

NONPROFITS INSURANCE ALLIANCE GROUP



Introduction to Liability Shields and Insurance Considerations

Liability Shields

Many nonprofit managers derive comfort from the practice of obtaining waivers from each participant in the organization's services or programs. They assume that a signed waiver is the key to escaping liability for harm. Other managers believe the opposite is true: that waivers "aren't worth the paper they're written on." Neither position accurately reflects the role of liability shields, including waivers, in the management of a nonprofit organization.

Liability shields include waivers, informed consent forms, permission slips and disclaimers. They are often useful risk management tools for the following reasons:

1. A well-written waiver or release can serve as a warning to the participant and his or her parent/guardian about the specific risks inherent in the activity sponsored by your nonprofit. With this information in hand, the participant can take steps to ensure their personal safety, or may decide not to participate in the activity due to concern about safety.
2. In most states, a properly written and executed waiver will effectively shift legal responsibility for harm from the nonprofit to the participant.
3. An individual who has signed a waiver may be less likely to initiate a lawsuit than someone who has not.

Key points to remember:

- An organization should consider using a participant waiver in cases where the nonprofit can identify the persons participating in the activity prior to the event.
- Waivers do not absolve the nonprofit from liability for injuries directly caused by the organization's negligence.
- Waivers are never an appropriate substitute for the careful supervision of an organization's activities.

A Head for Insurance...A Heart for Nonprofits

Major Categories of Liability Shields

WAIVERS

A waiver is the intentional act of relinquishing a known right, claim, or privilege, such as the right to sue an organization for its alleged misconduct. Therefore, a waiver removes the potential liability from the party that could be held responsible for harm. Although an individual's behavior (for example, engaging in an obviously hazardous activity such as sky-diving) occasionally implies a waiver or release, the term usually refers to an express or written agreement. Liability waivers are valid only if the person enters into the agreement knowingly and voluntarily and if the person waiving certain rights receives something in exchange. Courts often invalidate waivers on the grounds that a participant did not fully appreciate the rights being waived or that the waiver did not specifically indicate that it included the organization's liability for negligence.

Sample waivers are available in the Member Resources area of our website, under Forms and Templates. They include:

- Participant Waiver
- Participant Waiver and Release for Minors
- Release and Waiver of Liability and Indemnity Agreement

RELEASES

A “release” is a form of waiver executed after an injury has occurred. In most cases, a release is less tenuous than a waiver and more likely to be upheld in court. A release executed after an injury is on much more solid legal ground because the value of the exchange is less speculative. A claimant may execute a release in conjunction with a settlement arrangement.

Sample:

I hereby surrender any right to seek reimbursement from NONPROFIT, INC. and its directors, officers, employees, volunteers and other agents for the injury I sustained while participating in the annual 5K run on December 1, 2006.

Signed: _____ Date: _____

INFORMED CONSENT

An informed consent form does not attempt to excuse an organization from responsibility for its own negligence. Instead, the form seeks to relieve the nonprofit from liability for the inherent risks of an activity itself. An informed consent only relieves the organization for those risks that the organization reveals to the participant—there is no protection for risks not clearly identified in the consent form. Therefore, the form must apprise the participant or the parents/guardians in detail of the specific risks involved in the activity. The signer acknowledges that he or she has read and understood the risks involved and agrees not to bring suit for any harm resulting from the identified risks. The keys to an effective informed consent form are the identification and explanation of the risks inherent to the activity. An inherent risk is one that is essential to the nature of the activity. Skiing includes the inherent dangers of changing weather conditions, natural obstacles such as trees and rocks, and the possibility of severe injury resulting from a fall. An informed consent form would list these and any other recognized inherent risks of the activity. If the form does not identify a specific risk, the participant retains the right to seek redress from the organization for the harm caused by the unidentified risk.

Sample:

I understand and recognize that skiing poses inherent dangers, including those due to changing weather conditions, natural obstacles such as trees and rocks, and the possibility of severe injury resulting from a fall or collision with another skier or object. I agree to assume full responsibility for the risk of bodily injury, death and disability resulting from these risks while participating in the [Name of Event] on December 1, 2006. I hereby surrender any right to seek reimbursement from NONPROFIT, INC. and its directors, officers, employees, volunteers and other agents for injury sustained as a result of these inherent risks.

Signed: _____ Date: _____

PERMISSION SLIPS

Nonprofits should consider the use of permission slips for any activity involving a minor or other persons not legally competent to sign a waiver or informed consent. A permission slip does not absolve the organization from any liability but offers some protection. A well-drafted permission slip indicates the parents' or guardian's knowledge and consent for their child to participate in the activity. When parents are informed by the nonprofit about the nature and extent of the activity, they may feel more involved in the decision-making process. Also with a permission slip, the parent or guardian cannot claim convincingly that the organization infringed upon their authority, control, or custody over the child. Permission slips, like informed consents, must explain clearly and fully the nature of the activity. A trip to the zoo could include a visit to the animal petting section, and this may be important information to a parent of a child with allergies. The more parents know, the less likely they are to claim that "had I known, I would not have let my child participate."

Sample:

I hereby grant permission for my son, Junior, to attend the annual Recreation League Visit to the City Zoo on December 1, 2001. I also grant permission for Junior to ride in the bus that will transport participants to the Zoo. I agree to be present at the League Headquarters no later than 5:00 pm on December 1 in order to meet the bus when it returns from the Zoo.

Signed: _____ Date: _____

DISCLAIMERS

A “disclaimer” is an express disavowal, repudiation, or limitation of liability by one party to a transaction. Disclaimers differ from waivers in that they are unilateral; the injured party does not explicitly agree to the liability limitation. As such, they are of limited legal value. Their principal functions are to refute assertions about extra duties that a program has taken upon itself and to apprise potential claimants of relevant program limitations. The disclaimer may indicate, for example, that the sponsor will not provide security personnel for an event. Therefore, the sponsor is not assuming a special duty of care for the safety of event volunteers. Similarly, a clearly posted disclaimer of liability for harm from using athletic equipment that an organization provides for its sports program may counter any assertion that the organization assumes a special duty of care for the safety of the participants. In this sense, a disclaimer is roughly equivalent to an advisory or warning of risks that an individual may choose to accept or avoid. Regardless of legal effect, disclaimers, like waivers, may deter claims.

Sample:

This notice is to inform participants in the Snow Friends Ski-a-Thon Fundraiser that Snow Friends cannot provide security personnel or medical personnel during the event. Furthermore, Snow Friends has not inspected the ski hill or facility where the event will take place and warns all participants that participation is at the skier’s risk.

HOLD HARMLESS AGREEMENTS

A hold harmless is an agreement between two parties stating that one party will assume the risk of legal liability associated with an event for the other party. It is a risk transfer mechanism. Usually a landlord will include hold harmless language in a lease to protect him or her from being sued as a result of the event occurring on his or her property. Before signing a lease containing a hold harmless agreement, always ask yourself whether you are in position to prevent or control losses covered under the agreement. It is acceptable to strike language or modify it on legal documents, as long as both parties sign or initial the changes. Funders, such as governmental agencies, may also require a hold harmless agreement so that they will not be held responsible simply because they fund an event.

On the other side of the hold harmless issue are the agreements you should require from vendors and subcontractors that participate in events. Vendors may sell food and beverages, or perhaps arts and crafts at an event. They are an example of independent contractors. In addition to vendors, nonprofits may hire independent contractors to provide other necessary activities, such as security or clean up. In a hold harmless agreement with a vendor or subcontractor, the signer agrees to hold the nonprofit harmless in the event of an accident arising from their operations or services.

The requirement that a hold harmless be signed by the nonprofit is increasingly common. But you can protect your nonprofit by reading the language and verifying that you have not unwittingly accepted more risk than is appropriate under the circumstances. Keep in mind that a hold harmless agreement signed by someone without means to pay for damages is largely worthless. Proof of insurance or other financial resources backs up the promise to hold your organization harmless.

Sample waivers are available in the Member Resources area of our website, under Forms and Templates.

Insurance Considerations

When a nonprofit obtains a commitment from another organization or an individual to assume responsibility for harm or legal expenses, such as through one of the liability shields described above, the “promise to pay” on the nonprofit’s behalf could be a hollow one. For example, if the organization promising to pay has neither insurance nor a rainy day fund, it may be unable to cover the costs associated with its promise to indemnify. This means that your nonprofit assumes full responsibility for the risk of loss. One way to determine whether there is a source of funding for indemnification is to request a Certificate of Insurance or Additional Insured Endorsement.

CERTIFICATES OF INSURANCE

A Certificate of Insurance provides evidence that insurance coverage is in effect. The purpose of a certificate of insurance is to provide evidence to the certificate holder (for example, your nonprofit) that the insured (another organization) can satisfy certain financial obligations. The Certificate itself conveys no rights to the certificate holder, and does not alter the rights or obligations of the insurer. A Certificate of Insurance does not broaden the referenced policy's coverage. If there is a discrepancy between the terms of the insurance policy and the certificate of insurance, most courts will rule that the language of the policy takes precedence. Requiring a Certificate of Insurance from another organization or individual costs them nothing.

ADDITIONAL INSURED ENDORSEMENT

While a Certificate of Insurance gives you proof that a partner organization, a vendor or contractor has insurance in place (as described in the Certificate), it does not ensure that the insurance company issuing the certificate will defend your nonprofit in the event of a claim. For example, Nonprofit A may agree to indemnify Nonprofit B in the event B is sued because of harm resulting from a partnership between the two organizations. However, following a lawsuit in which both organizations are named, Nonprofit A’s insurance company may decline to defend Nonprofit B because B is not an “insured” under A’s policy. The way to obtain assurance that you will be defended under the policy (assuming the coverage applies to the claim) is to get your nonprofit added as an Additional Insured on the insured’s policy. Evidence of this is provided in the form of an Additional Insured Endorsement or a reference on the Certificate of Insurance.

Accountability in nonprofit organizations is more than a good stewardship of funds. It includes delivering our products and services while protecting people and property.

We believe that risk management is the cornerstone of accountability in any organization. To support that belief and to help our member-insureds avoid claims, we offer a wide range of educational and loss prevention resources highly subsidized or free of charge. Visit the Member-Insured Resource area of our website for more information on all of the resources available to you.

If you have questions or need assistance, please contact our Director of Loss Control at 800-359-6422 x76 or via email at losscontrol@insurancefornonprofits.org