

INTERPRETATIVE STATEMENT

**IMMUNITY AND DEFENSE FOR EMPLOYEES
AGAINST MEDICAL NEGLIGENCE/HEALTH CARE LIABILITY CLAIMS¹**

**Issued July, 2018 by the Office of the General Counsel
The University of Tennessee**

Background

State law provides that all state employees, including employees of The University of Tennessee, have immunity from liability for acts or omissions within the scope of their employment, unless the acts or omissions are willful, malicious, criminal, or done for personal gain. Tenn. Code Ann. § 9-8-307(h) (emphasis added).

The exception for "acts or omissions ... done for personal gain" includes incidents arising out of the ordinary practice of a health care profession and incidents arising in a teaching setting in which the professional, or one acting on his or her behalf, billed or could have billed for the services. A health care professional cannot retrospectively elect to forego billing for services that could have been billed and thereby cause the services to come within the immunity provided by state law. The University recognizes that encounters between a health care professional and a patient in a teaching setting (*i.e.*, those in which a resident, fellow, or student participates) have a potential element of gain to the University/State as well as the potential for personal gain to the professional. The Tennessee Court of Appeals has recognized that "in determining a dual employee's immunity status ... the ability to bill the patient for patient care provided is the most conclusive factor." *Prewitt v. Semmes-Murphy Clinic, P.C.*, No. W2006-005556-COA-R3-CV, 2007 WL 879565, at *11 (Tenn. Ct. App. Mar. 23, 2007). In determining the ability to bill for patient care, the University/State largely relies on the standards set forth in federal regulations promulgated by the Centers for Medicare and Medicaid Services (CMS) of the U.S. Department of Health and Human Services. (42 C.F.R. § 415, Subparts A-E.)

Governing Principles

1. Full-time employees of the University, including residents and fellows, acting within the scope of their employment who could not and do not bill for or receive any compensation from patient encounters, will be entitled to raise the immunity defense of Tenn. Code Ann. § 9-8-307(h), unless their acts or omissions are done for personal gain or are willful, malicious, or criminal.
2. All employees who engage in the practice of a health care profession and who are permitted to bill for their services, either personally or through another entity, are responsible for obtaining at their own expense professional liability insurance coverage

¹ The information presented in this interpretative statement is for informational purposes only and does not constitute legal advice. For legal advice concerning a specific situation, please contact an attorney in the Office of the General Counsel.

for patient encounters not entitled to the immunity defense of Tenn. Code Ann. § 9-8-307(h). For example, full-time, part-time, and volunteer faculty are responsible at their own expense for securing and maintaining professional liability insurance coverage for patient encounters outside a teaching setting for which they are permitted to bill for their services, either personally or through another entity.

3. For patient encounters that take place within a teaching setting (i.e., with residents, fellows, or students participating in patient care) and for which the professional is permitted to bill, the professional is responsible for obtaining professional liability insurance coverage at his or her own expense, except in the following circumstances:
 - (a) When the intent not to bill is set forth in a prior agreement between the faculty member and the University; or
 - (b) When any right or interest in billings is transferred in writing by the faculty member to the University by prior agreement.

These exceptions (a) and (b) are based on the premise that the intent of the faculty member in these circumstances is to participate in those patient encounters solely for teaching purposes. Therefore, even if the CMS criteria for billing are satisfied, it will be appropriate to raise the immunity of Tenn. Code Ann. § 9-8-307(h) on behalf of a professional, unless the acts or omissions were otherwise done for personal gain or were outside the scope of employment, willful, malicious, or criminal. For the protection of the professional, it is preferable that agreements referenced in subdivision (a) be in writing.

4. Services provided to patients within a teaching setting that do not meet the criteria for billing set forth in the applicable CMS regulations are assumed to be carried out solely for teaching purposes within the scope of University employment, and thus it will be appropriate to raise the immunity of Tenn. Code Ann. § 9-8-307(h) on behalf of a professional, unless the acts or omissions were otherwise done for personal gain or were outside the scope of employment, willful, malicious, or criminal. An example of this kind of activity is the supervision of residents in a clinic or hospital setting in which the patient-physician relationship according to the applicable CMS regulations is not established, and thus billing could not and does not take place.
5. When the immunity defense of Tenn. Code Ann. § 9-8-307(h) appears to be applicable, University counsel will request authorization from the Attorney General to appear on behalf of the professional employee and raise the immunity defense.

[End of Statement]