

# GENERAL ADVICE

## FROM GENERAL COUNSEL



### Employee Personal Liability

As a general rule, employees of NMSU are fully protected from any personal liability resulting from authorized work related activities. Should an employee have the misfortune to be sued, after determining that the activities were indeed within the scope of the employees authorized duties, the State will appoint and pay an attorney to represent the employee, and will typically pay any settlement or judgment resulting from that lawsuit.

#### ■ Exception – Unauthorized Signatures

If an employee signs an agreement or makes a commitment without explicit authority to do so (consult the signature authority table), then the employee may be held personally liable (at least in theory) for the obligations under the contract. *Exercise care in signing documents with private parties and businesses and even with other governmental or non-profit entities and consult the NMSU signature authority table frequently.*

#### ■ Exception – Unauthorized Activities

If an employee undertakes an activity that is not authorized, or is prohibited by NMSU, the employee may incur personal liability. For example, allowing an individual who is not on NMSU business to ride in or drive an NMSU vehicle, or taking an NMSU vehicle on a personal errand, could create personal liability. Another example is using NMSU facilities for non-NMSU sponsored activities. You may see no harm in allowing the “Charity of your Choice” to hold a board meeting in an empty classroom, but if one of the participants trips and falls, NMSU insurance coverage might not apply, and the liability could fall on the employee who improperly allowed the use. (Hence the strict rules on campus activity forms!) It goes without saying that intentional wrongful conduct is never authorized and can subject employees to personal liability.

### NMSU Liability

#### ■ Insurance Coverage

NMSU is protected from liability for most “torts” and “civil rights” claims, either because we enjoy governmental immunity from certain types of claims, or more commonly, because we are protected by the State Risk Management Division (RMD), a governmental entity that operates like an insurance company covering specified risks. This coverage includes personal injury claims by students and visitors resulting from the negligence of NMSU or its employees. Liability for employee injuries and illnesses resulting from their work are covered by NMSU’s worker’s compensation insurance coverage. Most of the damages resulting from employment related claims, other than wages, are also covered by RMD. However, subject to a few exceptions, NMSU’s liability protection extends only to claims against the entity and its employees – students are generally not provided with liability coverage for their activities. This issue can arise when the negligence of a student causes injury to others. Renette Apodaca,

Director of our Purchasing Department, is our contact with RMD and she can answer, or get answers to questions you may have regarding NMSU property and liability coverage.

#### ■ NMSU Exposure – Liabilities Not Covered by “Insurance”

Every activity that NMSU undertakes has the potential to create liability. We cannot let liability concerns drive the bus as we undertake the myriad of endeavors that contribute to the achievement of our mission. However, we can and should evaluate the associated risks when making a decision to undertake an activity, particularly those that are peripheral to our primary mission. As General Counsel, it is not within my purview to tell the institution which legal activities it should or should not undertake, but I can assist in evaluating the associated risks.

Corporate Boards. A good example is whether NMSU should accept an opportunity to have one of our employees serve on a board as a representative of NMSU. In some instances, the entity explicitly requests an NMSU representative to serve on its board, and in others an employee will request NMSU support for serving on such Boards. While representation on such boards can benefit NMSU and help achieve our mission, the liability risk may not be covered by our insurance. Before accepting a position on a Board as an NMSU representative (or authorizing NMSU reimbursement of an employee’s travel or other expenses resulting from serving on such a board), NMSU should consider the risk-benefit balance and whether there are any steps we can take to reduce risk. For example, we would all probably agree that the risk associated with a faculty member serving on the Board of an academic association is low, and that this activity is part of our core mission and should be approved. However, the risks of having an NMSU employee serve on a corporate fiduciary board are much higher, so before accepting this type of position, we might require evidence of adequate Director and Officer Liability Insurance and the naming of NMSU as a co-insured on the policy.

Agreements. The most significant source of liability for which NMSU has no insurance coverage comes from the hundreds of contracts (aka agreements, MOU’s, MOA’s) we enter into every year. The greatest protection from this liability is careful scrutiny of any proposed agreement to ensure that NMSU has the ability to fulfill each and every commitment made in the agreement. *A perfect performance of the duties under the contract discharges the liability.* While both the Purchasing Department and the University General Counsel will scrutinize those agreement documents presented to them for review, neither has the capacity to really know whether the contracting unit at NMSU has the ability to fulfill all the proposed commitments. We rely upon the responsible administrators in the relevant units to carefully read the documents and assess the unit’s ability to perform before forwarding the documents to us. Purchasing and Legal review address only whether the agreement is in compliance with legal requirements and NMSU policy and procedures. **Your signature on the routing sheet, or your email seeking our approval, is your representation to us that you have read the agreement and that your unit is prepared to fulfill the commitments made in it if the agreement meets legal requirements and procurement restrictions.** Ultimately, in the event of liability from breach of the contract, that liability will be assessed against the unit that made the contract. Also, keep in mind that while public entities are liable only on written contracts, such obligations can be created through something as informal as an exchange of emails. Please exercise caution in making commitments before seeking legal review.