

MEDICAL INJURY PAYMENT AMENDMENTS

2007 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Paul Ray

Senate Sponsor: _____

LONG TITLE**General Description:**

This bill enacts the Utah Birth-Related Neurological Compensation Association Act.

Highlighted Provisions:

This bill:

- ▶ creates the Utah Birth-Related Neurological Compensation Association Act;
- ▶ makes legislative findings;
- ▶ defines terms;
- ▶ creates an exclusive remedy;
- ▶ provides that an administrative law judge determines claims;
- ▶ provides for the filing of claims and responses;
- ▶ tolls the statute of limitations;
- ▶ provides for hearings, parties, and discovery;
- ▶ creates presumptions, and a process for determining claims;
- ▶ provides for the award of damages;
- ▶ establishes the:
 - conclusiveness of the award;
 - enforcement of the award;
 - limitations on claims;
 - assessment to fund the compensation plan; and
 - operation of the plan;



- ▶ creates the compensation association and membership of the association; and
- ▶ requires notice to patients of the Utah birth-related neurological injury compensation plan.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:**ENACTS:**

78-14b-101, Utah Code Annotated 1953

78-14b-102, Utah Code Annotated 1953

78-14b-103, Utah Code Annotated 1953

78-14b-104, Utah Code Annotated 1953

78-14b-105, Utah Code Annotated 1953

78-14b-106, Utah Code Annotated 1953

78-14b-107, Utah Code Annotated 1953

78-14b-108, Utah Code Annotated 1953

78-14b-109, Utah Code Annotated 1953

78-14b-110, Utah Code Annotated 1953

78-14b-111, Utah Code Annotated 1953

78-14b-112, Utah Code Annotated 1953

78-14b-113, Utah Code Annotated 1953

78-14b-114, Utah Code Annotated 1953

78-14b-115, Utah Code Annotated 1953

78-14b-116, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78-14b-101** is enacted to read:

CHAPTER 14b. UTAH BIRTH-RELATED NEUROLOGICAL INJURY

COMPENSATION ACT

78-14b-101. Title.

59 This chapter is known as the "Utah Birth-Related Neurological Injury Compensation
60 Act."

61 Section 2. Section **78-14b-102** is enacted to read:

62 **78-14b-102. Legislative findings and intent.**

63 (1) The Legislature makes the following findings:

64 (a) Physicians practicing obstetrics are high-risk medical specialists for whom
65 malpractice insurance premiums are very costly, and recent increases in such premiums have
66 been greater for obstetric physicians than for other physicians.

67 (b) Any birth other than a normal birth frequently leads to a claim against the attending
68 physician; consequently, such physicians are among the physicians most severely affected by
69 current medical malpractice problems.

70 (c) Because obstetric services are essential, it is incumbent upon the Legislature to
71 provide a plan designed to result in the stabilization and reduction of malpractice insurance
72 premiums for providers of obstetric services in Utah.

73 (d) The costs of birth-related neurological injury claims are particularly high and
74 warrant the establishment of a limited system of compensation regardless of fault. The issue of
75 whether birth-related injury claims are covered by this act must be determined exclusively in an
76 administrative proceeding.

77 (2) It is the intent of the Legislature to provide compensation, on a no-fault basis, for a
78 limited class of catastrophic injuries that result in unusually high costs for custodial care and
79 rehabilitation. This plan shall apply only to birth-related neurological injuries.

80 Section 3. Section **78-14b-103** is enacted to read:

81 **78-14b-103. Definitions.**

82 As used in this chapter:

83 (1) "Association" means the Utah Birth-Related Neurological Injury Compensation
84 Association established in Section 78-14b-115 to administer the Utah Birth-Related
85 Neurological Injury Compensation Plan and the plan of operation established in Section
86 78-14b-114.

87 (2) "Birth-related neurological injury":

88 (a) means injury to the brain or spinal cord of a live infant weighing at least 2,500
89 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at

least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired;

(b) applies to live births only; and

(c) does not include disability or death caused by genetic or congenital abnormality.

(3) "Claimant":

(a) means any person who files a claim pursuant to Section 78-14b-106 for compensation for a birth-related neurological injury to an infant; and

(b) includes:

(i) a claim filed by any legal representative on behalf of an injured infant; and

(ii) in the case of a deceased infant, a claim filed by an administrator, personal representative, or other legal representative of the deceased infant.

(4) "Administrative law judge" means an administrative law judge appointed by the Division of Occupational and Professional Licensing.

(5) "Division" means the Division of Occupational and Professional Licensing within the Department of Commerce.

(6) "Hospital" means any hospital licensed under Title 26, Chapter 21, Health Care Facility Licensing and Inspection Act.

(7) "Participating physician":

(a) means a physician:

(i) licensed under Title 58, Chapter 67, Utah Medical Practice Act, or Chapter 68, Utah Osteopathic Medical Practice Act;

(ii) who practices obstetrics or performs obstetrical services either full time or part time; and

(iii) who had paid or was exempted from payment at the time of the injury the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury occurred; and

(b) does not apply to any physician who practices medicine as an officer, employee, or agent of the Federal Government.

(8) "Plan" means the Utah Birth-Related Neurological Injury Compensation Plan established under this chapter.

(9) "Family member" means a father, mother, or legal guardian.

(10) "Family residential or custodial care":

(a) means care normally rendered by trained professional attendants which is beyond the scope of child care duties, but which is provided by family members; and

(b) is limited to the extent that:

(i) family members who provide nonprofessional residential or custodial care may not be compensated under this act for care that falls within the scope of child care duties and other services normally and gratuitously provided by family members;

(ii) family residential or custodial care shall be performed only at the direction and control of a physician when such care is medically necessary; and

(iii) reasonable charges for expenses for family residential or custodial care provided by a family member shall be determined as follows:

(A) if the family member is not employed, the per-hour value equals the federal minimum hourly wage;

(B) if the family member is employed and elects to leave that employment to provide such care, the per-hour value of that care shall equal the rates established by Medicaid for private duty services provided by a home health aide;

(C) a family member or a combination of family members providing care in accordance with this definition may not be compensated for more than a total of 10 hours per day;

(D) family care is in lieu of professional residential or custodial care, and no professional residential or custodial care may be awarded for the period of time during the day that family care is being provided; and

(E) the award of family residential or custodial care as defined in this section shall not be included in the current estimates for purposes of Subsection 78-14b-114(9)(c).

Section 4. Section **78-14b-104** is enacted to read:

78-14b-104. Utah Birth-Related Neurological Injury Compensation Plan --
Exclusiveness of remedy.

(1) There is established the Utah Birth-Related Neurological Injury Compensation Plan for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims. The plan shall apply to births occurring on or after January 1, 2008, and shall be

administered by the Utah Birth-Related Neurological Injury Compensation Association.

(2) (a) The rights and remedies granted by this plan on account of a birth-related neurological injury shall exclude all other rights and remedies of an infant, the infant's personal representative, parents, dependents, and next of kin, at common law or otherwise, against any person or entity directly involved with the labor, delivery, or immediate postdelivery resuscitation during which such injury occurs, arising out of or related to a medical negligence claim with respect to such injury.

(b) A civil action under the provisions of Chapter 14, Utah Health Care Malpractice Act, is not foreclosed where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property, provided that the suit is filed prior to and in lieu of payment of an award under this chapter.

(c) A suit filed under the provisions of Subsection (2)(b) shall be filed before the award of the division becomes conclusive and binding as provided for in Section 78-14b-111.

(3) Sovereign immunity is hereby waived on behalf of the Utah Birth-Related Neurological Injury Compensation Association solely to the extent necessary to assure payment of compensation as provided in Section 78-14a-110.

Section 5. Section **78-14b-105** is enacted to read:

78-14b-105. Administrative law judge to determine claims.

(1) The administrative law judge shall hear and determine all claims filed pursuant to this chapter, and shall exercise the full power and authority granted to the judge in an administrative procedure under Title 63, Chapter 46b, Administrative Procedures Act, as necessary, to carry out the purposes of this chapter. The administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable.

(2) (a) A civil action may not be brought until the determinations under Section 78-14b-109 have been made by the administrative law judge.

(b) If the administrative law judge determines that the claimant is entitled to compensation from the association, or if the claimant accepts an award issued under Section 78-14b-110 no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of Section 78-14b-104.

(c) If it is determined that a claim filed under this act is not compensable, neither the doctrine of collateral estoppel nor res judicata shall prohibit the claimant from pursuing any

and all civil remedies available under common law and statutory law.

(3) The findings of fact and conclusions of law of the administrative law judge shall not be admissible in any subsequent proceeding; however, the sworn testimony of any person and the exhibits introduced into evidence in the administrative case are admissible as impeachment in any subsequent civil action only against a party to the administrative proceeding, subject to the Rules of Evidence.

(4) An award may not be made or paid under this chapter if the claimant recovers under a settlement or a final judgment is entered in a civil action.

(5) The division may adopt rules to promote the efficient administration of, and to minimize the cost associated with, the prosecution of claims.

Section 6. Section **78-14b-106** is enacted to read:

78-14b-106. Filing of claims and responses.

(1) All claims filed for compensation under the plan shall begin by the claimant filing with the division a petition seeking compensation. The petition shall include the following information:

(a) the name and address of the legal representative and the basis for the representative's representation of the injured infant;

(b) the name and address of the injured infant;

(c) the name and address of any physician providing obstetrical services who was present at the birth and the name and address of the hospital at which the birth occurred;

(d) a description of the disability for which the claim is made;

(e) the time and place the injury occurred; and

(f) a brief statement of the facts and circumstances surrounding the injury and giving rise to the claim.

(2) The claimant shall furnish the division with as many copies of the petition as required for service upon the association, any physician and hospital named in the petition, along with a filing fee established by the division. Upon receipt of the petition, the division shall immediately serve the association, by service upon the agent designated to accept service on behalf of the association, by registered or certified mail, and shall mail copies of the petition, by registered or certified mail, to any physician, health care provider, and the hospital named in the petition.

(3) The claimant shall furnish to the Utah Birth-Related Neurological Injury Compensation Association the following information, which must be filed with the association within 10 days after the filing of the petition as set forth in Subsection (1):

(a) all available relevant medical records relating to the birth-related neurological injury and a list identifying any unavailable records known to the claimant and the reasons for the records' unavailability;

(b) appropriate assessments, evaluations, and prognoses and other records and documents as are reasonably necessary for the determination of the amount of compensation to be paid to, or on behalf of, the injured infant on account of the birth-related neurological injury;

(c) documentation of expenses and services incurred to date which identifies any payment made for expenses and services and the payor of those expenses and services; and

(d) documentation of any applicable private or governmental source of services or reimbursement relative to the impairments.

(4) The information required by Subsections (3)(a) through (d) shall remain confidential.

(5) The association shall have 45 days from the date of service of a complete claim, filed pursuant to subsections (1) and (2), in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury.

(6) Any claim which the association determines to be compensable may be accepted for compensation, provided that the acceptance is approved by the administrative law judge to whom the claim for compensation is assigned.

Section 7. Section **78-14b-107** is enacted to read:

78-14b-107. Tolling of statute of limitations.

The statute of limitations with respect to any civil action that may be brought by, or on behalf of, an injured infant allegedly arising out of, or related to, a birth-related neurological injury shall be tolled by the filing of a claim in accordance with this chapter, and the time a claim under this chapter is pending, or is on appeal, shall not be computed as part of the period within which a civil action may be brought.

Section 8. Section **78-14b-108** is enacted to read:

78-14b-108. Hearing -- Parties -- Discovery.

(1) The administrative law judge shall set the date for a hearing no sooner than 60 days and no later than 120 days after the filing by a claimant of a petition in compliance with this chapter. The administrative law judge shall immediately notify the parties of the time and place of the hearing, which shall be held in the county where the injury occurred unless otherwise agreed to by the parties and authorized by the division.

(2) The parties to the hearing shall include the claimant and the association.

(3) (a) Any party to a proceeding under this chapter may, upon application to the administrative law judge setting forth the materiality of the evidence to be given, serve interrogatories or cause the depositions of witnesses residing within or without the state to be taken, the costs thereof to be taxed as expenses incurred in connection with the filing of a claim.

(b) A depositions shall be taken after giving notice and in the manner prescribed for the taking of depositions in actions at law, except that they shall be directed to the administrative law judge before whom the proceedings may be pending.

Section 9. Section **78-14b-109** is enacted to read:

78-14b-109. Determination of claims -- Presumption -- Findings of administrative law judge binding on participants.

(1) The administrative law judge shall make the following determinations based upon all available evidence:

(a) whether the injury claimed is a birth-related neurological injury, taking into account that if the claimant has demonstrated, to the satisfaction of the administrative law judge, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in Section 78-14b-103;

(b) whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital;

(c) how much compensation, if any, is awardable pursuant to Section 78-14b-110; and

(d) whether, if raised by the claimant or other party, the factual determinations

regarding the notice requirements in Section 78-14b-116 are satisfied.

(2) The administrative law judge has the exclusive jurisdiction to make the factual determinations required by Subsection (1).

(3) If the administrative law judge determines that the injury alleged is not a birth-related neurological injury or that obstetrical services were not delivered by a participating physician at the birth, the administrative law judge shall enter an order and shall cause a copy of the order to be sent immediately to the parties by registered or certified mail.

(4) By becoming a participating physician, a physician shall be bound for all purposes by the finding of the administrative law judge or any appeal therefrom with respect to whether an injury is a birth-related neurological injury.

(5) If it is in the interest of judicial economy or if requested to by the claimant, the administrative law judge may bifurcate the proceeding addressing compensability and notice first, and addressing an award pursuant to Section 78-14b-110, if any, in a separate proceeding. The administrative law judge may issue a final order on compensability and notice which is subject to appeal under Section 78-14b-111, prior to issuance of an award pursuant to Section 78-14b-110.

Section 10. Section **78-14b-110** is enacted to read:

78-14b-110. Administrative law judge awards for birth-related neurological injuries -- Notice of award.

(1) (a) Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for the actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, family residential or custodial care, professional residential, and custodial care and service, for medically necessary drugs, special equipment, and facilities, and for related travel.

(b) The actual expenses in Subsection (1)(a) shall not include:

(i) expenses for items or services that the infant has received, or is entitled to receive, under the laws of any state or the Federal Government, except to the extent such exclusion may be prohibited by federal law;

(ii) expenses for items or services that the infant has received, or is contractually entitled to receive, from any prepaid health plan, health maintenance organization, or other

private insuring entity;

(iii) expenses for which the infant has received reimbursement, or for which the infant is entitled to receive reimbursement, under the laws of any state or the Federal Government, except to the extent such exclusion may be prohibited by federal law;

(iv) expenses for which the infant has received reimbursement, or for which the infant is contractually entitled to receive reimbursement, pursuant to the provisions of any health or sickness insurance policy or other private insurance program; and

(v) expenses included under this Subsection (1)(b) shall be limited to reasonable charges prevailing in the same community for similar treatment of injured persons when such treatment is paid for by the injured person.

(c) (i) periodic payments of an award to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury, which award:

(A) shall not exceed \$100,000; and

(B) may, at the discretion of the administrative law judge, be made in a lump sum; and

(ii) a death benefit for the infant in an amount of \$10,000; and

(d) reasonable expenses incurred in connection with the filing of a claim, including reasonable attorney fees, which shall be:

(i) subject to the approval and award of the administrative law judge; and

(ii) based on the following factors:

(A) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;

(B) the fee customarily charged in the locality for similar legal services;

(C) the time limitations imposed by the claimant or the circumstances;

(D) the nature and length of the professional relationship with the claimant;

(E) the experience, reputation, and ability of the lawyer or lawyers performing services;

and

(F) the contingency or certainty of a fee.

(2) If there is a final determination of compensability, and the claimants accept an award under this section, the claimants is not liable for any expenses, including attorney fees, incurred in connection with the filing of a claim under this chapter other than those expenses awarded under this section.

338 (3) An award under this chapter shall require the immediate payment of expenses
339 previously incurred and shall require that future expenses be paid as incurred.

340 (4) A copy of the award shall be sent immediately by registered or certified mail to
341 each person served with a copy of the petition.

342 Section 11. Section **78-14b-111** is enacted to read:

343 **78-14b-111. Conclusiveness of determination or award -- Appeal.**

344 (1) A determination of the administrative law judge as to qualification of the claim for
345 purposes of compensability under this chapter or an award by the administrative law judge
346 pursuant to this chapter shall be conclusive and binding as to all questions of fact. Review of
347 an order of an administrative law judge shall be by appeal to the Court of Appeals. Appeals
348 shall be filed in accordance with rules of procedure prescribed by the Supreme Court for
349 review of such orders.

350 (2) In case of an appeal from an award of the administrative law judge, the appeal shall
351 operate as a suspension of the award, and the association shall not be required to make payment
352 of the award involved in the appeal until the questions at issue therein shall have been fully
353 determined.

354 Section 12. Section **78-14b-112** is enacted to read:

355 **78-14b-112. Enforcement of awards.**

356 (1) The administrative law judge shall have full authority to enforce his award and to
357 protect himself from any deception or lack of cooperation in reaching his determination as to
358 any award. Such authority shall include the power to petition the district court for an order of
359 contempt.

360 (2) A party may, if the circumstances so warrant, petition the district court for
361 enforcement of a final award by the administrative law judge.

362 Section 13. Section **78-14b-113** is enacted to read:

363 **78-14b-113. Limitation on claim.**

364 Any claim for compensation under this chapter that is filed more than five years after
365 the birth of an infant alleged to have a birth-related neurological injury shall be barred.

366 Section 14. Section **78-14b-114** is enacted to read:

367 **78-14b-114. Assessments -- Plan of operation.**

368 (1) The assessments established pursuant to this section shall be used to finance the

Utah Birth-Related Neurological Injury Compensation Plan.

(2) The assessments and appropriations dedicated to the plan shall be administered by the Utah Birth-Related Neurological Injury Compensation Association established in this chapter in accordance with the following requirements:

(a) On or before July 1, 2007, the directors of the association shall submit to the Department of Insurance for review a plan of operation which shall provide for the efficient administration of the plan and for prompt processing of claims against and awards made on behalf of the plan. The plan of operation shall include provision for:

(i) establishment of necessary facilities;

(ii) management of the funds collected on behalf of the plan;

(iii) processing of claims against the plan;

(iv) assessment of the persons and entities listed in Subsections (4) and (5) to pay awards and expenses, which assessments shall be on an actuarially sound basis subject to the limits set forth in Subsections (4) and (5); and

(v) any other matters necessary for the efficient operation of the birth-related neurological injury compensation plan.

(b) Amendments to the plan of operation may be made by the directors of the plan, subject to the approval of the Department of Insurance.

(3) All assessments shall be deposited with the Utah Birth-Related Neurological Injury Compensation Association. The funds collected by the association and any income from the fund shall be disbursed only for the payment of awards under this chapter and for the payment of the reasonable expenses of administering the plan.

(4) The following persons and entities shall pay into the association an initial assessment in accordance with the plan of operation:

(a) On or before October 1, 2007, each hospital shall pay an initial assessment of \$75 per infant delivered in the hospital during the prior calendar year, as reported to the Department of Health; provided, however, that a hospital owned or operated by the state or a county or other political subdivision of the state shall not be required to pay the initial assessment or any assessment required by Subsection (5). The term "infant delivered" includes live births and not stillbirths, but the term does not include infants delivered or born to a patient for whom the hospital receives Medicaid reimbursement, if the sum of the annual charges for charity patients

plus the annual Medicaid contractals of the hospital exceeds 10% of the total annual gross operating revenues of the hospital. The hospital is responsible for documenting, to the satisfaction of the association, the exclusion of any birth from the computation of the assessment. Upon demonstration of financial need by a hospital, the association may provide for installment payments of assessments.

(b) (i) Beginning on and after October 15, 2007, all health care providers whose licensed scope of practice includes the authority to deliver infants, and who have admitting privileges in any hospital to deliver infants, shall be assessed an initial assessment of \$250.

(ii) The assessment required by Subsection (4)(b)(i) does not apply to:

(A) a resident physician, assistant resident physician, or intern in an approved postgraduate training program, as defined by the Board of Medicine or the Board of Osteopathic Medicine by rule;

(B) a retired physician who has withdrawn from the practice of medicine but who maintains an active license as evidenced by an affidavit filed with the division, however, prior to reentering the practice of medicine in this state, a retired physician must notify the division and pay the appropriate assessments pursuant to this section;

(C) a physician who is employed full time by the United States Department of Veterans Affairs and whose practice is confined to United States Department of Veterans Affairs hospitals;

(D) a physician who is a member of the Armed Forces of the United States and who meets the requirements established by the division by rule; or

(E) a physician who is employed full time by the state and whose practice is confined to state-owned correctional institutions, a county health department, or state-owned mental health or developmental services facilities, or who is employed full time by the Department of Health.

(c) On or before December 1, 2007, each health care provider described in Subsection (4)(b)(i) who wishes to participate in the Utah Birth-Related Neurological Injury Compensation Plan and who otherwise qualifies as a participating physician under this chapter shall pay an initial assessment of \$5,000. However, if the physician is either a resident physician, assistant resident physician, or intern in an approved postgraduate training program, as defined by the Board of Medicine or the Board of Osteopathic Medicine by rule, and is supervised in

431 accordance with program requirements established by the Accreditation Council for Graduate
432 Medical Education or the American Osteopathic Association by a physician who is
433 participating in the plan, such resident physician, assistant resident physician, or intern is
434 deemed to be a participating physician without the payment of the assessment. Participating
435 physicians also include any employee of the board of trustees of a state university who has paid
436 the assessment required by this Subsections (4) and (5)(a), and any certified nurse midwife
437 supervised by such employee. Participating physicians include any certified nurse midwife
438 who has paid 50% of the physician assessment required by this Subsection (4) and Subsection
439 (5)(a) and who is supervised by a participating physician who has paid the assessment required
440 by this subsection and Subsection (5)(a). Supervision for nurse midwives shall require that the
441 supervising physician will be easily available and have a prearranged plan of treatment for
442 specified patient problems which the supervised certified nurse midwife may carry out in the
443 absence of any complicating features. Any physician who elects to participate in such plan on
444 or after January 1, 2008, who was not a participating physician at the time of such election to
445 participate and who otherwise qualifies as a participating physician under this chapter shall pay
446 an additional initial assessment equal to the most recent assessment made pursuant to this
447 subsection, Subsection (5)(a), or Subsection (7)(b).

448 (5) (a) Beginning January 1, 2009, the persons and entities listed in Subsections (4)(b)
449 and (c), except those persons or entities who are specifically excluded from those provisions, as
450 of the date determined in accordance with the plan of operation, taking into account persons
451 licensed subsequent to the payment of the initial assessment, shall pay an annual assessment in
452 the amount equal to the initial assessments provided in Subsections (4)(b) and (c). If payment
453 of the annual assessment by a physician is received by the association by January 31 of any
454 calendar year, the physician shall qualify as a participating physician for that entire calendar
455 year. If the payment is received after January 31 of any calendar year, the physician shall
456 qualify as a participating physician for that calendar year only from the date the payment was
457 received by the association. On January 1, 2009, and on each January 1 thereafter, the
458 association shall determine the amount of additional assessments necessary pursuant to
459 Subsection (7), in the manner required by the plan of operation, subject to any increase
460 determined to be necessary by the Department of Insurance pursuant to Subsection (7)(b). On
461 July 1, 2009, and on each July 1 thereafter, the persons and entities listed in Subsections (4)(b)

and (c), except those persons or entities who are specifically excluded from those provisions, shall pay the additional assessments which were determined on January 1. Beginning January 1, 2009, the entities listed in Subsection (4)(a), including those licensed on or after October 1, 2008, shall pay an annual assessment of \$50 per infant delivered during the prior calendar year. The additional assessments which were determined on January 1, 2009, pursuant to the provisions of Subsection (7) shall not be due and payable by the entities listed in Subsection (4)(a) until July 1.

(b) If the assessments collected pursuant to Subsection (4) and the appropriation of funds by the Legislature are insufficient to maintain the plan on an actuarially sound basis, the plan administrator shall report to the Legislative Executive Appropriations Committee regarding the sum needed to make the fund actuarially sound.

(c) (i) Taking into account the assessments collected pursuant to Subsection (4), if required to maintain the plan on an actuarially sound basis, the Department of Insurance shall require each entity licensed to issue accident and health insurance under Title 31A, Chapter 22, Part 6, Accident and Health Insurance, or Health Maintenance Organizations under Title 31A, Chapter 8, Health Maintenance Organizations and Limited Health Plans to pay into the association an annual assessment in an amount determined by the commissioner of Insurance, by administrative rule pursuant to Subsection (7)(a), in the manner required by the plan of operation.

(ii) All annual assessments shall be made on the basis of net direct premiums written for the business activity which forms the basis for each such entity's inclusion as a funding source for the plan in the state during the prior year ending December 31, as reported to the Department of Insurance, and shall be in the proportion that the net direct premiums written by each carrier on account of the business activity forming the basis for its inclusion in the plan bears to the aggregate net direct premiums for all such business activity written in this state by all such entities.

(iii) No entity listed in this Subsection (5)(c) shall be individually liable for an annual assessment in excess of 0.25% of that entity's net direct premiums written.

(iv) Accident and health insurance carriers shall be entitled to recover their initial and annual assessments through a surcharge on future policies, a rate increase applicable prospectively, or a combination of the two.

493 (6) (a) The association shall make all assessments required by this section, except
494 initial assessments of health care providers as established in this section, and the assessments
495 of accident and health insurers pursuant to Subsection (5)(c)(i), which assessments will be
496 made by the Department of Insurance. The division shall provide the association, with such
497 frequency as determined to be necessary, a listing, in a computer-readable form, of the names
498 and addresses of all health care providers described in Subsection (4).

499 (b) (i) The association may enforce collection of assessments required to be paid
500 pursuant to this chapter by suit filed in county court. The association shall be entitled to an
501 award of attorney fees, costs, and interest upon the entry of a judgment against a health care
502 provider for failure to pay the assessment, with interest accruing until paid.

503 (ii) The division, upon notification by the association that an assessment has not been
504 paid and that there is an unsatisfied judgment against a health care provider, shall not renew
505 any license to practice for the health care provider until the judgment is satisfied in full.

506 (c) The Department of Health shall, upon notification by the association that an
507 assessment has not been timely paid, enforce collection of such assessments required to be paid
508 by hospitals. Failure of a hospital to pay such assessment is grounds for disciplinary action
509 under the hospital's licensing laws.

510 (7) (a) The Department of Insurance shall undertake an actuarial investigation of the
511 requirements of the plan based on the plan's experience in the first year of operation and any
512 additional relevant information, including without limitation the assets and liabilities of the
513 plan. Pursuant to such investigation, the Department of Insurance shall establish the rate of
514 contribution of the entities listed in Subsection (5)(c) for the tax year beginning January 1,
515 2009. Following the initial valuation, the Department of Insurance shall cause an actuarial
516 valuation to be made of the assets and liabilities of the plan no less frequently than biennially.
517 Pursuant to the results of such valuations, the Department of Insurance shall prepare a
518 statement as to the contribution rate applicable to the entities listed in Subsection (5)(c).
519 However, at no time shall the rate be greater than 0.25% of net direct premiums written.

520 (b) If the Department of Insurance finds that the plan cannot be maintained on an
521 actuarially sound basis based on the assessments and appropriations listed in Subsections (4)
522 and (5), the department shall increase the assessments specified in Subsection (4) on a
523 proportional basis as needed.

524 (8) The association shall report to the Legislature its determination as to the annual
525 cost of maintaining the fund on an actuarially sound basis. In making its determination, the
526 association shall consider the recommendations of all hospitals, physicians, accident and health
527 insurers, attorneys, consumers, and any associations representing any such person or entity. All
528 hospitals shall, upon request by the association, provide the association with information from
529 their records regarding any live birth. The information shall not include the name of any
530 physician, the name of any hospital employee or agent, the name of the patient, or any other
531 information which will identify the infant involved in the birth. The information thereby
532 obtained shall be utilized solely for the purpose of assisting the association and shall not
533 subject the hospital to any civil or criminal liability for the release thereof. The information
534 shall otherwise be confidential.

535 (9) (a) Within 60 days after a claim is filed, the association shall estimate the present
536 value of the total cost of the claim, including the estimated amount to be paid to the claimant,
537 the claimant's attorney, the attorney fees of the association incident to the claim, and any other
538 expenses that are reasonably anticipated to be incurred by the association in connection with
539 the adjudication and payment of the claim. For purposes of this estimate, the association
540 should include the maximum benefits for noneconomic damages.

541 (b) The association shall revise these estimates quarterly based upon the actual costs
542 incurred and any additional information that becomes available to the association since the last
543 review of this estimate. The estimate shall be reduced by any amounts paid by the association
544 that were included in the current estimate.

545 (c) In the event the total of all current estimates equals 80% of the funds on hand and
546 the funds that will become available to the association within the next 12 months from all
547 sources described in Subsections (4), (5), and (7)(a), the association shall not accept any new
548 claims without express authority from the Legislature. Nothing herein shall preclude the
549 association from accepting any claim if the injury occurred 18 months or more prior to the
550 effective date of this suspension. Within 30 days of the effective date of this suspension, the
551 association shall notify the governor, the speaker of the House of Representatives, the president
552 of the Senate, the Department of Insurance, the Department of Health, and the division of this
553 suspension.

554 (d) If any person is precluded from asserting a claim against the association because of

Subsection (9) (c), the plan shall not constitute the exclusive remedy for such person, his personal representative, parents, dependents, or next of kin.

Section 15. Section **78-14b-115** is enacted to read:

78-14b-115. Utah Birth-Related Neurological Injury Compensation Association -- Board of directors.

(1) (a) The Utah Birth-Related Neurological Injury Compensation Plan shall be governed by a board of five directors which shall be known as the Utah Birth-Related Neurological Injury Compensation Association. The association is not a state agency, board, or commission.

(b) The directors:

(i) shall be appointed:

(A) for staggered terms of three years or until their successors are appointed and have qualified; and

(B) by the Governor with the advice and consent of the Senate; and

(ii) shall be as follows:

(A) one citizen representative;

(B) one representative of participating physicians;

(C) one representative of hospitals;

(D) one representative of accident and health insurers; and

(E) one representative of physicians other than participating physicians.

(2) (a) The governor may select the representative:

(i) of the participating physicians from a list of at least three names to be recommended by a speciality board for obstetric physicians within the Utah Medical Association;

(ii) the representative of hospitals from a list of at least three names to be recommended by the Utah Hospital Association;

(iii) the representative of accident and health insurers from a list of at least three names, one of which is recommended by the American Insurance Association, one by the Alliance of American Insurers, and one by the National Association of Independent Insurers; and

(iv) the representative of physicians other than participating physicians from a list of three names to be recommended by the Utah Medical Association and a list of three names to

586 be recommended by the Utah Osteopathic Medical Association.

587 (b) In no case shall the governor be bound to make any appointment from among the
588 nominees of such respective associations.

589 (c) The governor shall promptly notify the appropriate medical association upon the
590 occurrence of any vacancy, and like nominations may be made for the filling of the vacancy.

591 (3) The directors shall not transact any business or exercise any power of the plan
592 except upon the affirmative vote of three directors. The directors shall serve without salary,
593 but each director shall be reimbursed for actual and necessary expenses incurred in the
594 performance of director's official duties as a director of the plan. The directors shall not be
595 subject to any liability with respect to the administration of the plan.

596 (4) The board of directors shall have the power to:

597 (a) administer the plan;

598 (b) administer the funds collected on behalf of the plan;

599 (c) administer the payment of claims on behalf of the plan;

600 (d) direct the investment and reinvestment of any surplus funds over losses and
601 expenses, provided that any investment income generated thereby remains credited to the plan;

602 (e) reinsure the risks of the plan in whole or in part;

603 (f) sue and be sued, and appear and defend, in all actions and proceedings in its name
604 to the same extent as a natural person;

605 (g) have and exercise all powers necessary or convenient to effect any or all of the
606 purposes for which the plan is created;

607 (h) enter into such contracts as are necessary or proper to administer the plan;

608 (i) employ or retain such persons as are necessary to perform the administrative and
609 financial transactions and responsibilities of the plan and to perform other necessary and proper
610 functions not prohibited by law;

611 (j) take such legal action as may be necessary to avoid payment of improper claims;
612 and

613 (k) indemnify any employee, agent, member of the board of directors or alternate
614 thereof, or person acting on behalf of the plan in an official capacity, for expenses, including
615 attorney fees, judgments, fines, and amounts paid in settlement actually and reasonably
616 incurred in connection with any action, suit, or proceeding, including any appeal thereof.

arising out of such person's capacity acting on behalf of the plan; provided that such person acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the plan and provided that, with respect to any criminal action or proceeding, the person had reasonable cause to believe his or her conduct was lawful.

(5) (a) Money may be withdrawn on account of the plan only upon a voucher as authorized by the association.

(b) All books, records, and audits of the plan are open for reasonable inspection to the general public, except that a claim file in the possession of the association or its representative is confidential and may not be disclosed until termination of litigation or settlement of the claim, although medical records and other portions of the claim file may remain confidential and exempt as otherwise provided by law. Any book, record, document, audit, or asset acquired by, prepared for, or paid for by the association is subject to the authority of the board of directors.

(c) Each person authorized to receive deposits, issue vouchers, or withdraw or otherwise disburse any funds shall post a blanket fidelity bond in an amount reasonably sufficient to protect plan assets, as determined by the plan of operation. The cost of the bond will be paid from the assets of the plan.

(d) Annually, the association shall furnish audited financial reports to any plan participant upon request, to the Department of Insurance, the division, and to the legislative auditor general. The reports must be prepared in accordance with accepted accounting procedures and must include the information required by the entities described in this subsection. At any time determined to be necessary, the entities listed in this Subsection (5)(d) may conduct an audit of the plan.

(e) Funds held on behalf of the plan are funds of the state. All income derived from the investments will be credited to the plan. The Department of Finance may invest and reinvest funds held on behalf of the plan in accordance with the trust agreement approved by the association and the Department of Finance.

Section 16. Section **78-14b-116** is enacted to read:

78-14b-116. Notice to obstetrical patients of participation in the plan.

Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating

648 physicians under this chapter and under the Utah Birth-Related Neurological Injury
649 Compensation Plan shall provide notice to the obstetrical patients as to the limited no-fault
650 alternative for birth-related neurological injuries. The notice shall be provided on forms
651 furnished by the association and shall include a clear and concise explanation of a patient's
652 rights and limitations under the plan. The hospital or the participating physician may elect to
653 have the patient sign a form acknowledging receipt of the notice form. Signature of the patient
654 acknowledging receipt of the notice form raises a rebuttable presumption that the notice
655 requirements of this section have been met. Notice need not be given to a patient when the
656 patient has an emergency medical condition or when notice is not practicable.

Legislative Review Note
as of 1-25-07 6:36 AM

Office of Legislative Research and General Counsel

H.B. 363 - Medical Injury Payment Amendments

Fiscal Note

2007 General Session

State of Utah

State Impact

Enactment of this bill will require additional ongoing appropriations of \$1,035,600 for the Department of Commerce and \$256,600 for the Attorney General to establish a new medical claims process. One-time appropriations of \$63,500 and \$138,800 for the Department and the Attorney General respectively will be needed for start-up costs.

	<u>FY 2007</u> <u>Approp.</u>	<u>FY 2008</u> <u>Approp.</u>	<u>FY 2009</u> <u>Approp.</u>	<u>FY 2007</u> <u>Revenue</u>	<u>FY 2008</u> <u>Revenue</u>	<u>FY 2009</u> <u>Revenue</u>
General Fund	\$0	\$1,163,900	\$1,163,900	\$0	\$0	\$0
General Fund, One-Time	\$0	\$198,800	\$0	\$0	\$0	\$0
Total	\$0	\$1,362,700	\$1,163,900	\$0	\$0	\$0

Individual, Business and/or Local Impact

Enactment of this bill will result in direct, measurable costs and/or benefits for individuals, businesses, or local governments.