perspectives
MY BENESCH MY TEAM
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A publication from
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Trends and topics in not-for-profit management

Not-for-Profit Spotlight

KidSMILES is a volunteer-led, not-for-profit dental clinic dedicated to providing quality dental care and education to children at an affordable cost to their families. The cornerstone of KidSMILES' efforts is a unique pediatric dental clinic in Columbus, OH.

The KidSMILES Clinic opened on December 18, 2012. Staffed by volunteer dentists, hygienists and other professionals, KidSMILES aims to serve children from working families who earn too much to qualify for Medicaid, but do not have private dental insurance.

Comprehensive dental care is provided, including:

- Dental examinations
- Radiographs
- Cleanings
- Fluoride treatments
- Sealants
- Cavity removal and restoration
- Extractions
- Endodontic treatment
- Space maintenance
- Harmful habit correction

KidSMILES has also teamed up with the Columbus Blue Jackets Foundation to implement an educational outreach program for central Ohio schools. During their school visits, the volunteers explain the benefits of good dental health and proper nutrition to the students.

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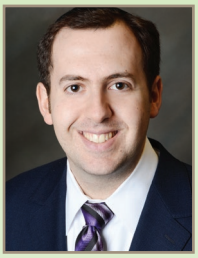
Liability Exposure for Volunteers



Daniel Meier

Volunteers working for an organization, especially those in the field of health care, are subject to liabilities. Fortunately both state and federal laws offer certain liability protection to volunteer professionals. However, these protections only go so far. A careful review of applicable law is critical for an organization and its volunteers to fully understand their exposure.

Federal Volunteer Protection Act

On the federal level, volunteers are protected under the Volunteer Protection Act (VPA), [42 U.S.C. § 14501]. Passed by Congress in 1997, the VPA provides all volunteers for not-for-profit organizations and government entities with protection from liability for harms caused by their acts or omissions while serving as volunteers. This federal statute preempts any conflicting state law, although states may enact broader protections.

Four requirements must be met for the law to apply:

- The volunteer is acting within the scope of his or her responsibilities.
- The volunteer is properly licensed, certified or authorized by the state to practice.
- The harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct or conscious indifference to the rights/safety of the person injured.
- The harm was not caused while the volunteer was operating a motor vehicle or other vehicle for which a license or insurance is required. [42 U.S.C. § 14503]

Notably, the liability limitations apply only to the volunteer (not to the organization). Further, "volunteer" includes individuals serving as directors, officers, trustees or a direct service volunteer. Volunteers must not receive compensation or anything in place of compensation that is in excess of $500. [42 U.S.C. § 14505(6)]

Under the VPA, two types of organizations qualify as not-for-profit organizations: (1) a 501(c)(3) organization as defined by the Internal Revenue Code and exempt from tax under 501(a) and (2) any not-for-profit organized for the public benefit and operated primarily for charitable, civic, educational, religious, welfare or health purposes. The organizations must also not practice any action that constitutes a hate crime. [42 U.S.C. § 14505(4)]

The VPA does not limit liability for crimes of violence, international terrorism, acts that constitute a hate crime, civil rights violations or if the volunteer was under the influence of alcohol or any drug at the time of the misconduct.

Volunteer liability protection under state law

Certain states also have laws in place to add further liability protection to volunteers, such as a charitable immunity law or a Good Samaritan law. Generally, Good Samaritan laws protect health care professionals providing care in emergency situations, while charitable immunity laws protect health care professionals who provide nonemergency care for certain charitable organizations. These laws often make it more difficult for plaintiffs to win a liability claim, but do not guarantee that volunteers will not be sued. Following is a description of several methods of how state laws have attempted to provide liability protection to volunteers.

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Not-for-Profit Spotlight

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Nearly 500 individuals have agreed to volunteer their time. The more professionals who volunteer, the more patients KidSMILES can serve. If you would like to volunteer, fill out the survey at the link provided here.

If you would like to support KidSMILES by making a donation, click here.

Contact KidSMILES for more information.

KidSMILES Pediatric Dental Clinic:
info@KidSMILESClinic.com
www.kidsmilesclinic.com

Take the Not-for-Profit Housekeeping Test

It's a new year and a very good time to take a quick compliance check of your not-for-profit organization. Revisit the mission, assess how your services support that mission and make sure your corporate house is in order. To help with this housekeeping task, Benesch offers a checklist to get you started. It is not an exhaustive "how to" guide, but simply a list of questions designed to identify issues and potential problems, or oversights that you can address before they become problems. Just click **here** to download the checklist and get started.

Rules for Reimbursing Employers Up for Review—*It's a Good Time to Brush Up on the Benefits and Requirements of Your Election*

Katie Tesner

Both federal and Ohio law requires that 501(c)(3) not-for-profit entities (as well as state and local governments) be given a unique option when it comes to paying their state unemployment claims. Specifically, they must be permitted to self-finance their unemployment benefit costs by reimbursing the Ohio Unemployment Compensation Trust Fund (Trust Fund) dollar-for-dollar for benefits charged to their account—this is known as the "reimbursing" method of financing.

In contrast, contributory employers are required to make quarterly payments to the Trust Fund at a calculated rate that applies to the employer's total taxable payroll.

The decision to elect reimbursing status is not a one-size-fits-all kind of determination, and should really be made by each not-for-profit on a case-by-case basis. If employee turnover is high (and layoffs predictable) or if the work is seasonal in nature, benefit costs could be very high, and the limited liability afforded by being a contributory employer may be more ideal. Annual cost projections can be made based on the known tax rate and the taxable payroll.

On the other hand, not-for-profits with stable employee numbers and little turnover will likely find reimbursing status more desirable. Because, generally speaking, the average tax for not-for-profits far exceeds the amount paid out in claims, most not-for-profits save a lot of money by electing reimbursing status. There is still a risk, though, as there is no relief from the responsibility to pay all unemployment claims to former employees, no matter the amount of the bill. This is why a surety bond, approved security or other form of collateral is required in order to secure the election.

For those entities that have selected reimbursing status, or are interested in pursuing this status moving forward, please note that the Ohio Department of Job and Family Services (ODJFS) is currently undertaking its five-year review of many of the administrative rules governing reimbursing employers in the Ohio Administrative Code, specifically those governing election notices, bonding amounts, adjustments in bonding amounts, failure to comply with surety bond determinations and group accounts. Amendments will be considered, so speak now or forever hold your peace (or at least until five years from now).

Mark your calendars for February 10, 2015. A public hearing on the affected rules is set to be held on this date beginning at 10 a.m. at the Rhodes State Office Tower Room 3110B, 30 E. Broad St., Columbus, OH 43215. The affected rules (inclusive of any proposed amendments) are available here. Written comments submitted or postmarked no later than February 10, 2015, will be treated as testimony, so feel free to submit your comments as soon as possible.

For more information on this topic, please contact **Katie Tesner** at ktesner@beneschlaw.com or 614.223.9359.

10 Ways to Lose Your Not-for-Profit Status

No. 3: Conflict of Interest

Cathy Paessun

As a not-for-profit executive, my most important partners are my board members. The people invited to be on a not-for-profit board are, by nature and need, the most passionate, have the most resources to bring to the table and are the most actively involved in the organization. Typically, there is some sort of connection between the board member and the mission of the not-for-profit.

In working daily with these deeply passionate, highly resourced individuals who are volunteering with you because they love the work your not-for-profit engages in, it might be tempting to use their company resources to support your mission's needs. Maybe a radio executive can get you airtime on a local station, an accountant offers to do your audit or an office furniture supplier offers to provide new desks. The first question is always: Is this a donation? If the answer is no, the board member's company will sell your not-for-profit these items or services, be very careful as you move forward.

Because of the fiduciary relationship of an elected board member to a governing board, those board members have a conflict of interest between their roles as a board member and an employee or principal of a private company. Neither the board member nor his or her company may gain inurement, that is, benefit or profit beyond the reasonable or fair market value of the services rendered or the goods provided. Your board should adopt a conflict of interest policy for use in these situations. If a sale of products or services from the company to the not-for-profit is to take place, you want to ensure:

- You have documentation stating the price your not-for-profit is paying is the same or lower than the price offered to any other company who contracts services from the for-profit company.
- If required, you have estimates from other, similar companies showing what you would have paid for similar products/services from a company that does not have an employee on your board.
- Your board is apprised of the conflict and the affected member is excluded from the discussion of and vote concerning whether to make the purchase.
- A roll call vote of the board is taken and recorded in the minutes of the meeting.

Conflict of interest issues between a board and the not-for-profit it serves can be tricky because the rules are not hard and fast and the situations are as unique as each board member. The safest approach is simply to avoid having a vendor relationship with a company represented by a board member. To avoid the appearance of inurement, board members are welcome to donate time, services and products, but should refrain from selling goods and services to the organization except in exceptional circumstances.

About the author: **Cathy Paessun** is Executive Director of the Juvenile Diabetes Research Foundation (JDRF) Mid-Ohio. As an organization development professional focused on the not-for-profit sector, she works with organizations to support their goals of revenue stabilization and growth through implementation of business best practices. Ms. Paessun can be reached at cpaessun@jdrf.org or 614.464.2873.

Liability Exposure for Volunteers

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Protection for uncompensated officers & directors of not-for-profits (New York)

In New York, as in many other states, the charitable immunity law was abolished by the courts in 1980. [*See Rakaric v. Croatian Cultural Club "Cardinal Stepinac Organization"* 76 A.D.2d 619, 430 N.Y.S. 2d 829 (1980).] Nevertheless, uncompensated officers and directors of not-for-profit organizations in New York are protected from liability for actions taken within the scope of their duties in such roles. [N.Y. N.P.L. § 720-a] However, this protection only helps the third-party liability of directors and officers of § 501(c)(3) organizations who serve without compensation and who have not acted in gross negligence or with the intent to cause harm. The statute does not limit liability in actions brought by the Attorney General or the not-for-profit. The statute also does not limit liability for directors and officers of not-for-profit corporations that are not exempt from tax under § 501(c)(3) or for directors and officers in actions brought on behalf of the corporation involving claims of neglect, failure to perform or other violations of a director's duties. The lack of protection for directors in New York is one reason why many not-for-profits that would otherwise choose to incorporate in New York instead do so in Delaware.

> "The lack of protection for directors in New York is one reason why many not-for-profits that would otherwise choose to incorporate in New York instead do so in Delaware."

Notably, other New York state laws provide protection to certain volunteer types. For example, a member of a volunteer fire department is not civilly liable for an official act. A volunteer for the National Ski Patrol is not liable in civil damages for emergency aid rendered. Additionally, a volunteer participating in a City of New York program is considered an employee and will be indemnified for liability suits.

Charitable Immunity Act vs. damages limitation (New Jersey)

While the charitable immunity law has been abolished in most states, remnants of this law have been retained in the form of common law doctrine in various jurisdictions, including Alabama, Arkansas, Georgia, Maine, Maryland, New Jersey, Virginia, Utah and Wyoming. The states with the least restrictive forms of charitable immunity are Arkansas, New Jersey and Virginia.

Initially, New Jersey established the doctrine of charitable immunity in 1925 by barring a negligence suit against a corporation established to maintain a public charitable hospital. [*See D'Amato v. Orange Memorial Hospital*, 101 N.J.L. 61, 127 A. 340 (N.J. 1925).] The doctrine was abolished in 1958 by the New Jersey Supreme Court, but resurfaced with the adoption of the New Jersey Charitable Immunity Act (NJCIA).

Under N.J.S.A. § 2A:53A-7, not-for-profit organizations organized exclusively for religious, charitable or educational purposes and their trustees, directors, officers, employees, agents, servants or volunteers are not liable for negligently causing injury to a beneficiary of the organization. This immunity does not apply to willful, wanton or grossly negligent acts, including sexual assault and other crimes of a sexual nature, negligent operation of a motor vehicle or an independent contractor of a not-for-profit corporation. Also, this immunity does not extend to any health care provider, in the practice of his profession, who is a compensated employee, agent or servant of any not-for-profit organization organized exclusively for religious, charitable or educational purposes.

New Jersey also has a damages limitation statute providing for a $250,000 limit on damages recoverable in negligence actions against not-for-profit hospitals. In a recent decision, the Superior Court of New Jersey, Appellate Division, was confronted with the question of whether a hospital was subject to the limited liability cap of $250,000 or was entitled to absolute immunity from liability. [*Kuchera v. Jersey Shore Family Health Center, et al.*, Docket No. L-1513-10 (Sup. Ct. N.J. App. Div. Oct. 10, 2013)] Specifically, in *Kuchera*, the plaintiff was injured when she slipped and fell on an oily substance while attending a free eye screening conducted by the New Jersey Commission for the Blind and Vision Impaired. The plaintiff filed a negligence action against Jersey Shore University Medical Center and its Family Health Center as the screening was being conducted on its premises. The plaintiff argued that the hospital liability was governed by the $250,000 limitation of liability. Ultimately, the Appellate Division affirmed the lower court's ruling that in addition to maintaining a hospital, the defendants also provided beneficial services listed in N.J.S.A. § 2A:53A-7 and are therefore, not engaged solely in hospital functions to the exclusion of educational and charitable purposes. Accordingly, the court found that the hospital was absolutely immune from liability under the statute.

Additionally, New Jersey has several other volunteer protection statutes, including for blood bank volunteers, emergency care law enforcement officers, emergency care health care professionals, emergency volunteers, volunteer fire company members and fraternal benefit societies.

Charitable cap statute (Massachusetts)

In other states, a form of charitable immunity exists by capping the amount that may be awarded as damages. For example, in Massachusetts a tort cap of $20,000 applies to not-for-profits for torts committed in the course of any activity carried on to accomplish directly the charitable purposes of the organization (*see* Mass. Gen. Laws Ann. Ch. 231, § 85K). However, the limitation does not apply if the tort was committed in the course of activities primarily commercial in character, even if such activities obtain revenue to be used for charitable purposes.

"The court explained that a corporation is considered charitable when "the dominant purpose of its work is for the public good." By contrast, a corporation is not charitable when its work is intended to benefit "its members or a limited class of persons." The "critical inquiry," the court ruled, is "whether the purpose of the organization is to benefit a select few, rather than the wider community."

The charitable cap statute was amended in 2013, increasing the cap from $20,000 to $100,000, exclusive of interest and costs, for not-for-profit health care providers in the context of medical malpractice claims. The intent of the increase, as applicable to hospitals and other not-for-profit organizations that provide health care, was to facilitate settlement of claims valued within that range. In fact, the charitable immunity doctrine was adopted by Massachusetts courts specifically in reference to a hospital. "The court reasoned that the hospital held its funds in trust for the benefit of the public, and that it would be an unlawful diversion of those funds to apply them to the satisfaction of a judgment based on the negligence of hospital agents." [*See English v. New England Medical Center*, 405 Mass. 423, 425, 541 N.E.2d 329 (1989), cert. denied, 493 U.S. 1056 (1990).] The *English* court explained that charitable gifts may be discouraged if the gift would be depleted by the payment of damages. [*Id.*]

In 2003, the highest court of Massachusetts upheld applying the state's cap on liability of charitable corporations to a charitable hospital in a negligence action involving a slip and fall that occurred because of snow and ice buildup on the hospital's parking lot. [*See Conners v. Northeast Hosp. Corp.*, 439 Mass. 469, 789 N.E.2d 129 (Mass. 2003).] The plaintiff argued that Northeast was not truly a charitable corporation, that its snow removal activities were not carried on to accomplish a charitable purpose, and that its snow removal activities were "primarily commercial" in nature. [*Id.* at 474-474] In making its ruling, the Massachusetts court clarified the "fundamental distinction of purpose" that separates charitable from for-profit corporations. The court explained that a corporation is considered charitable when "the dominant purpose of its work is for the public good." By contrast, a corporation is not charitable when its work is intended to benefit "its members or a limited class of persons." The "critical inquiry," the court ruled, is "whether the purpose of the organization is to benefit a select few, rather than the wider community." [*Id.*, at 474-475] Accordingly, using this analysis, the court found that a hospital was entitled to the benefit of the charitable tort cap in a negligence suit. [*Id.*]

Interestingly, in *Conners*, the Supreme Judicial Court recounted the legislative history of § 85K, including Governor Sargent's view that charitable corporations "by their nature and the quality and character of their charitable endeavor" should be "treated differently" with regard to their legal liability. [*Id.*, at 473] The court noted that, in enacting § 85K, the legislature had pursued "the legitimate objective of preserving charitable assets." Accordingly, § 85K was intended to strike an appropriate balance between "the desirability of protection for [charitable] corporations … against the interest of the [injured] person." [*Id.*]

Massachusetts also has volunteer protection statutes, under which a number of professionals are not liable for damages. Specifically, a director, officer or trustee of a not-for-profit charitable organization, such as a charitable education institute, is not liable for civil damages. [Mass. Ann. 231 § 85K] Additionally, a volunteer ombudsman, and a volunteer serving as an elder care coordinator or counselor, are not liable in a civil or criminal action. [Mass. Ann. 19A §§ 33A, § 38] Similarly, a physician, physician's assistant, registered nurse, respiratory therapist or veterinarian acting as a Good Samaritan is not liable in a suit for damages arising out of the rendering of emergency care. [Mass. Ann. 112 §§ 12B, 23BB, 58A] Lastly, an athletic volunteer serving a not-for-profit organization is not liable for damages resulting from service. [Mass. Ann. 231 § 85V]

Conclusion

Although federal and state laws may make it more difficult for a plaintiff to win a liability suit, they do not bar volunteers from being sued. As you can see above, the statutes seek to balance protecting a volunteer from personal liability with providing compensation to innocent victims of a volunteer's negligence. The laws vary as to the types of volunteers, the types of organizations and what actions are covered. Accordingly, it is important for volunteers and volunteer organizations to follow appropriate risk management practices.

For more information about volunteer liability and corresponding policies and procedures to reduce exposure, please contact **Daniel Meier** at dmeier@beneschlaw.com or 201.488.1013, or any member of our Health Care Practice Group for a further discussion.

Events

Ohio Association of Nonprofit Organizations' (OANO's) Standards for Excellence Clinic Series Columbus 2015

Dates: February 19, 2015 and February 26, 2015

Time: 9:00 A.M.–12 P.M. (for both dates)

Location: Chase Bank Building, 100 E. Broad St. 6th Floor, Columbus, OH

Topic:

When an organization adopts OANO's Standards for Excellence it is:

- Demonstrating program performance to funders
- Instilling client confidence
- Exhibiting quality services to volunteers

The Standards for Excellence are intended to describe how the most well-managed and responsibly governed organizations should and do operate. During these educational clinics, OANO will address eight guiding principles along with 58 Standards in not-for-profit management. Areas that are covered include: Mission and Program; Governing Body; Conflict of Interest; Human Resources; Financial and Legal; Public Accountability; Fundraising; and Public Affairs and Public Policy.

Clinics will include presentations and resource materials to assist in implementing best practices. Lunch will also be provided. Two people from an organization are welcome to attend (should be executive level and/or board member).

February 19, 9:00 A.M.–12:00 P.M.
February 26, 9:00 A.M.–12:00 P.M.

Organizations must plan to participate on both dates as different information will be covered each day.

Regular registration ends on February 18, 2015.

Late registration starts on February 19, 2015.

Registration can be found here.

Association of Fundraising Professionals 2015 International Fundraising Conference

Date: March 29–31, 2015

Location: The Baltimore Convention Center, One West Pratt Street, Baltimore, MD

For more information, click here.

Benesch's Not-for-Profit Team assists not-for-profit and tax-exempt clients in a broad array of matters, ranging from filing for nonprofit status and preparing federal and state tax exemption applications to training in not-for-profit regulatory compliance. Our not-for-profit attorneys are committed to protecting our clients' assets so that they can continue to drive the missions and goals of their organizations.

For more information regarding this edition or any not-for-profit issues, please contact:

Jessica N. Angney, Partner
jangney@beneschlaw.com
216.363.4620

Martha J. Sweterlitsch, Partner
msweterlitsch@beneschlaw.com
614.223.9367