

# Sources of Governmental Liability & Immunity

2024 CCCMA Emerging Managers Summer Camp

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# Introduction

- In real life, you probably don't often get deep into the intricacies of federal and state laws...but your city/town operates within them, and issues pop up all the time! Thus, management and others in the organization need to:
  - Have a working familiarity;
  - Be good issue-spotters and know where the big risk and liability “traps” are;
  - Know when to reach out for assistance, and where resources are; and
  - Develop a good “risk and liability radar” - and keep it on!
- In this presentation, we'll identify some of the primary (big ticket) sources of municipal liability, discuss immunities from liability, and review some management level “best practices” for mitigating liability risks.
- Please feel free to ask questions and share your thoughts/experiences.

# Sources of Liability – Federal & State Laws

- Colorado Governmental Immunity Act (GIA) - tort liability under state law
- Federal and state employment laws
- Federal and state wage laws
- Open meetings / open records laws
- Election law claims
- Cyber liability
- Technology accessibility laws
- Environmental laws and regulations
- Federal civil rights violations - 42 U.S.C. Section 1983
- Worker injuries - primarily governed by workers' compensation laws
- “Non-monetary” claims; e.g., Rule 106, injunctive or declaratory relief
- Ethics violations
- Breach of contract and/or assumption of contract liability via hold-harmless and indemnification agreements

# State Tort Liability

- The Colorado Governmental Immunity Act (CGIA) is the state law governing claims against public entities/employees for injury or damages due to negligence or willful and wanton conduct.
  - Applies to TORT actions.
    - What the heck's a tort anyway? Any what's negligence?
  - The CGIA set the framework for tort liability claims against all public entities and public employees, including elected and appointed officials, employees, and even "authorized volunteers". Does not cover "independent contractors".
- Key protections: immunities, monetary limits on liability, notice requirements.

# State Tort Liability – Monetary Limits of Liability



UNITED STATES OF AMERICA } ss. CERTIFICATE.  
STATE OF COLORADO }

*J. Jena Griswold, Secretary of State  
of the State of Colorado, do hereby certify*

that in accordance with C.R.S. 24-10-114(1)(b), the limitations on judgments set forth in C.R.S. §24-10-114(1)(a)(I)&(II) are as follows:

For all claims for relief that accrue on or after January 1, 2022, and before January 1, 2026, the adjusted limitation is:

\$424,000 for any injury to one person in any single occurrence.

\$1,195,000 for any injury to two or more persons in any single occurrence; except that, in such instance, no person may recover in excess of \$424,000.

# State Tort Liability

- The CGIA is an IMMUNITY act.
- It states public entities and public employees are immune from tort claims EXCEPT in areas where immunity is expressly waived.
- In waived areas, liability is determined generally in same manner as for private individuals. That is, there must be both a waiver of immunity and liability for a claimant to recover.
  - In litigated claims, this is a two-step process, first a hearing/ruling on whether immunity is waived (*Trinity* hearing) and then a determination of liability, either at trial or by motion practice (summary judgment).
- Public entities do not waive immunities or monetary limits of liability by purchase of insurance.

# State Tort Liability

- The CGIA applies only to STATE LAW torts and does not apply to:
  - Breach of contract claims.
  - Federal law claims (e.g., civil rights claims) (*Note: CGIA immunity can be asserted against a state tort claim and federal qualified immunity (more later) can be asserted against a federal claim, but each not against the other.*)
  - Peace officer “deprivation of rights” claims pursuant to Senate Bill 20-217 (C.R.S. 13-21-131).
- Many non-monetary claims, such as claims for injunctive or declaratory relief, claims of violation of open meetings/open records laws, or Rule 106 claims.

# CGIA Waivers of Immunity Pertinent to Municipalities

- Operation of motor vehicle by public employee.
- Dangerous condition of a public highway, road, or streets within the corporate limits of municipality.
- Dangerous condition of public hospital, jail, public facility in a park or recreation area maintained by a public entity, or of public water, gas, sanitation, electrical, power, or swimming facility.
- Operation and maintenance of public water, gas, sanitation, electrical, power, or swimming facility.
- Dangerous condition of public building.
- Operation of public hospital, correctional facility, or jail.
- Sexual misconduct claims in connection with youth-related activities programs (added 2022).



# CGIA Key Term – “Dangerous Condition”

- Municipality can be liable for a “dangerous condition.” This is:
  - A physical condition;
  - That creates an “unreasonable risk” (Colo. Supreme Court defines this as “a chance of injury, damage, or loss which exceeded the bounds of reason”);
  - That is known or should have been known to exist; and
  - Is proximately caused by the negligent act or omission of the public entity in its construction or maintenance.
- Design deficiencies are NOT a “dangerous condition” under the CGIA.
- Immunity also is not waived for injuries resulting from the “natural condition of unimproved land”.

# CGIA Operational Liability

- The CGIA also waives immunity for claims from certain operations, such as operation of water or sanitation facilities or a swimming pool.
- BUT, sometimes it's not clear what's a "facility." For example, a "water facility" does not include a natural watercourse or an irrigation ditch.
- AND, sometimes accidents happen, and maybe be nobody's fault! So, in these situations, is there a waiver, negligence, and liability?
  - Water/sewer backups are a great example.
  - "No fault" events can be difficult to handle. The injured party is pretty sure "It's your fault" but your (or your insurer's) investigation shows it's not!
  - Practical tips: On PR side, have your talking points ready for "no fault" events. On liability side, don't admit fault or "get ahead" of risk managers and/or insurers.

# CGIA Notice Issues

- The CGIA's notice requirement is a powerful protection.
- Notice required within 182 days after discovery of injury.
- Untimely notice forever forecloses lawsuit.
- Must be filed with governing body or attorney of public entity.
  - The CGIA notice is not a lawsuit but is a prerequisite to a lawsuit.
  - Send CGIA notices to your attorney, risk manager, and insurer as applicable.
- Practical tip: Consider who else might need to know you've received a CGIA notice; e.g., governing body, supervisor, employee(s) involved in the incident?

# CGIA Risk Management

- Embrace, reward, and adequately resource a safety/risk mitigation culture.
- Be proactive in identifying and addressing risky conditions and practices.
- Keep your radar on (and resources available) for addressing dangerous conditions, particularly those that folks complain about/bring to your attention and those that are obviously dangerous.
- Expect that supervisors adopt and maintain current safety policies, practices, and procedures and insist folks follow them.
- Fund, provide, and require frequent training.
- Assign appropriate staff to address and manage claims.

# Federal Civil Rights Liability

- Under federal law, the primary path to civil rights liability against a public official/public employee is 42 U.S.C. Section 1983; it states:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory... subjects, or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...” .

- Liability attaches if there is (1) action under color of law that (2) violates a constitutional or other federally protected right.
- Actions of public officials and employees in the course of performance of their official duties and responsibilities will be considered “under color of law.”

# Federal Civil Rights Liability

- Section 1983 is not itself a substantive statute. It is a remedial statute (the vehicle) by which one can seek money damages for violations of federal rights.
- Common claims v. municipalities under Section 1983 include:
  - First Amendment – free speech, religious free exercise/establishment clauses, right of assembly, right to petition government for redress
  - Fourth Amendment – search, seizure & warrants clauses
  - Fifth Amendment – takings clause and due process clause
  - Fourteenth Amendment – Equal protection
- Section 1983 does not include any caps on monetary damages. Successful plaintiffs may recover attorney fees under Section 1988. Often 1983 damages awarded are “nominal” while attorney fees awarded are very significant.

# Federal Civil Rights Liability

- Public officials/employees have qualified immunity against federal liability.
- Qualified immunity is not a statute or law, it's a judicial doctrine.
- The doctrine essentially provides that a public official/employee is protected from liability if the official/employee has a reasonable, good faith belief in the act that deprived the claimant of a federal right.
- Stated more legalistically, qualified immunity protects public officials and public employees from liability for civil damages “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

# Federal Civil Rights Liability

- This is an objective test, and the doctrine does not apply if there is law in place putting the official on notice that his/her conduct was wrongful.
- Some other noteworthy aspects of qualified immunity:
  - It is immunity from suit and not a mere defense to liability. That's why it's raised at the outset of a case, and why its denial is immediately appealable.
  - It applies in actions for civil liability under federal law and is not a “blanket” protection against all consequences of actions. For example, federal qualified immunity does apply to state tort claims, criminal charges, internal investigations, or employer disciplinary proceedings.
  - It applies to any “state actor” and not solely to fire, police and other first responders.



# Federal Civil Rights Liability – Risk Management

- Potential civil rights liability—particularly with respect to cutting-edge policies and initiatives that are often in the governing body/manager wheelhouse—can be tricky to assess. What to do?
  - Take the time needed and gather the information needed to properly evaluate the pros/cons and risks of any proposed action.
  - Seek expertise as needed. Call a litigator before litigation! Civil rights liability principles are highly complex and fact-specific. In addition to your general counsel’s input, it can be useful to consult with an attorney with litigation expertise in the area in question (e.g., search/seizure, free speech, etc.)
  - Be cautious and circumspect. Civil rights liability exposure can be heightened by “bad facts” that suggest (or are perceived to be based upon) retaliatory conduct or improper animus. In managing these risks, some “wise words” about avoiding “bad facts” can be helpful.

# Employment Practices Liability

- Every employer has workplace issues, and every employer will face claims of employment practices liability (EPL). From CIRSA's perspective—and probably yours too—EPL risks are “ever present” and EPL disputes and claims are among the most difficult to handle:
  - Time-consuming and emotionally draining – issues are personal. Everything a supervisor says, does, and writes will be scrutinized and second-guessed.
  - They are difficult to settle, and once they are in litigation, they are difficult to have dismissed on summary judgment motion.
- And EPL claims are expensive! Whether under federal or state law, many EPL claims allow the claimant to recover both economic and non-economic damages, and prevailing plaintiffs are often entitled an award of attorney's fees.

# Some Noteworthy Federal & State Employment Laws

- Federal/state anti-discrimination & harassment statutes, including Title VII, the Colorado Anti-Discrimination Act, Pregnancy Discrimination Act, POWR Act, Age Discrimination in Employment Act, and others.
- Americans with Disabilities Act.
- Federal and state wage laws, including the Fair Labor Standards Act pay and overtime rules.
- Worker injuries: primarily governed by workers' compensation law.
- Equal Pay for Equal Work Act.
- Family Medical Leave Act / Healthy Families and Workplaces Act (HFWA).
- Colorado Paid Family & Medical Leave Insurance Act (FAMLI).
- Federal and state whistleblower protection laws.
- Colorado lawful off-duty activities statute.
- Wrongful discharge claims.
- Federal and state military leave statutes.
- Contract and implied contract claims.
- Disputes over “at-will” employment and Due Process claims.

# Harassment

- Every municipality needs to have an up-to-date harassment policy in place covering all protected classes.
- The policy should address unacceptable conduct and define when unacceptable conduct constitutes harassment (including under the Colorado POWR Act). The policy should set out a complaint procedure that includes multiple avenues, establish an investigation process, set out consequences, and protect against retaliation.
- Policy's purpose is two-fold:
  - You want to define, deter, and prevent unacceptable conduct; and
  - Having and promptly carrying out an effective policy is a significant liability protection for the entity (not an immunity, but a potential defense).

# Harassment

- In the legal realm, “hostile work environment” is a legal term of art. However, “hostile work environment” is sometimes used in common parlance as a synonym for “people are being mean to me” when in fact the definition calls for the HWE to be connected to a protected class, such as gender, age, etc.
- This legal framework isn’t intended to set a “civility code,” BUT, it also does not prevent your organization from setting & enforcing other expectations of acceptable conduct. Management and the manager’s office is at the forefront of setting respectful workplace culture. Thus,
  - Have both expectations for professionalism, civility, respectful conduct, etc., and an up-to-date harassment policy.
  - This will better enable the organization to foster a positive workplace and deal effectively with a full spectrum of bad workplace conduct.

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# EPL Arising from Bad Process

- A huge generator of EPL liability is claims arising from bad process. In general, employers get to set the rules and procedures surrounding discipline and termination. Make sure you follow them—you will be held to them!
- Note that public employment often is not “at will”—perhaps even if you say it’s “at-will” in your policies. For example:
  - If your policies also state an employee can only be fired for cause, and/or only after a hearing, that’s not “at-will.” See this CIRSA article: <https://www.cirsa.org/news/employment-at-will/>.
  - And some positions by statute, charter, ordinance, collective bargaining agreement, contract or otherwise, simply are not “at will.”
- A failure to follow process can give rise to federal due process claims!

# EPL – Retaliation Risk

- Retaliation is one of the most common and troublesome EPL claims. (For FY 2023, 56% of EEOC Charges filed were retaliation claims).
- In general, retaliation can become actionable where an employer takes some adverse action against an employee because of their exercise of a protected right or engagement in some protected activity.
- For retaliation claims, everyone is in this “protected class.” That is, a claimant does not have to be within the protections of an underlying anti-discrimination law in order to pursue a retaliation claim.
- Timing alone can support a retaliation claim. Thus, supervisors must be aware of timing issues (but, on the other hand, the mere threat of a retaliation claim should not prevent doing the right thing).

# EPL Risk Management

- Give employment issues prompt and appropriate attention & follow-up.
- Fully review the facts of a situation before taking action. Be deliberate and use a “reality check” to ensure there is no whiff of retaliation.
- Follow (and train on) your policies and procedures; don’t go “off-script” or skip steps unless agreed upon.
- Be sure involvement in personnel matters is appropriately limited, including your own if you are the person who hears the appeal in an employee discipline case.
- Utilize available resources before taking action—check with HR and legal staff, consult with other resources as needed.
- Foster and expect a workplace based on fairness, dignity and respect.



# “Non-Monetary Relief” Claims for Liability

- Municipalities frequently face claims for “non-monetary” relief. While these claims do not carry a risk of an award of money damages, they are often high-profile claims that receive a lot of press and citizen scrutiny. Common types include:
  - OML violations: No money damages provision but court can issue order to comply and invalidate action taken in violation of statute. Successful claimant entitled fees/costs. Any citizen has standing!
  - CORA violations: remedies similar to OML.
  - C.R.C.P. 106(a)(4): “on the record” review of a quasi-judicial decision. Most commonly used to challenge land use and licensing decisions.
  - Declaratory relief: Declaration of rights/duties or of whether some action or enactment is lawful.
  - Injunctive relief claims: Request for court order directing you do/not do something.

# Concluding Thoughts

- While there are many aspects of municipal liability that officials and management cannot fully control—e.g., public perceptions, the actions of claimants, the inclinations of judges, the enactments of federal and state legislatures, etc.—embracing wise leadership in the areas where you have control will support your entity’s success and reduce your risks.
- Some examples not yet mentioned:
  - Help ensure your entity’s actions and decisions are always taken within the appropriate framework and on the basis of merits alone.
  - Encourage everyone above and below to embrace good process and commit to a “no surprises” approach.
  - Examine your entity’s loss and liability trends, and take action where needed.
  - With your attorney, risk managers, and others, educate those serving at all levels in your organization about liability risks—help them develop a good liability radar!

Concluding Thoughts

**Questions/Discussion**

**Thank you for the opportunity to present!**

# About the Colorado Intergovernmental Risk Sharing Agency (CIRSA)

- Public entity self-insurance pool for property, liability, and workers' compensation coverages
- Formed by in 1982 by 18 municipalities pursuant to CML study committee recommendations
- Not an insurance company, but an entity created pursuant to Colorado statutes and intergovernmental agreement of our members
- Total membership today stands at 290 member municipalities and affiliated legal entities
- Member-owned, member-governed organization
- No profit motive – sole motive is to serve our members effectively and responsibly
- CIRSA Board made up entirely of municipal officials
- Seek to be continually responsive to the liability-related needs of our membership – coverages and associated risk management services, sample publications, training, and consultation services, as well as specialty services such as home rule charter review
- We have the largest concentration of liability-related experience and knowledge directly applicable to Colorado municipalities

# Speaker Bios

**Sam Light** is Deputy Executive Director/General Counsel for CIRSA. Prior to joining CIRSA in 2018, he was a partner with the Denver law firm of Light | Kelly, P.C., specializing in municipal and other public entity law, insurance law, and defense of public entities and elected officials. Sam has over 30 years of experience serving as general or special counsel to several Colorado cities, towns, self-insurance pools, and other public entities, and he is a frequent speaker on public entity risk issues. (Contact Sam at ([saml@cirsa.org](mailto:saml@cirsa.org).)

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