

# MEDICAL MALPRACTICE CLAIMS BY MEMBERS OF THE UNIFORMED SERVICES

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Interim Briefing to Armed Services Committees on Interim Final Rule  
to Implement 10 U.S.C. 2733a, as Required by Section 731(b) of the  
National Defense Authorization Act for Fiscal Year 2020

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DoD Office of General Counsel

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## BACKGROUND

- Section 731 of the National Defense Authorization Act for Fiscal Year 2020 amended the Military Claims Act (10 USC Chapter 163) by adding section 2733a to allow members of the uniformed services (or their representatives) to file claims for compensation for personal injury or death caused by the medical malpractice of a DoD health care provider.
- Claims are adjudicated through an administrative process under rules and procedures of a DoD regulation, adopted via an interim final rule.
- The rules and procedures will be based primarily on a number of detailed provisions in the statute.
- Section 731(b) requires an “interim briefing” to the Armed Services Committees “on the development of regulations” for the new authority.

# ACTIONS TAKEN TO DATE

- **Working Group**

- Following the December 2019 enactment of section 731, the DoD General Counsel, in January 2020, established a DoD working group to develop the implementing regulations.
- Working group includes representatives of the General Counsels/Judge Advocates General of the Army, Navy, and Air Force, General Counsel of the Defense Health Agency, representatives of several components of the Office of Under Secretary of Defense for Personnel and Readiness and the DoD Office of General Counsel.

- **Notice of Claims Offices' Intake of Claims**

- On Jan. 1, 2020 (the statutory effective date) Army, Navy, and Air Force Claims offices began recording receipt of claims (to document meeting the timely filing requirement).
- Claims are being held in abeyance pending issuance of interim final rule.

- **Drafting of Interim Final Rule well underway**

- Working group developing implementation of a number of unique statutory provisions.

# IDENTIFYING UNIFORM NATIONAL STANDARDS

- **A unique legal requirement.**
  - The Federal Tort Claims Act (FTCA) applies the law of the State where the tort occurred.
  - The new section 2733a(f) requires that the DoD regulations include “uniform standards consistent with generally accepted standards used in a majority of states in adjudicating claims under” the FTCA “without regard to the place of occurrence.”
  - Identifying a set of national standards, rather than differing State-by-State rules, is appropriate in view of the unique Federal nature of military service.
- **Matters to be addressed in uniform national standards.**
  - Determining duty, breach of duty, causation, and harm in any given case.
  - Calculating economic damages and applying collateral source rules for other compensation provided by the United States.
  - Calculating non-economic damages and determining whether there is a cap.

# CLAIMS PROCEDURES TO BE ADDRESSED IN REGULATIONS

- **Who may file a claim?**
  - A member of a uniformed service (or representative) allegedly harmed incident to service by medical malpractice (10 USC 2733a(b)(1)).
  - May include a Reserve Component member if alleged malpractice occurred during Federal duty period (10 USC 2733a(i)(3)).
- **What DoD health care providers and facilities are covered?**
  - DoD military, civilian, or personal services contractor personnel acting within the scope of their employment (10 USC 2733a(i)(2)).
  - Covered facilities are DoD medical centers, community hospitals, or ambulatory care centers (10 USC 2733a(i)(1)).
- **How to file a claim?**
  - May use the standard claim form (SF-95, which is also used for FTCA claims) or any written filing.
- **When must a claim be filed?**
  - A claim must be presented to DoD in writing within 2 years after the claim accrues, except for claims filed during calendar year 2020, it is 3 years (10 USC 2733a(b)(4)).

# CLAIMS PROCEDURES (CONTINUED)

- **Can a claim under the new authority be coupled with other claims?**
  - A claim may only be paid if it is not allowed to be settled and paid under any other provision of law, such as the FTCA (10 USC 2733a(b)(5)).
- **What records will DoD consider?**
  - All submissions presented by claimant, which may include information from their medical records, outside medical opinions and information on harm.
  - Confidential (under 10 USC 1102) peer review medical quality assurance records may be considered by DoD but not disclosed outside DoD.
  - Other available government records pertinent to disability and compensation under the comprehensive military compensation program applicable to all cases of disability or death of military members.
- **Who has the burden of proof?**
  - A claimant must substantiate the claim (10 USC 2733(b)(6)).
- **What harm is DoD liable for?**
  - DoD is liable for the portion of compensable injury, loss, or damages attributable to the medical malpractice of a DoD health care provider (10 USC 2733a(c)(1)).
  - If other causes contributed to the personal injury or death of the member, whether pre-existing, concurrent, or subsequent to the health care, the potential amount of compensation will be reduced in proportion to other causes.
  - DoD is not liable for attorney's fees of the claimant (10 USC 2733a(c)(2)).

# CLAIMS PROCEDURES (CONTINUED)

- **What is the relevance of final DoD or VA disability determinations?**
  - Under 10 U.S.C. 1216a, DoD must use the Veterans Affairs Schedule for Rating Disabilities (38 C.F.R. Part 4) for purposes of the DoD Disability Evaluation System.
  - This provides a system used by both DoD and VA of medical examinations and hearings and appeals to determine degree of disability, with emphasis on occupational impact.
- **How long will it take for adjudication of claims?**
  - The time period for administrative action on FTCA claims under 28 U.S.C. 2675(a) – 6 months – provides an appropriate standard for an initial determination.
- **Can claimants appeal if they are not satisfied?**
  - The statute provides that the regulations may include an administrative appeals process as DoD considers appropriate (10 U.S.C. 2733a(f)(2)(A)(iii)).
- **Is a claims decision final?**
  - The adjudication and settlement of a claim under this new authority is final and conclusive (10 U.S.C. 2735).
  - Unlike the FTCA, the Military Claims Act (of which this new authority is a part) does not provide any Federal court jurisdiction.

# RECAP: NEW CLAIMS AUTHORITY SUPPLEMENTS

## OTHER VITAL DOD ACTIVITIES

- **Compensation:**

- Federal law provides a comprehensive system of compensation for military members and their families in cases of death or disability incurred in military service, applicable to all causes of death or disability – whether combat, training mishap, household accident, natural disease, or any other cause.
- In cases of death or very serious injury to a member for any cause, the comprehensive compensation system generally provides financial support, family health coverage, and other benefits for a lifetime, at a total value often in the millions of dollars.
- New claims authority provides the possibility of additional compensation in certain cases of medical malpractice.

- **Accountability:**

- DoD regulations require reporting to the National Practitioner Data Bank (NPDB) and State licensing boards of health care providers who fail to meet the standard of care in cases resulting in payments under a tort claim or the military compensation system.
- NPDB reports are used by the American health care system in making employment and clinical privileging decisions.
- Consistent with 10 USC 2733a(e), standard of care determinations for payable claims under the new claims authority will be used by the Defense Health Agency for clinical quality management and reported to the NPDB and State boards.

- **Transparency:**

- The Healthcare Resolutions Program is an independent, neutral, and confidential system that promotes full disclosure of factual information – including information involving adverse events and outcomes – and mediation of clinical conflicts.
- DoD rules provide that patients have a right to be heard in health care quality reviews of clinical practice.
- The new claims authority provides another opportunity for any member of the uniformed services who believes he or she has been harmed by medical malpractice by a DoD health care provider to be heard.



# UPCOMING ACTIONS

- **Issuance of interim final rule**
  - At the completion of DoD coordination and OMB clearance.
  - Target date: not later than September 30, 2020.
- **Public comment period**
  - Public comments will be considered and a final rule issued within one year thereafter (10 USC 2733a(f)(3)).
- **Delegations of authority**
  - DoD General Counsel will delegate authorities for initial claims decisions and administrative appeals.
  - Will establish mechanisms to monitor claims adjudications and identify opportunities for process improvement.
- **Annual Reports to Armed Services Committees**
  - DoD will provide annual reports as required by 10 USC 2733a(h).