

The Volunteer Protection Act:

How the Law Will Affect Associations

The federal Volunteer Protection Act of 1997 grants immunity from personal liability to those who volunteer for nonprofit organizations. It is intended to encourage volunteerism and facilitate volunteer organization recruiting by reducing the legal liability risks to individuals who choose to serve. The law preempts inconsistent state laws, standardizing protection that now varies greatly from state to state.

The law is complex. It contains numerous conditions, qualifications and limitations. Many questions are raised regarding its practical ramifications. Since no federal agency is authorized to interpret the law, clarification will likely have to await court determination on a case-by-case basis where claimants attempt to hold volunteers personally liable and the law is raised as a defense on behalf of the volunteers.

Here are some practical considerations regarding the impact of the act on associations:

What is the law all about?

The law preempts state law to provide that volunteers would not be liable for harm if (1) they were acting in the scope of the volunteer activity; (2) they were properly licensed (if necessary); (3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the claimant; and (4) the harm was not caused by the volunteer operating a vehicle, vessel, or aircraft.

The law does not allow punitive damages to be awarded against a volunteer unless the harm was caused by willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the claimant. In a suit against a volunteer, the volunteer's liability for "noneconomic damages" (pain and suffering, mental anguish, etc.) would be "several" but not "joint" (each volunteer would be responsible for a proportionate share).

The law allows states to opt out of coverage under certain circumstances. It also specifies conditions and restrictions that a state could impose without being inconsistent with the law. It further exempts from coverage any misconduct that constitutes a crime, a sexual offense, a violation of civil rights, or where the volunteer was under the influence of alcohol.

The law is effective 90 days after enactment. It will apply to any claim filed on or after the effective date if the harm that is the subject of the claim or the conduct that caused the harm occurred after the effective date.

Does the law apply to volunteers for all trade associations, professional societies, and other nonprofit organizations?

The new law defines a volunteer as someone who provides service for a non-profit and is not compensated, other than being reimbursed for expenses or anything of value under \$500 a year. The act defines non-profits as 501(c)(3)s under the 1986 Internal Revenue

Service Code, and any not-for-profit organization geared for public benefit and operated for charitable, educational, religious, welfare or health purposes.

Volunteers for organizations exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code are clearly covered by the law. In addition, volunteers of "any non-for-profit organization, which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare or health purposes, "are also clearly covered.

The legislative history indicates that coverage would "include trade and professional associations and other business leagues which are exempt from taxation under Section 501(c)(6)" apparently Congress does not expect that 501(c)(6) organizations would have to meet the "public benefit" and "operating primarily" tests.

Beyond 501 (c) (3) and 501 (c) (6) organizations and for non-tax-exempt nonprofit organizations, the law covers "organizations which are not tax exempt but which meet the 'public benefit' and 'operating primarily' tests. For exempt organizations other than 501(c)(3) and 501(c)(6) organizations, including such membership associations as "interest organizations" exempt under Section 501(c)(4) and agricultural organizations under Section 501(c)(5) as well as nonprofit organizations that do not have federal income tax exemption, coverage by the law will depend on whether each organization is found to meet the "public benefit" and "operating primarily" tests.

Does an association have to take any action to ensure that its volunteers are protected under the new law?

No. The law automatically provides a bar to liability in suits brought against association volunteers in circumstances covered by the law. When there may be some uncertainty about the applicability of the law to volunteers for associations other than 501 (c) (3) organizations, which are mentioned in the law, and 501 (c) (6)s which are mentioned in its legislative history, those associations need to consult with legal counsel; modifications in governing documents to meet the "public benefit" and "operating primarily" tests may be warranted.

Are lawsuits against association volunteers now prohibited?

No. The new federal law will provide a strong defense when liability suits are brought against volunteers in circumstances where the law applies, likely often leading to dismissal of the suits against the volunteers; but the law does not bar claimants from naming volunteers in lawsuits. It may, however, assist in deterring or discouraging potential claimants from bringing such suits in the first place.

Do nonprofit organizations as entities or the paid employees of these organizations derive any immunity from the law?

Clearly not. The law grants immunity from personal, individual liability only for volunteers of nonprofit organizations, not for the organizations themselves or for the employees of the organizations, such as typical paid association executive members.

Can a state government increase or decrease the protection afforded volunteers under the new law?

The law preempts all inconsistent state laws, including the greatly varying volunteer protection laws that now exist in all 50 states. Each individual state is given the prerogative to increase protection from liability for volunteers beyond that provided in the federal law. There is also a narrow exemption that permits an individual state to avoid preemption with respect to suits brought in state court and involving only citizens of the state if the state does so via a stand-alone law.

Does the new federal law render liability insurance no longer necessary for associations?

No. Insurance is still very important and very useful. Many liability risks for associations and their volunteers are not eliminated by the new law. For example, claims against associations themselves, as well as against association employees, are not affected; claims against volunteers that either pre-date the law or involve conduct pre-dating are not affected; even many potential claims against association volunteers - such as for employment discrimination - are not covered by the law. All of these are ordinarily covered by typical association liability insurance policies. Moreover, generally an association volunteer will not learn whether the new law applies to an individual situation until the court makes its determination on applicability; liability insurance indemnifies against legal expenses incurred in reaching that determination.

Effective risk management for associations involves several layers of protection, just as with automobile safety or fire safety. Training and education of employees volunteers, indemnification of individuals by the association, and association liability insurance can all be excellent, if in some respects overlapping precautions.

The new federal Volunteer Protection Act of 1997 increases and enhances association risk management, but it does not replace other risk management techniques, such as insurance.

Volunteer Protection Act of 1997

This is the text of Public Law 105-19; the Volunteer Protection Act of 1997 as signed into law by President Clinton on June 18, 1997:

One Hundred Fifth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the seventh day of January, one thousand nine hundred and ninety-seven

An Act

To provide certain protections to volunteers, nonprofit organizations, and governmental entities in lawsuits based on the activities of volunteers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Volunteer Protection Act of 1997'.

SECTION 2. FINDINGS AND PURPOSE.

(a) FINDINGS- The Congress finds and declares that--

(1) the willingness of volunteers to offer their services is deterred by the potential for liability actions against them;

(2) as a result, many nonprofit public and private organizations and governmental entities, including voluntary associations, social service agencies, educational institutions, and other civic programs, have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities;

(3) the contribution of these programs to their communities is thereby diminished, resulting in fewer and higher cost programs than would be obtainable if volunteers were participating;

(4) because Federal funds are expended on useful and cost-effective social service programs, many of which are national in scope, depend heavily on volunteer participation, and represent some of the most successful public-private partnerships, protection of volunteerism through clarification and limitation of the personal liability risks assumed by the volunteer in connection with such participation is an appropriate subject for Federal legislation;

(5) services and goods provided by volunteers and nonprofit organizations would often otherwise be provided by private entities that operate in interstate commerce;

(6) due to high liability costs and unwarranted litigation costs, volunteers and nonprofit organizations face higher costs in purchasing insurance, through interstate insurance markets, to cover their activities; and

(7) clarifying and limiting the liability risk assumed by volunteers is an appropriate subject for Federal legislation because--

(A) of the national scope of the problems created by the legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits;

(B) the citizens of the United States depend on, and the Federal Government expends funds on, and provides tax exemptions and other consideration to, numerous social programs that depend on the services of volunteers;

(C) it is in the interest of the Federal Government to encourage the continued operation of volunteer service organizations and contributions of volunteers because the Federal Government lacks the capacity to carry out all of the services provided by such organizations and volunteers; and

(D)(i) liability reform for volunteers, will promote the free flow of goods and services, lessen burdens on interstate commerce and uphold constitutionally protected due process rights; and (ii) therefore, liability reform is an appropriate use of the powers contained in article 1, section 8, clause 3 of the United States Constitution, and the fourteenth amendment to the United States Constitution.

(b) PURPOSE- The purpose of this Act is to promote the interests of social service program beneficiaries and taxpayers and to sustain the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions by reforming the laws to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities.

SECTION 3. PREEMPTION AND ELECTION OF STATE NONAPPLICABILITY.

(a) PREEMPTION- This Act preempts the laws of any State to the extent that such laws are inconsistent with this Act, except that this Act shall not preempt any State law that provides additional protection from liability relating to volunteers or to any category of volunteers in the performance of services for a nonprofit organization or governmental entity.

(b) ELECTION OF STATE REGARDING NONAPPLICABILITY- This Act shall not apply to any civil action in a State court against a volunteer in which all parties are citizens of the State if such State enacts a statute in accordance with State requirements for enacting legislation--

(1) citing the authority of this subsection;

(2) declaring the election of such State that this Act shall not apply, as of a date certain, to such civil action in the State; and

(3) containing no other provisions.

SECTION 4. LIMITATION ON LIABILITY FOR VOLUNTEERS.

(a) LIABILITY PROTECTION FOR VOLUNTEERS- Except as provided in subsections (b) and (d), 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 organization or entity if--

(1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;

(2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity;

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

(4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to--

(A) possess an operator's license; or

(B) maintain insurance.

(b) **CONCERNING RESPONSIBILITY OF VOLUNTEERS TO ORGANIZATIONS AND ENTITIES-** Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization or any governmental entity against any volunteer of such organization or entity.

(c) **NO EFFECT ON LIABILITY OF ORGANIZATION OR ENTITY-** Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.

(d) **EXCEPTIONS TO VOLUNTEER LIABILITY PROTECTION-** If the laws of a State limit volunteer liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

(1) A State law that requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers.

(2) A State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees.

(3) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.

(4) A State law that makes a limitation of liability applicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity. A financially secure source of recovery may be an insurance policy within specified limits, comparable coverage from a risk pooling mechanism, equivalent assets, or alternative arrangements that satisfy the State that the organization or entity will be able to pay for losses up to a specified amount. Separate standards for different types of liability exposure may be specified.

(e) **LIMITATION ON PUNITIVE DAMAGES BASED ON THE ACTIONS OF VOLUNTEERS-**

(1) **GENERAL RULE-** Punitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.

(2) CONSTRUCTION- Paragraph (1) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.

(f) EXCEPTIONS TO LIMITATIONS ON LIABILITY-

(1) IN GENERAL- The limitations on the liability of a volunteer under this Act shall not apply to any misconduct that--

(A) constitutes a crime of violence (as that term is defined in section 16 of title 18, United States Code) or act of international terrorism (as that term is defined in section 2331 of title 18) for which the defendant has been convicted in any court;

(B) constitutes a hate crime (as that term is used in the Hate Crime Statistics Act (28 U.S.C. 534 note));

(C) involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court;

(D) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or

(E) where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct.

(2) RULE OF CONSTRUCTION- Nothing in this subsection shall be construed to effect subsection (a)(3) or (e).

SECTION 5. LIABILITY FOR NONECONOMIC LOSS.

(a) GENERAL RULE- In any civil action against a volunteer, based on an action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity, the liability of the volunteer for noneconomic loss shall be determined in accordance with subsection (b).

(b) AMOUNT OF LIABILITY-

(1) IN GENERAL- Each defendant who is a volunteer, shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which that defendant is liable. The court shall render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.

(2) PERCENTAGE OF RESPONSIBILITY- For purposes of determining the amount of noneconomic loss allocated to a defendant who is a volunteer under this section, the trier of fact shall determine the percentage of responsibility of that defendant for the claimant's harm.

SECTION 6. DEFINITIONS.

For purposes of this Act:

(1) ECONOMIC LOSS- The term 'economic loss' means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement

services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(2) HARM- The term `harm' includes physical, nonphysical, economic, and noneconomic losses.

(3) NONECONOMIC LOSSES- The term `noneconomic losses' means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature.

(4) NONPROFIT ORGANIZATION- The term `nonprofit organization' means--

(A) any organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note); or

(B) any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note).

(5) STATE- The term `State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, any other territory or possession of the United States, or any political subdivision of any such State, territory, or possession.

(6) VOLUNTEER- The term `volunteer' means an individual performing services for a nonprofit organization or a governmental entity who does not receive--

(A) compensation (other than reasonable reimbursement or allowance for expenses actually incurred); or

(B) any other thing of value in lieu of compensation, in excess of \$500 per year, and such term includes a volunteer serving as a director, officer, trustee, or direct service volunteer.

SECTION 7. EFFECTIVE DATE.

(a) IN GENERAL- This Act shall take effect 90 days after the date of enactment of this Act.

(b) APPLICATION- This Act applies to any claim for harm caused by an act or omission of a volunteer where that claim is filed on or after the effective date of this Act but only if the harm that is the subject of the claim or the conduct that caused such harm occurred after such effective date.