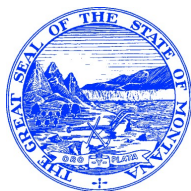


LEGISLATIVE AUDIT DIVISION

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MEMORANDUM

TO: Legislative Audit Committee Members

FROM: Chelsea Rayfield, Management & Program Analyst

CC: Greg Gianforte, Governor, Office of the Governor
Anita Milanovich, General Counsel, Office of the Governor
Don Harris, Chief Legal Counsel, Department of Administration

DATE: January 2022

RE: Performance Audit Follow-Up (21SP-27): *State Employee Settlements: Trends, Transparency, and Administration* (orig. 18P-04)

ATTACHMENTS: Original Performance Audit Summary

Introduction

The *State Employee Settlements: Trends, Transparency, and Administration (18P-04)* performance audit report was issued to the Legislative Audit Committee in June 2020. The audit included two recommendations to the Office of the Governor and two recommendations to the legislature. We conducted follow-up work to assess implementation of the report recommendations. This memorandum summarizes the results of our follow-up work.

Overview

Our report recommended the Office of the Governor and Department of Administration (DOA) establish standardized settlement documentation and language. It also recommended the Office of the Governor pursue statute establishing a centralized settlements review process. The DOA will establish settlements state policy by February 2022 to guide agencies in using consistent settlement language and retaining the appropriate settlement documentation. It will also outline a new review process for larger state employee settlements.

The audit recommended the legislature define settlements and their costs in statute and require consistent reporting in the state accounting, budgeting and human resources system (SABHRS). It also recommended the legislature require agencies assess the parties' right to privacy before using nondisclosure agreements. The 2021 Montana Legislature implemented both recommendations via the State's Settlement of Claims Sunshine and Transparency Act.

Background

A state employee settlement refers to a binding legal agreement between a state employee and state agency to resolve differences based on certain terms and conditions. They can be used as a management tool to limit the state's legal exposure and the costs of resolving claims in circumstances including employee discipline or discrimination complaints. From fiscal years 2014 to 2018, the state entered into 171 state employee settlements with a total cost of just under \$5 million. Prior to our audit there were

several high-profile state employee settlement cases that garnered the attention of the legislature. After the 2017 Legislative Session, a select committee was appointed to examine settlements. The 2019 session passed legislation providing statutory guidance for the state settlement process. This legislation was vetoed by the governor, who issued Executive Order (EO) No. 6-2019 to address parts of the bill. The 2021 Montana Legislature enacted state settlements legislation that included language implementing both audit recommendations under its purview.

Audit Follow-up Results

The following sections summarize the progress toward implementation of the report recommendations. To complete our follow-up work, we reviewed 2021 settlements legislation and interviewed staff in the Office of the Governor and the Department of Administration. Work also involved reviewing the statutorily required state settlement data website to ensure it was reporting the required information. Settlements trainings DOA provided to state agencies on settlements legislation were also reviewed.

RECOMMENDATION #1

We recommend the Montana Legislature enact legislation:

- A. Defining what constitutes a state employee settlement and what should be considered when determining the cost of a state employee settlement, and**
- B. Requiring reporting of state employee settlements in State Accounting, Budgeting, and Human Resource System (SABHRS), including defining what information should be reported.**

Implementation Status – Implemented

The 2021 Legislature passed the State’s Settlement of Claims Sunshine and Transparency Act. This act implemented both parts of this audit recommendation, defining a settlement as “a binding legal agreement between the state or its agencies, departments, or other state entities and a party who accepts monetary compensation in return for releasing claims against the state or its entities” (§2-6-1031(6), MCA). Per the act, monetary compensation, “includes money and anything of financial value that is used by a governmental entity to resolve a claim, including but not limited to paid administrative leave and reinstatement or rehiring of a terminated employee” (§2-6-1031(4), MCA). Statute also requires settlements be consistently coded in SABHRS and outlines the records to be retained by the agency and information to be reported on a public website.

In response to the act, DOA implemented two online trainings for human resources and legal staff across the state, including those in the Montana University System (MUS), although MUS was not included in the audit. The first online training reviewed the new settlement laws, including key definitions, the information required to be published on the public website, and the records agencies must retain. The second training explained how to report settlements on the new reporting website.

RECOMMENDATION #2

We recommend the Governor’s Office work with the Department of Administration to develop and implement policy establishing support documentation requirements and minimum standard settlement language that must be used for all state employee settlements.

Implementation Status – Being Implemented

The legislature defined in law the records to be maintained by agencies when monetary compensation is involved in resolving a claim. The required documentation includes, “a detailed description of the alleged conduct, acts, or omissions by one or more employees ... and the state’s defenses,” as well as the settlement terms (§2-6-1032(7)(b), MCA). The DOA reports it is developing state policy for the Montana

Operations Manual (MOM) that, per the State's Settlement of Claims Sunshine and Transparency Act, guides agencies on what records and information must be maintained. The policy will also provide standardized settlement language (i.e., a settlement agreement template) for settlements involving state employees. Staff at DOA expect the new MOM policy will be finalized by the end of February 2022.

RECOMMENDATION #3

We recommend the Montana Legislature enact legislation requiring agencies to conduct a documented balancing test of the public's right to know and the individual's right to privacy before including a non-disclosure, confidentiality, or similar terms as part of a state employee settlement.

Implementation Status – Implemented

Per the State's Settlement of Claims Sunshine and Transparency Act, nondisclosure agreements in settlements are "disfavored" and "may be utilized only when the right to individual privacy outweighs the public right to know" (§2-6-1032(5), MCA). This law necessitates state agencies complete a balancing test to determine whether a nondisclosure agreement may be used. The DOA reported it will be including a section regarding confidentiality in its impending MOM settlements policy, outlining this statutory requirement and the necessity of completing a balancing test accordingly. This policy will be available to agencies by the end of February 2022.

RECOMMENDATION #4

We recommend the Governor's Office:

- A. Pursue statute to establish and require a centralized review and approval of all state employee settlements, and**
- B. Work with the Department of Administration to develop and implement policy establishing centralized review which includes but is not limited to a review of:**
 - **Funding Source**
 - **Settlement Terms**
 - **Support for Settlement**
 - **Settlement Language**

Implementation Status – Being Implemented

The DOA and the Office of the Governor report they are in the early stages of developing a centralized review process for both state employee and tort settlements. It is expected this review process will be incorporated in the forthcoming MOM policy described above. While still being drafted, it is likely that settlements involving monetary compensation above \$75,000 will be reviewed. DOA staff said this monetary threshold is intended to balance DOA's review capacity with the need to review settlements. Review expectations for agencies will include having their chief legal or director certify they ensured the settlement process adhered to the provisions of the State's Settlement of Claims Sunshine and Transparency Act. The DOA review is intended occur before settlement terms are finalized, to ensure the agency adheres to state law in its processes and the likely settlement terms are reasonable given the specific situation. DOA staff clarified the centralized review process will not be meant to provide agencies guidance. For those settlements that fall below the established monetary threshold, DOA will implement a quarterly auditing process of those on the reporting website, which will likely include reviewing all settlement documentation of a sample to ensure compliance with law and policy.