



Oklahoma Volunteer Handbook

A Guide to Laws about and for Volunteers

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INTRODUCTION

Congratulations! If you're reading this handbook, you're probably thinking about or already are providing some sort of service as a volunteer. Volunteer service is a rewarding and much needed way to serve the community. Without the contributions of volunteers, most public service organizations could not survive.

It is, however, a fact of life that legal obligations and questions of legal liability inevitably accompany service as a volunteer. These obligations and questions should by no means deter you from volunteer service, but you need to be aware of laws that govern your obligations and duties as a volunteer. This handbook is designed to guide you through some of the legal issues you may encounter as a volunteer.

If you're just getting started in your volunteer service, don't think of this as something to read only after you think a legal liability problem may have come up! A good portion of this handbook is designed to help steer you through legal questions that may come up at the very beginning of your volunteer service; in other words, before you may have done anything at all in the way of service for an organization. With that in mind, take a little time to look at this guide before you start your service journey.

For more information about volunteer programs in Oklahoma, contact the Oklahoma Office of Volunteerism, Department of Civil Emergency Management, Will Rogers Memorial Office Building, Oklahoma City, OK 73105, (405) 521-2481.

LEGAL STRUCTURE

Many groups which provide or rely upon volunteer services are not for profit organizations. The group may raise money and have a steady stream of revenue, but the purpose of the group is to provide some charitable or community service, not to make profits for an owner or group of owners. If you are going to be providing volunteer services for such a group, you will find that the group either has or should have some form of formal legal organization which allows the group to take advantage of its status as a nonprofit organization.

In Oklahoma, the most prevalent form of nonprofit organization is the "501(c)(3)" not-for-profit corporation. This form of organization allows the nonprofit organization to be exempt from federal and Oklahoma income taxes on the revenue the organization generates.¹ This form of organization also allows the people providing leadership or other service to the organization to take advantage of certain laws (such as those discussed below on the leadership of the volunteer service organization) which limit or shield them from legal liability. If you are going to provide volunteer services for a nonprofit organization, you should make sure that the organization has gotten itself organized as a 501(c)(3) corporation.

The 501(c)(3) nonprofit corporation's exemption from income tax does not mean that the organization is exempt from all tax laws. For example, a nonprofit corporation still must file a special return with Internal Revenue Service. Additionally, if the organization has regular employees in addition to volunteers, the organization will be responsible to state and federal governments for payroll taxes such as Medicare, social security, and the proper withholding of taxes from the employees' wages. In some circumstances, a nonprofit organization may have to pay real estate (ad valorem) taxes on real estate the organization owns.

If you are providing volunteer service to a nonprofit organization and have questions about the tax laws that apply to the organization, please consult a professional tax advisor such as a lawyer or certified public accountant.

LEADERSHIP

Volunteers may also find themselves in a leadership role of a nonprofit organization. While paid professionals may manage and administer many of the nonprofit corporation's services, a nonprofit corporation must ultimately be governed by a board of directors. However, unlike the board members of a for profit corporation, the board members of a nonprofit corporation are usually volunteers.

Oklahoma law provides special protection for volunteer board members of nonprofit corporations. Under Oklahoma law, a member of a board of directors of a nonprofit corporation is immune from legal liability for any negligent act or omission of any employee or other board member of the nonprofit corporation. The law provides that a director is legally liable to third parties only for the director's own intentional wrongdoing or grossly negligent acts or omissions as a director of a nonprofit corporation.

Additionally, the members of the board of directors cannot be held legally liable to the corporation or other board members for breach of any fiduciary duty to the corporation unless

- 1) the breach is a breach of the director's own duty of loyalty to the corporation;
- 2) the breach involves acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law; or
- 3) the director receives an improper personal benefit from a transaction.

Put simply, under Oklahoma law, a volunteer member of the board of directors of a nonprofit corporation may be exposed to liability for the members' own personal conduct, but not for the conduct of employees or other members of the nonprofit corporation's board of directors.

VOLUNTEERING FOR CHILDREN

Many organizations rely upon volunteers to provide much needed services to children in the community. As a volunteer for such an organization, you may find yourself going through a screening or selection process which involves the gathering of an extensive amount of personal information from you. The screening process is generally designed first and foremost to determine the volunteer's suitability for the organization's particular services. The screening process is, however, also designed to protect the organization from potential legal liability for selecting volunteers which might harm the children.

A nonprofit organization providing services to children may therefore ask its volunteers to submit to a criminal background check. This check usually involves a request to an appropriate law enforcement agency to determine whether a prospective volunteer has any history of arrests or convictions for crimes. These background checks have traditionally required prospective volunteers to provide their name, social security number, and date of birth to the law enforcement agency conducting the check. Under the Volunteers for Children Act, however, the United States Congress has provided a procedure for criminal background checks through fingerprint samples of volunteers. As of the date of this handbook's publication, Oklahoma had not yet adopted the Act's procedures for fingerprint background checks. As more and more states

put the Act's procedures into place, however, expect more and more volunteer organizations to use fingerprint checks for their volunteers.

The natural question that arises with the use of fingerprint checks is this: can a nonprofit organization providing services to children be held legally liable for failing to adopt fingerprint checks? A specific provision of the Volunteers for Children's Act seems to say no. There are, however, no published cases to date construing this provision of the Act.

LIABILITY INSURANCE FOR VOLUNTEERS

Hopefully, neither you nor the organization for which you are volunteering will ever be sued. You and the organization can, however, provide protection against the costly expense of litigation and legal liability with an appropriate liability insurance policy. Nonprofit organizations can and should obtain appropriate insurance coverage to protect the organization and the volunteer from the potential expense of a judgment against the agency or volunteer.

Additionally, volunteers may also seek to obtain insurance coverage for themselves. Liability coverage may be available through the Voluntary Insurance Services Association, a national nonprofit organization ("VIS"), if the agency for which the volunteer works is a VIS member. Details may be obtained from VIS, 216 South Peyton Street, Alexandria, Virginia, 22314-2813, (703) 739-9300. Their website is www.cimaworld.com. VIS can provide primary or excess coverage in the forms of accident, personal liability, and car insurance. Moreover, many insurance companies which write homeowners insurance policies include, or may include upon request, clauses covering their insured for any liability they may incur as volunteers. Please contact the individual insurance company for details of such available coverage.

POTENTIAL LIABILITIES FOR THE VOLUNTEER AND THE VOLUNTEER SERVICE ORGANIZATION

A volunteer or nonprofit organization may be held legally liable to a third party if the volunteer or organization commits some kind of legally recognized "wrong" against a third party. This legal wrong may be, for example, a breach of contract or tort committed against a third party. The most common forms of tort liability are negligence, strict liability, and intentional misconduct.

A nonprofit organization may be held liable for the acts of its volunteers under legal doctrines known as agency and *respondeat superior*. Generally, an agent is someone hired, retained, or employed by a principal to perform a certain task for the principal. Under the law, a principal is held legally liable for the wrongful actions of the agent if the agent committed those actions while acting in the scope of the agent's authority. The doctrine of *respondeat superior*, which literally means "let the master answer," is just another way the law expresses the concept that a principal is liable for the actions of the agent committed within the scope of the agent's authority.

The most common type of agency or *respondeat superior* liability arises when a paid employee commits a wrongful act within the scope of the employee's employment. The doctrine may, however, apply with equal force in the event a volunteer commits a legal wrong within the scope of the duties and responsibilities the volunteer undertook for the organization.

Negligence Liability

The most prevalent form of legal liability is negligence liability. Generally, negligence liability arises when a person fails to use ordinary care in performing some type of action; the person's negligent conduct results in harm to another party, and the harm to the other party was a reasonably foreseeable result of the negligent conduct. Negligence liability would arise, for example, where a person driving a car was not paying careful attention to the road ahead and injured another person in an accident as a result. Volunteers who injure a third party because the volunteer failed to use ordinary care in performing the volunteered task may thus subject both themselves and the volunteer services organization to negligence liability.

Intentional Misconduct

If you intentionally injure someone as a volunteer, you alone may be liable for the injury caused. The doctrine of *respondeat superior* may still apply to hold the organization liable for the volunteer's intentional misconduct, but courts are more wary about invoking the doctrine of *respondeat superior* in intentional misconduct cases. Courts have often reasoned, particularly in a case of intentional misconduct which has no relation to the agent's actual services for the principal, that such intentional misconduct is outside the scope of the agent's employment or authority.

Additionally, intentional misconduct may be grounds for criminal prosecution or punitive damages. Under Oklahoma law, punitive damages may be imposed for misconduct which is reckless, malicious, intentional, or fraudulent. Like criminal sanctions, punitive damages are awarded to the injured party in order to punish the wrongdoer.

Strict Liability

Strict liability is a legal concept under which you may be liable to another party regardless of whether you were negligent. Strict liability usually arises from an unreasonable risk or danger posed by a certain activity or product. Strict liability often applies to situations where an injury is caused by defective products, blasting operations, the use or storage of dangerous chemicals, or other inherently dangerous activities. Oklahoma law generally protects volunteers from such liability, and it is unlikely that the doctrine of strict liability would be invoked to impose liability upon you as a volunteer.

SPECIAL STANDARD OF CARE FOR VOLUNTEERS

A. General Standard of Care

In the arena of negligence liability, the law imposes a standard of care upon persons. Usually, the law imposes a standard of "ordinary care," which is defined as the degree of care a reasonably prudent person would exercise in the same or similar circumstances. Certain different standards may apply, however, to certain people acting as volunteers.

B. Children as Volunteers

The standard of care to which a child is held is commensurate with the child's age, maturity, capacity, intelligence, alertness, and experience. Under Oklahoma law, children of "tender years" are considered too young to be legally negligent. Whether a child is of tender years varies with each child's capacity, intelligence, and maturity. In some cases, even 5-year-old children have been found to be within the "tender years doctrine."

Even though a child is held to a lesser standard of care than an adult, volunteer service organizations using the volunteer services of children may be held liable for harm to others caused by the child, especially if the organization knew or should have known that the child did not have the age, intelligence, or capacity to perform the task required, and, thus, the potential for harm to others existed. In this circumstance, the volunteer services organization may be held legally liable to an injured third party under the doctrine of either *respondeat superior* or "negligent entrustment." An example of negligent entrustment would be a circumstance where an organization allowed a 14-year-old child to drive one of the organization's cars, the 14-year-old got in an accident, and the organization knew or should have known that the child had not learned to drive and was not licensed to drive the car.

C. Professionals as Volunteers

Many professionals are strongly encouraged to provide their services on a volunteer basis. In Oklahoma, the standard of care to which a professional is held is that of a person of ordinary skill, competency, and standing in that particular trade or business. The standard of care required of a professional is still tied to the ordinary-care standard; however, that standard is adjusted to take into account the skill and competence expected of a professional in that particular trade or business. Thus, a professional who volunteers his or her services most often does not enjoy the benefit of a lower standard of care. Professionals should also determine whether their malpractice insurance covers the performance of volunteer services.

D. Licensed Health Care Practitioners as Volunteers

If you are a volunteer who is a licensed practitioner of the healing arts and you provide emergency medical assistance in good faith, you will not be held legally liable for your acts or omissions in rendering emergency care and treatment so long as you act in a reasonably prudent manner, without accepting payment for your assistance, and you continue to render treatment until an appropriately trained individual can take over the care. In addition, you may render treatment to a minor without the consent of the minor's parent or guardian as long as the treatment is performed under emergency conditions and in good faith.⁹ You may, however, be held responsible for any injury to a person which is the result of a willful or wanton act, or the failure to exercise ordinary care.

E. Good Samaritans

Even if you are not a licensed health care practitioner, you are protected under the law when in good faith you render or attempt to render emergency care and treatment to any victim of an accident or emergency situation. For unlicensed persons, emergency care assistance is limited to artificial respiration, restoration of breathing, prevention or retarding blood loss, or aiding or restoring heart action or circulation of blood to the victim.

F. Volunteers Who Render Assistance in Accidents Involving Hazardous Materials

Under Oklahoma law, you are also protected from liability when in good faith you render emergency care, assistance, or advice at the scene of an accident involving the use, handling, transportation, transmission, or storage of hazardous materials. In these circumstances, you are not liable for any damages resulting from your conduct in rendering care, assistance, or advice unless the damage was caused by your gross (as opposed to ordinary) negligence. Under these laws, "hazardous materials" means petroleum or petroleum products, or any other substance or

compound which is toxic to human, animal, or plant life. These laws do not affect the potential liability of any person arising from the manufacture, generation, transportation, storage, or handling of any hazardous materials, or of any person who is engaged professionally and commercially in rendering emergency care, assistance, or advice.

VOLUNTEERING FOR THE GOVERNMENT

Individuals working for the State of Oklahoma or a political subdivision of the State of Oklahoma (such as a county or city) are generally protected from individual liability occurring within the scope of their work or employment. The Oklahoma Governmental Tort Claims Act provides that the State and political subdivisions must assume liability and the defense for their employees under circumstances where the employee is acting in the course and scope of employment.

In other words, when an employee is in the act of performing his or her duties for the State or political subdivision and is not acting in bad faith or with a malicious intent, he or she will generally be within the scope of employment for the purposes of the Tort Claims Act. If, for example, an employee is involved in an accident while driving a governmental vehicle while in route to perform a task for the State or political subdivision, the Tort Claims Act will protect the individual as long as the individual was acting in good faith.

Acts performed outside the scope of the employment and not related to the government function will not be protected. For example, if an employee driving a government vehicle decides to stop by his or her home in route to performing a governmental task and is involved in a collision while backing out of his or her driveway, the Tort Claims Act most likely would not protect the employee from liability.

What does all of this mean to a volunteer? The tort claims act defines an employee of the State or political subdivision as a person working on a permanent or temporary basis, with or without compensation. The Oklahoma Attorney General has rendered an opinion stating that an unpaid volunteer enjoys the same degree of immunity as a full-time, compensated employee of the State.

Because the Tort Claims Act states that the employee must be performing a function assigned or delegated by a "competent authority," a volunteer should attempt to perform only those functions directly or indirectly related to the particular job. Should a volunteer injure someone while performing a task wholly unrelated to his or her particular job, he or she should keep in mind that the State or political subdivision may not assume liability if a claim arises from that task.

Additionally, so-called constitutional torts are not covered by the Tort Claims Act. A constitutional tort is an act which deprives an individual of his or her rights, privileges or immunities afforded by the Constitution and other laws. A State or political subdivision volunteer should therefore be mindful that he or she should not attempt to violate another person's lawful rights, such as freedom of speech, freedom to assemble and freedom from discrimination.

If a claim or cause of action is filed against the State or political subdivision (police department) because of the alleged acts of a volunteer, the volunteer must offer his or her assistance in the defense of the matter. Likewise, in the event the volunteer is served with legal documents or is notified about a complaint arising from an act he or she has performed as a volunteer for the state or political subdivision, the volunteer should contact his or her supervisor immediately.

VOLUNTEERS AND WORKERS' COMPENSATION

Unlike the Governmental Tort Claims Act, volunteers are for the most part not covered by the Oklahoma Workers' Compensation Act (the "WCA"). There must generally be an employer-employee relationship involving an agreement for the payment of wages for the WCA to be applicable. Absent such a relationship, the WCA is *probably* not applicable to you as a volunteer.

Some exceptions to this rule provide that a volunteer or uncompensated worker rendering service as an unauthorized firefighter, peace officer, or civil defense worker is an "employee" within the WCA. The WCA makes no provision for coverage of any other volunteer or uncompensated worker. Additionally, whether a volunteer utilized by Human Rights Commission is covered by Workers Compensation Act is determined by whether the Commission retains a right of control and supervision of work performed by volunteer. Also, under the FLSA, employees may not volunteer services to *for-profit* private sector employers. On the other hand, in the vast majority of circumstances, individuals can volunteer services to public sector employers.

CONCLUSION

As with any publication of this sort, this handbook is not a comprehensive treatise on the law of volunteerism. As always, if a specific legal liability question arises during the course of your volunteer service, there is no substitute for the advice of a good lawyer. We hope that the legal issues discussed here will, however, be helpful to you in your efforts to provide rewarding and conscientious volunteer service.

Statute References

1. 26 U.S.C. 501(c)(3); 2. Okla. Stat. tit. 18, § 1027; 3. Okla. Stat. tit. 18, § 866; 4. Okla. Stat. tit. 18, § 867; 5. 42 U.S.C. § 5119a; 6. 42 U.S.C. § 5119a(d); 7. Okla. Stat. tit. 23, § 9.1; 8. Okla. Stat. tit. 59, § 518; tit. 76, § 5(a)(1); 9. Okla. Stat. tit. 59, § 518; 10. Okla. Stat. tit. 76, § 5(a)(1); 11. Okla. Stat. tit. 76, § 5; 12. Okla. Stat. tit. 76, § 5; 13. Okla. Stat. tit. 76, § 5.7; 14. *Id.* at § 5.7(B); 15. *Id.* at § 5.7(C) 16. Okla. Stat. tit. 51, § 151 *et seq*; 17. *Id.* at § 152(5); 18. *Id.* at § 160; 19. Okla. Stat. tit. 85, § 3(6) 20. *Id.* at §§ 3(4) and (5)