

## Legal Issues Related to Volunteers

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This article helps the readers to identify the relevant legal issues relating to the presence of volunteers in nonprofit organizations in the U.S. One way of examining legal issues relating to volunteers is to consider how the usual rules with regard to employees are changed, if at all, by the presence of volunteers. Many of the same legal questions arise when both volunteers and salaried employees are working, but the answers to these questions may be less established when considered with regard to volunteers.

In order to understand legal issues, the legal definition of employee must be clear. "Employee" is defined differently for different legal purposes. Some of these definitions clearly include volunteers, whereas others are much less clear. For example, the United States Equal Employment Opportunity Law, 42 U.S.C. § 2000e(f), defines employee as "an individual employed by an employer." This definition does not explicitly state whether it includes volunteers. On the other hand, volunteers are explicitly included in the Pennsylvania State Tort Claims Act, 42 Pa. C.S.A. § 8501 *et seq.*, which defines employee as "any person who is acting or has acted on behalf of a government unit on a permanent or temporary basis, whether compensated or not. . . ." (emphasis added). "Employee" or "servant" is defined for vicarious liability purposes as one over whom the employer or master has a right of control, one whose services the employer or master consents to receive, and whose services are expected to benefit the master or employer. Volun-

teers, then, may be "employees" for some purposes and not for others.

### KEY TERMS

In discussing liability issues relating to volunteers, we began by defining some key terms. A "tort" is a legal wrong. "Negligence" is some deviation from the ordinary standard of care exercised by a reasonable person. "Cause" is a very complex legal concept but which has some of the same sense as in colloquial English, with some significant variations.

In order to understand how the liability laws apply to volunteers, it is necessary to understand some of the basic principles of liability. Under the common law of torts, an injured person can recover from someone whose negligence caused the injury. For example, if Mr. Smith drops a banana peel on the ground in front of Ms. Jones, and Ms. Jones slips on the banana peel and injures herself, she can recover from Mr. Smith for his negligence, if a reasonable person in the situation, using ordinary care, would not have dropped the banana peel.

### WHAT HAPPENS IF A VOLUNTEER INJURES A THIRD PARTY?

#### *Organization's Liability*

An employer may be liable for torts of its employees, even if the employer was not negligent, under the doctrine of *respondet superior*. This doctrine is also applied to cases of volunteers working for an organization. An organization may be liable for injuries caused by a volunteer to

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a third party under this doctrine of *respondeat superior* if: (1) the volunteer negligently or intentionally caused the accident; (2) the volunteer was performing his or her assigned work at the time of the accident; and (3) the volunteer was within the organization's control, *i.e.*, was a "servant." On this last element, courts look at whether the organization has the "right" of control, not whether that control is actually exercised. The right of control may be evidenced by management procedures, recordkeeping systems, etc.

There are several cases in which these principles were applied. For example, in one case, *Baxter v. Morningside Inc.*, 10 Wash. App. 893, 521 P.2d 946 (1974), the volunteer was in a car accident while driving a car on an errand for the organization. The court found the organization liable to the injured party because all three requirements for *respondeat superior* were met: the volunteer caused the accident, was doing his assigned work at the time of the accident and the organization had a right of control over the volunteer, because the organization and volunteer had agreed on the purposes and details of the errand. In other cases, even involving similar circumstances, courts have reached different conclusions. In *Scottsdale Jaycees v. Superior Court*, 17 Ariz. App. 571, 499 P.2d 185 (1972), which also involved a car accident, a volunteer for the organization was on his way to a meeting in another state as a designated delegate. The court ruled that the volunteer was not within the organization's control until the volunteer arrived at the meeting.

The organization's liability insurance policy may cover the organization for certain injuries cause by volunteers. The extent and terms of that coverage will probably vary from organization to organization.

### *Volunteers' Liability*

The volunteers themselves may also be personally liable for injuries to third parties caused by the volunteers' negligence. The volunteers may be covered by insurance policies of the organizations or personal insurance policies. Injured parties are likely to bring an action against both the volunteer and the organization but

look to the organization for a "deep pocket" for recovery for their injuries.

### *Volunteer Protection Legislation*

The usual rules of liability for injuries to third parties are now being changed in a number of states by volunteer protection legislation. At one time, charitable organizations were immune from liability under the theory of "charitable immunity." Among the rationales for that immunity were that the organizations were doing good in the society and should not be held liable and that charitable organizations may not have the resources to pay judgments and still serve their communities. That doctrine has now been largely abolished, with the result that volunteers and organizations can be liable under the principles outlined above.

However, several years ago a liability insurance "crisis" arose, and the cost of liability insurance premiums for many nonprofits skyrocketed. State legislatures responded by enacting volunteer protection statutes and other special legislation.

Some 35 states have now passed statutes which modify the usual liability rules in order to provide some more protection for volunteers and/or nonprofit organizations. These statutes change the common law rules of liability in significant ways but can only be understood in the context of those traditional rules. For example, some statutes prevent the injured party from recovering if the volunteer was merely negligent and require the injured party to show that the volunteer acted with gross negligence or intent to harm. Some statutes provide a degree of immunity for certain categories of volunteers. The statutes vary in the extent to which they apply only to volunteers or also apply to organizations for which the volunteers work. Some statutes place limits on the dollar amount of the organization's liability or limit the organization's liability to the extent of insurance coverage.

### WHAT HAPPENS IF A VOLUNTEER IS INJURED?

The liability issues when a volunteer gets injured while working also involve the concept of negligence. In general, the organization may be liable to the volunteer if

the injury was the result of the negligence of the organization. In order to recover on that theory, the volunteer would need to prove that the organization in fact deviated from the required standard of care and that that conduct caused the injury.

Some organizations ask volunteers to waive their right to sue the organization. Such waivers may not be given effect by courts and are held to very strict standards.

Certain categories of volunteers may be covered by state workers' compensation laws and their recovery for "on-the-job" injuries may be restricted by those laws. For example, the Pennsylvania Workers Compensation law applies to individuals who work for "valuable consideration." 77 P.S. § 22. A volunteer helping to build his church was held to receive "valuable consideration" because the work was a partial fulfillment of his tithing donations and therefore was covered by workers compensation, *Schreckengost v. Gospel Tabernacle*, 40 Wst. 241 (1959), *aff'd*, 188 Pa. Super. 652, 149 A.2d 542 (1959). In contrast, a court found that a hospital volunteer aide who received free meals in the hospital cafeteria during her shift and who received training was not receiving "valuable consideration" and was not covered by workers compensation. *Marcus v. Frankford Hospital*, 445 Pa. 206, 283 A.2d 69 (1971).

In order to illustrate the application of these various liability concepts, consider one particular example, that of a nature guide working in a park or recreation center giving nature walks. The various ways in which the volunteer's negligence could result in injury to some third party have been discussed along with the indicia of "right of control" which a court might examine. Organizations attempt to minimize these risks through "risk management." Risk management involves the identification of potential risks and the likelihood of their occurrence, the exploration of strategies to reduce or eliminate risk, and periodic assessments of whether the program is meeting the organization's needs.

For example, one of the ways in which a volunteer nature guide might be negligent and cause injury is by taking too many visitors on a hike. One guaranteed effective risk management strategy would be

to limit the number of visitors each guide may take to just one or two. That would have a great cost, because fewer people could go on the hikes. The complex but necessary process of evaluating risks and their costs must take place and the agency must arrive at some comprehensive risk management strategy.

#### OTHER LEGAL ISSUES RELATING TO VOLUNTEERS

Contract issues may arise in the context of agency law. A volunteer may be an "agent" of the organization who can bind the organization to a contract. Contract issues are also implicated when an organization and volunteer enter into a contract, agreeing upon conditions of the volunteer's service.

There are potential discrimination and civil rights issues in the hiring and firing of volunteers. For example, a volunteer firefighter alleged in a lawsuit that the fire company violated his free speech rights when it terminated him after he complained about alleged discrimination (the fire company would not allow his wife to join), and the fire company's motion for judgment before trial was denied. *Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54 (2d Cir. 1984). See also *Janusaitis v. Middlebury Volunteer Fire Department*, 607 F.2d 17 (2d Cir. 1979) (volunteer's suspension after criticizing fire company was valid exercise of state's interest as employer).

The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, may also be implicated if salaried employees do volunteer work (on their own time) for the organizations for which they work. Such employees/volunteers might be entitled to overtime pay in some circumstances.

#### CONCLUSION

In conclusion, volunteer administrators must know the answers to several critical questions, including: (1) whom can I call for legal advice relating to our work with volunteers? (2) What is the extent of our organization's liability coverage for torts of volunteers? (3) What is the current law in our state on liability for acts of volunteers? (4) Is volunteer protection legislation currently in effect or proposed?