



BOARDS OF HEALTH AND LIABILITY Issue Brief

Boards of Health and Liability

Boards of health govern and advise local health departments, set public health priorities and oversee the well-being of their communities. At some point, a board of health or its members may be accused of wrong-doing and face potential liability. Below is a general overview of liability as well as some practices for avoiding or limiting liability. Though the statutory reference used below in the fact sheet applies only in Kentucky, the legal provisions addressed in this document likely have similar counterparts in all other states. Lawyers in other states may have developed, or could develop, comparable guidance relating to the laws governing liability in their states. You may wish to talk with your attorney, or visit the [State Public Health Lawyer Directory](#) to find contact information for a public health attorney in your state. If you are concerned about a specific situation where liability may be an issue you should discuss the matter with your attorney.

Liability and Government Entities

General principles of common law (i.e., judicial decisions or case law) grant governments immunity from liability for torts committed by the government. “Torts” refers to wrongs made against a person or property, such as personal injury or property damage. Torts may arise out of different types of government activity. A “governmental function” is an activity carried out under the government’s basic authority (e.g., inspections, licensing and enforcement) while a “proprietary function” is an activity carried out for profit or is similar to a private activity (e.g., clinical health services).

- “Sovereign immunity” generally applies to state governments and agencies. It is based on the idea that a state should not bear the cost and burden of liability when it is governing. In other words, to govern is not a tort. Sovereign immunity applies to both governmental and proprietary functions on the assumption that state sovereignty must be protected to the fullest extent.
- “Governmental immunity” generally applies to a state’s officers, agents, employees and other state created units (e.g., counties, school boards, cities). Governmental immunity applies to governmental functions but not proprietary functions. The rationale for treating the functions differently is that local governments should not have a competitive advantage over businesses for proprietary activities.

The results of sovereign and governmental immunity can be harsh since they prevent compensation for those who are injured by government action. Most, if not all, states have waived their immunity under certain circumstances and allow injured parties to sue for damages.

Statutory Immunity

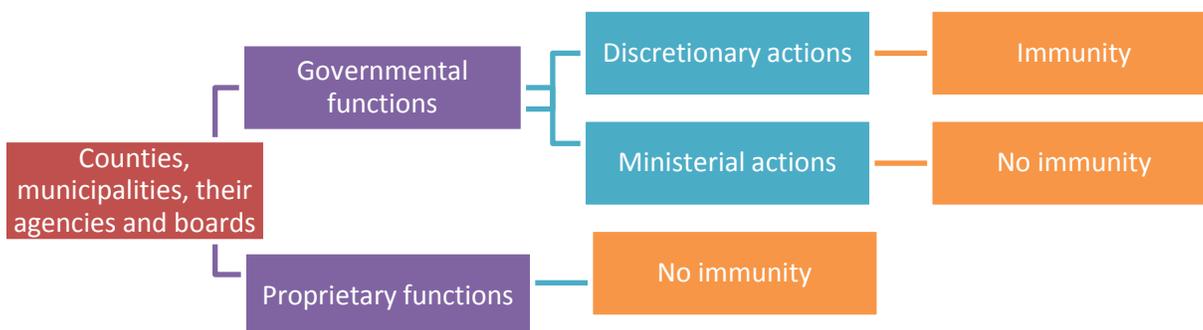
Many states have statutory provisions that waive immunity or limit the types of tort claims an individual can bring against state and local government. These laws typically allow immunity from torts arising from the performance of “discretionary actions” but not “ministerial actions.”

- “Discretionary actions” involve policy-based decision making and planning (e.g., developing a health department program).
- “Ministerial actions” do not leave room for how they are to be carried out (e.g., implementing a health department program).

In Kentucky, the [Claims Against Local Governments Act, KRS §§ 65.2001 through 65.2006](#), allows individuals to bring certain tort claims against municipal corporations, counties and their agencies. However, the law disallows claims “arising from the exercise of judicial, quasi-judicial, legislative, or quasi-legislative authority, exercise of judgment or discretion vested in the local government.” [KRS § 65.2003](#) provides examples of such judgment or discretion, which include:

- Adoption or failure to adopt any ordinance, resolution, order, regulation or rule,
- Failure to enforce any law,
- Issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization,
- Exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources and
- Failure to make an inspection.
- The statute does not exempt local governments “from liability for negligence arising out of acts or omissions of employees in carrying out their ministerial duties.”

Chart 1. Liability of Local Governmental Entities



Liability of Individual Board Members

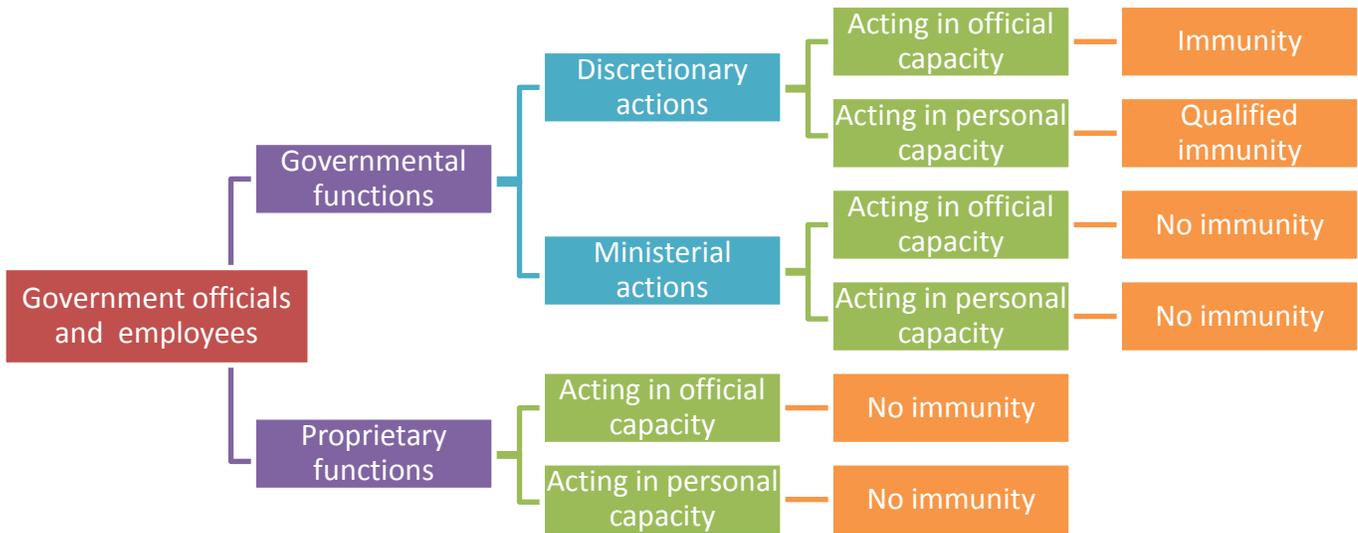
When an individual government employee or agent is sued his or her immunity from liability depends on the capacity in which he or she is being sued. If the individual is sued in his or her official capacity then he or she receives the same immunity as the government entity they work for or represent. This is referred to as “official immunity.”

If the individual is sued in his or her personal capacity then he or she may be entitled to “qualified official immunity.” Qualified official immunity applies if the following factors are present:

- The person acted within his or her scope of authority,
- The action was discretionary and
- The action was taken in good faith.

Malicious, willfully careless, criminal or corrupt actions will not be subject to immunity. Finally, individuals are not immune from negligent ministerial actions. For example, an employee who negligently injures someone while driving a government vehicle will probably not receive qualified official immunity since safely driving a car is not discretionary.

Chart 2. Liability of Officers and Employees



Representation and Indemnification

Local governments may provide legal representation and indemnification for employees when certain requirements are met. [KRS § 65.2005](#) of Kentucky’s Claims Against Local Governments Act instructs local governments to provide an employee with defense representation when the alleged tort occurs within the employee’s scope of employment and the employee gives written notice of the claim to the local executive authority within ten days of receiving the summons and complaint. Also, the local government shall pay any judgment, compromise or settlement of the tort claim unless:

- The employee acted or failed to act because of fraud, malice or corruption.
- The employee’s action was outside the scope of employment.
- The employee fails or refuses to assist defense counsel or give notice of the claim to the executive authority of the cause of action.
- The employee compromises or settles the claim without the local government’s approval.
- The employee obtains private counsel without the local government’s consent.

The Claims Against Local Government’s Act definition of “employee” includes “any elected or appointed officer of a local government.” See [KRS § 65.200](#).

Tips to Avoid Liability

Understanding the basic principles of immunity and liability can help boards of health and their members avoid or limit liability. It is often hard to tell if immunity will apply and impossible to predict how a court will rule. Below are a few tips on how to help keep you and your organization free from liability.

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- **Act within your authority.** Acting within your authority requires the knowledge and understanding of the board of health's responsibilities and duties. A board of health's authority is often found in state statutes. Your attorney can help you understand your authority. For general questions you may wish to contact your state local board of health association, the National Association of Local Boards of Health or the Network for Public Health Law.
 - **Avoid conflicts of interest.** Taking action on an issue where you have a conflict of interest may mean you are not acting in good faith. Disclosure of personal or financial conflicts of interest or potential conflicts of interest will reduce your chance of liability.
 - **Attend board meetings.** Many boards of health have rules that limit the number of meetings a member can miss. Attending meetings keeps you informed on issues and allows you to make better decisions. Some states allow boards to meet electronically, via video or teleconferencing.
 - **Stay informed.** Don't be afraid to ask questions or request clarification. Keeping up on the activities of the health department allows you to make sound decisions. If you don't get an adequate answer keep asking.
 - **Do not procrastinate.** Deal with issues in a timely manner. Putting matters off may mean you're not acting in good faith.
 - **Keep adequate records and meeting minutes.** Many states require boards of health to hold open meetings and keep minutes. The board should record all votes and make a record that reflects the meetings proceedings. If the board consults with its attorney on an issue it should make a record of the legal opinion if it's not privileged.

Additional Resources

Babette Neuberger & Tom Christoffel, The Legal Basis of Public Health, Module 10 - Responsibility & Liability, CDC's Public Health Training Network. Available at: <http://www2.cdc.gov/phtn/legal-basis/Mod10.pdf>. Last accessed on May 18, 2011.

Matthew T. Lockaby & JoAnna Hortillosa, Government Tort Liability: A Survey Examination of Liability for Public Employers and Employees in Kentucky, 36 N. Ky. L. Rev. 377 (2009).



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SUPPORTERS

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This document was developed by Andy Baker-White, associate director and Denise Chrysler, director for the Network for Public Health Law - Mid-States Region at the University of Michigan School of Public Health. The Network for Public Health Law provides information and technical assistance on issues related to public health. The legal information and assistance provided in this document does not constitute legal advice or legal representation. For legal advice, please consult specific legal counsel.