

## Purpose and Background

1. In general, OCERS provides indemnification and defense to OCERS' employees and Board members for claims arising out of their conduct occurring within the course and scope of their duties to the retirement system. OCERS' provision of indemnity and defense is required by state law. In certain circumstances other employing public agencies are also responsible for indemnifying and/or defending OCERS' employees and Board members.

The purpose of this policy is to establish the manner in which OCERS shall process and manage such claims, and to assure covered employees and Board members of the indemnity and defense to which they are entitled.

For purposes of this Policy, "employees" includes OCERS' direct employees and employees of the County of Orange who work at OCERS; provided, however, that OCERS reserves subrogation rights against the County of Orange in any cases where OCERS steps in to provide an indemnity or defense for an employee or Board member, but the County, in fact, would be the responsible entity under applicable law for indemnifying and defending the employee or Board member

## Policy Objectives

2. The objectives of this policy are to:
  - a. Provide a mechanism for reporting claims against Board members and employees arising within the course and scope of their duties to OCERS;
  - b. Ensure claims are appropriate for indemnification and/or defense (*i.e.*, that the alleged conduct is not fraudulent, criminal or due to wrongful personal gain; or is otherwise excluded from indemnity and/or defense under law);
  - c. Identify the appropriate agency responsible for indemnifying and/or defending OCERS' Board members and employees for actions arising within the course and scope of their retirement system duties;
  - d. Coordinate processing of claims between OCERS and other employing agencies as necessary; and
  - e. Provide for the payment of attorneys' fees and costs incurred from inception to and including the date on which OCERS determines whether to indemnify and/or accept the defense of the claims on behalf of the affected Board member or employee.

## Policy Guidelines

3. The Board adopts the following approach for all indemnity and/or defense claims made by Board members or employees arising within the course and scope of their retirement system duties:
  - a. As soon as practicable after a claim is made against a Board member or employee based on acts or omissions arising out of the performance of retirement system duties, such individual shall notify the Legal Department and provide the Legal Department with all documents provided by the claimant.

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- b. The Legal Department will review the claim, in conjunction with fiduciary counsel where appropriate, determine whether it is proper for a recommendation to the Board for indemnification and/or defense, and identify the appropriate indemnifying/defending agency.
- c. If the Legal Department determines that the claim is not appropriate for a recommendation of indemnification and/or defense, the Legal Department will promptly notify the individual of the reasons indemnification and/or defense is not proper. If the individual wishes to contest the determination of the Legal Department, the matter shall be agendized during a closed session at the next regular Board meeting, and the Board shall comply in all respects with the requirements of the Brown Act.
- d. If the Legal Department determines that the claim is appropriate for indemnification and/or defense, the Legal Department will promptly notify the individual of its recommendation to the Board. The Board shall agendize consideration of the matter during a closed session held at the next regular Board meeting and shall comply in all respects with requirements of the Brown Act.
- e. The Board will have sole and exclusive authority to determine whether the individual should be indemnified and/or defended. That determination shall consider whether indemnity and/or defense is/are (a) mandatory, (b) discretionary or (c) prohibited under law. If the Board determines that OCERS will not indemnify and/or defend the individual against the claim, the Board will notify the individual in writing within 72 hours of making the determination. The individual will then have the right to seek recourse as permitted by law. If the individual commences a legal action challenging the Board's determination, and until a final determination on the right to indemnification and/or defense is made, OCERS will advance defense costs on behalf of the individual on terms satisfactory to OCERS.
- f. If the Board determines to indemnify and/or defend against the claim on behalf of the individual, the Legal Department, in conjunction with Administrative Services, will undertake the necessary steps to ensure that the claim is properly resolved.
- g. The Legal Department and/or Administrative Services will communicate with the individual involved in the claim throughout the defense and resolution process.
- h. All Board members and employees who seek indemnification and/or defense from OCERS shall fully cooperate throughout the defense and resolution process.
- i. Prior to the determination of indemnification and/or defense (as further set forth in the following subparagraph) and thereafter if OCERS accepts the defense, OCERS shall select capable and competent legal counsel, subject to approval of the individual to be indemnified which approval shall not be unreasonably withheld, at the expense of OCERS. Alternatively, the Board of Retirement may permit the individual to select his or her own counsel under circumstances OCERS deems appropriate.
- j. Prior to the determination of indemnification and/or defense, OCERS shall advance all funds necessary to enable the subject individual to obtain effective defense to the claim, including attorneys' fees and costs reasonably incurred prior to such determination, subject to such recourse as is provided by law or contract. In the event that it is ultimately determined that OCERS correctly denied indemnity and/or defense of the individual under this policy, OCERS and the individual shall meet and confer to arrange the repayment of any such sums advanced to or on behalf of the

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- individual. Failing an amicable resolution being reached within 60 days of the determination, either party may commence legal action to resolve the dispute.
- k. In the event that OCERS obtains third party fiduciary insurance covering claims against Board members, employees, and OCERS itself, OCERS will timely and appropriately tender such claims and take all necessary actions in order to preserve the benefits of such insurance for the insureds.
  - l. Board members and employees who have ceased their duties with OCERS prior to receiving a claim arising out of their former duties for OCERS shall be entitled to the determination of indemnity and/or defense of the claim as set forth under this policy and at law in the same manner as if they had continued in their duties with OCERS. In the event that OCERS obtains third party fiduciary insurance covering claims against Board members and employees, OCERS shall secure continuing coverage as well for Board members and employees who have ceased their duties with OCERS, on commercially reasonable terms.
4. Notwithstanding this policy, OCERS reserves all rights under law (including subrogation rights against the County of Orange in cases where the County is the appropriate agency responsible for indemnifying and/or defending OCERS' Board members and employees) and any applicable employment contract with regard to the terms and conditions of its acceptance of indemnification and/or defense of Board members and employees. In the event of any conflict between such laws, contracts and this policy, the law shall prevail.

### **Policy Review**

5. The Board will review this policy at least every three years to ensure that it remains relevant and appropriate.

### **Policy History**

6. The Board adopted this policy on April 16, 2007. The Board amended this policy on January 18, 2011, March 17, 2014, and January 19, 2016.

### **Secretary's Certificate**

I, the undersigned, the duly appointed Secretary of the Orange County Employees Retirement System, hereby certify the adoption of this policy.



Steve Delaney  
Secretary of the Board

01/19/2016

Date