



***Liability Information
for
Texas Volunteers***

*as mandated by
H.B. 1831, 81st Legislative Regular Session, 2009*

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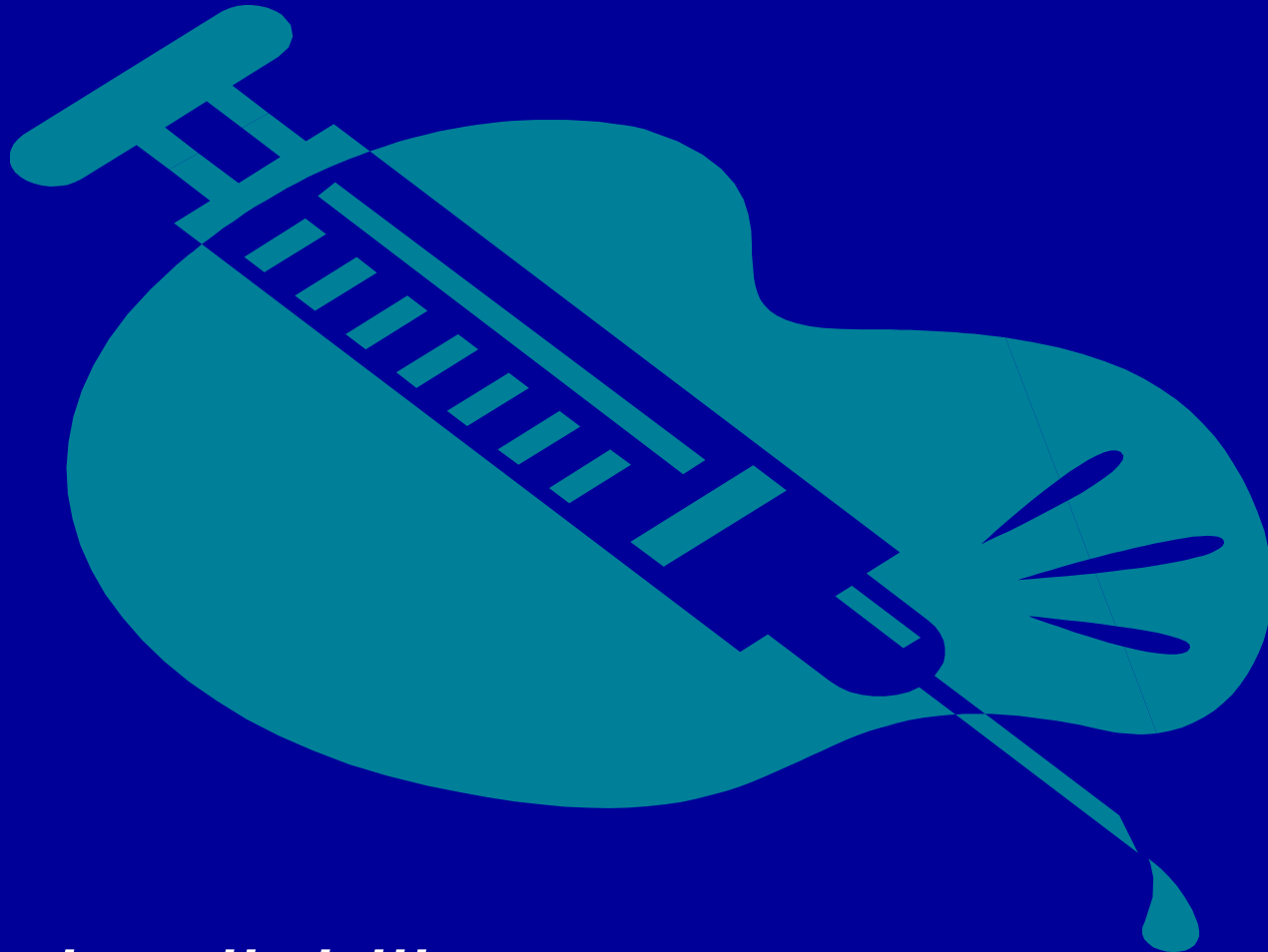
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DISCLAIMER

House Bill 1831 of the 81st Legislature required the Texas Division of Emergency Management to establish a liability awareness program for volunteers, including medical professionals. The intent of this summary is to comply with that legislative mandate. Private citizen disaster volunteers are the focus of this summary, which may not include all potentially relevant statutes. This summary is not intended to influence conduct, serve as legal advice or establish an attorney-client relationship. No warranty is made as to accuracy, and volunteers should not place reliance upon its contents. You should consult your own attorney if you have any question about the application of the law to a specific set of facts.

This might hurt a little . . .



. . . but liability awareness means understanding that details matter.

There is a lot of good news out there for volunteers, but unfortunately there is no “one size fits all” liability statute. Rather, there is a patchwork of federal and state laws covering both potential civil and criminal liability of different people in different situations. Remember, protection from liability does not mean you cannot be sued. Additionally, there are non-tort causes of action such as civil rights claims that are outside the scope of this summary.

Part I.

Statutory Provisions

- ***Federal***

- *Volunteer Protection*

- *Public Health*

- *Public Readiness and Emergency Preparedness (PREP) Act*

- *Smallpox Countermeasures*

- *National Disaster Medical System (NDMS)*

- ***State***

- *Agreements & License Portability*

- *Local Government*

- *Hazardous or Dangerous Situations*

- *State Military Forces*

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- *Emergency Medical Care*

- *Charitable Organizations*

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- *Food Donors*

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FEDERAL



Volunteer Protection



Volunteer Protection Act of 1997 (VPA)

A volunteer of a nonprofit organization or governmental entity is not liable for harm caused by his acts or omissions on behalf of those entities *if*:

- he is acting within the scope of his responsibilities for the entity;
- he was properly licensed, certified or authorized “if appropriate or required”;
- he did not cause harm by “willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed”; *and*
- he was not operating a motor vehicle.

Who is a volunteer?

A volunteer can be a director, officer, trustee or direct service volunteer *if:*

- the volunteer is uncompensated (other than reimbursement for actual expenses) *or*
- the volunteer does not receive anything in lieu of compensation worth more than \$500 a year.

What is a nonprofit organization?

A nonprofit organization cannot practice federal hate crimes *and* must be either:

- a tax-exempt organization under § 501(c)(3) of the Internal Revenue Code *or*
- any not-for-profit charitable, civic, educational, religious, welfare or health organization.

Exceptions:

A volunteer is not protected:

- for crimes of violence, international terrorism, or hate crimes under federal law;
- for sexual offenses or conduct committed under the influence as determined by state law;
- for civil rights violations under either federal or state law; *or*
- from a suit by their respective entities.

The VPA preempts (trumps) inconsistent state law, but allows states to provide more liability protection for volunteers.

- States can, however, follow specific procedures to opt out for civil litigation in their own state courts between their own state citizens.
- Also, states can still require entities to adhere to risk management procedures, make entities liable for volunteers in the same manner as employees, allow suit by officers of State or local government, or limit protection to those entities that provide a “financially secure source of recovery” to potential victims.
- Although punitive damages are limited to those proved by clear and convincing evidence to have been legally caused by “willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed,” state law can further limit punitive damages.

Public Health



Public Readiness and Emergency Preparedness (PREP) Act

A *covered person* is immune from liability

- under both state and federal law

for claims for loss related to administration/use of a *covered countermeasure if:*

- the countermeasure was administered/used during the effective period of a proper declaration by the Secretary of the U.S. Department of Health and Human Services (HHS) concerning the countermeasure;
- it was administered/used for a category of disease or health condition/threat specified in the declaration; *and*
- (for *program planners* or *qualified persons*) it was administered to/used by an individual in the population specified in the declaration who was (or the *program planner/qualified person* reasonably could have believed was) physically present/had a connection to the geographic area specified in the declaration.

Definitions:

- “*Covered countermeasure*” means a *qualified pandemic or epidemic product*, a *security countermeasure*; or a drug, biological product or device authorized for emergency use in accordance with the Federal Food, Drug, and Cosmetic Act.
- “*Covered person*” means a person that is a *program planner* or *qualified person* who prescribed/administered/dispensed a *covered countermeasure*.
- “*Program planner*” includes, among others, a person who supervised/administered a program for the administration/dispensation/distribution/provision/use of a *security countermeasure* or *qualified pandemic or epidemic product*.

- “*Qualified pandemic*” or “*epidemic product*” means a drug, biological product or device manufactured/used/ designed/developed/modified/licensed/procured to diagnose/mitigate/prevent/treat/cure a pandemic or epidemic or limit its harm (or a serious or life-threatening disease/condition caused by such drug, biological product or device) and approved/exempted/authorized for use under specific provisions of the Federal Food, Drug, and Cosmetic Act.
- “*Qualified person*” means a licensed health professional or other individual authorized to prescribe/administer/dispense countermeasures under the law of the state where prescribed/administered/dispensed or a person within a category identified in the Secretary’s declaration.

- “*Security countermeasure*” is a
 - drug,
 - biological product, *or*
 - device

determined by the Secretary to be a necessary countermeasure that is a priority of the Homeland Security Act to diagnose/mitigate/prevent/treat harm from any chemical, biological, radiological or nuclear agent (or adverse health consequences or death caused by such drug, biological product or device) *and* which is approved/cleared/licensed under specific federal statutes or which the Secretary determines will likely qualify for future approval.

- Exception: A federal cause of action against a *covered person* for death or serious physical injury proximately caused by *willful misconduct*, defined as an act or omission intended to achieve a wrongful purpose, known to be without legal or factual justification and in disregard of a known or obvious risk so great that it is highly probable the harm will outweigh the benefit.
- There is no willful misconduct if an act or omission is consistent with applicable directions, guidelines or recommendations by the Secretary if the Secretary or a local/State health authority was provided notice about serious physical injury or death from administration/use of a countermeasure within seven days of the actual discovery of such information by the *program planner/qualified person*.

Smallpox Countermeasures

A *covered person* is deemed an employee of the federal Public Health Service (for which the U.S. is responsible) for liability arising out of administration of a *covered countermeasure against smallpox* during the effective period of a declaration by the Secretary of the HHS concerning *countermeasures against smallpox* to an individual within a category covered by that declaration (or whom a *qualified person* had reasonable grounds to believe was within such category).

Definitions:

A “*covered person*” includes:

- a *qualified person* who administered a *covered countermeasure*;
- a volunteer working for a manufacturer/distributor, health care entity or State/political subdivision (or officials thereof) administering a program for countermeasures; *or*
- an individual who has privileges or is authorized to provide health care under the auspices of specified health care entities.

- A “*qualified person*” is a licensed health professional or other person who is authorized under relevant State law or the Secretary to administer a countermeasure.
- A “*covered countermeasure*” or “*covered countermeasure against smallpox*” is a substance specified in the Secretary’s declaration that is either used to prevent/treat smallpox or control/treat adverse effects of vaccinia inoculation or administration of another covered countermeasure.

If the U.S. pays damages to a claimant, it has the right to recover damages, interest and costs resulting from a *covered person's* willful misconduct or grossly negligent, reckless or illegal conduct.

National Disaster Medical System

The Secretary of the HHS may activate the National Disaster Medical System (NDMS):

- to provide health services, health-related social services, other human services, and auxiliary services;
- to respond to the needs of public health emergency victims; *or*
- to be present at specified locations and periods of time if the Secretary has determined that there is a risk of public health emergency.

- The Secretary may appoint individuals to serve as *intermittent disaster-response appointees*, who, acting within the scope of their appointment, are considered employees of the Public Health Service performing medical, surgical, dental or related functions for liability purposes.
 - For training programs authorized by the Assistant Secretary for Preparedness and Response or comparable official of any participating federal agency, acts of participating individuals (within the scope of participation) are considered to be within the scope of appointment regardless of whether compensation is received.

STATE



Agreements & License Portability



Emergency Management Assistance Compact (EMAC)

- Requires gubernatorial declaration of an emergency or disaster, but also provides for mutual cooperation in emergency training
- If a member state requests professional, mechanical or other skilled assistance:
 - a person with a license, certificate or permit in another responding party state is considered equally authorized in the requesting state for purposes of disaster response, subject to any limitations placed by the governor of the requesting state.

- *Officers or employees* of the state providing aid are considered agents of the state receiving aid for tort liability and immunity.
 - Such officers or employees are not liable for acts or omissions in good faith, which does not include:
 - willful misconduct,
 - gross negligence, *or*
 - recklessness.

Texas Government Code Section 418.117

If the assistance of a person who holds a:

- license,
- certificate,
- permit, *or*
- other document

evidencing qualification in a:

- professional,
- mechanical, *or*
- other skill

is requested by a state agency *or* local government entity under the Texas Statewide Mutual Aid System . . .

. . . the person is considered

- licensed,
- certified,
- permitted, *or*
- otherwise documented

in the political subdivision in which the service is provided as long as the service is required

– subject to any limitations imposed by the chief executive officer or the governing body of the requesting state agency *or* local government entity.

Local Government



Voluntary Local Government Indemnity of “Employees” & Limitation of Liability for Public Servants

- Local governments *may* choose to pay or provide court costs, attorney’s fees or legal counsel and damages awarded against an “*employee*” for negligent acts or omissions in the course and scope of the employee’s employment.
 - “*Employee*” includes:
 - a volunteer,
 - a former volunteer, *and*
 - their estates.

- *Note that this provision does not benefit volunteers for the State or county extension agents, but is instead limited to volunteers for a “county, city, town, special purpose district, including a soil and water conservation district, and any other political subdivision of the state.”*

Voluntary indemnity is not permissible *if:*

- the volunteer's damages were caused by official misconduct, willful or wrongful acts or omissions or gross negligence *or*
- damages are covered by insurance.

Payments may not exceed:

- “\$100,000 to any one person or \$300,000 for any single occurrence in the case of personal injury or death” *or*
- “\$10,000 for a single occurrence of property damage.”

A “*public servant*” is not, however, personally liable for greater than \$100,000 damages due to:

- property damage,
- personal injury,
- death, *or*
- deprivation of a right, privilege or immunity; *if*
 - the public servant is acting within the course and scope of their service for a local government *and*
 - the original \$100,000 is covered by voluntary local government indemnity or errors and omissions coverage.

“Public servant” includes:

- elected and appointed officials,
- local government *“employees”* as previously mentioned, *and*
- licensed physicians who provide emergency or post-emergency patient stabilization services in a hospital owned or operated by a unit of local government.

Hazardous or Dangerous Situations



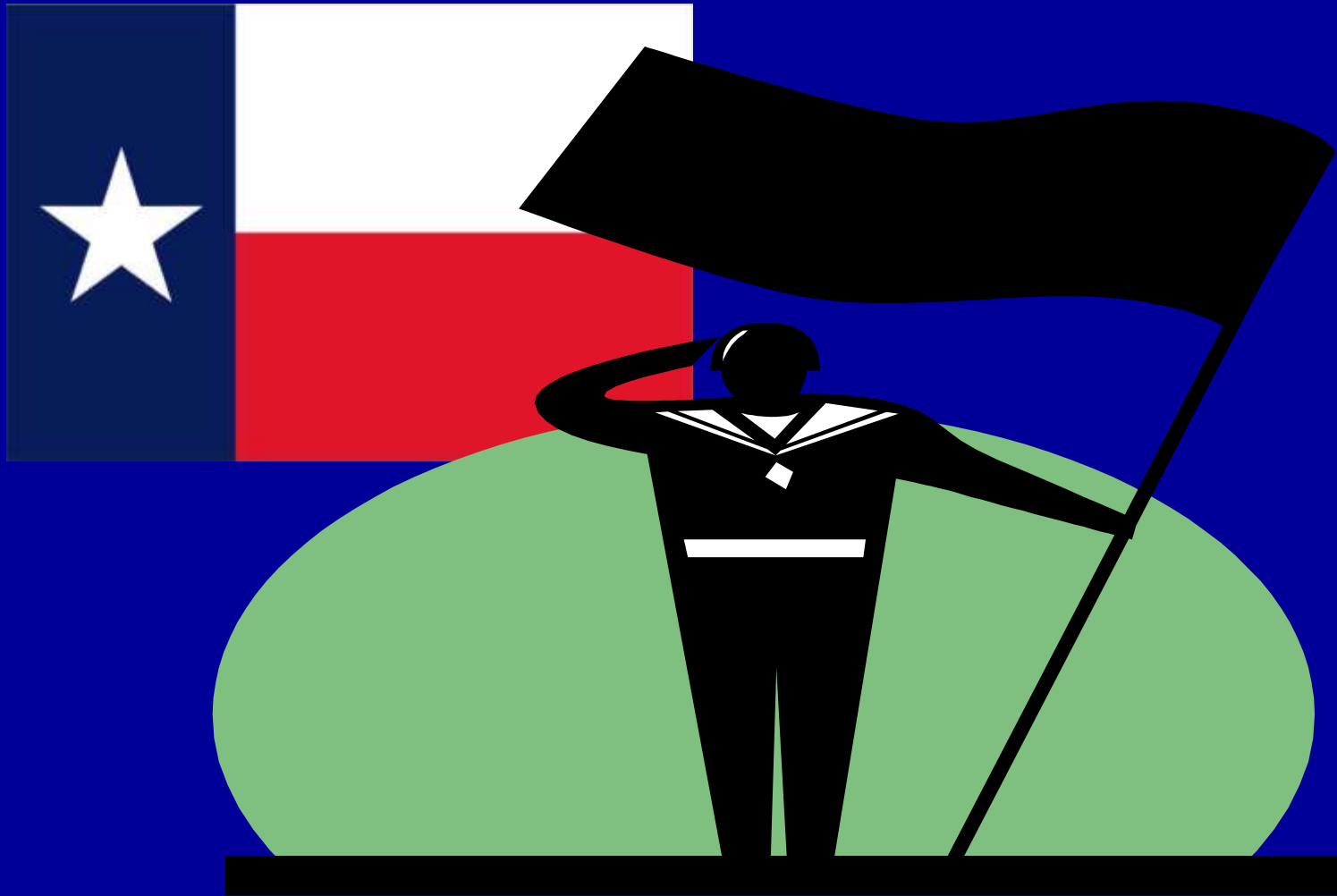
Texas Civil Practice & Remedies Code Chapter 79

An uncompensated individual is immune from civil liability for an act or omission while giving care, assistance or advice to manage:

- a hazardous material storage or transportation occurrence that threatens or endangers individuals, property or the environment due to either a hazardous material fire or explosion *or* the spillage, seepage or release of a hazardous material *or*
- at the request of an authorized representative of a local, state or federal agency, a disaster that threatens or endangers individuals, property or the environment.

Exception: There is no protection for reckless, intentional, willful or wanton misconduct.

State Military Forces



Texas Government Code

Sections 418.006, 421.061 & 431.085

A volunteer acting at the direction of an employee or officer of a local or state agency who is performing:

- *an activity related to sheltering or housing people in connection with evacuation of disaster-threatened or -stricken areas or*

- within the course and scope of direction, a *homeland security activity*

(“any activity related to the prevention or discovery of, response to, or recovery from a terrorist attack, natural or man-made disaster, hostile military or paramilitary action, or extraordinary law enforcement emergency”)

– *if* the volunteer is acting under the Governor’s homeland security strategy

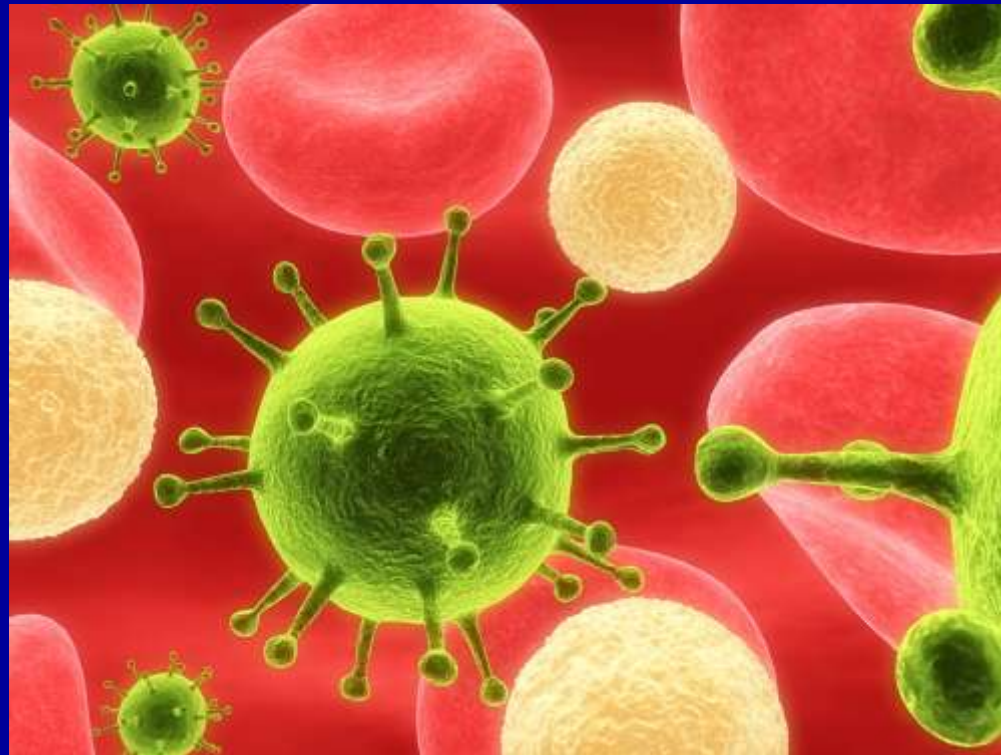
» *unless* there is willful or wanton negligence or conscious indifference/reckless disregard for public safety

. . . is considered a member of the state military forces ordered into active service of the state by proper authority who is discharging a duty in that capacity.

- PROTECTION:

Such members of the state military forces are not civilly liable.

Communicable Diseases



Texas Health & Safety Code

Section 81.007

A “*private individual*” performing duties in accordance with the instructions of the Texas Department of Health or a health authority pursuant to the Communicable Disease Prevention and Control Act is not liable for:

- personal injury or death, *or*
- property damage

unless he commits:

- willful misconduct *or*
- gross negligence.

Emergency Medical Care



Texas Civil Practice & Remedies Code

Chapter 74

A *person* who in good faith administers emergency care is not liable for civil damages,

- *including:*
 - one who administers emergency automated external defibrillator care *or*
 - a public safety volunteer whose duties include responding rapidly to an emergency.

Exceptions: Liability protection *does not apply* to care administered:

- with willful or wanton negligence;
- with an expectation of remuneration
 - (regardless of entitlement);
- by a person soliciting business or seeking remuneration for himself or a person he represents as an agent; *or*
- by a person whose negligent act or omission caused the emergency.

Regardless of remuneration, individuals “not licensed or certified in the healing arts who in good faith administer emergency care as emergency medical service personnel are not liable in civil damages” for such care as long as they are not willfully or wantonly negligent.

Charitable Organizations



Charitable Immunity and Liability Act of 1987

A volunteer of a charitable organization is not liable for an act or omission resulting in death, damage or injury if the volunteer was acting in the course and scope of his duties.

- *If, however, the death, damage or injury is proximately caused by an act or omission arising out of the operation or use of motor-driven equipment, to the extent that insurance is required and existing insurance coverage applies, the volunteer is liable.*

“*Volunteer*” is defined as:

- someone rendering services for or on behalf of a charitable organization who *does not* receive compensation beyond reimbursement for actual expenses, *and*
 - includes:
 - directors, officers, trustees, *or* direct service volunteers (including a volunteer health care provider).

“Charitable organization” is defined as either:

1. An organization exempt from federal income tax under Internal Revenue Code Section 501(c)(3) or (4) if it is a nonprofit organized/operated exclusively for purposes that are charitable, religious, educational or aimed toward prevention of cruelty to children or animals, youth sports/recreation, neighborhood crime prevention/patrol, fire protection/prevention, emergency medical/hazardous material response or the promotion of social welfare by primarily promoting the common good and general welfare; or

2. A bona fide organization organized/operated exclusively for purposes that are charitable, religious, educational or aimed at prevention of cruelty to children or animals, youth sports/recreation, neighborhood crime prevention/patrol, or one organized/operated exclusively for promotion of social welfare by primarily promoting the common good and general welfare; that does not perform activities not in furtherance of these purposes; that does not directly/indirectly participate/intervene in political campaigns; that dedicates its assets in furtherance of these purposes; that does not allow its net assets to benefit certain parties upon dissolution; *and* that normally receives more than one-third of annual support from gifts, grants, contributions or membership fees.

A volunteer health care provider serving as a direct service volunteer of a charitable organization is not liable for an act or omission resulting in death, damage or injury to a patient *if:*

- the volunteer is acting in the course of providing health care services to the patient;
- the services provided are within the scope of the volunteer's license; *and*
- prior to the volunteer's provision of health care services, the patient or a person responsible for the patient signs a written acknowledgment of limitations on recovery and the fact that the volunteer's services are not in expectation of compensation.

“Volunteer health care provider” is defined as:

– one who provides health care services without compensation or the expectation of compensation, who is licensed under specified laws:

- to practice medicine or as a retired physician,
- as a physician assistant or retiree,
- as a registered nurse or retiree,
- as a pharmacist or retiree,
- as a podiatrist or retiree,
- as a dentist or retiree,
- as a dental hygienist or retiree,
- as an optometrist or retiree,
- as a physical therapist or retiree,
- as an occupational therapist or retiree, *or*
- as an audiologist or retiree.

Exceptions:

- Acts or omissions that are intentional, willfully negligent or with conscious indifference/reckless disregard to safety
- Does not limit liability of volunteers of organizations formed substantially to limit liability under the Charitable Immunity and Liability Act of 1987
- Does not apply to organizations formed for the disposal, removal or storage of hazardous waste, industrial solid waste, radioactive waste, municipal solid waste, garbage or sludge

Emergency Management Duties



Emergency Management Council (EMC) / Local Emergency Planning Committee (LEPC)

- A member of:
 - the EMC *or*
 - of an LEPC established to develop an emergency management plan
- in accordance with the Texas Disaster Act
- *is not* personally liable for civil damages arising from the performance of their council or LEPC duties.

Food Donors



Good Faith Donor Act

A *person* or *gleaner* (who harvests a donated agricultural crop for the needy) is not civilly or criminally liable due to the condition of *apparently wholesome food donated* (given without requiring anything of monetary value in return)

- to a church or *nonprofit organization* for distribution to the needy
 - *unless* the person or gleaner commits
 - » gross negligence,
 - » recklessness, *or*
 - » intentional misconduct
 - conduct the person knows is harmful to the health/well-being of another.

A “*nonprofit organization*” is established/operated for:

- religious,
- charitable, *or*
- educational purposes; *and*

does not distribute its income to:

- members
- directors, *or*
- officers.

“[F]ood is apparently wholesome if [it] meets all quality standards of local, county, state, and federal agricultural and health laws and rules, even though the food is not readily marketable due to appearance, age, freshness, grade, size, surplus, or other condition. Canned goods that are leaking, swollen, dented on a seam, or no longer airtight are not apparently wholesome food.”

Nor is the donor of the gleaned crop civilly or criminally liable for injury to a gleaner *unless* the donor commits:

- gross negligence,
- recklessness, *or*
- intentional misconduct.

Fire Fighting



Texas Civil Practice & Remedies Code

Section 78.001

A volunteer fire fighter/volunteer fire department is not liable for damage to property resulting from reasonable and necessary action to fight/extinguish fire on the property.

Engineers & Architects



Texas Civil Practice & Remedies Code

Section 150.003

Licensed or registered engineers and architects who:

- without compensation or expectation of compensation (regardless of entitlement)
- in response to and during a gubernatorial state of emergency or disaster declaration
- provide services related to a public or private structure, building, roadway, piping or other system that are authorized under specified statutes/codes *and* at the request or with the approval of a local, state or federal public official acting in an official disaster response capacity

are not liable for civil damages for acts or omissions unless they constitute gross negligence or wanton/willful/intentional misconduct.

Exceptions:

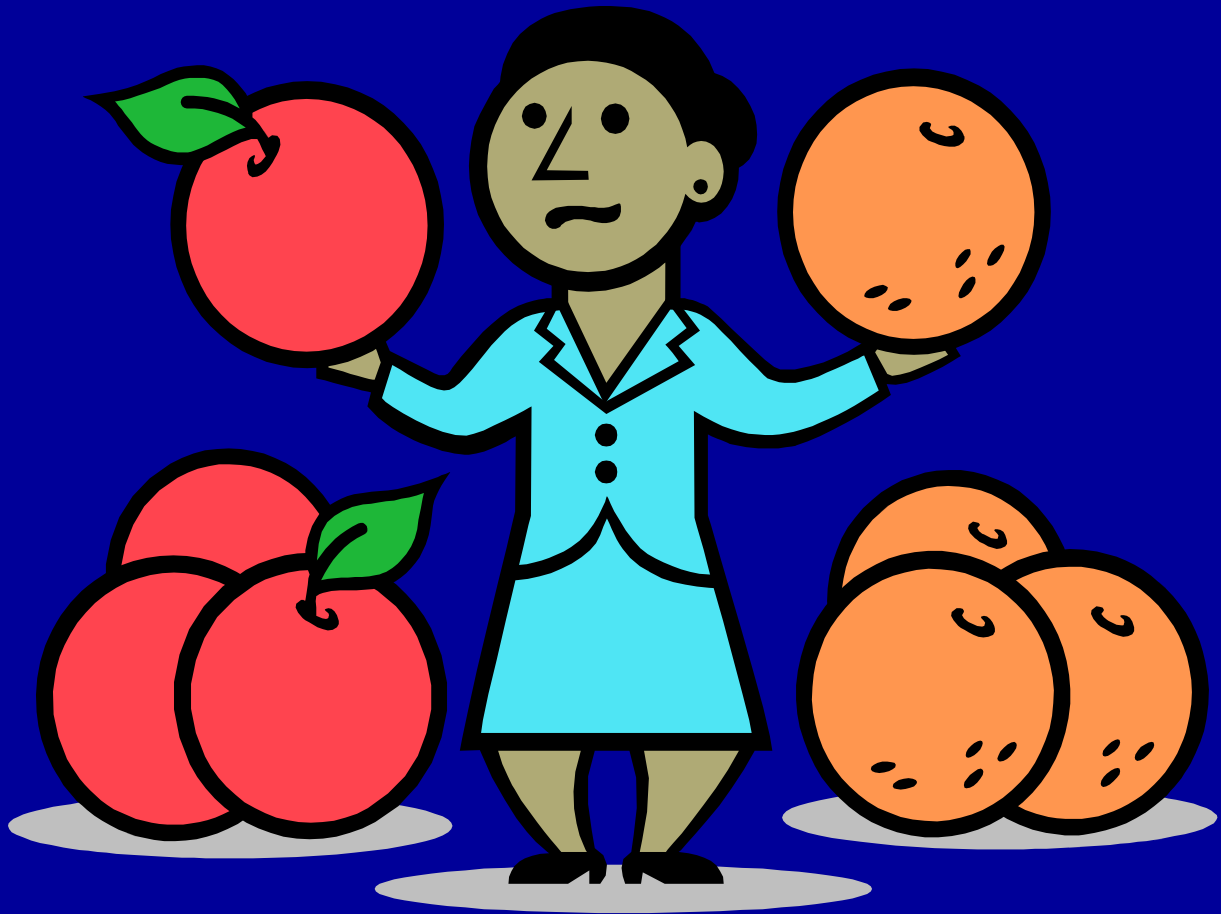
Does not apply to those at the scene of the emergency to:

- solicit business *or*
- perform compensated services



Part II.

Synopsis



Details Matter:

- Who?
- What?
- When?
- Where?
- Why?

Who?

Examples:

- For what entity?
- Licensed?
- Paid?

What?

Examples:

- Type of activity?
- Covered by insurance?
 - Up to what amount?

When?

Examples:

- During gubernatorial disaster declaration?
- During Secretary of HHS declaration?

Where?

Example:

- In geographical region specified in Secretary of HHS declaration?

Why?

Examples:

- At request of the State?
- With intention of compensation?

The law seeks to balance the interests of ensuring public safety while encouraging volunteerism and charity. Therefore, intentional misconduct and gross negligence are consistent exceptions from liability shields.

**Thank you
for serving
Texas!**





Part III.

Reference Materials

Citations

- **Federal**

- **United States Code (U.S.C.)**

- **Administration of Smallpox Countermeasures by Health Professionals,**
Title 42 U.S.C. Section 233(p)
- **Public Readiness and Emergency Preparedness (PREP) Act,**
Title 42 U.S.C. Section 247d-6d
- **National Disaster Medical System,**
Title 42 U.S.C. Section 300hh-11
- **Volunteer Protection Act of 1997,**
Title 42 U.S.C. Sections 14501 *et seq.*

- **Texas**

- **Civil Practice & Remedies Code**

- Chapter 74, Medical Liability
- Chapter 76, Food Donors [Good Faith Donor Act]
- Section 78.001, Liability
- Chapter 79, Liability of Persons Assisting in Hazardous or Dangerous Situations
- Chapter 84, Charitable Immunity & Liability [Charitable Immunity & Liability Act of 1987]
- Chapter 102, Tort Claims Payments by Local Governments
- Chapter 108, Limitation of Liability for Public Servants
- Section 150.003, Liability for Services Rendered During Disaster

- **Government Code**

- Section 418.006, Civil Liability
- Section 418.117, License Portability
- Section 418.174, Personal Liability Exemption of Member of Emergency Planning Council or Local Emergency Planning Committee
- Section 421.001, Definitions
- Section 421.061, Civil Liability
- Section 431.085, Liability for Member

- **Health & Safety Code**

- Section 81.007, Limitation on Liability
- Chapter 778, Emergency Management Assistance Compact (EMAC)

Web Site Links

- **Texas Statutes**, *Texas Legislature Online (TLO)*
<http://www.capitol.state.tx.us/>
- **Federal Statutes (U. S. Code)**, *Office of Law Revision Counsel*
<http://uscode.house.gov/>
- **Citizen Corps**
<http://www.citizencorps.gov/>
- **U.S. Department of Health & Human Services (HHS)**
<http://www.hhs.gov/>

Resources

- Office the Attorney General
 - *Emergency Legal Preparedness Manual*

- Texas Department of State Health Services
 - *Public Health Preparedness Legal Resources*
 - <http://www.dshs.state.tx.us/compreg/ogc/default.shtm>

- Citizen Corps
 - *Volunteer Liability Guide*
 - *State Liability Laws for Charitable Organizations and Volunteers*
 - http://www.citizencorps.gov/councils/volunteer_mgmt.shtm

- U.S. Department of Health & Human Services
 - *Public Readiness and Emergency Preparedness (PREP) Act*
 - <http://www.hhs.gov/disasters/discussion/planners/prepact/index.html>