

GOVERNMENTAL IMMUNITY REVISIONS

2020 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Todd Weiler

House Sponsor: Craig Hall

LONG TITLE

General Description:

This bill modifies provisions relating to governmental immunity.

Highlighted Provisions:

This bill:

- ▶ modifies the definitions of "governmental entity," "political subdivision," and "state" applicable to the Governmental Immunity Act of Utah;
- ▶ authorizes the attorney general to waive Eleventh Amendment immunity in cases brought under the governmental immunity law in federal court;
- ▶ prohibits a private attorney representing the state to waive Eleventh Amendment immunity in federal court without the attorney general's written consent;
- ▶ prohibits a party to a lawsuit under the Governmental Immunity Act of Utah from waiving or being determined to have waived immunity from suit unless immunity is waived in statute; and
- ▶ modifies a provision relating to the district courts' exclusive jurisdiction over an action under the Governmental Immunity Act of Utah.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:



28 AMENDS:

29 **63G-7-102**, as last amended by Laws of Utah 2019, Chapter 280

30 **63G-7-202**, as last amended by Laws of Utah 2014, Chapter 415

31 **63G-7-301**, as last amended by Laws of Utah 2019, Chapters 229 and 248

32 **63G-7-501**, as renumbered and amended by Laws of Utah 2008, Chapter 382



34 *Be it enacted by the Legislature of the state of Utah:*

35 Section 1. Section **63G-7-102** is amended to read:

36 **63G-7-102. Definitions.**

37 As used in this chapter:

38 (1) "Arises out of or in connection with, or results from," when used to describe the
39 relationship between conduct or a condition and an injury, means that:

40 (a) there is some causal relationship between the conduct or condition and the injury;

41 (b) the causal relationship is more than any causal connection but less than proximate
42 cause; and

43 (c) the causal relationship is sufficient to conclude that the injury originates with, flows
44 from, or is incident to the conduct or condition.

45 (2) "Claim" means any asserted demand for or cause of action for money or damages,
46 whether arising under the common law, under state constitutional provisions, or under state
47 statutes, against a governmental entity or against an employee in the employee's personal
48 capacity.

49 (3) (a) "Employee" includes:

50 (i) a governmental entity's officers, employees, servants, trustees, or commissioners;

51 (ii) members of a governing body;

52 (iii) members of a government entity board;

53 (iv) members of a government entity commission;

54 (v) members of an advisory body, officers, and employees of a Children's Justice

55 Center created in accordance with Section **67-5b-102**;

56 (vi) student teachers holding a license issued by the State Board of Education;

57 (vii) educational aides;

58 (viii) students engaged in internships under Section **53B-16-402** or **53G-7-902**;

- 59 (ix) volunteers as defined by Subsection [67-20-2\(3\)](#); and
60 (x) tutors.
- 61 (b) "Employee" includes all of the positions identified in Subsection (3)(a), whether or
62 not the individual holding that position receives compensation.
- 63 (c) "Employee" does not include an independent contractor.
- 64 (4) "Governmental entity" means:
- 65 (a) the state [~~and its political subdivisions, and~~];
66 (b) a political subdivision of the state;
67 (c) a publicly owned corporation created by the state or by a political subdivision of the
68 state for the administration of a public purpose relating to the state or citizens of the state; or
69 ~~[(b)]~~ (d) a law enforcement agency, as defined in Section [53-1-102](#), that employs one
70 or more law enforcement officers, as defined in Section [53-13-103](#).
- 71 (5) (a) "Governmental function" means each activity, undertaking, or operation of a
72 governmental entity.
- 73 (b) "Governmental function" includes each activity, undertaking, or operation
74 performed by a department, agency, employee, agent, or officer of a governmental entity.
- 75 (c) "Governmental function" includes a governmental entity's failure to act.
- 76 (6) "Injury" means death, injury to a person, damage to or loss of property, or any other
77 injury that a person may suffer to the person or estate, that would be actionable if inflicted by a
78 private person or the private person's agent.
- 79 (7) "Personal injury" means an injury of any kind other than property damage.
- 80 (8) "Political subdivision" means [~~any~~]:
- 81 (a) a county, city, town, school district, community reinvestment agency, special
82 improvement or taxing district, local district, or special service district[;];
83 (b) an entity created by an interlocal agreement adopted under Title 11, Chapter 13,
84 Interlocal Cooperation Act[;]; or
85 (c) any other governmental subdivision [~~or public corporation~~] of the state.
- 86 (9) "Property damage" means injury to, or loss of, any right, title, estate, or interest in
87 real or personal property.
- 88 (10) "State" [~~means the state of Utah, and includes each~~] includes:
89 (a) an office, department, division, agency, authority, commission, board, institution,

90 hospital, college, ~~H~~→ [H] **university**, [H] ←~~H~~ [~~Children's Justice Center,~~] or other instrumentality of
 90a the state[-];

91 and

92 (b) the Children's Justice Center.

93 (11) "Willful misconduct" means the intentional doing of a wrongful act, or the
 94 wrongful failure to act, without just cause or excuse, where the actor is aware that the actor's
 95 conduct will probably result in injury.

96 Section 2. Section **63G-7-202** is amended to read:

97 **63G-7-202. Act provisions not construed as admission or denial of liability --**

98 **Effect of waiver of immunity -- Exclusive remedy -- Joinder of employee -- Limitations on**
 99 **personal liability -- Public duty does not create specific duty.**

100 (1) (a) Nothing contained in this chapter, unless specifically provided, may be
 101 construed as an admission or denial of liability or responsibility by or for a governmental entity
 102 or its employees.

103 (b) If immunity from suit is waived by this chapter, consent to be sued is granted, and
 104 liability of the entity shall be determined as if the entity were a private person.

105 (c) No cause of action or basis of liability is created by any waiver of immunity in this
 106 chapter, nor may any provision of this chapter be construed as imposing strict liability or
 107 absolute liability.

108 (2) (a) Nothing in this chapter may be construed as adversely affecting any immunity
 109 from suit that a governmental entity or employee may otherwise assert under state or federal
 110 law.

111 (b) The attorney general representing the state in an action in federal court under this
 112 chapter may waive Eleventh Amendment immunity for the state.

113 (c) A private attorney representing the state in an action in federal court under this
 114 chapter may not waive Eleventh Amendment immunity for the state without the attorney
 115 general's written consent.

116 (3) (a) Except as provided in Subsection (3)(c), an action under this chapter against a
 117 governmental entity for an injury caused by an act or omission that occurs during the
 118 performance of an employee's duties, within the scope of employment, or under color of
 119 authority is a plaintiff's exclusive remedy.

120 (b) Judgment under this chapter against a governmental entity is a complete bar to any

121 action by the claimant, based upon the same subject matter, against the employee whose act or
122 omission gave rise to the claim.

123 (c) A plaintiff may not bring or pursue any civil action or proceeding based upon the
124 same subject matter against the employee or the estate of the employee whose act or omission
125 gave rise to the claim, unless:

126 (i) the employee acted or failed to act through fraud or willful misconduct;

127 (ii) the injury or damage resulted from the employee driving a vehicle, or being in
128 actual physical control of a vehicle:

129 (A) with a blood alcohol content equal to or greater by weight than the established
130 legal limit;

131 (B) while under the influence of alcohol or any drug to a degree that rendered the
132 person incapable of safely driving the vehicle; or

133 (C) while under the combined influence of alcohol and any drug to a degree that
134 rendered the person incapable of safely driving the vehicle;

135 (iii) injury or damage resulted from the employee being physically or mentally
136 impaired so as to be unable to reasonably perform the employee's job function because of:

137 (A) the use of alcohol;

138 (B) the nonprescribed use of a controlled substance as defined in Section 58-37-4; or

139 (C) the combined influence of alcohol and a nonprescribed controlled substance as
140 defined by Section 58-37-4;

141 (iv) in a judicial or administrative proceeding, the employee intentionally or knowingly
142 gave, upon a lawful oath or in any form allowed by law as a substitute for an oath, false
143 testimony material to the issue or matter of inquiry under this section; or

144 (v) the employee intentionally or knowingly:

145 (A) fabricated evidence; or

146 (B) except as provided in Subsection (3)(d), with a conscious disregard for the rights of
147 others, failed to disclose evidence that:

148 (I) was known to the employee; and

149 (II) (Aa) was known by the employee to be relevant to a material issue or matter of
150 inquiry in a pending judicial or administrative proceeding, if the employee knew of the pending
151 judicial or administrative proceeding; or

152 (Bb) was known by the employee to be relevant to a material issue or matter of inquiry
153 in a judicial or administrative proceeding, if disclosure of the evidence was requested of the
154 employee by a party to the proceeding or counsel for a party to the proceeding.

155 (d) The exception, described in Subsection (3)(c)(v)(B), allowing a plaintiff to bring or
156 pursue a civil action or proceeding against an employee, does not apply if the employee failed
157 to disclose evidence described in Subsection (3)(c)(v)(B), because the employee is prohibited
158 by law from disclosing the evidence.

159 (4) Except as permitted in Subsection (3)(c), no employee may be joined or held
160 personally liable for acts or omissions occurring:

- 161 (a) during the performance of the employee's duties;
- 162 (b) within the scope of employment; or
- 163 (c) under color of authority.

164 (5) A general duty that a governmental entity owes to the public does not create a
165 specific duty to an individual member of the public, unless there is a special relationship
166 between the governmental entity and the individual member of the public.

167 Section 3. Section **63G-7-301** is amended to read:

168 **63G-7-301. Waivers of immunity.**

169 (1) (a) Immunity from suit of each governmental entity is waived as to any contractual
170 obligation.

171 (b) Actions arising out of contractual rights or obligations are not subject to the
172 requirements of Sections [63G-7-401](#), [63G-7-402](#), [63G-7-403](#), or [63G-7-601](#).

173 (c) The Division of Water Resources is not liable for failure to deliver water from a
174 reservoir or associated facility authorized by Title 73, Chapter 26, Bear River Development
175 Act, if the failure to deliver the contractual amount of water is due to drought, other natural
176 condition, or safety condition that causes a deficiency in the amount of available water.

177 (2) Immunity from suit of each governmental entity is waived:

178 (a) as to any action brought to recover, obtain possession of, or quiet title to real or
179 personal property;

180 (b) as to any action brought to foreclose mortgages or other liens on real or personal
181 property, to determine any adverse claim on real or personal property, or to obtain an
182 adjudication about any mortgage or other lien that the governmental entity may have or claim

183 on real or personal property;

184 (c) as to any action based on the negligent destruction, damage, or loss of goods,
185 merchandise, or other property while it is in the possession of any governmental entity or
186 employee, if the property was seized for the purpose of forfeiture under any provision of state
187 law;

188 (d) subject to Subsection 63G-7-302(1), as to any action brought under the authority of
189 Utah Constitution, Article I, Section 22, for the recovery of compensation from the
190 governmental entity when the governmental entity has taken or damaged private property for
191 public uses without just compensation;

192 (e) subject to Subsection 63G-7-302(2), as to any action brought to recover attorney
193 fees under Sections 63G-2-405 and 63G-2-802;

194 (f) for actual damages under Title 67, Chapter 21, Utah Protection of Public Employees
195 Act;

196 (g) as to any action brought to obtain relief from a land use regulation that imposes a
197 substantial burden on the free exercise of religion under Title 63L, Chapter 5, Utah Religious
198 Land Use Act;

199 (h) except as provided in Subsection 63G-7-201(3), as to any injury caused by:

200 (i) a defective, unsafe, or dangerous condition of any highway, road, street, alley,
201 crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

202 (ii) any defective or dangerous condition of a public building, structure, dam, reservoir,
203 or other public improvement;

204 (i) subject to Subsections 63G-7-101(4) and 63G-7-201(4), as to any injury
205 proximately caused by a negligent act or omission of an employee committed within the scope
206 of employment;

207 (j) as to any action or suit brought under Section 20A-19-301 and as to any
208 compensation or expenses awarded under Section 20A-19-301(5); and

209 (k) notwithstanding Subsection 63G-7-101(4), as to a claim for an injury resulting from
210 a sexual battery, as provided in Section 76-9-702.1, committed:

211 (i) against a student of a public elementary or secondary school, including a charter
212 school; and

213 (ii) by an employee of a public elementary or secondary school or charter school who:

214 (A) at the time of the sexual battery, held a position of special trust, as defined in
215 Section 76-5-404.1, with respect to the student;

216 (B) is criminally charged in connection with the sexual battery; and

217 (C) the public elementary or secondary school or charter school knew or in the exercise
218 of reasonable care should have known, at the time of the employee's hiring, to be a sex
219 offender, as defined in Section 77-41-102, required to register under Title 77, Chapter 41, Sex
220 and Kidnap Offender Registry, whose status as a sex offender would have been revealed in a
221 background check under Section 53G-11-402.

222 (3) (a) As used in this Subsection (3):

223 (i) "Appropriate behavior policy" means a policy that:

224 (A) is not less stringent than a model policy, created by the State Board of Education,
225 establishing a professional standard of care for preventing the conduct described in Subsection
226 (3)(a)(i)(D);

227 (B) is adopted by the applicable local education governing body;

228 (C) regulates behavior of a school employee toward a student; and

229 (D) includes a prohibition against any sexual conduct between an employee and a
230 student and against the employee and student sharing any sexually explicit or lewd
231 communication, image, or photograph.

232 (ii) "Local education agency" means:

233 (A) a school district;

234 (B) a charter school; or

235 (C) the Utah Schools for the Deaf and the Blind.

236 (iii) "Local education governing board" means:

237 (A) for a school district, the local school board;

238 (B) for a charter school, the charter school governing board; or

239 (C) for the Utah Schools for the Deaf and the Blind, the state board.

240 (iv) "Public school" means a public elementary or secondary school.

241 (v) "Sexual abuse" means the offense described in Subsection 76-5-404.1(2).

242 (vi) "Sexual battery" means the offense described in Section 76-9-702.1, considering
243 the term "child" in that section to include an individual under age 18.

244 (b) Notwithstanding Subsection 63G-7-101(4), immunity from suit is waived as to a

245 claim against a local education agency for an injury resulting from a sexual battery or sexual
246 abuse committed against a student of a public school by a paid employee of the public school
247 who is criminally charged in connection with the sexual battery or sexual abuse, unless:

248 (i) at the time of the sexual battery or sexual abuse, the public school was subject to an
249 appropriate behavior policy; and

250 (ii) before the sexual battery or sexual abuse occurred, the public school had:

251 (A) provided training on the policy to the employee; and

252 (B) required the employee to sign a statement acknowledging that the employee has
253 read and understands the policy.

254 (4) (a) As used in this Subsection (4):

255 (i) "Higher education institution" means an institution included within the state system
256 of higher education under Section [53B-1-102](#).

257 (ii) "Policy governing behavior" means a policy adopted by a higher education
258 institution or the State Board of Regents that:

259 (A) establishes a professional standard of care for preventing the conduct described in
260 Subsections (4)(a)(ii)(C) and (D);

261 (B) regulates behavior of a special trust employee toward a subordinate student;

262 (C) includes a prohibition against any sexual conduct between a special trust employee
263 and a subordinate student; and

264 (D) includes a prohibition against a special trust employee and subordinate student
265 sharing any sexually explicit or lewd communication, image, or photograph.

266 (iii) "Sexual battery" means the offense described in Section [76-9-702.1](#).

267 (iv) "Special trust employee" means an employee of a higher education institution who
268 is in a position of special trust, as defined in Section [76-5-404.1](#), with a higher education
269 student.

270 (v) "Subordinate student" means a student:

271 (A) of a higher education institution; and

272 (B) whose educational opportunities could be adversely impacted by a special trust
273 employee.

274 (b) Notwithstanding Subsection [63G-7-101\(4\)](#), immunity from suit is waived as to a
275 claim for an injury resulting from a sexual battery committed against a subordinate student by a

276 special trust employee, unless:

277 (i) the institution proves that the special trust employee's behavior that otherwise would
278 constitute a sexual battery was:

279 (A) with a subordinate student who was at least 18 years old at the time of the
280 behavior; and

281 (B) with the student's consent; or

282 (ii) (A) at the time of the sexual battery, the higher education institution was subject to
283 a policy governing behavior; and

284 (B) before the sexual battery occurred, the higher education institution had taken steps
285 to implement and enforce the policy governing behavior.

286 ~~Ĥ→ [(5) A party to an action under this chapter may not waive immunity from suit and may
287 not be determined to have waived immunity from suit unless immunity from suit is waived
288 under a provision of this chapter.] ←Ĥ~~

289 Section 4. Section 63G-7-501 is amended to read:

290 **63G-7-501. Jurisdiction of district courts over actions.**

291 (1) The district courts have exclusive, original jurisdiction over any action brought
292 under this chapter in state court.

293 (2) An action brought under this chapter may not be tried as a small claims action.