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Providing Camp-Specific knowledge on Legal, Legislative, and Risk Management

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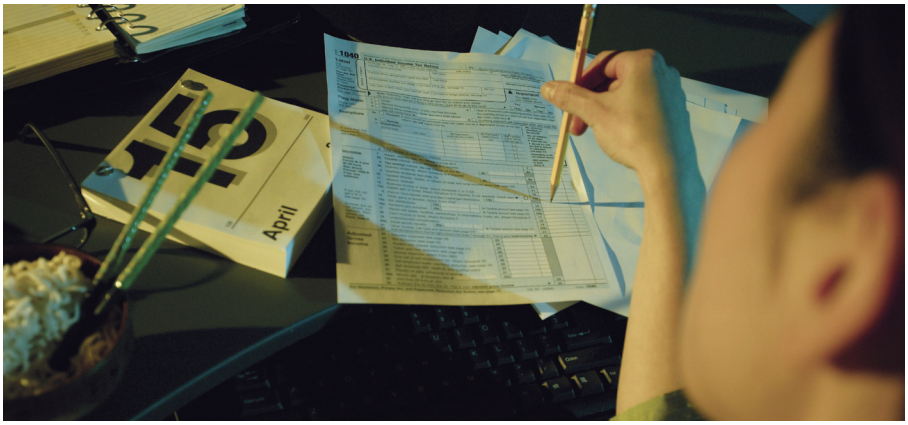

Camp Employment Taxation

James R. Betley, Ice Miller LLP

Employers in the United States, including camps, are required to pay Social Security, Medicare, and state and federal unemployment and income taxes on most employees. How these taxes are calculated and collected, to whom they are paid, and the nuances of special camp-related laws are some of the issues addressed in this article.

In 1935, the Congress of the United States passed a single law creating the Federal Insurance Contributions Act ("FICA") and the Federal Unemployment Tax Act ("FUTA"). FICA imposes Social Security and Medicare taxes, and FUTA imposes federal unemployment taxes. States also impose separate state unemployment taxes ("SUTA").

Social Security and Medicare (FICA)

Except as noted below, all camp employees are subject to FICA taxation. As a general rule, Social Security and Medicare taxes are shared by the camp and the employee. For 2012, the camp must pay: (a) a 6.2 percent Social Security tax on the first $110,100 earned by the employee each year, and (b) a 1.45 percent Medicare tax on the employee's entire annual gross pay. In 2011, the Tax Relief, Unemployment Insurance Reauthorization,

and Job Creation Acts of 2010 provided a two percentage point payroll tax cut for employees, reducing their Social Security tax withholding rate from 6.2 percent to 4.2 percent of wages paid. This lower rate has been extended, but only through February 29, 2012. The tax rate for Medicare for employees is also 1.45 percent. The combined tax (through February 29, 2012) is therefore 13.3 percent of gross pay, 7.65 percent of which is paid directly by the camp, and 5.65 percent of which is withheld by the camp from the employee's paycheck, to be forwarded to the Internal Revenue Service (IRS). If the payroll tax cut for employees is not extended, it will revert back to 6.2 percent in March 2012.

These taxes are reported on IRS Form 941, *Employer's Quarterly Federal Tax Return*, due April 30, July 31, October 31, and January 31 of each year. The taxes are paid quarterly if less than $2,500 per quarter, or monthly or semi-weekly depending upon the amount owed. See IRS Publication 15, *Employer's Tax Guide,* p. 24, for special provisions affecting seasonal employers and the filing of Form 941.

Exemptions

International staff who are nonresident aliens holding J-1 (cultural exchange) or F-1 (student) visas are exempt from FICA withholding, provided the services rendered are consistent with the purpose of their visa.

The American Camp Association supports an exemption from FICA for seasonal employment of all camp counselors who are full-time students. The United States Senate and United States House of Representatives both passed an ACA-sponsored FICA amendment in 1992, but the amendment was not enacted into law. Efforts continue to secure this beneficial change in the law.

Federal Unemployment Tax (FUTA)

This tax is paid entirely by the employer, and is not withheld from the camp employee's paycheck. For 2012, the FUTA tax rate is 6 percent and is applied against the first $7,000 in annual wages of each employee. Camps may take a credit against their FUTA tax liabilities for amounts paid into state unemployment funds. The maximum credit is 5.4 percent. Taxes are reported on IRS Form 940, *Employer's Annual Federal Unemployment Tax Return*, or IRS Form 940-EZ due January 31 of the following year. Generally, if the total tax liability for the year is more than $500, the tax must be deposited quarterly on April 30, July 31, October 31, and January 31 of each year. If the tax due for a quarter is more than $500, the tax must be deposited for that quarter. If the tax due is less than $500 for a quarter, the tax is carried over to the next quarter until the cumulative tax is more than $500.

There are two exemptions to FUTA that may apply to camps or their employees. First, nonprofit charitable, religious, and educational camps described in Section 501(c)(3) of the Internal Revenue Code (the "Code") and exempt from income tax under Code Section 501(a) are generally exempt from FUTA. Second, international staff who are nonresident aliens holding J-1 (cultural exchange) or F-1 (student) visas are also exempt from FUTA, provided the services rendered are consistent with the purpose of their visa.

State Unemployment Tax (SUTA)

States impose unemployment taxes independent of the federal government. As a general rule, states follow the federal lead in granting exemptions, although they are not required to do so. Those that do often have laws that provide for blanket adoption of federal exemptions. Accordingly, camps will find that the vast majority of states do not impose SUTA on camps already exempt from FUTA.

Since there are some exceptions, camps should contact their state labor department to correctly ascertain SUTA tax liability. Don't hesitate to question your state labor department if they do impose SUTA liability, as the American Camp Association has discovered state tax officials to be frequently unaware of the federal exemption for camps.

Withholding of Federal Income Taxes

Except as noted below, most camp employees are subject to withholding of federal income taxes. Every camp must obtain IRS Form W-4, *Employee's Withholding Allowance Certificate,* from each employee to determine the appropriate withholding amount. Most camp counselors will have insufficient earnings in the summer to trigger federal income tax withholding. Full-time employees, and part-time summer staff with other full-time positions, will likely be subject to withholding.

Foreign nationals working at a camp under a J-1 or F-1 visa are considered to be engaged in business in the United States, and are generally considered taxable at the same rates as U.S. citizens (even though exempt from FICA and FUTA). In the event the personal exemptions claimed on a foreign national's Form W-4 are not sufficient to avoid withholding at a given compensation level, camps should consult IRS Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*, and IRS Publication 519, *U.S. Tax Guide for Aliens,* to determine eligibility for exemption pursuant to a treaty. The United States is party to many treaties which exempt varying levels of compensation. Students studying in the United States on an F-1 visa would be typical beneficiaries. An individual claiming exemption pursuant to a tax treaty should provide the employer with IRS Form 8233, *Exemption From Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual.*

IRS Forms W-2, *Wage and Tax Statement*, summarizing all withholding, must be delivered to all camp employees by January 31st of the following year. By February 29th, copies of the Forms W-2 together with forwarding IRS Form W-3, *Transmittal of Wage and Tax Statements*, must be delivered to the Social Security Administration by the camp. Withheld income taxes are reported on Form 941, and are payable to the federal government monthly or semi-weekly, depending upon the amount owed. See Publication 15, p. 20 et seq., for taxpayer specific rules regarding depositing taxes.

Withholding of State Income Taxes

Many states impose state income tax and withholding requirements. Camps should check with their state department of revenue to determine liability and compliance procedures.

Independent Contractors

No federal income tax withholding or FICA or FUTA taxes apply to a camp's use of independent contractors. There are objective and stringent criteria by which the IRS determines who is and who is not a legitimate independent contractor and most camp employees do not meet the criteria. Generally speaking, an independent contractor works under contract, provides his or her own equipment, and maintains total discretion in the details of how a particular service is provided. Independent contractors are typically in business for themselves. Examples in the camp environment might be pool service companies, construction contractors, or independent consultants. See IRS Publication 15-A, *Employer's Supplemental Tax Guide*, p.6, for additional information regarding the criteria the IRS uses to determine whether an individual is an independent contractor.

Part-Time Workers

For purposes of federal income tax withholding, FUTA, and FICA, there is no difference between full-time, part-time, and employees hired only for short periods. It does not matter if an employee has another job and the full limit of Social Security taxes was already withheld by that employer.

Meals

The value of meals, if provided to an employee "for the convenience of the employer" and on the employer's premises, is not gross income to the employee and is therefore not subject to income tax withholding, FICA, and FUTA. Generally, meals are considered to be provided for the convenience of the employer if the employer has a substantial business reason for providing the meal other than as additional compensation to the employee (e.g., the employee's duties require that the employee be available at all times). Meals that are furnished with lodging that is excludable from gross income, as discussed below, are generally also excludable from gross income. See IRS Publication 15-B, *Employer's Tax Guide to Fringe Benefits*, p.16, for additional information regarding meals provided to employees.

Lodging

The value of lodging, if provided to an employee "for the convenience of the employer" on the employer's premises and as a condition of employment, is not gross income to the employee and is therefore not subject to income tax withholding, FICA, and FUTA. Generally, lodging is considered to be provided for the convenience of the employer if the employer has a substantial business reason for doing so other than providing additional compensation to the employee (e.g., the employee's duties require that the employee be available at all times). Lodging will not be considered to be provided for the convenience of the employer if the employee is permitted to choose between the lodging or additional compensation.

Lodging provided to a camp employee (including during off-season periods) will be gross income to the employee unless the employee has duties which justify the provision of lodging. The provision of lodging must be "integrally related" to the employee's duties. Factors that the IRS has considered in determining whether lodging is provided for the convenience of the employer and integrally related to the employee's duties include: (a) the employee's duties require that he or she be available at all times (e.g., nurse, counselor, maintenance, etc.); (b) the employee is available to constantly monitor the property; (c) the premises are sufficiently isolated that lodging is not available within a distance that allows the employee to adequately perform his or her duties; (d) the employee performs significant work duties at the residence provided; etc.

See Publication 15-B, p. 16, for additional information regarding lodging provided to employees.

Seasonal Camps Operated by Year-Round Organizations

There is a serious question whether, upon audit, seasonal camps can avoid FUTA, SUTA, and minimum wage and hour liability if the camp is part of a larger year-round entity. Seasonal camps in this situation should strive to create true independence from the "parent" year-round organization. An independent corporation, a separate board of directors, employees, budgets, assets, liabilities, and bookkeeping staff are all objective criteria that have been used in the past to determine whether an entity is truly independent and therefore eligible for "seasonal" exemptions.

Operating Camp Year-Round

There is a growing trend among camps to expand operations beyond the traditional summer season. One of many considerations a camp should review is the revenue impact that loss of seasonal exemptions can have on its camp operation. Those changes can be substantial offsets to anticipated revenue gains. Year-round for-profit camps must generally pay FUTA and SUTA on student counselors.

Remember, too, that federal and state minimum wage and hour provisions, including overtime, apply to employees of most year-round camp operations. The same "seasonal camp" definition applies for purposes of the federal minimum wage and hour laws.

IRS Forms and Publications

Camps and foreign nationals may access and download IRS forms and publications through the Internet at www.irs.ustreas.gov or obtain them via fax at 703-368-9694. To use the fax service, you must use a fax that includes a handset so that after dialing the fax number you can respond to questions to get to the right menu options.

James Betley is of counsel in Ice Miller LLP's Tax Group. Betley focuses his practice on multi-state, federal, and international tax planning and compliance and advises tax-exempt clients (including nonprofit and governmental entities) on a broad range of issues.

Electronic Medical Records in the Camp Setting: HIPAA Considerations

Tracey C. Gaslin RN, PhD, CRNI, CPNP

Stuart T. Weinberg, MD, FAAP

One of the pervasive considerations with electronic medical records (EMR) is protecting the privacy of the individual. People seem to get very nervous about security issues with electronic records, and when you hear about data breaches in the news, some of that fear is not totally unrealistic. However, electronic medical records offer the opportunity for security, auditing, and tracking disclosures that is often not possible with paper records.

With current technology, we have the capability to send electronic medical records to collaborating medical partners, health plan administrators, ancillary care providers, and a variety of other organizations that use patient data. How do we protect this data? How do we address security of our electronic systems? These questions were some of the initial concerns with the creation of the Health Insurance Portability and Accountability Act (HIPAA) of 1996.

HIPAA was enacted to help establish national standards for EMRs, especially in relation to funding of healthcare services and protection of the information held by covered entities. In an effort to better understand HIPAA and the relation to the camp setting, two components need to be defined:

1. Covered entity: any person, business, or agency that furnishes, bills, or receives payment for healthcare in the normal course of business and transmits any covered transactions electronically.
2. Covered transaction: transactions for which standards (45 C.F.R. Part 162) have been adopted. These transactions involve:
   a. health care claims
   b. eligibility for a health plan
   c. referral certification and authorization
   d. health care claim status inquiry/response
   e. enrollment or disenrollment in a health plan
   f. health care payment and remittance advice
   g. health plan premium payment transaction
   h. coordination of benefits transaction

These covered transactions deal most specifically with the financing of healthcare services and the sharing of medical information that will help to determine funding requirements. Camps will need to consider their role in the funding of healthcare services and the impact of HIPAA on the security of medical records. If an individual camp facility does not charge for their healthcare services, much of HIPAA is not applicable. However, if a camp bills insurance or other sources for payment or funding, they would then be considered a "covered entity" and would be required to adhere to the requirements as set forth in HIPAA. Before attempting to develop an entire response plan for HIPAA in your organization, ask other healthcare organizations in your area if they would be willing to share their established plans. Most organizations are willing to help by sharing their expertise in areas related to protected health information (PHI) and protection of patients.

> "Camps will need to consider their role in the funding of healthcare services and the impact of HIPAA on the security of medical records."

Many camps may identify that they do not meet the requirements of a "covered entity," and therefore, are not required to adhere to the many HIPAA requirements. It would be wise, however, to consider the safeguards discussed in the act as important efforts for securing any PHI. HIPAA has two security rules: the privacy rule and the security rule. The privacy rule addresses both electronic and paper copy records and encourages us to disclose the minimally necessary health information to achieve our purpose.

Privacy Rule

Several questions emerge when considering the privacy rule because camps may need to send campers for offsite health services and will need to share medical information regarding the camper. Who will have access to a camper's medical information? How will you share the information? What will you need to share? Will you have the ability to electronically transmit that information to the offsite health center, and if so, how are those transactions protected? Each camp should evaluate individual processes and consider establishing systems that attempt to maintain the privacy of PHI to the best of our ability.

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Security Rule

The security rule deals specifically with electronic records and addresses administrative, physical, and technical safeguards. Some of these safeguards are valid and useful considerations for a camp. Questions to consider include:

1. How will you determine who will have access to the medical records? Will there be required training regarding privacy considerations?
2. Do you have a contingency plan for emergencies in order to safeguard electronic records and/or retrieve electronic records? What disaster recovery procedures are in place to protect electronic records?
3. Are there controls for introducing or removing hardware, software, or data from the network?
4. When equipment is retired, how is it disposed of (or repurposed) properly to ensure that PHI is not compromised?
5. Have you considered a policy related to proper workstation use?
6. Are computer screens away from high traffic areas and not in direct view of the public?
7. Are you using some form of encryption when transmitting information so PHI is protected from intrusion?
8. Are there systems in place not allowing critical data and information to be changed (i.e., documentation by healthcare provider)?
9. Have you carefully considered the risks associated with EMRs? Should you establish a written risk management plan or integrate EMRs into your existing risk management plan?

Electronic medical records are the way of the future. EMRs have the ability to provide access to the right information by the right people and keep an audit trail of those activities. With electronic information, we will be able to analyze data regarding illnesses, injuries, and accidents. Electronically trending data will allow us to establish systems that can improve the safety of the camp experience for campers and staff and hopefully provide a timely response to health events when they do occur. Access to PHI that is accurate, up to date, and timely is essential to providing a quality camp experience and will be a driving force for the future.

Check out new training opportunities available through the e-Institute in ACA's Professional Development Center — www.ACAcamps.org/einstitute. CECs are available for all online courses and webinars. An April webinar will address technology in camp health care.

Visit the "Healthy Camp Toolbox" to learn more about ACA resources related to camp health care — www.ACAcamps.org/research/enhance/reduce-injury-illness.

Tracey Gaslin RN, PhD, CRNI, CPNP is a professor and a certified pediatric nurse practitioner specializing in camp nursing, pediatrics, and children with bleeding disorders. She is currently the medical director at The Center for Courageous Kids and serves as the education chair for the Association of Camp Nurses.

Stuart T. Weinberg, MD, FAAP, is an assistant professor in the Departments of Biomedical Informatics and Pediatrics at the Vanderbilt University School of Medicine. Dr. Weinberg has over forty-five years of experience with the camp community as a camper, staff, board member, volunteer, and consultant, and seventeen years of clinical experience as a pediatric resident, hospitalist, and outpatient clinician.

Dr. Gaslin and Dr. Weinberg are also members of the Healthy Camp Education and Monitoring Project Committee.

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Crisis Help Available Twenty-Four Hours a Day

We remind you that the ACA Camp Crisis Hotline is available to you twenty-four hours a day. We encourage you to use this service when you need help in a crisis. This year, we've added a new resource for you — a page on the ACA Web site that lists resources and links related to the most common types of calls we receive on the Hotline. Take a look at the broad range of resources now — before you need them: www.ACAcamps.org/camp-crisis-hotline. Consider using the case studies as a staff training tool!

The Hotline phone number is **800-573-9019**

Releases and Related Issues: Revisited

By Charles R. Gregg and Catherine Hansen-Stamp ©2012*

Introduction

Camp managers and camp families appear to understand the significance of an agreement in which the camp seeks protection from certain claims. These agreements are encountered regularly, across a broad spectrum of entertainment, instructional, and other activities.

The agreements (variously called "releases," "waivers," and "exculpatory agreements") have become more important in recent years, for several reasons. Camp activities and environments are expanding beyond the traditional offerings. Campers (and staff) present new challenges with regard to medical, learning, and behavioral issues. And our society is, unhappily, more inclined to "take it to court" than to discuss or negotiate (or forgive!), when the bad event occurs. These and other circumstances have complicated the issue of the duty of care owed to a camper and his or her family and increased the importance of protection from claims.

In this article we revisit releases, addressed by us in previous ACA articles.[1] Such an agreement, as discussed below, is a powerful tool for camp management when confronted by an angry or disappointed parent.

What Is a "Release?"

The focus of our discussion is the protection provided by an agreement by Party A that a claim will not be made against Party B for a loss suffered in the future. A "release" is such an agreement. The party signing the release "gives up" the right to sue, for himself or herself, and on behalf of others in some circumstances. The operative words of such an agreement often are: "release, waive, and agree not to sue." A waiver may be a slightly different animal — but the difference in effect is not significant. Your attorney will help you with the proper wording of the "release clause" to protect you in accordance with the laws of your state.

A release is more effective if it is a part of a larger document which lends support to the release itself, and adds to its enforceability — referred to here as a "participant agreement."

The Participant Agreement

A larger participant agreement, which might include a "release," (among other important provisions), can be a valuable tool in the information exchange flowing between an organization and its participants, both in providing important practical information to participants and in providing the organization potential protection from legal exposure. What is the nature of this agreement, or document, and what are its components?

Title

In the title, or perhaps a subtitle, you should inform the reader of the essential nature of the agreement. This will reduce the chances of a reader claiming that he or she had no idea of its significance, or a court finding that the title was inaccurate or misleading, thus rendering the agreement — or portions of it — unenforceable. Again, you will be guided in this matter by legal counsel, but consider stating at the outset, in the title or immediately thereafter in an introductory piece, that the document contains an acknowledgment and assumption of risks and a release (and possibly an indemnity against claims of others).

Parties

The parties to the agreement must be identified — for example, the camp and the parents of a camper, or visitor — and it must be clear, in states that allow it, that the parent is signing for himself or herself and on behalf of the minor camper or visitor.

Activities and Risks

It is important to show that the signing party understood the activities and their risks, and a good camp manager will include such a description in the agreement. The agreement might also refer to other documents or a Web site where such information is displayed. This is not simply a matter of strengthening your participant agreement — it is fair and good business to alert campers and their families or visitors to what the camp intends, and what the camp can and cannot do in taking care of the camper or visitor.

Most of the circumstances that can cause harm, including staff and other persons' conduct, the environment (including terrain, weather, plants, and animals), and equipment are inherent in the camp experience. That is, risks and circumstances that are integral to the camp experience — without which the activity would not produce the pleasure, excitement, learning, or other outcomes desired by the camp and the participant. Other risks also exist. The agreement should include a description of the inherent and other risks (making clear that the list is not complete and that others, not listed, may exist), and the adult or parent should be asked to represent that he or she understands the risks (and has discussed those with a participating child), and nevertheless, agrees to participate (or allows the child to participate).

It is virtually impossible to list every activity and every risk which a camper or other visitor might encounter. In fact, courts are reluctant to grant a release of a claim arising out of an unforeseen event. That being said, using "including but not limited to" language and thoughtfully considering the activities and risks that are described in the agreement is a worthwhile approach. The issue is usually resolved by the court determining whether the loss suffered was within the reasonable (not necessarily actual) contemplation of the parties when the agreement was entered into. Other courts will enforce a release of "any and all claims, known or unknown, and whether or not described in this document." You must confer with your local counsel to learn what your state law requires and what protection is available to you.

A camp should consider specifically addressing activities that might not reasonably be anticipated by the family or participant — trips off the campus and unique activities or equipment (for

example, a zip line or climbing tower) posing risks that might not be understood. Some camps make a point of explaining that independent contractors, not camp employees, may be used for certain services.

Acknowledgment and Assumption of the Risks

The person signing the document is next asked to assume and accept, for themselves and for a minor participant, the inherent and other risks.

Release of Claims

Next, the signing person, for himself or herself and, if state law permits, on behalf of the child (your legal counsel will advise you in this) releases the camp and associated persons and entities from future claims.

The released persons and parties should include those whose interests you wish to protect from a claim. The laws of all but a few states (Louisiana, Virginia, and Montana) allow the release of claims of negligence — that is, the failure of the camp or other released person to act as a reasonable, similarly situated person (manager, wrangler, life guard, counselor, etc.) would have acted under the circumstances. More serious misconduct, including gross negligence, reckless or intentionally wrongful acts, and violations of the law generally cannot be released. Most courts require that the parties are clear in their intent to include negligence in the released acts and a few states require that the intent to include negligence be specifically stated.

Courts are protective of a person's right to enter into a contract, as they choose, for whatever reason.

However, agreements containing releases are generally disfavored by the courts, for they violate a basic premise of the law — that a person harmed by another will be compensated. As a result, these agreements must be carefully drawn and strictly comply with state law.

State laws uniformly require that a release (including the larger participant agreement of which it is a part) must comply with the ordinary requirements of any contract: consideration (that is, a party receives something of benefit for the promise he or she makes), a meeting of the minds regarding the provisions, the legal and mental competency of the persons signing, and conformity to state law and policy.

In addition, because a release is "exculpatory" — that is, intending to eliminate liability already allocated under the law — agreements containing releases will be strictly construed against the party drafting the agreement, and generally, only enforced if they are clear, fairly and voluntarily entered into, and do not violate public policy. Consistent with these criteria, many states require that the specific release language be conspicuous — that is, stand out so that the release will be effectively brought to the attention of the person signing. This requirement can be met by bolding, enlarged font size, paragraph headings, and generous spacing to allow for easy reading.

Releases work if they are properly drawn and presented for signing in a non-coercive manner. As stated above, almost all states allow releases of claims of negligence, and of the states whose higher courts have ruled on the matter, less than a dozen do allow parents to surrender a child's right to sue for an injury. Even those states that do not allow a parent to sign for a child generally do allow the parent to release his or her right to recover for their own loss because of the injury to the child.

Indemnity

Careful camps will include an agreement of indemnity; that is, the signing party will protect, defend, and pay the released parties with regard to certain claims — for example, claims of other family members who may suffer a loss if the camper or visitor is hurt, or persons who may be hurt by the camper or visitor.

Other Provisions

The agreement may conclude with certain customary and fairly standard provisions, including: an identification of the state law which will be applied to a dispute and the place where a matter must be tried; a provision that the agreement (if state law permits) is binding on the family members and other heirs and the estate of the signing party; a provision that if a part of the agreement is deemed unenforceable by a court, the remainder will nevertheless remain in full force and effect; or other provisions.

Signatures

The document should be signed by the adult camper or visitor or the parents (preferably both) or guardian of a minor. Some camps ask minor campers or other visitors of a certain age (perhaps fourteen years or older) to sign to reflect their understanding of the activities and risks. See our discussion on this in the "Other Considerations" section of this article.

Much of what we have described above appears to be designed to protect the camp, and that certainly is an important feature of these agreements. However, you will note that throughout the agreement, signing parties are given important information about the camp, including its activities and risks, so that they can make informed decisions about whether to attend and with what expectations. Providing this information at the outset will reduce surprises and disappointments — and complaints.

How a Participant Agreement Might Be Used

The camp should consider having participant agreements signed by all adult campers and visitors and by parents for themselves and on behalf of their minor child (in all but a few states, those under eighteen years of age). Visitors asked to sign might include members of third party user groups. If the visitor's exposure to risk is slight, or if collecting a participant agreement in a particular situation "doesn't feel like our camp" (a wedding, perhaps, or other short-term ceremony or event), you can choose not to use an agreement, but understand that accidents can occur even in those situations. Visitors to the camp who are making deliveries or wish to merely inspect or observe the grounds or camp activities would not ordinarily be expected to sign an agreement. On the same token, you should determine whether your liability insurance coverage adequately protects the camp from claims that might

arise from these situations.

Camps often overlook the importance of collecting participant agreements from staff who either do not qualify for workers' compensation coverage (volunteers, for example) or who might suffer an injury that does not qualify for such coverage. These matters should be discussed with local counsel familiar with employment law and the camp's hiring practices and insurance coverage.

A visiting group — a college club for example — may agree to indemnify a camp against claims of its members, and the camp may feel that the indemnity provides enough protection to make the collection of participant agreements from the individual club members unnecessary. The importance of participant agreements in these situations should be considered on a case-by-case basis.

Other Considerations

Is This Fair?

Some families, and perhaps some camp directors, might feel it is unfair to seek to be released from responsibility for carelessly harming a camper. Asking a family to release you from your duty of care is a serious matter, involving ethical and practical management issues. It should be carefully considered with your legal counsel and perhaps discussed with a representative sampling of your camp families.

When a camp presents a family with an agreement containing a release, it is saying "we want you to agree, now, that you will not sue us if our carelessness hurts, or even kills, your child." If the parent asks you to justify this release, what do you say? You can be direct and honest, and explain the value of the participant agreement as an exchange of information about activities, risks, and camp family responsibilities. You might say further that you

Prepare Now: Resources for Current Hot Topics

Over the past several months, the American Camp Association (ACA) has been receiving questions focused around several "hot topics." These topics include: the Americans with Disabilities Act requirements, child abuse mandated reporter issues, criminal background checks, and inquiries about the camp-related laws and regulations in particular states. While the ACA Web site (www.ACAcamps.org) provides a significant number of resources on all of these topics, we have chosen to highlight just a few of the most popular ones in this issue of *CampLine*.

The Americans With Disabilities Act (ADA) — New Revisions

These regulations can be quite detailed and complex. (Visit www.ACAcamps.org/publicpolicy/ada-revisions for more information.) Therefore, ACA recommends that you call the ADA's information line, **800-514-0301** (voice, hit #7 to bypass the automated prompt) and consult directly with experts regarding your unique situation. Another great organization to consider contacting for help and guidance is the ADA National Network (http://adata.org/Static/Home.html).

Child Abuse Mandated Reporter Information

While ACA's Camp Crisis Hotline (www.ACAcamps.org/camp-crisis-hotline) regularly fields questions about this issue when camps are in session, the off-season is a terrific time to better familiarize yourself with these resources:

- Reporting Numbers by State: www.childwelfare.gov/pubs/reslist/rl_dsp.cfm?rs_id=5&rate_chno=11-11172
- Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws: www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm
- Additional Resources: www.ACAcamps.org/camp-crisis-hotline

Criminal Background Checks

As ACA continues to pursue policy changes that would allow all youth-serving organizations timely, inexpensive, and complete access to the best criminal background checks (CBCs) available, the ACA standards require all camps to complete a criminal background check on all new staff (employees and volunteers). Here are two excellent ACA resources on CBCs:

- Background Information and Guidance for Camps: www.ACAcamps.org/sites/default/files/images/publicpolicy/documents/CBC_Education_7_2011.pdf
- Criminal Background Check Thresholds: www.ACAcamps.org/publicpolicy/cbcthresholds

Database of Camp-Related Laws and Regulations

States vary significantly in their oversight of camp operations. In many states, camps fall under the jurisdiction of the state health department; in others, social or human services departments provide licensing or permit rules. To verify how the state in which your camp is located regulates camps (as well as information about criminal background check requirements, DMV records, and minimum wage requirements), check out ACA's State Laws and Regulations Web site: www.ACAcamps.org/publicpolicy/regulations.

Contributed by Rhonda Mickelson, Susan E. Yoder, and Kyle Heatherly

wish to deter frivolous suits, which occur too frequently in our litigious society. You might also advise that there is not a bright line between injuries resulting from inherent risks (with respect to which, generally, you owe no duty of protection) and those resulting from a camp's fault or negligence. You, the camp, wish to reserve to yourself the judgment as to the cause of the injury, and if and how to compensate the injured party — because you understand camps and camp activities better than a judge or jury being asked to decide the outcome of a lawsuit. Basically, you will be asking the parent to trust you to use the agreement as you see fit. Although these inquiries are rare, the camp should be prepared for them.

Why a Release? Can't We Use Just an Acknowledgment and Assumption of Risks?

Yes, a camp can utilize an agreement that contains no release of its liability for negligence, but includes a well-crafted acknowledgment and assumption of inherent risks, for example.[2] Such a document provides evidence of the participant's knowing and voluntary assumption of risks. This evidence can provide the basis for an assignment of fault against the participant, under a state's comparative fault or comparative negligence laws, thus decreasing or eliminating a participant's claim against the camp. In addition, it could buttress a defense that plaintiff's claims should be dismissed under the inherent risk doctrine (the general legal concept that a provider has no duty to protect individuals from the inherent risks of a sport or recreational opportunity — and has no liability for harm resulting from those risks). However, as discussed above, there is not a bright line between injuries determined to result from inherent risks (generally no duty), and those resulting from negligence (breach of a recognized duty). Including a release of liability for the camp's negligence in your agreement eliminates this murky line and gives the camp more control in determining how to utilize the agreement.

Should the Minor Camper Sign?

Although minors are not competent to contract,[3] there can be some real value in having the minor — particularly older minors — sign a participant agreement. The minor, for example, could agree to that portion of the form that describes activities and risks and contains an acknowledgment and assumption of those risks. The document can assist the child in understanding the nature of the activities and risks he or she may confront, making him or her more informed and better prepared for the activities. Although not a binding contract, the document can serve as evidence of the child's acknowledgment and assumption of risks — inherent or otherwise — thus potentially affecting the legal outcome of a case. As discussed above, sometimes depending upon the child's age, minors (as well as adults) are capable of assuming risks or otherwise engaging in conduct that can amount to "contributory fault" — ultimately decreasing any recovery obtained against an organization in a lawsuit. In addition, minors are subject to your state's version of the inherent risk "no duty" doctrine, if any. Choices about whether or not to have a minor sign one of these agreements and how that will be accomplished are important matters to discuss with your legal counsel.

Cut and Paste

Avoid the temptation to cut and paste from another camp's form. Each organization has its own unique operation and mission and factors that may be important to include or emphasize in the participant agreement. Importantly, there are many words used in connection with these agreements that have distinct legal meanings, which may vary from community to community and state to state. We have seen cut and paste efforts that result in provisions that contradict each other or that confuse or misuse words with distinct legal meanings.

Form Implementation and Consistency of Information

Educate your staff about the value, proper use, and implementation of the participant agreement you choose. For example, don't let participants or parents cross out words or provisions before they sign. This practice can have significant legal ramifications — potentially compromising the value of the altered agreement as well as agreements entered into with the organization's other participants/parents.

Your staff comments, Web site, and other information distributed or available to campers, families, and the general public should be consistent with each other and with the language included in your participant agreement. Caution staff about comments such as "these agreements aren't worth anything, but our [board, insurance company] requires they be signed." A Web site that says "don't worry, your child is always safe with us" also can impact or threaten the ultimate enforceability of the participant agreement in subsequent litigation. Importantly, guarantees of safety or absolute assurances of any kind can have other negative legal ramifications.

Varying State Laws and Federal Restrictions

As discussed above, a few states do not enforce releases at all. In other states, certain laws can affect the enforceability of a release in certain circumstances. For example, some courts have ruled that the language of a state's "inherent risk" law effectively prohibits those providers from obtaining a written release of their liability for negligence. A state's inherent risk law may also require that certain language be included in any agreement used with participants (for example, many of the "equine" laws). In addition, the National Park Service and some regions of the US Forest Service restrict the use of releases for those who operate under permit or license on those lands (instead requiring some variation of what has been termed a "Visitor's Acknowledgment of Risk" form). Legal counsel should review applicable state and federal law in developing an appropriate participant agreement for your organization.

E-Sign Issues

More and more camps and other organizations are using the Internet for program registration or other purposes and transitioning previously paper documents — including the participant agreement — to an electronic form that requires an electronic signature. Often, this is done with the assistance of a third party service provider who is helping the organization manage their

registration and, potentially, their database. Transitioning to online forms can be an efficient and "greener" way to manage your registration and other operations.

However, exercise caution with online documents — particularly those, like a participant agreement, that are intended to be binding contracts. Specific electronic signature laws govern the validity of online signatures and of the online process, as we discussed in the Fall 2010 *CampLine* article, "Are You Ready for the E-Sign Revolution?" Although an electronic signature is acceptable under the law, a variety of important steps must be addressed to assure the validity and integrity of the electronic (contract) record and the accompanying online process, so that the record can be effectively created, stored, retrieved, and introduced and used as evidence in court. Having a minor sign the electronic record with their parents raises additional issues.

Frequently, a third party provider (or internal consultant) is not familiar with e-sign legal issues, and you are well served to have your legal counsel work with these providers to get it right. Your legal counsel and even another adult representative of your camp families can ultimately act as "dummy" parents to review the online signature process to address any issues before it goes live.

Agreement Content

Carefully consider with your legal counsel the provisions (in addition to those discussed above) to include within the participant agreement. It is worth your time to think through (being consistent with your camp's unique operation) the purpose for which the agreement is to be used and applicable law.

The Big Picture

Remember, the use of a written participant agreement is not an overall panacea. A camp that takes the position "I just need a release of liability, and then I am set" is not considering the bigger picture. Endeavoring to run a professional and quality program and engaging in responsible risk management practices are arguably the most important ways to manage and minimize the risk of loss to both your participants and to your operation. Developing a solid participant agreement for use with your camper families, visitors, and potentially your staff (volunteer or otherwise) is just one aspect of effective risk management practices.

Give careful thought to how your camp will use participant agreements in its operations. Importantly, consider the variety of activities going on in the camp environment and what the agreement is intended to cover. It is worth your time to understand the big picture and develop participant agreements that fit your camp's needs and, importantly, comply with the law.

This article contains general information only and is not intended to provide specific legal advice. Camps and related organizations should consult with a licensed attorney regarding application of relevant state and federal law as well as considerations regarding their specific business or operation.

Charles R. (Reb) Gregg is a practicing attorney in Houston, Texas, specializing in outdoor recreation matters and general litigation. He can be reached at 713-982-8415 or e-mail rgregg@gregglaw.net; www.rebgregg.com

Catherine Hansen-Stamp is a practicing attorney in Golden, Colorado. She consults with and advises recreation and adventure program providers on legal liability and risk management issues. Hansen-Stamp can be reached at 303-232-7049, or e-mail reclaw@hansenstampattorney.com; www.hansenstampattorney.com

Notes

1 "Releases Revisited," *CampLine*, Spring 2007; "The What and Why of Camp Releases," *Camping Magazine*, January/February 2007; both articles by Charles R. Gregg and Catherine Hansen-Stamp.

2 (Alternatively, a written assumption of risks can include an express "assumption" of the risk of an organization's negligence, and if enforced by a court, provide the organization with protection essentially equivalent to a release for negligence.) An acknowledgment and assumption of risks is the type of document required in newly drafted ACA mandatory standard PD.30.2, for camps that allow adult campers/staff the choice of whether or not to wear a helmet for horseback riding activities. Certainly, the "acknowledgment" referenced in that standard could be included within the scope of a larger participant agreement, depending upon the circumstances and applicable law.

3 A minor is not capable of releasing his or her own rights to sue for negligence in a pre-injury release because, with some exceptions, he or she is not competent to enter into contracts. If a minor does agree to a release, the contract is considered voidable — that is, the minor can disaffirm (reject) or ratify (affirm) the contract by their words or conduct within a reasonable time after they reach adult age. Commonly, the minor disaffirms an agreement containing a release by filing suit. As a result, it is often customary to ask a parent to agree to release a minor's claims on the minor's behalf.

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Contributors:

Julie Anderson, Kim Brosnan, Barry Garst, Kyle Heatherly, Amy Katzenberger, Rhonda Mickelson, and Susan Yoder

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ACA Partners to Pursue an Executive Order on Environmental Literacy

While the American Camp Association (ACA) continues to advocate for programs that get more children involved in camp programs, we are frustrated that as a nation, we have made very little progress in advancing environmental and outdoor education. We have been very active in advocating for the No Child Left Inside Act (www.ACAcamps.org/publicpolicy/NCLI), however, with the stalemate in Congress, we've had to seek out other avenues to advance the environmental literacy of all Americans — most especially our young people.

As members of the No Child Left Inside Coalition (www.cbf.org/page.aspx?pid=687), we support a dual approach to the issue, and thus are pursing forging an Executive Branch approach by appealing directly to President Obama. In April 2010, when President Obama expressed his support for reconnecting Americans — especially children — with the outdoors through the America's Great Outdoors Initiative (www.ACAcamps.org/publicpolicy/AGO), we saw hope that the goals laid out in the Environmental Education Act of 1970 might finally gain some priority. However, with the No Child Left Inside Act stalled in Congress, we are urging the President to further his commitment to children and the outdoors by issuing an Environmental Literacy Executive Order.

This executive order would reconnect Americans with the great outdoors, provide opportunities for healthier lifestyles, prepare our youth to compete in the 21st century global economy, increase our nation's environmental literacy, ensure stewardship of our environment, and help ensure the most efficient use of existing environmental, conservation, and outdoor programs.

If you would like updated information about this initiative as it occurs, or would like to participate directly in advocating to the President, visit: www.ACAcamps.org/sites/default/files/images/publicpolicy/documents/ELEO-Key-Messages.pdf. For additional information about all of ACA's public policy initiatives, please visit: www.ACAcamps.org/publicpolicy.

Contributed by Susan E. Yoder and Kyle Heatherly

Standards: Reviewed, Revised, Reformatted!

THEY'RE HERE!

What's This Mean to Me?

- The 2012 edition of the *Accreditation Process Guide* (APG) was released mid-September 2011.
- All fee-paying camps and visitors will receive a complimentary printed version of the 2012 APG. These are distributed at the local level.
- Camps will begin using these standards at their NEXT on-site accreditation visit (i.e., camps being visited in 2012 and after will use the revised standards).
- As stated in the required Annual Statement of Compliance*, an accredited camp continues to meet the standards under which it was last visited, as well as all applicable current mandatory standards. As there are some slight revisions to the mandatory standards in the 2012 edition of the *Accreditation Process Guide*, it is important to review the current mandatory standards to determine your continual compliance. Current mandatory standards can be viewed at: www.ACAcamps.org/accreditation/mandatory-stds.
- Training for both camp personnel and visitors is required prior to a visit being conducted.

Highlights of the New Standards

- A "Camp Self-Assessment" review **must** be completed prior to the start of staff training for the summer season (or earlier if required by your local leadership). This consists of a review of twenty pre-identified standards all requiring written documentation. It is expected the written documentation will be complete at the time of the review, although the actual scoring will take place the day of the on-site visit. Using a secure, Web-based system, camp personnel has the opportunity to customize a set of standards based on the camp's program, site, and modes. This system also allows uploading documents for review by a third party (visitor).
- The Web-based system is available to any fee paying camp, regardless of when their next visit is scheduled. Access to this site is at: www.ACAcamps.org/standardstool.
- Resources previously available on the resource CD that accompanied the 2007 *Accreditation Process Guide* are now available online and are sorted by section of standard. Visit www.ACAcamps.org/standardstool/nutsbolts/resources-by-section.

For the most up to date information regarding standards (including any clarification and/or corrections), make sure to check out the Accreditation Resources/Tools page at www.ACAcamps.org/accreditation/resources-tools!

*Watch for a copy of the 2012 Annual Statement of Compliance to be included with your 2012 Certificate of Accreditation being mailed in February. This document must be signed and submitted each year.

Contributed by Rhonda Mickelson