



Department of Administrative Services

POLICY MANUAL

Issuing Program: Risk Management

Subject: Liability Self-Insurance Policy Manual
(Agency Liability Policy)

Number

125-7-201

Effective until
cancelled.

Revised July 1,
2015.

Approval

CONTENTS

I. Purpose	1
II. Self-Insurance Agreement.....	1
III. General Definitions and Exclusions	2
• General Definitions	2
• General Exclusions.....	3
IV. General Tort Liability.....	5
• A. Coverage	5
• B. Definitions	6
• C. Exclusions.....	6
• D. Limits of Liability.....	6
• E. Deductibles	6
• F. Conditions for Coverage.....	6
• G. Claim Filing.....	7
• H. Right of Recovery	7
V. Vehicle Liability.....	7
• A. Coverage	7



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- B. Definitions7
- C. Exclusions.....8
- D. Limits of Liability.....8
- E. Deductibles8
- F. Conditions of Coverage8
- G. Claim Filing.....8

VI. Fair Labor Standards Act (FLSA) Claims8

- A. Purpose8
- B. Coverage9
- C. Definitions9
- D. Exclusions.....9
- E. Deductibles9
- F. Conditions of Coverage9
- G. Loss Settlement10

VII. Special Services10

I. Purpose

Under Oregon Revised Statutes (ORS) Chapter 278 and ORS 30.260-300, the state pays its own cost of resolving tort liability claims. The state Insurance Fund provides self-insurance that pays the state's legal liability for torts and legal defense cost. These services are provided to state agencies by the Department of Administrative Services, Enterprise Goods & Services Risk Management program.

This purpose of this policy manual is to establish the liability self-insurance coverage, for state agencies alone, by the Insurance Fund and the conditions, standards, and other requirements that govern or control the use of this coverage. 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. This policy does not affect any insurance policy we may own. Should any provision in this policy be contrary to law, the law prevails. This edition applies to all claims with a date of loss on or after the effective date of this policy.

Changes and exceptions to the terms of this policy manual are only effective if the Enterprise Goods & Services Administrator or Risk Manager signs a written policy Amendment or Endorsement. This policy manual is subject to change without prior notice.

Additional liability coverage and related information may also be available under:

- Policy 125-7-101, Property Self-Insurance Policy Manual;
- Policy 125-7-202, Liability Self-Insurance Policy Manual for State Officers, Employees, and Agents;
- Policy 125-7-203, Employee Dishonesty Self-Insurance Policy Manual;
- Policy 125-7-204, Volunteer Injury Coverage Policy
- Policy 125-7-301, Aircraft and Pilot Standards
- Policy 125-7-401, Alcohol Risk Control Policy
- Policy 125-7-501, State Business & Travel Status Policy, and
- OAR Chapter 125, Division 155, State Vehicle Use and Access

II. Self-Insurance Agreement

The Insurance Fund pays tort liability claims for harm wrongly or negligently done by or on behalf of the state and defends against claims including claims that appear false or unfounded. This self-insurance policy includes the following lines of coverage for state agency tort liability, unless the loss is otherwise excluded or limited in this policy manual:

- A. General Tort Liability
- B. Vehicle Liability & Uninsured/Underinsured Motorist
- C. Fair Labor Standards Act Claims

III. General Definitions and Exclusions

Throughout this policy manual, “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 Administrative Services, Enterprise Goods & Services Risk Management. General Definitions and Exclusions apply to all lines of coverage. Other terms have the meaning stated in each respective line of coverage definition and exclusion section.

General Definitions

- A. **Agency** means a board, commission, department, division, institution or branch of the State of Oregon. A public corporation is an agency if we have agreed in writing to provide its legal liability.
- B. **Agent.** 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.
- C. **Claim** means a formal assertion, notice or demand seeking damages by or on behalf of a third party alleging that you or your staff harmed someone by committing a tort.
- 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** mean all sums recoverable by law from any liability claim covered under this policy manual including judgment awards, settlements, penalties and awards of plaintiff's attorney fees or court costs in connection with a tort claim.
- F. **Losses** mean 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 also include employee dishonesty losses under this policy manual.
- G. **Property Damage** means injury to or destruction of tangible property.
- H. **State Business (or official state business or state duties)** means any activity directed and controlled by a state agency to advance the lawful policies and purposes of the agency. Note: State law requires a narrow interpretation of state business when it involves any use of vehicles. Coverages under this policy require that you were acting in the scope of your employment or duties. Essentially that means you were engaged in state business at the direction and control of your agency. To determine that, we may look at your position description, your agency's enabling statutes, and other helpful sources.
- I. **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.

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.

- J. **Volunteer:** An unpaid person appointed by a state agency to work on its behalf. Volunteers are appointed to do state business under agency direction and control. They receive no remuneration. In this policy, volunteer and agent may be used interchangeably unless the context requires otherwise. See further definition of agent.

General Exclusions

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. Civil 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 Procedures. Administrative hearings or other proceedings under ORS Chapter 183 or other statutes, including judicial review or appeals of your administrative orders, hearings or rules.
 - b. "CERCLA" Cost-Recovery Claims. Claims/actions brought by the United States Government, or any other person, for recovery of costs incurred in removing or cleaning-up hazardous substances, under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 USC 9601 et seq.
 - c. Contract Issues. Breach of contract, contract disputes, disputes over requests for proposals, bid openings and selection, and related causes of action.
 - 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.
 - g. Public Records Law Claims. Actions brought for disclosure of public records under public records law, ORS 192.410 to 192.505.
10. Challenges to election law requirements of ballot titles, measure explanations, and related technical allegations customarily administered by the Secretary of State's Election Division.

This exclusion does NOT apply to substantive constitutional claims regardless of attorney fee requests, which include but are not limited to, revision claims, single subject claims, and Guaranty Clause claims.

11. Allegations that the Department of Consumer and Business Services has violated requirements of workers' compensation law in its handling of workers' compensation claim(s).
12. Allegations of inverse condemnation or of damage to properties adjacent to a highway project, and appeals over the condemnation or takings of real property rights and interests by the Department of Transportation, Highway Division.
13. Allegations that the Department of Water Resources has harmed someone by taking administrative actions of issuing orders that impair, reduce, deny or cut-off any right to take or use water.
14. Challenges to environmental studies, reports, or findings; or to alleged environmental impacts; or allegations of federal environmental regulation; all in connection with construction projects federally funded through a state agency.

Note: these exclusions from coverage do not mean that these allegations or challenges do not constitute or contain tort allegations. Rather, these are delegated to the named agencies to resolve at their direct expense and, with the Department of Justice, to defend against any torts that arise within these exclusions.

IV. 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 State 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 **non-tort** elements of a Mixed Claim arise from a contract, we will defend the **non-tort** portion of 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 of the non-tort portion of the Mixed Claim while the tort continues to be appealed. The coverage is for defense cost only.
 - b. Coverage for the **tort** portion of the mixed claim will be provided as stated under IV. General Tort Liability, A. 1. & 2.
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. Definitions

1. **Declaratory Judgment Action** is the legal determination of a court that resolves legal uncertainty for the litigants. It is a form of legally binding preventive adjudication by which a party involved in an actual or possible legal matter can ask a court to conclusively rule on and affirm the rights, duties, or obligations of one or more parties in a civil dispute (subject to any appeal).
2. **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.
3. **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.
4. **Injunctive Action** is a court order directing a party to do or cease doing a specific action.
5. **Protective remedy** means legal actions which seek declaratory judgment, injunctive relief or writs of mandamus as remedies for torts.
6. **Writ of Mandamus** is an order from a court to an inferior government official ordering the government official to properly fulfill their official duties or correct an abuse of discretion.

C. Exclusions

Except as expressly provided, we do not pay for liability arising out of any General Exclusions under III, GENERAL EXCLUSIONS.

D. Limits of Liability

Your liability to most tort claims is limited by the Oregon Tort Claims Act in ORS 30.260 to 30.300. There is no limit on your amount of coverage for tort claims under this policy manual.

Coverage for the non-tort portion of a Mixed Claim is only for defense cost and is limited as described under IV. General Tort Liability, A. 3. a.

E. Deductibles

There are no deductibles. However, we may require that any primary insurance or valid and collectible insurance be applied before the state's self-insurance.

F. Conditions for Coverage

1. **Cooperate fully with us and the Department of Justice.** Coverage may be forfeited if you fail to cooperate honestly and fully in our investigation, settlement or defense, and recovery of loss from the claim. If coverage is forfeited, you will be informed in writing of our decision and the reason for the decision.
2. You must comply with the terms and conditions of this policy manual.

G. Claim Filing

Per ORS 30.275, only a claimant or representative of a claimant can provide notice of claim, and the claim must be submitted to us.

H. 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.

V. 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.

B. Definitions

Additional definitions relating to Vehicle Liability are included in section III, General Definitions.

1. **Accident** means a sudden vehicular event allegedly causing unplanned and unexpected damage to property or injury to a specific person or persons.
2. **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.
3. **State vehicle** means a motor vehicle owned, commercially rented, borrowed, leased, or otherwise under the possession and control of the state. A commercially rented vehicle is a state vehicle if it is rented and used by a duly authorized employee at the cost of the state, solely for official state business. A vehicle, owned by DAS and lawfully rented to a local government or other non-state entity, is not a state vehicle for purposes of this policy. A state vehicle used for any purpose other than official state business is used unlawfully and at the personal liability of the driver.

C. Exclusions

Except as expressly provided in this policy, we do not pay for anything excluded under Section III. General Exclusions or any of the following:

1. Any other coverage for private vehicles. Except for the excess vehicle liability coverage described, we do not provide any coverage under this policy for any kind of private vehicle (motor vehicle, boat, airplane, or others), regardless of its use, authorization, or contract terms.

D. Limits of Liability

Your liability to most tort claims is limited by the Oregon Tort Claims Act in ORS 30.260 to 30.300. There is no limit on your amount of coverage for tort claims under this policy manual.

Coverage for the non-tort portion of a Mixed Claim is only for defense cost and is limited as described under IV. General Tort Liability, A. 3. a.

E. Deductibles

There are no deductibles. However, we may require that any primary insurance or valid and collectible insurance be applied before the state's self-insurance.

F. Conditions of Coverage

1. **Cooperate fully with us and the Department of Justice.** Coverage may be forfeited if you fail to cooperate honestly and fully in our investigation, settlement or defense, and recovery of loss from the claim. If coverage is forfeited, you will be informed in writing of our decision and the reason for the decision.
2. You must comply with the terms and conditions of this policy manual.

G. Claim Filing

Per ORS 30.275, only a claimant or representative of a claimant can provide notice of claim, and the claim must be submitted to us.

VI. Fair Labor Standards Act (FLSA) Claims

A. Purpose

The purpose of this policy is to insure agencies against unexpected budget disruption for claims alleging violation of the Fair Labor Standards Act (FLSA), promote accountability of agencies that violate the FLSA, and prevent additional exposure to the state for tax, benefit or other liabilities when paying wage settlements/awards.

B. Coverage

1. We will defend, settle, or pay damages for a defendant agency. FLSA damages may include wages, liquidated damages, reinstatement and attorney fees.

C. Definitions

Additional definitions relating to FLSA Claims are included in section III, General Definitions.

1. **Exempt Employees** means employees working in occupations and establishments that are exempt from the minimum wage and/or overtime pay provisions, with the largest category: the managerial exemption (usually referred to as “exempt employees”)
2. **Fair Labor Standards Act (FLSA)** is the federal law that sets the federal minimum wage, overtime pay, recordkeeping and child labor standards on full-time and part-time workers in the private sector and in federal, state, and local governments. It also includes recordkeeping obligations for employers for each covered, nonexempt worker concerning the hours worked and the wages earned.

D. Exclusions

Except as expressly provided in this policy, we do not pay for anything excluded under Section III. General Exclusions or any of the following:

1. We do not pay for costs of employee benefits, nor for agency staff time or other agency expenses.
2. **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.

E. Deductibles

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

F. Conditions of Coverage

1. **Cooperate fully with us and the Department of Justice.** Coverage may be forfeited if you fail to cooperate honestly and fully in our investigation, settlement or defense, and recovery of loss from the claim. If coverage is forfeited, you will be informed in writing of our decision and the reason for the decision.
2. You must comply with the terms and conditions of this policy manual.

G. Loss Settlement

1. With our and Department of Justice approval the defendant agency pays the wage portion of any settlement/award to the claimant(s) through its payroll system with appropriate deductions. We will then reimburse the agency for the wage portion of any settlement/award.
2. Alternatively, when it is in the state's interest to do so, we may elect to pay a compromised lump sum settlement. In that case, the claimants will indemnify the state for any benefit or tax liability.

Wages, liquidated damages, attorney fees (both defendant and plaintiff), and compromised settlements will accrue as regular losses in the agency's loss history, which determines future risk charges.

VII. Special Services

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.

HISTORY:

Effective April 8, 1991

Effective July 1, 2015 replacing April 8, 1991