

Department of Legislative Services  
Maryland General Assembly  
2014 Session

FISCAL AND POLICY NOTE

House Bill 1289 (Delegate Braveboy)  
Economic Matters

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**Workers' Compensation - Exclusivity of Compensation - Exception - Deliberate Act of Employer**

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This bill specifies that, for the purposes of Workers' Compensations Law, an employer has acted with deliberate intent to injure or kill an employee if the employer (1) acted in a manner that was *premeditated* or *willful* in causing the injury or death of the employee or (2) had *actual knowledge* that an injury or death was *substantially likely* to occur and *willfully disregarded* that knowledge.

The bill must be construed to apply only prospectively and may not be applied or interpreted to have any effect on, or application to, any cause of action arising before the bill's October 1, 2014 effective date.

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**Fiscal Summary**

**State Effect:** The bill *may* increase the number of actions for damages against the employer (including the State) and result in fewer hearings before the Workers' Compensation Commission (WCC) due to the specifications related to what constitutes the deliberate intent of an employer to injure or kill an employee. However, any such impact on the number of actions brought against an employer, the number of hearings, and related expenditures cannot be reliably estimated at this time.

**Local Effect:** The bill may increase the number of actions for damages against local governments as employers and result in fewer workers' compensation claims.

**Small Business Effect:** Potential meaningful. The bill may increase the number of actions for damages against small businesses and result in fewer workers' compensation claims.

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## Analysis

### Current Law:

#### *Workers' Compensation as an Exclusive Remedy*

Generally, workers' compensation is the *exclusive remedy* for a covered employee who has sustained an accidental personal injury, compensable hernia, occupational disease, or death, in which case specified beneficiaries may receive benefits and an employee may not normally sue the employer for damages. However, an employer may be sued for damages if an injury or death occurs and the employer had not secured workers' compensation insurance for his or her employees as required by State Workers' Compensation Law. Likewise, an employer may be sued if a covered employee is injured or killed as the result of the deliberate intent of the employer to injure or kill the covered employee. In these circumstances, a covered employee or his beneficiaries may bring a claim for workers' compensation or sue for damages, but not both. Under Workers' Compensation Law, depending on the extent and longevity of an injury, an employee may be awarded a weekly benefit that may not exceed the average weekly wage of the State (\$998 in 2014). In the event of an employee death, benefits are generally paid at the rate of two-thirds of the deceased covered employee's average weekly wage, but also may not exceed the average weekly wage of the State. Death benefits continue for a period of time based on the dependency level of the employee's beneficiaries.

*Maryland Tort Claims Act:* In general, the State is immune from tort liability for the acts of its employees and cannot be sued in tort without its consent. Under the Maryland Tort Claims Act (MTCA), the State statutorily waives its own common law (sovereign) immunity on a limited basis. MTCA applies to tortious acts or omissions, including State constitutional torts, by "State personnel" performed in the course of their official duties, so long as the acts or omissions are made without malice or gross negligence. Under MTCA, the State essentially "...waives sovereign or governmental immunity and substitutes the liability of the State for the liability of the state employee committing the tort." (*Lee v. Cline*, 384 Md. 245, 262 (2004)).

However, MTCA limits State liability to \$200,000 to a single claimant for injuries arising from a single incident. Attorney's fees are included in the liability cap under MTCA. Under MTCA, attorneys may not charge or receive a fee that exceeds 20% of a settlement or 25% of a judgment. MTCA claims are typically paid out of the State Insurance Trust Fund (SITF), which is administered by the State Treasurer. The liability for an MTCA tort claim may not exceed the insurance coverage granted to units of State government under the State Insurance Program/SITF.

In actions involving malice or gross negligence or actions outside of the scope of the public duties of the State employee, the State employee is not shielded by the State's color of authority or sovereign immunity and may be held personally liable.

MTCA also contains specific notice and procedural requirements. A claimant is prohibited from instituting an action under MTCA unless (1) the claimant submits a written claim to the State Treasurer or the Treasurer's designee within one year after the injury to person or property that is the basis of the claim; (2) the State Treasurer/designee denies the claim finally; and (3) the action is filed within three years after the cause of action arises. The purpose of the notice provision is "...to give the State early notice of claims against it. That early notice, in turn, affords the State the opportunity to investigate the claims while the facts are fresh and memories vivid, and, where appropriate, settle them at the earliest time." *Haupt v. State*, 340 Md. 462, 470 (1995).

*Local Government Tort Claims Act:* The Local Government Tort Claims Act (LGTCAs) defines local government to include counties, municipal corporations, Baltimore City, and various agencies and authorities of local governments such as community colleges, county public libraries, special taxing districts, nonprofit community service corporations, sanitary districts, housing authorities, and commercial district management authorities.

LGTCAs limits the liability of a local government to \$200,000 per individual claim and \$500,000 per total claims that arise from the same occurrence for damages from tortious acts or omissions (including intentional and constitutional torts). It further establishes that the local government is liable for tortious acts or omissions of its employees acting within the scope of employment. Thus, LGTCAs prevents local governments from asserting a common law claim of governmental immunity from liability for such acts of its employees.

LGTCAs also specifies that an action for unliquidated damages may not be brought unless notice of the claim is given within 180 days after the injury. The notice must be in writing and must state the time, place, and cause of the injury. The notice requirement does not apply to actions against specified nonprofit corporations covered under LGTCAs. Unless the defendant (the local government) in an LGTCAs suit can affirmatively show that its defense has been prejudiced by lack of required notice, the court, upon motion and for good cause shown, may entertain the suit even though the notice was not given.

**Background:** Many other states allow an employer to be sued if an injured employee or his or her beneficiaries prove that the injury was the result of deliberate intent on the part of the employer; however, the standards for proof vary greatly from state to state. For example, in West Virginia, an employee or his or her beneficiary must prove five elements to establish a deliberate intent claim: (1) that a specific unsafe working

condition existed and presented a high degree of risk and a strong probability of serious injury or death; (2) that the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition; (3) that the unsafe working condition was a violation of a safety statute, rule, or regulation, or of a commonly accepted safety standard within the industry; (4) that the employer intentionally exposed the employee to the unsafe working condition; and (5) that the employee suffered serious injury or death as a result of the unsafe working condition. In Ohio, statute does not specify the requirements to establish deliberate intent but states, “the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.” Ohio statute also specifies that deliberate removal by an employer of safety equipment or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption of deliberate intent.

In 1986, in the case of *Johnson v. Mountaire Farms of Delmarva, Inc.*, the Maryland Court of Appeals adopted a “specific intent” test as the sole determinant of whether an employee may bypass the exclusive remedy provisions of Workers’ Compensation Law, and pursue a tort action against his or her employer. State Workers’ Compensation Law allows a covered employee or beneficiary to sue an employer when the employee is injured or killed as a result of deliberate intent on the part of the employer. The court interpreted the ‘deliberate intent’ language of the provision to mean, “only where that employer has determined to injure an employee or employees within the same class and used some means to accomplish this goal.” *Johnson v. Mountaire Farms of Delmarva, Inc.*, 305 Md. 246, 503 A.2d 708, 714 (1986). As such, the court held that willful, wanton, or reckless negligence or misconduct of an employer that leads to employee injury or death is not considered deliberate intent and does not bypass the exclusive remedy provisions of Workers’ Compensation Law.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Injured Workers’ Insurance Fund/Chesapeake Employers Insurance Commission; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Workers’ Compensation Commission; Department of Legislative Services

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