

GOVERNOR'S OFFICE
(New Emergency Administrative Regulation)

10 KAR 1:011E. Defense of employees.

EFFECTIVE April 22, 2020

RELATES TO: KRS 12.211, 12.212., 12.213, 12.215

STATUTORY AUTHORITY: KRS 12.213

NECESSITY, FUNCTION, AND CONFORMITY: KRS 12.213 requires the Governor, with the advice of the Attorney General, to adopt administrative regulations governing the methods of defense of employees or former employees of the Commonwealth.

Section 1. Definitions. When used in this administrative regulation:

(1) "Claim" means a claim whether or not a suit has been filed.

(2) "Civil action" means a civil suit filed in a state or federal court.

(3) "Defendant" means an employee or former employee of the Commonwealth who has been sued in a civil action in his or her official or individual capacity, or both, on account of an act or omission made in the scope and course of his or her employment as an employee of the Commonwealth and any of its agencies.

(4) "State agency" means any department, administrative body, division or program cabinet acting for the Commonwealth, but does not include local units of government such a school districts, counties, sewer districts or other municipalities.

(5) "Acts and omissions liability insurance" means insurance to cover the cost of defending civil actions covered under this Act and paying judgments or settlements resulting therefrom.

Section 2. Notice of Claim; Investigation. An employee or former employee against whom a claim is made which may result in a civil action against him or her on account of an act or omission made in the course of his or her employment by a state agency should immediately report said claim and the circumstances surrounding the claim to the Attorney General. The Attorney General, if he or she thinks it warranted, may cause an investigation of the claim to be made by a regular or special investigator of his or her office.

Section 3. Application for Defense; Response. (1) Any person desiring the Attorney General to provide for his or her defense under this Act shall make a written request to the Attorney General and shall submit with the request a copy of the summons, complaint and all other papers, documents and exhibits pertaining to the action.

(2) The Attorney General shall make a timely response to the court by filing an answer or motion for the defendant provided the application for defense is received by the Attorney General at least ten (10) days before a pleading is due. The filing of a pleading in the case shall not commit the Attorney General to continue the defense if the Attorney General has not reached a final decision and notified the defendant that his or her defense will be provided.

(3) Upon receiving an application for defense, the Attorney General, after such investigation and research as he or she deems necessary, taking into consideration those factors set out in KRS 12.212, shall decide and notify the defendant whether defense will be provided, and if so, by what method set out in Section 4 of this administrative regulation. The Attorney General shall not be responsible for the defense of a defendant unless written acceptance of the defense has been made by the Attorney General.

(4) In every case where the Attorney General has made a general delegation of his or her discretionary power to decide when to provide defense to other authority in state government,

such authority shall make the decision and the application for defense provided by this section need not be made to the Attorney General, provided that in such cases the authority making the decision shall provide legal counsel for the defense. All settlements made in such cases shall, however, be approved by the Attorney General as provided by Section 6 of this administrative regulation.

Section 4. Methods of Defense. (1) Except where the defendant is covered by insurance as provided in Section 5 of this administrative regulation, defense to a civil action may be provided in any of the following manners:

(a) The Attorney General may assign an assistant attorney general or a special assistant attorney general employed for that purpose to handle the case to conclusion by either settlement or final adjudication.

(b) The Governor or any department with the approval of the Governor may assign a regularly employed attorney under KRS 12.210 or an attorney employed under a personal service contract to handle the case as in paragraph (a) of this subsection.

(c) Any state agency may assign its employed counsel to handle the case.

(2) Regardless of the method of defense provided no settlement of litigation being defended under this administrative regulation shall be made without the approval of the Attorney General, except as provided in Section 6 of this administrative regulation.

(3) A defendant who has requested defense under this administrative regulation may elect to provide his or her defense by counsel employed by the defendant and in such case shall notify the counsel employed by the state of his or her election in writing.

Section 5. Insurance. (1) Any state agency or class of state agencies may be authorized by the Governor to purchase acts and omissions liability insurance for the protection of its employees and the benefit of the public.

(2) Any state agency which believes it is economically feasible to purchase acts or omissions liability insurance may request the Governor for authority to do so. The agency's request shall be documented with data as to the history of claims, probable cost of the insurance and any reasons it believes insurance is advisable for said agency.

(3) Any policy of acts and omissions liability insurance purchased by a state agency shall provide a maximum coverage of \$50,000 for each claim. Nothing in this administrative regulation shall be deemed to waive the sovereign immunity of the Commonwealth with respect to a claim covered by this administrative regulation or to authorize the payment of a judgment or settlement against a state employee in excess of the limit provided in any acts or omissions liability insurance purchased by a state agency.

(4) KRS 44.055 authorizes state agencies to purchase policies of insurance covering vehicles owned by the state. For this reason "defendant," as defined in Section 1(3) of this administrative regulation, does not include a person being sued for negligence in the operation of a state vehicle.

Section 6. Settlements. (1) Any counsel assigned by a state agency or the Attorney General may recommend to the Attorney General the settlement of a civil action against a defendant under this administrative regulation. If the Attorney General approves the settlement recommended he or she shall notify the Secretary of the Finance and Administration Cabinet by written memorandum and if the Secretary concurs in this recommendation the Secretary shall issue a voucher to the State Treasurer for payment of the settlement. No settlement shall be made or paid without the prior approval of the Attorney General.

(2) Guidelines for settlements. No settlement should be recommended unless the assigned counsel believes:

- (a) The claim is legally valid,
- (b) There is a strong probability of a judgment being rendered against the defendant,
- (c) The settlement is a reasonable compromise in light of the nature of the claim.

(3) Defense counsel shall document the reasons for recommending a settlement in writing to the Attorney General and the documentation shall be a public record open to public inspection.

(4) This section shall not apply to any settlement reached by a defendant or his or her insurer which results in no cost to the Commonwealth.

Section 7. Cost of Administration. The Attorney General shall be reimbursed for the cost to his or her office for the administration of KRS 12.211 to 12.215 upon vouchers submitted by the Attorney General and approved by the Secretary of the Finance and Administration Cabinet.

S. TRAVIS MAYO, Chief Deputy General Counsel
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APPROVED BY AGENCY: April 21, 2020

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REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: S. Travis Mayo

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation continues the defense of employees or former employees of the Commonwealth of Kentucky as required to be governed by regulation pursuant to KRS 12.213.

(b) The necessity of this administrative regulation: This administrative regulation is necessary to continue the defense of employees and former Commonwealth of Kentucky as required to be governed by regulation pursuant to KRS 12.213.

(c) How this administrative regulation conforms to the content of the authorizing statutes: This administrative regulation conforms to the content of the authorizing statutes by continuing the defense of employees and former Commonwealth of Kentucky as required to be governed by regulation pursuant to KRS 12.213.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation assists in the effective administration of the statutes by continuing the defense of employees and former Commonwealth of Kentucky as required to be governed by regulation pursuant to KRS 12.213.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: N/A.

(b) The necessity of the amendment to this administrative regulation: The amendments to this administrative regulation are necessary to clarify Medicaid policy relating to copayments.

(c) How the amendment conforms to the content of the authorizing statutes: N/A.

(d) How the amendment will assist in the effective administration of the statutes: N/A.

(3) List the type and number of individuals, businesses, organizations, or state and local government affected by this administrative regulation: Employees and former employees of the Commonwealth of Kentucky; the Governor's Office; the Office of the Attorney General; the Finance and Administration Cabinet.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment. The entities identified will continue the defense of employees and former employees of the Commonwealth of Kentucky as they have under the prior regulation, 10 KAR 1:010, and providing payment to the Attorney General for the cost of administration of KRS 12.211 to 12.215 pursuant to the administrative regulation.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3). The Attorney General will be reimbursed for the cost of administering KRS 12.211 to 12.215 upon vouchers submitted by the Attorney general and approved by the Secretary of the Finance and Administration Cabinet.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3). Employees and former employees of the Commonwealth of Kentucky will benefit from being provided a legal defense in civil actions in which they have been sued for alleged acts or omissions performed during the scope of their employment.

(4) Provide an estimate of how much it will cost to implement this administrative regulation:

(a) Initially: The Governor's Office anticipates no additional costs as a result of this administrative regulation.

(b) On a continuing basis: The Governor's Office anticipates no additional costs as a result of this administrative regulation.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: The sources of funding to be used for implementation and enforcement of this administrative regulation are funds from general fund appropriations.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: Neither an increase in fees nor funding will be necessary to implement the administrative regulation.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: This administrative regulation neither establishes nor increases any fees, but continues fees prescribed by the prior administrative regulation.

(9) Tiering: Is tiering applied? Tiering is not applied.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? The Governor's Office, the Office of the Attorney General, and the Finance and Administration Cabinet will be affected by this administrative regulation.

2. Identify each state or federal regulation that requires or authorizes the action taken by the administrative regulation. None. KRS 12.213 requires promulgation of the administrative regulation.

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? The Governor's Office expects this administrative regulation to generate revenue for the Office of the Attorney General in the form of reimbursement of the cost in administering the administrative regulation.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? The Governor's Office expects this administrative regulation to generate revenue for the Office of the Attorney General in the form of reimbursement of the cost in administering the administrative regulation.

(c) How much will it cost to administer this program for the first year? The cost to administer the administrative regulation for the first year is unknown, but the administrative regulation provides for reimbursement of the cost of administering the administrative regulation to the Office of the Attorney General.

(d) How much will it cost to administer this program for subsequent years? The cost to administer the administrative regulation for the subsequent years is unknown, but the administrative regulation provides for reimbursement of the cost of administering the administrative regulation to the Office of the Attorney General.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): The Office of the Attorney is to be reimbursed the cost of administering the program.

Expenditures (+/-): The Office of the Attorney is to be reimbursed the cost of administering the program.

Other Explanation: _____