Utilizing Volunteers in Emergency Response

Addressing Liability and Managing the Risk in West Virginia
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Who are Emergency “Volunteers”? 

- Individuals (not always unpaid)
- Nonprofit organizations
- Businesses
- Organized volunteer teams
What Functions do Emergency “Volunteers” Perform?

- Shelter Operation
- Premises
- Mass Care
- Supply Chain Management
- Communication
- Case work
- Volunteer Management
- Training, drills & Exercises
- Transportation
- Search & Rescue
- Education
- Inspections
- Donations Management

FEMA News Photos
## What are the Concerns?

### The volunteer may cause harm

- Bodily injury
- Property damage
- Vehicle accidents
- Personal Injury
- Intentional or wrongful acts
- Professional errors/omissions

### The volunteer may be harmed

- Injury
- Death
- Illness
- Discrimination
- Property damage

### The law may limit the volunteer’s activities

- Licenses
- Permits
- Certificates
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
## To Whom Does Liability Matter?

<table>
<thead>
<tr>
<th>Category</th>
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<tbody>
<tr>
<td>Governmental agencies</td>
</tr>
<tr>
<td>Organizers of volunteer programs</td>
</tr>
<tr>
<td>Business and nonprofit organizations</td>
</tr>
<tr>
<td>Employers of volunteers</td>
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<tr>
<td>Individual volunteers</td>
</tr>
<tr>
<td>Supervisors and trainers of volunteers</td>
</tr>
<tr>
<td>Donors of premises, equipment &amp; supplies</td>
</tr>
<tr>
<td>Types of Liability Protection</td>
</tr>
<tr>
<td>-------------------------------</td>
</tr>
<tr>
<td><strong>Workers’ Compensation</strong></td>
</tr>
<tr>
<td>A system of statutory benefits for workers who are injured during covered employment</td>
</tr>
<tr>
<td><strong>Immunity</strong></td>
</tr>
<tr>
<td>Exemption from civil liability in described circumstances</td>
</tr>
<tr>
<td><strong>Indemnity</strong></td>
</tr>
<tr>
<td>Assumption of financial responsibility for liability of someone else</td>
</tr>
<tr>
<td><strong>License, Certificate &amp; Permit Recognition</strong></td>
</tr>
<tr>
<td>Special recognition of emergency workers’ professional and trade credentials</td>
</tr>
<tr>
<td>Question</td>
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<tr>
<td>-------------------------------------------------------------------------</td>
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<tr>
<td>Who is covered?</td>
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<tr>
<td>Are there prerequisites for coverage?</td>
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<tr>
<td>Are there any important defined terms?</td>
</tr>
<tr>
<td>Are there any exclusions?</td>
</tr>
<tr>
<td>What does the statute do for those covered?</td>
</tr>
</tbody>
</table>
### Injury to Volunteers

<table>
<thead>
<tr>
<th>Issue 1:</th>
<th>Coverage: mandatory v. optional</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issue 2:</td>
<td>Identify the employer</td>
</tr>
<tr>
<td>Issue 3:</td>
<td>Average weekly wage</td>
</tr>
<tr>
<td>Issue 4:</td>
<td>Other available injury compensation</td>
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</tbody>
</table>
### Injury to Volunteers

<table>
<thead>
<tr>
<th>Issue 1: Coverage: Mandatory v. optional</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Answer:</strong></td>
</tr>
<tr>
<td><strong>Must be determined on case by case basis</strong></td>
</tr>
<tr>
<td>• Type of organization and function is important</td>
</tr>
<tr>
<td>• Statutory and regulatory language sometimes unclear</td>
</tr>
</tbody>
</table>
### 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)
### 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)
## 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.
## 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?
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.
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?
### 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.
### 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.
# 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
<table>
<thead>
<tr>
<th>Injury to Volunteers</th>
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<tbody>
<tr>
<td><strong>Issue 4:</strong> What other injury compensation might be available for injured emergency services volunteers?</td>
</tr>
<tr>
<td>• Accidental injury, accident and sickness, or accidental death and dismemberment insurance</td>
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<tr>
<td>• Health and disability insurance</td>
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<tr>
<td>• Motor vehicle insurance (vehicle owner or adverse party)</td>
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<tr>
<td>• Personal injury claim or lawsuit</td>
</tr>
<tr>
<td>➢ Third parties</td>
</tr>
<tr>
<td>➢ In most situations, not against an employer that provides workers’ compensation, or its officers, managers, agents, representative or employees</td>
</tr>
</tbody>
</table>
### 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
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)
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)
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)
### Homeland Security & Emergency Management Act

<table>
<thead>
<tr>
<th>What are “disasters”?</th>
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<tbody>
<tr>
<td>What is “disaster recovery”?</td>
</tr>
<tr>
<td>What is a “political subdivision”?</td>
</tr>
</tbody>
</table>

- **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)
### 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”?
### 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)
**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
### 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)
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
**Homeland Security & Emergency Management Act**

<table>
<thead>
<tr>
<th>Donors of premises for shelter</th>
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<tbody>
<tr>
<td>• “<strong>Persons</strong>” who <strong>own or control</strong> real estate or other premises (“<strong>Person</strong>” includes corporations, volunteer organizations and other entities – see §15-5-2(k))…</td>
</tr>
<tr>
<td>• Who <strong>voluntarily and without compensation</strong> permit the designation or use of all or part of the real estate or premises…</td>
</tr>
<tr>
<td>• To <strong>shelter persons</strong> during an <strong>actual, impending, mock or practice emergency</strong>…</td>
</tr>
<tr>
<td>• Are not <strong>civilly liable</strong> for <strong>negligently causing death or injury</strong> to any <strong>sheltered person</strong> on or about the real estate or <strong>damage to their property</strong></td>
</tr>
</tbody>
</table>

§15-5-12

**Question:** What about injuries to shelter workers?
### 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?
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
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
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
### 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
### 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
**Governmental Tort Claims and Insurance Reform Act**

<table>
<thead>
<tr>
<th><strong>Who is an “employee of a political subdivision”?</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Employees</strong> include employees or servants, <strong>whether compensated or not</strong>, whether full-time or not, who are <strong>authorized and acting within the scope</strong> of employment for the political subdivision.</td>
</tr>
<tr>
<td><strong>Political subdivisions</strong> include <strong>volunteer fire departments and emergency service organizations</strong> 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.)</td>
</tr>
<tr>
<td>Thus, unpaid employees (volunteers) of recognized and authorized volunteer fire departments and emergency service organizations have immunity.</td>
</tr>
</tbody>
</table>

§29-12A-3
What Liability Protection is Available?

**Governmental Tort Claims Act**

<table>
<thead>
<tr>
<th>Governmental Tort Claims and Insurance Reform Act</th>
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<tbody>
<tr>
<td><strong>What responsibility does the political subdivision have for the volunteers?</strong></td>
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</tbody>
</table>

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 is the scope of employment/responsibility?**

The scope of employment/responsibility varies depending on the role and duties of the volunteer. Generally, it includes activities that are within the mission of the political subdivision and are authorized by the subdivision. The determination of the scope of employment/responsibility may involve legal analysis and can be challenging.

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**What are the defenses available to the political subdivision?**

The political subdivision may have defenses based on the good faith and due diligence of the volunteer. These defenses include the following:

- The volunteer acted in good faith.
- The volunteer’s act or omission was within the scope of employment/responsibility.
- The volunteer did not manifestly exceed the scope of employment/responsibility.

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**What are the indemnification provisions?**

The political subdivision is responsible for indemnifying the volunteer from any judgment arising from acts within the scope of employment/responsibility. This includes paying any judgments, costs, and attorney fees reasonably incurred by the volunteer in defending against the claim.

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**What are the potential consequences of failing to comply with the indemnification provisions?**

Failing to comply with the indemnification provisions can result in the loss of a defense, potentially exposing the volunteer to personal liability.

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**What are the implications for volunteer liability reform?**

The reform aims to clarify and simplify the process of volunteer immunity and liability, ensuring that volunteers are protected when acting within the scope of their duties.

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**What resources are available for further information?**

Further information can be found in the governmental codes and regulations, as well as legal resources provided by the political subdivision.

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**What are the potential benefits of volunteer liability reform?**

The benefits include reduced liability for volunteers, increased participation in community services, and a more streamlined legal process for both the volunteer and the political subdivision.

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**What are the potential drawbacks of volunteer liability reform?**

The drawbacks may include increased complexity and cost for the political subdivision, potential confusion among volunteers, and the challenge of defining the scope of employment/responsibility.

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**What is the future of volunteer liability reform?**

The future of volunteer liability reform will depend on legislative actions, public support, and the effectiveness of the current provisions in addressing the needs of political subdivisions and volunteers.
### Volunteer Protection Laws

<table>
<thead>
<tr>
<th>Limited civil liability of qualified directors</th>
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<tbody>
<tr>
<td>Limited immunity from civil liability for negligent acts and omissions by <strong>qualified directors</strong> performing <strong>managerial functions without compensation</strong> for a <strong>volunteer organization</strong></td>
</tr>
<tr>
<td>• Excludes gross negligence and operation of motor vehicles</td>
</tr>
<tr>
<td>• Volunteer organization or entity not immune for negligent acts of director</td>
</tr>
<tr>
<td>§55-7C-3</td>
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</table>
Volunteer Protection Laws

<table>
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<th>Limited civil liability of qualified directors</th>
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<tr>
<td><strong>Managerial functions</strong> are governing and controlling the organization, excluding physical or manual handling or use of tangible property, and the direct guidance or supervision of persons.</td>
</tr>
<tr>
<td><strong>Qualified directors</strong> serve without compensation (other than expense reimbursement) as an officer, member or director of a volunteer organization or entity.</td>
</tr>
<tr>
<td><strong>Volunteer organization or entity</strong> includes the state, political subdivisions and nonprofit organizations that have one of the purposes listed in W. VA. Code §55-7C-2</td>
</tr>
</tbody>
</table>
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
### 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
# Components of Risk Management

<table>
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<tbody>
<tr>
<td><strong>Risk identification &amp; assessment</strong></td>
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<tr>
<td><em>What can go wrong and the likely consequences</em></td>
</tr>
<tr>
<td><strong>Risk “control”/mitigation</strong></td>
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<tr>
<td><em>Reduce losses and their consequences</em></td>
</tr>
<tr>
<td><em>Comply with the law</em></td>
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<tr>
<td><em>Enhance the program’s ability to fulfill its mission</em></td>
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<tr>
<td><strong>Risk financing</strong></td>
</tr>
<tr>
<td><em>Pay for losses that occur</em></td>
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How Can Emergency Volunteer Programs Manage Risk?

<table>
<thead>
<tr>
<th>Risk Financing - Nothing Provides 100% Protection</th>
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<tbody>
<tr>
<td>Statutes</td>
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<tr>
<td>Insurance</td>
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<tr>
<td>Agreements with others</td>
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NO GUARANTEES!
How Can Emergency Volunteer Programs Manage Risk?

<table>
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<th>Risk Identification &amp; Assessment</th>
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<tbody>
<tr>
<td>Identify possible liability events</td>
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<tr>
<td>Assess the likelihood and consequences</td>
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<tr>
<td>Establish priorities</td>
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FEMA News Photo
## Risk “Control”/Mitigation

<table>
<thead>
<tr>
<th>Screening and selecting volunteers &amp; affiliates</th>
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<tbody>
<tr>
<td>Preparing volunteers for their roles, i.e. training, safety</td>
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<tr>
<td>Managing volunteers, i.e. supervising</td>
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</tbody>
</table>

How Can Emergency Volunteer Programs Manage Risk?
## What you can do now to address liability

<table>
<thead>
<tr>
<th>Action</th>
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<tbody>
<tr>
<td>Talk to leaders of your organization and sponsoring agency:</td>
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<tr>
<td>know what is actually being done</td>
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<tr>
<td>Find a legal advisor</td>
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<tr>
<td>Manage the program’s risk</td>
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<tr>
<td>Give volunteers an accurate picture</td>
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