



DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

FEB 13 2023

MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP
COMMANDERS OF THE COMBATANT COMMANDS
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Additional Protections for Department of Defense Personnel against Personal Liability for Performing Their Official Duties

Our civilian and military personnel perform important work in support of the national defense. The Department's ability to carry out its functions depends on the willingness of our personnel to make decisions and take actions that are consistent with their official duties but may nevertheless expose them to personal civil or criminal liability. Uncertainty regarding the potential for personal liability claims resulting in substantial attorney fees, monetary judgments, state criminal prosecutions, participation in congressional or Department of Justice special counsel proceedings, Office of Special Counsel proceedings, professional licensure actions, or claims of violation of state ethical or professional responsibility rules may have a chilling effect by intimidating personnel, stifling creativity and initiative, and limiting decisive action. Consequently, the threat of personal liability for a decision made or action taken as part of one's official duties can adversely affect the Department's achievement of its mission.

Many Federal agencies provide certain protections to their employees to mitigate these risks, and the Department of Defense and the Military Departments and Services already offer such protections to our personnel under most circumstances. In order to provide DoD personnel additional support not already covered by existing policies, I am directing that Department policy will be as follows, effective immediately:

- (a) **Indemnification.** Upon request, the Department of the Defense may indemnify, in whole or in part, a Department civilian employee or Service member (which for purposes of this policy shall include a civilian employee or Service member currently serving, including activated Reservists, or who has previously served in any DoD Component, and shall not include contractors) for any verdict, judgment, or other monetary award rendered against such individual, provided the Secretary or his or her designee determines that:
 - (1) the conduct giving rise to such verdict, judgment, or award was within the scope of the individual's employment/official duties; and
 - (2) such indemnification is in the interest of the Department of Defense.
- (b) **Settlement.** Upon request, the Department of Defense may pay for all or part of the settlement or compromise of a claim against a Department civilian employee or Service member at any time, provided the Secretary or his or her designee determines that:



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- (1) the alleged conduct giving rise to the claim was within the scope of the individual's employment/official duties; and
- (2) such settlement or compromise is in the interest of the Department of Defense.

Absent exceptional circumstances, as determined by the Secretary or his or her designee, the Department will not entertain a request to indemnify or to pay for settlement of a claim before entry of an adverse judgment, verdict, or other determination.

- (c) **Notification Requirements.** If a Department civilian employee or Service member wishes to request indemnification after becoming aware that he or she has been named as a party in a proceeding in his or her individual capacity as a result of conduct such individual reasonably believes was within the scope of his or her employment/official duties:

- (1) A currently employed civilian or active duty Service member shall immediately notify his or her supervisor that such an action has been initiated or is pending. The supervisor shall promptly thereafter notify the chief legal officer of the individual's DoD Component and the Department of Defense Office of General Counsel (DoD OGC).
- (2) A currently employed civilian or active duty Service member shall immediately apprise the chief legal officer of his or her DoD Component, as well as DoD OGC, of any offer to settle the proceeding.
- (3) A former civilian employee or separated/retired Service member must directly notify DoD OGC of the initiation of such a proceeding and of any offer to settle the proceeding.
- (4) For either a current or a former employee or Service member, the individual shall provide information to DoD OGC sufficient for the Department to determine whether the individual's actions fall within the scope of employment/official duties, whether a remedy against the United States is provided by law and is exclusive of any other civil action or proceeding for money by reason of the same subject matter against the individual whose act or omission gave rise to the claim, and whether indemnification is in the interest of the Department of Defense.

- (d) **Legal Representation.** The Department of Justice may represent a civilian employee or Service member or, if Department of Justice counsel is unavailable, provide private counsel or reimburse a civilian employee's or Service member's private counsel expenses, in civil, criminal, professional licensure, and congressional proceedings, in accordance with 28 CFR §§ 50.15-50.16. In addition, in the

following circumstances a Department civilian employee or Service member may request, pursuant to paragraphs (d) and (e), that the Department of Defense provide reimbursement for the cost of legal representation by private counsel in a proceeding related to the performance of the individual's scope of employment/official duties, including congressional requests for information or testimony or other Federal or state government or professional organization proceedings.

- (1) Reimbursement by DoD for Representation in Litigation. Reimbursement for representation in Federal or state court litigation, civil or criminal, implicates the authority of the Attorney General and is generally governed by 28 CFR §§ 50.15-50.16. In unusual cases when representation by the Department of Justice or reimbursement for private counsel by the Department of Justice is unavailable, the Department of Defense may provide reimbursement under this paragraph for representation in Federal or state court litigation with the approvals in paragraph (e) and the additional approval of the Attorney General or his designee, who will determine whether reimbursement is in the interest of the United States.
- (2) Reimbursement by DoD for Representation in a Congressional or Other Non-Litigation Proceeding. With the approvals in paragraph (e), the Department of Defense may provide reimbursement under this paragraph for representation in a proceeding other than Federal or state court litigation. This may include reimbursement for representation in a congressional proceeding or an administrative proceeding.
- (3) Reimbursement by DoD for Representation in an Investigation or Prosecution by a Department of Justice Special Counsel. The Department of Defense may provide reimbursement under this paragraph for representation in an investigation or prosecution by a Department of Justice Special Counsel only when: (i) the civilian employee or Service member is a witness and not a subject or target of the investigation or prosecution, and (ii) the DoD General Counsel and the Attorney General or his designee determines that reimbursement is in the interest of the United States and personally approves the reimbursement.
- (4) Circumstances Where Reimbursement by DoD is Unavailable. Except as provided in paragraphs (d)(1)-(3) above, the Department of Defense will not provide reimbursement under this paragraph for representation in a Federal criminal investigation or prosecution or in an investigation, audit, inspection, or other proceeding by a Federal inspector general.
- (5) Information to Include in a Request for Reimbursement. Any request to the Department of Defense for reimbursement under this paragraph shall include:
 - i. The name of and any retainer agreement with private counsel;

- ii. All process and pleadings served on the civilian employee or Service member related to the matter;
- iii. Whether the Department of Justice was asked to provide representation or reimbursement; and
- iv. Any additional information regarding the request that DoD OGC deems necessary.

(e) **Procedure for Requesting Indemnification or Reimbursement.** For indemnification, DoD reimbursement for private counsel representation under paragraph (d), or payment to satisfy a settlement proposal:

- (1) The civilian employee or Service member shall submit a written request, with documentation including copies of the verdict, judgment, award, or settlement proposal, as appropriate, as well as all required information regarding private counsel representation under paragraph (d), if applicable, to the head of his or her DoD Component, or in the case of a former civilian employee or separated/retired Service member, directly to DoD OGC.
- (2) The DoD Component head shall submit to DoD OGC, in a timely manner, the requesting individual's request and documentation, along with a recommended disposition of the request with a detailed analysis supporting such recommendation.
- (3) In considering any request for indemnification by DoD, DoD OGC shall, where appropriate, seek the views of the Department of Justice and/or the U.S. Attorney for the district encompassing the location where the action is brought.
- (4) The DoD General Counsel may designate a DoD Deputy General Counsel to approve requests up to \$75,000. Only the DoD General Counsel may approve requests in excess of \$75,000, except if the General Counsel is the individual requesting indemnification or payment in any amount, the General Counsel shall submit the request to the Secretary or his or her designee for decision.

(f) **General Provisions.**

- (1) Any payment by DoD to indemnify a Department civilian employee or Service member, to settle a claim, or to provide reimbursement for private counsel shall be for a sum certain and must be contingent upon the availability of appropriated funds of the DoD Component to which the individual is assigned.

- (2) Determinations made by the Secretary or his or her designee, or determinations made by the DoD General Counsel or his or her designee under paragraph (e)(4), under this policy shall be in that official's sole and unreviewable discretion. For determinations under this policy assigned to the Secretary, the Secretary's designee may be the Department of Defense General Counsel (except for approval of requests by the General Counsel under paragraph (e)(4)), or if another individual, shall be no less senior than an Under Secretary of Defense or official of equivalent seniority.
- (3) Department civilian employees and Service members should follow any applicable policies of their DoD Component. This policy applies only in circumstances not otherwise covered by applicable policies of a DoD Component and supplements but does not supersede current rules, regulations, and policies governing requests for personal-capacity representation and indemnification.
- (4) This policy supplements but does not supersede the provisions of the Federal Tort Claims Act (28 U.S.C. § 1346), Westfall Act (28 U.S.C. § 2679), Gonzalez Act (10 U.S.C. § 1089), 10 U.S.C. § 1037, 10 U.S.C. § 1054, or any other relevant legal protection.

I hereby delegate to the Department of Defense General Counsel all determinations assigned to the Secretary of Defense under this policy (except for approval of requests by the General Counsel under paragraph (e)(4)). I also direct that this policy be incorporated into future DoD Issuances as appropriate. The DoD General Counsel may issue such additional guidance as she or he considers necessary to implement this directive.

A handwritten signature in black ink, appearing to read "Robert H. Anderson". The signature is written in a cursive, somewhat stylized font.