

Memorandum 2010-7

Defense and Indemnification Under the Government Claims Act

This memorandum continues the Commission's study on the legal and policy implications of treating a charter school as a public entity for the purposes of the Government Claims Act. 2009 Cal. Stat. res. ch. 98 (ACR 49 (Evans)).

Although these provisions are often referred to as the "Tort Claims Act," the California Supreme Court now refers to the statutes as the "Government Claims Act," because the claims presentation requirements also apply to contract claims and other non-tort claims. *City of Stockton v. Superior Ct.*, 42 Cal. 4th 730, 171 P.3d 20, 68 Cal. Rptr. 3d 295 (2007). The Commission will follow the Court's practice.

This memorandum examines the policy and structure of the defense and indemnification provisions of the Government Claims Act. Gov't Code §§ 825-825.6, 995-996.6. For purposes of comparison, this memorandum also provides a brief overview of the defense and indemnification rights and responsibilities of private entities and their employees. As will be seen, the differences between public employee and private employee defense and indemnification rules are minimal in terms of both policy rationale and end result.

All statutory references in this memorandum are to the Government Code unless otherwise indicated.

PRIOR COMMISSION STUDY

The Government Claims Act was intended to be a comprehensive treatment of claims against public entities and employees. As part of this comprehensive treatment, the Commission studied the defense and indemnification laws that applied to public employees at the time. The Commission found the existing laws to be inadequate. *Recommendation Relating to Sovereign Immunity, Number 4 — Defense of Public Employees*, 4 Cal. L. Revision Comm'n Reports 1301, 1306 (1963) (hereinafter, *Number 4 — Defense of Public Employees*).

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission's recommendation identified several key problems with the previous law. Depending on the statute or the public entity involved, the problems could work to the disadvantage of either the employee or the employer.

Some of the key problems sometimes faced by public employees included the following:

- Intentional torts and criminal or administrative actions were not covered, even though the employee's actions were within the scope of employment and circumstances suggested that the employee should be defended.
- The employee had a right to a defense but no effective method to enforce that right.
- A conflict of interest between the entity and a deserving employee prevented the employee from receiving a defense at public expense.

Id. at 1306-07.

Some of the key problems sometimes faced by public entities included the following:

- The entity wanted to provide a defense for the employee but was not authorized to do so.
- The entity was required to provide a defense, even when the employee acted with bad faith or malice.
- The entity was required to indemnify an employee's choice of private attorney, even though the employee had no obligation to request a defense in advance.

Id.

The Commission's final recommendation, much of which was accepted by the Legislature, replaced the overlapping and inconsistent statutes with a general statute providing for the defense and indemnification of public employees at public expense. The Commission's recommendation also included safeguards to protect the public fisc in cases of fraud or actual malice. See *id.* at 1306; Section 825.6; 7 Cal. L. Revision Comm'n Reports, *Recommendation Relating to Sovereign Immunity Number 8 — Revisions of the Governmental Liability Act* 401, 403 (1965).

DISCUSSION OF DEFENSE AND INDEMNIFICATION PROVISIONS

One of the main policies of the Government Claims Act is to provide an avenue for compensation of those injured by government activities. This policy was implemented with a general rule that public employees are liable for their torts to the same extent as private individuals. This general rule is significantly constrained by the various immunities granted to public employees. See generally Memorandum 2010-6. Under this approach, public employees executing the duties of their employment could sometimes be personally liable for a resulting tort. See generally Sections 814-822.2.

The Legislature was concerned that the potential for personal liability might inhibit public employees' willingness to fully perform their jobs. To alleviate public employee concerns, the Legislature adopted the defense and indemnification provisions of the Government Claims Act. These provisions encourage public employees to execute their employment duties without fear that they would be personally required to pay for the costs of a judgment or defense. See Sections 825.4, 825.6; *Johnson v. State*, 69 Cal. 2d 782, 791-92, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); *Number 4 — Defense of Public Employees, supra*, at 1307.

However, the Legislature also recognized that, at times, employees should be personally liable for their actions. Sections 825, 825.6.

Thus, the Government Claims Act balances the competing policies of (1) providing those injured by government activities with avenues for compensation, and (2) protecting public employees from personal liability, while (3) protecting the government fisc by making public entity defense and indemnification of a public employee mandatory, discretionary, or prohibited, depending on the circumstances.

Provisions that Protect Public Employees

The rights of an employee under the defense provisions of the Government Claims Act are in addition to any rights that may exist under another enactment or contract. Section 996.6.

Mandatory Defense and Indemnification

On the request of an employee, a public entity must defend the employee in a civil proceeding based on an injury alleged to have been caused by an act or omission of the employee *in the scope of employment*. Section 995. Scope of

employment is usually defined according to common law because there is no statutory definition. See *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 209, 814 P.2d 1341, 285 Cal. Rptr. 99 (1991).

The entity must provide a defense regardless of whether the tort was deemed negligent or intentional. The Legislature determined that, because intent is a subjective mental condition, the difference between a negligent and an intentional tort could be a matter of such small degree that policy was better served by allowing indemnification for both types of torts. See generally Arvo Van Alstyne, *A Study Relating to Sovereign Immunity*, 5 Cal. L. Revision Comm'n Reports 4, 236 (1963).

The entity would then have no incentive to argue that the employee should not be indemnified because a tort was intentional rather than negligent. Such a rule also gives employees some reassurance that a public employer will be responsible for actions taken for its benefit. The Legislature determined that zealous performance of a public employee's job duties should be encouraged even if the entity runs the risk that at times an employee's zeal will go too far. See *id.*

The policy that public employees should not be personally liable for torts committed within the scope of employment extends beyond defense to include indemnification. In general, if the public entity is required to defend its employee, the entity is also required to pay any judgment, compromise, or settlement agreed to by the entity. Sections 825(a), 825.4.

Public Entity Reimbursement Limited

The policy served by the defense and indemnification provisions would be undermined if the entity could routinely seek reimbursement of defense and indemnification costs from the employee. The Government Claims Act addresses this by limiting the reimbursement rights of public entities.

If the public entity is required to defend an employee, the entity has no right to recover the cost of the defense from the employee. Section 996. If the employee pays any part of a claim that the entity should have paid, the employee has a right to reimbursement. Section 825.2(a), (b).

These provisions eliminate a potential conflict of interest. The absolute requirement to pay removes the entity's incentive to find a way to force the employee to pay out of pocket or reimburse the entity. Even when the entity is liable for acts by an employee due to actual fraud, corruption, or actual malice,

the entity only has a right to indemnity from an employee if there is an agreement reserving the entity's rights or the entity did not provide the defense. Section 825.6. In most cases, employees can be reassured that they will not be liable for their own defenses. *Number 4 — Defense of Public Employees, supra*, at 1307; see also, *Recommendation Relating to Sovereign Immunity, Number 1 — Tort Liability of Public Entities and Public Employees*, 5 Cal. L. Revision Comm'n Reports 801, 819 (1963) (hereinafter, *Number 1 — Tort Liability of Public Entities and Public Employees*).

Discretionary Defense

The Government Claims Act also includes a number of provisions that give a public entity the discretion to decide whether to provide a defense, depending on individual facts and circumstances.

The corollary to an entity's duty to defend an employee who acts within the scope of employment is that an entity may decline to defend if the entity determines that (1) the employee acted outside the scope of employment, (2) the employee's defense would create a conflict of interest between the employer and employee, or (3) the employee acted with actual fraud, actual malice, or corruption. Section 995.2.

However, to avoid problems where it may not be clear at the outset whether an employee is in fact entitled to a defense, the statute does not prohibit such a defense. Also, a denial to defend on one of the abovementioned grounds does not appear to excuse the entity from reimbursing the employee's costs of litigation, if a defense was warranted. See Sections 995.2, 996, 996.4; *Sinclair v. Arnebergh*, 224 Cal. App. 2d 595, 597, 36 Cal. Rptr. 810 (1964); see also *Number 4 — Defense of Public Employees, supra*, at 1307-08.

An entity also has discretion to provide a defense in situations such as a criminal, administrative, or disciplinary proceeding. Sections 995.4, 995.6, 995.8. The Legislature determined that a public entity should not be automatically banned from providing a defense in these situations. At times an employee could be subject to such a proceeding for conduct within the scope of employment. For example, before these provisions were enacted, a public school employee was charged with assault after removing a bully from the school grounds. The statutes did not allow the entity to defend the employee and the employee had to pay for his own defense. *Number 4 — Defense of Public Employees, supra*, at

1308-09. Today, the entity can decide whether to provide a defense for an employee based on the specific facts and circumstances of the situation.

All of these discretionary defense rules further the general policy of encouraging employee zeal by reducing the risk of personal liability for work-related conduct.

Employee Remedies if Entity Refuses to Provide Defense

A public employee has two remedies available if the entity abrogates its responsibility to defend and indemnify. An employee always had a right to pursue a writ of mandate. However, the Legislature acknowledged that this remedy is unlikely to be effective, and created a second remedy. An employee may select and hire a private attorney and be reimbursed for reasonable expenses. Section 996.4; see also *Number 4 — Defense of Public Employees, supra*, at 1307.

Provisions that Protect the Public Entity

Although, on balance, it was determined that protecting public employees who were executing their employment duties was more important than protecting the government fisc, the Government Claims Act recognizes that there should be limits to a public entity's responsibility to defend or indemnify an employee.

Employee Responsibilities when Receiving Defense

Even when an entity is required to provide a defense, the employee has some responsibilities. In return for receiving a defense, the employee must first give notice to the entity, because the entity should have an opportunity to provide the defense if it has an obligation to pay the costs of a defense and any judgment that may result. *Number 1 — Tort Liability of Public Entities and Public Employees, supra*, at 819.

The employee must also reasonably cooperate with the defense. Sections 825, 825.2.

Public Entity Right to Indemnification

Though a public entity generally does not have a right to indemnification, in a few situations the entity must or may seek reimbursement from an employee for the cost of defense and any judgment against the entity or the employee. Sections 825.6, 996.4.

When the public employer provides the defense, an employee who did not reasonably cooperate in good faith in the defense must indemnify the employer. Section 825.6(a)(3).

When the public entity does not provide a defense, the employee must indemnify the public entity if (1) the employee's act or omission at issue was caused by actual fraud, corruption, or actual malice, or (2) the employee did not conduct the defense in good faith. Section 825.6(a)(1).

When the public entity provides a defense pursuant to an agreement reserving its rights against the employee, there is a change to the usual presumption that the employer is not entitled to indemnification. The employer is entitled to indemnification unless (1) the employee establishes that the act or omission at issue occurred within the scope of employment, and (2) the public entity cannot establish that the employee's act or omission at issue was caused by actual fraud, corruption, or actual malice, or that the employee did not reasonably cooperate in the defense. Section 825.6(a)(2).

The rules on indemnification of a public entity may be subject to contrary provisions of a memorandum of understanding. Section 825.6(c).

DEFENSE AND INDEMNIFICATION IN THE PRIVATE SECTOR

An employer in the private sector also has an obligation to indemnify its employees for conduct within the scope of employment. Indemnification includes reasonable costs for a defense. Lab. Code §§ 2802, 2804; see, e.g., *Jacobus v. Krambo Corp.*, 78 Cal. App. 4th 1096, 1100, 93 Cal. Rptr. 2d 425 (2000).

This requirement has been justified on the following grounds:

- The employer is more likely than the employee to be able to prevent recurrence of the tortious behavior.
- The employer is more likely than the employee to be able to bear the cost of the loss.
- The employer is likely to be the ultimate beneficiary of the employee's actions.

See, e.g., *Sunderland v. Lockheed Martin Aeronautical Systems Support Co.*, 130 Cal. App. 4th 1, 8, 29 Cal. Rptr. 3d 665 (2005).

In some cases, a corporate employer may even be liable for the criminal acts of its employees. *U.S. v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972).

A private employer is entitled to reimbursement if the employee was guilty of a culpable degree of negligence. In general, culpable negligence for a paid employee is interpreted as a failure to use ordinary care. Lab. Code § 2865; *Dahl-Beck Electric Co., Inc., v. Rogge*, 275 Cal. App. 2d 893, 897, 80 Cal. Rptr. 440 (1996).

CONCLUSION

Whether the employer is public or private, most of the policy considerations driving the requirements to defend and indemnify employees are similar. The employer may not have been the direct cause of the injury but it was likely the intended beneficiary, and the employer can fulfill the compensation and deterrence goals of tort liability better than the employee.

Because the policy considerations are similar, when an employee acts in good faith and within the scope of employment, the outcome is likely to be the same whether the employer is public or private. The employee's defense and any judgment or settlement will be paid by the employer.

However, one area of policy differs between public and private employees. The Legislature wants to encourage public employees to perform their duties with zeal and without fear of personal liability. This is especially true when an employee is performing a primarily governmental role such as lawmaking or law enforcement. One way the Legislature implements this policy is by giving public employees defense and indemnification rights that are slightly stronger than those available to private employees:

- A public employee has a right to a defense provided by the employer. A private employee only has a right to indemnification after the fact. (Despite this nuance, the potential of vicarious liability gives a private employer an incentive to defend an employee from the outset.)
- A public employee is also less likely than a private employee to be required to reimburse an employer. If the employee receives a defense and the employer did not reserve its rights, the employer cannot seek reimbursement. Otherwise, only an employee who acted with actual fraud, actual malice, or corruption, or who refused to cooperate with the defense is required to reimburse an employer. By contrast, private employees found guilty of "culpable negligence" may be required to reimburse the employer.

For cases not clearly within the scope of employment, it is not clear how often the additional defense and indemnification protections provided to public

employees result in a different outcome for public employees versus private employees.

Ultimately, the defense and indemnification rules for public and private entities are similar enough in their policy rationales and results that they do not provide a helpful basis for evaluating whether a charter school should be governed by the Government Claims Act. There is no strong policy argument either way.

Respectfully submitted,

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