

**Representative Kera Birkeland** proposes the following substitute bill:

**GOVERNMENT ATTORNEY FEES AMENDMENTS**

2023 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Kera Birkeland**

Senate Sponsor: \_\_\_\_\_

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**LONG TITLE**

**General Description:**

This bill allows a private party and a political subdivision to recover attorney fees in certain civil actions involving a governmental entity.

**Highlighted Provisions:**

This bill:

- ▶ defines terms;
- ▶ requires a court to award reasonable attorney fees to a private party who prevails in certain civil actions involving a governmental entity;
- ▶ requires a court to award reasonable attorney fees to a political subdivision that prevails in certain civil actions involving a private party;
- ▶ prohibits a court from awarding attorney fees to a private party in certain civil actions involving certain governmental entities;
- ▶ prohibits a court from awarding attorney fees to a private organization in certain circumstances; and
- ▶ makes technical and conforming changes.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**



26 None

27 **Utah Code Sections Affected:**

28 AMENDS:

29 **63G-7-301**, as last amended by Laws of Utah 2022, Chapters 388, 428

30 ENACTS:

31 **78B-5-826.5**, Utah Code Annotated 1953



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

34 Section 1. Section **63G-7-301** is amended to read:

35 **63G-7-301. Waivers of immunity.**

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

38 (b) Actions arising out of contractual rights or obligations are not subject to the  
39 requirements of Section **63G-7-401**, **63G-7-402**, **63G-7-403**, or **63G-7-601**.

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

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

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

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

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

55 (d) subject to Section **63G-7-302**, as to any action brought under the authority of Utah  
56 Constitution, Article I, Section 22, for the recovery of compensation from the governmental

57 entity when the governmental entity has taken or damaged private property for public uses  
58 without just compensation;

59 (e) as to any claim for attorney fees or costs under Sections [63G-2-405](#) and [63G-2-802](#);  
60 (f) for actual damages under Title 67, Chapter 21, Utah Protection of Public Employees  
61 Act;

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

65 (h) except as provided in Subsection [63G-7-201\(3\)](#), as to any injury caused by:  
66 (i) a defective, unsafe, or dangerous condition of any highway, road, street, alley,  
67 crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or  
68 (ii) any defective or dangerous condition of a public building, structure, dam, reservoir,  
69 or other public improvement;

70 (i) subject to Subsections [63G-7-101\(4\)](#) and [63G-7-201\(4\)](#), as to any injury  
71 proximately caused by a negligent act or omission of an employee committed within the scope  
72 of employment;

73 (j) notwithstanding Subsection [63G-7-101\(4\)](#), as to a claim for an injury resulting from  
74 a sexual battery, as provided in Section [76-9-702.1](#), committed:

75 (i) against a student of a public elementary or secondary school, including a charter  
76 school; and  
77 (ii) by an employee of a public elementary or secondary school or charter school who:  
78 (A) at the time of the sexual battery, held a position of special trust, as defined in  
79 Section [76-5-404.1](#), with respect to the student;  
80 (B) is criminally charged in connection with the sexual battery; and  
81 (C) the public elementary or secondary school or charter school knew or in the exercise  
82 of reasonable care should have known, at the time of the employee's hiring, to be a sex  
83 offender, as defined in Section [77-41-102](#), required to register under Title 77, Chapter 41, Sex  
84 and Kidnap Offender Registry, whose status as a sex offender would have been revealed in a  
85 background check under Section [53G-11-402](#); [~~and~~]

86 (k) as to a claim to recover attorney fees under Section [78B-5-826.5](#); and  
87 [~~(k)~~] (l) as to any action brought under Section [78B-6-2303](#).

- 88 (3) (a) As used in this Subsection (3):
- 89 (i) "Code of conduct" means a code of conduct that:
- 90 (A) is not less stringent than a model code of conduct, created by the State Board of
- 91 Education, establishing a professional standard of care for preventing the conduct described in
- 92 Subsection (3)(a)(i)(D);
- 93 (B) is adopted by the applicable local education governing body;
- 94 (C) regulates behavior of a school employee toward a student; and
- 95 (D) includes a prohibition against any sexual conduct between an employee and a
- 96 student and against the employee and student sharing any sexually explicit or lewd
- 97 communication, image, or photograph.
- 98 (ii) "Local education agency" means:
- 99 (A) a school district;
- 100 (B) a charter school; or
- 101 (C) the Utah Schools for the Deaf and the Blind.
- 102 (iii) "Local education governing board" means:
- 103 (A) for a school district, the local school board;
- 104 (B) for a charter school, the charter school governing board; or
- 105 (C) for the Utah Schools for the Deaf and the Blind, the state board.
- 106 (iv) "Public school" means a public elementary or secondary school.
- 107 (v) "Sexual abuse" means the offense described in Subsection [76-5-404.1\(2\)](#).
- 108 (vi) "Sexual battery" means the offense described in Section [76-9-702.1](#), considering
- 109 the term "child" in that section to include an individual under age 18.
- 110 (b) Notwithstanding Subsection [63G-7-101\(4\)](#), immunity from suit is waived as to a
- 111 claim against a local education agency for an injury resulting from a sexual battery or sexual
- 112 abuse committed against a student of a public school by a paid employee of the public school
- 113 who is criminally charged in connection with the sexual battery or sexual abuse, unless:
- 114 (i) at the time of the sexual battery or sexual abuse, the public school was subject to a
- 115 code of conduct; and
- 116 (ii) before the sexual battery or sexual abuse occurred, the public school had:
- 117 (A) provided training on the code of conduct to the employee; and
- 118 (B) required the employee to sign a statement acknowledging that the employee has

119 read and understands the code of conduct.

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

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

123 (ii) "Policy governing behavior" means a policy adopted by a higher education  
124 institution or the Utah Board of Higher Education that:

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

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

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

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

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

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

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

137 (A) of a higher education institution; and

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

140 (b) Notwithstanding Subsection [63G-7-101\(4\)](#), immunity from suit is waived as to a  
141 claim for an injury resulting from a sexual battery committed against a subordinate student by a  
142 special trust employee, unless:

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

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

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

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

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

152 Section 2. Section **78B-5-826.5** is enacted to read:

153 **78B-5-826.5. Attorney fees -- Definitions -- Award against governmental entity.**

154 (1) As used in this section:

155 (a) "Associational standing" means that an association, organization, or similar  
156 representational entity has standing to sue because at least one of its individual members has  
157 standing to sue and the participation of the individual member in the lawsuit is not necessary to  
158 the resolution of the lawsuit.

159 (b) "Attorney fees" means attorney fees reasonably incurred in a qualified civil action  
160 on behalf of a prevailing party or a prevailing political subdivision.

161 (c) (i) "Governmental entity" means the state and its political subdivisions.

162 (ii) "Governmental entity" does not include:

163 (A) a law enforcement agency; or

164 (B) the Department of Public Safety created in Section [53-1-103](#).

165 (d) "Judgment" means a final ruling or judgment, including any supporting opinion,  
166 that determines the rights of the parties and concerning which all appellate remedies have been  
167 exhausted or the time for appeal has expired.

168 (e) "Political subdivision" means the same as that term is defined in Section  
169 [63G-7-102](#).

170 (f) "Prevailing party" means a private party that receives, in a qualified civil action, a  
171 judgment:

172 (i) dismissing the governmental entity's claim for monetary or equitable relief against  
173 the private party;

174 (ii) reversing or vacating the decision, fine, fee, order, or decree imposed by the  
175 governmental entity against the private party; or

176 (iii) that substantially, materially, and favorably modifies a decision, fine, fee, order, or  
177 decree imposed by the governmental entity against the private party.

178 (g) "Prevailing political subdivision" means a political subdivision that receives, in a  
179 qualified civil action:

180 (i) a favorable judgment on the political subdivision's claim for monetary or equitable

181 relief against the private party;

182 (ii) a judgment affirming the decision, fine, fee, order, or decree imposed by the  
183 political subdivision against the private party; or

184 (iii) a judgment that does not substantially and materially modify, in the private party's  
185 favor, the decision, fine, fee, order, or decree imposed by the political subdivision against the  
186 private party.

187 (h) "Private party" means a person that is not a governmental entity.

188 (i) "Qualified civil action" means a judicial proceeding, other than an action sounding  
189 in tort, in which:

190 (i) a governmental entity seeks monetary or equitable relief against a private party at  
191 common law or pursuant to a state or local law;

192 (ii) a private party seeks equitable relief against a governmental entity to compel the  
193 governmental entity to act in accordance with a state or local law; or

194 (iii) a private party seeks judicial review of an agency or administrative action.

195 (2) Except as provided in Subsection (3), in a qualified civil action, a court shall award  
196 attorney fees:

197 (a) to the prevailing party; or

198 (b) if the qualified civil action was brought by or against a political subdivision, to the  
199 prevailing political subdivision.

200 (3) Subsection (2) does not apply to a prevailing party:

201 (a) if the court finds that:

202 (i) the matter could have been resolved via a reasonable settlement; and

203 (ii) the private party failed to make a timely, reasonable settlement offer;

204 (b) if the private party files a qualified civil action and the private party's standing to  
205 sue is based on the doctrine of associational standing, regardless of whether the private party is  
206 the prevailing party;

207 (c) for an action brought by the Office of State Debt Collection under Title 63A,  
208 Chapter 3, Part 5, Office of State Debt Collection, seeking the collection of an accounts  
209 receivable or a criminal accounts receivable;

210 (d) for an action for judicial review of a decision of the Career Service Review Office  
211 under Title 67, Chapter 19a, Grievance Procedures;

212 (e) for an action for judicial review of a decision or order of a school board under Title  
213 53G, Chapter 11, Part 5, School District and Utah Schools for the Deaf and the Blind  
214 Employee Requirements; or

215 (f) for an action for judicial review brought under Title 63G, Chapter 2, Part 4,  
216 Appeals, or Part 7, Applicability to Political Subdivisions, the Judiciary, and the Legislature, as  
217 applicable, of a decision or order of:

218 (i) a chief administrative officer;

219 (ii) a local appeals board;

220 (iii) the State Records Committee; or

221 (iv) an administrative unit of the judicial branch.

222 (4) A claim for attorney fees under this section is not subject to Title 63G, Chapter 7,  
223 Part 4, Notice of Claim Against a Governmental Entity or a Government Employee.

224 (5) Subsection (2) supersedes any other provision of law that prohibits an award of  
225 attorney fees to a private party or a political subdivision, or makes permissive an award of  
226 attorney fees to a private party or a political subdivision, in an action that would otherwise  
227 constitute a qualified civil action under this section.