

Authority and Purpose

OCERS typically provides indemnification and defense to OCERS' employees and Board members for claims arising from their conduct performed within the course and scope of their duties to the retirement system. This provision of indemnity and defense is required under the Government Claims Act, specifically, Government Code Sections 825 and 995. The purpose of this policy is to set forth the manner in which OCERS will carry out its obligations of indemnity and defense.

Introduction

A public entity like OCERS may be required to pay a judgment, settlement, or compromise in an action brought against an OCERS employee or Board member. This duty to indemnify arises where:

- 1) the action is based on an act or omission of the individual within the scope of their employment or official position;
- 2) the individual requests in writing at least 10 days before the day of the trial that OCERS defend the action; and
- 3) the individual cooperates in good faith in the defense of the action.¹

Similarly, OCERS is generally required, upon request, to provide for the defense of any civil action brought against an OCERS employee or Board member on account of an act or omission conducted in the scope of their employment or official position.² In particular, OCERS must provide for the defense of such actions where:

- 1) the action is based on an act or omission of the individual within the scope of their employment or official position;
- 2) the individual did not act with actual fraud, corruption, or actual malice; and
- 3) defense of the action would not create an actual conflict of interest between OCERS and the individual.³

OCERS is required to provide a defense if a potential, rather than an actual, conflict of interest exists. However, in that case, OCERS is not required to provide the individual with separate defense counsel in an action that names both the employee or Board member and OCERS. Also, OCERS is not required to defend an employee or Board member when an investigation is instituted (but no civil action is yet filed) alleging a conflict of interest violation under Government Code section 1090.

¹ Govt Code, §825 subd. (a).

² Gov. Code, § 995; for exceptions, see Gov. Code, §§ 995.2 to 995.4.

³ Govt Code, §§ 995, 995.2.

OCERS Board Policy

Indemnity and Defense Policy

The purpose of requiring public agencies to indemnify and defend their employees and officials is to encourage those individuals to zealously carry out their duties, secure in the belief that if they are sued for doing so, their agency will come to their aid.

These indemnity and defense obligations apply to both current and former employees and officials. For purposes of this policy, a "claim" is the filing of any civil or administrative action. In addition, "employees" include OCERS' direct employees and employees of the County of Orange who work at OCERS. However, OCERS reserves subrogation rights against the County in any case where OCERS provides an indemnity in place of the County's obligation.

Determination Process

It is vital that issues of indemnity and defense are addressed in a prompt and efficient manner. With that objective, the Board adopts the following procedure for all claims made against Board members or employees arising from an act or omission occurring within the course and scope of performing their duties to OCERS:

1. As soon as practicable after a claim is filed or threatened to be filed, the Board member or employee will notify the OCERS' Legal Division in writing and provide it with all reasonably necessary or useful information about the claim.
2. The Legal Division will review the claim (or potential claim) and determine whether indemnification and defense are required or otherwise in OCERS' best interest. The Legal Division will then notify the individual of its determination, and agenda consideration of the issue by the Board in closed session held at the next regular Board meeting.⁴
3. The Board will have sole authority to determine whether OCERS will indemnify and defend the individual.⁵ If the Board decides against indemnification or defense, the individual will be notified in writing as soon as practicable. If the individual commences a legal action challenging the Board's determination, and until that challenge is resolved, OCERS will advance the reasonably necessary defense costs on behalf of the individual on terms satisfactory to OCERS.
4. Indemnification by OCERS shall not apply to any criminal or civil enforcement action brought in the name of the people of the State of California by an elected district attorney, city attorney, or attorney general.⁶

⁴ OCERS is required to inform the employee within 20 days from the receipt of a written request for defense whether it will or will not provide a defense, and the reason for a refusal (Govt Code, §995.2(b)).

⁵ Board members and employees who have ceased their duties with OCERS prior to receiving a claim shall also be entitled to a determination of indemnity and defense.

⁶ Gov. Code, § 825(f)(4).

OCERS Board Policy

Indemnity and Defense Policy

Coordination

Defense of claims requires diligent coordination and it is necessary for all individuals who seek indemnification or defense to fully cooperate with OCERS throughout the claim.⁷ For its part, OCERS, through the Legal Division, will monitor the claim's status and communicate with the indemnified individual on a regular basis through the claim process to keep them informed of the progress of the claim.

If OCERS accepts defense of the claim, OCERS will select competent legal counsel reasonably agreed to by the indemnified individual. In providing that defense, OCERS may use its own attorney, employ outside counsel, or purchase insurance which requires that the insurer provide the defense. In the event that OCERS possesses insurance applicable to the claim, OCERS will tender the claim to the insurer and work with the insurer to ensure that any policy coverage is provided.

Prior to the determination of whether OCERS will indemnify and defend the individual, OCERS shall pay the reasonably necessary attorneys' fees and costs to defend the claim. In the event that OCERS denies defense and it is ultimately determined that OCERS correctly denied defense, OCERS will work with the individual to arrange the repayment of the amount advanced.

However, should OCERS grant defense coverage, it will cover the expenses incurred in providing a defense and will not recover them from the employee.⁸ If OCERS pays any portion of a claim or judgment, the employee or official is also not required to reimburse OCERS,⁹ except where the claim arises from the individual's actual fraud, corruption, or actual malice, or where the employee willfully failed or refused to defend the action in good faith, or to reasonably cooperate in good faith in the defense conducted.¹⁰

Policy Review

The Board will review this policy at least every three years to ensure that it remains relevant and appropriate.

Policy History

The Board adopted this policy on April 16, 2007. The Board amended this policy on January 18, 2011, March 17, 2014, January 19, 2016, June 17, 2019, and June 20, 2022.

⁷ A public employee's failure to cooperate in good faith with the public entity's defense of a claim against the employee relieves the public entity of its obligation to indemnify the employee (*DeGrassi v. City of Glendora*, 207 F.3d 636 (9th Cir. 2000)).

⁸ Gov. Code, § 996.

⁹ Gov. Code, § 825.4.

¹⁰ Gov. Code, § 825.6.



OCERS Board Policy Indemnity and Defense Policy

Secretary's Certificate

I, the undersigned, the duly appointed Secretary of the Orange County Employees Retirement System, hereby certify the adoption of this policy.

A handwritten signature in blue ink that reads "Steve Delaney".

06/20/2022

Steve Delaney
Secretary of the Board

Date