

Volunteer Protection Legislation

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In the past few years, about half of the states have passed some form of "volunteer protection legislation" to create special liability rules for legal actions brought against volunteers. Although these statutes vary in their terms and applications, their basic effect is to make it more difficult for potential plaintiffs to maintain liability actions against volunteers. These statutes reflect developing public policies about the relationship between liability rules and the extent of volunteer work performed in our society. As an embodiment of these policies, the statutes' effect may extend far beyond changing of legal rules for maintaining actions against volunteers.

COMMON LAW RULES

The recent volunteer protection statutes must be viewed in the context of the legal rules they purport to change. Absent any special legislation, all individuals, including volunteers, are subject to the same "common law" liability rules, *i.e.*, rules developed through court cases. Under these well-established common law rules, all people are personally liable for any damages caused by their negligent or intentional conduct. "Negligence" is conduct that departs from the standard of care that a reasonable person would

use in the same circumstances. "Intentional conduct" is just what it sounds like, conduct in which the actor intends to cause some harm or damage. Under these rules, for example, if a person is driving a car and fails to use the standard of care that a reasonable person would use, and as a result of this "negligence" causes an accident, the negligent driver may be personally liable for the resulting damages. It does not matter that the driver may have been transporting meals to the elderly as part of his or her volunteer work at the time of the accident.

In addition, under common law, organizations may be "vicariously" liable for the negligent or intentional acts of their volunteers. This is an application of general master-servant law, which applies to situations in which a person causes an injury while working for another person or entity. Under the rules of vicarious liability, an organization (as "master") may be liable for injuries caused by one of its volunteers (as "servant") if, at the time of the injury, the volunteer was performing his or her assigned work, was acting negligently or with the intent to cause injury, and was within the organization's control. Again, this is merely an application of general legal rules, rules that apply to a business and the acts of its employees.

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THE CHANGING LIABILITY LANDSCAPE

In the mid-1980s, the conjunction of several factors produced a widespread effort to create special liability rules for acts of volunteers. First, there was a sense among many legal observers that awards for plaintiffs in civil tort actions were getting out of hand. The press widely reported on extremely large verdicts in a variety of liability cases. These cases included suits involving volunteers. One of the first involving volunteers to get a great deal of publicity was an action in New Jersey against a volunteer Little League coach. The parents of a Little League participant alleged that the coach had been negligent in moving their son from a position in the infield to the outfield, and that this negligence resulted in their son's injury by a fly ball. Although that case settled out of court, the legislature in New Jersey reacted by passing a statute making it more difficult to maintain actions against volunteer athletic coaches.

Along with the reports of large jury verdicts and actions by what many people believed were greedy plaintiffs, the insurance market became very tight. The insurance market goes through cycles, and in the mid-1980s, liability insurance rates climbed at a great rate. It became difficult for all types of entities, including those that involve volunteers, to obtain affordable liability insurance.

Some legislators and representatives of the nonprofit sector reacted with great concern to these trends in the courts and the insurance market; these concerns were fueled by the widespread press coverage of the "liability insurance crisis." Lawmakers heard reports of nonprofit organizations curtailing their programs because of the inability to obtain affordable insurance. They also had a perception that some number of potential volunteers were not willing to donate their services because of the prospect of lawsuits alleging negligence

by volunteers. Following the lead of New Jersey's "Little League" statute, states began passing special laws to replace the common law rules for maintaining actions against volunteers. There was also an initiative for Congress to pass a bill, given the number "911" to connote a sense of urgency, which would create incentives for states to enact these volunteer protection statutes.¹

At the present time, according to a recent survey of state laws compiled by the newly-formed Non-Profits Risk Management & Insurance Institute, about half of the states have special statutes giving some degree of protection to volunteers in cases of actions personally directed at them. In addition, some states have also acted to give new protection to charitable organizations. Finally, almost all states have now passed statutes limiting the liability of directors and officers of certain types of nonprofit organizations.

PROVISIONS OF VOLUNTEER PROTECTION LEGISLATION

None of the statutes relating to actions against volunteers completely immunize volunteers from suit. Rather, they give varying degrees of "partial immunity" by changing what a plaintiff has to prove in an action against a volunteer. Whereas under common law the plaintiff merely had to prove that the injury resulted from the volunteer's negligence, these special statutes require the plaintiff to prove something more: that the volunteer acted with gross negligence, in a willful or wanton manner, with bad faith, or in some other way that goes beyond mere negligence.

The statutes also vary in the volunteers to whom they apply. They contain varying definitions of "volunteer" (and many do not even use that word) and they apply to volunteers who work for various types of organizations. Some of the statutes only apply to volunteers

working for organizations exempt from federal income tax under Section 501(c) (3) of the Internal Revenue Code, whereas others apply to broader categories of "charitable organizations." The statutes also have varying exceptions, such as for accidents caused by volunteers operating motor vehicles, or they may only apply to volunteers working for organizations that have insurance.

The statutes also vary as to whether they also change the liability of the organization. In most cases, the statutes only change the rules for suing a volunteer, and do not make it any less difficult to prove liability against the organization, even for the "vicarious liability" described above.

EFFECTS OF STATUTES

At this point, there is no data on whether the statutes are having their desired effects. One of the goals of these statutes was to remove a barrier to volunteer participation. It is unclear whether states that have passed these protective statutes are seeing an increase in the total number of volunteers coming forward or whether previously reluctant individuals are now less concerned about liability. Nor are there any statistics as to whether, in these states, volunteers are now more willing to take on assignments that are viewed as "risky" or assignments that may be more likely to result in legal actions for injuries caused by a volunteer.

There is also no data as to whether organizations whose volunteers are covered by the volunteer protection statutes, or the volunteers themselves, have experienced any changes in the cost or availability of insurance coverage in response to these statutes. Statistical information is also unavailable about whether such organizations are now expanding their programs or reversing decisions to curtail programs.

Indeed, such "hard" data that the statutes are having the desired effects

would be very difficult to assemble. The statutes themselves were based on information about the effects of increased liability costs and the prospect of large damages awards that was more anecdotal than scientifically compiled. Thus, even if studies were made now, there is no data on volunteer involvement, programming decisions or insurance before the statutes were enacted to compare with current information. Information about the statutes' impact would also be difficult to compile because the statutes may have had subtle effects on individuals' decisions to volunteer or organizations' programming decisions; these decisions are the result of a constantly-changing mix of considerations.

EDUCATION ABOUT THE STATUTES

Just as members of the volunteer community had a role in proposing the crafting of some of the statutes, they may also have a role in implementing the statutes. If directors of volunteers agree that these statutes have removed a barrier to volunteer participation, then it may be up to them to educate the public about the statutes. There are several layers of education that directors of volunteers might pursue.

Of course, the first level of education is self-education. Every director of volunteers should know whether his or her state has a volunteer protection statute or whether such a statute has been proposed.

Certainly an immediate concern of all volunteer administrators is the maintenance of participation by present volunteers. In those states with volunteer protection statutes, new and existing volunteers should be informed about these statutes and how they change volunteers' potential liability. It would undoubtedly be helpful for directors of volunteers to have an attorney available to whom volunteers can direct questions about liability. A discussion about volunteers' liability might be incorporated

into an initial orientation session or into a risk management training program.

A greater challenge is how to educate members of the public at large, some of whom may be potential volunteers who would want to know about these statutes. Some states are now producing booklets about the liabilities of volunteering. These booklets are being developed with the cooperation of state bar associations and may be used as educational tools by directors of volunteers.

WHOSE INTERESTS DO THESE STATUTES SERVE?

Volunteer protection statutes are the result of a deliberate public policy decision to create special rules for liability actions against volunteers. In recent years the concept of volunteering has been incorporated into political discourse to an extent previously unknown. These statutes are in some sense a continuation of that trend. They represent a large-scale recognition by legislators of the value of volunteering and of legislators' interests in furthering volunteering. Implicit in these statutes is the belief that making it more difficult to maintain lawsuits against volunteers will raise the level of volunteer participation and will ultimately have a beneficial impact on our society.

Yet upon closer examination, the public policy choices represented by these statutes are very complex. These statutes chiefly affect three groups: volunteers, the organizations for which they work, and people being served by volunteers. The interests of these groups with regard to volunteer protection statutes are in some ways in sharp conflict.

At first blush, it would seem that volunteers would want extremely protective legislation, legislation that would make it extremely difficult to hold volunteers liable for any accidents that they cause while they are doing their volunteer work. After all, volunteers might say that they are freely giving their time

and energies while other people are not, and that they should not be penalized for any mishaps that occur while they are doing their best to help their communities. This rationale is explicitly recognized in Colorado's statute, which states that its intent is "to encourage the provision of services or assistance by persons on a voluntary basis to enhance the public safety rather than to allow judicial decisions to establish precedents which discourage such services or assistance to the detriment of public safety" (Colo. Rev. Stat. § 13-21-116). These statutes do not completely immunize volunteers from suit and do leave plaintiffs with the option of suing volunteers who acted recklessly, in bad faith, etc., as the various statutes provide.

However, these statutes may also be contrary to volunteers' interests. The statutes create a double standard. They hold everyone in society except volunteers liable for their negligent acts and give special protection to volunteers. Some people may view this as reflecting a perception that volunteers are not as capable as salaried workers, or that volunteers need such protection in order to perform at their optimum level. Volunteers might perceive a paternalistic strain underlying these statutes. Certainly throughout all of the years before such statutes, people in our society have participated extensively in volunteer work.

People who benefit directly from volunteers' services are among the most likely potential plaintiffs in actions against volunteers. When one examines these statutes from the perspective of these people, first impressions are again somewhat deceiving. Initially, it would appear that such people would be strongly opposed to these volunteer protection statutes. The statutes make it harder for people to recover damages against volunteers. In the event of an injury caused by a volunteer to a beneficiary of the volunteer's services, the

beneficiary would want to be able to maintain an action against the volunteer to its fullest.

On the other hand, direct beneficiaries of volunteer services also want to have the most capable, talented and dedicated volunteers available. To the extent that potential volunteers do not come forward because of fear of liability, people served by volunteers would be in favor of some limited protection because such protection would help create the best pool of talented volunteers.

Organizations that involve volunteers also have complex interests with regard to these statutes. Organizations would certainly support these statutes' goal to encourage the best possible group of volunteers to come forward and give their time. But to the extent that these statutes leave the organizations on the line for liability and remove liability from volunteers, that may give organizations some pause.

This analysis of the disparate interests of volunteers, beneficiaries and organi-

zations does not make the position of volunteer administrators any easier. In some sense, volunteer administrators have obligations to further the interests of all three of those groups. Difficult as these questions may be, it seems clear that volunteer administrators, both individually and as a group, must come to grips with them and decide on a position. Volunteer administrators can then act on this position in following the effects of volunteer protection statutes in those states with such statutes, in lobbying in those states that have not yet enacted them, and in participating in the ongoing national debate about the desirability of these statutes.

NOTE

1. In December of 1990, the White House instituted a Volunteer Liability Protection Initiative. One of the goals of this initiative was to establish a standardized, model volunteer protection act that all states could enact.