
Frequently asked questions about the Kansas Health Care Provider Insurance Availability Act

General Questions

Q: Why are health care providers required to comply with the Fund law?

A: The original Health Care Provider Insurance Availability Act was enacted in 1976 at a time when many physicians and other health care providers could not obtain adequate or affordable professional liability insurance coverage. The Kansas Medical Society, the Kansas Hospital Association, and the Kansas Commissioner of Insurance were instrumental in persuading the Legislature to pass the laws that became the Health Care Provider Insurance Availability Act. The three principal features of the Act have always been: (1) a requirement that all health care providers, as defined under K.S.A. 40-3401, maintain professional liability insurance coverage as a condition of active licensure, (2) creation of a joint underwriting association, the Health Care Provider Insurance Availability Plan, to provide professional liability coverage for those health care providers who cannot purchase coverage in the commercial insurance market, and (3) creation of the Health Care Stabilization Fund (HCSF) to, (a) provide excess coverage above the primary coverage purchased by health care providers, and (b) to serve as reinsurer of the Availability Plan.

The Availability Act was specifically cited by the Kansas Supreme Court in the *Miller v. Johnson* decision published in October 2012. The Court upheld the Legislature's authority to replace a common law rule with a statutory limit on noneconomic damages in personal injury actions. The Court's media release said, "The decision relied in part on the statutory cap's relationship to the Health Care Provider Insurance Availability Act. That Act requires that all health care providers maintain liability insurance with designated levels of excess coverage."

Q: Who is required to comply with the Health Care Provider Insurance Availability Act?

A: Any profession or facility defined as a "health care provider" under K.S.A. 40-3401 is required to comply with the Act. There are numerous health care providers defined as such in K.S.A. 40-3401(f).

Specified professionals licensed to practice in Kansas: chiropractors, nurse anesthetists, nurse midwives, physicians, physician assistants, and podiatrists are required to comply with the Act as a condition of active licensure.

Specified facilities licensed to operate in Kansas: ambulatory surgery centers, assisted living facilities, community mental health centers, hospitals (critical access, general, and special), nursing homes, and residential health care facilities are required to comply with the Act as a condition of licensure. One unique psychiatric hospital is also required to comply.

Specified business entities formed in Kansas such as professional corporations, limited liability companies, and partnerships organized by defined health care providers for the purpose of providing health care services are required to comply with the Act.

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Q: Are dentists, optometrists, or pharmacists required to comply with the Health Care Provider Insurance Availability Act?

A: No. There are a few dentists certified by the Kansas Board of Healing Arts to administer anesthesia who are required to comply, but generally, dentists are not required to comply. For a number of years optometrists and pharmacists were required to comply and for that reason, they are listed in K.S.A. 40-3401(f). Another section in the Act discontinues compliance for optometrists and pharmacists as of July 1, 1991.

Q: I am a health care provider but my profession is not included in your list. Can I participate in HCSF coverage?

A: No. Only those professionals, facilities, and business entities specifically defined as health care providers under K.S.A. 40-3401 are eligible for HCSF coverage.

Requirements

Q: What is required of a health care provider in order to comply with the Availability Act?

A: The principal requirements include: (1) professional liability insurance (PLI) coverage purchased from a company authorized by the Kansas Commissioner of Insurance to sell PLI to health care providers. These companies are often referred to as “admitted carriers.” The PLI policy must be a claims-made policy and there must be separate limits of coverage (at least \$200,000 per claim subject to not less than \$600,000 annual aggregate coverage) for each individual health care provider insured under the PLI policy. If the health care provider is a Kansas resident, the insurance company is responsible for collecting the appropriate surcharge payment and is responsible for submitting a notice of basic coverage to the HCSF Board of Governors within 30 days of the effective date of the PLI policy.

The health care provider must also choose one of three levels of coverage under the Health Care Stabilization Fund. For a number of reasons, most health care providers purchase a basic PLI policy with \$200,000 per claim, \$600,000 annual aggregate limits and select the \$800,000 per claim, \$2.4 million annual aggregate coverage under the HCSF. This provides total coverage amounting to \$1.0 million per claim subject to \$3.0 million annual aggregate coverage for each health care provider. There are, however, other possible combinations of coverage allowed.

A non-resident health care provider may be insured by a company that is not an admitted carrier, but only if the non-admitted insurance company has submitted a properly executed declaration of compliance with the Health Care Provider Insurance Availability Act. Then the non-resident health care provider may be eligible to render professional services in Kansas. The individual non-resident health care provider is responsible for submitting a non-resident certification with a copy of the PLI certificate of insurance as well as the surcharge payment to the HCSF Board of Governors.

Q: I provide telemedicine services from out of state and do not actually practice in Kansas. Am I required to comply with the Kansas laws pertaining to professional liability insurance?

A: If you read images, read slides, or otherwise provide telemedicine services to a patient located in Kansas, then you must have an active license to render professional services in Kansas regardless of where you are located. In that case, you must also

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comply with Kansas laws governing professional liability insurance and participation in Health Care Stabilization Fund coverage.

Q: Can multiple health care providers be covered under a single policy?

A: Yes. Whether the health care providers are individual professionals or separately licensed facilities, a single policy covering multiple health care providers may be issued as long as the policy provides separate limits of coverage for each insured health care provider. The limits cannot be less than \$200,000 per claim and cannot be less than \$600,000 annual aggregate for each licensed health care provider. There cannot be shared limits and the insurer must collect and remit an appropriate HCSF surcharge for each insured health care provider.

Q: I am an out-of-state health care provider and I already have a liability insurance policy that provides \$1.0 million per claim coverage. Why should I also be required to pay for additional coverage via the HCSF?

A: Some medical professional liability insurance policies contain an endorsement that stipulates different coverage limits when the insured health care provider is rendering professional services in a so-called “Fund State” like Kansas. If your policy has such a provision, your coverage under the policy will become \$200,000 per claim when you are practicing in Kansas. If you are absolutely certain that your policy will provide adequate liability coverage when you are practicing in Fund States like Kansas, you can select the minimum level of HCSF coverage in order to achieve compliance. The minimum HCSF coverage level is \$100,000 per claim subject to not more than \$300,000 annual aggregate coverage.

Q: Can a health care provider purchase excess professional liability insurance coverage?

A: Yes. For example, a health care provider could purchase a claims-made PLI policy with limits of \$200,000 per claim/\$600,000 annual aggregate issued by an admitted carrier, then select the \$100,000 per claim/\$300,000 annual aggregate level of HCSF coverage, and also purchase an excess policy to cover liabilities exceeding \$300,000 per claim and \$900,000 annual aggregate.

Q: If for some reason a Kansas resident health care provider cannot obtain the basic professional liability insurance coverage required for compliance with the Availability Act, can the health care provider purchase liability insurance from a non-admitted insurance company?

A: No. The Legislature created the Health Care Provider Insurance Availability Plan (the Plan) to assure that all Kansas health care providers will always have access to the basic professional liability insurance coverage required under the Act. The Plan is independent from the Health Care Stabilization Fund. The Plan is operated by a servicing carrier that is similar to a third party administrator. To assure that the Plan does not become competitive with commercial insurance companies, the Plan adopts premium rates that are higher than commercial premium rates. Furthermore, the Plan normally requires two declination letters from admitted insurance companies before it will insure a health care provider. To obtain contact information for the current servicing carrier, send an email message to hcsf@ks.gov.

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Self-Insurance**Q: Can a health care provider be self-insured?**

A: Yes. But the statute allowing self-insurance is very limited. In order to be eligible to apply for permission to self-insure, the individual health care provider must have an annual premium of \$100,000 or more for the basic \$200,000 per claim/\$600,000 annual aggregate coverage. If the health care provider is eligible to apply for a certificate of self-insurance, the health care provider must meet rigorous standards in order to be approved by the Board of Governors. Among other things, the health care provider must submit documentation that the health care provider has sufficient financial resources including assets reserved exclusively for payment of professional liability claims, and also has appropriate procedures established to process and handle claims.

Q: Can a non-resident health care provider be self-insured?

A: No. A non-resident health care provider may be insured by a non-admitted insurance company that has signed and submitted a declaration of compliance with the Health Care Provider Insurance Availability Act, but cannot be covered by a self-insurance plan.

Q: If a health care system employs numerous health care providers and the premium for the group exceeds \$100,000, would it be possible to self-insure the group?

A: No. The Kansas statute governing self-insurance of health care providers defines a health care system as common ownership of two or more licensed facilities. It does not include health care professionals.

Tail Coverage**Q: When a health care provider retires or otherwise discontinues his or her professional services in Kansas, can the health care provider obtain an extended reporting endorsement (tail coverage) from the Health Care Stabilization Fund?**

A: One of the advantages of coverage from the HCSF is automatic tail coverage when a health care provider becomes inactive. The tail coverage is statutory; there is no insurance policy issued. The amount of coverage is equal to the level of HCSF coverage in effect on the date of the incident giving rise to the malpractice claim, plus the amount of basic coverage required under K.S.A. 40-3402. For most health care providers, this means they will have automatic tail coverage of \$1.0 million per claim when the health care provider becomes inactive. A health care provider should convert his or her license to inactive status at the same time they discontinue their basic PLI policy in order to assure HCSF tail coverage. Similarly, a facility that discontinues operations should cancel its Kansas license in order to assure tail coverage.

Q: How long will my tail coverage last?

A: HCSF tail coverage is continuous and unless the Legislature amends or repeals Kansas law, it will not expire. There are statutes of limitation in Kansas that determine how long a health care provider is liable for care provided to a patient.

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Licensure

Q: I am planning to retire and my license will expire not long thereafter. Can I just allow my license to lapse by not renewing it?

A: Yes. But it would be better to coordinate inactivation of your license with the date of cancellation of your basic professional liability insurance policy. It is easy to inactivate a license and there is no fee. Then the inactive license will be cancelled if it is not renewed.

Q: I am in the process of relocating to Kansas and I have applied for an active license. The licensing agency informs me that I need proof of professional liability insurance in order to be licensed, but the insurance company informs me that I need an active license in order to obtain a policy. What can I do?

A: Apply for the basic insurance coverage and obtain a letter of intent from the insurance company. Send the letter of intent to the HCSF Compliance Section so we can verify that the insurer has been approved by the Insurance Commissioner. If the company is an approved insurer, we will forward the letter of intent to the licensing agency. The licensing agency will accept the letter of intent for purposes of processing your application and if all other requirements are met, will issue an active license. The insurer will then make the insurance policy effective on the same date as your active license to practice in Kansas.

Q: I am relocating out of state. Can I maintain my Kansas license just in case I might return to practice in Kansas again?

A: Because health care providers are required to comply with the Health Care Provider Insurance Availability Act as a condition of active licensure to render professional services in Kansas, there are two options available.

1. You can inactivate your license as of the date you discontinue your professional liability insurance policy, thereby assuring that you will receive the benefit of tail coverage via the HCSF. This is not the same as cancelling your license. If you decide to resume your practice in Kansas, you can convert your inactive license back to active status by showing evidence of continuing education credits and arrangements for professional liability insurance coverage. Some health care providers choose to convert their active license to exempt status which results in the same tail coverage as conversion to inactive status.
2. You can maintain an active license if you also maintain compliance after becoming a non-resident. In this case, tail coverage would be unnecessary because your compliance would be continuous. It is important to know that when you become a non-resident, the HCSF will continue to cover any claims that may arise as a result of professional services rendered when you were in compliance as a Kansas resident. But when you are a non-resident, the HCSF will cover only those claims that arise as a result of your practice in the State of Kansas.

Facilities**Q: Are nursing facilities for mental health required to comply with the Health Care Provider Insurance Availability Act?**

A: No. Because the Legislature did not specifically define nursing facilities for mental health as health care providers under the Availability Act, nursing facilities for mental health are not eligible for coverage under the Health Care Stabilization Fund.

Q: Are separate insurance policies required for general liability versus professional liability?

A: No. A single policy can provide both types of coverage as long as the type of coverage and associated limits are clearly identified. In addition, the policy can provide coverage for health care providers as defined under K.S.A. 40-3401(f) and separately insure other professional staff members who are not defined health care providers. Such policies cannot, however, stipulate a total aggregate policy limit that could interfere with the minimum limits for those health care providers insured under the policy. Furthermore the separate limits of coverage for each licensed health care provider must be identified in the policy.

Q: If a health care provider is a facility that employs different types of employees, what kind of coverage is provided pursuant to the Health Care Provider Insurance Availability Act?

A: The Act stipulates that the Health Care Stabilization Fund is liable for “Any amount due from a judgment or settlement which is in excess of the basic coverage” of a health care provider “for any personal injury or death arising out of the rendering of or the failure to render professional services.” The Act also stipulates that the amount of HCSF coverage is the amount that was selected by the health care provider at the time of the incident that resulted in a claim. The phrase “professional services” is defined under the Act to mean “patient care or other services authorized under the act governing licensure of a health care provider.” In other words, the HCSF does not cover general liability. Furthermore, there are specific provisions in the Act that exclude coverage for sexual acts or criminal acts.

If a health care provider facility employs nurses, therapists, or other professional staff that are not defined health care providers under K.S.A. 40-3401(f), and the facility is named as a defendant as a result of alleged negligence by a non-health care provider, then the HCSF will cover the vicarious liability of the health care provider facility. If, however, an individual non-health care provider staff person is named as a defendant, the non-health care provider is not covered by the HCSF. Similarly, because officers and administrators are not defined health care providers, if they are named individually as defendants in a professional liability claim, the HCSF cannot provide coverage. If the health care provider facility is named as a defendant as a result of alleged negligence by an officer or administrator that results in injury to a patient, then the HCSF will cover the vicarious liability of the facility. For these reasons, many health care provider entities purchase separate professional liability coverage for health care staff who are not defined health care providers under K.S.A. 40-3401(f).

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Q: Our client has sold their facility to a new owner. How does our client obtain tail coverage?

A: Nothing in the Health Care Provider Insurance Availability Act precludes the seller from purchasing an extended reporting endorsement or tail coverage policy. A seller may want to obtain coverage for any claim that exceeds the buyer's policy limits. The purchase of an extended reporting endorsement or tail coverage policy does not, however, relieve the buyer of the responsibility imposed by K.S.A. 40-3402(a) to purchase coverage for "claims made during the term of the policy which were incurred during the term of such policy or during the prior term of a similar policy." Unless a health care provider facility is actually closed and the license cancelled, there is no tail coverage provided by the HCSF.

Q: Are the owners, lessees, operating companies, management firms or similar entities involved in operation of a health care provider facility covered by the Health Care Stabilization Fund?

A: No. The Health Care Stabilization Fund is liable for "Any amount due from a judgment or settlement that is in excess of the basic coverage" of a health care provider "for any personal injury or death arising out of the rendering of or the failure to render professional services." The phrase "professional services" is defined under the Act to mean "patient care or other services authorized under the act governing licensure of a health care provider." Owners, lessees, operating companies, management firms and similar entities are not licensed by the State of Kansas for purposes of rendering patient care, nor are they identified in the definition of "health care provider" under the Act.

Business Entities

Q: How do I determine whether a business entity meets the definition of health care provider and is required to participate in the Fund?

A: Send an email message to hcsf@ks.gov. Provide the name of the business entity, explain your inquiry, and request assistance from the HCSF Legal Section.

Q: How do I file an amendment to create a Professional Limited Liability Company?

A: In order for a Limited Liability Company (hereafter LLC) to be eligible for Health Care Stabilization Fund coverage, it must have a professional purpose and all of the members must be defined health care providers. Therefore, the entity must be a Professional LLC. If you have formed a General LLC rather than a Professional LLC, an amendment form is available on the Kansas Secretary of State's website. Form "CL" is available at URL http://www.kssos.org/forms/business_services/CL.pdf

If you have questions about filing an amendment, contact your legal counsel or you can contact the Business Services Department in the Secretary of State's office at 785-296-4564. In general, you will indicate you wish to form a Professional LLC, set forth a professional purpose, and attach an original certificate from the appropriate regulatory board indicating the members have active Kansas licenses and the corporate name has been approved. The amendment, filing fee, and original certificate are mailed to the Secretary of State's office.

Q: Who do I contact to obtain the certificate from the regulatory agency?

A: To obtain a certificate from the Board of Healing Arts, call 785-296-7413 and ask to speak with a staff member in the Office of General Counsel. To obtain a certificate from the Board of Nursing, call 785-296-4929.

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Miscellaneous**Q: How do I obtain verification of my compliance with the Fund law?**

A: Contact the HCSF office by sending an email message to hcsf@ks.gov. Provide your license number as well as your full name just in case there is another health care provider with the same name.

Q: My principal employer paid the premium for a basic policy as well as the HCSF surcharge and informs me that the policy will not cover any outside employment I engage in. Can I purchase a separate policy to cover my moonlighting jobs?

A: First you should review your employment contract to determine if moonlighting is prohibited. There is nothing in the Health Care Provider Insurance Availability Act that prevents the purchase of more than one basic policy, but it is unnecessary. The basic policy must cover all claims made during the policy period. Therefore, if a health care provider is covered under two policies, both policies are liable for any claim that arises during the period when both policies are in effect. For that reason, it may be advisable to make arrangements with the employers to share the cost of premiums and surcharges. Another, perhaps better, option would be for you to purchase an independent policy and ask the employers to reimburse you for part of your expense for premium and surcharge.

Q: How do I increase or decrease my HCSF coverage?

A: It is not possible for an insurer to adjust Fund coverage levels upon renewal of the basic policy. The health care provider must submit a separate request. There are forms available at the HCSF website or you can contact the office at hcsf@ks.gov and ask for either of the two forms. Fund coverage limits can be decreased at any time, but higher coverage limits require approval by the HCSF Board of Governors.

Q: Is there any way I can obtain an exemption from the compliance requirements?

A: Yes. If you are no longer rendering professional services in Kansas, you may convert your active license to exempt or inactive status. Similarly, if your facility has discontinued operations, you can cancel your Kansas license to operate. In addition, the HCSF Board of Governors has statutory authority to grant temporary exemptions but only if there are exceptional circumstances. Requests for temporary exemptions must be in writing and the health care provider must sign an affidavit assuring the Board of Governors that the health care provider will not render professional services during the period of exemption.

Q: Do insurance agents earn commissions on the entire amount of professional liability coverage?

A: No. There are no commissions earned on the amount of excess HCSF coverage. The Legislature did, however, make provision for commissions on professional liability insurance coverage obtained from the Health Care Provider Insurance Availability Plan.

Q: Where can I obtain more information about the Health Care Provider Insurance Availability Act?

A: You can obtain a significant amount of information, including instructions and forms, from the HCSF website at <https://hcsf.kansas.gov/>. Or you can send an email message to hcsf@ks.gov and it will be routed to the appropriate member of the staff.

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