

SENATE TAX, BUSINESS AND TRANSPORTATION  
COMMITTEE SUBSTITUTE FOR  
SENATE BILL 523

**56TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2023**

This document may incorporate amendments proposed by a committee, but not yet adopted, as well as amendments that have been adopted during the current legislative session. The document is a tool to show amendments in context and cannot be used for the purpose of adding amendments to legislation.

AN ACT

RELATING TO THE PUBLIC PEACE, HEALTH, SAFETY AND WELFARE;  
AMENDING THE MEDICAL MALPRACTICE ACT TO CHANGE THE LIMITATION  
OF RECOVERY FOR CERTAIN CLAIMS AGAINST FACILITIES THAT ARE NOT  
HOSPITAL-CONTROLLED; UPDATING REPORTING REQUIREMENTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**SECTION 1.** Section 41-5-3 NMSA 1978 (being Laws 1976,

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Chapter 2, Section 3, as amended) is amended to read:

"41-5-3. DEFINITIONS.--As used in the Medical Malpractice Act:

A. "advisory board" means the patient's compensation fund advisory board;

B. "control" means equity ownership in a business entity that:

(1) represents more than fifty percent of the total voting power of the business entity; or

(2) has a value of more than fifty percent of that business entity;

~~[B.]~~ C. "fund" means the patient's compensation fund;

~~[C.]~~ D. "health care provider" means a person, corporation, organization, facility or institution licensed or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist, physician's assistant, certified nurse practitioner, clinical nurse specialist or certified nurse-midwife or a business entity that is organized, incorporated or formed pursuant to the laws of New Mexico that provides health care services primarily through natural persons identified in this subsection. "Health care provider" does not mean a person or entity protected pursuant to the Tort Claims Act or the

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Federal Tort Claims Act;

[D-] E. "hospital" means a facility licensed as a hospital in this state that offers in-patient services, nursing or overnight care on a twenty-four-hour basis for diagnosing, treating and providing medical, psychological or surgical care for three or more separate persons who have a physical or mental illness, disease, injury or rehabilitative condition or are pregnant and may offer emergency services. "Hospital" includes a hospital's parent corporation, subsidiary corporations or affiliates if incorporated or registered in New Mexico; employees and locum tenens providing services at the hospital; and agency nurses providing services at the hospital. "Hospital" does not mean a person or entity protected pursuant to the Tort Claims Act or the Federal Tort Claims Act;

F. "independent outpatient health care facility" means a health care facility that is an ambulatory surgical center, urgent care facility or free-standing emergency room that is not, directly or indirectly through one or more intermediaries, controlled or under common control with a hospital. "Independent outpatient health care facility" includes a facility's employees, locum tenens providers and agency nurses providing services at the facility. "Independent outpatient health care facility" does not mean a person or entity protected pursuant to the Tort Claims Act or the Federal Tort Claims Act;

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[E-] G. "independent provider" means a doctor of medicine, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist, physician's assistant, certified nurse practitioner, clinical nurse specialist or certified nurse-midwife who is not an employee of a hospital or outpatient health care facility. "Independent provider" does not mean a person or entity protected pursuant to the Tort Claims Act or the Federal Tort Claims Act. "Independent provider" includes:

(1) a health care facility that is:

(a) licensed pursuant to the Public Health Act as an outpatient facility;

(b) not an ambulatory surgical center, urgent care facility or free-standing emergency room; and

(c) not hospital-controlled; and

(2) a business entity that is not a hospital or outpatient health care facility that employs or consists of members who are licensed or certified as doctors of medicine, doctors of osteopathy, chiropractors, podiatrists, nurse anesthetists, physician's assistants, certified nurse practitioners, clinical nurse specialists or certified nurse-midwives and the business entity's employees;

[F-] H. "insurer" means an insurance company engaged in writing health care provider malpractice liability insurance in this state;

[G-] I. "malpractice claim" includes any cause of

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action arising in this state against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care that proximately results in injury to the patient, whether the patient's claim or cause of action sounds in tort or contract, and includes but is not limited to actions based on battery or wrongful death; "malpractice claim" does not include a cause of action arising out of the driving, flying or nonmedical acts involved in the operation, use or maintenance of a vehicular or aircraft ambulance;

[H.] J. "medical care and related benefits" means all reasonable medical, surgical, physical rehabilitation and custodial services and includes drugs, prosthetic devices and other similar materials reasonably necessary in the provision of such services;

[I.] K. "occurrence" means all injuries to a patient caused by health care providers' successive acts or omissions that combined concurrently to create a malpractice claim;

[J.] L. "outpatient health care facility" means an entity that is hospital-controlled and is licensed pursuant to the Public Health Act as an outpatient facility, including ambulatory surgical centers, free-standing emergency rooms, urgent care clinics, acute care centers and intermediate care facilities and includes a facility's employees, locum tenens

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providers and agency nurses providing services at the facility.

"Outpatient health care facility" does not include:

(1) independent providers;

(2) independent outpatient health care

facilities; or

(3) individuals or entities protected pursuant

to the Tort Claims Act or the Federal Tort Claims Act;

~~[K-]~~ M. "patient" means a natural person who received or should have received health care from a health care provider, under a contract, express or implied; and

~~[L-]~~ N. "superintendent" means the superintendent of insurance."

**SECTION 2.** Section 41-5-5 NMSA 1978 (being Laws 1992, Chapter 33, Section 2, as amended) is amended to read:

"41-5-5. QUALIFICATIONS.--

A. To be qualified under the provisions of the Medical Malpractice Act, a health care provider, except an independent outpatient health care facility, shall:

(1) establish its financial responsibility by filing proof with the superintendent that the health care provider is insured by a policy of malpractice liability insurance issued by an authorized insurer in the amount of at least two hundred fifty thousand dollars (\$250,000) per occurrence or by having continuously on deposit the sum of seven hundred fifty thousand dollars (\$750,000) in cash with

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the superintendent or such other like deposit as the superintendent may allow by rule; provided that hospitals and hospital-controlled outpatient health care facilities that establish financial responsibility through a policy of malpractice liability insurance may use any form of malpractice insurance; and provided further that for independent providers, in the absence of an additional deposit or policy as required by this subsection, the deposit or policy shall provide coverage for not more than three separate occurrences; and

(2) pay the surcharge assessed on health care providers by the superintendent pursuant to Section 41-5-25 NMSA 1978.

B. To be qualified under the provisions of the Medical Malpractice Act, an independent outpatient health care facility shall:

(1) establish its financial responsibility by filing proof with the superintendent that the health care provider is insured by a policy of malpractice liability insurance issued by an authorized insurer in the amount of at least five hundred thousand dollars (\$500,000) per occurrence or by having continuously on deposit the sum of one million five hundred thousand dollars (\$1,500,000) in cash with the superintendent or other like deposit as the superintendent may allow by rule; provided that for independent outpatient health care facilities, in the absence of an additional deposit or

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policy as required by this subsection, the deposit or policy shall provide coverage for not more than three separate occurrences; and

(2) pay the surcharge assessed on independent outpatient health care facilities by the superintendent pursuant to Section 41-5-25 NMSA 1978.

~~[B-]~~ C. For hospitals or hospital-controlled outpatient health care facilities electing to be covered under the Medical Malpractice Act, the superintendent shall determine, based on a risk assessment of each hospital or hospital-controlled outpatient health care facility, each hospital's or hospital-controlled outpatient health care facility's base coverage or deposit and additional charges for the fund. The superintendent shall arrange for an actuarial study before determining base coverage or deposit and surcharges.

~~[C-]~~ D. A health care provider not qualifying under this section shall not have the benefit of any of the provisions of the Medical Malpractice Act in the event of a malpractice claim against it; provided that beginning July 1, 2021, hospitals and hospital-controlled outpatient health care facilities shall not participate in the medical review process, and beginning January 1, 2027, hospitals and hospital-controlled outpatient health care facilities shall have the benefits of the other provisions of the Medical Malpractice Act

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except participation in the fund."

SECTION 3. Section 41-5-6 NMSA 1978 (being Laws 1992, Chapter 33, Section 4, as amended) is amended to read:

"41-5-6. LIMITATION OF RECOVERY.--

A. Except for punitive damages and past and future medical care and related benefits, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall not exceed six hundred thousand dollars (\$600,000) per occurrence for malpractice claims brought against health care providers if the injury or death occurred prior to January 1, 2022. In jury cases, the jury shall not be given any instructions dealing with this limitation.

B. Except for punitive damages and past and future medical care and related benefits, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall not exceed seven hundred fifty thousand dollars (\$750,000) per occurrence for malpractice claims against independent providers; provided that, beginning January 1, 2023, the per occurrence limit on recovery shall be adjusted annually by the consumer price index for all urban consumers.

C. [~~In calendar year 2022 and subsequent calendar years~~] The aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a

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result of malpractice, except for punitive damages and past and future medical care and related benefits, shall not exceed [~~the following amounts~~] seven hundred fifty thousand dollars (\$750,000) for claims brought against an independent outpatient health care facility [~~that is not majority-owned and -controlled by a hospital:~~

~~(1)] for an injury or death that occurred in calendar years 2022 and 2023 [seven hundred fifty thousand dollars (\$750,000) per occurrence;~~

~~(2) for an injury or death that occurred in calendar year 2024, five million dollars (\$5,000,000) per occurrence;~~

~~(3) for an injury or death that occurred in calendar year 2025, five million five hundred thousand dollars (\$5,500,000) per occurrence;~~

~~(4) for an injury or death that occurred in calendar year 2026, six million dollars (\$6,000,000) per occurrence; and~~

~~(5) for an injury or death that occurred in calendar year 2027 and each calendar year thereafter, the amount provided in Paragraph (4) of this subsection, adjusted annually by the consumer price index for all urban consumers, per occurrence].~~

D. In calendar year 2024 and subsequent years, the aggregate dollar amount recoverable by all persons for or

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arising from an injury or death to a patient as a result of malpractice, except for punitive damages and past and future medical care and related benefits, shall not exceed the following amounts for claims brought against an independent outpatient health care facility:

(1) for an injury or death that occurred in calendar year 2024, one million dollars (\$1,000,000) per occurrence; and

(2) for an injury or death that occurred in calendar year 2025 and thereafter, the amount provided in Paragraph (1) of this subsection, adjusted annually by the prior three-year average consumer price index for all urban consumers, per occurrence.

~~[D-]~~ E. In calendar year 2022 and subsequent calendar years, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice, except for punitive damages and past and future medical care and related benefits, shall not exceed the following amounts for claims brought against a hospital or ~~[an]~~ a hospital-controlled outpatient health care facility ~~[that is majority-owned and -controlled by a hospital]:~~

(1) for an injury or death that occurred in calendar year 2022, four million dollars (\$4,000,000) per occurrence;

(2) for an injury or death that occurred in

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calendar year 2023, four million five hundred thousand dollars (\$4,500,000) per occurrence;

(3) for an injury or death that occurred in calendar year 2024, five million dollars (\$5,000,000) per occurrence;

(4) for an injury or death that occurred in calendar year 2025, five million five hundred thousand dollars (\$5,500,000) per occurrence;

(5) for an injury or death that occurred in calendar year 2026, six million dollars (\$6,000,000) per occurrence; and

(6) for an injury or death that occurred in calendar year 2027 and each calendar year thereafter, the amount provided in Paragraph (5) of this subsection, adjusted annually by the consumer price index for all urban consumers, per occurrence.

~~[E.]~~ F. The aggregate dollar amounts provided in Subsections B through ~~[D]~~ E of this section include payment to any person for any number of loss of consortium claims or other claims per occurrence that arise solely because of the injuries or death of the patient.

~~[F.]~~ G. In jury cases, the jury shall not be given any instructions dealing with the limitations provided in this section.

~~[G.]~~ H. The value of accrued medical care and

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related benefits shall not be subject to any limitation.

~~[H.]~~ I. Except for an independent outpatient health care facility, a health care provider's personal liability is limited to two hundred fifty thousand dollars (\$250,000) for monetary damages and medical care and related benefits as provided in Section 41-5-7 NMSA 1978. Any amount due from a judgment or settlement in excess of two hundred fifty thousand dollars (\$250,000) shall be paid from the fund, except as provided in ~~[Subsection F]~~ Subsections J and K of this section.

J. An independent outpatient health care facility's personal liability is limited to five hundred thousand dollars (\$500,000) for monetary damages and medical care and related benefits as provided in Section 41-5-7 NMSA 1978. Any amount due from a judgment or settlement in excess of five hundred thousand dollars (\$500,000) shall be paid from the fund.

~~[I.]~~ K. Until January 1, 2027, amounts due from a judgment or settlement against a hospital or hospital-controlled outpatient health care facility in excess of seven hundred fifty thousand dollars (\$750,000), excluding past and future medical expenses, shall be paid by the hospital or hospital-controlled outpatient health care facility and not by the fund. Beginning January 1, 2027, amounts due from a judgment or settlement against a hospital or hospital-controlled outpatient health care facility shall not be paid from the fund.

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~~[J-]~~ L. The term "occurrence" shall not be construed in such a way as to limit recovery to only one maximum statutory payment if separate acts or omissions cause additional or enhanced injury or harm as a result of the separate acts or omissions. A patient who suffers two or more distinct injuries as a result of two or more different acts or omissions that occur at different times by one or more health care providers is entitled to up to the maximum statutory recovery for each injury."

**SECTION 4.** Section 41-5-29 NMSA 1978 (being Laws 1992, Chapter 33, Section 10, as amended) is amended to read:

"41-5-29. FUND REPORTS.--

A. On January 31 of each year, the superintendent shall, upon request, provide a written report to all interested persons of the following information:

~~[A-]~~ (1) the beginning and ending calendar year balances in the fund;

~~[B-]~~ (2) an itemized accounting of the total amount of contributions to the fund;

~~[C-]~~ (3) all information regarding closed claims files, including an itemized accounting of all payments paid out; and

~~[D-]~~ (4) any other information regarding the fund that the superintendent or the legislature considers to be important.

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B. The superintendent or the superintendent's designee shall track and make publicly available the following information regarding Sfll→independent←Sfll outpatient health care facilities:

(1) the total number of claims filed against Sfll→independent←Sfll outpatient health care facilities by year;

(2) the total number of settlements paid out on behalf of Sfll→independent←Sfll outpatient health care facilities by year; and

(3) the dollar amounts of settlements paid out by the fund on behalf of Sfll→independent←Sfll outpatient health care facilities by year."

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