

# Milwaukee Legal Initiative for Nonprofit Corporations (M-LINC)



## LEGAL ISSUES RELATING TO THE USE OF VOLUNTEERS & LEGAL PROTECTIONS FOR VOLUNTEERS

NONPROFIT CENTER OF MILWAUKEE  
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# A Reminder about M-LINC



- M-LINC is the Milwaukee Legal Initiative for Nonprofit Corporations
- Housed at Marquette University Law School
- Launched in September 2008
- Karin Holmberg Werner, JD, is the director of M-LINC
- Currently serving as a resource for Wisconsin nonprofits with legal questions
- M-LINC coordinates FREE legal advice and educational programs on legal issues important to small and mid-sized nonprofits

# What are we going to discuss today?



- This program is aimed at ensuring that your organization:
  - Minimizes the risk associated with the use of volunteers; and
  - Is adequately informed about statutory legal protections for volunteers.

# In particular, we will discuss:



- What is a volunteer? Are individuals you deal with volunteers or employees?
- What laws apply to volunteers vs. employees?
- Should you screen potential volunteers and how?
- When and how can a nonprofit organization be held liable for the negligent acts of its volunteers?
- Can your volunteers be sued?
- What procedures can reduce the organization's risk of liability for the acts of volunteers?
- Federal and Wisconsin statutes that reduce or guard against volunteer liability.
- Basic steps to follow if your organization uses volunteers.

## Starting Point: The Importance of Volunteers



- Recent surge in volunteerism in the United States.
- Increasingly common practice among nonprofits of relying on volunteers and other unpaid staff (interns, trainees, and students).
- Dollar value of volunteer time in 2005 is estimated at \$280 billion.

# What is a Volunteer?



- Legal distinction between employees and volunteers.
- Traditionally only employees have been protected by employment laws – for example, laws that prohibit discrimination and govern wages – while volunteers have not.
- This distinction is not always clear, though, because the law looks beyond the labels employers give individuals or the individuals give themselves and examines the nature of the relationship between the individual performing services and the employer.
- Note: an employer is liable under the law for actions (and misdeeds) of volunteers to the same extent that it is liable for the actions of employees.

# Who's Who in the Office?



- Major categories of individuals working at a nonprofit: employee, volunteer, intern, trainee, and independent contractor.
- What if an employee volunteers his or services to the employer? What if the time is on a weekend?
- Employees may volunteer their services to the nonprofit employer only if the services are (i) not the same type of services the employee is employed to perform and (ii) the service takes place outside the employees normal working hours. Otherwise, the employee must be compensated accordingly.

# Employee



- Employee: an individual who performs services under the direction and control of an employer in exchange for compensation. Employers have many legal obligations to their employees (anti-discrimination laws, tax withholding laws, workers' compensation and unemployment insurance).
- E.g., Scott works from 9 to 5, biweekly paycheck from which federal and state taxes are withheld, W-2 form from employer at the end of the year.
- What if the position is grant funded?

# Volunteer



- Volunteer: an individual who without compensation or expectation of compensation, freely performs services at the direction of a nonprofit, usually on a part-time basis, and solely for his or her personal purpose or pleasure.
- Note: volunteers can perform a wide variety of services with different levels of authority. The key is that they have no expectation of getting paid for those services. But volunteers are entitled to receive monetary reimbursement for certain minimal expenses such as the costs of transportation and meals while volunteering.
- Neither federal nor state law defines at what point – or dollar amount – the payment of expenses to a volunteer by a nonprofit organization will cross the line between volunteer and employee. The case law does suggest, however, that providing significant benefits to volunteers, such as health insurance and/or room and board, may turn them into employees.

# Volunteer (Continued)



- Remember, the law looks to the facts and not the label assigned to the person.
- E.g., Sally works for a nonprofit three days a week between 10 and 3. She receives no compensation or benefits. At the end of each week, she is reimbursed for her weekly transportation costs.
- Note: If a volunteer is given significant non-wage benefits, the volunteer may be considered an employee under the law.

# Intern



- Not a legal term and no legal definition.
- Rather, interns are volunteers, trainees or employees.
- If services in exchange for compensation in the form of a wage or a stipend, then they are employees and they should be entered in the payroll system, paid at least minimum wage with appropriate taxes paid and withheld.
- If they are not receiving or expecting compensation, they are volunteers and can be reimbursed for minimal expenses such as travel and lunch.
- Note: no special exception to employment law rules due to the fact that the duration of the employment is short or the individual is a minor.

# Trainee



- Trainee: Unlike intern, the term trainee is found in employment law.
- Both federal and state laws provide an exemption from wage and hour laws for trainees. I.e., can pay trainees less than minimum wage.
- Trainee is a person engaged in bona fide training for future employment.
- Note: narrow exception, proceed carefully.
- The US Department of Labor requires that ALL of the following six criteria be met for an individual to be exempt as a trainee from the minimum wage and overtime provisions of the FLSA.
  - Training similar to vocational school or educational institution
  - Training for the benefit of the trainee or student.
  - Trainees do not displace regular employees, but work under their close observation.
  - No immediate advantages to the employer from the trainees activities.
  - Trainees are not necessarily entitled to a job at the conclusion of the training.
  - Employer and trainees understand that the trainees are not entitled to wages for the time spent in training. (Note: school credit or reasonable stipend to cover expenses is acceptable).

# Independent Contractor



- Workers who contract either orally or in writing with an employer to provide services under very limited supervision from the employer.
- Unlike the individuals discussed in the other sections of this chapter, independent contractors are classic “freelancers,” and they tend to work for a number of organizations at the same time.
- They, not the employer, are in control of the means, method and tools of their work.
- Upon payment, they will receive a Form 1099 from the employer and the independent contractor is responsible for paying all taxes.
- Note: Incorrectly classifying an employee as an independent contractor may subject the nonprofit to liability for failing to withhold taxes and violations of labor laws.

# Questions to ask to determine the category the individual fits into:



- Are we offering to pay something to this individual?
- If so, what are we offering to pay and why?
- What does the individual expect to gain from this experience, and does he expect to receive any compensation?
- What will the individual be doing for us, how often, and under whose supervision?
- On balance, who is benefiting the most from the relationship?

# Screening Potential Volunteers



- Key method for reducing volunteer-related liability.
- Nonprofits should give attention to the volunteer “hiring” process. The aim is to engage talented, dedicated volunteers, while reducing the risk of liability associated with a volunteer program. The following are suggested best practices:
  - Application
  - Interview
  - Position Description
  - Check References
  - Other Background Checks as Needed

# Volunteer Application



- Use written applications for volunteers. They provide information to help the organization assess the volunteer's experience and interest and also can be used, if necessary, to show that the organization made an effort to solicit truthful background information from the volunteer.
- SEE SAMPLE VOLUNTEER APPLICATION
- Information in application: contact information, relevant skills, prior employment, volunteer history, references and criminal conviction information.
- The application can also ask about areas of interest and preferred volunteer job duties to get the best match and to help improve chances that the volunteer will stay with the organization for the long term.
- Keep volunteer application in a personnel file and retain, if possible, for at least six years after the volunteer stops volunteering for the organization.

# Volunteer Interview



- To the extent possible, nonprofit managers should interview potential volunteers in a manner similar to potential employees.
- Purpose of the interview:
  - Describe the program and how it uses and benefits from volunteer services;
  - Explain the work the volunteer can expect to do;
  - Evaluate the person as a potential volunteer;
  - Assess the individual's main areas of interest and time commitment; and
  - Make clear that the person is interviewing for an unpaid position.
- Documentation: add interview notes to the volunteer's personnel file. This will provide evidence that the organization conducted a careful interview.
- Note: when volunteers will work closely with children, the elderly or other vulnerable populations, the organization should take special precautions. Perhaps have interview conducted by a specially trained professional (such as clinically trained social worker in Big Brother/Big Sister case).

# Position Description



- Clearly sets forth the organization's expectations of the volunteer and improves chances of a smooth relationship between the organization and the volunteer as the volunteer will know what is expected of him or her.
- May help increase volunteer retention.
- A clear position description will also decrease the possibility that the volunteer will undertake duties for which he or she has not received adequate training or supervision. This should limit the nonprofit's exposure to liability based on the misdeeds or negligence of the volunteer.
- **SEE SAMPLE VOLUNTEER POSITION DESCRIPTION**

# Reference Check and Background Checks



- Essential part of volunteer screening process.
- Gather at least three references on volunteer application or during interview. Get written consent for employer references, if appropriate.
- **SEE SAMPLE VOLUNTEER REFERENCE FORM**
- Documentation: Put information obtained from references in writing and in the volunteer's personnel file.
- Other background checks (criminal, credit, etc.):
  - \$25 to \$75 per applicant.
  - Evaluate whether this cost is a necessary expense based on a risk assessment of the volunteer's area of work.
  - May be necessary if volunteer will work with vulnerable populations, such as children.
  - Note: need applicant's consent before getting a credit report.
- **OVERALL POINT:** Nonprofits should – and, in some cases, must – take steps to make sure that the volunteers they use are reliable and trustworthy.

# Volunteer Compensation/Benefits: How Much is Too Much?



- Once a nonprofit takes on a volunteer, the organization must decide whether and, if so, how it may legally “compensate” the new volunteer. “Compensation” may be to defray the cost of volunteering, demonstrate gratitude or simply to provide an incentive for volunteering.
- This section will address legal limits on the type and amount of benefits that a nonprofit may provide to volunteers.

# No Specific Law Governing Volunteer Compensation



- No specific law on volunteer benefits.
- But federal regulations governing public sector volunteers, such as school coaches and volunteer firefighters, provide some guidance. Those regulations provide that a volunteer can be paid out-of-pocket expenses, reasonable benefits or a nominal fee to perform the services. Small fees or stipends are permitted but must be nominal (i.e., less than 20% of the hypothetical employee wage). Beyond that, you risk converting the volunteer to an employee.
- Look at total amount of payments made in the context of the particular situation.

# Best Practices for Volunteer Compensation



- **Key questions:**
  - Did volunteer expect or contemplate receiving compensation in exchange for performing services?
  - Did employer receive an immediate advantage from the work done by the individual?
  - Also look at what it would cost the employer to compensate someone else for those services.
- **Best Practices:**
  - Ask volunteers to submit receipts promptly for all expense reimbursements so that the organization can properly document these expenses.
  - Always use term “reimbursement of expenses”, not wage or stipend.
  - Track these reimbursed expenses separately from payroll.
  - No tax form required for these reimbursements.
  - If a nonprofit chooses not to reimburse a volunteer for volunteer-related expenses, the individual may be able to take an income tax deduction for that expense if directly connected to the volunteer services. If asked about this by a volunteer, the nonprofit should not give tax advice and should suggest the volunteer contact his or her accountant.
  - Note: time value of donated services is not deductible

# Setting Up the Volunteer Relationship



- Make clear (preferably in writing) that this is volunteering at will and that the nonprofit is free to discontinue the relationship at any time.
- The use of volunteers can increase the liability of the organization. Thus, organizations should terminate any relationship that does not serve the best interests of the organization.
- In order to avoid misunderstandings, the organization should make clear to the volunteer that the organization will periodically review the volunteer's performance and may let him or her go if problems arise or the organization's needs change. Incorporate this verbally and in writing in the interview and orientation of volunteers, as well as in an initial letter or agreement explaining the volunteer position.
- “While we hope your volunteer relationship with us will be a continued and rewarding one, we reserve the right to terminate this relationship at any time for any reason.”
- Reserve right to cut short term volunteer positions (summer) short, too.
- Clarifying this from the start helps to prevent misunderstandings and conflicts later on.

# Clarifying Financial Relationship



- Also, clarify financial relationship at the start of the volunteer's service.
- State (preferably in writing) that the position is an unpaid one and that the volunteer will not receive a wage, benefits, or other compensation in exchange for his or her services.
- If the nonprofit will be reimbursing the volunteer's expenses, or paying a stipend or training fee, the volunteer letter should identify the exact nature of the financial arrangement and state what type of documentation the organization will require for reimbursement. If the organization does not intend to reimburse expenses, the letter should indicate this.

# Volunteer Policies



- Policies: Nonprofit should consider also giving volunteer a volunteer code of conduct or volunteer policies and procedures manual when they begin work. The policies should cover the volunteer's responsibilities to the organization, such as consulting with supervisors, being on time, and maintaining confidentiality of client information. They should also repeat language about at will volunteering and state that volunteer is unpaid and not an employee.
- Other possible inclusions include policies on confidentiality, physical appearance, use of technology, smoking, drug use, absenteeism, safety and health and harassment.
- Include harassment policies in the volunteer training or orientation. Volunteers should know how to make a complaint or report any harassment.
- KEY: Make expectations clear from the outset to avoid later conflicts and potential liabilities.

# Volunteer Management



- Best practices in volunteer management to minimize potential liabilities and to retain good volunteers.
- Try to match the nonprofit's and volunteer's expectations as much as possible before work begins.
- Consider use of volunteer questionnaire in addition to application.
- Host required orientation session with copies of relevant policies or codes of conduct. Also discuss mission of organization, specific procedures, overall volunteer duties and responsibilities. Identify who at the organization is responsible for fielding volunteer concerns and questions.
- Provide regular trainings for continuing volunteers. Opportunity for volunteers to ask questions and to have policies reinforced. Model volunteer trainings on employee trainings. Require volunteers to attend trainings on anti-harassment policies.
- Supervise and evaluate volunteers on an ongoing basis.
- Must take action on a negative evaluation. Meet with volunteer and set up action plan for short timetable for improvement. If performance does not improve within that timeframe, the organization should terminate the relationship.
- Volunteer recognition: Awards ceremony, holiday cards, annual dinner, or thank-you notes. Helps with volunteer retention.

# Terminating the Volunteer Relationship



- Reckless or bad volunteers can cause expense and significant risks to the nonprofit. Terminating or releasing or letting go a poor-performing volunteer is crucial to the operation of an organization and the overall goal of limiting liability.
- Model volunteer terminations on employee terminations.
- Perhaps, first oral warning, then written warning, then let go on third instance of misconduct.
- Make clear that there may be instances of volunteer misconduct that warrant immediate termination without the progressive steps.
- Protocol for terminating volunteers similar to employees. Have more than one staff member attend the final meeting at which the individual is told of the termination, carefully document the reasons for the termination in the volunteer's personnel file, and have the volunteer return all keys and property of the organization. Possible exit interview to ask volunteer's opinion of how the volunteer program was managed.

# Volunteer as Agent of the Nonprofit



- Nonprofits should not hesitate to release a volunteer who exposes the nonprofit to liability. Nonprofits are liable for the acts and misdeeds of volunteers just as they are for employees.
- This section will address ways in which organizations can face liability for a volunteer's actions and ways in which organizations can protect themselves from such liability.
- Courts have traditionally held organizations liable for the actions of their volunteers when foreseeable injury caused by the negligence or the will of the volunteer. To be liable, there must be a volunteer relationship at the time of the injury and the volunteer must be acting within the scope of his or her volunteer position at the time of the injury.
- Note: negligence does not require bad intent. I.e, could be an accident.

# Volunteer as Agent of the Nonprofit (Continued)



- Nonprofits can also be held liable for the selection and retention of a volunteer who acts negligently or engages in other wrongful conduct. The organization may be found to have negligently retained a volunteer if the organization was in a position to have known that the volunteer posed an unreasonable risk of harm.
- Nonprofits can reduce the risk of harm and protect themselves from liability associated with the use of volunteers via processes discussed previously. Written application, conduct in-person interviews, check references, and possible assessment of candidate by a social worker and/or interview by organization's membership committee, etc.

# Volunteers and Anti-Discrimination Laws



- Anti-discrimination and human rights laws generally not applicable to volunteers. E.g., Title VII won't apply, unless significant benefits (i.e., close to a salary) and employer control over work.
- Americans With Disabilities Act – also generally only covers employees and not volunteers. Employee defined by ADA as person with job-related benefits, and the “employer” organization has a right to control the person’s work. If volunteer considered an employee under ADA, reasonable accommodation required unless doing so would cause undue hardship. E.g., if “employee” in wheelchair, must modify equipment, make existing employee facilities readily accessible, etc.
- **EXCEPTION:** Under the ADA, a “public accommodation” – an organization providing goods and services to the public – cannot deny disabled persons the opportunity to participate in or benefit from its publicly offered activities, goods or services. Organizations cited by the ADA as public accommodations include museums, galleries, libraries, schools, day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies, social service agencies, etc. This definition includes many nonprofits.

# Anti-Discrimination Laws (Continued)



- What if nonprofit has a disabled volunteer and its building is not fully accessible. Could that person bring a claim against the nonprofit under the ADA's public accommodation provisions? Although no court has ruled on this question to date, nonprofits should strive to accommodate volunteers with disabilities seeking to participate in their volunteer programs. If faced with a situation where the volunteer cannot be accommodated, a nonprofit should seek the advice of counsel before turning away the volunteer for reasons based on his or her disability.

# Potential Tax Liability for Misclassifying a “Volunteer”



- It is important for nonprofits to be sure that they are properly classifying their volunteers under the wage and hour and tax laws. If, for instance, a volunteer is receiving some form of remuneration in exchange for services, that remuneration might be deemed a wage by the IRS, for which back taxes and penalties can be assessed.
- Nonprofits with questions about “how much is too much” to give a volunteer or about how to properly classify a worker should consult with an accountant or attorney and then accurately document the arrangement.
- Potential liability:
  - Back wages if paid the “volunteer” sub-minimum wages
  - Un-withheld taxes: Social Security and Medicare, plus federal and state income taxes, plus interest
  - Plus potential liquidated damages and attorney’s fees
  - Plus potential civil and criminal penalties
- E.g. nonprofit put welfare recipients to work beautifying a city. Paid sub-minimum wages and helped “volunteers” locate housing. The participants sued for being paid sub-minimum wage and won. Court found the organization was violating the Fair Labor Standards Act by paying the participants sub-minimum wage. Found participants were performing actual work for a commercial purpose and were not just receiving job training or life skills counseling.

# Statutory Protections for Volunteers



- Generally volunteers are not personally liable for a corporation's debts, obligations, or liabilities. Nevertheless, a volunteer may be personally liable for harm caused by his or her own wrongful conduct unless there is some basis for limiting liability.
- Under Chapter 181 of the Wisconsin Statutes, volunteers for nonstock corporations are specifically protected against the risk of personal liability.
- Congress has also created a liability shield for volunteers by enacting the Volunteer Protection Act of 1997. This Act applies to volunteers for unincorporated associations, as well as nonprofit corporations, and provides even greater personal liability protections than the Wisconsin Statute. It immunizes, with some exceptions, individuals who do volunteer work for nonprofit organizations from liability for acts of ordinary negligence committed in the course of their volunteer work.
- Note: does not limit the liability of the organization to the person making the claim. Organization could still be held liable for actions of volunteer.

# Insurance as Extra Protection



- Regardless of how careful a nonprofit is, lawsuits may arise. Even baseless lawsuits can sap a nonprofit's resources. Insurance policies are an integral shield against liability costs.
- Insurance trades possibility of heavy loss for the certain, but more moderate and manageable, cost of insurance premiums.
- Types of Insurance to consider:
  - General liability insurance
  - Professional liability insurance
  - Directors and officers insurance – extend to employees and agents?
  - Workers compensation
  - Special event insurance
  - Automobile insurance
  - Volunteer accident insurance is the equivalent of workers compensation for employees. (Covers injuries sustained by volunteers in the course of their service to the nonprofit.) \*Organizations that place volunteers in positions in which they are likely to suffer physical injury, such as sports and recreation camps, may wish to consider purchasing this type of insurance.

# Insurance Continued



- General liability insurance – coverage in the event the nonprofit’s property is damaged or the nonprofit is sued by a third party for damages. Could occur if third party suffers injury due to the negligence of a nonprofit volunteer, such as a van driver injuring a client.
- Practical point: the nonprofit should fully disclose to the insurance broker or carrier the precise nature of the programs and services it provides and whether it uses volunteers in addition to employees. The nonprofit should ask the insurance broker or carrier if volunteers can be added to their existing general liability policies as “insureds,” so that insurance will cover injuries to third parties based on the negligent acts of volunteers.
- Professional liability insurance - Same as above, plus check to see if volunteers have their own professional liability insurance.

# Final Point



- Carefully screen, supervise and evaluate volunteers, and release them when necessary. These steps can protect the organization from liability for negligent acts of volunteers. Nevertheless, there are no guarantees of protection from lawsuits. Proper insurance coverage for volunteer activities is, therefore, essential.

# Future Plans for M-LINC



- Upcoming Educational Programs:
  - April 21<sup>st</sup> - Employment Law for Nonprofits (Nonprofit Center of Milwaukee)
  - June 2<sup>nd</sup> – Lobbying Restrictions for Nonprofits (Wisconsin Nonprofit Association Annual Summit)
- Please also check out M-LINC's website ([www.nonprofitlinc.org](http://www.nonprofitlinc.org))

# Thank You and Contact Information



Thank you for coming today.

M-LINC

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