



Sharing Employees: Recognizing Potential Liability

Background

In responding to demands for expanded services, new mandates and financial limitations, political subdivisions look to a variety of methods to deliver services. Often the most efficient way is to join with other public entities with mutual interests and objectives. This effective solution has risks specific to sharing employees of which MCIT members should be aware.

Joint employer liability is a theory of law where two separate entities can be held responsible for damages in an employment relationship. Generally, it can be another way in which a plaintiff may try to access deep pockets from as many parties as possible. For this reason, MCIT recommends that liability for the employment relationship be specifically allocated in written documents and concentrated in one entity.

Potential Liability Arising out of Joint Employer Relationship

The types of lawsuits that can occur when the employment relationship is not clearly delineated in favor of one public entity over another include the following:

- Negligent hiring
- Negligent supervision or retention
- Employment discrimination
 - Minnesota Department of Human Rights (MDHR) claims
 - Equal Employment Opportunity Council (EEOC) claims
 - Americans with Disabilities Act (ADA) claims
 - Sexual harassment – Title VII claims
- Retaliation and whistleblower claims
- Fair Labor Standards Act – wage and hour claims (overtime class actions)
- Excessive force claims and violation of civil rights
- Wrongful termination, breach of contract and tortious interference with employment contract
- Workers' compensation liability

There is also the potential for tax liability and penalties if it is determined after the fact that an employment relationship exists.

Preliminary Considerations

When public entities are considering providing services through a cooperative or joint effort, the separate entities must decide how staff employed to provide the services will be managed. Specifically, they should answer these questions:

- Do the entities currently have staff providing services in their respective jurisdictions?
- Do the parties intend to use existing staff?
- Do collective bargaining agreements cover current staff?
- Will fewer staff be used; will there be a layoff?
- Is there a current vacancy that will be filled through a contract with another entity?
- Will the parties be creating a new governing body?
- Will the parties be providing services that were not previously provided in one or more jurisdictions?
- Will the agreement have the effect of eliminating or replacing a public employee who is part of a collective bargaining agreement? If so, were negotiations with the exclusive representative and the employer on the effects to the employee of the job elimination or restructuring conducted?
- Who will supervise the persons providing services?

Written documentation can take many forms, including contracts, mutual aid agreements and joint powers agreements. The parties should create a written document to memorialize the intent of the agreement between them as to the above and other issues. Ensuring that the parties have the same intent initially may prevent confusion and disagreement over the terms in the future.

The purpose of the written agreement is to avoid having a judge interpret the rights and responsibilities of the parties in a manner that was not intended by the parties. If the language is vague or ambiguous, a judge may be asked to interpret the intent of the parties when a dispute arises.

Forms of Cooperative Agreements

Contracts, mutual aid agreements and joint powers agreements are all forms of written documents that reflect the relationship between two or more parties. The form of the agreement is not dictated by any legal source and as a result, there is much discretion in the drafting of documents. The terms “joint powers arrangement,” “joint powers agreement,” “joint powers organization,” and “joint powers entity” are all used by members of MCIT to describe relationships. The use of those terms in this document may seem confusing and inconsistent to the novice, but it is because there are no rules dictating the form of the document used to designate the relationship. The intent of this article is to point out areas of exposure to risk so that readers may choose one form over the other.

Contracts

The simplest form of an intergovernmental cooperative venture is a direct contract for services. In this arrangement, Entity A contracts with Entity B for some specific service or task. The normal rules of contracting apply. Namely, the contract must be authorized and signed by the governing body (i.e., county board of commissioners, board of supervisors or board of directors) or a designee of the public entity, specifically authorized by resolution of the governing board to sign the agreement.

When the entities enter into the contract pursuant to the authority under Minn. Stat. § 471.59, the provisions of that statute must be met. The contract should specifically state which party is the employer for workers’

compensation coverage and other issues related to employee benefits. The actions of the parties must match the terms of the agreement or risk that a court will find a contrary determination regarding who is the employer.

Mutual Aid Agreements

A mutual aid agreement is another way for public entities to come together to share resources. These have long been used for emergency management and law enforcement purposes.

A mutual aid agreement represents a plan by separate public entities detailing how they will provide assistance to one another for common benefit. Generally, mutual aid situations include circumstances when an entity does not have sufficient resources to respond to an emergency or other uncommon event.

Mutual aid agreements are authorized by Minn. Stat. §12.331 and Minn. Stat. §471.59. When mutual aid and assistance are provided by tribal officers pursuant to specific statutes, the parties should ensure that all parties meet the definition of the authorized party to enter into the contract.

A third party may bring a lawsuit against the parties to the mutual aid agreement for damages arising out of the joint operation. Public entities can be held vicariously liable for the negligent acts of another entity's employees.

Even without vicarious liability, a plaintiff has incentive to name all of the entities as defendants in the lawsuit, hoping to recover from more than one political subdivision. Therefore, it is imperative that the parties carefully allocate the liability for any claims arising out of the mutual aid activity.

Generally, liability should follow the command, if the requesting party is in control of the situation and directs the responding parties' employees, the agreement should include a provision for indemnification if appropriate.

For example, a mutual aid agreement may provide that when one party responds to a request for assistance, the requesting party agrees to defend, indemnify and hold harmless the responding party against any and all claims brought against the responding party, or its officers and agents, for injury, death or damage to the property of any third persons, arising out of the assistance. This indemnification includes all costs and attorneys' fees that may be incurred by the party being indemnified in defending itself.

The mutual aid agreement should also provide for workers' compensation coverage or self-insurance for each party. Without a specific provision relating to workers' compensation, a court might find more than one entity responsible for the injuries to an employee. Absent the proper provision in the agreement, an entity may be paying for injuries to an employee not in its employ but one who was injured during the mutual aid activity.

Sample language: Each party shall be responsible for injuries or death to its own employees to the extent required by law. Each party will maintain workers' compensation insurance or self-insurance, covering its own employees while they are providing assistance pursuant to this agreement.

Joint Powers Agreements

Minnesota Statutes § 471.59 provides the statutory framework for joint ventures between "governmental units." Known as the Joint Powers Act, this statute permits government units to join as a single entity to accomplish common goals.

The Joint Powers Act is the generic joint venture law permitting almost any kind of joint operations. The only significant limitation in the design of a joint powers organization is that an entity not included in the definition of “government unit,” such as a private business, cannot become a member of the Joint Powers Organization unless specifically authorized by legislation.

Generally, a joint powers entity is formed by governmental units that exercise a power “common to the contracting power” or “any similar powers.” This is referred to as commonality of powers. In addition, counties and other governmental units may enter into agreements with other governmental units to perform on behalf of that unit any service or function that the unit providing the service or function is authorized to provide for itself.

Two or more Minnesota governmental units may create a new and distinct governmental entity whenever the existing governing boards determine that a new entity offers a better way to meet a duty or obligation. The new entity has the authority to adopt operational policies and procedures to run the organization effectively. All practices of the joint powers entity must conform to Minnesota Statutes for public entities.

Based on changes to the Joint Powers Act in 2006, MCIT strongly recommends that agreements include the following language: “Pursuant to Minn. Stat. § 471.59, Subd. 1a, none of the participating entities are responsible for the acts or omissions of the other participating entities.”

Although recent legislative changes provide protections from the “stacking of the tort caps,” it is important that the formation document specifically reference Minn. Stat. § 471.59. It is equally important that the joint powers entity form and operate according to requirements of that statute. When the joint powers entity’s functions change, the organization should review its governing documents and operations, and amend them if necessary.

Minn. Stat. § 471.59 provides that governmental units participating in joint activities:

- Are a single governmental entity for tort liability purposes.
- May not be held responsible for the acts or omissions of another participating member of the joint powers (unless specifically agreed to in writing).
- May waive the tort caps by procuring insurance coverage in excess of the tort limits.

Issues to Consider When Forming Relationships

Liability of Contracting Parties

Contracts should assign liability to the parties because there is no statutory formula to automatically allocate liability. For example, County Alpha’s liability for the contracted services should be reduced in direct proportion to the increase in liability assumed by County Beta. Even if Alpha and Beta agree that total liability for the services will be assumed by Beta, Alpha will most likely be a named party to any suit arising out of Beta’s services within the boundaries of Alpha or on behalf of Alpha.

Example: County Alpha contracts with County Beta for county engineering services. In this agreement, Beta’s county engineer will provide services to Alpha. The contract will state:

- What services Beta will provide.
- What Alpha will pay Beta for the services.
- How long the contract will last.
- Which entity will be responsible for third party claims arising out of Beta’s service to Alpha.

The parties to the contract should include a provision that specifies what liability Alpha retains and what is assumed by Beta. For example, Beta will be responsible for all supervision and discipline. Alpha's role will be one of contract management to ensure County Beta is fulfilling its contractual responsibilities.

Member of Joint Powers Organization Serving as Fiscal Agent

Many of the governmental units that commonly join with others for specific purposes, which include community corrections, public health and human services, seek to implement as many efficiencies as possible. In so doing, the members of the joint powers entity may rotate assignment as the fiscal agent or assign one member to serve that role.

This can be a problem when a current or former employee brings a lawsuit against the employer. Determining whether a fiscal agent is an employer is a question of fact that will be determined on a case-by-case basis by the courts if not addressed in the written agreement.

Example: In the *Bushard v. ISD* (2001 Minn. App.) case, an employee of a collaborative sued the school district, a member of the collaborative who served as the fiscal agent, for breach of employment contract and retaliatory discharge. The school district's duties included hiring and supervising the collaborative's staff pursuant to the school district's personnel policies and procedures.

The lower court determined that the school district, not the collaborative, was the employer. The court found it significant that the collaborative employees were hired and supervised according to the school district's personnel policies and procedures. Additionally, the fact that the collaborative employees received their paychecks and benefits through the school district was deemed to be evidence of the employment relationship.

Also, an employee of the school district evaluated the plaintiff's work, suggesting an employer/employee relationship.¹

In employment-related claims, liability is linked directly to employment status. In some circumstances, a fiscal agent's actions may be considered independent from the joint activity of the joint powers entity such that individual liability may attach. (Minn. Stat. § 471.59, Subd. 1a (b)). The limitation of one statutory cap for the individual members (to the agreement) (with or without a new entity) and the joint powers board (if there is a new entity) pursuant to Minn. Stat. § 471.59 does not protect a governmental unit from liability for its own independent acts or omissions not directly related to the joint activity.

¹ The court's determination that the school district was the plaintiff's employer resulted in the dismissal of the claims because the employee failed to challenge the termination by a writ of certiorari (required by public employees). The determination that the school district was the employer also resulted in the dismissal of the claims against the individual defendant because an agent of the school district could not be held liable for tortious interference with a contract because a party cannot interfere with its own contract.

Equal Employment Opportunity Council (EEOC) Investigations when Member of Joint Powers Entity Serves as Administrative Office or Human Resources for Joint Powers Entity

Issues can also arise when one of the members serves as the human resources department for the joint powers entity. If the joint powers is a separate entity, it should adopt its own personnel and related policies. The employees of the joint powers entity should be given notice of where complaints are to be filed and who within the joint powers entity will conduct harassment/discrimination and other investigations.

Many joint ventures that serve corrections, human services or public health may have more than one physical location. The agreement should specify the location of the administrative office and where complaints are to be filed.

Example: A claim filed with the EEOC by an employee of a joint powers entity accuses a county and the joint powers entity of sexual harassment. There was some evidence that the employee had filed a complaint with both the joint powers entity and the human resources office of one of the member counties. Many employees of the county were brought into the investigation and discovery process by the EEOC. The county could not be dismissed from the lawsuit even though it was not the employer.

This same issue may arise in claims filed with the Minnesota Department of Human Rights or other employment claims filed in district court.

Vicarious Liability for Actions of Other Member's Employees

It is common for cities and counties to create a task force that joins their resources to engage in more effective drug or gang law enforcement activities. A task force may be organized as a separate entity under a joint powers agreement, pursuant to a mutual aid agreement or pursuant to a service contract with another entity.

It is important for the participating entities to define their purpose, goals and objectives in the written document. If the parties desire to have appropriate backup if and when a major drug/gang enforcement effort is initiated, a mutual aid arrangement may be appropriate. If one agency wants to contract for the knowledge and expertise of another agency, a service contract model might be sufficient.

Regardless of the form of the agreement, the roles, responsibilities and obligations of the parties should be well-defined. It is important that law enforcement officers know their respective responsibilities. In particular, lines of authority should be clearly defined so there is no doubt about who is in charge of the operation.

Because the task force uses licensed peace officers doing the same work for another jurisdiction, it is likely that an injured party will name more than one public entity as a defendant. Both the task force and the member who hired and trained the officer will be named.

To protect the entities from liability, it is crucial that the written agreement clearly provide who is in control of each task contemplated by the agreement. Ideally the risk would be consolidated and placed with the party in control of the actions of the task force.

Liability Considerations for Task Forces

When a separate joint powers entity is created, it should have its own policies for hiring, training and supervising employees; excessive force; and pursuit.

If the task force is not organized as a separate joint powers entity, then the agency in control of the activity should defend and indemnify the other parties. On occasion this could result in one agency or entity being responsible for another's act or omissions.

The agreement should specify that nothing in the agreement should be construed as a waiver of any municipal tort liability limits, governmental immunities or defenses. Note, the legislative changes to Minn. Stat. § 471.59 in 2006 made it clear that entities participating in joint powers endeavors shall be considered a single governmental unit for liability purposes, regardless of the number of entities involved.

The agreement should also be clear about how the agencies will handle damage awards above or outside of the applicable insurance carried by the other party. This is particularly important with regard to a separate joint powers entity that has agreed to be responsible for the liability exposures of the participating agencies.

The parties should decide in advance how any uncovered costs (i.e., deductible, damages in excess of tort caps, expenses that exceed insurance) will be funded by the participating agencies. The agreement should also specify how excess damages will be apportioned.

Sample language for Indemnification and Hold Harmless clauses for joint powers entity:

The joint powers entity shall be considered a separate and distinct public entity to which the parties have transferred all responsibility and control for actions taken pursuant to this Agreement. Joint powers entity shall comply with all laws and rules that govern a public entity in the State of Minnesota and shall be entitled to the protections of Minn. Stat. Chap. 466.

The joint powers entity shall fully defend, indemnify and hold harmless the Parties against all claims, losses, liability, suits, judgments, costs and expenses by reason of the action or inaction of the board and/or employees and/or agents of the joint powers entity. This Agreement to indemnify and hold harmless does not constitute a waiver by any participant of limitations on liability provided under Minn. Stat. Section 466.04.

To the full extent permitted by law, actions by the parties pursuant to this Agreement are intended to be and shall be construed as a "cooperative activity," and it is the intent of the parties that they shall be deemed a "single governmental unit" for the purposes of liability, all as set forth in Minn. Stat. Section 471.59, Subd. 1a(a); provided further that for purposes of §471.59, each party to this Agreement expressly declines responsibility for the acts or omissions of the other party.

The Parties of this Agreement are not liable for the acts or omissions of the other participants to this Agreement except to the extent to which they have agreed in writing to be responsible for the acts or omissions of the other parties.

Workers' Compensation – Joint Employer Liability

Joint employment may occur when an employee is providing services for more than one employer at the time of injury. When an employee is employed by two or more entities, each employer has joint and several liability for injuries to the worker. An employee can therefore look to all the employers or only one of them. Any notice provided to one employer is deemed to be notice to the other as well.

Example: Joint employment was found in *Hough v. ISD No. 115*, (Slip Op. WCCA March 5, 1996). Hough was employed by a bus company that contracted to supply school bus transportation to the school district. As a part of the contract, the school district required the bus company's employees to attend safety workshops sponsored by the school district.

During the course of the mandatory workshops, the school district paid the attendees, including Hough, an hourly wage. Hough was injured while attending a workshop.

Noting that the case “involves the novel intersection of several legal doctrines,” the court concluded that “under the unusual and unique facts of this case,” the employee was jointly employed by the school district and the bus company at the time of injury. The court cautioned, however, that “we in no way conclude that an employment relationship would be created between the sponsor of a training session and an attendee under more typical circumstances.”

In the case of joint employment, where one joint employer is uninsured, the Special Comp Fund (which is statutorily responsible for benefits from uninsured employers) is not liable for benefits. As a result, the insured joint employer will be responsible for the employee’s injury.

MCIT recommends that the roles and responsibilities of the parties to share employees be clearly provided in the written document in any arrangement to share employees. The document should provide who the employer is or who will provide the workers’ compensation insurance or self-insurance for the employees during the time they are providing services subject to the agreement.

If the employee will serve two employers at the same time, it would be worthwhile to provide for a mechanism to share the costs in the event of a costly workers’ compensation claim. This would at least prevent the additional expenses incurred in a contribution action to have the court determine how the costs would be shared.

Risk Management Recommendations

For Joint Powers Agreements

A political subdivision entering into a cooperative venture should ensure that:

- The proper statutory provisions authorizing joint effort have been followed. Such as:
 - Are all parties included in the definition of “Governmental Units” in 471.59?
 - What is the purpose of the joint activity?
 - What is the enabling legislation that empowers the group to execute its functions?
 - How will the joint powers be governed?
 - How will members apportion liability such as debts or damages?
 - How will assets be divided when the group dissolves?
- The agreement is signed by the board of the governing body or other official authorized by the governing body to sign that specific agreement (a county official, such as the sheriff or human services director cannot enter in a contract on behalf of the county without a resolution authorizing the official’s act).
- If the JPA creates a new entity, the entity makes provisions for liability coverage.

For Arrangements Where One Party Provides Extra Services

- Have a written agreement that clearly defines the roles and responsibilities of each party
- Avoid sharing duties related to personnel administration, i.e. hiring, payroll, labor contract administration, etc., among the separate entities.
- Have separate personnel policies for discipline, sexual harassment and discrimination.
- Have indemnification clauses for any liability under federal or state employment laws arising out of any function for which the other party is reasonably or contractually responsible.

- Maintain and manage assets and accounts of the joint powers entity [or the group that is acting cooperatively] separately from the fiscal agent's.
- Check stock for payroll and letterhead need to represent separate entities.
- Tax and benefits forms should be in the name of the joint powers entity.
- In addition to the Joint Powers Agreement for the group, there should be a separate written contract between the joint powers entity and the member who serves as a fiscal agent to delineate clearly that the fiscal agent is not the employer for joint powers entity employees.
- If the fiscal agent is one of the members to the joint powers agreement (not forming a new entity), the joint powers agreement should provide how the time and expenses of the fiscal agent will be allocated to the other members. The joint powers agreement should provide that the fiscal agent is not responsible for the negligent acts of other members to the joint powers agreement.
- Do not have member personnel supervise and direct joint powers entity personnel.

These recommendations are not all inclusive, and a member should contact MCIT for additional recommendations when the need arises. As the need to work cooperatively with other entities continues, so does the developing body of risk management recommendations.

Related MCIT Resources

The following materials are available at MCIT.org in the Resource Library:

- Sharing Employees: Drafting Agreements
- Sample Contract for Sharing Employees
- Model Mutual Aid Agreement