ind. Code § 16-31-6-2.5.

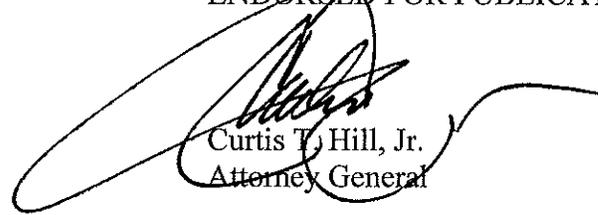
¹⁶ Ind. Code § 16-31-6-3.

¹⁷ Ind. Code § 16-31-6-4.

¹⁸ Ind. Code § 16-31-6-1.

It should be noted, however, that the immunity protections afforded to IGR members in the medical or health care fields are almost entirely based on response to real-world, emergency/disaster-based scenarios or accidents. None of the immunities provided apply to military training, medical training, or other non-emergency or educational activities involving live subjects.

SUBMITTED, and
ENDORSED FOR PUBLICATION:

A large, stylized handwritten signature in black ink, appearing to read "Curtis T. Hill, Jr.", is written over the typed name and title.

Curtis T. Hill, Jr.
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