

**ITEM 6**  
**FINAL STAFF ANALYSIS**  
**PROPOSED PARAMETERS AND GUIDELINES**

Code of Civil Procedure  
Sections 1299.2, 1299.3, 1299.4, subdivision (b),  
1299.5, subdivision (a), 1299.6, subdivision (a),  
1299.8 and 1299.9, subdivision (b)

Statutes 2000, Chapter 906

*Binding Arbitration*  
01-TC-07

County of Napa, Claimant

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**EXECUTIVE SUMMARY**

**Background**

The test claim statutes added Title 9.5 to the Code of Civil Procedure, providing new procedures to govern the resolution of impasses reached in collective bargaining between public employers and employee organizations representing firefighters and law enforcement officers.

The statutes provided that if an impasse is declared after the parties exhaust their mutual efforts to reach agreement over matters within the scope of the negotiation, and the parties are unable to agree to the appointment of a mediator, or if a mediator agreed to by the parties has been unable to effect settlement of a dispute between the parties, the employee organization can, by written notification to the employer request that their differences be submitted to an arbitration panel.

The arbitration panel is required to meet with the parties within ten days after its establishment, or after any additional periods of time mutually agreed upon. The panel is authorized to meet with the parties, to make inquiries and investigations, hold hearings, and take any other action including further mediation, that the panel deems appropriate. Five days prior to the commencement of the arbitration panel's hearings, each of the parties is required to submit a last best offer of settlement on the disputed issues. The arbitration panel may, for purposes of its hearings, investigations, or inquiries, subpoena witnesses, administer oaths, take the testimony of any person, and issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records. Preexisting statutory provisions apply unless otherwise provided in the test claim statutes. Among other things, these general arbitration provisions provide procedures for the conduct of hearings, e.g., notice of hearings, witness lists, admissible evidence, subpoenas, and depositions.

The panel decides the disputed issues separately, or if mutually agreed, by selecting the last best offer package that most nearly complies with specified factors. The panel then delivers a copy of its decision to the parties, but the decision may not be publicly disclosed for five days. The decision is

not binding during that period, and the parties may meet privately to resolve their differences and, by mutual agreement, modify the panel's decision. At the end of the five day period, the decision as it may be modified by the parties is publicly disclosed and binding on the parties.

The test claim statutes in their entirety were declared unconstitutional by the California Supreme Court on April 21, 2003, as violating portions of article XI of the California Constitution. The basis for the decision is that the statutes (1) deprived the county of its authority to provide for the compensation of its employees as guaranteed in article XI, section 1, subdivision (b); and (2) delegate to a private body the power to interfere with local agency financial affairs and to perform a municipal function, as prohibited in article XI, section 11, subdivision (a).

### **Commission's Decision**

On March 29, 2007, the Commission on State Mandates (Commission) reconsidered the Statement of Decision on the *Binding Arbitration* test claim, finding that the prior Statement of Decision adopted on July 28, 2006, was contrary to law. The Commission adopted a new decision and approved reimbursement for the following state-mandated activities pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514.

1. Selecting an arbitration panel member (Code Civ. Proc. § 1299.4, subd. (b)).
2. Submitting the last best final offer of settlement to the arbitration panel (Code Civ. Proc. § 1299.6, subd. (a)).
3. Once arbitration is triggered under Code of Civil Procedure section 1299.4, the following activities required by the arbitration panel or to participate in the arbitration process:
  - a. Meet with the arbitration panel (Code Civ. Proc. § 1299.5, subd. (a)).
  - b. Participate in inquiries or investigations (Code Civ. Proc. § 1299.5, subd. (a)).
  - c. Participate in mediation (Code Civ. Proc. § 1299.5, subd. (a)).
  - d. Participate in hearings (Code Civ. Proc. § 1299.5, subd. (a)).
  - e. Respond to subpoenas and subpoenas duces tecum (Code Civ. Proc. § 1299.5, subd. (b)).
  - f. Respond to or make demands for witness lists and/or documents (Code Civ. Proc., § 1299.8).<sup>1</sup>
  - g. Make application and respond to deposition requests (Code Civ. Proc., § 1299.8).<sup>2</sup>
  - h. Conduct discovery or respond to discovery requests (Code Civ. Proc., § 1299.8).<sup>3</sup>

Because the test claim statutes were declared unconstitutional on April 21, 2003, the reimbursement period was limited to January 1, 2001 through April 20, 2003.

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<sup>1</sup> Incorporating by reference Code of Civil Procedure section 1282.2, subdivision (a)(2).

<sup>2</sup> Incorporating by reference Code of Civil Procedure sections 1283 and 1283.05.

<sup>3</sup> Incorporating by reference Code of Civil Procedure section 1283.05.

## **Draft Parameters and Guidelines and Proposed Modifications**

Commission staff issued the adopted Statement of Decision and staff's draft proposed parameters and guidelines on May 10, 2007.<sup>4</sup> The proposed reimbursable activities were limited to those approved in the Statement of Decision.

On June 11, 2007, the County of Napa proposed new reimbursable activities and clarifying changes to the draft parameters and guidelines and provided a declaration to support their position that the draft [of the Reimbursable Activities section] does not accurately reflect the full reality of the *Binding Arbitration* Program.<sup>5</sup> For each mandated activity, the County identifies *who* implemented the mandate, and also proposes additional reimbursable activities that are the most reasonable methods of complying with the mandate.<sup>6</sup>

The Commission has the authority when adopting parameters and guidelines to include activities that are considered "the most reasonable methods of complying with the mandate."<sup>7</sup> Therefore, staff reviewed each of claimant's proposed changes in order to advise the Commission whether County's proposed activities and modifications are "the most reasonable methods of complying with the mandate."

## **Department of Finance Comments**

On May 15, 2008, the draft parameters and guidelines, as proposed for modification by claimant and modified by staff were issued for review and comment.<sup>8</sup> On June 2, 2008, the Commission was notified that Finance concurs with the staff recommendation on most of the changes to the proposed parameters and guidelines.<sup>9</sup> Finance also finds that the staff recommendation to allow activities as required by the arbitration panel to be reimbursable is in compliance with the Commission's authority to determine the most reasonable methods of complying with the mandate. Finance recommends and staff concurs that a limitation on expert witness costs should be added to Part C. Non-Reimbursable Activities of Section IV. Reimbursable Activities.

No other comments were submitted on the draft staff analysis and draft parameters and guidelines.

## **Recommendation**

Staff recommends that the Commission adopt the Draft Parameters and Guidelines, as modified by the claimant, staff, and the Department of Finance (beginning on page 19), and allow reimbursement for the most reasonable methods of complying with the mandate.

Staff also recommends that the Commission authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

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<sup>4</sup> See Exhibit A.

<sup>5</sup> See Exhibit B.

<sup>6</sup> See Attachment 1 for Napa County's Chronology: Collective Bargaining Process, Mediation, and Binding Arbitration.

<sup>7</sup> California Code of Regulations, title 2, section 1183.1, subdivision (a)(1)(A)(4).

<sup>8</sup> See Exhibit C.

<sup>9</sup> See Exhibit D.



## Chronology

10/24/2001	Test claim filed by the City of Palos Verdes Estates
07/28/2006	Commission adopted Statement of Decision denying test claim
08/16/06	Request for reconsideration filed with the Commission
10/04/06	Commission granted the request for reconsideration
01/23/2007	County of Napa joined as co-claimant
03/29/2007	Commission adopted Statement of Decision on reconsideration
05/10/2007	Commission staff issued draft proposed parameters and guidelines
06/11/2007	County of Napa filed comments on staff's proposed parameters and guidelines
05/15/2008	Commission issues draft staff analysis and proposed parameters and guidelines
06/02/2008	Department of Finance filed comments on draft staff analysis and proposed parameters and guidelines
06/06/08	Commission staff issues final staff analysis and proposed parameters and guidelines

## Discussion

Commission staff issued the adopted Statement of Decision and staff's draft proposed parameters and guidelines on May 10, 2007.<sup>10</sup> The proposed reimbursable activities were limited to those approved in the Statement of Decision.

On June 11, 2007, the County of Napa proposed new reimbursable activities and clarifying changes to the draft parameters and guidelines and provided a declaration to support their position that the draft [of the Reimbursable Activities section] does not accurately reflect the full reality of the *Binding Arbitration Program*.<sup>11</sup> The declaration by Deputy County Counsel Jacqueline Gong describes the County's rationale for the steps taken to comply with the Binding Arbitration statute. The County explains that "[a]t each step of the arbitration process, any number of individuals spend time and resources as a necessary part of participation in the program." Thus, for each mandated activity, the County identifies *who* implemented the mandate, and also proposes additional reimbursable activities that are the most reasonable methods of complying with the mandate.

The Commission has the authority when adopting parameters and guidelines to include activities that are considered "the most reasonable methods of complying with the mandate."<sup>12</sup> Therefore, staff reviewed each of claimant's proposed changes in order to advise the Commission whether County's proposed activities and modifications are "the most reasonable methods of complying with the mandate."

The test claim statute added new section 1281.1 of the Code of Civil Procedure which states that any request to arbitrate made pursuant to subdivision (a) of section 1299.4 shall be considered as made pursuant to a written agreement to submit a controversy to arbitration. Further, section

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<sup>10</sup> See Exhibit A.

<sup>11</sup> See Exhibit B.

<sup>12</sup> California Code of Regulations, title 2, section 1183.1, subdivision (a)(1)(A)(4).

1299.8 of the Code of Civil Procedure specifies that unless otherwise provided in this title, Title 9 (commencing with Section 1280) shall apply to any arbitration proceeding undertaken pursuant to the test claim statute. Further, section 1282.4, subdivision (a), Code of Civil Procedure, states that a party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration. Throughout this staff analysis, references are made to section 1299.8 and specific Title 9 sections that are incorporated in by reference and that are applicable to the binding arbitration proceeding.

#### Section IV. Reimbursable Activities

The County of Napa proposed amendments to clarify the activities and costs that are reimbursable. The **bold text** is staff's original proposed language (as approved in the Statement of Decision) and the underlined text is claimant's proposed modification. Staff's findings and recommendations follow:

1a. **Selecting an arbitration panel member** which includes attorney, staff and negotiator time to research potential members, prepare for the selection, and brief the panel member. (Code Civ. Proc., § 1299.4, subd. (b))

The County proposes that language be added, clarifying that reimbursement for "selecting an arbitration panel member" includes reimbursement for "attorney, staff, and negotiator time to research potential members, prepare for the selection, and brief the panel member." According to County,

In January 2001, [the Napa County Deputy Sheriff's Association] DSA requested that disputed economic issues under negotiations with the County be submitted to arbitration pursuant to California Code of Civil Procedure Section 1299 et seq ... After consultation with other agencies, and meetings between the County's Human Resources Director and legal counsel, the County designated its arbitration panel member. The selection of the partisan member is key as this member represents the employer's perspective. Strategically, the County sought a panel member who would have a fundamental knowledge about the collective bargaining process and an understanding of County operations and funding, including county structures, staffing patterns, law enforcement operations, this member needed to enhance the neutral arbitrator's understanding of the technical aspects of the County's economic positions. For these reasons, the County spent some time researching, consulting, and evaluating who best would represent the County.<sup>13</sup>

The test claim statute establishes the arbitration panel consisting of three members; two representing the parties and one impartial person acting as chairperson.<sup>14</sup>

The Commission found that once arbitration is triggered under Code of Civil Procedure section 1299.4, the activities initiated by the local public agency employer to participate in arbitration are not discretionary. Selection of the County's panel representative is key to the arbitration proceeding. Therefore, staff finds that the proposed activities "to research potential members and prepare for the selection" are necessary to perform the mandated activity of selecting the agency panel member and constitute reasonable methods of complying with the mandated program.

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<sup>13</sup> See Exhibit B, Declaration of Jacqueline M. Gong (County's Declaration), Paragraph 2.

<sup>14</sup> Code of Civil Procedure section 1299.4, subdivision (b).

Once the panel member is selected, staff finds that the activity to brief the member is reasonably necessary for the local agency public employer to participate in the arbitration. Although the Commission recognized that this activity was not expressly required by the test claim statute, staff finds that it is a reasonable method of complying with the mandated program and thus should be reimbursable.

Therefore, staff recommends approval of County's proposed language.

1b. This also includes attorney, staff, and negotiator time to vet and select a neutral arbitrator

County also proposes reimbursement for attorney, staff, and negotiator time to "vet and select a neutral arbitrator, as the third panel member."

The test claim statute provides a procedure for the panel members (arbitrators selected by the parties) to select a neutral chairperson, an impartial person with experience in labor and management dispute resolution.<sup>15</sup> And, in the event the *parties are unable or unwilling to agree upon a third person to serve as chairperson, an alternate* process specifies that the two members of the arbitration panel shall jointly request from the American Arbitration Association or the California State Mediation Service, a list of impartial and experienced persons who are familiar with matters of employer-employee relations. If after five days of receipt of the list, the two panel members cannot agree on which of the listed persons shall serve as chairperson, they shall, within two days, alternately strike names from the list, with the first panel member to strike names being determined by lot. The last person whose name remains on the list shall be chairperson.<sup>16</sup>

Code of Civil Procedure section 1280, subdivision (d) defines "neutral arbitrator" as an arbitrator who is (1) selected jointly by the parties or by the arbitrators selected by the parties or (2) appointed by the court when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by them.

In the test claim proceeding, claimants sought reimbursement for time of the agency negotiators, staff and counsel in vetting and selecting a neutral arbitrator. The Commission's decision concludes that the test claim statutes require the arbitration panel members selected by the parties, rather than the employer or employee organization to select the neutral third panel member to act as chairperson. *However, the decision is silent as to activities that may occur if the two panel members allow the parties to select the neutral third panel member to act as chairperson.*

In her declaration, Deputy County Counsel Jacqueline Gong states:

In preparation of selecting a neutral arbitrator, legal counsel conducted extensive research on prospective neutral arbitrators: analyzing their backgrounds and arbitration experience, gathering former decisions and contacting agencies who had participated in arbitration hearings with them. It was essential for the County to vet the prospective arbitrators. Strategically, due to the complicated data analysis the County anticipated it would need to present at the hearing, the County evaluated arbitrators for their ability and comfort with handling extensive factual information and analysis and for a liberal approach to admitting evidence. After further discussions between the County's [arbitration panel member] Human Resources Director and legal counsel, the County planned its approach in

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<sup>15</sup> Code of Civil Procedure section 1299.4, subdivision (b).

<sup>16</sup> Code of Civil Procedure section 1299.4, subdivision (c).

participating in the joint selection of the neutral arbitrator. The County and DSA jointly selected a neutral arbitrator.<sup>17</sup>

According to this declaration, “[i]t was essential for County to vet the prospective arbitrators.” This is consistent with the Commission’s Statement of Decision, that “activities initiated by the local public agency employer to participate in arbitration are not discretionary.” Since the mandated program could not proceed without selection and participation of a neutral arbitrator as the third panel member and chairperson, staff finds that County’s participation in the selection process is necessary to participate in the arbitration process, and thus should be reimbursable.

Staff also finds that it was reasonably necessary for the County or any other local agency employer to “vet” a person who is proposed for nomination or appointment as neutral arbitrator. Since the arbitration panel is a three-person panel, the neutral chairperson’s “ability and comfort with handling extensive factual information and analysis and for a liberal approach to admitting evidence” were critical to the outcome of the binding arbitration. The County would not be able to make this assessment without “vetting” persons proposed for nomination or appointment as neutral arbitrator. Thus, staff finds that the County’s proposed activities of “vetting and selecting a neutral arbitrator” are the most reasonable methods to implement the binding arbitration process. Therefore, staff recommends approval of the additional activities to allow reimbursement for the County’s participation in the selection of the neutral third panel member to act as chairperson.

2. **Submitting the last best final offer of settlement to the arbitration panel which includes attorney and staff time to prepare for and draft the last best final offer for submission as well as attorney, staff and board members’ time for consultation with governing board** (Code Civ. Proc., § 1299.6, subd. (a)).

The County requests reimbursement for attorney and staff time to prepare for and draft the last best final offer for submission as well as attorney, staff and board members’ time for consultation with the governing board. In her declaration, Deputy County Counsel Jacqueline Gong stated:

In April 2001, the parties and legal counsel met with the arbitration panel to submit their last best final offers of settlement ... At this meeting, the parties further settled on two economic proposals. In preparation for the meeting, staff and legal counsel prepared and drafted the County’s last best final offer for submission after consultation with the County’s Board of Supervisors.<sup>18</sup>

Code of Civil Procedure section 1299.6, states, in relevant part, as follows:

(a) Once the arbitration process is triggered, the arbitration panel shall direct that five days prior to beginning its hearings, each of the parties shall submit the last best offer of settlement as to each of the issues within the scope of the arbitration ... made in bargaining as a proposal or counterproposal and not previously agreed to by the parties prior to any arbitration request made pursuant to subdivision (a) of Section 1299.4. ... (Emphasis added.)

(b) Notwithstanding the terms of subdivision (a), the parties by mutual agreement may elect to submit as a package the last best offer of settlement made in bargaining as a proposal or counterproposal on those issues within the scope of arbitration, as defined in this title, not

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<sup>17</sup> See Exhibit B, County’s Declaration, Paragraph 3.

<sup>18</sup> See Exhibit B, County’s Declaration, paragraph 4.



previously agreed to by the parties prior to any arbitration request made pursuant to subdivision (a) of Section 1299.4. ...

The Commission's decision on reconsideration states that "the test claim statutes do not, however, require the local public agency employer to prepare for and consult with the governing board regarding the last best offer of settlement. Thus, the only activity required is to *submit* the last best final offer of settlement to the arbitration panel, and, therefore, that activity alone is state-mandated and subject to article XIII B, section 6." (Emphasis in Statement of Decision.)

The *last best offer of settlement* is limited to the issues within the *scope of arbitration made in bargaining as a proposal or counterproposal and not previously agreed to by the parties prior to any arbitration request*. *Scope of arbitration* means "economic issues, including salaries, wages and overtime pay, health and pension benefits, vacation and other leave, reimbursements, incentives, differentials, and all other forms of remuneration."<sup>19</sup> Thus, based on the statutory description, the last best offer of settlement pre-exists any arbitration request made pursuant to subdivision (a) of section 1299.4, because it was made in bargaining as a proposal or counterproposal and not previously agreed to. Therefore, staff finds that claimant's proposed new activity to "prepare for and draft the last best final offer for submission as well as attorney, staff and board members' time for consultation with the governing board" should be denied because as defined, the *last best final offer* preexists the mandated activity.

However, staff finds that if during the arbitration process, the local agency's last best final offer of settlement changes, and the arbitration panel directs the parties to resubmit their offers, that it is reasonably necessary to respond to the panel and to update the "last best final offer of settlement." If this occurs, then it would also be reasonably necessary for the local agency's staff, negotiator, and attorney, to confer with the governing board in closed session before revising and submitting an updated offer. Thus, staff recommends approval of claimant's proposed reimbursable activities, as modified by staff below, because the proposed reimbursable activities are reasonably necessary to carry out the mandated program.

If directed by the arbitration panel to resubmit the last best final offer:

- Attorney and staff time to redraft and resubmit the "last best final offer."
- Attorney, staff, and board members' time to consult with the governing board regarding modifications to the last best final offer.

**3. Once arbitration is triggered under Code of Civil Procedure section 1299.4, the scope of which is defined in Code of Civil Procedure section 1299.3, subdivision (g), the following activities required by the arbitration panel or to participate in the arbitration process:**

The Commission recognized that Code of Civil Procedure section 1299.8 states that, unless otherwise provided in the test claim statutes, the general provisions regarding arbitration found in the Code of Civil Procedure (§ 1280 et seq.) are applicable to binding arbitration proceedings under the test claim statutes. The relevant portions of these general arbitration provisions establish procedures for the notice and conduct of hearings, witness lists, admissible evidence, subpoenas, and depositions. (§ 1282 et seq.) Section 1299.9, subdivision (b) states that, unless otherwise agreed to by the parties, the costs of the arbitration proceeding and the expense of the arbitration panel, except those of the employer representative, shall be borne by the employee organization.

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<sup>19</sup> Code of Civil Procedure section 1299.3, subdivision (g).

Thus, the public agency employer is responsible for costs of its agency panel member, but not the cost of the proceeding or the other panel members.

In the Statement of Decision, the Commission made the following findings:

Once arbitration is triggered under Code of Civil Procedure section 1299.4, the arbitration panel within the scope of its authority, may direct the parties to perform specified activities. Since the arbitration proceeding, once triggered, is mandatory, the Commission finds that the activities directed by the arbitration panel or activities initiated by the local public agency employer to participate in arbitration are not discretionary. As noted ... the arbitration panel's authority includes meeting with the parties or their representatives, making inquiries and investigations, holding hearings and taking any other action including further mediation that the arbitration panel deems appropriate, as well as subpoenaing witnesses, administering oaths, taking the testimony of any person, issuing subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any subject matter before the panel.

The plain language of the test claim statutes does not require the local public agency, or its staff or governing board to prepare for hearings, prepare expert witnesses, prepare a closing brief, or consult with its panel member prior to the issuance of the award. Nor does the plain language of section 1299.7, subdivision (a), require the local public agency or its staff or governing board to negotiate with the employee organization representatives based on the award. Further the plain language of the test claim statutes does not require the employer's arbitration panel member to participate in pre-arbitration meetings with local agency staff, consult with local agency staff prior to issuance of the award, consult in closed session with the arbitration panel, or consult with local agency staff and the governing board regarding the award. However, to the extent that any of the above activities are directed by the arbitration panel within the scope of its authority, the activity is state-mandated.

Thus, once arbitration is triggered under Code of Civil Procedure section 1299.4, the Commission determined that the following activities to participate in the arbitration process or as required by the arbitration panel are state-mandated and subject to article XII B, section 6:

- A. Meet with the arbitration panel.
- B. Cooperate in inquiries or investigations.
- C. Participate in mediation.
- D. Participate in hearings.
- E. Respond to subpoenas and subpoenas duces tecum.
- F. Respond to or make demands for witness lists and/or documents.
- G. Make application and respond to deposition requests.
- H. Conduct discovery or respond to discovery requests.

The state-mandated activities identified above were included in staff's draft proposed parameters and guidelines. The County of Napa proposed changes to each activity; clarifying who performs

the activity and identifying related activities that are reasonably necessary to implement the mandated program. The original state-mandated activities (**bold text**) and County's amendments (underlined text) were reviewed by staff and are discussed below.

County proposes adding activities that were denied in the Commission's decision because they were not expressly required by statute. However, the Commission also determined that to the extent that any of the specified activities are directed by the arbitration panel within the scope of its authority, the activity is state-mandated. Thus, it is necessary to review the proposed activities and to determine if they are directed by the arbitration panel or are reasonably necessary to implement the mandated program. Otherwise, County's proposed additional activities would be inconsistent with the Commission's Statement of Decision and should be denied.

- A. **Meet with the arbitration panel** which includes attorney, staff, agency panel member and negotiator time to prepare for and to meet with the panel. This also includes agency panel member time for consulting in closed session with the panel; attorney, staff, agency panel member and negotiator time to consult with the panel member prior to the issuance of the award; and attorney, staff, agency panel member, governing board and negotiator time to consult regarding the award.<sup>20</sup> (Code Civ. Proc. § 1299.5, subd. (a).)
- B. **Participate in inquiries or investigations** which include attorney and staff time to prepare for and respond to inquiries or investigations. (Code Civ. Proc. § 1299.5, subd. (a).)
- C. **Participate in mediation** which includes attorney and staff time to prepare for and participate in the mediation process. (Code Civ. Proc. § 1299.5, subd. (a).)

The County proposes clarifying changes which expand the mandated activities and specify which agent or representative of a local agency may be reimbursed for performing the mandated activity.

The Commission found that once triggered, the arbitration proceeding is mandatory, and the activities directed by the arbitration panel or activities initiated by the local public agency employer to participate in arbitration are not discretionary. Section 1299.5, subdivision (a), provides that the arbitration panel, shall, within 10 days of its establishment or any additional periods to which the parties agree, meet with the parties or their representatives, either jointly or separately.

Nothing in the Commission's Statement of Decision, the test claim statute, or mandates case law restricts an eligible claimant from being reimbursed for increased costs incurred for the cost of attorney, staff, or negotiator time for this program. Further, section 1282.4, subdivision (a), Code of Civil Procedure, states that a party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration.

Thus, staff finds that it is reasonably necessary for a local agency to assign state-mandated activities for the purposes of this mandated program to an attorney, staff, or negotiator to perform. Staff also finds that it is reasonably necessary to "prepare" for meetings, inquiries or investigations, mediation, hearings with the panel, and to consult with the agency panel members jointly or separately.

Section 1299.9, subdivision (b) states that unless otherwise agreed to by the parties, the costs of the arbitration proceeding and the expenses of the arbitration panel, except those of the employer representative, shall be borne by the employee organization.

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<sup>20</sup> The analysis of last activity proposed by County is on page 14 of this analysis.

The Commission's decision states:

The plain language of the test claim statutes does not require the employer's arbitration panel member to participate in pre-arbitration meetings with local agency staff prior to the issuance of the award, consult in closed session with the arbitration panel, or consult with local agency staff and the governing board regarding the award. However, to the extent that any of the activities are directed by the arbitration panel within the scope of its authority, the activity is state-mandated.

Section 1299.5, subdivision (a), provides that the arbitration panel, shall, within 10 days of its establishment or any additional periods to which the parties agree, meet with the parties or their representatives, either jointly or separately, make inquiries and investigations, hold hearings, and take any other action including further mediation, that the arbitration panel deems appropriate. Additionally, section 1299.8 states that, unless otherwise provided in the test claim statutes the general provisions regarding arbitration found in the Code of Civil Procedure are applicable to binding arbitration proceedings under the test claim statutes.

Staff also finds that it is reasonably necessary to "prepare for, respond to, or participate in inquiries or investigations, mediation, and hearings with the panel.

Therefore, staff recommends approval of County's proposed language as described above.

#### **Depositions and Discovery Requests**

- D. **Make application and respond to deposition requests which includes attorney and staff time to research, prepare to make or respond to requests, gather responsive documents, meet with witnesses and others to obtain responses or responsive documents or requests and draft and serve responses or requests.** (Code Civ. Proc., § 1299.8.)<sup>21</sup>
- E. **Conduct discovery or respond to discovery requests which includes attorney and staff time to research, prepare to make or respond to requests, gather responsive documents, meet with witnesses and others to obtain responses or responsive documents or discovery requests and draft and serve responses or discovery requests.** (Code Civ. Proc., § 1299.8.)<sup>22</sup>

Section 1299.8 states that, unless otherwise provided in the test claim statutes the general provisions regarding arbitration found in the Code of Civil Procedure are applicable to binding arbitration proceedings under the test claim statutes. Section 1283.05 of the Code of Civil Procedure sets forth detailed procedures regarding the rights of parties to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures, as if the arbitration were pending in a civil action in superior court, subject to the limitations as to depositions set forth in section 1283.05, subdivision (e). State law also gives arbitrators the power to enforce the rights, remedies, procedures, duties, liabilities and obligations of discovery, by the imposition of the same terms, conditions, consequences, liabilities, sanctions, and penalties as can be or may be imposed in a civil action by a superior court, except the power to order the arrest or imprisonment of a person.

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<sup>21</sup> Incorporating by reference Code of Civil Procedure sections 1283 and 1283.05.

<sup>22</sup> Incorporating by reference Code of Civil Procedure section 1283.05.

According to the County's declaration:

As with any arbitration process, the County, through its staff and legal counsel, prepared and responded to requests for discovery and other inquiries for information, served and drafted responses/responsive documents....<sup>23</sup>

As agreed to with the arbitration panel, the County prepared its response to DSA's request for budgetary documentation and the evidentiary exhibits for the hearing. This preparation entailed considerable time and resources, not only of legal counsel and County Human Resources staff, but of staff from the County Executive Office and Auditor-Controller. The compilation of fiscal data and analysis far exceeded what the County typically gathered in preparation of its routine negotiations, including past & present annual budgets and projections, budget updates, information on wage increases for employees over the span of ten years, data demonstrating revenue losses and gains, debt service levels, County funding priorities, data on general reserve set-asides and other budget and spending limitations.<sup>24</sup>

Based on the application of section 1283.05 to the arbitration proceeding, through section 1299.8, staff finds that County's proposed changes to the activities related to depositions and discovery are reasonably necessary to participate in the state-mandated arbitration proceeding. Therefore, staff recommends approval of County's proposed language, as stated above.

#### **Subpoenas, Witnesses, and Hearing**

- F. **Respond to subpoenas and subpoenas duces tecum** which includes attorney and staff time to research, prepare to respond to subpoenas, gather responsive documents, meet with witnesses and others to obtain responses or responsive documents, draft and serve responses. (Code Civ. Proc. § 1299.5, subd. (b).)
- G. **Respond to or make demands for witness lists and/or documents** which includes attorney and staff time to research, prepare to make or respond to demands, gather responsive documents, meet with witnesses and others to obtain responses or responsive documents or demands and draft and serve demands or responses. (Code Civ. Proc., § 1299.8.)<sup>25</sup>
- H. Vet, select and prepare expert witnesses as well as prepare general witnesses (attorney, staff and negotiator time). (Code Civ. Proc. § 1299.5, subd. (a).)
- I. **Participate in hearings** which include attorney, staff, witness and negotiator time to prepare for and participate in the hearings ...<sup>26</sup> (Code of Civ. Proc., § 1299.5, subd. (a).)

Staff finds that the changes proposed by County, clarify and are consistent with the Commission's decision, specify whose time is reimbursable, and are reasonably necessary to implement the binding arbitration mandate. Therefore, staff recommends approval of County's proposed language for the following reasons:

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<sup>23</sup> See Exhibit B, County's Declaration, paragraph 7.

<sup>24</sup> See Exhibit B, County's Declaration, paragraph 5.

<sup>25</sup> Incorporating by reference Code of Civil Procedure section 1282.2, subdivision (a)(2).

<sup>26</sup> Ibid.

Code of Procedure section 1299.8 states that, unless otherwise provided in the test claim statutes the general provisions regarding arbitration found in the Code of Civil Procedure are applicable to binding arbitration proceedings under the test claim statutes.

Code of Civil Procedure section 1299.5, subdivision (b) authorizes the arbitration panel to subpoena witnesses, administer oaths, take the testimony of any person, and issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any subject matter before the panel. Section 1282.2 prescribes these hearing procedures for arbitrations and includes specific procedures regarding witness lists.

Staff finds that claimant's proposed changes to the activity "to respond to or make demands for witness lists and/or documents" and the proposed reimbursable activities, "Vet, select and prepare expert witnesses as well as prepare general witnesses" are reasonably necessary to comply with the procedures set forth in Code of Civil Procedure section 1282.2, subdivision (a)(2) which is incorporated by reference in section 1299.8. County's proposed new activities are reasonably necessary to participate in arbitration hearings and are consistent with the Commission's decision.

Moreover, County Counsel Gong, states in her declaration:

The three-day hearing involved attorney, staff and witness time to prepare and participate in the hearing...To effectively participate in the arbitration hearing, the County searched for and retained expert witnesses to analyze the fiscal impact of proposed economic issues on the County and its ability to pay, as well as to study the comparability of the County's economic proposals to similarly situated agencies. Expert witnesses developed analytical studies and prepared for testifying at the arbitration hearing with the assistance of legal counsel. General witnesses were also identified and prepared for testifying about County budgets, revenue and financial commitments.<sup>27</sup>

Staff finds that pursuant to section 1283.2 of the Code of Civil Procedure, except for the parties to the arbitration and their agents, officers and employees, all witnesses appearing pursuant to subpoena are entitled to receive fees and mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in the superior court. The fee and mileage of a witness subpoenaed upon the application of a party to the arbitration shall be paid by such party. The fee and mileage of a witness subpoenaed solely upon the determination of the neutral arbitrator shall be paid in the manner provided for the payment of the neutral arbitrator's expenses, and is not reimbursable under this mandate. In comments dated June 2, 2008, Department of Finance recommends adding the limitation on expert witness costs to Part C. Non-Reimbursable activities, of Section IV. Reimbursable Activities, as follows:

7. fee and mileage of a witness subpoenaed solely upon the determination of the neutral arbitrator.

Staff agrees with this recommendation and has added this language to the proposed parameters and guidelines.

The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed. On request of any party to the arbitration, the testimony of witnesses shall be given under oath.

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<sup>27</sup> Exhibit B, County's Declaration, paragraph 6.

## **AFTER THE ARBITRATION HEARING (Additional Activities Proposed by County)**

1. Prepare and submit additional written evidence and closing brief (attorney and staff time).

The County proposes adding “prepare and submit additional written evidence and closing brief” to the Reimbursable Activities.

However, the Commission made the following finding in its Statement of Decision:

Further, the plain language of the test claim statute does not require the local public agency, or its staff, or governing board ... to prepare a closing brief ... However, to the extent that any of the above activities are directed by the arbitration panel within the scope of its authority, the activity is state-mandated.

In paragraph 7 of her declaration, County Counsel Gong stated:

... The three-day hearing involved attorney, staff and witness time to prepare and participate in the hearing. Following the hearing, legal counsel and staff *at the direction of the arbitration panel* prepared the submission of additional written evidence and closing briefs.

The County prepared and submitted additional written evidence and closing brief following the arbitration hearing. Based on the County’s declaration, staff finds that these activities were directed by the arbitration panel, and thus are state-mandated. Therefore, staff recommends approval of claimant’s proposed reimbursable activities, as modified by staff, because they are state-mandated.

2. Attorney, staff, agency panel member and negotiator time to consult with the agency panel member prior to the issuance of the award.
3. Attorney, staff, agency panel member, governing board, and negotiator time to consult regarding the award [subd. (b)]. (Code Civ. Proc. § 1299.5, subd. (a).)

The County proposes two new activities that follow the arbitration hearing. After the hearing, the panel decides the disputed issues separately, or if mutually agreed, by selecting the last best final offer package that most nearly complies with statutory factors.<sup>28</sup> The statutory factors are as follows:

- The stipulations of the parties.
- The interest and welfare of the public.
- The financial condition of the employer and its ability to meet the costs of the award.
- The availability and sources of funds to defray the cost of any changes in matters within the scope of arbitration.
- Comparison of matters within the scope of arbitration of other employees performing similar services in corresponding fire or law enforcement employment.
- The average consumer prices for goods and services, commonly known as the Consumer Price Index.
- The peculiarity of requirements of employment, including, but not limited to, mental, physical, and educational qualifications, job training and skills, and hazards of employment.

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<sup>28</sup> Code of Civil Procedure section 1299.6, subdivisions (a) and (b).

- Changes in any of the foregoing that are traditionally taken into consideration in the determination of matters within the scope of arbitration.<sup>29</sup>

The panel then delivers a copy of its decision to the parties, but the decision may not be publicly disclosed for five days. The decision is not binding during that period, and the parties may meet privately to resolve their differences and, by mutual agreement, modify the panel's decision. At the end of the five day period, the decision as it may be modified by the parties is publicly disclosed and is binding on the parties.

The Commission did not make a finding on the County's proposed activities and the test claim statute does not expressly require the attorney, staff, agency panel member, governing board, or negotiator to consult prior to the issuance of the award or regarding the award. However, staff finds that the proposed activities are reasonably necessary to perform the mandated activity to participate in the arbitration process and are reasonable methods of complying with the mandated program. Without consulting with any of the parties identified above, there is no way for the County to determine if by mutual agreement, the panel's decision can be modified before the end of the five day period or if the panel's decision will be binding. Therefore, staff recommends approval of the County's additional proposed activities, as modified by staff.

### **Staff Recommendation**

Staff recommends that the Commission adopt the Draft Parameters and Guidelines, as modified by claimant, staff, and Department of Finance (beginning on page 19), and allow reimbursement for the most reasonable methods of complying with the mandate.

Staff also recommends that the Commission authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

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<sup>29</sup> Code of Civil Procedure section 1299.6, subdivision (c).



## Attachment 1

### Chronology: Collective Bargaining Process, Mediation, and Binding Arbitration

July 2000	Napa County begins collective bargaining process with Deputy Sheriff's Association.
November, December, January, February	Mediation – four occasions
Jan. 16, 2001	During mediation, the DSA requested economic issues be submitted to binding arbitration.
	County consulted with other agencies; the County's Human Resources Director met with legal counsel.
February 20, 2001	Last day of mediation ... County designated its Human Resources Director as its partisan panel member; DSA designated its panel member.
	Discussions between the County's Human Resources Director and legal counsel, the County planned its approach in participating in the joint selection of the neutral arbitrator.
March	County and DSA jointly designated impartial chairperson.
April 17, 2001	Parties met with arbitration panel <ul style="list-style-type: none"> <li>• Identified the disputed economic issues</li> <li>• Established hearing timetable for exchange of requested information, exhibits, witness lists</li> <li>• Agreed on hearing dates.</li> </ul> Parties settled on two economic proposals on retirement and dental benefits.
April 17 – May 22	Parties conducted discovery and exchanged documents as agreed to with the arbitration panel.  Responses to discovery requests involved staff time and resources from the Human Resources Division, County Executive Office and Auditor-Controller's Department. County also incurred costs for legal counsel, both in-house and retained outside counsel.  County searched for and retained expert witnesses to analyze the fiscal impact of proposed economic issues on the County and its ability to pay, as well as to study the comparability of the County's economic proposals to similarly situated agencies.

	<p>Expert witnesses developed analytical studies and prepared for testifying at the arbitration hearing with the assistance of legal counsel.</p> <p>General witnesses were also identified and prepared for testifying about County budgets, revenue and financial commitments.</p> <p>Legal counsel drafted county's last best final offer for submission after consulting with the Board of Supervisors.</p>
May 17	(5 days before hearing) Parties submitted last best final offer from negotiations.
May 22	<p>Parties participated in hearing – 3-days</p> <p>Legal counsel, staff, expert and general witnesses.</p>
	At the direction of the arbitration panel, County through its staff and legal counsel prepared the submission of additional written evidence and closing briefs.
	Panel selects the party's last best offer on each disputed economic issue that most nearly adheres to specified factors under CCP 1299.6.
September 2001	<p>Panel issued its decision.</p> <p>5 Days later, binding decision was made public by the county.</p>

**FINAL DRAFT PARAMETERS AND GUIDELINES,  
AS PROPOSED FOR MODIFICATION BY CLAIMANT  
AND MODIFIED BY STAFF AND DEPARTMENT OF FINANCE**

Code of Civil Procedure Sections 1299.2,  
1299.3, 1299.4, 1299.5, 1299.6, 1299.8 and 1299.9

Statutes 2000, Chapter 906

*Binding Arbitration*

01-TC-07

Reimbursement Period: January 1, 2001, through April 30, 2003

**I. SUMMARY OF THE MANDATE**

On March 29, 2007, the Commission on State Mandates (Commission) adopted a Statement of Decision on the *Binding Arbitration* test claim, finding that the prior Statement of Decision adopted on July 28, 2006, was contrary to law, and, in applying the appropriate law to the test claim, the test claim statutes mandate the following activities:

1. Selecting an arbitration panel member (Code Civ. Proc. § 1299.4, subd. (b)).
2. Submitting the last best final offer of settlement to the arbitration panel (Code Civ. Proc. § 1299.6, subd. (a)).
3. Once arbitration is triggered under Code of Civil Procedure section 1299.4, the following activities required by the arbitration panel or to participate in the arbitration process:
  - a. Meet with the arbitration panel (Code Civ. Proc. § 1299.5, subd. (a)).
  - b. Participate in inquiries or investigations (Code Civ. Proc. § 1299.5, subd. (a)).
  - c. Participate in mediation (Code Civ. Proc. § 1299.5, subd. (a)).
  - d. Participate in hearings (Code Civ. Proc. § 1299.5, subd. (a)).
  - e. Respond to subpoenas and subpoenas duces tecum (Code Civ. Proc. § 1299.5, subd. (b)).
  - f. Respond to or make demands for witness lists and/or documents (Code Civ. Proc., § 1299.8).<sup>1</sup>
  - g. Make application and respond to deposition requests (Code Civ. Proc., § 1299.8).<sup>2</sup>
  - h. Conduct discovery or respond to discovery requests (Code Civ. Proc., § 1299.8).<sup>3</sup>

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<sup>1</sup> Incorporating by reference Code of Civil Procedure section 1282.2, subdivision (a)(2).

<sup>2</sup> Incorporating by reference Code of Civil Procedure sections 1283 and 1283.05.

The Commission found that these activities constitute a “program” as well as a “new program or higher level of service.” Furthermore, the Commission found that the activities impose “costs mandated by the state” within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514.

## **II. ELIGIBLE CLAIMANTS**

Pursuant to Code of Civil Procedure section 1299.2, any city, county, and city and county employing firefighters and/or law enforcement officers, as defined in Code of Civil Procedure section 1299.3, that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs, except a city, county, or city and county governed by a charter that was amended prior to January 1, 2001, to incorporate a requirement for resolving employment disputes via binding arbitration (Code Civ. Proc., § 1299.9, subd. (a)).

## **III. PERIOD OF REIMBURSEMENT**

Government Code section 17557, subdivision (e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The test claim was filed on October 24, 2001, establishing eligibility for fiscal year 2000-2001. However, the operative date of the test claim statutes, as enacted by Statutes 2000, chapter 906, is January 1, 2001. Moreover, the test claim statutes were declared unconstitutional by the California Supreme Court on April 21, 2003. *Therefore, the reimbursement period for costs incurred pursuant to Statutes 2000, chapter 906, is limited to January 1, 2001, through April 30, 2003.*

Actual costs for one fiscal year shall be included in each claim. Pursuant to Government Code section 17561, subdivision (d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.

If the total costs for a given fiscal year do not exceed \$1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564.

## **IV. REIMBURSABLE ACTIVITIES**

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, “I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct,” and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the

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<sup>3</sup> Incorporating by reference Code of Civil Procedure section 1283.05.

reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

A. Selection of Local Agency Panel Member and Neutral Chairperson

1. Select an arbitration panel member, which includes attorney, staff and negotiator time to research potential members, and prepare for the selection,
2. Brief the panel member, which includes panel member, attorney, staff, and negotiator time.
3. Vet and select a neutral arbitrator which includes attorney, staff and negotiator time to research potential candidates for neutral chairperson. (Code Civ. Proc. § 1299.4, subd. (b), subd. (c), § 1299.8.)

B. Arbitration Process (includes agency panel member, attorney, staff, and negotiator time)

Once the arbitration is triggered under Code of Civil Procedure section 1299.4, the scope of which is defined in Code of Civil Procedure section 1299.3, subdivision (g), the following activities are reimbursable to participate in the arbitration process and when directed by the panel:

1. Prepare for and meet with the arbitration panel in open or closed session, either jointly or separately. (Code Civ. Proc., § 1299.5, subd. (a)).
2. Submit the last best final offer of settlement to the arbitration panel, five days before the hearing, or as may be mutually agreed to by the parties.
3. Conduct discovery or respond to discovery requests, which includes time to research, prepare to make or respond to requests, gather responsive documents, and meet with witnesses and others to obtain responses or responsive documents or discovery requests and draft and serve responses or discovery requests. (Code Civ. Proc., § 1299.8.)<sup>4</sup>
4. Prepare for, respond to, and participate in inquiries or investigations Code Civ. Proc., § 1299.5, subd. (a)).
- 4.5. Respond to subpoenas and subpoenas duces tecum, which includes time to prepare to respond to subpoenas, gather responsive documents, meet with witnesses and others to obtain responsive documents draft and service responses. (Code Civ. Proc., § 1299.5, subd. (b).)
6. Respond to or make demands for witness lists and/or documents, which includes time to research, prepare to make or respond to demands, gather responsive documents, and meet with witnesses and others to obtain responses or responsive documents or demands and draft and serve demands or responses. (Code Civ. Proc., § 1299.8.)<sup>5</sup>

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<sup>4</sup> Incorporating by reference Code of Civil Procedure section 1283.05.

<sup>5</sup> Incorporating by reference Code of Civil Procedure section 1282.2, subdivision (a)(2).

7. Prepare for arbitration panel hearing(s) vet, select, and prepare expert and general witnesses.
8. Make application and respond to deposition requests, which includes time to research, prepare to make or respond to requests, gather responsive documents, and meet with witnesses and others to obtain responses or responsive documents or requests and draft and serve responses or requests. (Code Civ. Proc., § 1299.8.)<sup>6</sup>
9. Participate in hearings (Code Civ. Proc. § 1299.5, subd. (a)).
10. Consult with the panel, either jointly or separately prior to the award. (Code Civ. Proc., § 1299.5, subd. (a).)
11. Consult with local agency panel member, board of governors, negotiator, attorney, or staff regarding the award. (Code Civ. Proc., § 1299.5, subd. (a).)
12. When directed by the panel:
  - (a) Submit *updated* last best final offer of settlement to the arbitration panel, including time to prepare for and redraft the last best final offer, and time for consultation with governing board. (Code Civ. Proc. § 1299.6, subd. (a).)
  - (b) Prepare for and participate in mediation (Code Civ. Proc. § 1299.5, subd. (a).)
  - (c) Prepare and file closing briefs. (Code of Civ. Proc., § 1299.5, subd. (a).)<sup>7</sup>

#### C. Non-Reimbursable Activities

The following activities are not reimbursable:

1. train agency management, counsel, staff and members of governing bodies regarding binding arbitration;
2. restructure bargaining units to accommodate binding arbitration;
3. perform discovery activities, as set forth in Code of Civil Procedure sections 1281.1, 1281.2 and 1299.8, when such activities are engaged in outside the binding arbitration process triggered by Code of Civil Procedure section 1299.4;
4. collect and compile comparability data, handle two track negotiations or participation in mediation, when such activities are engaged in outside the binding arbitration process triggered by Code of Civil Procedure section 1299.4;
5. negotiate with the employee organization representatives based on the arbitration panel's award, pursuant to Code of Civil Procedure section 1299.7, subdivision (a); ~~and~~
6. litigate interpretation of the test claim statutes; and
7. fee and mileage of a witness subpoenaed solely upon the determination of the neutral arbitrator.

<sup>6</sup> Incorporating by reference Code of Civil Procedure sections 1283 and 1283.05.

<sup>7</sup> Incorporating by reference Code of Civil Procedure sections.

## V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

### A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

#### 1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

#### 2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

#### 3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant, expert witness, and attorney invoices with the claim and a description of the contract scope of services.

#### 4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

#### 5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

## B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

## **VI. RECORD RETENTION**

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter<sup>8</sup> is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the

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<sup>8</sup> This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.



time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

## **VII. OFFSETTING REVENUES AND REIMBURSEMENTS**

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

## **VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS**

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

## **IX. REMEDIES BEFORE THE COMMISSION**

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

## **X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES**

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision, is on file with the Commission.