

FHMS COVID-19 Resource Center:

SUGGESTIONS FOR PENNSYLVANIA MUNICIPALITIES IN A COVID-19 WORLD

Municipalities are in a unique position in that their "business" can encompass a wide array of locations and environments. They also have statutory governmental immunity, subject to certain exceptions. Below are recommendations for limiting liability exposure and protecting municipal employees and visitors. We have not provided recommendations for schools as these facilities present issues that are beyond the scope of this article.

Governmental Immunity and the Real Property Exception

Pennsylvania's Political Subdivision Tort Claims Act ("PSTCA"), 42 Pa.C.S. § 8541, *et seq.*, is a stringent rule of statutory governmental immunity. Except as otherwise stated in the PSTCA, no local agency is liable for any damages on account of any injury to a person or property cause by any act of the local agency. *See* 42 Pa. C.S. § 8541. The exception to this rule requires three conditions be met. First, the damages must be recoverable under common law or a statute creating a cause of action if the PSTCA had not applied. *See* 42 Pa. C.S. § 8542(a)-(a)(1). Second, the injury must be caused by the negligent acts of the local agency or an employee acting within the scope of his office or duties with respect to one of the exceptions. *See* 42 Pa. C.S. § 8542(a)(2). Third, the acts alleged must fall within one of the eight enumerated exceptions in section 8542(b). *See* 42 Pa. C.S. § 8542(a)(2)-(b)(1)-(8).

These exceptions are to be narrowly interpreted; however, visitors may try to allege COVID-19 exposure claims under the real property exception:

(b) Acts which may impose liability. The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:

(3) Real property. The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency.

The Pennsylvania Supreme Court recently addressed the meaning of "care" in the above exception and refocused the exception to require that facilities be in an appropriate condition for their anticipated use. *Brewington v. City of Philadelphia*, 199 A.3d 348 (Pa. 2018) (finding that the plaintiff sufficiently alleged that the school negligently cared for real property and that governmental immunity did not apply for failing to affix mats to gym walls).

Although some cases hold a municipality liable for negligent maintenance of real property, no case law addresses whether the virus would be considered a dangerous condition of the real property. Similarly, no court has ever addressed whether improper sanitization rendered a municipal facility not in a condition for its anticipated use. However, a plaintiff who claims exposure from a municipal facility may argue that lack of sanitization made the facility unsafe for its anticipated use. Also, codefendants might join a municipality on the same theory in an effort to identify other sources of exposure.

Recommendations

Below are recommendations to minimize liability from COVID-19 exposure claims brought under the real property exception. Documentation of efforts to prepare and keep the property safe will be a critical effort.

(1) Guidelines Specific to the Municipality

A municipality should create guidelines specific to its facilities, operation, and location. What may be appropriate for a local park may not suffice for a municipal building, recreational facility, or library. Also, the reopening phase that the municipality is in will dictate the level of restrictions. Pennsylvania Governor Tom Wolf uses a three-phase matrix to determine the level of restrictions applicable to a county. Those phases and their respective restrictions can be found [here](#). In addition to the restrictions applicable to the phase the county is in, it is important to be familiar with and implement CDC guidelines. For quick reference, the following is specific CDC guidelines for [Park Administrators](#), [Park Visitors](#), [Businesses](#), [Cloth Masks](#), and [Hand Hygiene](#). A municipality's guidelines should address indoor and outdoor spaces separately. Things to consider include:

- Whether, when and where will masks or face coverings be required;
- Whether to make face coverings available for employees, visitors, or both;
- What accommodations should be made for individuals with health issues that limit use of masks;
- How social distancing and utilizing face masks will be enforced;
- Whether temperature checks will be made;
- Whether there will be specific points of entry and exit;
- Whether there will be limits on the number of people permitted in certain areas; and
- Whether there will be more stringent rules for particular locations or events.

Once these guidelines are established, they should be posted on municipal websites and distributed to local residents via community messaging services or email. The municipality's guidelines should be clearly visible on the websites and also posted on websites for specific locations (i.e. parks, library, activity center). Signage should be posted at entry points and/or provided directly to visitors upon arrival.

The notice should identify that the guidelines are intended to benefit the visitor's health as well as the health of other visitors and municipal employees. The notice should advise the visitor that, by entering the municipal property, they agree to abide by the guidelines. Finally, the notice should advise that precautions to provide clean and sanitized facilities were taken, but that entry or use of the facilities is at a visitor's own risk. Please note that refusing to admit individuals to certain municipal facilities based on failure to mask or submit to temperature checks could implicate constitutional concerns. Also, any such notice would likely not be an enforceable pre-injury waiver under the *Top Copy / Employer's Liability* test. A more detailed discussion on that test and pre-injury liability waivers can be found [here](#).

(2) Documentation of Temperature Checks

If temperature checks are being done, then documentation of same should be kept in secure areas and out of the public view. At the end of each day, the documents should be removed and stored in a secure location. The next day should start with a clean sheet. If possible, an alternate form of identification should be considered, such as membership accounts or driver's license numbers. The type of thermometer used should be documented by model and number, along with a record that the device was tested for accuracy. Consider using multiple thermometers at moderate to high traffic locations to permit proper sanitization and to allow quicker processing of visitors.

(3) *Inspections and Sanitization*

Consider having an inspection checklist to be completed before a facility opens and at set intervals throughout the day. Employees should inspect the facility, including its equipment and children's play areas, and document any sanitization or other measures, such as hand sanitizers (if offered) placed at designated stations. Under the real property exception, lack of notice is generally not a defense. Thus, municipalities should consider having employees check the sanitizer stations at certain intervals to ensure that sanitizer is present and adequately full.

Develop instructions for sanitizing facilities that are consistent with the federal and state guidance. The instructions should identify all areas that have routine human contact as locations that must be sanitized and the frequency for same. In addition to the instructions, a sanitization punch list could be used to document when areas have been cleaned. Any such list or documentation should be retained and identify the employees who did the work.

(4) *Staffing*

Use facility attendance records to coordinate staffing and shift coverage from low traffic areas to high traffic areas. In high volume locations where visitors cannot social distance, consider having employees perform routine walkthroughs and monitoring. Develop a plan for visitors who refuse to comply with the safety requirements.

(5) *Hotlines*

Consider having a hotline or designated phone number through which civilians can report concerns or issues of non-compliance with the guidelines, areas that need to be sanitized, or the need for more hand sanitizer.

(6) *Outdoor Facilities*

For outdoor facilities, such as parks or campgrounds, temporary mobile stations may be necessary to provide a copy of the guidelines and track the number of visitors. Also, the stations can provide a point of access for visitors to report situations or concerns of non-compliance with the guidelines.

(7) *Indoor Facilities*

For indoor facilities, such as libraries and recreation centers, consider limiting access, pedestrian traffic patterns, partial or staggered openings, and changes to make social distancing more feasible. Signs stating a section is closed or directing pedestrians may be appropriate. Libraries may want to consider rotating book carts. Consider having a selected number of books available for a set period of time and then having those books taken out of service for cleaning and replaced with another cart of books. Play areas and toys may need to be removed, limited in number, or cleaned more frequently. Facilities with communal books or toys may need to post an advisory that those items cannot be routinely sanitized during business hours and that visitors use them at their own risk.

Please do not hesitate to contact us with any questions or concerns.

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