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### Guidance Document

#### Liability Protection for Negligent Acts or Omissions of Public Health Nurses (PHNs)

##### **A. Generally:**

- a. **Public Health Nurses (PHNs)** are protected from legal liability for any **negligent** act or **failure** to act related to their duties and responsibilities.
- b. **Public Employers**, including the Commonwealth, cities and towns (municipalities), counties and political subdivisions (e.g. regional planning agencies), may be held liable for the negligent acts of any of their employees, including PHNs, but claims are capped at \$100,000 and will generally be covered under the public employers' insurance policy.

Definition of Negligence: Failure to provide care that a reasonably prudent nurse would have provided under similar circumstances that results in injury or harm.

##### Examples of Negligence:

- a. Unintentionally administering the wrong dose of a medication;
- b. Failing to provide adequate discharge instructions;
- c. Unintentional errors in documentation; and
- d. Unintentionally pricking a patient while administering a shot.

##### **B. Specific Liability Protections for Public Health Nurses:**

###### **1. What are the statutory protections for PHNs?**

PHNs cannot be held legally liable for negligent acts or omissions while working as part of an immunization or other protective public health program. Public health programs include programs designed to prevent sickness, disease and injury under state or local health departments (G.L. c. 112, §12C). This protection applies regardless of whether the nurse is considered an employee of

the protective program. If the nurse is considered a municipal or political subdivision employee, the Massachusetts Tort Claims Act (TCA) (G.L. Ch. 258) also protects the nurse from liability and additionally limits the liability of their employer (*see* Section III., below).

**2. Does immunity from liability mean that a PHN cannot be sued?**

No. Even though the law provides for liability protection, a PHN can still be sued for negligence, and the law requires that they respond to the court in their defense. Immunity from liability means that the PHN will not have to pay a judgment or be otherwise held responsible for that claim.

**3. Does immunity from liability mean that a PHN cannot be subject to a licensing board action for the same negligent act or omission?**

No. A complaint can still be filed with the licensing board. A legal claim for negligence is a separate process that does not preclude licensing board action.

**4. What PHN activities are immune from liability claims?**

Negligent acts or omissions must be related to a PHN's duties in the protective public health program or the PHN's scope of employment with the public employer.

Liability protection encompasses all activities that a public health nurse may be assigned by a municipality or required to do by law, including but not limited to:

- a. Administering vaccines;
- b. Investigating and reporting diseases;
- c. Chronic disease management (including home visits); and
- d. Community outreach and education.

Instances where a PHN is determined to be acting outside the scope of their employment are uncommon. For instance, travel between home visits is considered within the scope of employment, making the PHN immune from liability for accidents caused by negligence. Travel to and from home or running personal errands during the working day is not generally considered within the scope of employment, so a PHN could be held negligent for an accident caused during that time.

**5. Who covers the cost to defend a lawsuit or licensing board action against a PHN?**

If the PHN is considered a 'public employee', as discussed in detail in Section III below, the liability protection insurance policy for public employers will provide coverage to defend a lawsuit against the PHN at no cost to the PHN. However, there are scenarios where the employer's insurance may not provide coverage, including if the nurse is not an employee, not acting within their scope of employment, or if the PHN is subject to a licensing board action. This is why the American Nurses Association suggests all practicing nurses carry private insurance through the Nurses Service Organization (NSO), which provides coverage for costs incurred in defending licensing board or other claims where the PHN is not otherwise covered.

**6. Are 'Scope of Employment' and a PHN's 'Scope of Practice' the same thing?**

No. Scope of Practice is governed by the Board of Registered Nursing (BORN) and Massachusetts laws and regulations and is the same for all nurses. (See, [\*Decision Making Guidelines for the\*](#)

[Nursing Scope of Practice](#)). Whereas Scope of Employment includes all of the activities reasonably related to the PHN's job duties as assigned by the employer.

While these often align (the municipality assigns a PHN a task that is within the PHN's Scope of Practice) – there could be scenarios when the PHN is permitted to do an activity under their Scope of Practice, but the municipality has not assigned the PHN that job responsibility.

For example, a PHN is directed by their employer to run an annual flu vaccine clinic, but the PHN decides to also operate a blood drive at the clinic. The blood drive activities may be within the PHN's Scope of Practice, but outside their Scope of Employment. In this case, the PHN may be immune from liability for providing services as part of a public health program, but the municipal insurance would likely not cover the cost of the lawsuit against the PHN because they were not acting within their scope of employment when the negligence occurred.

**C. Legal Negligence Protections for Public Employers, including Municipalities and Political Subdivisions**

**7. What are the statutory protections for public employers?**

An employer may generally be held liable for the negligent acts of their employees. However, municipalities and political subdivisions have protections under the Tort Claims Act (TCA) (G.L. Ch. 258), which caps monetary judgments for the negligent acts of their employees at \$100,000.

**8. Who qualifies as a 'public employer' under the TCA?**

A public employer includes the Commonwealth of Massachusetts, a municipality, or any political subdivision (e.g. regional planning agencies).

**9. Who qualifies as a 'public employee' under the Tort Claims Act (TCA)?**

A public employee is a person working on behalf of a public employer and subject to the direction and control of that employer. A 'public employee' is defined very broadly in this law, and includes:

- Elected or appointed officials
- Full or part-time workers
- Temporary or permanent workers
- Paid workers
- Volunteers

Just because an employer does not categorize an individual as an employee does not mean they won't be considered an employee for purposes of the TCA. The determination of whether a PHN is public employee will be made on a case-by-case basis, and the primary question will be whether they were working under the direction and control of the employer at the time of the negligent act or omission.

**10. What does it mean to work under the 'direction and control' of an employer?**

Whether a PHN is under the direction and control of a public employer and therefore a 'public employee' will be a question of fact. Generally, courts will look to whether the PHN was acting within their 'scope of employment' or carrying out assigned duties at the time the negligent act or omission occurred (*see Question 6., above*).

Additional factors will be considered in determining ‘direction and control’, especially if the employer is claiming that the PHN is an independent contractor. These factors include whether the employer does any of the following:

- a. Setting the PHN’s work schedule;
- b. Providing the PHN with tools and equipment to do their job;
- c. Requiring training or instructing the PHN on how to perform duties; or
- d. Offering benefits.

All of these conditions do not need to be present, and other factors may be considered in making the determination that an individual was under the ‘direction and control’ of a public employer and therefore considered an employee under the TCA.

**11. If a PHN is sued for negligence and not considered an employee, what does that mean for the municipality or political subdivision?**

If the PHN is determined to be:

- a. An employee:
  1. The public employer can be held liable for up to \$100,000; and
  2. The costs of defending the lawsuit and any judgment will be covered pursuant to the employer’s liability insurance policy.
- b. A true independent contractor or other non-employee:
  1. The public employer cannot be held liable;
  2. The cost of defending the lawsuit against the *employer* will be covered pursuant to the employer’s liability insurance policy;
  3. The cost of defending the lawsuit against the *PHN* will *not* be covered by public employer’s liability insurance.<sup>1</sup>

**D. Other Public Health Nurse Liability Considerations**

**12. If a PHN is employed as part of a Public Health Excellence (PHE) collaborative or other shared arrangement (SSA), does the nurse still have liability protection when providing services for other municipalities in the SSA?**

Yes. The protections in M.G.L. c. 112, §12C for nurses in public health programs extends to all nurses in the program and does not depend on where the PHN is employed.

Additionally, the template Intermunicipal Agreement (IMA) for Shared Service Arrangements makes clear that PHNs are employed by the host municipality or political subdivision and are acting within the scope of their employment even when they are working in another municipality. This will be strong evidence that the TCA would apply to protect the PHN from liability and additionally limit the liability of the municipality or political subdivision.

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<sup>1</sup> It’s possible that the nurse may be covered under a contracting agency’s policy, but if not, the nurse may be held personally liable for all claims against them. This is one important reason for PHNs to consider obtaining their own malpractice insurance.

**13. If a PHN for a Shared Services Arrangement (SSA) is sued for a negligent act in a non-host municipality, can the host municipality or political subdivision be held liable and whose insurance will cover the lawsuit?**

A host municipality or political subdivision may be liable for the nurse's negligent actions up to \$100,000. Pursuant to language in the template Intermunicipal Agreement (IMA), the host municipality or political subdivision insurance policy will cover the costs of defending the lawsuit and any judgment, regardless of where the incident occurred. However, the IMA also provides that any liabilities attributable to shared services arrangements will be proportionately shared by all municipalities in the collaborative.

**14. Could a municipality or political subdivision be held liable for the negligent act of a student nurse precepting under the PHN?**

Yes. A student nurse acting under the direction and control of a public employer will be held to the same standard as a PHN or other public employee; if the student acts negligently (e.g. administering a vaccine incorrectly causing injury), the employer may be held liable up to \$100,000.

**15. If a student nurse is sued for their negligence while working under the PHN, which insurance would cover the costs of the lawsuit against the student nurse?**

The public employer's insurance would provide coverage to defend the lawsuit, however, nursing schools generally provide liability insurance for their student nurses. A municipality or political subdivision may be able to require that the school liability insurance policy be utilized for any negligence action brought against the student nurse through a clinical contract provided by the school or other mechanism. The municipal or political subdivision attorney should review the contract and insurance policies and determine if such a mechanism exists to require the school insurance policy to cover the costs of any lawsuits against the public employer related to the actions of a student nurse.

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