

CLM 2016 Midwest Conference
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**Let Me Help You – Out of a Million Dollars:
The Truth About Volunteer Liability and Risk Management**

I. Avoiding misclassification of volunteers and employees

According to the IRS, the 85% of all charitable nonprofits have no paid staff and are run entirely by volunteers. For charitable or religious based nonprofits, the volunteer workforce is integral and critical to operations. But to surprise of many, volunteers may have employee rights under certain circumstances, potentially subjecting your organization to employment related liability such as wrongful discharge, sexual discrimination and unpaid wages.

A. Classification relating to the payment of wages

Do I have to pay wages to a volunteer? A volunteer, or the government, may claim so. When faced with this issue, consider two factors: is the entity covered because it is involved in a commercial enterprise and is the worker a true volunteer.

1. The nonprofit as a covered entity

Public service, religious and charitable non-profits are generally not covered entities. However, if the entity is engaged in a commercial enterprise, such as running a gift shop or creating items for competitive sale, this could remove the entity from that exemption. *Tony & Susan Alamo Foundation v. Secy of Labor*, 471 U.S. 290, 295 (1985). The Department of Labor (DOL) would also look to the individual's actual duties and whether those duties involve the individual in interstate commerce.

2. The worker as an employee or volunteer.

The Fair Labor Standards Act (FLSA) defines employment very broadly, i.e., "to suffer or permit to work." However, the Supreme Court has made it clear that the FLSA was not intended "to stamp all persons as employees who without any express or implied compensation agreement might work for their own advantage on the premises of another." In administering the FLSA, the Department of Labor follows this judicial guidance in the case of individuals serving as unpaid volunteers in various community services. Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable or similar non-profit organizations that receive their service.

See also *Tony & Susan Alamo Foundation v. Secy of Labor*, 471 U.S. 290, 295 (1985), finding that the FLSA excludes from the definition of “employee” one who “without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit.” The subjective expectation of the worker as to whether the position was a paid position is only a single factor and not dispositive.

Questions to ask in the event of a claim for payment:

- Does the worker actually possess a motive to perform free service;
- Are the services different than those performed by paid workers
- Is a paid worker displaced
- How is the organization advantaged by the service?

Clarifying steps to avoid lurching into the employee realm:

- Do not pay for services beyond expense reimbursement
- Limit the “perks”
- Do not promise future employment
- Do not reference an employee handbook; if a separate volunteer handbook is used, avoid language implying an employee-employer relationship.

B. Classification relating to Title VII and State based discrimination liability

1. Title VII Liability

Title VII applies only to employees, however, the definition of “employee” is less than helpful: “an individual employed by an employer.” 42 U.S.C. 2000e(f). There are two basic methods of examining the question, with variations among the circuits.

- a. **Threshold remuneration test.** A worker must demonstrate receipt of direct remuneration, i.e. salary or wages, or significant indirect benefits not incidental to the service performed in order to proceed to further analysis of the common law agency test. *Juino v. Livingston Parish Fire Dist. No 5*, 717 F.3d 431 (5th Cir. 2013)
- b. **Common law agency.** Remuneration is not an “exalted” factor among all the agency factors considered in determining employment vs. volunteer status of workers for discrimination purposes. *Marie v. American Red Cross*, 771 F.3d 344 (6th Cir. 2014).

2. State based discrimination liability

- a. California used a remuneration based review to determine whether the worker was a volunteer for purposes of protection under state

discrimination laws. *Mendoza v. Town of Ross*, 128 Cal. App. 4th 625 (2005). It has recently extended statutory discrimination protections to volunteers. California Gov. Code 12940.

- b. Texas has adopted a very specific statute protecting unpaid interns from sexual harassment. It applies a specific multi factor test for internship and does not address volunteers. Tex. Lab. Code sect 21.1065.

II. Laws related to tort liability

A. Charitable Immunity

This doctrine was originally recognized in 1861, offering nonprofits and charities from any tort lawsuit. More recently, courts and legislative bodies have largely modified or even eliminated the doctrine. See, ie, *Nicholson v. Good Samaritan Hosp.*, 199 So. 344 (Fla. 1940); *Malloy v. Fon*, 232 P.2d 241 (Cal. 1951); *Howle v. Camp Amon Carter*, 470 S.W.2d 629 (Tex. 1971).

Some states permit liability only to the limits of available insurance coverage. See, ie, *Helton v. Sisters of Mercy*, 234 Ark. 76 (1961); *Cox v. de Jarnette*, 123 S.E.2d 16 (Ga.Ct.App. 1961).

B. Volunteer Protection Act

Under the Volunteer Protections Act of 1997 (VPA), a volunteer will not be liable for harm he or she causes while negligently performing services for a nonprofit or for a government entity. 42 U.S.C. sect. 14501-14505. It is not all encompassing: there are exceptions for gross negligence, willful or criminal misconduct, hate crimes, sexual offenses, and injuries from motor use. There are limitations on punitive damages as well.

Note that while volunteers are shielded from personal liability when the requirements are met, the nonprofit remains potentially liable under *respondeat superior*.

The VPA preempts state law, but only to the extent that state law is inconsistent; a state may provide additional protection to volunteers.

C. State Law Examples

a. Florida

Unpaid volunteers are immune from civil liability for negligent acts or omissions but immunity is not extended to willful and wonton acts. To the extent that the volunteer is immune, liability then extends to the nonprofit for whom the volunteer was acting as an agent. Fla. Code. 768.1355; *Gillet v. Watchtower*, 913 S.2d 618 (Fla.App. 3^dDist 2005).

b. Texas

All volunteers are immune from civil liability for any act or omission resulting in death, damage, or injury if the volunteer can prove he/she was acting in the course and scope of their duties or functions, but only applies to those who do not receive compensation, including stipends, for their volunteer services. It does not extend to intentional or willful/wanton acts. Tex. Code. Sect. 84.004.

c. California

Cal. Corp. Code Sect 5329 provides immunity for nonprofit volunteer directors and officers where they are:

- Unpaid
- Acting with scope of duties
- Acting in good faith
- The acts are not reckless, willful, intentional, or gross misconduct
- And – the nonprofit has adequate insurance or if a small nonprofit has made adequate efforts to procure insurance

III. Case Studies of Personal Injury Liability

With the abrogation of charitable immunity and the extension of volunteer protection, nonprofits are vulnerable to all of the anticipated types of personal injury liability: auto, premises, misconduct, and failure to exercise reasonable care. Below are two case studies for discussion.

A. Liability for Injury to Volunteers

Case Study: Personal injury to a volunteer in a mission related activity. A group of volunteers are sprucing up the landscaping of the local parish as part of its annual spring cleaning activity. Sandra is using a step ladder to reach some pruning. She misses a step on the ladder and breaks her ankle. She claims it was all her fault. For now.

B. Liability for Injury to Third Parties by Volunteers

The duty to protect and the duty to supervise are two of the most frequently cited bases for volunteer injury to third parties. It has become a hotbed for those nonprofits organizations who sponsor or charter another organization, such as religious organizations and the Boy Scouts. In a recent Washington case involving sexual misconduct by a Scout leader in a troop sponsored by a Mormon ward, the Boy Scout entities were dismissed because they lacked specific knowledge of the Scout leader's dangerous propensity, and because the Scout organizations were not in physical custody and control of the injured minor. However, the chartering church could not be dismissed on summary judgment because there were factual issues regarding potential indications of the Scout leader's unsuitability. *N.K. v. Corp. of Presiding Bishop of Church of Latter Day Saints*, 307 P.3d 730 (Wn.App. 2013).

Case Study: two patrons are seeking meals at a volunteer meal site staffed by volunteers. An altercation occurs between them. The volunteers attempt to resolve the altercation by separating the two men and offering them coffee. No authorities are called. One man says he will meet the offer man outside. Another altercation occurs outside, this time with a weapon.

IV. Risk Management

A. Preengagement paperwork

Develop a written description of the position and an assessment of the risk. This should include:

- Responsibilities
- Key tasks
- Primary risks to the volunteer i.e. driving, physical work
- Identify the reporting relationship.

Consistent with the description, an attorney can draft an appropriate waiver or other acknowledgement of risk and understanding of potential consequences.

B. Screening and Selection issues

The core elements are written applications, interviews, appropriate background checks.

The greater the risk to position presents, the more extensive the screening process should be.

A criminal history record check should be part of a screening process, not a selection criteria. However, some criminal records will permanently disqualify a volunteer from holding a position, particularly in youth serving organizations.

C. Train, Supervise and Discipline

Training needs can differ based on the nature of the job and the experience of the volunteer. The purpose is to provide and receive acknowledgment of a solid understanding of the organization, its mission and the responsibilities of the volunteer.

Commit to clear instructions and a clear chain of reporting.

D. Prepare an injury action plan, including incident reports

E. Insurance

Consider:

- Commercial General Liability
- Directors and Officers Liability
- Automobile Liability – require proof of insurance for driving positions.