

*Volunteer Protection Act of 1997*  
*Public Law 105-19*

**Synopsis and *Analysis***

This synopsis and analysis is offered as an aid to the volunteer administrator in S. C. An attempt has been made to summarize each section of Public Law 105-19 and to follow with an analysis where indicated. The analysis is based on SC law and is only the interpretation of the author; it is not intended nor will it be considered legal advice. Many issues raised by the analysis are yet to be determined by either the legislature or by case law. It is incumbent upon all volunteer administrators to keep up to date on changes and developments in this area. It would be advisable to consider options such as changes in insurance, review the organizations's risk management policy and discuss the issues raised by Public Law 105-19 with the policy makers for your organization.

The format for this paper is as follows:

synopsis (plain text) The author's summary of each section language in the Act.

analysis (***bold italics***) The author's interpretation of the Act with suggestions and questions for volunteer managers.

Another feature of this paper is the is the extra wide margin on the right. This area is for the reader to make notations regarding follow-up activities, suggestions, or questions.

This paper has been prepared for distribution by Pamela DeFanti Robinson, Director, Univesity of South Carolian School of Law Pro Bono Program, for members of the S. C. Association for Volunteer Administration (SCAVA). SCAVA is the professional organization of volunteer administrators in South Carolina. Reproduction is permitted if credit is given to SCAVA and the author. [*President Clinton signed this bill into law (P. L. 105-19) on June 18, 1997. The effective date is September 16, 1997.* Ms. Robinson's paper was posted to the Web site of the Strom Thurmond Institute of Government and Public Affairs on August 25, 1998.]

# The Volunteer Protection Act of 1997

Public Law 105-9

Purpose: To provide certain protections to volunteers, non-profit organizations, and governmental entities in lawsuits based on the activities of volunteers.

*No real pitfalls in interpretation in this section;*

## Sec. 1. Title

This Act is titled "the Volunteer Protection Act of 1997"

## Sec. 2. Findings

Congress finds that volunteers are willing to serve but are deterred by the potential of lawsuits against them. As a result of the deterrence many volunteer based organizations, non-profits and governmental entities have been adversely affected. They note that volunteers have withdrawn from boards of directors and other types of service. Congress finds a link between the adverse affect of fewer volunteers and the diminishment of services to the communities. Fewer and more expensive programs are a result.

Congress also finds that the deterrence to volunteering based on a fear of lawsuits will affect programs that use Federal funds and which are very successful public-private partnerships. The national scope of such programs was also noted. This section also makes a direct link between the goods and services provided by volunteers, especially in private entities that operate in interstate commerce and the appropriateness of Congress passing a law to protect volunteers. This is a necessary legal connection to preserve the constitutionality of the Act. (article 1, section 8, clause 3) Congress also makes the link to interstate commerce based on the finding that higher liability costs and unwarranted litigation cost will require volunteers and non-profits to face higher costs in purchasing insurance through interstate insurance carriers.

The Act concludes this section with the reasons that Federal legislation is appropriate. They include: national scope of the problem, legitimate fears of volunteers, the expenditure of Federal Government funds and provision of federal tax exemptions for organizations that depend on volunteers. Liability reform will promote the free flow of goods and services, and uphold constitutionally protected rights. Of great interest is the finding that clarifying liability risk is in the interest of the Federal Government, as it is to it's benefit to encourage the continued operation of volunteer services because the Federal Government lacks the capacity to carry out all of the services provided by such organizations and individuals.

*There is a slight chance that someone might challenge the finding linking this legislation to the Commerce Clause of the US Constitution.*

### Section 3: Preemption and State non-applicability

This technical section states that the Act is the law of the land unless a state has a law that is inconsistent with the Act. State law that provides **greater** protection shall prevail.

For this Act to be nonapplicable in state court the legislature of a state must proactively pass legislation whereby this Act would not apply to actions in that state.

*It is unlikely that the SC legislature will pass a law whereby this Act would be declared nonapplicable to the citizens of South Carolina. This means that if a volunteer is sued in State or Federal court this Act will apply. There may be some areas in SC where specific groups of volunteers have special laws that cover their liability. If that law is inconsistent with this Act the state law will apply not this Act. For example, volunteer Guardians ad Litem that operate within the statewide program have a statute that provides them with protection. Both this Act and the state statute have similar language as to the standard to apply, i.e, if the harm is not willful misconduct or gross negligence the volunteer will be protected.*

*It is unknown how a court will deal with the application of this statute and a state law. One theory is that a court would start with the applicable state statute and then pick and choose the sections of the statute that would be best for the plaintiff. The Federal law would be applied only if needed to protect the plaintiff.*

### Section 4: Limitation on Liability

(a) This is the heart of the Act. With exceptions (noted below; see Section 4(d)) no volunteer in a non-profit or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization. The volunteer must be acting within the scope of the volunteer's responsibilities at the time of the act or the omission; if appropriate or required the volunteer must be properly licensed, certified or authorized by the proper authorities; and the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the acts of the volunteer. Of special note is the portion of this section that removes the liability protection if the harm was committed by the volunteer while operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires a license or insurance.

*The words "on behalf" and "in the scope of" are significant to the analysis of this section. They bring to bear the doctrine of*

*“respondeat superior”. This phase indicates that the master is liable in certain cases for the wrongful acts of his servant. In the world of volunteers the master would be the volunteer administrator or the organization; the servant is the volunteer. All volunteers should be informed about this doctrine and its potential for liability .*

*Below is a diagram explaining the theories of negligence with an example of each in italics:.*

<i>Types of Negligence</i>	<i>Example</i>
<i>Simple</i>	<i>Sneeze while driving</i>
<i>Gross, reckless flagrant indifference</i>	<i>Reading the NY Times while driving</i>
<i>Intentional, willful criminal misconduct</i>	<i>Aiming your car at a person with the intent to harm</i>

*As with all tort law there are always the possibilities that other circumstances will affect the outcome. For example, if a person knew that they had a disease that caused them to sneeze hundreds of times a day and still drove this could move the negligence from simple to the gross category*

(b) Other parts of this section include:

Non-profit and governmental entities can still bring a civil action against one of their volunteers.

*For example, if a volunteer was working in the kitchen and broke the organization’s prize Waterford punch bowl, the organization could still sue the volunteer to recover the loss.*

(c) Non-profit and governmental entities can still be sued for harm caused to any person.

*This brings up the serious and often convoluted issues of vicarious liability, indemnification, and subrogation. First the simple definitions. Vicarious liability is indirect legal responsibility; for example, the liability of an employer for the acts of an employee. Indemnification is the process of restoring a victim of a loss, in whole or in part, by payment, repair, or replacement. Some states provide for special funds to compensate crime victims. Insurance is often a method of indemnifying an organization or person from the cost of a loss. For the purposes of this analysis subrogation is the lawful substitution of the insurance carrier for the insurers. Of*

*extreme interest is the fact that often there will be a clause in the insurance policy that because the insurance company has the right of subrogation they insurance company, not the organization makes the decision of whether or not to sue. For example, in court an organization is determined to be liable for the act of one of its volunteers. The organization is held liable for \$25,000. For public relations reasons the organization decides not to try to recover this amount from the volunteer and just let their insurance cover it. The insurance carrier may invoke the subrogation clause and sue the volunteer to recover the \$25,000. The key for volunteer administrators is to determine whether your insurance process has a subrogation clause and if so work to have it removed.*

(d) Exceptions to volunteer liability protection

State laws that limit liability protection subject to one or more of the following conditions will not be considered inconsistent with the Act. The conditions include:

- \* State laws that require adherence to risk management procedures including mandatory training for volunteers
- \* State law that applies the same liability standard for volunteers as it does for employees
- \* State law which allows an officer of the State or local government to sue a volunteer unless State law prohibits it
- \* State law which limits liability only if the organization or entity provides a financially secure source of recovery for those harmed by the acts or omissions of a volunteer.

*This is an area that should be watched carefully as state legislative response might be to pass laws to require one or more of the above conditions.*

(e) Limitation on punitive damages based on the actions of volunteers.

The only way a claimant can recover punitive damages for the actions of a volunteer operating within the scope of their duties is to establish by clear and convincing evidence that the harm was proximately caused by the volunteer acting in manner that was willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed. There are exceptions to this limitation. They are:

- \* if the misconduct constitutes a crime of violence (defined in USC Title 8 §16) or of international terrorism and the defendant is convicted in any court

- \* the misconduct constitutes a hate crime, involves a sexual offence (as defined by State law), or involves misconduct whereby the defendant is found to have violated at Federal or State civil rights law
- \* where the defendant was under the influence of alcohol or drugs (as defined by State law).

*Recovery of punitive damages requires a direct link between the actions or omissions of the volunteers and the harm caused. The evidence must meet the evidentiary standard of clear and convincing proof. This means the proof should leave the trier of facts with a firm belief or conviction that the allegations are true. This is not the high standard to be met in criminal cases that require proof beyond a reasonable doubt but is more than a mere preponderance of the evidence. Section 4(e) moves us into the area of damages and away from liability protection. In this section the harm must go beyond simple negligence into the area of gross negligence to arrive at the issue of punitive damages. To recover punitive damages you must face a high standard of proof. For example if while volunteering for your organization a volunteer was found negligent while driving a car, the or she would not have immunity protection; but the limitations on punitive damages may come to the volunteer's aid. The volunteer would still be liable for actual damages.*

*Here is another example of the right hand taking away what the left hand had giveth; another limitation on liability protection.*

*Another interesting point is that under state law it is unclear what is the definition of a sex offense.*

## Section 5. General rules - Liability

Volunteers will be liable for certain amounts of noneconomic loss. The amount of noneconomic loss allocated to that volunteer is in direct proportion to the percentage of responsibility for the harm caused, as determined by the trier of fact. There shall be separate judgements against each defendant declaring the percentage of liability.

*This section should be read in conjunction with Sec.4(a) Liability protection for volunteers. For definitions please look at Section 6. This Federal law applies a pure form of comparative negligence for determining the amount of noneconomic loss a plaintiff would recover. For example in the pure form, if a volunteer was responsible for only 10% of the harm that resulted in non-economic loss, then the volunteer would only be required to pay 10% of that loss. SC uses a not-greater - than version of doctrine of*

*comparative negligence. Plaintiff can recover only if his negligence is not as great as the defendant's negligence.*

*The end result is that in some cases the volunteer could be better off with the application of the Federal law rather than the SC version.*

## Section 6. Definitions

Economic loss- any pecuniary loss resulting from harm. This includes loss of earnings and benefits related to employment, medical expenses, replacement services, loss due to death, burial costs, and loss of business or employment opportunities. The losses are to the extent recovery is allowed under state law.

Harm- physical, nonphysical, economic, and noneconomic losses

Noneconomic loss- losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (but not domestic services) hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature.

Nonprofit organization- IRS 501(c) 3 organizations; and any not for profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes. Neither type of organization can practice actions that constitute a hate crime.

*This last sentence was placed in the Act to deny protection for members of such groups as the KKK.*

State- means the individual states and a group of territories or districts such as D.C. and Puerto Rico. It also includes the political subdivisions of the states and territories.

Volunteer- an individual who performs services for a nonprofit or governmental entity who does not receive compensation (except reasonable reimbursement for expenses incurred) or any other thing of value in lieu of compensation, in excess of \$500 a year. The term also applies to directors, officers, trustees or direct service volunteers.

*Carefully determine if by providing extra benefits and services for your volunteers you have not removed them by definition from coverage by this Act. Community service programs that provide reimbursement and scholarships at the conclusion of their service are probably not covered. Other service learners, especially mandatory programs should also evaluate the cost of a required*

*course to determine if these students fall under the definition of volunteer. Ironically people who are court mandated to perform community service may be covered. Another interesting point is that the intent to serve is not an issue in defining volunteer but could become an important fact in the minds of any jury.*

#### Section 7- Effective date

The Act becomes effective 90 days after enactment. The harm must have occurred after the effective date of the Act.

*President Clinton signed this bill into law (P. L. 105-19) on June 18, 1997. The effective date is September 16, 1997*

Pamela DeFanti Robinson © 1997

