

# Responder e-Learn Introduction to Organization

N 1050 – Legal Issues & Ethics

## Disclaimer

Please note that this lesson is for informational purposes only and does not constitute legal advice. In addition, this lesson is not and should not be interpreted as a statement of position by the U.S. Department of Health and Human Services (HHS) or National Disaster Medical System (NDMS).

If you need advice about a specific legal situation, contact the NDMS USERRA representative, the HHS Office of the General Counsel, your employer's attorney, or your personal lawyer.

# Introduction

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, better known as the "Bioterrorism Act," outlines the legal status of National Disaster Medical System (NDMS) team employees and their protection under Federal statutes. This lesson provides an overview of the purposes of policies governing legal issues that may arise during NDMS activations, training, and exercises.

## Module Objectives

After completing this module, learners should be able to:

- Recognize the policies governing each of the following topics as they relate to the rights and responsibilities of NDMS team employees :
  - Employment and appointment status
  - Workers' compensation
  - Medical licensure
  - Tort and professional liability
  - Discrimination and retaliation protection

## Why This Matters to You

As an NDMS employee it is important that you are informed of policies that govern legal issues that may arise during activations, deployments, trainings and exercise.

## Employment and Appointment Status

The Bioterrorism Act grants the Secretary of the U.S. Department of Health and Human Services the power to appoint non-government employees to serve as Intermittent Disaster Recovery Personnel in accordance with applicable Federal government civil service laws and regulations. This means that these individuals become temporary Federal government employees.

## Employment and Appointment Status

An individual is appointed to this status once and then activated when necessary. New NDMS team employees begin with this status and current team employees transition to it. Team employees must remain active in order for this appointment to stay in effect.

## Workers' Compensation

Workers' compensation is a statutory arrangement under which the employer is responsible for paying the costs of occupational injuries and illnesses and the employee may not sue the employer for these injuries and illnesses.

## Workers' Compensation

Main principles of worker's compensation:

- **No fault compensation:** An injured worker is eligible for care regardless of whether the cause of that injury or illness was the fault of the employer or the employee.
- **Fair compensation:** An injury will have an effect on salary. This impact will vary depending on degree of injury.
- **Mandated coverage:** All employees are required to fund the system.
- **Protection from lawsuits:** Neither the employer nor the worker can be sued for the event.
- **Right of appeal:** All of the parties involved have the right to appeal the decision of the insurer.

## The Federal Employees' Compensation Act

The Federal Employees' Compensation Act (FECA) is a Federal statute that governs aspects of workers' compensation for Federal employees. FECA is administered by the U.S. Department of Labor (DOL) and covers Federal employees and anyone acting under the "direction and control" of the Federal Government.

## The Federal Employees' Compensation Act

Under the Bioterrorism Act, FECA also applies to training programs authorized by the Assistant Secretary of Preparedness and Response (ASPR) or a comparable official of any Federal agency. This includes any work related to preparation for deployment, training, drills, and equipment maintenance.

## Coverage and Exclusions

The need to report injury and illness promptly to secure care and maintain eligibility for coverage is important to the utilization and benefits of workers' compensation. The defining point for whether an injury or illness is covered is whether that event took place because of employment or in the course of employment.

## Coverage and Exclusions

Some exclusions include, but are not limited to:

- Self-inflicted injuries
- Injury in an off-duty activity that is not part of one's duty
- Injury from an altercation where the worker was the initial aggressor

## FECA Eligibility

Two factors to determine FECA eligibility:

1. Does the individual hold Federal employment of appointment status?
2. Is the individual acting within the scope of that status?

## Claiming Workers' Compensation

Team employees need to report any illness or injuries within 30 days of occurrence to ensure proper compensation. When filing a claim, identify the injury as a traumatic injury or an occupational disease or illness.

After processing the claim, the U.S. Department of Labor will assign a case number and provide a telephone contact number.

## Claiming Workers' Compensation

For more information on workers' compensation and how it applies to NDMS team employees, consult the NDMS Team Handbook section on workers' compensation or the NDMS team website <http://teams.hhs.gov>.

## Claiming Workers' Compensation - Definitions

### Definitions:

- **Traumatic Injury:** A wound or other condition of the body caused by external force including stress or strain.
- **Occupational Illness or Disease:** A condition produced in the work environment over a period longer than one workday or shift.

## Medical Licensure and Certification

Each State sets its own requirements for medical licensure and certification.

The Federal government requires its medical personnel to be licensed professionals. However, the license can be from any State. Since the Supremacy Clause of the U.S. Constitution confirms that States cannot limit the Federal government's ability to operate, the higher-level authority may set its own rules concerning the licensure of its personnel. This allows the Federal government to use its employees' licensure from one State to permit them to practice in any other State.

## Disaster Response Personnel & Medical Licensure

Intermittent Disaster Response Personnel are Federal employees. Once appointed as Intermittent Disaster Response Personnel, NDMS team employees' medical licenses are valid in all States and territories as long as they are performing work within the scope of the appointment. This applies to activations and training programs authorized by the Assistant Secretary of Preparedness and Response or a comparable official of any Federal agency.

## Disaster Response Personnel & Medical Licensure

NDMS team employees are responsible for ensuring that:

- Their medical licenses or certifications are current
- Their NDMS credentials are current
- They work only within the scope of their licensure or certification

## The Federal Government and Tort Liability

Originally, the Federal government was immune from lawsuits. However, the Federal government passed a law, called the Federal Tort Claims Act (FTCA), which allows citizens to sue the government for certain harms that its employees cause in the course of their employment.

## The Federal Government and Tort Liability

The Federal Tort Claims Act requires that:

- The suit is only permitted in Federal court
- It is tried before a judge and not a jury
- No punitive damages are awarded
- Malpractice claims against Federal government professionals are considered tort claims against Federal employees

## Tort Liability and Malpractice

A tort is harm to another. When someone is sued for a tort, he or she is being accused of harming another person. Anyone can be sued for a tort.

Professional liability, also called “malpractice,” is an allegation that a professional has caused harm in the course of his or her practice. This is an element of tort liability.

## Claims Against NDMS Employees

An individual may file a lawsuit for harm caused by an NDMS team employee. The suit may be against an individual, or the Federal government. The Federal government decides whether the NDMS team employee was a Federal employee and acted within the scope of that employment. If so, the government substitutes the United States as the defendant and there is no personal liability.

Since all NDMS team employees are Federal employees while holding their Intermittent Disaster Response Personnel appointment during deployment or training, the only question is whether they acted within the scope of their employment.

## Claims Against NDMS Employees

Some local governments have maintained their ability to be immune from lawsuits. This immunity may protect medical professionals as well. However, during NDMS activation, there is no local employment relationship. Therefore, local government immunity may not apply.

## Good Samaritan Laws

Good Samaritan laws are State regulations that relieve medical professionals of liability for acts performed in good faith unless they constitute gross negligence. These laws would apply if a medical professional were to stop at the side of a road to assist with an accident. These laws do not prevent lawsuits against medical professionals. Instead, they make it difficult for the person who is suing the medical professional to prove a case against them.

## Good Samaritan Laws

These laws typically apply to persons who do not have a duty to respond, such as in the above example of the medical professional who is on the way home from work and provides assistance at an accident scene. When activated and during training, NDMS team members have a duty to respond, which means that Good Samaritan laws do not apply.

## Insurance

When acting as Intermittent Disaster Response Personnel, the Federal government covers response teams and individual team employees for workers' compensation, liability, and malpractice.

When teams are operating in a non-Federal capacity, they may wish to obtain insurance.

## The Uniformed Services Employment and Re-Employment Rights Act (USERRA)

The Uniformed Services Employment and Re-Employment Rights Act (USERRA) provides employment discrimination and retaliation protection for NDMS team employees . This protection is the same as that provided to military reservists when they are activated or participating in authorized training.

## USERRA Protections

USERRA provides broad anti-discrimination protections for initial hiring, re-employment, retention in employment, promotion, or any benefit of employment to an individual based on their NDMS membership, application for membership, performance of service, application for service, or obligation for NDMS service.

## USERRA Protections

USERRA prohibits discriminatory employment actions where the employee's status as an NDMS team member is a "motivating factor" in the employment action, even if that status was not the sole reason for the action. This includes termination, refusal to reinstate, transfer to an inferior position, denying promotion, poor performance evaluations, and other adverse employment actions.

## Retaliation Protection under USERRA

USERRA provides protection for NDMS employees from employer retaliation for asserting their USERRA rights, filing a USERRA complaint with Federal authorities, or by initiating court action to enforce their rights. The act also protects any NDMS employee's co-workers who testify or make a statement to Federal officials regarding a USERRA complaint, assist or participate in a USERRA investigation, or exercise a right provided under USERRA.

## Employer Obligations Under USERRA

USERRA covers every employer, regardless of size, and protects full-time, part-time, and probationary employees.

Under USERRA:

- The employer must excuse the employee from work to participate in activation activities or to attend training.
- The employer must reinstate the employee as if he or she was not absent.
- The employer cannot require advance application for leave.
- The employer cannot make the employee responsible for altering work schedules or finding replacement employees.
- The employer cannot require the employee to reschedule official NDMS training or other obligations. Employers must make alternatives available.

## Compensation While on Leave

Leave under USERRA is unpaid although an individual may use any available paid time off for this leave. The employer is not required to make up the difference between NDMS pay and regular pay.

USERRA provides for the continuation of health benefit coverage for persons who are absent from work to serve in the military. Team members activated for more than 30 days may elect to continue employer-sponsored healthcare for up to 24 months. However, they may be required to pay up to 102 percent of the full premium.

## Compensation While on Leave

For military service of less than 31 days, healthcare coverage continues as if the service member had remained employed. The individual cannot be required to pay more than the normal employee share of any premium.

USERRA clarifies pension plan coverage by explicitly stating that all pension plans are protected.

## Status and Seniority

For status and seniority purposes, employers must place employees returning from leave in the position they would have attained had they remained continuously employed, as long as they are qualified. However, if the absence is more than 90 days, employers may place them in the same position or a position of like seniority, status, and pay. If the employee is injured or disabled, the deadline for reinstatement may be extended for up to two years.

## Employee Obligations Under USERRA

USERRA requires that employees provide advance written or verbal notice to their employers for all military duty unless giving notice is impossible, unreasonable, or precluded by military (or NDMS) necessity.

An employee should provide notice as far in advance as is reasonable under the circumstances.

## Returning From USERRA Leave

When returning to work from a leave of 30 days or less, employees are required to return for the first regularly scheduled shift after the end of service while allowing reasonable time for travel. The employee must report at the beginning of the next regularly scheduled work period on the first full day following completion of service and an eight-hour rest period following safe transportation home.

## Additional Information on USERRA

After returning to work from a leave of 31 to 180 days, the employee must submit an application for reinstatement no later than 14 days after completion of service. For service of more than 180 days, an application for reemployment must be submitted within 90 days of release from service.

Situations for invoking USERRA rights vary based on individual situations. Consult the listed points of contact and/or website locations when addressing specific situations with regard to USERRA.

## Conclusion

NDMS team members are appointed as Federal Intermittent Disaster Response Personnel, which means that they:

- Are covered by the Federal government for workers' compensation and liability during activations and training
- Are not covered by Good Samaritan laws or local government tort immunity
- Must maintain their own licenses and certifications
- Are protected from employment discrimination and retaliation under USERRA

## Conclusion

To learn more about your rights under USERRA, consult the Employer Support for the Guard and Reserve [www.esgr.mil](http://www.esgr.mil) or the U.S. Department of Labor, Veterans Employment and Training Service (VETS) <http://www.dol.gov/vets>. If you need advice about a specific legal situation with regard to USERRA related issues, consult the NDMS's assigned USERRA Ombudsman, HHS's Office of the General Counsel, your lawyer, or your employer's attorney.

## Think about it:

Do you anticipate any potential problems with your employer releasing you for activation or training?

## Bibliography

The following resources were used to develop the content of this lesson and can be used to access additional information:

- **Employer Support for the Guard and Reserve. (n.d.)** Retrieved February 24, 2009 from <http://www.esgr.org>.
- **National Disaster Medical System. (n.d.)** Retrieved February 24, 2009 from <http://teams.hhs.gov>.
- **U.S. Department of Labor, Veterans Employment and Training Service (VETS). (n.d.)** Retrieved February 24, 2009 from <http://www.dol.gov/vets>.

## Bibliography - continued

- **U.S. Department of Labor. (n.d.)** Office of Workers' Compensation Employment Standards Administration (ESA), Office of Workers' Compensation Programs (OWCP), Division of Federal Employees' Compensation. Retrieved February 24, 2009 from <http://www.dol.gov/esa/owcp/contacts/fecacont.htm>.
- **U.S. Department of Labor. (n.d.)** Uniformed Services Employment and Reemployment Rights Act. Retrieved February 24, 2009 from <http://www.dol.gov/elaws/userra.htm>.