

# Legal Issues in Managing Volunteers

*Hartford Public Library May 4, 2011*

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# What is Pro Bono Partnership?

Pro bono legal assistance...

- For nonprofit organizations that serve poor and underprivileged populations, or otherwise serve the public interest
- When the organization cannot afford legal counsel
- Provided by staff attorneys and volunteer attorneys from law firms and corporate legal departments



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# What assistance is available?

Non-litigation, business law matters, such as:

- Employment law counseling
- Fundraising regulations
- Corporate governance issues: bylaw review; conflict of interest policies
- Business documents that require legal review, such as a contract or lease; or assistance with negotiations



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- This information are provided for general educational purposes only. Because the circumstances of specific situations are unique, you should contact legal counsel with specific issues or questions.



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# Agenda

- What is a “volunteer”?
- Applicable laws
- Selection and supervision of volunteers
- Nonprofit’s responsibility for volunteer actions
- Federal Volunteer Protection Act
- Steps to Protect Nonprofit
- Insurance Coverage



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# What is a volunteer?

- A person who performs a service willingly and without pay (*dictionary*)
- A person who provides services without any expectation of compensation and without coercion or intimidation (*Fair Labor Standards Act-- FLSA*)



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# Volunteer or Employee?

- Use caution so person is not “deemed” to be an employee.
  - Calling someone “volunteer” is not enough
  - Performing same tasks as employees?
  - Compensation?
- If an employee, entitled to protection of certain laws
  - Nondiscrimination
  - Fair Labor Standards



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# Volunteer or Employee?

- Nominal / token gifts okay
  - Occasional meal
  - Documented expense reimbursement
  - Plaques of appreciation
  - Expressions of appreciation
- Watch out for gifts in lieu of compensation (exceeding \$500 year)\*

*\* Level referenced in Volunteer Protection Act*



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# What Laws Apply/Don't Apply to Volunteers?

- For the most part, anti-discrimination laws do not apply to volunteers; e.g. Civil Rights Act of 1964, Americans with Disabilities Act, Workers Compensation
  - Exceptions include “public accommodations”
  - Anti-Harassment
    - Non-profit may be liable to a volunteer for harassment
  
- But... Federal or state **grant programs or funding statutes** (regardless of civil rights laws) may make antidiscrimination laws applicable to volunteers
  - Review the terms of your funding grants or statutes



# What Laws Apply/Don't Apply to Volunteers?

- **Fair Labor Standards Act (FLSA) does NOT apply**
  - FLSA sets minimum wage and maximum hours
- **To meet “volunteer” criteria under FLSA...**
  - Entirely voluntary – no coercion or promise of advancement to employment
  - The volunteer does not replace an employee

*cont. on next slide*



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# What Laws Apply/Don't Apply to Volunteers?

- **To meet “volunteer” criteria at private non-profit under FLSA... *cont.***
  - **Services are insubstantial compared to those of employee**
  - **Time different from regular working hours**
  - **Distinctly different from employee duties**
  - **No pay or anticipation of future pay**



# What Laws Apply/Don't Apply to Volunteers?

- **To meet “volunteer” criteria at public agencies under FLSA...**
  - **If a public employee:**
    - **And same agency, must be distinctly different duties**
    - **And same duties, must be different agency**
  - **If private individual, general “volunteer” standards apply**



# Selection of Volunteers

- Clear description of duties
  - Responsibilities, hours, skills, education, licenses, and other qualifications
  - Lines of communication with agency
- Application process
  - Written application
  - Interview
  - Reference checks (important)



# Selection of Volunteers

- Degree of Scrutiny
  - Vulnerable clients require more intensive screening
  - Assess risk level of the position
    - Access to children or infirm vs. land management
  - Screen position, not person
    - Same process for all applicants
  - Consider different assignments for different volunteers



# Selection of Volunteers

- Background check?
  - Depends on position
  - Obtain written authorization from volunteer
    - Retain record of results
  - Consider using a third party to perform check
  - Volunteers for Children Acts (federal) permits groups working with children, elderly and disabled to request fingerprint-based criminal history background checks of volunteers
- Caution but not suspicion
  - Can be fertile hunting ground for predator



# Volunteer Supervision

- Volunteer handbook
  - Duties (including what they should not do)
  - Confidentiality policy
  - Safety policies
  - Useful Forms
  - Insurance information
  - Grievance policies and process for making complaint
  - Disciplinary procedures
- Signed acknowledgement of understanding





# Volunteer Supervision

- Consistent, thoughtful and fair supervision will help prevent legal and other problems
  - Performance discussions
  - Praise, criticism and warnings
  - Fairness with peers
  - Termination when appropriate



# Nonprofit responsible for acts of volunteers?

- Yes, so use care in selection and supervision of volunteers
- Vicarious liability
  - Nonprofit is liable if volunteer is acting within scope of duties
  - If volunteer is negligent and causes harm while performing assigned task, then nonprofit may be liable



# Nonprofit responsible for acts of volunteers?

- Yes, so use care in selection and supervision of volunteers
- Negligent engagement and retention
  - Placing volunteer who has propensities for conduct that would harm others
  - “You put a dangerous volunteer with vulnerable clients”
    - Known or should have known (foreseeable)



# Nonprofit responsible for acts of volunteers?

- Nonprofit's liability may hinge on adequacy of selection, screening and supervision
  - Did nonprofit know, or should they have known of volunteer's dangerous tendencies?
  - Would a reasonable investigation uncover volunteer's criminal or dangerous tendencies?



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# Nonprofit responsible for acts of volunteers?

- Nonprofit will need to show it used “reasonable care” when engaging, supervising and retaining volunteer
  - Checked references
  - Application process
  - Good match of experience with duties
  - Checked out “red flags”



# Protection for Volunteers

- 1997 President Clinton signed Volunteer Protection Act (VPA) to encourage volunteerism by reducing risk and fear of legal liability
- Who is covered?
  - **Volunteers** of tax-exempt 501(c)3 groups
  - **Volunteers** of nonprofits organized for public charitable purposes (501(c)4 groups)
  - **Volunteers** of trade and professional groups (501(c)6 group)
  - **Volunteer** board member



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# Federal Volunteer Protection Act

## ● Overview

- Does not bar lawsuits from being brought, just provides a defense and may discourage lawsuits
- It is a law, so if nonprofit is covered, then it protects volunteers
- Volunteers of these entities cannot be sued by injured beneficiaries for **economic** damages
- Does not cover volunteer's attorneys fees



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# Volunteer Protection Act

- **Protects volunteer from liability for negligent acts or omissions when:**
  - Acting within scope of duties at time of act of omission
  - Properly licensed and authorized for activity
  - NOT willful or criminal misconduct, gross negligence or reckless misconduct
  - NOT caused by volunteer operating motor vehicle or other vehicle requiring license or insurance



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# Federal Volunteer Protection Act

## Loopholes in VPA

- Volunteers remain liable for non-economic damages in proportion to own responsibility
  - Physical and emotional pain and suffering
- No limitation for
  - Crimes of violence of terrorism
  - Hate crimes or violations of civil rights laws
  - Sexual offenses
  - Acts committed under influence drugs/ alcohol



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# Protection to Nonprofit --Insurance

- *Generally, wise investment even for cash-strapped nonprofit*
- **Types of coverage - common**
  - General Liability – claims of injuries by third parties (many exclusions)
  - Auto Liability – Your vehicles vs. volunteer’s vehicle (non-owned/hired auto coverage-excess)
  - Property Casualty – damage by third party or “acts of God” to property
  - Director’s and Officer’s – covers directors and officers actions, which are usually excluded by GL policy.
  - Make sure has EPLI rider or get separate policy



# Insurance Coverage

- **Types of Coverage, *cont.***
  - Professional Liability – GL usually excludes professional activities
  - Umbrella Coverage – Provide additional coverage when primary coverage is exhausted. Like GL, doesn't cover harassment, civil rights or mismanagement claims
  - Volunteer accident insurance—covers volunteers if they have accident
  - Bonding. GL doesn't cover theft or gross misconduct. Bond will cover.



# Insurance Coverage

- **Obtain professional advice and consider second opinion as well**
  - **Ensure you are covered for harm TO a volunteer, and harm caused BY a volunteer**
  - **Coverage for organization and volunteer**
  - **Volunteers should check own coverage and nonprofit should consider supplementing**



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# Protection to Nonprofit

- If volunteers drive...
  - Must be properly licensed (photocopy on file)
  - Questionnaire about driving record, with signature verifying truthfulness
    - Predetermine standard – two moving violations disqualify?
    - Consider verifying through DMV
  - Clear policies about passenger behavior
  - Seat belts required
  - Periodic re-check (2-3 years)



# Protection to Nonprofit

- Assume “public accommodation” laws will apply to volunteers
  - Volunteer protected from discrimination
  - Access to facility
- In case of volunteer injury during work
  - Clear policy for reporting
  - Show concern and release from duties
  - Workers’ Compensation does not cover volunteers
- Common sense



# Summary Best Practices

- Select and screen potential volunteers very carefully
- Monitor and evaluate volunteers with a “hands on” management approach. Hold them to high standards.
- Protect their volunteer status by carefully monitoring “compensation”
- Investigate any claims of injury or wrongdoing
- Carefully select insurance policies to help protect against risk



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Questions? Call us!  
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Thank you to Daniel Alexandre and the Hartford Public  
Library

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