

WORKING WITH VOLUNTEERS:

Legal Issues and Best Practices

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Agenda

- **Potential risks to CAA and its volunteers**
- **Protecting against those risks**
 - Risk management
 - Insurance and indemnification
 - Laws limiting liability of CAAs and their volunteers
- **OMB rules on volunteer time**

Potential Risks to CAA

- **Potential risks to CAA and its volunteers**
- **Protecting against those risks**
 - Risk management
 - Insurance and indemnification
 - Laws limiting liability of CAAs and their volunteers
- **OMB rules on volunteer time**

Potential Risks to Volunteers

- Liability to third parties for acts committed while volunteering
- Injuries to themselves/their property while volunteering
- Liability to CAA for damages to CAA's property, reputation



Risk Management Generally

- **Identify risks**
- **Evaluate risks**
- **Decide how to deal with risks**
 - Avoidance – decide not to do an activity
 - Modification – change policies and procedures
 - Transfer – insurance, waivers/releases
 - Retention – accept risk
- **Periodically re-assess risks, revise plan for dealing with risks if necessary**



Questions to Ask

- What work do volunteers do?
- Who's volunteering?
- Are they compensated?
- What are the working conditions?
- How are volunteers trained and supervised?
- What are the applicable state and federal volunteer laws?
- How is volunteer time treated under OMB circulars?

What Work Do Volunteers Do?



Volunteer Positions

- **Identify, evaluate the risks they pose**
 - Decide how to deal with risks – avoid, modify, transfer or retain
- **Identify relevant legal requirements and steps necessary to comply**
- **Background checks, immigration status, insurance, licensing, training, tax reporting, etc.**



Volunteer Positions

- Don't assign volunteers to work in for-profit enterprises run by CAA
- Check before assigning volunteers to work covered by union contracts
- Where possible, avoid assigning volunteers to do work that would otherwise be done by regular employees

Who is Volunteering?



Screening Process

- Tailor process to risks posed by position
- Identify qualifications for position
- Identify characteristics automatically disqualifying applicants
- Identify licenses/insurance required for a position; develop procedures to confirm that applicants have them
- Develop written screening guidelines and tools to document screening process
- Train staff on screening process



Application Process

- Review completed application form
 - Evaluate if each applicant's background/experience, skills and preferences are a good match for the position
- Conduct in-person interview
- Conduct background check (criminal history record check, if relevant)
- Require physicals (if relevant)
- Check references, licenses, insurance
- Obtain waivers and consent forms
- Take steps to avoid discrimination



Criminal History Record Checks

- Identify positions that require them, set guidelines for each position
- State check vs. national check
- Sex offender registries
- In-house vs. private screening firm
- Budget for costs of checks
- Application forms
- Procedures for documenting that checks done
- Appeals process, privacy protections



Waivers, Releases & Consent Forms

■ **Waivers/releases**

- Volunteers agree in advance that CAA won't be liable for injuries/harm they suffer while volunteering
- Not always enforceable, but may discourage "nuisance" lawsuits

■ **Consent forms**

- Put volunteers on notice of risks involved
- Use to rebut claims that injured volunteers wouldn't have engaged in activity had they known risks involved



Minors

- Parental consent forms
- Compliance with child labor laws
- Closer supervision than for adult volunteers



CAA Employees

- **FLSA issue – time spent volunteering could be hours worked for nonexempt employees**
 - Don't assign them to volunteer work similar to their paid positions
 - Don't have them volunteer during their regular work hours
 - Have volunteer employees sign statement
 - Centralize decision making about who volunteers for what
- **Don't assign volunteer to work otherwise done by regular employees**



Trainees/Interns

- May not be considered employees for various purposes (e.g., wage and hour laws, unemployment), but don't just assume – check
- To be a trainee rather than an employee under FLSA: 6 factor test
 - See DOL website: <http://www.dol.gov/elaws/esa/flsa/scope/ee15.asp>



Trainees/Interns

Six FLSA factors:

Training similar to what would be done in a vocational school

Training for benefit of trainee

Employer gets no immediate advantage from trainee's activities

Trainee doesn't displace regular employees

Trainee not entitled to a job at end of training period

Shared understanding that trainee not entitled to wages for training time

2nd Circuit Court of Appeals (CT/NY/VT):

Test is who is the "primary beneficiary" of the relationship – the intern or the employer?

TANF Recipients

- TANF recipients can only work maximum number of hours permitted under FLSA (or state wage and hour law, if state minimum wage is higher than federal)
 - State TANF agency will calculate # of hours
 - See 45 C.F.R. §§ 261.31 and 261.32

Youthful & First-Time Offenders

- **Youthful & first-time offenders doing community service are not employees under FLSA if they:**
 - Voluntarily enter into program for their own benefit;
 - Do not displace regular employees or impinge on the employment opportunities of others;
 - Are under the supervision and control of the courts; and
 - Perform the work without contemplation of pay
- **See US Dep't of Labor (DOL) Wage and Hour Division (WHD) Field Operations Handbook § 10b38,**
http://www.dol.gov/whd/FOH/FOH_Ch10.pdf

Participants in CNCS Programs

- **Participants in some Corporation for National and Community Service programs are not employees for purposes of FLSA**
 - Foster Grandparents and Senior Companion programs
 - See DOL WHD Field Operations Handbook § 10b30
 - Americorps programs
 - See DOL Wage & Hour Opinion letter online at http://www.nationalservice.gov/sites/default/files/documents/ogc_flsa1998.pdf

What are the Working Conditions?



Safety Policies

- Require supervised volunteer contact with children, other vulnerable populations
- Instruct staff and volunteers how to respond in case of injury involving a volunteer
- Implement regular review of location/premises where volunteers will be working



Use of Autos

- Check that CAA carries necessary insurance
- Require and check volunteers' licenses and insurance; check history of accidents, moving violations
- Require volunteers to have in vehicle: registration, accident form, pen and paper
- Train volunteers on what to do in case of an accident

Insurance

- Check what, if any, insurance coverage is required by federal or state law, regs, grant terms and conditions, etc.
 - For example: Foster Grandparents regs specify what coverage must be maintained by organization and by Foster Grandparents



Insurance Coverage Purchased by CAA

- **General liability policy**
- **Volunteer liability policy**
- **D&O liability policy**
- **Workers' compensation**
- **Auto policy**
 - Commercial auto policy – for when volunteers/employees drive vehicles owned by CAA
 - Non-owned auto policy – for when volunteers/employees drive own cars
 - Volunteer driver excess policy



Insurance Coverage Purchased by Volunteers

- Volunteers may have coverage through their own insurance
- They should check their policies, talk to their insurance agents

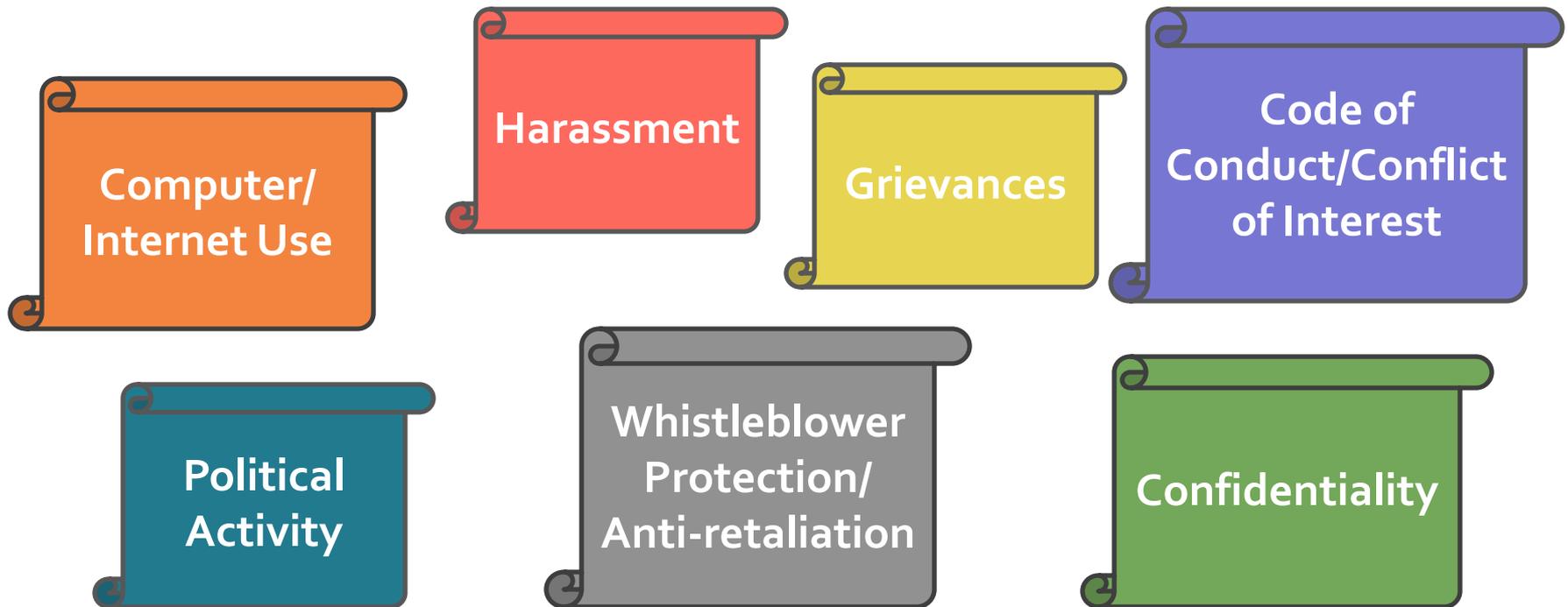
How are Volunteers Trained and Supervised?

Policies & Procedures

- **Develop written volunteer policies and procedures (volunteer handbook) which includes:**
 - Code of conduct/conflict of interest policy
 - Confidentiality policy
 - Computer/internet use
 - Political activity while volunteering
 - Prohibited volunteer conduct
 - Procedures in case of accidents involving volunteers
 - Grievance policy for volunteers
 - Program-specific volunteer policies

Additional Policies

- Consider applying employment policies to volunteers, e.g. policies on:



Staff Training

- **Train staff responsible for supervising volunteers in:**
 - Volunteer policies/handbook
 - How to train, supervise, evaluate and motivate volunteers, and how to deal with volunteer performance problems
 - Position-specific information about volunteers' duties and responsibilities
 - Risk management techniques and safety procedures



Volunteer Orientation

- **Review volunteer policies/handbook**
 - Have volunteer sign acknowledgement
- **Train for specific duties volunteer will be performing**
 - So staff know volunteers have necessary skills, can competently perform duties
 - Including risk management/safety procedures
- **Conduct periodic training as necessary**



Volunteer Supervision/Evaluation

- Monitor how volunteers are doing their jobs
- Give volunteers periodic feedback on how they're doing, how they can improve
- Get feedback from volunteers re: whether they are satisfied
 - If assignment isn't working out, re-assign volunteer
- Discipline volunteers, if necessary

Are Volunteers Compensated?

Types of Compensation

- **Look at everything of monetary value the volunteer receives from CAA, e.g.:**
 - Stipends
 - Expense reimbursements
 - Gifts/awards
 - Food and entertainment
 - Fringe benefits



Why Does it Matter?

- Compensation could cause volunteer to be considered an employee
- May disqualify volunteers from coverage under liability protection laws
- Could be taxable income subject to reporting and withholding
- Could be considered income for purposes of gov't benefit eligibility

What are the Applicable State and Federal Volunteer Laws?



Indemnification/Disclaimers

- State laws give nonprofit corporations authority to indemnify directors, officers, employees, and agents (including volunteers) for liability and defense costs in cases brought against them due to their positions with the nonprofits
- If providing volunteers to other organizations, acting as a volunteer clearinghouse
 - Indemnification
 - Disclaimers

Laws Limiting CAAs' Liability

- Charities can't be sued/can't be held liable for certain acts (few states)

**Charitable
Immunity**

- Limits on damages that can be awarded against charities (fewer states)

Liability Caps

- Protect public CAAs (and, in some states, private ones)

**State Tort Claims
Acts**



State Laws – CAAs' Liability

- NH law, RSA § 508:17, Liability cap
 - Org's liability for damage or injury sustained by one person alleging negligence on part of volunteer limited to \$250K; (for multiple persons, limited to \$1 million)
- ME law, Charitable immunity (common law)
 - Common law immunity applies only if an organization derives its funds mainly from public and private charity. *Thompson v. Mercy Hosp.*, 483 A.2d 706 (Me. 1984). If an organization has insurance, recovery is limited to the extent of coverage. Me. Rev. Stat. Ann. tit. § 158 (West).



Laws Limiting Volunteers' Liability – Federal Volunteer Protection Act

- **42 U.S.C. § 14051 et seq.**
- **Applies to volunteers for nonprofits and government entities**
 - Provides a minimum level of protection
 - State law may provide more protection
 - States may opt out
 - “Volunteer” = someone who provides services and receives no more than \$500 in compensation per year



Federal Volunteer Protection Act

- **Protects volunteers from liability for harm they cause while acting within the scope of their responsibilities as volunteers**
 - If appropriate or required, volunteers must be properly licensed, certified, authorized by the appropriate authorities



Federal Volunteer Protection Act

- **Does NOT protect volunteers from liability for harm caused by:**
 - Volunteer operating a vehicle for which state requires an operating license or insurance
 - “Willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed”



State Laws Limiting Volunteers' Liability

- **State volunteer protection laws**
 - May provide more protection than federal law
 - Vary as to who's protected
 - Directors and officers
 - Other volunteers
 - Vary in scope of protection and conditions required for protection



State Laws – Volunteers' Liability

- ME law, 14 M.R.S. § 158-A, Immunity for charitable directors, officers and volunteers
 - Must not receive compensation (may be paid for expenses)
 - Applies when the cause of action involves a negligent act or omission and occurs within the scope of org. activity
 - Waive immunity if arises out of operation of a motor vehicle, vessel, aircraft or any vehicle that requires a license and insurance; extent of damages limited to insurance coverage
 - Immune from civil liability for:
 - Personal injury, death or property damage including monetary loss
 - An act or omission not committed by them but occurred within the scope of activity of the org.



State Laws – Volunteers' Liability

- NH law, RSA § 508:17, Non-profit or government volunteers
 - Must not be compensated (other than reimbursement for expenses actually incurred for services)
 - Immune from civil liability from an act or omission resulting in damage if org had record indicating person a volunteer and volunteer acted in good faith and within scope of duty
 - Not immune from damage or injury caused by willful, wanton or grossly negligent misconduct by the volunteer



State Laws – Volunteers' Liability

- VT law, 12 V.S.A. § 5781, Non-profit organizations
 - A director, officer, or trustee of a non-profit organization who serves in good faith and without compensation is not personally liable for damages resulting from:
 - an act or omission within the scope of official duty,
 - the act or omission of an employee of the organization, or
 - an act or omission of another director, officer or trustee.
 - No immunity if act or omission constitutes gross negligence or an intentional tort
 - No protection from liability for damages that result from the operation of a motor vehicle

How is Volunteer Time Treated Under OMB Circulars?



OMB Rules on Volunteer Time

- **Value of donated services is not reimbursable, but may be used for match**
 - Uniform Guidance, 2 C.F.R. § 200.434(b)
- **Volunteer services may be counted toward match if they are “an integral and necessary part” of the grant-funded project**
 - Uniform Guidance, 2 C.F.R. § 200.306(e); HHS’ codification of the Uniform Guidance 45 C.F.R. § 75.306(e)



Valuing Volunteer Time

- **3 ways to calculate value under OMB circular rules:**
 - Use rates paid by CAA for similar work
 - If no comparable position at CAA, use rates paid for similar work in CAA's labor market
 - If services provided by another employer, use rate based on what that employer pays
 - In the above cases, paid fringe benefits that are reasonable, necessary, allocable and otherwise allowable may be included in the valuation
 - Uniform Guidance, 2 C.F.R. § 200.306(e)

Match Criteria

- Necessary & reasonable for accomplishment of program
- Verifiable from grantee's records
- Not used for more than one federal program
- Not from another federal award, unless permitted by program legislation
- Allowable under cost principles
- Included in approved budget (if required by funding source)
- Meet funding source's general grant management rules
- Uniform Guidance, 2 C.F.R. § 200.306(b)

NOTE:

Uniform Guidance clarifies that federal statute authorizing program must specifically provide that such funds can be used as a match for other federal programs



Match Criteria

- **Document how you calculated value of donated services charged to grant**
 - OMB Circular A-110, #23(d), (h)(5); HHS version, 45 CFR § 74.23;
 - Not addressed in Uniform Guidance



Indirect Costs

- **When calculating indirect cost rate:**
 - Value of donated services and property may not be charged as indirect costs (Uniform Guidance, 2 C.F.R. § 200.434(b))
 - Include value of donated services used in performing direct cost activity and ensure it is allocated a proportionate share of applicable indirect costs when (Uniform Guidance, 2 C.F.R. § 200.434(e)):
 - The aggregate value of the services is material in amount; and
 - The services are supported by a significant amount of the indirect costs incurred by the organization
 - If no basis for determining fair market value of services, must negotiate an appropriate allocation of indirect cost with cognizant agency

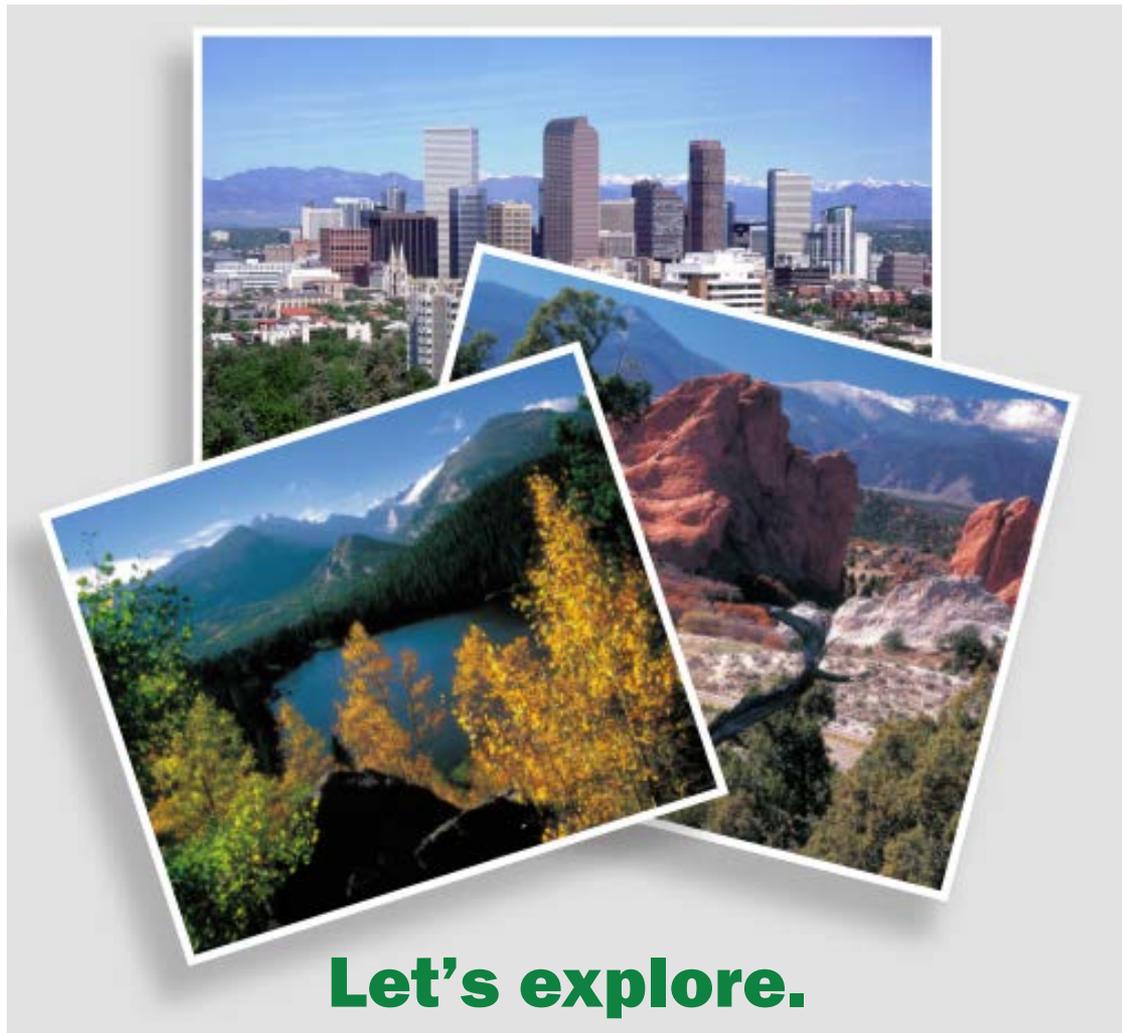


Indirect Costs

- Where donated services directly benefit a project, indirect costs allocated to those services are part of project's total costs and may be reimbursed or used for match
 - Uniform Guidance, 2 C.F.R. § 200.434(e)(ii)
- Unrecovered indirect costs – including those associated with volunteer time – may be included in match, with prior approval of federal awarding agency
 - Uniform Guidance, 2 C.F.R § 200.306

Additional Resources

- **Nonprofit Risk Management Center:**
 - Publications, online training and other resources on volunteer risk management
 - Visit www.nonprofitrisk.org and click on “Volunteer Management” under “Areas of Expertise”



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