

## FREQUENTLY ASKED QUESTIONS AND ANSWERS

*Updated 10/5/2021*

### **Dishonesty and Faithful Performance of Duty Policy in Lieu of Bond – Ohio Revised Code 3.061**

The Auditor of State of Ohio (AOS) has prepared the following frequently asked questions and answers (FAQ) related to Ohio Revised Code 3.061, Dishonesty and faithful performance of duty policy in lieu of bond, which became effective March 20, 2019 and was amended via HB 444, effective April 12, 2021.

This guidance is provided by the AOS to assist political subdivisions in deciding whether to adopt a policy, by ordinance or resolution, to allow for the use of an employee dishonesty and faithful performance of duty policy, rather than a surety bond. *This guidance does not constitute legal advice and should not be relied upon for that purpose. Political subdivisions should consult with their statutory or appointed legal counsel for specific advice to evaluate compliance.*

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**Q1:** What types of entities have the ability to choose to adopt a policy to allow for the use of an employee dishonesty and faithful performance duty policy rather than a surety bond?

**A1:** The statute applies to political subdivisions, which are defined as a “county, township, municipal corporation (i.e. city or village), school district, community school, park district created under Chapter 1545. Of the Revised Code, library or library district specified in section 3375.32, juvenile facility district created under section 2151.65 of the Revised Code, or detention facility district created under section 2152.41 of the Revised Code.” R.C. 3.061(A)(1).

**Q2:** What is an “employee dishonesty and faithful performance of duty policy”?

**A2:** “A policy of insurance or a coverage document issued by a joint self-insurance pool authorized under section 2744.081 of the Revised Code, to protect against losses that would otherwise be protected against under a surety bond and to protect against other losses as determined by the political subdivision.” R.C. 3.061(A)(2).

**Q3:** Where can I find guidance to identify the applicable officers, employees or appointees for my entity?

**A3:** Please refer to Section 3-5 of the [Ohio Compliance Supplement](#) and Exhibit 2 of the [Ohio Compliance Supplement Implementation Guide](#), which lists entities and statutory references for guidance. However, an entity should consult its statutory legal counsel to determine which individuals this requirement applies to in order to evaluate compliance.

**Q4:** If my entity is one of the political subdivisions permitted and wishes to use an employee dishonesty and faithful performance of duty policy, rather than a surety bond, what actions must be taken?

**A4:** In order to use a policy rather than a surety bond, the entity must adopt a policy *by ordinance or resolution* to allow for the use of such policy. R.C. 3.061(B).

**Q5:** Once the ordinance or resolution described in Q&A4 above is adopted, when must the employee dishonesty and faithful performance duty policy be in place?

**A5:** The policy must be in effect and apply to the officer, employee, or appointee (required by law to give an individual surety bond to qualify for the office or employment) *before* the beginning of the individual’s term of office or employment, and the individual shall not commence the discharge of their duties until coverage is documented as required by the legislative authority. R.C. 3.061(C)(1), (D)(1).

**Q6:** What will happen if the coverage described in Q&A 5 above is not in place when the discharge of duties commences?

**A6:** A lack of coverage shall render the office vacant and it shall be filled as required by law. R.C. 3.061(D)(1).

**Q7:** If an officer, employee or appointee of a subdivision is *not* required by law to give bond before being entitled to enter upon the duties of the office or employment, is that officer, employee or appointee *required* to be covered under a dishonesty and faithful performance of duty policy before being entitled to enter upon the duties of the office or employment?

**A7:** No. R.C. 3.061(A)(2)–(C). However, a best practice would be for all employees who handle or have access to cash and/or financial activity should be covered by either a bond or policy in an amount approved by the legislative body of the entity.

**Q8:** If a political subdivision adopts a policy, by ordinance or resolution as discussed in Q&A 4 above, may some officers, employees or appointees still be covered by surety bonds and others be covered under the employee dishonesty and faithful performance of duty policy or can the entity immediately obtain a policy for all officers, employees and/or appointees and then cancel any bonds in place for those individuals who are mid-term?

**A8:** The amended version of R.C. 3.061, via HB 444, allows a political subdivision to switch from utilizing bonds to a policy when its officers are mid-term or during its employees' employment, whereas the former law required a policy to be in place before an officer took office or before an employee began employment.

**Q9:** Would the procedures described above differ if a person were appointed to the unexpired term of office for an official, employee or appointee who leaves office prior to the end of the term?

**A9:** It would appear not. Previously, since the bond or policy is applicable to the individual, it used to be required to be in effect and apply to the person appointed to the unexpired term *before* that person takes office. Again, as a result of HB 444, the amended version of R.C. 3.061 allows a political subdivision to switch from utilizing bonds to a policy when its officers are mid-term or during its employees' employment. This would appear to eliminate this requirement and instead give the political subdivision the option to switch, or not, for the new appointee.

**Q10:** What is the required coverage amount for an officer, employee or appointee under an employee dishonesty and faithful performance of duty policy?

**A10:** The coverage "shall be equal to or greater than the maximum amount of the bond otherwise required by law. If no amount, or only a minimum amount, of coverage is specified in law for the particular officer, employee, or appointee, the amount of coverage shall be an amount agreed upon by the legislative authority or the authority otherwise designated by law to determine the amount of the bond." R.C. 3.061(D)(6). However, an entity should consult its statutory legal counsel to determine the appropriate amount for each officer, employee or appointee to ensure compliance. Also, see Q&A13 below for additional information regarding deductibles.

**Q11:** What happens if my political subdivision decides not to adopt a policy to use a dishonesty and faithful performance of duty policy in lieu of bond?

**A11:** The entity shall continue to use surety bonds as provided in the Revised Code. R.C. 3.061(E).

**Q12:** Must the officer, employee or appointee be covered under the employee dishonesty and faithful performance duty policy *before* taking the oath of office as is required for a surety bond?

**A12:** Yes. R.C. 3.061(B)–(C). Whichever option an entity chooses, either a bond or a policy in lieu of a bond, it must be in effect in order for the individual to be qualified to hold office or employment, in addition

to all other statutory requirements.

**Q13:** If a dishonesty and faithful performance of duty policy includes a deductible, how do we determine the policy limits to meet the coverage requirement for each officer, employee or appointee set by R.C. 3.061(D)(6)?

**A13:** The coverage is the policy amount less any exemptions or exclusions. For example, a county auditor's bond must be not less than \$5,000, nor more than \$20,000, as the board of county commissioners requires. R.C. 319.02. Thus, the maximum amount for a policy is \$20,000. The policy may be for \$20,000 with no deductible or \$25,000 with a \$5,000 deductible. While the coverage of these two examples would both meet the requirement, the entity could receive less of a recovery when a deductible is in place. For example, in the case of a \$5,000 finding for recovery (FFR), under the \$20,000 policy with no deductible, the entity would be paid \$5,000, but under the \$25,000 policy with a \$5,000 deductible the entity would be paid nothing. However, an entity should consult its statutory legal counsel to determine the appropriate policy terms, amounts and deductibles in order to evaluate compliance.

**Q14:** If the AOS issues an FFR under R.C. 9.24(H)(3) and 117.28, will the total amount of the FFR change if the entity has a dishonesty and faithful performance of duty policy in lieu of bond?

**A14:** No. The AOS issues an FFR for the full amount of public dollars to be recovered. In many circumstances, a bonding or insurance company is named jointly and severally liable in the FFR. However, the bonding or insurance company's liability would be based on the amount and other terms of the bond or policy. Any amount of the FFR above the amount paid by the bonding or insurance company would still be the responsibility of the person(s) named in the FFR.

**Q15:** If the AOS issues an FFR for \$25,000 and the political subdivision has a \$25,000 dishonesty and faithful performance of duty policy in lieu of bond with a \$5,000 deductible in place, the political subdivision will only receive \$20,000 from the insurance company or joint self-insurance pool. Will the political subdivision be responsible for the additional \$5,000?

**A15:** As stated above, the person(s) named in the FFR would be responsible. Collection of the amount would be at the discretion of the entity's statutory legal counsel or the Ohio Attorney General's Office.

**Q16:** If a school district suffers a "social engineering" loss (i.e. intentional misleading of an employee by a person purporting to be a vendor, client, employee or authorized person through the use of a communication (electronic, telegraphic, cable, teletype, telephone voice, telefacsimile or written instruction), the claim of "loss" is in the amount of \$500,000, and the insurance provides coverage of \$100,000 for a social engineering loss, the district has lost \$400,000. The "faithful performance of duty" coverage may be triggered but only if the employee that was the target of the social engineering made a mistake and/or did not follow proper written/customary procedures. If no mistakes were made and established policies were followed, social engineering limits would be the only coverage afforded to the district. Will the AOS issue an FFR during the next audit? If so, who would the FFR be issued against? Would a specific person be named?

**A16:** Although this scenario does not provide enough information to determine if an FFR would be issued, if an FFR were issued, whether the district utilizes surety bonds or an employee dishonesty and faithful performance of duty policy would not affect the amount or who the FFR would be issued against and if the specific person would be named. If an FFR would be issued, it would be a case by case specific determination, it would be made for the full loss and name the responsible party/parties with any bonding or insurance company named jointly and severally in the loss. The determination on the issuance of an FFR would be fact specific and a general answer is not appropriate for this question.

**Q17:** An entity has an employee dishonesty and faithful performance of duty policy in place with a limit of \$50,000 and a \$5,000 deductible, rather than a surety bond. A vendor provided services of \$25,000, but the bill was mistakenly paid twice and the vendor will not return the \$25,000 overpayment. The AOS issues an FFR for \$25,000 naming the accounting clerk and the treasurer. There is no malfeasance on the part of

the clerk or treasurer, this is a mistake. The entity is paid \$20,000 per the policy, what happens to the \$5,000 deductible the entity has absorbed? Will the AOS pursue the treasurer individually for the \$5,000?

**A17:** First, based upon this fact pattern, an FFR would be issued against the vendor as primarily liable. Whether the officer, employee or appointee is covered by a bond or a policy, it relates to both employee dishonesty and faithful performance of duty by the employee. Thus, the individual and their insurance or bonding company would be secondarily jointly and severally liable. While the scenario above describes a mistake made by the employee(s), ensuring payments are properly made would fall under the faithful performance of duty responsibility. As noted in Q&A14 above, the FFR would be for the \$25,000; how much is collected is within the discretion of the entity's statutory legal counsel or the Ohio Attorney General's Office.