

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 440
Economic Matters

(Delegate Cassilly, *et al.*)

Employers of Ex-Offenders - Liability for Negligent Hiring or Inadequate Supervision - Immunity

This bill establishes that an “employer” may not be held liable for negligently hiring or failing to adequately supervise an “employee” based on evidence that the employee has received probation before judgment for an offense or has been convicted of an offense if the employee meets specified criteria and performs specified types of work for the employer. The bill defines “employer” as a person engaged in a business, industry, profession, trade, or other enterprise in the State. “Employer” does not include the State, a county, or a municipality in the State.

The bill applies prospectively to causes of action arising on or after the bill’s October 1, 2017 effective date. The bill’s provisions do not limit or abrogate any immunity from civil liability or defense available to a person under any other provision of the Maryland Code or at common law.

Fiscal Summary

State Effect: Potential decrease in special fund expenditures for the State Insurance Trust Fund (SITF) if subcontractors hired by the State avoid civil judgments as a result of the immunity provisions of the bill. Potential decrease in general fund expenditures for State agencies subject to lower SITF assessments as a result of the bill.

Local Effect: Potential decrease in local expenditures if local governments provide liability coverage to their subcontractors and these subcontractors hired by local governments avoid civil judgments as a result of the immunity provisions of the bill.

Small Business Effect: Potential meaningful impact on small businesses immune from civil liability as a result of the bill.

Analysis

Bill Summary: Under the bill, an “employee” is an individual other than an independent contractor who performs services for compensation for an employer under a written or oral contract for hire, whether express or implied. “Employee” does not include a person who contracts to perform work or provide a service for the benefit of another and who is (1) paid by the job, rather than by the hour or some other time-measured basis; (2) free to hire as many helpers as the person desires and to determine what each helper will be paid; and (3) free to work for other contractors, or to send helpers to work for other contractors, while under contract to the hiring employee.

An employer may not be held liable for negligently hiring or failing to adequately supervise an employee based on evidence that the employee has received probation before judgment for an offense or has been convicted of an offense if (1) the employee has completed the term of imprisonment or probation for the offense or has been released on parole for the offense and (2) the employee performs work for the employer in the manufacturing industry, in the shipping and receiving industry (excluding work requiring the operation of a motor vehicle on a public highway or street), in the warehousing industry, on the construction of new structures, or on the rehabilitation or demolition of unoccupied structures.

Current Law: Employers may be held liable for the actions of their employees under a variety of legal principles, including negligent hiring. Negligent hiring is a cause of action in tort in which an employer may be held liable for damages to an injured party as a result of the actions of an employee if (1) the employer owed a duty of care to the injured party (*e.g.*, providing a safe working environment for employees or a duty of care to a member of the public who could reasonably come into contact with the employee); (2) the employer breached this duty by failing to conduct a reasonable investigation into the employee’s fitness for the position or duties; (3) the employer’s failure to conduct this reasonable investigation resulted in the hiring of the employee; and (4) there is a causal relationship between the hiring of the employee and the plaintiff’s injuries, resulting in damages to the plaintiff. Negligent hiring actions are not limited to the actions of an employee with a criminal record.

Factors a court considers when evaluating a negligent hiring claim include the availability of or access to employee background information, whether a reasonable investigation would have revealed information needed to evaluate an employee’s potential danger or harm to others, and the nature of the employee’s position and/or duties.

Maryland courts have held that an employer is ordinarily not required to investigate the criminal record of a potential employee. *Evans v. Morsell*, 284 Md. 160, 167 (1978). Maryland courts have also recognized that "...there is a rebuttable presumption that an employer uses due care in hiring an employee...." *Evans* at 165, citing *Norfolk and Western Railroad Co. v. Hoover*, 79 Md. 253, 263 (1894). With respect to intentional torts committed by an employee, the critical inquiry is "...whether the employer knew or should have known that the individual was potentially dangerous." *Evans* at 165.

Negligent supervision actions are typically centered on the inadequate supervision of an employee, resulting in injury to the plaintiff, rather than the process the employer used when hiring the employee.

State Expenditures: Special fund expenditures may decrease if the bill results in decreased payments from SITF. General fund expenditures decrease for State agencies subject to lower SITF premiums/assessments if SITF payments decrease as a result of the bill.

The State self-insures through SITF, which is administered by the Treasurer's Office. Although the bill specifies that the State is not considered an employer for purposes of the immunity provisions established under the bill, the Treasurer's Office advises that the State does provide some liability coverage for subcontractors hired by the State for the types of claims affected by the bill.

The magnitude of the bill's fiscal impact, which cannot be reliably determined at this time, depends on the decrease in claims and/or SITF payments for negligent hiring and/or inadequate supervision as a result of the bill.

Agencies pay premiums to SITF that are comprised of an assessment for each employee covered and SITF payments for torts committed by the agency's employees. The portion of the assessment attributable to losses is allocated over five years. The Treasurer is charged with setting premiums "so as to produce funds that approximate the payments from the fund." (*See* Md. State Fin. & Proc. Code Ann. § 9-106(b).) The actuary assesses SITF's reserves and each agency's loss experience for the various risk categories, which include tort claims and constitutional claims. An agency's loss history, consisting of settlements and judgments incurred since the last budget cycle, comprises part of the agency's annual premium. That amount is electronically transferred to SITF from the appropriations in an agency's budget.

The Division of Parole and Probation (DPP) advises that it does not foresee any fiscal impact of this legislation other than certifying for an employer the community supervision status or history of an employee or applicant for employment. DPP provides this information upon request and can handle additional inquiries with existing resources.

The Department of Labor, Licensing, and Regulation advises that, because the bill only addresses employer liability for negligent hiring or inadequate supervision, the bill does not have a fiscal impact on the Division of Workforce Development and Adult Learning. The division oversees the State's workforce system that provides job training opportunities for individuals with barriers to employment.

Local Expenditures: While the bill's definition of "employer" specifically excludes a county or a municipality in the State, the bill may result in decreased expenditures for local governments to the extent that local governments provide liability coverage to subcontractors covered by the bill's provisions. The extent to which this occurs is unclear at this time. However, many local governments obtain insurance coverage through the Local Government Insurance Trust (LGIT). LGIT advises that, while it does provide coverage for its local government members, it would not extend coverage to a subcontractor or the subcontractor's employee for the situations addressed by the bill.

Small Business: The bill may have a meaningful impact on small businesses that avoid lawsuits and/or civil judgments as a result of the bill's immunity provisions.

Additional Information

Prior Introductions: None.

Cross File: SB 55 (Senator Cassilly) - Judicial Proceedings.

Information Source(s): Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Department of Public Safety and Correctional Services; Local Government Insurance Trust; Department of Legislative Services

Fiscal Note History: First Reader - February 15, 2017
md/kdm

Analysis by: Amy A. Devadas

Direct Inquiries to:
(410) 946-5510
(301) 970-5510