

EMPLOYMENT RISK MANAGEMENT AUTHORITY

(ERMA)

MASTER PROGRAM DOCUMENT

FOR THE

POOLED EMPLOYMENT PRACTICES LIABILITY PROGRAM

(PEPLP)

AS AMENDED EFFECTIVE June 3, 2024

TABLE OF CONTENTS

- ARTICLE I - GENERAL1**
- A. PURPOSE 1
- B. PROGRAM YEARS 1
- C. FINANCING THE PROGRAM 2
- 1. DEPOSIT CONTRIBUTIONS..... 2
- 2. CAPITAL CONTRIBUTION 2
- 3. BONDS OR DEBT INSTRUMENTS 3
- 4. ASSESSMENTS 3
- D. AMENDMENTS TO THIS PLAN..... 3
- ARTICLE II - COVERAGE3**
- A. GENERAL DESCRIPTION..... 3
- 1. COVERAGE PROVIDED 3
- 2. LIMITS OF COVERAGE 4
- 3. RETAINED LIMITS..... 4
- 4. COVERAGE TERM, RENEWAL, AND CANCELLATION 5
- B. MEMORANDUM OF COVERAGE5
- C. DISTRIBUTION 6
- ARTICLE III – CONTRIBUTIONS, RATES AND ASSESSMENTS6**
- A. ADMINISTRATIVE EXPENSES, TRAINING EXPENSES AND DEPOSIT
 CONTRIBUTION CALCULATIONS 6
- 2. DEPOSIT CONTRIBUTIONS..... 6
- 3. EXPERIENCE MODIFICATION 7
- 4. PROGRAM ADMINISTRATIVE BUDGET 7
- 5. PROGRAM TRAINING BUDGET..... 8
- 6. UNDERWRITING CREDITS/DEBITS..... 8
- B. ADJUSTMENTS TO ACCOUNT BALANCES 8
- 1. ESTABLISHMENT OF THE LEVEL OF FUNDING 8
- 2. ASSESSMENTS 8
- 3. RETROSPECTIVE ADJUSTMENTS 9
- C. CLOSED PROGRAM YEARS 9
- ARTICLE IV - ADMINISTRATION9**
- A. ORGANIZATION AND RESPONSIBILITIES 9
- 1. RELATION TO ERMA STRUCTURE 9
- 2. BOARD OF DIRECTORS RESPONSIBILITIES 10
- 3. EXECUTIVE COMMITTEE RESPONSIBILITIES 10
- 4. ADMINISTRATOR'S DUTIES AND RESPONSIBILITIES11
- 5. LITIGATION MANAGER 13
- B. REPORTS AND SCHEDULES 16
- 1. FINANCIAL REPORTS 16
- 2. CLAIMS REPORTS..... 16
- 3. ACTUARIAL STUDIES..... 16
- C. LOSS CONTROL SERVICES/TRAINING/COMPLIANCE AUDITING 17

ARTICLE V - PARTICIPATION	17
A. ELIGIBILITY AND APPLICATION	17
1. ELIGIBILITY	17
2. APPROVAL OF APPLICATION.....	18
3. DATE OF MEMBERSHIP	18
4. APPLICATION FEE CREDIT	18
B. MEMBER'S DUTIES	19
1. PROVIDE UNDERWRITING INFORMATION	19
2. PAYMENT OF CONTRIBUTIONS AND OTHER CHARGES	19
C. DUTY TO REPORT CLAIMS	20
D. TERMINATION OF PARTICIPATION	20
ARTICLE VI - CLAIMS ADMINISTRATION.....	21
A. SELECTION OF ADJUSTOR OR INVESTIGATION FIRM	21
B. CLAIMS AUDIT.....	21
C. AUTHORITY'S RIGHT AND DUTY TO DEFEND	22
D. SETTLEMENT AUTHORITY.....	22
E. DISPUTES REGARDING MANAGEMENT OF A CLAIM.....	22
F. SELECTION OF DEFENSE COUNSEL	23
ARTICLE VII - DEFINITIONS	24
APPENDIX A - RETROSPECTIVE ADJUSTMENTS.....	26
APPENDIX B - EMPLOYMENT PRACTICES LIABILITY COVERAGE	27

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(PEPLP)

ARTICLE I - GENERAL

A. PURPOSE

1. The primary purpose in forming the Employment Risk Management Authority, hereinafter *ERMA*, is to create a method for providing coverage for legal damages incurred by the *Members* because of *Wrongful Employment Practices*. The Joint Exercise of Powers Agreement and the Bylaws have been created and duly approved to provide the *Members* with this coverage. This *Master Program Document*, hereinafter the MPD, for the Pooled Employment Practices Liability Program, hereinafter the PEPLP, sets forth the manner in which these services shall be delivered to the membership. In the event of a conflict among these governing documents, the Joint Exercise of Powers Agreement controls over the Bylaws, and the Bylaws control over this MPD.
2. The PEPLP shall use pooled sharing of operating costs and losses above the *Members' Retained Limits*. The PEPLP may purchase excess coverage or reinsurance above those limits provided by ERMA.
3. The PEPLP shall provide various *Retained Limits* from which the *Members* may choose, subject to the approval of the *Board of Directors*.
4. The *Board of Directors* has the right to alter the terms and conditions of the pooled underlying coverage in response to the needs and abilities of the PEPLP, the *Members*, and the availability of coverage from outside sources.
5. A summary of the *Limits of Coverage* and *Retained Limits* provided in *Program Years* is set forth in Appendix B.

B. PROGRAM YEARS

1. A *Program Year* shall be defined as the losses incurred during the period from 12:01 a.m. Pacific time on July 1st of each year to 12:00am Pacific time on June 30th of the following year. The income and expenses of each *Program Year* shall be accounted separately from any other *Program Year's*

income or expenses.

2. The PEPLP shall charge a *Deposit Contribution* to each *Member* at inception of each *Program Year* to fund the cost of losses and expenses anticipated for the life of the *Program Year*. The *Deposit Contribution* shall consist of a contribution to cover pooled losses, based on an actuarial projection of losses for the year and the exposure of loss presented by each *Member* plus a reasonable margin for contingencies, as well as *administrative expenses* and training expenses based on expected costs.
3. After a *Program Year* is at least five years old, *Retrospective Adjustments* may be made annually, subject to the discretion of the Executive Committee or the *Board*, and subject to criteria set forth in this MPD. The process for determining *Retrospective Adjustments* is set forth in Appendix A.
4. A *Program Year* cannot be completed until all *Claims* incurred during that *Program Year* are closed and it is probable that no new *Claims* for that *Program Year* will be made. The *Program Year* shall remain open until the *Board of Directors* authorizes closure based on its determination that known *Claims* for the year are closed, and no further *Claims* will be made.
5. To maintain the actuarial soundness of the PEPLP, the *Board of Directors* shall have actuarial studies done periodically and shall take appropriate action, as set forth in Article III – Contributions, Rates and *Assessments*, if a *Program Year* is found to be actuarially deficient.

C. FINANCING THE PROGRAM

1. DEPOSIT CONTRIBUTIONS

Deposit Contributions shall be established as set forth in Article III.A.1.

2. CAPITAL CONTRIBUTION

In addition to the *Deposit Contribution*, in ERMA's early years, each *Member* was required to make a capital contribution annually for the first five years of participation, which equated to 15% of loss funding contribution collected, to provide a margin for greater confidence in the program and to build a fund that could be used for program years in need. The capital contribution was equal to the *Board*-approved capitalization rate per \$100 of payroll and was paid over a five-year period. All original funds have been allocated.

The capital contribution fund was reactivated in 2014 to receive funds dedicated to future training initiatives.

Capital contributions will not be dedicated to any one specific *Program Year*, but will be considered when determining the overall actuarial soundness of the PEPLP. The capital contribution amounts will be maintained in a separate equity account and will be returned in the same proportion as the return of other equity at the discretion of the *Board of Directors*. Capital contributions may be applied at the discretion of the *Board of Directors* to any *Program Year*.

3. BONDS OR DEBT INSTRUMENTS

- (a) Bonds or other debt instruments may be used to fund one or more *Program Years*. However, *Members* shall be responsible only for the retirement of such debt for the *Program Years* in which they participate. Such retirement of debt shall be calculated into the rates and deposit contributions.
- (b) Upon a two-thirds vote of the *Board of Directors*, debt financing can be authorized for any legal purpose; however, any debt so incurred shall be the debt of *ERMA* and not the debt of any *Member*, unless each *Member*, in writing, authorizes the debt and accepts responsibility for its payment.
- (c) Any monies collected or earned by *ERMA* may be used to retire such debts.

4. ASSESSMENTS

Assessments may be made at the discretion of the *Board of Directors*, when the PEPLP, as a whole, is found to be actuarially unsound. *Assessments* shall be determined as set forth in Article III, C. 2.

D. AMENDMENTS TO THIS MASTER PROGRAM DOCUMENT

- 1. This MPD may be amended by a two-thirds vote of the Executive Committee or *Board of Directors*, provided prior written notice has been given to the *Members*.
- 2. The *Members* may repeal such amendments by a majority vote at the next regular or special meeting of the *Board* after the effective date of the amendment.

ARTICLE II - COVERAGE

A. GENERAL DESCRIPTION

1. COVERAGE PROVIDED

- (a) The Memorandum of Coverage, and any endorsements thereto, shall provide the terms, conditions, limitations and exclusions for the defense and indemnification of covered parties, as defined, for liability because of

Wrongful Employment Practices. The Memorandum of Coverage shall be reviewed annually and approved by the *Board of Directors*.

- (b) An account shall be established from which losses and expenses of the PEPLP shall be paid. Although the intent of the PEPLP is to provide pooled coverage, coverage may be obtained, either partly or wholly, from commercial insurance or reinsurance if it is to the financial advantage of the PEPLP as determined by the *Board of Directors*. In making its determination, the *Board* shall consider the objectives of security, minimizing costs to the PEPLP, and the desire of the *Members* for a particular type of coverage. Any such commercial insurance shall have an A.M. Best Rating Classification of A or better and an A.M. Best Financial Rating of VII or better, or their equivalents.

2. LIMITS OF COVERAGE

- (a) The PEPLP shall provide, where economically practical, *Limits of Coverage* of at least \$2,000,000 per occurrence.
- (b) The *Board of Directors* may authorize choices of limits less than \$1,000,000 by the *Members*.

3. RETAINED LIMITS

- (a) The pooled coverage shall be excess of the *Retained Limits* as recommended by the Administrator, chosen by each *Member*, and approved by the *Board of Directors*. The Administrator shall consider, among other factors, the financial needs of the *Members* when establishing the choices of *Retained Limits*. The *Board of Directors* may alter the choices of *Retained Limits*, increase *Retained Limits* for *Members* which do not substantially comply with elements of the PEPLP, and institute Aggregate Stop Loss coverage, as described below, or other forms of retentions as the financial strength of the PEPLP dictates.
- (b) The *Board of Directors* may offer annual aggregate limitations to the repeated cost of the *Retained Limit* payments by a *Member* in any *Program Year*. This form of coverage shall be called Aggregate Stop Loss and is further defined in Article II, A, 3, (b).
- (c) A participating *Member* may elect to change its *Retained Limit* after its first year in the program, but any request to lower a *Retained Limit* is effective only with approval of the *Board of Directors*. Any change in the *Retained Limit* shall be for a complete *Program Year* and must be received by the *Board of Directors* at least thirty (30) days prior to the inception of the new *Program Year* in which the change is to be effective.

The *Board of Directors* may require a *Member* to increase its *Retained Limit* at the inception of a new *Program Year* by providing written notice of such change to the *Member* at least sixty (60) days prior to the increase.

- (d) Each *Member* shall bear the costs of its *Claims*, including defense and related costs, including but not limited to attorneys' fees, investigation costs, expert costs, vendor costs and any other related costs up to the amount of its *Retained Limit*. This expense shall be borne by the individual *Member* to the extent such costs are not limited by an *Aggregate Stop Loss*. *Members* shall report all payments made within their *Retained Limits* to ERMA to ensure efficient claims control and actuarial analysis.

4. COVERAGE TERM, RENEWAL, AND CANCELLATION

The coverage term shall be the same period of time as the *Program Year*. Cancellation of coverage by withdrawal of a *Member* shall be permitted only at the end of any *Program Year*. The timing of cancellation of coverage by expulsion of a *Member* shall be as determined by the *Board of Directors*.

B. MEMORANDUM OF COVERAGE

1. The President shall appoint a Coverage Committee, which may consist of up to three (3) members of the *Board of Directors*. The members of the Committee shall remain as members until such time as the President relieves them of their duties. Each year, prior to the last *Board of Directors* meeting of the *Program Year*, the Committee shall review, as necessary, the Memorandum of Coverage and recommend changes, where appropriate, for the next *Program Year*. The Committee shall consider the desires of the *Members* for coverage as well as the financial impact such coverage may have on the PEPLP. The *Board of Directors* shall evaluate and, if appropriate, approve the recommendations of the Committee and adopt the Memorandum of Coverage for the next *Program Year* prior to or at the last regular or special meeting of the expiring *Program Year*.
2. The *Board of Directors* shall evaluate and, if appropriate, approve the recommendations of the Committee and adopt the Memorandum of Coverage for the next *Program Year* prior to or at the last regular or special meeting of the expiring *Program Year*.
3. Notwithstanding Section B.1., above, the *Board of Directors* may, from time to time, amend the coverage provided in the Memorandum of Coverage, purchase excess insurance or reinsurance, or participate in other pooling arrangements authorized by the Government Code, based on the needs of the PEPLP and the *Members*, costs, funding, available insurance, and other relevant factors.

C. DISTRIBUTION

A copy of this MPD and the current Memorandum of Coverage shall be provided to each *Member* in each year that changes are adopted. All endorsements or other changes to the PEPLP shall be distributed to the *Members as made*. All documents shall be deemed to be provided to the *Member* if the representative for the *Member* personally receives a copy of such document, if the document has been duly mailed in the U.S. Postal system, or if the document is posted to the official ERMA website and notice thereof has been mailed in the U.S. Postal system or sent via email to the *Member*.

**ARTICLE III - CONTRIBUTIONS, RATES AND
ASSESSMENTS**

A. ADMINISTRATIVE EXPENSES, TRAINING EXPENSES AND DEPOSIT CONTRIBUTION CALCULATIONS

1. DEPOSIT CONTRIBUTIONS

- (a) The Administrator, in conjunction with an actuary, shall annually establish rates and *Deposit Contributions*, subject to *Board* approval, adequate to fund the actuarially determined losses in the pooled layer of the PEPLP, including defense costs and other claims-related expenses, the cost of excess coverage, and the projected administrative costs and training costs, including retirement of debt, if any, of the PEPLP.
- (b) The annual *Deposit Contribution* for each *Member* shall be calculated utilizing (1) the actuarially determined expected losses for the PEPLP, (2) a capital contribution during the first five years of participation equal to or exceeding 15% of the amount needed to cover defense and indemnity (if applicable – required in ERMA’s early years, but not currently applied), (3) a charge for excess insurance or reinsurance, if any, (4) a charge for the *Administrative Expense* of the PEPLP, and (5) a charge for the Training Expense of the PEPLP as determined by the Administrator.
- (c) The *Administrative Expense* charged to each *Member* is calculated by allocating the total *Administrative Expenses* required for the upcoming *Program Year* among the *Members* based on the payroll for each *Member*. This expense may be modified by experience at the discretion of the *Board of Directors*.
- (d) The training expense charged to each *Member* is calculated by allocating the total training expenses required for the upcoming *Program Year* among the *Members* based on the payroll for each *Member*. This expense may be

modified by experience at the discretion of the *Board of Directors*.

- (e) Payroll as of December 31st of the year preceding the commencement date of a new *Program Year*, inflated by no more than 5%, will be utilized in determining the *Deposit Contribution* calculation. Payroll shall be submitted for the four calendar year quarters using reported payroll on DE-9C payroll reports by February 15th of the new program year.

2. EXPERIENCE MODIFICATION

- (a) Each Member may be evaluated each year for an experience modification credit or debit based on no more than the past six years of experience. At the discretion of the Board of Directors, all or a portion of the six years of experience may be used in the calculation of the experience modification factor.
- (b) The calculation of the credit or debit shall include the actual loss experience of each individual *Member* as it relates to the average loss experience of the group as a whole. The criteria which shall be used is the relationship of actual average loss experience over the period being rated as it relates to the average payroll for the same period.
- (c) The Board has the discretion to apply a credibility factor and to establish upper and lower limitations on the maximum and minimum experience modifications.

3. PROGRAM ADMINISTRATIVE BUDGET

Each *Program Year* shall have its own administrative budget to cover the costs of operating and maintaining the administrative functions of the PEPLP for that year. This budget shall include, but not be limited to, the following expenses:

- (a) Financial and claims auditing;
- (b) Program management services;
- (c) Legal services;
- (d) Claims adjusting for *Claims* which exceed the *Retained Limits*;
- (e) Actuarial services;
- (f) Insurance expense;
- (g) Investment and banking fees;
- (h) The cost of administrative materials; and

- (i) A provision for other minor miscellaneous costs.

4. PROGRAM TRAINING BUDGET

Each *Program Year* shall have its own training budget which shall cover the costs of operating and maintaining the training and loss control functions of the PEPLP for that year. This budget shall include, but not be limited to, the following expenses:

- (a) Costs for training workshops and loss prevention programs;
- (b) Costs for employment related legal assistance; and
- (c) Costs for compliance auditing for (a) and (b) above, if deemed necessary.

5. UNDERWRITING CREDITS/DEBITS

The *Board of Directors*, at its discretion, may impose credits or debits where warranted because of some inequity that would otherwise be encountered.

B. ADJUSTMENTS TO ACCOUNT BALANCES

1. ESTABLISHMENT OF THE LEVEL OF FUNDING

- (a) The confidence level used for determining the funding requirements of the PEPLP and the *Program Year Deposit Contributions* will be determined by the Administrator and approved by the *Board of Directors*; however, the confidence level shall not be lower than 70 percent or the amount needed to cover expected losses.
- (b) Interest rates for the type of investments utilized by the PEPLP may be used to determine the amount of funds necessary to meet the selected confidence level for the PEPLP, but such interest rate shall not exceed seven percent.
- (c) Reserves for each *Program Year* shall be actuarially determined and shall be sufficient to maintain the overall funding to meet the approved confidence level.

2. ASSESSMENTS

- (a) When a *Program Year* is actuarially unsound, the Administrator, with the assistance of an actuary, will determine to what extent, if any, the PEPLP as a whole is not *actuarially sound*.
- (b) The PEPLP is not *actuarially sound* when the available reasonably estimable

reserves are less than the amount of reserves required at the expected confidence level, including expected interest earnings. Reserves are reasonably estimable on a *Program Year* when it is at least three years old.

- (c) If the PEPLP is not *actuarially sound*, the *Board of Directors* may, at its discretion, impose an *Assessment* against all *Members* participating in the deficient *Program Year(s)*. Each *Member's Assessment* shall be determined by the proportion which that *Member's Deposit Contribution* for that year relates to the total *Deposit Contribution* paid by all *Members* for that year.
- (d) If the PEPLP as a whole is *actuarially sound*, the *Board of Directors* may, at its sole discretion, assess the *Members* who participated in any *Program Year* that is not *actuarially sound*.
- (e) A program year or years that are not *actuarially sound* will be adjusted annually with the Retrospective Adjustment Process discussed in the next section.

3. RETROSPECTIVE ADJUSTMENTS

The Retrospective Adjustment Process defines the methodology by which program years that are a full five years old are adjusted annually. The Retrospective Adjustment Process is defined in ERMA's Financial Stability Plan, as approved by the *Board of Directors*, and appears in its entirety in Appendix A.

C. CLOSED PROGRAM YEARS

- 1. The *Board of Directors* may close a *Program Year* as described in Article I, B.
- 2. Upon closure of a *Program Year*, a final calculation of account balances shall be made as described in ERMA's Financial Stability Plan, specifically the Retrospective Adjustment Process, and found in Appendix A. The account balances shall be returned to the *Members* at the discretion of the *Board of Directors* based on the percentage of *Deposit Contribution* paid by each *Member* for that *Program Year*.
- 3. The *Board of Directors* retains the right to assess *Members* which participated in a closed *Program Year* if such *Program Year* incurs additional expenses after closure.

ARTICLE IV - ADMINISTRATION

A. ORGANIZATION AND RESPONSIBILITIES

- 1. RELATION TO *ERMA* STRUCTURE

- (a) This MPD supplements the Bylaws. In the event of a conflict between the Bylaws and this MPD, the Bylaws control. From time to time, resolutions of the Executive Committee or *Board of Directors* may be adopted which may take precedence over this MPD for a limited period of time; however, any change thus enacted by resolution that is intended to last beyond six months shall be expressly incorporated into and amend this MPD.
- (b) The Administrator shall be the Program Administrator for the PEPLP and shall report to the Executive Committee or *Board of Directors* of *ERMA*.
- (c) A Litigation Manager shall be selected by the Program Administrator and approved by the *Board of Directors* to supervise the handling of *Claims* and report to the Program Administrator and the *Board of Directors*, as requested by the *Board*.

2. *BOARD OF DIRECTORS* RESPONSIBILITIES

- (a) The *Board of Directors* shall meet at least one (1) time per year to review the developments and performance of this PEPLP as part of a general or special *Board of Directors* meeting.
- (b) The *Board of Directors* may delegate to the Executive Committee any of its responsibilities not otherwise reserved to the Board in the Joint Exercise of Powers Agreement or Bylaws.
- (c) The *Board of Directors* shall review and have authority to override all decisions made by the Executive Committee.

3. EXECUTIVE COMMITTEE RESPONSIBILITIES

An Executive Committee may be established and, if so, shall have the following duties with respect to the PEPLP:

- (a) Direct proposals for outside service contracts including, but not limited to, program administration, claims adjusting, actuarial services, and financial and claims audit services.
- (b) Supervise the management of claims including, but not limited to, the review of loss reserves and claims expenses.
- (c) Provide policy and guidance to the Litigation Manager with regard to management of specific claims where the Litigation Manager requests such direction or where he or she lacks authority to establish such policy.
- (d) Settle any claim equal to or less than the limit of coverage for *ERMA*.

However, such authority shall only apply to those claims for which the Ultimate Net Loss is in excess of the settlement authority given to the Litigation Manager and above the *Retained Limit* of the *Member*.

- (e) Hear all disputes regarding the selection of defense counsel on a particular case brought to it by the *Member* for which such defense counsel was chosen.

4. ADMINISTRATOR'S DUTIES AND RESPONSIBILITIES

(a) GENERAL

- (i) The Program Administrator shall use his or her best efforts to administer the PEPLP so as to achieve the objectives and goals of the PEPLP and *ERMA*.
- (ii) The Program Administrator shall administer the PEPLP in a manner that will provide claim and cost accountability for each *Program Year*, separate and apart from all other *Program Years*, and from other programs of *ERMA*.

(b) CLAIMS ADMINISTRATION

The Program Administrator shall:

- (i) Resolve disputes between a *Member* and the Litigation Manager, Claims Adjustor or Investigator;
- (ii) Prepare an annual report showing claims activity, paid claims, case reserves, *obligated reserves*, and status of pooled funds of each *Program Year* for each *Member*;
- (iii) Obtain the services of a claims auditor and present the findings to the Executive Committee or *Board of Directors*, if the cost of these services is within the approved annual budget; and
- (iv) Coordinate with the Litigation Manager, whose duties are outlined in Section 5, Litigation Manager.

(c) FINANCIAL DUTIES

The Program Administrator shall:

- (i) Prepare a budget for each *Program Year* for approval by the *Board of Directors* before the beginning of the *Program Year*;
- (ii) Prepare an annual report comparing each *Program Year's* budgeted to actual expenditures;

- (iii) Ensure that *Retrospective Adjustments* for previous *Program Years* and rates and *Deposit Contributions* for each new *Program Year* are calculated in the manner described in Article III;
- (iv) Obtain actuarial services and present the findings to the Executive Committee or *Board of Directors*, provided the cost of such services is within the approved annual budget;
- (v) Evaluate and present to the Executive Committee or *Board of Directors* the recommendations of the actuarial studies with recommended actions where *Program Years* are, or are likely to be, actuarially unsound in the near future;
- (vi) Engage the services of an independent financial auditor selected by the Executive Committee or *Board of Directors* and present the findings to the Executive Committee or *Board of Directors*, provided the cost of these services is within the approved annual budget; and
- (vii) Present financial audits to the Executive Committee or *Board of Directors*.

(d) ACCOUNTING RESPONSIBILITIES

The Program Administrator shall:

- (i) Invoice *Member Entities* for *Deposit Contributions* and other amounts due;
- (ii) Report to the Executive Committee or *Board of Directors* any invoices not paid and outstanding for more than thirty (30) days;
- (iii) Prepare vouchers, invoices, or other demands for payment for approval by the President and, upon approval, submit the demands to the Treasurer for payment;
- (iv) Maintain detailed financial records of all income, expenses, cash deposits, and withdrawals;
- (v) Maintain financial records according to generally accepted accounting principles; and
- (vi) Present timely quarterly and annual financial statements to the Executive Committee or *Board of Directors*.

(e) LOSS CONTROL SERVICES/TRAINING/COMPLIANCE AUDIT

The Program Administrator shall:

- (i) Assist the *Members* in the evaluation of their employment related policies, practices and procedures regarding exposures that may result in claims, and report the evaluations to the Executive Committee or *Board of Directors*;
- (ii) Recommend to the Executive Committee or *Board of Directors* loss control and training programs for adoption;
- (iii) Assist the *Members* in establishing loss control programs and training programs;
- (iv) Evaluate the efficiency of the loss control and training programs and report such findings to the Executive Committee or *Board of Directors*; and
- (v) Establish compliance auditing standards to ensure participation in the established loss control and training programs adopted by the *Board of Directors* or Executive Committee.

5. LITIGATION MANAGER

The Litigation Manager shall:

- (a) Oversee, generally, all liability claims administration and management, supervise the daily operations of handling *claims* for the PEPLP, and report to the Program Administrator on such operations.
- (b) Have the authority to settle any claim with an Ultimate Net Loss, as defined in the Memorandum of Coverage applicable to that claim, equal to or less than one hundred fifty thousand dollars (\$150,000), per claimant, in excess of the *Retained Limit* of the *Member* involved.
- (c) Assist the Program Administrator in the selection of an approved defense counsel, claims adjusting, loss prevention and investigation services, if those services are required, including evaluation of quality and price of services in the defense, claims handling, investigation and reporting services;
- (d) Oversee performance of the approved defense counsel, claims adjustor, and loss prevention and investigation services, with special emphasis on the handling of open claims, including:
 - (i) review all open claims valued in excess of 50 percent of the

individual *Member's Retained Limit* and, if necessary, recommend action on such claims;

- (ii) Review all open claims in which an outside investigator has been retained by the *Member* or *ERMA*, and
 - (iii) Review monthly claims reports and relate to the Executive Committee or *Board of Directors* any significant trends that may be developing.
- (e) Assist the Program Administrator in presenting claims audits to the Executive Committee or *Board of Directors*, with recommendations of changes in claims procedures where appropriate.
 - (f) Perform a quarterly review of claims files including new claims likely to exceed 50 percent of the *Member's Retained Limit*, claims in which an outside investigator has been retained by the *Member* or *ERMA*, and those claims for which a *Member*, the Executive Committee, or the *Board of Directors* has requested a specific review;
 - (g) Review, at least quarterly, all open claims in excess of the involved *Member's Retained Limit* and, if necessary, recommend action on such claims;
 - (h) Report to the Executive Committee or *Board of Directors* at each meeting, summarizing the active claims of general interest to the *Members* and claims for which a *Member*, the Executive Committee, or the *Board of Directors* has specifically requested a review;
 - (i) Assist the *Members* in training their personnel in the correct procedures for response to employees and reporting of incidents or claims
 - (j) Advise, where needed, on the setting and changing of reserves for claims;
 - (k) Report to any excess insurance or reinsurance obtained by *ERMA* all claims that meet the reporting requirements of such excess insurance or reinsurance;
 - (l) For those *Members* with excess insurance or reinsurance other than that obtained by *ERMA*, provide notice to the *Member* in the acknowledgement of the claim that the claim may need to be reported to the *Member's excess* insurance or reinsurance, and suggest the *Member* check the reporting requirements of any such excess carrier or reinsurance; and provide notice to the *Member* and its pool administrator, if any, when the claim has reached 50 percent of the *ERMA* layer.

- (m) Ensure the *Member* is advised of ERMA's coverage position on a claim as soon as practicable.
- (n) Monitor and evaluate the effectiveness of the defense firms:
- (o) Advise the Board on recommendations for settlement of claims in excess of the settlement authority given to the Litigation Manager;
- (p) Answer inquiries from *Members* regarding claims or procedures;
- (q) Establish a list of attorneys who have demonstrated proficiency in defending employment actions against public agencies;
- (r) Establish a list of investigators who have demonstrated proficiency in investigating employment actions against public agencies;
- (s) After consultation with the *Member* as set forth in Article VI F, select defense counsel, if needed, for each claim where the Ultimate Net Loss, as defined in the Memorandum of Coverage, is at least 50 percent of the involved *Member's Retained Limit*;
- (t) Review the performance of the claims adjuster or investigator's personnel assigned to *ERMA's* account with special emphasis in the handling of open claims;
- (u) Advise and assist the Program Administrator in the selection of claims adjusting and investigation providers/companies;
- (v) Determine, consistent with the requirements of the Memorandum of Coverage and using reasonable discretion based on the particular facts and circumstances, whether a claim has been timely reported to *ERMA* as a condition precedent to coverage under the Memorandum of Coverage; ;
- (w) Annually provide to the Executive Committee or *Board of Directors* a review and evaluation of all panel defense counsel, including performance and costs; and
- (x) Provide other services as may reasonably be requested by the *Member*, Executive Committee or the *Board of Directors*.

B. REPORTS AND SCHEDULES

1. FINANCIAL REPORTS

- (a) Unaudited, annual financial statements shall be presented to the Executive Committee or *Board of Directors* within 150 days after the end of the fiscal year. These reports will include:
 - (i) A balance sheet,
 - (ii) An income statement, and
 - (iii) A statement of account balances for each *Program Year* by *Member*.
- (b) Unaudited, quarterly financial statements shall be presented to the Executive Committee or *Board of Directors* within 60 days after the end of the quarter. These reports will include a balance sheet and income statement.
- (c) A signed audited financial statement for the *Program Year* shall be presented to the Executive Committee or *Board of Directors* within 150 days after the end of the *Program Year*.

2. CLAIMS REPORTS

- (a) Quarterly claims reports shall be presented to the *Members* within 30 days after the end of the quarter. These reports will include:
 - (i) Status of each claim by *Program Year* including case reserves, allocated claims reserves, amounts paid for indemnity, and allocated claims expense; and
 - (ii) Summary of number of claims, total claims reserves, and total paid expenses by *Program Year* for each *Member*.
- (b) Special reports shall be prepared when reasonably requested by the Executive Committee or *Board of Directors*.
- (c) A claims audit report shall be obtained at least every other year, including a statement of adequacy of claims procedures and accuracy of the claims data.

3. ACTUARIAL STUDIES

- (a) An actuarial report shall be obtained as determined by the Executive Committee or *Board of Directors*, which shall evaluate the adequacy of reserves for each open *Program Year*.

- (b) The actuarial report shall also include loss projections for future *Program Years* based on the experience of the PEPLP.

C. LOSS CONTROL SERVICES/TRAINING/COMPLIANCE AUDITING

ERMA will provide loss control services, training, and compliance auditing to the *Members*, as needed, to minimize claims expenses and reduce loss exposures for the PEPLP.

ARTICLE V - PARTICIPATION

A. ELIGIBILITY AND APPLICATION

1. ELIGIBILITY

- (a) Only *Members* of ERMA may participate in the PEPLP.
- (b) Each *Member* must initially commit to at least three full *Program Years* of participation in the PEPLP.
- (c) Each prospective *Member* of ERMA must submit an application along with a non-refundable application fee of \$2,500 and provide a completed and signed resolution obligating the prospective *Member* to participate for the required three years and accepting the rules and policies set forth in the PEPLP governing documents. The resolution shall also state the *Retained Limit* desired by the prospective *Member*. The prospective *Member* shall, if practicable, submit five years of wrongful employment practices loss experience, complete an Underwriting Information Sheet, complete an Exposure Analysis Questionnaire, and provide copies of the last four quarterly DE-9C, Federal 941 or J200 payroll reports, if required, or, upon approval of the Executive Committee or *Board of Directors*, the current number of full-time equivalent employees.

For the initial *Program Year* or for latter years at the discretion of the *Board of Directors*, the underwriting and submission of data requirements listed above may be waived.

- (d) The prospective *Member* shall provide the application and applicable fee, resolution form, the experience and underwriting information, and the DE-9C, Federal 941 or J200 payroll information at least 60 days prior to the inception of the *Program Year* in which its participation will commence, or on which it desires coverage to commence.

- (e) Those *Members* affiliated with a primary JPA shall be provided extended coverage under the Memorandum of Coverage for their primary JPA's Board of Directors and JPA employees, provided at least 50%, by payroll, of that primary JPA's members participate in *ERMA* and/or 50% of the primary JPA's total members participate in *ERMA*. This coverage shall be added by endorsement to the Memorandum of Coverage.

2. APPROVAL OF APPLICATION

- (a) An Underwriting Committee, appointed by the President, shall review the membership application and other underwriting and experience criteria of the prospective *Member*. The Underwriting Committee shall make a recommendation to the Executive Committee or *Board of Directors* regarding approval of the prospective *Member*.
- (b) The Executive Committee or *Board of Directors* shall, from a review of the membership application, other underwriting and experience criteria, and the advice of the Underwriting Committee and Program Administrator, determine the acceptability of the exposures presented by the prospective *Member*.
- (c) The Administrator shall advise the prospective *Member*, in writing, of the decision of the Executive Committee or *Board of Directors* within 15 business days after the decision.

3. DATE OF MEMBERSHIP

It is preferable that a new *Member* enter the PEPLP at the commencement of a *Program Year*. If the new *Member* enters at any other time, the *Deposit Contribution* may be prorated for the remainder of the *Program Year*, and covered losses of the new *Member* which occur on or after the date of membership will be paid; however, the new *Member* shall be required to share losses for the pool for the entire year, just as if it had begun its membership at the commencement of the *Program Year*.

4. APPLICATION FEE CREDIT

Following completion of the first *Program Year*, the *Member* will receive a credit in an amount equal to the fee remitted upon application for membership. This will be issued in the form of a contribution credit, applicable to the *Members'* second year *Deposit Contribution*.

B. MEMBERS' DUTIES

1. PROVIDE UNDERWRITING INFORMATION

- (a) Each *Member* shall provide payroll information based on the State DE-9C, Federal 941, or J200 payroll reports, and if practicable provide copies of the DE-9C, Federal 941, or J200 payroll reports quarterly within fifteen days after filing with the State or Federal Government; or upon approval of the Executive Committee or *Board of Directors*, provide the full-time equivalent number of employees for the *Member* on an annual basis.
- (b) Each *Member* shall cooperate with *ERMA* in the claims management, loss control, training, underwriting, and actuarial activities of *ERMA*.

2. PAYMENT OF CONTRIBUTIONS AND OTHER CHARGES

- (a) Each year, no later than July 1st, *ERMA* shall bill each *Member* its *Deposit Contribution* for the next *Program Year*. The annual billing shall be due and payable on July 15th, and shall be delinquent if not paid on or before the last working day in July.
- (b) A *Member* may be billed an additional amount because of *Assessments* to bring a *Program Year* into a state of actuarial soundness, or amounts due for other items. This billing is due and payable upon receipt, and delinquent if not paid on or before thirty (30) calendar days after receipt. The date of receipt shall be determined as the date the billing was presented in person to a representative of the *Member*, or posting the billing in the U.S. Mail, or the date sent via electronic mail.
- (c) Any *Member* which has formerly participated in the PEPLP, but has withdrawn as a *Member*, shall be required to pay all applicable billings for the *Program Years* in which it participated. Delinquent billings shall be treated in the same manner as set forth above, as if the withdrawn *Member* were still a *Member*.
- (d) The penalties and interest described below will be strictly enforced. *Members* may only use those payment methods specifically approved by the Executive Committee or *Board of Directors*.
- (e) Interest on Delinquent Amounts Due and Payable - Interest shall accrue on all delinquent amounts due and payable to *ERMA* at the rate as prescribed in the Bylaws.
- (f) Failure to Pay Billings, Penalties, or Interest - Failure to pay billings, penalties, or the accrued interest shall be considered grounds for removal of

the *Member* from the PEPLP and may result in the expulsion of the *Member* from *ERMA* according to the *ERMA* Agreement.

- (g) Failure to Pay Defense and Related Costs - Failure to pay defense and related costs including but not limited to attorneys' fees, investigation costs, expert costs, vendor costs and any other related costs incurred within the *Retained Limit* shall be considered grounds for removal of the *Member* from the PEPLP and may result in the expulsion of the *Member* from *ERMA* according to the *ERMA* Agreement
- (h) Penalties for Non-Payment by Former Members - Failure to pay billings, penalties, or accrued interest thereon shall constitute a breach of the agreement between the former *Member* and *ERMA*. The former *Member* shall be liable for the billings, penalties, accrued interest, and all costs incurred by *ERMA* in the enforcement of all provisions set forth in this MPD, the Bylaws, and the Joint Exercise of Powers Agreement.

C. DUTY TO REPORT CLAIMS

Timely reporting of claims is essential to efficient claims and litigation management. Failure to timely report any claim, as defined in the Memorandum of Coverage, to *ERMA* may result in denial of that claim or other penalties, as set forth in the Memorandum of Coverage.

D. TERMINATION OF PARTICIPATION

1. A *Member* in one *Program Year* shall participate in the next *Program Year* unless, at least six months before the commencement of the next *Program Year*:
 - (a) a written request to terminate participation is received from the *Member*, or
 - (b) a written termination notice from the Executive Committee or *Board of Directors* has been sent to the *Member*.
2. Termination of participation in future *Program Years* does not relieve the terminated *Member* of any benefits or obligations of those *Program Years* in which the *Member* participated. These obligations include payment of *Assessments*, *Retrospective Adjustments*, wrap up costs, or any other amounts due and payable.
3. The Executive Committee or *Board of Directors* may terminate future participation by a *Member* for the following reasons:
 - (a) Termination as a *Member* of *ERMA*;
 - (b) Declination to cover the *Member* by the organization, if any, providing excess insurance or reinsurance or pooled excess coverage;

- (c) Nonpayment of past billings, *Assessments*, *Retrospective Adjustments*, or other charges;
- (d) Habitual late payment of billings, *Assessments*, *Retrospective Adjustments*, and/or other charges, or habitual late response in submitting data required by *ERMA*;
- (e) Nonpayment or habitual late payment of defense and related costs, including but not limited to attorneys' fees, investigation costs, expert costs, vendor costs and any other related costs that are incurred within the *Retained Limit*;
- (e) Failure to provide underwriting information as defined herein;
- (f) Development of an extraordinarily poor loss history;
- (g) A substantial change in exposures which are not acceptable in the PEPLP;
- (h) Financial impairment, including bankruptcy, which may jeopardize the PEPLP's ability to collect amounts due in the future;
- (i) Failure to comply with loss control services, training, or compliance auditing programs adopted by *ERMA*;
- (j) Conduct detrimental to *ERMA*; and/or
- (k) Termination of the *Member* by its primary joint powers authority.

ARTICLE VI - CLAIMS ADMINISTRATION

A. SELECTION OF ADJUSTOR OR INVESTIGATION FIRM

The *Board of Directors* or Executive Committee shall review proposals for claims adjusting and investigation services, if those services are deemed necessary. The Executive Committee will make recommendations if necessary to the *Board of Directors* regarding the qualifications of the proposals. The adjusting and investigation company shall have the capacity and shall report claims activities in such a manner that the segregated accounting requirement of the PEPLP can be easily administered.

B. CLAIMS AUDIT

1. At least once every two years, the adequacy of claims adjusting shall be examined by an independent auditor who specializes in claims auditing.

2. The Administrator shall obtain the services of a claims auditor and present the findings to the Executive Committee or *Board of Directors*, if the cost of these services is within the approved annual budget.
3. The claims audit report shall address the issues of adequacy of claims procedures and accuracy of claims data.

C. AUTHORITY'S RIGHT AND DUTY TO DEFEND

The Authority's right and duty to defend a claim shall be defined in the Memorandum of Coverage.

D. SETTLEMENT AUTHORITY

1. Each *Member* shall have input with regard to settlement authority for its claims that do not exceed its *Retained Limit*; however, when a claim's incurred costs reach one-half of the *Member's Retained Limit*, or when a *Member* retains an outside investigator to investigate a claim, all information concerning the claim shall be provided to the Litigation Manager. The Litigation Manager shall continue to keep the *Member* fully informed on the progress of the claim, and shall consult with the *Member* regarding any settlement within or above the *Member's Retained Limit*. The *Member* shall fully cooperate in all matters pertaining to the claim.

The *Authority* shall have the right to assume the control of the negotiation, investigation, defense, appeal, or settlement of any *Claim* the *Authority* determines, in its sole discretion, to have reasonable probability of resulting in an *Ultimate Net Loss* in excess of the applicable *Retained Limit*. The *Covered Parties* shall fully cooperate in all matters pertaining to such *Claim* or proceeding.

2. The Litigation Manager shall have the authority to settle any claim with an Ultimate Net Loss, as defined in the Memorandum of Coverage applicable to that claim, equal to or less than one hundred fifty thousand dollars (\$150,000) in excess of the *Member's Retained Limit*.
3. The Executive Committee or *Board of Directors* shall have the authority to settle any claim in an amount equal to or less than the limit of coverage of *ERMA*. However, such authority shall only apply to those claims whose Ultimate Net Loss is in excess of the settlement authority given to the Litigation Manager and above the *Member's Retained Limit*.

E. DISPUTES REGARDING MANAGEMENT OF A CLAIM

1. Any dispute between a *Member* and the Litigation Manager, claims adjustor or investigator shall be brought to the attention of the Program Administrator who shall attempt to resolve the dispute and/or refer it to the Executive Committee or *Board of Directors*. Any decision by the Program Administrator may be appealed to the Executive Committee or *Board of Directors*, however, such appeal shall be in writing

and shall be made within 30 calendar days of the Program Administrator's decision.

2. Any settlement decision or other decision made by the Litigation Manager may be appealed; however, such appeal shall be in writing to the Executive Committee or *Board of Directors* within 30 calendar days of the date of the Litigation Manager's decision.
3. When an appeal has been filed, the Executive Committee or *Board of Directors* shall hear the appeal within 60 calendar days, or at the next scheduled Executive Committee or *Board of Directors* meeting, whichever is later.

F. SELECTION OF DEFENSE COUNSEL

1. A panel of approved defense attorneys shall be proposed by the Litigation Manager, with input from the Members, and approved by the *Board of Directors*. The Executive Committee or *Board of Directors*, at its discretion, may periodically review the panel of defense attorneys and remove or add attorneys to that panel.
2. Nothing in this section shall be construed to limit the right of a *Member* to retain its own defense counsel to represent the *Member* in any litigation. If, however, a *Member* retains counsel other than the counsel assigned by the Litigation Manager, or, in the case of an appeal of the Litigation Manager's decision, a decision by the Board, the *Member* shall be solely responsible for that counsel's attorney's fees and costs, and the *Member* shall be deemed to have waived any rights to defense and indemnity coverage from *ERMA* for that particular litigation.
3. Assignment to defense counsel shall be made from the approved defense panel by the Litigation Manager after consultation with the *Member*. In the event the Litigation Manager assigns the case to a firm or individual other than the one expressly preferred by the *Member*, the Litigation Manager shall advise the *Member* in writing of the reasons for the change, and the *Member* shall have the right to appeal the decision to the *Board of Directors*. The decision of the *Board of Directors* shall be binding and final, with no further right of appeal.
4. Regardless of the selection process, the *Member* shall bear the financial responsibility of all defense expenses, including fees, until such time as its *Retained Limit* is exhausted.

ARTICLE VII - DEFINITIONS

1. **Actuarially Sound** means that the *Program Year* has sufficient funds to pay the *Administrative Expenses* and the expected cost of *Claims* at a sixty (60) percent confidence level as determined by a certified actuary for the *Program Year*.
2. **Administrative Expenses** means those expenses incurred by the PEPLP that are not incurred due to any specific *Claim* and does not constitute a reserve for future expected changes in the size of existing *Claims* or discovery of previously unknown *Claims*. Administrative Expenses shall include expenses of ERMA that are allocated to the PEPLP.
3. **Assessments** means charges to *Members* in excess of their contributions, which are not part of a *Retrospective Adjustment*, for the purpose of raising sufficient funds to reach an *Actuarially Sound* condition.
4. **Claim** means, if not otherwise defined within the context of the Memorandum of Coverage, to be all demands for compensation by third party claimants against a covered party arising out of one occurrence.
5. **Retrospective Adjustment** means the allocation of funds and liabilities to the accounts of each *Member* for each *Program Year* and the process of returning excess funds, or charging deficiencies of funds, in the accounts of each *Member*.
6. **Limits of Coverage** means the maximum amount of financial protection afforded any *Member* as the result of a single occurrence.
7. **Member** means a governmental entity, including any commissions, agencies, districts, authorities, boards, or other similar government entity under the direct control of the governmental entity, that is eligible to participate in a joint powers authority. A Member is one who has been accepted into ERMA and is a Named Covered Party in the Memorandum of Coverage and Endorsements thereto.
8. **Obligated Reserves** means reserves for expected claims expenses, determined by an actuarial study, not attributable to any known *Claim*. This is sometimes called IBNR.
9. **Program Year** means the period of coverage provided by the Memorandum of Coverage, usually a 12-month period. However, any renewals, by endorsement, for a new term shall constitute a new Program Year.
10. **Open Program Year** means a *Program Year* for which the *Executive Committee or Board of Directors*, due to *Claims* within the *Program Year* that are not finalized and/or the possibility of new *Claims* arising, has not authorized the final *retrospective adjustment*.
11. **Closed Program Year** means a *Program Year* that the *Executive Committee or Board of Directors* has declared closed and for which it has authorized final *retrospective adjustments*.

12. **End of Program Year** means that time when the coverage period of the Memorandum of Coverage lapses.
13. **Retained Limit** means the amount of all *Claims* arising out of one *Occurrence* which will be paid directly by the *Member*.

APPENDIX A

RETROSPECTIVE ADJUSTMENTS

ERMA's Financial Stability Plan, Section II, defines the Retrospective Adjustment Process as follows:

As each program year is independent from the others, it is possible to assess each program's year's deficit, or surplus, independently on an annual basis as each program year reaches a certain maturity threshold.

The Retrospective Adjustment Process was approved unanimously at ERMA's February 22, 2008, Board of Directors meeting. This process calls for the retrospective adjustment (assessment for a deficit year or return of surplus contributions for a surplus year) for each program year that is a full five years old according to the following methodology:

- Each year at its May Board of Directors' meeting, the ERMA Board would formally retrospectively adjust a program year's retained earnings balance five full years after the inception of that program year and each year thereafter until the program year is closed (all claims have been settled, and no case or IBNR reserves remain).
- A deficit (in whole or part at the Board's discretion) would be assessed to increase the equity in each eligible program year to the expected confidence level.
- Alternatively, if an open program year is in a surplus position, the Board would consider returning surplus (in whole or part at the Board's discretion) for any equity amount that exceeds the 90% confidence level to allow for continuing claims development in future years.
- If a current program year not yet eligible to receive a retrospective adjustment is in a deficit position at any confidence level, the negative equity at that confidence level will be subtracted from the "Total Distribution Available" at that confidence level.
- If no IBNR remains in a year in which all claims are closed, the Board would consider returning surplus or levying an assessment to officially close out that year.

Additional considerations:

- It is possible for program years to re-open, in which case a later assessment is possible.
- In the event of an overall program surplus, an individual program year or multiple program years would not be adjusted via a return of surplus, unless the ERMA program as a whole remained funded at the 90% confidence level after the return of surplus.
- The current year March 31 financial statements will be utilized to determine each program year's retained earnings balance, and net assessments/net return of surplus (due to the possibility of several program years being adjusted) will be invoiced/released on or before June 30.

APPENDIX B

EMPLOYMENT PRACTICES LIABILITY COVERAGE

A. GENERAL DESCRIPTION

1. COVERAGE PROVIDED

The Memorandum of Coverage will provide defense and indemnity for *Wrongful Employment Practices*.

2. LIMITS OF LIABILITY

The Limits of Liability of the coverage will be Combined Single Limits of at least \$1,000,000 less the amount of the individual *Member's Retained Limit* for each *Occurrence*. The Executive Committee or *Board of Directors* may authorize choices of limits other than \$1,000,000 to the Members, and excess insurance or reinsurance may be provided to provide protection in layers above \$1,000,000.

3. RETAINED LIMITS

The *Retained Limits* available to the *Members* will be \$25,000, \$50,000, \$75,000 \$100,000, \$250,000, \$350,000 and \$500,000.

4. RATES

The contribution rates will be based on an actuarial report and adopted by the Executive Committee or *Board of Directors*.

5. CONCLUSION

It is important that each *Member* understand the coverage provided under the Memorandum of Coverage, and any exclusions thereto, as each *Member* is individually responsible or must make other arrangements for any *Claim* not covered by the Memorandum.