CHAPTER 32-12.2
CLAIMS AGAINST THE STATE

32-12.2-01. Definitions.

As used in this chapter, unless the context otherwise requires:

1. "Claim" means any claim for money damages brought against the state or a state employee for an injury caused by the state or a state employee acting within the scope of the employee's employment whether in the state or outside the state.
2. "Injury" means personal injury, death, or property damage.
3. "Occurrence" means an accident, including continuous or repeated exposure to a condition, which results in an injury.
4. "Personal injury" includes bodily injury, mental injury, sickness, or disease sustained by a person and injury to a person's rights or reputation.
5. "Property damage" includes injury to or destruction of tangible or intangible property.
6. "Scope of employment" means the state employee was acting on behalf of the state in the performance of duties or tasks of the employee's office or employment lawfully assigned to the employee by competent authority or law.
7. "State" includes an agency, authority, board, body, branch, bureau, commission, committee, council, department, division, industry, institution, instrumentality, and office of the state.
8. "State employee" means every present or former officer or employee of the state or any person acting on behalf of the state in an official capacity, temporarily or permanently, with or without compensation. The term does not include an independent contractor.
9. "State institution" means the state hospital, the life skills and transition center, the state penitentiary, the Missouri River correctional center, the North Dakota youth correctional center, the North Dakota vision services - school for the blind, the school for the deaf, and similar facilities providing care, custody, or treatment for individuals.

32-12.2-02. Liability of the state - Limitations - Statute of limitations.

1. The state may only be held liable for money damages for an injury proximately caused by the negligence or wrongful act or omission of a state employee acting within the employee's scope of employment under circumstances in which the employee would be personally liable to a claimant in accordance with the laws of this state, or an injury caused from some condition or use of tangible property under circumstances in which the state, if a private person, would be liable to the claimant. No claim may be brought against the state or a state employee acting within the employee's scope of employment except a claim authorized under this chapter or otherwise authorized by the legislative assembly. The enactment of a law, rule, or regulation to protect any person's health, safety, property, or welfare does not create a duty of care on the part of the state, its employees, or its agents, if that duty would not otherwise exist.
2. The liability of the state under this chapter is limited to a total of five hundred thousand dollars per person and two million dollars for any number of claims arising from any single occurrence. The state may not be held liable, or be ordered to indemnify a state employee held liable, for punitive or exemplary damages. Any amount of a judgment against the state in excess of the two million dollar limit imposed under this subsection may be paid only if the legislative assembly adopts an appropriation authorizing payment of all or a portion of that amount. A claimant may present proof of the judgment to the director of the office of management and budget who shall include within the proposed budget for the office of management and budget a request for payment for the portion of the judgment in excess of the limit under this section at the next regular session of the legislative assembly after the judgment is rendered.
3. Neither the state nor a state employee may be held liable under this chapter for any of the following claims:
   a. A claim based upon an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule.

b. A claim based upon a decision to exercise or perform or a failure to exercise or perform a discretionary function or duty on the part of the state or its employees, regardless of whether the discretion involved is abused or whether the statute, order, rule, or resolution under which the discretionary function or duty is performed is valid or invalid. Discretionary acts include acts, errors, or omissions in the design of any public project but do not include the drafting of plans and specifications that are provided to a contractor to construct a public project.

c. A claim resulting from the decision to undertake or the refusal to undertake any legislative or quasi-legislative act, including the decision to adopt or the refusal to adopt any statute, order, rule, or resolution.

d. A claim resulting from a decision to undertake or a refusal to undertake any judicial or quasi-judicial act, including a decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.

e. A claim relating to injury directly or indirectly caused by a person who is not employed by the state.

f. A claim relating to injury directly or indirectly caused by the performance or nonperformance of a public duty, including:
   (1) Inspecting, licensing, approving, mitigating, warning, abating, or failing to so act regarding compliance with or the violation of any law, rule, regulation, or any condition affecting health or safety.
   (2) Enforcing, monitoring, or failing to enforce or monitor conditions of sentencing, parole, probation, or juvenile supervision.
   (3) Providing or failing to provide law enforcement services in the ordinary course of a state's law enforcement operations.

g. "Public duty" does not include action of the state or a state employee under circumstances in which a special relationship can be established between the state and the injured party. A special relationship is demonstrated if all of the following elements exist:
   (1) Direct contact between the state and the injured party.
   (2) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who allegedly was injured.
   (3) Knowledge on the part of the state that inaction of the state could lead to harm.
   (4) The injured party's justifiable reliance on the state's affirmative undertaking, occurrence of the injury while the injured party was under the direct control of the state, or the state action increases the risk of harm.

h. A claim resulting from the assessment and collection of taxes.

i. A claim resulting from snow or ice conditions, water, or debris on a highway or on a public sidewalk that does not abut a state-owned building or parking lot, except when the condition is affirmatively caused by the negligent act of a state employee.

j. A claim resulting from any injury caused by a wild animal in its natural state.

k. A claim resulting from the condition of unimproved real property owned or leased by the state.

l. A claim resulting from the loss of benefits or compensation due under a program of public assistance.

m. A claim resulting from the reasonable care and treatment, or lack of care and treatment, of a person at a state institution where reasonable use of available appropriations has been made to provide care.

n. A claim resulting from damage to the property of a patient or inmate of a state institution.

o. A claim resulting from any injury to a resident or an inmate of a state institution if the injury is caused by another resident or inmate of that institution.

p. A claim resulting from environmental contamination, except to the extent that federal environmental law permits the claim.

q. A claim resulting from a natural disaster, an act of God, a military action, or an act or omission taken as part of a disaster relief effort.
r. A claim for damage to property owned by the state.
s. A claim for liability assumed under contract, except this exclusion does not apply to liability arising from a state employee's operation of a rental vehicle if the loss is not covered by the state employee's personal insurance or by the vehicle rental company.

4. An action brought under this chapter must be commenced within the period provided in section 28-01-22.1.
5. This chapter does not create or allow any claim that does not exist at common law or has not otherwise been created by law as of April 22, 1995.

32-12.2-03. State to be named in action - Personal liability and defense of employees - Indemnification of claims and final judgments.

1. An action for an injury proximately caused by the alleged negligence, wrongful act, or omission of a state employee occurring within the scope of the employee's employment must be brought against the state.
2. A state employee is not personally liable for money damages for an injury when the injury is proximately caused by the negligence, wrongful act, or omission of the employee acting within the scope of employment.
3. A state employee may not be held liable in the employee's personal capacity for acts or omissions of the employee occurring within the scope of the employee's employment. A state employee may be personally liable for money damages for an injury when the injury is proximately caused by the negligence, wrongful act, or omission of the employee acting outside the scope of the employee's employment. The plaintiff in such an action bears the burden of proof to show by clear and convincing evidence that the employee was acting outside the scope of the employee's employment. The extent to which an employee may be personally liable under this section and whether the employee was acting within the scope of employment must be specifically stated in a final judgment.
4. Except for claims or judgments for punitive damages, the state shall indemnify and save harmless a state employee for any claim, whether groundless or not, and final judgment for any act or omission occurring within the scope of employment of the employee if the employee provides complete disclosure and cooperation in the defense of the claim or demand and if the employee has given written notice of the claim or demand to the head of the state entity that employs the state employee and to the attorney general within ten days after being served with a summons, complaint, or other legal pleading asserting that claim or demand against the state employee.
5. A judgment in a claim against the state is a complete bar to any claim by the claimant, resulting from the same injury, against the employee whose act or omission gave rise to the claim.
6. The state shall defend any state employee in connection with any civil claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring within the scope of the employee's employment if the employee provides complete disclosure and cooperation in the defense of the claim or demand and if the employee requests such defense in writing within ten days after being served with a summons, complaint, or other legal pleading asserting a cause of action against the state employee arising out of a civil claim or demand. The request for defense must be in writing and provided to the head of the state entity that employs the state employee and the attorney general. The head of the state entity that employs the state employee shall advise the attorney general as to whether that person deems the employee's actions that are the subject of the action to have been within the scope of the employee's employment. The determination of whether a state employee was acting within the scope of employment must be made by the attorney general. If the attorney general determines that the employee was acting within the scope of the employee's employment, the state shall provide the employee with a defense by or under the

control of the attorney general or the attorney general's appointee. This section is not a waiver, limitation, or modification of any immunity or other defenses of the state or any of its employees, nor does it create any causes of action against the state or any of its employees.

7. For any claim brought under this chapter, a state employee may choose to hire the employee's own separate defense counsel to represent the state employee in the litigation. If the state employee chooses to hire separate defense counsel, subsections 4 and 6 do not apply to the state employee in that litigation and the state will not indemnify, save harmless, or defend the state employee nor pay for the state employee's defense or any judgment against the state employee.

32-12.2-04. Notice required - Payment of claims.

1. a. A person bringing a claim against the state or a state employee for an injury shall present to the director of the office of management and budget within one hundred eighty days after the alleged injury is discovered or reasonably should have been discovered a written notice of the alleged claim stating the time, place, and circumstances of the claim, the names of any state employees known to be involved, and the amount of compensation or other relief demanded.
   b. If the claim is one for serious injury, notice must be presented to the director of the office of management and budget within one year after the alleged serious injury is discovered or reasonably should have been discovered. For purposes of this section, "serious injury" has the meaning as provided in section 26.1-41-01.
   c. The time for giving the notice does not include the time during which a person injured is incapacitated by the injury from giving the notice.
   d. The time for giving the notice is waived for a claim for relief that resulted from sexual assault, sexual abuse, gross sexual imposition, or any other claim based on a sexual act or sexual contact as defined in chapter 12.1-20.
2. After receipt of notice of a claim, the director of the office of management and budget shall, in a timely manner, notify the head of the state entity involved, the attorney general, and any insurer or self-insurance pool providing coverage for that state entity. For claims over ten thousand dollars, the director, in consultation with the head of the state entity involved and the attorney general, may settle claims covered by the state risk management fund if the claim is made in writing and settlement is approved by the attorney general. The director of the office of management and budget may independently settle any claim covered by the state risk management fund if the claim is made in writing and the settlement is for not more than ten thousand dollars.
3. A claim shall be paid out of the risk management fund unless that claim is covered by insurance or participation in a government self-insurance pool. All necessary loss adjustment expenses must be included as a component of the claim and be paid out of the fund. Loss adjustment expenses include investigation costs and attorney's fees associated with a claim.
4. The acceptance by the claimant of a settlement is final and conclusive on the claimant and constitutes a complete release of any claim against the state and the state employee whose act or omission gave rise to the claim.
5. A person bringing a legal action against the state or a state employee for a claim shall deliver a copy of the summons, complaint, or other legal pleading in which the claim is first asserted in the action to the director of the office of management and budget at the time the summons, complaint, or other legal pleading is served in the action. This provision is in addition to any applicable rule of civil procedure.

32-12.2-05. Arbitration of claims.

The director of the office of management and budget, in consultation with the head of the state entity involved and the attorney general, may agree to submit a claim covered by the state risk management fund to mediation or binding arbitration. If a claim is submitted to arbitration, the arbitrator must apply the limitations on liability imposed under this chapter in deciding the claim.

32-12.2-06. Liability insurance - Reinsurance.

Upon approval of the director of the office of management and budget, an entity of the state may participate in a government self-insurance pool or may purchase insurance against liability of the entity and its employees for damages resulting from claims under this chapter. The director shall limit participation in government self-insurance pools and, except as provided in this section, the purchase of insurance to exposures determined to cause an excessive financial risk to the state risk management fund, including exposures reasonably expected to deplete the fund and have a significant detrimental impact on the state's budget. The director shall develop a state self-retention program that provides as much coverage as possible of potential liability recognized by this chapter, but that includes insurance purchases in a manner that is determined appropriate by the director in consultation with the state risk manager. The insurance may be provided by an insurance company authorized to do business in this state which the insurance commissioner has determined to be responsible and financially sound, considering the extent of the coverage required, or coverage may be provided by a government self-insurance pool. If a premium savings will result and the director of the office of management and budget approves, the insurance policy or memorandum of coverage may be in force from one through three years from the date of issue. The director may procure an excess loss reinsurance contract for the state.

32-12.2-07. Risk management fund - Appropriation.

1. The director of the office of management and budget shall implement and administer a program of self-retention against liability for the state through the establishment of a risk management fund. Each entity of the state shall participate in the program by contributing the appropriate share of its costs as determined by the director.
2. The state risk management fund is a special fund in the state treasury administered by the director of the office of management and budget. The fund is a revolving fund consisting of contributions from participating state entities, all payments received by the fund from its activities, and other appropriations by the legislative assembly. The state investment board shall invest the fund in accordance with chapter 21-10. Funds received as contributions from state entities, all other payments deposited in the fund, and interest and income received on investments are hereby appropriated on a continuing basis for the purposes of the fund. Section 54-44.1-11 does not apply to the fund.
3. The director of the office of management and budget shall:
    a. Review the state's exposure to various types of potential risks in consultation with affected state entities and advise state entities as to the reduction of risk and fiscal management of those losses.
    b. Be responsible for statewide risk management coordination, evaluation of funding and insuring alternatives, and the approval of all liability insurance purchases or government self-insurance pool participation in consultation with affected state entities.
    c. Identify methods to eliminate redundant efforts in the management of state risk management and insurance programs.
    d. Administer the state risk management fund or contract for a third-party administrator.
4. The director of the office of management and budget may request bids from insurance carriers or government self-insurance pools or negotiate with insurance carriers and government self-insurance pools and may enter into contracts of insurance with carriers or memorandums of coverage with government self-insurance pools that are best qualified to underwrite and service insurance or coverage programs for the state through the risk management fund.

32-12.2-08. Duties of director of the office of management and budget.

The director of the office of management and budget is responsible for determining the specifications for liability insurance or coverage for the state. The director shall require an insurance company or government self-insurance pool providing coverage for the state to

guarantee that its policy or memorandum of coverage provides minimum coverages pursuant to required specifications and is primary coverage to any coverage under the risk management fund.

32-12.2-09. Insurance no waiver of immunity.

No purchase of insurance or participation in a government self-insurance pool or self-retention fund by the state may be construed as a waiver of any immunity to suit.

32-12.2-10. Eleventh Amendment immunity preserved.

This chapter does not waive the state's immunity under the Eleventh Amendment to the United States Constitution in any manner, and this chapter may not be construed to abrogate that immunity.

32-12.2-11. Certain records relating to claims against the state or state employees privileged and exempt from open records law.

1. The following records in the possession of the office of management and budget or a public entity are privileged and exempt and are not subject to section 44-04-18 or section 6 of article XI of the Constitution of North Dakota:
   a. Records containing information relating to that portion of the funds or liability reserves of the risk management fund established for the purpose of satisfying a specific pending or reasonably predictable claim against the state or a state employee; and
   b. Incident reports, investigation reports, or other risk management fund records of a pending or reasonably predictable claim against the state or a state employee.
2. The office of management and budget shall make available for public disclosure records identified in subsection 1 when disclosure of the record will not prejudice any outstanding claim or reasonably predictable claim against the state or a state employee, all civil litigation or adversarial administrative proceedings, including the exhaustion of all appellate remedies, have been completed, and, in the case of reasonably predictable claims, the applicable statute of limitations has expired.
3. Any party to an action against the state or a state employee acting within the scope of employment as defined in this chapter shall comply with applicable rules of civil procedure when requesting documents or other information in the possession or control of the state.

32-12.2-12. State agency loss control committee records and meetings privileged and exempt from open records and open meetings law.

The records of any state agency loss control committee addressing any pending or reasonably predictable claim are exempt from section 44-04-18 and are not open records under section 6 of article XI of the Constitution of North Dakota unless the director of the office of management and budget determines disclosure will not prejudice any pending or reasonably predictable claim and the meetings of any loss control committee of a governing body are not public meetings subject to section 44-04-19 and section 5 of article XI of the Constitution of North Dakota. The records and communications at meetings of the committee regarding any pending or reasonably predictable claim are privileged and are not subject to subpoena or discovery or introduction into evidence in any civil action. The records of the committee include all information, data, reports, or records created by or made available to the committee. Any information, data, report, or record otherwise available from original sources is not confidential or immune from discovery or use in any civil action merely because it was presented or considered during the proceedings of the committee. A person who testified before the committee or who is a member of the committee may testify as to matters within that person's knowledge but may not be asked about the records of, the testimony before, or the discussions of the committee. This section does not relieve any person of any liability incurred as a result of actions reviewed by the committee.

32-12.2-13. Contract between the state and a political subdivision.

A contract between the state and a political subdivision may not contain a provision that requires one party to assume the liability of the other or the liability of a third party or to bear the costs of defense of actions against the other or against a third party.

32-12.2-14. Risk management motor vehicle crash review.

The department of transportation, in consultation with the risk management division, shall review all motor vehicle crashes or incidents in which a state employee is issued a traffic citation involving a state-owned or state-leased motor vehicle for purposes of making a remedial recommendation to the agency employing the individual involved, as appropriate, and identifying crash and other trends. The department may defer to the determination and recommendation of an agency that reviewed the crash through an established loss control committee. In cases of repeated crashes, citations, or accidents involving substantial property damage or personal injury, or traffic violations for which there is a criminal penalty, the department may revoke, suspend, or restrict the ability to drive a state-owned or state-leased vehicle.

32-12.2-15. Contracts limiting liability to the state.

1. Notwithstanding any provision in this chapter to the contrary, an agency may agree to limit the liability of a contractor to the state if the agency determines such services or products cannot be effectively obtained without such limitation and the limitation does not pose any significant risk of loss to the state and is in the best interests of the state. The agency, in consultation with the office of management and budget and the attorney general's office, shall prepare a written documentation before agreeing to any liability limitation. An agency's authority to agree to a limitation of liability is limited to contracts for the purchase or lease of, or services related to, software, communication, electronic equipment, and economic forecasting.
2. An agency may limit its ability to recover indirect consequential damages.
3. If the extent of potential direct loss is unknown, an agency may agree to limit direct damages to a reasonably estimated amount commensurate with the foreseeable risk of loss to the state. The amount must be equal to twice the total value of the contract, unless all parties to the contract agree to an alternative amount. Any agreed upon amount that is less than twice the value of the contract must be approved by the director of the office of management and budget. The liquidated damages and retainage provisions for delay, missed deadlines, and other breaches are not subject to a general limitation on direct or indirect damages authorized under this section.
4. A contract under this section may not limit any loss to the state resulting from fraud or other intentional or willful misconduct, breach of confidentiality obligations, or loss resulting from tangible property damage or personal injury.
5. An agency may purchase routine or standardized products that contain adhesive contract terms in shrink wrap documents, third-party end user license, or click-through agreements that are not consistent with this section if the agency, in consultation with the attorney general's office and the office of management and budget, determines the purchase poses no reasonable risk that an improper contractual obligation will be imposed against the agency or of loss that cannot be limited under this section given the nature of the product's intended use, including data and system security. Routine or standardized products are products that are commercially available to the public which do not exceed twenty thousand dollars in cost.

32-12.2-16. Ratifying contracts limiting liability to the state.

Any employee or official of an agency who enters a contract requiring the agency to limit the liability of the contracting party without first consulting with the office of management and budget and the attorney general's office will be deemed to be acting within the scope of the employee's or official's employment provided the contract is approved or ratified by the attorney general and

the director of the office of management and budget and otherwise meets the conditions contained in section 32-12.2-15.

32-12.2-17. Indemnification and insurance requirements in state contracts.

1. The director of the office of management and budget shall establish guidelines for indemnification and insurance provisions in contracts that may be entered by an executive branch state agency. The director shall consult with representatives of executive branch state agencies, the insurance industry, and the business community to establish and revise the guidelines and provisions. The guidelines must establish procedures for determining the appropriate indemnification and insurance provisions in contracts.
2. If a contract for services requires a provision for indemnification, the contract must require the contractor to indemnify the state and its agencies, officers, and employees for vicarious liability, but may not require indemnification for the contributory negligence, comparative degree of fault, sole negligence, or intentional misconduct of the state or its agencies, officers, and employees, unless the director of the office of management and budget or the director's designee determines a more stringent indemnification provision is appropriate. If indemnification is required, the contract must require that the state be endorsed on the contractor's commercial general liability policy as an additional insured or must require an equivalent form of protection for the state.
3. This section does not apply to a contract between an executive branch state agency and another person that is the owner of private property that is being used to accommodate a state construction project.
4. The failure of the state to comply with subsection 2 does not void any part of a contract.

32-12.2-18. Student required driving in educational programs.

Upon request by any state institution of higher education, the office of management and budget, through the risk management fund, shall provide a defense and administer claims against students arising from the operation of a vehicle owned or leased by the state the operation of which is a required part of an established course of study. Liability shall be limited to the required amounts of financial responsibility contained in section 39-16.1-02. Nothing in this chapter makes the state responsible for the actions of the student or requires indemnification for any loss beyond the limits provided in this section, nor provides any benefits to the student except those minimum levels undertaken in a program of self-insurance filed under section 26.1-41-05.

32-12.2-19. Data breach response and remediation costs.

The director of the office of management and budget may pay from the risk management fund costs necessary for notification and remediation following a data breach involving a state entity. The director of the office of management and budget, in consultation with the information technology department and the state entity involved, shall determine what measures are to be taken under this section. Expenditures under this section are limited to two hundred fifty thousand dollars per incident and may be made only to the extent the risk management fund can continue to meet current and future liability obligations and the response and remediation costs are not covered through insurance. The director may purchase insurance and approve the purchase of insurance by state entities to cover data breach response and remediation costs. Each state entity shall contribute the appropriate share of its costs under this section as determined by the director.