

# LEGAL SERVICES

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## MEMORANDUM

February 26, 2014

**SUBJECT:** Questions regarding HB 269  
(Work Order No. 28-LS1251\N)

**TO:** Representative Wes Keller  
Attn: Ernest Prax

**FROM:** Megan A. Wallace   
Legislative Counsel

This memorandum serves as a response to a list of questions you sent regarding HB 269.

*1. Does the bill affect AS 08.01.063, Military Courtesy Licenses?*

No, not specifically, but the bill may create some ambiguity as it relates to the application of AS 09.65.300(a) to temporary courtesy license holders, since the bill only specifically includes one type of temporary courtesy license in the definition of "health care provider." Because the bill only includes one type of temporary courtesy license, a court may interpret the change to mean that other types of temporary courtesy licenses are excluded from AS 09.65.300(a). Military courtesy licenses may not fall under AS 08.01.063, so there is a chance a court could find that those license holders are not subject to AS 09.65.300(a).

Nevertheless, a health care provider issued a temporary courtesy license under AS 08.01.063 is still "licensed in this state to provide health care services." While, in my opinion, AS 09.65.300(a) would still apply to a health care provider issued a temporary courtesy license under AS 08.01.063, regardless of the changes made by HB 269, so long as the provider met the requirements of AS 09.65.300(a)(2) - (a)(5), it is uncertain whether a court would reach the same conclusion.

Please keep in mind that AS 08.01.063 provides for a temporary courtesy license to a spouse of an active duty member of the armed forces under certain circumstances and is not limited to health care providers. AS 09.65.300(a) would only be applicable to persons issued a temporary courtesy license under AS 08.01.063 who were also health care providers.

*2. Temporary licenses can be granted under AS 08.20.160, AS 08.20.163, AS 08.64.270, AS 08.64.275 and AS 08.68.210. Will they be affected by HB 269?*

Not specifically, but as stated above, the bill may create some ambiguity as it relates to inclusion of these temporary courtesy licenses under AS 09.65.300(a), since the bill only

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specifically includes temporary courtesy licenses issued under AS 08.01.062 in the definition of "health care provider." As explained in response to question 1, there is a chance that a court could interpret the language of HB 269 to mean that only persons holding temporary courtesy licenses issued under AS 08.01.062 are eligible for the immunity provided under AS 09.65.300 and that other temporary courtesy license holders are not.

*3. Since HB 269 alters AS 08.01.062 and the licenses issued are under regulation for various boards that issue courtesy licenses -- 12 AAC 28.955, 12 AAC 16.205, 12 AAC 40.045 and 12 AAC 44.318 -- will the effect be confined to those licenses issued solely as courtesy licenses?*

HB 269 does *not* alter AS 08.01.062. HB 269 merely attempts to clarify the definition of "health care provider" under AS 09.65.300(a).

Temporary courtesy licenses issued to persons other than nonresidents may be affected, as HB 269 creates an ambiguity as to temporary courtesy licenses issued outside of AS 08.01.062 (providing the Department of Commerce, Community, and Economic Development the authority to establish criteria by regulation for the issuing of temporary courtesy licenses "to nonresidents who enter the state so that, on a temporary basis, they may practice the occupation regulated by the board or the department"). The effect, however, is limited to whether AS 09.65.300 applies to those other temporary courtesy license holders.

HB 269 should have no effect on the regulation of any temporary courtesy licenses.

*4. If the Answer to 2 is yes, will this be resolved by dropping "temporary" from page 1, line 10 in HB 269?*

No. By only dropping "temporary" from this line, there is still some ambiguity relating to the application of AS 09.65.300 to those holding "courtesy licenses" under a provision other than AS 08.01.062. In my opinion, an amendment to AS 09.65.300(a)(1) is unnecessary altogether because a health care provider who is issued any type of temporary courtesy license would already be considered a licensed health care provider under existing AS 09.65.300(a)(1).

If an amendment is still desired and the intent is to make it clear that the immunity provided in AS 09.65.300(a)(1) is to apply to any health care provider holding any temporary courtesy license, then I would recommend revising the language in sec. 1 to read: **"in this paragraph, "health care provider" includes a health care provider who holds a temporary license or permit."**

If the intent is to permit the application of AS 09.65.300 to temporary courtesy license holders, but only if the temporary courtesy license is issued under AS 08.01.062, then different language should be used to make this intent clear.

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*5. What protection do military health care providers have under the Federal Claims Tort Act? If they are practicing off base, under a courtesy license and not in an official capacity, what protection would they have under the Federal Claims Tort Act?*

I am uncertain what "protection" you are referring to.

The bill at issue provides protections to health care providers in the form of immunity from civil damages where health care services are provided for free and the other requirements of AS 09.65.300(a)(1) - (a)(5) are met.

The Federal Claims Tort Act provides that U.S. district courts "shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. sec. 1346 (b)(1).

Using the hypothetical provided, it is my opinion that if the military health care provider was not practicing in an official capacity, he or she would likely not be considered to be "acting within the scope of his office or employment," and the U.S. district courts would not have exclusive jurisdiction over any such claim.

The Federal Claims Tort Act also provides the exclusive remedy for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment. *See* 28 U.S.C. sec. 2679. No other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim is permitted. *Id.* Again, however, if the health care provider is not acting within the scope of his office or employment, the Federal Claims Tort Act will likely offer no protection.

The opinions expressed above are the product of a short review of the Federal Claims Tort Act. If an individual federal employee has questions as to whether they are subject to or protected by the Federal Claims Tort Act, I highly recommend that they consult their supervisor or an attorney in the applicable federal office or department.

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