



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF STATE COUNSEL

October 21, 2022

Caitlin Heim, Esq.
Assistant Counsel
Office of State Comptroller
110 State Street
Albany, New York 12236

Re: Public Officers Law §17
Lavine v. State of New York, et al., (for Governor Kathy Hochul)
Sup. Ct., Onondaga County, Index No. 7623/2022

Dear Ms. Heim:

Pursuant to Public Officers Law Section 17(2)(b), this office has reviewed the presently available facts and circumstances relating to the above matter. Based on this review, we have determined for the purposes of representation only, and without any determination as to the ultimate merits, that representation by the Attorney General of defendant **Governor Kathy Hochul**, would be inappropriate. The defendant was employed by the State of New York at the time in question.

I, therefore, certify that defendant **Governor Kathy Hochul** is entitled to representation by private counsel, in accordance with the provisions of Section 17 of the Public Officers Law.

Very truly yours,

John V. Cremo

JOHN V. CREMO
Deputy Attorney General

cc: Jill Faber, Deputy Attorney General
Aimee Cowan, Assistant Attorney General
Tim Mulvey, Assistant Attorney General
Ed Thompson, Assistant Attorney General in Charge



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF STATE COUNSEL

October 28, 2022

Hon. Kathy Hochul
The State Capitol
Albany, New York 12224

**Re: Lavine v State of New York, et. al.
Index No. 007623/2022 (Onondaga Co.)**

Dear Governor Hochul:

The Office of the Attorney General ("Office") has reviewed your request for Attorney General representation pursuant to N.Y. Public Officers Law Section 17 ("POL § 17") in *Lavine v State of New York, et. al.* ("the Lawsuit"). The defense and indemnification of State officers and employees are subject to the terms and conditions of POL §§ 17 and 17-a¹ and this letter.

Certification of Private Counsel to Represent You

Based on the information currently available to this Office, we have determined that it would be inappropriate for the Attorney General to represent you in the Lawsuit. We are, however, certifying to the State Comptroller under POL § 17 that you are entitled to be represented by private counsel in the Lawsuit [if applicable, subject to the condition that you and (identify the Group of Certified State Defendants) are required to be represented by the same private counsel in the Lawsuit.]

Upon this Office's certification to the State Comptroller, the State will pay reasonable attorneys' fees and litigation expenses to such private counsel during the pendency of the Lawsuit, subject to (1) certification by the head of your employing agency [identify State Agency] that you are entitled to representation under POL § 17, and (2) the audit and warrant of the State Comptroller. We suggest that you share this letter with your attorney and that your attorney contact Assistant Counsel Caitlin Heim in the Office of the State Comptroller at (518) 408-0068.

¹ For your review and consideration, enclosed are copies of POL §§ 17 and 17-a.

Approval of Settlements and Indemnification of Settlements and Judgments

POL §§ 17 and 17-a set forth the conditions under which the State will indemnify you or pay a judgment or settlement. Your attention is called to subdivision 3(a) of POL § 17, which provides that the State will indemnify you in the amount of any judgment obtained against you in any state or federal court, or in the amount of any settlement of a claim, or will pay such judgment or settlement, provided that the act or omission from which the judgment or settlement arose occurred while you were acting within the scope of your public employment or duties and did not result from intentional wrongdoing on your part. In the event the State indemnifies you or pays a judgement or settlement on your behalf, you will be deemed to have released the State, its agencies, officers, and employees from any claims for indemnification or payment you might have under POL §§ 17 and 17-a.

Subdivisions 3(b) and 3(d) of POL § 17 set forth the procedures for review and approval of a settlement or judgment that may be subject to indemnification or payment by the State. When a settlement is proposed, POL § 17(3)(b) requires you to submit the proposed settlement to the head of [identify the employing State Agency] for review and certification. If the proposed settlement is consistent with the provisions of POL § 17, the head of the [identify the employing State Agency], will certify the proposed settlement and submit such proposed settlement and the agency certification to this Office for review and approval. Therefore, should you and your private counsel wish to consider settlement, you must contact the [identify the employing State Agency] before any settlement is finalized.

Within thirty days of entry of a final judgment or settlement of a claim, POL § 17(3)(d) provides that you are required to serve a copy of the final judgment or settlement upon the head of the [identify the employing State Agency]. If the judgment or settlement is consistent with the provisions of POL § 17, the head of the [identify the employing State Agency], or designee, will certify the judgment or settlement for payment. The [identify the employing State Agency] then submits its certification to this Office. If this Office concurs with the [identify the employing State Agency]'s certification, payment will be made following the audit and warrant of the State Comptroller.

Conditions for Interposing a Compulsory Counterclaim

If private counsel who represents you under POL § 17 determines that it would be legally appropriate, beneficial to your defense, and in the interest of the State to interpose a counterclaim on your behalf, your counsel may do so, subject to the following conditions.

1. In order for your private counsel to represent you on such a compulsory counterclaim, you must agree that if presented with a proposed settlement of the action against you and you reject the settlement, you waive any claims for indemnification or payment you might have under POL § 17 for the amount of any judgment, costs, and attorneys' fees awarded against you in excess of the amount of the proposed settlement.
2. You must assign to the State any damages awarded to you on the counterclaim up to an amount equal to any judgment, costs, and attorneys' fees awarded to the

plaintiff against you. If there is an award in your favor in excess of any award, including costs and attorneys' fees, to the plaintiff, that excess amount will belong to you. And in the event that your private counsel is successful on your counterclaim and the plaintiff is denied any recovery, the entire amount of the judgment will belong to you.

3. Finally, if the plaintiff withdraws the claims against you in the Lawsuit or the claims against you are dismissed before trial but your counterclaim remains pending, private counsel will no longer represent you at State expense on the counterclaim and you waive any claims for indemnification or payment you might have under POL § 17 for the amount of any judgment, costs, and attorneys' fees awarded against you.

This letter and the provisions of POL §§ 17 and 17-a should be carefully reviewed by you and can be explained to you by your private counsel. It is important that all procedures be followed.

Sincerely,



Ed J. Thompson
Assistant Attorney General in Charge
300 South State Street – Suite 300
Syracuse, New York 13202
Telephone: (315) 448-4800

Enclosures

Public Officers

§ 17. Defense and indemnification of state officers and employees. 1.

(a) As used in this section, unless the context otherwise requires the term "employee" shall mean any person holding a position by election, appointment or employment in the service of the state, including clinical practice pursuant to subdivision fourteen of section two hundred six of the public health law, whether or not compensated, or a volunteer expressly authorized to participate in a state-sponsored volunteer program, but shall not include an independent contractor. The term employee shall include a former employee, his estate or judicially appointed personal representative and persons who assist the education department or the department of health as consultants or expert witnesses in the investigation or prosecution of alleged professional misconduct, licensure matters, restoration proceedings, or criminal prosecutions for unauthorized practice pursuant to title eight of the education law or title II-A of the public health law.

(b) For the purposes of this section, the term "employee" shall include members, officers and other persons in the employment of the New York state energy research and development authority, members of the board of directors, officers and other persons in the employment of the New York state science and technology foundation, and members of the board of directors, officers and other persons in the employment of the New York state olympic accommodations control corporation or serving on its board of directors on or before June thirtieth, nineteen hundred eighty.

(c) For the purposes of this section, the term "employee" shall include members of the state patient qualification review board appointed by the commissioner of health pursuant to article thirty-three-A of the public health law.

(d) For the purposes of this section, the term "employee" shall include directors, officers and employees of the facilities development corporation.

(e) For the purposes of this section, the term "employee" shall include directors, officers and employees of the environmental facilities corporation.

(f) For the purposes of this section, the term "employee" shall include ombudsmen designated under section five hundred forty-four and section five hundred forty-five of the executive law, and shall include such ombudsmen without regard to whether they are volunteers or paid staff of the office for the aging or of designated substate ombudsman programs under the direction of the office.

(g) For the purposes of this section, the term "employee" shall include the members of the board, officers and employees of the greenway heritage conservancy for the Hudson river valley or the greenway council.

(h) For the purposes of this section, the term "employee" shall include members of the board, officers and employees of the New York local government assistance corporation.

(i) For purposes of this section, the term "employee" shall include the officers and employees of the Central Pine Barrens joint planning and policy commission.

(j) For purposes of this section, the term "employee" shall include directors, officers and employees of the dormitory authority.

(k) For the purposes of this section only, the term "employee" shall include any member, director, officer or employee of a soil and water

conservation district created pursuant to section five of the soil and water conservation districts law who is working on a project which receives funding from the state and has received approval by the state soil and water conservation committee or who is carrying out the powers and duties pursuant to article two of the soil and water conservation districts law by working with any agency of the state as defined by subdivision five of section three of the soil and water conservation districts law.

(l) For the purposes of this section and consistent with the provisions of section 13 of a chapter of the laws of 1997, amending the public authorities law, the public health law, the public officers law, chapter 41 of the laws of 1997 relating to providing a retirement incentive for certain public employees, and the civil service law, relating to the creation of the Roswell Park Cancer Institute corporation and providing for the rights, powers, duties and jurisdiction of such corporation, the term "employee" shall include directors, officers and employees of the Roswell Park Cancer Institute corporation.

(m) For the purposes of this section, the term "employee" shall include the members of the spinal cord injury research board within the department of health.

(n) For the purposes of this section, the term "employee" shall include directors, officers, and employees of the Governor Nelson A. Rockefeller empire state plaza performing arts center corporation.

(o) For the purposes of this section, the term "employee" shall include the directors, officers and employees of the state of New York mortgage agency.

(q) For the purposes of this section, the term "employee" shall include the members, officers and employees of the tobacco settlement financing corporation.

(r) For the purposes of this section, the term "employee" shall include the directors, officers, and employees of the state of New York municipal bond bank agency and the directors, officers, employees, trustees and other managers (however denominated), of any tax lien entity (as defined in subdivision sixteen of section twenty-four hundred thirty-two of the public authorities law) of the state of New York municipal bond bank agency.

(s) For the purposes of this section, the term "employee" shall include the members of the board, officers and employees of the Niagara river greenway commission.

(t) For the purposes of this section, the term "employee" shall include the members of the board, officers and employees of the dormitory authority for purposes of section sixteen hundred eighty-1 of the public authorities law.

* (u) For the purposes of this section, the term "employee" shall include the members of the empire state stem cell board within the department of health.

* NB Repealed December 31, 2025

(v) For the purposes of this section, the term "employee" shall include the members of the board, and officers and employees of the New York city off-track betting corporation.

(w) For purposes of this section, the term "employee" shall include a person certified by the office of court administration and paid by the city of New York to serve as a guardian ad litem in an action or proceeding pending in the housing part of the civil court of the city of New York.

(x) For the purposes of this section, the term "employee" shall

include the members of the board, officers and employees of the dormitory authority for purposes of section sixteen hundred eighty-q of the public authorities law.

(y) For purposes of this section, the term "employee" shall include members of the board, officers and employees of the New York state thruway authority or its subsidiaries.

(z) For purposes of this section, the term "employee" shall include members of the governing board, officers and employees of the New York state canal corporation.

2. (a) Upon compliance by the employee with the provisions of subdivision four of this section, the state shall provide for the defense of the employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties; or which is brought to enforce a provision of section nineteen hundred eighty-one or nineteen hundred eighty-three of title forty-two of the United States code and the act or omission underlying the action occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties. This duty to provide for a defense shall not arise where such civil action or proceeding is brought by or on behalf of the state.

(b) Subject to the conditions set forth in paragraph (a) of this subdivision, the employee shall be entitled to be represented by the attorney general, provided, however, that the employee shall be entitled to representation by private counsel of his choice in any civil judicial proceeding whenever the attorney general determines based upon his investigation and review of the facts and circumstances of the case that representation by the attorney general would be inappropriate, or whenever a court of competent jurisdiction, upon appropriate motion or by a special proceeding, determines that a conflict of interest exists and that the employee is entitled to be represented by private counsel of his choice. The attorney general shall notify the employee in writing of such determination that the employee is entitled to be represented by private counsel. The attorney general may require, as a condition to payment of the fees and expenses of such representation, that appropriate groups of such employees be represented by the same counsel. If the employee or group of employees is entitled to representation by private counsel under the provisions of this section, the attorney general shall so certify to the comptroller. Reasonable attorneys' fees and litigation expenses shall be paid by the state to such private counsel from time to time during the pendency of the civil action or proceeding subject to certification that the employee is entitled to representation under the terms and conditions of this section by the head of the department, commission, division, office or agency in which such employee is employed and upon the audit and warrant of the comptroller. Any disputes with respect to representation of multiple employees by a single counsel or the amount of litigation expenses or the reasonableness of attorneys' fees shall be resolved by the court upon motion or by way of a special proceeding.

(c) Where the employee delivers process and a request for a defense to the attorney general as required by subdivision four of this section, the attorney general shall take the necessary steps including the retention of private counsel under the terms and conditions provided in paragraph (b) of subdivision two of this section on behalf of the employee to avoid entry of a default judgment pending resolution of any question pertaining to the obligation to provide for a defense.

3. (a) The state shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim, or shall pay such judgment or settlement; provided, that the act or omission from which such judgment or settlement arose occurred while the employee was acting within the scope of his public employment or duties; the duty to indemnify and save harmless or pay prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing on the part of the employee.

(b) An employee represented by the attorney general or by private counsel pursuant to this section shall cause to be submitted to the head of the department, commission, division, office or agency in which he is employed any proposed settlement which may be subject to indemnification or payment by the state and if not inconsistent with the provisions of this section such head of the department, commission, division, office or agency in which he is employed shall certify such settlement, and submit such settlement and certification to the attorney general. The attorney general shall review such proposed settlement as to form and amount, and shall give his approval if in his judgment the settlement is in the best interest of the state. Nothing in this subdivision shall be construed to authorize the state to indemnify and save harmless or pay an employee with respect to a settlement not so reviewed and approved by the attorney general.

(c) Nothing in this subdivision shall authorize the state to indemnify or save harmless an employee with respect to fines or penalties, or money recovered from an employee pursuant to article seven-a of the state finance law; provided, however, that the state shall indemnify and save harmless its employees in the amount of any costs, attorneys' fees, damages, fines or penalties which may be imposed by reason of an adjudication that an employee, acting within the scope of his public employment or duties, has, without willfulness or intent on his part, violated a prior order, judgment, consent decree or stipulation of settlement entered in any court of this state or of the United States. The attorney general shall promulgate such rules and regulations as are necessary to effectuate the purposes of this subdivision.

(d) Upon entry of a final judgment against the employee, or upon the settlement of the claim, the employee shall cause to be served a copy of such judgment or settlement, personally or by certified or registered mail within thirty days of the date of entry or settlement, upon the head of the department, commission, division, office or agency in which he is employed; and if not inconsistent with the provisions of this section, such judgment or settlement shall be certified for payment by such head of the department, commission, division, office or agency. If the attorney general concurs in such certification, the judgment or settlement shall be paid upon the audit and warrant of the comptroller. On or before January fifteenth the comptroller, in consultation with the department of law and other agencies as may be appropriate, shall submit to the governor and the legislature an annual accounting of judgments, settlements, fees, and litigation expenses paid pursuant to this section during the preceding and current fiscal years. Such accounting shall include, but not be limited to the number, type and amount of claims so paid, as well as an estimate of claims to be paid during the remainder of the current fiscal year and during the following fiscal year.

4. The duty to defend or indemnify and save harmless prescribed by this section shall be conditioned upon (i) delivery to the attorney general or an assistant attorney general at an office of the department of law in the state by the employee of the original or a copy of any

summons, complaint, process, notice, demand or pleading within five days after he is served with such document, and (ii) the full cooperation of the employee in the defense of such action or proceeding and in defense of any action or proceeding against the state based upon the same act or omission, and in the prosecution of any appeal. Such delivery shall be deemed a request by the employee that the state provide for his defense pursuant to this section.

5. The benefits of this section shall inure only to employees as defined herein and shall not enlarge or diminish the rights of any other party nor shall any provision of this section be construed to affect, alter or repeal any provision of the workers' compensation law.

6. This section shall not in any way affect the obligation of any claimant to give notice to the state under section ten of the court of claims act or any other provision of law.

7. The provisions of this section shall not be construed to impair, alter, limit or modify the rights and obligations of any insurer under any policy of insurance.

8. The provisions of this section shall apply to all actions and proceedings pending upon the effective date thereof or thereafter instituted.

9. Except as otherwise specifically provided in this section, the provisions of this section shall not be construed in any way to impair, alter, limit, modify, abrogate or restrict any immunity available to or conferred upon any unit, entity, officer or employee of the state or any other level of government, or any right to defense and/or indemnification provided for any governmental officer or employee by, in accordance with, or by reason of, any other provision of state or federal statutory or common law.

10. If any provision of this section or the application thereof to any person or circumstance be held unconstitutional or invalid in whole or in part by any court of competent jurisdiction, such holding of unconstitutionality or invalidity shall in no way affect or impair any other provision of this section or the application of any such provision to any other person or circumstance.

11. The provisions of this section shall not apply to physicians who are subject to the provisions of the plan for the management of clinical practice income as set forth in the policies of the board of trustees, title 8, New York codes, rules and regulations, regarding any civil action or proceeding alleging some professional malpractice in any state or federal court arising out of the physician's involvement in clinical practice as defined in that plan, provided however, that the provisions of this section shall apply when a claim or proceeding arises while the physician was acting on behalf of the state within the scope of such physician's public employment or duties.

Public Officers

§ 17-a. Reimbursement of funds paid by state agencies and state entities for the payment of awards adjudicated in sexual harassment claims. 1. As used in this section, the term "employee" shall mean any person holding a position by election, appointment, or employment in the service of the state of New York, whether or not compensated. The term "employee" shall include a former employee or judicially appointed personal representative.

2. Notwithstanding any law to the contrary, any employee who has been subject to a final judgment of personal liability for intentional wrongdoing related to a claim of sexual harassment, shall reimburse any state agency or entity that makes a payment to a plaintiff for an adjudicated award based on a claim of sexual harassment resulting in a judgment, for his or her proportionate share of such judgment. Such employee shall personally reimburse such state agency or entity within ninety days of the state agency or entity's payment of such award.

3. If such employee fails to reimburse such state agency or entity pursuant to subdivision two of this section within ninety days from the date such state agency or entity makes a payment for the financial award, the comptroller shall, upon obtaining a money judgment, withhold from such employee's compensation the amounts allowable pursuant to section fifty-two hundred thirty-one of the civil practice law and rules.

4. If such employee is no longer employed by such state agency or entity such state agency or entity shall have the right to receive reimbursement through the enforcement of a money judgment pursuant to article fifty-two of the civil practice law and rules.