



# The Legal Basis of Public Health

An Individual or Group Study Course in Ten Modules

## Module 10

### Responsibility and Liability

SS0010



**CDC**  
CENTERS FOR DISEASE CONTROL  
AND PREVENTION

## ***The Legal Basis of Public Health***

SS0010 - Module 10, Responsibility and Liability

### **Continuing Nursing Education (CNE)**

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# *The Legal Basis of Public Health*

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## **Supported by**

The Centers for Disease Control and Prevention  
The Association of Schools of Public Health

Cooperative Agreement U36-CCU 300430-14

## **Provided through**

Public Health Training Network  
<http://www.cdc.gov/phtn>

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## **Course Contents**

This course consists of the following ten modules and a Coordinator Guide, which includes suggestions for using the course materials.

|               |   |
|---------------|---|
| <b>SS0001</b> | <b>Module 1, Introduction</b>                     |
| <b>SS0002</b> | <b>Module 2, Data Collection and Surveillance</b> |
| <b>SS0003</b> | <b>Module 3, Service Delivery</b>                 |
| <b>SS0004</b> | <b>Module 4, Licensing</b>                        |
| <b>SS0005</b> | <b>Module 5, Inspections</b>                      |
| <b>SS0006</b> | <b>Module 6, Enforcement</b>                      |
| <b>SS0007</b> | <b>Module 7, Policy Development</b>               |
| <b>SS0008</b> | <b>Module 8, Negotiation</b>                      |
| <b>SS0009</b> | <b>Module 9, Communication</b>                    |
| <b>SS0010</b> | <b>Module 10, Responsibility and Liability</b>    |

# Table of contents

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|   |    |
|---|----|
| About this module .....   | 1  |
| Overview .....  | 1  |
| Module components .....   | 1  |
| Goals .....   | 1  |
| Learning objectives .....   | 2  |
| Responsibility .....  | 4  |
| Liability .....   | 6  |
| Principles of liability from common law .....                     | 6  |
| Sovereign immunity .....  | 6  |
| Governmental immunity .....                                       | 7  |
| State tort claims acts .....                                      | 9  |
| Liability of states and their political subdivisions .....        | 9  |
| Liability of individual health officers: Qualified immunity ..... | 21 |
| Self-check review .....   | 31 |
| References .....  | 33 |
| Group exercises .....   | 35 |
| Evaluation and Test for Module 10 .....                           | 35 |

# About this module

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## Overview

This module discusses legal responsibility and potential liability of public health officers.

Public health authorities have broad legal authority which gives them the power to institute a wide variety of measures to protect the public's health and safety. Earlier modules focus on how you can most effectively carry out your responsibilities within the legal context of public health.

But what does the law say about those responsibilities? Are they discretionary or mandatory? Can you be forced to act? Can your actions or failure to act be the source of legal jeopardy? And what happens if your actions result in harm? Can you be sued for damages or faced with criminal prosecution? This module looks at these questions.

## Module components

This module consists of the following components:

- Text and self-study exercises to be completed individually or discussed with members of your learning group. The exercises are meant to help you better absorb what you have just read and immediately apply the concepts.
- A self-check review, found at the end of the text, will help you assess your understanding of the material.
- Group exercises to undertake with your learning community, found at the end of the text.

## Goals

This module is intended to help you as a public health professional:

1. Do what is necessary to protect the public's health and safety effectively and without unfounded fear of personal legal liability
2. Carry out your professional duties in a manner that will avoid civil or criminal legal problems.

**Learning objectives**

After completing this module, you should be able to:

1. Explain the difference between sovereign and qualified personal immunity.
2. Explain the difference between proprietary and regulatory functions of public health agencies.
3. Explain the difference between ministerial and discretionary duties and the circumstances in which immunities apply.
4. Describe how you can protect yourself from civil or criminal prosecution.





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## Before you begin...

Because the law in this area varies considerably among jurisdictions, you should obtain a copy of your state's tort claims act. In some states, the tort claims act covers both the state and its political subdivisions—city and county agencies and officials. In other jurisdictions, a separate act covers the state's political subdivisions.

### Where to find the law...

The best place to look is in your local law library. Other sources include legal counsel for your agency and the Internet. The FindLaw website posts state statutes [called state codes] and many recent state court opinions. The address is <http://www.findlaw.com/casecode/state.html>. Beware that locating state material through the Internet takes patience, and it may not be the most expedient way to find your state's laws.

### Locating an expert...

You should also locate a legal expert with whom you can consult as you work your way through this module. Someone who is familiar with the complexities of governmental tort laws in your state can help you untangle some of the law's more subtle nuances.

You can use the space in the margins to jot down questions that arise as you are reading.

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# Responsibility

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State statutes that authorize public health officials to protect and enhance the public's health and safety outline a variety of functions. These functions are classified as either mandatory or discretionary.

Mandatory functions are required by law.

**Mandatory functions** are those which an agency must undertake by legislative mandate. The statute leaves no room for an agency to determine whether to carry out the function. Examples of mandatory functions include:

- Statutory requirements to maintain vital records
- Legal mandates to develop toxic air pollutant regulations
- Ordinances requiring agencies to hold "open or public meetings" and to make other information available to the public

Discretionary functions allow decision-making.

**Discretionary functions** are defined as ones involving the exercise of judgment or discretion in connection with planning or policy-making. Discretionary activities may include:

- Decisions to create a waste disposal site
- Management of natural resources
- Planning inspection and social service policies
- Allocating funds for inspection of nursing homes and day care facilities

Duties are either mandatory or discretionary, but latitude is allowed for both.

Health departments have a legal responsibility to carry out mandatory functions, but are allowed considerable latitude in how and when to carry out discretionary ones. Even when faced with a mandatory duty, courts will usually find an agency has a great deal of discretion in determining *how* to fulfill its obligation.

Courts rarely force health officials to perform mandatory duties.

Although courts could theoretically compel officials to perform mandatory duties, such as maintaining certain types of health records or ordering the abatement of a particular nuisance, they rarely do so. Thus, there is virtually no likelihood that a court will take action against a public health official for not fulfilling his or her legal responsibilities.



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## Bringing it home...

1. Does your agency have mandatory duties? What are they?
  
  
  
  
  
  
  
  
  
  
  2. Name some duties of your agency that are discretionary.
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# Liability

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Fears about liability

Conventional wisdom holds that Americans have become litigation happy, filing lawsuits whenever anything goes wrong or whenever they think they could collect money for damages. The concern over potential litigation has fallen heavily on health care professionals, particularly those who practice medicine. But there is a related fear that anyone with responsibility for the well-being of others may be sued if that well-being is lost. Understanding the laws of liability will put such fears in their proper perspective.<sup>1</sup>

Liability laws covering state and local health department agencies and employees vary considerably across the country. This section of the module will describe the general rules of liability, first as rooted in common law, and then the instances where state or local law has departed from common law and created differences across jurisdictions.

“Liability” is a broad term and is used in this module to mean that a person or entity may be held responsible for compensating another or making that person “whole” if the person is injured or their property is damaged.

## **Principles of liability from common law**

Modern liability statutes are rooted in common law.

Understanding the history of governmental liability and immunity principles as they were originally shaped by common law will give you a foundation for understanding how this area of the law has evolved through modern statutes and legal court opinions. You may also want to refer back to the discussion of the common law in Module 1, Introduction.

### *Sovereign immunity*

It used to be that lawsuits against federal and state governmental entities were all but impossible to pursue because the U.S. legal system followed the principle of complete sovereign immunity, which bars lawsuits against the government without its consent. The purpose of sovereign immunity was to:

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<sup>1</sup> What is commonly perceived as a litigation or malpractice crisis is, at most, an exaggeration. There is little hard data to support the idea that patients are suing more, winning more often when they sue, collecting more when they win, or adding substantially to health care costs as a result of lawsuits. In fact, clearer data seem to establish the opposite: that there are actually more instances of medical malpractice than those which result in lawsuits for damages. In a "perfectly" fair and just system, many more—not fewer—patients would be collecting compensation for the negligent harm they have suffered in the course of medical treatment.

Sovereign immunity protects government from all unwanted lawsuits.

- Protect the operation of government, enabling it to fulfill its responsibilities by insulating it from threats of legal action and interference by the courts
- Shield government from the time and expense of defending itself in litigation
- Protect public funds

Under common law, sovereign immunity applied to the federal and state government, but not to a state’s political subdivisions.

*Governmental immunity*

A tort is a legal wrong or injury committed upon a person or their property.

A related but more narrowly drawn principle, that of governmental immunity, applied to all three levels of government. The principle of governmental immunity means the state is immune from liability for torts committed by its officers, agents, and employees. Governmental immunity applied not only to state officers, agents and employees, but also to those of counties and cities. However, when the principle was applied to counties and cities, it was not absolute.

Under common law, a distinction was made between governmental functions, and proprietary functions.

Definitions

- **Governmental functions** are those activities carried out under the government’s basic exercise of powers to promote the comfort, health, safety, and overall welfare of the general public, including the regulatory activities of inspection, licensing, and enforcement.
- **Proprietary functions** are activities carried out primarily to realize a profit or activities normally carried out by private parties, such as clinical health services.

|                        | States, state agencies, officers and employees | Counties, municipalities officers and employees |
|------------------------|--|---|
| Governmental functions | Absolute sovereign immunity                    | Governmental immunity                           |
| Proprietary functions  | Absolute sovereign immunity                    | No immunity                                     |

|                      |   |
|----------------------|---|
| The rationale        | The rationale for treating states and their subdivisions differently was based on the assumption that the state is inherently sovereign, and its sovereignty must be protected at all times and in all capacities. On the other hand, a municipal corporation acts in a dual capacity—carrying out governmental functions as an agent of the state and also engaging in proprietary or business activities of benefit solely to itself and its inhabitants. The former activities were entitled to reap the benefits of the state’s immunity while the latter activities were not.                              |
| The practical effect | For states, state agencies, agents, officers, and employees, the combined principles of sovereign and governmental immunity offered a complete bar to lawsuits for torts committed at that level of government. At the county and local level, however, agencies and their employees were liable for torts arising out of their proprietary functions while protected in the exercise of governmental functions. Distinctions between proprietary and governmental functions were defined by common law court opinions. The line was not always clearly drawn nor consistent from one jurisdiction to the next. |



### **Bringing it home...**

What are some governmental functions your agency carries out?

Does it have any proprietary functions?

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## State tort claims acts

Evolution of the common law      Because of the inherent unfairness of absolute sovereign and governmental immunity, which forced injured parties to bear the costs of an accident, virtually all states have repealed (abrogated) these sweeping common law principles, replacing them with more limited immunities through state legislation known as state tort claims acts and, in some states, by state constitutional provision.<sup>2</sup>

Some elements of common law still remain.      What remains, at least in some jurisdictions, is that the law continues to distinguish between the state and its political subdivisions when conferring immunities. Similarly, in some jurisdictions the language and rationale provided in the common law distinguishing between proprietary and governmental functions persist to this day.

### *Liability of states and their political subdivisions*

The general rule      In most, if not all states and localities, government officials are, by statute, granted immunity from lawsuits arising from the exercise of their governmental functions. Most may be held liable for torts arising from the exercise of proprietary functions.

State laws generally take one of two forms:

- Immunity can be the rule or the exception, depending on the state.
- *Overall immunity is granted the state, subject to specified exceptions.* In such states, immunity is the general rule and the limited circumstances under which the state agrees to be sued are specifically described.
  - *Immunity is the exception.* State statutes following this model confer immunity on a limited basis as exceptions to a comprehensive scheme permitting governmental tort actions. In such states the doctrine of sovereign immunity is abolished, and immunities are restored on a limited basis as deemed appropriate by state legislators.

Immunity of counties and cities      The rules for governmental tort immunities of counties and municipal corporations usually take one of three forms, the first of which is the most common:

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<sup>2</sup> See *Civil Actions Against State and Local Government Its Divisions, Agencies and Officers, 2<sup>nd</sup> Ed.*, for an excellent discussion of liability principles as applied to state government and its political subdivisions.

- The state tort claims act governs the tort immunities of its counties and municipal corporations.
- The state tort claims act expressly excludes political subdivisions from coverage; more limited immunities are usually provided to them under a separate tort claims act.
- In a small minority of states, the rules governing immunity for counties and municipalities remain defined by common law principles.

Some commonalities in state tort claims acts

Regardless of the form they take, virtually all state tort claims acts:

- Retain immunity for essentially governmental functions
- Waive immunity for negligence of governmental officers and employees acting within the scope of their employment
- Establish procedures for filing claims against the government
- Limit the amount of damages that may be recovered
- Authorize governmental entities to purchase liability insurance

The term “negligence” means a failure to exercise reasonable care and caution. The standard by which the legal system judges “reasonable care” is often expressed as that which a “prudent” or careful person would do.



## Bringing it home...

Is sovereign immunity the exception or the rule in your state?

Does your state tort immunity act cover political subdivisions of the state?

Are the immunities provided your state and its political subdivisions co-extensive, i.e., equal in their scope of coverage?



### Liability for proprietary functions

Public health clinicians must meet the same standards as private clinicians.

Public health agencies are often involved in the provision of clinical services through public health clinics, school health programs, and the like. In such situations, the public health clinician has a legal responsibility to provide care that meets the same high professional standards expected of private clinicians. Failure to perform at this level of care and competency constitutes malpractice—that is, negligent performance by a professional that results in harm to the patient or client.

Malpractice insurance is essential.

Like clinicians working in other public or private institutions, professionals who provide clinical services in health departments need malpractice insurance protection, which is usually provided by the employer (in this case, by the government).

Situations where state agencies could be sued for negligence

There are other situations in which a public health agency may act in a proprietary role and could conceivably be sued for negligence. For example, the agency may operate an automobile child-restraint sale or loaner program and may worry about legal liability if a defective car seat results in harm to the user. Although this is an unlikely event, it must be dealt with before beginning any such program, either through insurance, waivers, or legal counsel's assurance of some relevant statutory immunity.

### Liability for governmental functions

What about the public health professional's regulatory role? Certainly harm can result from the enforcement of public health laws. For example, a restaurant closed while an episode of food poisoning is being investigated will lose business, perhaps running into the tens of thousands of dollars. A nursing home that has its license restricted or suspended will suffer even greater damage. And any business or facility investigated by a local or state health department may find that rumors emanating from the investigation have driven business away, even if no problem is found to exist.

Health departments are not liable for harm caused by enforcement of laws

Can owners of these businesses sue the health department for compensation and win? The bottom-line answer is no. Virtually all states provide immunity from tort actions arising out of the performance of essential governmental functions. In many jurisdictions this is called “the general duty doctrine.” The doctrine says that a governmental body engaged in the inherently governmental tasks of enforcing laws and regulations ought not to be hampered in fulfilling its public duty by exposing it to tort liability should its actions (or failure to act) result in injuries to members of the public. Thus under the general duty doctrine, absent compelling circumstances discussed later in this module, the government cannot be held liable to private plaintiffs for the negligent exercise of its authority.

The general rule refined

In most states the general rule is that governmental entities are immune from suit for torts committed by their officers and employees in performing basic governmental functions, unless liability is specifically permitted by statute, or the function, even though essentially governmental in nature, is ministerial rather than discretionary.

The extent of immunity varies among states.

Discretionary v. ministerial functions

Immunity conferred for discretionary duties.

While a small number of states grant absolute immunity for governmental functions, most state laws confer immunity only for activities that are discretionary in nature, permitting the government to be sued for injuries resulting from the performance of ministerial duties. The essence of a discretionary governmental function is that it involves basic policy-making or planning decisions.

Little judgment involved in carrying out ministerial duties.

By contrast, ministerial functions leave no room for an agency to determine *whether* to carry out the function. Moreover, *how* the function is to be implemented is prescribed by policy or regulation leaving little, if any, room for the exercise of judgment.

Ministerial functions are often described as the day-to-day operational activities of government. Some examples include:

- Operating and maintaining public facilities on a day-to-day basis
- Determining safety measures to employ in operating public facilities
- Carrying out previously planned social service programs
- Evaluating foster homes
- Investigating child abuse reports

The following case studies help clarify the significance of the distinction between discretionary and ministerial functions.

Case study: Airline safety

An important, relatively recent U.S. Supreme Court decision illustrates the extraordinary lengths the courts are willing to go to bar lawsuits by defining federal agency actions as discretionary in nature. The issue before the Court was whether the Federal Aviation Administration (FAA) was negligent in using a “spot-check” system to ascertain aircraft compliance with safety requirements.

Under its “spot-check system,” the FAA shares its legal duty to ensure civil aircraft safety with aircraft manufacturers and operators. FAA rules require manufacturers and operators to develop plans and perform inspections and safety tests to establish that aircraft comply with FAA safety rules. The FAA then reviews the company data by conducting “spot checks” of the manufacturers’ work.

The extent of FAA oversight varies according to the experience and trustworthiness of the manufacturer. New manufacturers of unknown capability receive a complete FAA conformity review, while only critical parts and assemblies are inspected for experienced manufacturers. The FAA relies on the experienced manufacturers’ tests and records for the remainder of its check. If upon completing a “spot check” the FAA determines that the aircraft complied with minimum safety regulations, the FAA certifies the aircraft.

The case before the Supreme Court involved a fire on an aircraft certified by the FAA. The fire started in a lavatory trash receptacle which failed to meet FAA safety regulations. Most passengers on board died of asphyxiation. Next-of-kin sued the airline and the FAA, contending that the latter’s “spot-check” system failed to meet its statutory inspection obligations.

FAA had non-discretionary duty to ensure safety, but discretion as to how this was done.

The FAA’s inspection function might seem to be a non-discretionary area that could be challenged through a lawsuit alleging negligent performance. But the Court concluded that while checking airlines for safety is mandatory, there is discretion as to *how* to carry out its compliance function.

The Court’s reasoning sheds light on the great deference courts will give to administrative agencies, recognizing the need to balance the objectives of a legislative mandate (such as supervising safety procedures of private individuals) against the realities of finite resources. As the Court recognized, when an agency develops an enforcement program, “it is exercising discretionary regulatory authority of the most basic kind.”

Courts try to protect government regulatory activities.

The Court further explained that:

By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took “steps to protect the Government from liability that would seriously handicap efficient government operations.” Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the Government's regulatory program... Judicial intervention in such decision-making through private tort suits would require the courts to “second-guess” the political, social, and economic judgments of an agency exercising its regulatory function. [*United States v. Varig*, 467 U.S. 797 at 813 (1984)]

Under the Court's ruling, the acts of the FAA employees in executing the "spot-check" program, which were conducted in accordance with agency directives, were also shielded from legal liability.

Discretionary function exception limits areas where government can be sued and prevents personal liability fears.

It should be noted that in extending the discretionary function exception to such lengths, the Supreme Court was applying the exception in two ways:

- To support the concept of sovereign immunity by limiting the area in which government could be sued
- To protect the qualified personal immunity of government administrators in order to avoid the chilling effect of personal liability fears. [See the discussion of qualified personal immunity below.]

Taken together, these two legal protections mean that public health regulators have wide latitude in carrying out their responsibilities without falling prey to legal liability for any harm that might be related to failure to "perfectly" regulate.

Case study:  
Contaminated oysters

A Louisiana court reached a similar decision in a lawsuit against the Louisiana Department of Health and Human Resources. In that case persons who fell ill after eating contaminated raw oysters sued the State Health Department for failing to warn the public about the hazards of eating the shellfish. The Court held the Department was immune from liability, finding that the agency's decision to inform physicians about the threat rather than issuing a warning directly to the public was a discretionary policy decision. [*Simeon v. Doe*, 618 So.2nd 848, (La. 1993)]

|   |  |
|---|--|
| Case study: County road building  | The following discussion illustrates the distinctions that state courts sometimes make between discretionary and ministerial functions. In a 1998 Georgia case, plaintiffs sued a county and the county road superintendent alleging they were negligent in constructing a road. Plaintiffs' injuries were sustained as they drove around a curve reaching a segment where the pavement abruptly ended. The car flipped over as it hit a gravel surface. The trial court granted defendants' motion for summary judgment finding the county entitled to a claim of sovereign immunity and the county road superintendent protected by the doctrine of official immunity. [See discussion of official immunity below.]  |
| Road construction is ministerial but decisions about pavement surfaces are discretionary. | <p>The plaintiffs appealed. The appellate court affirmed the trial court's decision with respect to the county; but disagreed with the lower court's determination that the road superintendent was entitled to claim official immunity. The appellate court's rationale was that decisions relating to how to construct the highway, including the selection of pavement surfaces, were discretionary in nature; therefore, the county was immune from liability. But according to the appellate court, actual construction of the road was a ministerial duty. Because the road superintendent had very little discretion in carrying out his functions, he was not entitled to claim official immunity.</p> <p>The appellate court made no determination about whether the county road superintendent's actions were in fact negligent. The court merely held that he was not protected by official immunity.</p> |
| If an employee is merely following instructions, negligence is difficult to prove.        | The practical effect of the appellate court's decision was to give the plaintiffs another opportunity to prove, at trial, that the county road superintendent acted negligently. Noting the harsh effect of the majority opinion, at least one dissenting judge would have affirmed the lower court's decision. According to the dissenting judge, because the record showed that the road superintendent merely followed the instructions of the county, plaintiffs would not be able to prove that the superintendent's actions constituted negligence. Therefore, the dissenting judge would not have required the road superintendent to submit to the time and expense of a trial. [ <i>Ross v. Taylor County</i> , 498 S.E.2d 803 (Ga.App. 1998).]   |

### Liability in circumstances creating a special duty

Special duty owed      In some jurisdictions an exception to immunity for governmental functions is made where plaintiff can establish that the public entity owed them a special duty beyond that which is owed to the public at large. A special duty may be created when a governmental entity fails to exercise due care after assuming a duty to warn or to come to the aid of a person in need or when the government creates or maintains a nuisance. Also, when a function is statutorily mandated and the statute reflects an intent to identify and protect a particular group, the government may be found to owe a special duty to that particular class, if it had knowledge of violations or deleterious conditions but failed in its duty to take preventive measures.

#### a. A statutory duty to protect special groups or individuals

Case study:  
Children in day  
care

A county was found to owe a special duty of care to children in day care facilities in a 1986 Minnesota case [*Andrade v. Ellefson*, 391 N.W.2d 836 (Minn 1986)]. In that case, the county acted as the State agent carrying out the State's licensing and inspection duties for day care facilities within the area. Two parents sued the county and the day care operators alleging their seven-month-old infants were injured while under the facility's care. The parents alleged the home was unfit to operate as a day care center and the county had negligently inspected and re-issued a license to the home.

The immediate question before the court was whether the county was entitled to a claim of governmental immunity. As an agent of the State, the county would ordinarily be entitled to immunities granted the State in the state tort claims act. Minnesota law provides:

The State and its employees could not be found liable "...for any losses based on the failure of a person to meet the standards needed for license, permit or other authorization issued by the state or its agent."  
[Minn.Stat. Sect 3.736, subd 3 (1984)]

Carrying out inspections not discretionary.

However, the county's immunity was waived because it had purchased liability insurance. Under the laws of many states, if a governmental entity purchases liability insurance or agrees to indemnify officers and employees for tort liability, that entity is deemed to have waived its immunity to the extent of the limits of the insurance policy or indemnification agreement. Nor could the county claim immunity based on a defense that state law confers immunity on political subdivisions for "discretionary acts." The Court determined that, "license inspections conducted by the county were not at the planning or policy level where discretionary immunity usually applies."

Statute created a duty to protect a special group.

The final defense available to the county was that the county's inspection and licensing functions created only a general duty owed to the public at large and, as a matter of policy, the county should be entitled to immunity for the exercise of a governmental function. The court rejected this defense, finding instead that the county, which had actual knowledge of overcrowding at the center, owed a "special duty" to the children. The court's finding was based on an interpretation of the State's Welfare Licensing Act which it determined had created a mandatory duty to protect small children in licensed day care facilities.



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## Stop and think...

Can the Minnesota day care case above be distinguished from the following Illinois case?

In a 1985 case arising in the State of Illinois, a health inspector and the county health department were sued by two patrons of a restaurant who fell ill after eating contaminated food. The health officers were allegedly aware that the restaurant was serving contaminated food. For reasons that are not explained, neither the health officer nor the health department took action to close the restaurant, nor did they warn patrons about the problem.

While the court recognized that the nature and extent of the county's duty to inspect the restaurant changed once the contamination was discovered, the court nevertheless held that plaintiffs were not entitled to recover damages from the county for their injuries. In applying the "general duty doctrine," the court held that the duty owed by the government was to the public at large and not to the individual restaurant patrons who fell ill as a result of the county's breach of duty. [*Fryman v. JMK/Skewer, Inc.* (1985, 3d Dist) 92 Ill Dec 1978, 484 NE2d 909].



## b. Nuisances created and maintained by governmental entities

Case study: Ditch construction

Sovereign immunity will generally not preclude a lawsuit against a governmental entity for nuisances that it creates and maintains. This was the basis for a finding of an Indiana court that a county was not immune from tort liability in a case involving the construction of a ditch. In that case, the county allegedly constructed a ditch in such manner as to permit raw sewage from an improperly installed septic system on an adjacent property to flow through the plaintiff's land. The plaintiff's daughter became ill after playing in leaves in an area of her yard where water from the ditch had pooled. She was subsequently diagnosed with typhoid.

Government liable for injuries resulting from situations it has created.

The court found that the county's negligent activities (improperly constructing and maintaining the ditch) gave rise to a special duty owed to the plaintiffs. The court articulated the general rule, which distinguishes a county's *failure to act* from *activities that are carried out in a negligent manner*. When a county fails to act to protect the welfare of its citizens or to provide rescue services, it is generally shielded from liability on the ground that the decision *not* to act is a policy decision, or the duty is a general one owed to the public at large. However, when a county *does* act it must do so with care and will be held liable for injuries resulting from a perilous situation which it creates. [*Henshilwood v. Hendricks County et al.*, 653 N.E.2d 1062 (1995)]

## c. Failure to warn

Government must warn of dangers it has created.

A governmental entity will usually be held liable for failing to warn about hazards when it has notice of a dangerous condition which it created or had control over, and the danger is not readily apparent to the public. For example, a municipality would not be held liable for failing to place warning signs or otherwise protect persons using public beaches if an injury arose from natural conditions such as a strong undertow or steep drop-off, since the decision to warn is a discretionary function. However, a city would be held liable to persons injured while diving in an unmarked area of a public beach where harm resulted from their striking an underwater concrete abutment placed there by the city. Because the city created the condition and the danger was not readily apparent to the public, the city has a special duty to warn divers of the hidden danger.

| <b>Table 10b. Liability of Governmental Entities under State Tort Claims Acts<sup>3</sup></b> |                             |             |                   |   |
|---|-----------------------------|-------------|-------------------|---|
|   | Discretionary               | Ministerial | Special duty owed | Liability insurance/ indemnification agreements |
| Governmental  | Immunity                    | No immunity | No immunity       | No immunity                                     |
| Proprietary   | No immunity - cap on awards |             |                   |   |

Court decisions are sometimes influenced by public policy.

By now you have probably realized that distinctions between proprietary and governmental functions, between discretionary and ministerial functions, and the existence of a special duty, are not always clear. Furthermore, courts sometimes reach opposing decisions on seemingly similar facts for reasons of public policy. For instance, if the courts wanted to compensate a sympathetic victim or deter governmental employees from acting negligently, they might decide a governmental function is ministerial or deem it to be proprietary in nature. In contrast, where a court views it important to insulate public officials from the threat of liability, they will generally interpret activities as discretionary or governmental in nature.

But to reiterate, for the most part the courts are extremely reluctant to impede the important work of governmental agencies by expanding the scope of their liability. For this reason, they often go to great lengths to define functions so as to fall within the ambit or scope of a state’s immunity rules.

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<sup>3</sup> General rules - Laws vary from state to state.



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## Bringing it home...

In your jurisdiction is a distinction made between discretionary and ministerial governmental functions?

Does your jurisdiction recognize a “special duty of care” doctrine for governmental functions?

Does your state tort claims act have provisions granting near absolute immunity for activities related to licensure and issuing of permits?

Does it have similar provisions for governmental inspections and failure to inspect health and safety hazards?

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### *Liability of individual health officers: Qualified immunity*

Qualified immunity  
for individuals

Thus far we have been speaking about the liability of governmental entities at the state, county and municipal levels. But what about the *personal* liability of individual public health officers? Injured persons who go to the time and expense of bringing a lawsuit will often name not only a governmental entity as a defendant but also the officers, agents, or employees who were involved in the incident. The latter may be sued in their official capacity as well as personally.

Definitions of official and individual capacities

A suit against an individual in his *official capacity* means the plaintiff is seeking recovery from the governmental entity which employs the defendant; a suit against a person in his or her individual capacity means the plaintiff is seeking recovery directly from the person. Do immunity provisions protect them? The answer is a qualified yes.

The courts protect those who perform their duties in good faith.

As a general rule, when you perform your public health duties in good faith and in a reasonable fashion, you are not personally liable for damages that may result from your acts. The legal system, i.e., judges, understands that if you are made too fearful of the legal consequences of your actions, you will be timid and ineffectual in carrying out your duties—not a desirable state of affairs. Thus, the courts have fashioned legal doctrines that afford public health practitioners broad immunity from lawsuits.

Acting within the scope of your authority

This is a qualified immunity, not an absolute one. It only applies under circumstances where you are acting in good faith within the scope of your authority. The principle would not hold in instances of gross and willful carelessness, malicious, corrupt or criminal actions, or acts that went beyond the authority vested in the public health agency or the scope of your employment. Clearly you would not engage in willful carelessness or corruption through mere inattention.

Deciding whether an agency's authority has been exceeded

Going beyond an agency's appropriate authority may seem less clear cut. But, in fact, this problem would arise not from taking legitimate authority to excess, but rather from going off into completely unauthorized or clearly invalid areas, for example, attempting to require participation in religious services by all nursing home residents.

Frank Grad<sup>4</sup> lists the following questions that arise in determining whether an employee has exceeded an agency's authority:

- Was the employee authorized or required to do what was done?
- Was the employee authorized to use the means that were used?
- Were the employee's actions based on a mere error in the exercise of discretion or did the employee knowingly go beyond legal authority or knowingly use improper means?

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<sup>4</sup> Grad, p. 242.

Case study:  
Embargo of food  
products

These factors were considered by a federal court in a lawsuit seeking damages from a state health official for the alleged wrongful embargo of plaintiff's food products. [*Juci-Rich Products v. Richard Lowe, Individually and as Regional Supervisor of the Illinois Department of Public Health*, 735 F.Supp. 1387 (C.D.Ill.1990)]. The case originated in 1987 when a large number of school children in Danville, Illinois, succumbed to a food-related illness. *Juci-Rich's* products were among those served to the children.

State health department officials and Federal Food and Drug inspectors made an initial inspection of the facility, noting unsanitary conditions and food safety law violations. The inspectors also obtained a sample of the product for testing. At the conclusion of the inspection, the health officials left *Juci-Rich* a copy of their report, including detailed recommendations to correct unsanitary conditions. The recommendations required corrective actions within sixty days following the inspections.

Three days later defendant Richard Lowe, the regional supervisor, and other health officials returned to the facility with the express intent of determining whether corrections had been made or whether immediate action was warranted. The company refused the officers entry to the facility to inspect it. At that point, Lowe determined that he had no choice other than to embargo the facility's products based on the information he currently possessed. The day following the embargo, lab results were returned demonstrating an extremely high yeast and mold count.

*Juci-Rich* contended that because Lowe did not have the benefit of the sample results at the time of inspection, he lacked a proper basis for imposing an embargo. Disagreeing with the manufacturer, the court concluded that Lowe was entitled to qualified immunity as he had probable cause to believe the food was adulterated, and he did not violate any statutory or constitutional rights in issuing the embargo notice. The court held that Lowe's qualified immunity existed *even if it later turned out the food was not, in fact, adulterated*, as Lowe was acting fully within the scope of authority conferred upon him by the Illinois Food, Drug and Cosmetic Act.

The general rule  
repeated

Public health practitioners performing their duties in good faith and in a reasonable fashion are not personally liable for damages that may result from their acts.

Or, as a standard legal encyclopedia puts it:

A health officer who by statute is authorized to take action for the prevention of the spread of disease is not liable for injuries resulting from such reasonable and customary measures as he may in good faith adopt or direct for that purpose with regard to persons or matters subject to his jurisdiction; and this rule has been applied to errors of judgment. However, health officers may be held personally responsible for gross and willful carelessness in the exercise of their powers, acts of corruption, unreasonable or arbitrary action, or acts in excess of their authority. (39A C.J.S. Health & Environment, Sec. 54)

#### Variations on the general rule

Liability for negligence in performing ministerial acts

State statutes vary widely in the amount of protection offered to individuals. In some jurisdictions health officials may be held liable for negligently performing ministerial, as opposed to discretionary, acts. For example, health officials may be personally liable for operating a motor vehicle in a negligent manner and for failing to provide appropriate social services.

Case study: Suicide of mental health patient

This occurred in a case arising in North Carolina. In that case the administrator of an estate sued a mental health facility, the County Department of Social Services, and three county employees for negligence in the suicide of a mental health patient. The employees were sued both in their official capacities and individually. The court determined the county and the three employees were entitled to governmental immunity insofar as they were sued in their *official capacity*.

Public officers vs. public employees

The remaining question before the court was whether the three employees, sued in their individual capacities, were entitled to qualified immunity. Because North Carolina law creates a distinction between *public officers* and *public employees*, granting only the former qualified immunity, the court looked to the job titles and functions of each defendant. It determined that the Director of the County Department of Social Services was a *public officer*, as he was engaged in the performance of governmental duties involving the exercise of judgment and discretion. According to the North Carolina Supreme Court, a public officer is, by definition, someone whose position is created by the constitution or statutes of the state.

The other two defendants, a department social worker and a supervisor of the Adult Protective Services Unit, were held to be mere public employees, and therefore not entitled to a qualified immunity defense. [*Meyer v. Walls, Buncombe County Department of Social Services, et.al.*, 489 S.E.2d 880 (1997).]

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### Stop and think...

North Carolina's rationale for limiting qualified immunity to public officials has been stated as follows: "It would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be held personally liable for acts or omissions involved in the exercise of discretion and sound judgment which they had performed to the best of their ability, and without any malevolent intention toward anyone who might be affected thereby...."

The immunity has never been extended to a mere employee of a governmental agency upon this principle ... since the compelling reasons for the non-liability of a public officer, clothed with discretion, are entirely absent..." [*Miller v. Jones*, 32 S.E.2d at 597.]

Do you agree with the North Carolina court's determination that only public officers need the protections of immunity from liability?

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North Carolina’s laws are near one end of an extreme favoring limited immunity for the actions of government employees. Most other jurisdictions are more protective, encompassing a wider array of activities and government employees within the ambit of laws granting immunities from tort liability.

Case study: Case management plan

Consider the following Minnesota case, one also involving a lawsuit against a county social worker. The Minnesota court examined the type of functions performed, rather than the person’s job title, to determine whether the social worker’s activities were discretionary or ministerial in nature. In that case, the social worker was determined to be protected by official immunity from liability for alleged negligence in formulating a case management plan for a child who died at the hands of her mother. Formulating the plan was held to be a discretionary function because it required the exercise of judgment in determining what services should be provided, who would provide them, their frequency and the nature and extent of agency supervision. The social worker was, however, subject to tort liability for alleged negligence in *implementing* the plan because implementation was ministerial in nature. [*Olson v. Ramsey County*, 509 N.W.2d 368 (Minn 1993)]

| <b>Table 10c. Liability of Officers and Employees<sup>5</sup></b> |  |                             |                    |
|---|--|-----------------------------|--------------------|
|   | Acting in Official Capacity                  | Acting in Personal Capacity |                    |
|   |  | Ministerial                 | Discretionary      |
| Governmental  | Same as government entities (see Table 10b.) | No immunity                 | Qualified immunity |
| Proprietary   | No immunity                                  |                             |                    |

<sup>5</sup> General rules - Laws vary from state to state.





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## Bringing it home...

Does your state law limit qualified immunity to those exercising discretionary functions?

How is “discretionary function” defined in your state?

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Defense and indemnification of government employees

Most states accept liability for negligent acts of their officers and employees that occur within the scope and course of their employment. A common situation involves a lawsuit arising from an automobile accident occurring while an employee is at work.

Many state statutes authorize or require governmental entities to defend their officers, employees or agents in court, and also require governmental entities to indemnify officers and employees for damages awarded in a lawsuit based on negligence.

The provisions in the following Kansas statutes are typical:

Governmental entities must provide for defense of civil actions against employees unless: (1) the act or omission was not within the scope of employee’s employment; (2) the employee acted or failed to act because of actual fraud or malice; (3) the defense would create a conflict of interest between the governmental entity and the employee; or (4) a proper request for a defense was not made. [*Kan Stat Ann Section 75-6108.*]

Governmental entities must indemnify employees unless the trial court finds that the act or omission was a result of employee’s actual fraud or malice. [*Kan Stat Ann Section 75-6109.*]

Virtually all states limit their liability exposure by capping the amount of damages for which they agree to be held responsible.

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## Bringing it home...

Many health officials worry that if sued they will be forced to pay large legal expenses to defend their activities, even if they ultimately win in court.

Find out if your agency will represent you in court if you are sued for negligence while performing your job and whether your state statute provides for indemnification in the unlikely event that you are assessed a damage award.

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### Liability for criminal violations

Liability only when violations are intentional.

If you apply public health law in good faith, you are highly unlikely to violate the criminal law. As Grad puts it:

To convict a public health officer of most kinds of official wrongdoing, it is necessary to prove some wrongful, evil, or selfish intent. Thus, it is virtually impossible for a public health officer to run afoul of criminal laws of this nature without knowledge on his or her part, through mere thoughtlessness, inattention, or negligence. . . . To constitute a crime, official wrongdoing must be intentional; the mere violation of a public duty that is neither willful nor corrupt will not ordinarily be criminal.<sup>6</sup>

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<sup>6</sup> Grad, p. 234.

### Precautionary measures

Good records provide protection.

To assure protection from civil and criminal legal difficulties, you should carefully document what you do, as you do it. Then, if you later need to demonstrate that appropriate agency procedures have been consistently followed, your work logs and records will provide key evidence that nothing untoward or improper occurred. Without such contemporaneous documentation, after-the-fact defenses become problematic.

While it is extremely unlikely that your work will ever result in civil or criminal legal repercussions, there are two practical lessons here:

- First of all, adhere to the standards and ethics of your profession and you will not run afoul of the legal system.
- Second, maintain complete records that will allow you to demonstrate that you in fact performed in a reasonable and defensible manner.



**See Group exercise 10.1 at the end of the module.**



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## Review of terminology...

This module uses a number of legal terms that may have been unfamiliar to you. You may find it useful for review to define them now in your own words; doing this will also give you a glossary that is specific to this module. Feel free to add more terms.

common law

discretionary functions

general duty doctrine

governmental functions

governmental immunity

liability

malpractice

mandatory functions

ministerial functions

negligence

proprietary functions

qualified immunity

sovereign immunity

special duty exception

state tort claims act

tort

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# Self-check review

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Check your knowledge of the material by answering the questions below.

1. Public health agencies or practitioners could be held liable for negligence in which of the following cases?
  - A. Failure to meet professional standards in providing clinical services.
  - B. Actions that cause financial loss to business.
  - C. Acting outside of legitimate authority.
  - D. Erring when making discretionary policy judgments.
  
2. Which of the following is **not** a characteristic of personal immunity?
  - A. It gives public health practitioners wide latitude in carrying out their responsibilities.
  - B. It applies only to non-discretionary functions.
  - C. It recognizes that agencies must often perform their duties with limited resources.
  - D. None of the above; they all are characteristics of personal immunity.
  
3. Which is the most important principle to remember in order to avoid civil or criminal liability?
  - A. Don't take any action that might result in someone's loss of income or property.
  - B. Document everything you do.
  - C. Don't take summary action without consulting a lawyer.
  - D. Just carry out orders and let your superior make all decisions.

4. Immunity for government agencies and their employees is necessary in order to:
  - A. Make victims pay for damages.
  - B. Allow officials to make discretionary decisions without fear of being sued.
  - C. Compel officials to perform mandatory duties
  - D. Avoid using public funds to defend and indemnify public employees.
  
5. Which of the following would be considered a proprietary function?
  - A. Providing immunizations
  - B. Inspecting restaurants
  - C. Maintaining vital records
  - D. Investigating child abuse reports
  
6. In most jurisdictions an agency is immune from liability:
  - A. For proprietary functions
  - B. For ministerial acts
  - C. When a general duty is owed
  - D. When it has taken out liability insurance

Answers:

|                           |
|---------------------------|
| 1.A&C, 2.B, 4.B, 5.A, 6.C |
|---------------------------|

# References

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*Civil Actions Against State and Local Government Its Divisions, Agencies and Officers*, 2<sup>nd</sup> Ed., Prepared by Shepard's Editorial Staff, J. L. Craig, Editor-in-Chief, Shepard's/McGraw Hill, Inc., CO (1992 Suppl. 1998).

*Corpus Juris Secundum*, A restatement of American law as developed by all reported cases, *Health and Environment*, St. Paul, MN, West Publishing Co. (1998 supplement).

Grad, F.P. *The Public Health Law Manual*. 2nd ed. Washington, D.C.: American Public Health Association, 1990.

# Group exercises

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## Exercise 10.1 Applying the Rules

Mr. and Mrs. Martinez sued the Brown County Health Department alleging their daughter, Suzanna, contracted bacterial meningitis following exposure to the bacteria at her daycare facility. The parents based their suit on the health department's failing to inspect the licensed daycare facility and warn parents of the danger even though another child who attended the same facility was recently diagnosed with the illness.

### Questions:

Is the county health department immune from liability?

What facts would you want to know to make that determination?

Are the inspectors entitled to qualified immunity? Under what circumstances?



**Exercise 10.2** Joe Scam, a real estate agent and an elected member of the Crook County Board of Health, was involved in the sale of residential property to Mr. and Mrs. Taken. Part of the sale required Board of Health certification that a new septic system could be installed on the land. Mr. Scam used his influence to obtain the necessary Board certification. Mr. and Mrs. Taken were later advised that the soil capacity was not adequate and that a new system could not be installed. The homeowners sued Mr. Scam, who defended himself saying he was entitled to qualified personal immunity as a government official, that the Board's action in granting the certification was a discretionary function, and that he therefore could not be the subject of a tort action.

**Questions:**

Who should win the case and why?

What if the Board's certification was based on the innocent, but mistaken, report of a health department official who inspected the property prior to the sale?

Is the inspector liable?

Is the health department liable?

# To register for continuing education credit and to evaluate this module

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## Registering for Continuing Education Credit

To receive credit for this module you must submit course enrollment forms and the answers to the Evaluation and Test (located on the following pages) to CDC. There are several ways to complete this registration process:

*Complete the forms online.*

- U Go to the PHTN website [www.cdc.gov/phtn](http://www.cdc.gov/phtn) and complete the registration and evaluation online. Directions will be given at the website.

*Complete the forms on paper. There are two ways to obtain the forms from CDC. (If you plan to study additional modules, you may want to request enrollment materials for those modules also at this time.)*

- U Request the enrollment materials online by going to the following URL at the PHTN website <http://www.cdc.gov/phtn/legal-basis/req-form.htm> and completing the online request form. After the online form is submitted, an enrollment packet will be mailed to you with instructions.
- U Request the enrollment materials by calling 1-800-41-TRAIN (1-800-418-7246). At the prompts, press 1, then 3. Please clearly speak your name, mailing address, daytime phone number, and the correct module name and number. The enrollment materials will be mailed to you with instructions.

If you are unable to register online, you will have to wait several weeks until your course enrollment materials arrive in the mail. If this is the case, you might want to complete the Evaluation and Test immediately after you finish the module by marking your answers directly on the following pages (or make a photocopy) and then, when the enrollment materials arrive, transfer your answers to the answer sheet included with the materials.

## Evaluating the Module

If you are registering for continuing education credit, you will be asked to complete an evaluation as part of that process.

If you are not interested in receiving continuing education credit, we ask that you please take time to evaluate the module. Follow the procedure specified above for getting continuing education credit, but indicate in the first question on the Evaluation and Test that you do not wish to receive continuing education credit. Although this is not required, your opinion of the module is important to us. By letting us know if this module was effective for you, we can improve future editions, as well as other PHTN courses.

**Evaluation and Test**  
***The Legal Basis of Public Health***  
***Module 10, Responsibility and Liability***  
**COURSE #SS0010**

**Objectives for *Module 10, Responsibility and Liability***

- g Explain the difference between sovereign and qualified personal immunity.
- g Explain the difference between proprietary and regulatory functions of public health agencies.
- g Explain the difference between ministerial and discretionary duties and the circumstances in which immunities apply.
- g Describe how you can protect yourself from civil or criminal prosecution.

NPlease use the red *CDC Answer Sheet* included in the enrollment materials to complete the following questions.

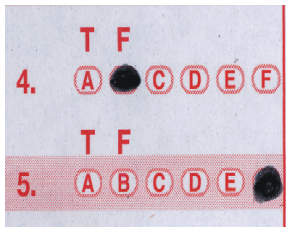
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***Tell us about yourself...***

1. What type of continuing education credit do you wish to receive?
  - A. (CME) *Not Available for this Course*
  - B. Continuing Nursing Education (CNE)
  - C. Continuing Education Units (CEU)
  - D. do not want continuing education credit
  
2. Have you previously completed *Module 1, Introduction*?  
(*Completion of Module 1 is required before taking any of the other modules.*)
  - A. yes
  - B. no
  - C. I have just completed *Module 1, Introduction*.
  
3. Are you a
  - A. Nurse
  - B. Physician
  - C. None of the above

Please note: Question 5 is a continuation of question 4. Please answer each question, but choose only ONE occupation. Your answer to one of the these questions will be F. None of the above

For example, a Health Educator would answer as follows:



4. Which of the following best describes your current occupation?
  - A. Epidemiologist
  - B. Health Educator
  - C. Laboratorian
  - D. Pharmacist
  - E. Physician Assistant
  - F. None of the above
  
5. Which of the following best describes your current occupation?
  - A. Field Inspector (nursing homes, restaurants, etc.)
  - B. Manager/Supervisor
  - C. Environmental Health Worker/Sanitarian
  - D. Lawyer/Attorney
  - E. Other public health professional
  - F. None of the above
  
6. Which of the following best describes the organization in which you work?
  - A. Academic
  - B. Private health care setting
  - C. Federal government
  - D. State government
  - E. Local government
  - F. Other organization

### ***Tell us about the module...***

7. How did you first learn about this module
  - A. State publication (or other state-sponsored communication)
  - B. MMWR
  - C. CDC website (not including PHTN website)
  - D. PHTN source (PHTN website, catalog, email or fax announcement)
  - E. Colleague
  - F. Other

8. How did you obtain this module?
  - A. Purchased from the Public Health Foundation
  - B. Downloaded from the PHTN website
  - C. Borrowed or copied materials from someone else
  - D. Other
  
9. What was the most important factor in your decision to obtain this module?
  - A. Content
  - B. Continuing education credit
  - C. Request from supervisor
  - D. Previous participation in PHTN training(s)
  - E. Ability to take the course at my convenience
  - F. Other
  
10. I completed this module
  - A. As an individual learner
  - B. As part of a learning group that organized itself
  - C. As part of a learning group that was organized by someone outside of the group
  
11. My completion of this module included interaction(s) with an expert(s) on the topic?
  - A. Yes
  - B. No
  
12. My interaction(s) with the expert(s) on this topic could be described as follows
  - A. I had no interactions with an expert
  - B. One or more sessions organized by someone outside of the group
  - C. One or more sessions organized by someone within my group
  - D. One or more informal consultations that I initiated on my own
  
13. How long did it take you to complete this module?
  - A. 1 - 2 hours
  - B. 3 - 4 hours
  - C. 5 hours or more
  
14. How many of the ten modules comprising the *Legal Basis of Public Health* have you completed?
  - A. 1 or 2 modules
  - B. 3 to 5 modules
  - C. 6 to 9 modules
  - D. All 10 modules

15. How many of the ten modules comprising *The Legal Basis of Public Health* do you plan to complete?
- A. 1 or 2 modules
  - B. 3 to 5 modules
  - C. 6 to 9 modules
  - D. All 10 modules
16. Please rate your level of knowledge prior to completing this module.
- A. Had a great deal of knowledge about the content
  - B. Had a fair amount of knowledge about the content
  - C. Had limited knowledge about the content
  - D. Had no prior knowledge about the content
  - E. No opinion
17. Please estimate your knowledge gain due to completing this module.
- A. Gained a great deal of knowledge about the content
  - B. Gained a fair amount of knowledge about the content
  - C. Gained a limited amount of knowledge about the content
  - D. Did not gain any knowledge about the content
  - E. No opinion
18. If this module is further evaluated through the use of focus groups or other methods (e.g., follow up questionnaires) would you be willing to participate?
- A. Yes
  - B. No

Please use the scale below to rate your level of agreement with the following statements about this module.

- A. Agree
- B. No opinion
- C. Disagree
- D. Not applicable

19. The objectives were relevant to the purpose of the course.
20. I would recommend this module to my colleagues.
21. I believe completing this module will enhance my professional effectiveness.
22. The content in this module was appropriate for my training needs.
23. Reading the text on my own was an effective way for me to learn this content.

24. The self-study questions contributed to my understanding of the content.
25. The group exercises contributed to my understanding of the content.
26. The Coordinator Guide contributed to my ability to have a learning experience appropriate to my (or my group's) needs.
27. Downloading the materials from the PHTN website was user-friendly.
28. Ordering the materials through the Public Health Foundation was user-friendly.
29. Ordering the materials through the 1-800-41-TRAIN phone number was user-friendly.
30. I am confident I can explain the difference between sovereign and qualified personal immunity.
31. I am confident I can explain the difference between proprietary and regulatory functions of public health agencies.
32. I am confident I can explain the difference between ministerial and discretionary duties and the circumstances in which immunities apply.
33. I am confident that I can describe how I can protect myself from civil or criminal prosecution.