



MANAGING MAINE VOLUNTEERS

(FROM A LEGAL PERSPECTIVE)

The information in this article is offered for general information purposes only. It does not provide legal advice, and the reader should seek out counsel from a qualified attorney before taking any action.

An attempt has been made to provide a look at Maine laws affecting both volunteers and charitable organizations, but not every statute or case having impact may have been identified.

Statutes have been paraphrased in many circumstances in order to make them easier to understand, so the reader is encouraged to go to <http://janus.state.me.us/legis/statutes> for a more thorough reading.



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INTRODUCTION

Maine has a proud tradition of volunteerism. We rank 15th among the fifty states in numbers of adult volunteers, 2nd in New England in terms of the number of volunteers and 7th in the nation for volunteer hours per resident.¹ Volunteers are the key to many successes in our past and will continue to be so in our future.

Sometimes volunteer managers think of their job as primarily being one of matching volunteer skills to agency needs, but there is another part of the job that is too often ignored – managing the risks associated with service by volunteers.

SCENARIOS

Consider some of the following scenarios:

1. You run a program that provides outreach to elderly people who are housebound. After a visit by a volunteer, a family member of the elderly person calls and complains that his mother has new bruises on her wrists and he thinks she has been improperly restrained by your volunteer.
2. Your agency responds to local disasters and staffs a Volunteer Reception Center. The use of the property was donated by Farmer Brown. While working his regular shift, one of your volunteers is injured by a falling beam.
3. You run a soup kitchen that provides meals for the homeless. Some of the food is donated by a local grocery and volunteers prepare the food for consumption. After a noon meal several of the people served get violently ill and have to be taken to the hospital.
4. Your non-profit organization provides after-school care for elementary school children. One of your volunteers is injured when he is hit in the head with a baseball thrown by one of the children in the program.
5. Your volunteer is staffing a donations table at a charity event and at the end of the evening much of the cash is missing.
6. Two of your volunteers have gotten romantically involved and are in the midst of a nasty break-up. Threats have been made, and in the parking lot after completing their volunteer shifts, they get into a physical altercation where one is seriously hurt.

All of these scenarios have legal implications that should be considered by a volunteer manager when deciding if or who of the available volunteers should be used. It is not enough to simply have a volunteer sign a release of liability, as that by itself may not be enough. Analyzing the risks, planning how to mitigate them, implementing the plan, and monitoring the results are all part of a volunteer manager's job. This article will discuss some basic risk management strategies and then take a look at Maine laws that apply to volunteers and the organizations that use them.

¹ www.volunteeringinAmerica.gov



RISK MANAGEMENT STRATEGIES

UNDERLYING LEGAL PRINCIPLES

In order to understand when a risk arises, you need to have a basic understanding of the underlying legal principles. These principles have been part of the common law for centuries, and are almost always applied when considering whether there is any liability for an act or omission by an individual or an organization. They are:

1. Duty of Care. Does the individual or organization have a duty to protect the person or property from harm or damage?
2. Breach of that Duty. Did the individual or organization do something or forget to do something that violated their duty of care?
3. Actual harm. Was someone or something actually harmed as a result of the individual or organization doing something or forgetting to do something they should have done?
4. Foreseeability. Was the harm that occurred something a reasonable person could have foreseen if they had taken the time to think about it? For example, you might expect throwing a baseball at someone could injure them, but even if you miss the person and hit something else that falls on them, that is also reasonably foreseeable.
5. Proximate Cause. This involves using the “but for” logic - “but for” the act or omission, the harm would not have occurred. For example, but for running the red light, the collision would not have occurred.

Duty of Care

A 2001 Maine case gives a good explanation of the meaning of Duty of Care, saying:

“A duty is ‘an obligation, to which the law will give recognition and effect, to conform to a particular manner of conduct toward another.’ *Budzko v. One City Ctr. Assocs. Ltd. P’ship*, 2001 ME 37, ¶ 10, 767 A.2d 310, 313 (quoting *Quadrino v. Bar Harbor Banking & Trust Co.*, 588 A.2d 303, 304 (Me.1991)). Generally, the duty at issue and its means of fulfillment can be readily identified, leaving only the question of breach for the fact finder. See *Stanton*, 2001 ME 96, ¶ 11, 773 A.2d at 1050. Thus, when we talk of duty, we often discuss one’s obligation to: (1) operate a motor vehicle safely; (2) provide medical or legal services competently; (3) assure that floors are not slippery; (4) warn of foreseeable risks to persons present on one’s property; or (5) otherwise conduct ourselves or our business in ways that do not cause injury to others.”²

The typical Duty of Care analysis involves looking at whether or not the agency has a relationship with the volunteer that creates a duty of care. Maine has specifically found a duty of

² *Mastriano v. Blyer*, 2001 ME 134, 779 A.2d 951 (ME.2001)



care can be owed to a volunteer, saying not being paid for services does not preclude the existence of an employment relationship.³ It would be prudent for agencies to assume that a duty of care is owed to volunteers who provide services to that agency.

There are some circumstances where an absolute duty of care arises because of a law specifically designed to cover that circumstance. This is called **strict liability**. A classic example of this might be a tiger rehabilitation facility. No matter how strong the cages, if a tiger gets loose and injures someone, the owner of the facility would be strictly liable for those injuries.

Volunteers at a jail or Appalachian Trail Club builders with chainsaws might be different, but most activities in which volunteers are typically engaged are not inherently dangerous. Nevertheless, the volunteer manager should look carefully at each situation and assess the risk associated with the activities the volunteer will be doing. For example, Maine has recently adopted a strict liability policy for defendants conducting the abnormally dangerous activity of blasting, saying “A person who creates a substantial risk of severe harm to others while acting for his own gain should bear the costs of that activity.”⁴ This is a recent development in Maine law, and the Maine courts presumably have not examined each activity which could be subject to strict liability. In any event, it is arguable it would not apply to a non-profit organization because of the fact the organization would not be acting for its own gain, but this premise has not yet been tested in the Maine courts.

There is also the question of whether a volunteer organization has a duty of care to third persons who interact with volunteers. Maine law does not impose a general obligation to protect third persons from harm, **absent a special relationship**.⁵ Examples of relationships Maine law has recognized as “special” in the sense they trigger a duty of care include common carrier-passenger, employer-employee, innkeeper-guest, land owner-invitee, and parent-child. What all of these special relationships have in common is there is a “disparity of position and influence between the parties”.⁶

The Maine Supreme Court recently held that a summer camp did not owe a special duty of care to a camper who was sexually assaulted by a volunteer counselor who contacted the camper two months after she had left the camp.⁷ The Court reasoned that the camp experience was a limited presence in the camper’s life, and the camp did not owe a duty to the camper for the misconduct by the volunteer counselor for criminal action months after she left the camp.⁸

Courts approach these cases based upon the particular facts, so it is difficult to predict how a court may rule with respect to a specific situation. An agency should be aware that it may owe a duty to recipients of its services who interact with volunteers retained by the agency.

Breach of Duty

Once the duty has been established, there must be a breach of that duty. In other words, the agency must do something that clearly violates the duty owed to the volunteer or to a recipient of their services.

Examples might be failure to provide safety equipment, failure to instruct a volunteer properly in how to use a tool, or permitting a clearly ill volunteer to prepare food. Another example would be where the agency is aware there are bad feelings between two of its volunteers and fails to take any action to protect them from each other, or doesn’t do a criminal background check on

3 *Fournier v. Rochambeau Club*, 611 A.2d 578 (ME.1992).
4 *Dyer v. Maine Drilling*, 2009 ME 126, ¶31,984 A.2d 210, 219
5 *Bryan R. v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 199 ME 144, 738 A.2d 839
6 *Dragomir v. Spring Harbor Hospital*, 2009 ME 51, 970 A.2d 310 (ME. 2009)
7 *Cniadek V. Camp Sunshine At Sebago Lake, Inc*, 2011 ME 11, ___ A.3d ___
8 *Id.* at ¶23.



persons who are entering other person's homes to provide services.

The bottom line is that once the duty of care has been established, it is the responsibility of the organization to take reasonable steps to ensure this duty is fulfilled.

Actual Harm

The person asserting a claim must prove actual harm. Under Maine law this harm could be physical, financial, or (in some circumstances) emotional.⁹ The facts of each case are considered by the court in determining whether actual, and compensable, harm exists. For example, in a scenario where an organization has a duty to warn a volunteer of a hazard associated with his assignment but fails to do so, if the volunteer is not harmed in any way the organization has no liability.

Foreseeability

This concept is grounded in the belief you can't reasonably expect a person to protect against every possible contingency. A consequence is reasonably foreseeable if the act or omission has created a risk which might reasonably be expected to result in the injury or damage at issue, even if the exact nature of the injury itself is not foreseeable.¹⁰

So – let's say it is reasonable to expect a person could be injured if your parking lot is not cleared of snow in a reasonable time. A volunteer comes to work his shift, loses his balance, does not actually fall, but his cell phone flies out of his hand and into a snow bank – permanently damaging it.

You might not have foreseen that failing to clear the parking lot would have resulted in a damaged cell phone, but you should have foreseen that there were risks associated with not doing so and you could be held liable.

Proximate Cause

Proximate cause is "that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the result would not have occurred."¹¹ Another way to think of proximate cause is that if it hadn't been for X, Y wouldn't have happened – they are proximate, or "next to", each other. Proximate cause is the stuff of law student nightmares and requires more complex analysis than can be done here.

In determining whether a defendant's negligence is the proximate cause of a plaintiff's injury, most courts focus on the foreseeability of the harm that resulted from the defendant's negligence. For example, if a driver negligently drives his automobile, it is foreseeable that he might cause an accident with another vehicle, hit a pedestrian, or crash into a storefront. But suppose the negligent driver collides with a truck carrying dynamite, causing an explosion that injures a person two blocks away. Assuming that the driver had no idea that the truck was carrying dynamite, it is not foreseeable that his negligent driving could injure a person two blocks away. Therefore the driver would not be liable for that person's injury.

⁹ *Curtis v. Porter*, 2001 ME 158, 784 A.2d 18 (Me.2001)

¹⁰ *Colvin v. A R Cable Services-ME, Inc.*, [1997 ME 163](#), ¶ 7, [697 A.2d 1289](#), 1290-91

¹¹ *Webb v. Haas*, [1999 ME 74](#), ¶ 20, [728 A.2d 1261](#), 1267 (quoting *Searles v. Trustees of St. Joseph's College*, [1997 ME 128](#), ¶ 8, [695 A.2d 1206](#), 1209)



WHY RISK MANAGEMENT?

A risk management strategy is just another tool in your tool kit to help you accomplish your agency's mission. It should be a normal part of your daily activities and an integral part of any strategic plan you develop. It will keep you from being blindsided by something you hadn't even thought of and derailing your good work.

Before we get into any great detail, here is a link to a glossary of risk management terms you might find helpful. <http://www.nonprofitrisk.org/library/glossary.shtml>

Risk management is an actual discipline that helps you to identify, assess, and control the risks your organization faces in your current operating environment. These risks can be present in your operations, your staffing, your governance, or your service delivery. Managing these risks will help you cope with the uncertainties of your work in an organized and comprehensive fashion – and enable you to take the steps necessary to protect your resources and assets.

Risk management is about more than just identifying a risk. It also involves weighing the risk against the expected outcome, prioritizing the risk, coming up with a plan for dealing with it, and monitoring the situation on an ongoing basis.

When you are prioritizing, one of the things to think about is whether or not you can mitigate the risk. Are there things you could do that would lessen the risk? If so, that might be one of the first things you tackle.

You may decide a risk is worth taking, and this is a legitimate choice – so long as it is a considered one. To operate totally risk-free would be to paralyze most operations, so that is not normally an option. The trick is to determine which risks are worth taking and what steps you can take to lower the risk.

The Process

1. Begin by looking at your organization and the context in which you are considering implementation of a risk management program. Have you had a recent incident that has hurt your organization, or have you just decided it is time to implement a risk management strategy? What are your goals, and what are the barriers to accomplishing these goals?

This piece is necessary for you to do in order to create the framework for your program. If your interest is strictly to make sure your insurance premiums are low, this might involve a completely different program than one that also includes promoting your reputation in the community.

2. Let's assume you have decided to include risk management as a part of your strategic plan. What's next? Identify the risks. Divide them into categories.

Typical non-profit categories might be **people, property, income, and reputation**. List each item in each category. For example, under the "people" category list each person in your organization and identify any risks associated with that person. This could include risks to the person or risks from the person. Ask yourself the question "What could go wrong?" Do the same thing for each item in each category.

When considering your property risks think about natural disasters as well as those things that may result from human error or crime. When considering income risks make sure you look at grant funding as well as other sources, of income - and don't forget to look at your contracts.



3. The next step is to prioritize your risks. After you've asked the question "What could go wrong?" Ask "If it does go wrong, what are the consequences?" This will help you prioritize.

Prioritization should focus on the potential seriousness of the risk, as well as the likelihood of it happening. Another way to prioritize might be to list those you can mitigate most quickly or easily, and tackle the more difficult ones later.

4. Select the risk management strategy you will use to address each of the risks you have decided to work on, and then implement your plan. There are four basic risk management strategies, although there could be many variations for each of them.

AVOID IT. Don't go there if it poses too much of a risk. If you don't have the resources necessary to make the risk an acceptable one, then don't offer the service or the program.

CHANGE IT. Change the service or the program in such a way as to minimize the risk. A good way to do this is to establish a protocol for dealing with an activity that has some identified risks. Make sure these policies and procedures are disseminated to all involved.

ACCEPT IT. Normally referred to as "retention", this means you've decided to accept the risk. You may have changed it to the point it is now at an acceptable level, or you may have to accept the risk "as is" in order to accomplish your mission. This is just as appropriate a way to manage risk as any of the other techniques – the key is to fully understand the risk before the decision is made to retain it.

SHARE IT. This is typically done through contracting with another organization in some way that shares the risk. The most common example of this type of strategy is a contract for liability insurance coverage. You may also have a situation where you can contract out part of the service you want to deliver to another provider, such as contracting for catering at an annual event rather than doing it yourself.

5. The last step is to monitor your risk management plan. This plan should be a living entity – organized in such a way as to be able to respond to new information and events. As things and people change, revisit the plan to ensure it still meets your organization's needs.

One of the ways to do this might be to have a committee meet regularly to review and revise your risk management program. This committee should include key players and should include volunteers as well as staff. A good idea might be to also have your insurance agent participate on the committee.

Not all risk management strategies fall neatly into this formal process. Sometimes decisions have to be made "on the fly". All that is suggested here is that you look at the risks as a normal part of any decision you make as a volunteer manager.

Forcing yourself to look at the risks will go a long way to helping you decide what to do, and soon it will become a habit.



Hallmarks of a Risk-Aware Nonprofit

The Nonprofit Risk Management Center¹² has come up with Twelve Hallmarks of a Risk-Aware Nonprofit. An organization that has these hallmarks is well on its way to success.

If you would like to take a closer look at each of these Hallmarks, go to <http://www.non-profitrisk.org/tools/hallmarks/hallmark2.shtml>.

Hallmark #1. Takes More Risks than It Avoids. A non-profit cannot function without taking risks. Avoiding risks altogether is easier, but much less productive, than evaluating risks carefully and taking them when necessary.

Hallmark #2. Heralds A Risk Management Champion. Not every organization has the funds to hire a Risk Management professional. When a leader emerges who both believes in the importance of sound risk management and is also effective in motivating others, he or she should be publicly acknowledged and rewarded as the organization's person who carries the standard so that others are motivated to identify risks and come up with creative solutions to address those risks.

Hallmark #3. Guided By Reality, In Addition To Scary Headlines. In a non-profit that is guided by reality, ordinary risks receive priority before out-of-the-ordinary risks. Part of the risk management analysis is to consider the probability that an event will occur as well as the cumulative impact on the organization of probable risks over time.

Hallmark #4. Is Bold But Smart. Organizations that take bold steps can make great strides to serve people and communities. Every nonprofit should identify the smart steps necessary to provide a measure of protection, security and assurance to accompany bold risk-taking.

Hallmark #5. Cultivates a 'Can-Do' Attitude Among Paid and Volunteer Staff. When everyone takes responsibility for finding and fixing safety hazards and other downside risks, a "can-do" risk management culture is created. Employees and volunteers who are educated about spotting risks are confident in their own judgment that something presents a hazard and are empowered to take action.

Hallmark #6. Sees the Whole Iceberg Not Just the Tip. Every organization encounters risks that are easily visible to the general public. Organizations with a healthy risk management perspective do not just anticipate known risks – they anticipate the unknown as well.

Hallmark #7. Understands that Hindsight Isn't 20:20, But it's Better than a Blindfold. Organizations that ignore past mistakes, or operate in denial, guarantee that history will repeat itself. View past mistakes as learning opportunities, not embarrassments to be swept under the rug.

Hallmark #8. Tells It Like It Is. Nonprofits that "tell it like it is" gain the respect of their peers, their clients, their professional advisors and government regulators. Words chosen, method of communication and delivery have a tremendous effect on the ability and willingness of the listener/recipient to understand the change, endorse the change, and alter their behavior to conform with the new reality.

Hallmark #9. Is Transparent with Insurance Partners. Nonprofits that do not hide information or withhold it from their insurance partners are not surprised by lack of coverage or other issues that may arise because the insurance partner does not know what is really going on.

12 Nonprofit Risk Management Center, 15 N. King St., Suite 203, Leesburg, VA 20176 (202) 785-3891



Hallmark #10. Values the Journey, Not Just the Destination. This type of an organization has adopted the policy of ongoing learning. It continues to evaluate and adjust internal policies and makes sure training paid and volunteer staff about risks and exposures that reflect current procedures, programs and services is regularly delivered.

Hallmark #11. Engages the Board in Their Battle. The more the Board knows about the nonprofit's programs, activities, finances, operating environment and competition, the more the board can offer as risk managers for the nonprofit.

Hallmark #12. Looks at Risk from Everyone's Perspective. A diverse group of eyes and ears identifying and examining risks sees more than a single set ever can. Inviting an objective third party to conduct a risk assessment is not a threat, but a gift.

Questions to ask yourself¹³

- Have you screened your volunteers sufficiently for criminal history or qualifications?
- Do your volunteers understand the parameters of their assignment and the limits of their authority?
- Is there adequate supervision for your volunteers?
- Are the trainings and exercises you conduct safe?
- Do the volunteers understand the potential dangers and how to avoid them?
- Do your volunteers have the right personal protective equipment for the things you are asking them to do?
- Do your volunteers operate machinery or vehicles?
- Is the equipment being used well maintained?
- Are the procedures for documenting volunteer activities clear and being consistently followed?
- Does your program have reliable resources for support and funding?
- Do you review all your Memorandums of Understanding to ensure you are not required to maintain insurance you do not have and to indemnify the other organization for losses?
- Are your protocols, practices and procedures in place sufficient to cover all of the things discussed above?

Incorporating risk management strategies into your normal operations will result in big dividends. You will have a safer, more efficient organization that is positioned to have the least amount of interruptions to the services it provides and allow you to continue to do the good work you do with a minimum of legal interference.

Even if your organization does not have a formal risk management strategy in place you can incorporate the basic principles discussed here into your daily volunteer management activities and benefit your organization in the process.

¹³ *Citizen Corps Volunteer Liability Guide, FEMA, pp.36-37*

AGENCIES/NONPROFIT ORGANIZATIONS

CHARITABLE IMMUNITY

Some organizations in Maine are free from liability for their negligent acts – regardless of whether they have violated the legal principles discussed previously. Maine is one of only nine states that follow the common law doctrine of charitable immunity.¹⁴

Under Maine law¹⁵, a director, officer or volunteer of a charitable organization is immune from civil liability for personal injury, death or property damage, including any monetary loss, from their negligent acts or omissions occurring within the course and scope of the activities of the charitable organization they serve. Only negligent acts are given immunity, as opposed to intentional ones (like an assault).

Under this statute, not only the organization, but also the director or officer is immune as well from civil liability for any act or omission occurring within the course and scope of the activities of the charitable organization they serve, but which are not his or her personal acts.

So what kind of an organization gets this protection? One that “ ‘has no capital stock and no provision for making dividends or profits’ and ... derive[s] its funds ‘mainly from public and private charity, hold[ing] them in trust for the object of the institution’ ”¹⁶

There are two reasons for extending this type of immunity – (1) funds come mainly from charitable sources and are held in trust to be used exclusively for the purposes of the charitable organization; and (2) to permit the invasion of these funds that are in trust to satisfy tort claims could jeopardize the sources of charitable support upon which the organization depends.¹⁷

This immunity is not total, however. For example, it is limited by an exception for acts arising out of the director or officer’s operation of a motor vehicle, vessel, aircraft or other vehicle for which the operator or owner of the vehicle is required to possess an operator’s license or maintain insurance.¹⁸

In this type of circumstance, the person filing suit can’t recover any more money than the applicable insurance policy limits (except for an umbrella policy). If the insurance carrier attempts to insert a provision to exclude coverage for claims authorized by this section, it is considered a void provision and has no effect.¹⁹

Immunity is further limited when a charitable organization is covered by a liability insurance policy. The organization is considered to have waived its immunity from liability for negli-

14 14 M.R.S. §158-A

15 *Id.*

16 *Child v. Cent. Me. Med. Ctr.*, 575 A.2d 318, 319 (Me.1990) (alterations in original) (quoting *Webber Hosp. Ass’n v. McKenzie*, 104 Me. 320, 329, 71 A. 1032, 1036 (1908))

17 *Id.*

18 14 M.R.S. § 158-A(3)

19





gence in that event. The policy is required to contain a provision to keep the insurer from asserting charitable immunity as a defense. If damages are awarded, they cannot exceed the coverage limits in the liability policy.²⁰

A recent Maine case²¹ further erodes the doctrine of charitable immunity. In this case the Maine court said the doctrine of charitable immunity does not apply to an intentional tort. It made this ruling in the context of a lawsuit against a charitable organization involving an assault.

Other kinds of intentional torts could be battery, intentional infliction of emotional distress, trespass, false imprisonment, or fraud. An intentional tort can be distinguished from negligence by looking at whether or not the civil wrong resulted from an intentional act, or was one simply resulting from the failure of the actor to take sufficient care in fulfilling a duty owed.

In addition to this broad charitable immunity, there are some narrow exceptions to the standard liability laws carved out by the Maine legislature that provide immunity from liability for specific organizations or in specific circumstances, as follows:

LICENSURE REPORTING IMMUNITY

Any person, health care facility or other emergency services organization acting in good faith that provides information about a licensee or applicant for a license to the Maine Emergency Medical Services is immune from civil liability.²²

COMMUNITY SERVICE

A charitable organization (as defined in the statute) is not liable for any claim arising from death or injury to a person or damage to property caused by a juvenile or adult participating in a supervised work or service program, performing community service, or providing restitution. This includes a claim arising from death or injury to the juvenile or adult or their property as well.²³

EMERGENCY MANAGEMENT ASSISTANCE COMPACT (EMAC)

Officers or employees of a state rendering aid in another state pursuant to the EMAC are considered agents of the requesting state for liability and immunity purposes. That officer or employee is not liable on account of any act or omission in good faith, unless the action is willful misconduct, gross negligence, or recklessness.²⁴

20 14 M.R.S. §158

21 *Picher v Roman Catholic Bishop of Portland et al* 2009 ME 67, 974 A.2d 286

22 32 M.R.S. §93

23 14M.R.S., §158-B

24 37-B M.R.S. §926



DISTRIBUTION OF DONATED FOOD

Any charitable or not-for-profit organization and any employee or volunteer of that organization who in good faith receive and distribute food apparently fit for human consumption at the time it is distributed – without charge – are immune from civil liability arising from an injury or death due to the condition of the food. An exception to this rule is made if the injury or death is a direct result of the gross negligence, recklessness or intentional misconduct of the organization.²⁵

HIPAA

In 1996, as part of the **H**ealth **I**nsurance **P**ortability and **A**ccountability **A**ct (HIPAA), Congress amended the Public Health Service Act to consider qualified clinician volunteers working at free clinics to be employees of the US Public Health Service.²⁶ With this “employee” designation, these volunteers would be covered for malpractice liability by the Federal Government through the Federal Tort Claims Act.

The Patient Protection and Affordable Care Act extended this coverage to free clinic volunteers, board members, employees, or contractors.²⁷ This status provides the covered individual with immunity from medical malpractice lawsuits resulting from that person’s performance of their duties at the free clinic, as the federal government assumes responsibility for such suits.

VOLUNTEER PROTECTION ACT

It is important to understand the provisions of the Volunteer Protection Act of 1997 do not offer **any** type of immunity or other protection for nonprofit organizations. It also **does not** limit any nonprofit from bringing an action against their volunteer.²⁸ The protections this act does provide are discussed in detail in the Volunteers section of this article.

25 14 M.R.S. §166(3)

26 42 U.S.C. 233(o)

27 ACA Public Law 111-148

28 42 U.S.C. §14503(b)(d)

VOLUNTEERS

It is important for the manager of volunteers to understand the protections extended to volunteers in Maine through federal and state laws. In the context of mitigating risk, many of these protections should alleviate concerns raised about using volunteers for certain activities. At the same time, you must realize these protections apply to the volunteer – not to the organization who uses the volunteer. When analyzing risks take into consideration where liability might fall even if the volunteer is protected.

VOLUNTEER PROTECTION ACT OF 1997

In 1997 the United States Congress passed the Volunteer Protection Act (VPA).²⁹ The stated purpose of this Act was to encourage volunteers to continue to volunteer without fear of liability. It established a minimum level of protection that pre-empted state law unless the state provides greater protections under its own laws than the VPA.³⁰ The VPA also does not apply in a state where the state has enacted a statute expressly declaring the VPA provisions will not apply.³¹ Maine has not enacted this type of a statute, so the VPA does apply here. Before we get into the specific provisions of the Act, let's look at some definitions used.

Definitions

Volunteer. This means an individual performing services for a nonprofit organization or a governmental entity who does not receive compensation (other than reasonable reimbursement or allowance for expenses actually incurred); or any other thing of value in lieu of compensation, in excess of \$500 per year. It includes a volunteer serving as a director, officer, trustee, or direct service volunteer.³²

Nonprofit organization. This means any 501(C)(3) organization exempt from tax unless they practice an action which constitutes a hate crime. It also includes any not-for-profit organization which is organized and conducted for the public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes unless it practices any action which constitutes a hate crime.³³

Punitive Damages. Punitive damages are damages paid over and above the actual loss to the person harmed. They are intended to punish the wrongdoer, as opposed to making the claimant "whole".

29 42 U.S.C. §14503(a)

30 42 U.S.C.. § 14502.

31 *Id.*

32 42 U.S.C. §14505(6)

33 42 U.S.C. § 14505(4)



Immunity

The VPA provides immunity for volunteers:

1. Serving a Non-Profit Organization
 2. Serving a Governmental Entity
 3. Acting within the scope of his or her responsibilities at the time of the act or omission
 4. Properly authorized and licensed, if required
 5. Receives no compensation (reasonable reimbursement for expenses is allowed)
- OR**
6. Does not receive anything of value in lieu of compensation in excess of \$500.00 per year
- UNLESS**
7. The harm was caused by willful, criminal or reckless misconduct, gross negligence or a conscious, flagrant indifference to the rights or safety of the individual who was harmed;
- OR**
8. The harm was caused by the volunteer operating a motor vehicle, vessel, or aircraft where the State requires an operator's license and insurance.³⁴

Punitive damages cannot be awarded against a volunteer for harm he or she caused in the scope of their responsibility to a nonprofit organization or governmental entity unless the harm was proximately caused by willful or criminal misconduct, or a there was a conscious, flagrant indifference to the rights or safety of the person harmed.³⁵

The limitations on liability also do not apply to misconduct constituting a crime of violence or international terrorism **for which the defendant has been convicted** in a court, misconduct constituting a hate crime, misconduct constituting a sexual offense, misconduct in which the defendant is found to have violated a state or federal civil rights law, or misconduct where the defendant was under the influence of drugs or intoxicating alcohol.³⁶

The VPA does not prevent a non-profit organization from bringing a lawsuit against a volunteer, and it does not protect a non-profit organization from a lawsuit for harm caused by a volunteer. In a civil action against a volunteer who has acted in the scope of their responsibility to a governmental entity or a nonprofit, the volunteer is only liable for non-economic loss in direct proportion to the percentage of their responsibility for the harm done.³⁷

34 42 U.S.C. §14503

35 *Id.*

36 *Id.*

37 42 U.S.C.S. §14504



STATE VOLUNTEER PROTECTION LAWS

Non-profit Volunteer Immunity

Under Maine law³⁸, a volunteer is immune from civil liability for personal injury, death or property damage, including any monetary loss, from their negligent acts or omissions occurring within the course and scope of the activities of the charitable organization the volunteer serves.

Only negligent acts are given immunity, as opposed to intentional ones (like an assault or embezzlement). An intentional act can be distinguished from a negligent one by looking at whether or not the civil wrong resulted from an intentional act, or was one simply resulting from the failure of the actor to take sufficient care in fulfilling a duty owed.

Under this statute the volunteer is also immune from civil liability for any act or omission occurring within the course and scope of the activities of the charitable organization the volunteer serves, but which are not his or her personal acts.

This broad immunity is limited by an exception for acts arising out of the volunteer's operation of a motor vehicle, vessel, aircraft or other vehicle for which the operator or owner of the vehicle is required to possess an operator's license or maintain insurance. The person filing suit under this statute is limited to a recovery no greater than the applicable insurance policy (except for an umbrella policy). If the insurance carrier attempts to insert a provision to exclude coverage for claims authorized by this section, it is considered a void provision and has no effect.

Good Samaritan Law

In Maine, any person who renders first aid, emergency treatment or rescue assistance voluntarily, without expecting any type of compensation (monetary or otherwise) from the person they assist, is not liable for any damages for injuries sustained by that person or for damages for that person's death because of the aid, treatment, or assistance. An exception to this rule applies if the injuries or death is caused willfully, wantonly, recklessly, or by gross negligence on the part of the person giving the aid, treatment, or assistance.

This law applies to members or employees of nonprofit volunteer or governmental ambulance, rescue or emergency units – whether or not a fee is charged for the services by the nonprofit or governmental entity and whether or not the members or employees receive salaries or other compensation from the nonprofit or governmental entity. The law does not apply if the aid, treatment, or assistance is given on the premises of a hospital or clinic.³⁹

Health Care Volunteers

IF you are a

licensed health care practitioner

retired physician

retired podiatrist

retired dentist

³⁸ 14 M.R.S. §158-A

³⁹ 14M.R.S. §164



AND

you voluntarily – without any expectation of compensation
provide professional services to

a nonprofit organization

an agency or political subdivision of the State of Maine

members or recipients of services of a nonprofit organization or agency or political subdivision of the State of Maine

FOR THE PURPOSE OF

supporting the State’s response to a public health threat

supporting the State’s response to an extreme public health emergency

supporting the State’s response to a disaster

THEN

you are not liable for an injury or death arising from medical services provided unless the injury or death was caused willfully, wantonly, recklessly or by gross negligence.⁴⁰ This extended immunity to retired physicians, podiatrists and dentists only applies if the licensed professional is retired from practice, possessed an unrestricted license in the relevant profession and has not been disciplined by the licensing board in the previous five years at the time of the act or omission causing the injury.⁴¹

If you are an emergency medical services person who voluntarily (without the expectation of compensation) provides emergency medical services within the scope of your licensure to support the State’s response to a public health threat, the State’s response to an extreme public health emergency, or the State’s response to a disaster, then you also are not liable for an injury or death arising from those emergency medical services provided unless the injury or death was caused willfully, wantonly, recklessly or by gross negligence.⁴²

The difference here is the immunity does not apply if providing services to a nonprofit organization, as it does for health care practitioners, retired physicians, podiatrists and dentists.

For purposes of this law, an emergency medical services person includes a first responder, a basic emergency medical technician, and an advanced emergency medical technician.⁴³

Any person who works as a volunteer without compensation in a public immunization program set up by the Department of Health and Human Services will not be held liable for damages or injuries sustained by a person immunized under the program or for damages for the death of a person immunized under the program unless it is established the injuries or death were caused willfully, wantonly, recklessly or by gross negligence by the volunteer.⁴⁴

40 24M.R.S. §2904

41 *Id.*

42 *Id.*

43 *Id.*

44 22 M.R.S. §1063



Special Advocate Immunity

A person serving as a court appointed special advocate for the Judicial Department, or as a director, deputy director or regional volunteer coordinator of the CASA program cannot be held liable for acts performed within the scope of the person's administrative duties, and is entitled to quasi-judicial immunity for acts performed within the scope of the person's duties as a *guardian ad litem*.⁴⁵

Government Employee Immunity Extended to Volunteers

The immunity granted to government employees under the Maine Tort Claims Act⁴⁶ is extended to volunteer firefighters because of a 1997 case⁴⁷ where the court found a volunteer EMS organization was an agent of the government and therefore was entitled to the same immunity provided to government employees. Likewise, a volunteer *guardian ad litem* was held to be a state employee because she was acting as an officer of the court in a 1999 Maine case.⁴⁸

Any person called out pursuant to the Maine State Emergency Management Act, including a voluntary and uncompensated grantor of a permit to use that grantor's premises as an emergency management shelter, is immune from liability for the death of or injury to any person, or damage to property as a result of engaging in emergency management activities.⁴⁹

Volunteer Drivers

An insurance company cannot refuse to issue motor vehicle liability insurance to an applicant solely because he or she is a volunteer driver. The insurance company also cannot impose a surcharge or increase the rate for a motor vehicle policy solely on the basis the insured, a member of the insured's household, or a person who customarily operates the vehicle is a volunteer driver. A volunteer driver is defined as a person who provides services, including transporting individuals or goods, without compensation above expenses to a nonprofit agency or charitable organization.⁵⁰

45 4 M.R.S. §1506

46 14 M.R.S. §8111

47 *Bernard v McKinnis*, 1997 ME 186, 699 A2d 1148

48 *Kennedy v State*, 1999 ME 85, 730 A.2d 1252

49 37-B M.R.S. §822

50 24-A M.R.S. §2902-F



OTHER LAWS

Workers Compensation

Volunteers are generally not covered under Maine workers compensation laws, except under the following circumstances:

The organization for which the volunteer provides services has a rider in their policy covering volunteers. Since Workers Compensation can limit an organization's liability in the event of an injury, it is a good idea to obtain this type of endorsement on your Workers Compensation policy.

A person is certified by the Director of the Maine Emergency Management Agency within the Department of Defense, Veterans and Emergency Management as a qualified search and rescue worker and is performing search and rescue activity at the request of a state, county or local government entity. In this circumstance this type of worker is considered an employee under Maine law.⁵¹

A person is a Volunteer firefighter who is an active member of a volunteer fire association as defined in Title 30-A, section 3151 or a volunteer emergency medical services person as defined in Title 32, section 83, subsection 12. This is another circumstance where the volunteer is considered an employee under Maine law.⁵²

A person is part of "emergency management forces".⁵³ This is defined as a person engaged in performing emergency management activities, including, but not limited to, persons called out by the Governor pursuant to an emergency proclamation. This is discussed in greater detail immediately below.⁵⁴

State of Maine Emergency Management Act: Title 37-B

In 1983 Maine adopted the State of Maine Emergency Management Act, and it has been revised and amended several times since. There are several important provisions that affect volunteers and agencies that use them.

Maine Emergency Management Agency (MEMA) and local organizations for emergency management may employ any person they consider necessary to assist with their emergency management activities, which would include volunteers. Any person called and employed for assistance in this manner is deemed to be an employee of the State for purposes of immunity from liability and for purposes of workers' compensation insurance unless otherwise excepted under the Workers Compensation Act.⁵⁵

Under this statute "local organization for emergency management" is defined as an organization created specifically under state statute to perform local emergency functions, and emergency management is defined as the coordination and implementation of an organized effort to mitigate against, prepare for, respond to and recover from a disaster.

"Prepare" means planning how to respond in case an emergency or disaster occurs and working to increase resources available to respond effectively.

"Recover" means activities that, in the short term, return vital life support systems to minimum operating standards and, in the long term redevelop a disaster area to preexisting conditions or to conditions that are less disaster prone.

51 14 M.R.S. §8102

52 14 M.R.S. §8102

53 37B M.R.S. § 823

54 37-B M.R.S. §703(2-B)

55 37-B M.R.S. §784-A



“Respond” means activities designed to provide emergency assistance to victims of a disaster.⁵⁶

Any person called out pursuant to this statute, including a voluntary and uncompensated grantor of a permit to use that grantor’s premises as an emergency management shelter, is immune from liability for the death of or injury to any person, or damage to property as a result of engaging in emergency management activities.⁵⁷

All members of the “emergency management forces” are deemed to be employees of the State while on, or training for, emergency management duty. They have all the rights given to state employees under the Maine Workers’ Compensation Act.⁵⁸

Food Donors

A good faith donor of canned or perishable food apparently fit for human consumption at the time of the donation to a charitable or not-for-profit organization for free distribution is immune from civil liability arising from injury or death due to the condition of the food. An exception is if the injury or death is a direct result of the gross negligence, recklessness or intentional misconduct of the donor.⁵⁹

Any charitable or not-for-profit organization and any employee or **volunteer** of the organization who in good faith receives and distributes food apparently fit for human consumption at the time it is distributed – without charge – are immune from civil liability arising from an injury or death due to the condition of the food.

An exception to this rule is made if the injury or death is a direct result of the gross negligence, recklessness or intentional misconduct of the organization.⁶⁰

CONCLUSION

Managing volunteers is a complex task.

Volunteers can be a significant asset of your organization and their mismanagement could cripple your ability to accomplish your mission. Part of managing volunteers is assessing the risk associated with their use. Ask the question “Is this the type of activity where volunteers would be useful?” but also ask the question “What is the risk associated with using volunteers in this activity.”



Remember that some risks are acceptable risks. To expect to operate in a completely risk-free environment is not realistic. Instead, make sure you are managing the risk by analyzing, planning, implementing, and monitoring risk management strategies. Be flexible and ready to adapt your strategies to changing personnel and environment. Keep your insurance provider in the loop and encourage your staff and volunteers to be “risk aware”.

Each organization faces unique risks associated with their clientele, location, services, facilities, volunteers, staff, fundraising activities and a multitude of other things. Be creative and you will be rewarded for the effort with an organization that is prepared for most occurrences and has a plan in place for how to recover from those you can’t prepare for.

⁵⁶ 37-B M.R.S., §703

⁵⁷ 37-B M.R.S. §822

⁵⁸ 37-B M.R.S. §823

⁵⁹ 14M.R.S. §166(2)

⁶⁰ 14M.R.S. §166(3)

RESOURCES FOR VOLUNTEER PROGRAMS

Information on essential business practices for volunteer programs, opportunities for professional development for managers of volunteers, and national as well as Maine-based training for volunteer program staff can be found on line at



VOLUNTEERMAINE.ORG



Advancing Volunteerism. Strengthening Communities.

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The Maine Commission for Community Service builds capacity and sustainability in Maine's volunteer and service communities by funding programs, developing managers of volunteers and service-learning practitioners, raising awareness of sector issues, and promoting service as a strategy.

This publication has been developed and printed under 013-07B-3793 with funding provided by the Corporation for National and Community Service. (Feb. 2011)