

LIABILITY COVERAGE LIMITS

Political subdivisions are liable to pay money damages for injuries proximately caused by their employees under circumstances where the political subdivision, if a private person, would be liable to an injured person. "Injury" means personal injury, death, or property damage.

Liability for injury is limited to \$250,000 per person and \$500,000 for injury to three or more persons (represented as \$250,000/\$500,000). This is the dollar maximum that can be assessed against a political subdivision for any single occurrence or accident.

This raises a question - if the limits for these types of injuries are subject to the \$250,000/\$500,000 tort cap, why does the NDIRF make available the option of either \$1,000,000 or \$2,000,000 liability coverage limits for all of our members?

While all NDIRF member entities are domiciled in North Dakota, their employees and officers frequently travel and conduct business in other states. If an accident occurs in a state other than North Dakota, they may be subject to that state's jurisdiction and therefore the foreign state's laws. As an example, if there is an auto accident in Minnesota involving a vehicle owned by a North Dakota political subdivision and operated by its employee, the North Dakota tort cap of \$250,000/\$500,000 will likely not apply. Minnesota's laws would be controlling and they may not have a cap to protect liability above \$250,000/\$500,000. Accordingly, in this situation, the NDIRF member needs higher limits.

State claims can also be asserted under the North Dakota Human Rights Act or the North Dakota State Constitution. Causes of action under these laws vary but they are typically based on such issues as equal protection, discrimination,

retaliation or sexual harassment. Damages may be statutorily or otherwise limited but, in certain circumstances, payments owed could exceed the tort cap. In a few situations, when claims are made under these laws, the issue of whether the \$250,000/\$500,000 tort cap applies has not been addressed by the North Dakota Supreme Court. The NDIRF will take the position, when defending these claims, the tort cap applies but it cannot be predicted how the Supreme Court would rule on a specific case.

Many lawsuits are premised on federal, not state law. Examples include constitutional claims based on free speech, illegal search, etc. or federal statutory claims regarding the Americans

Continued on Page 2

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**INSIDE ...
Disciplinary Memos
Independent Contractor
Financial Insight**

continued from cover

with Disabilities Act (ADA), the Civil Rights Act, “Section 1983” and numerous others. These types of claims are not protected by the North Dakota state law tort cap for political subdivisions.

Another reason to provide higher limits is the possibility that the tort cap could be declared unconstitutional. While we believe this to be unlikely, if it were to happen the political subdivision would be covered for losses in excess of \$250,000/\$500,000 up to the limit of liability

provided by their NDIRF coverage.

In summary, the North Dakota injury tort cap of \$250,000/\$500,000 does not pertain to all of the claims made against NDIRF members. The NDIRF, on behalf of its members, will argue the tort cap limit when it is appropriate. However, the reality is that many claims are simply not protected by the tort cap law. It therefore makes good financial sense to cover the political subdivision and its employees with higher limits. ■

RISK SERVICES

INDEPENDENT CONTRACTOR or EMPLOYEE

*The courts have considered many facts in deciding whether a worker is an **independent contractor** or an **employee**. These relevant facts fall into three main categories: behavioral control; financial control; and relationship of the parties. In each case, it is very important to consider all the facts – no single one provides the answer. Carefully review the following definitions.*

Behavioral Control

These facts show whether there is a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. The business does not have to actually direct or control the way the work is done – as long as the employer has the right to direct and control the work. For example:

- **Instructions** – if you receive extensive instructions on how work is to be done, this suggests that you are an **employee**. Instructions can cover a wide range of topics, for example:
 - ◆ how, when, or where to do the work
 - ◆ what assistants to hire to help with the work
 - ◆ what tools or equipment to use
 - ◆ where to purchase supplies and services

If you receive less extensive instructions about what should be done, but not how it should be done, you may be an **independent contractor**. For instance, instructions about time and place may be less important than directions of how the work is performed.

- **Training** – if the business provides you with training about required procedures and methods, this indicates that the business wants the work done in a certain way, and this suggests that you may be an **employee**.

Financial Control

These facts show whether there is a right to direct or control the business part of the work. For example:

- **Significant Investment** – if you have a significant investment in your work, you may be an **independent contractor**. While there is no precise dollar test, the investment must have substance. However, a significant investment is not necessary to be an **independent contractor**.
- **Expenses** – if you are not reimbursed for some or all business expenses, then you may be an **independent contractor**, especially if your unreimbursed business expenses are high.
- **Opportunity for Profit or Loss** – if you can realize a profit or incur a loss, this suggests that you are in business for yourself and that you may be an **independent contractor**.

Continued on Page 3

continued from Page 2

Relationship of the Parties

These are facts that illustrate how the business and the worker perceive their relationship. For example:

- **Employee Benefits** – if you receive benefits, such as insurance, pension, or paid leave, this is an indication that you may be an **employee**. If you do not receive benefits, however, you could be either an **employee** or an **independent contractor**.
- **Written Contract** – a written contract may show what both you and the business intend. This may be very significant if it is difficult, or perhaps impossible, to determine status based on other facts.

When You Are an Employee

- Your employer must withhold income tax and your portion of social security and Medicare taxes. Also, your employer is responsible for paying social security, Medicare, and unemployment taxes on your wages. Your employer must give you a Form W-2, Wage and Tax Statement, showing the amount of taxes withheld from your pay.
- You may deduct unreimbursed employee business expenses on Schedule A of your income tax return, but only if you itemize deductions and they total more than two percent of your adjusted gross income.

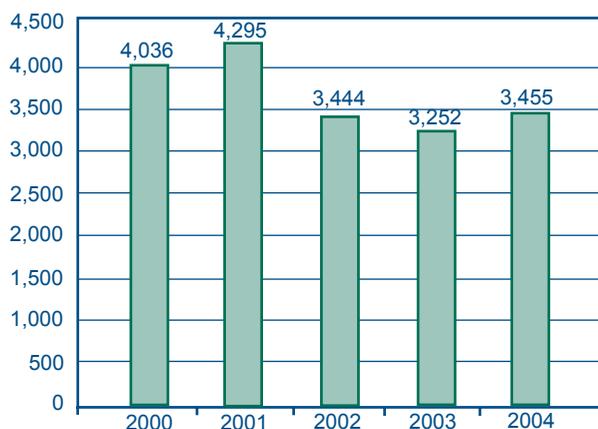
When You Are an Independent Contractor

- The business may be required to give you Form 1099-MISC, Miscellaneous Income, to report what it has paid you.
- You are responsible for paying your own income tax and self-employment tax (Self-Employment Contributions Act – SECA). The business does not withhold taxes from your pay. You may need to make estimated tax payments during the year to cover your tax liabilities.
- You may deduct business expenses on Schedule C of your income tax return. ■

From Internal Revenue Service Publication 1779 (Rev. 5-03)

FINANCIAL INSIGHTS

LOSSES PAID (in thousands)



This graph represents losses paid by NDIRF over the past 5 years, including payments made to adjusters and attorneys assisting in the claims settlement process. Since its inception in 1986, NDIRF has paid losses totaling more than \$50 million. ■

FROM THE CEO

The biennial celebration of citizen government that is the North Dakota legislative session is now in full swing and I'd like to take this opportunity to advise NDIRF members of a bill we favor and are following closely this session.

As many of you may be aware, the North Dakota Supreme Court declined to apply a common law doctrine called the "public duty rule" in a case decided in June 2004. Previously, it had been assumed that this doctrine, which provides a safe harbor for certain governmental activities conducted for the benefit of the public at large, was the rule in North Dakota.

The Court, in its opinion, invited the state legislature to address this matter. Senate Bill No. 2265, introduced this legislative session, does just that. It would add sections to the political subdivision and state tort claims acts identifying activities which, by their nature of being performed for the benefit of the general public rather than specific persons, are entitled to immunity. Your support of Senate Bill No. 2265 would be valuable and appreciated. ■

'JUST THE FACTS, MA'AM': DOCUMENTING FOR JUDGE AND JURY, PART I

This is part 1 of a 3-part series that provides information on how to make a disciplinary memorandum that effectively conveys your message in a way that won't come back to haunt you in court.

Avoid extraneous information

Disciplinary memos are no place for extraneous comments like:

- ◆ "I thought we were friends before this happened."
- ◆ "I know you think this discipline is probably because you're black/disabled/female/Muslim."
- ◆ "Perhaps Joe could benefit from psychotherapy to deal with his uncontrolled anger issues."
- ◆ "It seems like Joe's behavior is just one more piece of evidence."

Avoid statements that establish or suggest a commitment that you will inevitably fail to live up to. For example, don't make commitments like:

- "If there are no additional violations of this type by December 31, this discipline will be null and void." (The employee will inevitably reoffend on January 5.)
- "I intend to meet with Joe every Monday during the next six months to see how he is progressing." (You won't.)
- "I intend to do everything possible to make this situation work so Sally will succeed in her new role." (You can't.) ■

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Mark Your CALENDAR

February 2005

- 17: NDIRF Board of Directors Meeting
NDIRF offices, Bismarck

April 2005

- 26: ND League of Cities Regional Meetings,
SW Region, Elgin
- 27: NW Region, New Town
- 28: NC Region, Velva

May 2005

- 03: NE Region, Park River
- 04: SE Region, Lisbon
- 05: SC Region, Wishek
- 11: NDIRF Annual Meeting
Ramkota Inn, Bismarck
- 11: NDIRF Board of Directors Meeting
NDIRF offices, Bismarck

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