

815 CMR 5.00: SETTLEMENTS AND JUDGMENTS

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5.01: Purpose

(1) 815 CMR 5.00 is promulgated pursuant to M.G.L. c. 7A, §§ 15 and 16 for the purpose of clarifying the procedures by which departments may preserve the availability of funds and may obtain access to funds for the payment of judgments and settlements under M.G.L. c. 258. Such clarification will:

- (a) Aid departments in making the payment of judgments and settlements a part of their current year operation or capital project budgeting; and
- (b) Ensure faster payment of judgments and settlements, which will lessen the waiting time for successful claimants and litigants against the Commonwealth and its departments and minimize the amount of any applicable interest.

(2) 815 CMR 5.00 shall identify funds legally available for payment and shall minimize the need to use deficiency payments for judgments and settlements of claims against the Commonwealth. 815 CMR 5.00 shall also prevent use by departments of the Commonwealth of funds not legally available for payment of such judgments and settlements.

5.02: Definitions and Applicability

815 CMR 5.00 is applicable to the payment of settlements and judgments for claims against the Commonwealth and its departments. For the purposes of 815 CMR 5.00, these terms are defined as follows:

Claim - A demand for damages as compensation for an injury or other harm allegedly suffered, including, but not limited to, personal injury, property damage, violation of civil rights, erroneous conviction, breach of contract, failure to comply with contract bidding laws, incorrect or improper personnel determinations regarding pay, promotion, or discipline, failure to comply with statutory or constitutional provisions applicable to employment, and eminent domain taking damages, including any attorney's fees and interest associated with these claims.

Department - All state agencies, subdivisions, offices, boards, commissions or institutions within the Executive, Judicial, and Legislative branches of the Commonwealth.

Judgment - A final, unappealed order of a court or administrative body authorized by statute to review or adjudicate claims against the Commonwealth and its departments.

Legally Available Funds - Monies appropriated either specifically for the payment of settlements and judgments or authorized for the payment of certain contractual expenditures.

Legally available funds do not include funds not specifically authorized by 815 CMR 5.00 for use in the payment of judgments and settlements, including any legislatively authorized trust funds as defined in M.G.L. c. 29, § 1. Trust funds must be used solely to further their statutorily authorized goals. Departments shall not interpret those goals to include the payment of judgments and settlements arising from claims related to those goals, unless such payments are specifically authorized for the funds.

5.02: continued

Settlement - An agreement to pay a claim covered by 815 CMR 5.00, entered into by an official duly authorized to bind the Commonwealth or a department, whether the agreement settles the claim prior to or after the institution of litigation.

5.03: Procedures for Tort Claims Governed by M.G.L. c. 258

Settlement during statutory presentment period. A claim under M.G.L. c. 258 must be assessed and acted upon within six months of receipt by the department (or by the Office of the Attorney General (AGO), when initial presentment is made there). The following procedures and timelines shall be followed:

- Day 1: Presentment Notice received by the appropriate department or AGO.
- Day 3: AGO forwards a copy of any notice it receives to the appropriate department; the department forwards a copy of any notice it receives from a claimant to the AGO.
- Day 90: AGO receives the department's investigation report and disposition recommendation.
- Day 120: The department has acted on recommendation in one of the following ways: (1) Commenced negotiations with claimant (or legal representative thereof) for settlements of \$2,500 or less; (2) Sent investigation report and settlement recommendation over \$2,500 to AGO; or (3) sent denial to claimant.
- Day 135: AGO approves terms of settlement on recommendations over \$2,500. The department commences settlement negotiations with claimant, if it has not already.
- Day 160: The department sends negotiated settlement documents to the Comptroller together with evidence of approval by AGO and the Executive Office for Administration and Finance (if required) and a release executed by claimant. The documents forwarded to the Comptroller should include the following:
 - A copy of the presentment letter;
 - Settlement memorandum describing the terms of the settlement;
 - Release executed by claimant;
 - Consent of AGO (for settlement over \$2,500) and the Secretary of Administration and Finance (for settlement over \$20,000) if required; and
 - Form W-9 for party being paid
 - Executed stipulation of dismissal, if settled during litigation.

Comptroller processes settlement payment.

- Day 180: Presentment procedures have been completed. The department has sent copies of investigation report, settlement documents, and denials to AGO.

5.04: Settlement or Judgment After the Initiation of Litigation Pursuant to M.G.L. c. 258

Payment of settlements and judgments after the initiation of litigation pursuant to M.G.L. c. 258 shall be paid from the Liability Management and Reduction Fund if approved pursuant to the procedures set forth in 815 CMR 5.03.

5.05: Procedures for Personnel Claims for Monetary Awards

- (1) 815 CMR 5.05 applies to:
 - (a) Claims for monetary awards by current or former employees regarding any aspect of their employment by the Commonwealth, including, but not limited to: claims related to all non-classification job actions (including discipline and termination, pay and promotion, transfers, leave and overtime disputes), position classifications, and conditions of employment or employment discrimination; and

5.05: continued

(b) Settlements or orders (administrative or judicial) arising from proceedings involving employees of the Commonwealth before the Civil Service Commission (pursuant to M.G.L. c. 31), the Massachusetts Commission Against Discrimination (pursuant to M.G.L. c. 151B), the Department of Labor Relations (pursuant to M.G.L. c. 150E), the Human Resources Division Personnel Administrator (pursuant to M.G.L. c. 30, §§ 45 through 50) and the grievance and arbitration procedures set forth in any collective bargaining agreement entered into by the Commonwealth or its departments, as authorized by M.G.L. c. 150E, § 8.

(2) 815 CMR 5.05 does not apply to retroactive salary adjustments made pursuant to negotiated collective bargaining agreements. Such retroactive salary adjustments are separately appropriated to meet department obligations under legislatively approved collective bargaining agreements. These funds are held as a salary reserve and allocated by the Fiscal Affairs Division of the Executive Office for Administration and Finance.

(3) Payment of Settlements, Orders, or Judgments relating to personnel claims for monetary awards.

(a) The following may be paid from departments' current year operating budgets, without regard to the year in which the claims arose, but only from funds appropriated for salary purposes, if such unused salary funds exist and pursuant to spending plan approval by Fiscal Affairs Division:

1. Awards by the Personnel Administrator in personnel classification appeals pursuant to M.G.L. c. 30, § 49.
2. Arbitration and grievance procedures awards under collective bargaining agreements pursuant to M.G.L. c. 150E, § 8. Such claims shall be paid as soon as possible after the appointing department receives notice of the award and spending approval from the Executive Office for Administration and Finance. Payment of such awards shall be issued at the end of the first full pay period after receipt of such notice and approval.
3. All other awards for back pay (not including attorney's fees, interest, or other damage awards) for personnel claims of employees who currently are on the payroll of the Commonwealth.

(b) All other payments of settlements, orders or judgments relating to personnel claims for money awards described in 815 CMR 5.05(1), shall be in accordance with 815 CMR 5.07, and only from funds obtained through the deficiency budget process specifically to pay such settlement, order or judgment. Such payments shall include, but shall not be limited to, back pay or damage awards to terminated employees, attorneys fees or interest awards to terminated employees, attorneys fees or interest awards to any employees, continuing or terminated, and back pay awards to continuing employees which, because of lack of funds, cannot be paid pursuant to 815 CMR 5.05(3).

5.06: Procedures for Contract Claims

(1) 815 CMR 5.06 applies to:

(a) Post-litigation settlements or judgments in contract claims arising from capital projects including:

1. Claims arising from contracts related to capital construction projects funded through bond funds pursuant to M.G.L. c. 29, § 14, including contracts for all phases of project study, design, and construction;
2. Claims arising from contracts related to "pool account" capital projects, *i.e.*, bonded projects which include various activities of a certain type, such as asbestos or toxic waste removal; and
3. Claims arising from eminent domain takings in connection with capital projects.

(b) Post-litigation settlements and judgments in contract claims arising from department contracts funded from the department's annual maintenance appropriation.

5.06: continued

(2) 815 CMR 5.06 generally does not apply to disputed claims for payment under contracts, whether funded through capital or maintenance appropriations, which are resolved at the administrative level as part of a dispute resolution mechanism of contract management prior to the initiation of litigation. These claims may be paid from funds encumbered for the contract or by the submission of a change order or release or other appropriate encumbering action as appropriate. If such funds are not available, payment shall be made pursuant to 815 CMR 5.07.

(3) Notification Procedure When Contract Litigation Instituted.

(a) Not more than 30 days after the institution of litigation on a contract claim, department counsel, or other staff person assigned to the matter for the purposes of evaluating the financial risk of the litigation and monitoring its progress, shall submit a report on the claim to the Comptroller. The report shall be on a form supplied by the Comptroller and include:

1. A description of the claim, including contract and encumbrance identification numbers;
2. The amount of the claim;
3. An evaluation of the potential amount of contingent liability; and
4. An evaluation of the potential for a settlement or likelihood of recovery on the claim.

(b) Reports shall be updated once a year by August 1st. Where possible, reports shall be prepared in consultation with the Assistant or Special Assistant Attorney General assigned to handle the case.

(4) Procedure for Payment.

(a) Contract claims from maintenance appropriations which are settled or ordered to be paid pursuant to litigation in the fiscal year in which funds were encumbered shall be paid from those encumbered funds through the accounts payable period.

(b) Any settled pre-litigation claims related to regular maintenance appropriations for which contract funds are unavailable due to the expiration of the accounts payable period, and all post-litigation settlements and judgments in contract matters, shall be paid in accordance with the procedures set forth in 815 CMR 5.07, regarding the payment of settlements and judgments after the initiation of litigation.

5.07: General Procedure for the Payment of Settlements and Judgment after Initiation of Litigation

Settlements and judgments arising from any claim other than those enumerated in 815 CMR 5.03 shall be made in accordance with the following procedures. When litigation involving a monetary claim against the Commonwealth covered by 815 CMR 5.00 terminates in a final settlement or judgment, department counsel or the staff person assigned to handle or monitor the claim shall do the following:

1. Prepare a Non-tort Settlement/Judgment Payment Authorization Form.
2. Forward the Non-tort Settlement/Judgment Payment Authorization Form and a copy of the settlement or judgment to the Comptroller.

The Non-tort Settlement/Judgment Payment Authorization Form and copy of the settlement or judgment shall be sent to the Comptroller promptly after resolution, generally within two weeks after the date of judgment or execution of a settlement.

Each claim shall be prepared using forms supplied by the Comptroller and after consultation with the Assistant Attorney General or Special Assistant Attorney General assigned to the matter, when appropriate.

5.08: Responsibilities of the Comptroller

Upon receipt of the documents described in 815 CMR 5.07 from the department, the Comptroller shall review the documents and certify the amount due and payable. The Comptroller will notify the assigned attorney after the payment is issued in payment of the claim.

5.09: Issuance of Payment

Payment made pursuant to 815 CMR 5.07 shall be made to the order of the claimant or, if the claimant is represented by counsel, to the order of the claimant and counsel. Payment shall be made to the claimant or, if the claimant is represented by counsel, to the counsel, or, if requested by the assigned attorney, to the assigned attorney.

REGULATORY AUTHORITY

815 CMR 5.00: M.G.L. c. 7A, §§ 15 and 16; M.G.L. c. 258, §§ 1 through 5.