I. PURPOSE

Under ORS Chapter 278 and ORS 30.260-300, the state pays its own cost of resolving tort claims. The purpose of self-insuring is to pay reasonably for harm wrongly or negligently done by or on behalf of the state and to defend against claims that appear false or unfounded. These services are provided to state agencies by the Department of General Services, Risk Management Division and the Department of Justice, Trial Division.

This policy manual seeks to define coverage for state agencies alone. It does not purport to create, define or otherwise affect the rights or powers of anyone except the state's agencies. It does not limit or define the state's rights or defenses in any action at law. It applies to all claims reported to us after April 8, 1991. Changes and exceptions to the terms of this policy manual are issued by us through written Endorsements and Policy Interpretations.

See also, 125-7-202, Liability Self-Insurance Policy Manual for State Officers, Employees and Agents; 125-7-203, Employee Dishonesty Policy Manual; and, 125-7-101, Property Self-Insurance Policy Manual. All other Policy Manuals of the 125-7- series are repealed.

II. DEFINITIONS

Throughout this policy, "you" and "your" refer to the state and its agencies. "Staff" refers to your officers, employees and agents unless otherwise specified. "We," "us," and "our" refer to the Department of General Services, Risk Management Division. Other terms, as used in this policy manual, have these meanings:

A. **Agency** means a board, commission, department, division, institution or branch of the State of Oregon.

B. **Agent** is not a precisely defined term. The courts are likely to decide someone is your agent if that person performs a duty or function on your behalf and is subject to the direction and control of you or your staff. That direction and control applies to the method, manner, means, location and timing of the duty or function. Any person or organization with legal capacity to contract could be your agent. Volunteers can be your agents.

C. **Claim** means a formal assertion that you or your staff harmed someone by committing a tort. All claims cost money to investigate and resolve even if they are false or unfounded. Claims come to our attention by many methods:
1. Claimant or counsel makes written notice of their assertions to us as required by ORS 30.275.

2. You, we or the Department of Justice is served with a legal action which includes an assertion of a tort by you or your staff.

3. We learn of an event which, from its facts, we conclude that a particular person intends to bring a legal action for tort.

You must promptly notify us of any claim, even if you believe that it is unfounded or that you could resolve it. We may agree to your plan of resolution, if it is consistent with applicable law and rules.

D. **Contract** means any purported agreement or promise which is asserted to impose upon you a legal duty to perform or refrain from some action. The contract need not meet all the contractual tests of legal enforceability. It may be created by operation of law or by federal or state administrative regulations which define benefits or procedures you have chosen to administer.

E. **Damages** means judgment awards, settlements, penalties and awards of plaintiff's costs.

F. **Employment claim** means a tort claim based on a state employee's legally protected employment rights and interests. It does not include claims based on rights or interests arising out of collective bargaining agreements or other contracts.

G. **Losses** means our costs of defense, damages and related costs for claims against you or your staff. If a claim names multiple defendants or an incorrect defendant, we will determine to whom losses will be charged for premium allocation purposes. Losses, for premium allocation purposes, also include your costs of defending or paying any claim which, contrary to this policy manual, you do not report to us, even though those costs are not reimbursed from the Insurance Fund. Losses also include employee dishonesty losses under this policy manual.

H. **Mixed claim** means a legal action which is not excluded from coverage and which complains of torts and of contractual breaches or other issues which do not fall within the definition of tort.

I. **Private or personal vehicle** means a vehicle owned by your staff or any vehicle not owned, rented or leased by, nor in the possession or control of, the state.

J. **Protective remedy** means legal actions which seek declaratory judgment, injunctive relief or writs of mandamus as remedies for torts.

K. **State auto** means a licensed motor vehicle that is owned, rented or leased by you or is in your control and possession. It includes one rented with your authorization by your staff. In that event, the rented vehicle is a "state auto" only while your staff is using it in the scope of their employment or duties and not for
private purposes. State autos, by law, may not be used for any private purpose. You should not lend a state auto to someone other than staff without clear authority to do so. Liability coverage may not apply while a state auto is on loan.

L. **Tort** is defined by statute as the breach of a legal duty that is imposed by law, other than a duty arising from contract or quasi-contract, the breach of which results in injury to a specific person or persons for which the law provides a civil right of action for damages or for a protective remedy (key requirements emphasized).

In evaluating a claim to determine whether it is covered as a tort, we look for these elements:

1. A breach by you or your staff of a legal duty that is not established by a contract or under related contractual theories.
2. The breach of duty must inflict injury to a particular person or class in a manner that is distinct from the injury that the breach inflicts on the general public.
3. The law must provide for, and the claimant must be claiming, damages or some type of protective relief (injunction, declaratory judgment, writ of mandamus) for that injury.
4. Special injury to a particular person or class is a legal element of the relevant claim or of its statutory remedy. (If the complainant may obtain the same remedy without alleging an injury different from the injury to the general public, the claim generally is not a tort.)
5. The procedural conditions for bringing a particular claim are consistent with and can be satisfied without violating the Tort Claims Act (ORS 30.260-300) procedural system (statute of limitations, notice requirements, etc.).
6. There are indications of a legislative intent that the Tort Claims Act not apply to the claim (for example, the claim could already have been brought against the state before the Tort Claims act was passed in 1967).

The first three are essential elements. The rest help us determine claims which remain arguable.

### III. GENERAL TORT LIABILITY

A. **Coverage.** Subject to the provisions of this policy manual:

1. **Tort Claims Seeking Money Damages.** We will pay damages or defend claims against you for your alleged torts. Coverage for your staff, while acting within the scope of their employment or duties, is described in our Liability Self-Insurance Policy Manual for Officers, Employees and Agents.
2. **Tort Claims Seeking Non-Monetary, Protective Remedies.** We will defend you against actions seeking a protective remedy for an alleged tort. We will also defend non-tort mandamus actions against the Judicial Department or its staff and against District Attorneys, all in their official capacities. We will also pay awards of plaintiff's attorney fees.

3. **Mixed Claim Coverage.**

   a. If the non-tort elements of a mixed claim arise from a contract, a document or an action which was specifically approved in advance in writing by an Assistant Attorney General, we will defend the mixed claim against you or your staff even if the tort elements are withdrawn or dismissed. We will pay all damages except those that are clearly for non-tort elements.

   b. If the non-tort elements of a mixed claim arise from a contract, a document or an action which was not specifically approved in advance in writing by an Assistant Attorney General, we will defend the mixed claim against you or your staff only while the part of the claim which alleges a tort continues to be pled and has not been dismissed or withdrawn. If the dismissal of the tort elements is appealed, we will offer to resume defense while the tort continues to be appealed. We will pay only those damages that are clearly for tort elements.

4. **Constitutional Challenges.** We will pay the cost to defend declaratory or injunctive actions seeking to prevent implementation of new state laws if the legal action alleges the new law is unconstitutional. The new law must have been written by the Legislative Assembly or by citizen-petitioners and not have been drafted by a state agency.

B. **Exclusions.** Except as expressly provided, we do not pay for the following:

1. Costs of preventing claims. Each agency must take reasonable steps to prevent wrongful acts or foreseeable harm to people who may encounter its property, staff or activities.

2. Legal costs you incur before you report a claim to us or any costs or claims which you have already paid or promised to pay without our approval. Note: You may not deny, approve, pay or defend tort claims for yourself. You may not pay someone to withdraw or abandon a tort claim. We must administer all claims. Even without this exclusion, no state official may, without statutory authority, use public monies to pay anyone for any kind of demand or claim which is not a valid obligation of the State. Avoid personal liability; call us or your counsel if you are unsure.
3. Costs of complying with a protective remedy. This exclusion also applies to fines, penalties, contempt citations or judgments for your delayed conformance to a court's order. Awards of plaintiff's attorney fees are not excluded.

4. Double-dipping. Court awards or judgments for (i) payment of goods or services you have received and for which you should have paid; (ii) For the payment of monies you are withholding in your accounts; or (iii) Payment or transfer of funds required by law, rule or contract which you have refused to pay. This exclusion applies, for example, to wages and related taxes or benefits you may be ordered to pay. It applies to money the court concludes you are wrongfully withholding. Awarded penalties and plaintiff's costs and your defense are not excluded.

5. Agency fines. Fines or penalties imposed by federal or state agencies.

6. Defense or damages for alleged torts by your staff which are excluded from coverage by the Liability Self-Insurance Policy Manual for Officers, Employees and Agents.

7. Contractual liability. Liabilities created by contract. You may not extend coverage to anyone who is not covered as a matter of law and of fact without our knowledge and written permission. Only we may obligate the Insurance Fund or issue certificates of self-insurance or endorsements thereto on behalf of the state.

8. Medical treatment costs for persons in state custody unless treatment is for injury caused by a tort committed by you or your staff.

9. Non-torts. Except as provided for mixed claims, defense or damages for claims that do not meet the definition of 'tort' and claims that we have historically regarded as 'non-tort' in our administration of the Insurance Fund. A list of these "non-tort" claims includes, but is not limited to the following:

   a. Administrative Proceedings. Administrative hearings or other proceedings under ORS Chapter 183 or other statutes, including judicial review or appeals of your administrative orders, hearings or rules.


d. Election Law Claims. Appeals from acts or omissions of election officers under elections laws brought pursuant to ORS 246.910.

e. Habeas Corpus. Actions brought to challenge the legality of confinement, conditions of confinement, conviction or sentence under state and federal constitutions and statutes.

f. Public Meetings Law Claims. Actions brought to require compliance, prevent violations, and/or determine the applicability of public meetings law, ORS 192.610 to 192.690, pursuant to ORS 192.680.


C. Limits. The state's liability to claimants is limited by law. In certain federal issues these limits do not apply. Therefore, there is no dollar limit on your coverage.

D. Conditions of Coverage.

1. Early contact and investigation can be critical to loss control. You must report any claim or mixed claim to us in writing as promptly as practical, in no case later than 60 days after you have clear notice of it. Failure to comply will result in additional charges (see section on Premiums). Accidents resulting in serious injury or death for which you or your staff expect to be blamed must be reported to us within the next working day. Use telephone or other electronic means for such serious accidents.

2. You must comply with this policy manual.

3. You must complete and return our annual Risk Reports.

E. Deductibles. There are no deductibles. However, the state is not normally insured for the risks covered by this policy manual. Therefore, any valid and collectible insurance is normally primary, paying before these self-insured coverages.

F. Right of Recovery. If we defend or pay damages on a claim, we have the right to recover costs or damages from any party in connection with the claim. We will handle any recovery actions. Our recovery will reduce your losses used in fixing your future billings for coverage. If our recovery efforts could have repercussion
on your agency, please notify us of your concern in writing. Recovery, excess of our coverage and costs, will be paid to you.

G. Premiums. Your standard biennial premium is your share of actuarially estimated state tort liability loss expense. Your share is based on your paid losses as they compare to state total paid losses. Additional premiums are charged to you for late reported losses.

Prompt reporting can make a great difference in the ultimate loss from a claim. Additional premiums for late reported claims will be charged in addition to all other premiums. Additional premiums will be equal to the greater of $1,000 or one-tenth the amount of the total loss on late reported claims. The additional premium will be added to the standard biennial premium next to be charged.

If we must commence coverage of claims or losses excluded under this policy manual, we will promptly reassess your premiums to reflect your historic losses for that kind of claim or loss. We are required by law to keep the Insurance Fund actuarially sound.

IV. VEHICLE LIABILITY

A. Coverage

1. State Vehicle Liability. We will pay or defend claims against you for property damage or bodily injury to others while your staff operates a state auto or any other state vehicle within the scope of their employment or duties.

2. Personal or Private Vehicle Liability. If you authorize your staff to use a personal or private auto on state business, he or she is responsible to carry the minimum liability insurance required by law. Likewise, for private boats, airplanes or other vehicles, he or she is responsible to carry normal and reasonable liability insurance. If your staff operates a personal or private auto, boat, airplane or other vehicle on state business, their personal liability insurance policies are primary and our coverage is secondary. If the amount of liability to third parties exceeds their private policy limits, we will indemnify them according to our policy manuals.

Conditions, exclusions, limits and other details are contained in our Liability Self-Insurance Policy Manual for Officers, Employees and Agents.

B. Premiums. Vehicle liability premiums are included in general tort liability premiums.

V. REVISIONS, NEW COVERAGES

Do you have any special needs to cover losses excluded by our policy manuals? Contact us. Options may include amending our policy manuals, endorsing a special
coverage for your unique need, developing a new plan of self-insurance, obtaining commercial insurance or controlling the risk to remove the need for coverage.

The major limits on revisions and new coverages are that they should be legal, consistent with statewide risk management policy and timed or funded to merge with budget processes. Some changes require approval of the Emergency Board. (See also III. G. Premiums.)

VI. REPORTING CLAIMS

To access any kind of Insurance Fund coverage, send us our State Self-Insurance Claim Report form. It is an all-purpose self-insured claim and lawsuit report form. It replaces all earlier claim forms. Use it for auto, liability, property and dishonesty losses, but not for workers' compensation. Photo the attached copy of the form. You may contact us for a supply of forms if you are a frequent user. Include supporting information such as:

a. A copy of any summons and complaint;


c. Explanations, photographs and copies of any letters, reports, rules, orders, witnesses names or other material you may have, related to the claim.

Do not forget, if it applies, to timely file (b) the DMV report with the appropriate police or DMV office.

Note: Never let formalities or incomplete data, documentation or reports delay the prompt reporting of a claim. If our reporting form is not handy, you can start things by just giving us a call, a fax or electronic mail.

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