

What To Expect If You Get Sued

A Litigation Handbook for North Dakota State Employees

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Introduction

The North Dakota Legislature established a risk management program for all State agencies in its 1995 legislative 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 agencies 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 Risk Management Division favors a team approach to risk and claim management, particularly when a lawsuit occurs. This handbook has been designed to provide you with information that will assist you in the event a lawsuit is filed against you. The Risk Management Division believes that early reporting and investigation of a claim or lawsuit allows the Risk Management staff, defense counsel, and each individual employee to achieve the best possible result.

This handbook will discuss defense protections provided to State employees under the State Tort Claims Act (Act) as well as explain 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 under federal law or the law of states other than North Dakota. However, the employee defense provided by the Act pertains to a suit brought in any court.

Please take a few moments to read this handbook carefully. If you have any questions about the information in this handbook, you may contact the State Risk Manager at (701) 328-7584.

Legal Terminology

In order to understand the legal process, you must first be familiar with some basic legal concepts and terminology.

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.

Damages The money requested in a lawsuit to compensate for injury is referred to as damages and is generally divided into two classifications: compensatory and punitive.

Compensatory damages are intended to compensate for the actual injury and return the individual to the original economic position prior to the alleged injury. There are two types of compensatory damages.

Economic damages - Actual damages suffered, the out-of-pocket losses sustained by the injured person. They are tangible items of damages, such as past and future lost earnings, as well as past and future medical expenses and cost of care.

Non-economic damages - This category includes intangible damages such as pain and suffering, mental anguish, emotional distress and losses of the enjoyment of life. The monetary value of such losses cannot be ascertained with any degree of certainty.

Punitive damages, often referred to as exemplary damages, are not directly related to the plaintiff's injury, but may be assessed against the defendant in cases of intentional wrongdoing or gross negligence. They are intended as punishment to the defendant or as a deterrent to others. In some jurisdictions, punitive damages may not be insured on the basis that public policy dictates that the wrongdoer is to be punished.

Defendant A person against whom a legal action or suit is brought.

Injury	Personal injury, death, or property damage. Personal injury includes bodily injury, mental injury, sickness or disease sustained by a person and injury to a person's rights or reputation. Property damage includes injury to or destruction of tangible or intangible property.
Liability	A legal obligation, responsibility, or duty to do or refrain from doing something. For example, if you are "liable" for a judgment, you are legally obligated to pay that judgment.
Negligence	Failure to exercise the degree of care considered reasonable under the circumstances, resulting in an unintended injury to another party.
Plaintiff	The person who starts a personal action or lawsuit to obtain a remedy for an injury to his or her rights.
Scope of Employment	Acting on behalf of the State in the performance of duties or tasks lawfully assigned to an employee by competent authority. Actions of a State employee that constitute reckless or intentional misconduct are not within the scope of the employee's employment for purposes of the State Tort Claims Act.
State Employee	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.
Statute of Limitations	The time limit allowed by law to bring legal action.

Evolution of a Lawsuit

► Complaint and Answer

A majority of lawsuits begin when the defendant is served with a summons and a copy of the complaint. The complaint specifies the allegations against the defendant and the summons informs the defendant of the time requirements to file an answer to the complaint.

The defendant may be served several ways. For example, a deputy sheriff may give the defendant the papers personally or leave the papers at the defendant's home with another adult who lives there; or, the defendant could receive the documents through certified mail. It is important to remember exactly when and how you received the papers.

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. If the defendant's answer is not filed within the specified time period, a default judgment can be entered against the defendant.

Because of the time limitation, it is crucial that, upon notification of a lawsuit, you immediately inform your supervisor and the Office of the Attorney General. For further information concerning defense protections provided to North Dakota State employees see the "*Defense of a State Employee*" section of this pamphlet.

► Selection of Counsel

The Risk Management Fund has established a roster of attorneys from across the state who have agreed to serve as counsel for the Fund to represent State employees who are served for actions covered by the Fund. You will be notified of the defense attorney hired to defend you, and that attorney will provide you with copies of pertinent correspondence and documents relating to the case.

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. Should an employee decide to hire private counsel, it is imperative that the attorney be notified immediately so that an Answer to the Complaint can be filed within the 20 day period. Again, please refer to the "*Defense of a State Employee*" section for

a detailed discussion of protections waived by a State employee hiring private counsel.

► **Discovery**

The period that follows the filing of a lawsuit is known as discovery. This is the time during which both plaintiff and defense attorneys attempt to gain as much information as possible about facts pertaining to the case.

Thorough discovery will assist the participating attorneys in assessing the merits and weaknesses of their client's case, as well as the other party's case. During discovery the parties and witnesses will be asked to testify and to produce documents and other relevant evidence. All discovered material is not necessarily admissible as evidence into court. It is critical that you work with your attorney prior to submitting requested material.

Some of the most common discovery procedures are:

Interrogatories - Written questions that are prepared by one party's attorney and given to the other party's attorney. Your attorney will require your assistance to provide answers to the questions. Interrogatories should always be answered with the assistance of your attorney. The information you supply is given under oath and signed by you, and must be reliable.

Request for Production of Documents - The opposing attorney's written request to your attorney that asks for copies of documents that may contain important evidence. Again, your attorney will need your help to identify documents that are requested. However, not all of those documents will necessarily be produced to the opposing attorney. Certain documents are privileged and not discoverable. You and your attorney will discuss these issues and respond to the document request.

Deposition - A question and answer session in the presence of a court reporter, where attorneys from both sides are present and an individual gives testimony under oath. The plaintiff, defendant and all witnesses who may have important information about the case may give a deposition at some point during discovery. Inform your attorney *immediately* if you receive a subpoena or any other document requesting a deposition.

Depositions are a critical element of the discovery phase. Most

information obtained by either plaintiff or defense attorney during a deposition can be used during the trial. Your manner, responses, and attitude at the deposition are all factors that may determine the success or failure of a trial or the ability to reach settlement. Your attorney will meet with you before your deposition to discuss what will happen and prepare you for the deposition.

► **Settlement**

Many litigation cases are settled without ever going to trial. Settlements may be advantageous to both parties because they can eliminate the uncertainty of damage awards and also avoid verdicts in excess of coverage.

Various factors influence a decision to settle a case:

- Strength or weakness of the case such as liability, credibility of evidence, witnesses and supporting testimony of experts.
- Prior decisions on similar cases in the same jurisdiction.
- Reputation of the judge and attorneys involved.
- Sympathy for the plaintiff.
- Hostility toward the defendant.
- Public policy issues.

A settlement is not an admission of guilt. Rather, it is an agreement between the parties to resolve their dispute in exchange for a cash payment. As a condition to the settlement, the plaintiff is usually asked to sign a release absolving the defendant from any and all liability (past, present and future) arising out of the case and reciting that the settlement is not an admission of liability. You will be consulted in any settlement negotiations.

► **Trial**

If a lawsuit is not settled, it will be tried before a judge (a “court trial,” or “bench trial”) or before a jury (“jury trial”). Jury trials typically have six to twelve jurors depending on the jurisdiction where the case is tried.

It is key to the defense of the case that you are in attendance throughout

the course of the trial. Most trials will proceed in the following order:

Opening statements by the plaintiff and defense attorneys - These statements are a brief overview of the facts of the case that each side intends to provide during the course of the trial.

Presentation of evidence - Each attorney will be given an opportunity to present evidence in support of his or her client's case. Such evidence may include testimony of witnesses and experts as well as documentary evidence, such as medical records, policies and procedures.

Closing arguments by the attorney - A recap of the information presented at trial with a subjective interpretation of the evidence presented in support of each case. Damages are discussed with dollar amounts requested.

Instruction to the jury by the judge - The judge gives the jury information on the applicable law in order to reach a just verdict. The jury decides based on the facts of the case. The judge informs the jury of the laws that apply to the case.

Jury deliberation - The jury reviews and evaluates all facts of the trial in order to reach a verdict.

Verdict - The decision reached by the jury or judge.

Post-trial motions - Requests to set aside the verdict, reduce the damages awarded, or to file an appeal.

Appeal – The losing side asks a higher court to overturn the verdict based on errors made by the trial court.

Employee Liability

When the North Dakota Legislature enacted the State Tort Claims Act they provided State employees with protections from liability in the event an employee would become a named party to a lawsuit resulting from the employee acting within the scope of employment. For example:

N.D.C.C. § 32-12.2-03(1) provides that an action for an injury proximately caused by the alleged negligence, wrongful act, or omission of a State employee occurring within the scope of the employee's action must be brought against the State, rather than the State employee.

In the event an employee is named as a defendant in a lawsuit and it is claimed the employee was acting within the scope of employment, the Fund will request the employee be dismissed from the action. It should be noted, however, that if the motion to dismiss the named employee is successful, the employee would still be obligated to cooperate in the defense of the action.

N.D.C.C. § 32-12.2-03(2) provides that a State employee is not *personally* liable for money damages for an injury when the injury is proximately caused by the negligence, wrongful act, or omission of the employee acting within the scope of employment.

The State Tort Claims Act's exclusions to liability may not apply to an action brought under federal law or the law of another state. Accordingly, in one of those instances, a State employee could be found liable for an action within the scope of employment, which could result in a judgment being entered against that State employee. If that were to occur, this provision requires the State, through the Risk Management Fund, to pay that judgment amount.

N.D.C.C. § 32-12.2-03(3) provides a State employee is only liable in the employee's personal capacity for acts or omissions of the employee occurring outside the scope of the employee's employment. The statute requires that the plaintiff bear the burden of proof to show by clear and convincing evidence that the employee was acting outside the scope of the employee's employment.

By providing that employees are only liable for actions outside the scope of employment, the State has obligated itself to pay for damages when

employees are performing their job functions as directed. This provision requires the party bringing an action against a State employee in his or her “personal capacity” to prove an employee was not performing his or her job function, or was doing so in a reckless or intentionally wrongful manner, when the event resulting in the claim or lawsuit occurred. Therefore, if an employee is performing that employee’s job, as directed, the employee should not be ordered to pay a judgment. By not performing assigned tasks as directed, employees may create liability through their own actions.

N.D.C.C. § 32-12.2-03(4) provides that the State will indemnify and save harmless a State employee - who requests representation and cooperates in the defense of the claim - for any claim, whether groundless or not, and for any final judgment for any act or omission occurring within the scope of employment of the employee other than for punitive damages.

The term “indemnify” means that if a judgment should be entered against a State employee for acts within the scope of employment, the State will pay the judgment. The term “save harmless” means that the State will pay defense costs to defend the claim or lawsuit. (See “*Defense of a State Employee*” section of this pamphlet for further information pertaining to employee obligations pertaining to these protections.)

If a judgment for punitive damages is awarded, payment of those damages would be the sole responsibility of the State employee.

N.D.C.C. 32-12.2-03(5) provides that a judgment in a claim against the State is a complete bar to any claim by the claimant, resulting from the same injury, against the employee whose act or omission gave rise to the claim.

This provision means that once a claim or lawsuit is settled, either before a legal action is commenced or as the result of a judgment by the court or a jury, the claimant cannot attempt to recover damages against the State employee in a separate claim or lawsuit resulting from the same occurrence.

Defense of a State Employee

N.D.C.C. 32-12.2-03 (4) and (6) provides that the State will defend a State employee in connection with any civil claim or demand arising out of an alleged act or omission occurring within the scope of the employee's employment if the employee provides complete disclosure and cooperation and requests such defense in writing.

If a State employee is named as a party to a lawsuit and the employee seeks to be indemnified and defended by the State, the employee must request such defense in writing within ten days after being served with a summons, complaint, or other legal pleading.

Even though this statute allows State employees ten 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 that they have been made a party to a lawsuit. There is a short period of time - 20 days – in which the Risk Management Fund and the Attorney General's office must 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.

Tell your agency head and the Attorney General's office 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* form as soon as possible, and in any event, within the ten day period following the service. (A sample *Request for Legal Defense* form is included as an appendix to this handbook, and an original *Request for Legal Defense* form is included in the informational packet you have received with this handbook.) If you have any questions regarding this procedure, contact the State Risk Manager for direction at (701) 328-6514.

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 Fund will be able to correctly identify which claims should be settled and

how best to defend a case, if appropriate. This requirement does not mean that should an employee inadvertently make a minor mistake in providing “complete disclosure and cooperation” defense for that employee would be barred. However, refusal to provide information or participate in the process, or making a significant misrepresentation of the facts, would result in the State barring representation and indemnification.

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.

N.D.C.C. 32-12.2-03 (7) provides that if a State employee chooses to hire the employee’s own separate defense counsel to represent him or her in connection with any civil claim or demand arising out of an alleged act or omission occurring within the scope of the employee’s employment, the employee waives the indemnification and save harmless provision of the Tort Claims Act.

This provision allows an employee to select an attorney of his or her choice should the employee not choose to be represented by the attorney hired by the Risk Management Fund. However, it encourages employees to agree to representation by an attorney on the Risk Management Fund roster. Using those attorneys helps ensure high quality legal representation and reasonable legal costs, as well as consistent legal positions. This benefits State employees and the Risk Management Fund.

If an employee chooses to retain an attorney other than the defense counsel hired by the Risk Management Fund, the employee will be required to pay any and all defense costs associated with the claim or lawsuit, as well as any resulting settlement or judgment. The Risk Management Fund will not reimburse the employee for the costs.

Further discussion of State employee defense issues can be found at Section 8 of the Risk Management Manual. A copy of the Manual can be found at all agency administrative offices or at the Risk Management Division website – www.state.nd.us/risk.

APPENDIX

Appendix A

REQUEST FOR LEGAL DEFENSE AND INDEMNIFICATION PURSUANT TO N.D.C.C. Ch. 32-12.2

On _____, 200__, I was served with a copy of legal pleadings in the matter of:

_____, in which a claim is asserted against me as a State employee. A copy of the pleading served on me is attached.

The allegations against me in this suit pertain wholly to activities within the scope of my employment.

Pursuant to N.D.C.C. 32-12.2-03(6), I hereby request: 1) legal representation in this matter by an attorney hired by the Risk Management Fund, and 2) indemnification by the State of North Dakota.

I promise to provide to the attorney assigned to represent me and/or the State of North Dakota, complete disclosure of all facts known to me or learned by me and I further promise to cooperate fully with the attorney(s) hired by the State in the defense of this lawsuit.

I have read, understand and agree to the foregoing condition of representation by the Risk Management Fund and the State of North Dakota.

Dated this _____ day of _____, 200__.

Signature

Telephone Numbers:

Work: _____

Home: _____

Fax: _____

Within 10 days of being served, send to:

Office of the Attorney General
State Capitol Building
600 East Boulevard Avenue
Bismarck ND 58505-0040
Phone: 701-328-2210; Fax: 701-328-2226

and to:

Division of Risk Management
Century Center
1600 East Century Ave, Suite 4
Bismarck ND 58503-0649
Phone: 701-328-7584; Fax: 701-328-7585

The Head of Your Employing Agency

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