

Legal Issues Relating to the Use of Volunteers

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What is M-LINC?

- M-LINC is the Milwaukee Legal Initiative for Nonprofit Corporations
- Housed at Marquette University Law School
- Launched in September 2008
- Karin Holmberg Werner, JD is the director of M-LINC
- Currently serving as a resource for Wisconsin nonprofits with legal questions
- M-LINC coordinates FREE legal advice and educational programs on legal issues important to small and mid-sized nonprofits

Presentation Objectives

- Introduce five steps to the risk management process
- Discuss what laws apply to volunteers vs. employees
- Explain why it's important to recruit your volunteers with care, utilizing applications, screenings, references and position descriptions
- Discuss when and how your organization can be held liable for the negligent acts of your volunteers
- Determine if your volunteers can be sued
- Introduce the Volunteer Protection Act
- Identify steps you can take to reduce your organization's risk of liability for the acts of volunteers
- Discuss supervising volunteers to prevent liability
- Discuss insurance for volunteers and risk liability

The Importance of Volunteers

- Recent surge in volunteerism in the United States
- It is an increasingly common practice among nonprofits to rely on volunteers and other unpaid staff such as interns, trainees, and students.
- Dollar value of volunteer time is estimated at
 - In 2011: **\$18.50 (In Wisconsin, latest available figure)**
 - In 2012: **\$22.14 (Nationally)**
- About 63.4 million Americans, or 26.3% of the adult population, gave 8.1 BILLION hours of volunteer service worth \$173 BILLION in 2010.
- Wisconsin ranks 10th in the nation for volunteering.
- More than 1.51 million Wisconsinites volunteer 154.8 million hours of service valued at \$3.5 billion.

Source:

Corporation for National and Community Service. *“Research Brief: Volunteering in America Research Highlights”* (2011).
2011 Volunteer Wisconsin: <http://volunteerwisconsin.org/index.php/component/content/article/1-latest-news/172-vcla>

What is a Volunteer?

- There is a legal distinction between employees and volunteers
- The distinction is not always clear because the law looks beyond the labels employers give individuals or the individuals give themselves and examines the nature of the relationship between the individual performing services and the employer.
- An employer is liable under the law for actions (and misdeeds) of volunteers to the same extent that it is liable for the actions of employees.

Who's Who in Your Organization?

Employee?

Volunteer?

Intern?

Trainee?

Independent Contractor?

Employee

- Employee: an individual who performs services under the direction and control of an employer in exchange for compensation. Employers have many legal obligations to their employees (anti-discrimination laws, tax withholding laws, workers' compensation and unemployment insurance).
- E.g., Scott works from 9-5, biweekly paycheck from which federal and state taxes are withheld, W-2 form from employer at the end of the year.

Volunteer

- Volunteer: an individual who without compensation or expectation of compensation, freely performs services at the direction of a nonprofit, usually on a part-time basis, and solely for his or her personal purpose or pleasure
- Note: Volunteers can perform a wide variety of services with different levels of authority. The key is that they have no expectation of getting paid for those services. But volunteers are entitled to receive monetary reimbursement for certain minimal expenses such as the cost of transportation and meals while volunteering.
- Neither federal nor state law defines at what point – or dollar amount – the payment of expenses to a volunteer by a nonprofit organization will cross the line between volunteer and employee. The case law does suggest, however, that providing significant benefits to volunteers, such as health insurance and/or room and board, may turn them into employees.

Volunteer (Continued)

- Remember, the law looks to the facts and not the label assigned to the person.
- E.g., Sally works for a nonprofit three days a week between 10 and 3. She receives no compensation or benefits. At the end of the week, she is reimbursed for her weekly transportation costs.
- Note: If a volunteer is given significant non-wage benefits, the volunteer may be considered an employee under the law.

Intern

- Not a legal term and no legal definition.
- Rather, interns are volunteers, trainees or employees.
- If services rendered are in exchange for compensation in the form of a wage or a stipend, then they are employees and they should be entered in the payroll system, paid at least minimum wage with appropriate taxes paid and withheld.
- If they are not receiving or expecting compensation, they are volunteers and can be reimbursed for minimal expenses such as travel and lunch.
- Note: No special exception to employment rules due to the fact that the duration of the employment is short or the individual is a minor.

Trainee

- Trainee: Unlike intern, the term trainee is found in employment law.
- Both federal and state laws provide an exemption from wage and hour laws for trainees. i.e., can pay trainees less than minimum wage.
- Trainee is a person engaged in a bona fide training for future employment.
- Note: Narrow exception, proceed carefully.
- The US Department of Labor requires that ALL of the following six criteria be met for an individual to be exempt as a trainee from the minimum wage and overtime provisions of the FLSA.
 - Training similar to vocational school or educational institution
 - Training for the benefit of the trainee or student.
 - Trainees do not displace regular employees, but work under their close observation.
 - No immediate advantages to the employer from the trainee's activities.
 - Trainees are not necessarily entitled to a job at the conclusion of the training.
 - Employer and trainees understand that the trainees are not entitled to wages for the time spent in training. (Note: school credit or reasonable stipend to cover expenses is acceptable)

Independent Contractor

- Workers who contract either orally or in writing with an employer to provide services under very limited supervision from the employer.
- Unlike the individuals discussed, independent contractors are classic “freelancers” and they tend to work for a number of organizations at the same time.
- They, not the employer, are in control of the means, methods and tools of their work.
- Upon payment, they will receive a Form 1099 from the employer and the independent contractor is responsible for paying all taxes.
- Note: Incorrectly classifying an employee as an independent contractor may subject the nonprofit to liability for failing to withhold taxes and violations of labor laws.

Questions to Ask to Determine the Category in Which the Individual Fits

- Are we offering to pay something to this individual?
- If so, what are we offering to pay and why?
- What does the individual expect to gain from this experience, and does he expect to receive any compensation?
- What will the individual be doing for us, how often, and under whose supervision?
- Overall, who is benefiting the most from the relationship?

Risk Management Process

The Risk Management process enables an organization to systematically identify and prioritize risks and take action to prevent or reduce the risks facing people, property, finances and goodwill.

By using this process, you will be less likely to overlook risks or jump to conclusions about how to handle them.

The risk management process is a series of five steps:

- Establish the context: Identify the key activities, programs and services provided by your volunteers and your expectations for those activities or programs.
- Acknowledge and identify risks: Ask yourself, “*What could go wrong?*” Identify what surprises could occur in each of your key activities or programs.
- Evaluate and prioritize the risks: Use an existing list of program leaders, i.e. your commission on aging, the ADRC board, veteran volunteers, finance committee or other small groups, to help identify risks and how costly they could be.
- Implement risk management techniques: Answer the questions, “What will we do to prevent these things from going wrong?” “What reasonable steps can we take to eliminate those surprises?”
- Monitor and update the program: What can your organization adjust or strengthen in the areas of position design, recruitment, screening, training and supervising volunteers?

What Could Go Wrong?

Injuries **to** Volunteers

- Accidents can happen that result in physical injuries to volunteers – especially when physical activity is part of the volunteer process.
- Volunteers also may be harmed by negligence that puts them at risk unnecessarily.
- Workplace safety laws, such as the Occupational Safety and Health Act (OSHA) apply to volunteers.
- Claims of discrimination, harassment (including sexual harassment), and failure to accommodate a disability or religion are all possibilities when working with volunteers.
- Describing the “essential functions” of the volunteer position in writing can be an invaluable defense to any failure to accommodate claim.
- Volunteers may suffer harm under more traditional legal theories, such as intentional infliction of emotion distress or defamation. These types of claims arise most often when you’ve told a volunteer that the organization no longer needs his or her services as a volunteer.

Injuries **caused by** Volunteers

- Even the best-intentioned volunteer has the potential to injure your clients or staff. These include harassment (sexual or otherwise), assault and battery, negligence, and even crimes such as child abuse or molestation.
- Your organization may be vicariously liable for these acts or crimes, especially in cases of negligent hiring or retention or failure to adequately supervise or train volunteers.
- Negligent hiring or retention occurs when someone within the organization knew or should have known that a volunteer had some tendency that would cause injury to someone else and did nothing to prevent it. Even if the volunteer’s actions don’t result in a lawsuit or monetary damage, they could just as easily damage your organization’s reputation through bad publicity.
- Relationships between clients and staff or volunteer members can pose a problem for any organization, not just those working with young children. Inappropriate relationships between volunteers and clients should be expressly forbidden.
- Volunteers also have the potential to injure the nonprofit itself. If a volunteer acts as an agent of your organization, or the organization holds a volunteer out as its agent – either intentionally or accidentally – the volunteer could legally bind the organization.

Key Questions to Ask

Ask the following questions when implementing risk management techniques:

- What if our attempts to prevent harm fails and something goes wrong anyway?
- Will the people on site know what to do?
- What will our organization do, if anything?

- Do the potential surprises have a price tag?
- What might it cost if a volunteer damages a client's property?
- Who should pay for the medical expenses if a volunteer gets hurt?
- What if our organization is sued?
- What if the volunteer doesn't have medical insurance?
- Do either the volunteers or our organization have adequate insurance coverage or funds on hand to pay for harm?

Screening Potential Volunteers

- Screening is the key method for reducing volunteer-related liability.
- What you see isn't always what you get. To protect the nonprofit's clients, its reputation and its other staff, establish a basic screening process that reduces risk. All applicants should be subject to a basic screening process.
- Nonprofits should give attention to the volunteer “hiring” process. The aim is to engage talented, dedicated volunteers, while reducing the risk of liability associated with a volunteer program. The following are suggested best practices:
 - ✓ Application
 - ✓ Interview
 - ✓ Position Description
 - ✓ Check References (even if the applicant is the board chair’s nephew or the mayor’s sister!)
 - ✓ Other Background Checks as Needed: i.e. depending on the position requirements (established in the position description), the screening process might include verification of licensure or educational credentials

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Volunteer Application

- Use written applications for volunteers. They provide information to help the organization assess the volunteer's experience and interest and also can be used, if necessary, to show that the organization made an effort to solicit truthful background information from the volunteer.
- Information in application: contact information, relevant skills, prior employment, volunteer history, references and criminal conviction information.
- Then application can also ask about areas of interest and preferred volunteer job duties to get the best match and to help improve chances that the volunteer will stay with the organization for the long term.
- Keep volunteer applications in a personnel file and retain, if possible, for at least six years after the volunteer stops volunteering for the organization.

Volunteer Interview

- To the extent possible, nonprofit managers should interview potential volunteers in a manner similar to potential employees.
- Prepared questions help keep the interview focused, discourage reliance on memory and provide standard information for evaluation.
- Purpose of the interview:
 - Describe the program and how it uses and benefits from volunteer services
 - Explain the work the volunteer can expect to do
 - Evaluate the person as a potential volunteer
 - Assess the individuals main areas of interest and time commitment
 - Make clear that the person is interviewing for an unpaid position
- Documentation: Add interview notes to the volunteer's personnel file. This will provide evidence that the organization conducted a careful interview.
- Note: When volunteers will work closely with children, the elderly or other vulnerable populations, the organization should take special precautions. Perhaps have the interview conducted by a specially trained professional (such as clinically trained social worker in Big Brother/Big Sister case).

Position Description

- Clearly sets forth the organization's expectations of the volunteer and improves chances of a smooth relationship between the organization and the volunteer as the volunteer will know what is expected of him or her.
- Each volunteer assignment should have a written position description. The position description clarifies - for the applicant and the nonprofit - the nature of the assignment, the expectations, the prohibitions and the consequences.
- May help increase volunteer retention.
- A clear position description will also decrease the possibility that the volunteer will undertake duties for which he or she has not received adequate training or supervision. This should limit the nonprofit's exposure to liability based on the misdeeds or negligence of the volunteer.

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Reference Check and Background Checks

- Essential part of volunteer screening process
- Gather at least three references on volunteer application or during interview. Get written consent for employer references, if appropriate.
- Documentation: Put information obtained from references in writing and in the volunteer's personnel file.
- Other background checks (criminal, credit, etc.):
 - \$25-\$75 per applicant
 - Evaluate whether this cost is a necessary expense based on a risk assessment of the volunteer's area of work
 - May be necessary if volunteer will work with vulnerable populations, such as older adults.

Note: When conducting background or investigatory checks on employees, applicants, or volunteers, nonprofit organizations must comply with the Fair Credit Reporting Act (FCRA). The FCRA requires you to get written authorization from an employee, applicant, or volunteer before conducting background checks or credit checks, checking driving records, or hiring an agency to conduct other background checks.

- **OVERALL POINT:** Nonprofits should - and in some cases, must - take steps to make sure that the volunteers they use are reliable and trustworthy.

Volunteer Orientation

- A good orientation helps volunteers succeed.
- Volunteer orientations and volunteer handbooks help introduce and reinforce what to do, what not to do, who to report to, how to handle a crisis or grievance.
- Knowing how to do things and what is expected helps to strengthen appropriate and safe actions.
- Orientation should include the following:
 - Welcome
 - Introduction
 - History and mission of the organization
 - Organization's volunteering history and opportunities for volunteers
 - Performance expectations and prohibited behaviors
 - How volunteers will be evaluated
 - Issues related to public relations and volunteer service
 - What volunteers can expect from the organization
 - Volunteer handbook, including volunteer handbook signoff (SAMPLE)
 - Questions and answers

Volunteer Supervision

- Supervision strategies should be developed that reflect the nature of the organization, the type of service to be performed, the resources available to the nonprofit, and the background, skills and capabilities of the volunteers serving the organization.
- For example, persons performing court-mandated community service might require more intense supervision than volunteers helping restock the shelves at a public library.
- Volunteers using power tools to undertake home repairs might require a more extensive orientation than volunteers picking up trash in a local park.

Volunteer Supervision (cont'd.)

Volunteers may be unable or unwilling to fulfill the duties they have been assigned. If reassignment isn't possible, or if volunteers violate rules to which they are required to abide, discipline should be imposed.

Ask yourself the following questions related to volunteer supervision:

- Does your nonprofit have a volunteer handbook or similar document that contains all of the policies that apply to volunteers?
- Do you have a *grievance policy/procedure* or other strategy for receiving and taking action on volunteer complaints?
- Are all volunteers required to sign an *acknowledgment* indicating that they have read and agree to abide by the nonprofit's policies?
- Are volunteers subject to *discipline*, up to and including removal, for failing to follow the nonprofit's policies?
- Are the nonprofit's *disciplinary procedures* concerning volunteers applied consistently?
- Are supervisors of volunteers trained in *performance counseling* so they are in position to help a volunteer address performance weaknesses?

Setting Up the Volunteer Relationship

- Make clear (preferably in writing) that this is volunteering at will and that the nonprofit is free to discontinue the relationship at any time.
- The use of volunteers can increase the liability of the organization. Thus, organizations should terminate any relationship that does not serve the best interests of the organization.
- In order to avoid misunderstandings, the organization should make clear to the volunteer that the organization will periodically review the volunteer's performance and may let him or her go if problems arise or the organization's needs change. Incorporate this verbally and in writing in the interview and orientation of volunteers, as well as in an initial letter of agreement explaining the volunteer position.
- "While we hope your volunteer relationship with us will be a continued and rewarding one, we reserve the right to terminate this relationship at any time for any reason."
- Reserve the right to cut short-term volunteer positions (i.e. summer positions) short, too.
- Clarifying this from the start helps to prevent misunderstandings and conflicts later on.

Volunteer Compensation/Benefits: How Much is Too Much?

- Once a nonprofit takes on a volunteer, the organization must decide whether and, if so, how it may legally “compensate” the new volunteer.
- “Compensation” may be to defray the cost of volunteering, demonstrate gratitude or simply to provide an incentive for volunteering.
- This section will address legal limits on the type and amount of benefits that a nonprofit may provide to volunteers.

No Specific Law Governing Volunteer Compensation

- No specific law on volunteer benefits.
- But federal regulations governing public sector volunteers, such as school coaches and volunteer firefighters, provide some guidance. Those regulations provide that a volunteer can be paid out-of-pocket expenses, reasonable benefits or a nominal fee to perform the services. Small fees or stipends are permitted but must be nominal (i.e., less than 20% of the hypothetical employee wage). Beyond that, you risk converting the volunteer to an employee.
- Look at total amount of payments made in the context of the particular situation.

Best Practices for Volunteer Compensation

Key questions:

- Did volunteer expect or contemplate receiving compensation in exchange for performing services?
- Did employer receive an immediate advantage from the work done by the individual?
- Also look at what it would cost the employer to compensate someone else for those services.

Best Practices:

- Ask volunteers to submit receipts promptly for all expense reimbursements so that the organization can properly document these expenses.
- Always use term “reimbursement of expenses”, not wage or stipend.
- Track these reimbursed expenses separately from payroll.
- No tax form required for these reimbursements.
- If a nonprofit chooses not to reimburse a volunteer for volunteer-related expenses, the individual may be able to take an income tax deduction for that expense if directly connected to the volunteer services. If asked about this by a volunteer, the nonprofit should not give tax advice and should suggest the volunteer contact his or her accountant.
- Note: time value of donated services is not deductible

Clarifying the Financial Relationship

- Also, clarify the financial relationship at the start of the volunteer's service.
- State (preferably in writing) that the position is an unpaid one and that the volunteer will not receive a wage, benefits, or other compensation in exchange for his or her services.
- If the nonprofit will be reimbursing the volunteer's expenses, or paying a stipend or training fee, the volunteer letter should identify the exact nature of the financial arrangement and state what type of documentation the organization will require for reimbursement. If the organization does not intend to reimburse expenses, the letter should indicate this.

Volunteer Policies

Policies: Nonprofit should consider also giving volunteer a volunteer code of conduct or volunteer policy & procedure manual when they begin work. The policies should cover the volunteer's responsibilities to the organization, such as consulting with supervisors, being on time, and maintaining confidentiality of client information. They should also repeat language about at will volunteering and state that volunteer is unpaid and not an employee.

- Other possible inclusions include policies on confidentiality, physical appearance, use of technology, smoking, drug use, absenteeism, safety and health and harassment.
- Include harassment policies in the volunteer training or orientation. Volunteers should know how to make a complaint or report any harassment.
- KEY: make expectations clear from the outset to avoid later conflicts and potential liabilities.

Volunteer Management

Best practices in volunteer management help to minimize potential liabilities and to retain good volunteers.

- Try to match the nonprofit's and volunteer's expectations as much as possible before work begins.
- Consider use of volunteer questionnaire in addition to application.
- Host required orientation with copies of relevant policies or codes of conduct. Also discuss mission of organization, specific procedures, overall volunteer duties and responsibilities. Identify who at the organization is responsible for fielding volunteer concerns and questions.
- Provide regular trainings for continuing volunteers. Opportunity for volunteers to ask questions and to have policies reinforced. Model volunteer trainings on employee trainings. Require volunteers to attend training on anti-harassment policies.
- Supervise and evaluate volunteers on an ongoing basis.
- Must take action on a negative evaluation. Meet with volunteer and set up action plan for short timetable for improvement. If performance does not improve within that time frame, the organization should terminate the relationship.
- Volunteer recognition: Awards ceremony, holiday cards, annual dinner, or thank-you notes. Helps with volunteer retention.

Terminating the Volunteer Relationship

- Reckless or bad volunteers can cause expense and significant risks to the nonprofit. Terminating or releasing or letting go a poor-performing volunteer is crucial to the operation of an organization and the overall goal of limiting liability.
- Model volunteer terminations on employee terminations.
- Perhaps, first oral warning, then written warning, then let go on third instance of misconduct.
- Make clear that there may be instances of volunteer misconduct that warrant immediate termination without the progressive steps.
- Protocol for terminating volunteers should be similar to employees. Have more than one staff member attend the final meeting at which the individual is told of the termination, carefully document the reasons for the termination in the volunteer's personnel file and have the volunteer return all keys and property of the organization. Possible exit interview to ask volunteer's opinion of how the volunteer program was managed.

Volunteer as Agent of the Nonprofit

- Nonprofits should not hesitate to release a volunteer who exposes the nonprofit to liability. Nonprofits are liable for the acts and misdeeds of volunteers just as they are for employees.
- This section will address ways in which organizations can face liability for a volunteer's actions and ways in which organizations can protect themselves from such liability.
- Courts have traditionally held organizations liable for the actions of their volunteers when foreseeable injury caused by the negligence or the will of the volunteer. To be liable, there must be a volunteer relationship at the time of the injury and the volunteer must be acting within the scope of his or her volunteer position at the time of the injury.
- Note: negligence does not require bad intent. I.e., could be an accident.

Volunteer as Agent of the Nonprofit

- Nonprofits can also be held liable for the selection and retention of a volunteer who acts negligently or engages in other wrongful conduct. The organization may be found to have negligently retained a volunteer if the organization was in a position to have known that the volunteer posed an unreasonable risk of harm.
- Nonprofits can reduce the risk of harm and protect themselves from liability associated with the use of volunteers via processes discussed previously. Written application, conduct in-person interviews, check references, and possible assessment of candidate by a Social Worker and/or interview by organization's membership committee, etc.

Different Positions, Different Risks

- In a typical nonprofit organization, there are multiple categories of volunteers:
 - member of the board of directors or advisory committees
 - office workers
 - volunteers who work with clients
 - volunteers who work on special projects
 - volunteers who perform other short-term assignments
- Each volunteer category brings with it risk management issues and challenges.

Board Members

Board members have fiduciary and other legal duties of care, loyalty and obedience associated with their leadership and policy-making position in the organization.

- A board manual helps assure that board members receive the basic documents and information on the organization's history, structure, and activities.
- A board orientation program helps bring new board members up-to-date quickly.
- Board minutes inform members as well as document the board's actions.
- These and other activities will help a board meet its responsibilities.

Questions Every Board Should Ask

- Does the board keep thorough and accurate records?
- Do the meeting minutes document the decisions made including a summary of the major points of discussion?
- Are dissenting votes recorded?
- Does the board have a manual and operating procedures?
- Does the board explore options before arriving at a decision?
- Are attendance policies in place and enforced for board members who fail to participate?
- Do members stay informed about the nonprofit's activities?
- Are background materials provided in advance of each meeting?
- Do members ask questions and seek clarification on matters before them?
- Does the board have a conflict of interest policy? Is the policy followed?

Programmatic Volunteers

- All programmatic volunteers should have up-to-date records, which are reviewed annually by the director of volunteers, a fresh orientation and possibly a skill upgrade or training to expand their skills.
- They may also need to provide current documentation of licensure

Volunteers Use of Your Equipment and Systems

- Access to the Internet and e-mail, and litigation surrounding these forms of communication have radically changed privacy in the workplace.
- It's imperative that volunteers who use your equipment as part of their duties understand your applicable rules about technology.
- Volunteers should be aware that there should be no expectation of privacy while using your equipment and systems, and that all of the nonprofit's equipment is subject to scrutiny and review.
- This review includes messages sent via e-mail and the results of Web searches.
- Some nonprofits create a reminder message that appears randomly when staff and volunteers logon to the computer.

Volunteers and Anti-Discrimination Laws

- Anti-discrimination and human rights laws generally not applicable to volunteers. E.g., Title VII won't apply, unless significant benefits (i.e., close to a salary) and employer control over work.
- Americans With Disabilities Act –also generally only covers employees and not volunteers. Employee defined by ADA as person with job-related benefits, and the “employer” organization has a right to control the person’s work. If volunteer considered an employee under ADA, reasonable accommodation required unless doing so would cause undue hardship. E.g., if “employee” in wheelchair, must modify equipment, make existing employee facilities readily accessible, etc.
- EXCEPTION: Under the ADA, a “public accommodation” –an organization providing goods and services to the public –cannot deny disabled persons the opportunity to participate in or benefit from its publicly offered activities, goods or services. Organizations cited by the ADA as public accommodations include museums, galleries, libraries, schools, day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies, social service agencies, etc. This definition includes many nonprofits.

Anti-Discrimination Laws (Cont'd.)

- What if a nonprofit organization has a disabled volunteer and its building is not fully accessible? Could that person bring a claim against the nonprofit under the ADA's public accommodation provisions?
- Although no court has ruled on this question to date, nonprofits should strive to accommodate volunteers with disabilities seeking to participate in their volunteer programs.
- If faced with a situation where the volunteer cannot be accommodated, a nonprofit should seek the advice of counsel before turning away the volunteer for reasons based on his or her disability.

Potential Tax Liability for Misclassifying a “Volunteer”

- It is important for nonprofits to be sure that they are properly classifying their volunteers under the wage and hour and tax laws. If, for instance, a volunteer is receiving some form of remuneration in exchange for services, that remuneration might be deemed a wage by the IRS, for which back taxes and penalties can be assessed.
- Nonprofits with questions about “how much is too much” to give a volunteer or about how to properly classify a worker should consult with an accountant or attorney and then accurately document the arrangement.
- Potential liability:
 - Back wages if paid the “volunteer” sub-minimum wages
 - Un-withheld taxes: Social Security and Medicare, plus federal and state income taxes, plus interest
 - Plus potential liquidated damages and attorney’s fees
 - Plus potential civil and criminal penalties
- E.g. nonprofit put welfare recipients to work beautifying a city. Paid sub-minimum wages and helped “volunteers” locate housing. The participants sued for being paid sub-minimum wage and won. Court found the organization was violating the Fair Labor Standards Act by paying the participants sub-minimum wage. Found participants were performing actual work for a commercial purpose and were not just receiving job training or life skills counseling.

Statutory Protection for Volunteers

- Generally volunteers are not personally liable for a corporation's debts, obligations, or liabilities. Nevertheless, a volunteer may be personally liable for harm caused by his or her own wrongful conduct unless there is some basis for limiting liability.
- Under Chapter 181 of the Wisconsin Statutes, volunteers for non-stock corporations are specifically protected against the risk of personal liability.
- Congress has also created a liability shield for volunteers by enacting the Volunteer Protection Act of 1997. This Act applies to volunteers for unincorporated associations, as well as nonprofit corporations, and provides even greater personal liability protections than the Wisconsin Statute. It immunizes, with some exceptions, individuals who do volunteer work for nonprofit organizations from liability for acts of ordinary negligence committed in the course of their volunteer work.
- Note: Does not limit the liability of the organization to the person making the claim. Organization could still be held liable for actions of volunteer.

Volunteer Protection Act

- The Volunteer Protection Act [42 U.S.C. § 14503(a)] provides immunity for volunteers serving nonprofits or government for harm caused by their acts or omissions if: The volunteer was acting within the scope of his or her responsibilities at the time of the act/omission.
- Appropriate or required, the volunteer was properly licensed, certified or authorized to act.
- The harm wasn't caused by willful, criminal or reckless misconduct, gross negligence or a conscious, flagrant indifference to the rights or safety of the individual harmed.
- The harm wasn't caused by the volunteer operating a motor vehicle, vessel or aircraft where the state requires an operator's license and insurance.
- Despite the Volunteer Protection Act, many volunteers remain fully liable for any harm they cause, and all volunteers remain liable for some actions. The law only protects volunteers serving certain nonprofits and governmental entities. The VPA doesn't prevent a nonprofit from bringing an action against a volunteer.

Insurance as Extra Protection

- Regardless of how careful a nonprofit is, lawsuits may arise. Even baseless lawsuits can sap a nonprofit's resources. Insurance policies are an integral shield against liability costs.
- Insurance trades possibility of heavy loss for the certain, but more moderate and manageable, cost of insurance premiums.
- Types of Insurance to consider:
 - General liability insurance
 - Professional liability insurance
 - Directors and officers insurance –extend to employees and agents?
 - Workers compensation
 - Special event insurance
 - Automobile insurance
 - Volunteer accident insurance is the equivalent of worker's compensation for employees. (Covers injuries sustained by volunteers in the course of their service to the nonprofit.) *Organizations that place volunteers in positions in which they are likely to suffer physical injury, such as sports and recreation camps, may wish to consider purchasing this type of insurance.

Insurance (continued)

- General liability insurance – coverage in the event the nonprofit’s property is damaged or the nonprofit is sued by a third party for damages. Could occur if third party suffers injury due to the negligence of a nonprofit volunteer, such as a van driver injuring a client.
- Practical point: the nonprofit should fully disclose to the insurance broker or carrier the precise nature of the programs and services it provides and whether it uses volunteers in addition to employees. The nonprofit should ask the insurance broker or carrier if volunteers can be added to their existing general liability policies as “insureds,” so that insurance will cover injuries to third parties based on the negligent acts of volunteers.
- Professional liability insurance -Same as above, plus check to see if volunteers have their own professional liability insurance.

More about Insurance...

- Insurance Does Not Prevent Losses
- Insurance also doesn't safeguard volunteer program participants, but it can help pay for insured losses and the cost of investigating or defending allegations of wrongdoing. The types of losses that may occur determine what types of insurance are appropriate.

Major categories of claims include:

- Claims filed against the nonprofit that result from harm or loss suffered by volunteer workers while providing service for the organization or loss caused by volunteers while performing their service.
- Claims filed against the volunteer alleging harm caused by the volunteer while performing service for the organization.

More about Insurance....

No Single Policy Addresses Every Risk

Various insurance products respond to the different types of claims and losses that might result from volunteer service.

- For example, medical claims for a volunteer's services-related injuries will first be covered by the volunteer's existing health care coverage.
- You might consider buying a Volunteer Accident Policy to provide excess coverage over the volunteer's personal coverage. Accident and injury policies will pay claims regardless of who is at fault. Since they provide "excess insurance"--they pay only after other available insurance pays--these policies are relatively inexpensive.
- Some organization choose to purchase more costly "primary coverage" by including volunteers under Workers' Compensation policies.

Other Types of Insurance

- Insurance is available to protect the nonprofit from harm caused by volunteer staff. To protect your nonprofit against liability claims, look at Commercial General Liability, Directors' and Officers' Liability, Professional Liability and Automobile Liability coverages.
- Every nonprofit should identify an insurance professional (agent, broker or consultant) who can help the organization evaluate its need for insurance coverage and coordinate the submission of applications for coverage with various insurance companies.

Final Points

- Carefully screen, supervise and evaluate volunteers and release them when necessary.
- These steps can protect the organization from liability for negligent acts of volunteers.
- Nevertheless, there are no guarantees of protection from lawsuits. Proper insurance coverage for volunteer activities is, therefore, essential.

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For more information on M-LINC, visit www.nonprofitlinc.org

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