

Proposed

SENATE TAX, BUSINESS AND TRANSPORTATION  
COMMITTEE SUBSTITUTE FOR  
SENATE BILL 524

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

AN ACT

RELATING TO THE PUBLIC PEACE, HEALTH, SAFETY AND WELFARE;  
AMENDING THE MEDICAL MALPRACTICE ACT TO CHANGE THE LIMITATION  
OF RECOVERY FOR CLAIMS AGAINST OUTPATIENT HEALTH CARE  
FACILITIES; UPDATING DEFINITIONS.

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

SECTION 1. Section 41-5-3 NMSA 1978 (being Laws 1976,  
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. "fund" means the patient's compensation fund;
- C. "health care provider" means a person,  
corporation, organization, facility or institution licensed or

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1 certified by this state to provide health care or professional  
2 services as a doctor of medicine, hospital, outpatient health  
3 care facility, doctor of osteopathy, chiropractor, podiatrist,  
4 nurse anesthetist, physician's assistant, certified nurse  
5 practitioner, clinical nurse specialist or certified nurse-  
6 midwife or a business entity that is organized, incorporated or  
7 formed pursuant to the laws of New Mexico that provides health  
8 care services primarily through natural persons identified in  
9 this subsection. For the purposes of the Medical Malpractice  
10 Act, "health care provider" does not include:

11 (1) private persons or entities not qualifying  
12 under the Medical Malpractice Act; or

13 (2) individuals or entities protected under  
14 the Tort Claims Act or the Federal Tort Claims Act;

15 D. "hospital" means a facility licensed as a  
16 hospital in this state that offers in-patient services, nursing  
17 or overnight care on a twenty-four-hour basis for diagnosing,  
18 treating and providing medical, psychological or surgical care  
19 for three or more separate persons who have a physical or  
20 mental illness, disease, injury or rehabilitative condition or  
21 are pregnant and may offer emergency services. "Hospital"  
22 includes a hospital's parent corporation, subsidiary  
23 corporations or affiliates if incorporated or registered in New  
24 Mexico; employees and locum tenens providing services at the  
25 hospital; and agency nurses providing services at the hospital.

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1 For the purposes of the Medical Malpractice Act, "hospital"  
2 does not include:

3 (1) private persons or entities not qualifying  
4 under the Medical Malpractice Act; or

5 (2) individuals or entities protected under  
6 the Tort Claims Act or the Federal Tort Claims Act;

7 E. "independent provider" means a doctor of  
8 medicine, doctor of osteopathy, chiropractor, podiatrist, nurse  
9 anesthetist, physician's assistant, certified nurse  
10 practitioner, clinical nurse specialist or certified nurse-  
11 midwife who is not an employee of a hospital or outpatient  
12 health care facility. "Independent provider" includes a  
13 business entity that is not a hospital or outpatient health  
14 care facility that employs or consists of members who are  
15 licensed or certified as doctors of medicine, doctors of  
16 osteopathy, chiropractors, podiatrists, nurse anesthetists,  
17 physician's assistants, certified nurse practitioners, clinical  
18 nurse specialists or certified nurse-midwives and the business  
19 entity's employees. For the purposes of the Medical  
20 Malpractice Act, "independent provider" does not include:

21 (1) private persons or entities not qualifying  
22 under the Medical Malpractice Act; or

23 (2) individuals or entities protected under  
24 the Tort Claims Act or the Federal Tort Claims Act;

25 F. "insurer" means an insurance company engaged in

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1 writing health care provider malpractice liability insurance in  
2 this state;

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

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

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

22 J. "outpatient health care facility" means ~~[an~~  
23 ~~entity that is licensed pursuant to the Public Health Act as an~~  
24 ~~outpatient facility, including]~~ ambulatory surgical centers,  
25 free-standing emergency rooms and urgent care clinics ~~[acute~~

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1 ~~care centers and intermediate care facilities]~~ that are one  
 2 hundred percent owned by physicians licensed to practice in  
 3 this state pursuant to the Medical Practice Act and includes a  
 4 facility's employees, locum tenens providers and agency nurses  
 5 providing services at the facility. For the purposes of the  
 6 Medical Malpractice Act, "outpatient health care facility" does  
 7 not include:

8 (1) independent providers;

9 (2) private persons or entities not qualifying  
 10 under the Medical Malpractice Act; or

11 (3) individuals or entities protected under  
 12 the Tort Claims Act or the Federal Tort Claims Act;

13 K. "patient" means a natural person who received or  
 14 should have received health care from a health care provider,  
 15 under a contract, express or implied; and

16 L. "superintendent" means the superintendent of  
 17 insurance."

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

20 "41-5-5. QUALIFICATIONS.--

21 A. To be qualified under the provisions of the  
 22 Medical Malpractice Act, a health care provider shall:

23 (1) establish its financial responsibility by  
 24 filing proof with the superintendent that the health care  
 25 provider is insured by a policy of malpractice liability

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1 insurance issued by an authorized insurer in the amount of at  
2 least two hundred fifty thousand dollars (\$250,000) per  
3 occurrence or by having continuously on deposit the sum of  
4 seven hundred fifty thousand dollars (\$750,000) in cash with  
5 the superintendent or such other like deposit as the  
6 superintendent may allow by rule; provided that hospitals and  
7 outpatient health care facilities that establish financial  
8 responsibility through a policy of malpractice liability  
9 insurance may use any form of malpractice insurance; and  
10 provided further that for independent providers, in the absence  
11 of an additional deposit or policy as required by this  
12 subsection, the deposit or policy shall provide coverage for  
13 not more than three separate occurrences; and

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

17 B. For hospitals or outpatient health care  
18 facilities electing to be covered under the Medical Malpractice  
19 Act, the superintendent shall determine, based on a risk  
20 assessment of each hospital or outpatient health care facility,  
21 each hospital's or outpatient health care facility's base  
22 coverage or deposit and additional charges for the fund. The  
23 superintendent shall arrange for an actuarial study before  
24 determining base coverage or deposit and surcharges.

25 C. A health care provider not qualifying under this  
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1 section, including any individual or entity protected under the  
 2 Tort Claims Act or the Federal Tort Claims Act, shall not have  
 3 the benefit of any of the provisions of the Medical Malpractice  
 4 Act in the event of a malpractice claim against it; provided  
 5 that beginning July 1, 2021, hospitals and outpatient health  
 6 care facilities shall not participate in the medical review  
 7 process, and beginning January 1, 2027, hospitals and  
 8 outpatient health care facilities shall have the benefits of  
 9 the other provisions of the Medical Malpractice Act except  
 10 participation in the fund."

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

13 "41-5-6. LIMITATION OF RECOVERY.--

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

23 B. Except for punitive damages and past and future  
 24 medical care and related benefits, the aggregate dollar amount  
 25 recoverable by all persons for or arising from any injury or

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1 death to a patient as a result of malpractice shall not exceed  
2 seven hundred fifty thousand dollars (\$750,000) per occurrence  
3 for malpractice claims against independent providers; provided  
4 that, beginning January 1, 2023, the per occurrence limit on  
5 recovery shall be adjusted annually by the consumer price index  
6 for all urban consumers.

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

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

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

21 ~~(3) for an injury or death that occurred in~~  
22 ~~calendar year 2025, five million five hundred thousand dollars~~  
23 ~~(\$5,500,000) per occurrence;~~

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

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1 occurrence; and

2 ~~(5) for an injury or death that occurred in~~  
 3 ~~calendar year 2027 and each calendar year thereafter, the~~  
 4 ~~amount provided in Paragraph (4) of this subsection, adjusted~~  
 5 ~~annually by the consumer price index for all urban consumers,~~  
 6 ~~per occurrence] three million dollars (\$3,000,000) for claims~~  
 7 ~~brought against an outpatient health care facility; provided~~  
 8 ~~that beginning January 1, 2024, the per occurrence limit on~~  
 9 ~~recovery shall be adjusted annually by the consumer price index~~  
 10 ~~for all urban consumers.~~

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

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

22 (2) for an injury or death that occurred in  
 23 calendar year 2023, four million five hundred thousand dollars  
 24 (\$4,500,000) per occurrence;

25 (3) for an injury or death that occurred in

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1 calendar year 2024, five million dollars (\$5,000,000) per  
2 occurrence;

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

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

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

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

19 F. In jury cases, the jury shall not be given any  
20 instructions dealing with the limitations provided in this  
21 section.

22 G. The value of accrued medical care and related  
23 benefits shall not be subject to any limitation.

24 H. A health care provider's personal liability is  
25 limited to two hundred fifty thousand dollars (\$250,000) for

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1 monetary damages and medical care and related benefits as  
 2 provided in Section 41-5-7 NMSA 1978. Any amount due from a  
 3 judgment or settlement in excess of two hundred fifty thousand  
 4 dollars (\$250,000) shall be paid from the fund, except as  
 5 provided in Subsection I of this section.

6 I. Until January 1, 2027, amounts due from a  
 7 judgment or settlement against a hospital or outpatient health  
 8 care facility in excess of seven hundred fifty thousand dollars  
 9 (\$750,000), excluding past and future medical expenses, shall  
 10 be paid by the hospital or outpatient health care facility and  
 11 not by the fund. Beginning January 1, 2027, amounts due from a  
 12 judgment or settlement against a hospital or outpatient health  
 13 care facility shall not be paid from the fund.

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

23 **SECTION 4. APPLICABILITY.**--The provisions of this act  
 24 apply to all claims for medical malpractice that arise on or  
 25 after the effective date of this act.

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