



## WE DON'T NEED INSURANCE—VOLUNTEER PROTECTION ACT OF 1997

January 2007



You are sitting at your desk as the executive director or CEO of a nonprofit organization or association trying to complete at least one item on your three page to-do list when the phone rings.

Your board chair says, “I was talking to a colleague who told me there is a federal law that eliminates the need for us to buy Directors & Officers insurance. If so, that will save us a lot of money that we can apply to our programs. What do you think?”

As you wrestle your mind from the task at hand to focus on what your chair is saying, your brain is searching frantically for that law and what you know about it. You attended some seminar sometime when the speaker talked about a volunteer protection act—what did she say about it?

The federal Volunteer Protection Act (VPA) of 1997 (42 USCA Sec. 14501 et seq.), signed in to law by President Bill Clinton, still causes much confusion within the nonprofit sector. Comments and beliefs include nonprofit organizations no longer needing either general liability or Directors & Officers liability insurance, the law only applying to small nonprofits, the law being useless, and anywhere in between. Reality is somewhere in the middle. The law has both good and bad provisions. The act offers some protections for volunteers but does not negate the need for risk management strategies or liability insurance. Here’s an overview of the law to help you respond to your board chair.

### Liability Limitation for Volunteers

The law states that “no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organizations or entity.” The liability limitation only applies if:

the volunteer was acting within the scope of his/her responsibilities;

the volunteer, if appropriate or required, was properly licensed, certified or authorized to act in the state in which the harm occurred;

the harm was not caused by willful or criminal misconduct, reckless misconduct, gross negligence, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and

the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle requiring the operator or owner to possess an operator's license or maintain insurance.

On the down side, the law allows the nonprofit or governmental entity to bring a civil action against the volunteer (so the organization can still sue the volunteer). Plus, the law does not provide any protection or limit the liability of the nonprofit, governmental entity or its employees (that could be you). Therefore, the entity still needs insurance to protect itself and its employees and provide defense for the volunteer even if the volunteer's liability is limited.

## Definitions

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The devil is always in the details. First, who is a volunteer? A volunteer is an individual performing services for a nonprofit organization or governmental entity who does not receive compensation or anything of value in excess of \$500 per year over and above reimbursement of expenses. The term includes people serving as a director, officer, trustee, or direct service volunteer.

Second, what qualifies as a "nonprofit organization?" A nonprofit is a 501(c)(3) or any not-for-profit organization that is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes. According to the American Society of Association Executives, the law applies to 501(c)(6)s, including trade and professional associations, although they are not specified in the act. The sponsors of the bill did not change the statutory definition but included language in the House Judiciary Committee Report stating their intent to cover volunteers of 501(c)(6)s. However, coverage for 501(c)(4) and 501(c)(5) organizations by the law is dependent upon a finding that the organization meets the "public benefit" and "operating primarily" tests. That is a big "if."

The term "harm" means physical, nonphysical, economic and noneconomic losses. Noneconomic losses are physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, and loss of consortium. It also includes hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature. Noneconomic damages are often where the big money is within claim settlements and lawsuits.

## Practical Implications

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The VPA pre-empts state volunteer protection laws unless the state law provides additional protection from liability relating to volunteers. But some state laws are still applicable and not inconsistent with the VPA. The state law may:

require the nonprofit or governmental entity to adhere to risk management procedures, including mandatory training;

make the nonprofit or entity liable for the acts or omissions of its volunteers to the same extent as employees (vicarious liability);

make a limitation of liability inapplicable if the civil action was brought by an officer of a state or local government;

make the liability limitation applicable only if the organization or entity provides a financially secure source of recovery for individuals harmed by a volunteer (i.e., insurance)

Be sure to research your state law(s) to determine if any of its provisions will supersede the VPA. The Nonprofit Risk Management Center's Web site offers a free download of a summary of [state volunteer immunity laws](#). Consider how your state laws define "volunteer" and which positions are eligible for protection. Does your state require the organization to have liability insurance with certain limits, and do you meet these requirements?

The liability limitations also do not apply to any misconduct:

that results in a conviction for a crime of violence (state law) or international terrorism;

that constitutes a hate crime;

that results in a conviction for a sexual offense as defined by state law;

in which the defendant (volunteer) has been found to violate a federal or state civil rights laws; or

in which the defendant (volunteer) was under the influence of intoxicating alcohol or any drug at the time of the misconduct.

The exception for violations of federal or state civil rights laws is significant since approximately 80-90 percent of nonprofit D&O claims are employment-related (discrimination, wrongful termination, and harassment—all civil rights violations).

## Your Response

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The short answer for your board chair is that the Volunteer Protection Act only applies to the volunteer; there is no protection for either the entity or its employees. The law will not prevent the filing of a claim nor pay for the defense of an allegation of harm arising from a volunteer's misconduct. The volunteer can raise the VPA as a defense to any such suit but that costs money. A liability insurance policy will pay the defense expenses if the claim is covered. From a Directors and Officers' perspective, there are many possibilities for a claim to be filed against the board and organization that would not be covered by the VPA, such as employment practices, anti-trust or general mismanagement of the organization.

The second point is that the law does not protect the volunteer if he/she acted willfully, criminally, recklessly or is grossly negligent. Most, if not all, lawsuits will allege the defendant acted in such a manner (that is where the big money is). The volunteer immunity also does not apply if the action results in the volunteer being convicted of: a crime of violence, a hate crime, a sexual offense, violating federal or state civil rights laws, or being under the influence of intoxicating alcohol or any drug.

state's laws so you can respond fully to your board chair.

## **Additional Suggestions**

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The best way to protect your board, employees, volunteers and organization is through risk management strategies (policies and procedures) to mitigate the loss. Insurance is the best way to finance your risks. The organization should have various types of liability policies such as general liability and Directors & Officers liability. However, do not forget auto liability insurance, especially Hired and Nonowned Auto Liability, since the VPA specifically excludes misconduct involving an automobile. Depending upon the nature of the nonprofit's operations, there may be the need for additional types of liability insurance.

The board has a fiduciary responsibility to protect the organization's assets, which is often partially met through insurance. However an organization may not be able to afford nor see the need for all types of insurance recommended by its insurance agent or consultant. To meet its due diligence, the board or senior management should review the risks and insurance options to make a conscious business decision about what coverages to buy. If the purchase decisions are a board decision, they should be documented appropriately in the minutes.

Now back to your to-do list.

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