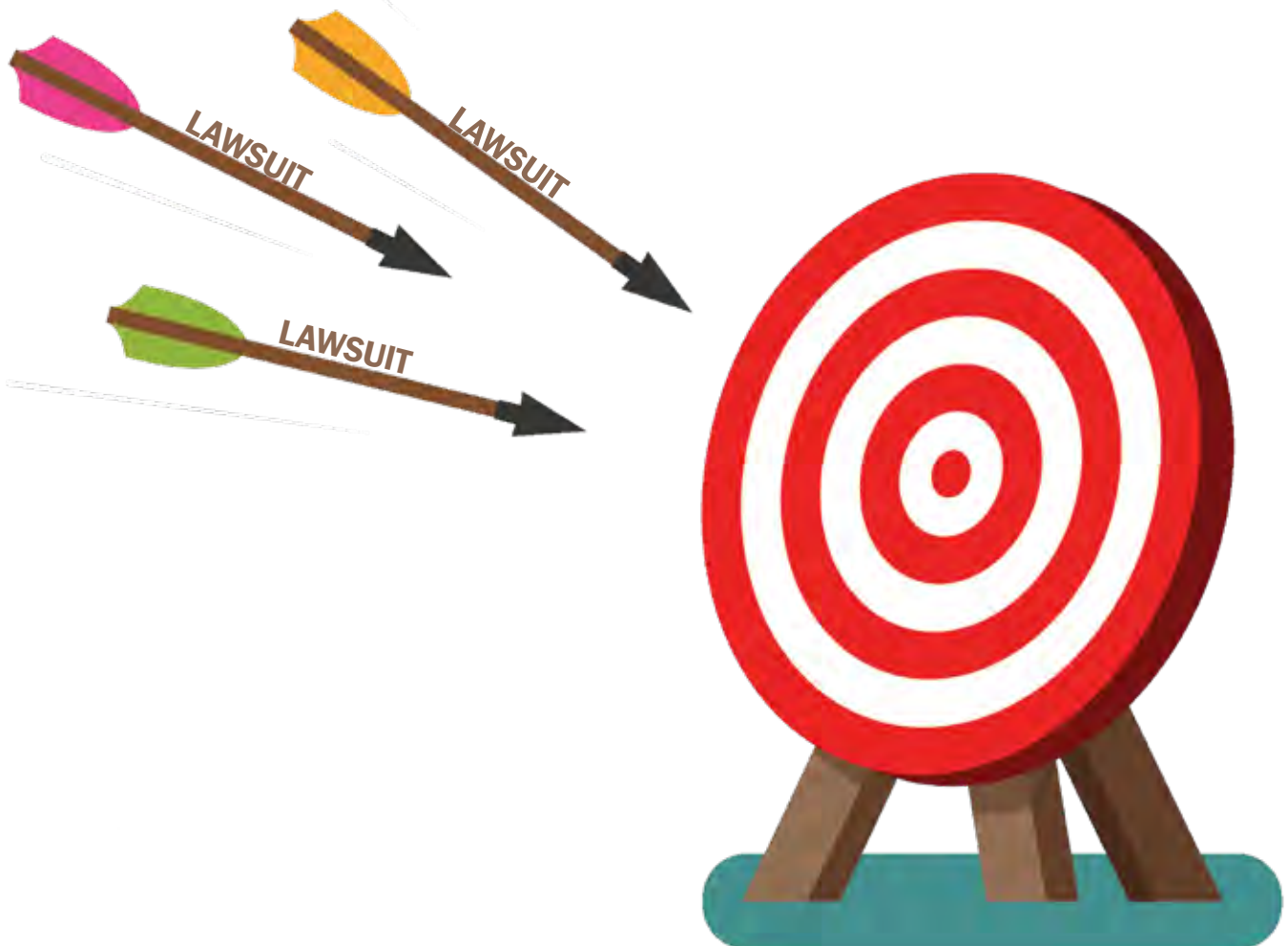


What You Need to Know about PERSONAL LIABILITY

Township Officials Can Combat Lawsuits with Knowledge, Best Practices, and Insurance

Township supervisors and employees are exposed to liability risks every day. Although they possess some immunity and protections while acting in their official capacity, **litigation threats are always lurking, threatening to cost townships time, money, and aggravation.** When it comes to lawsuits, the best defense is a good offense: So, know the law, watch what you say and do, and make sure your township has adequate insurance coverage.

BY AMY BOBB / ASSISTANT EDITOR



The notices came by registered mail to their homes. The supervisors of Watts Township in Perry County were each being served in lawsuits filed by the board of auditors for allegedly receiving improper meeting pay.

"It was the first and only time I've been sued, and I can tell you I wasn't happy about it," supervisor Glenn Smithgall recalls.

After contacting their solicitor, he and the other two supervisors were relieved to learn that since they were serving in their capacity as public officials, they would not be on the hook personally for the lawsuits. Eventually, the supervisors even felt vindicated when the Commonwealth Court ruled that because the township had appointed a certified public accountant to audit its finances, the board of auditors had no authority to impose surcharges on the elected officials, a decision ultimately upheld last year when the Pennsylvania Supreme Court denied an appeal. (*PSATS' Legal Defense Partnership had filed a brief in support of the Watts Township supervisors.*)

Still, despite this victory and the support and defense of the township and its solicitor, the lawsuits brought concerns and headaches for the supervisors and cost the township thousands of dollars. In the end, Smithgall notes, there were no real winners in this litigation.

"The auditors spent thousands of dollars and didn't get anywhere," Karl Raudensky, chair of the board of supervisors, says, "and it cost the township around \$15,000 to defend against the claims."

In today's "sue-happy" world, lawsuits may feel like par for the course for townships, and whether the claim comes from a disgruntled employee or a property owner upset about a land use decision, it's likely that public officials will eventually be named in a suit.

"There is such a range of claims that can be thrown against you as an elected official," Michael Crotty, a partner at Siana Law in Chester Springs, says. "More and more, we are seeing a consistent trend that if someone is going to file a lawsuit, you will be named in both your



official and individual capacities."

For township officials tasked with providing local public services, liability risks are everywhere, and it often feels like today's plaintiffs want to hold everyone and their brother responsible for righting the wrongs they claim they have suffered. Still, township officials can rest assured that unless they are committing a crime or otherwise acting recklessly, governmental immunity and township insurance usually kick in to protect them.

"If someone running for township office were to ask me if they need to be concerned with personal liability, I would tell them 'no' unless they are recklessly or intentionally disregarding the law," PSATS Counsel and Education Director Scott Coburn says.

Protection for officials

Lawsuits make anyone nervous, but when it's your name in black and white on the documents, they feel particularly troublesome.

"People worry that they could be held personally liable," says Andrew DiProspero, vice president of H.A. Thomson Co., which provides insurance services for the Pennsylvania Intergovernmental Risk Management Association (PIRMA). "As long as you are making decisions on behalf of your township and not doing something criminal, any kind of defense and payment to a claimant become the responsibility of the township, and

hopefully it has the insurance to cover it."

For starters, lawsuits filed against township supervisors and employees acting in their "official capacity" are normally treated as claims against the township, not the individual.

"For the most part, if you're at the table as a public official acting on applications and conducting township business, you are wearing your hat of elected official," Crotty says. "Few if any cases make that distinction that you're acting in your personal capacity when you are making decisions as part of a board of supervisors. It's the body taking action, not the individual."

That fact, however, doesn't stop people from naming elected officials and employees, both in their official and individual capacities, in lawsuits.

"Depending on the facts in the case, many lawsuits will include the township, the board of supervisors, the police department, the township manager, the zoning or codes officer, and even the solicitor and engineer as defendants when it really should fall under the umbrella of the township," he says.

Casting a wide net is typical in today's legal world. Attorneys are attempting to draw as many defendants as possible into the suit in hopes of assessing responsibility against at least one of them. By hedging their bets, they are increasing the odds that they have singled out the right person to be held liable.

"They don't want to only sue person A

"More and more, we are seeing a consistent trend that if someone is going to file a lawsuit, you will be named in both your official and individual capacities."

PERSONAL LIABILITY



and then years down the road realize they should have sued person B, but now it's too late," Crotty says.

Sometimes, too, plaintiffs will name elected officials in a lawsuit to apply pressure and increase the likelihood of getting what they want. Whatever the

reason, once the lawsuit is filed, the first task of the defense counsel is to try to get the courts to narrow down the number and scope of defendants. Depending on the facts in the case, Crotty says, attorneys have varying degrees of success.

"Typically, the goal at the beginning of a lawsuit is to get individuals thrown out of the case," Christopher Gabriel, a partner with the Sewickley law firm of Cafardi Ferguson Wyrick Weis & Gabriel, says. "The courts will apply immunity after deciding whether

the individuals were doing something within the scope of their job or acting in an obvious malicious way."

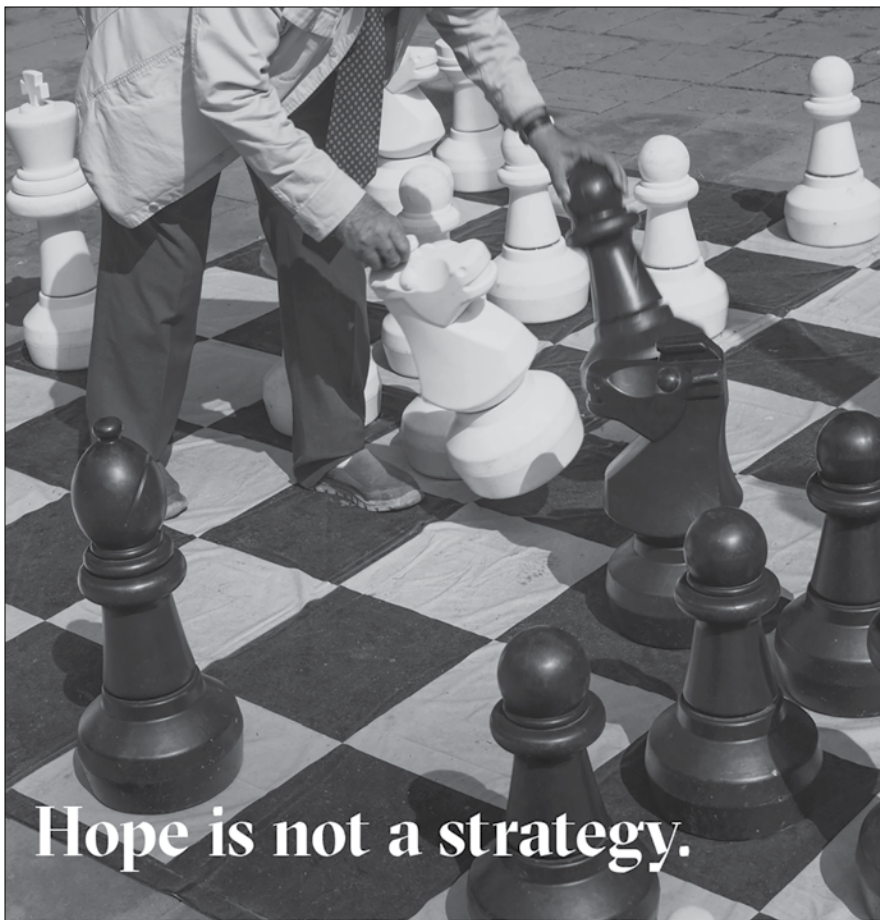
The evolution of immunity

Historically, public officials facing litigation threats have a powerful weapon on their side: governmental immunity. Over the years, doctrines and statutes providing federal, state, and local governments with immunity from tort-based claims have continued to evolve.

For generations, the doctrine of "sovereign immunity," an English common-law term meaning the "king can do no wrong," dictated that governments were immune from liability. Beginning in the 1960s and '70s, the courts began to chip away at this protection. In a landmark ruling in 1973, the Pennsylvania Supreme Court abolished the doctrine of governmental immunity altogether. Litigation soon became the preferred method of resolving disputes, and lawsuits against municipalities increased.

To help remedy the situation, Pennsylvania enacted the Political Subdivision Tort Claims Act in 1978 to reestablish the concept of governmental immunity. Under this law, municipalities and individuals acting on their behalf are granted broad immunity except for negligent acts in eight areas (*operation of motor vehicles; the care, custody, or control of others' personal property; real property; trees, traffic controls, and street lighting; municipal-owned utility service facilities; streets; sidewalks; and animals in the control of the municipality, such as police dogs*). Even if a township is found liable in one of these areas, damages are capped at \$500,000 per occurrence and recovery for pain and suffering is restricted. The law also requires the township to defend and indemnify elected officials and employees who have acted, or believed they have acted, in "good faith" on behalf of the municipality.

Another way elected officials have been traditionally protected from litigation is through a common-law doctrine that shields "high public officials" from claims under certain laws while performing their official duties. This defense is often invoked in defamation cases involving a public official's comments at a meeting.



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"Township supervisors can expect immunity against defamation or slander as long as what they said was in the course of the officials' duties or powers and within the scope of their authority," PSATS' Coburn explains.

In light of such protections, plaintiffs have turned to other avenues for holding public officials liable. Since the 1990s, an increasing number of citizens, landowners, developers, and employees have discovered that with a nip or tuck there, they can sue their local officials by claiming a constitutional violation under Section 1983 of the federal Civil Rights Act.

Through the years, municipalities and public officials have been the targets of civil rights liability suits for various actions they have taken, ranging from land use decisions to employment practices. These suits have the potential to be costly since, unlike claims brought under the Pennsylvania Political Subdivision Tort Claims Act, there is no cap on damages for civil rights violations.

Although civil rights lawsuits continue to plague local governments, it's important to note that public officials may be entitled to "qualified immunity" protection. Established by the U.S. Supreme Court nearly 40 years ago, this doctrine helps to shield government officials from being held personally liable for constitutional violations under federal law if they did not violate a "clearly established" statutory or constitutional right of which a reasonable person would know.

"The broad purpose of qualified immunity is to ensure government officials can perform their jobs effectively without the threat of liability," Coburn says. "There are tests employed by the courts to see if qualified immunity applies."

Over time, the courts have continued to expand the doctrine to make it more favorable to government defendants. These days, to prove a Section 1983 violation, a plaintiff must both show a constitutional right was violated and overcome the qualified immunity rule protecting public officials.

"As long as you have done something within the scope of official action and have acted with objective reasonableness under the rules in place, you will likely be protected," Coburn says. ►



Common civil rights lawsuits

When townships and public officials are sued in federal court, allegations often center on a perceived violation of a federal statute (such as the *Family Medical Leave Act* or *Equal Employment Opportunity laws*) or the plaintiff's constitutional rights.

Civil rights violations typically occur under the following amendments to the U.S. Constitution:

- **First Amendment**, specifically freedom of speech and religion. Retaliation claims typically fall here.
- **Fourth Amendment**, often targeting police or codes officials for unlawful search and seizure.
- **Fifth** (right to due process in criminal proceedings), **Sixth** (right to counsel and a fair, speedy trial), and **Eighth** (right to reasonable bail, fines, and no cruel or unusual punishment) **amendments**, which are often used against police.
- **14th Amendment**, which, in guaranteeing due process and equal protection under the law, is used to redress a broad variety of violations, from discrimination to religious rights.

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“Remember, immunity is not immunity from being sued. **It is immunity from judgment.**”

A threat to qualified immunity

Despite legislative and judicial protections governing their immunity, township officials are still vulnerable to lawsuits.

“Remember, immunity is not immunity from being sued,” Crotty says. “It is immunity from judgment.”

Therefore, even if a township believes it is on the right side of the law, it may have to suffer through a costly and lengthy litigation process before getting to what it hopes will be a triumphant end goal: having a case dismissed or decided in the township’s favor.

Success can never be guaranteed in a lawsuit, especially since statutes and case law are constantly evolving. Take the issue of qualified immunity, which has been under recent attack in the wake of Black Lives Matter protests

across the country. As activists push for racial justice, much of the national debate has focused on police accountability and reform, with some calling for a rolling back of qualified immunity.

“Qualified immunity attempts to provide this balancing act between public officials who act reasonably and those who act irresponsibly,” attorney Christopher Gabriel says. “Over the years, the U.S. Supreme Court has balanced that heavily in favor of protecting public officials, including police, and that is what is now controversial.”

Starting around 2005, the courts have increasingly sided with public officials when applying the doctrine to police cases involving use of excessive or deadly force. Proponents say qualified immunity is necessary to shield government officials from harassment

and litigation while performing their duties. Police, in particular, must be protected from liability so that they can make reasonable split-second judgments during tense and dangerous situations, advocates say.

Critics, on the other hand, contend that qualified immunity keeps public officials from being held accountable for irresponsible behavior, such as in cases involving excessive police force. Opponents also believe the doctrine has stunted the development of constitutional law because important questions go unanswered when civil rights claims are prevented from being brought in the first place.

Since the U.S. Supreme Court created qualified immunity, it could, of course, decide to take it away. Both Clarence Thomas and Sonia Sotomayor, justices on opposite ends of the ideological spectrum, have called for reexamining the policy for varying reasons. Thomas has said the doctrine has strayed too far from the original intent of the law, while Sotomayor believes it sends a message that unreasonable conduct will go unpunished. In June, the high court signaled an unwillingness to address the issue, at least for now, when it declined to hear any of the eight cases pending before it on the subject.

In the meantime, several members of Congress have taken up the banner and introduced bills and resolutions to repeal or reform qualified immunity.

“The question is if you decide to sweep it away, then what do we replace it with?” Gabriel says. “We can’t have police doing their job and having no idea if they are protected.”

Although the debate so far has mainly focused on law enforcement, any efforts to alter qualified immunity could eventually be felt by local officials as well.

“I tell people that when we are in strange times like we are now, you can’t be sure of what’s going to happen,” Gabriel says. “While many may only be thinking of police right now, there

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“As long as you are **doing what you are supposed to do and getting advice and asking questions** when you need to, broadly speaking, the law will protect you.”

is some overlapping protection with elected officials. Depending on where this ends up, there could be some rolling back of protection.”

Preventing trouble

With court challenges always lurking, public officials should take utmost care that their decisions and actions are well within their boundaries, especially

during times when public officials are under a microscope, such as the police are now.

“You never want your municipality to be the test case and at the lead of any court challenges,” Gabriel says “You have to be able to conduct your township business, but you should be extra cautious in what you say and do.”

He advises township officials to understand where their duties lie and not do anything to provide the courts with an opportunity to unexpectedly change some standard. In other words, don’t get into court in the first place.

Recognizing that the best defense is a good offense, the following best practices can help to protect townships and their public officials from litigation liability:

- **Make sure you have proper insurance coverage** — A complete insurance package should include an errors and omissions policy for public officials (*also called public officials liability insurance*) to cover claims stemming from wrongful acts for which the township is legally obligated to pay damages, including defense costs. (*See the sidebar on page 26 for more about this insurance.*) Verify that the policy includes coverage of employment practices liability since lawsuits in this area are common.

Keep in mind that while an insurance policy helps to protect the township from costly tort liability lawsuits, it will not shield public officials from everything. Read through your carrier’s “reservation of rights” letter, which spells out what is not covered under a policy, and be aware that whatever costs the insurance policy doesn’t cover will have to be picked up by the township.

“You want robust policies that cover everything you think you need so pick a provider carefully,” Crotty says. “Review your policy and know what you have.”

As an example, if you have a police force, a separate police professional liability insurance policy is necessary to protect the township from allegations of police misconduct, accidents involving high-speed chases, and other incidents that could result in large settlements or damage awards.

- **Stay in your lane** — Where township officials tend to get in legal trouble is when they step outside their official role for which they have immunity. ➤



You’re being sued. Now what?

If you find yourself served in a lawsuit, do you know what to do? Here’s some helpful advice:

- **Contact your solicitor and insurance carrier.** Anytime a claim or lawsuit is filed against you or a situation occurs that could potentially lead to litigation, you should immediately alert your solicitor and insurance carrier.
- **Send all relevant documents** as quickly as possible to the solicitor and insurer, including copies of the lawsuit papers and any supporting documentation that you may have gathered on the case.
- **Watch your words.** Be careful not to make irresponsible remarks about the case to the news media or residents or while in a public meeting. It should go without saying that you should never assume or imply responsibility for any action or decision related to the lawsuit or claim. Your safest bet is to refer all questions to your solicitor.

Once an insurance claim is made, it becomes the responsibility of the carrier to see it through to its end, whether that means settling the claim or proceeding with litigation. In defending the township, insurance companies will typically use their own attorneys who specialize in certain areas of the law. However, depending on the situation, a carrier may want to include the township solicitor on the defense team since that person is often more familiar with the circumstances and background of the local case.

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ERRORS & OMISSIONS INSURANCE

Public officials liability policy helps to protect against costly lawsuits

Adequate insurance coverage is critical to help shield townships from costly liability claims and lawsuits.

"You should be covered with an umbrella of insurance policies depending on the types of claims that could come at you," Michael Crotty of Siana Law says.

In addition to property and general liability policies, a complete insurance package should include public officials liability insurance, commonly referred to as an errors and omissions policy, to cover the township for damages (*other than property damage and bodily injury*) caused by wrongful acts and decisions of public officials. Such liability claims may allege a loss of revenue, property right infringement, or free speech or other constitutional violation.

"Basically, it means that no one has been hurt and no building has burned down, but someone is alleging that because of your action or inaction, you have damaged them," Andrew DiProspero of H.A. Thomson Co. says.

An errors and omissions policy can help to defend the township from such claims as wrongful termination and demotion, discrimination, improper discipline, sexual harassment, improper bidding, zoning or permit improprieties, and failure to provide

services. These areas tend to be less "black and white" than claims covered under a township's property or casualty insurance.

"Errors and omissions claims are more nebulous and usually require the courts to decide if they're right or wrong," Rick Atkinson of the HDH Group says.

Because errors and omissions policies are not standardized, townships should sit down annually with their insurance agent to review what is covered under their policy and what changes may be necessary. It's important to iron out insurance coverage before a lawsuit or claim occurs.

Insurance experts recommend exploring such questions as:

- **Who is covered?** The policy should cover all elected and appointed officials, as well as duly established boards and commissions. Make sure the definition of "insured" is broad enough. Does it include past, present, and future township officials? Does it cover members of boards and commissions?

"A well-written policy will include elected officials, current and former, as well as all employees and volunteers serving on task forces, boards, and committees," Atkinson says. "If I were on my township board or com-

mission, one of the first things I would want to know is does the township have errors and omissions liability insurance and am I covered under it."

- **What is covered?** The policy is designed to provide coverage for damages caused by the "wrongful acts" of public officials that result in the loss of revenue, forfeiture of property rights, or constitutional violations. Determine what wrongful acts are covered. Is the policy up to date and will it provide protection against current litigation trends that may threaten the township?

Townships should verify that the policy provides coverage for employment practices and decisions, including hiring and firing of employees and discrimination in employment. Make sure the policy also covers planning and zoning issues since these areas are sometimes excluded from coverage.

- **What is not covered?** Insurance is never absolute in covering every situation. Find out what scenarios are not covered. Which exclusions are spelled out in the policy?

In addition to excluding coverage for property damage and bodily injury, an errors and omissions policy typically does not cover claims involving eminent domain, breach of contract, dishonest acts, and willful and malicious conduct by a public official. A "reservation of rights" letter spells out what is not covered under a policy.

When understanding coverage, it might help to think of public officials liability insurance in the same vein as car insurance: Your insurance company will cover you if you get in a fender bender because you ran a red light, but if you intentionally ram someone because of road rage, your carrier will be less inclined to offer protection.

- **When are we covered?** Errors and omissions policies are typically written as "claims made" policies,

Townships should sit down annually with their insurance agent to review what is covered under their errors and omissions policy.





“As long as you are making decisions on behalf of your township and not doing something criminal, any kind of defense and payment to a claimant become the responsibility of the township, and hopefully it has the insurance to cover it.”

which mean coverage is triggered when a claim is made against the township, even if the alleged action did not occur during the current policy period. Nail down the time period that claims will be covered. What is the retroactive date of the policy?

Because lawsuits are complicated, it's not unusual for a township to be sued a year or more after an event happened. With a “claims made” policy, the insurance company would still cover the claim if it was reported during the time the policy was in effect. Keep in mind that the insurance company will use a retroactive date to place some limit on how far back its coverage will extend.

“You want that date to go at least as far back as you had your policy with the previous carrier,” Atkinson says. “You want to be sure you are covered for any incidents that occurred during that prior period.”

• **How much is covered?** Insurance policies usually have two main components for defending litigation: 1) Duty to defend — who pays for attorney fees and other costs to defend you, and 2) Duty to indemnify — who pays for any judgment award against you. Ensure that the township policy has adequate limits to cover both.

What expenses will the policy cover when defending the township in a claim or lawsuit? What is the deductible? What is the maximum dollar amount of coverage that will

be provided per occurrence?

For errors and omissions insurance, the state Department of Community and Economic Development suggests a minimum coverage of \$1-3 million with a reasonable deductible ranging from \$1,000 to \$10,000 depending on the size of the township and its ability to pay.

“It's important to have an insurance adviser whom you trust to give you fair advice and provide the full range of services that your township requires,” Atkinson says.

While you want to develop some continuity with an insurance carrier, it's not a bad idea to work with your adviser to periodically shop around policies, perhaps every three years or so. When seeking proposals, look beyond just the price to focus on the policy terms and conditions and make sure you are comparing apples to apples. Requiring insurers to clearly spell out the terms of their coverage and identify all exclusions upfront will help to make your comparison easier.

In today's litigious environment, townships need a comprehensive umbrella of insurance coverage, including an errors and omissions policy, to protect themselves and their public officials from liability.

“You never want to risk not having the right policy just to save a little bit of money on your premiums,” DiProspero says. “You are only asking for trouble.”

In his role as a municipal attorney, Gabriel has observed that local officials tend to cause problems when they comment in public about pending personnel matters, interfere in the township's supervisory chain of command instead of letting the administrator manage, and seek unlawful access to employee medical files.

To avoid trouble, public officials should have a sense of what is legally and morally right and wrong within the framework of their duties and must weigh their actions carefully. Will making this decision result in an illegal consequence? Will the outcome be favorable to some and prejudicial to others?

“As long as you are doing what you are supposed to do and getting advice and asking questions when you need to, broadly speaking, the law will protect you,” Gabriel says.

However, if your actions are found to be malicious, criminal, or outside your scope of public duties, you could lose governmental immunity protection and be on the hook for any damages.

• **Stay abreast of legal developments and trends in society** — Knowing the “hot button” issues of the day can keep township officials from unknowingly treading into what could turn out to be a proverbial minefield.

For example, townships remain susceptible to civil rights claims, particularly around employment practices. In addition to litigation under Section 1983 of the Civil Rights Act, public officials are vulnerable to lawsuits if they violate certain state laws, including the Pennsylvania Whistleblower Law, which prohibits an employer from discriminating or retaliating against a public employee who reports waste or wrongdoing to authorities, and the Pennsylvania Human Relations Act, which contains many of the same anti-discrimination protections provided in the federal Civil Rights Act and the Americans with Disabilities Act.

“There is always an active intent on behalf of plaintiffs to seek a foothold in



civil rights legislation and sue,” Gabriel says.

When making personnel decisions, therefore, be aware of common claims and lawsuits. Some recent trends in employment litigation include sexual harassment lawsuits in the wake of the

#MeToo movement and discrimination claims related to new laws and workplace developments, such as the employer’s response to medical marijuana and COVID-19.

Retaliation claims are also on the rise. They comprise nearly half of the complaints received by the U.S. Equal Employment Opportunity Commission, and several municipalities in Pennsylvania have had retaliation claims, based on First Amendment rights, end up in federal court in recent years.

When it comes to discrimination claims, Rick Atkinson, senior vice president of the HDH Group, which provides insurance services through the PSATS-endorsed insurance trust, Municipal Risk Management, Inc., notes that these days, nearly everyone falls into a “protected” class of some kind under the continually expanding law.

“Almost everyone can claim legal protection, which opens the door to lots of claims,” he says.

The township’s solicitor and insurance broker are reliable “go-to” resources for staying apprised of trends and developments in the legal and insurance worlds. PSATS, too, offers various webinars and training that explore the effects of new laws and court rulings on townships and their liability risks.

“The history of insurance policies is basically the history of court cases,” Atkinson says. “Whenever the courts alter something, the insurance industry will respond and adapt accordingly with their policies and pricing.”

• **Practice good public risk management** — To avoid or minimize costly lawsuits, townships must be proactive in reducing their day-to-day litigation risk. A good risk management program involves implementing up-to-date policies and procedures, educating public officials and employees about liability risks and prevention, and documenting actions and conversations.

“Once a lawsuit comes, a paper trail is everything,” H.A. Thomson’s DiProspero says.

Remember, the more proactive you are in your approach to risk management, the better protected you will be.

“Any claim or lawsuit is always best defended before it ever happens,” Atkinson says. “What can get you into trouble is what takes you by surprise. That’s when you react without a well-thought-out plan.”

If a township has done its homework, however, and has implemented a risk management plan that meets today’s contemporary legal standards, it should find itself in good shape whenever that inevitable lawsuit comes along.

“Maybe you won’t be able to prevent certain claims, but you can put yourself in the best possible position to defend against them,” he says. ♦

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