



2005 ASSEMBLY BILL 789

October 31, 2005 – Introduced by Representatives WIECKERT, WASSERMAN, MUSSER, FIELDS, ALBERS, JENSEN, OWENS, GUNDERSON, McCORMICK, F. LASEE, KRAWCZYK, LEHMAN, PETROWSKI, HAHN, HINES, HUNDERTMARK, STRACHOTA, VOS and OTT, cosponsored by Senators GROTHMAN, RISSER, MILLER, WIRCH, ROESSLER, LASSA, A. LASEE, DARLING and ERPENBACH. Referred to Committee on Insurance.

1 **AN ACT to amend** 146.89 (4) and 895.46 (1) (a) of the statutes; **relating to:** state
2 agency status coverage under the Volunteer Health Care Provider Program
3 regardless of applicable health care liability insurance coverage.

Analysis by the Legislative Reference Bureau

Under the Volunteer Health Care Provider Program (VHCPP) in current law, health care services of a volunteer health care provider and a nonprofit agency whose joint application is approved by the Department of Administration must be provided without charge primarily to low-income persons who are uninsured and, except for the provision of certain dental and dental hygiene services to Medical Assistance (MA) recipients, are not recipients of MA or Medicare Program benefits. Volunteer health care providers include physicians, dentists, registered nurses, licensed practical nurses, nurse-midwives, optometrists, and physician assistants. These volunteers are, for the provision of services under the VHCPP, state agents of the Department of Health and Family Services (DHFS).

Under current law, for a person with status as a state agent of DHFS, the attorney general may, if requested by the secretary of health and family services, appear and defend the person in any civil action or other matter brought before a court as the result of an act committed in the lawful course of the agent's duties. In addition, a civil action or civil proceeding against a state agent for an act committed in the course of the discharge of the agent's duties may not be brought unless the claimant serves on the attorney general written notice within 120 days of the event that caused injury, damage, or death. Lastly, judgments in excess of any insurance

ASSEMBLY BILL 789

applicable to the state agent defendant must be paid by the state, and a governmental unit need not provide or pay for legal representation if applicable insurance provides the representation.

This bill provides status as state agents of DHFS to volunteer health care providers who provide services under the VHCPP, regardless of whether the health care provider has medical malpractice insurance coverage that would extend to the provision of the services. Limitation in current law on state payment of damages and costs and on payment or provision of legal representation for state agents who have applicable insurance coverage do not, under the bill, apply. The bill specifies that any medical malpractice insurance policy providing coverage for a health care provider's services may exclude coverage for services that the health care provider provides as a volunteer health care provider.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 146.89 (4) of the statutes is amended to read:

2 146.89 (4) Volunteer health care providers who provide services under this
3 section are, for the provision of these services, state agents of the department of
4 health and family services for purposes of ss. 165.25 (6), 893.82 (3) and 895.46. This
5 state agency status applies regardless of whether the volunteer health care provider
6 has coverage under a policy of health care liability insurance that would extend to
7 services provided by the volunteer health care provider under this section; and the
8 limitations under s. 895.46 (1) (a) on the payment by the state of damages and costs
9 in excess of any insurance coverage applicable to the agent and on the duty of a
10 governmental unit to provide or pay for legal representation do not apply. Any policy
11 of health care liability insurance providing coverage for services of a health care
12 provider may exclude coverage for services provided by the health care provider
13 under this section.

14 **SECTION 2.** 895.46 (1) (a) of the statutes is amended to read:

ASSEMBLY BILL 789

1 895.46 (1) (a) If the defendant in any action or special proceeding is a public
2 officer or employee and is proceeded against in an official capacity or is proceeded
3 against as an individual because of acts committed while carrying out duties as an
4 officer or employee and the jury or the court finds that the defendant was acting
5 within the scope of employment, the judgment as to damages and costs entered
6 against the officer or employee, except as provided in s. 146.89 (4), in excess of any
7 insurance applicable to the officer or employee shall be paid by the state or political
8 subdivision of which the defendant is an officer or employee. Agents of any
9 department of the state shall be covered by this section while acting within the scope
10 of their agency. Regardless of the results of the litigation the governmental unit, if
11 it does not provide legal counsel to the defendant officer or employee, shall pay
12 reasonable attorney fees and costs of defending the action, unless it is found by the
13 court or jury that the defendant officer or employee did not act within the scope of
14 employment. The Except as provided in s. 146.89 (4), the duty of a governmental unit
15 to provide or pay for the provision of legal representation does not apply to the extent
16 that applicable insurance provides that representation. If the employing state
17 agency or the attorney general denies that the state officer, employee or agent was
18 doing any act growing out of or committed in the course of the discharge of his or her
19 duties, the attorney general may appear on behalf of the state to contest that issue
20 without waiving the state's sovereign immunity to suit. Failure by the officer or
21 employee to give notice to his or her department head of an action or special
22 proceeding commenced against the defendant officer or employee as soon as
23 reasonably possible is a bar to recovery by the officer or employee from the state or
24 political subdivision of reasonable attorney fees and costs of defending the action.
25 The attorney fees and expenses shall not be recoverable if the state or political

ASSEMBLY BILL 789**SECTION 2**

1 subdivision offers the officer or employee legal counsel and the offer is refused by the
2 defendant officer or employee. If the officer, employee or agent of the state refuses
3 to cooperate in the defense of the litigation, the officer, employee or agent is not
4 eligible for any indemnification or for the provision of legal counsel by the
5 governmental unit under this section.

6 **SECTION 3. Initial applicability.**

7 (1) HEALTH CARE LIABILITY INSURANCE. This act first applies to health care
8 liability insurance policies issued or renewed on the effective date of this subsection.

9 (END)