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Giving and Receiving: Insuring Company-Sponsored Volunteerism?

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This is the time of year when we are reminded of the importance of giving. Many companies not only donate generously to nonprofits and community programs, but also support the volunteer efforts of their employees through matching donations; sponsoring community activities, such as organizing and staffing a community clean-up day; hosting a major fundraising event for a local nonprofit; or allowing employees time off during work hours to volunteer at a sponsored school or local community center. Volunteerism has benefits to both employers and employees. Employees who engage in employer-sponsored volunteer efforts report improved leadership and communication skills, show greater loyalty to their employer, and assist the employer in maintaining a positive image in the community for its products and services.[1] Volunteerism builds cooperation and a sense of unity among co-workers and promotes teamwork within the company.[2] An employer that actively promotes or sponsors volunteerism improves employee recruitment and retention.[3]

If sponsoring volunteerism has rewards, like any business activity, it also comes with its attendant risks. The last thing any well-meaning company wants to do is turn holiday cheer into a New Year liability hangover. A company that sponsors volunteer activities will want to assure that its employee-volunteers are protected from injuries that may occur while volunteering and that it is protected against claims that may arise from volunteer activities. This can be achieved through the use of insurance and other means of risk transfer, such as: (1) covering employee-volunteers under the employer's or volunteer organization's workers compensation insurance; (2) requiring the volunteer organization to carry adequate limits of liability insurance that covers injuries or damages caused by a volunteer's negligent or reckless conduct; (3) procuring special event or sponsorship liability insurance for one-time fundraising or similar events, including liquor liability coverage when appropriate; (4) entering into indemnity agreements; and (5) using waivers of liability, particularly when sponsoring events that include activities having a risk of injury, such as races or walkathons. We discuss each of these below.

[1] "*Why Companies Volunteer*," newyorkcares.org, https://www.newyorkcares.org/why-companies-volunteer (last visited Dec. 9, 2014).
[2] *Id.*
[3] *Id.*

1. Workers Compensation Insurance

It may not seem obvious, but workers compensation insurance may cover volunteer activities. Employees who volunteer at employer-sponsored events (the "employee-volunteer") or for nonprofits or charitable organizations sponsored by the employer (the "volunteer organization") may assume they are protected by their employer's workers compensation insurance in case they are injured—much as they would be if such injuries occurred while they were at work. Workers compensation is the sole and exclusive remedy of an injured employee against an employer where injury arises out of and in the course of employment.[4] Most states' workers compensation programs, however, exclude injuries that arise out of voluntary participation in off-duty recreational, social or athletic activities. But some states recognize an exception for voluntary activities that are "a reasonable expectancy of, or are expressly or impliedly required by, the employment."[5] If an injured employee-volunteer is not covered by workers compensation, the alternative is that he may assert claims for compensation directly against the employer and/or the volunteer organization.

Whether workers compensation insurance will cover a volunteer, however, is a question of fact, and depends on a variety of factors.[6] These include whether (a) the employee is pressured or coerced either directly or indirectly to participate in the volunteer activity; (b) the activity is officially sponsored or subsidized by the employer; (c) the employee's performance evaluation is dependent on participation in the volunteer activity; and (d) the activity substantially benefits the employer "'beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.'"[7] Thus, an employee-volunteer is more likely to be covered in the event she is injured when she volunteers for an employer-sponsored event, is permitted time off to perform volunteer work for an employer-sponsored organization, or if the employer requires the employee (whether directly or indirectly) to participate in the volunteer activity. If an employer would like its employees to be covered by its workers compensation insurance while participating in a volunteer event, it is good practice for the employer to sponsor the event officially, to make a record that the employee's participation will be viewed by the employer in a favorable light, and to acknowledge the nature of the benefits the employer expects to accrue to the business as a result of such participation.

The volunteer organization may also have its own workers compensation insurance that may cover the employee-volunteer. States differ on whether volunteers may be covered under a volunteer organization's workers compensation insurance. California law, for example, permits the extension of workers compensation insurance to volunteers of private, nonprofit organizations, but there are certain requirements

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[4] *See*, *e.g.*, Cal. Lab. Code § 3602(a); N.Y. Workers' Comp. Law § 11.

[5] Cal. Lab. Code § 3600(a)(9). The statute requires that employees be advised of this provision by a posting in a conspicuous place. *See also* N.Y. Workers' Comp. Law § 10[1] ("[T]here shall be no liability for compensation . . . where the injury was sustained in or caused by voluntary participation in an off-duty athletic activity not constituting part of the employee's work related duties unless the employer (a) requires the employee to participate in such activity, (b) compensates the employee for participating in such activity or (c) otherwise sponsors the activity.").

[6] "Whether an employee's injury arose out of and in the course of her employment is generally a question of fact to be determined in light of the circumstances of the particular case." *Wright v. Beverly Fabrics, Inc.*, 115 Cal. Rptr. 2d 503, 507 (Cal. Ct. App. 2002), *rev. denied.*

[7] *Ostrowski v. Wasa Elec. Servs., Inc.*, 960 P.2d 162, 168 (Haw. Ct. App. 1998) (quoting 2 Larson, *Larson's Worker's Compensation Law* § 22.00 at 5-87 (1997)). *Compare Smith v. Workers' Comp. Appeals Bd.*, 236 Cal. Rptr. 248 (Cal. Ct. App. 1987) (finding workers compensation coverage for school employee killed in windsurfing accident while at school-sponsored club picnic) *with Hughes Aircraft Co. v. Workers' Comp. Appeals Bd.*, 196 Cal. Rptr. 904 (Cal. Ct. App. 1983) (finding no workers compensation coverage for employee injured during off-duty holiday party subsidized by employer). A compilation of cases interpreting Cal. Lab. Code § 3600(a)(9) can be found in *City of Stockton v. Workers' Comp. Appeals Bd.*, 38 Cal. Rptr. 3d 474 (Cal. Ct. App. 2006).

the nonprofit must meet in order for the coverage to apply.[8] Separate and apart from workers compensation insurance, some volunteer organizations may also have accident insurance that applies specifically to their volunteers who are injured while performing volunteer activities. But as noted below, an employer needs to ensure that the limits of the volunteer organization's insurance are adequate.

2. Requiring the Volunteer Organization to Have Adequate Liability Insurance

A company can also minimize its risk by requiring any volunteer organization that it sponsors to have general liability (GL) insurance with adequate limits of coverage. GL insurance provides coverage for bodily injury or property damage caused by "accident" or by an "occurrence"—an event unexpected or unintended by the insured. GL insurance may not provide coverage for any injuries to the employee-volunteer,[9] but may be a source of insurance coverage in the event the employee-volunteer negligently or recklessly causes injury or damage to a third party while participating in the volunteer activities, subject to the terms and conditions of the insurance policy. The standard GL insurance policy will also provide a defense to the employee-volunteer against third-party claims for injury or damage arising from the employee-volunteer's negligence, provided that the claims against the employee-volunteer are potentially covered under the policy. Without GL insurance coverage, the employee-volunteer, and the employer, could both become targets for third-party claims, and the employee's personal assets could be placed at risk.

Most standard form GL insurance policies include "volunteers" in the definition of "insureds," as long as the volunteer is acting within the scope of his or her volunteer activities.[10] This should include employee-volunteers who are permitted time off from work to volunteer or who participate in sponsored events on the "company's clock."[11] An employee-volunteer should still be considered a volunteer for purposes of the volunteer-organization's GL insurance even when receiving his salary for the time spent participating in volunteer activities.

In addition to GL insurance coverage, if the employee-volunteer will be using her own vehicle as part of the employer-sponsored volunteer activities, the company may want to determine whether it has "hired and nonowned" automobile insurance coverage, either as part of its automobile coverage or as an endorsement to its GL policy, that would cover the company against third-party claims when employee-volunteer drivers are at fault and cause injury to others.

It is also important to know that most GL policies contain exclusions to coverage so that the employee-volunteer, and the employer, will not be covered for certain types of third-party injury or damage claims. For

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[8] *See* Cal. Lab. Code § 3363.6.

[9] *Krueger v. Iowa Rails to Trails, Inc.*, 435 N.W.2d 391 (Iowa Ct. App. 1998) (no coverage for injured employee where employer was a volunteer of the Named Insured and therefore an insured under the policy).

[10] The standard-form commercial general liability policy language drafted by the Insurance Services Organization (ISO) provides the following in the section, "Who Is An Insured": "Each of the following is also an insured: Your 'volunteer workers' only while performing duties related to the conduct of your business. . . ." A "volunteer worker" is defined as "a person who is not your 'employee', and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you."

[11] *See Am. Justice Ins. Reciprocal v. Hutchison*, 15 S.W.3d 811 (Tenn. 2000) (term "volunteer" as used in a GL policy is ambiguous, and therefore can encompass an employee receiving salary from his employer while volunteering for another organization).

example, coverage may be limited to specific types of volunteer activities defined in the policy, or may exclude certain types of events.[12] In addition, there are some types of conduct that insurers nearly always contend are uninsurable. GL insurers uniformly insist that claims that a volunteer-employee sexually molested a child or intentionally caused harm are not covered by any GL insurance policy, and therefore such insurers almost never voluntarily agree to provide a defense for such claims.[13] This may leave the company without coverage for litigation arising from such claims, regardless of whether or not the company is ultimately found to be liable. For that reason, a company may want to assure that its employees only volunteer for organizations that provide active supervision of volunteers, or where there is little risk that claims alleging these types of uncovered risks would be asserted.

3. Special Event or Sponsorship Insurance

One of the ways a company can give back to the community is to sponsor fund-raising activities or special events for volunteer organizations. In addition to benefiting the organization, these types of events can provide favorable publicity and increase employee morale. Before sponsoring such an event, the company may want to evaluate its GL insurance coverage to assure that it will cover any unique exposures. The company also should consider taking precautions to limit the risk of its liability arising from the event, for example, by making sure that participants in a race are supplied with adequate amounts of water or that there is adequate security in place for events open to the public.[14]

The company also may wish to consider purchasing Special Event or Sponsorship Insurance Coverage that would provide insurance for injury and property damage arising out of the special event. This specialized coverage should be considered where the fund-raising event involves large numbers of participants or volunteers, or unique risks—such as races, walks and other athletic events. There are good business reasons to consider purchasing this specialized coverage. First, the coverage would preserve the limits of the company's existing GL coverage so that the coverage is available for claims that arise in the ordinary course of its business. Second, the premium for the company's existing GL insurance coverage ought not to be based on any increased risk due to sponsorship of the event. Nevertheless, as with all insurance policies, this type of insurance will have a cost and its limitations and exclusions should be carefully reviewed to assure that the policy provides coverage for the risks that could arise from the event.

There may be an increased risk of injury when a company-sponsored event serves alcoholic beverages. Generally, GL policies contain an exclusion for bodily injury or property damage for which the insured may be liable by causing or contributing to the intoxication of any person. The standard exclusion, however, applies only to an insured that is in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. The liquor liability exclusion is not intended to apply where an employer not involved in

[12] For example, in *Nautilus Ins. Co. v. Mobile Area Mardi Gras Ass'n*, U.S. Dist. LEXIS 114625 (S.D. Ala. Oct. 27, 2010), a policy issued to an organization engaged in the business of "Mardi Gras Ball and Event[s]" contained an "events exclusion endorsement," that excluded coverage for bodily injury to "any person" while participating in "any circus, concert, demonstration, event, exhibition, race, rodeo, show, stunting activity, theatrical performance, any contest, or any activity of an athletic or sports nature." The term "any person" as used in the exclusion included volunteers.

[13] *See*, *e.g.*, *J.C. Penny Cas. Ins. Co.*, 278 Cal. Rptr. 64 (Cal. 1991); *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153 (Ct. App. 1992); *Kim v. Nat. Indem. Co.*, 6 P.3d 264 (Alaska 2000). Nevertheless, under some state's laws, there may be coverage for related acts of negligent supervision or negligent failure to warn. *E.g.*, *Doe v. Shaffer*, 738 N.E.2d 1243 (Ohio 2000).

[14] *Amezcua v. Los Angeles Harley-Davidson, Inc.*, 132 Cal. Rptr. 217 (Cal. Ct. App. 2011) (discussing principles of assumption of risk and liability in the context of sponsorship of a charitable activity).

the alcoholic beverage industry sponsors an event where alcohol is served.[15] Nevertheless, where a vendor is supplying alcohol at a company-sponsored event, the company may want to assure that the vendor has specialized liquor liability coverage—coverage that overrides the exclusion—so that the risk of alcohol-related injuries is transferred from the company or volunteer organization to the vendor.

The company also may want to protect itself against the negligence of the volunteer organization arising from the special event by asking to be named as an additional insured under the volunteer organization's GL insurance coverage for that event. If this is possible, the company will want to obtain a certificate of insurance verifying that it has been added as an additional insured. The company will also want to assure that the policy is in force, that it was issued by a reputable insurer, and that the limits of liability are adequate to cover the risk, ideally in an amount equal to the company's GL coverage.

4. Indemnity Agreements

Insurance is not the only way to transfer risk. The business that sponsors an event may want to secure an agreement with the benefitted volunteer organization or the vendors or suppliers to the event, indemnifying and holding the sponsor harmless for any liability arising from the event. Indemnity agreements are contracts, and should be in writing and drafted or reviewed by counsel to assure that they comply with applicable law, provide adequate protection for the sponsor, and are enforceable. It is important to understand, however, that such an indemnity agreement is only as good as the financial condition of the organization giving the indemnity. Just as a sophisticated insured would care about the financial condition of an insurer from whom it purchased coverage, a company should appreciate that an indemnity agreement from a volunteer organization provides no more protection than that organization's financial wherewithal to pay any claim that might arise.

5. Waivers of Liability

Waivers of liability are another means to limit the employer's liability arising from sponsored activities or volunteer events. A waiver of liability may be appropriate for participants in sponsored events such as races or other athletic activities. The waiver must be clear and unambiguous and must be explicit in informing the participant of the effect of executing the waiver.[16] Properly drafted, the waiver is generally enforceable, but such waivers and releases of liability are generally only valid to protect against negligence.[17] A waiver of liability is not valid if the sponsoring company's or volunteer organization's conduct was grossly negligent or reckless—but a liability insurance policy will generally cover such conduct. Also, in some states, a pre-injury liability waiver signed by a parent on behalf of her child may not be enforceable.[18] There may be other reasons for avoiding waivers of liability; participants, volunteers or volunteer organizations may find them objectionable or heavy-handed. To the extent a company considers using waivers of liability, it may want to consult an attorney to assure that the waiver is properly drafted and enforceable to the extent permitted by law.

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[15] *See Am. Legion Post #49 v. Jefferson Ins. Co. of N.Y.*, 485 A.2d 249 (N.H. 1983) (liquor exclusion does not apply to veteran's association that operated a bar, the profits of which were used for organization's operating expenses).

[16] *See*, *e.g.*, *Huverserian v. Catalina Scuba Luv*, *Inc.*, 110 Cal. Rptr. 3d 112, 115 (Cal. Ct. App. 2010) ("To be effective, . . . a release 'must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties.'") (original emphasis deleted).

[17] *See*, *e.g.*, *Stelluti v. Casapenn Enterprises*, *LLC*, 1 A.3d 678 (N.J. 2010) (business's limitation of liability for negligence that arises from patron's voluntary use of exercise equipment is enforceable and not contrary to the public interest); *Hamer v. City Segway Tours of Chicago*, *LLC*, 930 N.E.2d 578 (Ill. Ct. App. 2010) (release drafted with sufficient particularity is enforceable).

[18] *See*, *e.g.*, *Woodman ex rel. Woodman v. KERA LLC*, 785 N.W.2d 1 (Mich. 2010) (waiver of liability executed by parent on minor child's behalf unenforceable); *Galloway v. State of Iowa*, 790 N.W.2d 252 (Iowa 2010) (same).

It is often said that it is better to give than to receive. By adopting methods to minimize the risk, a company can give generously and, at the same time, receive the benefit of knowing that it and its employees are not exposed to undue risk from doing good.