



NEW JERSEY HOSPITAL ASSOCIATION

DATE: January 13, 2003

TO: Chief Executive Officers
In-house Counsel
Human Resources Executives
Emergency Contacts
Vice Presidents, Nursing

FROM: Valerie Sellers *VS*
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SUBJECT: Update—New Jersey's Smallpox Preparedness Vaccination Program

As we have communicated, new information is being provided almost daily regarding the voluntary smallpox vaccination of healthcare workers. As you know, New Jersey's Department of Health and Senior Services (DHSS) is moving forward with the implementation of the state's plan. As part of this plan, DHSS expects hospitals to provide the names of those individuals that are volunteering to be vaccinated by January 24 and vaccinations for healthcare workers are scheduled to begin on Feb. 10.

As DHSS has released its plan and conducted information and training sessions, there are a number of significant issues that remain unresolved not only in New Jersey, but also nationally. NJHA has been working closely with the American Hospital Association, as well as representatives from the state and from hospitals to identify those issues, and to provide hospitals with up-to-date information and guidance. The following is a summary of the issues along with advisories to hospitals as to actions that they should consider with participating in the state's smallpox plan.

Issues Related to Coverage

Workers' Compensation – The policies governing coverage for volunteers in the smallpox vaccination program vary from state to state. Commissioner of Health and Senior Services Dr. Clifton Lacy, requested an opinion of the state's Attorney General to determine whether workers' compensation benefits are payable for adverse reactions from the administration of the smallpox vaccine to individuals who serve as a member of a smallpox healthcare team (a copy is enclosed for your information). It is the opinion of the Attorney General's Office that *all individuals who serve on the response team, whether public or private employees or volunteers, are eligible for workers' compensation coverage for illnesses resulting from the vaccination.*

The opinion recognizes, however, that it is possible that some team members such as contract workers and independent contractors may not be covered by the Workers' Compensation Act. In the course of discussion with representatives from the Deputy Attorney General's office, however, they have indicated that it may be possible for these

individuals to be considered as emergency management volunteers or civil defense volunteers; and therefore they would be eligible for state workers' compensation under N.J.S.A. App. A:9-57.1 et. seq. Upon request of an additional review and opinion by the Commissioner, more specific information regarding contracted employees may be provided.

A copy of the opinion rendered by the Attorney General's Office will be provided to hospitals for review and consideration by their legal counsel. It should be noted that the opinion of the Attorney General's Office is binding only on state employees and that the individual carriers representing hospitals will make their own determination as to whether a policy covering workers' compensation will apply to healthcare workers participating in the smallpox vaccination program. However, it is also the belief that a carrier that elects not to cover such claims and is challenged in a court of law must provide proof as to why the Attorney General's opinion is not applicable.

Given the information currently available, hospitals are encouraged to take the following action:

- Review your current policy to assess if your employees are covered by your carrier's workers' compensation plan and what specific coverage may apply. More specifically, how many days of absences are required before workers' compensation will apply.
- Consider requesting a formal opinion from the carrier to review against the policy and ensure the policy of the carrier is appropriate.
- Review internal policies regarding supplemental pay above the established caps.
- If your hospital has contracted employees, such as emergency department physicians, you need to research what coverage may apply. Specifically, will the agency's workers' compensation plan provide coverage for voluntary participation in the smallpox vaccination program?
- Determine how you will communicate to your employees about the availability and application of coverage.

Disability and Life Insurance Coverage

Some disability and life insurance plans may not apply coverage in the event an illness or death should occur as a result of an "act of war," (or other relevant reasons for exclusion).

- Hospitals should review their policies to determine if employees (and their family members) that participate in the smallpox vaccination plan will be eligible for health and life insurance coverage if necessary.
- Hospitals should encourage potential volunteers who have personal policies to check with their carriers regarding coverage.

Liability

Perhaps the most discussion that has occurred regarding the federal Smallpox Vaccination Program relates to the issue of liability. From the onset, individuals contemplating participation in the program have expressed concern about their liability should they inadvertently infect a patient or family member following their vaccination.

Under the Homeland Security Act, a specific provision in that law addresses the issue of liability – Section 304. Section 304 provides an exclusive remedy against the United States for injury or death attributable to smallpox, or vaccinia immune globulin (“smallpox countermeasures”). This would mean that no claim for liability for injury or death attributable to a smallpox countermeasure could be brought against entities or individuals covered by Section 304’s protections.

The AHA, among others such as public health agencies, believes that the clear intent of Section 304 is to provide protection to hospitals in exchange for their participation in the government’s initiative. However, the Centers for Disease Control and Prevention (CDC) provided an interpretation of Section 304 that is much more narrow. The CDC has interpreted the liability protections reflected in Section 304 to apply only to *hospitals and institutions under whose auspices countermeasures are administered*.

This interpretation would mean that only hospitals “operating as a clinic” (offering the vaccination) would be legally protected from liability. In New Jersey, there are six clinics that will be established and staffed by public health officials to administer the smallpox vaccinations. Therefore, according to the AHA, the hospital and its volunteers would not be protected from liability under the federal law.

There are very few states where hospitals are actually administering the smallpox vaccination. As a result, hospitals throughout the country have expressed hesitancy in moving forward with participation in a smallpox vaccination program, New Jersey hospitals among them. This issue can only be resolved at the federal level. NJHA has learned that the U.S. Department of Health and Human Services and the Department of Justice have been working to resolve the interpretation of the liability protections reflected in the Homeland Security Act and a final determination may be forthcoming in the next several days.

In fact, Secretary Tommy Thompson issued a letter to AHA’s president, Dick Davidson, indicating that he believes the declaration he issues on Jan. 24 will indicate that Section 304 of the Homeland Security Act will provide protection to hospitals that participate in the smallpox vaccination plan. The language used by Secretary Thompson in this is still not clearly definitive on liability protection nor does it address the issue of coverage for voluntary medical staff and independent contractors. We will not know the extent of protection being afforded hospitals until we actually see the final language. In the interim, however, hospitals should give consideration to the following:

- How have you communicated to employees what liability protections they may be afforded?
- If there should be action taken at the federal level to expand liability protection to those participating in the smallpox vaccination program, it may not be broad enough to cover independent contractors, i.e, contracted emergency department physicians, or voluntary medical staff. Hospitals should give consideration as to how the hospital's vaccination plan can be implemented absent those individuals that may not be protected.

Patient Rights

Questions have been raised regarding the rights of patients to be informed that a healthcare worker has been vaccinated. A senior official with the Department of Health and Senior Services has taken the position that policies governing disclosure to patients should be consistent with policies pertaining to disclosure of HIV/AIDS and Hepatitis.

- Hospitals should examine their own policies for consistency and determine what is appropriate for their employees.

I have enclosed background information and correspondence that may be helpful in better understanding the issues and NJHA will be providing you with additional information as it becomes available. We also hope to meet with representatives from labor unions to discuss their issues and concerns and to ensure that there is an understanding that everyone is committed to protecting healthcare workers should they elect to participate in the smallpox vaccination program. Since your staff will undoubtedly have similar issues and concerns that you have regarding liability and workers' compensation, it may be helpful to share this information with those individuals who are providing the smallpox training. They, in turn, may be able to respond to questions being raised by potential volunteers.

If you have specific questions or need additional information, please contact me at 609-275-4261 or vsellers@njha.com.

Enclosures

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