

# Utilizing Volunteers in Emergency Response

## *Addressing Liability and Managing the Risk in West Virginia*

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# Introduction

Volunteers are a critical resource for filling the gap between professional emergency response capacity and community or regional needs. As with any activity, however, there is risk of liability. Occasionally bodily injuries, illnesses, property damage and other events may occur, with potential liability for the sponsoring agency or organization, the volunteer program, individual volunteers, trainers, leaders and affiliates. Some consequences are direct: claims, lawsuits, settlements, payment of benefits to injured volunteers, attorney's fees, court costs, and civil and criminal penalties under state law. Others are indirect: disruption of relationships, damage to reputation, and increased insurance costs. None of these potential consequences are unique to volunteers, however. Any workforce – whether paid or volunteer – poses risk.

Concern about risk can be a barrier to emergency volunteerism. Individual volunteers may fear personal liability or injury. Organizations that recruit, screen, train, deploy, or supervise volunteers have concern about their liability for injury to, or harm caused by, those volunteers. Individuals and organizations that donate supplies or permit emergency responders to use their personnel, equipment or real property are also concerned. The barrier may loom larger than is warranted by the facts. There is no indication that emergency volunteerism produces any unusual liability. Still, perception drives behavior, and the perception of substantial liability risk can hinder program development.

There is no simple, complete and uniform legal protection for emergency volunteerism. West Virginia laws provide immunity, and occasionally indemnity, if their requirements are met and no exclusions are triggered. Insurance also has exclusions and limitations, and may not cover all volunteers. This uncertainty need not be a barrier to emergency volunteerism. An organization that understands what protection is available can tailor its program to take advantage of that protection, and use good risk management practices to mitigate remaining risk. Although the details may differ, the process is the same, whether or not the organization pays its workers.

The goals of this Guide are the following:

- Identify and summarize the West Virginia Code provisions related to emergency volunteer liability, including liability protection, licensure and workers' compensation
- Identify risk management practices that reduce the risks associated with emergency volunteerism

This Guide is offered for general informational purposes only, and without warranty of any kind. It does not provide legal or other professional advice. It does not address specialized issues, such as credentialing and privileging of health care workers. Every effort has been made to provide useful and accurate information, but descriptions of the law have necessarily been generalized and may not apply to a specific situation. In some areas the scope of protection under West Virginia law is not firmly settled, and the Guide

notes the outstanding issues and attempts to provide some guidance. Users are encouraged to consult with a legal advisor, human resources professional, risk manager or insurance agent, as appropriate, for more in-depth information about their specific issues. Finally, keep in mind that with few limitations, anyone can make a claim or file a lawsuit, so following the suggestions in this Guide is no guarantee against being sued.

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# Overview of West Virginia Statutes

This section summarizes the important West Virginia statutes and regulations and how they apply to emergency services volunteers. The discussion necessarily paraphrases West Virginia statutes and regulations. Citations are included in end notes, and users are encouraged to read the full text of statutes on the West Virginia Code website, <http://www.legis.state.wv.us/WVCODE/Code.cfm>.

Keep in mind that this discussion is general. Program sponsors will differ in their approach to protecting their volunteers, so always talk to the sponsor to confirm whether and how it is protecting its volunteers.

The Guide discusses four general types of protection, defined below. Not all types of protection are available to every volunteer.

**Immunity** is exemption from liability under the law in situations where liability would otherwise exist: a legal bar to recovery. Immunity can provide a basis for dismissal of a lawsuit in its early stages or for judgment in favor of a party found to be immune. The scope of immunity granted is limited to the types of liability described in the statute granting immunity. Commonly, immunity is limited in scope to ordinary negligence resulting in civil damages for injury, death and property damage. Immunity from criminal liability is a separate matter, which is not normally provided, and is included here only with regard to licensing.

**Indemnity** is assumption of financial responsibility for liability related to an activity, for example, a commitment to pay on behalf of a volunteer the costs of a liability claim arising from specified volunteer work. Indemnity may include payment of a settlement or judgment and the costs of defense (attorneys' fees and court costs). Insurance is a type of indemnity.

**License/certificate/permit recognition** provides special recognition of professional and trade credentials for duly qualified emergency service workers (paid or unpaid) assisting in West Virginia disasters and emergencies. This special recognition protects skilled workers from civil and criminal penalties for using those skills without the required license, certificate or permit.

**Workers' compensation** provides statutory benefits (lost wages, medical treatment, rehabilitation etc.) for covered employees who are injured or killed while working. Most workers are covered by workers' compensation, but some are not, including many volunteers. For workers who are not covered by workers' compensation, some employers provide insurance that offers similar but less extensive benefits.

The first two categories of protection, immunity and indemnity, are included in statutes that are specific to organized emergency management activities, in statutes that focus on emergency situations outside the scope of emergency management, and in volunteer

protection statutes that are unrelated to emergencies. The discussion of immunity and indemnity is organized by type of protection, beginning with the statutes related to emergency management volunteers and moving on to more general protection. The discussion will then move on to license, certificate and permit recognition, which is addressed in the emergency management statutes. The discussion on workers' compensation comes last. The workers' compensation statute and the emergency management statutes both play a role in determining the injury protection provided for emergency volunteers.

## **Immunity & Indemnity**

Immunity and indemnity are addressed together because they are complementary. Immunity limits an injured person's legal right to recover damages from the volunteer. It does not pay any costs to defend the volunteer or pay a judgment. Indemnity does not limit the injured person's legal right to recover, but provides the volunteer with a legal defense and pays judgments and settlements, if necessary. Immunity is provided by law. Indemnity is occasionally provided by law, but is more often provided by contract, such as an insurance policy or mutual aid agreement. For a volunteer, it is best to have both immunity and some form of indemnity.

## **Disaster and Emergency Management**

This section summarizes the protection available under emergency management statutes. The subsequent sections will discuss protection that is not specific to emergency management, but may provide valuable protection to emergency volunteers.

### **Homeland Security and Emergency Management Act** **W. Va. Code §15-5**

As its name states, this is West Virginia's Homeland Security and Emergency Management Act (HSEMA). It provides immunity to certain entities and individuals in connection with emergency management activities. The more removed an activity is from the preparation for and carrying out of emergency functions, the less likely it is to be covered by this statute.

#### ***Government entities and duly qualified emergency service workers***

The state, its political subdivisions, their agencies, and, except in cases of willful misconduct, "duly qualified emergency service workers" who are attempting to comply with HSEMA or any associated order, rule, regulation or ordinance are immune from liability for resulting death, injury and property damage.<sup>1</sup> The scope of the immunity is limited to the most common type of liability: bodily injury and property damage. There is no immunity from other types of liability, for example for violations of constitutional rights or contractual liability. There is no immunity for acts that constitute "willful misconduct", one of many terms used in immunity statutes to describe disqualifying conduct that goes beyond ordinary negligence.

Nongovernmental organizations are not immune, even if their volunteers are duly qualified emergency service workers, and therefore immune. Thus, the organization could still be liable for the negligent acts of its immune volunteers. It could also be liable for its own independent negligence in selecting, training, deploying, supervising or retaining those volunteers.

To fully understand this immunity, it is necessary to explore the meaning of the terms used in the statute.



The HSEMA provides immunity to the state, its “**political subdivisions**”, and their “**agencies**”. “**Political subdivisions**” are any county or municipal corporation in the state.<sup>2</sup> The term “agencies” is not defined in the HSEMA. Local<sup>3</sup> and regional<sup>4</sup> “organizations for emergency services” are not specifically identified by HSEMA as government “agencies”, so check with a qualified attorney before relying on statutory immunity for those organizations.

Government  
Entities

The HSEMA also provides immunity to “**duly qualified emergency service workers**”.<sup>5</sup> To be a “duly qualified emergency service worker”, the individual must fall into one of three categories.

#### First category of duly qualified emergency service workers

The first category is duly qualified full or part-time paid or **volunteer** employees performing **emergency services** in the state, subject to the control or at the request of West Virginia or a political subdivision. The inclusion of “volunteer” employees confirms that unpaid emergency service workers are protected.

Individual  
Volunteers

A protected worker must be working for one of the following types of organizations:

- West Virginia or any other state, territory, possession or the District of Columbia
- The federal government
- Any neighboring country or political subdivision thereof
- Any agency or organization<sup>6</sup>

The final category, “any agency or organization”, is very broad and should include emergency service workers affiliated with almost any type of organization, including organizations for emergency services and Citizen Corps programs. The workers must, however, be working **subject to the control or at the request of the state or a political subdivision**. This limits immunity to workers operating with official approval. Unaffiliated or spontaneous volunteers who appear unsolicited at the scene of an emergency would not qualify for this immunity unless they are officially incorporated into the response. Even trained members of organized emergency volunteer groups are not covered by this immunity if they self-activate without official order or sanction.

The term “**duly qualified**” is not defined by statute, but its commonsense meaning would be that they should be qualified to perform the skills for which they are deployed, whether by prior background, training and experience, or through special training. For emergency service workers “employed by or associated with” a homeland security or emergency service organization, it may also mean having a background check and taking a written oath.<sup>7</sup>

“**Emergency services**” is an important term because it defines the scope of activities for which emergency service workers have immunity. “Emergency services” are activities before, during and after a **disaster** to prepare for and carry out **emergency functions**.<sup>8</sup> These emergency functions include prevention, detection, deterrence and mitigation of disasters; minimizing and repairing resulting injury and damage; and all

other activities necessary or incidental to the preparation for and carrying out emergency services functions. Thus, emergency services are broadly defined to include a wide variety of activities both before and after a disaster.

“Disaster” is another defined term. Disasters are events that cause widespread or severe damage, injury or loss of life or property resulting from any natural or man-made cause or other public calamity requiring emergency action.<sup>9</sup> The term “disaster” includes not only the event, but the imminent threat of such an event.

Although these definitions are expansive enough to include activities before and after a disaster, it is not clear how far beyond the time of the disaster immunity extends for emergency service workers. Immediate preparation and response (for example, placing sandbags in preparation for anticipated flooding) seems clearly included. Long term mitigation and recovery are less likely covered. The less connected an activity is to a specific disaster, the more difficult it is to argue that it is an “emergency service” for which immunity is available.

#### Second category of duly qualified emergency service workers

“**Duly qualified instructors and properly supervised students**” in “**recognized educational programs where emergency services are taught**” also have immunity.<sup>10</sup> “Recognized educational programs” include programs in educational institutions existing under state laws. Locally and regionally provided training for volunteer emergency service workers (for example, CERT training) is not directly addressed. To be included, it would have to be an educational program established by the Division of Homeland Security and Emergency Management or otherwise under HSEMA. Check with the sponsoring agency before assuming that there is protection in a specific educational setting.

Instructors  
& Students

#### Third category of duly qualified emergency service workers

The third category of duly qualified emergency service workers is members of mine rescue teams that are designated by a mine operator under the law and are performing or engaging in emergency rescue services.<sup>11</sup> When engaged in rescue work, these workers are both paid by and covered by the workers’ compensation coverage of the mine operator where the emergency exists.<sup>12</sup>

Mine Rescue

#### ***Mutual aid***

The HSEMA gives duly qualified emergency service workers working in West Virginia under a mutual aid agreement, compact or arrangement with the state or a political subdivision the same “powers, duties, immunities and privileges” they would have if working in their own state, province or political subdivision.<sup>13</sup> The purpose is to assure individual out-of-state emergency service workers that they will not have increased liability exposure by rendering assistance in West Virginia. They also share in West Virginia’s immunity for duly qualified emergency service workers, addressed above.

Mutual Aid

This section of HSEMA does not extend immunity to an entity that sends emergency service workers to provide mutual aid.

The HSEMA also includes a section that establishes a statewide mutual aid system.<sup>14</sup> This section relates to intrastate mutual aid between West Virginia political subdivisions. It provides that “for the purposes of liability, all persons responding under the operational control of the requesting political subdivision are deemed to be employees of the requesting participating political subdivision.” Thus, the political subdivision that requests aid assumes responsibility for the liability of those persons responding.

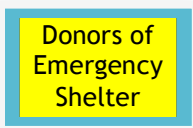
The HSEMA also incorporates the Emergency Management Assistance Compact (EMAC).<sup>15</sup> All 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands have adopted EMAC, which provides structure and standardization for requesting and receiving interstate mutual aid in disasters declared by the governor. EMAC addresses state to state mutual aid – not mutual aid between political subdivisions that happen to be located in different states.

Article VI of EMAC addresses liability. The officers or employees of a state providing aid under EMAC are “agents of the requesting state for tort liability and immunity purposes”. A state, its officers and employees rendering EMAC aid are not liable for good faith acts or omissions. Good faith excludes “willful misconduct, gross negligence, and recklessness”. Thus, a responding state and its officers and employees have immunity from tort liability for ordinary negligence and are treated as state “agents”.

EMAC’s big limitation is that a responding state’s political subdivisions, their employees and volunteers, nongovernmental organizations and businesses and their employees who respond across state lines in a disaster are not covered by EMAC unless the responding state designates them as part of its official response force. As with most emergency management immunity laws, individuals and organizations that respond on their own initiative and without official inclusion in emergency forces are not protected by EMAC.

### ***Emergency shelter***

Another important category of immunity is for those who volunteer their real estate or other premises as emergency shelter.<sup>16</sup> **Persons** who own or control real estate or other premises and **voluntarily and without compensation** permit their designation or use to **shelter persons** during an **actual, impending, and mock or practice emergency** are not civilly liable for negligently causing death or injury to any sheltered person on or about the real estate or damage to their property.



By definition, “person” includes individuals, corporations, volunteer organizations and other entities, so this immunity is not limited to individuals.<sup>17</sup>

The premises must be provided “voluntarily and without compensation”, so there is no immunity if the owner/controller of the premises is compensated for its use as emergency shelter.

Immunity extends to “actual, impending, mock or practice emergencies” so it includes exercises and drills as well as actual emergencies. No one is actually being sheltered, but there may be stand-in volunteers involved playing the role of sheltered persons. This section also does not directly address immunity for injury/damage to emergency workers or others who are on the donated premises to operate the shelter rather than seek shelter for themselves. Of course, in some cases, those workers might also be part of the sheltered population.

Immunity is limited to “**negligently causing death or injury to any sheltered person on or about the real estate or damage to their property**”. It does not include conduct exceeding ordinary negligence (such as intentional acts, gross negligence, willful and wanton misconduct) and types of damage other than injury, death and property damage.

Note that this immunity specifically targets **emergency shelter for persons**. It provides immunity only for injury to persons sheltered or for damage to their property. It does not mention immunity for donating the use of premises for storage or warehousing of emergency supplies or for providing temporary medical care or vaccinations. The immunity appears to protect short term shelters rather than longer term temporary housing, but exactly where the line would be drawn is unclear.

### ***Mobile Support Units***

Mobile support units (MSU)<sup>18</sup> are organizations for emergency services created and deployed by the governor or the governor’s authorized representative to reinforce local emergency service organizations in stricken areas. Mobile support units are dispatched by the governor, may operate within or outside West Virginia, and are subject to the operational control of the emergency services authority in the area where they are serving.<sup>19</sup>

Individual  
Volunteers

MSU “personnel” may include the state’s or a political subdivision’s employees, but may also include individuals who are not employed by the state or a political subdivision. Those who are not government personnel are paid at the same rate as circuit court jury members and have the same “rights and immunities” as are provided by law for the employees of West Virginia. Thus, MSU personnel who work as duly qualified emergency service workers in a West Virginia disaster benefit from the same immunity provided to state employees.

## ***Other Emergencies***

This section addresses a group of laws that provide immunity to individuals who voluntarily provide assistance in emergency situations that are not necessarily HSEMA “disasters”. These statutes can be an important source of protection for emergency volunteers, especially those who are not formally activated.

### **Actions, Suits and Arbitration (Emergency Related)**

#### **W. Va. Code §55-7**

This chapter of the West Virginia Code provides immunity for individuals who help others in various types of emergency situations.

#### ***Good Samaritans***

This is a very important source of immunity for those who do not qualify for HSEMA immunity. Anyone who in good faith and without compensation renders emergency care at the scene of an accident or to a victim at the scene of a crime is immune from liability for civil damages arising from any act or omission in rendering emergency care.<sup>20</sup> The scope of protection is not limited to people with health care training.

Unaffiliated  
Individual  
Volunteers

This statute does not require that the person rendering emergency care be affiliated with or operating under the orders of an emergency services organization. It does not require a declaration of a disaster or emergency. Thus it protects individuals who are not “duly qualified emergency service workers”. Members of CERT teams that are not formally activated, as well as spontaneous or unaffiliated volunteers who just happen to be at the scene, can benefit from this protection.

“Emergency care” is not a defined term, but may imply care for physical injuries. “Good faith” is also undefined. Although not explicitly stated, acting within one’s level of expertise and in due consideration of the surrounding conditions may be a component of “good faith”. Thus, emergency volunteers should be instructed to act only within their training.

#### ***Hazardous substance response personnel***

Trained hazardous substance response personnel who in good faith render advice or assistance at the scene of an actual or threatened discharge of a hazardous substance are immune from liability for civil damages resulting from their act or omission.<sup>21</sup> The personnel must be trained in a qualified program of hazardous substance emergency response that is certified by the state fire marshal, and must receive no compensation other than out-of-pocket expense reimbursement or compensation from his or her regular employer. A person who caused or contributed to the actual or threatened discharge is not immune from liability.

Individual  
Volunteers

“Good faith” and “civil damages” are not defined, but the scope of the immunity is likely to include “civil damages” for injuries, deaths and property damage arising from the person’s “good faith” acts or omissions. “Good faith” limits the scope of actions that will

qualify for protection. For example, EMAC defines “good faith” as excluding “willful misconduct, gross negligence, or recklessness”.

### ***Ski patrol***

Members of national ski patrol systems who provide, without compensation, emergency aid or assistance to an injured or ill person in various ski-related settings are not liable for civil damages due to good faith acts or omissions.<sup>22</sup> National ski patrol systems are national organizations whose members are unpaid volunteers who are trained in safety and emergency medical treatment. Good faith is not defined, but acting within the required training is a likely component.

### ***Automatic external defibrillators***

Persons who without compensation and in good faith use an AED to render emergency medical care or treatment that does not amount to gross negligence are immune from liability for civil damages.<sup>23</sup> There are two categories of protection. For both categories, the early defibrillation program that maintains the AED must be in compliance with the AED statute. However, “anticipated operators” are protected only when rendering care outside the course of their employment or profession as health care providers.

### **Forests & Wildlife Areas**

#### **West Va. Code §20-3**

This article addresses forest fires. Volunteer fire departments are included among the potential responders.

Fire Fighters

### ***Persons fighting forest fires***

In an active forest fire, employees of the Division of Forestry, other state agencies, and volunteers have the authority to enter public and private lands, destroy fences, plow lands and, in extreme emergencies, set back fires. This statute limits their liability for damages from resulting death, personal injury or property damage to the limits of insurance available through the organization with which they are working.<sup>24</sup> (The list of potential organizations includes volunteer fire companies.) There is no immunity for willful or criminal misconduct, gross negligence or reckless misconduct, or conscious, flagrant indifference to the rights or safety of any person harmed.

### ***Middle Atlantic Interstate Forest Fire Protection Compact***

This is an interstate compact (like EMAC) that establishes a structure for integration of forest fire fighting efforts among the signatory Mid-Atlantic States. This compact defines “employee” as including volunteers or auxiliary employees legally part of the responding state’s forces. Article V gives the employees of a responding state working under the control of a receiving state’s officers the same immunities as comparable employees of the receiving state.<sup>25</sup> The state rendering aid, its officers and employees are not liable for any act or omission while rendering aid or maintaining or using equipment or supplies in connection with that aid. The receiving state assumes and bears all liability that arises in connection with the aid under its laws, the laws of a responding state, or the laws of the third state.

## **Fire Fighting; Fire Companies and Departments**

### **W. Va. Code §8-15**

This article empowers municipalities to establish fire fighting services to prevent and extinguish fires. It does not grant immunity from liability, but allows volunteer and part volunteer fire departments to use their allocated funds to buy property and casualty insurance for protection and indemnification against loss, damage or liability and workers' compensation insurance to provide injury benefits to volunteer firefighters.<sup>26</sup> Volunteer firefighters do have immunity under the [Governmental Tort Claims and Insurance Reform Act](#), below.

### ***Donation of Equipment***

Persons and organizations that donate fire control or rescue equipment to a volunteer fire department are immune from civil liability for personal injury, property damage or death resulting from a defect in the donated equipment, unless the donor acted with malice, gross negligence, recklessness or intentional misconduct which resulted in the harm.<sup>27</sup> Despite this immunity, insurance companies that sell liability insurance to donors of fire equipment are liable up to the limits of the policy, unless the insured donor has rejected coverage for this exposure in writing.

Donors of Fire  
& Rescue  
Equipment

## **Emergency Medical Services Act**

### **§16-4C**

This statute establishes a regulatory structure for emergency medical services (EMS).

### ***Limitation of liability; mandatory errors and omissions insurance***

Any person or entity that employs paid or unpaid EMS personnel for ambulance service, or who otherwise provides ambulance service, is required to obtain errors and omissions liability insurance with limits of no less than \$1,000,000 per incident. EMS personnel and providers are not liable for civil damages or injuries in excess of the actual limits of insurance, unless those damages are intentionally or maliciously inflicted.<sup>28</sup>

Individual  
Volunteers

## *Non-Emergency Related*

The laws summarized in this section provide protection for a variety of activities that are not limited to emergency situations, but may include them.

### **Federal Volunteer Protection Act of 1997**

#### **42 USC §§14501-14505**

The Federal Volunteer Protection Act of 1997 (VPA) provides immunity for acts and omissions of individual volunteers who are registered and working as uncompensated volunteers of a government or a nonprofit organization, irrespective of the substance of their work. Thus it protects emergency services workers who meet its requirements along with other volunteers whose work has no relationship to emergencies and disasters.

Individual  
Volunteers

The VPA does not provide immunity to the government or organization for which a covered volunteer works. It also does not protect a volunteer from a lawsuit against the volunteer by the government or organization for which he or she works.

The VPA prohibits awards of punitive damages against a covered volunteer unless the claimant establishes by clear and convincing evidence that the harm was caused by the volunteer's willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed. This is a high standard of proof, which should eliminate actual awards of punitive damages in most cases.

The VPA imposes significant requirements and limitations to qualify for immunity:

- The volunteer must at the time of the act or omission be working within the scope of his or her responsibilities for the government or nonprofit organization.
- The volunteer must have the appropriate license, certificate or authorization to perform the activities that caused the harm, if the state where the harm occurred requires one.
- The harm must not have been caused by the volunteer's willful or criminal misconduct, gross negligence, reckless misconduct, or conscious, flagrant indifference to the rights or safety of the individual harmed, or other crimes enumerated in the statute
- The harm must not have been 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 possess an operator's license or maintain insurance

Despite its limitations, the VPA offers useful protection. The VPA is not limited to emergency services activities, so volunteers whose activities are too far removed from emergency services for protection under W. Va. Code §15-5-11 may have immunity under the VPA. However, the registration and scope of responsibilities requirements preclude VPA protection for spontaneous or unaffiliated emergency volunteers. Even registered/affiliated emergency volunteers may not be protected by the VPA if they self-



activate and are not considered to be acting within the scope of their responsibilities for the organization at the time of the act or omission.

### **Actions, Suits and Arbitration (Non-emergency Related)**

#### **W. Va. Code §55-7**

##### ***Unpaid Directors of Governmental and Nonprofit Entities***

West Virginia provides immunity from civil liability for **negligent** acts and omissions by **qualified directors** performing **managerial functions without compensation** (other than expense reimbursement or statutory per diem) for a **volunteer organization or entity**.<sup>29</sup> A qualified director is not immune from liability arising from gross negligence in his or her performance of duties or from his or her operation of a motor vehicle.

Directors of  
Volunteer  
Organizations

“**Volunteer organization or entity**” includes the state and its political subdivisions and nonprofit organizations with one or more of a broad array of purposes listed in the statute, which include fire-fighting and other public safety services. It excludes nonprofit hospitals with 150 or more beds. The organization or entity for which the qualified director works is not immune from liability for the director’s actions.

Immunity is limited both by position of the volunteer and the function performed. Rank and file volunteers and supervisory personnel are not immune. A **qualified director** (unpaid officer, member or director of a board, commission, committee, agency or other nonprofit or volunteer organization or entity) is immune only when performing a **managerial function** (exercising government, control, or superintendence of the affairs of a volunteer organization or entity through direction, regulation or administration.) Managerial functions do not include physical or manual handling of tangible property, operation of motor vehicles, and direct guidance or supervision of persons.

##### ***Food Donation and Gleaning***

This statute provides immunity from civil or criminal liability to individuals and some organizations involved in gathering and distributing free food to the needy.<sup>30</sup> Although not limited to emergencies, it could provide immunity from liability for food donated to nonprofit organizations and distributed by them to individuals who are needy due to a disaster.

Food  
Donation

A “person” (includes a wide variety of organizations and government entities), “gleaner” (a harvester of an agricultural crop for donation), and nonprofit organization are immune from civil or criminal liability for death or injury due to the nature, age packaging or condition of **apparently wholesome food** or **apparently fit groceries** donated or received in good faith for free distribution to the needy. “Apparently fit grocery products” and “apparently wholesome foods” are items that meet the quality and labeling standards of federal, state and local laws. This immunity excludes injury or death of the end user resulting from an act or omission that constitutes gross negligence or intentional misconduct.

Owners or occupiers of land who allow collection or gleaning of donations on their property for donation without profit to the needy are not subject to civil or criminal liability for injury or death to a gleaner or representative of a nonprofit while they are collecting or gleaning food on the landowner's property. This immunity excludes injury or death arising from the landowner's or occupier's gross negligence or intentional misconduct.

### **Government Tort Claims and Insurance Reform Act**

#### **W. Va. Code §29-12A-1 - §29-12A-18**

A full exploration of West Virginia governmental tort liability and immunity laws is beyond the scope of this Guide. However, this statute is important because it provides immunity and indemnity to **employees of political subdivisions**. "Employee" includes uncompensated officers, agents, employees, or servants acting within the scope of authorized employment for a political subdivision. "Political subdivisions" include volunteer fire departments and emergency service organizations that are recognized and authorized to perform governmental functions. Thus, their volunteers are protected by this statute.

Government  
Employees &  
Volunteers

Volunteers for volunteer fire departments or emergency service organizations are immune from liability if they meet certain requirements. Their acts or omissions must not be "manifestly outside the scope of employment or official responsibilities" or "with malicious purpose, in bad faith, or in wanton or reckless manner".<sup>31</sup> A volunteer is within the "**scope of employment**" when performing assigned duties or tasks in good faith and without corruption or fraud.<sup>32</sup> There is no immunity for contractual liability claims, claims based on alleged violations of the constitution or statutes of the United States, or liability expressly imposed upon the employee by the West Virginia Code.<sup>33</sup>

An employee's immunity does not limit the liability of the political subdivision for which that employee works.<sup>34</sup> However, political subdivisions have their own separate immunity from some types of liability under W. Va. Code §29-12A-5 and, as discussed above, they also have immunity for emergency service activities under W. Va. Code §15-5-11 of the HSEMA.

This statute also provides indemnity that is similar in scope – but not identical - to the employee's immunity. A political subdivision is required to pay the cost of its employee's defense in a civil action to recover damages for injury, death or loss to persons or property, if the employee was acting in good faith and manifestly not outside the scope of employment or responsibilities.<sup>35</sup> It is also required to pay a judgment awarding damages for injury, death, or loss to persons or property entered against an employee who was acting in good faith and not outside the scope of employment or responsibilities. A political subdivision may also establish self-insurance programs or buy insurance to protect itself and its employees from civil liability for injury, death or loss to persons or property. These risk financing methods do not waive the immunity or defenses of the political subdivision or its employees.<sup>36</sup>

## **Workers' Compensation Exemption from Liability**

### **§23-4-2(d)(2)**

An injured employee's or volunteer's co-workers may have legitimate concerns that they can be sued if they cause or contribute to the injury. West Virginia's Workers' Compensation Act, discussed in greater detail below, exempts from liability an employer that provides workers' compensation coverage, and extends this protection to officers, managers, agents, representatives and employees of the employer who, at the time of the injury, were acting on the employer's business and without "deliberate intent" to inflict an injury.

"**Deliberate intent**" is described in detail in §23-4-2(d)(2) of the Workers' Compensation Act. Although the statute attempts to set a high bar to recovery from fellow employees, it remains possible in limited circumstances for an injured employee to successfully sue a co-worker. According to press reports, volunteer firefighters in supervisory positions are especially concerned because they issue orders that may send firefighters into situations that prove dangerous.<sup>37</sup> Fire departments have purchased special insurance to protect against this residual liability, but increasing premiums were threatening their ability to continue doing so. In March 2011, W. Va. Code §12-4-14a was passed to establish the Volunteer Fire Department Workers' Compensation Subsidy Program, which provides subsidies to enable volunteer fire departments to pay increased insurance costs. As of May 2012, two bills in the West Virginia legislature, SB 458 and HB 4479, would significantly amend §23-4-2 in an effort to more precisely define and limit the scope of this exception to exclusive remedy. However there has been no movement of this proposed legislation since early 2012.

A fellow worker for a political subdivision of the state might have immunity from this type of liability and be provided with a defense and payment of judgment under W. Va. Code §29-12A-5(b) and §29-12A-11. (See discussion under Government Tort Claims and Insurance Reform Act, above.) However, no statutory protection is absolute, and there are exceptions from immunity and indemnity, as described above. Conduct that constitutes "deliberate intent" under the workers' compensation statute might potentially fall within those exceptions.

## **Other Sources of Indemnity**

West Virginia statutes offer significant immunity, but not much indemnity. Volunteers and volunteer programs can investigate the following potential sources of indemnity:

### ***Homeowner's, renter's, and personal umbrella insurance***

Volunteers may have some liability protection for their volunteer activities through their own personal liability policy. Volunteers can check with their insurance agent to determine whether and for what types of liability they are covered.

### ***Commercial general insurance, public entity liability insurance, public risk pool membership***

Commercial and public entity policies protect the organization that buys the policy, its employees, officers, and directors against liability for bodily injury, property damage and personal injury (such as false arrest and defamation). Public risk pools provide similar coverage for public entities. Some entities that use volunteers may buy a separate volunteer liability insurance policy. If volunteers are protected by liability insurance, training should include general information about the insurance and referral to a source where volunteers can obtain more specific information.

### ***Self-insured plans***

Public entities with significant financial strength may establish their own self-insured plans to cover a portion of their liability, and sometimes cover their volunteers in these plans.

### ***Professional liability insurance***

General liability policies exclude most coverage for professional liability, which insurers then provide under special insurance tailored for the specific profession. An example is insurance for the negligent acts of health care providers in practicing their professions. A volunteer who has professional liability insurance through his or her regular employer may not be protected by that insurance for volunteer work. Some professionals supplement their employer's coverage with an individual professional liability policy, which may insure them during volunteer work.

### ***Automobile liability insurance***

The automobile liability insurance for a vehicle provides primary coverage for an accident involving that vehicle. However, the insurance will pay only up to the policy limits of coverage (the maximum dollar amount the policy will pay), which may not be adequate for a serious loss if the policy only has the minimum limits required by law. A volunteer that operates his or her own vehicle during volunteer activities should provide evidence of coverage and adequate limits. A volunteer that operates a vehicle owned by someone else should confirm coverage with that vehicle's owner before operating the vehicle.

### ***Directors' and officers' or public officials' liability insurance***

These policies would be held by an organization rather than an individual. They protect against “wrongful acts” that cause harm other than bodily injury or property damage, and may cover volunteers of the organization. Policy provisions vary greatly, and are of greatest concern to those in a policy making or upper management position.

### ***AmeriCorps programs***

AmeriCorps grantees are required to ensure that their employees and members have appropriate liability coverage.

Use caution when relying upon any of the above sources of indemnity. Liability insurance has limitations. It only pays a judgment up to the policy limits. It will also pay the costs of defense but those payments sometimes reduce the limits available to pay a judgment. Liability policies define the claims they will cover and exclude other types of claims, so it is important to look carefully at the scope of coverage provided by a policy.

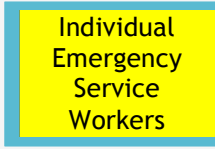
## Licenses, Certificates and Permits

### Homeland Security and Emergency Management Act

### Emergency Management Assistance Compact

### W. Va. Code §15-5

Licenses, certificates and permits are important components in a liability discussion. States require these credentials to control the quality of services delivered within their borders. Individuals, whether or not paid, who work without state required credentials can be subject to civil or criminal liability. Unlicensed volunteer work may also disqualify the volunteer from statutory immunity. For example, federal Volunteer Protection Act immunity is conditioned on the volunteer having, if required, the appropriate license, certificate or authorization in the state where the harm occurs.



This is not an issue for all emergency service workers. Many will not use professional or other skills that require a license, certificate or permit. Those who do use these skills in their emergency service work will likely have the appropriate credentials, if they perform their emergency service work in their home state where they regularly work. The problem usually arises when skilled workers travel away from their home state to provide assistance, or when retired skilled workers want to volunteer, but do not have active credentials.

There is statutory protection for skilled workers who travel to another state to provide emergency services. Article V of EMAC provides that states receiving assistance will recognize licenses, certificates and permits held by **members of a responding state's forces**, subject to conditions and limitations imposed by the state governor. To qualify for recognition of credentials under EMAC, volunteers must be part of the state's officially designated forces. Unaffiliated volunteers and emergency workers from political subdivisions are not included unless they are made part of their state's official response.

EMAC is not the only statute that addresses this issue. West Virginia's HSEMA provides that "any requirement for a license to practice any professional, mechanical or other skill does not apply to an authorized emergency service worker who shall, in the course of performing his or her duties, practice such skill during an emergency."<sup>38</sup> This protects skilled workers who provide emergency services in West Virginia under the control of, or at the request of West Virginia or one of its political subdivisions. Other states to which West Virginia forces respond may have similar statutes that benefit out of state responders. This must be verified on a state by state basis.

The statewide mutual aid statute also provides for recognition of licenses, certificates and permits between West Virginia political subdivisions who are aiding one another.<sup>39</sup>

## Workers' Compensation

### Workers' Compensation Act

#### W. Va. Code Chapter 23

### Homeland Security and Emergency Management Act

#### W. Va. Code Chapter 15-5

Injured  
Emergency  
Volunteers

A paid employee who suffers a work-related injury, illness, or death usually receives from his or her employer “no-fault” workers’ compensation benefits, including replacement for lost wages (disability) and medical expenses. Most state laws require employers to have workers’ compensation insurance or an approved self-insurance plan to secure these benefits. As a trade-off for the employer providing workers’ compensation even when it was not at fault, most state laws limit the injured employee’s right to sue the employer for additional damages.

Volunteers are a gray area for workers’ compensation. Because they are unpaid, volunteers are often not “employees” for workers’ compensation purposes. Volunteers who work in fire and emergency services areas are more likely to be covered by workers’ compensation because their functions are so critical.

West Virginia follows this general approach.<sup>40</sup> Under West Virginia’s Workers’ Compensation Act, most (but not all) employers are required to provide workers’ compensation for their employees.<sup>41</sup> Employers that are not required to provide workers’ compensation may do so voluntarily.<sup>42</sup> Employers that provide workers’ compensation are not, in most situations, liable for other common law or statutory damages (such as pain and suffering) arising from an employee’s injury or death. The employer’s officers, managers, agents, representatives or other employees are also not liable for injury to an employee if they were acting in furtherance of their employer’s business and did not inflict an injury with “deliberate intent”.<sup>43</sup>

The major issues surrounding workers’ compensation for volunteers are the following:

- Are employers required to provide workers’ compensation for volunteers?
- May an employer provide workers’ compensation for volunteers even if it is not required to do so?
- If the employer provides workers’ compensation for a volunteer, how are the disability benefits determined?
- If a volunteer has paid regular employment, does the regular employer cover the volunteer during emergency service activities?
- What other sources of compensation are available to injured volunteers?

The statutory language is not always clear and there is little or no published case law available to aid interpretation.<sup>44</sup> **Thus, an important take away from this section is that volunteers should not assume that they are covered by workers’ compensation or other injury/illness/death benefits.** Volunteers should always confirm with their organization whether and how they will receive workers’ compensation or other benefits

if they are injured. Organizations that use volunteers should provide this information to volunteers during training and upon request.

***Are employers required to provide workers' compensation for volunteers?***

The state of West Virginia, its political subdivisions, volunteer fire departments or companies, and **emergency service organizations as defined by the HSEMA** are “employers” under the Workers’ Compensation Act and are required to provide workers’ compensation for their “employees”.<sup>45</sup> The term “emergency service organizations” does not include all organizations that might potentially work with emergency volunteers. It includes only emergency service organizations defined by the HSEMA and operating under the control of a government. Workers’ compensation coverage is specifically made optional for many organizations that use volunteers, including churches, volunteer rescue squads, and volunteer police auxiliary units organized by government entities or political subdivisions.<sup>46</sup>

There is no clear statement in the statute that volunteer fire departments and emergency service organizations are required to provide workers’ compensation for volunteers/unpaid employees, although they are clearly required to provide it for “employees”. Whether coverage is required depends on what “employee” means, and the definitions in the statute and the rules are not conclusive.<sup>47</sup>

The omission of volunteer fire departments and emergency service organizations from the optional category, and their inclusion in the definition of “employers”, suggests that they are required to provide workers’ compensation coverage to at least some of their unpaid workers, especially those that are engaged in operational functions. The West Virginia Insurance Commission confirms verbally that it considers operational volunteers for these organizations to be covered by workers’ compensation. The statutory and regulatory language is not conclusive, however, so volunteers should check with the organization before relying on workers’ compensation coverage.

***May an employer provide workers' compensation for volunteers even if it is not required to do so?***

West Virginia’s workers’ compensation statute permits employers to voluntarily provide workers’ compensation for their “employees” even if they are not required to do so.<sup>48</sup> Again, the definition of “employees” does not specifically include or exclude unpaid workers. Note that an employer that voluntarily provides workers’ compensation benefits to employees who would not otherwise be covered only benefits from the [exemption from liability for common law damages](#) if it notifies the employees that it provides workers’ compensation and the employees continue to work for the employer.<sup>49</sup>

One barrier may be the availability of coverage from commercial insurers. Employers that want to voluntarily provide coverage may have a difficult time finding an insurer willing to write that coverage. Those employers may also want to explore accident and sickness coverage, which provides some benefits to injured workers, but does not provide the exemption from liability for common law damages.



### ***How are disability benefits determined for volunteers?***

Workers' compensation disability benefits replace, in part, an injured worker's lost earnings. By statute, disability benefits are based on the injured employee's "**average weekly wage earnings, wherever earned**" at the time of the injury, subject to maximums and minimums.<sup>50</sup>

Injured volunteers do not lose earnings from their unpaid volunteer positions, but they may be disabled from their regular jobs. "Wherever earned" is not defined, but the practice<sup>51</sup> is that volunteers' disability benefits are calculated based on their earnings in their regular jobs, subject to statutory maximums and minimums. As always, volunteer programs should verify with their insurer how benefits are calculated for their specific type of volunteer.

### ***If a volunteer has paid regular employment, does the regular employer cover the volunteer during emergency service activities?***

There is no single answer to this question. The answer depends on whether the volunteer's injury, illness or death occurred **in the course of and resulting from covered employment with that employer**. The facts underlying each case are evaluated before a decision is made about compensability under a particular employer's workers' compensation coverage.

If volunteer service is a personal activity unrelated to the employee's regular employment responsibilities, and the employee is not being paid by the employer while engaged in volunteer service, then the employee is unlikely to be covered by the employer's workers' compensation. An example is an employee who becomes part of her neighborhood CERT team on her own time and without support by her employer. In this situation, the employer would likely have no involvement with the volunteer's CERT activities and no responsibility for workers' compensation coverage.

If volunteer service is part of the employee's regular employment, during which he is paid by his regular employer, the volunteer is likely covered by his employer's workers' compensation. For example, a truck driver for a bottled beverage company might deliver bottled water to a disaster scene while on the employer's payroll and driving the employer's truck. Or an engineering firm might donate the time of its employees to help emergency personnel assess damaged buildings for habitability. In these situations, the employer is likely to be a participant in the agreement to provide emergency services and to be responsible for workers' compensation coverage.

In between these two extremes are a variety of situations where the regular employer's liability for workers' compensation benefits will be an issue of fact. For example, the regular employer might release its employees to the control of the emergency service organization during the emergency. The greater the control of the emergency service or other volunteer organization over the volunteer's activities, and the less the control and involvement of the regular employer, the less likely it is that the regular employer's workers' compensation coverage will apply.

In West Virginia, the requirements of the workers' compensation law determine whether an organization is an "employer" under the statute. Thus, the regular employer and the organization using the employee as a volunteer cannot contractually agree to an allocation of responsibility for workers' compensation that is inconsistent with the law.<sup>52</sup> A regular employer can, however, enter into a memorandum of agreement with an emergency services organization to establish the parties' expectations about workers' compensation coverage and the factual basis for determining who controls the employee. Employers that lend employees to work with emergency services or other volunteer organizations should consult their legal counsel for advice on their particular circumstances.

By statute, members of Mobile Support Units (MSU) operate under the control of the authority in the area where they are serving, and members who are not employees of the state or its political subdivisions are entitled to the same rights and immunities as are provided by law to state employees.<sup>53</sup> This appears to separate MSU members who are regularly employed in the private sector from the control of their regular employer for purposes of workers' compensation.

Under the statewide mutual aid system, personnel of a political subdivision who are injured or killed while rendering assistance and in the scope and course of their employment are entitled to:

- Benefits normally available while working for employer (their regular employer's workers' compensation), and
- **Additional state and federal benefits** available for line of duty deaths (Special programs that may be established after an event)<sup>54</sup>

The scenarios discussed above are only general descriptions of possible outcomes. When there are two potential employers for purposes of workers' compensation coverage, the outcome will be based on an analysis of all the facts. Volunteers should check with their regular employer and with the organization with which they plan to volunteer to confirm the organizations' positions regarding workers' compensation coverage.

### ***What other sources of compensation are available to injured volunteers?***

An injured volunteer may also have the following possible sources of compensation:

#### Health care and disability insurance

A volunteer may be able to recover some medical expenses and lost income through the volunteer's own health care insurance and disability insurance.

#### Automobile insurance

A volunteer who was injured in a motor vehicle accident may be able to recover from his or her own automobile insurance company (if the volunteer was driving his or her own car at the time of the accident); the automobile insurance company for the vehicle in which he or she was injured (if the vehicle in which he or she was injured was owned by

someone else); or the automobile insurance company for the owner of another vehicle involved in the accident (if that driver was at fault).

### Personal injury lawsuit

Even if a volunteer receives workers' compensation benefits, he or she may be able to sue someone (usually not the entity that provided the workers' compensation benefits or its employees, but see discussion above under [Workers' Compensation Exemption from Liability §23-4-2\(d\)\(2\)](#)) who negligently or intentionally caused or contributed to the injury: for example, the owner of premises upon which the volunteer was injured, if that owner has no immunity. In addition to the medical expenses and lost income recoverable under workers' compensation, the volunteer may be able to recover other common law damages, such as pain and suffering. To avoid duplicate recovery, a volunteer who receives workers' compensation benefits may have to reimburse the workers' compensation insurer out of any recovery against the third party.

### Accidental injury, accident, sickness and death insurance

A volunteer for a local government, an agency, a nonprofit organization or other volunteer program may be covered for some medical costs under accidental injury or similar insurance purchased by the organization for its volunteers. Compare the coverage provided under such insurance with the benefits the program wants to provide. Volunteer accident and sickness insurance sometimes covers only medical expenses, not lost income, has a relatively low maximum payment, or pays only what the volunteer's regular health insurer does not pay. Before choosing this path, be sure that the policy does not exclude emergency or public safety volunteers.

## **Summary**

West Virginia statutes provide liability protection in a number of different sections. This is a summary cross reference between categories of stakeholders and some potential sources of liability protection.

### **Unaffiliated volunteers**

[Good Samaritan](#)

### **Political subdivision employees and volunteers**

[Homeland Security & Emergency Management Act](#)

[Federal Volunteer Protection Act](#)

[Unpaid Directors](#)

[Food Donation & Gleaning](#)

[Government Tort Claims & Insurance Reform Act](#)

[Workers' Compensation Act](#)

### **State employees and volunteers**

[Homeland Security & Emergency Management Act](#)

[Emergency Management Assistance Compact](#)

[Federal Volunteer Protection Act](#)

[Unpaid Directors](#)

### **Statutory emergency service organization volunteers**

[Homeland Security & Emergency Management Act](#)

[Federal Volunteer Protection Act](#)

[Unpaid Directors](#)

[Government Tort Claims & Insurance Reform Act](#)

[Workers' Compensation Act](#)

### **Volunteers responding in another state**

[Emergency Management Assistance Compact](#)

[Mutual Aid Laws](#)

[Federal Volunteer Protection Act](#)

[Government Tort Claims & Insurance Reform Act](#)

### **Volunteer Fire Service**

[Volunteer Fire Companies and Departments](#)

[Forest Fires](#)

[Interstate Forest Fire Protection Compact](#)

[Equipment Donation](#)

[Federal Volunteer Protection Act](#)

[Unpaid Directors](#)

[Government Tort Claims & Insurance Reform Act](#)

[Workers' Compensation Act](#)

**Mobile Support Units**

[Homeland Security & Emergency Management Act](#)

[Federal Volunteer Protection Act](#)

[Unpaid Directors](#)

[Government Tort Claims & Insurance Reform Act](#)

[Workers' Compensation Act](#)

**Nonprofit organizations**

[Emergency Shelter](#)

[Food Donation & Gleaning](#)

[Unpaid Directors](#)

[Workers' Compensation Act](#)

**Students**

[Homeland Security & Emergency Management Act](#)

**Businesses**

[Homeland Security & Emergency Management Act \(for their workers serving as volunteers\)](#)

[Emergency Shelter](#)

[Food Donation & Gleaning](#)

[Workers' Compensation Act](#)

**Political subdivisions and their agencies**

[Homeland Security & Emergency Management Act](#)

[Food Donation & Gleaning](#)

[Government Tort Claims & Insurance Reform Act](#)

[Workers' Compensation Act](#)

**State and its agencies**

[Homeland Security & Emergency Management Act](#)

[Emergency Management Assistance Compact](#)

[Food Donation & Gleaning](#)

[Workers' Compensation Act](#)

**Other special functions**

[Hazardous Substance Response](#)

[National Ski Patrol Systems](#)

[Automatic External Defibrillators](#)

[Mine Rescue](#)

[Food Donation & Gleaning](#)

[Emergency Medical Services](#)

[Federal Volunteer Protection Act](#)

# Risk Management

The first part of this manual described the protection available to West Virginia emergency management volunteers and the organizations that use them. The best liability protection, however, is good risk management, because it focuses on preventing events that could result in liability. The immunity and indemnity provisions described in the previous section do not prevent losses; they only shift the financial cost to the injured person or to an insurer. Everyone wins if the loss is prevented.

This section describes some techniques for managing risk in an emergency volunteer program. These techniques can be used by any program, whether established or just beginning.

## Obtaining Support

The support of the program leader is a critical component of risk management. Programs may be sponsored by public agencies, nonprofit organizations, or occasionally by an educational or business entity. Where multiple agencies or organizations are involved, obtain support from all of them.

Obtaining initial leadership support is just the beginning. Managing risk is an ongoing process. Support must be nurtured, expanded and revisited when circumstances change or new information is identified.

## Gathering Information

Risk management is successful only if it is grounded in the characteristics and activities of the program and its sponsor.

Begin by reviewing any written materials and talking to key players. The following are some suggested beginnings for the inquiry:

### ***What type of organization is the program/sponsor?***

For some issues, the type of organization is important. For example, employees and volunteers of political subdivisions, including volunteer fire departments and emergency service organizations, have governmental immunity that is not available to their counterparts in nonprofit or business organizations.

### ***Does the program have existing policies and procedures?***

Policies and procedures are important risk management tools, so existing policies and procedures often provide a good foundation for risk management.

### ***What activities do the program's volunteers perform?***

The key to identifying risk is to know what volunteers will be doing. Does their work require licenses or other government approval?

***Are other organizations closely involved with the program?***

Review documentation of the relationship and consider each organization's risks.

***Does the program have any history of claims, losses or "near-miss" events?***

History can help identify risks. What has happened before can happen again. But do not limit the inquiry to history, because a lot of other things can happen too.

***Does the program have members under the age of 18?***

A program that has members under the age of 18 should consider the requirements of West Virginia's child labor statutes and regulations, train its personnel about special issues related to interaction with minors, adapt its procedures to protect minors, and document parental consent for their participation.

***Does the program or a sponsor have a safety officer, human resources officer, or risk manager who handles volunteer injuries?***

*These risk professionals can provide information about the program for managing volunteer injuries and any history of injuries.*

***Does the program keep written training records for each volunteer?***

Records help ensure that volunteers receive the training they need, and proves they have received it, if necessary.

***Does the program deploy teams to other states to assist in disaster response?***

If yes, does the program work with state emergency management officials to ensure that volunteers are designated as part of the state's response force under EMAC?

## **Identifying and Analyzing Risk**

Risk identification and analysis tells the program what can happen and how those events might affect the program, its volunteers and others.

Identifying risk does not mean that volunteer programs are too "risky." Risk is part of all activities. Volunteers who are properly selected, trained and managed pose no greater risk than do paid personnel performing the same activities.

Consider the information gathered and imagine how liability could result. Activities are a primary driver of liability, so each activity deserves attention. Both operational and non-operational activities have risks; for example lifting heavy (or not so heavy) items, driving motor vehicles, using tools and ladders, entering private premises, receiving confidential information, and working with vulnerable populations. Most programs will have little loss experience, so do not be limited by what has happened in the past.

Responsibility is also a driver of liability. Individuals with greater authority have a wider range of risk. Multiple organizations may share responsibility for a volunteer program.

It is not enough to identify what can go wrong. It is also important to know who is responsible to prevent that outcome.

Standard operating procedures and rules of conduct suggest how liability might occur, and thus are useful risk identification tools. The absence of procedures for recruiting, screening, accepting, supervising and terminating members increases risk. If the program has no procedures, put this on the list of issues to address.

Emergency activation procedures are an important risk management consideration. Some programs activate their members for response and others do not. Procedures help ensure a consistent activation and deactivation approach, and documentation can serve as useful defense evidence if a claim is made. Keep in mind that instructing members/teams to self-activate does not eliminate all chances of liability.

Look for any circumstances under which volunteers might respond outside their home state. Volunteers responding in another state may be operating in a less familiar environment and have different licensing requirements and liability and injury protection than is offered in their home state.

Analyze the identified risks to estimate their likely consequences and rank them for action. Consider how often liability is expected to result and what the associated costs would be. In addition to payment of judgments, settlements and member injury claims, remember intangible costs, such as damage to the program's reputation and partnerships. Focus the analysis on identifying risks that can cause the greatest harm.

### **Adopting Strategies**

There is no single set of strategies for managing a volunteer program's risk. Practices used by volunteer programs differ significantly, and these differences provide an opportunity for programs to learn from one another. The following are examples of useful approaches.

#### ***Position descriptions***

Position or job descriptions are important risk management tools for most organizations, including those that use volunteers. The process of developing position descriptions helps the organization identify risk associated with the position's activities. Their use in the hiring process helps ensure the best fit between applicants and jobs, thus reducing the risk of an undesirable outcome.

Here are some basic elements to consider including in position descriptions:

- Position title
- Date(s) and location(s) of activities
- Time commitment
- Working conditions (inside/outside, extensive walking etc.)
- Narrative description of purpose (usually a sentence or two)
- Essential functions (a brief description of each important activity)



- Qualifications required, if any (education, special skills, completion of supplemental training, etc.)
- Screening required (for example, criminal background checks)
- Position to which the position reports

Some volunteers have managerial responsibilities. Their responsibilities may require additional management, communication, documentation and organizational skills, and their decisions may affect the safety of more people. Consequently, their liability exposures are broader than those of volunteers who are assigned to individual tasks. Supplemental position descriptions for these responsibilities will help volunteers prepare to discharge these additional responsibilities effectively and with less risk for everyone.

### ***Application, interviews, and screening***

A volunteer organizations' mission affects its application and screening processes. Some organizations need volunteers for one-time events. Others need volunteers for long term and progressively responsible and sensitive relationships. Those needs drive the level of information required about volunteers. The following are some general approaches for using the application and screening processes to manage an organization's risk associated with volunteers.

#### Application

Complete and accurate information about potential volunteers is a powerful tool for reducing risk. Using a standard application form helps collect consistent information. Start with a template that has been approved by the organization for paid employees, adjust for use with volunteers, and have the final product approved by a human resources professional or an attorney. Some components to consider including on the form are the following:

- Confirmation by the applicant that the information provided is accurate and complete
- Notice that the program will verify the information and reject the applicant if it is inaccurate or incomplete
- Written permission by the applicant to conduct specific types of background checks, as discussed under *Screening* below
- Notice that any position offered will be "at will" and subject to termination at the program's discretion
- For programs that accept participants under the age of 18, a space for written permission by the parent or guardian

A frequent risk management concern with volunteers is that they may be injured. Providing workers' compensation, as discussed earlier in this Guide, is one way to protect both the volunteer and the organization. If workers' compensation is not provided, the organization may also ask volunteers (and, if the participant is a youth, his or her parents or guardians) to sign a written waiver of liability that describes the risks of the program's activities. Waivers of liability are often not legally enforceable, especially against minors. However, a waiver that describes the activities and associated risks

shows that the volunteer (and his or her parents) knew of risks inherent in the activity and chose to participate. Waivers can also be useful in settlement negotiations. Check with an experienced attorney for advice on the best language to use.

### Interviews

If the program conducts interviews, use the same caution as for paid positions. A standardized list of interview questions helps the interviewer gather all the required information and reduces the chances of asking a discriminatory or other problematic question. Have the questions pre-approved by someone familiar with federal and state employment laws. Inevitably additional conversation and follow up questions occur, so be sure interviewers know how to make good decisions about follow-up questions.

### Screening

Screening verifies an applicant's representations and identifies background or history inconsistent with the responsibilities of the position. If the program accepts applicants before screening is completed, the offer should be in writing and contingent upon the satisfactory completion of the screening.

An incorrectly managed screening process can be a source of liability either to the applicant or someone harmed by an inadequately screened volunteer. Do not begin screening without the applicant's written permission for the specific types of screening the program will use. Screen all applicants for the same position in the same manner. Identify in advance how the program will address specific findings and equally enforce those consequences with all applicants. To avoid liability for failure to identify an applicant who poses a hazard, be certain to meet state requirements for screening individuals who will work with vulnerable populations. Keep complete records of all screening results for both accepted and declined applicants, and be certain those results are addressed consistently with each applicant. When developing screening protocols, it may be helpful to consider protocols used by surrounding jurisdictions.

### ***Offer and acceptance***

The procedures used to accept members from the pool of applicants differ among programs. Any process that is based on consistently applied objective criteria and is not wrongfully discriminatory will help the program avoid liability and/or unfavorable publicity. The program can avoid possible misunderstandings by putting information into a written offer letter or service agreement to be signed by the member and the member's parents, for minors.

Any statements made in the offer letter or service agreement will be a binding commitment by the program and the volunteer. Consequently, use great care in describing benefits. For example, do not refer to accident and sickness insurance as workers' compensation coverage. Secure legal or human resources approval of the offer letter or service agreement before adopting it for use in the program.

### ***Privacy of volunteer records***

The recruitment and selection process generates information that can be highly confidential. Disclosure of this information can harm the individual and expose the program to significant liability. Consequently, the confidentiality of all volunteer records, including unsuccessful applicants, should be respected.

### ***Work and conduct rules***

Clear work and conduct rules are an important risk management practice. They help volunteers perform their jobs, identify unacceptable conduct, and give the program an objective basis for managing performance and ending relationships, if necessary.

Some infractions are so serious they warrant immediate termination of the volunteer relationship. Identify within the work and conduct rules any infractions that warrant immediate termination, often those that present an unacceptable risk of damage to property or injury to a person, or that evidence intent to do harm or break the law. Refer to the program's progressive discipline and termination procedures, if the program has them. Give each volunteer a copy of the rules and require the volunteer to sign an agreement to obey them.

The following are some common topics addressed by work and conduct rules:

- Time records
- Periodic retraining
- Periodic rescreening and required reporting of changes in driving record, criminal record, professional licensure, or other record required for the position held
- Uniforms and identification cards
- Procedures for reporting injuries, illnesses, accidents, and property damage
- Safety rules and personal protective equipment
- Statements to media
- Confidentiality and privacy
- Wrongful discrimination
- Harassment (sexual and other)
- Alcohol and drug use
- Smoking
- Cell phone usage
- Photography
- Personal use of program computers/email
- Carrying weapons

### ***Training***

Training helps programs manage liability because it prepares volunteers to deal safely and effectively with situations they are likely to encounter. Training is especially important for operational activities. Deploying volunteers into emergency situations without adequate training increases significantly the chance of volunteer injury and liability to third parties for volunteers' actions.

Pre-prepared curricula or “train the trainer” courses are offered by some national Citizen Corps programs.<sup>55</sup> This national baseline promotes consistency and makes it more difficult to argue that a program is not providing adequate training.

Training should provide information to help volunteers respond safely and effectively in emergencies, but should not, except for work rules that prohibit inappropriate actions, establish inflexible standards. Conditions at the scene may require that volunteers use their judgment, so inflexible standards that appear to establish one correct way of responding can increase liability risk. Consider including a statement that the recommendations do not replace what a reasonable person would do under similar circumstances, and that the recommendations may be adjusted based on circumstances at the scene. Consult with an attorney for advice on establishing the right balance.

It is good practice to maintain training records that identify volunteers who were trained, when they were trained, and the topics covered. Records help manage the training schedule and ensure there are no training gaps. Include externally provided training such as Incident Command System. If training becomes an issue in a lawsuit, the records will document that the appropriate training was provided.

Training is more effective if the program requires refresher training. Without refresher training, skills can deteriorate, volunteers will be unaware of changes in procedures, and the chances of liability will increase.

Training will be required by law or regulation for some volunteers, for example firefighters, but training decisions should not be driven solely by legal requirements. It is good practice to train volunteers if paid employees performing the same activities would be trained. The relatively small training investment is offset by the benefits of reducing the chance of liability.

### ***Handbooks***

Distributing a handbook can help volunteers retain information, reinforce work rules, and serve as an important foundation for performance evaluation, progressive discipline, and termination procedures. If a handbook is distributed, have each volunteer sign an acknowledgement and agreement to comply with work rules. Be sure volunteers receive any updates to the handbook.

### ***Performance management***

Volunteer programs invest significant time and resources in recruiting and training members. Regrettably, an occasional volunteer will be unable or unwilling to perform as expected. A procedure for managing performance through supervision, performance evaluation, progressive discipline and termination will help manage these situations consistently and successfully. Develop procedures with the advice of an employment attorney or skilled human resources professional, and be sure to clearly identify which categories of workers (paid and/or volunteer) are covered by a procedure.

Privacy is important throughout this process, even for volunteers. Avoid making written or oral public statements that could damage the volunteer's reputation. Administer discipline and termination in a private setting, with only the volunteer, the supervisor, and a witness (who will maintain confidentiality) present. Keep volunteer files in a secure place at all times, providing them with the same protection as paid employees' files. If contacted for a reference on the member, follow the organization's standard procedures for employee references.

### ***Activation/deployment approaches***

Emergency volunteer programs – especially Community Emergency Response Teams - can adopt different approaches to activation of members in emergencies. One option is to instruct volunteers to activate only when ordered to do so by the program. Another is to avoid any involvement with activation, leaving it to volunteers to decide when and how to activate. A hybrid approach is to have a standard operating procedure that instructs members in advance when and how to activate. Finally, the program can permit self-activation in the member's immediate surroundings (i.e. neighborhood, university or workplace) but limit participation in larger emergencies to formal program activation.

There is no activation approach that guarantees against liability. On its face, self-activation may appear to insulate the program leaders and the sponsoring organization from liability by separating them from deployment or direction of members. This fails to recognize two important factors.

First, there are links with the program even if volunteers self-activate.

- Self-activation may be pursuant to a standing order, and not all that different – for liability purposes - from an order to activate issued at the time of an emergency.
- Volunteer programs have multiple points of contact with their volunteers. Even if its volunteers self-activate, an injured person might argue that the program has put the volunteer in a position to respond and that volunteer training shaped their actions. An injured volunteer might argue that training did not adequately prepare for the situation encountered.
- By accepting volunteers and instructing them to self-activate, some might argue that the program has implicitly made a decision that the volunteers are capable of responding without supervision, and an injured person may question that decision.
- Even self-activated volunteers can appear to the public to be acting on behalf of the program if they carry officially issued identification, wear identifying vests or personal protective equipment, or identify themselves as program volunteers.

Any of the above might be argued as grounds for program liability, even if volunteers self-activate.

Second, self-activation does not offer the risk control benefits of program activation for specific emergencies. A program that activates its volunteers for specific emergencies may reduce the chance that its volunteers will respond to situations that are beyond their capabilities. If program activation enhances oversight at the emergency scene, it can also

help ensure that volunteers work within their level of training and comply with the program's rules. Both of these effects reduce, although they do not eliminate, risk.

Another important concern is that self-activation may prevent volunteers from qualifying for immunity and indemnity. With a few exceptions, for example for Good Samaritan immunity, self-activated volunteers will not meet the statutory requirements described above.

No activation strategy eliminates a program's potential liability for the acts of, or injuries to, its volunteers. Thus, each program should analyze the risks and benefits of each approach and choose the strategy that is most effective for its needs. Then acknowledge and manage the remaining risks.

### **Maintaining the Momentum**

Risk management is an ongoing process. Activities, partners, and environments change, and so must risk management strategies. The keys to success are monitoring changes in the program, evaluating the effectiveness of adopted strategies, and making changes as needed. For the best chance of success, assign responsibility and accountability for maintaining the momentum to one or more individuals.

## Conclusion

This Guide had two goals. First, to help West Virginia emergency volunteer programs understand how the law protects them and their volunteers from liability to third parties, injuries to the volunteers, and violations of license, certificate and permit laws. Second, to identify risk management practices that reduce the risks associated with emergency volunteerism. This section will provide a quick overview. This is only an overview and omits the details of the discussion above. For a full understanding, go to the appropriate section.

**Liability.** West Virginia law provides fairly robust immunity for emergency management volunteers. Duly qualified emergency service workers who are actively engaged in work under the HSEMA have immunity from liability for bodily injury and property damage. Good Samaritan laws extend immunity to individuals responding in good faith and without compensation to provide emergency care to someone injured in an accident or the victim at the scene of a crime. Other more targeted immunity is provided by other statutes for specific emergency situations, including ski patrols, mine rescue teams, providers of emergency shelter, and hazardous substance release personnel.

Moving beyond emergency situations, the Federal Volunteer Protection Act of 1997 provides some liability protection to volunteers for governments and nonprofit organizations. This immunity is helpful to emergency volunteers when they are engaging in non-operational activities that may not be covered by HSEMA immunity. Also helpful, in both emergency and non-emergency situations, is the immunity available under the Government Tort Claims and Insurance Reform Act for uncompensated workers for political subdivisions, which include volunteer fire departments and emergency service organizations. The Government Tort Claims and Insurance Reform Act also indemnifies volunteers – pays for their legal defense and judgments against them, if any.

Of course, conduct beyond ordinary negligence, such as gross negligence, willful misconduct, and bad faith, is usually excluded from both immunity and indemnity. Also excluded from immunity and indemnity is liability that is unrelated to negligence, such as breach of contract or constitutional violations.

Non-governmental organizations – including nonprofits – do not have the same liability protection as individuals. They are protected from liability arising from the donation of premises as emergency shelter. They also have some immunity in connection with food gleaning and donation. They do not share in the immunity of their volunteers, either under the Federal VPA or the HSEMA. The organization may be liable for the acts of its volunteers or for its own independent negligence in selecting, training, deploying, supervising or retaining those volunteers.

In sum, there is significant liability protection provided for emergency volunteers, but very limited protection for nongovernmental organizations that use them. Those

organizations should confirm that their insurance protects them from liability arising out of their emergency volunteer programs.

**Workers' compensation.** The law clearly permits, and likely requires, volunteer fire departments and statutory emergency service organizations to provide workers' compensation for their volunteers. For other volunteer organizations, coverage for volunteers is optional. Even if there is a mandate, it does not insure that a specific organization provides workers' compensation for its volunteers. Volunteers should check with the organization for which they plan to work, rather than assuming they will be entitled to benefits if they are injured. If there are benefits, determine whether they will be workers' compensation benefits, as defined by statute, or accident and sickness insurance, which may provide less protection. Ask to see evidence of coverage, for example a current insurance certificate.

Leaders of volunteer programs should know whether they are required to provide workers' compensation insurance for their volunteers, and whether they actually do so. If necessary, check with an attorney. One reason for an organization to consider voluntarily providing workers' compensation coverage is to benefit from the exemption from liability for civil damages. To benefit from this exemption, the organization must inform the volunteer of the workers' compensation coverage and obtain their written acknowledgement.

**Licenses, certificates and permits.** Programs should not deploy workers, paid or volunteer, to perform skills that require a license, certificate or permit before confirming that the worker possesses the required credential or falls within a statutory exception. In interstate response efforts, look at the law of the state where the skills will be practiced. EMAC only provides for recognition of the credentials of responders who are part of the official response force of another EMAC state. The state receiving aid may also have a statute similar to West Virginia's, which recognizes the credentials of duly qualified emergency service workers responding within the state pursuant to a mutual aid agreement with the state or a political subdivision.

**Risk management.** Good risk management is just as important as immunity and indemnity, because it helps avoid the incidents that create liability. Volunteer risk management includes:

- Using an application and screening process that is fairly and consistently applied
- Knowing the volunteer's capabilities, limitations and background
- Documenting the organization's relationship with its volunteers
- Respecting volunteers' private information
- Establishing and enforcing work and conduct rules
- Training volunteers to safely and effectively perform their functions
- Managing performance

Volunteer programs that consistently manage their risk benefit themselves, their sponsors, their members, and the community. They are more likely to have long-term viability because they are more useful and pose less risk to their sponsors. They are also



more attractive to new volunteers, because they work in a safer environment, have clear responsibilities, and may benefit from injury and liability protection. Finally, the public benefits from the additional services performed by volunteers, and is protected from harm by the program's screening and training procedures.

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<sup>1</sup> W. Va. Code §15-5-11

<sup>2</sup> W. Va. Code §15-5-2(d)

<sup>3</sup> W. Va. Code §15-5-8 & 15-5-9

<sup>4</sup> W. Va. Code §15-5-10

<sup>5</sup> W. Va. Code §15-5-11(c)

<sup>6</sup> W. Va. Code §15-5-11(c)(1)

<sup>7</sup> W. Va. Code §15-5-15

<sup>8</sup> W. Va. Code §15-5-2(a)

<sup>9</sup> W. Va. Code §15-5-2(h)

<sup>10</sup> W. Va. Code §15-5-11(c)(2)

<sup>11</sup> W. Va. Code §15-5-11(c)(3)

<sup>12</sup> W. Va. Code §22A-1-35(j)

<sup>13</sup> W. Va. Code §15-5-11(d)

<sup>14</sup> W. VA. Code §15-5-28

<sup>15</sup> W. Va. Code §15-5-22

<sup>16</sup> W. Va. Code §15-5-12

<sup>17</sup> W. Va. Code §15-5-2(k)

<sup>18</sup> W. Va. Code §15-5-2(c)

<sup>19</sup> W. Va. Code §15-5-7

<sup>20</sup> W. Va. Code §55-7-15

<sup>21</sup> W. Va. Code 55-7-17

<sup>22</sup> W. Va. Code §55-7-16

<sup>23</sup> W. Va. Code §16-4D-4

<sup>24</sup> W. Va. Code §20-3-4

<sup>25</sup> W. Va. Code §20-3-25

<sup>26</sup> W. Va. Code §8-15-8b

<sup>27</sup> W. Va. Code §8-15-8c

<sup>28</sup> W. Va. Code §16-4C-16

<sup>29</sup> W. Va. Code §55-7C-3

<sup>30</sup> W. Va. Code §55-7D-3 & §55-7D-4

<sup>31</sup> W. Va. Code §29-12A-5(b)

<sup>32</sup> W. Va. Code §29-12A-3(d)

<sup>33</sup> W. Va. Code §29-12A-18

<sup>34</sup> W. Va. Code §29-12A-5(c). §29-12-4(c)(2) states that “a political subdivision is liable for injury, death or loss to persons or property caused by the negligent performance of acts by their employees while acting within the scope of employment §29-12-4(c)(1) specifically states that the political subdivision is liable for employees’ negligent operation of motor vehicles and §29-12-4(c)(4) extends this to employee negligence within or on the grounds of buildings used by the political subdivision.

<sup>35</sup> W. Va. Code §29-12A-11(a)

<sup>36</sup> W. Va. Code §29-12A-16

<sup>37</sup> *Volunteer firefighters Offered Coverage*, Charleston Daily Mail, Jared Hunt, August 3, 2010, <http://charlestondaily.com/News/201008020777>, accessed September 20, 2010

<sup>38</sup> W. Va. Code §15-5-11(b)

<sup>39</sup> W. Va. Code §15-5-28(i)

<sup>40</sup> Until recently, West Virginia provided workers’ compensation through a state fund. The system has now been privatized (opened to private insurers) and workers’ compensation is administered by the West Virginia Insurance Commission. These changes do not affect workers’ substantive rights to workers’ compensation benefits, but they do affect the sources of workers’ compensation insurance available to employers.

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<sup>41</sup> W. Va. Code §23-2-1(b) provides a list of the types of employers not required to provide workers' compensation coverage

<sup>42</sup> W. Va. Code §23-2-1(d)

<sup>43</sup> W. Va. Code §23-2-6 & 23-2-6a

<sup>44</sup> The West Virginia Insurance Commissioner Legal Department provided its perspective on the interpretation of the workers' compensation statute, for which the author is grateful, but the final interpretation here is the author's.

<sup>45</sup> W. Va. Code §23-2-1(a)

<sup>46</sup> W. Va. Code §23-2-1(b)

<sup>47</sup> W. Va. Code §23-2-1a; §85CSR8-3.6

<sup>48</sup> W. Va. Code §23-2-1(b) & (d)

<sup>49</sup> W. Va. Code §23-2-6

<sup>50</sup> W. Va. Code §23-4-14

<sup>51</sup> *High Fees Burn Volunteer Fire Departments*, Charleston Daily Mail, George Hohmann, May 6, 2010, <http://www.dailymail.com/News/201005050820>, accessed September 3, 2010

<sup>52</sup> *Lester v. State Workmen's Compensation Commission*, W.Va., 242 S.E. 2d 443 (1978)

<sup>53</sup> W. Va. Code §15-5-7

<sup>54</sup> §15-5-28(m)

<sup>55</sup> Community Emergency Response Teams - [http://www.citizencorps.gov/cert/training\\_mat.shtm](http://www.citizencorps.gov/cert/training_mat.shtm), Medical Reserve Corps - [https://medicalreservecorps.gov/File/TASeries/5-1\\_Special\\_Topics\\_RiskMgmt\\_\(FINAL\).pdf](https://medicalreservecorps.gov/File/TASeries/5-1_Special_Topics_RiskMgmt_(FINAL).pdf); Fire Corps - <http://www.firecorps.org/academy>