

## **Protecting SHIP Volunteers and Program Sponsors from Liability Risk Management Resources**

### **Introduction**

Since the introduction of the Medicare Modernization Act (MMA) of 2003, SHIP counselors have guided millions of Medicare beneficiaries through the process of comparing and selecting from an array of Part D prescription drug plans. Often, the process is straightforward and simple. In many cases, however, the process is complicated by a beneficiary's need for a specific medication, or the existence of a retiree health plan, or by a question of access to a local pharmacy. Because these complications create the potential for the spread of misinformation or costly mistakes that could impede a beneficiary's access to health care, many SHIP program managers are rightly concerned about the potential exposure of volunteers to liability in court. Simply put, a concern exists that disgruntled clients will sue local SHIP sponsor agencies and organizations, staff supervisors, and possibly the volunteers themselves.

How can SHIP managers manage the risk?

### **Statutory Protections for Volunteers**

To encourage volunteerism, both federal and state law generally protects volunteers from being found liable in court for harm resulting from their actions, or their failures to act, in the course of their volunteer duties on behalf of those they are trying to help. There are, however, some clear exceptions to these federal and state immunity protections.

Understanding the key points of both federal and state law should help SHIP managers feel more confident in using volunteers to fulfill the program's mission to educate their communities about Medicare and respond to the need for personalized counseling and assistance involving Medicare benefits.

More information about specific [federal](#) and [state](#) protections is provided below.

### **Risk Management in SHIP Programs**

SHIPs use volunteers in many different capacities, including such important roles as counselors, educators, and outreach workers. Aside from the federal Volunteer Protection Act and related laws in many states, what else can SHIP managers do to limit the risk of liability inherent in a health insurance counseling program that relies on volunteers to deliver essential services? What strategies exist to lessen the chance that

clients will have a bad experience, allege wrong-doing, and sue in court? Consider the following. How many of these do you use already? Which of these risk management ideas can protect your office and personnel from liability? Which ones make most sense for a busy local SHIP program? Click on the links below to see sample risk management resources from HAP and SHIPs around the country.

- 1) A counseling manual with procedures and policies.
- 2) [Position descriptions](#) that clearly state the scope of a volunteer's responsibilities.
- 3) [Application questionnaires](#) that ask potential volunteers about their interests, qualifications and references, and screen for suitability.
- 4) A volunteer agreement or "contract" that details the terms and expectations for the volunteer position.
- 5) A counseling agreement that describes the scope of services, for counselors and clients to sign and keep.
- 6) A [HIPAA-compliant form](#) through which clients designate the purposes for which they are giving private health information and authorizing how SHIP volunteers may use the information.
- 7) New [counselor orientation](#) and regular refresher or update training.
- 8) Progress notes maintained on each matter a volunteer works on, for example, case flow and/or intake forms.
- 9) Monitoring volunteer activities by a designated supervisor including, for example, listening in as volunteers meet with or call clients.
- 10) Periodic performance evaluation of volunteers.
- 11) A [counselor certification program](#) with proficiency measures.
- 12) Periodic counselor and/or supervisor meetings to review progress.
- 13) Providing insurance coverage through the nonprofit organization's or government agency's liability carrier.
- 14) A written notice for clients that describes the volunteer counselor role, what to expect in terms of guidance, client responsibility for decision-making, and a

disclaimer that counselors cannot advise clients to choose one plan over another.

## Federal Law

The federal law ([Public Law 105-19](#)) is usually referred to as the “*Volunteer Protection Act of 1997*”. It generally provides that volunteers cannot be held liable to the people they strive to help by a court for what they do or fail to do, as long as they are volunteering for a governmental unit or a non-profit organization that has tax-exempt status or is “organized and conducted for the public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which would constitute a hate crime...”, P.L. 105-19, Section 6(4). (Tax exempt status is usually referred to as “*501(c)(3) status*”, for the section of the tax code that exempts these organizations from federal taxation).

The Volunteer Protection Act specifically defines a volunteer. A volunteer is an individual who performs services for a governmental entity or nonprofit organization and who receives no compensation for the services performed other than reasonable reimbursement of expenses, such as transportation costs, or occasional gifts in lieu of compensation, such as a plaque or attendance at a recognition banquet.

For the federal Volunteer Protection Act’s protections to apply, a volunteer must meet four qualifications. First, the volunteer must have been:

- 1) Acting within the scope of her responsibilities to the sponsoring nonprofit or governmental agency. In the SHIP context, a volunteer would have to be engaged in activities such as counseling or community outreach, as directed by the state SHIP office or a local SHIP sponsor.
- 2) Properly licensed, authorized or certified by the appropriate authorities to perform the volunteer activities. This means that a volunteer performing professional activities, such as an attorney giving free legal advice about Medicare coverage, or a pharmacist reviewing a beneficiary’s prescriptions against a Part D plan’s formulary, should be properly licensed by the state licensing authority. It *could* also mean that if a lead agency requires volunteers to be certified as SHIP counselors or community educators, that *any* volunteer must complete the requisite training, updates, and proficiency determinations.

Moreover, the volunteer is *not protected* from being found liable to anyone harmed as a result of her volunteer activities if she was:

- 3) Engaging in any willful or criminal misconduct, gross negligence, reckless misconduct or with acting with conscious and flagrant indifference to the rights

or safety of the person harmed. Thus, the state or local SHIP sponsor must know what volunteers are doing in the name of the organization to assure they are properly representing the organization.

- 4) Operating a car or other vehicle for which the state requires an operator's license and/or liability insurance.

The Volunteer Protection Act *never* protects certain actions. These include situations where a volunteer's action or failure to act:

- 1) Was a crime of violence or international terrorism under federal law,
- 2) Constituted a federal hate crime,
- 3) Involved a sexual offense for which the volunteer was found guilty in court,
- 4) Was found to have violated a federal or state civil rights law, or
- 5) Was committed while "under the influence" as determined by applicable state law.

The Volunteer Protection Act expressly does *not* prevent a judge from finding that the sponsoring organization or agency is liable for a volunteer's actions, or failure to act. Thus, state and local SHIP offices must still assure that they are properly protected against liability. The Act specifically permits agencies to sue a volunteer under appropriate circumstances.

## State Law

The Volunteer Protection Act allows states to enact complementary laws that contain similar or more protection for volunteers. Congress intended the federal law to offer a standard minimum set of protections for volunteers. Any state law that does not provide as much protection as the federal law is not enforceable. This is called "*federal preemption*." The Volunteer Protection Act allows states to maintain their own volunteer liability statutes that:

- 1) Require nonprofits or governmental agencies to use risk management tools, such as required training courses;
- 2) Make the sponsoring organization liable for the acts of its volunteers just like they are liable for the acts of paid employees;

- 3) Precludes a limitation on the liability of a volunteer in a civil (not criminal) case brought by a state or local official under state law;
- 4) Requires nonprofits or governmental agencies to maintain liability insurance to protect volunteers.

See [PL 105-19, Section 4 \(d\)](#).

The Nonprofit Risk Management Center publishes a [free guide](#) to "State Liability Laws for Charitable Organizations and Volunteers."