

Manager/Supervisor Risk Management

#51– 5/3/12

A twice weekly e-mail training for YCPARMIA members

TOPIC: GOVERNMENT CODE – DUTY TO DEFEND AND INDEMNIFY

If you were to look at your personal auto liability policy you would see that it agrees to defend and indemnify you as the insured for your auto liability. The basis of this protection is the contract (policy), and is contingent upon you paying your insurance premium.

There is a similar obligation owed by your public entity employer that is found in the Government Code. The GC requires a public entity to defend an employee or former employee in a civil action for injury or damages that arise out of an act or failure to act within the employee's scope of employment, and to indemnify (pay damages on behalf of) the employee for a settlement or judgment based on that injury. Rather than being based on a contractual obligation (insurance) this duty to defend and indemnify is based on the employment relationship.

YCPARMIA's public entity members, as authorized by the GC, have chosen to meet this obligation, in a large part, through their participation in YCPARMIA's Liability Program. Our liability coverage agreement calls for the payment of sums that a covered party becomes legally obligated to pay as damages, and also states that there is a duty to defend any claim or suit against any covered party. The definition of a covered party found in agreement includes "...past or present elected or appointed officials, employees or volunteers of the participating agency, whether or not compensated, while acting for or on behalf of the participating agency..."

The issue then becomes, was the employee in the course and scope of their employment when the accident occurred? Obviously these situations are fact specific. The GC does lay out a few areas where the acts would be outside the scope including fraud, corruption or malice. Similarly, the entity usually has no duty to provide a defense in a criminal action against their employee – committing crimes are not part of the job. The same argument can be made regarding allegations of discrimination or sexual harassment. The employee's job duties do not include these types of acts. Areas that require a closer look include incidents involving volunteers, or auto accidents where the employee is operating their own vehicle.

The question of course and scope is obviously one that has the potential for creating a conflict between the employer and the employee, but in YCPARMIA's experience the issue seldom arises. In the vast majority of cases there is no conflict, and the duty to defend and indemnify is not disputed. Defense of the member agency and their employees is provided by the same attorney under the direction of, and reporting to, YCPARMIA; similarly decisions to deny, defend or settle are made by YCPARMIA.

Next topic: YCPARMIA Liability Coverage