



2019 RISK MANAGEMENT SEMINAR

Tag Anderson, Risk Management Director
October 10, 2019

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Notes:

WELCOME

- Things to Know
 - Breaks
 - Exits
 - Restrooms



Notes:

RISK MANAGEMENT FUND

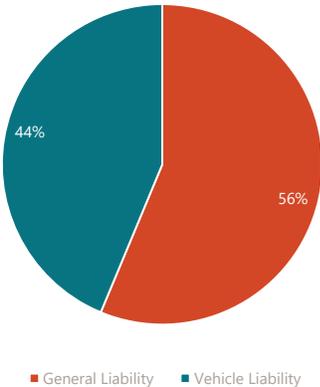
Indemnity incurred:	\$9,806,352
Expenses incurred:	\$5,023,936
Total:	\$14,830,288

(Paid and Reserved)
As of August 26, 2019

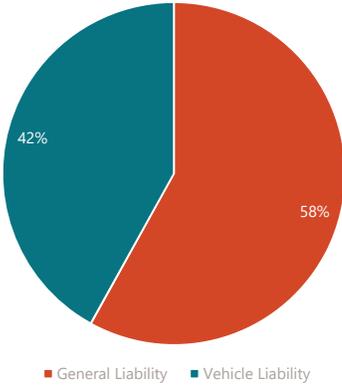
Notes:

RISK MANAGEMENT FUND STATUS

Number of Claims & Lawsuits

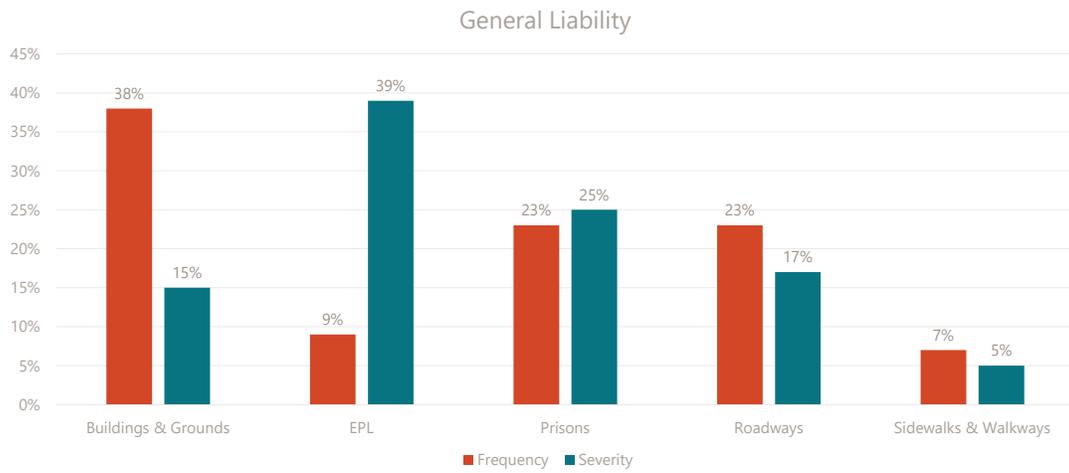


Cost of Claims & Lawsuits



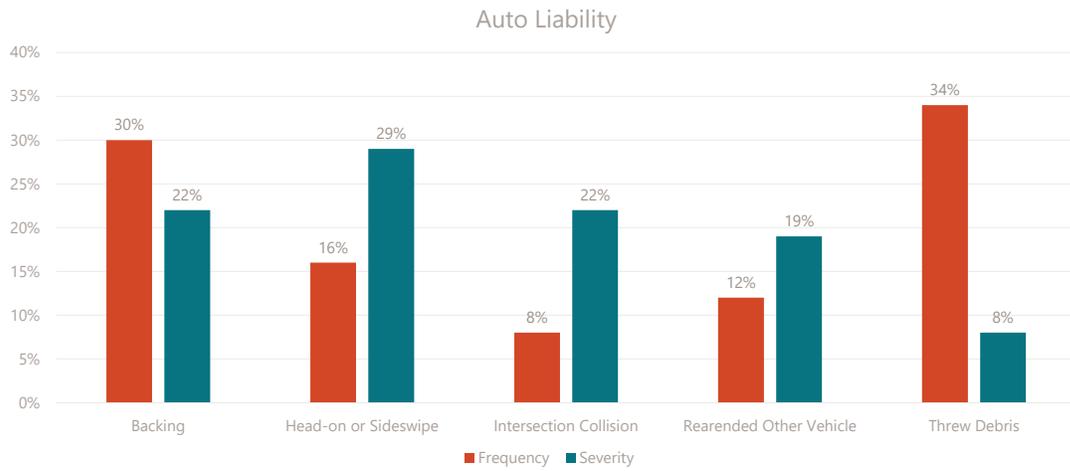
Notes:

RISK MANAGEMENT FUND STATUS



Notes:

RISK MANAGEMENT FUND STATUS



Notes:

RISK MANAGEMENT FUND STATUS

- Excess/reinsurance for the fund
 - Statutory caps
 - Extraterritorial liability
 - Coverage of up to \$10,000,000 - \$5,000,000 sexual misconduct
 - Third-party cyber liability
- Certificate of financial responsibility

Risk Management Division continues to secure Excess/Reinsurance for the Fund.

- Applies over the statutory caps if held invalid or inapplicable.
- Addresses extraterritorial liability.
- Coverage of up to \$10,000,000 - \$5,000,000 sexual misconduct.
- Additional excess layer of third-party cyber liability.

Certificate of Financial Responsibility can reference excess coverage to meet high required insurance limits.

Notes:

RISK MANAGEMENT FUND STATUS

- **Cyber Liability Insurance Policy: NDCC 32-12.2-19**
 - Covers both first-party notification and third-party liability.
 - Covers all state entities except Bank of North Dakota.
 - Prompt data breach reporting.
 - Deductible is paid through the RM Fund.
 - Costs included as part of Risk Management contributions.

Notes:

RISK MANAGEMENT FUND STATUS

- **Actuarial review**
 - Statutory caps on liability are assumed.
 - Fiscal Policy 508 and Risk Management requirements on out of state motor vehicle rentals.
 - Accurately identifying full time equivalent positions and vehicle and equipment counts.
 - Part time and temporary positions (including volunteers) must be combined for an estimated employee count.

Notes:



2019 LEGISLATION

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Notes:

LEGISLATION

- SB 2110 – Cybersecurity Strategy Oversight.
- SB 2010 – Fire and Tornado and State Bonding Fund.
- SB 2166 – Failed.

- SB 2110 – Cybersecurity Strategy Oversight: Impacts procurement, contract negotiation and contract management.
- SB 2010 – Fire and Tornado and State Bonding Fund: Administration through NDIRF.
- SB 2166 – Failed: Would have increased statutory caps for political subdivisions to \$1/\$4 million. NDIRF and Risk Management reviewing to make recommendations.

Notes:



RISK MANAGEMENT

Discount Programs – Statewide Loss Control –
Open Records –RMIS Potential Changes

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Notes:

RISK MANAGEMENT FUND CONTRIBUTIONS DISCOUNT PROGRAM

- Approximately 59% of state agencies participated.
- Average contribution savings is 14%.
- Total potential discount available is 15%.

Notes:

RISK MANAGEMENT FUND CONTRIBUTION DISCOUNT PROGRAM

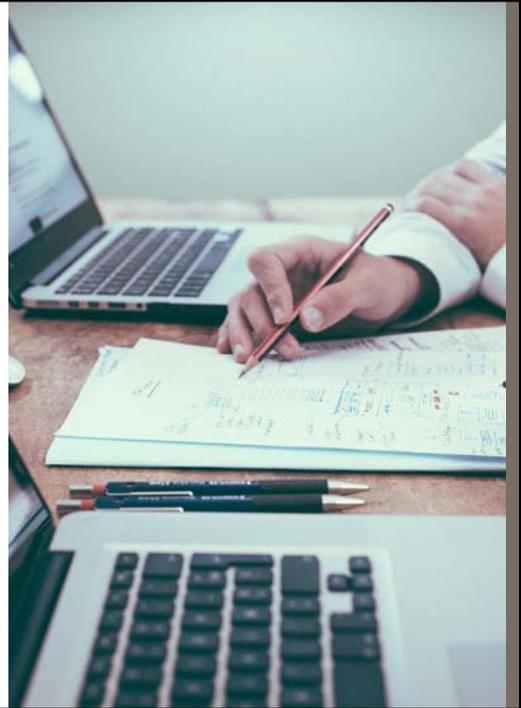
- Primary reason for not receiving full discount:
 - Discrimination policies.
 - Identification of third-party liability (#4).
 - Driving a state fleet vehicle.
 - Additional training/emails needs to occur every fiscal year.
 - This does not include risk/financial assessments.
 - Agency distracted driving policy.

- Primary reason for not receiving full discount:
 - Discrimination policies or training fail to address reasonable accommodations requests (#3).
 - Agencies specific identification of third-party liability (#4).
 - Driving a state fleet vehicle (i.e. backing, winter driving, distracted driving).
 - Additional training/emails needs to occur every fiscal year.
 - This does not include risk/financial assessments.
 - Ensure your agency's distracted driving policy matches DOT State Fleet's Distracted Driving Policy (#6).

Notes:

DISCOUNT PROGRAM POLICY REVIEW

- Policy review and verification module.
- Module can be made available outside of PeopleSoft.
- Agency created modules encouraged.



Policy Review and Verification Module.

- Employees can be assigned RM discount policy review through ELM.
- Risk Management available to assign and track for discount purposes.
- Training module is short – less than 10 minutes to complete.
- Encompasses 11% of the 15% discount available.

Module can be made available outside of PeopleSoft.

Agency Created Modules Encouraged.

Notes:

RISK MANAGEMENT WORKERS COMPENSATION PROGRAM

- Premium reduction program.
 - No additional programs added.
 - FY19 \$2,064,092 in dividends and discounts were returned to state agencies.
 - \$736,045 rewarded for participation.
 - 34 agencies will receive discounts in their premium.

Notes:

STATEWIDE LOSS CONTROL COMMITTEE

- Purpose: seek assistance, share information, best practices, trends, consistency.
- Supplement not Replace Agency Loss Control Committees.
- Small agency loss control participation.

Notes:

RISK MANAGEMENT DOCUMENTS

- Increase in Open Records requests.
- Risk Management Records are exempt but must be released when disclosure will not prejudice any claim or reasonably predictable claim.
- Confidentiality of agency records/information retained, but exempt records and associated information may be subject to release absent some impact on a predictable claim.

Notes:

RISK MANAGEMENT DOCUMENTS

- Risk Management needs information to fulfill its statutory mission.
- Continue to encourage use of RMIS as one means of documentation and retaining documents.
- Where there are concerns, discuss alternatives with Risk Management.

Notes:



RISK MANAGEMENT

State Contracts – Recurring Issues

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Notes:

INDEMNITY PROVISIONS

- **Authority**
 - Lack of statutory authority.
 - Lack of a specific appropriation or spending authority.
 - Addressed in AG Contracts Manual.
- **Often found in Purchase Orders of Vendor contracts**
 - Use State drafted contract or addendum.
 - Look to see if there is a State term contract.

State entities do not have authority to agree to indemnify vendors, contractors and other third parties for their liability.

- Lack of statutory authority.
- Lack of a specific appropriation or spending authority.
- Addressed in AG Contracts Manual.

Often found in Purchase Orders of Vendor contracts.

- Use State drafted contract or addendum whenever the relationship will be ongoing or gives rise to liability concerns.
- Look to see if there is a State term contract.

Notes:

INDEMNITY OBLIGATION WORKAROUNDS

- State responsibility
- State obligation
- Certificate
- Joint and several liability
- Challenge vendor



- State may agree to be fully responsible for its actions and that of its officers and employee consistent with North Dakota law.
- State may agree to or assume any reasonable affirmative obligation related to the receipt of a product, service or lease of property. Address vendor's concerns of derivative liability by promising to do or refrain from doing that which gives rise to the vendor's concerns.
- Provide certificate of financial responsibility.
- Explain North Dakota does not retain joint and several liability, but rather has adopted modified comparative fault.
- Challenge vendor to articulate a situation whereby they could be held derivatively liable for the negligence of the State or its employees.

Notes:

ADDITIONAL INSURED PROVISIONS

- State liability is addressed through a self-retention fund, not insurance.
- Not possible to be made an additional insured to the Risk Management Fund.
- Expenditures from the RM Fund are governed by statute, not contract.

Notes:

LIMITATION OF LIABILITY PROVISIONS

- Direct loss, including property damage and personal injury cannot be limited.
- Only certain types of contracts/purchases.
- By statute, Legal Counsel (AAG/SAAG) and Risk Management must be consulted.
- Written documentation must be maintained.

Notes:

LIMITATION OF LIABILITY WORKAROUNDS

- Contractual expectations.
- Warranty disclaimers.
- Service credits, limited replacement or repair obligations.
- Include language that focuses on those items for which a vendor maintains a commercial general liability policy.

- Agency may define its contractual expectations in any way it deems appropriate.
- Agency may agree to broad warranty disclaimers and agree to accept full risk that products or service will not be error free or work without interruption or problem.
- Service credits, limited replacement or repair obligations as a means of addressing limited warranties do not operate as an impermissible limitation of liability.
- Include language that focuses the direct loss exclusion on extra-contractual losses involving personal injury and damage to tangible property - those items for which a vendor maintains a commercial general liability policy.

Notes:

VENUE AND CHOICE OF LAW PROVISIONS

- Lack of authority to agree to:
 - litigate in another jurisdiction.
 - be governed by the laws of another jurisdiction.
- Legislature determines the standards for State liability and the conditions under which the State may be sued.
- Legislature has preserved Eleventh Amendment immunity from suit in federal court – NDCC 32-12.2-10.

Notes:

VENUE/CHOICE OF LAW WORKAROUNDS

- Contract may be silent on venue and choice of law.
- Limiting choice of law provision to contract interpretation only and preserving all limitations contained under North Dakota law, including NDCC Chap. 32-12.2, has been used in exceptional circumstances.
- Consult Attorney General's Office!
 - www.attorneygeneral.nd.gov – Contract Drafting and Review Manual.

Notes:



RISK MANAGEMENT TEMPLATE LANGUAGE

- Template is a tool.
- Tailor the requirements.
- Limited vicarious indemnification only where there is actual risk.

- Template is a tool for analysis and a starting point for indemnity and insurance requirements.
- Simply lifting the language is not a substitute for proper analysis and tailoring the requirements to actual risks.
- Limited Vicarious Indemnification is the default only for contracts that actually pose some risk of liability to the State, e.g. leases or service contracts where the contractor will be performing some activity that gives rise to potential harm.

Notes:

RISK MANAGEMENT TEMPLATE LANGUAGE

- Off the shelf product purchases.
- Not applicable to contracts between state entities.
- Contracts with political subdivisions.
- Public non-profits.

- Most off the shelf product purchases do not require indemnity or insurance provisions.
- Not applicable to contracts between state entities.
- Contracts with political subdivisions do not need indemnity or insurance provisions except occasionally where the contract calls for further activity of an independent contractor.
- Public non-profits that are funded entirely or in part by the State or a political subdivisions may also no require indemnity provisions.

Notes:

RISK MANAGEMENT TEMPLATE LANGUAGE

- Address realistic risk of loss to the state.
- Who controls the risk?
- Involve legal.
- Be cognizant of transactional and administrative costs.

- Address realistic risk of loss to the state.
- Reinforce decisions on delegated responsibilities. Who controls the risk?
- Involve legal in the question of whether there is risk of derivative liability to the State for the actions of the independent contractor.
- Be cognizant of transactional and administrative costs.

Notes:

RISK MANAGEMENT TEMPLATE LANGUAGE

- **Auto Liability Insurance – required coverage**
 - Only recommended when contractor/vendor will be driving on the State's behalf.
 - Ordinary commute, transportation of goods through ordinary commercial means or common carrier does not require minimum levels of auto insurance.
 - Driving to a job site to begin work versus driving to multiple job sites across the workday as part of the work being performed.

Notes:

RISK MANAGEMENT TEMPLATE LANGUAGE

- Professional Liability – Extended Reporting Period
 - Question of latent professional negligence
 - Would agency know or recognize professional negligence during contract period?
 - Could professional negligence cause substantial harm or damage?
 - Professional consulting services, with agency exercising its own independent judgement, rarely would need an extended reporting period and may not even need professional liability coverage at all.

Notes:

RISK MANAGEMENT TEMPLATE LANGUAGE

▪ Additional Insured Endorsements

- Primary and noncontributory coverage under contractor's liability policies is resurfacing as an issue with some carriers using non-standard coverage forms.
- Coverage limited to indemnity obligation and minimum levels of insurance required by contract.
 - *State shall be endorsed on the commercial general liability policy on a primary and noncontributory basis, including any excess policies (to the extent applicable), as additional insured. STATE shall have all the benefits, rights and coverages of an additional insured under these policies that shall not be limited to the minimum limits of insurance required by this agreement or by the contractual indemnity obligations of the Contractor.*

Notes:

RISK MANAGEMENT TEMPLATE LANGUAGE

- **Additional Insured Endorsements – Importance**
 - Additional insured coverage statutorily required if contractor is required to indemnify State.
 - Requirement not met if contractor’s coverage is not primary.
 - Purpose not fully met if coverage limited to purely vicarious claims.
 - Vicarious claims brought by contractor’s employees are barred by workers compensation exclusivity – but some derivative direct negligence claims are not. (*Fleck v. ANG Coal Gas. Co.*, 522 N.W.2d 445 (N.D. 1994)).
 - Risk of injury to contractor or further downstream subcontractor employees is often the primary risk.
 - Retained right of control and reinforcement of delegated responsibilities.

Notes:

RISK MANAGEMENT TEMPLATE LANGUAGE

▪ Personal Service Contracts

- Improper classification of independent contractor continues.
- Individuals and Contractor employees must have workers compensation coverage.

- *Workers compensation coverage meeting all statutory requirements. In the event Contractor does not secure workers compensation coverage including optional coverage for activities under this agreement, Contractor agrees to waive, release, and hold harmless the State from any and all claims for injuries arising out or in furtherance of Contractor's activities under this agreement.*

Notes:

RISK MANAGEMENT TEMPLATE LANGUAGE

▪ Leases

- State Entities cannot agree to most commercial lease documents drafted by a private Landlord.
- No lease should be agreed to without input from legal.
- Must affirmatively require Landlord to maintain property coverage for fire and other perils on the structure. (Implied co-insured.)
- Mutual waiver of subrogation on first-party property coverage may be permissible.
- Address common areas if there will be foot traffic from the public.

Notes:

FACILITY USE AGREEMENTS

- Facility use agreements involve the use of grounds/facilities by non-state employees, outside groups, private activities.
- Like leases or service contracts, an evaluation of the risks and the control and responsibility of over those risks is required.

Notes:

STATE OWNED FACILITIES AND GROUNDS-GENERALLY

- Should be open for use by the public if the contemplated use is not inconsistent with the primary purpose of the facility.

Notes:

FACILITY USE REQUIREMENTS

- Requirements must reasonably address risk without discouraging or creating obstacles to public use.
- Identify and assess risks associated with contemplated activity—probability/severity.
- Ask: who will be in charge or responsible to address each specific risk associated with an intended use of the facility.

Notes:

FACILITIES INTENDED FOR PUBLIC USE E.G., PARKS, TRAILS, CAPITOL GROUNDS

- Intended use of some facilities that are designed to be used as a public benefit or service do not require facility use agreements with indemnity language or insurance requirements unless there are additional activities/risks involved beyond the primary intended use of the facility.
- e.g. Alcohol, food, events open to public

Notes:

RECREATIONAL ACTIVITIES.

- Recreational immunity statutes may apply where individuals are allowed to use, without any charge, grounds or facilities for recreational purposes.
- Does not apply to recreational opportunities for which there is a fee. Potential damage to state property should still be considered.

Notes:

FACILITY USE AGREEMENTS PURPOSE OF INDEMNITY/INSURANCE REQUIREMENTS

- Purpose is to address derivative liability and damage to public property, and make those organizations, entities, or persons that are at fault responsible and able to meet their obligations.
- Addresses risks that are not under the direction and control of properly trained and authorized state employees.
- Furthers the policy of allowing State facilities to be used by the public.

Notes:

FACILITY USE AGREEMENTS PARTICIPANT WAIVER OF LIABILITY FORM

- Where risks arise from participation in an activity, a Waiver Form may be used in conjunction with or as an alternative to insurance requirements.
- Not appropriate for direct public benefit or services.

Notes:



INFORMATION TECHNOLOGY
CONTRACT MANAGEMENT
Third-party Products or Services

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Notes:

INFORMATION TECHNOLOGY CONTRACTS

- Establishment of third-party risk management program.
 - Required for all vendor products or services that touch the State's network.
 - Framework for identifying products or services that could impact the network or State liability.
 - Cooperative and collaborative approach.

- Establishment of third-party risk management program.
 - All vendor products or services that could impact the State's network infrastructure or State's ability to prevent disclosure or unauthorized access to State controlled data.
 - Framework for identifying products or services that give rise to these risks and comprehensively and systematically addressing the risks to protect the State's interests.
 - Cooperative and collaborative approach involving ITD and agency IT professionals, purchasing/contracts personnel, Risk Management and legal.

Notes:

INFORMATION TECHNOLOGY CONTRACTS

- Third-party risk management program - steps
 - Identification of vulnerability.
 - Address or remediate the vulnerability.
 - Ongoing tracking and monitoring.

Third-party risk management program – Steps

- Identification of vulnerability
- Address or remediate the vulnerability
 - Technical fix or patch
 - Different vendor – alternative solution
 - Financial – contractual obligations
- Ongoing tracking and monitoring
 - Ensure updates or patches are implemented
 - Ensure updated insurance information
 - Contract renewals

Notes:

RISK MANAGEMENT OPEN FORUM – QUESTIONS?

- Motor Vehicle Liability Coverage.
 - State fleet
 - Leased/courtesy
 - Personal vehicle
 - Rental
- Proper use of state owned or leased vehicle.

- Distracted driving obligations.

Notes:

RISK MANAGEMENT OPEN FORUM – QUESTIONS?

- Incident Reports – When to Report?
 - Realistic risk of third-party liability.
 - Continued risk of damage or harm if not corrected.
 - Employee injuries.
 - Employment practices liability.

Notes:

RISK MANAGEMENT OPEN FORUM – QUESTIONS?

- State employee defense and indemnity.
 - Scope of Employment.
 - Obligation is not limited by statutory caps.
 - No indemnity for punitive damages.
 - Duty to cooperate.

Notes:



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