

**STATE OF NORTH DAKOTA  
OFFICE OF MANAGEMENT & BUDGET  
RISK MANAGEMENT DIVISION**

**RISK MANAGEMENT  
MANUAL**

**September 2011**

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## Section 1: The Risk Management Process in North Dakota

### Origin of the Risk Management Program

Website: [www.nd.gov/risk](http://www.nd.gov/risk)

The North Dakota Legislature established a risk management program for all State agencies during the 1995 session.

This action was a result of a North Dakota Supreme Court decision that eliminated the State's sovereign immunity. In that ruling, the court held that the State, like individuals and private corporations, should be held responsible for the negligence of its agents and employees.

The risk management program was instituted to provide a coordinated process for ensuring that the State is properly protected against losses and has the appropriate procedures and mechanisms in place to handle claims and lawsuits.

The North Dakota Legislature established the risk management workers compensation program during the 2001 session. This program was created to save premium dollars through a deductible program and to establish a cross agency return-to-work program for all State agencies. This program is discussed in more detail in Section 7 of this Manual.

The Office of Management and Budget (OMB) has overall responsibility for the risk management program. Each State agency has designated a risk management contact person to work with the program.

### State of North Dakota Risk Management Division Mission and Policy Statements

#### Mission Statement

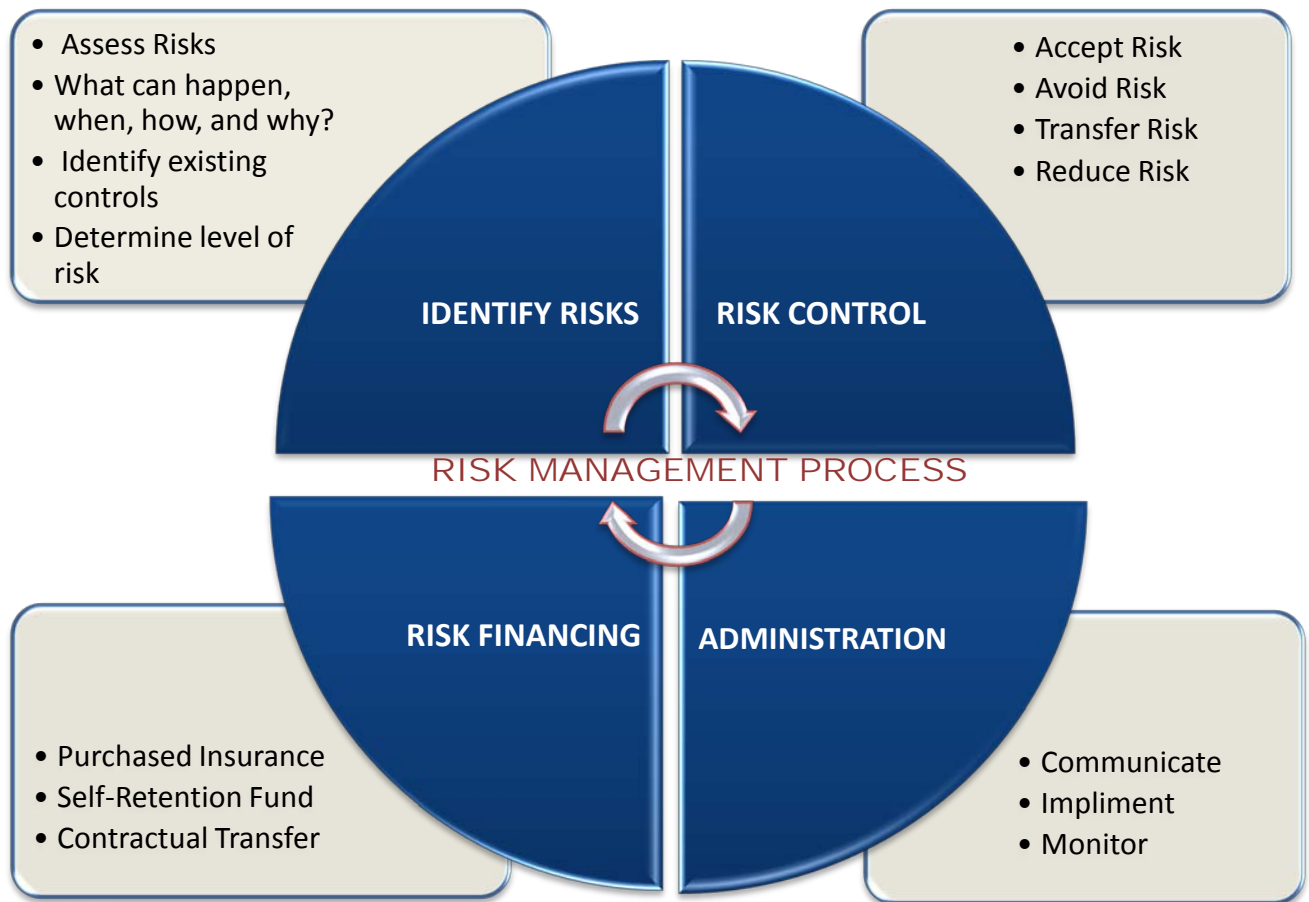
The mission of the Risk Management Division of the Office of Management and Budget is to protect the assets of the State of North Dakota — its people, property, and financial resources — so that the State can continue to meet its obligations to its citizens.

#### Policy Statement

The policy of the Risk Management Division is to use the risk management process. This process involves systematic risk assessment, risk control, risk financing, and administration of these activities. (See the Risk Management Process chart below.) The most important of these components is the implementation of effective risk control programs, including ones focusing on employee and public safety, property and data protection, environmental safety, vehicle fleet safety, and security.

Through this process, the State will:

- Identify and measure the tort liability risks faced by its various agencies and operations.
- Implement appropriate measures to control these risks.
- Develop plans for financing these risks.
- Develop systems for effectively administering the program and monitoring results.



## Transfer and Financing of Risk

The State, as it deems appropriate, will transfer or share tort liability risk with others (such as government insurance pools, commercial insurers, and contractors), or it will retain risk through deductibles, self-insurance, or special State funds. The criteria for making risk financing decisions will be the combination that minimizes the State's long-term "cost of risk" — the sum of retained losses, insurance premiums, risk control costs, and administrative costs.

## Key Risk Management Program Partners and Their Roles

The key risk management program partners are:

- Office of Management and Budget
- The Risk Management Division
- Workforce Safety and Insurance
- State Fire and Tornado Fund
- State Entities, including Agencies, Departments, Boards, Commissions, and Institutions

### Office of Management and Budget

The Office of Management and Budget has responsibility and authority for risk management under [North Dakota Century Code Chapter 32-12.2](#), including administration of the State liability Risk Management Fund.

Administration of the risk management program — including the purchase of all liability insurance, consulting, claim management, and related services — will be carried out by this office.

### The Risk Management Division

The Risk Management Division staff consists of a director, a claims administrator, a loss control analyst, a manager of the Risk Management Workers Compensation Program, and an administrative staff officer. The Division oversees the State's Risk Management process, the Risk Management Workers Compensation Program, coordinates insurance coverage and risk financing, manages claims, works with legal defense counsel, compiles and analyzes risk management data, and conducts risk management educational programs.

#### *Identifying and Measuring Exposures*

Division staff:

- Assist with the physical inspection of State facilities to identify potential for loss before it occurs.
- Review incident and claim forms to identify loss trends that indicate the need for employee training or to identify unsafe conditions.
- Ensure that contracts, leases, and agreements are properly drafted so that risk of loss to the State is appropriately addressed.
- Review new laws, regulations, and requirements to help State agencies and employees comply with established standards.
- Serve as a resource for risk management related matters.

### ***Risk Control***

Division staff recommend the use of effective loss control practices, assist in the transfer of risks by contract when appropriate, and recommend the purchase of insurance when advisable.

### ***Risk Financing***

The Risk Management Fund is the primary means by which the State finances risk of loss arising from third party claims against the State and its employees. For certain types of claims, the purchase of insurance is required and the Division assists agencies with these purchases.

### ***Claims Adjudication***

Division staff:

- Ensure that claims reporting requirements are met, that claims are properly adjusted, and that reserves on outstanding claims are set and adjusted as necessary.
- Coordinate with the Attorney General's Office and the agency head in managing and settling claims.
- Establish reporting procedures to keep agencies apprised of claim activity.
- Administer a risk management information system to meet reporting, reserving, and loss control requirements.

### ***Risk Administration***

In consultation with the Attorney General's Office, the Division hires the most competent attorneys to represent the State, its agencies and its employees, and monitors lawsuits to ensure efficient and cost-effective litigation.

### ***State Entities***

All State employees and officials have a critical role in the risk management process. This role includes such activities as establishing safe workplaces, following best practices, limiting exposure to potential liability and loss, and carrying out the steps necessary to maintain effective and efficient risk management.

The State looks to each of its officials and employees to follow the State's risk management process. Each State agency has designated a risk management contact person who will work with the Risk Management Division to implement the process in the agency.

## SUMMARY OF STATE RISK FINANCING

RISK	DESCRIPTION	FINANCING SOURCE
All Risk Insurance	Damage to equipment/property owned and leased by the State, not covered under another program	Insurance policy purchased by State agencies and facilitated through Risk Management
Automobile Liability	Liability arising out of the use of State-owned, rented or leased vehicles	Risk Management Fund <ul style="list-style-type: none"> <li>Rentals should generally include liability coverage and damage waiver when available</li> </ul>
Automobile Property	<ul style="list-style-type: none"> <li>Damage to State-owned vehicles</li> <li>Damage to rented or leased vehicles</li> </ul>	<ul style="list-style-type: none"> <li>State Fleet, NDDOT</li> <li>Purchased insurance or Risk Management Fund</li> </ul>
Aviation Liability	Liability arising out of the use of State-owned or leased aircraft	Commercial insurance policy purchased by State agencies
Boiler & Machinery	Explosion or damage caused by steam boilers and related equipment	State Fire & Tornado Fund, Insurance Department
Fidelity	Employee theft of property or money	State Bonding Fund, Insurance Department
General Liability	Liability arising out of the State's premises, operations or employees	Risk Management Fund
International Travel Insurance	Coverage for state employees traveling out of the country on official state business	Insurance policy purchased by Risk Management; Workforce Safety & Insurance
Medical Malpractice	Liability relating to professional medical services provided by the State	Risk Management Fund and purchased professional liability coverage
Petroleum Tank Release	Clean-up costs for contamination from petroleum tank release	Petroleum Tank Release Compensation Fund, Insurance Department
Professional Liability	Liability relating to other professional services provided by State employees (e.g., counselors, social workers, attorneys, public officials, etc.)	Risk Management Fund
Property	Damage to buildings and contents belonging to State agencies	State Fire & Tornado Fund, Insurance Department
Workers' Compensation	Employee injuries or illness relating to their jobs	Risk Management Workers Compensation Fund and Workforce Safety & Insurance

## Section 2: The Risk Management Fund

### Outline of the Risk Management Fund and Liability and Defense Coverage

The 1995 North Dakota Legislature created a new chapter of the Century Code, [N.D.C.C. ch. 32-12.2](http://www.legis.nd.gov/cencode/t32c12-2.pdf) ([www.legis.nd.gov/cencode/t32c12-2.pdf](http://www.legis.nd.gov/cencode/t32c12-2.pdf)) governing claims against the State and State employees for personal injury, death, or property damage caused by the State or a State employee “acting within the scope of the employee’s employment.”

The chapter also established the Risk Management Fund and directed that it be administered by the Office of Management and Budget.

The following is a summary of the Risk Management Fund. This summary does not create any rights or responsibilities other than those established in N.D.C.C. ch. 32-12.2.

#### Provisions of the Risk Management Fund

It is the opinion of the Attorney General that with certain exceptions, all State and agency operations fall within the scope of N.D.C.C. ch. 32-12.2. Thus, liability risks associated with these operations are funded through the Risk Management Fund. Liability to a third party (non-employee) includes bodily injury, personal injury, professional liability, errors and omissions or property damage resulting from the operations of the State, its agencies, employees, boards, or commissions.

#### *Damages Coverage*

The Risk Management Fund will pay money damages for a third party injury caused by the negligence or wrongful act or omission of a State employee acting within the employee’s scope of employment under circumstances in which the employee would be personally liable to a claimant under state law.

The Risk Management Fund also will pay money damages for an injury caused from some condition or use of tangible property under circumstances in which the State, if it were a private person, would be liable to the claimant.

Coverage includes claims for damages resulting from an occurrence, accident, wrongful act, error or omission or claim made because of bodily injury, personal injury, property damage, professional liability, or public officials’ professional liability or any combination thereof.

However, the Risk Management Fund will not pay money damages for those claims excluded under N.D.C.C. ch. 32-12.2 or other applicable law.

### ***Coverage Limit***

The amount of money damages the Risk Management Fund may pay is limited to a total of two hundred fifty thousand dollars (\$250,000) per person and one million dollars (\$1,000,000) per occurrence. The per occurrence cap may be exceeded only if more than one claimant presents proof of judgment to the Director of the Office of Management and Budget to be included in the proposed budget for the Office of Management and Budget and the Legislature adopts an appropriation to pay the claim during the next regular legislative session.

The Risk Management Fund will not pay or indemnify a State employee held liable for punitive or exemplary damages.

### ***Defense Coverage***

The Risk Management Fund will defend any claim brought against the State under N.D.C.C. ch. 32-12.2 or brought against a state employee acting within the scope of employment at no cost to the employee, if that employee 1) provides complete disclosure and cooperation in the defense of the claim or demand; 2) has given written notice of the claim or demand to the head of the state entity that employs the state employee and to the attorney general within ten days after being served with a summons, complaint or other legal pleading asserting that claim or demand against the State employee; and 3) requests representation.

For any claim brought under N.D.C.C. ch. 32-12.2 a State employee may hire, at his or her expense, counsel to represent the employee in the litigation. If the State employee chooses to hire separate defense counsel, the State will not indemnify, save harmless or defend the State employee nor pay for the State employee's defense or any judgment against the State employee.

The Risk Management Fund may, at its discretion and in consultation with the head of the agency involved and the Attorney General, investigate any occurrence, settle any claim or suit that may result, or submit the claim to mediation or binding arbitration.

Defense costs are payable in addition to the above-stated limit.

### ***Exclusions***

Pursuant to N.D.C.C. § 32-12.2-02(3), neither the State nor a State employee may be held liable under the State Tort Claims Act for any of the following claims:

- a) A claim based upon an act or omission of a State employee exercising due care in the execution of a valid or invalid statute or rule.
- b) A claim based upon a decision to exercise or perform or a failure to exercise or perform a discretionary function or duty on the part of the State or its employees, regardless of whether the discretion involved is abused or whether the statute, order, rule, or resolution under which the discretionary function or duty is performed is valid

or invalid. Discretionary acts include acts, errors, or omissions in the design of any public project but do not include the drafting of plans and specifications that are provided to a contractor to construct a public project.

- c) A claim resulting from the decision to undertake or the refusal to undertake any legislative or quasi-legislative act, including a decision to adopt or the refusal to adopt any statute, order, rule, or resolution.
- d) A claim resulting from the decision to undertake or the refusal to undertake any judicial or quasi-judicial act, including a decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.
- e) A claim relating to injury directly or indirectly caused by a person who is not employed by the state.
- f) A claim relating to injury directly or indirectly caused by the performance or nonperformance of a public duty, including:
  - (1) Inspecting, licensing, approving, mitigating, warning, abating, or failing to so act regarding compliance with or the violation of any law, rule, regulation, or any condition affecting health or safety.
  - (2) Enforcing, monitoring, or failing to enforce or monitor conditions of sentencing, parole, probation, or juvenile supervision.
  - (3) Providing or failing to provide law enforcement services in the ordinary course of a state's law enforcement operation.
- g) "Public duty" does not include action of the state or a state employee under circumstances in which a special relationship can be established between the state and the injured party. A special relationship is demonstrated if all of the following elements exist:
  - (1) Direct contact between the state and the injured party.
  - (2) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who allegedly was injured.
  - (3) Knowledge on the part of the state that inactions of the state could lead to harm.
  - (4) The injured party's justifiable reliance on the state's affirmative undertaking, occurrence of the injury while the injured party was under the direct control of the state, or the state action increases the risk of harm.
- h) A claim resulting from the assessment and collection of taxes.
- i) A claim resulting from snow or ice conditions, water or debris on a highway or on a public sidewalk that does not abut a State-owned building or parking lot, except when the condition is affirmatively caused by the negligent act of a State employee.
- j) A claim resulting from any injury caused by a wild animal in its natural State.
- k) A claim resulting from the condition of unimproved real property owned or leased by the State.
- l) A claim resulting from the loss of benefits or compensation due under a program of public assistance.
- m) A claim resulting from the reasonable care and treatment, or lack of care and treatment, of a person at a state institution where reasonable use of available appropriations has been made to provide care.

- n) A claim resulting from damage to the property of a patient or inmate of a state institution.
- o) A claim resulting from any injury to a resident or an inmate of a state institution if the injury is caused by another resident or inmate of that institution.
- p) A claim resulting from environmental contamination, except to the extent that federal environmental law permits the claim.
- q) A claim resulting from a natural disaster, an act of God, a military action, or an act or omission taken as part of a disaster relief effort.
- r) A claim for damage to property owned by the State.
- s) A claim for liability assumed under contract, except this exclusion does not apply to liability arising from a State employee's operation of a rental vehicle if the loss is not covered by the State employee's personal insurance or by the vehicle rental company.

### ***Immunity***

The Risk Management Fund is a self-retention fund for the State and does not constitute insurance or a government self-insurance pool. Neither the existence of the Risk Management Fund nor any certificate of coverage or other document constitutes a waiver of any existing immunity to suit or creates any liability to suit.

### ***Notice Requirement***

A person bringing a claim against the State or a State employee for an injury shall present to the Director of the Office of Management and Budget within one hundred eighty (180) days after the alleged injury is discovered or reasonably should have been discovered a written notice stating the time, place, and circumstances of the injury, names of any State employees known to be involved, and the amount of compensation or other relief demanded. The time for giving notice does not include the time during which a person injured is incapacitated by the injury from giving notice. If the claim is one for death, the notice may be presented by the personal representative, surviving spouse, or next of kin within one year after the alleged injury resulting in the death.

### ***Definitions***

*Claim:* any claim for money damages brought against the State or a state employee for an injury caused by the State or a State employee acting within the scope of the employee's employment whether in the state or outside the State.

*Injury:* personal injury, death, or property damage.

*Occurrence:* an accident, including continuous or repeated exposure to a condition, which results in an injury.

*Personal injury:* bodily injury, mental injury, sickness, or disease sustained by a person and injury to a person's rights or reputation.

*Property damage:* injury to or destruction of tangible or intangible property.

*Scope of employment:* means the state employee was acting on behalf of the State in the performance of duties or tasks of the employee's office or employment lawfully assigned to the state employee by competent authority or law.

*State:* includes an agency, authority, board, body, branch, bureau, commission, committee, council, department, division, industry, institution, instrumentality, and office of the State.

*State employee:* means every present or former officer or employee of the state or any person acting on behalf of the state in an official capacity, temporarily or permanently, with or without compensation. The term does not include an independent contractor.

*State institution:* the State Hospital, the Developmental Center, the State Penitentiary, the Missouri River Correctional Center, the North Dakota Youth Correctional Center, the North Dakota Vision Services - School for the Blind, the School for the Deaf, and similar facilities providing care, custody or treatment for individuals.

### **Other Coverages**

The Risk Management Division may purchase or authorize the purchase of commercial insurance and/or governmental self-insurance for exposures determined to cause an excessive financial risk to the Fund. Such purchased commercial insurance and/or governmental self-insurance shall be primary coverage.

### **Insurance Coverages**

Under state law, all liability insurance and/or governmental self-insurance purchased on behalf of the State must be authorized by the Director of the Office of Management and Budget.

The determination of whether to purchase insurance or to self-retain the various risks of the State through the Risk Management Fund requires analysis, a statewide perspective, and risk financing expertise. The Risk Management Division of the Office of Management and Budget is the focal point for this decision-making process, which includes substantial input from State agencies.

### **Types of Coverages**

The State's approach to the purchase of insurance varies by type of risk. Some insurance is purchased due to the catastrophic potential of some exposures to negatively affect the financial stability of the Risk Management Fund. In addition, the Risk Management Division helps facilitate the purchase of other insurance by agencies. Other types of coverage are provided through the Fire and Tornado Fund and the State Bonding Fund. The various coverages are summarized below.

### ***Aviation***

Insurance coverage is purchased by the various entities that have aviation risks. Due to the catastrophic nature of aviation risks, this exposure is funded through purchase of commercial insurance coverage, not the Risk Management Fund.

### ***Medical Malpractice***

The UND School of Medicine and the Risk Management Division facilitate the purchase of medical malpractice insurance for certain faculty, medical residents and other students in healthcare programs with insurance requirements. In addition, agencies with independent medical contractors can secure coverage through this Insurance.

### ***Reinsurance***

Insurance coverage is purchased to address liability exposure that could exceed the statutory caps of the Risk Management Fund.

### ***Rental Vehicles***

Because of costs and difficulties with administering long-distance claims, Risk Management guidelines are that additional liability coverage and damage waiver insurance should be purchased when renting a vehicle other than in bordering or closely bordering states.

### ***Other Insurance***

The Risk Management Division also assists in the procurement of other insurance as determined necessary.

**All Risk Insurance.** Special coverage is available for mobile equipment, portable radios, computers, artwork, and similar property. An agency wishing to purchase this coverage should contact the Risk Management Division.

## **Certificates of Insurance and of Financial Responsibility**

Since the Risk Management Fund is not insurance, it will not issue Certificates of Insurance. It will, however, provide a Certificate of Financial Responsibility for liability exposures it covers. If you are asked to provide proof of financial responsibility, a request can be submitted from Risk Management's website at [www.nd.gov/risk](http://www.nd.gov/risk). A sample of the Certificate of Financial Responsibility is provided below.

State agencies that purchase commercial insurance coverage can obtain Certificates of Insurance from the insurers. If you are asked to provide a certificate, contact the insurer's agent for assistance.

**CERTIFICATE OF FINANCIAL RESPONSIBILITY**

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE LIABILITIES ASSUMED BY THE STATE OF NORTH DAKOTA OR THE COVERAGES THAT MAY BE AFFORDED BY ANY INSURANCE CARRIERS OR SELF-INSURED FUNDS.

LIABILITY OF THE STATE IS CREATED AND LIMITED BY ENACTMENT OF CHAPTER 32-12.2 OF THE NORTH DAKOTA CENTURY CODE. AS OF APRIL 22, 1995, ALL TERMS, CONDITIONS, STATUTES OF LIMITATIONS APPLY AS OUTLINED THEREIN. DAMAGES THAT MAY BE PAID WITHOUT SPECIFIC LEGISLATIVE AUTHORITY FOR EVENTS OCCURRING PRIOR TO AUGUST 1, 1997, ARE \$250,000 PER PERSON AND \$750,000 PER OCCURRENCE; ON OR AFTER AUGUST 1, 1997, \$250,000 PER PERSON AND \$1,000,000 PER OCCURRENCE.

THE STATE OF NORTH DAKOTA HAS FUNDED FOR THIS LIABILITY EXPOSURE AT A LEVEL DETERMINED BY AN INDEPENDENT ACTUARY.

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/SPECIAL ITEMS:

XXXX

THIS CERTIFICATE IS ISSUED TO: XXXX

ON THIS DATE OF: \_\_\_\_\_

BY:

\_\_\_\_\_  
AUTHORIZED REPRESENTATIVE OF  
THE STATE OF NORTH DAKOTA  
OFFICE OF MANAGEMENT AND BUDGET

## **Funding**

N.D.C.C. ch. 32-12.2, passed by the 1995 Legislature, established the State Risk Management Fund, a risk retention pool from which tort liability claims against the State and state employees as well as administration cost of the Risk Management Fund will be paid. Each State agency, board, and commission is required to participate in the program by contributing the appropriate share of the Fund's costs as determined by the Director of the Office of Management and Budget.

## **State Agencies**

The contribution of each State agency is calculated by an actuarial review of the Fund. Initially, with no claim history, contributions were based solely on the number of employees of each agency and the number of vehicles owned by the State. Beginning with the 2001-2003 biennium, the actuarial review factored each agency's Fund loss history in determining the level of required contribution.

### ***Risk Management Fund Contribution Discount Program***

State agencies and facilities can reduce the rate of their required contribution to the Risk Management Fund by documenting that they have established a pro-active loss control program.

To facilitate that process, Risk Management has developed an application form (SFN 53424) that must be completed by any agency or facility applying for a discount. The application must be submitted to Risk Management by June 30 of each year.

Discounts will be determined based upon a review of the application and supporting documentation. Discounts will be applied to the contribution and the agency or facility will be billed for the discounted amount.

## Section 3: The Loss Reporting Process

### Reporting Incidents and Accidents

An incident is an unplanned occurrence that resulted or could have resulted in injury to people or damage to property, specifically involving the general public and state employees. An incident can also involve issues such as harassment, violence, and discrimination. Incidents may also be referred to as an accidents or near miss.

Promptly reporting potential liability arising from someone having or claiming to have been injured or to have had damage to their property is critical. When an incident is reported promptly, unsafe conditions are quickly corrected, and evidence is preserved for administration of potential claims as well as protection of the State's interests. Late or inaccurate reporting could jeopardize the defense of a claim or lawsuit.

*All incidents* must be reported to the Risk Management Division within **24 hours** of the incident or receiving the report of the incident. Such incidents shall be reported through Risk Management's on-line reporting system at [www.nd.gov/risk](http://www.nd.gov/risk). Utilize the Risk Management Fund Incident Report (SFN 50508) for general and employee incidents and the Motor Vehicle Report forms (SFN 51301) for accidents involving State Fleet vehicles. The report should be completed by the employee that has the most information or first-hand knowledge about the incident. Incident reports should *not* be completed by non-state employees. If a report cannot be filed on-line, it may be submitted by hard copy to Risk Management.

In the event that a vehicle accident involves serious injury and/or property damage, it should be reported immediately to local law enforcement using 9-1-1 and State Radio (1.800.472.2121). All accidents involving serious injury, death, or extensive property damage should also be reported immediately to Risk Management (701.328.7584).

All incidents should be investigated thoroughly with factual and accurate records prepared and attached to the incident report. Properly investigated and analyzed incidents will assist in administration of potential claims/lawsuits, and protecting property by locating causes of incidents so corrective action can be taken. The responsible supervisor shall take corrective action necessary to eliminate any hazardous conditions and/or work practices.

An investigation may be directed by Risk Management as a "Risk Management Investigation". Such investigation may be conducted by the agency or facility or Risk Management may request that a third party become involved in the investigation. Under these circumstances, it is important to remember that Risk Management must be involved in the determination to conduct the investigation in order for the results to be protected under N.D.C.C. § 32-12.2-11. Also note, *only* Risk Management has the authority to decide if these documents may be disclosed while a matter is pending.

## **Incident Reports as Loss Control Tools**

The incident report forms are designed to document the State employee(s)' full version of how the incident happened. It is imperative that only State employees complete the Incident Report Form. Under N.D.C.C. § 32-12.2-11, incident reports, investigation reports, or other risk management fund records of a pending or reasonably predictable claim against the state or a state employee are *privileged and exempt from the open records law*.

The incident form will document all of the information concerning the incident while it is fresh in the employee's mind. Note that a potential claimant has 180 days (approximately 6 months) to file a Notice of Claim form with the Risk Management Division. Therefore, the State employee may not be asked about the incident until six months after it occurred. With that potential lapse in time, the details, if not the entire incident, may be forgotten if the circumstances surrounding it haven't been properly documented. Prompt reporting and the preservation of evidence assists in the preparation and defense of a claim, as well as the early resolution of claims.

In addition to documenting information to address potential claims, the incident report is an important tool in disclosing unsafe practices or unsafe conditions that have the potential of creating liability. Risk Management sends quarterly reports of incidents that have not evolved into claims to the agency's Risk Management Contact. These reports help identify trends so that the agency or facility Loss Control Committee can proactively address the potential exposures, review the effectiveness of current safety programs, and to prevent similar incidences from re-occurring.

*Note that filing an incident report with Risk Management does not impact your agency or facility contribution rate for liability coverage.* Loss history is a criterion for the contribution rate but that is based solely on claim data, not on information contained in or the number of incident reports filed.

### **Claimant's Role**

Claimants (third party) are *not* to complete the Incident Report Form SFN 50508. Their report of the incident or accident is separate and apart from the State employee's report.

If the third party indicates that they are seeking reimbursement, repairs, other recourse related to the incident, it should be documented on the incident report and Risk Management will mail the third party a Risk Management Fund Notice of Claim (SFN 50552) and a cover letter with instructions. The form is also available on Risk Management's web site at [www.nd.gov/risk](http://www.nd.gov/risk). If the potential claimant has any questions concerning the process, direct them to call Risk Management.

## Claims

A person bringing a claim against the State or a State employee for an injury **must make the claim in writing** to the director of the Office of Management and Budget. The form that can be used is the Risk Management Fund Notice of Claim (SFN 50552). The claim generally must be filed within 180 days of when the alleged injury was discovered or reasonably should have been discovered.

If a potential claimant, an attorney representing a potential claimant, a member of the news media, or anyone else has any questions concerning an incident, or claim, or a potential claim, direct them to call Risk Management.

## Destruction Hold Process

“Destruction Hold” or “Litigation Hold” are terms used to ensure preservation of evidence in “pending” or “reasonably foreseeable” litigation. Destruction Hold preserves documents, electronic information, and other materials that may constitute evidence. In situation where litigation against your agency is pending or reasonably foreseeable, the agency must take steps to preserve all potential evidence. The following guidelines for Destruction Hold should be followed, to the extent feasible, for agency information and materials stored or maintained on agency property and in remote, personal, or home locations and computers of agency employees, consultants, and contractors.

Federal and state laws and rules have defined obligations to preserve documents, electronic information, and other materials when a party is involved in or reasonably foresees that it may become involved in litigation. The duty to preserve documents, whether in electronic or other formats, arises upon notice that litigation could be instituted. What constitutes notice that litigation could be instituted will depend on the circumstances. The duty to preserve applies to email and other electronic documents to the same extent it applies to paper documents and files. The documents, electronic information, and other materials, including all originals, copies, versions and drafts, that are subject to preservation and disclosure – and that may become part of a litigation hold – include, but are not limited to, the following:

- Paper documents
- Word processing documents
- Email and email attachments
- Calendars and planners
- Spreadsheets and databases
- Instant messages
- Network logs
- PowerPoint presentations
- Manuals, publications, bulletins, pamphlets
- Graphics files
- Images

- Voicemail
- Backup tapes
- Information put on an agency Website

Once an entity is subject to or should reasonably foresee that it could become involved in litigation, it has an obligation to preserve relevant documents, electronic information, and other materials. The law provides for severe sanctions in the event that relevant documents are destroyed, significantly altered, or if a party otherwise fails to preserve the documentation, information, or other materials. These sanctions may be imposed against the entity or individual who destroys or significantly alters the documents. In addition to monetary sanctions, courts may impose evidentiary sanctions (such as issuing an order that certain facts are established against a party or refusing to allow a party to introduce certain evidence), or even dismiss all or part of the action or proceeding. To properly preserve relevant documents, Risk Management and the office of the Attorney General recommend your entity establish a procedure to preserve documents in situations where litigation against your entity is pending or reasonably foreseeable. The procedure could include the following:

1. If managers or supervisors become aware of potential or actual litigation, they should contact the Risk Management Division and the assistant attorney general or special assistant attorney general assigned to the agency. If an assistant attorney general or special assistant attorney general is not assigned to your agency, managers or supervisors should contact the North Dakota Solicitor General (Director of Civil Litigation) at 701.328.3640.
2. A Destruction Hold Notice should be issued by the entity or its assigned assistant attorney general or special assistant attorney general based upon currently available information. The Risk Management Division may also direct that an agency issue a destruction hold notice.
3. The Risk Management Division, appropriate agency personnel and the assistant attorney general or special assistant attorney general assigned to the agency, in conjunction with the North Dakota Solicitor General or the assistant attorney general designated to represent your entity in the litigation or potential claim, will determine whether a litigation hold should be implemented. "Appropriate agency personnel" includes the person or persons most knowledgeable about the relevant computer systems and network operations at the agency, the storage and retrieval of information, and procedures for backing up and archiving electronic information. Depending on the nature of the litigation and type of documents involved, it may be appropriate to discuss the potential claim with the Director of the Information Technology Department (ITD) or his or her designee.
4. If a decision is made to implement a formal litigation hold, the scope of the litigation hold and how best to implement the litigation hold will also be outlined.
  - a. Identify the information, including electronically stored information that may be

relevant to the litigation.

- b. Identify who may have the relevant documents, electronic information, or other materials in their possession.
- c. Identify all locations and storage media of such materials. With respect to electronic information, such locations may include:
  - Desktop and laptop computers
  - Network servers
  - Email servers
  - Handheld devices (Cell phones, Blackberries, Palm Pilots)
  - Storage devices including CD's and ZIP drives
  - Offsite storage
  - Remote computers with network connections
  - CDs, DVDs, Memory Sticks, and other portable storage devices
  - Home computers or equipment
- d. Identify how best to implement the litigation hold, including how to preserve electronic data. Implementation includes:
  - i. Arranging for the appropriate individual (entity head, division director, assistant attorney general), to send a written notice to employees at all applicable organizational levels setting forth the documents and other materials as to which diligent efforts should be made to preserve and the method and places of preservation.
  - ii. Notifying the appropriate agency personnel of steps the agency needs to take to preserve electronic data, such as requesting segregation, removal, or exchange of computers or hard drives and the copying or cloning of drives.
  - iii. Notifying the Director of ITD, or his or her designee, of steps ITD needs to take to preserve electronic data, such as halting routine deletion of email, halting automatic updates or cleaning of computers, preserving backup tapes beyond the routine write-over cycle, or transferring certain electronic data to a dedicated server.
  - iv. Determining how to monitor compliance with the litigation hold notice by periodically checking back with affected management and staff.
  - v. Determining how to keep a written record of steps taken to preserve documents, electronic information, and other materials to demonstrate compliance with the duty to preserve potential evidence.
  - vi. If needed, determining who will assist in reviewing documents for production and assertion of privileges.

- vii. Determining how affected staff will be notified when the litigation hold has been canceled or removed.

Sample documents that can help facilitate document preservation are available on the Risk Management web site at [www.nd.gov/risk/risk-management-fund/litigation-hold](http://www.nd.gov/risk/risk-management-fund/litigation-hold).

## Lawsuits

A State employee served with any legal documents asserting a claim against the employee related to his or her employment should **immediately** contact the Risk Management Division, the Attorney General's Office, and his or her agency head, forwarding to each a copy of all documents received. Prompt action is necessary because attorneys have a limited time in which to prepare and file an answer on the employee's behalf.

If a state employee is a named defendant in a lawsuit claiming damages for actions covered by the Risk Management Fund, defense of the lawsuit will be provided by an attorney hired by the Fund. For further information on state employee defense under the Risk Management Fund, see Section 6 of this Manual.

## Managing Claims

The claims process does not end when the claim has been reported. Managing the claim is a critical activity that may involve various employees, including agency heads, managers, directors, the agency risk management contact person, attorneys, etc.

### Making Statements

Following an accident or incident that results in a claim, the involved State employee may be contacted by a number of people seeking information. The employee should give statements only to the Risk Management Division, law enforcement authorities, adjusters or experts hired by the State, and attorneys for the State. If the employee is not sure whom to talk to, he or she should contact Risk Management before making a statement or discussing the case with anyone.

When discussing the claim, the employee should give only the facts, not his or her opinion. Liability or fault should not be admitted. The employee must be careful about what is said and ask for a copy of his or her statement if it has been recorded or written.

Do **not** talk to:

- People assisting or working on behalf of the claimant (attorneys, insurance).
- The media or the general public.

Such requests for information must be referred to the Risk Management Division.

Do *not* put anything in writing after the incident other than what is required for the Incident Report, investigation materials, and other items approved by Risk Management and/or the Attorney General's Office. Written materials created before the incident (plans, specifications, and so on) should *not* be disclosed without the knowledge and consent of Risk Management or the Attorney General's Office.

### **Collecting Evidence**

A State employee involved in or a witness to an accident may be in a position to help collect evidence that will be needed to manage any claim arising from the incident.

The kinds of information that should be collected include:

- The names and roles of the people at the scene.
- The equipment, vehicles, or other property involved in the incident, their placement, and their condition, inside and outside.
- Weather conditions and visibility.
- The state of the general environment, including road surface, placement of signs, and so on.

The employee may want to record some of this information in the form of a diagram or take photos or a video if he or she has access to the appropriate equipment.

Two important things to remember in collecting evidence/information are:

- Stick to the facts. Do not speculate about fault or cause.
- Think safety first. The State employee should not endanger him or herself or others.

The information collected should be forwarded to Risk Management to be filed with the incident report.

### **Reporting Forms**

Forms for reporting accidents and incidents are available on the Risk Management web site and through the on-line reporting system. Go to [www.nd.gov/risk/](http://www.nd.gov/risk/).

### **Department Location Codes**

The agency code must be included on the Incident Reports. A list of current agency codes is available at [www.nd.gov/risk/publications/manuals-guides](http://www.nd.gov/risk/publications/manuals-guides).

### **Risk Management and Workers Compensation Program Contacts**

Each agency has a designated Risk Management and Workers Compensation Program contact person. A listing of the current names and telephone numbers of the *Risk Management and Workers Compensation Program Contacts* is available at [www.nd.gov/risk/publications/manuals-guides](http://www.nd.gov/risk/publications/manuals-guides).

## Section 4: Loss Control Policies, Procedures, and Practices

### Components of a Loss Control System

Loss control is a proactive approach to preventing accidents and resulting injuries. A loss control program will help control costs, protect the State from liability, help comply with standards, and maintain a safe working environment.

Loss control requires the commitment of everyone at all levels — agency/division directors, risk management contacts, safety directors, and all employees.

An effective loss control system includes the establishment of policies, assignment of responsibilities, and allocation of resources, ongoing review of incidents/accidents, periodic safety audits and training, incident/accident reporting and investigation, safety inspections, safety communication, and development and regular review of emergency and contingency plans.

Each of these components should be implemented, documented, monitored, and updated as necessary.

#### Policies and Procedures

Risk Management encourages State agencies and facilities to develop policies and procedures governing the operations of their agency. Benefits to agencies in implementing this process include:

- Evaluating how and why certain jobs are to be done;
- Assisting employees to understand how to properly perform their assigned tasks; and
- Providing a defense against a claim of negligence when State employees are performing an assigned task in the scope of employment.

#### Loss Control Committees

As part of its loss control system, every State agency or facility should establish a loss control committee.

The committee should be appointed by the head of the agency or facility to act as the main contact for the agency's loss control and safety activities. The committee membership should represent a cross-section of employees. Having representation from all areas of our agency will help the Committee to efficiently address, disseminate information, and delegate items that need to be accomplished.

The suggested functions of the loss control committee include:

- Developing a loss control and safety policy for the agency and communicating that policy to *all* employees.
- Offering loss control and safety suggestions.
- Reviewing accidents or incidents involving agency personnel or property. This includes recommending to the agency head loss control and safety measures that could prevent similar occurrences in the future.
- Establishing a procedure for reporting hazardous conditions or activities and taking corrective action.
- Periodically inspecting agency facilities to see that all employees are complying with established loss control and safety practices and to identify and correct hazardous conditions.
- Preparing checklists to guide and document inspections.
- Assisting and coordinating participation in fire and civil defense evacuation or shelter drills and compliance with the appropriate evacuation/shelter plans.
- Assisting in the development/review of customized policies and procedures to address sexual and other forms of unlawful harassment; acceptable internet/e-mail use in the workplace; substance abuse; workplace threats and violence; and emergencies, including fire, natural disaster/severe weather, and bomb threats. Determining loss control and safety training needs and developing a plan of action to ensure required safety training is accomplished.
- Addressing safety equipment needs.
- Ensuring that first aid kits and personal protective equipment needs are met.
- Developing and conducting loss control and safety orientation programs for new employees.
- Reviewing the agency's Records Management System.
- Reviewing agency contracts to ensure adherence to Risk Management guidelines and state procurement requirements.
- Assisting with the agency's Continuity of Operations Plan (COOP).

A loss control committee should meet as needed, but at least annually. If an appointed member is unable to attend, it is his/her responsibility to ensure another representative from that division attends the meeting in his/her place.

### **Privileged Communication—Exempt Records**

All communications at a loss control committee involving agency incidents or claims are privileged under NDCC § 32-12.2-12 and committee members should not disclose those communications and discussions when they involve claims or incidents that could potentially give rise to liability except as directed by the agency head or legal counsel. Records created by a loss control committee are privileged as well and should not be disclosed when the records relate to an incident or claim that could give rise to liability except as directed by the agency head, legal counsel, or the Risk Management Division. Risk Management records, including incident reports, claims, investigative reports, and other records of a pending or reasonably predictable claim are exempt and

may only be disclosed if the Director of the Risk Management Division determines that disclosure will not prejudice any pending or reasonably predictable claim.

## **Records Management Systems**

### **The Importance of a Records Management System**

The Records Management Division of the Information Technology Department has developed and implemented a Records Management Program for State agencies and facilities. The Program is responsible for the preservation of state records, which includes determining retention periods, selecting the appropriate retention medium, choosing the best retention location, and selecting the best filing system for the records. Information to assist you in developing and maintaining an effective records management system to address your paper and electronic records is available at [www.nd.gov/itd/services/records-management](http://www.nd.gov/itd/services/records-management).

As it relates to Risk Management, proper records handling becomes especially important in the defense of a claim or lawsuit filed against the State or an employee of the State acting within the scope of employment. An effective records management system can assist in:

1. Locating documents that can be used in a legal proceeding.
2. Avoiding the costs associated with data retrieval when the exact location of information is unknown.
3. Reducing the chances of being assessed discovery sanctions for not providing documents.

Upon learning of actual, pending, or reasonably predictable claim, an agency's or facility's records coordinator should work with management and legal counsel to issue a Destruction Hold Notice. For more information on Destruction Hold Notice, see Section 3 of this Manual.

### **Open Records Requests**

After an incident occurs you may receive an open records request for information. If the incident involves a matter that could potentially result in a claim against the State, it is recommended that agencies contact Risk Management and/or legal counsel for assistance in responding to the request.

Incident reports, investigative reports and other risk management records are *privileged* and *exempt* from disclosure under N.D.C.C. § 32-12.1-11. Only Risk Management has the authority to decide if these records may be disclosed.

## Facility Audit and Inspection Checklists

The ability to recognize safety and health hazards is the core of an effective loss control program. One effective method for your agency to identify, detect, correct or control potential hazards is to conduct periodic health and safety audits or inspections. There are a number of factors to consider when establishing an effective audit or inspection procedure. For example, consider:

- using a team approach;
- rotating members of audit team - *new eyes see different things*;
- being thorough - *cover every nook and cranny in your facility*;
- being frequent - *the day after an audit new safety concerns can arise*;
- being comprehensive - *overlooking little things can create big problems*;
- utilizing inspection checklists as a reference – *initially a checklist can offer direction to the inspection team and the form will serve to document the team's findings*;
- setting up a system for corrective action after the audit.

[N.D.C.C. § 18-08-12](#) addresses period fire inspections of state buildings and institutions. In part, the statute provides as follows:

The state fire marshal, or the state fire marshal's designee, shall inspect *annually* the state penitentiary, the James River correctional center, the Missouri River correctional center, the North Dakota youth correctional center, the state developmental center at westwood park, Grafton, the state veterans' home, and the state hospital. The inspection of all other state institutions and occupied state-owned buildings, except residential buildings, must be made by the state fire marshal, or the state fire marshal's designee, *at least once every three years*. The officer in charge of the institution or building shall prepare a response to the report based upon the findings of the fire inspection. Inspection and reporting under this section for residential buildings must be performed *annually*.

There are a number of sample forms and resources that may assist in the audit and inspection process. Contact Risk Management for these resources.

## Loss Control Audits and Training

### Loss Control Audits

The Risk Management Division can conduct audits of state facilities to identify hazards, help implement loss prevention efforts, assess the adequacy of resources devoted to loss retention, and evaluate current loss prevention programs. The facility will receive a written report of findings and recommendations resulting from the audit.

Contact the Risk Management Division to request a loss control audit at 701-328-7584.

## **Loss Control Training**

On request, Risk Management conducts training on various subjects including the following subjects:

- Risk Management Workers Compensation Program
- Incident Reporting Procedures
- ND State Employee Liability and Defense Coverage
- On-Line Incident Reporting

## **Policies and Procedures Addressing Emergencies, Including Fire, Natural Disasters/Severe Weather, and Bomb Threats**

Agencies should have formal policies or plans addressing how employees, visitors, and officials should respond to natural and man-made disasters, including fire, severe weather, bomb threats and various other threats of violence. These plans should address the unique nature of *each* facility involved and should be periodically (at least annually) communicated to all employees through training and drills. These plans should also be coordinated/communicated with the landlord/tenants of the facility; fire department, law enforcement and other first responders.

Items that should be considered and addressed in any emergency policy or evacuation plan include the following:

- Primary and secondary evacuation routes, as well as shelter in place areas
- Notification procedures
- Evacuation of individuals that need assistance (mobility, hearing/vision impaired, other health conditions)
- Delegated authority to address the situation

The Risk Management Division is able to assist agencies in drafting policies and plans appropriate for their location and need. Contact Risk Management for sample policies.

## **Contingency and Disaster Planning**

All agencies should have a formalized plan to address natural and manmade disasters and means of ensuring the continuity of agency operations. A web-based application is available to assist agencies in developing and maintain plans consistent with other state entities. Further information on contingency planning and continuum of government can be found on the Risk Management web site at [www.nd.gov/risk/contingency-planning](http://www.nd.gov/risk/contingency-planning).

## State Vehicles

Agency officials and employees must be aware of the rules and limitations that apply to the operation of state owned, rented or leased motor vehicles.

The operation of vehicles on State business is addressed and regulated by various statutory provisions, including the Tort Claims Acts, as well as the [State Fleet Services Policy Manual](#). All employees should review and be familiar with these regulations prior to travelling for State business. Employees can also reference Risk Management's [Vehicle Coverage Frequently Asked Questions](#), which addresses common questions regarding vehicle coverage and authorized use of State vehicles.

## Addressing Employment Practices Liability (EPL) Exposures

### Proactive Steps to address EPL

Employment practices liability presents tremendous potential exposure to the State, agencies and employees personally. In order to address this risk, agencies must adopt and implement meaningful policies that address discrimination, harassment and workplace violence. Risk Management recommends these best practices for all State agencies:

- 1) Develop adequate EPL policies and procedures;
- 2) Provide training to supervisors and managers on how to implement the policies and procedures; (See on-line training module)
- 3) Ensure that each employee, whether temporary or permanent, and all volunteers are trained on the policies and procedures at the time of hiring. The training should include:
  - Providing each newly hired employee with copies of the policies and procedures for their review;
  - Requiring each newly hired employee to sign a statement (see sample statement) that they have read and understand the policies and procedures;
  - Incorporating a review of the policies and procedures into the annual performance review of each employee by requiring the employee to acknowledge in writing that they have been provided copies of the policies and procedures, that they have read them, have discussed any questions with their supervisor, and that they understand them;
  - Identifying at least 2 separate individuals who complaints may be filed with;
  - Assuring discretion in the investigation of an allegation; and
  - Ensuring no retaliation to the reporting employees.
- 4) Ensure employee training is documented for all employees and volunteers and that the documentation is retained for a period of six years; and
- 5) Ensure any claims reported are thoroughly investigated and resolved and that investigation and resolution is documented.

Sample EPL policies, forms, and guides are available on the Risk Management and Human Resources Management services web sites at [www.nd.gov/risk/sample-documents](http://www.nd.gov/risk/sample-documents) and [www.nd.gov/omb/hrms/](http://www.nd.gov/omb/hrms/).

## First Aid Kits

Each State agency and facility must ensure adequate first-aid supplies are readily available to each employee and are easily accessible in each work or activity area. Each kit must be stocked with necessary supplies for the potential of injuries in the area. The kit should be inspected on a regular basis, restock supplies that have been used and replace supplies with lapsed expiration dates. The inspection must be documented. (See First Aid Kit Checklist below.) Make certain the kit contains one-way microshield CPR devices, disposable gloves (protective), and does not contain oral medications. It is imperative that state employees or volunteers, while acting in their official capacity, never administer or give any type of oral medication to anyone.

The kit should be easily transportable and located in a well-marked and easily accessible area.

### FIRST AID KIT CHECKLIST

Location \_\_\_\_\_  
 Checked By \_\_\_\_\_ Date \_\_\_\_\_

\* The following represents a general checklist of the “essential” items and may need to be customized to correspond with the work/activity area and the level of training of the individuals administering the first aid.

Item	Status	Date Re-stocked
Adhesive Bandages		
Adhesive Tape		
Antiseptic Wipes		
CPR Microshield		
Disposable Gloves		
Elastic Bandages		
Gauze Compresses		
Scissors		
Stretch Bandages		
Tweezers		

CODING: **P** = Present at time of inspection    **R** = Restocked at time of inspection  
**X** = Out of stock (notify and reorder immediately)

## Section 5: Contracts and Agreements

### Managing Contractual Risk

Because all contractual relationships pose some risk of potential liability, State contracts must be reviewed to ensure that the State's interests are adequately protected. The "[Guidelines to Managing Contractual Risk](#)" will assist agencies with this critical task, specifically addressing indemnification and insurance provisions. The Guidelines can be found in both PDF and RTF format at [www.nd.gov/risk/sample-documents](http://www.nd.gov/risk/sample-documents).

Note the following provisions in the Tort Claims Act, N.D.C.C. ch 32-12.2: [www.legis.nd.gov/cencode/t32c12-2.pdf](http://www.legis.nd.gov/cencode/t32c12-2.pdf):

- N.D.C.C. § 32-12.2-17: The Director of OMB shall establish guidelines for indemnification and insurance provisions in state contracts.
- N.D.C.C. § 32-12.2-02(3)(s): Neither the state nor a state employee may be held liable for a claim for liability assumed under contract.

*The Risk Management Fund cannot defend or pay settlements or judgments on behalf of third parties (contractors) that an agency contractually agrees to indemnify. Any such cost would be the sole expense of the contracting agency.*

- N.D.C.C. § 32-12.2-13: Indemnification provisions are prohibited in contracts between the state and a political subdivision; contractors for political subdivisions can be required to indemnify the State.
- N.D.C.C. § 32-12.2-15: State may ordinarily only agree to limit the liability of a vendor for certain goods and services (i.e. software, communication, or electronic equipment); only indirect consequential damaged may be waived. Must complete [SFN 54345 Application for Approval to Limit the Liability of a Vendor](#). The Attorney General's Office has more information at: [www.ag.nd.gov/Forms/LimitLiabilityofVendor.htm](http://www.ag.nd.gov/Forms/LimitLiabilityofVendor.htm).

Ensure that the agency's policies and procedures on contract management include the coordination and/or review with legal counsel and the State Procurement Office. Procurement has various resources such as: laws, guidelines, training, and templates at [www.nd.gov/spo/](http://www.nd.gov/spo/). The Attorney General's Office also has sample contracts and a Contract Drafting Manual at [www.ag.nd.gov/Manuals/Manuals.htm](http://www.ag.nd.gov/Manuals/Manuals.htm).

### Special Use Agreements

#### Facilities Use Agreements

There may be occasions where third parties request to use State buildings, equipment and/or real property. The use of State facilities by third parties could result in damages for which the State may not and should not be liable. These risks should be dealt with by requiring the party making such a request to enter into a Facilities Use Agreement.

An example or template [Facilities Use Agreement](http://www.nd.gov/risk/sample-documents) can be found at [www.nd.gov/risk/sample-documents](http://www.nd.gov/risk/sample-documents). To ensure that the indemnification and insurance requirements are complied with, a certificate of insurance and an additional insured endorsement should be obtained from the renter at least 10 days prior to the event or activity.

Some uses of the State's facilities may not present risks in which it is necessary to require insurance coverage. To determine which events require insurance involves an analysis of the activities and potential risks involved. Categorizing the differences:

- a) Requiring Insurance: activities presenting higher risks of injury or property damage to participants/attendees/ public/employees would involve such things as physical/athletic activity, equipment, some demonstrations, hands-on workshops, any time alcohol is authorized, overnight stays, etc.
- b) No Insurance: activities that present a very low potential for risk of injury or property damage to participants/attendees/ public/employees would involve such things as holding a meeting, luncheons, speakers, presentations/training, etc.
- c) Risk Management recognizes that some activities may be difficult to determine which agreement is necessary and reasonable, therefore agencies are encouraged to consult with our office and legal counsel to assist with those decisions.

If an agency analyzes the situation and determines that insurance is not necessary, the agency may implement the use of a simplified facilities use agreement. An example or template [Facilities Use Agreement](http://www.nd.gov/risk/sample-documents) can be found at [www.nd.gov/risk/sample-documents](http://www.nd.gov/risk/sample-documents). *NOTE* that this should not be the default form used by an agency; rather it is an alternate or an option to the form requiring insurance.

Alcohol is not allowed on State property, unless there is specific authorization. If this situation occurs in relation to a facility use agreement, contact Risk Management for recommended procedures and language.

### **Special Events Waivers of Liability, Indemnification, and Medical Releases**

When State facilities are used by the general public for special events that present a higher than normal potential for injury (i.e. sponsored water recreational activities, athletic events, wellness centers, field trips, or other events), participants should be required to execute a Waiver of Liability, Indemnification, and Medical Release. See examples of recommended [Waiver forms](http://www.nd.gov/risk/sample-documents) at [www.nd.gov/risk/sample-documents](http://www.nd.gov/risk/sample-documents).

Waivers may also be a process that can be part of an agency's facilities use agreement. In some cases where the insurance coverage is not required, but there remains some risk of harm, the organization and the State agency should secure waivers from each participant releasing the State from liability. Where the risk of harm is not insignificant, the agency should consider closely monitoring the execution of waivers, depending on the nature of the activities.

## Section 6: North Dakota State Employee Defense

This section discusses the statutory protections provided to State employees through the North Dakota State Tort Claims Act, N.D.C.C. ch. 32-12.2., as well as explains the State employee's obligations in the defense of claims or lawsuits. The limits of liability established by the Act may not apply to actions in Federal Court or courts in states other than North Dakota. However, the employee defense provided by the Act pertains to a suit brought in any court.

In order to accurately describe the defense protections and obligations under the Act, it is necessary to define certain terms.

### Definitions

*State employee*- means every present or former officer or employee of the State or any person acting on behalf of the State in an official capacity, temporarily or permanently, with or without compensation. The term does not include an independent contractor.

*Scope of employment*- means the State employee was acting on behalf of the State in the performance of duties or tasks of the employee's office or employment lawfully assigned to the employee by competent authority or law.

*Claim*- means any claim for money damages brought against the State or a State employee for an injury caused by the State or a State employee acting within the scope of the employee's employment whether in the State or outside the State.

*Injury*- means personal injury, death, or property damage.

*Punitive damages*- means damages awarded in addition to compensatory damages to serve as punishment for wanton misconduct or as a deterrent to others.

### Publications

Reference material available on [Risk Management's](#) website includes:

- Liability of State Employees in North Dakota - Brochure
- Litigation Handbook for ND State Employees: What to Expect If You Get Sued
- Preparation for Testifying Guidelines
- Request for Legal Defense and Indemnification form

### Safeguards Provided to and Obligations Required of State Employees

The State will defend a State employee in connection with any civil claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring within the scope of employee's employment if the employee provides complete disclosure and cooperation and requests such defense in writing.

The determination of whether or not the employee was acting within the scope of the employee's employment will be made by the attorney general. The head of the State entity that employs the State employee will advise the attorney general as to whether that person deems the employee's actions that are the subject of the action to have been within the scope of the employee's employment.

The employee must provide complete disclosure and cooperation in the defense of the claim or demand and the employee must give written notice of the claim or demand to the head of the State entity that employs the State employee and the attorney general within ten days after being served with a summons, complaint or other legal pleading asserting that claim or demand against the State employee.

The requirement that the State employee provide complete disclosure and cooperation in the defense of the claim will ensure the employee and the State are provided appropriate representation. By meeting this requirement, the Attorney General's office and the Risk Management Division will be able to correctly identify which claims should be settled and how best to defend a case.

If an employee is named as a party in a lawsuit, it is necessary for the employee to notify the head of his or her employing agency and the Office of the Attorney General within 10 days of being served with any legal document asserting a legal claim against the employee. Typically, this claim would be in a Summons and Complaint, which are served on the State employee personally or by certified mail.

Under the rules of the courts in North Dakota, a defendant only has 20 days to file a written response with the court when served with a Summons and Complaint. That is a relatively short period of time for the Risk Management Division and the Attorney General's office to investigate the matter, discuss it with the State employee and the agency head, determine which attorney the matter should be assigned to, give that attorney time to become familiar with the matter, and for the attorney to prepare the appropriate legal response. Accordingly, even though this statute allows State employees 10 days in which to advise the Office of the Attorney General that they have been served with a legal pleading, we recommend employees make every effort to **IMMEDIATELY** notify their supervisor, the agency head and the Office of the Attorney General.

Risk Management, together with the office of the Attorney General, will determine which attorney has the expertise to best serve as counsel for the Fund to represent State employees who are served for actions covered by the Fund.

A State employee may choose to hire his or her own attorney and not be represented by an attorney retained by the Risk Management Fund. If so, the State will **not** pay a judgment entered against the employee as the result of that claim, nor reimburse the employee for defense costs. The state also will not pay any judgment for punitive damages awarded against a State employee.

## Request for Legal Defense

The [Request for Legal Defense](#) form has been developed to assist an employee to meet the requirements set out at N.D.C.C. 32-12.2-03(6).

It is recommended that, should you be served with a legal pleading, you **immediately** notify your agency head, the Solicitor General at the Office of the Attorney General, and Risk Management. Tell them that you have been served; arrange to provide a copy of all of the materials served upon you to them; and, if you wish to be defended and indemnified by the State, advise them that you will be forwarding a signed *Request for Legal Defense* as soon as possible and, in any event, within the ten day period following the service. If you have any questions concerning this procedure, contact Risk Management for direction.

## Section 7: Risk Management Workers Compensation Program

### Introduction

The state of North Dakota has a long standing commitment to provide a healthy and safe working environment for all state employees. N.D.C.C. § 65-04-03.1 establishes a single workers compensation account for all state agencies. The program titled the Risk Management Workers Compensation Program (RMWCP) is administered by the Risk Management Division of the Office of Management and Budget. This cross agency program is designed to reduce costs while enhancing recovery of injured employees and improving workplace moral.

One feature of the RMWCP is the development of a return-to-work program titled the “*Transitional Duty Program*”, as addressed below. A return-to-work or transitional duty program is cited by the American Occupational Medical Association for the positive effects it provides to both the psychological and physical recovery of the injured employee. Transitional duty has been proven to work in both public and private sectors across the nation.

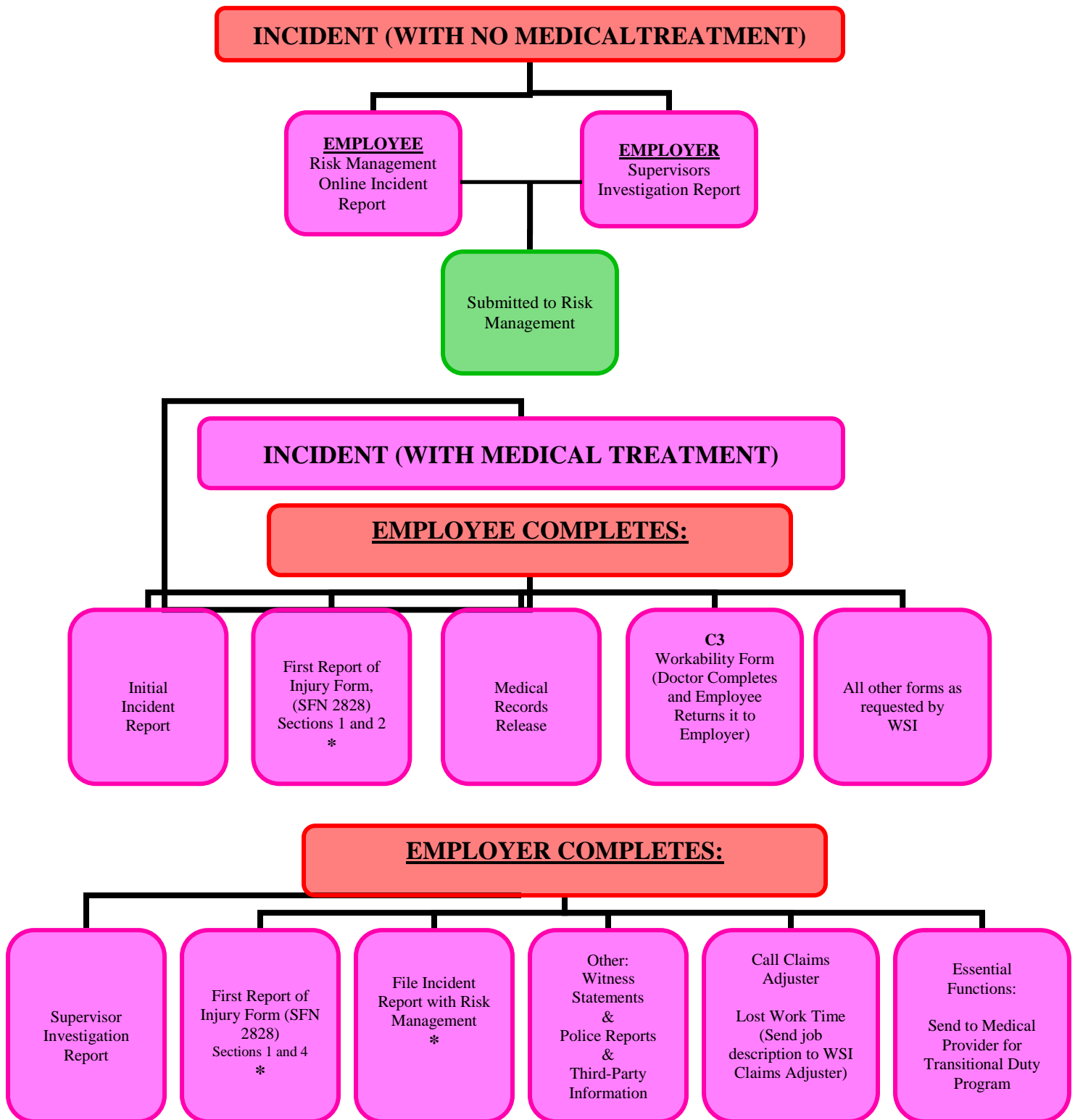
Statistics show that injured employees off work longer than six months have only a fifty percent chance of ever returning to their job; if time lost exceeds one year, their chances decrease to less than ten percent. Therefore, the North Dakota Transitional Duty Program is established with the following goals in mind:

1. Foster and enhance the physical and psychological recovery process for injured workers.
2. Reduce medical, disability, and lost time costs.
3. Reduce indirect accident costs.
4. Minimize the chance of re-injury.
5. Encourage cooperation between state agencies, their employees, and management.
6. Establish a more stable work force.
7. Enhance the injured employee’s sense of confidence and well being.

This section of the Risk Management Manual will discuss the North Dakota Risk Management Workers Compensation Program. It should be recognized that this section cannot be all-inclusive and that situations will arise that are not addressed here. Any questions or concerns can be addressed by contacting the RMWCP Manger at the Risk Management Division at 701-328-7583. In addition, each state agency has a designated risk management workers compensation contact person who will be able to assist state employees with completing forms to document workplace incidents, injuries, or diseases.

An overview of the RMWCP is shown on the chart found on the next page.

## STATE AGENCY NDWCP CLAIMS MANAGEMENT PROCESS



\*Completed on line and filed electronically

## Employee Responsibilities

### Reporting Incidents and Accidents

Report ALL incidents and accidents as soon as possible to your supervisor (or his/her designee in the event of an absence) preferably by the end of the workday.

#### ***Incident Only***

If you do not appear to be in need of immediate medical treatment other than first aid, assist your supervisor in completing a Risk Management Fund Incident Report form (SFN 50508), within 24 hours of notification of an incident. The incident report serves as a record of notification to your employer pursuant to N.D.C.C. § 65-05-01.3 in the event you should require medical treatment at a future date. If the incident does not result in a worker's compensation claim, the incident report will be used for loss control purposes.

First aid injuries mean any one time treatment and subsequent observation of minor bruises, scratches, cuts, burns, splinters, and so forth, which do not ordinarily require medical care. Such treatment and observation are considered first aid even when provided by registered professional personnel.

#### ***Injury***

Reportable injuries are defined as injuries requiring medical treatment beyond first aid. If you are injured and intend to seek medical treatment, when practical, you must:

- 1) Notify your supervisor and your agency risk management workers compensation contact.
- 2) Complete the Section 1 and Section 2 of the SFN 2828 form and file it with Workforce Safety & Insurance (WSI). *Note:* It is recommended this process be completed electronically at [www.workforcesafety.com/](http://www.workforcesafety.com/).
- 3) Advise your employer that you are seeking medical treatment.  
*NOTE:* Employees must seek treatment from the pre-selected Designated Medical Provider for all but emergency care or when travel time would delay care.
- 4) Have your medical provider complete Section 3 of the form or similar form with the same information.
- 5) Return the form completed by the medical provider to your designated agency risk management workers compensation contact as soon as possible, but no longer than 24 hours after receiving treatment.

### ***Contributing Factors***

An injured employee is required to report any extenuating factors involved with an occupational injury or disease. That information must be communicated in writing to WSI at the time the incident is reported to the employer. Extenuating factors include:

- 1) Knowledge about pre-existing injuries or conditions.
- 2) Second jobs or hobbies that could affect the severity of or recovery from the injury.
- 3) Third party involvement (conditions of leased property, equipment malfunction, vehicles).

### ***Transitional Duty***

If your medical provider releases you for transitional duty (See Transitional Duty Program addressed below) or if your temporary transitional duty has expired you must:

- 1) Maintain regular contact with your supervisor or designated representative.
- 2) Provide a Doctor's Report of Injury Form (C3) or similar form completed by the medical provider to your Risk Management Contact and supervisor after each medical appointment.
- 3) Select leave choice option.
- 4) Provide your agency and the WSI claims adjuster with a current address and telephone number at all times.

### ***Permanent Physical Limitations***

If you are released to work, but your medical provider indicates that you will have permanent limitations that will not allow you to perform the essential functions of your regular position and changes or accommodations cannot be made, the Risk Management Workers Compensation Manager will work with your agency to determine if an alternate vacant position is available. If not, you will be referred to your personnel or administrative officer to identify suitable positions that you are qualified to be reassigned to. Your name will be referred to other state entities for consideration when hiring for vacant positions that you qualify for. An appropriate alternate position must be approved by your medical provider. If a suitable vacancy is not offered within 30 days of the meeting with personnel, other rehabilitation options will be available through WSI. A Rehabilitation Consultant will develop a return-to-work plan taking into account your functional capabilities, employment history, work experience, education, and transferable skills.

## **State Entity Responsibilities**

### **Facilitating the Reporting of Workplace Incidents and Accidents**

#### ***Risk Management Workers Compensation Contact***

Each State entity is required to appoint a risk management workers compensation contact person to serve as a liaison between the injured state employee, the Risk Management Division, and WSI. All employees of your agency or facility should be made aware of the contact person's name and telephone number.

Employees must be directed to report ALL incidents and accidents as soon as possible to their supervisor (or his/her designee in the event of an absence). The supervisor is then responsible to work with the employee and risk management workers compensation contact person to complete the reporting procedures. A checklist titled *Risk Management Workers Compensation Program Supervisor Checklist* has been developed to assist the injured employee's supervisor in completing this process. See a sample of that form at the end of this section.

#### ***Designated Medical Provider (DMP)***

The Risk Management Workers Compensation Program (RMWCP) has selected state-wide occupational health specialists to serve as the Program's DMPs. The occupational health specialists are located in medical facilities (including satellite care centers) across North Dakota. They employ registered nurses to assist injured workers who seek medical treatment. These nurses assist with coordinating care and restrictions for medical necessity and appropriateness; provide recommendations; act as a liaison between the injured worker, employer, medical provider, and WSI claims adjuster; and assist in the coordination of transitional work.

State entities that use one of the Program's DMPs can expect to see reduced costs associated with their employees' claims, fewer long-term claims, a more timely return to work by injured employees, a discount in its workers compensation premium, and the elimination of the \$250 deductible cost associated with workers compensation claims.

It should be noted that the \$250 deductible will not be waived when an employee seeks treatment at an emergency room when it would have been appropriate for that treatment to have been provided at a clinic, after-hour clinic, or walk-in clinic, even if it meant waiting until the next morning when the clinic opens. Of course, the \$250 deductible will be waived when the employee has adopted the DMP program and the required treatment is of an emergency nature or if a delay in treatment will result in worsening the condition.

All State agencies and facilities are required to notify its employees of its DMP choice. Employees have the option of selecting a different provider but must make that selection known to the employer before they seek treatment for a workplace injury.

## ***Incident Reporting***

For all reported injuries, even if the injury does not appear to need medical treatment other than first aid, complete a Risk Management Fund Incident Report form (SFN 50508) and file it with the Risk Management Division within 24 hours of receiving the report of the injury. The incident report serves as a record of notification to the employer pursuant to N.D.C.C. 65-05-01.3 in the event the employee should require medical treatment at a future date. If the incident does not result in a workers compensation claim, the incident report will be used for loss control purposes. With prior approval from Risk Management, agencies can submit monthly incident summary reports.

Reportable injuries are defined as injuries requiring medical treatment beyond first aid. First aid injuries mean any one time treatment and subsequent observation of minor bruises, scratches, cuts, burns, splinters, and so forth, which do not ordinarily require medical care. Such treatment and observation are considered first aid even when provided by registered professional personnel.

## ***Traumatic Injury Reporting***

If an employee suffers an injury that is traumatic and will result in hospitalization, or temporary total disability, the supervisor or contact person must immediately file First Report of Injury form (SFN 2828) (preferably electronically) to report and initiate medical management of the claim. In addition, Risk Management must be notified by calling 701-328-7583. It is imperative that this reporting process be completed to ensure that immediate and appropriate care is provided to the injured employee.

The supervisor or agency contact is then required to follow up with the employee to ensure that Sections 1 and 2 of the SFN 2828 is completed and filed with WSI.

## ***Routine Injury Reporting***

If an employee is injured on-site and intends to seek medical treatment, render assistance as necessary and make arrangements for transport. If the injury is an emergency, seek urgent care at the nearest facility.

Ensure that employees are informed that if the employee is injured off-site, and if their condition may worsen if they delay treatment until it is available by the Designated Medical Provider, they are to:

- 1) Seek treatment at clinics, after-hour clinics, and walk-in clinics where available;
- 2) In an emergency – seek immediate medical care at the nearest emergency room;
- 3) Notify the health care provider that the injury is a workers' compensation injury; and
- 4) Arrange to have a report of the incident called in to the supervisor or contact person explaining the circumstances of the injury, the need for treatment

(emergency or other), and their destination.

**NOTE:** Employers should encourage employees to seek treatment from the employer's chosen Designated Medical Provider for all but emergency care or where travel time would delay care. The injured employee may elect to be treated by other than the employer's Designated Medical Provider if they have designated a separate Designated Medical Provider, in writing, prior to the injury.

Offer to call the Designated Medical Provider to set up the appointment, if feasible.

Complete the Section 1 and 4 of the SFN 2828 form and file it with WSI within 24 hours, if possible, but no later than 24 hours from receipt of a copy of the Employee's Report of Injury.

Advise the employee that if he or she is seeking medical treatment that they are required to file Section 1 and Section 2 of the SFN 2828 form with WSI and to return Section 3 of the form to their supervisor or risk management workers compensation contact as soon as possible but no later than 24 hours after receiving treatment.

### ***Family and Medical Leave Act (FMLA)***

To strike a fair balance between protecting employment interests and managing long term absences from the workplace, most experts agree the employee's 12 week FMLA leave entitlement should run concurrently with workers compensation leave. Accordingly, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee. For each workers compensation injury that results in a "serious health condition," you should designate the leave as FMLA-qualifying and promptly notify the injured employee.

It is important to insure that the employee is qualified for leave under the Family Medical Leave Act. Employers should check if the employee has used any family medical leave in the past twelve months and whether the agency's policy defines the twelve month period as:

- the calendar year;
- any fixed 12-month "leave year" such as a fiscal year, a year required by state law, or a year starting on the employee's "anniversary date;"
- the 12-month period measured forward from the date any employee's first FMLA leave begins; or
- a "rolling" 12-month period measured backward from the date an employee uses FMLA leave.

If the completed C3 indicates the need for leave for the employee, within two business days of receiving that information, notify the injured worker that the paid leave is to be designated as covered by FMLA and will be counted as such. Oral notices should be confirmed in writing no later than the next payday.

Employees may elect to utilize their rights under FMLA, if applicable, in lieu of accepting a transitional duty position. Provisions of FMLA will supersede the provisions of the transitional duty program. However, workers compensation benefits may be discontinued if FMLA is chosen in lieu of a transitional duty assignment.

### ***Wage Replacement Benefits***

If the medical provider orders the employee not to work for five or more calendar days in a row because of a work-related injury or illness, the employee will be paid a wage replacement benefit. There are three types of wage replacement benefits.

- **Temporary Total Disability.** If an employee experiences a total disability that is temporary, and the medical provider has taken the employee off work for five or more consecutive calendar days in a row, the employee will be paid a TTD wage replacement benefit at a rate of 66 and 2/3 of the employee's average gross weekly wage at the time of the injury. Total benefits cannot exceed statutory maximum benefit or go below the statutory minimum unless the employee's pre-injury net wage was lower than the statutory minimum, in which case the employee would receive benefits equal to the pre-injury net wage. Additionally, the employee may receive up to \$15 per week for each dependent child the employee supports. A dependent child is defined as: 1) a child under the age of 18 residing in the injured worker's household or a child for whom the injured worker has a legal obligation to support; or 2) a child age 18 and older who is incapable of supporting himself because of a disability and who is dependent upon the injured worker for support; or 3) a child between the ages of 18 and 22 who is a full-time student and dependent upon the injured worker for support.
- **Temporary Partial Disability (TPD)** - If an employee's wages are reduced because of a physical limitation related to the employee's injury, the employee will be paid a TPD wage replacement benefit. TPD benefits end when the employee's wages return to at least 90% of the gross weekly preinjury wages. TPD benefits can only be paid up to 5 years for those suffering a loss of earnings capacity after July 1, 1991.
- **Permanent Total Disability (PTD)** - This benefit is for employees who are totally disabled and unable to return to work of any kind. When deciding whether PTD has been sustained, WSI must consider the following factors: nature of injury, degree of physical impairment, education, work history, wage-earning capacity, and potential for vocational rehabilitation.

## ***Transitional Duty Assignment***

The injured employee's supervisor must continue to communicate with the employee, provide assistance as necessary, evaluate the information on the physical assessment form, and develop a transitional duty assignment as necessary. If the employee will not be performing their regular job duties or if the work restrictions are unclear and clarification needs to be obtained, complete the "Temporary Transitional Duty Assignment" form and forward to the medical provider for approval prior to initiating the assignment. If a job description was not available at the time the employee sought medical treatment and the employee has been taken off work or if work restrictions are unclear, fax a copy to the medical provider and the Risk Management Division. Additional information on the State's Transitional Duty Program is addressed below.

Remember, Section 3 of the SFN 2828 must be provided to the injured employee's supervisor following each medical provider visit.

*Failure by State Entity to Participate in the Transitional Duty Program.* If a State entity has an injured worker who 1) has been off work for longer than 5 consecutive days, 2) has been cleared for transitional duty by their medical provider, and 3) for whom a position is available to meet their restrictions and that entity fails to participate in the Transitional Duty Program, that entity may be surcharged \$25.00 for each calendar day it fails to participate.

## ***Follow-up to Reported Incident or Injury***

The injured employee's supervisor is required to investigate the accident resulting in the incident or injury and complete and an incident report within 24 hours of the incident. Obtain written witness statements if applicable.

## **Transitional Duty Program**

**Purpose.** Transitional duty (return-to-work) programs serve as "tools" for motivated employees who want to continue working during the course of their recovery from an occupational injury or disease. Transitional duty helps the employee stay in the work environment which, in turn, has proven to speed recovery and reduces workers compensation costs.

Transitional duty may also serve as a cost control technique for employees who are not motivated to be at work during their recovery or for those situations where there is suspicion regarding the severity of the injury. A transitional duty program encourages physicians to medically release the employee for work when appropriate.

**State Policy** - *The State of North Dakota has established a Transitional Duty Program that will enhance recovery, comply with the Americans with Disabilities Act, help minimize workers compensation costs, and provide a service to employees who are injured or contract an occupational disease in the scope of their employment with the State.*

*Employees will be placed in transitional duty positions, when feasible, during the course of recovery from an occupational injury or disease that precludes them from performing their normal job tasks. In the event of a permanent disability that prevents an employee from performing the essential functions of their regular position and for which reasonable accommodations cannot be made, every effort will be made to place the employee in an alternative vacant position that they are qualified to perform and that matches their physical limitations.*

**NOTE:** N.D.C.C. § 65-05-08(7) provides that if an employee refuses to return to work or if the transitional duty does not work out for reasons not related to their medical condition (attendance, cooperation, etc.) the employee's compensation payments may be discontinued.

## **Implementing the Transitional Duty Program**

### ***State Responsibilities***

**Transitional Duty Pool** - State agencies and facilities are encouraged to establish and locate their own transitional duty positions in-house. However, if none are available to accommodate an injured employee's restrictions, a position will be located through the RMWCP. The state entity that is the employer at the time the injury occurred to the employee will be required to pay the full pro-rated salary of the employee while the receiving agency will enjoy the benefit of an extra employee compensated by the originating agency. The Administrative Rules adopted by the Risk Management Division governs the operation of the TDP.

### ***State Entity Responsibilities***

- Provide transitional duty that accommodates the physical limitations of employees who are recovering from an occupational injury or disease.
- Identify possible alternative work or special projects prior to the need to utilize transitional duty.
- Communicate the employee's and supervisor's responsibilities in regard to their role in this program and ensure that all parties perform these responsibilities.
- Communicate with the Risk Management Division, WSI, and the health care provider in regard to the availability of transitional duty, the status of the employee's claim and any extenuating facts or circumstances that could affect the employee's early return to work.
- If unable to accommodate the employee's restrictions, contact the agency's personnel or administrative officer and Risk Management to locate appropriate transitional duty within another agency.

Once a position is identified, a copy of the duties must be sent to the employee's treating medical provider for approval. A follow-up phone call should be made to facilitate the response. If a timely response is not received, the state entity should contact the RMWCP.

The receiving agency supervisor who will be responsible for the employee will be required to sign the temporary transitional duty job description. It is imperative that the physical limitations set by the medical provider are not exceeded. Consideration will need to be given to part time situations and required time off to attend medical appointments.

A \$25.00 surcharge may be imposed on an employing agency that fails to provide transitional duty to an injured employee who has been off work for at least 5 consecutive calendar days, for whom a position is available to meeting the employee's limitations and restrictions, and if the employee has been cleared for transitional duty. There would be no penalty for a receiving agency not agreeing to accept an injured employee for transitional duty.

If an entity has a position or special project that would be appropriate to accommodate someone with a physical limitation (usually back injuries, hand and wrist injuries, or leg, foot or ankle injuries), a description of the duties and physical requirements can be sent to the agency's personnel or administrative officer or the Risk Management Division for addition to the TDP.

If the State is unable to provide transitional duty or if a medical provider refuses to release the employee to ANY type of work, the employing entity must establish a regular schedule of consistent contact with the employee to provide moral support, assistance, and to monitor the progress of their medical status. Reports of these contacts should be provided to the Risk Management Division to ensure the efficient and timely handling of the claim.

If an employee's medical provider certifies that the employee has sustained permanent limitations that do not allow the employee to perform the essential functions of their regular position, every effort will be made to make reasonable accommodations. This includes a reassignment to an appropriate vacant position. State entity personnel should interview qualified employees with permanent limitations from other agencies who are referred from the agency's personnel or administrative officer for vacant positions, and give consideration to hiring them. Incentives to hire previously injured employees in positions that will accommodate their restrictions resulting from a workplace injury may be available through WSI Preferred Worker Program.

*NOTE:* The Risk Management Division will serve as a technical resource for information and problem solving. Call 701-328-7583 for information or assistance.

## ***Employee Responsibilities***

If your medical provider indicates that you have temporary physical restrictions that do not allow you to perform your regular job, consideration will be given to modify your duties as necessary. If it is not possible or feasible to modify your duties, either a transitional duty assignment that meets your physical restrictions will be developed, or an appropriate position will be located. You will receive your normal wages and benefits that will be prorated if less than 8 hours a day are worked. This assignment will last until the earlier of:

- a) Ninety consecutive calendar days elapse from the acceptance of the special assignment.
- b) Your medical provider indicates you have permanent restrictions that will prevent you from returning to your job.
- c) Appropriate transitional duty tasks are no longer available.
- d) You are released to full duty.
- e) Your claim for workers compensation benefits is denied.
- f) Your own agency, department, or facility finds a position that meets the restrictions set by your physician.

You must respond to a transitional duty assignment offer within 24 hours, when possible, but not later than two days. Exceptional circumstances will allow up to seven days for a response. Disability benefits may discontinue if an employee does not accept a transitional duty position that is approved by their medical provider and is within 25 miles of the pre-injury position.

*NOTE:* Employees may, at their own discretion, accept a temporary position that is more than 25 miles from their original position. An employee will not be subject to the denial of benefits if he or she does not accept the temporary position that is more than 25 miles from their original position. Employees may elect to utilize their rights under the Family Medical Leave Act, if applicable, in lieu of accepting a transitional duty position. Provisions of FMLA will supersede the provisions of this program. However, workers compensation disability benefits may be discontinued.

### **Transitional Duty Assignment Defined**

**Option 1** - Employee remains assigned to regular job with some key tasks or functions temporarily altered or suspended or hours temporarily reduced. If the employee is performing at least 51% of the essential functions of their position there will not be a classification issue and this transitional duty will not necessarily need to be limited to 90 days. This is considered reasonable accommodation provided that an undue hardship is not placed on the agency due to the limited work status of the employee.

- Option 2** - Medical restrictions prevent an employee from performing significant portions of his or her regular job tasks. Supplemental tasks not usually done by the employee, but within medical restrictions are identified. Supplemental tasks are assigned to fill employee's allowed work time.
- Option 3** - Employee's medical restrictions prevent employee from accomplishing most of his or her regular job. A series of supplemental tasks are assembled and combined to fill employee's allowed work time. Creativity is essential-special projects, volunteer related activities, assistance with safety program implementation, etc.
- Option 4** - The injured employee's agency cannot accommodate temporary transitional duty requiring an appropriate position from another agency. The employee works in a vacant position, volunteer position, or special project for a maximum of 90 days. The original agency will continue to pay the employee's salary. Special efforts must be made by the original agency, receiving agency, and WSI to ensure that all related issues are properly handled. Risk Management must be notified and will coordinate this option.

In all of the above options, the employee remains in their regular position and job classification. They continue to receive regular wages and accrue benefits. Seniority, lay-off rights, and other employee rights remain intact. Wages and benefits are pro-rated, based on actual hours worked. In some cases, when an employee is only working part time, wages may be supplemented by payment of temporary partial disability. These benefits end when wages return to at least 90% of the employee's gross weekly pre-injury wages.

Changes in transitional duty are based on the treating medical provider's documented physical limitations. The employee must bring an updated physical assessment form to their supervisor after each appointment to evaluate the possibility of changes or increase in duties.

Options 2, 3, and 4 are *temporary* special assignments. They are offered when there is medical documentation that the employee cannot perform the regular job, but is expected to recover from the injury or illness within a reasonable period of time. Transitional duty is not reinstatement or reemployment. Special assignments will end when one of the following occurs:

- a) Ninety consecutive calendar days have elapsed from the day the employee starts the assignment.\*
- b) The employee is released for regular work.
- c) Permanent restriction that prevents the employee from performing the essential functions of their regular position and for which reasonable accommodations cannot be made, is documented.
- d) The temporary assignment is no longer available or other conditions require the agency to stop the temporary assignment.

- e) The claim for workers compensation benefits is denied.
- f) Suitable transitional work which will last for the remainder of the time ordered by the physician becomes available with the original agency or facility.

\* A second 90 day temporary position may be approved if the employee performs one term while being conservatively treated for an injury and then ends up having a surgery which requires some lost time and a subsequent recovery period is needed. An option to extend the 90 days is to temporarily reclassify the employee's position if the disability is projected to continue for an extended period of time and the reclassification does not pose a hardship to the agency.

## **Permanent Disabilities**

### **Re-assignment Rights**

This subsection explains the procedures that will occur in the event that an employee is unable to perform the essential functions of his or her regular position due to a permanent disability that results from the employee's industrial injury or occupational disease. This differs from transitional duty because, in the event of a permanent disability, alternative positions would need to be permanent and the 90 day period that pertains to transitional duty would not apply. This does not prejudice State employees as they have re-assignment rights to positions they qualify for and for which their permanent limitations do not preclude them from performing the essential functions.

In the event of a permanent disability, WSI will assign a Vocational Rehabilitation Consultant to assist with the identification of job goals that are appreciable to restrictions and transferable skills. The Vocational Rehabilitation Consultant will request the agency's personnel or administrative officer to review the employee's personnel file. That review will determine alternative State positions for which the employee meets the minimum qualifications and would be eligible to take as a transfer, comparable transfer, or voluntary demotion. The Claims Adjuster will provide this information to the Vocational Rehabilitation Consultant. The information will then be forwarded to the employee and the agency or facility for consideration for future vacancies.

Upon receipt of permanent limitations, the Vocational Rehabilitation Consultant will again contact the agency or facility for review of the possibility of reasonable accommodations or placement into an alternative position that is available. If the agency or facility indicates that neither of these two options is possible, the Rehabilitation Consultant will contact the agency's personnel or administrative officer to set up a meeting with all parties to discuss the employee's options, to explain their rights to transfer and voluntarily demote, and to review appropriate vacancies.

From the date of this consultation, the State, as the employer, will have 30 days to review vacancies, offer alternative employment or propose an on-the-job training opportunity. In some cases, the position does not have to be immediately available, as long as the offer is made and accepted within the 30 days and the position will be

available within 90 days. Once this 30 days has elapsed the Vocational Rehabilitation Consultant will pursue other rehabilitation options with the employee.

During this 30 day time period the names of eligible employees will be provided to various personnel representatives who are requesting certification lists for appropriate vacancies. These employees should be given the opportunity for an interview when qualified. Every effort needs to be made to offer these employees alternative employment as ADA issues could apply and the costly process of vocational rehabilitation can be avoided.

## **Premium Discount Program**

**History.** In 1993 North Dakota Workers Compensation (NDWC) implemented a premium discount program that awarded efforts to implement a pre-approved risk management program. (N.D.C.C. § 65-04-19.1) In 1995 the North Dakota Legislature mandated every State agency, institution, and entity employing 25 or more full-time equivalent employees participate in that program. (N.D.C.C. § 65-04-19.2) Implementing this program provides the necessary tools to construct an effective method of promoting safety and claims management for State entities' workers compensation exposures.

Through the Risk Management Workers Compensation Program (RMWCP), the original NDWC (now WSI) discount program has been enhanced to reward State entities with a proactive claims management/injury prevention program. The current discount potential has been set to at a potential 10% discount and the RMWCP is committed to ensuring all State agencies or facilities qualify to the fullest discount possible. Qualifying for the discount should result in a reduction in the number of days an injured worker is away from work – which results in reduced claims costs. This reduction will have a positive impact on the entity's experience rate (projection of future losses), ultimately reducing the total cost of its workers compensation premiums.

By qualifying for this program an entity and its employees will realize:

- Increased safety awareness.
- Improved morale among employees.
- Reduced risk of injury to employees and damage to equipment.
- Improved quality of work.
- Increased productivity.
- Reduced workers compensation claims costs through properly responding to and managing workplace injuries.

**Requirements of the Risk Management Workers Compensation Discount Program.** To qualify for a discount, a State entity must have a program in place that has been approved by the Risk Management Division. The program must contain the following requirements:

- 1) **Safety Policy** – Prepare a statement, signed by top management, identifying the responsibilities of management and employees for ensuring a safe workplace. Review this policy with all employees on an annual basis.
- 2) **Safe Operating Procedures** - Develop written guidelines for procedures and tasks involving recognized hazards.
- 3) **Annual Inspection** – Conduct an annual inspection of your agency/facility workplace.
- 4) **Essential Job Functions** - Develop a list of essential job functions for each job category. These lists help you properly place workers in jobs and assign injured workers to transitional duties.
- 5) **Establish a written training program** through which all employees learn about general safety rules, safe operating procedures, ergonomics hazards, and claims management principles.
- 6) **Implement an effective claims management program** including the designated medical provider and transitional duty as required.
- 7) **Online claim filing** – Ensuring that 90% of workers compensation claims are filed on-line within 24 hours of a routine injury and immediately following a traumatic injury,
- 8) **Incident Reporting** – Ensuring that 90% of Workers Compensation incidents are filed on-line with Risk Management within 24 hours of notice of injury.
- 9) **Accident Investigation and Near-Miss Program** – Develop procedures for investigation all accidents a “near misses/incidents.”
- 10) **Ergonomics Program** – Develop an ergonomics action plan/program.

**How to apply for the Discount Program.** Complete and submit the RMWCP Premium Discount Application form found at the end of this section to the Risk Management Division by June 30th of each year.

If you need any assistance in completing the application process, contact the RMWCP Manager at (701) 328-7583.

## RMWCP Dividend Program

Through proactive loss control practices, the RMWCP has realized savings to the State for workers compensation costs. In an effort to share those savings with the agencies and facilities that have effectively addressed and managed their claims, the RMWCP has adopted a dividend program that will go into effect for fiscal year 2005. Agencies will not be required to file any additional paperwork to qualify for this dividend program. Rather, at the time of premium renewal, the Risk Management Division will determine each agency's or facility's dividend by dividing the cost of that entity's premium for a period of 3 to 5 years by the entity's total losses for that same period (the incurred loss ratio). The incurred loss ratio will determine the dividend based on:

At the time of premium renewal, the Risk Management Division will determine each agency's or facility's dividend by dividing the cost of that entity's premium for a period of 3 to 5 years by the entity's total losses for that same period (the incurred loss ratio). The incurred loss ratio will determine the dividend based on:

Incurred Loss Ratio	Premium Size				
	\$0 to \$25,000	\$25,001 to \$50,000	\$50,001 to \$75,000	\$75,001 to \$100,000	\$100,001 and over
0% - 5%	14%	17%	20%	23%	26%
5.1% - 10%	10%	13%	16%	19%	22%
10.1% -15%	8%	10%	13%	16%	19%
15.1% - 20%	6%	7%	9%	12%	16%
20.1% -25%	4%	5%	7%	9%	13%
25.1% - 30%	3%	4%	5%	7%	10%
30.1% - 35%	0%	2%	4%	5%	7%
35.1% - 40%	0%	0%	2%	3%	4%
40.1% - 45%	0%	0%	0%	2%	2%
45.1% or >	0%	0%	0%	0%	0%

## RMWCP Guides and Forms

The guides and forms developed to implement and support the State's Risk Management Workers Compensation Program can be found below.

- [Workers Compensation Designated Medical Provider Program Reviewed](#) (1mb PDF)
- [Designated Medical Provider Brochure](#) (101kb PDF)
- [Training System Users Guide](#) (3mb PDF)
- [Transitional Duty Guide](#) (455kb PDF)
- [Instructions to Online Incident Reporting](#) (977 KB)
- [Risk Management Workers Compensation Premium Discount Application SFN 53425](#) (274kb PDF)
- [Risk Management Workers Compensation Program Training Guide](#)
- [RMWCP DMP Manual](#) (1mb PDF)
- [Designated Medical Provider Form](#) (84kb PDF)
- [State Selected Designated Medical Providers](#) (21kb PDF)
- [Benefits of an Effective Workers Compensation Designated Medical Provider Program \(brochure\)](#) (101kb PDF)

**STATE OF NORTH DAKOTA**  
**TRANSITIONAL DUTY PROGRAM**

**Risk Management Contact and Supervisor Checklist**

(All parts of this checklist must be completed with "date accomplished" or "not applicable" and once completed filed with the Risk Management Workers Compensation Manager (RMWCPM). If you have any questions, contact your agency's workers compensation contact or Risk Management.)

**EMPLOYEE NAME:** \_\_\_\_\_ **SSN:** \_\_\_\_\_

**INJURY DATE:** \_\_\_\_\_

Reporting:

- \_\_\_\_\_ **Incident Report** completed by Employee as soon as possible after incident/ accident, but not more than 24 hours.
- \_\_\_\_\_ **Supervisor's Accident Investigation** completed (immediately if possible, not later than 24 hours).
- \_\_\_\_\_ Obtain written witness statements if applicable.
- \_\_\_\_\_ Sections 1 and 4 of **First Report of Injury Form (SFN 2828)** completed by supervisor (if employee seeks medical treatment) and sent to WSI and/or designated agency representative within 24 hours.
- \_\_\_\_\_ Forward a copy of the C-3 or similar form and Supervisor's Accident Investigation Report to the Agency Risk Management Workers Compensation Contact and the Risk Management Office.

Transitional Duty

- \_\_\_\_\_ Inform the employee that you will design transitional duties based on the medical provider's limits, if possible, or locate an appropriate assignment from another agency. Remind the employee that the C-3 or similar form must be returned within 24 hours if possible, but not later than 2 days of every medical provider visit.

If the employee is medically restricted from returning to full duty:

- \_\_\_\_\_ Identify transitional duty utilizing the Physical Assessment Form (C-3 or similar form).
- \_\_\_\_\_ Call the RMWCM, if necessary, to discuss transitional duty options.
- \_\_\_\_\_ Outline tasks in a temporary duty assignment description.
- \_\_\_\_\_ Fax a copy of the proposed Temporary Transitional Duty assignment to the RMWCM.
- \_\_\_\_\_ When approved by the medical provider, contact and inform the employee when he/she will be expected to report to work.
- \_\_\_\_\_ Provide the employee with a copy of the temporary assignment description and obtain the employee's signature.
- \_\_\_\_\_ Maintain the original in an appropriate file.
- \_\_\_\_\_ Send a copy to the RMWCPM.
- \_\_\_\_\_ Call the RMWCPS if you or the employee have **ANY** questions about medical restrictions or assignments ***before the*** employee starts work.

**If the medical provider documents that the employee is to remain completely off work:**  
**(Note: Medical providers must provide work restrictions. They should not provide a work use that simply states that the employee is to stay off work.)**

\_\_\_\_\_ Determine if the employee is in a hospital, confined to bed rest or immediately recovering from a surgery.

**If the employee does not report as assigned:**

- \_\_\_\_\_ Notify Risk Management and appropriate agency representatives.
- \_\_\_\_\_ Try to call/contact employee that day to determine why they did not report for work.
- \_\_\_\_\_ Send a certified letter to the employee instructing them to return to work; and that failure to do so will result in an absent without leave status, subject to progressive disciplinary procedures.

**Temporary Transitional-Duty Assignment**

**Day One** (first day employee reports as assigned)

- \_\_\_\_\_ Review assigned tasks, physical restrictions based on physical assessment, work assignment and supervisor with the employee **prior** to beginning work.
- \_\_\_\_\_ Remind the employee not to work beyond the established work restrictions. If you or employee has any questions regarding restrictions or tasks, call the medical provider.

**Day 30 and Day 60** (consecutive calendar days from Day One):

- \_\_\_\_\_ Update and upgrade task assignments as doctor relaxes employee's limitations.
- \_\_\_\_\_ Review each new assignment with employee prior to beginning work.
- \_\_\_\_\_ Send update of temporary transitional-duty assignment description to medical provider for approval if significant changes have been made.
- \_\_\_\_\_ Ask the claims adjuster to contact the medical provider, if no progress is noted.
- \_\_\_\_\_ Provide RMWCPM copies of any correspondence to the claims adjuster and the appropriate agency.

**Day 75:**

- \_\_\_\_\_ Give the employee two-week notice if the employee is not completing at least 51% of regular job duties. Send a copy of the notice to Risk Management and appropriate agency representatives.

**Day 90:**

- \_\_\_\_\_ Arrange call-in program with employee, specifying frequency of call-in, when to call in and to whom to report. Have employee complete Workers' Compensation Leave Options Form, if not already completed.
- \_\_\_\_\_ If the employee is performing 51% of the job duties and is still making medical improvements, extend the transitional duty assignment in increments of 30 days as indicated. Always identify the next date of evaluation-do not leave it open-ended.

**Notify Risk Management in writing when the transitional duty assignment has ended.**

***SPECIAL NOTE: Make a special effort to provide any assistance needed to the employee in obtaining information or assistance in the management of their claim. A caring and helpful attitude by the supervisor is very important in promoting recovery from an injury.***

I have completed the actions as required on this checklist on the dates I have indicated.

\_\_\_\_\_  
Signature Title

\_\_\_\_\_  
Date

Dear Medical Provider,

The State of North Dakota has implemented a proactive Transitional Duty Program for our employees who are injured on the job. All State agencies are involved with this program and when possible will temporarily modify an employee's regular job requirements or provide alternative work while an employee is recovering from an injury. An inter-agency pool of temporary transitional duty jobs has been established that will accommodate most temporary physical restrictions if an agency cannot provide alternative work.

The length of this transitional duty is 90 calendar days unless the employee is performing most of their regular job functions. The employee will receive their regular wage during the performance of transitional duty which will be pro-rated if less full time work is performed. Part time positions are available if necessary and accommodations for medical appointments will be made.

A job description of the employee's regular position will be provided for your review. Please note which duties need to be eliminated or transitional and the specific medical reason for this. If you believe that this employee will have permanent restrictions or will not be able to return to their regular job within 90 days, please provide documentation to support this.

We share the common goal of seeing this employee fully recovered and returned to regular work as soon as possible. We plan to focus on abilities, not disabilities, in providing temporary transitional duty and respectfully request your support and communication in this regard.

**PLEASE COMPLETE THE C-3 FORM at the time of the each appointment. Our employees are required to deliver this form to their supervisor after every appointment so that suitable job tasks can be identified or modified as needed. An alternate form is acceptable if it provides similar information.**

If you have any questions, please feel free to contact us as noted below.  
Thank you.

Contact Person: \_\_\_\_\_  
Telephone: \_\_\_\_\_

STATE OF NORTH DAKOTA

WORKERS' COMPENSATION LEAVE CHOICE OPTION

PURPOSE OF THIS FORM:

Employees who are eligible to receive temporary total disability benefits for a lost time claim can continue to receive full salary by choosing one of four options of leave to supplement their benefits. The disability checks stubs must be turned over to the agency payroll clerk to receive this benefit. The amount paid by WSI will be deducted from your paycheck. State law prohibits employees from receiving both workers' compensation benefits and full leave benefits simultaneously.

You may choose to be placed on leave without pay in lieu of using accrued leave. If you used paid leave and your leave is exhausted, you may, with the approval of the appointing authority, be placed on a leave of absence without pay.

When you choose options # 2 - #5 to supplement your disability benefits, the amount of paid leave charged equals the difference between the benefits check and your regular salary. Your pay center will issue a check for the full amount of your salary less the benefits check.

These options can be changed or modified as necessary by working directly with the appropriate payroll clerk.

Choice (Check One)

- Option #1** - Do not apply any accumulated leave time during the period in which workers' compensation is being received.
- Option #2** - Apply accrued sick leave to make up the difference between my workers' compensation benefits and my normal salary during the period in which workers' compensation is being received.
- Option #3** - Apply accumulated compensatory time to make up the difference between my workers' compensation benefits and my normal salary.
- Option #4** - Apply accrued annual leave to make up the difference between my workers' compensation benefits and my normal salary.
- Option #5**- Apply a combination of Option #2, #3 or #4 to make up the difference between my workers' compensation benefits and my normal pay, during the period in which workers' compensation is being received. Record in the space below the type and amount of leave and the order in which you would like it used. **Also, note any special instructions regarding leave usage. (Example: use all sick leave except for 8 hrs and then apply annual leave.)**

**I understand that the amount of leave benefits combined with workers' compensation benefits cannot exceed my normal salary.**

\_\_\_\_\_  
Employee's Signature Date

\_\_\_\_\_  
Supervisor's Signature Date

## DESIGNATED MEDICAL PROVIDER

We are participating in the Workplace Safety & Insurance (WSI) Risk Management Program. This allows the Risk Management Workers Compensation Program (RMWCP) to designate health care providers to treat your workplace injuries and illnesses. These providers can be individuals, clinics, hospitals, or any combination thereof. They can be medical doctors, chiropractors, osteopaths, dentists, optometrists, podiatrists, psychologists, or any combination of these providers. **WSI may not pay for medical treatment** to another provider unless you are referred to this provider by the Designated Medical Provider, or unless you notified us in writing prior to the injury that you wanted to be treated by a different medical provider. You must also name your different medical provider. **Emergency care is exempt from this designated provider requirement.**

The Designated medical Provider for \_\_\_\_\_  
is \_\_\_\_\_

.....  
Cut or tear on dotted line

Return bottom portion

Name of employee (please print) \_\_\_\_\_

I have been informed of the Department's Designated Medical Provider and the provisions of the WSI and RMWCP requirements concerning treatment for workplace injury and illness.

Signature of Employee \_\_\_\_\_

Date \_\_\_\_\_

I wish to select the following provider as a designated provider to seek treatment from in the event of a workplace injury or illness.

\_\_\_\_\_  
Name

\_\_\_\_\_  
Address

## FMLA Notice to Injured Employee

Dear

This letter is to inform you that (name of State entity) has elected to implement your Family and Medical Leave concurrent with your Workers Compensation Leave resulting from your injury on (\_\_\_\_\_). Your Family Medical Leave will start on \_\_\_\_\_ and the time used will be deducted from the twelve weeks available to you in the twelve month period of (calendar year, fiscal year or year triggered by date of injury) as specified in (entity's name) leave policy.

Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work, and you must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from leave. If you do not return to work following FMLA leave for a reason other than: (1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.

You may elect to substitute accrued paid leave for unpaid FMLA leave.

You will be required to present a fitness-for-duty certificate prior to being restored to employment. If such certification is required but not received, your return to work may be delayed until certification is provided.

While on leave, you will be required to furnish us with periodic reports after each medical appointment of your status and intent to return to work.

If you have any questions regarding your Family Medical Leave or Workers Compensation leave status please contact (human resources, supervisor) at (phone).

Sincerely

STATE OF NORTH DAKOTA

TEMPORARY TRANSITIONAL-DUTY ASSIGNMENT

Employee's Name \_\_\_\_\_

Claim No. \_\_\_\_\_

Date of Injury \_\_\_\_\_

Date Returned to Work \_\_\_\_\_

Program End Date \_\_\_\_\_

This assignment is available *IMMEDIATELY* for a maximum of 90 calendar days.

**Job and Pay Data**

\_\_\_\_\_ Unchanged from regular work      \_\_\_\_\_ Changed from regular work

\_\_\_\_\_ Full-time      \_\_\_\_\_ Part Time      \_\_\_\_\_ Shift/Days Off

**Agency/Location:**

\_\_\_\_\_

**Supervisor/(phone):**

\_\_\_\_\_

**Duties Assigned/Physical requirements:**

DUTIES: % TIME/SHIFT

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

These job duties do not have the following physical requirements:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Supervisor Statement:**

I have designed this assignment based on the treating physician's medical restrictions. If I or the employee has any questions regarding the medical appropriateness of this assignment, I will contact the doctor immediately.

\_\_\_\_\_

Supervisor Signature/Date

**Employee:**

I have read and understand this temporary assignment. I agree to work within the restrictions listed. If I have any questions or feel I am being asked to work beyond my capabilities, I will notify my supervisor immediately.

\_\_\_\_\_  
Employee Signature/Date

**Physician's Statement:**

1. I agree this employment appears to be within the employee's capabilities.

\_\_\_\_\_  
Physician's Signature/Date

2. I agree this employment, as amended by me (initial changes), appears to be within the worker's capabilities.

\_\_\_\_\_  
Physicians Signature/Date

3. I disagree. This employment is not within the worker's capabilities because of the following objective medical reasons:

\_\_\_\_\_  
Physicians Signature/Date

**Return the completed signed form to:** \_\_\_\_\_

**Fax #** \_\_\_\_\_

**Questions: Call** \_\_\_\_\_

**at telephone number:** \_\_\_\_\_ **or facsimile number:** \_\_\_\_\_