

# WHAT VOLUNTEER COORDINATORS NEED TO KNOW



# VOLUNTEER LIABILITY IN MAINE

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## INTRODUCTION

The issue of volunteer liability is critical to nonprofit and governmental organizations that use their services. It is also important to commercial firms that make staff available for volunteer work.

The goal of this report is to provide an overview of the current status of volunteer liability, with emphasis on volunteers in the State of Maine. To make the report as useful as possible, we have included examples of best practices in structuring volunteer programs.

In many areas there is no clearly settled law relating to volunteer liability. In other areas, there may be conflicts between the laws of different jurisdictions (Federal, state, local) or types of law (Constitutions, statutes, court decisions, regulations, ordinances). Where the law isn't settled, we tried to outline the key considerations in framing your actions.

Please note that the law is not a fixed object, it is always changing. Good volunteer management requires that you stay abreast of developments in the area.

This document is meant to be educational in content. It isn't designed to be legal advice. If there are questions about a situation that may expose your organization to possible legal liability, the services of a competent attorney should be sought.

## VOLUNTEER DEFINITION

A common dictionary definition of volunteer is “A person who performs or gives his/her services of his/her own free will”. As the term is commonly used, it implies that the service is performed for little or no compensation. This is, in essence, what distinguishes the volunteer from a paid employee, consultant or contractor.

While this definition can be useful in defining who is or is not a volunteer, the law recognizes several different types of volunteers when the issue relates to the possible legal liability of a group using volunteer service.

Categorizing different types of volunteers may also impact the legal responsibility of the volunteer himself/herself. Examples include directors of nonprofit organizations and those who volunteer professional services.

The most common types of volunteers recognized by the law are as follows:

- Pure Volunteers –people who are not legally bound and not in pursuance or protection of any personal interest.
- Directed Service – court ordered service as a part of a criminal sentence or civil penalty for which the person receives no compensation.
- Service for Compensation – an arrangement to receive something of more than nominal value, such as room and board or training in a marketable skill, in exchange for otherwise “uncompensated” service.
- Officers and Directors – owe a special set of duties and obligations to the organization they serve, implicitly agreeing to be bound to higher standards than a typical volunteer.
- Professionals Acting as Volunteers – may include professionals such as accountants, attorneys, physicians, dentists and architects, who, when acting in their own area of expertise, may be held to a higher standard in discharging their duties than a non-professional.
- Student Volunteers – service learning, duties required as a part of coursework for a grade and/or academic credit.
- Persons Acting in Their Own Interest – e.g. director or officer of a condominium association.
- Subsidized Volunteers – programs such as Americorps, Vista, Foster Grandparents, or Senior Companions, where a person receives a stipend or living allowance as partial compensation for their services.

## TORT LIABILITY

The dictionary defines a tort as “Any wrongful act, damage, or injury done willfully, negligently, or in circumstances involving strict liability, but not involving breach of contract, for which a civil suit can be brought”. In volunteer programs, the issue usually arises in one of two broad circumstances:

1. A volunteer performing duties on your behalf causes injury to the person or property of someone else, or
2. A volunteer serving your organization is injured in the course of performing duties on your behalf.

In either case, there is a chance that your organization will be sued.

### Injury Caused by Volunteers

The Federal government (Volunteer Protection Act of 1997) and the State of Maine (Title 14, Section 158-A) have laws that protect certain people serving as volunteers. This protection only extends to some types of service.

The Maine legislation tends to expand the types of volunteers and organizations offered protection. (List enclosed as Appendix A) States may pass a law to opt out of the Federal protection. Maine has not chosen to do so. This means that volunteers in Maine are protected under both Federal and state law.

Generally, volunteers in Maine are protected from personal liability to anyone who may suffer personal injury, death, or property damage occurring within the course and scope of the entity’s activities. If the volunteer’s own actions caused the injury, the protection only applies where the injury was caused by the volunteer’s negligence. Intentional misconduct is not protected. If an injured party attempts to hold a volunteer liable for something someone else in the organization did, the exception applies more broadly to any legal action, not just negligence.

Maine law has an important exception. The law does not apply to injuries caused by operation of a motor vehicle, vessel or aircraft, but only to the extent there is applicable insurance coverage. As a practical matter, this leaves the volunteer’s insurance coverage as the first recourse of an injured party.

Good practice when volunteers will be operating personal vehicles as a part of their duties is to obtain proof of appropriate licensure and insurance before having the volunteer begin service. Many organizations, as well as many liability insurance policies, require that this be updated annually. From an organizational point of view, the entity’s liability typically only begins at the amount of any monetary award to the injured party that exceeds the limits of the volunteer’s own insurance policy.

Volunteer drivers should be made aware that Maine provides additional protection for them. Under Title 24-A, Chapter 39, Subchapter 1 of the Maine Revised Statutes, volunteers may not be denied motor vehicle liability insurance, not surcharged in any way, because a volunteer driver is using the vehicle.

These protections apply only to actions brought against the volunteer and don't protect the group using the volunteer. An injured person may be able to take action against the organization for which the volunteer works.

Maine courts generally accept the common law view that an employer is liable for the acts of employees that occur within the course and scope of their duties. While no Maine case has specifically ruled that volunteers are either covered or exempt from this principle, there are indications that raise a caution flag about how the courts might rule. In the case of Lunt v. Fidelity & Casualty Company, a Maine court held that compensation alone was not the determining factor. Direction and control over the worker's duties were potentially more important. The court stated, "The better rule is that a sufficient contract of employment is created by a mutual agreement that one is to labor in the service of another". While this case is not definitive, it shows a tendency of the courts to hold groups liable in situations where the volunteer's actions are subject to an organization's substantial control of the performance of the volunteer's work.

Any compensation arrangements for volunteers may have an impact on the potential liability of that volunteer. A Maine case that took the question of compensation to a jury was Binette v. Dyer Library Association. In the case a real estate firm of a volunteer officer of a nonprofit library handled the sale of library property. The issue revolved around whether the officer really served the Association without compensation in the matter. The real estate commission charged was half the usual rate and was paid solely to the other firm partner. The case points to the need for meticulous documentation of anything that is even arguably a compensation arrangement whenever an officer, director or service volunteer could possibly benefit from an organization's transactions.

## Injury to Volunteers in the Course of Service

Maine case law gives clear indication that organizations can be liable for injuries to volunteers suffered in the course of their service. In the case Fournier v. Rochambeau Club, a club member was helping prepare food for a club function under the guidance of the club's president and manager. During preparation the member injured himself using a knife. The club was held liable for not providing adequate guidance on how to do the work. The member was not being compensated for his help. The court found that he was a "gratuitous employee", not a volunteer, despite the lack of compensation. The court gave little guidance about the term "gratuitous employee". It demonstrates how far courts may go in finding liability on behalf of injured parties. It also shows the importance of training volunteers as a part of sound volunteer management. In general, courts will favor less than perfect training over failure to provide training at all.

## **ANTI-DISCRIMINATION**

Federal, state and local governments have multiple laws relating to discrimination. These are often applied to the workplace, even when the worker is a volunteer. As with many other areas related to volunteer liability, it is important to be aware of the statutes that may apply to your situation. A summary of major pieces of relevant law follows.

### Federal Employment Discrimination Law

The major laws relating to employment discrimination are Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Pregnancy Discrimination Act. Title VII prohibits employment discrimination based on race, color, religion, sex or national origin. The Age Discrimination in Employment Act added similar protection for people age 40 or older. These Acts include a wide range of prohibited practices in employment, including actions that may be deemed to be harassment. A comprehensive list of inappropriate conduct can be found at [www.eeoc.gov/facts/qanda.html](http://www.eeoc.gov/facts/qanda.html).

Whether a volunteer is considered an "employee" under these acts is generally considered on a case-by case basis. As a general rule, compensation is the primary factor in whether a person is considered an employee. This places most of the volunteer situations you are likely to encounter outside the realm of Federal employment discrimination legislation. There are, however, several important exceptions.

1. The Equal Employment Opportunity Commission's position is that welfare recipients performing uncompensated service as a condition of receiving benefits are employees within the definition of the Acts.



2. Volunteers who receive “significant remuneration” in return for their service may be considered employees, regardless of whether the remuneration is financially equivalent to a salary. Examples of this have included receipt of group life insurance, pension benefits, Workers Compensation, and/or professional certification, even where the benefit is provided by a third party rather than the organization using the services of the volunteer. The specific facts control each case. For example, providing Workers Compensation alone would likely be inadequate to classify a worker as an employee. Workers Compensation coverage provided in addition to a modest retirement benefit may be enough to establish employment. In one case the receipt of a state retirement benefit as well as disability and survivor benefits for a volunteer firefighter was sufficient to bring a volunteer fire company under the Act.
3. When volunteer service is a prerequisite to, or a substantial advantage in, obtaining employment. For example, a person serving as a volunteer counselor could be covered under the Act if an agency gives preferential hiring treatment to those who have volunteered over those who have not, and had, in fact, hired a number of prior volunteers. This is true even if the volunteer had taken the position with no expectation of securing paid employment in the future.

In general, courts have found that the provision of compensation of some form is the determining factor in distinguishing employees from volunteers (Smith v. Berks Community Television). Nominal gifts (t-shirts, plaques, small honoraria to directors, lunch or snacks) or occasional travel reimbursement are not enough to constitute compensation.

Finally, the fact that a group labels or treats someone as a volunteer is not enough to bring the relationship outside the scope of the Acts, even if a person has agreed to perform a service as a designated volunteer. (Haavistola v. Community Fire Company of Rising Sun)

### State of Maine Employment Discrimination Law

The Maine anti-discrimination laws generally prohibit the same conduct that is banned by Federal law. The most important distinction is that while there have been no specific decisions in Maine, there has been case law in other jurisdictions that has more broadly included volunteers within the definition of employee under state anti-discrimination laws.

The most common grounds for this extension have been based on the degree of control the organization exerts over the work performed by the volunteer. One case (Harmony Volunteer Fire Company & Relief Association v. Pennsylvania Human Relations Commission) cited the “tight control over such employment related matters as hiring, firing, training, and assignments” as the basis for establishing jurisdiction under the state law. Given that Maine has used a relatively broad interpretation of when a volunteer can be considered equivalent to an employee in the tort area (see above), there is a reasonable possibility that this would be extended to the employment discrimination area.

As a practical matter, any group using volunteers is advised to develop policies that treat volunteers as being on an equal footing with employees in the area of employment discrimination. Conduct that would be illegal as it pertains to an employee should also be treated as inappropriate as it applies to volunteers.

Given a strong public policy bias in Maine towards eliminating illegal discrimination in the workplace, it would seem likely that at the very least regulators and the public would pursue available means to broaden the circumstances under which a volunteer is deemed to be an employee for jurisdictional purposes under Maine anti-discrimination law.

### State and Federal Public Accommodations Law

Title II of the Civil Rights Act of 1964 guarantees “full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation...without discrimination or segregation on the ground of race, color, religion or national origin.” A key issue is the definition of “place of public accommodation”. This is typically determined on a case-by-case basis.

The most recent review of this issue was by the U.S. Supreme Court in the case of Welsh v. Boy Scouts of America. The Court ruled that the Boy Scouts were not subject to the Act because there was no concrete connection to a physical site and were not, therefore, a place of public accommodation. Note that the Welsh case was ruled entirely on jurisdictional grounds, i.e. the Act did not apply because the Scouts did not operate as a place of public accommodation within the definition of the law. No decision was made on the issue of whether discrimination based on sexual preference is a prohibited practice under the Act.

It seems likely that some volunteer operations might be seen as places of public accommodation within the Act’s scope. For example, soup kitchens or homeless shelters might be deemed public accommodations analogous to restaurants or hotels for jurisdictional purposes under Title II. This would still leave open the question of whether a potential volunteer could use the protection of the Acts in respect to the opportunity to serve as a volunteer.

To date, there has been very little guidance on how the states, including Maine, will interpret state public accommodation laws in light of Welsh. Before the decision, some states were in accord with the Welsh decision while others had a broader definition of public accommodation similar to that asserted by the plaintiff in Welsh. Since the case was decided entirely under Federal statute, Maine courts might look to the Welsh decision for guidance but would be under no obligation to follow the U.S. Supreme Court’s line of reasoning in deciding upon the scope of Maine law.

In practice, with the variability of possible statutory interpretation and the high cost of defense, most organizations treat volunteers as if anti-discrimination laws cover them.

An organization can limit volunteer opportunities for classes of people who could be protected by anti-discrimination laws if there is a valid business reason for doing so. For example, a girl’s

camp or boy's camp would be able to limit either volunteers or employees of the opposite sex from positions as sleep-in overnight counselors in camp cabins.

### The Americans With Disabilities Act (ADA)

The ADA contains employment and public accommodations sections. While the issue has had little litigation to this point, it is unlikely that the employment sections would apply to volunteers in ways that would go beyond those cited above for Title VII of the Civil Right Act. There is more uncertainty as to whether the public accommodations provision could apply more broadly than under the Civil Rights Act.

In general, there are no exceptions to the ADA based upon the size of the organization. Public agencies and nonprofits are required to comply. A person entitled to ADA protection may not be denied opportunity based on a disability, defined as "physical or mental impairment that substantially limits one or more of the major life activities of such individual". A person is also protected even if no impairment is currently present if the discrimination is based upon an incorrect belief that a person has such an impairment.

Covered entities must make a "reasonable effort" to accommodate the disability. This is a highly subjective standard. It is applied based upon the individual facts of each case. Reasonableness is closely tied to the cost and practicality of accommodating the disability. Assessment is based on the size and resources of an organization. For example, an accommodation that could be reasonable for a large grocery chain could be seen as not reasonable (and hence not required) for a small food pantry. A good resource for information on accommodation of disabilities is the Job Accommodation Network, <http://janweb.icdi.wvu.edu/english/homeus.htm>.

### Public Entities and Federal Grantees

Groups that receive Federal or state funding should be aware that the conditions of their funding could require them to comply with standards that stricter than those cited above. You should be fully aware of any added requirements on your organization imposed by a particular provider of funds.

Finally, note that groups placing volunteers to independent organizations may be liable for discriminatory acts of the independent organization. This may, for example, be applicable to schools that place students in businesses for practical components of their education. While it is unlikely that an organization would be held liable in this context for an event that could not readily be foreseen, liability might be established if it could be shown that the organization had been aware of potentially discriminatory acts and failed to take reasonable steps to investigate and/or protect the volunteer.

## YOUTH AS VOLUNTEERS

The use of youth volunteers can present problems of volunteer liability that may not be present when older volunteers are utilized.

The issue of the need to obtain work permits for younger volunteers tends to vary from state to state. In Maine, it appears that obtaining a work permit is not necessary in most youth volunteer situations. The one exception may be in those situations cited previously in which a “volunteer” could be considered an “employee” based on significant remuneration (training, stipends, certification, etc.). In those circumstances, check with the Maine State Bureau of Labor Standards, Wage & Hour Division, in Augusta, (207) 624-6400.

Activities in which minors may engage for compensation, as well as hours of employment, are limited by the Federal Fair Labor Standards Act and the Maine Department of Labor’s “Rules Governing Hazardous Occupations for Minors Under Eighteen Years-of-Age”.

State of Maine standards are stricter than the Federal government’s. To date, there has been little guidance from case law concerning the applicability of these standards to volunteers. Nonetheless, it is likely that any group using the services of youth volunteers who would otherwise be subject to regulation if they were being paid would run a serious risk of liability if a youth volunteer was injured in the course of performing work that would otherwise be prohibited as employment for pay. The Maine rules in this area can be found at [www.state.me.us/labor/bls/wagehour.htm](http://www.state.me.us/labor/bls/wagehour.htm)

## WORKERS COMPENSATION

Generally, volunteers in Maine are not covered under Workers Compensation policies as part of the standard coverage. Maine courts have generally reinforced that volunteers are not subject to Workers Compensation coverage. Since Workers Compensation can limit an employer’s liability in the event of injury in the course of performing work, this means that an organization using volunteer workers could be exposed to greater financial liability for injury to a volunteer worker than for an identical injury to someone working for compensation.

Interestingly, even in a case where the work being performed was not completely voluntary, a Maine court has ruled that the labor is not subject to Workers Compensation. Clossen v. Town of Southwest Harbor, ruled that a general assistance client assigned to work as part of a “work fare” program was not subject to the Compensation program. This is one of the few areas where courts in Maine have favored a narrower interpretation of when a volunteer can be considered an employee.

With most Workers Compensation insurers in Maine you can purchase an “endorsement” extending coverage to volunteers. This provides the same protection to volunteer workers as for paid staff. Rates are based on the type of work, anticipated hours worked and wage that would be expected if the volunteer were being compensated. As a practical matter, the decision to purchase Workers Compensation coverage for volunteers should be made in consultation with a trusted insurance advisor based upon the specific circumstances of your organization.

## TAXATION

Questions of taxation in the area of volunteer service usually arise when a volunteer is provided non-cash benefits for their service. Non-cash benefits that may give rise to tax liability often include things such as living allowances, stipends, post-service benefits, and certain “in-kind” benefits of substantial value, for example professional training that may lead to a valuable certification or the potential for future compensation. In most cases, however, the benefits typically provided to volunteers are not taxable. These may include occasional meals and lodging required for service, childcare, modest holiday gifts, etc. State tax law typically follows Federal law in this area. More detailed questions in this area should be referred to a qualified accountant.

Scholarships are subject to special rules. Scholarships that are not tied to the performance of service to the granting program are not generally taxable. In particular, scholarships based exclusively on merit or need are excluded from taxation. The more the award appears to be tied to an exchange of services, the more likely it is to be taxed. As always, what is done is determinative, not what you elect to call it.

## BRIEF HISTORY



The Maine Commission for Community Service was established in 1994 by Executive Order and under state statute in 1995. The 26-member Commission is Maine's partner with the Federal Corporation for National Service. The Maine State Planning Office provides administrative support.

The Maine Commission for Community Service's mission is to foster community service and volunteerism to meet human and environmental needs in the State of Maine. Through planning, convening, and investments, the Commission seeks to make real a vision of vibrant, productive communities with involved, responsible citizens.

### ***What does it do?***

The Maine Commission for Community Service provides leadership to Maine's citizens to:

- Get things done by meeting local education, public safety, human and environmental needs;
- Strengthen communities by bringing diverse people together to solve problems at the local level;
- Foster civic responsibility through community service and participation;
- Expand opportunities for citizens of all ages to serve their communities and for affordable post secondary education.

In addition, the Commission is:

- The State Administrator of AmeriCorps crew programs;
- A State Clearinghouse for community service and volunteerism;
- An advocate and educator for community service and volunteerism in Maine;
- A State resource for community service and volunteerism technical assistance and training. In this role, one significant Commission activity is coordination of training for all Maine National Service programs (AmeriCorps, Senior Corps, and Learn & Serve).

## **FOR MORE INFORMATION, VISIT THESE WEB SITES:**

**<http://www.nonprofitmaine.org/links.html>**

The Maine Association of Nonprofits offers risk management information resources and educational programs to nonprofit organizations throughout Maine. This website contains online resources.

**<http://www.nonprofitrisk.org>**

The Nonprofit Risk Management Center, a source of information and training on risk management

**<http://www.VolunteerMaine.org>**

Volunteer Maine's program resources section has information and links to national guidance and training

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This publication is also on the Internet at

[www.VolunteerMaine.org/progresources.html](http://www.VolunteerMaine.org/progresources.html)