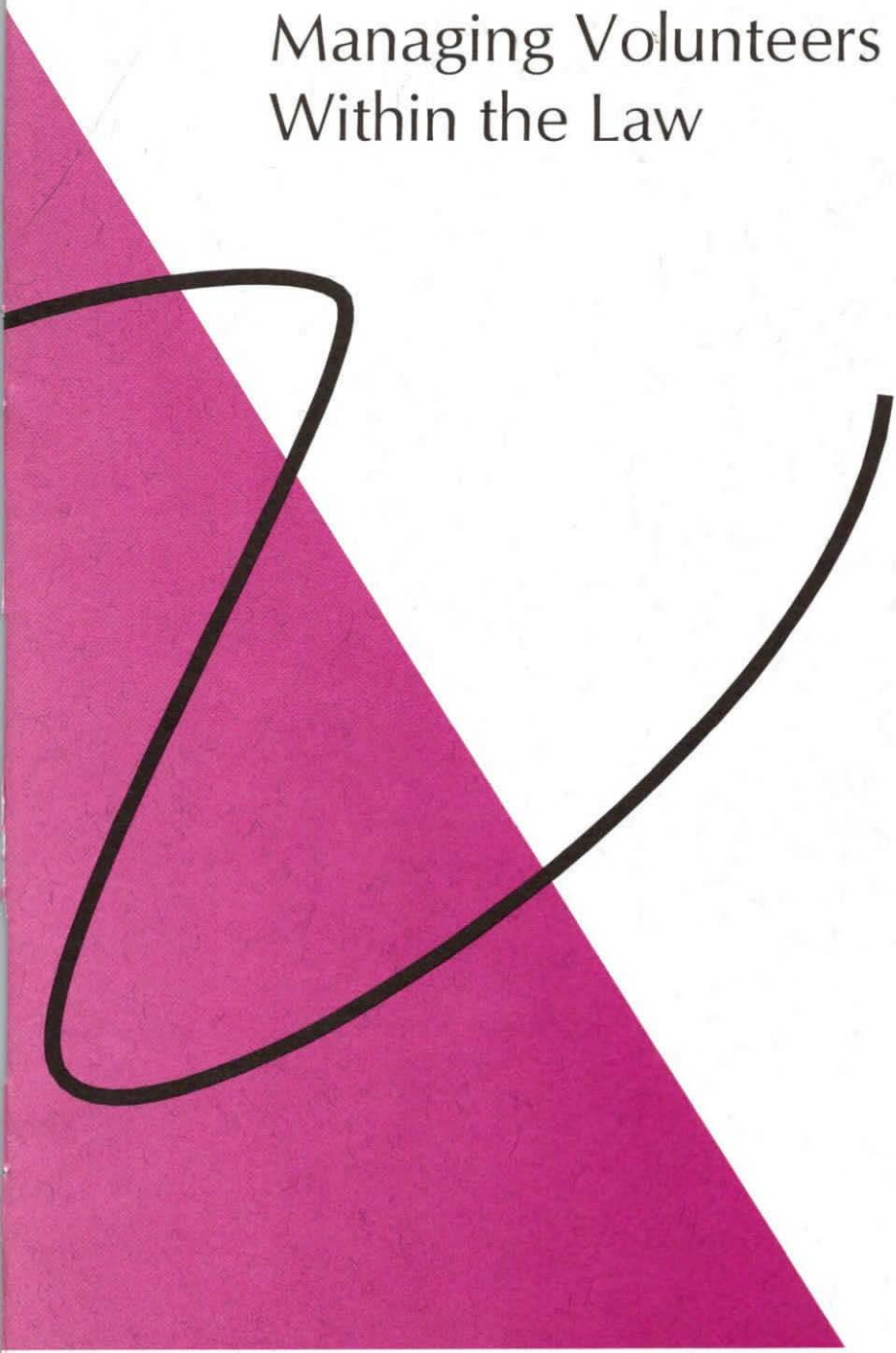
Managing Volunteers Within the Law



A Community Service Brief from the Nonprofit Risk Management Center

Community Service Briefs

This publication is part of a series on legal liability, insurance, and risk management for community-serving organizations. The series is designed to serve three major purposes: provide guidance on resolution of legal issues; suggest strategies that program managers can implement to prevent legal problems from hampering their operations; and offer suggestions for modifying laws that may inhibit national and community service.

All opinions expressed in this booklet are those of the authors on behalf of the Nonprofit Risk Management Center. They do not necessarily reflect the official position of the Corporation for National and Community Service.

Nonprofit Risk Management Center

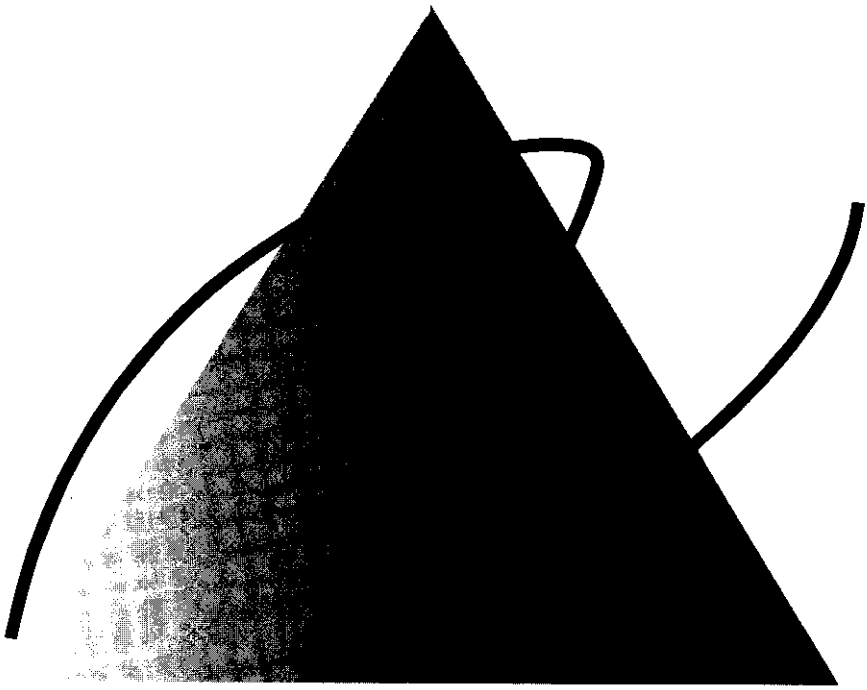
The mission of the Nonprofit Risk Management Center is to meet the risk management and insurance needs of community serving organizations through research, education, and advocacy. The Center is an independent nonprofit organization that does not sell insurance nor endorse specific insurance providers. General operating support has been received from the Ford Foundation, the Lilly Endowment, and the Mott Foundation. Liaison to the insurance industry is provided by representatives of the nation's leading insurance, risk management, and health benefits associations serving on the Center's Council of Technical Advisors.

Corporation for National and Community Service

The Corporation for National and Community Service will engage Americans of all ages and backgrounds in community–based service. This service will address the nation's education, human, public safety, and environmental needs to achieve direct and demonstrable results. In doing so, the Corporation will foster civic responsibility, strengthen the cords that bind us together as a people, and provide educational opportunity for those who make a substantial commitment to service.

Managing Volunteers Within the Law

a community service brief



Charles Tremper
Anna Seidman
Suzanne Tufts

NONPROFIT RISK MANAGEMENT CENTER

Acknowledgments

The authors thank the following individuals for their helpful suggestions on this *Community Service Brief.*

Barbara Baker, National Society for Experiential Education
Winnifred Brown, New York City Mayor's Voluntary Action Center
Michael Goldstein, Lohnes & Albertson
Jeffrey Kahn, Children's Hospital of Philadelphia
William Lyons, University of Nebraska, College of Law
Eric Magee
Andrew O. Moore, National Association of Service and Conservation Corps
Cynthia Paveglio, New Hampshire Office of Wage and Hour Administration
Pamela Poff, Jackson, Lewis, Schnitzler & Krupman
Margaret Pringel, U.S. Department of Labor
Jadwiga Sebrecht, Women's College Coalition
Nila Stovell, U.S. Department of Labor
Bradford W. Warbasse, Gordon, Feinblatt, Rothman, Hoffberger and Hollander

With special thanks to Harvey Dale and Sandra Agan of the New York University Program on Philanthropy and the Law.

Community Service Brief Review Panel

William C. Basl, Washington Service Corps
Mike Brown, City Year
Irene Fisher, Lowell Bennion Community Service Center
Margaret O'Neill, Student Service Allliance

Contents

Introduction **1**
Anti-Discrimination **3**
Federal Employment Discrimination Law 3
State Employment Discrimination Law 5
Federal Public Accommodations Law 6
State Public Accommodations Laws 8
The Americans with Disabilities Act 9
Public Entities and Federal Grantees 11
Workers' Compensation **14**
Child Labor Laws **16**
Taxation **17**
General Tax Rules 17
Living Allowances, Stipends and Other Payments During Service 18
Non-Cash Benefits 18
Scholarships 19
Reimbursements 21
Conclusion **22**
Footnotes **23**

Introduction

Volunteers' rights! While those words have not become an advocacy slogan, volunteers do indeed have rights. Failure to respect them is both bad management and grounds for a lawsuit.

To help you comply with laws pertaining to the management of volunteers, this Community Service Brief provides guidance regarding some of the most common legal issues that arise in the management of volunteers. Discrimination, workers' compensation, child labor, and taxation receive attention here.

The guidance available from this booklet is limited because the applicability of many of these laws to volunteers is unsettled and because the laws vary across the country. Each state has its own rules and even the interpretation of federal laws varies somewhat depending on court rulings and agency interpretations that have not been standardized nationally.

Because the applicability of many laws to volunteers has not received much attention, this booklet sometimes provides only the principles of law rather than clear rules.

Few laws apply to volunteers *per se*. However, statutes that do not specifically exclude volunteers or clearly limit their scope to paid workers may apply to all who provide service, whether or not in exchange for compensation.

In addition to alerting you to your responsibilities under these laws, the information here may help you work to change laws that inappropriately interfere with your ability to accept the assistance of volunteers.

More information about laws that limit the use of volun-

teers is available in *Legal Barriers to Volunteer Service*. For a free copy, write or fax the Nonprofit Risk Management Center.

At the outset, a brief word about terminology is necessary. As you will see, the applicability of many of the laws depends on whether an individual is considered to be a "volunteer" or an "employee." As a matter of law, the label *you* give someone is not determinative. An individual you refer to as a "volunteer" may nonetheless be subject to employment laws and standards.

Throughout this booklet, we use "volunteer" to refer to anyone customarily thought of as a volunteer. We use "employee" to refer to someone covered by the employment law at issue, whether or not otherwise considered to be a volunteer. In general, the more a volunteer resembles an employee—compensation, tasks typically performed by employees, subject to same rules as employees—the more likely that laws applying to employees will apply to the volunteer.

While we have attempted to make our work as thorough and as accurate as possible, this booklet cannot provide exhaustive or definitive answers for many of the questions it addresses. The law simply does not permit such certainty. Our goal is to give you as much of the answer as possible under these conditions. You may still need to consult a lawyer for an opinion regarding your specific circumstances. If so, this booklet should be a time-saving tool for your attorney. We have included footnotes specifically for attorneys' use. (If you're not an attorney, you can skip the footnotes.)

If you spot an error or omission in this booklet, or if you have ideas for operating in ways that minimize the negative effects of any law on your program, please notify the authors. Our chief objective is to provide the best possible guidance to the field, and that includes a commitment to update the material in this booklet as needed. Please let us know how we can make these materials more useful for you and please share your knowledge with us so other programs can learn from your experience.

Anti-Discrimination

Federal, state, and local governments have laws that may prohibit discrimination against volunteers, particularly with regard to "hiring and firing." There are two types of anti-discrimination laws that may apply: employment discrimination laws and laws governing "public accommodations."

Although the federal laws have been applied to volunteers only in very limited situations, some of the state laws are applied more broadly. In addition, organizations that receive government funding may be specifically prohibited from discrimination involving volunteers by the terms of their grant or contract. The newest federal anti-discrimination law, the Americans with Disabilities Act, receives separate attention below because the courts have not yet ruled on its applicability to volunteers and because its requirements are less well-known.

Federal Employment Discrimination Law

Federal laws prohibiting employment discrimination based on race, color, religion, sex or national origin include Title VII of the Civil Rights Act of 1964,[1] the Age Discrimination In Employment Act of 1967,[2] and the Pregnancy Discrimination Act.[3] Several cases under these laws have involved volunteers or prospective volunteers who claimed discrimination and sued organizations. *These cases held that volunteers who receive no compensation are not protected by federal employment discrimination laws.* In a recent case, though, a federal court of appeals ruled that a volunteer fire fighter who receives benefits from her membership in a fire company *may* be covered if those benefits represent "significant remuneration."[4]

Federal employment discrimination statutes consistently use the word "employee," but do not specify what characteristics make an individual an employee. Consequently, courts have been forced to make this determination on a case by case basis. The courts have addressed the issue of whether a volunteer is an employee in two contexts.[5] The first has arisen when a volunteer alleges discrimination. The second is when an organization claims that it is not subject to federal employment discrimination laws because it does not employ the minimum number of employees necessary to trigger application of the laws.[6] In this context, the courts have had to decide whether volunteer workers should be counted as employees. In both contexts, federal courts have uniformly concluded that uncompensated volunteers are *not* "employees" and, therefore, are not entitled to the laws' protections.[7]

In reaching their decisions, the federal courts have found that compensation is an essential element of employee status.[8] *Smith v. Berks Community Television*[9] illustrates the federal courts' approach in this area. In that case, the court reviewed the distinction between paid and unpaid services and found no protection for volunteers under Title VII. According to the court, "[i]n enacting Title VII, Congress sought to eliminate a pervasive, objectionable history of denying or limiting one's livelihood simply because of one's race, color, sex, religion or national origin." The court, therefore, held that employee status requires an economic relationship between the individual and the employer. Because volunteers, being unpaid, are not subject to the economic injuries due to discrimination which the statute was designed to prevent, the court reasoned that volunteers are not denied access to a means of livelihood, and thus are not protected by the statute.

A recent case, *Haavistola v. Community Fire Company of Rising Sun*,[10] however, holds that the label of "volunteer" will not automatically exempt an individual from being considered as an employee under federal employment laws. *Haavistola* is important because it is the first appeals court case to address these issues. According to *Haavistola*, courts must examine whether the benefits a volunteer receives represent "indirect but significant remuneration" rather than merely

"inconsequential incidents of an otherwise gratuitous relationship." A volunteer who receives significant remuneration in exchange for services *may* qualify as an employee.[11]

The issue that *Haavistola* leaves open is what kind of benefits can be classified as "significant remuneration." The benefits Haavistola received include a state-funded disability pension, survivors' benefits for dependents, scholarships for dependents upon disability or death, bestowal of a state flag to family upon death in the line of duty, benefits under the Federal Public Safety Officers' Benefits Act when on duty, group life insurance, tuition reimbursement for courses in emergency service techniques, tax-exemptions for unreimbursed travel expenses, ability to purchase a special commemorative registration plate for private vehicles without paying extra fees, and access to a method by which she may obtain certification as a paramedic.[12] The court does not, however, indicate how these should be weighed.[13]

State Employment Discrimination Law

Unlike federal laws, some state employment discrimination laws have been applied to volunteers. While most state courts that have considered the question have followed the federal courts in concluding that employment discrimination laws do not apply to volunteers, some have taken a different approach than the federal courts and a few have reached a different result. These latter cases examine the degree of control that the organization has over the individual instead of focusing on the economic relationship between the volunteer and organization.

Harmony Volunteer Fire Company & Relief Association v. Pennsylvania Human Relations Commission[14] illustrates this "control" analysis. In *Harmony*, the court held that the Pennsylvania Human Relations Act, which prohibits discrimination against employees, applies to volunteer fire companies which rejected women applicants. In determining whether the fire company was an employer under the Act, the court bypassed a compensation analysis, stating that "[a]lthough

the duty to pay a salary is often coincident with the status of employer, it is not an absolute prerequisite."[15] Instead the court ruled that the key to the relationship is the employer's power to control the details of the employee's activities. The court concluded that the fire company qualified as an employer because it had tight control over such employment-related matters as hiring, firing, training, and assignments.

Other states have looked to the federal courts for guidance in applying their employment discrimination laws and have found that uncompensated volunteers are not protected under state law. For example, in *City of Fort Calhoun v. Collins*,[16] the Nebraska Supreme Court held that because the Nebraska Fair Employment Practice Act is patterned after Title VII of the Civil Rights Act of 1964, its interpretation should be similar. The court held that volunteer fire fighters are not employees within the meaning of the Nebraska statute because they receive insufficient compensation.

Federal Public Accommodations Law

Public accommodation statutes originated with the common law obligation of innkeepers and common carriers to admit and serve all travelers. The reasoning behind these statutes is that some privately owned businesses and organizations are public in many respects and thus have a duty to provide equal access to services. Over the past few decades, Congress has enacted several laws to clarify and expand that duty.

Title II of the Civil Rights Act of 1964 is the principal federal public accommodations law. The statute ensures that all persons are entitled to "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."[17]

Volunteers seeking the protection of Title II face two issues. The first is whether the organization the volunteer serves or wishes to serve is a "place of public accommodation" under the statute. The second issue is whether Title II's

protection applies to volunteers offering to provide services to an organization or whether it applies only to individuals who receive goods or services from an organization.

Most volunteer organizations are not "places of public accommodation" and therefore not subject to Title II. The determination of what is or is not a public accommodation is made on a case by case basis. A membership organization or club can be considered to be a public accommodation if it offers advantages and facilities on the basis of a general public invitation to join.[18]

In *Welsh v. Boy Scouts of America*[19] a federal appeals court addressed the threshold issue of whether a membership organization such as the Boy Scouts of America qualifies as a "place of public accommodation" under Title II. After an extensive analysis of Title II and its legislative history, the court ruled in favor of the Scouts. In reaching its conclusion, the court ruled that in order to qualify as a "place of public accommodation," an establishment must have a substantial connection to a concrete facility or location. According to the court, the Boy Scouts is not a "place of public accommodation" because it lacks a connection to a particular site or facility. The Boy Scouts of America is a membership organization whose benefits flow primarily from the interpersonal associations of its members rather than from a tangible facility.[20]

In addition to establishing a substantial connection to a concrete facility or location, a volunteer bringing suit under Title II also needs to show that providing services to an organization qualifies as the enjoyment of that organization's "goods, services, facilities, privileges, advantages, or accommodations." The issue of whether Title II's protection applies to volunteers offering to provide services to an organization has yet to be addressed by a federal court. As discussed below, state courts are divided with regard to state laws similar to Title II.

State Public Accommodations Laws

Thirty-nine states as well as the District of Columbia have public accommodation statutes.[21] Whether an organization is considered a public accommodation depends on the interpretation of the law in a given state. Some state court decisions concur with the federal *Welsh* case and hold that a membership organization which is not tied to a particular location or facility cannot be considered a "place" for purposes of state laws prohibiting discrimination in places of public accommodation.[22]

Other courts have not restricted application of their public accommodation statutes in this manner. These courts have interpreted state statutes as encompassing any organization, whether in a fixed location or not, which offers goods or services to the public.[23] The focus is on the activity of the organization, not on its location. Factors such as selectivity of membership, number of members, and benefits of membership are all important in reaching a determination.

Even if an organization qualifies as a public accommodation under state law, the protection of the public accommodations statutes might not apply to volunteers offering their services to the organization. At least one state court, in *Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities*,[24] has held that its state statute does not apply to the offer of services by a prospective volunteer, as opposed to the request for services from the organization. The court held that the claimant, a woman whose application to be the Scoutmaster of a Boy Scout troop was refused because of her sex, was not protected by the statute.

In reaching its conclusion, the *Quinnipiac* court reasoned that the Connecticut statute was originally enacted to protect individuals from discriminatory practices that deny access to goods and services. It was not directed at alleged discrimination by an organization that refuses to "avail itself of a claimant's desire to offer services."[25]

Thus, in most states, anti-discrimination laws do not apply to volunteers of nonprofit organizations that receive no

government funding. Nonetheless, good policy reasons counsel against invidious discrimination. Moreover, lawsuits challenging alleged discrimination may still be filed, especially in states where the issue has not been definitively resolved. Such suits may not succeed, but they are likely to be costly. For these reasons many organizations choose to treat volunteers as if they are protected by anti-discrimination laws.

The Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (ADA)[26] prohibits several types of discrimination against persons with disabilities. The ADA requires that individuals with disabilities enjoy equal opportunity to participate in the most integrated setting possible with regard to available employment and program services.

The Act includes both employment and public accommodation sections. Although the employment sections of the ADA are unlikely to apply to volunteers, the public accommodations sections may apply. For detailed information on the ADA we suggest consulting one of the comprehensive guides such as the *ADA Compliance Manual* or the *ADA Handbook,* (although neither directly addresses applicability of the ADA to volunteers). The *Compliance Manual* is published by the U.S. Equal Employment Opportunity Commission (EEOC) and is available at Commission headquarters and field offices and public libraries. A copy can be purchased from the Bureau of National Affairs, 1231 25th Street, N.W., Washington, D.C. 20037, (800) 372-1033 and from Commerce Clearing House, 4025 West Peterson Ave., Chicago, IL 60646, (312) 583-8500. The *ADA Handbook* is a joint publication of EEOC and the Department of Justice and may be purchased at Government Book Stores or by calling (202) 783-3238. An excellent nongovernmental source for information about meeting the needs of individuals with disabilities is the Job Accommodation Network, 1-800-ADA-WORK.

All public agencies are subject to the ADA, and nonprofits generally must comply with the public accommodations

rules regardless of staff size. "Public accommodation" generally means an organization that provides goods and services to the public. The ADA contains a detailed list of the sorts of organizations and activities that are included in the Act's coverage: schools (from nursery through post-graduate, both public and private), museums, galleries, libraries, senior centers, day care centers, stadiums, auditoriums, convention centers, lecture halls, homeless shelters, food banks, adoption agencies, social service, "places of public gathering," stores, gymnasiums and "places of exercise or recreation."[27]

The ADA defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment."[28] This definition not only includes persons whose impairment substantially limits major activities, it also includes persons who are *regarded by others* as having an impairment, whether or not the impairment actually substantially limits major life activities.

Pursuant to Title III of the ADA, individuals with disabilities cannot be denied the opportunity to participate in or benefit from the activities of public accommodations. Furthermore, "the opportunity offered to disabled people must be equal to that offered non-disabled people; and the participation or benefit cannot be offered separately, unless that is the only effective way that a disabled person can participate in the program."[29] For example, public accommodations must insure that people with disabilities are admitted or served and that auxiliary aides and services are provided to enable a person with a disability to participate (as long as such modifications do not pose an undue burden).

Although no case has yet applied the ADA to a volunteer, the rules may apply; especially if the volunteer position clearly benefits the volunteers. Additional information may be obtained from special telephone information lines set up by the agencies that administer the ADA; the U.S. Equal Employment Opportunity Commission, which operates an ADA Helpline (800) 669-EEOC (Voice) or (800) 800-3302 (TDD);

and the U.S. Department of Justice, Civil Rights Division, Office on the Americans with Disabilities Act (202) 514-0301 (Voice), or (202) 514-0381 (TDD), (202) 514-6193 (Electronic Bulletin Board).

Aside from the federal Americans with Disabilities Act, many states and localities have their own disability discrimination laws covering public and private facilities and organizations. While the Americans with Disabilities Act is broader and supersedes most local laws, some states have laws which may pose additional requirements. As with the other areas of law discussed in this booklet, it is important to consult state and local law with regard to accommodating persons with disabilities in your program.

Public Entities and Federal Grantees

Organizations receiving federal funds generally are subject to federal anti-discrimination laws in the administration of the funded program—thus, they may not discriminate on the basis of sex, race, religion and other federally protected characteristics. In addition, the federal statutes which authorize programs may contain their own anti-discrimination provisions. For example, the National and Community Service Act of 1990 (as modified by the National and Community Service Trust Act of 1993) prohibits grantees from discriminating on the basis of race, color, national origin, sex, age, political affiliation or disability. Religion may not be the basis for discrimination by grantees commencing programs with grants authorized under the amended version of the law.[30]

Some funding statutes create an additional obligation for grantees regardless of civil rights laws. Thus, with regard to discrimination, federal grantees generally must treat volunteers in the same manner as they would employees. If you are receiving federal funds, you need to check to see whether you are required by the terms of your grant or the statute through which you are funded to comply with anti-discrimination rules and other federal civil rights provisions. Even if

you are not receiving federal funds, you may be bound as a subcontractor of an organization that receives federal funds.

If your organization places volunteers with independent organizations for the purpose of performing service, your organization could be liable for the discriminatory acts carried out by the other organization. Take, for example, the cooperative education scenario where colleges and universities place students in businesses for the purpose of obtaining practical education. Schools that receive federal financial assistance are prohibited from discriminatory conduct by Title VI of the Civil Rights Act of 1964[31] which states: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Similar language appears in federal statutes barring discrimination based on sex,[32] age,[33] and disability.[34] The Department of Education has interpreted the language of these statutes to prohibit "second hand" discrimination and has promulgated regulations which reflect this interpretation. For example, "A recipient [institution] under any program to which this Part applies may not, directly or through contractual or other arrangements, on grounds of race, color or national origin: . . . . deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program . . ."[35]

Segregation which occurs naturally in a program may not necessarily be prohibited by federal statute. For example, a service-learning program based at a women's college might have all female volunteers, or an urban service corps might have all minority participants who respond to the program's solicitations for volunteers. As long as the programs do not prohibit participation or impose other barriers to participation by all who wish to serve, anti-discrimination laws are not violated.

In some very specific circumstances, selection can be based on a factor, such as sex, that would ordinarily be

impermissible. A bona fide occupational qualification (BFOQ) for the service can be imposed if truly necessary. For example, female applicants may be rejected from a service program that places volunteer counselors at a boy's camp where the counselors must sleep in the cabins with the boys.

Workers' Compensation

Workers' compensation laws provide a means of recovery for individuals injured during the course and scope of employment. Workers' compensation benefits are commonly reserved exclusively for injured "employees" and their families. Several states, however, allow volunteers to utilize workers' compensation under some circumstances, while a few other states define "employee" and/or "employment" to include some classes of volunteers. Since workers' compensation laws vary from state to state, familiarity with the law of the state or states in which your organization operates is necessary to determine your obligation to purchase workers' compensation insurance.

The applicability of workers' compensation rules to volunteers depends on the wording of state statutes, some of which exclude nonprofits' employees as well as volunteers. The Arkansas statute, for example, expressly excludes from its definition of covered employment "institutions maintained and operated wholly as public charities."[36] Idaho exempts from workers' compensation coverage "employment which is not carried on by the employer for the sake of pecuniary gain."[37] Some states statutorily allow volunteer organizations the option of treating their volunteers as employees for purposes of workers' compensation.[38]

In a few states, the question of whether a volunteer may receive workers' compensation benefits has been addressed by the courts. Some of these decisions hinge on whether the volunteer receives any form of compensation, such as a living allowance, stipend, room and board, benefits or even reimbursement for expenses.[39] Other courts place little emphasis on whether or not the individual has been compensated, but

look instead to the degree of control the employer exercises over the volunteer's service.[40]

Although you may not want to pay workers' compensation premiums, covering volunteers under workers' compensation may offer a significant advantage if the option is available. In almost all states, individuals who elect to seek workers' compensation remedies cannot additionally attempt to recover damages through personal injury litigation against their employer. In these states, workers' compensation presents a trade-off. Workers can recover under workers' compensation for work-related injuries without needing to prove the employer's fault; but their recoveries are more limited than a jury might award.

Child Labor Laws

Child labor laws can restrict minors' volunteer service. In the interest of protecting children, U.S. Department of Labor staff may consider some forms of volunteer service to be employment for purposes of the federal child labor law. Even though the child labor law is part of the Fair Labor Standards Act, which generally does not apply to volunteers, the justification for applying the child labor rules to volunteers is stronger than the justification for applying the minimum wage and maximum hour rules.

In light of this uncertainty, some volunteerism experts recommend that organizations design service assignments for young volunteers to comply with the child labor restrictions regarding hazardous occupations, licensing, parental consent, and working hours.[41]

Federal child labor protections do not pose the only obstacle to programs enlisting the service of minor volunteers. Each state enforces its own child labor provisions, some of which impose restrictions more severe than federal law. The New York State Department of Labor advises that employment certificates should be obtained by workers under 18 years of age whether in paid employment or in volunteer service.[42] Because each state's law is unique, you should check with your state labor department if in doubt.

Taxation

General Tax Rules

Federal and state taxing authorities will expect their share of almost any compensation you give to your volunteers. In general, for tax purposes, you must treat payments to volunteers the same as payments to employees. Consequently, absent an exception from federal or state tax laws, you must withhold income taxes and FICA (Social Security and Medicare) contributions from the compensation you pay your volunteers.[43] Living allowances, stipends, post-service benefits, and in-kind benefits are usually treated like wages.[44]

The Internal Revenue Code contains a number of exceptions, discussed below, that exclude some items from tax. In addition, some federally funded programs provide exceptions in their legislation. Moreover, although volunteers may receive a taxable benefit, some may not earn enough during the year of service to owe any income tax. For example, although your program may award volunteers a $1,000 taxable living allowance, if these volunteers have no other earnings for the year, they escape income tax, since their income will be less than the minimum taxable amount. FICA must still be paid, however.

State tax rules generally follow the Internal Revenue Code with respect to definitions of "taxable income" and withholding requirements. (Many states start with the federal rules and merely add several modifications in the computation of the tax due.) Because state tax codes are not standardized, some may contain applicable exceptions that are beyond the scope of this booklet.

Living Allowances, Stipends and Other Payments During Service

To the extent living allowances, stipends and other forms of cash awards constitute "compensation for services," they are taxable under the Internal Revenue Code and subject to FICA withholding just as if they were wages paid to employees. The IRS taxes income, and these cash awards are a form of income. The FICA tax is a bit narrower, but the definition of "wages" used for FICA is broad enough to include living allowances, and most other forms of compensation for services.

Only if a program qualifies for special tax rules, which are sometimes part of legislation for the program, will living allowances be totally exempt. Job training programs fall within one of the few exemptions. Earnings of individuals enrolled in government-sponsored job training programs who render no service as part of the training experience are not taxed.[45]

Non-Cash Benefits

In-kind benefits, such as meals, lodging, uniforms and health insurance are subject to special tax rules. Although the IRS treats many in-kind benefits as taxable compensation, exceptions apply to most non-cash benefits volunteers typically receive. (Scholarships are discussed separately below.)

Meals and lodging are exempt if they meet the following tests.[46]

Meals Provided for the convenience of the program; and;Served on the program premises or worksite (not in a restaurant).

Lodging Provided to recipients required to accept the lodging a condition of their service to enable them to better perform their duties.

If your program satisfies these rules, the value of meals and lodging is not taxed. Housing must be provided to further the purpose of the program rather than merely to provide

shelter. Meals should be served at program sites or facilities. Feeding volunteers at the golden arches five days a week can turn every Big Mac they eat into taxable income.

Health and accident insurance coverage can generally be provided tax-free.[47] Likewise, uniforms required as a condition of employment and which are not suitable for everyday wear are not taxed.[48] Child care is not subject to tax if it meets certain IRS guidelines.[49]

Inexpensive items may be excludable from income as *de minimis* fringe benefits. This imprecise exception encompasses items such as holiday gifts, coffee and doughnuts, soft drinks, local telephone calls, and use of the copy machine.[50] The more expensive the item, the less likely it is to qualify as *de minimis*, especially if given more than once.

In-kind benefits that do not qualify for a tax exemption must be assigned a dollar value for tax purposes. You will be responsible for determining the fair market value of the goods distributed and for withholding the tax from the volunteers' living allowance or other cash income. Generally, the fair market value of a benefit is the amount an individual would have to pay for the item at a local store or restaurant.[51]

Scholarships

The Internal Revenue Code exempts "qualified scholarships" from tax.[52] These rules have gotten much tighter over the years, so that many scholarships are now fully or partially taxable. Because these rules were not written with volunteers in mind, their application to your program may not produce a clear answer without a ruling from the IRS. The explanation here draws on the tax treatment of scholarships for graduate students.

The first requirement a scholarship must meet to be "qualified" is stated in the negative. The scholarship must *not* be given as compensation for services the recipient performs on behalf of the granting program or institution. Thus, a graduate student who is required to teach in exchange for a scholarship is taxed. Similarly, scholarships awarded to your

volunteers could be taxed as income if a volunteer must perform work to receive the scholarship.

Taxation may depend on how a volunteer "earns" a scholarship. The more the scholarship appears to have been given in exchange for labor, the more likely it is to be taxed. If scholarships are given in addition to a living allowance that alone adequately compensates the volunteer for service, taxation is less likely. Similarly, scholarships based exclusively on merit or need are "qualified." If, for example, your scholarship is a "Merit and Achievement Award" the recipients are less likely to surrender some of their funds to the IRS than if you offer "Scholarship Compensation for Community Service Work."

Words alone are not determinative, however. The program's judgment as to whether or not the award constitutes compensation is not binding on the IRS. Similarly, whether or not the grantor of the award withholds tax on the benefit will not sway the IRS determination.[53] IRS opinion is similarly unaffected by the rulings of other agencies and tribunals. For example, a National Labor Relations Board ruling that an individual is not an employee is not binding for tax purposes.[54]

Even "qualified" scholarships are taxable unless used for permitted purposes: tuition, fees, books, supplies and equipment required for courses of instruction. The IRS taxes any portion of a scholarship used for living expenses or other non-qualifying purposes. A volunteer who uses his scholarship award to wine and dine his college sweetheart may find himself washing dishes to pay the IRS.

Taxable benefits will remain taxable even though volunteers never receive any cash directly or hold the benefit itself in their hands. For example, your organization may write a check directly to a college for tuition payment of a former volunteer. The individual who is credited with the value of the tuition payment then becomes liable for federal and state taxes on it, which the organization is ordinarily responsible for withholding.

Tax liability arises when a volunteer receives the benefit,

for example, by requesting payment to the college where he or she enrolls after the program. Program managers should advise volunteers that no tax need be paid until they exercise the right to use the benefit, but should also advise these individuals to budget for the upcoming tax liability.[55]

Reimbursements

Reimbursements to volunteers are taxable to the same extent as reimbursements to employees. Only if the expense qualifies as a tax deduction for an employee does it avoid tax.[56] Thus, reimbursement for a volunteer's purchase of a uniform, required for program participation, would not be considered part of the individual's taxable income.

Reimbursements for ordinary living expenses like food, clothing and commuting to and from home *are* taxable income. You may be able to provide meals tax-free in some circumstances, but reimbursements for meals or for groceries to cook meals will ordinarily be subject to tax.[57] (An exception is allowed if an individual is traveling away from home for the program.)

Conclusion

Reading this booklet may leave you uncertain about your legal obligations. Some of this material is complicated or contrary to common expectations. Most of the laws discussed in this booklet do not refer specifically to volunteers. Because these laws have been enacted for a variety of purposes, some are interpreted as applying to volunteers and others not. In many instances, good arguments support both sides.

Until the courts rule on these issues—which will happen only if someone sues—the uncertainty will continue. For that reason and others, many volunteer programs comply with anti-discrimination laws and other rules that they may not be required to follow. This booklet should at least provide some assistance for deciding which course to follow.

Footnotes

These footnotes are included to provide legal citations and elaborations for use by lawyers. They are not essential to understanding the text.

[1] 42 U.S.C., § 2000e et seq.

[2] 29 U.S.C. § 621 et seq.

[3] 42 U.S.C. § 2000e (k).

[4] Haavistola v. Community Fire Co. of Rising Sun, 6 F.3d 211 (4th Cir. 1993).

[5] See Leda E. Dunn, Note, "Protection" of Volunteers Under Federal Employment Law: Discouraging Voluntarism?, 61 *Fordham L. Rev.* 451, 459-62 (1992).

[6] For example, Title VII applies only to organizations with 15 or more employees and the Age Discrimination in Employment Act applies only to organizations with 20 or more employees.

[7] EEOC v. Monclova Township, 920 F.2d 360 (6th Cir. 1990); Graves v. Women's Professional Rodeo Ass'n, 907 F.2d 71 (8th Cir. 1990); Hall v. Delaware Council on Crime & Justice, 780 F. Supp. 241 (D. Del. 1992); Tadros v. Coleman, 717 F. Supp. 996, 1004 (S.D.N.Y. 1989), aff'd, 898 F.2d 10 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 186 (1990); EEOC v. Pettegrove Truck Service, Inc., 716 F. Supp. 1430 (S.D. Fla. 1989); Alcena v. Raine, 692 F. Supp. 261 (S.D.N.Y. 1988); Shoenbaum v. Orange County Ctr. for Performing Arts, 677 F. Supp. 1036 (C.D. Cal. 1987); Smith v. Berks Community Television, 657 F. Supp. 794 (E.D. Pa. 1987); Beverly v. Douglas, 591 F. Supp. 1321 (S.D.N.Y. 1984). See also Diane C. Desautels, Note, Discrimination Law-Statutory Protection for Volunteers Against Discrimination, 11 W. *New Eng. L. Rev.* 93 (1989).

[8] Graves, 907 F.2d at 73 ("compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, but it is an essential condition to the existence of an employer-employee relationship"); Tadros 717 F. Supp. at 996 ("a Title VII plaintiff is only an "employee" if the defendant both pays him and controls his work"); Shoenbaum 677 F. Supp. at 1039 (by analogy to Title VII, volunteers receiving no financial remuneration or reimbursement are not employees under the Age Discrimination In Employment Act).

[9] 657 F. Supp. 794, 796 (E.D. Pa. 1987) (considering Congress'

purpose in enacting Title VII, "unpaid volunteers are not employees within the meaning of the [Civil Rights Act of 1964]").

[10] 6 F.3d 211 (4th Cir. 1993). In Haavistola, the U.S. Court of Appeals for the Fourth Circuit reversed a Maryland district court's grant of summary judgment against Haavistola. The court held that because compensation is not defined by statute or case law, it cannot be determined as a matter of law. Whether benefits received represent sufficient remuneration to be deemed compensation is a disputed material fact, and its ultimate determination must be made by a fact finder. It was erroneous for the district court to conclude on the basis of a summary judgment record alone that benefits received by fire company members are not sufficient to make them employees under Title VII.

[11] According to the Haavistola court, however, compensation is but part of the test for determining whether a volunteer is an employee. The volunteer must also establish that the putative employer had sufficient control over the volunteer to make the volunteer an employee. If the degree of control is too low, then the volunteer will be considered an independent contractor rather than an employee. The court refers to an extensive list of factors outlined in Garrett v. Phillips Mills, Inc., 721 F.2d 979 (4th Cir. 1983), which should be analyzed in making the control determination.

[12] Haavistola, 6 F.3d 211 at 221.

[13] The court carefully distinguished cases in which the volunteers received no financial remuneration of any sort, either direct or indirect; received no fringe benefits or reimbursement for expenses; and contributed assistance on a purely voluntary basis. Haavistola, 6 F.3d 211 at 221. See also Tadros, 717 F. Supp. at 998, where the court found that no reasonable jury could return a verdict for Dr. Tadros, a Visiting Lecturer at Cornell Medical College, because Cornell bestowed no pecuniary or other benefits on Dr. Tadros. He received no salary, no health or dental benefits, no insurance or retirement benefits, no office space, and no secretarial help. Furthermore, the court noted that the association with Cornell on his resume was not "the type of salary or other benefit contemplated by Title VII."

[14] 459 A.2d 439 (Pa. Commw. Ct. 1983). See also Herberd v. Basking Ridge Fire Co. No. 1, 395 A.2d 870 (N.J. Super. 1978) (volunteer firefighters were employees of both the fire company and the township and were therefore protected by the New Jersey Law Against Discrimination).

[15] 459 A.2d at 442.

[16] 500 N.W.2d 822 (Neb. 1993).

[17] 42 U.S.C.A. § 2000a (1982).

[18] As one court stated: "The hallmark of a place of public accommodation [is] that 'the public at large is invited.'" National Organization for Women v. Little League Baseball, Inc., 318 A.2d 33, 37 (N.J. Super. 1974), aff'd., 338 A.2d 198 (N.J. 1974).

[19] 787 F. Supp. 1511 (N.D. Ill. 1992), aff'd, 993 F.2d 1267 (7th Cir. 1992), *cert. denied*, __ U.S. __ (1993).

[20] The Welsh court, however, carefully distinguished situations

in which membership in an organization effectively serves as the "ticket" for admission to a particular "place." See, e.g., United States v. Slidell Youth Football Ass'n, 387 F. Supp. 474 (E.D. La. 1974) (holding that the football league which owned a sports facility containing "two fully equipped football fields, grandstands and a food concession stand enclosed in a chain link fence" was a public accommodation under Title II).

[21] Diane C. Desautels, Note, Discrimination Law-Statutory Protection for Volunteers Against Discrimination, 11 W. *New Eng. L. Rev.* 93, 96 n. 23 (1989).

[22] United States Jaycees v. Iowa Civil Rights Comm'n, 427 N.W.2d 450 (Iowa 1988); United States Jaycees v. Massachusetts Comm'n Against Discrimination, 463 N.E.2d 1151 (Mass. 1984); United States Jaycees v. Richardet, 666 P.2d 1008 (Alaska 1983); United States Jaycees v. Bloomfield, 434 A.2d 1379 (D.C. App. 1981).

[23] Kiwanis Int'l. v. Ridgewood Kiwanis Club, 806 F.2d 468 (3d Cir. 1986); Isbister v. Boys Club of Santa Cruz, Inc., 707 P.2d 212 (Cal. Ct. App. 1985); Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Comm'n, 309 S.E.2d 342 (W.VA. 1983); United States Power Squadrons v. State Human Rights Appeal Board 452 N.E. 2d 1199 (N.Y. App. Div. 1983); Curran v. Mount Diablo Council of the Boy Scouts of Am., 195 Cal. Rptr. 325 (Cal. Ct. App. 1983), appeal dismissed, 468 U.S. 1205 (1984); United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981); National Org. for Women v. Little League Baseball, Inc., 318 A.2d 33 (N.J. Super. 1974), aff'd., 338 A.2d 198 (N.J. 1974).

[24] 528 A.2d 352 (Conn. 1987).

[25] Quinnipiac, 528 A.2d at 360.

[26] 42 U.S.C. § 12101 et seq.

[27] 42 U.S.C. § 12181(7).

[28] 42 U.S.C. § 12101.

[29] ADA Compliance Guide, ¶ 520, August 1990.

[30] § 12635 ¶ C, 1 & 2.

[31] 42 U.S.C. § 2000d.

[32] 20 U.S.C. § 1681.

[33] 42 U.S.C. § 6102.

[34] 29 U.S.C. § 794.

[35] 34 C.F.R. § 100.3(b). See also Goldstein, Michael B. and Wolk, Peter C. "Legal Rights and Obligations of Students, Employers, and Institutions." In K. G. Ryder, J. W. Wilson and Associates, *Cooperative Education in a New Era: Understanding and Strengthening the Links Between College and the Workplace*, 1987.

[36] Ark. Stat. Ann. § 11-9-102 (3) (A) (iii).

[37] Idaho Code § 72-212(5).

[38] E.g., California, Florida, New York. U.S. Chamber of Commerce, *1993 Analysis of Workers' Compensation Laws*. On the other hand, Utah requires public entities to purchase workers' compensation for their volunteers. Utah Code tit. 67, § 20-3.

[39] Van Horn v. Industrial Acc. Com., 219 C.A.2d 457, 33 Cal. Rptr. 169 (1963) (recipient of football scholarship permitted to

collect workers' compensation from college). Hoppman v. Workers Compensation Appeals Bd., 226 Cal. App.3d 1119, 277 Cal. Rptr 116 (1991) (worker who received minimal hourly wage in exchange for services to church held eligible for workers' compensation benefits even though state statute exempted individuals performing services for charitable organization in exchange for aid or sustenance only.)

[40] Stegeman v. Francis Xavier Parish, 611 S.W.2d 204 (Mo. 1981) (uncompensated volunteer construction worker for parish school held eligible for compensation where employer had right of control over worker's service.); California Compensation Insurance Co. v. Industrial Accident Commission, 118 C.A.2d 653, 258 P.2d78 (1953) (construction workers who volunteered some of their noncompensated hours to the construction of church, under control of same foreman for whom they performed compensated work, held to be covered by workers' compensation when injured during noncompensated hours.)

[41] Ellis, Susan, *Children as Volunteers*, 47-48 (1991).

[42] New York State Department of Labor, letter from Commissioner Lillian Roberts to New York City Mayor Voluntary Action Center, 1984.

[43] 26 U.S.C. § 3402.

[44] The Internal Revenue Code subjects to tax "all income from whatever source derived" unless specifically excluded. 26 U.S.C. § 61. The principal element in the definition of "Gross Income" is "compensation for services," which the courts and the Internal Revenue Service have consistently construed as encompassing payment for services including compensation in forms other than cash. I.R.S. Reg. § 1.61.1.

[45] Payments received by trainees in programs under Titles I and II of the Comprehensive Employment and Training Act (CETA), for services performed during on-the-job training for a private construction company or for work experience in a city clinic were held to be included in the participants' gross income. Allowances received for participation in a program, or to enable the trainee to participate, and not for the performance of services were ruled tax free. Rev. Rul. 75-246, 1975.

Similarly, Job Service Corps members who acquired new employment skills but performed no actual service, were not required to pay tax on their stipends. The IRS reasoned that the stipends served the same function as tax exempt unemployment relief payments made for the promotion of the general welfare, which are tax-exempt. Conversely, members of a state service corps who were directly compensated for services rendered were required to pay federal income tax on their wages, but not on reimbursements for ordinary and necessary expenses. Rev. Rul. 68-133, 1968; 74-413, 1974; 68-139, 1968; 63-136, 1963.

[46] 26 U.S.C. § 119.

[47] 26 U.S.C. § 106. See also 26 U.S.C. § 125.

[48] Rev. Rul. 70-474, 1970-2 C.B. 34.

[49] 26 U.S.C. § 129.

[50] Internal Revenue Code section 132 grants an exemption for *de minimis* fringe benefits that are inexpensive enough to make accounting unreasonable or administratively impractical.

[51] Treas. Reg. § 1.61-21(b)(2).

[52] 26 U.S.C. § 117.

[53] Bhalla, Chandler, (1960) 35 TC 13 Rev. Rul. 60-378, 1960-2 CB 38.

[54] Saber, Joseph, TC Memo 1981-477; Hales, Stephen, TC Memo 1978-221; Rev Rul 78-54, 1978-1 CB 36.

[55] Liability for tax begins when an individual "constructively receives" the scholarship. As a practical matter, constructive receipt and actual receipt will almost always coincide at the time the individual makes use of the scholarship. See Treas. Reg. § 1.446-1(c)(i).

[56] See *Federal Tax Coordinator* 2d § L-4414, p. 34,455.

[57] Comm'r. v. Kowalski, 434 U.S. 77, 54 L.Ed.2d 252 (1977).

Risk Management Publications for Volunteer Organizations

Am I Covered for . . .?: A Guide to Insurance for Non-Profits (2d ed.), by Terry S. Chapman, Mary L. Lai & Elmer L. Steinbock, 285 pages, $15.00. The most complete and up-to-date handbook on insurance purchasing for nonprofits.

D & O—Yes or No? 20 pages, $6.00. This booklet examines the major considerations for deciding whether to purchase directors and officers insurance and, if so, which policy to select.

Guidebook for Directors of Nonprofit Corporations, 1992, 118 pages, $19.95. A layperson's guide from the American Bar Association for every board that wants to protect itself from lawsuits.

Insurance Assurance for Volunteers, 1994, 16 pages, $5.00. A resource to help volunteer managers understand and communicate with insurance professionals about liability, accident and injury, auto, and D&O coverages for volunteers.

No Surprises: Controlling Risks in Volunteer Programs, by Charles Tremper & Gwynne Kostin, 1993, 60 pages, $9.95. This practical handbook offers strategies for protecting the organization, its staff, and the community it serves from injuries, lawsuits, and other unpleasant surprises.

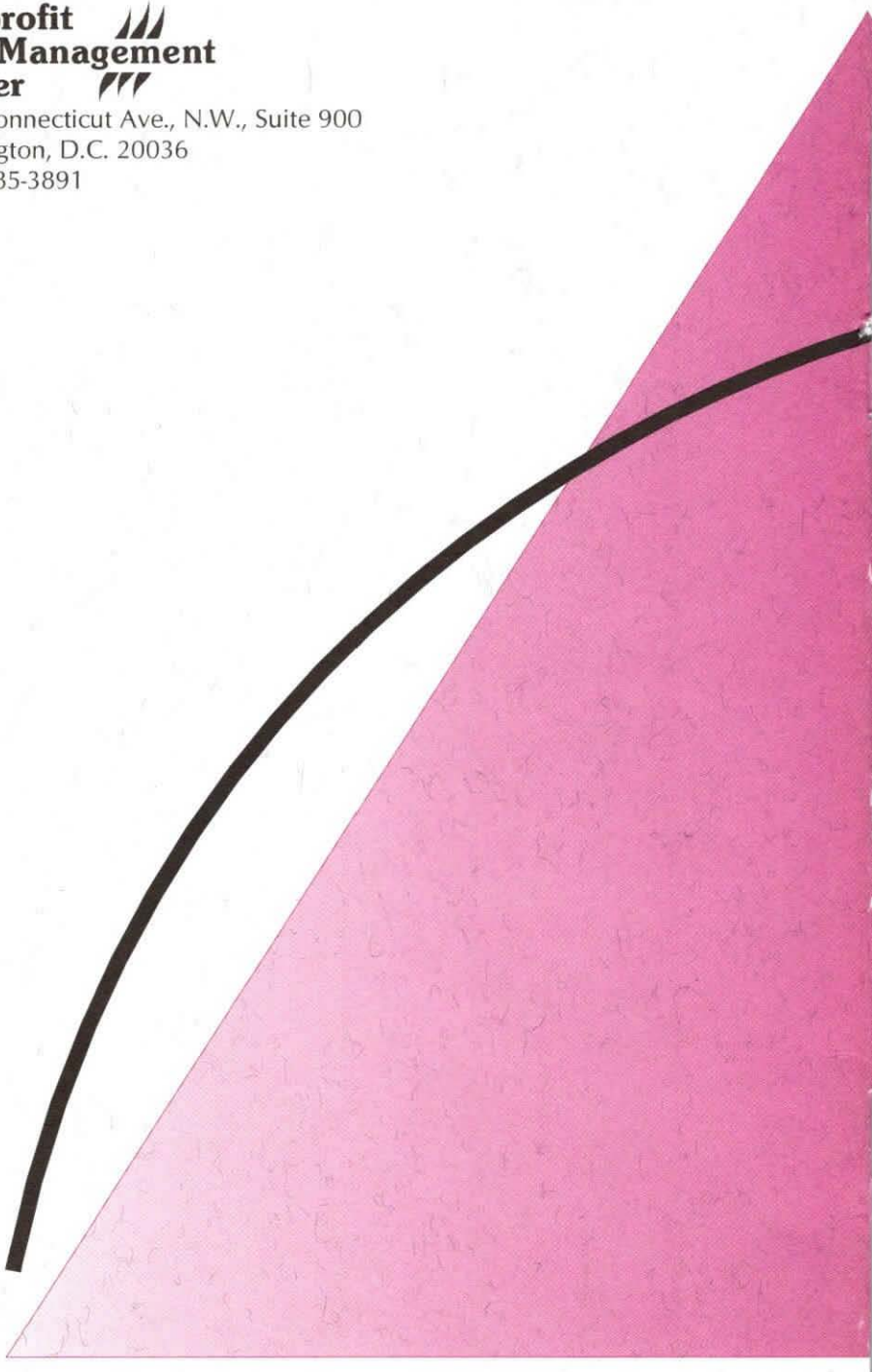
State Liability Laws for Charitable Organizations and Volunteers, 1993, 48 pages, $12.50. A state-by-state compilation of volunteer protection laws and limitations on the liability of charitable organizations.

To order, please include $3 shipping and handling for the first item plus $.50 for each additional item, $5.00 maximum. Send order and payment or purchase order to:

NRMC Publications
1001 Connecticut Ave., NW, Suite 900
Washington, DC 20036
(202) 785-3891
fax: (202) 833-5747

To receive a current publications list write, phone, or fax the Center.

Nonprofit Risk Management Center
1001 Connecticut Ave., N.W., Suite 900
Washington, D.C. 20036
(202) 785-3891



printed on recycled paper