

Securing Waivers of Liability from Volunteers of Nonprofit Organizations

Nonprofit organizations often rely on volunteers who generously give their time and take on a wide variety of tasks critical to the success of the nonprofit's mission, some of which may involve a risk of injury. Nonprofits sometimes seek volunteers to do construction-related work for needy families, for example, help staff a homeless shelter or provide home based care to senior citizens. Depending upon the nature of the organization and the work that the volunteer undertakes, it may be important for a nonprofit organization to protect itself from potential personal injury liability by making sure it obtains signed waivers from its volunteers.

What is a volunteer waiver of liability?

A waiver of liability (also known as a "release") is a written statement in which the volunteer agrees to assume the risk of injury inherent in the volunteer activity, and also releases the organization from liability for any injuries that he or she might sustain while working as a volunteer.

Most waivers of liability are designed to prevent future legal claims against the organization related to injuries for which the organization might otherwise bear legal responsibility, and for which the nonprofit

organization may not be insured. Thus, waivers of liability can play an important role in protecting the organization's funds, and ensuring that those funds are used for the organization's mission rather than in defending legal claims.

In order for the waiver to protect the nonprofit organization from legal claims as much as possible, it would help if the nonprofit adopted a basic orientation program for all new volunteers. The program can serve several functions:

- it is a good way for the nonprofit to educate the volunteer about its mission;
- it helps orient the volunteer to the nonprofit's programs and procedures;
- it allows the nonprofit to provide any necessary safety training for the volunteer; and
- it provides a setting for the nonprofit to ask the volunteer to sign the waiver and release.

The organization should ask the volunteer to read and sign the written waiver of liability prior to the start of any work. By reviewing and signing the document, the volunteer agrees to give up the right to seek monetary damages from the organization if he or she

gets injured while working for the organization, and in exchange, the organization provides the volunteer with a structured opportunity to serve the community.

The language used in the written waiver of liability is very important because it establishes the scope of the waiver and is the basis upon which a court might ultimately determine whether the organization will be held liable for a volunteer's injuries. The process used to obtain the waiver is important to demonstrate that the waiver was obtained voluntarily, without any pressure by the organization, and as a precondition to starting any work.

Are volunteer waivers necessary?

A nonprofit is not required to have a written waiver of liability. However, requiring volunteers to execute waivers of liability is strongly recommended for organizations that engage volunteers in tasks that have the potential of resulting in bodily injury, such as work that involves physical labor or that places volunteers in areas where hazardous conditions may exist. Even if the risk of injury is small, seeking and securing written waivers may prevent the organization from being held liable in the future.

A written waiver also serves to educate the volunteer about the potential hazards involved in the organization's work. By focusing the volunteer's attention on the potential hazards, the waiver can play an important role in the nonprofit's efforts to reduce accidents and injuries.

In a few states, waivers of liability may not be needed to shield nonprofit organizations engaged in charitable work from negligence lawsuits. As a matter of law, charitable organizations in certain jurisdictions are not subject to suit for accidents or injuries.

In Maryland, for example, the courts have a longstanding doctrine of charitable immunity that is based on the notion that the funds of a charitable organization are held in trust for the benefit of the public and should not be diverted to pay damage awards.

In Virginia as well, courts have considered the charitable status of an organization that is being sued for injuries caused by negligence. The law recognizes a limited form of immunity that is available to certain organizations if the organization's beneficiaries are injured by negligent employees.

The legal doctrine of charitable immunity is not widely accepted, however, and should not be considered sufficient to eliminate the need for written waivers of liability. The District of Columbia courts, for example, rejected charitable immunity principles in the mid-1940s and have consistently concluded that nonprofit corporations and organizations can be held liable for injuries caused by the negligence of their agents and employees.

Consequently, although a nonprofit may be able to claim charitable immunity as a defense to a negligence action in some cases, nonprofit organizations in the DC metro area are advised to secure written releases/waivers of liability from volunteers, in order to best insure that the nonprofit can best avoid personal injury lawsuits and the payment of monetary damages.

Are volunteer waivers likely to be enforceable?

Whether a court is likely to enforce a waiver of liability that releases an organization from liability for personal injuries varies from state to state. In some jurisdictions, waivers of liability are disfavored and are generally not enforced while courts elsewhere will

uphold a clear, signed waiver of liability even if the person who signed it contends that he or she did not read the document or understand its terms.

D.C. and Maryland—As a general matter, in the District of Columbia and Maryland, clear and unambiguous waivers of liability for injuries caused by the simple negligence of an organization and its employees are enforceable.

The courts have not yet ruled on the enforceability of a waiver of liability that a nonprofit organization has secured from an injured volunteer; however, judges in the District and Maryland have considered the effectiveness of liability waivers when a person who voluntarily chooses to participate in activities (including sports and amusements) is injured. The courts have enforced waivers of liability with respect to the activities of a health club, a game show, a drag racing course, and a skydiving operation, and personal injury negligence lawsuits brought in the District and in Maryland have been dismissed as a result.

There are exceptions to the general rule. The primary exception is that a waiver will not be enforced in D.C. and Maryland if the waiver violates public policy. Courts have concluded that waivers signed by parents on behalf of minor children fall within this exception. So, too, have courts deemed unenforceable waivers that:

- were fraudulently or mistakenly obtained,
- are patently offensive on their face,
- have been procured as a result of disproportionate bargaining power or undue influence,
- cover injuries that the organization or its employees intentionally or willfully inflicted, or

- absolve the nonprofit from any reckless or grossly negligent conduct.

Moreover, a waiver of liability is manifestly contrary to public policy if the state legislature has specifically prohibited or invalidated such waivers in an applicable statute.

Because exceptions to the enforceability of waiver of liability provisions do exist, the fact that a nonprofit organization has procured waivers from its volunteers may not be sufficient to thwart all personal injury litigation in court. However, given that a clear and unambiguous waiver of liability precludes personal injury claims under D.C. or Maryland law, such waivers could substantially reduce the number or scope of any such litigation.

Virginia—In contrast to the law of the District of Columbia and Maryland, Virginia law unequivocally rejects prospective (*i.e.*, pre-injury) waivers of liability that prevent a negligent actor from being held liable for the resulting personal injuries of another.

Virginia's supreme court held that a pre-injury release of liability for future negligent acts violates public policy and will not be enforced to preclude damages claims for bodily injury more than 100 years ago, and the state's courts have maintained this basic principle ever since. Accordingly, clear releases signed by individuals who are subsequently negligently injured in sporting events have routinely been declared void under Virginia law. Likewise, Virginia law has been applied in wrongful death lawsuits to invalidate a prospective release signed by the decedent waiving negligence liability.

The implication of Virginia's public policy is that a nonprofit organization may be limited in its ability to seek enforcement of a

waiver of liability signed by a volunteer if the volunteer sustains personal injuries and sues under Virginia law. The fact that such waivers are strongly disfavored in Virginia also means that it is very important that all written waivers of liability signed by volunteers for the benefit of a nonprofit organization in this region include a statement that clearly establishes that the laws of the District of Columbia or Maryland apply. However, in order for this approach to be effective there has to be a reasonable connection to the District of Columbia or Maryland.

In order to determine if a connection with the District or the State of Maryland exists, the court will look at many factors. Some of the many factors that a court could consider include where the volunteer lives, where the nonprofit is located, where the volunteer signed the waiver form, where the volunteer work was performed, and where the legal claim is brought.

Not all factors will be considered in every case, and depending on the circumstances, some factors may count more than others. Therefore, it is important for you to work with your attorney to review the circumstances surrounding the use of the waiver to determine whether D.C. or Maryland law could apply.

What is the typical format of a volunteer waiver form?

Volunteer waivers take many forms. Depending on what language is included and what language is left out, some waivers have a better chance of being enforced than others. In order to provide guidance to your nonprofit, a sample volunteer waiver form is appended to this alert. However, this sample may not be appropriate for every nonprofit organization. **Your**

organization's release and waiver form should be drafted in consultation with legal counsel to suit the specific needs and circumstances of your organization.

In general, many organizations combine the volunteer release and waiver statements with an Emergency Contact form and/or a volunteer application. Regardless, it is important that the release and waiver form be written in clear and unambiguous language, and it is helpful to include capitalized typeface or bolded lettering to ensure that the volunteer signing the form sees and understands the legal rights that are at stake.

A waiver of liability form should provide that the volunteer agrees to "release," "discharge," and "forever hold harmless" the organization and its officers, directors, employees and agents. Although the scope of the injuries and conduct that are covered by the release may ultimately depend on state law, the waiver itself should be worded broadly, to include the release of legal claims for damages related to "bodily injury," "personal injury," "illness," "death" or "property damage," and it should establish that the organization and its servants are not liable for *any* and *all* conduct that results in injury, especially "negligence." The waiver should also expressly exculpate the organization and its servants for injury caused by "any first aid," "treatment," or "service" administered to an injured volunteer.

A waiver of liability form should also make clear that the volunteer is agreeing to "assume the risks" of injury, harm, illness, or death that may be inherent in the work that he or she agrees to do on behalf of the organization, and that, unless the nonprofit tells the volunteer otherwise, it does not carry or maintain health insurance for its volunteers. It should also state clearly that

the organization does not itself assume any financial responsibility for medical, health or disability payments if a volunteer sustains an injury.

Finally, although a waiver and release form may contain other statements related to the rights and responsibilities of the organization in regard to its volunteers, it is important that the form include a choice-of-law provision. Such a statement establishes the agreement is intended to be “broadly construed” and to be “governed by and interpreted in accordance with the laws” of a state that enforces waiver of liability agreements (e.g., the District of Columbia or Maryland).

Volunteer Insurance

Sometimes, nonprofits are reluctant to ask volunteers to sign a waiver of liability. The nonprofit may feel that it may be inconsistent with its mission to assist people in need. They may also be reluctant to risk offending a donor or volunteer. At the same time, the nonprofit must realize that it cannot carry out its mission if it has to pay to defend legal claims, some of which may have no merit. Therefore, a nonprofit should consult with its insurance broker about what insurance it may want to consider purchasing in conjunction with using a waiver of liability.

In general, the first policy nonprofits think about purchasing is a comprehensive general liability or CGL policy. This insures the nonprofit if it is sued by anyone (including a client or volunteer) for a personal injury the person suffered as a result of the negligent acts or omissions of the nonprofit.

However, many nonprofits are concerned that this policy may not protect its volunteers if they are injured, especially if the volunteer signed a waiver of liability. In

such case, the nonprofit may want to ask its broker about accidental medical insurance coverage for volunteers.

This policy covers a volunteer in the case he or she is injured while volunteering. The policy reimburses the volunteer for any uninsured medical expenses the volunteer incurs as a result of the injury. The policy is a no-fault policy – meaning that it will pay the volunteer’s uninsured medical expenses up to the stated policy limits, regardless of who caused the accident. The payments typically are made at the time of treatment, and normally the volunteer is not required to hire a lawyer and file a legal claim against the nonprofit in order to receive coverage.

The benefit of this type of insurance is that it allows the nonprofit to provide some financial protection to its volunteers. The nonprofit may feel that this offsets any negative feelings that might develop by having its volunteer sign a waiver of liability.

Additional Resources

You may find the following information helpful:

- The Nonprofit Risk Management Center: www.nonprofitrisk.org
- Free Management Library: www.managementhelp.org

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[INSERT ORGANIZATION'S LOGO]

EMERGENCY CONTACT AND RELEASE¹

Emergency Contact Information **Date** _____

Name: _____

Address: _____

Phone day: _____ evening: _____ cell: _____

E-mail: _____

In case of an emergency, contact:

Name: _____ Relationship: _____

Address: _____

Phone day: _____ evening: _____ cell: _____

E-mail: _____

Any allergies, medications, or other information needed in an emergency:

Release and Waiver of Liability

PLEASE READ CAREFULLY! THIS IS A LEGAL DOCUMENT THAT AFFECTS YOUR LEGAL RIGHTS!

This Release and Waiver of Liability (the "Release") executed on this ____day of _____, 20__, by _____(the "Volunteer") in favor of **[Insert name of nonprofit]**, a nonprofit corporation, and its directors officers, employees, and agents.

The Volunteer desires to work as a volunteer for **[Insert name of nonprofit]** and engage in the activities related to being a volunteer for **[Insert name of volunteer event or type of volunteer work]** (the "Activities"). The Volunteer understands that the Activities may include **[Insert specific description of activities, including description of physical labor, exposure to hazardous conditions, or other circumstances that may result in personal injuries]**.

The Volunteer hereby freely, voluntarily, and without duress executes this Release under the following terms:

¹ This sample form is provided for general guidance only, and it may not be appropriate for every nonprofit organization. *Your organization's release and waiver form should be drafted in consultation with legal counsel to suit the specific needs and circumstances of your organization.*

1. **Release and Waiver.** Volunteer does hereby release and forever discharge and hold harmless **[Insert name of nonprofit]** and its successors and assigns from any and all liability, claims, and demands of whatever kind or nature, either in law or in equity, that arise or may hereafter arise from Volunteer's Activities with **[Insert name of nonprofit]**.

VOLUNTEER UNDERSTANDS THAT THIS RELEASE DISCHARGES **[INSERT NAME OF NONPROFIT]** FROM ANY LIABILITY OR CLAIM THAT THE VOLUNTEER MAY HAVE AGAINST **[INSERT NAME OF NONPROFIT]** WITH RESPECT TO ANY BODILY INJURY, PERSONAL INJURY, ILLNESS, DEATH, OR PROPERTY DAMAGE THAT MAY RESULT FROM VOLUNTEER'S ACTIVITIES WITH **[INSERT NAME OF NONPROFIT]**, WHETHER CAUSED BY THE NEGLIGENCE OF **[INSERT NAME OF NONPROFIT]** OR ITS OFFICERS, DIRECTORS, EMPLOYEES, OR AGENTS OR OTHERWISE. VOLUNTEER ALSO UNDERSTANDS THAT **[INSERT NAME OF NONPROFIT]** DOES NOT ASSUME ANY RESPONSIBILITY FOR OR OBLIGATION TO PROVIDE FINANCIAL ASSISTANCE OR OTHER ASSISTANCE, INCLUDING BUT NOT LIMITED TO MEDICAL, HEALTH, OR DISABILITY INSURANCE IN THE EVENT OF INJURY OR ILLNESS.

2. **Medical Treatment.** Volunteer does hereby release and forever discharge **[Insert name of nonprofit]** from any claim whatsoever which arises or may hereafter arise on account of any first aid, treatment, or service rendered in connection with the Volunteer's Activities with **[Insert name of nonprofit]**.

3. **Assumption of the Risk.** The Volunteer understands that the Activities may involve work that may be hazardous to the Volunteer, including, but not limited to, **[Insert types of work the volunteer will perform]**, and transportation to and from the work sites. Volunteer hereby expressly and specifically assumes the risk of injury or harm in the Activities, and releases **[Insert name of nonprofit]** from all liability for injury, illness, death, or property damage resulting from the Activities.

4. **Insurance.** The Volunteer understands that, except as otherwise agreed to by **[Insert name of nonprofit]** in writing, **[Insert name of nonprofit]** does not carry or maintain health, medical, or disability insurance coverage for any Volunteer. **Each Volunteer is expected and encouraged to obtain his or her own medical or health insurance coverage.**

5. **Photographic Release.** Volunteer does hereby grant and convey unto **[Insert name of nonprofit]** all right, title, and interest in any and all photographic images and video or audio recordings made by **[Insert name of nonprofit]** during the Volunteer's Activities with **[Insert name of nonprofit]**, including, but not limited to, any royalties, proceeds, or other benefits derived from such photographs or recordings.

6. **Other.** Volunteer expressly agrees that this Release is intended to be as broad and inclusive as permitted by the laws of the State of **[*****]**, and that this Release shall be governed by and interpreted in accordance with the laws of the State of **[*****]**. Volunteer also agrees that in the event that any clause or provision of this Release shall be held to be invalid by any court of competent jurisdiction, the invalidity of such clause or provision shall not otherwise affect the

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remaining provisions of this Release which shall continue to be enforceable.

IN WITNESS WHEREOF, Volunteer has executed this Release as of the day and year first above written.

Volunteer: _____ Witness: _____