



THE MYTH of VOLUNTEER IMMUNITY

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Volunteers are often the engine of success for a nonprofit organization. They are the essence of charity work and help to make real the missions of thousands of organizations worldwide. In the nonprofit sector an organization can find itself financially strapped with limited resources and an ever growing client base. The countless hours of donated time by everyday people help an organization fulfill its mission and provide the necessary services to the population that needs it most. In fact, according to the Corporation for National & Community Service, in 2009 volunteers accounted for 8.1 billion hours of service.¹ At an estimated

dollar value of \$20.85 per charity hour, this accounted for approximately \$169 billion of service. Simply put, without volunteers, the nonprofit sector would be a shell of what we know it to be today.

The government has also recognized how important volunteerism is to the nonprofit sector. Both federal and state laws provide volunteers with some degree of protection from civil liability. Every state has enacted laws that address the legal liability of volunteers, but all are very different in terms of breadth and scope of protection. In an effort to provide uniformity and create a minimum level of volunteer protection, in 1997 the federal government enacted the “Volunteer Protection Act” (VPA). Generally, the VPA pre-empts any state law that is inconsistent with the VPA, unless the state law provides greater protection. The VPA also permits states to enact their own laws which make the federal law inapplicable in a particular state.

Volunteer immunity laws may provide volunteers with some protection but they are not complete solutions. Many in the nonprofit sector mistakenly believe that volunteer protection statutes provide complete protection from civil liability to volunteers, including directors and officers. The second mistaken belief is that volunteer immunity laws provide protection from liability for the nonprofit entity.² Belief in either of these myths could lead to potentially disastrous consequences. For this reason volunteer immunity laws should be understood by both the volunteer and the organization. Other risk management mechanisms, including insurance, should be in place to fill the gaps and provide piece of mind.

Volunteer Immunity

The need to provide legal protection for individuals donating their time was largely overlooked by governments until the mid 1980's. Not coincidentally it was around this time that lawsuits against nonprofit and government volunteers started attracting increased media attention and scrutiny. Volunteers, including directors and officers, were finding themselves at increased risk of litigation, while at the same time insurance prices had increased so substantially that many nonprofits were left with no other choice but to drop their insurance coverage, leaving themselves, their employee and their volunteers (including directors and officers) exposed to the costs of litigation. The consequent decrease in overall volunteerism and increase in board resignations hindered the ability of many organizations to fulfill their missions.³

State Volunteer Immunity Laws

Prior to the passage of volunteer immunity laws, a volunteer accused of negligence during the course of performing his or her duties could be held personally liable. The government realized that this discouraged volunteerism and in 1990, President George H.W. Bush released a model state volunteer protection act and called for states to take action.

Every state has passed legislation that provides some degree of liability protection to volunteers. The statutes in each state are quite different in terms of the breadth and scope of coverage provided, however, and all include different exceptions. Due to the non-uniformity of, and exceptions in, state volunteer immunity laws, in many circumstances volunteers are not protected by voluntary immunity laws. Common statute exceptions include certain types of conduct, such as gross negligence, use of motor vehicles and federal actions. For example, Colorado's volunteer protection statute states, "a volunteer acting in good faith for a non-profit organization or corporation, or a hospital is immune from civil liability. This immunity doesn't extend to acts involving a motor vehicle."⁴

Many states provide volunteer protection only to directors and officers. Some also include a narrow group of volunteers that provide public emergency services like firefighters and emergency service personnel. Other states provide much broader protection which extends to all uncompensated volunteers who render services for nonprofit or government agencies. Because state laws differ greatly and many state laws include unique provisions and exemptions from protection, organizations should refer to the volunteer protection laws of the applicable state(s).

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Volunteer Protection Act of 1997

In 1997, President Bill Clinton signed into law the federal Volunteer Protection Act (VPA). The purpose of the VPA was to provide immunity from tort claims and encourage volunteerism. The VPA provides protection to “volunteers for a nonprofit organization or government entity; who either (a) receive no compensation (although reasonable reimbursement of expenses incurred is allowed), or (b) do not receive anything of value in lieu of compensation in excess of \$500 per year.”⁵

The VPA provides protection to nonprofit and government volunteers if:

- The volunteer was acting within the scope of his or her responsibility;
- The volunteer was properly licensed, certified or authorized to engage in the activity or practice;
- The harm was not caused by willful, criminal or reckless misconduct, gross negligence or conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and
- The harm was not caused by the operation of a motor vehicle, aircraft, or other vehicle for which an operator's license or insurance is required by the state.⁶

Although the VPA provides a more consistent and uniform approach to protection, and offers a degree of protection to volunteers, it also can provide a false sense of security. For example, although volunteers are protected from claims of negligence, they are not protected against claims of gross negligence. Thus, if a lawsuit contains an allegation of gross negligence against a volunteer, the volunteer must defend against the action, and will typically incur defense costs in doing so. Additionally, the VPA excludes protection for two of the most common types of suits filed against volunteers, employment-related claims alleging violations of federal or state civil rights laws and claims as a result of automobile accidents. Importantly, volunteer protection statutes do not necessarily prevent a suit from being filed against a volunteer. Rather, such statutes provide a defense for the volunteer, which means that the volunteer typically will have to retain an attorney and incur defense costs. Because defense costs in these actions can be quite high, a volunteer should not rely on voluntary immunity statutes alone to provide protection from lawsuits.

Furthermore, while the VPA and state volunteer immunity statutes provide limited protection for volunteers, it does not shield the nonprofit entity from liability. These gaps of volunteer protection along with the exposures the organization faces as a result of volunteer actions require a comprehensive risk management approach.

Volunteers may have some protection under their homeowners and personal automobile policies, and should consult with their agent to understand the scope of the coverage.

Volunteer Exposures

Volunteer exposures typically excluded by federal and state volunteer immunity laws include:

Automobile

A large number of organizations require volunteers to drive as a part of their responsibilities. As previously noted, volunteer immunity statutes usually do not apply to lawsuits arising from the volunteer's use of an automobile. For organizations that have volunteer drivers, risk management strategies should be implemented as a way to minimize the exposure to the volunteer and the organization.

Governance and Management

The volunteer board of directors of a nonprofit is responsible for overseeing the direction of the organization so that it can fulfill its mission. If a board of directors causes harm to the organization, legal action may be brought against one or more of the individual board members as well as against the organization.

As previously mentioned, federal and state volunteer protection laws provide some immunity to board members, but the protection is not comprehensive. For example, compensated directors and officers typically are not protected and violations of certain federal statutes such as federal anti-discrimination laws are not covered. Even if immunity laws are applicable, the laws do not protect the volunteer director from the costs associated with defending a claim.

Employment Practices

The frequency of employment practices claims, which include claims of discrimination, harassment, retaliation and wrongful termination, has grown substantially since the early 1990's. In fact, employment practices claims are the most common type of claims brought against nonprofits. The cause of these allegations may be the result of the actions of an organization's volunteers or its employees. Increasingly, plaintiffs' attorneys sue individuals, including volunteer directors, personally, along with the organization. The cost to defend,

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settle or pay damages for employment-related claims has risen substantially in recent years. Volunteer administrators, managers, supervisors and board members cannot rely on federal and state volunteer immunity laws for protection against these lawsuits, as such statutes do not provide immunity from federal civil rights laws, which are the basis of most employment practices claims.

Risk Management and Insurance

Since volunteer immunity laws do not provide comprehensive protection for volunteers, and typically provide no protection for the nonprofit entity, steps should be taken to minimize losses. Loss control programs have been effective, for example, in reducing automobile accidents among volunteer drivers.

In addition, both volunteers and nonprofit entities should assure that appropriate insurance protections are in place. Volunteers may have some protection under their homeowners and personal automobile policies, and should consult with their agent to understand the scope of the coverage. For the organization, protection for volunteers may be available under general liability, auto liability, directors & officers liability (D&O), and employment practices liability (EPL) policies. Depending on the type of organization and its mission, professional liability or malpractice coverages also may be appropriate. The organization should work closely with its agent or broker to identify all its exposures, and to be certain that both the organization and its volunteers are protected to the fullest extent of available coverages.

In Closing

Volunteers provide our communities with vital services that assure continued support for specific populations and causes. Depending on the nature of the organization, the level by which it relies on volunteer assistance may vary. Some organizations are comprised entirely of volunteers and others may use them sporadically. Whatever the reason an agency has for requiring volunteer support, their importance to organizations and the community is never questioned.

Volunteers should understand what protections may be available under their personal insurance policies.

For this reason, both the nonprofit and the volunteer should understand the liability exposures they face as result of volunteer service. The nonprofit community often mistakenly believes that the volunteers and the agency are not at risk from lawsuits because they are protected by volunteer immunity laws. This misperception could be potentially devastating.

Volunteers should understand what protections may be available under their personal insurance policies. To provide piece of mind, an organization and its board should consult insurance and risk management professionals to assist in developing a comprehensive insurance and risk management program that addresses volunteer related exposures. The combination of government protections, risk management processes and procedures, appropriate insurance coverages and company oversight should help to provide a positive experience for everyone and continue to promote volunteerism within the organization. ■