

DOING GOOD THE WRONG WAY

Volunteer Liability – Legal and Practical Issues

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Volunteer Defined

- ❑ Community Service – not just for hardened criminals on parole anymore.
- ❑ Volunteer – one whose work makes no cents.

Volunteer Defined

29 CFR 553.01 – Application of FLSA to Volunteers

- ❑ An individual who performs hours of service for a public agency for civic, charitable, or humanitarian services without promise, expectation or receipt of compensation, is considered to be a volunteer during such hours.

- ❑ Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion from an employer.

Volunteer Defined

29 CFR 553.01 – Application of FLSA to Volunteers

- An individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.
 - An example of an individual performing services that constitute the "same type of services" is a nurse, employed by a state hospital, who proposes to volunteer to perform nursing services at a state-operated health clinic that does not qualify as a separate public agency.
 - Examples of volunteer services that do not constitute the "same type of services" include: a city police officer who volunteers as a part-time referee in a basketball league sponsored by the city or a city parks department employee who serves as a volunteer city firefighter.
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Limited Protection for Volunteers

- ❑ The charitable immunity doctrine that provided protection to charitable organizations and, in some states, their agents from tort liability has been abolished in most states by statute or case law.
- ❑ The protection afforded by state or federal volunteer protection statutes is not absolute.
- ❑ Although some governmental immunity acts provide protection to volunteers, the protection is not absolute; and it cannot be assumed that a nonprofit organization providing services to a public entity will be treated as a public entity for governmental immunity purposes.

Volunteers Face Liability for Negligent Acts

- ❑ Absent immunity from liability, a volunteer is not relieved of the duty of exercising a reasonable degree of care and skill. If a volunteer injures a minor, the effectiveness of defenses such as assumption of risk, waiver, and contributory negligence may be reduced.
 - A child may be presumed incapable of negligence.
 - Generally, the law does not allow a parent to waive a child's cause of action for negligence or other torts.

Volunteers Face Liability for Negligent Acts

- Some states have enacted statutes that authorize a parent to release or waive a child's prospective claim for negligence. *See, e.g.,* Colo. Rev. Stat. 13-22-107 (parent may waive or release a child's prospective claim for negligence, but may not waive a prospective claim for willful and wanton acts or omissions, reckless acts, or grossly negligent acts).

Volunteers Face Liability for Intentional Acts

- ❑ Volunteers may be held liable for intentional acts that cause injury, such as criminal violations and intentional torts, including assault, battery, false imprisonment, trespass, and infliction of emotional distress.
- ❑ If committed against a minor, defenses may be limited. For example, the defense of consent may be limited by legal presumptions about a minor's capacity to consent.

General Insurance Considerations

- Volunteers may have some limited coverage under their own homeowner's and/or auto liability policies.
 - A volunteer's provision of transportation to participants in an event may not be covered.
 - The volunteer coverage provided under many homeowner policies is limited to damages arising from bodily injury or property damage and, therefore, will not respond to claims arising out of personal injury (libel, slander, invasion of privacy, false imprisonment).
 - Indemnification is only as good as the ability of the indemnitor to pay.

Public Entity Liability for the Acts of Volunteers

- ❑ Direct Liability – Where governmental immunity does not shield a public entity, tort liability may result from the acts or omissions of the public entity. The liability most often stems from the entity's breach of the duty of care.
- ❑ Vicarious Liability – Where tortious conduct occurs that is not the result of the acts or omissions by a public entity itself, but instead results from the conduct of an employee or an agent, the public entity may be held vicariously liable under the doctrine of *respondeat superior*.

Public Entity Liability for the Acts of Volunteers

- Volunteers may be agents:
 - Absence of a contract or compensation does not necessarily qualify a volunteer as an independent contractor.
 - A public entity may control a volunteer through supervision or the establishment of volunteer policies.
 - Failing to exercise control does not allow a public entity to escape liability because, regardless of the direct level of supervision, a public entity has the general authority to control its volunteers.

Public Entity Liability for the Acts of Volunteers

- ❑ Negligent Hiring – Negligent hiring is distinct from vicarious liability. It is not based on the wrongful conduct of the employee/servant, but rather is premised on the conduct of the employer in hiring or selecting the employee or volunteer.
 - May apply to impose liability even though the employee or volunteer is acting outside the scope of employment.
 - Generally imposes a duty on an employer to perform a reasonable investigation of an employee's/volunteer's background.

Public Entity Liability for the Acts of Volunteers

- The relationship between hospitals – including charitable hospitals – and doctors is analogous to the relationship between volunteers and nonprofit organizations or public entities. The relationship is typically not an agency relationship and generally is not based on the doctors being paid by the hospital. Still, many courts have held that a hospital can be liable for its negligence in failing to investigate the background and credentials of doctors who receive staff privileges. *See, e.g., Johnson v. Misericordia Community Hosp.*, 301 N.W. 2d 156, 164 (Wisc. 1981) (hospital has a duty to exercise care in the selection of its medical staff).

Public Entity Liability for the Acts of Volunteers

- ❑ *Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211 (Alaska 1991) – A guardian *ad litem* filed action against a church and a daycare assistant for the alleged sexual abuse of a child. The trial court granted summary judgment in favor of the church. On appeal, the court rejected “as without merit” the church’s argument that the daycare assistant’s position as a volunteer did not require a formal interview or a background check. The court noted that a volunteer may be a servant if subject to the control of another, citing the Restatement (Second) of Agency 220, 225 (1958).

Public Entity Liability for the Acts of Volunteers

- *Swearinger v. Fall River Joint Unified School District*, 212 Cal. Rptr. 400 (Cal. Ct. App. 1985) – The district hosted a basketball tournament and invited other districts to participate. Families of students in the host district provided lodging to visiting students, one of whom was injured when she and her volunteer host were involved in an automobile accident. Because the faculty of the host district selected the host families, the court held that the host district had a duty to exercise reasonable care in the selection. The court determined that there were disputed factual issues concerning the duty and the selection criteria and reversed the trial court's summary judgment in favor of the district.

Public Entity Liability for the Acts of Volunteers

- *Big Brother/Big Sister of Metro. Atlanta v. Terrell*, 359 S.E. 2d 241 (Ga. App. 1987) – The Georgia Court of Appeals held that the trial court's denial of summary judgment to Big Brother on the issue of negligent selection was in error because Big Brother's screen process was adequate. The screening consisted of a written application, multiple references that were checked, an extensive interview and assessment by a clinically trained caseworker, and a personal meeting with the membership committee. The court determined that a criminal background check was not necessary in light of the foregoing screening process.

Volunteer Protection Acts – 42 U.S.C. 14501

- Preempts state law to the extent inconsistent with the act.
- Defines *volunteer* as an individual who performs services for a nonprofit organization or governmental entity and does not receive (a) compensation – other than reimbursement or allowance of expenses actually incurred – or (b) any other thing of value in lieu of compensation in excess of \$500 per year.
- *Volunteer* includes directors, officers, trustees, or direct service volunteers.

Volunteer Protection Acts – 42 U.S.C. 14501

- ❑ Defines *nonprofit organization* as (a) any organization described in 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under 501(a) of the Code, or (b) any not-for-profit organization organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare or health purposes and that does not practice any act constituting a hate crime.
- ❑ Defines *harm* to include physical, nonphysical, economic, and noneconomic losses.

Volunteer Protection Acts – 42 U.S.C. 14501

- ❑ The act provides immunity for a volunteer serving nonprofit organizations or governmental entities for harm caused by his/her acts or omissions if:
 - Volunteer is acting within scope of volunteer's responsibilities at the time of the act or omission;
 - Volunteer, if appropriate or required, is licensed, certified, or authorized;
 - Harm is not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference; and
 - Harm is not caused by operation of a motor vehicle.
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Volunteer Protection Acts – 42 U.S.C. 14501

- The immunity does not apply to acts that constitute:
 - Violent crime (18 U.S.C. 16) or international act of terrorism (18 U.S.C. 2331) for which the volunteer has been convicted in any court;
 - Hate crime (18 U.S.C. 245);
 - Sexual offense, as defined by state law, for which the volunteer has been convicted in any court;
 - Misconduct for which the volunteer has been found to have violated a U.S. or state civil rights law;
 - Influence of alcohol or drugs.

Volunteer Protection Acts – 42 U.S.C. 14501

- ❑ Punitive damages may not be awarded against a volunteer acting within the scope of responsibilities unless a claimant establishes by clear and convincing evidence that harm was caused by willful or criminal misconduct, or a conscious, flagrant indifference to the rights of others.
- ❑ Act does not affect civil action brought by nonprofit organization or governmental entity against volunteer (*e.g.*, breach of fiduciary duty).
- ❑ Act does not provide immunity to the nonprofit organization or the governmental entity.

Volunteer Protection Acts – 42 U.S.C. 14501

- *Gaudet v. Braca*, 2001 Conn. Super. LEXIS 3352 – Plaintiff sought damages for injuries suffered while she was selling tickets for a high school soccer game when a partially constructed ticket booth fell on her. A school booster club and the school administration authorized the construction. Mr. Braca, a member of the club, was not paid to build the booth. The booster club was a nonprofit club. The court dismissed the case ruling that Mr. Braca was immune under 42 U.S.C. 14501 because he was a volunteer working for a nonprofit organization and acting within the scope of his responsibilities.

Volunteer Protection Acts – 42 U.S.C. 14501

- *Armendarez v. Glendale Youth Center*, 265 F. Supp. 2d 1136 (D. Ariz. 2003) – A former employee of a nonprofit corporation sued it and the individual members of its board and claimed unpaid wages under FLSA. Under the employee's leadership, the nonprofit ran out of money and incurred substantial debt to the IRS for payroll tax violations. The court dismissed the employee's claim and held that the federal act applies to individual board members of a nonprofit and that it precludes FSLA claims because the federal laws listed as exceptions to the act's applicability do not include FSLA.

Volunteer Protection Acts – 42 U.S.C. 14501

- *Momans v. St. John's Northwestern Military Academy, Inc.*, 2000 U.S. Dist. LEXIS 5129 (N. D. Ill. 2000) – Although the federal Volunteer Protection Act does not define the term *willful*, it has an established meaning: “the usual meaning assigned to ‘willful’ . . . is that the actor has intentionally done an act of unreasonable character in disregard of a known risk that was so great as to make it highly probable that harm would follow.” (citing *Prosser and Keeton on the Law of Torts*, § 34 at 213 (4th ed. 1984)).

Volunteer Protection Acts – 42 U.S.C. 14501

Gray Areas

- ❑ Acting within the scope – With many organizations or public entities, the volunteers duties or responsibilities are undefined or are not clearly defined. Does the organization or public entity have to expressly authorize the volunteer to perform specified duties before the act will apply? If so, from whom does the authority have to come? Compare with Colorado Governmental Immunity Act which protects volunteers acting for the benefit of a public entity at the “request or and subject to the control of the public entity.
- ❑ Appropriate or required license or certification – State licensing requirements are set out in statutes or ordinances. But what does “appropriate” mean?

Volunteer Protection Acts – State Laws

- ❑ All fifty states have volunteer protection statutes.
- ❑ Similar to the federal act, most state laws make individual volunteers for specified types of organizations (typically nonprofit organizations, governmental entities, and nonprofit hospitals) immune from civil liability if they have acted in good faith and without malfeasance.
- ❑ Like the federal act, state laws contain exceptions for:
 - Willful or wanton conduct.
 - Gross negligence.
 - Operation of a motor vehicle.

Volunteer Protection Acts – State Laws

- Similar to the federal act, many state volunteer protection laws:
 - Do not preclude suit by nonprofit or governmental entity against a volunteer; and
 - Do not immunize nonprofit or governmental entities from liability for harm caused by their volunteers.
- Nonprofit Risk Management Center – summary of volunteer protection statutes:
<http://www.nonprofitrisk.org/library/state-liability.shtml>

Member Requests for Coverage for Nonprofit Supporting Organizations

- ❑ In most instances supporting organizations are legally distinct from the public entities they support. The governing body of such groups may include public entity board members or employees but often do not. Frequently, the public entity exercises little or no control over the supporting organization.
- ❑ Self-insurance pool members, as well as many supporting nonprofit organizations, often assume that the supporting organizations are covered by the member's insurance.
- ❑ More sophisticated members or supporting organizations request coverage – either by separate policy/coverage or by additional insured designation.

Member Requests for Coverage for Nonprofit Supporting Organizations

- ❑ Hypothetical Pool: (a) located in a state with a strong governmental immunity act (*e.g.*, Colorado), (b) relies on act in negotiating reinsurance/excess insurance premiums, (c) restricted membership.
- ❑ Do applicable statutes or provisions of the pooling agreement limit who can be a pool member?
 - State statutes and or insurance department regulations may preclude separate supporting organizations from being a pool member.
 - If state law does not, the pooling agreement may. For example, the agreement may provide that the pool may extend coverage only to members and that only persons or entities that are protected by governmental immunity may be members.
- ❑ How will reinsurers/excess providers react to coverage for persons or entities not covered by governmental immunity?

Member Requests for Coverage for Nonprofit Supporting Organizations

- How are public entities defined in the applicable governmental immunity act?
 - Colo. Rev. Stat. 24-10-103(5) is illustrative: the term *public entity* means “the state, county, city and county, municipality, school district special improvement district, and every kind of district, agency, instrumentality, or political subdivision thereof organized pursuant to law and any separate legal entity created by intergovernmental contract or cooperation ...”
 - No reference to supporting nonprofit or charitable organizations. Are they instrumentalities?

Member Requests for Coverage for Nonprofit Supporting Organizations

- How do courts interpret and apply governmental act definitions?
 - No reported Colorado cases have specifically addressed whether a supporting nonprofit organization is a public entity entitled to immunity under the act.
 - Colorado Court of Appeals has held that the term *instrumentality* must be interpreted in the context in which it appears in the act. By placing the term in a list of other entities that are public in nature, the legislature has expressed an intent to restrict that term to only entities that are governmental in nature.

Member Requests for Coverage for Nonprofit Supporting Organizations

- *Carroll v. Paddock*, 764 N.E. 2d 1118 (Ill. 2002) – The characteristics that make a nonprofit supporting entity a charitable organization do not, without more, qualify it as a public entity. Public entity status requires either direct government ownership or operational control.

Member Requests for Coverage for Nonprofit Supporting Organizations

- *Pagan v. Sarasota County Public Hospital Board*, 884 So.2d 257 (Fla. App. 2004) – Under Florida law, governmental immunity extends to private parties that are *agents* of the state. Fla. Stat. 768.28. The analysis of whether a nonprofit corporation is an agent centers on the issue of control retained or exercised by the governmental entity. The nonprofit must be subject to something more than regulatory control. Control that flows from a contractual arrangement is not, alone, sufficient. The fact the corporation is formed by a public entity is not, in and of itself, sufficient. Significant control over the day-to-day operations of the nonprofit corporation will support agency status.

Member Requests for Coverage for Nonprofit Supporting Organizations

- Can a nonprofit supporting organization be considered a *public employee*?
 - Colo. Rev. Stat. 24-10-103(4) is illustrative: the term *public employee* is defined to mean “an officer, employee, servant, or authorized volunteer of the public entity, whether or not compensated, elected, or appointed but does not include an independent contractor. For the purposes of [the act], ‘authorized volunteer’ means a person who performs an act for the benefit of a public entity at the request of and subject to the control of the public entity.”

Member Requests for Coverage for Nonprofit Supporting Organizations

- ❑ The Colorado Supreme Court interpreted the term *public employee* – in the context of whether a private for profit corporation contracting with the state to operate a shooting range in a state park is a *public employee* – to be limited to natural persons. “[B]y referring to ‘officers,’ ‘servants,’ ‘volunteers,’ and persons who are ‘elected’ or ‘appointed,’ [the act] indicate[s] that only natural persons are intended to qualify.” *Safari 300, Ltd v. Hamilton Family Enterprises, Inc.*, 181 P.3d 278 (Colo. 2007).

Member Requests for Coverage for Nonprofit Supporting Organizations

- What organizational requirements or structure might enhance the likelihood that a court will find a supporting organization to be an agency or instrumentality of a public entity?
- Must (i) be organized, maintained and operated by the pool member as a corporation exempt from taxation under 501(a) of the Internal Revenue Code or listed as an exempt organization in 501(c)(3) of the Code (a parent/subsidiary corporate relationship model) or (ii) be organized, maintained, and operated as a tax exempt organization under the Code and subject to significant supervision and control by the pool member (a brother/sister corporate relationship model).

Member Requests for Coverage for Nonprofit Supporting Organizations

- ❑ Must provide copies of (a) the determination letter issued by the Internal Revenue Service and (b) its most recently filed IRS Form 990.
- ❑ Must provide complete copies of its organizational documents. NOTE: Not all 501(c)(3) organizations are formally organized as corporate entities. If an unincorporated nonprofit association is governed by a set of bylaws or other organizational documents adopted by more than one person, the IRS treats the organization as a nonprofit corporation.

Member Requests for Coverage for Nonprofit Supporting Organizations

- ❑ A majority of the officers, directors, or trustees of the supporting organization must be appointed or elected by the governing body of the pool member or by officers of the member's governing body acting in their official capacity.
- ❑ The officers, directors, or trustees of the supporting organization and any volunteer who performs services for or on behalf of the organization must serve or perform services without compensation other than reimbursement for actual expenses incurred.