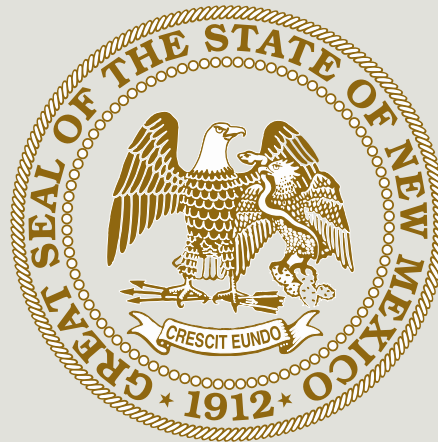


Civil Rights Commission

October 2, 2020



NEW MEXICO

GENERAL SERVICES DEPARTMENT

General Services Division / Risk Management Division

- Ken Ortiz, Cabinet Secretary, General Services Division
- Mark Tyndall, Director, Risk Management Division
- Jacob Maule, Bureau Chief, Legal Bureau
- Linda Vigil, Executive Assistant, Office of the Secretary
- Randall Cherry, General Counsel, Office of the Secretary

- HB 5, Section 1, J

“The Commission may request assistance from the legislative council service and the risk management division of the general services department.”

Civil Rights Commission Data Request

1. How many civil rights lawsuits against public employees/public entities covered by your entity have been filed each year for the past five years? If possible, please provide a breakdown of how many of these were against police officers/departments? Corrections officers/correctional facilities? School employees/schools? Other government _____ employees/entities?

FY12: 255
FY13: 248
FY14: 248
FY15: 221
FY16: 247
FY17: 275
FY18: 314
FY19: 285
FY20: 300

The breakdown by agency/entity is attached.

These claims include the following categories of civil rights claims:

- Claims brought against law enforcement officers pursuant to §41-4-12 of the Tort Claims Act
- Claims brought pursuant to 42 U.S.C. §1983 of the Federal Civil Rights Act
- Employment claims that include claims of discrimination

All claims are dated based upon the date of loss/incidence

Civil Rights Commission Data Request

2. What percentage of the lawsuits covered by your entity over the last five years have been civil rights cases?

FY12: 21%

FY13: 20%

FY14: 18%

FY15: 20%

FY16: 17%

FY17: 18%

FY18: 18%

FY19: 17%

FY20: 20%

Civil Rights Commission Data Request

3. What was the total amount of money paid out in settlements and judgments each year for civil rights cases over the last five years? If possible, please delineate how much was paid in settlement and how much in judgement.

Unfortunately, RMD data is not stored in a manner where a distinction between a judgement and settlement amounts can be queried electronically.

FY12: \$7,327,480

FY13: \$7,248,209

FY14: \$12,947,505

FY15: \$7,993,109

FY16: \$2,913,156

FY17: \$2,415,695

FY18: \$4,567,377

FY19: \$4,615,984

FY20: \$ 451,371

Note: All figures represent actual dollars paid as of September, 2020 and are subject to change as cases continue to be adjudicated over time.

Civil Rights Commission Data Request

4. How much did you pay in plaintiffs' attorneys' fees and costs for civil rights cases each year for the last five years?

RMD is unable to track what a plaintiff's attorney is paid in a majority of cases. Therefore, an assumption of 30% of settlements and judgements is provided as an approximation.

FY12: \$2,198,244
FY13: \$2,174,463
FY14: \$3,884,252
FY15: \$2,397,933
FY16: \$582,631
FY17: \$724,708
FY18: \$1,368,713
FY19: \$1,384,795
FY20: \$135,411

Note: All figures represent actual dollars paid as of September, 2020 and are subject to change as cases continue to be adjudicated over time.

Civil Rights Commission Data Request

5. How much did you pay in defense attorneys' fees and costs for each year over the last five years?

FY12: \$3,904,384
FY13: \$7,265,381
FY14: \$6,574,908
FY15: \$5,874,685
FY16: \$2,097,107
FY17: \$2,667,680
FY18: \$4,060,346
FY19: \$3,244,556
FY20: \$1,283,274

Note: All figures represent actual dollars paid as of September, 2020 and are subject to change as cases continue to be adjudicated over time.

Civil Rights Commission Data Request

6. What coverage is provided for your civil rights cases and by whom? (e.g. private insurance, self-insure, excess policies)

The following coverage is self-insured through the Risk Management Division:

COVERAGE DEFINED

A. The Public Liability Fund will pay those sums for ultimate net loss that the covered parties become legally obligated to pay as damages because of the liabilities and waivers of immunity set forth in the New Mexico Tort Claims Act, caused by an occurrence, except as otherwise excluded under Section IV, below. The duty to defend under this Certificate of Coverage extends to liabilities and waivers of immunity expressly contained in the New Mexico Tort Claims Act. The duty to defend also extends to causes of action arising under the New Mexico Fair Pay for Women Act, New Mexico Inspection of Public Records Act, New Mexico Whistleblower Protection Act, and the New Mexico Ethics Commission Act. There is no general duty to defend other claims.

B. The Director, acting on behalf of the General Services Department, Risk Management Division, through the Public Liability Fund, will have the right and the duty to defend the covered party against a claim or suit for damages covered under Section II, paragraph A, above. Such duty, however, shall cease upon final disposition of such claim or order issued by a court of competent jurisdiction.

COVERED PARTIES

A. Governmental Entities are covered parties under the Certificate of Coverage. Employees of covered Governmental Entities, acting within the scope of their duties, are covered parties. Other parties defined by NMSA Section 41-4-3 (F) as Public Employees of covered Governmental Entities are covered parties.

B. Any other entity to which the General Services Department, Risk Management Division has issued a Certificate of Coverage is also a covered party under this Certificate of Coverage.

C. Any Public Employee using an automobile owned or leased by a covered Governmental Entity or other Certificate of Coverage holder is also a covered party under this Certificate of Coverage.

Civil Rights Commission Data Request

7. Are insurance policies or certificates issued? If so, please provide sample copies. If not, please provide any other documents that set forth what is covered.

<https://www.generalservices.state.nm.us/uploads/files/RMD/PAC/FY21-Liability-Certificate-of-Coverage.pdf>

Civil Rights Commission Data Request

8. How are premiums determined and by whom?

Risk rate premium calculations are based on several factors including agency or university risk experience and exposure pursuant to the Risk Management Premium Rating Rule for Certain Risks (Rule 1.6.2). 70% of the total civil rights premium amount is allocated based on each department's percentage of claim experience (i.e., ratable losses) for the five most recent fiscal accident years. The remaining 30% is allocated based on each department's percentage of projected 2020/21 exposure (FTEs).

The actuarial firm Aon is contracted to do the actuarial reports and the rating plan annually.

Civil Rights Commission Data Request

9. Identify any actuarial consultants you have employed over the last five years and please provide any studies or reports they provided to you related to civil rights claims.

RMD has not commissioned any actuarial studies related to civil rights beyond the aforementioned premium development studies.

Civil Rights Commission Data Request

10. To the extent there is cost-sharing for civil rights lawsuits, how is the allocation determined between the governmental entity and you or your insurer?

There is no cost sharing for most civil rights lawsuits. Exception: Employment cases.

- RMD does not cover damage awards for past or future salary or wage loss.
- For verdicts, these damages are paid 100% by an agency
- For settlements, an agency is required to contribute an amount to be determined by the Director

Civil Rights Commission Data Request

11. Describe any preventative measures you have taken to with your insureds to prevent future civil rights litigation.

All state employees are required to take an online civil rights training annually. Additionally, RMD provides the following trainings through its Loss Control Bureau:

- EEOC Training
- Anti –Workplace Harassment and Sexual Harassment Training
- ADA Training
- Civil Rights Training
- Respectful Workplace Training
- Employee and Manger Diversity Training
- Unemployment Training
- Active Shooter Training
- Safety OSHA Training
- Workplace Investigations
- Manager and Supervisor Professional Development Programs
- Customized Leadership Development Programs

Curriculum for any specific training can be provide can be provided on request.

Civil Rights Commission Data Request

How many civil rights lawsuits **that included one or more claims for constitutional violations** have been filed during the last five years? **1 We are looking exclusively for cases where at least one cause of action in the lawsuit was for violation of a constitutional right.** This could be a claim brought pursuant to 42 U.S.C. § 1983. We are not seeking lawsuits involving claims brought under other types of civil rights statutes such as Title VII, the Americans with Disabilities Act, the Individuals with Disabilities Education Act, the New Mexico Human Rights Act, the New Mexico Whistleblower Protection Act, the New Mexico Fair Pay for Women Act, the New Mexico Tort Claims Act, Title IX, Title VI, or any other statute other than claims brought for constitutional violations pursuant to 42 U.S.C. § 1983 or any other type of claim for violation of the state or federal constitution.

RMD is in a very similar situation as New Mexico Counties in that we are unable to query our database in a way that specifically identifies the types of civil rights action being adjudicated. In an attempt to address the substance of the request, we will manually review a subset (10 highest dollar claims) of the data between now and our discussion on Friday and will report those results.

Top Ten

1701049-000: DPS, \$925k – Brought under § 41-4-12 & NM Constitution. Contemplated § 1983 claim, but settled prior to refiling

1800773-000: DPS, \$900k – Brought under HRA, WPA, & FATA. Specifically avoided a § 1983 claim in order to remain in State Court

1700498-000: SJC, \$445k – Brought under WPA & HRA. Contemplated § 1983 claim

1801005-000: DPS, \$400k – Contemplated § 1983 claim, but settled prior to filing

1801005-001: DPS, \$400k – Contemplated § 1983 claim, but settled prior to filing

1801005-002: DPS, \$400k – Contemplated § 1983 claim, but settled prior to filing

1900253-000: CYFD, \$2.4M – § 504 Rehabilitation Act, ADA, 14TH Amendment, & 42 U.S.C. § 1396 *(All federal causes of action, but not normally contemplated as civil rights.)

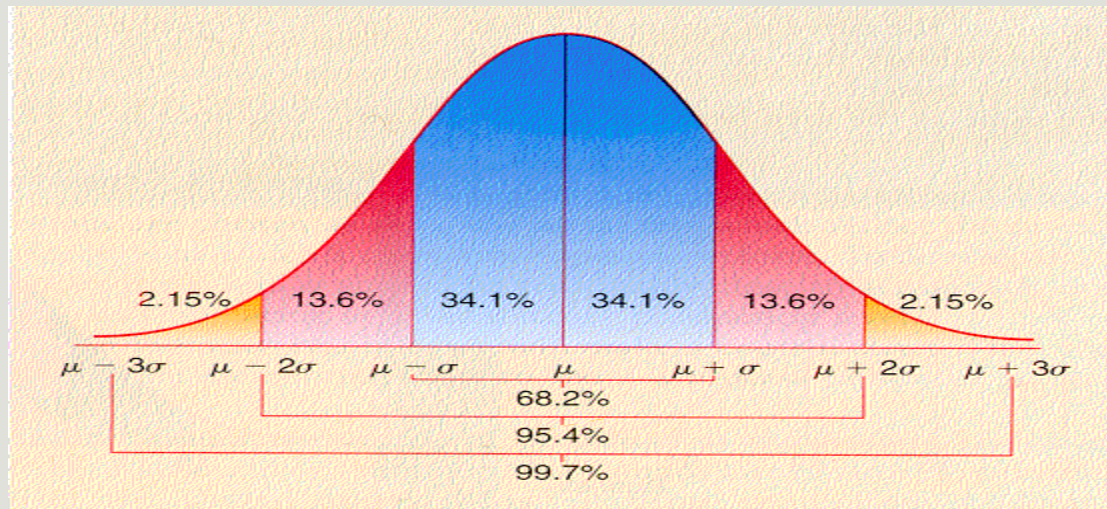
Future Considerations

The members of the commission shall review policies and develop policy proposals for laws for the creation of a civil right of action... of any right, privilege or immunity secured by the constitution of New Mexico. HB 5 § 1-F

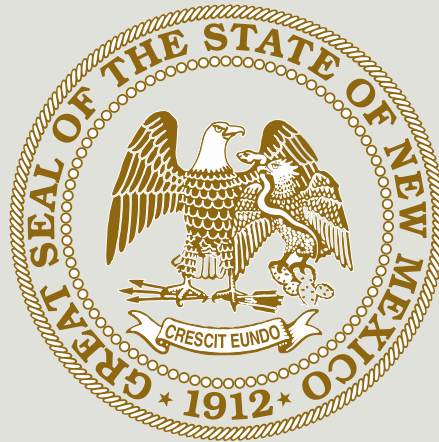
- The commission shall consider whether such right of action shall provide for;
 - Monetary damages, punitive damages, injunctive relief, and other equitable relief
 - Attorney fees for a prevailing plaintiff, the statute of limitations for the right of action, and indemnification of public employees

The commission shall review the use of qualified immunity as a defense... for a claim that would be brought either under 42 U.S.C. § 1983 or to Subsection F. HB 5 § 1-G

Each of the above considerations could increase liability to the State; perhaps significantly. Parameters around each of the above elements would need to be defined prior to any specific cost projections.



Questions & Comments



NEW MEXICO

GENERAL SERVICES DEPARTMENT