



# Utilizing Volunteers in Emergency Response

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## ***Addressing Liability and Managing the Risk in West Virginia June 2012***

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# Who are Emergency “Volunteers”?

- **Individuals (not always unpaid)**
  - **Nonprofit organizations**
    - **Businesses**
  - **Organized volunteer teams**



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# What Functions do Emergency “Volunteers” Perform?

Shelter  
Operation

Premises

Mass  
Care

Supply  
Chain  
Management

Search &  
Rescue

Case  
work

Communication



Education



Inspections

Donations  
Management

Volunteer  
Management

Training, drills  
& Exercises

Transportation

# What are the Concerns?

## *The volunteer may cause harm*

**Bodily injury**

**Personal Injury**

**Property damage**

**Intentional or wrongful acts**

**Vehicle accidents**

**Professional errors/omissions**

## *The law may limit the volunteer's activities*

**Licenses**

**Permits**

**Certificates**

## *The volunteer may be harmed*

**Injury**

**Illness**

**Death**

**Property damage**

**Discrimination**



# What are the Concerns?

## Direct consequences

- Damage awards
- Settlements
- Costs of legal defense
- Loss of property
- Loss of personnel

May be some protection

## Indirect consequences

- Damage to reputation
- Loss of support & funding
- Loss of partnerships
- Diminished volunteer base
- Higher insurance premiums

No protection

Chilling effect of all the above

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# To Whom Does Liability Matter?

**Governmental agencies**

**Organizers of volunteer programs**

**Business and nonprofit organizations**

**Employers of volunteers**

**Individual volunteers**

**Supervisors and trainers of volunteers**

**Donors of premises, equipment & supplies**

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# Types of Liability Protection

## Workers' Compensation

A system of statutory benefits for workers who are injured during covered employment

## Immunity

Exemption from civil liability in described circumstances

## Indemnity

Assumption of financial responsibility for liability of someone else

## License, Certificate & Permit Recognition

Special recognition of emergency workers' professional and trade credentials

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# What to Look for in a Statute

**Who is covered?**

**Are there prerequisites for coverage?**

**Are there any important defined terms?**

**Are there any exclusions?**

**What does the statute do for those covered?**

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# What Liability Protection is Available?

## Workers' Compensation Act

### Injury to Volunteers

**Issue 1:** Coverage: mandatory v. optional

**Issue 2:** Identify the employer

**Issue 3:** Average weekly wage

**Issue 4:** Other available injury compensation

# What Liability Protection is Available?

## Workers' Compensation Act

### Injury to Volunteers

**Issue 1:** Coverage: Mandatory v. optional

**Answer:**

**Must be determined on case by case basis**

- Type of organization and function is important
- Statutory and regulatory language sometimes unclear

# What Liability Protection is Available?

## Workers' Compensation Act

### Injury to Volunteers

**Issue 1:** Coverage: Mandatory v. optional

#### Coverage mandatory:

- **Members of mine rescue teams assisting in mine accidents** with the consent of the owner who, in such case, shall be deemed the employer, or at the direction of the department of mines. §23-2-1a(a)(4)
- **All forest firefighters assisting in the prevention, confinement and suppression of any forest fire** under the supervision of the director of the department of natural resources or a designated representative. §23-2-1a(a)(5)



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# What Liability Protection is Available?

## Workers' Compensation Act

### Injury to Volunteers

**Issue 1:** Coverage: Mandatory v. optional

#### Coverage Optional:

- **Volunteer rescue squads, police auxiliaries, and EMS organizations** created/ sponsored by government entities. §23-2-1(b)(7) & 85 CSR 8-4
- **Nonprofit and volunteer organizations.** 85 CSR 8-8-3
- **Churches.** §23-2-1(b)(5) & 85 CSR 8-4.3d (Churches are exempt from mandatory workers' compensation)

# What Liability Protection is Available?

## Workers' Compensation Act

### Injury to Volunteers

**Issue 1:** Coverage: mandatory v. optional

#### **Benefit of providing coverage when it is optional:**

- Reduces upside exposure - exclusive remedy
- Exemption of employer from tort liability for injuries to covered volunteers.  
§23-2-6
- Exemption of fellow employees from tort liability for injuries and if does not inflict an injury **with deliberate intention**.
  - §23-2-6A
  - SB 458 & HB 4479

**Prerequisite** - If coverage is optional, employer must give notice of the coverage to the covered workers and if they remain employed, they are considered to have waived common law damages.

# What Liability Protection is Available?

## Workers' Compensation Act

### Injury to Volunteers

**Issue 1:** Coverage: mandatory v. optional

#### Challenges:

- Will anyone sell you coverage?
- Where will you get the money to pay for it?
- Will anyone work with you if you don't have it?

# What Liability Protection is Available?

## Workers' Compensation Act

### Injury to Volunteers

#### Issue 1: Coverage: Mandatory v. optional?

#### Coverage required for volunteers as “employees”

Government entities, including the state and political subdivisions, **volunteer fire departments or companies, and emergency service organizations** as defined in the Homeland Security and Emergency Management Act (HSEMA) must cover “employees”.

HSEMA organizations are:

- Local emergency service organizations
- Regional emergency service organizations
- Mobile support units

§23-2-1(a), §15-5-1 et seq.



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# What Liability Protection is Available?

## Workers' Compensation Act

### Injury to Volunteers

**Issue 1:** Coverage: Mandatory v. optional?

**Gray areas §23-2-1(a), §15-5-1 et seq.**

- Non-operational volunteers for volunteer fire departments
- “Emergency services organizations” not defined
- Whose workers’ compensation coverage?



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# What Liability Protection is Available?

## Workers' Compensation Act

### Injury to Volunteers

**Issue 1:** Coverage: Mandatory v. optional?

#### Protect your volunteers

- Do not assume that an organization that you believe is required to provide workers' compensation coverage actually does so – ask for evidence
  - If there is workers' compensation coverage, be sure that volunteers are covered, not just paid employees
  - Do not assume your particular organization is (or is not) required to provide workers' compensation coverage – consult with an experienced attorney
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# What Liability Protection is Available?

## Workers' Compensation Act

### Injury to Volunteers

#### Issue 2: Identify the employer

Is the regular employer responsible for workers' compensation for emergency volunteers?

- Yes, if the volunteer's emergency services activities are part of the volunteer's job and he or she is being paid by the regular employer during those activities.
- No, if the volunteer's emergency services activities are a personal activity unrelated to employment responsibilities.

If both the regular employer and the emergency services organization are involved and have workers' compensation coverage, responsibility may have to be negotiated or litigated.

**Consider:** An organization lending its employees should consider a written agreement with the emergency services organization that transfers control of and responsibility for the employees during activation.

# What Liability Protection is Available?

## Workers' Compensation Act

### Injury to Volunteers

#### Issue 3: Average weekly wage

- Workers' compensation benefits for covered, unpaid volunteers are based on the volunteer's earnings "wherever earned" i.e. at his or her regular job. §23-4-14(a)
  - Benefits are subject to statutory maximums and minimums based on the state average weekly wage. §23-4-6
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# What Liability Protection is Available?

## Workers' Compensation Act

### Injury to Volunteers

**Issue 4:** What other injury compensation might be available for injured emergency services volunteers?

- **Accidental injury, accident and sickness, or accidental death and dismemberment insurance**
- Health and disability insurance
- Motor vehicle insurance (vehicle owner or adverse party)
- Personal injury claim or lawsuit
  - Third parties
  - In most situations, not against an employer that provides workers' compensation, or its officers, managers, agents, representative or employees

# What Liability Protection is Available?

## Homeland Security & Emergency Management Act

### Immunity

#### Immunity is never absolute

**All immunity statutes limit the scope of immunity to ensure that persons with bad intent are not protected. Examples of excluded behavior include:**

- Willful and wanton misconduct
- Bad faith (or not in good faith)
- Gross negligence
- Intentional disregard for the safety of others
- Immunity only for “negligence”
- Recklessness
- Malicious purpose
- Intentional misconduct

# What Liability Protection is Available?

## Homeland Security & Emergency Management Act

### Immunity

#### Immunity for emergency services workers

**Duly qualified emergency service workers** are not liable for **injury, death or property damage** resulting from their **activities in compliance or in a reasonable attempt to comply with the Homeland Security & Emergency Management Act (HSEMA)**, in the **absence of willful misconduct**.

The state, its political subdivisions and their agencies are also immune.

§15-5-11(a)

This section also provides that license requirements for any professional, mechanical or other skills do not apply to an authorized emergency service worker practicing those skills in an emergency.

§15-5-11(b)

# What Liability Protection is Available?

## Homeland Security & Emergency Management Act

### Homeland Security & Emergency Management Act

#### Who is a “duly qualified emergency service worker”?

- **Duly qualified** full or part time paid, **volunteer** or auxiliary employee of this state, or any other state, territory, possession or the District of Columbia, of the federal government, of any neighboring country or political subdivision thereof, or of any agency or organization **performing emergency services in this state subject to the order or control of or pursuant to the request of the state or any political subdivision.**
- **Duly qualified instructors and properly supervised students** in recognized educational programs where emergency services are taught.
- A **member of any duly qualified mine rescue team** designated by a mine operator under the Code and who is performing emergency rescue services.

§15-5-11(c)

# What Liability Protection is Available?

## Homeland Security & Emergency Management Act

### Homeland Security & Emergency Management Act

#### What are “emergency services”?

**Preparation for and carrying out of all emergency functions to protect, respond and recover, to prevent, detect, deter and mitigate, to minimize and repair injury and damage resulting from disasters.** Emergency functions include:

- Fire fighting, police
- Medical and health, emergency welfare, housing, community facilities
- Communications, evacuation, emergency transportation
- Restoration of utilities
- Special weapons defense (chemical, radiological and other)
- **Activities necessary or incidental to preparation or carrying out of above**

§15-5-2(a)



# What Liability Protection is Available?

## Homeland Security & Emergency Management Act

### Homeland Security & Emergency Management Act

What are “disasters”?

What is “disaster recovery”?

What is a “political subdivision”?

- A **disaster** is the **occurrence or imminent threat of widespread or severe damage, injury or loss of life or property** resulting from any natural or terrorist or man-made cause... §15-5-2(h)
- **Disaster recovery** includes activities **before, during or after a disaster** to provide, or to participate in the provision of **emergency services**, temporary housing, residential housing, essential business activities and community facilities. §15-5-2(i)
- A **political subdivision** is any county or municipal corporation in West Virginia §15-5-2(d)

# What Liability Protection is Available?

## Homeland Security & Emergency Management Act

### Homeland Security & Emergency Management Act

#### Requirements for association with a homeland security or emergency service organization

- Must not:
  - have been convicted of a felony
  - advocate now or in the past government overthrow by violence
  - be currently charged or convicted of a subversive act against the U.S.
- Must:
  - undergo a background check.
  - take a written loyalty oath as set forth in the statute

§15-5-15

**Question: Do these requirements factor into “duly qualified emergency services worker”?**

# What Liability Protection is Available?

## Homeland Security & Emergency Management Act

### Homeland Security & Emergency Management Act

#### Intrastate Mutual aid

#### Statewide mutual aid system

- License, certificate and permit recognition
- 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
- 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
  - **Additional state and federal benefits** available for line of duty deaths

§15-5-28(i), (l) and (m)

# What Liability Protection is Available?

## Homeland Security & Emergency Management Act

### Homeland Security & Emergency Management Act

#### Interstate and Intrastate Mutual aid

**Mobile Support Units.** Units created and deployed by the Governor within or outside West Virginia to reinforce emergency service organizations in stricken areas. Personnel who are not employed by the state or a political subdivision have the **same rights and immunities as state employees.** §15-5-7

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# What Liability Protection is Available?

## Homeland Security & Emergency Management Act

### Homeland Security & Emergency Management Act

#### Interstate Mutual aid

**Duly qualified emergency service workers.** When performing duties in West Virginia pursuant to a lawful agreement, compact or arrangement for mutual aid and assistance to which West Virginia or a political subdivision is a party, have the **same power, duties, immunities and privileges they would have in their own state, province or political subdivision.** §15-5-11(d)



# What Liability Protection is Available?

## Homeland Security & Emergency Management Act

### Homeland Security & Emergency Management Act

#### Interstate Mutual aid - Emergency Management Assistance Compact Articles V & VI

- Provides immunity for an **assisting state and that state's officers or employees** when they are aiding a requesting state
- Protects only acts that are in good faith, and excludes willful misconduct, gross negligence, or recklessness
- Recognizes **licenses, certificates or permits** issued by the responding state for professional, mechanical or other skills requested by the state receiving aid (subject to Governor's limitations)

§15-5-22

Note: The Mobile Support Units statute, W. Va. Code §15-5-7, provides a basis for recognizing members of these units as **state employees** when deployed

# What Liability Protection is Available?

## Homeland Security & Emergency Management Act

### Homeland Security & Emergency Management Act

#### Donors of premises for shelter

- **“Persons”** who **own or control** real estate or other premises (“Person” includes corporations, volunteer organizations and other entities – see §15-5-2(k))...
- Who **voluntarily and without compensation** permit the designation or use of all or part of the real estate or premises...
- To **shelter persons** during an **actual, impending, 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**

§15-5-12

**Question: What about injuries to shelter workers?**

# What Liability Protection is Available?

## Good Samaritan/Tort laws

### Good Samaritan/Tort Laws

#### Aid to victims of accident and crime

Limited immunity from liability for civil damages for good faith acts and omissions of persons who render **emergency care** to a **victim** at the **scene of an accident or crime**

- Immunity for **individuals**, including those licensed to practice medicine or dentistry...
- Immunity applies to **emergency care**
- Care must be provided **at the scene of an accident or crime**

§55-7-15

**Question: What about illnesses and medical emergencies not related to accident or crime?**



# What Liability Protection is Available?

## Good Samaritan/Tort laws

### Public Health Law

#### Automated external defibrillator (AED)

Limited immunity from liability for civil damages for acts and omissions of persons in rendering emergency medical care or treatment involving the use of an AED

- For “**anticipated operator**” (someone trained per the statute who utilizes an AED that is part of an early defibrillation program), immunity conditioned on the AED program being in compliance with the statute and the anticipated user gratuitously and in good faith rendering emergency care using the AED other than in the course of the operator’s employment or profession as a health care provider
- For “**unanticipated operator**”, immunity conditioned on gratuitously and in good faith rendering emergency care using the AED
- No gross negligence

§16-4D-4

# What Liability Protection is Available?

## Good Samaritan/Tort laws

### Good Samaritan/Tort Laws

#### Ski patrol rendering emergency care

Limited immunity from civil damages for good faith acts and omissions when providing **emergency aid or care** to an injured or ill person during patrol, **at the scene** of a rescue operation or **while transporting** for transfer to an emergency medical center or hospital

- Must be a **member in good standing** of a **national ski patrol system** (a national organization whose members are **uncompensated** - excluding facility access, amenities, gifts and discounts - **and required to train in safety and emergency medical treatment**)

§55-7-16



# What Liability Protection is Available?

## Good Samaritan/Tort laws

### Good Samaritan/Tort Laws

#### Immunity from liability for trained hazardous substance response personnel

Limited immunity from civil damages for good faith acts and omissions in the course of **rendering advice or assistance without remuneration** at the scene of an **actual or threatened discharge of a hazardous substance**

- Must be **trained** in a qualified program of hazardous substance emergency response certified by the state fire marshal
- Limited immunity protects a qualified person who receives reimbursement for out of pocket costs or compensation from regular employer while providing advice or assistance
- “Hazardous substances” defined in statutes/regulations

§55-7-17



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# What Liability Protection is Available?

## Good Samaritan/Tort laws

### Good Samaritan/Tort laws

#### Good Samaritan Food Donation Act

##### Persons or corporations who donate food or grocery products

Immunity for a “person” (includes a wide variety of organizations and entities) , “gleaner”, and nonprofit organization 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/received in good faith for free distribution to the needy. Excludes gross negligence and intentional misconduct. §55-7D-1 through 5 - §55-7D-3

##### Landowners or occupiers who allow collection or gleaning of donations

Protects landowners or occupiers from **civil or criminal liability** for injury or death to a gleaner or representative of a nonprofit while collecting or gleaning food on the landowner’s property. Excludes gross negligence and intentional misconduct.

§55-7D-4



# What Liability Protection is Available?

## Governmental Tort Claims Act

### Governmental Tort Claims and Insurance Reform Act

#### Immunity from liability for employees of political subdivisions

An **employee of a political subdivision** is immune from liability unless one of the following applies:

- Acts or omissions were **manifestly outside the scope of employment or official responsibilities**, or
- Acts or omissions were with **malicious purpose, in bad faith or in a wanton or reckless manner**, or
- Liability is expressly imposed by the West Virginia Code

§29-12A-5

Immunity does not apply to **contractual liability, employment practices and labor relations, violations of the constitution or statutes of the United States.**

§29-12A-18

# What Liability Protection is Available?

## Governmental Tort Claims Act

### Governmental Tort Claims and Insurance Reform Act

#### Who is an “employee of a political subdivision”?

**Employees** include employees or servants, **whether compensated or not**, whether full-time or not, who are **authorized and acting within the scope** of employment for the political subdivision.

**Political subdivisions** include **volunteer fire departments and emergency service organizations** as recognized by an appropriate political body and authorized by law to perform a governmental function. (see §15-5-11 – emergency service activities are governmental functions.)

**Thus, unpaid employees (volunteers) of recognized and authorized volunteer fire departments and emergency service organizations have immunity.**

§29-12A-3

# What Liability Protection is Available?

## Governmental Tort Claims Act

### Governmental Tort Claims and Insurance Reform Act

#### What responsibility does the political subdivision have for the volunteers?

The **political subdivision can be liable as an organization** for its volunteer's acts or omissions, even if the volunteer is immune.

§29-12A-4 & 5

The political subdivision is responsible to:

- **Defend** a volunteer who acted in good faith and “not manifestly outside” the scope of employment/responsibility.
- **Indemnify and hold harmless a volunteer** from any judgment arising from an act in good faith and within the scope of employment/official responsibility.

§29-12A-11

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# What Liability Protection is Available?

## Volunteer Protection Laws

### Volunteer Protection Laws

#### Limited civil liability of qualified directors

Limited immunity from civil liability for negligent acts and omissions by **qualified directors** performing **managerial functions without compensation** for a **volunteer organization**

- Excludes gross negligence and operation of motor vehicles
- Volunteer organization or entity not immune for negligent acts of director

§55-7C-3

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# What Liability Protection is Available?

## Volunteer Protection Laws

### Volunteer Protection Laws

#### Limited civil liability of qualified directors

**Managerial functions** are governing and controlling the organization, excluding physical or manual handling or use of tangible property, and the direct guidance or supervision of persons.

**Qualified directors** serve without compensation (other than expense reimbursement) as an officer, member or director of a volunteer organization or entity.

**Volunteer organization or entity** includes the state, political subdivisions and nonprofit organizations that have one of the purposes listed in W. VA. Code

§55-7C-2

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# What Liability Protection is Available?

## Volunteer Protection Laws

### Volunteer Protection Laws

#### Federal Volunteer Protection Act of 1997

Limited immunity for **individuals** who work as **uncompensated** volunteers for **government agencies and nonprofit organizations**

- Volunteers must be **registered** with such an organization and acting within the scope of their responsibilities
- Protects only **individual volunteers**, not their organizations
- Volunteers must be properly **licensed, certified, or authorized** by the appropriate authorities for the activities in the state where the harm occurred
- Excludes liability arising from willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer
- Excludes harm caused by **operation of a vehicle** for which the law requires that the operator be licensed or have insurance

# What Liability Protection is Available?

Other

## Other Possible Liability Protection

- Homeowner' s, renter' s, and personal umbrella insurance
  - Commercial, general or public entity liability insurance
  - Public entity self-insured plan
  - Professional liability insurance
  - Automobile liability insurance
  - Liability insurance for directors and officers or public officials
  - Agreements
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# How Can Emergency Volunteer Programs Manage Risk?

## Components of Risk Management

### **Risk identification & assessment**

*What can go wrong and the likely consequences*

### **Risk “control”/mitigation**

*Reduce losses and their consequences*

*Comply with the law*

*Enhance the program’s ability to fulfill its mission*

### **Risk financing**

*Pay for losses that occur*

# How Can Emergency Volunteer Programs Manage Risk?

## Risk Financing - Nothing Provides 100% Protection

Statutes

Insurance

Agreements with others

**NO GUARANTEES!**

# How Can Emergency Volunteer Programs Manage Risk?

## Risk Identification & Assessment

Identify possible liability events

Assess the likelihood and consequences

Establish priorities



# How Can Emergency Volunteer Programs Manage Risk?

## Risk “Control”/Mitigation

Screening and selecting volunteers & affiliates

Preparing volunteers for their roles, i.e. training, safety

Managing volunteers, i.e. supervising



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# Conclusion

## **What you can do now to address liability**

**Talk to leaders of your organization and sponsoring agency:  
know what is actually being done**

**Find a legal advisor**

**Manage the program's risk**

**Give volunteers an accurate picture**

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