



BULLETIN

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*Risk Management
 Division
 Mission Statement*

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.

WHAT: The 2001 Risk Management Seminar -

Since the loss of sovereign immunity, the Risk Management Division has been stressing the importance of adequate insurance and indemnification provisions in state contracts. State agencies have made great strides to contractually manage their risk. However, due to changes in insurance policies, changes in laws, and changes in court decisions *the playing field has been altered*.



The 2001 Risk Management Seminar is designed to build on the effective contract procedures you have instigated and expand on that foundation to ensure your agency's contract provisions are accomplishing what you intend.

Watch for a brochure about the seminar which you will receive by April 1, 2000.

The Management and Transfer of Risks in Contracts and Insurance Policies.

WHEN: May 2nd and 3rd, 2001

WHERE: The North Dakota National Guard
 Raymond J. Bohn Memorial Armory,
 4200 East Divide Avenue in Bismarck.

WHY: The focus of this year's seminar will be addressing the major risks resulting from improperly drafted contracts. Too often, the issues of risk transfer, indemnification, and insurance are not adequately addressed even when the contract contains hold harmless and insurance provisions.

The Seminar will also provide an opportunity to review 2001 legislative actions that impact the State's liability exposures and the risk management process.

HOW: Keynote speaker Gale Nordling - an engineer, attorney, and risk manager - will share his expertise in drafting effective contractual language to ensure the State's contractual risks are properly transferred, retained, shared, reduced or avoided.

WHO: Recommended attendees: Division Directors, Business Managers, Assistant and Special Assistant Attorneys General, Risk Management Contacts, and other interested State employees.

To pre-register for the seminar e-mail the name(s) of employee(s) interested in attending the Seminar and the name of the agency or facility they work for to: rschumac@state.nd.us; telephone the information to (701) 328-6514; or fax the information to (701) 328-6515.

How and When Can A State Employee be Sued?



Loss
Control
Tools

Employee Training

Federal and State laws *require* state agencies to take affirmative steps to establish a safe workplace.

Establishing and implementing proper policies and procedures to address *Sexual Harassment, Workplace Violence, Hostile Work Environment and Substance Abuse* may provide the agency an affirmative defense in the event of a claim or lawsuit.

Accordingly:

- 1) Develop adequate policies and procedures;
- 2) Provide training to supervisors and managers on how to implement the procedures;
- 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:
 - a. providing each newly hired employee with copies of the policies and procedures for their review;
 - b. requiring each newly hired

There are different scenarios in which a State employee can be sued - in their “*individual or official capacity*” (acting within the scope of employment), or *personally* (acting outside the scope of their employment).

Prior to the State’s loss of sovereign immunity in September of 1994, a State employee alleged to be acting in the employee’s official capacity and the State could not be sued for money damages. However, even with sovereign immunity, a State employee could have been sued in their individual capacity or, if the injured party could have proven the employee was not acting within the scope of employment, they could have been sued personally.

The Act contains provisions indemnifying State employees against liability and providing for employee defense. It also established the Risk Management Fund, the program that pays the State’s and State employees’ indemnification and defense costs.

So, how does the process work? The basis for a lawsuit against a State

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employee would be an allegation that, due to the employee’s *negligence*, someone was injured or damaged. A claim of negligence means the plaintiff is claiming the employee did something a reasonable person would not have done, or failed to do something a reasonable person would have done.

As a result of the loss of sovereign immunity, the State, State agencies, boards, commissions, and State officials and employees acting within the scope of their employment can now be sued.

While it appears that State employees being subjected to suit for their “official acts” is a negative, the loss of sovereign immunity did not impose any new or additional liability on individual State employees. As before, there is still the possibility of a State employee being sued in their individual capacity. However, the 1995 Legislature, by enacting the State Tort Claims Act (N.D. C.C. § 32-12.2), addressed the new potential for suit against State employees when acting in their official capacities and added some protections when they are sued in their individual capacity and the presumption a person is not acting “personally.”

A party in a lawsuit. Lawsuits against State employees may be venued in State court, Federal court, or a court of another state or jurisdiction. The State Tort Claims Act directs how an action venued in North Dakota state courts is to be conducted. Often times if a State employee is named as a defendant in a lawsuit they will be sued in both their individual and official capacity. The State Tort Claims Act directs (in State court actions) if there is an attempt to sue a State employee personally, the plaintiff must show *by clear and convincing evidence* that the employee was acting outside the scope of employment. If they are unable to meet that requirement, the action is to proceed against the State only and the employee’s name would be removed from the caption of the lawsuit.

employee to sign a statement that they have read and understand the policies and procedures;

- c. 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, and that they understand them;
 - d. identifying at least two separate individuals who complaints may be filed with;
 - e. assuring discretion in the investigation of an allegation; and
 - f. ensuring no retaliation to the reporting employee.
- 4) Ensure employee training is documented for all employees and volunteers and the documentation retained for a period of six years.
- 5) Ensure any claims reported are thoroughly investigated, resolved and documented.

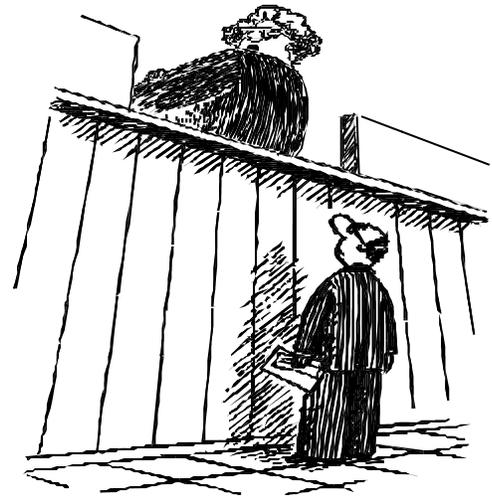
Indemnification. If the lawsuit is venued in other than state of North Dakota courts, it is very probable that the employee’s name would not be removed from the lawsuit and, it is possible that judgment could be entered against the State employee even though it was determined the employee was acting within the scope of employment. This circumstance is where one of the protections provided by the State Tort Claims Act comes into play. Under the Act, the State indemnifies state employees acting within the scope of employment. That means the State, through the Risk Management Fund, would pay any judgment entered under this scenario.

Defense. As you can imagine, the cost of defending a lawsuit can result in major expenditures. The State, under the State Tort Claims Act and through the Risk Management Fund, defends any 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 the employee’s employment *if the employee provides complete disclosure and cooperation* in the defense of the claim or demand and if the employee requests such defense in writing within ten days after being served with a summons, complaint, or other legal pleading asserting a cause of action against the state employee arising out of a civil claim or demand.

State Employee Request for Defense and Indemnification. In order to make this process as easy as possible for state employees, the Risk Management Division developed a one page form entitled, “*Request for Legal Defense and Indemnification Pursuant to N.D.C.C. ch. 32-12.2.*” The form is found in the Risk Management Manual following page 8.4-1 and on the Risk Management Division web site under the list of forms. If a State employee is served with a legal pleading, Risk Management recommends they *immediately* notify their agency head and the Attorney General’s office. If the

employee wishes to be defended and indemnified by the State, they should complete the *Request for Legal Defense* and forward that, along with a copy of all the materials served upon them, to their agency head and the Solicitor General.

It is imperative that the employee takes prompt action because under the rules of the courts in North Dakota, a defendant only has 20 days after they receive service to file a written response with the court. That is a relatively short period of time for the Risk Management Fund and Attorney General’s office to investigate the matter, discuss it with the State employee and their 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.



If a State employee has any questions concerning the information in this article, please contact Risk Management or your agency attorney.

This article is intended to be the first in a series of articles discussing litigation issues that State employees should be aware of in order to ensure they are provided all protections available to them. For more information on State employee defense see Section 8 of the Risk Management Manual.

Risk Management Division

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CHECK IT OUT!!
Please check your address label.
Report any corrections to our office.

BULLETIN

2001 Schedule for ILG Risk Management Program

Basic Insurance Concepts - A discussion of property and liability coverages, claims management, and attending legal issues:

Bismarck June 13, Minot June 21, and Fargo June 28.

Principles of Risk Management - A discussion of the risk management process, risk control principles, and risk financing principles:

Minot July 26, Bismarck August 2, and Fargo August 9.

Developing a Plan - A step-by-step process of developing an effective risk management plan that will work for your entity:

Bismarck September 6, Minot September 12, and
Fargo September 19

To register contact the Institute of Local Government c/o ND Association of Counties, PO Box 417, Bismarck Nd 58502. Phone: (800) 932-8730; Website: www.ndaco.org.

*Risk Management Division
Website Features*

Visit our website at www.state.nd.us/risk/ for standard and updated features including:

- ◆ Personnel e-mail and telephone directory
- ◆ Risk Management Manual
- ◆ Reporting Forms (following page 3.5-1 of the manual)
 - *Incident Reort (SFN 50508)
 - *Notice of Claim (SFN 50552)
 - *Motor Vehicle Accident Report (SFN 51301)
 - *Destruction Hold Notice (SFN 52376)
- ◆ Facility Audit and Inspection Checklists (Page 4.3-1)
- ◆ Emergency and Disaster Procedures (Pages 4.5-1 through 4.6-5)
- ◆ Facility Use Agreement Form (Page 5.2-2)
- ◆ Waiver Forms (Pages 5.2-3 & 4)
- ◆ Risk Management Bulletins