

# BEST PRACTICES IN EMERGENCY PUBLIC HEALTH VOLUNTEER MANAGEMENT

Volunteers: The Heroes of Disasters Conference

Augusta Civic Center

April 15, 2008

## VOLUNTEER IMMUNITY STATUTES

### Federal law

#### Volunteer Protection Act of 1997

The **Volunteer Protection Act of 1997**<sup>1</sup> was enacted by the Congress to provide immunity from civil liability for volunteers acting on behalf of non-profit and charitable organizations or governmental agencies. The Act immunizes individual volunteers from liability for ordinary negligence for acts committed in the course of their voluntary activities. The Act also establishes limits upon punitive and non-economic damages for volunteers whose conduct is otherwise considered actionable. In enacting the statute, Congress found that many non-profit public and private organizations had lost volunteer board members due to liability concerns and that liability concerns had significantly increased operating expenses for non-profit and charitable organizations.<sup>2</sup> The **Act preempts contrary state laws**, but also allows States to elect not to be governed by the Act, in which case volunteers may be subject to liability in state court pursuant to state liability law.<sup>3</sup>

#### A. Scope of immunity

Generally, the Volunteer Protection Act provides that no volunteer of a nonprofit organization or governmental entity may be liable for harm caused by an act or omission of the volunteer on behalf of the organization, provided the volunteer was acting within the scope of the volunteer's responsibility at the time, and, if required, the volunteer was properly licensed, certified or otherwise authorized to participate in the activities which gave rise to the harm.<sup>4</sup> However, the Act does not provide immunity for any harm arising from willful, criminal or grossly negligent conduct, or conduct which was either reckless or demonstrated a conscious and flagrant indifference to the victim's safety. Furthermore, the Act does not immunize harm caused from the

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<sup>1</sup> 45 U.S.C. §14501.

<sup>2</sup> 45 U.S.C. §14501(2).

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<sup>4</sup> 45 U.S.C. §14501(4).

operation of a motor vehicle.<sup>5</sup> Furthermore, the Act does not prevent a non-profit organization or governmental agency from bringing a civil action against a volunteer.<sup>6</sup>

### **B. Restrictions against immunity**

As noted, there are certain restrictions regarding volunteer immunity. Thus the federal act will defer to state law which requires a nonprofit organization to adhere to risk management procedures, including mandatory volunteer training. Further exceptions to immunity include:

- State law which makes the organization or entity liable for the acts of its volunteers to the same extent as an employer is responsible for the acts of its employees;
- State law which excludes immunity if the action is brought by an officer of state or local government pursuant to applicable law; or
- State law which only authorizes immunity if the non-profit organization or governmental entity provides a financially secure source of recovery for persons injured by the acts of volunteers.<sup>7</sup>

In addition, the Act does not immunize volunteers from punitive damages for acts committed by willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.<sup>8</sup> Furthermore, immunity is not available to a volunteer whose conduct constituted a crime of violence, hate crime, civil rights violation, or arose while the volunteer was under the influence of alcohol or drugs.<sup>9</sup>

### **C. Non-economic losses**

As mentioned earlier, the federal Act establishes limits on non-economic damages sustained by a person as a result of a volunteer's non-exempt conduct. The term "economic loss" refers to pecuniary loss resulting from harm, such as lost wages or income. Non-economic loss refers to losses for physical and emotional pain and suffering. Damages for non-economic loss are capped at the amount of non-economic loss for which the respondent is directly responsible.<sup>10</sup> Thus volunteers are not subject

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<sup>5</sup> 45 U.S.C. §14501(40)(a) (3) & (4).

<sup>6</sup> 45 U.S.C. §14501(4) (c).

<sup>7</sup> 45 U.S.C. §14501(d).

<sup>8</sup> 45 U.S.C.14501 (e) (1).

<sup>9</sup> 45 U.S.C.14501(f).

<sup>10</sup> 45 U.S.C.14501(f)(5).

to joint and several liability for non-economic losses, but rather are responsible, if at all, only for the non-economic loss sustained by their victims directly in proportion with their actual responsibility, as determined by a judge or jury in a civil action.

#### D. Volunteers

The Act defines a “volunteer” as an individual performing services for a nonprofit organization or government entity who does not receive compensation for his or her services, other than reasonable reimbursement for expenses actually incurred, or any other thing of value in lieu of compensation in excess of \$500 per year.<sup>11</sup> Included within the definition of a volunteer would be a director, officer, trustee, or direct service volunteer.

#### E. Nonprofit organizations

The Federal Volunteer Protection Act applies to two different types of organizations. First, immunity is available for volunteers serving a non-profit corporation established pursuant to Section 501(c) (3) of the Internal Revenue Code, which is exempt from taxation and does not practice any type of action considered a hate crime.<sup>12</sup> The second type of qualifying organization for whom a volunteer may serve is any other type of not for profit organization organized and conducted for the public benefit primarily for charitable, civic, educational, religious, welfare or health purposes, and which does not engage in any conduct considered a hate crime.<sup>13</sup>

#### F. Summary of Federal Volunteer Protection Act

In general, the Volunteer Protection Act constitutes a significant immunity shield for those volunteers of bona fide non-profit organizations who are not compensated for their activities, and whose harm producing conduct arises from actions taken in good faith which may rise to the level of ordinary negligence, but not recklessness, or a substantial deviation from an ordinary standard of due care. However the Act does impose limitations on immunity, and generally will not immunize conduct arising from the operation of a motor vehicle, the use of intoxicating liquors or drugs, or involving a hate crime. *Furthermore, although volunteers may be immunized for their negligent conduct, the Act does not restrict the liability of the non-profit organizations or governmental entities which engage the volunteer.* Furthermore, conduct deemed outside the scope of the volunteer’s duties is not subject to immunity.

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<sup>11</sup> 45 U.S.C.14501(f)(6).

<sup>12</sup> 45 U.S.C..14501(f)(4).

<sup>13</sup> *Ibid.*

### Intermittent Disaster Response Personnel

42 U.S.C. §300hh-11 provides immunity for intermittent disaster response individuals appointed as members of the National Disaster Medical System. Voluntary health professionals are generally considered intermittent disaster response personnel and enjoy corresponding legal protections from liability, as well as workers compensation coverage and waivers of state licensure requirements.

### Temporary Volunteers

The Public Health Service is authorized to accept “volunteer services” under 42 U.S.C. § 217b. However, these provisions do not require the Public Health Service to accept volunteer services during a declared federal public health emergency. **In order to qualify for immunity, individuals must offer their services to the federal government under a formal agreement for which no compensation is provided. Furthermore, the immunity only extends to services to patients in federal DHHS facilities, beneficiaries of the federal government, or individuals or groups whose health services are authorized by federal DHHS programs.**

## Maine law

### Charitable immunity: 14 M.R.S.A. §158

#### A. Charitable organizations

The doctrine of charitable immunity is grounded in the common law. *An organization asserting charitable immunity must plead and proof charitable immunity as an affirmative defense to a liability action. Generally, before an organization will be considered “charitable” for purposes of common law tort immunity, it must establish that its charitable funds are derived mainly from public and private charity.* For charitable immunity to apply, funds donated for charitable purposes are held in trust to be used exclusively for those purposes, and invasion of the corpus of the trust would destroy the charitable sources upon which the organization relies. *Coulombe v. The Salvation Army*, 2002 ME 25, ¶10.

Generally Maine law provides that a charitable organization is deemed to have waived its common law immunity from tort liability for negligence or any other tort to

the extent that the organization is insured for such liability.<sup>14</sup> Thus, charitable organizations will be deemed to have waived charitable immunity to civil liability to the extent of their insurance policy limits, but are not liable for any overage beyond the policy limits.

### **B. Charitable organization directors, officers and volunteers**

Unlike charitable organizations, the directors, officers or direct service volunteers who serve charities are immune from civil liability, provided the harm producing act occurs in the course and scope of the volunteer's activities.<sup>15</sup> Like the federal Volunteer Protection Act, the Maine charitable immunity statute excludes from immunity any cause of action arising from the operation of a motor vehicle, vessel or craft for which the operator must be licensed or maintain insurance. However, a volunteer's liability in such a cause of action is limited to the combined policy limits of the available insurance.

Officer and director immunity pursuant to 14 M.R.S.A. §158-A is restricted to acts of negligence or omission which occur within the course and scope of the activities of the charitable organization.

### **C. 14 M.R.S.A. §158-B Limited liability of charitable organizations**

A charitable organization which uses or supervises persons convicted of criminal offenses or juveniles adjudicated to have committed juvenile offenses in a community service program are immune from liability for property damages caused by a participating adult/juvenile or from liability for death or injury to a participating adult/juvenile.

## **24 M.R.S.A. 2904 Healthcare Practitioner Volunteer Immunity Act**

### **A. Active Healthcare practitioners**

Maine law provides tort immunity for *any licensed health care practitioner* who voluntarily, without the expectation of any compensation, provides professional services within the scope of his or her license, to: (1) a non-profit organization, (2) a state agency or political subdivision of the State, (3) to members of a nonprofit organization; (4) to support the State's response to a public health threat as that term is defined by 22 MRSA §801(10); (5) to support the State's response to an extreme public

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<sup>14</sup> 14 M.R.S.A §158.

<sup>15</sup> 14 M.R.S.A. §158-A.

health emergency as that term is defined in 22 MRSA §801(4-A), and (6) to support the State's response to a disaster as that term is defined in 37-B MRSA §703(2).<sup>16</sup> **Excluded from civil immunity under this statute is any injury or death caused willfully, wantonly or recklessly, or by gross negligence.** Similar immunity is provided to an emergency medical services person who, without expectation of compensation, provides emergency medical services within the scope of his or her license in response to the State's response to a public health threat, extreme public health emergency or disaster.<sup>17</sup>

#### B. Retired physicians, podiatrists and dentists

Maine's HealthCare Practitioner Volunteer Immunity Act likewise provides civil tort immunity to any retired physician, podiatrist or dentist who voluntarily, without expectation of compensation, provides professional services within the scope of that person's licensure, provided the cause of action did not arise from conduct caused willfully, wantonly or with gross negligence, and the volunteer conduct was committed on behalf of: (1) a non-profit organization, (2) a state agency or political subdivision, (3) a non-profit organization, or in support of the State's (4) response to a public health threat, (5) extreme public health emergency, or (6) disaster.<sup>18</sup> However, the immunity only applies to retired health care professionals who remain licensed in their relevant profession and have not been disciplined by the professional licensing board in his or her field in the past five years.

#### **14 M.R.S.A. §164 Good Samaritan Act**

Maine's Good Samaritan Act provides that "... any person who voluntarily, without the expectation of monetary or other compensation from the person aided or treated, emergency treatment or rescue assistance to a person who is unconscious, ill, injured or in need of rescue assistance" is not civilly liable for any resulting injuries, unless such injuries were caused willfully, wantonly, recklessly or by gross negligence. **The statutory immunity is available to members of nonprofit volunteer or government ambulance, rescue or emergency services, even if the rescue service charges a user fee or the employees or members receive salaries or other compensation from the nonprofit agency or governmental entity.** The immunity conferred by this statute does not apply to care or services rendered on the premises of a hospital or health clinic.

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<sup>16</sup> 24 M.R.S.A..2904(1).

<sup>17</sup> 24 M.R.S.A. §2904(1)(B).

<sup>18</sup> 24 M.R.S.A..2904(2).

The immunity provided under this statute only relates to voluntary services provided to persons who are “unconscious, ill, injured, or in need of rescue assistance”. The Act provides no immunity for non-emergency volunteer services or for injuries/damages arising from pre-event planning or strategy.

### Maine Emergency Management Assistance Agency Statutes

#### A. Maine Emergency Management Assistance Agency right to call for and employ assistance; 37-B M.R.S.A. §784-A

In 2006 the Maine Legislature amended the Maine Emergency Management Agency (MEMA) enabling statutes to significantly expand tort immunity for volunteers specifically designated by MEMA to participate in emergency responses, whether or not under the auspices of the Emergency Management Assistance Compact (“EMAC”).<sup>19</sup> Previously, the statute appeared primarily to invest civil immunity upon volunteers called out by MEMA to participate in EMAC emergency responses. Adopted in Maine in 1998, the EMAC is an interstate compact initiated by the National Conference of State Legislatures intended to promote mutual assistance between the states in managing any emergency or disaster declared in the respective states.<sup>20</sup> Prior to the 2006 amendment, persons “called out and employed for assistance” under the direction of MEMA pursuant to the Emergency Management Assistance Compact were deemed to be state employees, eligible for tort immunity and worker compensation benefits as provided in the EMAC.<sup>21</sup> Nevertheless, questions arose as to the meaning of the phrase “called out and employed for assistance”, and whether the phrase only applied to emergency responders such as firefighters, emergency medical technicians, and other law enforcement personnel. Consequently, the statute was amended to also immunize any health care worker duly licensed in Maine, designated by MEMA to perform emergency management or health activities in Maine during a declared disaster or civil emergency or designated by MEMA to provide aid in another state pursuant to the EMAC. In order to trigger immunity for health care worker volunteers under this section, MEMA must either have called the volunteer out to participate out of state in an EMAC response to an emergency, or to participate in the State of Maine pursuant to a disaster or civil emergency declared by the Governor pursuant to his/her emergency powers in 37-B M.R.S.A. §742.

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<sup>19</sup> See P.L. 2005, c.630, §2.

<sup>20</sup> 37-B M.R.S.A. §921.

<sup>21</sup> 37-B M.R.S.A.. 1784-A.

Health care workers called out by MEMA pursuant to this statute are also entitled to workers compensation coverage for any injuries or occupational illnesses they may sustain as a result of their volunteer service.

**B. 37-B M.R.S.A. §822: Maine Emergency Management Agency**

This statute provides that neither the State, nor any political subdivision, nor any emergency volunteer called out and employed by MEMA pursuant to 37-B M.R.S.A. §784-A may, while engaged in emergency management activities and while performing duties imposed upon the Maine Emergency Management Assistance Agency, be held civilly liable for personal injury, death or property damage. The statute does not purport to affect the right of any person to receive benefits pursuant to any other provision of state or federal law.

The 2006 statutory amendment to 37-B M.R.S.A. § 784-A, clarifies that volunteer healthcare workers called out by MEMA to respond to an emergency or disaster situation, are entitled to tort immunity under this statute.

**C. 37-B M.R.S.A. § 823 Compensation for injuries received in the line of duty.**

Pursuant to this statute, all “members of the emergency management forces” are deemed to be employees of the State of Maine while on, or training for, emergency management duty. Thus the State of Maine will provide workers compensation benefits and death benefits to any member of the emergency management force authorized by MEMA to respond to an emergency or disaster situation. The term “members of the emergency management forces” is not defined. However, 37-B M.R.S.A. § 784-A provides that health care workers designated by MEMA to participate in an emergency or disaster response are entitled to workers compensation coverage as provided under this section. Hence, it would appear that volunteer health professionals duly called out by MEMA would be entitled to workers compensation benefits from the State of Maine for any injuries arising from the emergency or disaster response.

**D. 37-B M.R.S.A. §926 EMAC Immunity**

“Officers and employees” of a State which render aid in another state while participating in the Emergency Management Assistance Compact are considered agents of the requesting state for purposes of tort immunity. Hence, under the EMAC, duly authorized volunteers must look to the immunity law of the State which requested emergency assistance. However the statute further provides that a “[compact] party

state or its officers or employees rendering aid in another state pursuant to this compact are not liable on account of any act or omission in good faith on the part of such forces while so engaged or on account of the maintenance or use of equipment or supplies in connection therewith”.

This statute has caused considerable confusion. This statute establishes the immunity provisions for the EMAC. The EMAC does not define the term “officers or employees”. Hence, prior to the amendment of 37-B M.R.S.A.784-A, it was not clear whether health care volunteers identified by the DHHS Office of Emergency Public Health Preparedness, would be eligible for tort immunity pursuant to the EMAC provisions. Furthermore, assuming EMAC immunity provisions applied, generally, volunteers must look to the law of the state which requested assistance to determine their tort immunity. The only exception to this principle is the provision in this section that officers and employees rendering aid in another state pursuant to the compact would not be liable for their good faith efforts, or on account of the use or maintenance of equipment or supplies in the emergency response.

**In any event, any immunity conferred by this statute would only be available to persons authorized by MEMA to participate in out of state emergency missions, and only for injuries or damage caused during the course of the emergency response in the state which requested assistance.** Thus, if a volunteer called out to California to provide emergency assistance injures a person in Missouri while driving out to California, immunity under this section would not apply.

### **22 M.R.S.A. §816 Immunity for private institutions and healthcare workforce members**

This statute provides qualified immunity to health care facilities and health care volunteers administering public health measure court orders or for liability arising during periods of declared public extreme public health emergency. Private facilities, their employees and agents would be treated as state employees under the Maine Tort Claims Act for any acts involving restraining or confining a person considered a public health threat pursuant to Title 22, Chapter 250. Therefore, if a person were lawfully restrained in a hospital or other health care facility while deemed a public health threat, neither the health care facility nor its staff would be civilly liable for such involuntary restraint.

## ESAR-VHP

In 2006 the Legislature significantly amended this statute to provide additional immunity to hospitals which hired additional medical staff during periods of extreme public health emergency or disaster as declared by the Governor. In such situations, hospitals would not be civilly liable for any harm which arose from their hiring, credentialing or privileging decisions during the declared emergency, provided the institution attempted to contact the appropriate professional licensing boards to screen the volunteer and conduct appropriate background checks.<sup>22</sup>

### Best Practices in Volunteer Management

#### 1. Establish clear rules and responsibilities

- Establish role/responsibility statements and establish protocols governing volunteer practices
- Conduct periodic training
- Require ongoing supervision of volunteers
- Document education, training, and supervision
- Establish risk management protocols
- Promptly address and mitigate deviations from response protocols

#### 2. Verify professional licensure/registration status of volunteers

- Routine check with licensing agency
- Require volunteers to notify Supervising agency of any change in licensing status

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<sup>22</sup> 22 M.R.S.A. § 816(1-A).

- Document appropriate licensing status

### 3. Secure MEMA designation for volunteer response

- Establish inventory of volunteers by topic area/nature of emergency and secure Maine Emergency Management Assistance designation to participate in a declared emergency response
- Restrict volunteer participation to the period of declared emergency response

### 4. Coordinate emergency response to Governor's emergency declaration

- For non-health care volunteers, immunity must be tethered to declared emergency response
- For health care workers, participation may be annexed to Governor's declared emergency or DHHS Commissioner public health emergency declaration

### 5. Identify gaps in tort immunity

- No statutory immunity for pre-event planning and training
- Statutory immunity generally available to individuals, rather than organizations
- Inventory available private insurance

- Consider approaching Legislature with volunteer organization immunity