MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Liability Protections for Boards of Health and Staff

Cheryl Sbarra, Esq.

MAHB Certificate Program – Spring 2025

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Disclaimer

This information is provided for educational purposes only. It is not intended to constitute legal advice.

Definition of Liability – Whose fault is it?

- Legal responsibility for a person's act or failure to act (omission).
- Can be criminally or civilly liable.
  - Depends on the charge and who is bringing it.
    - Government (prosecution) file criminal cases.
      - *Example:* Negligent manslaughter.
    - Individuals file civil cases.
      - *Example:* Personal injuries as a result of a motor vehicle accident.
- If held liable, the person must do something.
  - Criminal cases – punishment (jail, prison, probation)
  - Civil – payment of damages caused.

Liability Protection Standards

- Protects a person from negligence.
  - Acting negligently (without reasonable care) or failing to act when there is a duty to act.
  - *Example:* Stepping on and killing petunias while walking to the front door to inspect.
- Not from gross negligence.
  - Reckless disregard for a person's safety and well being.
  - *Example:* Inspecting a residence for housing code violations while drunk.
- Not from intentional misconduct.
  - Intentional disregard for a person's safety.
  - *Example:* Inspecting a restaurant and punching the bartender because someone was smoking.
- Not from civil rights violations.
  - *Example:* Not assisting a person because the person is transgender.

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Legal Liability Protection

- **Massachusetts Tort Claims Act, G.L. Chapter 258**
  - **Public employers** are liable for harm caused by the negligent or wrongful act for failure to act of any **public employee** who acted **within the scope of his/her employment.** No personal liability.
  - Intentional wrongdoing is not covered.

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Who is a public employer?

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

- Commonwealth of Massachusetts
- City, town, county
- Public health multi-municipal collaboratives (PHE grantees)

Covered public employees – 3-step analysis

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

1. Are you a "public employee?"
2. Are you "subject to the direction and control of a 'public employer?'"
3. Was the act (or failure to act) within the scope of your employment?

1. Are You a Public Employee?

- Elected or appointed officials
- Full or part time
- Temporary or permanent
- Compensated or uncompensated
  - MRC volunteers

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

2. Are you subject to direction or control of public employer?

- Question of fact in each case.
- Paid employees doing regular job are under the direction and control.
- Board of Health members are under direction and control of municipality.
  - Working on behalf of municipality.
  - Representing municipality.

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

3. Were you acting within the scope of your employment?

- Was the conduct in question what you were hired to do?
- Did it occur within authorized time and space?
- Was it motivated by a purpose to serve employer?
- Travel to and from home is generally not within scope of employment.
- Merely being "on call" does not place you within the scope of employment.
  – Once you get the call . . .

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Bottom Line

- If you are a public employee (BOH member or staff) and you are acting within the scope of your employment, the municipality must defend you.
- Unless you did something intentional, horrendous and very, very wrong.
  - Inspecting a dwelling unit while drunk, stumbling into the china cabinet and breaking everything in it.
  - Punching someone in the face for violation the food code.
  - Refusing to inspect a property because the property owner is disabled.

MAHB
Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Discretionary functions

- Chapter 258, Section 10(b): Protects public employers (cities, towns, boards of health) from any claim based upon the performance or failure to perform a discretionary function . . . ***Whether or not the discretion involved is abused.***

- Purpose: to **avoid allowing civil claims to be "used as a monkey wrench"** in the machinery of government decisions making. *(Cady v. Plymouth-Carver Regional School District 1983).*

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Definition of "discretionary function"

- Does the government actor have any discretion at all as to what course of action to follow or is the course of action determined by statute or regulation.
  - For instance – state tobacco sales law calls for $1000 fine and a permit suspension for selling tobacco to someone under 21.
- **Weighing alternatives and making choices with respect to public policy and planning.**

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Example of Discretionary Function

- City's exercise of its discretion in deciding not to incur cost of erecting a fence on stairs near children's playground, or to remove snow from the stairs, was based on a determination of **allocation of limited resources**, which was an integral part of its governmental policy making or planning function, and thus tort action for wrongful death of a child was barred, **even if city's decisions was ill-advised or unreasonable.** *Barrett v. City of Lynn (2001).*

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Not a discretionary function

- Negligently supervising a truck driver's operation of a salt truck "**does not appear to have a 'close nexus to policy making or planning.**'" *Ku v. Town of Framingham* (2004).

  – Salt truck driver drove in middle of a double solid yellow-lined road at night and town knew this.

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Failure to Inspect – Chapter 258, Sec. 10(f)

- No liability for **failing to inspect, or inadequately or negligently inspecting** real or personal property to determine whether the property complies with or violates any "law, regulation, ordinance or code, or contains a hazard to health or safety . . ."
- Cited by a municipal attorney.
- Does this mean you shouldn't inspect?

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Legal Protections for Volunteers and Health Care Providers

I. **Federal Law Protections**

1. Federal Volunteer Protection Act (42 U.S.C. § 14501)
2. Federal Public Readiness and Emergency Preparedness Act (PREP Act)

II. **Massachusetts State Law Protections**

1. EMS Personnel (G.L. c. 111C, § 21)
2. Good Samaritans (G.L. c. 112, § 12V ; G.L. c. 112, § 12B)
3. Physicians and Nurses in Public Health Programs (G.L. c. 112, § 12C)
4. Public Employees (G.L. c. 258 – Mass Tort Claims Act)
5. Protections issued during an Emergency Declaration

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Federal Volunteer Protection Act
(42 U.S.C. § 14501)

- Persons who volunteer for governmental entities and eligible non-profit organizations.
- Volunteer: A person who does not receive compensation and receives less than $500 for expenses.
- Criteria for federal liability protection:
  - Acting within scope of their responsibilities
  - Properly licensed, certified or authorized to act
  - Harm not caused by willful, criminal or reckless conduct or gross negligence.
  - Harm not caused by operating a motor vehicle, vessel, or aircraft.

MAHB
Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Liability Protections for Vaccination Clinics

- **Ch. 64 of the Acts of 2020: *An Act to Provide Liability Protections for Health Care Workers and Facilities During the COVID-19 Pandemic.***
  - Provides liability protection for the **prescription, administration, delivery, distribution, or dispensing** of COVID-19 vaccine by a health care professional or health care facility;
  - Extends to volunteer organizations that make their facilities available to support activities during the COVID-19 emergencies.
- **Public Readiness and Emergency Preparedness Act (PREP Act).**
  - Declaration issued by the U.S. Department of Health and Human Services (HHS) providing liability protection from "countermeasures" (vaccines) against diseases or other threats or public health emergencies, including the **distribution, administration, and use of** vaccines.
  - Covers **program planners, administrators, and qualified persons who prescribe, administer, and/or dispense** vaccines.
- **Does not protect willful, intentional misconduct.**
- **National Vaccine Injury Compensation Program for injury or death.**
  - Petition to U.S. Court of Federal Claims – 42 USC 300 AA

Massachusetts Liability Protections

1. **Good Samaritans**
   - All persons exempt from liability for rendering emergency care (in good faith). (G.L. c. 112, § 12V).
   - Physicians, nurses, PAs and respiratory therapists, if not in the ordinary course of practice and if they do not charge a fee. (G.L. c. 112, § 12B).
2. **EMS Personnel** (G.L. c. 111C, § 21)
   - Exempt from liability for rendering first aid, CPR, transportation, or other emergency medical services (in good faith while on duty).

Massachusetts Liability Protections

3. **State or Municipal Protective Public Health Programs** (G.L. c. 112, §12C)
   - State law exempts physicians and nurses from liability in administering immunizations or "**other protective programs under public health programs.**"
   - "Other protective programs" include public health programs established or administered by the Commonwealth for diagnoses and treatment.

     Example: Tuberculosis clinics, municipal flu clinics
   - Applies whether the doctor or nurse is a volunteer or an employee.
   - More protective than in traditional medical settings where there is no exemption for negligence.

Massachusetts Liability Protections

4. **Specific Emergency Protections**
   - Federal and State Governments may promulgate temporary liability protection during emergencies.
   - When the emergency ends, protections end.
   - *Example:* COVID-19 State of Emergency
     - Statewide temporary order exempted all healthcare providers from liability for negligent acts or omissions while providing health care.

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Employees v. Independent Contractors
G.L. c. 149, sec. 148B

- **Could be an issue for liability protection for the public employer.**
- **A person is an employee unless**
  - 1. The person is free from control and direction in performance of the service, **and**
  - 2. The service is performed outside the usual course of the business of the employer, **and**
  - 3. The person is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

MAHB
Assisting Massachusetts Boards of Health through training, technical assistance and legal education

1. Freedom from control (IRS Test Rev Rule 87-41)

- Instructions from employer?
- Training from employer?
- Are services performed integrated into employer's operation?
- Ongoing relationship with employer, or moves from job to job?
- Fixed hours of work?
- Full-Time Work?
- Where is work performed?
- Does employer request regular reports? (etc.)

2. Is the work performed outside the employer's usual course of business?

- Is the service performed by the person necessary to the business of the employer or merely incidental?
- If the work is "necessary" the person must be considered an employee.
- The employer needs to determine whether it hired the person to perform work that is a necessary part of the employer's operations.
- This is the most difficult prong for an employer to overcome.

Examples of Prong 2 from AG's office

- Drywall company classifies a person installing drywall as an independent contractor.
  - Violation of Prong 2 – this is an essential part of the employer's business.
- Motor vehicle appraising company classifies an individual appraiser as an independent contractor.
  - Violation of Prong 2 – performing appraisals is performing an essential part of the company's business.
- Accounting firm hires a person to move office furniture.
  - No violation of Prong 2 – moving furniture is incidental.

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

3. Is the service being provided actually an independent trade, occupation, or business?

- Whether the service performed by the person could be considered an independent trade or business because the person can perform the service for anyone who wants to avail themselves of the service, or

- Whether the nature of the business compels the person to depend on a single employer for the continuation of the services.

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Why does this matter?

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education

Ramifications for employer who misclassifies

- Minimum wage
- Overtime compensation
- Health benefits
- Workers' compensation
- Unemployment

Liability protections

- Employer liable even if they misclassify

MAHB

Assisting Massachusetts Boards of Health through training, technical assistance and legal education