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## CORRESPONDENCE MEMORANDUM

**DATE:** December 15, 2006

**TO:** Members of the Employee Trust Funds, Group Insurance, Teachers Retirement, Wisconsin Retirement and Deferred Compensation Boards

**FROM:** Robert Weber, DETF Chief Counsel

**SUBJECT:** Attorney General opinion (OAG-2-06) on Board member liability

On October 30, the Attorney General issued an opinion requested by Eric Stanchfield and David Mills on behalf of the Investment Board, Employee Trust Funds Board and the boards attached to the Department of Employee Trust Funds. In her opinion, a copy of which is attached, Attorney General Lautenschlager states that Board members are state officers and public employees for purposes of Wis. STAT. §§ 893.82 and 895.46, and therefore are entitled to:

- **Time limit for asserting claims against them.** Any claim against a Board member must be asserted by written notice to the Attorney General within 120 days of the event causing the damage, or the claim is barred. This notice requirement and time limit, however, would not apply in a federal civil action.
- **Legal representation.** The state will defend a Board member sued for acts committed while carrying out Board duties. Generally, this representation will be provided by the Attorney General. If the Board member refuses the state's offer of legal counsel and hires outside counsel of his or her own choice, then the Board member is **not** entitled to reimbursement for the expenses and costs of that representation.
- **Limitation on damage awards.** The maximum amount that can be recovered by any person is \$250,000. No punitive damages are recoverable. This damage limit, however, would not apply in a federal civil action.
- **Indemnification for damages.** The state will pay any "excess damages" awarded in proceedings against a Board member who is sued in his or her official capacity or for acts committed while carrying out Board duties and the court or jury finds that the Board member was acting within the scope of employment. Excess damages are those that exceed any applicable insurance coverage of the Board member.

Board	Mtg Date	Item #
JI	12/14/06	4

The Attorney General also responded to several questions about circumstances under which a Board member might not be entitled to have the state pay the damage award.

*Jury or court finding that Board member was not acting within scope of employment?*

In theory, if there was a finding that the Board member acted outside the scope of employment, then the Attorney General could seek reimbursement for fees and costs expended in representing the Board member. In practice, the Attorney General said this situation is unlikely to arise, because the Attorney General makes a determination as to scope early in the defense and would have to demonstrate a significant change in circumstances to justify a suit for reimbursement.

*Board member found to have breached fiduciary duty?*

Indemnification also applies to at least some breach of fiduciary duty cases, because there is no express statutory exception prohibiting indemnification for breach of fiduciary duty specifically and because not every breach of fiduciary duty is outside the scope of employment. However, the Attorney General notes the possibility that the circumstances of a particular breach might place a Board member outside the scope of his or her employment, and therefore not entitled to indemnification.

*Federal lawsuits and criminal prosecutions?*

Indemnification also applies to settlements or judgments in civil enforcement actions brought by the federal government. However, it may not apply in state or federal criminal actions. The Legislature has expressly extended the indemnification provision to certain state and federal criminal prosecutions, but only those under specified statutes brought against state employees and officials because of acts committed in the storage, transportation, treatment or disposal of hazardous substances. No other crimes are listed.