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Volunteering for Trouble or Trouble with Volunteers?: A Guide to the Liability Risks for Nonprofits and their Volunteers

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Volunteers often constitute an essential portion of the “workforce” of nonprofit organizations. Volunteers can play an essential role in providing important charitable services and constitute a vital link to an organization’s constituency and the public—enhancing or harming a nonprofit’s image and functioning. The use of volunteers, however, entails risk—both from and to volunteers. For example, volunteers can be placed in positions where their own personal safety may be endangered or where they may present a threat (physical, economic or otherwise) to employees, visitors, patients, members, or others making use of the nonprofit’s services or facilities. At the same time, volunteers may be deterred from volunteering due to concerns that they may be injured or sued for their actions, proving the adage that no good deed goes unpunished.

As is apparent, the ability to obtain and maintain a volunteer force that functions smoothly with employees and the constituency of an organization is critical. As such, a nonprofit must use care in selecting and supervising volunteers, while at the same time taking steps to ensure that current and potential volunteers do not feel the risks associated with volunteering are too great. This article will provide an overview of some of the legal issues presented by the use of volunteers.

A concern for the nonprofit: Is the nonprofit volunteer really an employee?

Nonprofits, like all employers, are subject to an ever-expanding array of employment statutes. Anti-discrimination statutes exist at the federal, state, and local levels, barring discrimination based upon a wide range of protected characteristics from race and religion to gender identity and expression. However, as a general rule, courts have held that such statutes apply only to individuals in an employment relationship and do not apply to volunteers.

The question becomes, then, whether a volunteer may actually be an employee. This question is more complicated than it may seem, but there is not much in the label “volunteer” itself. It is fairly clear that the individual’s perception that volunteering is prestigious or professionally advantageous to him or her does not create an employment relationship, but the line between employee and volunteer becomes less clear when something of value is provided to the volunteer. Where there is evidence of compensation, courts often will look at the “economic realities” of the relationship, including the degree of control over the activities of the volunteer. Reimbursing a volunteer for volunteer-related expenses generally should not convert a volunteer into an employee. However, when the financial benefits provided to a volunteer extend beyond the simple reimbursement of expenses, there is an increasing risk that the individual could be considered an employee. For example, some nonprofits make volunteers who are exposed to personal risk eligible for a range of benefits such as a disability pension, survivors’ benefits for dependents, and other benefits. Some courts have found that such benefits could reflect the existence of an employment relationship. Thus, the urge to provide volunteers with stipends or other financial benefits, while admirable, could expose the nonprofit to significant additional risk in the form of employment litigation.

In the area of federal and state anti-discrimination laws, there is a significant benefit to an individual being considered a volunteer because the nonprofit usually will not be liable under these laws. In contrast, under workers’ compensation laws, there can be a significant downside to an individual not being considered an employee because the nonprofit does not get the benefit of the limited liability afforded to the nonprofit for injuries sustained by the volunteer. This is not to say an injured volunteer would have an automatic or meritorious claim against the nonprofit for which s/he is volunteering—the

volunteer would have to prove all the elements of his or her claim, subject to all defenses, including, in some states, a limitation on liability and/or partial charitable immunity. The possibility of a suit for negligence suggests that nonprofits should take steps to assure that their volunteers are not subjected to dangerous conditions, including through a lack of appropriate training.

This risk of potential claims (whether employment or injury-based) is enhanced by the fact that many nonprofits do not adequately train or take typical employment-related steps with volunteers—such as providing sexual harassment training or providing a policy on reporting sexual harassment.

Because volunteers in most situations will not be considered employees, the risk of liability for an employment law claim by a volunteer is low. However, the potential for personal injury and other claims still exists, and the reputational harm to an organization from lawsuits is potentially very high. The risk can be mitigated to a large extent by recognizing that volunteers are potentially exposed to the same risks as employees and that the steps taken to protect employees should be taken to protect volunteers, consistent with their exposure to risks.

By way of example, creating a volunteer handbook and/or volunteer orientation which address the types of risks a volunteer could be exposed to will go a long way toward limiting the likelihood a claim will be filed and the organization's reputation damaged. In the employment area, this should include appropriate policies, such as an anti-harassment policy with a reporting mechanism which provides a way for volunteers to report a potential problem before it becomes a much larger problem for the organization—just as with employees. Similarly, if a volunteer will be exposed to hazards on the “job,” whether from providing medical services or assisting in construction activity, the same protections and training provided to employees should be provided to volunteers. An orientation program should be provided to volunteers that covers the essential elements of the volunteer activity and provides the volunteer with information on how to report any problem the volunteer may encounter while performing volunteer work.

Do the nonprofit and its volunteer need to worry about getting sued for volunteer activities?

Many states limit the maximum potential liability of certain nonprofit organizations and most nonprofit organizations have comprehensive liability insurance policies. Those protections, however, may provide minimal comfort to a volunteer concerned with being sued personally for actions taken while volunteering. Such concern could be a barrier to recruiting volunteers, particularly in areas of high potential litigation, including providing volunteer medical services, assisting a vulnerable population, and even driving for the organization.

In order to prevent the fear of becoming enmeshed in litigation from discouraging volunteerism, the federal government and many states have enacted legislation designed to protect volunteers from certain types of liability, such as from honest mistakes or ordinary negligence. For example, Congress passed the federal Volunteer Protection Act in 1997. The Act provides that a “volunteer”¹ of a nonprofit organization generally will not be liable from harm caused if (1) the volunteer was acting within the scope of the volunteer's responsibilities; (2) the volunteer was properly licensed, certified, or authorized by the state in which the harm occurred (where such authorization is required); (3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious flagrant indifference to the rights or safety of the individual harmed by the volunteer; and (4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the owner or operator is required to possess an operator's license or maintain insurance. The limitations on liability do not apply to terrorist or violent criminal acts, hate crimes, sexual offenses, misconduct in violation of civil rights laws, or offenses committed while the volunteer was under the influence of alcohol or “any drug.”

While the federal statute provides significant protection to volunteers, the protection does have gaps. For example, a volunteer who injures someone while driving for the organization is not protected. Significantly, the federal Act does not prohibit states from providing additional protections from liability relating to volunteers.

Accordingly, it is important for nonprofits to understand the limits each state places on volunteer liability in order to ensure that volunteers are adequately protected and the organization has appropriate insurance coverage. The limitations on volunteer liability vary significantly from state to state. For example, the Maryland Volunteer Service Act provides that a “volunteer is not liable in

damages beyond the limits of any personal insurance the volunteer may have in any suit that arises from the volunteer's act or omission in connection with any services provided or duties performed by the volunteer on behalf of the association or organization, unless an act or omission of the volunteer constitutes gross negligence, reckless, willful, or wanton misconduct, or intentionally tortious conduct." Thus, unlike the federal statute, the Maryland statute does not exempt driving from its protections. A volunteer is liable only to the limits of his or her automobile insurance unless his or her conduct falls within one of the other exemptions. Significantly, the Maryland statute for volunteers does not even require that volunteers actually maintain liability insurance in order to be eligible for the liability limitation. In short, if a volunteer does not maintain liability insurance, the volunteer cannot be held liable unless the volunteer's action constituted gross negligence, reckless, willful or wanton misconduct, or intentionally tortious conduct.

Other states, such as Alabama, provide broad protection for a volunteer acting in good faith within the scope of his or her volunteer duties with exceptions only for "willful or wanton misconduct." In some instances, a volunteer receives protection from certain lawsuits only if an organization takes affirmative steps. For example, in Michigan a volunteer will receive protection from certain lawsuits only if the nonprofit organization expressly assumes liability for those claims in its articles of incorporation. (Thus, for nonprofits incorporated in states such as Michigan, if such assumption of volunteer liability is desired, it is necessary to proactively amend the organization's articles of incorporation accordingly.) Finally, many states provide broad protections to certain categories of volunteers, including medical providers and volunteers performing duties for the state such as volunteer police officers and conservation officers.

As should be apparent, it is critical that each organization understand the law in the jurisdictions where it has volunteers to ensure that volunteers are receiving the maximum protection possible (at least to the maximum extent desired by the nonprofit), that volunteers' questions and concerns regarding lawsuits can be accurately answered, and that the organization has appropriate insurance coverage in light of the volunteer exemptions.

What should the nonprofit do?

Nonprofits should consider the following simple steps to help minimize the potential liability from and to volunteers:

- Establish criteria for volunteers to enable reasonable care in the selection of volunteers. Obtain complete information to enable identification of a "risky" volunteer. This consideration is especially important if the volunteer will work with vulnerable individuals such as children.
- Provide training and guidance to volunteers similar to an employee performing the same duties.
- Ensure that volunteers understand that they are volunteers, that they are not eligible for employee benefits, and that their status as a volunteer is not a step toward obtaining employment with the organization.
- Establish a volunteer handbook which provides volunteers with clear channels for reporting and resolving any problems (including harassment).
- Develop rules for supervising and monitoring volunteers.
- Develop criteria for discontinuing volunteers who demonstrate unfitness.
- Understand the scope of exemption from liability for volunteers and take the steps necessary to maximize that protection.
- Examine the organization's insurance policies to ensure that they provide sufficiently broad coverage for actions taken by volunteers.

¹ "Volunteer" is defined as a person who does not receive compensation or receive other benefits in excess of \$500 per year. The liability of the organization for harm caused by a volunteer is not limited under the Act.

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