

Tillotson Program

Course and Scope

May 2018

Course and Scope

- Merriam-Webster's definition: the range of conduct and activity within which an employee can reasonably be considered to be carrying out the business of his or her employer
- Implications for Course and Scope Considerations
 - Possible Liability for Municipal Employer
 - Possible Impacts to Coverage
 - This is for Defense and Indemnity in non-criminal manners, but does not directly apply to Workers Compensation.

Doctrine of Respondeat Superior

- Doctrine holds that employer is vicariously liable for an employee's acts or omissions within the course and scope of employment. Maguire v. State (Mont. 1992).
- In Montana common law does not apply when law is declared by statute. State v. Berdahl (Mont. 2017)
- For governmental entities the common does not apply for course and scope obligations as the duties have been codified in Mont. Code Ann. § 2-9-305.

Course and Scope

Mont. Code Ann. § 2-9-305

- (1) It is the purpose of this section to provide for the immunization, defense, and indemnification of public officers and employees civilly **sued for their actions taken within the course and scope of their employment.**
- (2) In any noncriminal action brought against any employee of a state, county, city, town, or other governmental entity for a negligent act, error, or omission, including alleged violations of civil rights pursuant to 42 U.S.C. 1983, or other actionable conduct of the employee **committed while acting within the course and scope of the employee's office or employment,** the governmental entity employer, except as provided in subsection (6), shall defend the action on behalf of the employee and indemnify the employee.
- . . .
- (4) In any noncriminal action in which a governmental entity employee is a party defendant, the employee must be indemnified by the employer for any money judgments or legal expenses, including attorney fees either incurred by the employee or awarded to the claimant, or both, to which the employee may be subject as a result of the suit unless the employee's conduct falls within the exclusions provided in subsection (6).
- (5) Recovery against a governmental entity under the provisions of parts 1 through 3 of this chapter constitutes a complete bar to any action or recovery of damages by the claimant, by reason of the same subject matter, against the employee whose negligence or wrongful act, error, omission, or other actionable conduct gave rise to the claim. In an action against a governmental entity, the employee whose conduct gave rise to the suit is immune from liability by reasons of the same subject matter if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of the employee's employment, unless the claim constitutes an exclusion provided in subsections (6)(b) through (6)(d).

Mont. Code Ann. § 2-9-305

(continued)

- (6) In a noncriminal action in which a governmental entity employee is a party defendant, the employee may not be defended or indemnified by the employer for any money judgments or legal expenses, including attorney fees, to which the employee may be subject as a result of the suit if a judicial determination is made that:
 - (a) the conduct upon which the claim is based constitutes oppression, fraud, or malice or for any other reason does not arise out of the course and scope of the employee's employment;
 - (b) the conduct of the employee constitutes a criminal offense as defined in Title 45, chapters 4 through 7;
 - (c) the employee compromised or settled the claim without the consent of the governmental entity employer; or
 - (d) the employee failed or refused to cooperate reasonably in the defense of the case.

- (7) If a judicial determination has not been made applying the exclusions provided in subsection (6), the governmental entity employer may determine whether those exclusions apply. However, if there is a dispute as to whether the exclusions of subsection (6) apply and the governmental entity employer concludes that it should clarify its obligation to the employee arising under this section by commencing a declaratory judgment action or other legal action, the employer is obligated to provide a defense or assume the cost of the defense of the employee until a final judgment is rendered in that action holding that the employer did not have an obligation to defend the employee. The governmental entity employer does not have an obligation to provide a defense to the employee in a declaratory judgment action or other legal action brought against the employee by the employer under this subsection.

Course and Scope

- Entity's involvement and determination is important.
- “The statute states, unambiguously and repeatedly, . . . , that defense and indemnification of a government employee will not be provided if any of the exclusions in subsection (6) of the statute apply” STATE OF MONTANA, et al., v. CHARLENE A. BERDAHL, 2017 MT 26.
- A city or town has the discretion under the statute to either make the determination themselves and stand by and wait for another party to challenge it, or to pursue a declaratory judgment action. Id.

Course and Scope Implications

- Depending on facts of a given case if a City or Town does not make a course and scope determination they could be forced to indemnify/defend an employee, even though MMIA coverage may not be available (i.e. intentional act, willful violation of the law, etc.)
- Course and Scope is a lynch pin of coverage under the MMIA's Memorandum
 - Acting within course and scope of duties or employment under the statute is required in order to be a Covered Party under the Memorandum

Factors to Determine Course and Scope

- Is conduct commonly done by the employer's employees,
- Does employer have reason to expect the act would be done, and
- The extent and departure from the normal methods of accomplishing an authorized employment result. *Kornec v. Mike Horse Mining & Milling Co. (1947)*.
- Under the statute, even if within course and scope an employee cannot be indemnified if the conduct is a criminal offense;

- Examples:

- *Maquire v. State* (Mont. 1992) – Clear rape was outside scope of employment;
- *Gambling v. Cornish* (N.D. Ill. 1977) – Sexual assault by police officers is too outrageous to be considered expectable, and motivated by personal interests);
- *J.H v. West Valley City* (Utah 1992) – Sexual assault of a youth who was an adviser to a youth program was not conduct of a general kind and nature like the conduct for which he was employed.

Things to Consider

- Ensure Job Descriptions are Accurate
- Representational Issues
 - Evaluate whether Entity can and will make the determination under the statute about course and scope
 - Impact on liability exposure/case strategy?
 - Impact on other employees?
 - If too close to make a determination must provide a defense until course and scope is determined:
 - If course and scope is an issue must be careful in representation, i.e. who is the client? IN RE: the Rules of Professional Conduct considerations;
- Punitive Damage Issues: Governmental Entity is immune, but if course and scope not addressed and punitive damages are awarded against individual how does statutory obligation to indemnify employee play out?
- What if an employer and employee don't agree on whether its within course and scope? Does that change if employer was not aware of the activity?

Questions