

Understanding Informed Consent: A Guide for Active Duty Military and Military Medical Beneficiaries



Making Your Healthcare Wishes Known Through an Advance Directive: Guide for Active Military and Military Medical Beneficiaries

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—From a declaration of the American Bar Association



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Introduction

This informational guidebook provides important information for active military personnel and their military medical beneficiaries about the informed consent process, which includes two components: 1) your right as a patient to determine what happens to your body or that of a beneficiary such as a minor child, and 2) the health care provider's duty to provide you with enough information so you can make an educated decision about your medical condition and the proposed treatment, including the risks, benefits, and alternatives. As the patient, you have the right to make decisions about your own health care. You should be aware of those rights so you can be an active participant in your and your beneficiary's treatment decisions.

What is Informed Consent?

Although the specific definition of informed consent varies from state to state, informed consent is basically a conversation or series of conversations that take place between the patient and the health care provider so that the patient is fully informed and aware of the risks, benefits, and alternatives to the medical treatment being proposed to treat the patient's medical condition. When a patient consents, he or she is authorizing the health care provider to perform the medical treatment on his or her body.

In general, every patient has the right to decide what happens to his or her own body and can refuse even life-saving treatment for religious, personal, and other reasons. The level of information a health care provider must disclose differs in every situation depending on the patient, his or her medical condition, and applicable laws. There are limited exceptions for military personnel that are discussed later in this guidebook.

What is Involved in Giving Informed Consent?

The process of giving your informed consent should include the following components: disclosure, capacity, voluntarism, understanding, and decision-making.

- ★ **Disclosure** – The health care provider should talk to you about the medical treatment or procedure he or she is proposing so that you can make a fully informed decision about whether to undergo or refuse treatment. Ask questions and get them answered to your satisfaction. The health care provider should discuss and disclose the following topics in order to obtain your informed consent:
 - The diagnosis, if known;
 - The nature and purpose of the proposed treatment or procedure, including any risks and/or benefits;
 - Reasonable alternatives (regardless of cost), including their risks and/or benefits; and
 - The risks and benefits of not receiving any treatments.
- ★ **Capacity** – This is your ability to understand the information provided by the health care provider and your ability to form a reasonable, informed decision about the medical treatment being offered. The general assumption is that adults are capable of making informed decisions and, therefore, have capacity; however, a health care provider may find otherwise during his or her assessment and declare that you lack capacity.
- ★ **Voluntarism** – After being fully informed of the proposed medical treatment and its risks, benefits, and alternatives, you have the right to freely decide without being pressured by outside forces. A health care provider's attempt to assist you with your decision typically should not be interpreted as undermining your voluntarism, but rather as merely providing guidance with the choice you believe is best for you.

**Giving your informed
consent is more than just
signing your name on a form.**

- ★ **Understanding** – It is important that you understand the information the health care provider has presented to you.
- ★ **Decision-making** – This is the point where you have made an informed choice and authorized your health care provider to perform the proposed medical treatment or procedure. This authorization is often documented by you voluntarily signing a consent form.

How Much Information is Necessary to be “Fully Informed”?

Some states have very specific laws concerning how much information needs to be provided so that you can make an informed decision. For most medical tests and treatments, your health care provider should provide you with enough information given your particular case so that you feel comfortable making your own decision about whether to undergo or refuse the treatment. It is essential that your health care provider use plain terminology in the patient’s preferred language. You have the right and should feel free to ask questions at any time so that you are comfortable about your decision.

When Is Written Informed Consent Required?

Written informed consent is required for all diagnostic, therapeutic, and surgical procedures that are complex, invasive and/or involve the risk of serious injury. It is

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generally not required for simple and common medical procedures like a blood draw where the related risks are commonly understood. The health care provider is responsible for determining whether a procedure is complex and requires your written informed consent. The written consent form is a legal document, so make sure you read and understand it. Your signature on the consent form is evidence that the informed consent process took place and that you understand the risks, benefits, and alternatives to the proposed treatment.

How Long Does My Informed Consent Last?

Informed consent is valid for a reasonable period of time. The Joint Commission, an independent non-profit organization that accredits and certifies over 20,000 health care organizations in the United States, indicates that a reasonable time period may consist of thirty days prior the procedure date. In cases where treatment is planned in advance, such as chemotherapy, consent may be obtained up to six months in advance.

What Situations Allow Treatment Without Informed Consent?

Under some circumstances, obtaining informed consent from the patient may not be possible. Many states have laws that recognize situations when a health care provider will be allowed to treat a patient even though the patient has not consented to the treatment. A few examples where this would be acceptable include:

- ★ **Emergency** – When there is insufficient time to obtain informed consent and the patient is likely to suffer significant harm or death without immediate treatment, the patient’s consent is generally presumed.
- ★ **Therapeutic Privilege** – A health care provider may determine it would be in the patient’s best interest to not inform him or her about all or a portion of the treatment’s risks as the informing process itself would likely harm the patient in an unacceptable way. For example, a health care provider may choose to not inform a cardiac patient of the proposed treatment’s side effects as the information may agitate the patient and cause a heart attack.
- ★ **Unanticipated Condition During Surgery** – As a general rule, your consent is limited to the medical procedures contemplated by the written consent form. When a surgeon encounters an



unanticipated condition during surgery, however, the surgeon can exercise reasonable judgment to treat an unanticipated condition that requires immediate action so that the patient's life or health is preserved. Most consent forms now include language addressing this exception.

- ★ **Waiver** – Some patients with capacity expressly indicate they do not want to be informed about the treatment and its associated risks. In other words, the patient has waived his or her right to give informed consent. This is a legitimate exception and should you choose to waive your right, the waiver must be in writing.
- ★ **Military Fitness for Duty** – Military commanders have the legal right to require service members to undergo physical, psychiatric or other medical examinations and procedures to determine fitness for duty without obtaining the service member's consent. This may also include vaccinations.

How Is The Informed Consent Process Different For Active Military?

Generally, military personnel must submit to medical care necessary to preserve their lives, alleviate undue suffering, or protect or maintain the health of others. Commanders may order one of his or her service members to undergo examination when warranted, and the military treatment facility (MTF) commander will determine whether hospitalization is necessary. Consent is not an issue in these situations but as a practical matter, the health care provider should counsel and obtain your consent prior to performing certain procedures unless one of the following exceptions apply:

- ★ **Mental Health Evaluation Requirement** – When a commander decides a service member needs to be assessed for mental health issues or psychiatric hospitalization, the commander will ensure compliance with Department of Defense Instruction 6490.4. A command-directed mental health evaluation has the same status as any other military order.
- ★ **Medical Care With or Without the Service Member's Permission** – Emergency medical care required to save the service member's life, health, or fitness for duty may be performed and is determined by the attending health care provider. If the

Your health care provider should provide you with enough information given your particular case so that you feel comfortable making your own decision about whether to undergo or refuse the treatment.

service member or his or her representative refuses treatment and the unit commander is not available, the MTF commander may order the treatment.

What Happens if a Service Member is Incapacitated and Cannot Give Consent?

A service member who is found incompetent or incapacitated by a team of medical providers – often referred to as the medical board – may be treated without his or her consent as long as life or health will not likely be endangered by the medical treatment (this also applies if the service member is believed incompetent and action by the medical board is pending). Incompetent or incapacitated service members may also receive routine medical care to treat minor ailments.

Can A Service Member Appoint Someone Else to Consent for Him/Her?

You can give legal authority to someone else who will make health care decisions for you when you cannot or choose not to make your own health care decisions. This is generally accomplished through a durable power of attorney for health care.

Can a Military Service Member Refuse All or Certain Types of Treatment?

Military policy on this issue is consistent with the Patient Self-Determination Act and The Joint Commission's standards, which state that a patient with decision-making capacity has the legal and moral right to participate in his

or her own medical care decisions, including the right to refuse medical treatment at any time, even if the treatment is life-saving. Military policy further states that upon admission, all adult patients will be informed in writing of their right to participate in their own health care decisions, including the right to accept or refuse medical or surgical treatment and their right to prepare advance directives, subject to certain overriding provisions in federal law.

The exception to this rule, however, is that military commanders retain authority to issue orders when necessary and appropriate to support mission requirements. For example, a military commander can order a service member to receive the anthrax vaccine even if the service member refuses.

How is the Informed Consent Process Different for My Minor Children?

Generally, minors do not have the capacity as described above to consent to medical treatment. Parental consent is required unless state or federal law allows minors to consent for themselves. The definition of a minor, the circumstances under which a child is “emancipated” from his or her parents, the age at which consent is valid, and the medical care and treatment for which minors can consent without parental involvement varies by state, so you should consult your legal assistance division for further guidance. You can sign a durable or non-durable power of attorney for your child’s health care so that a trusted individual is authorized to make medical decisions for your children while you are deployed or in active service.

In certain situations, your minor child may be able to self-consent to certain medical treatments. As with all informed consent, a minor providing consent must be legally competent and capable of understanding the risks, benefits, treatment alternatives, and prognosis. Generally, the legality of a minor’s consent is determined by the state laws in which treatment will be provided unless federal law requires otherwise or as modified in overseas locations by Status of Forces Agreements.

- ★ **Emancipated Minors**—Under most state laws, emancipated minors are presumed capable of providing informed consent for their own health care. Emancipated minor status is generally given to adolescent children under the age of majority (legal age) due to certain life circumstances such as marriage, having attained financial self-sufficiency and living alone or enlisting in military service.

Written informed consent is required for all diagnostic, therapeutic, and surgical procedures that are complex, invasive, and/or involve the risk of serious injury.

Minors serving in the military are considered emancipated during enlistment but like their adult counterparts, they too are subject to his or her commander’s decisions about whether health care is needed.

- ★ **Sexually Transmitted Infections**—Most states allow minors to consent to being tested for a sexually transmitted infection without parental consent. However, some states allow health care providers to inform parents when they deem it would be in the minor’s best interest. Many states also include HIV testing and treatment in this category.
- ★ **Contraceptives, Pregnancy, and Prenatal Care** Most states allow unemancipated minors to consent to contraceptive services without parental consent while other states have no relevant laws or policy on the matter. Many states also allow minors to consent to prenatal care, while other states require parental consent after the second trimester. Some states also allow health care providers to inform parents when the provider deems it to be in the minor child’s best interest.
- ★ **Abortion**—Very few states allow minors to consent to an abortion without parental involvement. States vary considerably in the amount of parental involvement or consent that is required. For example, some states require that parents only receive advance notification while others require at least one parent’s consent. Other states require both parents’ consent and some require both advance notification and parental consent while others remain silent on the issue.



- ★ **Drug and Alcohol Abuse and Mental Health Treatment**—Minors can consent to counseling and treatment for drug and/or alcohol abuse and for other mental health treatment without parental consent in many states. State laws vary as to whether and when parental involvement and/or consent is required.
- ★ **Mature Minor Doctrine**—A few states have started using an exception called the Mature Minor Doctrine. Under this doctrine, a minor can refuse or consent to medical treatment if he or she possesses sufficient maturity to understand and appreciate the benefits and risks of the proposed medical treatment. The courts or the health care provider will look to the minor's level of maturity in determining the legal sufficiency of the minor's consent. The minor's age; intelligence; ability to understand the risks, benefits, nature, and impact of the proposed treatment; and prognosis are all factors used to determine the minor's level of maturity.

Nothing prevents a health care provider from encouraging a minor who is deemed legally capable of providing consent from contacting his or her parents or allowing the health care provider to contact the parents when the provider believes the treatment involves serious consequences or when failure to notify the parents might jeopardize the minor's safety or health. Even so, the minor's sole consent is binding when applicable law deems the minor legally capable of consenting.

Military commanders have the legal right to require service members to undergo... examinations and procedures to determine fitness for duty without obtaining the service member's consent.

What Type of Consent is Needed for Experimental Drugs or Vaccines?

Military commanders should ensure their service members are continually educated about the intent and rationale behind both routine and theater-specific (deployment areas) military immunization standards so that the command's health and overall effectiveness is protected. Immunizations required by regulation or other legal directive may be given involuntarily unless the service member refuses for religious reasons. In cases of involuntary immunization, the following procedures and limitations apply:

Under normal circumstances, a service member will not be involuntarily immunized. If a service member declines or refuses immunization, the commander will:

- ★ Ensure that the service member understands the purpose of the vaccine;
- ★ Ensure that the service member has been advised of the possibility that the disease may be naturally present in a possible area of operation or may be used as a biological weapon against the United States and its allies;
- ★ Ensure that the service member is educated about the vaccine and has been able to discuss any objections with medical authorities;
- ★ Counsel the service member, in writing, that he or she is legally required to be immunized; that if the service member continues to refuse immunization, he or she will be legally ordered to be immunized; and that failure to obey the order may result in action under the Uniform Code of Military Justice and/or administrative action for failure to obey a lawful order as deemed appropriate by the commander; and
- ★ Order the service member to receive the immunization.
- ★ If, after any of the steps listed above, a service member elects to be immunized, adverse action will not normally be taken based solely on the service member's initial refusal to be immunized.

When a General Court Martial Convening Authority (GCMCA) or its delegated representative determines that conditions of imminent threat exist (where the threat of naturally occurring disease or use of biological weapons

is reasonably possible), service members may be involuntarily immunized. Involuntary immunization(s) will not be ordered by a commander below the GCMCA unless authority to do so has been properly delegated by the GCMCA. Prior to ordering involuntary immunizations, all of the steps described above should be followed, situation permitting. In performing this duty, unit personnel should only use the amount of force necessary to assist medical personnel in administering the immunization.

Telemedicine

Telemedicine allows the health care provider to give clinical services to a patient through electronic communication via two-way video conferencing, e-mail, smart phone, wireless tools, and other forms of telecommunications technology. For example, telemedicine may involve x-rays being electronically transmitted and the patient's vital signs or medication therapy being monitored remotely.

Telemedicine is widely used throughout the world and is particularly beneficial to patients in remote areas or rural communities. In military settings, telemedicine is used to diagnose injuries and illnesses and aid in treating and rehabilitating wounded service members. Your health care provider should obtain your written informed consent prior to beginning telemedicine services. This means you must consent not only to the medical treatment being proposed but also to the use and access of any electronic communications. Your health care provider should explain how the technology will be used, the risks and benefits of using the technology, and the alternatives to telemedicine.

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Conclusion

As an active-duty service member, it is important that you understand your rights as a patient, as well as your beneficiary's rights, during the informed consent process. Giving a health care provider your informed consent is more than just signing your name on a form. The process involves good communication and an exchange of information between you and your health care provider. You should ask questions throughout the entire process so that you can make an informed and voluntary decision about whether to receive or refuse a particular course of medical treatment for you or your minor child.