

Department of State Health Services

**Summary of Statutory Provisions Affecting the Liability of Providers in a Public Health Emergency
September 2009**

Prepared and Updated by the Office of General Counsel

The statutes in this table are described in summary form with many provisions omitted. The actual statute and relevant case law should always be consulted for application in a particular situation. This document is not meant to substitute for the advice of an attorney.

This chart does not describe all statutes that generally (1) protect a governmental or other entity as opposed to employees, officers, or volunteers or (2) apply to tort liability or medical malpractice. The omission of these statutes does not imply they are unimportant or irrelevant. Consultation with an attorney is appropriate to determine the application of other statutes.

Statute/Law	Who is covered?	Immunity from what?	Limitations on or exceptions to immunity?	Comments
Sovereign immunity under U.S. Constitution, 11th Amendment	State agency or individual sued in official capacity	Immune from liability for damages and/or from lawsuit	Does not apply if sovereign immunity has been waived, e.g., sovereign immunity is waived by Texas Tort Claims Act (see below).	
Official immunity doctrine	State or local government employee or official sued in individual capacities	Immune from personal liability for negligence	Applies when employee was performing duty requiring exercise of discretion, acting within scope of authority, and acting in good faith.	The definition of official immunity doctrine can be found in Op. Tex. Att'y. Gen. No. GA-0115 (2003).
Government Code §§ 421.061, Civil Liability, and 421.062, Liability Under Interlocal Contract	1) Officer or employee of state or local agency performing a homeland security activity, or 2) Volunteer performing homeland security activity at the request or under the direction of an officer or employee of state or local agency	Considered members of state military forces. Members of such forces are not civilly liable for an act performed in the discharge of duty under Government Code § 431.085.	1) Activity must be under procedures or circumstances described in governor's homeland security strategy. 2) Must be within course and scope of person's authority. 3) Does not apply if willfully or wantonly negligent, conscious indifference, or reckless disregard for safety of others.	Under Government Code § 421.062, Liability Under Interlocal Contract, state or local agency that furnishes service related to homeland security activity under an interlocal contract is immune from civil liability. Requires the existence of a contract with specific terms and acting in good faith. Protects government unit, not employee or officer.

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Government Code § 418.006, Civil Liability	Officer or employee of a state or local agency or a volunteer acting at the direction of an officer or employee of a state or local agency.	Considered for the purposes of Government Code § 431.085 (see entries in this chart for Government Code, §§ 421.061 and 421.062) to be a member of the state military forces ordered into active service of the state by proper authority and is considered to be discharging a duty in that capacity if the person is performing an activity related to sheltering or housing individuals in connection with the evacuation of an area stricken or threatened by disaster.	Activity must be related to sheltering or housing individuals in connection with the evacuation of an area stricken or threatened by disaster.	Section 418.006 was added by Chapter 1408 (House Bill 4409), Acts of the 81 st Legislature, Regular Session, 2009.
Government Code § 418.185(e), Mandatory Evacuation	Officer or employee of the state or a political subdivision who issues or is working to carry out a mandatory evacuation order.	Immune from civil liability for any act or omission within the course and scope of the person's authority under the order.	Must be acting within course and scope of the person's authority under the mandatory evacuation order.	Section 418.185 was added by Chapter 1280 (House Bill 1831), Acts of the 81 st Legislature, Regular Session, 2009.
Civil Practice and Remedies Code §79.003, Disaster Assistance	<p>Person giving care, assistance or advice with respect to the management of an incident:</p> <p>1) that is a disaster (man-made or natural) and</p> <p>2) in which the care, assistance or advice is provided at the request of local, state, or federal agencies.</p>	Immune from civil liability for act or omission.	<p>1) Does not apply to a person who expects or receives compensation from or on behalf of the recipient of the care, assistance, or advice in excess of reimbursement for expenses.</p> <p>2) Does not apply to reckless conduct or intentional, willful, or wanton misconduct.</p>	
Health and Safety Code § 81.007, Limitation on Liability	Private individual performing duties in compliance with orders or instructions of DSHS or a health authority issued under Communicable Disease Prevention and Control Act, Health and Safety Code, Chapter 81.	Not liable for death of or injury to person or for damage to property.	<p>1) Applies to private individual (not defined).</p> <p>2) Does not apply to willful misconduct or gross negligence.</p> <p>3) Applies only to efforts to control communicable diseases.</p>	

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<p>Title 42, United States Code, §247d-6d, "Public Readiness and Emergency Preparedness Act" or PREP Act added by Public Law 109-148 (2005)</p>	<p>A person or entity that is:</p> <ol style="list-style-type: none"> 1) a manufacturer of a [covered] countermeasure; 2) a distributor of such countermeasure; 3) a program planner of such countermeasure; 4) a qualified person who prescribed, administered, or dispensed such countermeasure; or 5) an official, agent, or employee of a person or entity described in 1-4. (42 USC §247d-6d(i)(2)(B)). <p>The coverage of the statute may be modified by the contents of the "declaration" issued by the secretary of HHS to activate this coverage (42 USC §247d-6d(b)).</p>	<p>"A covered person shall be immune from suit and for loss caused by, arising out of, relating to or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration . . . has been issued with respect to such countermeasure." (42 USC §247d-6d(a)(1)).</p>	<ol style="list-style-type: none"> 1) Does not protect willful misconduct (42 USC §247d-6d(d)). 2) The duration and scope of the coverage is established and may be modified by the declarations and modifications of declarations issued by the secretary of HHS. 	<ol style="list-style-type: none"> 1) Declarations are found at www.hhs.gov/disasters/discussion/planners/prepact/index.html. As of August 2009, pandemic influenza declarations have been issued for vaccine, antivirals, diagnostics, personal respiratory protection devices, and respiratory support devices. 2) Regulatory clearance to use certain types of countermeasures must be granted by the FDA in the form of Emergency Use Authorizations (EUAs). For examples, see the above declarations affecting the use of Tamiflu® and Relenza®: declaration (73 Fed Reg 61861, October 17, 2008); amendment of declaration (74 Fed Reg 29213, June 19, 2009); and the emergency use authorization (74 Fed Reg 38648, August 4, 2009) 3) The National Vaccine Injury Compensation (NVIC) Program Vaccine Injury Table (42 U.S.C. § 300aa-14) was administratively amended by a notice in the 70 Fed Reg 19092, April 5, 2005, to include trivalent (seasonal) influenza vaccines (killed and live virus vaccines). The NVIC is not an emergency act. The current vaccine injury table appears in the Code of Federal Regulations at 42 CFR § 100.3. The HHS Secretary has not added the H1N1 vaccine to the table.

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Title 42, United States Code, Chapter 139, Volunteer Protection, §§ 14501-14505	Volunteer of a nonprofit organization or governmental entity	Not liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity.	<ol style="list-style-type: none"> 1) Volunteer must be acting within scope of responsibilities for organization or entity. 2) If required, volunteer must be properly licensed. 3) Does not protect against willful or criminal misconduct, gross negligence, reckless misconduct, or conscious flagrant indifference to rights or safety of others. 4) Does not protect if volunteer violated federal or state civil rights law. 5) Does not protect the entity using the volunteer. 6) Does not protect volunteer for for-profit entities. 	<ol style="list-style-type: none"> 1) Federal law preempts inconsistent state law unless state law provides additional protection to covered persons. 2) States may elect to opt out of this law. Texas has not done so.
Civil Practice and Remedies Code § 74.151, Liability for Emergency Care	Person who in good faith administers emergency care.	Not liable in civil damages for act performed during the emergency.	<ol style="list-style-type: none"> 1) Does not apply to willfully or wantonly negligent acts. 2) Does not apply if care was done for or in expectation of remuneration, provided that being legally entitled to remuneration for the care shall not determine whether or not the care was administered for or in anticipation of remuneration. 3) Does not apply to care administered by a person who was at the scene because he or a person he represents was an agent soliciting business. 4) Does not apply to a person whose act or omission was a cause of the emergency. 	Part of Texas "Good Samaritan" law.

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Civil Practice and Remedies Code § 74.152, Unlicensed Medical Personnel	Person not licensed or certified in the healing arts who in good faith administers emergency care as emergency medical service personnel.	Not liable in civil damages for act performed.	<ul style="list-style-type: none"> 1) Does not apply to willfully or wantonly negligent act. 2) Applies only if care administered in good faith. 3) Does not matter whether care is for or in expectation of remuneration. 	Part of Texas “Good Samaritan” law.
Civil Practice and Remedies Code, Chapter 84, Charitable Immunity and Liability Act of 1987	Volunteer health care provider who is serving as a direct service volunteer of a charitable organization	Immune from civil liability for any act or omission resulting in death, damage or injury to a patient.	<ul style="list-style-type: none"> 1) Must have acted within scope of duties and within scope of license. 2) Before services, patient or person responsible for patient must sign document acknowledging the voluntary status and immunity from liability except in certain circumstances. 3) Care must be provided without expectation of compensation. 4) Does not apply to act or omission that is intentional, willfully negligent, conscious indifference, or reckless disregard for safety. 5) Does not apply to government entities or employees. 	<ul style="list-style-type: none"> 1) Slightly different immunity granted to volunteer officers, directors or trustees of charitable organization. 2) Also provides for limit on damages against an employee of a nonhospital, charitable organization. 3) Also provides for limit on damages against a nonhospital charitable organization. 4) Also provides for limit on damages against hospital or hospital system. 5) § 84.003 defines “volunteer health care provider.” Chapter 791 (Senate Bill 1211), Acts of the 81st Legislature, Regular Session, 2009, amended the definition.

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Civil Practice and Remedies Code, Chapter 108, Limitation of Liability for Public Servants	1) Public official; 2) State employee or officer; 3) Physician or psychiatrist who was performing services under a contract with any state agency; 4) Officer, volunteer, or employee of local government (county, city, district, political subdivision of state); 5) Physician providing emergency or poststabilization services to patients in local government hospital; or 6) Employee of municipal hospital management contractor	Caps personal liability of public servant for damages arising from personal injury, death, or deprivation of right, privilege, or immunity or property damage resulting from act or omission by the public servant.	1) Act or omission must be within course and scope of duties. 2) Limits personal liability of public servant to \$100,000 in damages only if Chapter 104 (see below), Chapter 102 (see below), insurance or coverage by interlocal government would apply (and cover that amount). 3) Does not include contractors or employees of contractors. 4) Does not apply to actions arising under the constitution or laws of the United States.	1) Provision dovetails with Civil Practice and Remedies Code, Chapters 102 and 104 (see below) that provide for indemnification by state or local government for person's liability. 2) Local health authorities are "state officers when performing duties prescribed by state law" under Health and Safety Code § 121.024; therefore, they may be entitled to protections for state officers. 3) It is unclear whether the law will cover a physician under contract to a local health department (LHD) when the LHD is under contract with the state.
Civil Practice and Remedies Code, Chapter 104, State Liability for Conduct of Public Servants	Act or omission in the scope of duties on behalf of a state agency by: 1) State employee or officer, or 2) Physician or psychiatrist who was performing services under a contract with any state agency.	1) Negligence; 2) Deprivation of a right, privilege, or immunity secured by the constitution or laws of this state or the United States; or 3) Indemnification in best interests of state as determined by Attorney General.	Provides for indemnification by state (state pays damages awarded against covered person after trial or settlement), rather than immunity from liability. State indemnifies up to \$100,000 per person or \$300,000 per occurrence. Does not apply to willful or wrongful act or gross negligence. The Attorney General will defend public servant in lawsuit.	Provision dovetails with Civil Practice and Remedies Code, Chapter 108, which caps personal liability at \$100,000.

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Civil Practice and Remedies Code, Chapter 102, Tort Claims Payments by Local Governments	<p>1) Officer, volunteer, or employee of local government (county, city, district, political subdivision of state), or</p> <p>2) Employee of municipal hospital management contractor.</p>	Local government may pay damages (indemnify) for negligent act or omission in course and scope of employment.	<p>1) Local government may indemnify officers, employees, or volunteers. Important to identify whether local government has actually chosen to indemnify all, some, or none of its employees.</p> <p>2) Does not cover official misconduct, willful or wrongful act or omission, or gross negligence.</p> <p>3) Local government may indemnify up to \$100,000 per person or \$300,000 per occurrence.</p>	<p>1) Provision dovetails with Civil Practice and Remedies Code, Chapter 108, which caps personal liability at \$100,000.</p> <p>2) See Health & Safety Code, Chapter 261, Subchapter C, on municipal hospital management contractor.</p>
Civil Practice and Remedies Code, Chapter 101, Texas Tort Claims Act	The Act addresses liability of governmental unit (state, political subdivision, or municipal hospital management contractor) for wrongful act or omission or negligence of officer or paid employee (not volunteer or independent contractor) acting within the scope of employment for property damage, personal injury, or death caused by motor vehicle or condition or use of tangible or real property.	The Act provides that filing suit under the Act against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.	<p>1) Liability of state or city capped at \$250,000 per person and \$500,000 per occurrence.</p> <p>2) Liability of other local government capped at \$100,000 per person and \$300,000 per occurrence.</p> <p>3) Because governmental liability "caps" (amounts government will pay) may be higher than amounts government will pay if individual employees are liable (compare Civil Practice and Remedies Code, Chapters 102 and 104, above), many plaintiffs will elect to sue the governmental entity, not the individual.</p> <p>4) A governmental unit within a public health district is not liable for district personnel or property.</p> <p>5) A city is liable under the Act for governmental functions (health, hospitals, EMS, etc.) but not for proprietary functions (any activity that is abnormally dangerous, etc.).</p>	<p>1) The language on irrevocable election by plaintiff is found in Civil Practice and Remedies Code § 101.106.</p> <p>2) See Health and Safety Code, Chapter 261, Subchapter C, on municipal hospital management contractor.</p>

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<p>The Emergency Management Assistance Compact (EMAC), Health and Safety Code § 778.001, Article VI</p>	<p>"Officers or employees of a party state rendering aid in another state pursuant to this compact. . ."</p>	<p>"Tort liability" – specifically, covered persons "shall be considered agents of the requesting state for tort liability and immunity purposes; and no party state or its officers or employees rendering aid . . . shall be liable on account of any act or omission in good faith on the part of such forces while so engaged or on account of the maintenance or use of any equipment or supplies in connection therewith."</p>	<p>1) Does not cover willful misconduct, gross negligence, or recklessness.</p> <p>2) Covers only "officers or employees" not private citizens.</p> <p>3) Aid must be at the request of the host state government, during a declared disaster, or during exercises.</p>	<p>All 50 states, Puerto Rico, the U.S. Virgin Islands, Guam, and the District of Columbia are party states.</p>
<p>Title 42 United States Code, § 233(p), Administration of Smallpox Countermeasures by Health Professionals (enacted in the Homeland Security Act of 2002, Public Law 107-296, Section 304)</p>	<p>1) "Covered person" includes health care entities; drug and vaccine manufacturers; qualified persons who administer the countermeasure; or officials, agents, or employees of any of these persons.</p> <p>2) "Qualified" means that the person is authorized under the law of the state to administer the countermeasure.</p>	<p>1) A "covered person" means an employee of the Public Health Service with respect to liability arising out of administration of a "covered countermeasure" against smallpox to an individual during the effective period of a declaration by the Secretary of the U.S. Department of Health and Human Services.</p> <p>2) A "covered countermeasure" means a substance that is used to prevent or treat smallpox or vaccinia immune globulin used to control or treat the adverse effects of vaccinia inoculation. The substance must be specified in the declaration.</p>	<p>The United States is liable for claims arising from administration of covered countermeasure to an individual.</p> <p>The United States has the right to recover (from the covered person) damages that it awarded or paid under this section if the covered person's conduct was grossly negligent, reckless, illegal, willful misconduct, or a failure of obligation under a contract between the covered person and the United States.</p>	<p>A declaration by the Secretary may be issued when "an actual or potential bioterrorist incident or other actual or potential public health emergency makes advisable the administration of a covered countermeasure to a category or categories of individuals."</p> <p>There is no current declaration issued by the secretary of HHS under this law.</p>
<p>Title 42 United States Code §§ 239-239h added by Public Law 108-20, Smallpox Emergency Personnel Protection Act of 2003</p>	<p>Person injured by administration of smallpox countermeasure including:</p> <p>1) Health care worker or emergency responder who is part of a smallpox emergency response team to whom a smallpox vaccine is administered or</p> <p>2) Individual injured by accidental vaccinia inoculation through contact.</p>	<p>Provides a "no fault" source of benefits and compensation for reasonable and necessary medical treatment reimbursement, certain lost employment income, lump sum death payment, and lost wages death benefit.</p>	<p>1) Coverage is strictly "pre-event".</p> <p>2) Coverage is analogous to worker's compensation, rather than liability coverage.</p> <p>3) Coverage is triggered by a declaration under 42 USC § 233(p) above.</p>	<p>There is no current declaration issued by the secretary of HHS under this law.</p>