# Federal Tort Claims Act (FTCA): An Abbreviated Guide for Free Clinics

**October, 2015**

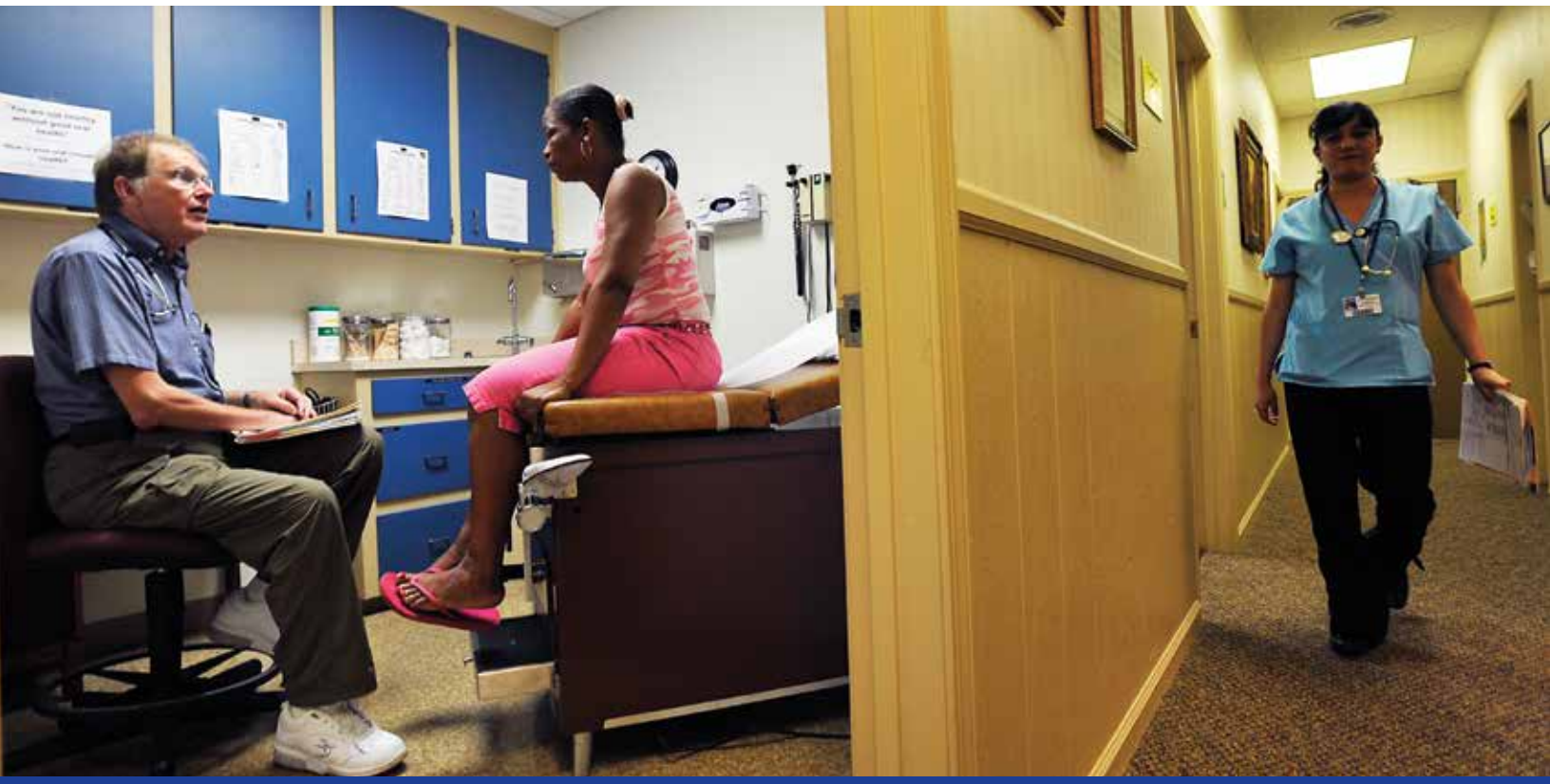
## Federal Malpractice Protection

In today's practice of medicine, it is standard protocol to obtain malpractice insurance to assure liability protection in case of injurious, negligent or improper practice. Should such an occurrence happen, malpractice insurance is intended to cover any monetary damages awarded as a part of a court judgment. Free clinics are not immune from this need. Prior to 2004, a free clinic had to choose between the purchase of private insurance or reliance on state "Good Samaritan" or other immunity protections. Private insurance is very costly, and state protections, even in the best of instances, often have serious limitations. The advent of Federal Tort Claims Act (FTCA) protections in 2004 expanded this choice to include an option that not only offered excellent protection for individuals working at free clinics but also was free of charge.

The federal government program provides malpractice liability coverage to specific individuals who work or volunteer at approved free clinics. This protection is defined under the FTCA. In order to be awarded such protection, a free clinic must submit an application that includes a list of eligible individuals for whom they are requesting protection. This benefit must be renewed annually through a reapplication process. This guide will supply you with the information necessary to determine your eligibility for this benefit as well as provide an understanding of the reapplication requirements.

## History

The Free Clinic Federal Tort Claims Act (FTCA) program is authorized by section 224(0) of the Public Health Service Act, codified at 42 U.S.C. 233(0), passed in 1996. In 2004, the first funding was appropriated to allow implementation of this section, leading to the first free clinic deeming — i.e., approval — granted in 2005. Initially the program provided coverage only for volunteer health professionals at approved free clinics. In 2010, with the passage of the Affordable Care Act, coverage was expanded to board members, officers, paid health professional staff and certain health professional contract employees along with previously covered volunteers. A number of clinics have chosen to cover all their staff and volunteers, regardless of their exposure to potential malpractice claims. Such inclusion is allowable but should be considered carefully by each clinic as maintenance of all such individuals in the application system requires an investment of effort that may not be worth it. Currently in 2015, there are 239 free clinics approved for FTCA coverage, and as of the end of 2013, coverage was active for 13,779 individuals, of whom 7,637 were health care providers.



## Definition of Free Clinic

For the purposes of the FTCA program, a free clinic must meet the following criteria in order to be approved:

- It does not accept reimbursement from any third-party payer (including reimbursement under any insurance policy or health plan, or under any federal or state health benefits program).
- It may accept grant funding if such funding is not based upon reimbursement for units of service provided (if you have a question as to acceptability of a particular grant, inquire with Health Resources and Services Administration/Bureau of Primary Health Care).
- It may accept voluntary donations, but these may not be a condition of services received.
- It does not impose charges on individuals who are receiving services (including sliding charges based upon the patient's ability to pay). No direct charges or sliding scales fees.
    - It must be licensed or certified in accordance with applicable state law regarding the provision of health services As most states do not have specific requirements for licensing free clinics, this is not applicable for the majority of free clinics applying.


## Eligible Individuals

Approved free clinics must list all individuals whom they wish to have deemed for FTCA coverage. Eligible classes of individuals include board members, officers, professional health providers (paid or volunteer), other paid or volunteer staff and certain types of health professional contractors. A health professional must:

- Provide services at a free clinic or through HRSA/BPHC-approved off-site programs or events carried out by a free clinic.
    - Services must be provided at the specific site of a free clinic. A free clinic may be approved for multiple sites.
    - Mobile clinics may be permitted.
    - Off-site events may be health fairs or similar activities and must be specifically approved by HRSA/BPHC.
- Be "sponsored" by a free clinic.
    - Private practitioners providing free care at their private practice would not qualify.
- Provide a qualifying health service.
    - Any service that is required or authorized under Title XIX of the Social Security Act or eligible for Medicaid reimbursement at the federal level is covered.
- Not receive compensation for providing services from patients or third-party payers.
    - Professionals may be salaried but not receive fees from patients or other sources of reimbursement.
    - Volunteer health professionals may receive repayment from the free clinic for reasonable expenses in service to patients such as parking, meals at clinic, etc.
- Be licensed or certified to provide health care services in accordance with applicable state law.
    - Retroactive coverage, prior to date on the approval letter, is not available.
- Provide patients with written notification prior to service of the extent to which his/her legal liability is limited pursuant to the Public Health Services Act, if the free clinic has not already provided such notification.
    - This process should always be done by the clinic. It may be provided at patient intake and renewed annually.
    - Specific language relating such limitations may be secured from the HRSA Helpline: ***FreeclinicsFTCA@hrsa.gov*** or 877-974-2742. Notification is available in both English and Spanish.

## Requirements for FTCA Coverage

In order to be deemed eligible for FTCA coverage, a free clinic must:

- Provide a written, board-approved policy of quality assurance/quality improvement, including all risk management systems as well as th credentialing and privileging process that has been signed by a board authorized representative within the past three years.
    - Quality assurance, to guarantee that treatment protocols are universally applied to all patient care.
    - Quality improvement, to adopt a system that strives for improved treatment outcomes.
    - Risk management, to identify areas of exposure to error/risk and to adopt practices that lessen this exposure.
- Disclose all medical malpractice claims and professional disciplinary actions of all FTCA health professional applicants.
    - Bi-annual screening through National Practitioner Data Bank (NPDB).
    - Past claims or actions may cause an individual deeming to be denied.
- Report requested annual data.
    - As of 2012, the requested data includes annual count of patients, patient visits as well as those counts for patient/visits seen by deemed providers, and the number of deemed providers. Requests for annual data are now expected to be submitted along with the renewal applications. In 2015, the data of 2014 will be submitted with the application for 2016. Notice of data request and due date will be sent by HRSA/BPHC to actively participating clinics.

## Credentialing and Privileging

The adoption of formal credentialing and privileging protocols is often the most challenging element for new free clinics applying. By moving from an informal protocol to a formal one, free clinics implement more rigorous and standardized systems of screening prospective health care professionals. Credentialing assures that individuals have the appropriate license, education and other experiences/background for the role they will play at the free clinic.

Privileging is the process by which the free clinic's board of directors gives permission to a particular individual to do what they are going to do at the free clinic.

Credentialing will require some elements to be verified from the direct source, on information otherwise known as primary source verification. This includes verification of license, education and training. Other elements may be verified more indirectly through secondary source verification. Secondary sources may include documents provided by health professional, telephone verification, etc. This includes identity check, vaccination records and certification of CPR, among others.

Credentialing may be done by the free clinic or delegated to an appropriate Credentialing Verification Organization (CVO). Typically the CVO will be a hospital that has a relationship with the free clinic. The CVO relationship must be defined by a written agreement. CVOs may use inquiries they have previously made when credentialing for the hospital. These inquiries must, however, meet the time frame requirements that are part of the HRSA guidelines: to review credentials and privilege every two years.

Privileging may be granted by verifying specialty privileging at another health care institution, orienting/observing the specialty by another deemed practitioner or by training the practitioner in the particular specialty needed. Peer review activities must be used when privileging every two years.

## National Practitioner Data Bank

Past malpractice claims and disciplinary actions must be screened through the NPDB. The NPDB is a website *(npds.hrsa.gov)* that serves as a federally mandated repository of past malpractice claims and disciplinary actions. Free clinics must register in order to gain access to this information. They may then seek information on all health professional applicants. CVOs may also check the NPDB as long as the dates meet HRSA requirements. Proof of checking must also be available should it be requested by HRSA/BPHC. For any new or supplemental health care professional applicants, **FTCA requires that all past claims and actions within the past 10 years be reported.** Redeeming health care applicants must be checked for the past five years. Past claims within those time frames, regardless of outcome, must be reported in the FTCA application and may lead to a denial of an individual's deeming status. All deemed health care professionals must be screened via the NPDB every two years, and the results must be included in renewal of privilege at the clinic.


## Elements to Consider in Adopting FTCA

The malpractice protection offered through the FTCA is very strong and proven protection. Some maintain that it is stronger than any coverage that can be secured from the insurance market at a cost of thousands of dollars. Perhaps, most compelling for a free clinic, FTCA coverage is free! FTCA implementation will also enhance and improve the quality of services provided by the free clinic. In the current funding environment, where clinical outcomes are essential indicators for continued funding, the adoption and implementation of QA/QI policies will enhance a free clinic's ability to compete for those funds.

The cost to a free clinic to get FTCA coverage is time. Preparation of the application, organizing the personnel files, implementing the required policies and procedures — all these elements require time, a most valuable commodity for free clinics. Calculation of this time should be factored in to the decision-making process regarding seeking to apply for FTCA coverage.

Finally, FTCA coverage may be used by a free clinic for selected eligible individuals who work or volunteer at the free clinic. You are not required to cover all your health professionals with FTCA, nor are you required to cover all of any one discipline that work or volunteer at the free clinic. Consequently, you may consider using FTCA coverage only as coverage of last resort. For example, if volunteer physicians from a particular hospital are covered by their hospital's malpractice policies for their work at the free clinic, FTCA is unnecessary. Subrogation is a term used to describe a medical event in which there is more than one malpractice insurance policy in place. Such a circumstance may cause unfortunate complications if a claim is filed, and it should be avoided.

The availability of malpractice protection may be a major incentive to encourage volunteer participation with a free clinic. Once approved, do not hesitate to use the prospect of FTCA coverage to encourage new providers to join your efforts.

## Application Process

The process for submitting an application for FTCA coverage to HRSA/BPHC has changed as of 2013. All applications — New, Supplemental and Renewal — must now be submitted online through the ***HRSA/BPHC Electronic Handbook (EHB)***. This is designed to allow for more rapid turnaround times for application review and approval as well as to better communicate with federal staff supporting the Free Clinic FTCA program.

It is recommended that all information necessary to complete an initial application be secured prior to initiating the application process. In order to submit an application, an applicant must first register as a "user" of the EHB. When a new applicant is prepared to submit their application, they must request that an account be opened by HRSA/BPHC. This request is made by submitting an email to ***FreeclinicsFTCA@hrsa.gov***, which will secure a unique account as well as the password to access the account. The email, in addition to the creation of an account for the free clinic applicant, will require the clinic to name an Authorizing Official (typically the executive director). This individual controls the password, thus access to the account. This registration occurs only once, when the free clinic is initially registered. The unique password must be used when accessing the EHB on behalf of that specific free clinic for any purpose. There is no limit to the number of people who may register on behalf of a free clinic, but there can be only one Authorizing Official for each application.

Specific instructions on how to proceed through the EHB applications are fairly self-explanatory. The process allows you to follow the status of your application preparation, tracking each section for completeness. You may save your work as you proceed through the application. The EHB system is also designed so that the information that does not change is repopulated in future applications, thus saving time and effort.

For those who have previously been deemed or have submitted earlier applications for FTCA coverage, the information contained within the application is closely aligned with what has been required in past FTCA application cycles. The previously submitted information in the EHB should also be available so you do not have to repeat your entries in those sections. All sections must be completed, and required policies must be uploaded through the EHB. In questions where a "yes/no" choice is required, a "no" answer may require an explanation. New for the 2016 application, there are also instances when a "yes" answer requires an explanation. Such information may be placed in the comment box and saved for the reviewer. In Section 5, Question #8, related to the holding of periodic meetings to review and assess quality assurance issues, a "yes" answer also requires a description of the structure (frequency of meetings, individuals required to attend, etc.) of the committee that meets periodically. In Section 5, Question #9, related to peer review activities considered when reviewing and revising the QA plan, if the answer is "yes", describe what information and process is utilized by the clinic in updating and revising the QA plan. In Section 5, Question #11, related to participating in risk management continuing education activities, a description of the specific activities is required with a "yes" answer. Finally, another change in the application relates to the Signatures section. While in the past, original signatures were required, the EHB will now accept an electronic typed name as a legitimate signature.

When you have completed the application form, submission is as easy as pressing the "submit application" button. If any section is incomplete, the application will not be electronically accepted. Once the application is accepted, all communication regarding any necessary changes will be requested through the EHB and you will receive a notice of approval in the same manner. Application approvals will also be confirmed via hard and email copies.

Please note for renewal applicants, HRSA/BPHC will publish the dates when reapplications may be submitted and the date by which they must be submitted. As a most recent example, in 2015, reapplications were accepted as of August 10 and must have been submitted by September 7, 2015. As in previous years, approximately 10 days prior to the date for acceptance of renewal applications, the EHB is shut down for reprogramming for this new acceptance. **Once you have submitted your renewal application, you can be assured that your approval for 2016 letter will be issued by November 30, 2015.** However, there is a benefit to early submission, as your application will be reviewed in the order it was received. Please note carefully, during the period from when the reapplication may be submitted until a clinic has received its 2016 approval. No additional supplemental applications may be submitted. Thus, the closer to the opening date that you submit your reapplication, the sooner it will be reviewed and approved — and the sooner you may submit additional supplemental applications. New applications will be accepted throughout this period; however, it may take longer than the typical 30-day turnaround period due to the volume of renewal applications that is being processed.

Please note technical assistance is available at the Call Center at ***hrsa.gov*** or 877-464-4772 for registration and user name questions. FTCA technical assistance is available from the BPHC Help Line at 877-974-2742.

## Supplemental/Renewal Applications

Once a free clinic has been approved and has a roster of deemed individuals with FTCA malpractice protection, individuals may be added at any time during the calendar year, with the exception of the aforementioned period between the opening of the reapplication submission and the issuance of the renewal deeming letter for the coming year. The use of a Supplemental Application is required to be submitted through the EHB. It is quite similar to the Initial Deeming Application. You are not required to send the previously submitted policies for review unless the clinic has made changes in its policies. Approval of individuals contained in a supplemental application is generally made for an initial period that consists of the remainder of the calendar year. These individuals will then need to be included in the next year's renewal application. All applications may be found on the HRSA/BPHC website (http://bphc.hrsa.gov/ftca/freeclinics/), along with instructions on how to enroll on the EHB.

FTCA malpractice coverage must be renewed annually. Notice for renewal is typically provided by HRSA during the summer, with a due date in early September. These time frames may change, so watch for HRSA/BPHC notices. The renewal application is closely aligned to the initial application, although not all copies of required policies may be needed if no changes have been made. All individuals who require coverage for the following year must be included in the reapplication. No one is automatically rolled over for coverage the following year.

## About the Author:

Marty Hiller worked at the Free Clinic of Greater Cleveland for 27 years, serving as its executive director for 20 years. During that time, he assisted in establishing the Ohio Association of Free Clinics as well as spearheaded the establishment of the National Association of Free Clinics, serving as its first president. He then worked as a private consultant as the free clinic support for the implementation and expansion of the FTCA program. In that role, he authored a report to Congress on free clinics, the first such document published for the federal government. After five years in that role, he started a consulting business — Hiller & Servaites, LLC, along with Mara Servaites — providing a variety of services to free and charitable clinics, including strategic planning, board and leadership development, among others.

## About AmeriCares

AmeriCares is an emergency response and global health organization committed to saving lives and building healthier futures for people in crisis in the United States and around the world. Every day, AmeriCares puts critically needed medicines and supplies in the hands of frontline health workers and develops innovative, sustainable health improvements in their communities. AmeriCares is the No. 1 nonprofit provider of donated medicines and supplies, both in the United States and worldwide, distributing over $500 million in quality medicines and relief supplies to more than 90 countries each year.

In the U.S., AmeriCares responds to emergencies and supports more than 800 free clinics and community health centers nationwide with free medicine, medical supplies and capacity-building programs. AmeriCares is the nation's largest provider of donated medical aid to the U.S. health care safety net, last year delivering more than $117 million in aid to a network of clinics and health centers serving 5 million patients in need. AmeriCares also operates four free clinics in its home state of Connecticut and routinely deploys its mobile clinic to help damaged clinics remain operating during hurricanes and other emergencies. For more information, visit ***americares.org***

GE Foundation

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