



The Power of Collaboration – Part 1

Paul J. Shives, VP and Director of Safety Services

J.A. Montgomery
CONSULTING

The Power of Collaboration



Our Agenda for Part One

- Insurance & Indemnification
- Creating and Managing a Joint Insurance Fund
- Employee Safety
- Worker's Compensation
- The Tort Claims Act (Title 59)
- Employment Practices Liability
- Recreational Cannabis
- Americans with Disabilities Act (ADA)



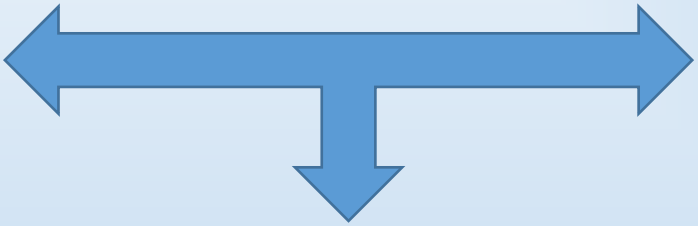
Insurance and Indemnification



How we view typically insurance



Personal Insurance Most of Us Need



Insurance and Indemnification



Every 9 minutes,
child protective services substantiates, or finds
evidence for, a claim of child sexual abuse.

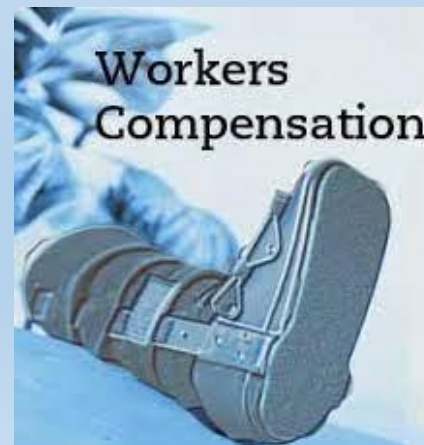
RAINN

National Sexual Assault Hotline | 800.656.HOPE | online.rainn.org
Please visit rainn.org/statistics/children-and-teens for full citation.¹



Insurance and Indemnification

- Regardless of who the insured is (i.e., a municipal entity, private commercial entity or individuals or families), insurance is about **the sharing of risk.**



The Higher the risk, the higher the cost for insurance..



Assessing Risk – Homeowners Insurance



Highest Replacement Cost,
In a Flood Prone Area,
Very old Dwelling, Wood
frame

Higher Replacement cost, Not
New, Partially in a flood hazard
area

Lower Replacement Cost, Not in Flood Prone Area,
Newer Dwelling, Smoke Detectors

Insurance as a “Layer Cake”



- **First Layer:** How much do you want to retain yourself? (aka the deductible and co-insurance)
- **Second Layer:** Basic layer of insurance coverage (commercial insurance or Self Insurance)
- **Third and Beyond Layers:** Excess Insurance, usually commercial insurance

Types of Insurance Coverage

- **Worker's Compensation**

- Coverage is mandated by law for on-the-job injuries or illness on a “no-fault” basis
- Represents **half the cost** of property-casualty insurance for typical local government entities
- **Will cover this in more detail later**



Type of Insurance Coverage

- **Automobile Insurance** – damage to auto, property, and injuries; No-Fault in NJ.
- **Property Insurance**
 - Approximately 10% of the cost of property-casualty insurance for local government entities.
 - Most common perils covered:
 - Fire
 - Flood, windstorm, lightning & other weather-related events
 - Motor vehicle collisions
 - Failure of mechanical & electrical equipment



PROPERTY INSURANCE

Type of Insurance Coverage

- **Property Insurance (Continued)**

- Perils **NOT** covered (**Separate Insurance is needed**):

- Flood within flood hazard areas (Covered by Flood Ins.)
- Wear and tear, along with faulty construction
- Pollution, disease and pathogens (EJIF)
- Theft by officials, employees or volunteers (Crime Policies)

- Types of Property **NOT** covered (**Separate Insurance is needed**): :

- Land, beaches & related improvements, including sidewalks, roadways and greenery
- Sanitary and storm sewers
- Watercraft and aircraft
- Personal property or vehicles owned by employees
- Electronic data and software
- Money and securities



PROPERTY INSURANCE

Property Insurance Coverage



Property Insurance
\$125,000,000 Limit
Zurich North America
\$900,000 MEL or CEL Deductible
\$100,000 JIF Deductible
Member Deductible

Type of Insurance Coverage

- **Crime Policies**

- Covers the exclusions under the property policies for monies and securities as well as theft by officials, employees and volunteers.
- **Statutory Bonds** – the faithful performance bond required by the Treasurer or CFO, Tax Collector, Utility Collector. Levels of bonding are set out in State regulation in N.J.A.C. 5:30-8. The MEL requires the following:
 - Completed application
 - Credit score of 600 or above
 - No pending bankruptcies, insolvencies or similar financial condition
 - Completed FCRA Consumer Disclosure and Authorization form.
 - There is an appeal process for those employees who are denied.



Liability Coverage

- **Liability Insurance Coverage**

- 40% of the costs of property-casualty insurance for typical local government entities

- **Liability Insurance (Continued)**

- Typically consists of eight (8) primary insurance policies

- *General Liability*
- *Auto Liability*
- *Police Professional Liability*
- *Public Officials Liability*
- *Employment Practices Liability*
- *Environmental Liability*
- *Cyber Liability*
- *Aircraft Liability*

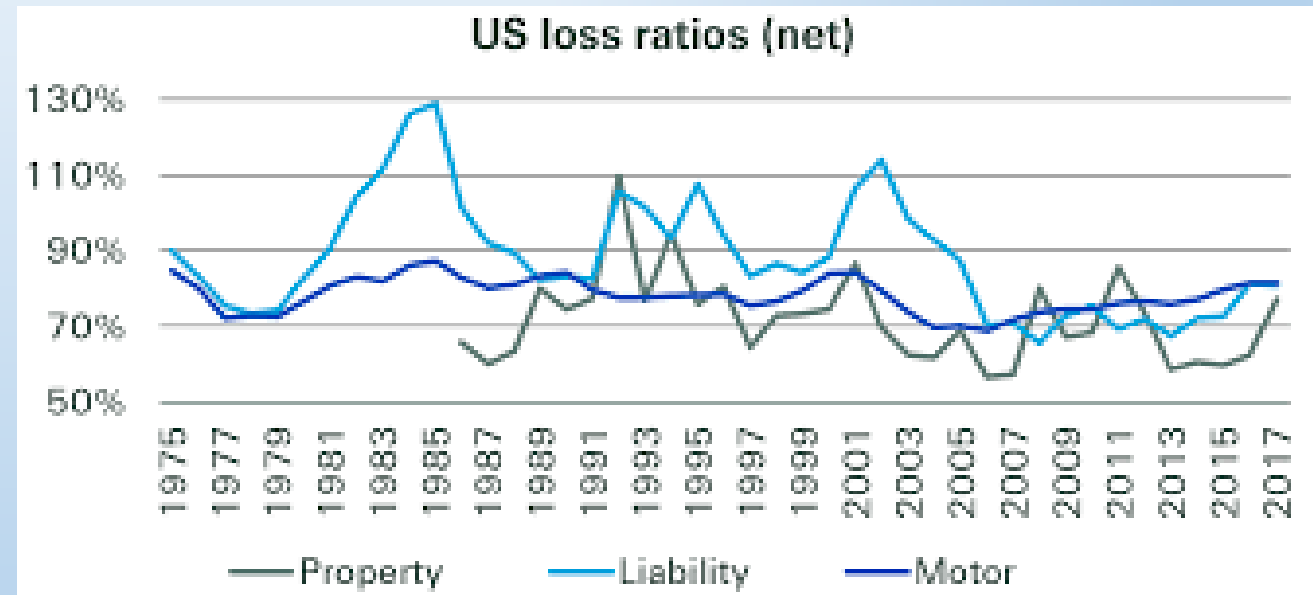


Liability Coverage

- Special Coverage Requirements
 - *Special Events*
 - *Fireworks Displays* – Hold Harmless and COI
 - *Amusement Rides* – Hold Harmless and COI
 - *Skateboard Facilities* – MEL and NJ CEL have special requirements
 - *Employed Attorney Professional Liability* – Must be JIF approved



Municipal Insurance Funds in New Jersey



Municipal Insurance Funds in New Jersey

- Before the 1980's, local governments in NJ could not legally form insurance "pools" (or Joint Insurance Funds).
- The nationwide insurance crisis in the 1980's accelerated the need for an alternative to commercial insurance for local governments.
- The NJSLOM and the NJSBA lobbied heavily for the enabling legislation.
- The enabling legislation was passed, and the first local insurance pool was formed in Bergen County.
- When excess coverage became unavailable, the need arose for the creation of a "super JIF," the NJ Municipal Excess Liability (NJ MEL) Joint Insurance Fund to offer that coverage. The county equivalent, the NJ CEL, was created in 2010.



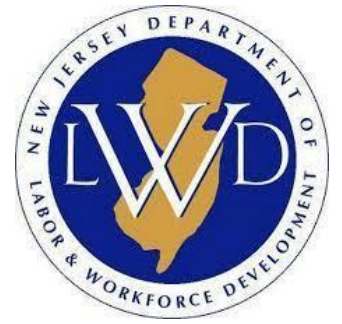
Municipal Insurance Funds in New Jersey

- JIFs are **governmental entities**, NOT insurance companies. Specifically, JIFs are considered inter-local governmental entities, responsible for the insurance program of its members. NJ courts have upheld the JIF status as governmental entities.
- Concept is to “pool” resources (i.e. taxpayers' dollars) and share risk
- Heavily regulated by the State of New Jersey and must follow the rules for governmental entities.
- There is **joint oversight** of JIFs by the NJ DCA and the NJ DOBI
- The enabling legislation can be found at 40A: 10-36



Municipal Joint Insurance Funds – State Regulation

- **NJ Dept. of Labor and Work Force Development & NJ Dept. of Health**
 - Compliance with Public Employee Occupational Safety & Health regulations (PEOSH)
 - NJ Right to Know requirements (DOH)
- **NJ Department of Environmental Protection**
 - Provides technical assistance and training for members



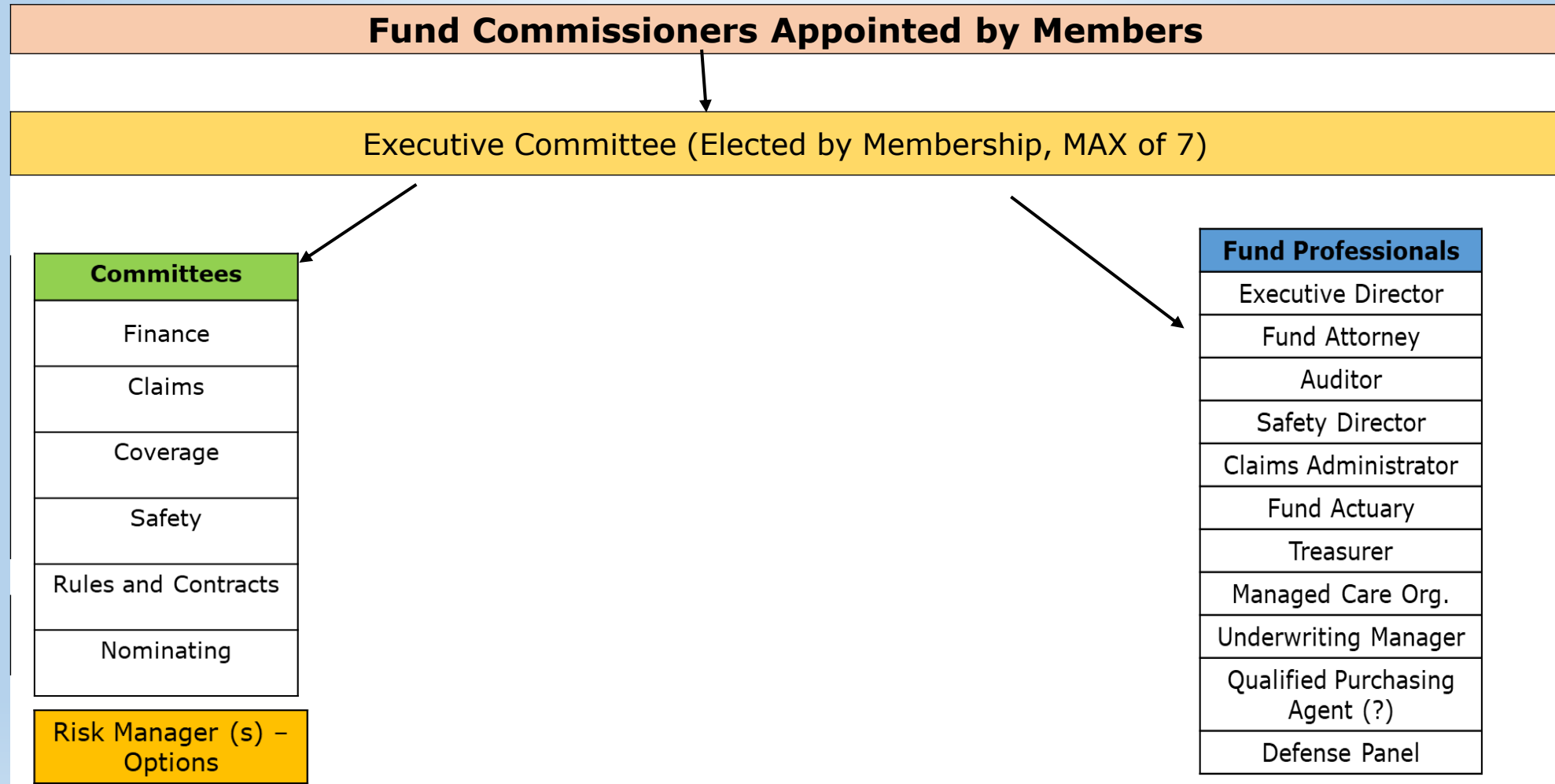
Operation of Municipal Joint Insurance Funds

- JIF Commissioners are appointed by their respective local government entities, and must be either local elected officials or employees of member local units to serve. Elected officials serve for two years and appointed officials serve one year terms. There are no term limits.
- Each JIF has formulated and adopted a set of **Bylaws** by which they will operate.
- An Executive Committee and officers are elected at the reorganization meeting each January by the Commissioners.
- JIFs are subject to the regulations contained in the Local Budget Law, Local Fiscal Affairs Law, Local Public Contracts Law, OPRA, and the Open Public Meetings Act.
- The Executive Committee meets monthly to conduct business, according to the Open Public Meetings Act.

Risk Managers & the Defense Panel

- Most JIFs require their members to retain a licensed insurance advisor to act as Risk Manager.
 - Risk Managers fulfill a vital role for the member entities with expertise on insurance coverage and the specific exposures that are present in public settings.
 - Risk Managers must be appointed pursuant to the NJ LPCL and subject to the same “Pay to Play” regulations applicable to all other professional appointments.
 - Some JIFs require the same risk managers to be appointed for all members. Check the JIF By Laws to determine how the Risk Managers are appointed and compensated.
- Each JIF appoints a panel of attorneys annually to defend cases on behalf of the JIF. The appointments are made pursuant to the NJ LPCL and subject to the same “Pay to Play” regulations applicable to all other professional appointments.

Organization of a Joint Insurance Fund



Operation of Municipal Joint Insurance Funds

- JIFS may be created and organized by:
 - *Geography* – i.e., municipalities within a county or within a “region” or even more than one county
 - *Purpose* – i.e., water and sewer authorities, housing authorities, first responders
 - *Form of Government* – i.e., professional municipal manager form of government
 - *None of the Above*

19 MEL Affiliated JIFS

[Atlantic County Municipal JIF](#)

[Bergen County Municipal JIF](#)

[Burlington County Municipal JIF](#)

[Camden JIF](#)

[Central Jersey JIF](#)

[First Responder JIF](#)

[Gloucester, Salem, Cumberland
Municipal JIF](#)

[Mid Jersey Municipal JIF](#)

[Monmouth County Municipal JIF](#)

[Morris County Municipal JIF](#)

[New Jersey Public Housing Authority](#)

[New Jersey Self Insurers JIF](#)

[New Jersey Utility Authorities JIF](#)

[Ocean County Municipal JIF](#)

[Professional Municipal Management
JIF](#)

[Public Alliance Insurance Coverage
Fund](#)

[South Bergen Municipal JIF](#)

[Suburban Metro JIF](#)

[Suburban Municipal JIF](#)

NJ CEL Affiliated Members

- Camden County Insurance Commission
- Gloucester County Insurance Commission
- Burlington County Insurance Commission
- Cumberland Count Insurance Commission
- Union County Insurance Commission
- Mercer County Insurance Commission
- Atlantic County Insurance Commission
- Ocean County Insurance Commission
- Monmouth County
- Hudson County



Operation of a Municipal Joint Insurance Fund

- **The Responsibilities of the Fund Commissioners:**

- To operate the Fund “in the interests of the total membership.”
- Formulate the annual budget, insurance coverage limits, authorize the purchase of reinsurance and determine all other operating and financial policies of the JIF
- Invest funds
- Enter into contracts in accordance with the NJ LPCL
- Adopt the Plan of Risk Management
- Join a Joint Insurance Fund (i.e., the MEL, or E-JIF).
- Establish and maintain a website with the following (at a minimum):
 - Budgets (current year, and at least 2 prior years)
 - Audit Reports
 - Meeting Schedule
 - Plan of Risk Management
 - Bylaws
 - Contact information
 - OPRA policy and procedures

Operation of a Municipal Joint Insurance Fund

- **Plan of Risk Management**

- Must be filed with the State of NJ DOBI and NJDCA
- The Plan is prepared by the JIF's Underwriting Manager, adopted at the annual Reorganizational Meeting and must include:
 - ***Lines of Insurance Coverage, limits and amount of "risk" retained by the JIF***
 - ***Reinsurance and Excess Insurance***
 - ***Methods to calculate member assessments***
 - ***Loss adjustment procedures***
 - ***Actuarial Methodology***

Operation of a Municipal Joint Insurance Fund

- By Laws
- Indemnity and Trust Agreement
 - Under the law in NJ, each member of the JIF must agree to be jointly and severally liable for JIF's obligations. (The JIF is backed by the "full faith and credit" of the individual members.)
- Membership Commitment
 - Maximum commitment under the law is three (3) years
 - Requires a Resolution of the governing body and a 2/3 approval by the JIF Executive Committee. **Membership is not automatic, the approval is discretionary by the Executive Board.**
 - Notice to withdraw from the Fund requires 90 day notice, even if the commitment is expiring.
 - Former members are still subject to "Special or Supplemental Assessments."

Operation of a Municipal Joint Insurance Fund

- **Annual Reorganizational Meeting**
 - Usually held in January
 - Elect Executive Committee (7 members or less) with alternates
 - Elect officers (Chairperson and Secretary, and maybe a Vice Chair)
- **Meetings and compliance with OPMA**
 - Notice required
 - JIF is required to establish and maintain a website
- **Assessments and Supplemental Assessments & Return of Surplus**
 - As determined by the budget
- **Conflicts of Interest**
 - Compliance with NJ LG Ethics Act

Operation of a Municipal Joint Insurance Fund

- **Claims**

- Commissioners must approve claim settlements
- The appointed Claims Administrator prepares the PAR's each month for review.
- Claims committee reviews and recommends approval (or denial) of Payment Authority Requests (PAR's) each month. The Fund Commissioners determine the cases they want to settle (subject to approval by the MEL).

- **Dissolution of the Fund**

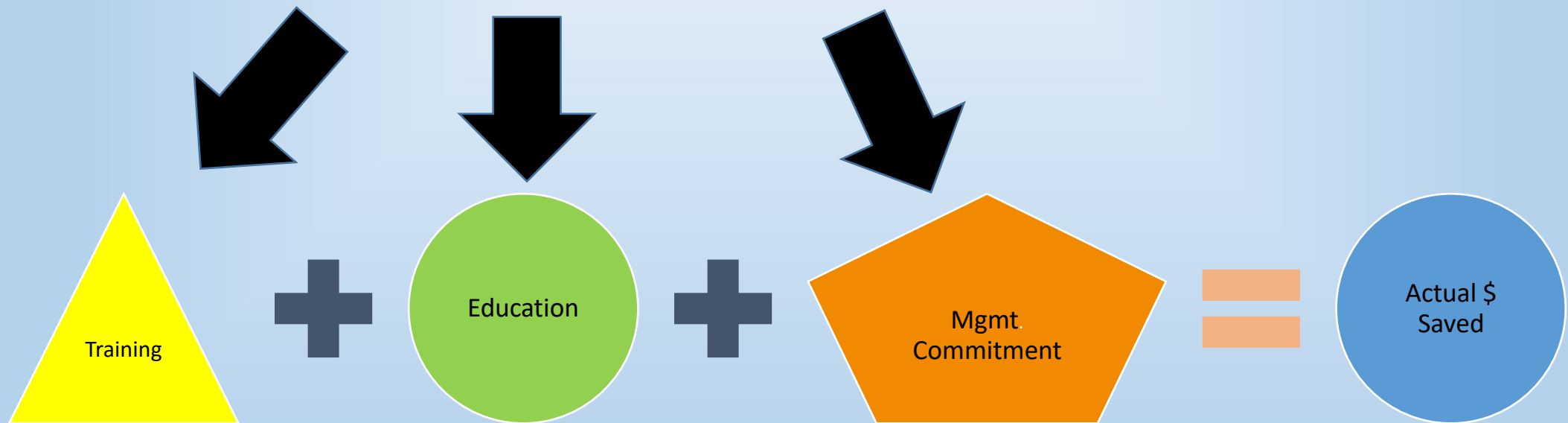
- All outstanding claims must be paid before a JIF can apply to the DOBI for approval to dissolve. Some claims take decades to resolve. Dissolution requires a vote of the entire membership.

Employee Safety



Why Does Safety & Risk Control Matter?

The Keys To Effective Risk Control



Employee Safety Programs

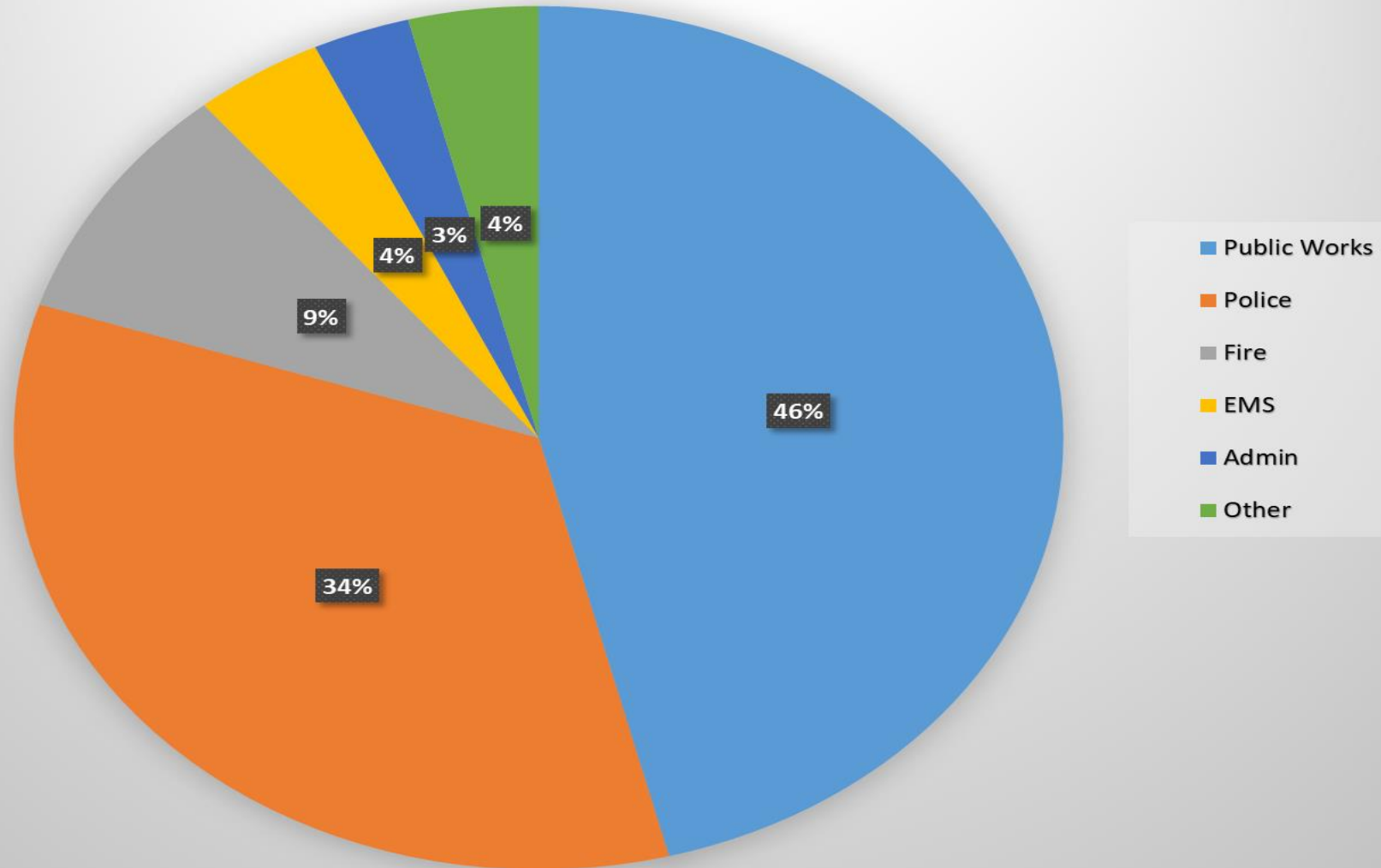


- What we know.....

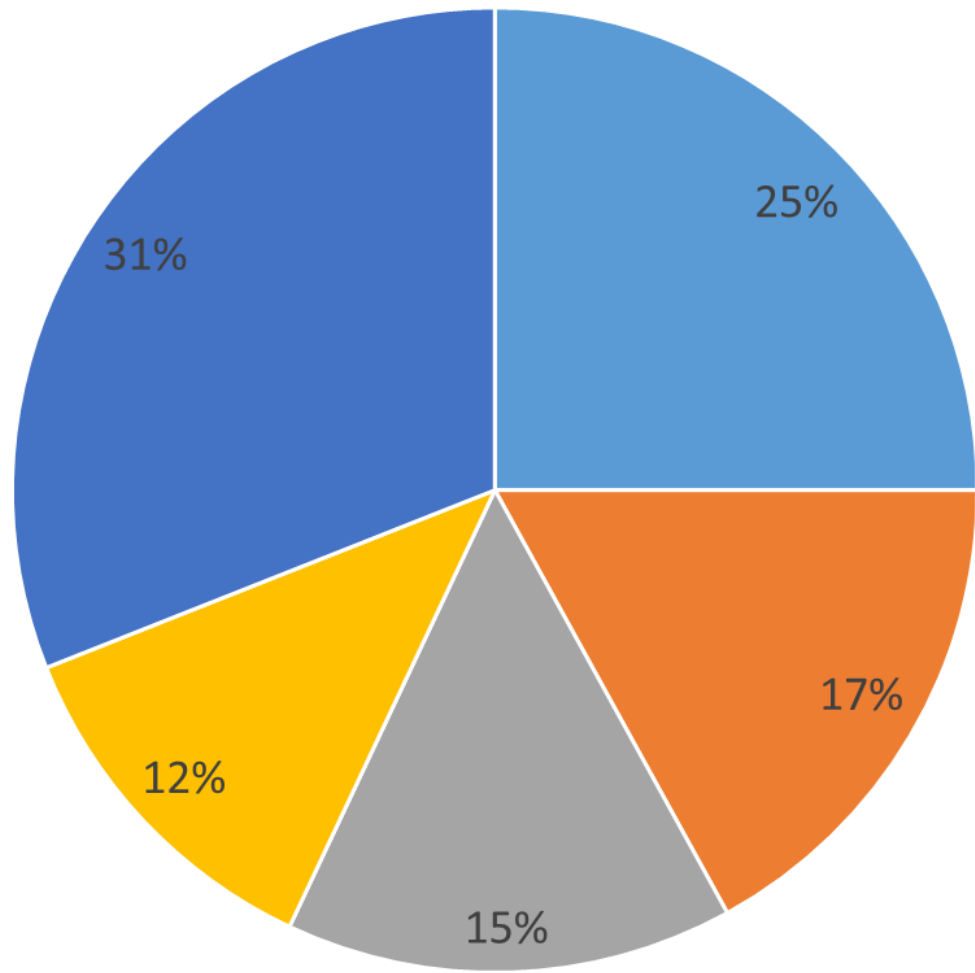
- The first national workplace safety regulations were not put into place until **1970**, when President Nixon signed the ***Occupational Safety and Health Act*** (OSHA). NJ PEOSH covers public employee workers.
- Municipal and county entities with viable & effective Safety Committees experience fewer accidents with less costs incurred.
- Police (34%) and Public Works (46%) accidents account for 80% of all accidents. Add in EMS and Firefighters, and it is **90%**.
- 43% of all Fire Department fatalities are the result of ***heart attacks***
- A police officer, firefighter or DPW worker has a HIGHER chance of being injured on the job than an underground miner or construction worker.
- ***Effective safety and risk control programs WORK.***

Targeted Approach

Municipal Accidents by Department

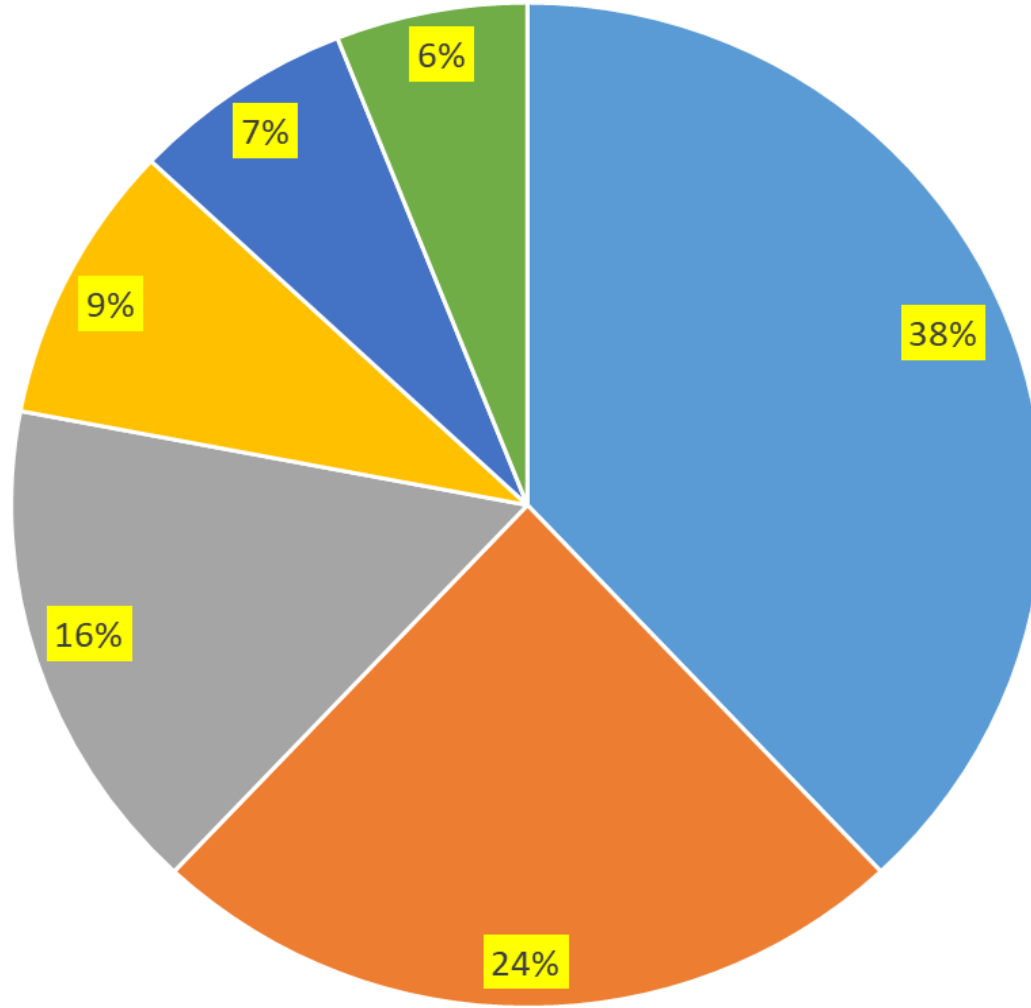


Police Claims



■ Lifting ■ Motor Vehicle ■ Slips & Falls ■ Assaults ■ Other

Public Works Employee Accidents



■ Trash Collection ■ Streets ■ Bldgs and Grounds ■ Vehicle Repair ■ Water & Sewer ■ Other

Effective Management Strategies That Impact Safety in a Positive Way

- Monitor Safety Performance.
- Empower employee involvement in the safety program.
- Require ALL personnel to complete safety orientation and periodic refresher training.
- Discuss safety with employees at the start of each shift.
- Actively participate in accident investigations.
- Monitor PEOSHA compliance.

PEOSH



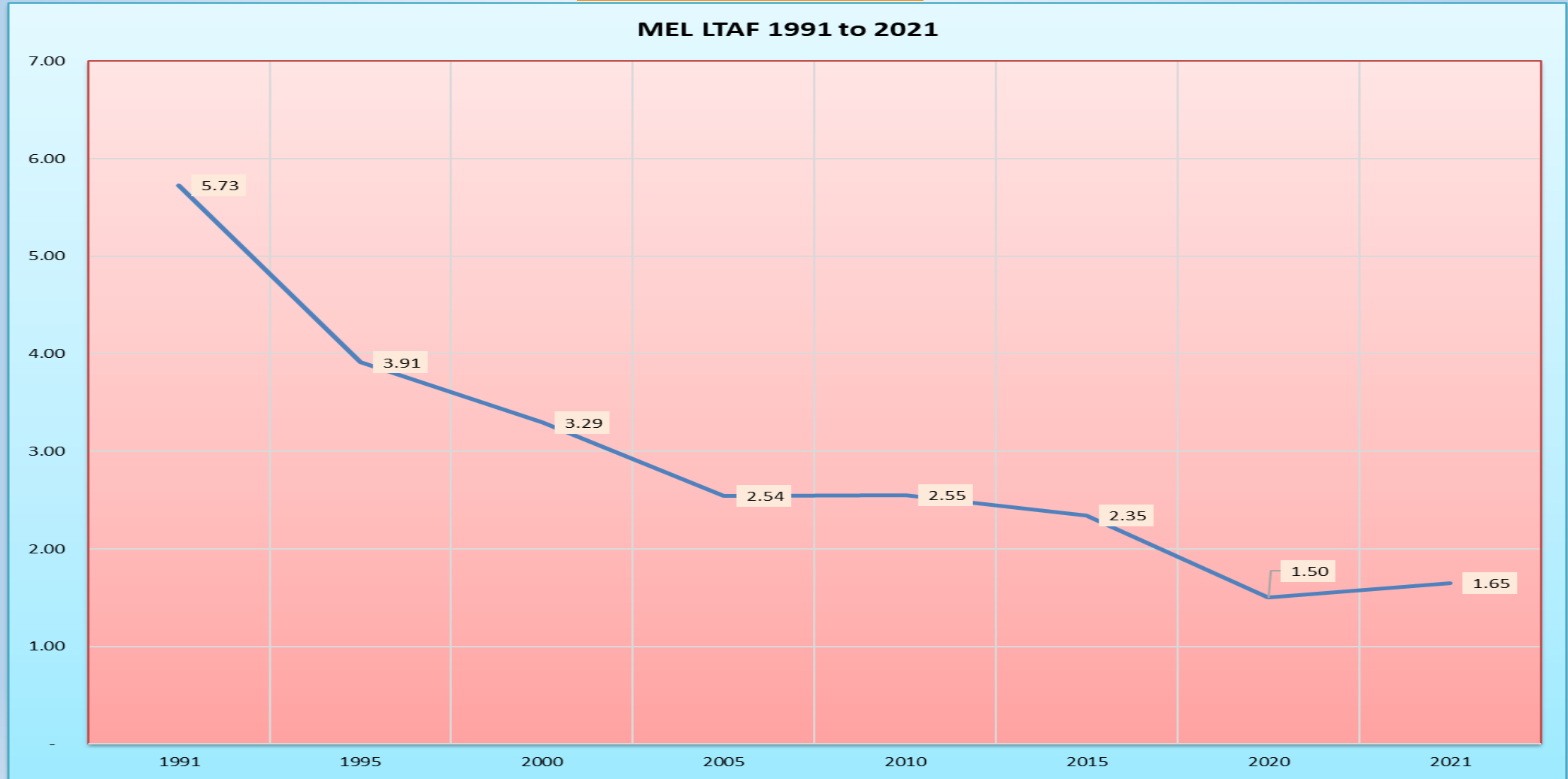
Creation of a Safety Committee

- Plans and implements the safety and risk control program.
- Should include the risk management consultant, representatives from management, collective bargaining units, and non-union employees. All departments should be represented and there should be a representative from senior management who attends but does not run the meeting.
- An agenda should be prepared that includes a review and discussion of all insurance claims by the membership. Meeting minutes should be taken and approved. Other agenda items should include any safety concerns from the employees.
- A review of all training programs should be conducted along with preparation of a training plan for each department and each employee.

Measuring the Effectiveness of Loss Control Programs

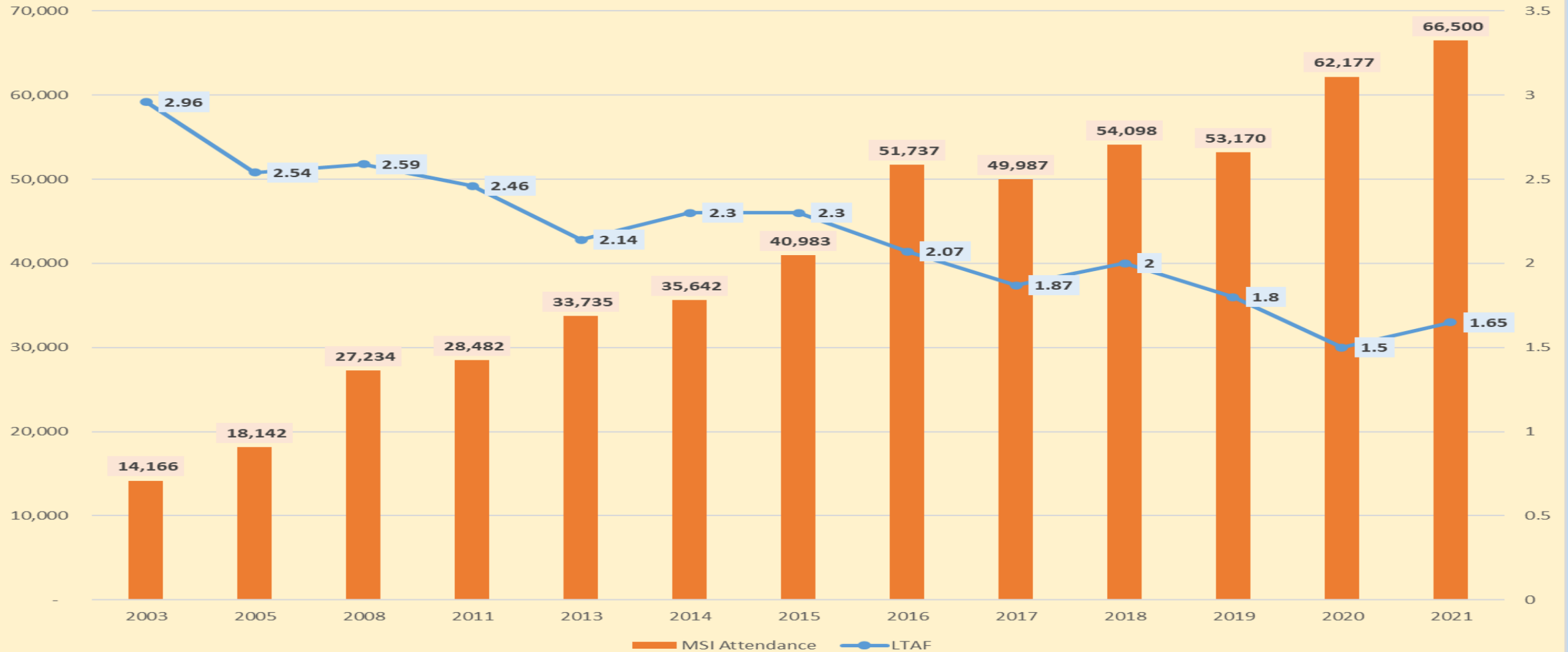
- **Lost Time Accident Frequency or *LTA***
 - **The Lost Time Accident Frequency is a standard OSHA metric that calculates the number of incidents that result in time away from work.** Not all recordable incidents result in lost time, which is why there is a separate calculation for these more severe incidents.
 - ***The “safer” the work environment is, the lower the LTA.***
 - **Statistics show that ongoing training and education of workers is the most effective tool in reducing the LTA and keeping it low.**

Lost Time Accident Frequency (LTAF)



LTAf and MSI Usage

Lost Time Accident Frequency v. MSI Attendance 2003-2021



Training Resources Available

- MEL Municipal Safety Institute (MSI) (**NOTE: The NJCEL members also have access to the same resources.**)
 - **MELSAFETYINSTITUTE.ORG**
 - MSI LIVE – Virtual Instructor-Led Training and In-Person Training (See Catalog with over 60 course titles)
 - MSI NOW – Digital Streaming Safety Library with over 200 titles
 - MSI DVD – Safety Video Lending Library with over 400 titles
 - MSI Briefings – Short Video Briefing Programs on Safety Subjects
 - MEL Online Videos – Professionally produced videos on MEL website
 - MSI Leadership Academy – New initiative to train supervisors

Training Resources Available

- MSI Forms and Documents
- MSI Model Policies
- MSI Law Enforcement Training Resources
- MSI Safety Bulletins
- One on One Consultation with:
 - Safety Professionals, including loss control visits and job safety observations on an ongoing basis
 - Former Police Command Staff Officers – including one on one meetings with Chiefs of Police and Law Enforcement Ad Hoc Committee Meetings

Workers' Compensation



Workers' Compensation in NJ

- Law is found at: N.J.S.A. 34:15-1 et. seq.
- ***Half the cost of local government property/casualty claims is attributed to Workers' Compensation.***
- Until the start of the 20th century, employees injured on the job were forced to sue their employers for negligence under common law.
- NJ was the first state to adopt a permanent workers' compensation law where benefits are provided for traumatic injuries and occupational disease.
- WC coverage is “no-fault.”
 - The injured worker must only be able to show that the injury occurred during the course of work and arose out of work. They do not need to prove the employer was negligent.

Workers' Compensation in NJ

- WHO IS COVERED?????
 - Regular and not “casual” employees.
 - Independent contractors may be covered if the employer exercises effective control over the independent contractor as if the contractor was an employee or if the employer has a “long-term economic dependency” on the independent contractor. Based on this legal interpretation, what do you want to make sure of?
 - Are volunteers covered?



Workers' Compensation in NJ

- Certain volunteers are covered:
 - Elected and appointed officials
 - Board of Education members
 - Volunteer Firefighters
 - Volunteer First Aid Squad workers
 - Reserve or auxiliary police officers



Workers' Compensation in NJ

- **Benefits Under WC:**

- Necessary Medical Care – Directed and managed by the **employer**
- Temporary Disability Payments if off from work.
 - 70% of the employee's earnings up to the state-average weekly wage, which is established annually by the Workers' Compensation Bureau.
 - There is a seven-day waiting period before becoming eligible; but once this is satisfied the payment is retroactive.
 - Not subject to federal or state wage tax or social security tax.

Workers' Compensation in NJ

- In New Jersey, these weekly benefits are 70% of your average weekly wages before the injury, but there is a maximum and minimum that changes every year. For injuries that happen in 2021, the weekly maximum benefit is \$969, and the minimum is \$258



Workers' Compensation in NJ

- Temporary Disability Payments if off from work (continued):
 - Payments stop when the doctor certifies that the employee has reached “maximum medical improvement,” even if the employee cannot return to work yet. At that point, the employee is evaluated for an indemnity award. (to be discussed later)
 - If there is any doubt about the employee’s ability to perform a particular job, the employer may schedule a “functional capacity exam” (FCE).
 - In lieu of temporary disability payments, many local government employees receive their full salaries for up to one year when they are off from work because of a job-related illness, injury or disability. The JIF will reimburse the employer based on the State average.

Workers' Compensation in NJ

- Indemnity Awards:
 - Employees also receive compensation for permanent disabilities, computed as a percentage of a body part, or in some cases, a percentage of the whole body. The rating for an indemnity award has no bearing on the actual ability of an employee to return to work.



Workers' Compensation in NJ

- **Special Claims Issues**

- Coordination of WC with State Pensions
- Coordination of WC with Social Security Disability
- WC Courts – set up under the NJ Dept. of Labor, no juries
- Reopening Claims – up to 2 years after the last WC payment
- Section 20 Settlements
- Second Injury Fund
- Subrogation



Workers' Compensation in NJ

- When is the employee covered?
 - Generally (but not always), coverage starts when an employee arrives at the employer's premises and ends when the employee leaves.
 - First Responders are covered when traveling from home to the scene or when traveling to the station to pick up equipment needed to respond to an emergency.
 - Employees traveling for work to another location as part of their job are covered.



Workers' Compensation in NJ

- **Occupational Disease Claims**, i.e., “injuries or illnesses caused by repetitive activity or exposures over a period of time.”
 - Include musculoskeletal issues, hearing loss, PTSD, and Lyme disease.
- **Heart Attacks**
 - 1995 NJ Supreme Court decision
 - To be compensable, heart disease must also be:
 - Due in a material degree to causes which are characteristic to a particular occupation
 - The work exposure exceeds the exposure caused by the workers' personal risk factors such as smoking, and
 - The employment substantially contributed to the development of the disease



Workers' Compensation in NJ

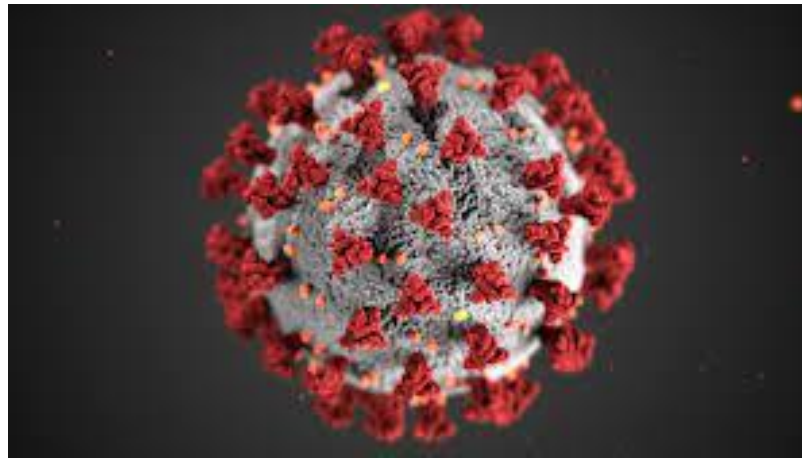


- **Heart Attacks** (continued):

- A heart attack suffered by an on-duty police officer or firefighter is **presumed** to be compensable under a special provision of the law in NJ.
- Extended to cover emphysema contracted by firefighters in 2003.
- New legislation in 2019 established that cancer is also **presumed** to be job-related if a firefighter has at least seven (7) years experience on the job. The **presumption** covers both volunteer and career firefighters and expires when the firefighter reaches age 75.
- Can be rebutted by the employer if the “preponderance of the evidence” shows that the cancer or heart attack is unrelated to firefighting.
- Public Safety Workers are also eligible for the same **presumption** when exposed to communicable diseases.

Question for You

- Are COVID-19 Claims Covered by Workers' Compensation?

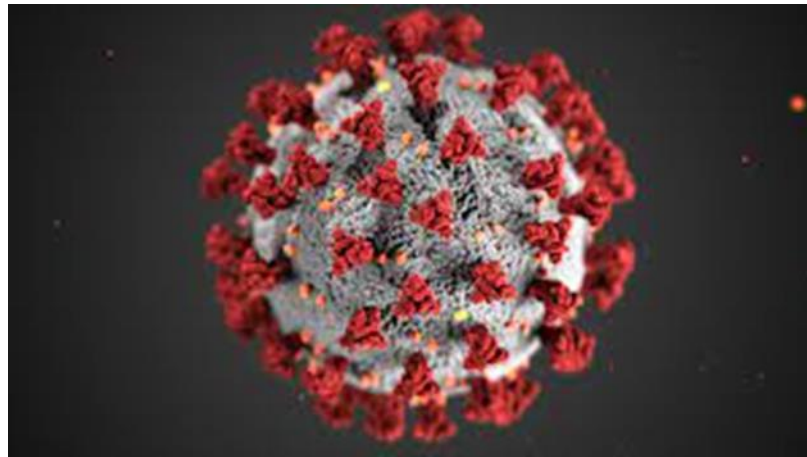


COVID-19 Workers' Compensation Claims

- Senate Bill 2380 Signed into law on 9/14/2020 by Governor Murphy
- Creates a **“rebuttable presumption”** of WC coverage for COVID-19 cases contracted by “essential employees” during a public health emergency declared by an Executive Order by the Governor. Effective retroactively to 3/9/2020.
- Public safety workers or first responder including police, fire, or EMTs.
- Medical or healthcare provider
- Essential to the public’s health, safety, and welfare
- “Loosely” interpreted

Impact on Public Employees in the MEL System

- Since 3/9/2020:
 - Over 13,000 claims filed
 - Total paid out us > \$20 million (And Counting....)



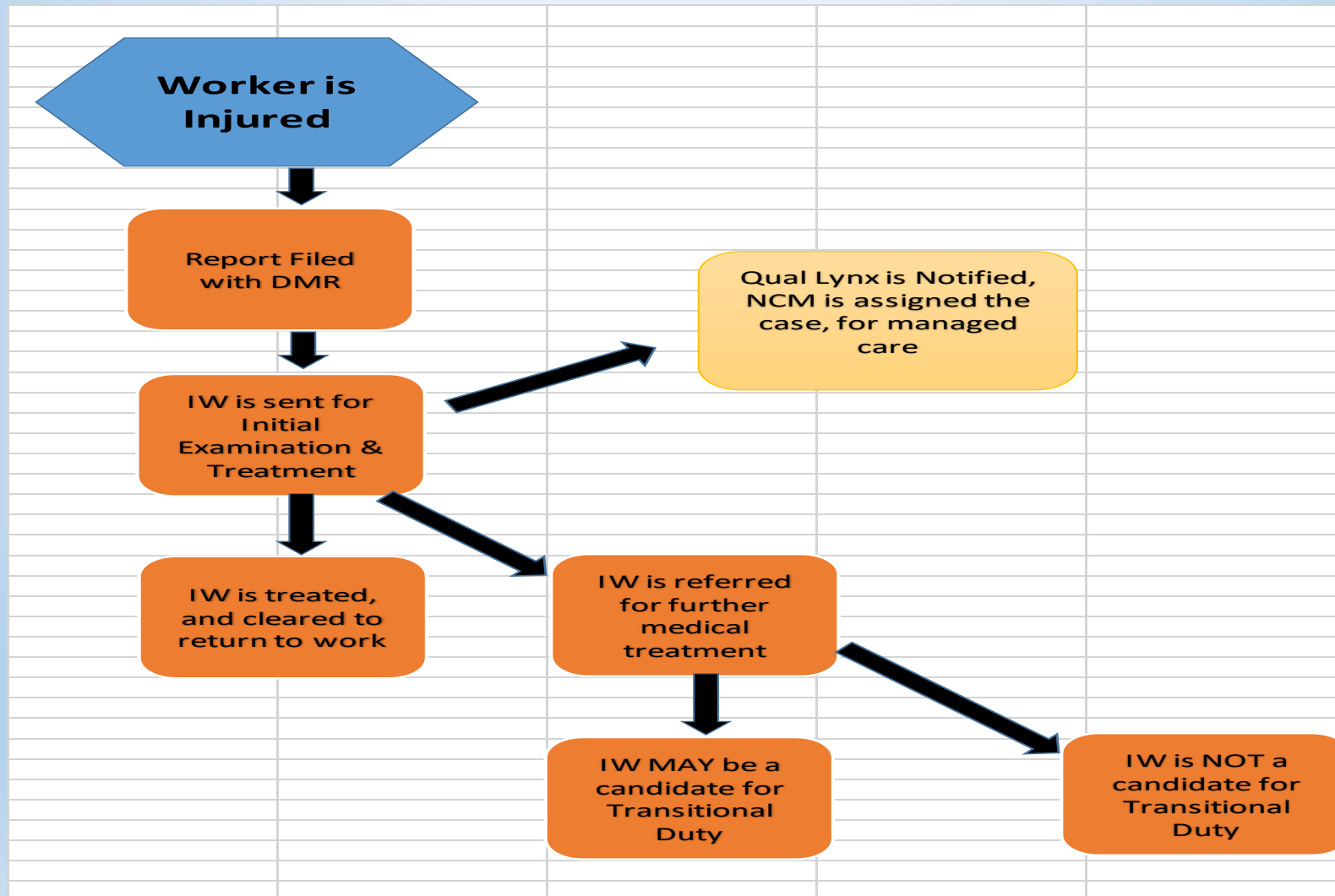
Workers' Compensation in NJ

- **Managing the Claims Process**

- Use the most skilled physician
- Maintain contact with the injured employee
- Return the employee to work as soon as possible – “Transitional Duty”
- Include your attorney in the claims control discussion
- New tools – establishing a baseline for each employee.



Transitional Duty Policy for WC



Workers' Compensation Fraud

- Investigations should be conducted if fraud is suspected
- Fraud may be subject to criminal prosecution
- Suspicion is NOT sufficient grounds for dismissal
- However, the filing of a WC claim does not immunize the employee from adverse employment action for other legitimate reasons.



Break Time

- We will now take a **10-minute break.** Please be back in ten minutes. Thank you!

Selected Case Law

- Kossack V. Bloomfield (1960)
 - Police officer was injured at home while cleaning his service revolver. There was no provision in the department's policies that specified where or when officers were to maintain their revolvers.
 - Court ruled the officer was covered by WC because he had a duty to keep the service revolver clean and serviceable, and was "unquestionably fulfilling the duties of office."



Selected Case Law

- Minter v. Mattson (2018)
 - The town told an employee that it was “critical to come to work” during a heavy snowstorm. The employee was injured in a vehicle accident during the commute.
 - While workers’ compensation coverage does not usually begin until the employee reaches the workplace, the “going and coming” limitation does not apply if the employee is required to travel in dangerous conditions.

Tort Claims and Title 59 Immunities



What in the world is a “Tort Claim?”

- A tort is *an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability.*
- The law recognizes torts as civil wrongs and allows injured parties to recover for their losses. Injured parties may bring suit to recover damages in the form of monetary compensation or for an injunction, which compels a party to cease an activity. In certain cases, courts will award punitive damages in addition to compensatory damages to deter further misconduct.
- The Federal Tort Claims Act is a 1946 federal statute that permits private parties to sue the United States in a federal court for most torts committed by persons acting on behalf of the United States. Historically, citizens have not been able to sue their state—a doctrine referred to as *sovereign immunity*.

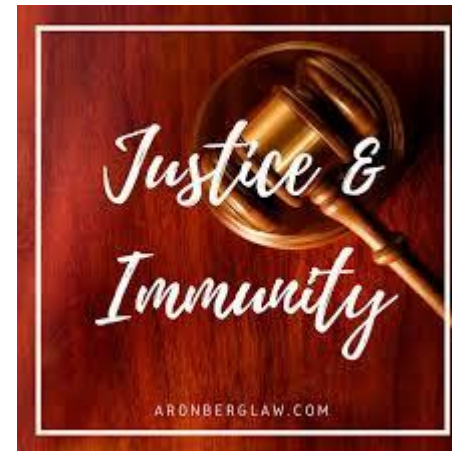


Title 59 in New Jersey

- Conceivably almost any accident that happens could result in a lawsuit against a local governmental entity.
- While private entities have the ability to limit the scope of their activities, for the most part, government does not.
- Local governments in NJ were protected by “sovereign immunity” until 1959 when the NJ Supreme Court ruled that governmental employees could be sued for failure to perform ministerial duties but not for discretionary activities.
- The NJ Sup. Ct. struggled to determine what discretionary activities should have immunity over the next 11 years, ultimately inviting the NJ Legislature to adopt a Tort Claims Act.

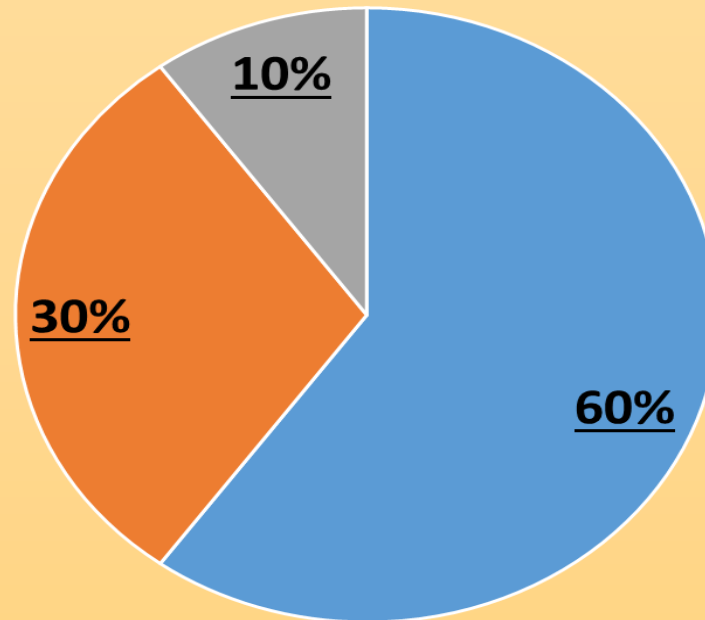
Title 59 in New Jersey

- Title 59 was passed by the State Legislature in 1972, and it provides governmental entities and employees with immunity to civil suit UNLESS a separate law establishes liability.
 - Modeled after the State of California Tort Statute
 - Incorporates the concept of “modified governmental immunity.”



Liability Claims Against Local Government

Liability Claims Against Local Gov't Entities



- Common Accidents (Title 59)
- Civil Rights Cases (Federal, State, and EPL)
- Environmental Issues - Super Fund suits

Discretionary Immunity

- Section 2 of Title 59
- All NJ public entities (municipalities, counties, authorities and the State of NJ) are granted broad immunity for the exercise of governmental discretion.
- Section 3 of Title 59, extends discretionary immunity for:
 - Good faith enforcement or failure to enforce any law
 - Issuance, denial, suspension, or revocation of permits or orders, or the failure to do so.
 - Failure to inspect, or negligent inspection of property

Discretionary Immunity

- “The law does not protect a public employee from liability if it is established that his conduct was ***outside of the scope of his employment*** or constituted a crime, actual fraud, actual malice, or willful misconduct.”
 - ❑ A public entity may be immune but individual employees or officials may not be immune.

Indemnification Ordinances

- **Title 59** permits local entities to indemnify local public employees for civil violations if, in the opinion of the governing body the acts committed by the employee did not constitute actual fraud, actual malice, willful misconduct or an intentional wrong.
- Indemnification ordinances *are discretionary for local governmental* entities in NJ. They are mandatory for state and school employees.

Indemnification Ordinances

- Most of the ordinances are standard in that they state that ***the local government employer will indemnify you and hold you harmless from liability if you are sued in the course of your employment.***
- However, there is usually a “**reservation of rights**” clause in the ordinance stating that your employer “**reserves the right**” to ***discontinue your defense if, through the course of discovery or the court proceedings they become aware that you acted OUTSIDE of the scope of your responsibility and job duties.***
- Many local governments have made their Code available online. If that is the case for your local government, check the Code for the indemnification policy and ordinance. If you cannot locate it, reach out to your local municipal or county att

Recreational Immunity

- Recreational Immunity
 - ❑ Immunity for failure to provide supervision of recreational facilities
 - ❑ No immunity for failure to protect against a dangerous condition



Police Qualified Immunity

- Law Enforcement Immunity (Qualified Immunity)
 - ❑ No requirement that a municipality maintain a police department
 - ❑ Police officers are immune as long as the officer acted in “good faith” which means “honesty of purpose and integrity of conduct without knowledge, either actual or sufficient to demand in inquiry that the conduct is wrong.”
 - ❑ Immunity does not apply to false arrest or false imprisonment
 - ❑ Officers are required to intervene if a fellow officer is violating someone’s civil rights or using excessive force.



Accidents on Public Property

- To prevail a plaintiff must establish:
 - ❑ The claimant was using public property with reasonable care for its intended purpose
 - ❑ The public property was in a dangerous condition
 - ❑ The public entity had actual or constructive notice of the dangerous condition that caused the accident
 - ❑ The action or inaction of the public entity or employee was “**palpably unreasonable**,” (i.e., actions or inactions that no prudent person would approve.)



Protections from Civil Suits

- Design Immunity
- Scarce Resources
- Sidewalks and Curbs
 - ❑ Residential v. Commercial Property Owners
- Snow and Ice Immunity
- Streets and Crosswalks

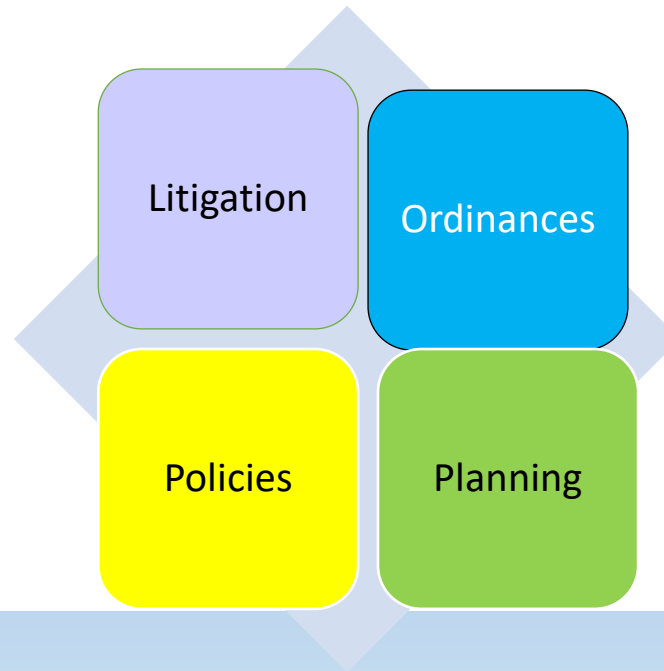


Other Provisions

- Fire Dept. and Ambulance Corps
- States of Emergency
- Collateral Source Rule – Award reduced by insurance
- Sewage Backups – No liability if in sewer lateral, may have liability in main
- Statue of Limitations
 - ❑ Claim within 90 days, lawsuit in 2 years
- Punitive Damages
 - ❑ Permitted for civil rights, sexual molestation, and environmental liability suits. Not usually covered by insurance

Litigation Risk Committee

- Mayor (or County Director, Chairman of Authority), Manager or Executive Director, Local Unit's Attorney, RMC, and Other Dept. Heads (plus Safety Comm. Chair)
- Works collaboratively with the Safety Committee



Litigation Risk Committee

- Responsibilities:
 - Litigation monitoring
 - Review of Pertinent Ordinances and Resolutions
 - Inspections of property and facilities
 - Reporting and follow-up
 - Capital Planning
 - EPL Update
 - ADA Review
 - Land Use Review
 - Child Abuse Policy Review
 - Review coverage issues with RMC and Underwriter
 - Special Events and Use of Public Facilities
 - Environmental Liability
 - Ethics and Open Public Meetings Act Review



Cases

- **Shuttleworth v. Conti (1984)**

- ❑ An intersection accident occurred when a motorist failed to stop because foliage covered the stop sign. The town argues that it was eligible for immunity because it lacked the resources to trim all of the foliage around town.
- ❑ The court ruled that the allocation of scarce resources immunity did NOT apply because leaving stop signs obscured was **palpably unreasonable.**



Cases

- **Kolitch v. Lindedahl (1985):**

- ❑ Motorist lost control of his vehicle at a dangerous curve that lacked a warning sign. The plaintiff was able to show that the speed limit was entirely too high and that there had been numerous accidents at this curve. Therefore, the town was on notice, but failed to act.
- ❑ The NJ Supreme Court held that discretionary immunity applies to the placement of permanent traffic signals and signs, and the establishment of speed limits.



Cases



- **Levin v. Salem County (1993):**

- ❑ A young man dove off of a county-owned bridge into a river, struck his head on a sandbar and suffered a broken neck. For years the county had known that people often dove from this bridge but did not place any warnings and made no effort to stop the practice.
- ❑ The court ruled the county was not liable because the injured party must establish that the property was being used for its intended purpose. Bridges are not intended to be diving platforms.

Cases

- **Petrocelli v. Sayreville Shade Tree Commission (1997):**

- Plaintiff was injured when her bicycle struck an uneven sidewalk caused by the roots of a shade tree. She sued both the town and the Shade Tree Commission
- Court ruled that when the town establishes a “Shade Tree Commission” both the town and the commission become immune from lawsuits alleging failure to maintain trees.



Cases



- **Jones v. Hartford (2003):**

- At 4 a.m. plaintiff was a passenger in a car stopped by police because it met the description of a vehicle that had been reported hijacked at gunpoint. One of the responding officers roughed up and injured the plaintiff, even though the plaintiff did not resist. Fellow officers did not intervene. The report ultimately proved to be a hoax.
- Court ruled that the fellow officers were not eligible for immunity and were liable because they have an affirmative duty to protect a citizen's civil rights.

Lessons Learned

- Title 59 is complicated. Actively solicit the advice of your local attorney, and the other professionals retained by your JIF.
- Creation of a Litigation Risk Committee is an excellent way to coordinate and manage the conditions that give rise to claims and lawsuits.
- The most important tool is **DOCUMENTATION** of your efforts to address dangerous conditions and significant discretionary decisions.



Employment Practices Liability

Also known as “When otherwise very smart people sometimes do inexplicably stupid things in the workplace that cost money.”



Employment Practices Liability

- **The Statistics from 2021:**
 - **44%** of employees say they have experienced harassment in the workplace.
 - **38%** say they have **been harassed “remotely”, through** email, chat apps, text, or video conferencing.
 - **About half** say their workplace does NOT immediately address harassment
 - **Over 1/3** have left their jobs because of unresolved harassment
 - **Only about 50%** have reported harassment



NJ Law Against Discrimination (NJLAD)

- **NEW JERSEY LAW AGAINST DISCRIMINATION (LAD)**: The LAD prohibits unlawful employment discrimination based on the following “protected classes”:
 - ❑ an individual's race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy), familial status, marital/civil union status, religion, domestic partnership status, affectional or sexual orientation, gender identity and expression, atypical hereditary cellular or blood trait, genetic information, liability for military service, and mental or physical disability (including perceived disability, and AIDS and HIV status)
 - ❑ First anti-discrimination law in the US (1945)
 - ❑ Amended by the **Crown Act in 2019**

NJ LAD

- The act allows “fee-shifting” where the defendant must pay the plaintiff’s legal bills if there is ANY award.
- As a result of “fee-shifting,” legal costs now represent approximately 70% of the total cost of employment-practice actions.
 - ❑ One example:
 - Plaintiff rejected a settlement offer of \$75,000 and was awarded only \$20,000 from the jury. Plaintiff’s counsel submitted a fee application for \$671,000, and eventually received \$450,000 for attorney fees.



NJ LAD

- Early on, most claims and lawsuits against local government involved ***equal employment opportunities for women and minorities***.
- Today, however, there are far more lawsuits arising from ***promotional disputes***. ***Two-thirds of these cases come from police departments***.
- Elected officials need to “insulate” themselves from charges of either favoritism or retaliation. Recommended actions:
 - Adopt a Police Promotional Ordinance
 - Contract with an outside agency to interview qualified applicants and provide an objective analysis
 - If the town is NOT a Civil Service town, an outside agency should also conduct a written test.

Lehmann v. Toys R Us (1993)



Lehmann Case

- Landmark decision in our State for harassment on the job, NJ Supreme Court Case (1993)
- Theresa Lehmann was a supervisor in the Purchasing Dept. at Toys R Us, and she was subject to numerous touching incidents, unwanted sexual advances and inappropriate comments by her superior.
- She complained to her superiors but was told to “work it out.”
- She complained to senior management, but there was no change.
- She was offered a transfer but rejected it.
- She ultimately resigned and filed suit.



Lehmann Case

- The Court ruled that an employer is responsible for sexual harassment committed by its supervisory employees unless the employer established an EFFECTIVE anti-harassment program.
- The court made it clear the decision is not limited to sexual harassment but applies to all harassment in the workplace based on an employee belonging to a “protected class.”
- Judge Garibaldi wrote the decision.



Components of an Effective Anti-Harassment Program

- **Written policies and procedures** that prohibit discrimination and harassment in the workplace. The MEL responded by developing a “Model Employment Policies and Procedures Manual” that is updated every two years, and available on the MEL Website.
- **Both formal and informal complaint procedures** (Included in the Model Manual.)
- **Mandatory management training** no less frequently than bi-annually, and training for all other employees no less frequently than every three years.
- **An effective system to monitor compliance**, to ensure that the complaint structure is “trusted” by employees.
- **An unequivocal commitment from senior management** that demonstrates consistent practice through action over words.

Lehmann Decision

- Harassment in the workplace is actionable if it creates what a **reasonable person** would consider a situation ***“sufficiently severe or pervasive to create an intimidating, hostile or offensive working environment.”***
- NJ Supreme Court reaffirmed the principles in the Lehmann decision in a 2002 case, Mancini v. Teaneck.
 - ❑ Mancini was a female police officer in Teaneck who was subjected to 15 years of “low level harassment.”
 - ❑ The court found in her favor, and she received \$125,000 in compensatory damages and \$500,000 in punitive damages, plus interest.
 - ❑ Fee Shifting = Her attorney received \$700,000 in fees
 - ❑ The town paid its attorney \$1 million to defend the case. Total cost to the town = \$3 million.

NJ Conscientious Employee Protection Act

- Passed in 1985 during the Kean administration, also known as CEPA
- Designed to prevent “Serpico” situations.
- Protects governmental employees from being fired or demoted in retaliation for focusing the spotlight on official activity that harms or potentially harms the general public.
- Also known as the “Whistleblower Act.”



NJ CEPA

- “An employer shall not take any retaliatory action against an employee because the employee discloses an activity, policy, or practice that the **employee reasonably believes**:
 - ❑ Is in violation of the law
 - ❑ Is fraudulent or criminal
- Fee shifting applies to CEPA cases
- Statute of limitations is one-year, as opposed to NJLAD with a two-year statute of limitations.
- Requires ANNUAL posting of a notice to employees.
- Used by employees now to gain leverage to fight almost any otherwise legitimate job action.

NJ CEPA

Conscientious Employee Protection Act "Whistleblower Act"

Employee voluntarily without protected employee activities, employee appropriate

1. New Jersey law provides an employee from being any, retaliatory action against an employee because the employee has any of the following:
 - a. Disclosed or intended to disclose, in a statement or in a public forum an activity which is prohibited by the employer or another person, with whom there is a business relationship, and the employee reasonably believes is in violation of a law, or a rule or regulation issued under the law, or, in the case of an employee who is a licensed or certified health care professional, disclosure follows certified the required quality of patient care.
 - b. Provided information or testimony, or public testimony concerning, or testimony concerning, any violation of law, or a rule or regulation issued under the law, to the employer or another employee, with whom there is a business relationship, or to the state or an employee who is licensed or certified health care professional, public regulator, or another entity, and public testimony concerning an employee, testimony of health care quality of patient care, or
 - c. Provided information concerning, or testimony concerning, any violation, or other claim against, customer, customer employee, public employee, vendor or purchaser of the employer, or any subcontractor party.
 - d. Provided information regarding any unethical conduct or fraudulent activity, public or private, of receipt of insurance benefits or other employee insurance benefits that defraud any shareholder, investor, client, patient, customer, former employee, vendor or purchaser of the employer or any government entity.
 - e. Disclosed to an employer or purchaser of, any activity, policy or practice which the employee reasonably believes:
 - i. is in violation of a law, or a rule or regulation issued under the law, or, if the employee is a licensed or certified health care professional, disclosure involves patient care.
 - ii. is fraudulent or illegal.
 - iii. is inconsistent with a clear mandate of public policy concerning the public health, safety or welfare as provided in the amendments to C.E.P.A. (a)-(d).
2. The protection against retaliation, which the employee is entitled to, shall apply unless the employee has brought the activity, policy or practice to the attention of a supervisor of the employer, or, written notice was given the employer in reasonable opportunity to investigate activity, policy or practice. Protection, disclosure is not required where the employee reasonably believes that the activity, policy or practice is likely to cause injury, harassment of the employer or where the employee has a justification for a failure of the disclosure, provided that the situation is emergency in nature.

CONTACT INFORMATION

This information may be required for the following covered persons:
Employees within Administrative Governmental Jurisdiction (NJ C.E.P.A. 34:15-4)

Name: _____

Address: _____

Telephone Number: _____

This notice must be conspicuously displayed.

Employers with employees with 10 or more employees must distribute notice of this law to their employees.
If you have 10 or more employees you may wish to have a copy of this notice posted in your office.



LWD
CONSULTING

And Our Newest Challenge- Legalization Of Recreational Cannabis!

- NJ Voters overwhelmingly approved a ballot question on the sale and use of recreational cannabis in November of 2020
- NJ Legislature followed up with passage of the *NJ Cannabis Regulatory Enforcement Assistance, and Marketplace Modernization Act (CREAMM)*
- Act included creation of the *NJ Cannabis Regulatory Commission*
- As of 1/1/2023, a total of 36 licenses for sale of recreational cannabis products have been issued. Additional licenses approved at each monthly meeting.
- Over \$120 million in sales of recreational cannabis products thus far
- Sales increased by 46% in the July to September 2022 time frame.



Legalization of Recreational Cannabis

- Challenges for NJ Local Government:

- To permit or not permit recreational facilities in their municipality (zoning) & the local tax (Deadline for OPT OUT was 8/21/2021)
- Regulating and enforcing employee use of cannabis products either for medicinal or recreational purposes
- CDL Drivers
- NON-CDL Drivers and employees in “safety sensitive” positions
- Law Enforcement Officers
- All other employees

NOTE: Written policies that have been distributed to all employees (with an acknowledgement) are ESSENTIAL to your program.



Legalization of Recreational Cannabis

- **Resources Available to you:**

- Bulletins issued by the MEL Attorney, Labor Counsel, and Safety Director's office – on the MEL website

- **Model Policies that address use of cannabis products:**

- Model CDL Driver Policy
- Model NON-CDL Driver policy
- Model Personnel Policies Manual (Non-Civil Service AND Civil Service)
- Employee Handbook (Non-Civil Service AND Civil Service)
- Volunteer Handbook

- Most recent issue is ***“guidance”*** from AG's office re: recreational use of cannabis by law enforcement officers – more to come on this

- **Pending Legislation (2022):**

- ***S2656 – Sen. Sarlo (LE officers)***
- ***A3868 – Assemblywoman Mosquera (Paid First Responders)***



Court Cases – Harassment

- Cutler v. Dorn (2008)

- ❑ A Jewish police officer sued under NJ LAD based on a series of minor comments and jokes over the years. In some cases, the officer participated in the “give and take.” The judge threw out the case, and the officer appealed. The Appellate Division agreed with the lower court judge and ruled the comments in question were only “breaking chops and teasing.”
- ❑ NJ Supreme Court disagreed, and said the Appellate Courts statement ***“undervalues these stereotypic references and demeaning comments” and these “isolated incidents could be viewed, in the aggregate, to create an objectively humiliating and painful environment.”***

Court Cases – Harassment

- **Groslinger v. Wyckoff (2009):**

- Police officer alleged gender discrimination and sexual harassment after her supervisor and several employees made caustic remarks when she could not continue to work during a difficult pregnancy. The Town Administrator investigated the complaints and found the supervisor's remarks to be inappropriate but found no discriminatory intent. He disciplined the supervisor and ordered additional anti-harassment training.
- The court granted summary judgment dismissing the case because the town consistently followed and implemented its anti-harassment program.

The Americans With Disabilities Act (ADA)



The Americans With Disabilities Act (ADA)

- Signed into law by President George H.W. Bush in 1990
- Often credited as the world's first civil rights law for people with disabilities
- “..to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities....”
- ADA bans discrimination on the basis of disability in the areas of:
 - Employment
 - Public Accommodation
 - Public Services
 - Transportation
 - Telecommunications



The Americans With Disabilities Act (ADA)

- **Title I** of the act addresses employment
- **Title II** addresses public services, programs, and activities provided by State and local governments
- **Title III** addresses public accommodations such as restaurants, theaters, offices and places of business



ADA – Title I – Employment

- Prohibits discrimination against qualified individuals with disabilities, defined as:
 - Physical or mental impairment that limits one or more life activities
 - Individuals with a record of an impairment
 - Individuals regarded as having such an impairment
- Requires employers to make “reasonable accommodation” to enable people with disabilities to enjoy equal employment opportunities if such would not pose an “undue hardship.”
 - Making facilities accessible
 - Job restructuring
 - Acquiring or modifying equipment
 - Sign language interpreters
 - Flex scheduling



ADA – Title I – Employment



- Requires employers ***to meet and discuss*** employee's requests for reasonable accommodation
- Cost is a factor to consider
- If the employee cannot work, the employer is NOT required to create a new position
- Employers may not ask prospective employees about the nature or severity of the disability but may ask about the ability to perform the job functions
- Use of illegal drugs not covered by ADA
- Health Insurance Portability and Accountability Act (HIPAA) regulations apply

ADA – Title II – Public Services, Programs and Activities

- Requires local governments to provide reasonable accommodations to the extent necessary to ensure equal access to the public
 - ❑ Under federal law, existing public facilities built or last altered BEFORE January 26, 1992, are treated differently from those built or altered after that date. (Grandfathered)
 - ❑ Does not require alteration
 - ❑ Consider redesign or equipment, reassignment of services to accessible buildings, home visits, delivery of services another way (i.e. electronically or through the mail.)



ADA – Title II – Public Services, Programs and Activities

- **Facilities constructed or altered AFTER 1/26/1992 must comply with ADA Standards for Accessible Design and ADA Architectural Guidelines**
 - ❑ Only notable exception is for “Structural Impracticality.”
 - ❑ Includes accessible entrances and exits, routes, restrooms, telephones, drinking fountains, and parking areas
- In 2010 the USDOJ issued Revised ADA Standards for Accessible Design (ADASD)
 - ❑ Many architects are not familiar with the new guidelines, so make sure you search for a qualified professional to assist with design of any new facilities.
 - ❑ Consider ALL public sector projects for review (roads, sidewalks, parks and playgrounds, new buildings, etc...)

ADA – “Tester” Lawsuits

- “fee shifting” applies to ADA cases
- A number of attorneys nationwide have joined with “serial litigants” to sue multiple local governments and businesses for alleged ADA violations.
- Most of these are “surprise” lawsuits with no advanced warning
- The law generally recognizes two broad categories:
 - ❑ Particularized claims of a failure to reasonably accommodate
 - Individuals needing specific assistance like access to books on a higher shelf or access to a computer
 - ❑ Generalized claims of an overall lack of access
 - Incorrect construction limiting full and free movement of wheelchair-bound individuals

ADA Accessibility of Local Government Websites

- Title II includes access to local government websites
- If local governments receive direct or indirect federal funding, the regulations apply.
- US DOJ typically review websites if a complaint is filed. However, the DOJ also conducts random checks.
- Guidance is available on the NJ MEL Website.
 - ❑ <https://njmel.org/mel-safety-institute/resource-center/public-property/americans-with-disabilities-act-ada/>
- Additional guidance:
 - ❑ https://www.ada.gov/pcatoolkit/ch5_toolkit.pdf



ADA Accessibility of Local Government Websites

- Images must have text equivalents
- Post documents in at “Text-Based” Format
- Avoid Dictating Colors and Font Settings
- Include Audio Descriptions and Captions
- Include a “skip navigation” link at the top of webpages
- Minimize blinking, flashing, or other distracting features
- Design online forms to include description HTML tags
- Include visual notification and transcripts if sounds automatically play
- Use titles, context, and other heading structures to help users navigate complex pages or elements



ADA Cases – Robles v. Domino's Pizza (2019)

- Mr. Robles was blind and sued Domino's because he was not able to order food through their website. The website is not compatible with screen reading software. Domino's argued the ADA applies to "physical locations" not websites.
- Federal appeals court ruled ADA applies to services and products, not just physical locations.
- This case is relatively recent and points directly to the need for local governments to make sure their websites comply with the ADA requirements. Meet with your IT staff to go over the requirements.



ADA Cases – Castro V. Borough of Ridgefield (2007)



- Plaintiff is a quadriplegic homeowner who applied for a zoning variance to add a handicap ramp to his front yard. The Zoning board held the hearing on the 3rd floor of a building constructed before 1992 with no elevator, and did not offer an alternative, accessible location for the meeting. The Borough claimed it did not have notice of Mr. Castro's needs because he did not request assistance.
- Federal court jury found the Borough liable for failing to provide a "reasonable accommodation" to attend the meeting, notwithstanding the age of the building and absence of a formal request for assistance.
- A local government is responsible to provide reasonable accommodations to access its programs and services even if the building predates the ADA's enactment.

ADA Takeaways

Accessible



- Make sure you appoint an ADA Coordinator and arrange for that individual to attend ADA training.
- Has your local government adopted an ADA Plan with a Grievance Procedure as required by Title II?
- Ensure that the local government's policy is posted in several public locations
- Make sure all department heads are aware of the ADA policy and grievance procedure in case they encounter an issue
- Develop an ADA compliance checklist and inspect your public facilities
- Assume that someone will file a claim or lawsuit and be prepared
- Select qualified professionals to assist in designing or retrofitting your buildings or facilities.

Questions?

- This concludes Part 1 of the *Power of Collaboration*.
- Thank you for your attention.
- We will begin Part 2 after a break.
 - My Contact Information:
 - Paul J. Shives, Safety Director
 - Pshives@jamontgomery.com
 - 609-290-5686 (Cell Number)