

Department of Legislative Services
 Maryland General Assembly
 2017 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 913

(Delegate Rosenberg, *et al.*)

Health and Government Operations

Budget and Taxation

Attorney General - Powers - Maryland Defense Act of 2017

This bill authorizes the Attorney General to investigate, commence, and prosecute or defend any civil or criminal suit or action that is based on the federal government’s action or inaction that threatens the public interest and welfare of the State’s residents, as specified. The bill sets forth a process by which the Attorney General must provide notice to the Governor. The bill requires that the Governor’s proposed budget for fiscal 2019 and each subsequent year appropriate at least \$1.0 million for the Attorney General to use only for carrying out the bill’s provisions and employing five attorneys. The bill also authorizes the Attorney General to employ any assistant counsel that the Attorney General considers necessary to carry out any duty of the Office of the Attorney General (OAG) under specified conditions.

The bill takes effect June 1, 2017.

Fiscal Summary

State Effect: General fund expenditures for OAG increase by \$1.0 million annually beginning in FY 2019, which reflects the bill’s mandated appropriation. OAG can use existing resources until FY 2019 to handle any litigation initiated as a result of the bill. **This bill establishes a mandated appropriation beginning in FY 2019.**

(\$ in millions)	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	0	1.0	1.0	1.0	1.0
Net Effect	\$0.0	(\$1.0)	(\$1.0)	(\$1.0)	(\$1.0)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: The bill authorizes the Attorney General to investigate, commence, and prosecute or defend any civil or criminal suit or action that is based on the federal government's action or inaction that threatens the public interest and welfare of the residents of the State with respect to (1) protecting the health of the residents of the State and ensuring the availability of affordable health care; (2) safeguarding public safety and security; (3) protecting civil liberties; (4) preserving and enhancing the economic security of workers and retirees; (5) protecting financial security of the residents of the State, including their pensions, savings, and investments, and ensuring fairness in mortgages, student loans, and the marketplace; (6) protecting the residents of the State against fraud and other deceptive and predatory practices; (7) protecting the natural resources and environment of the State; (8) protecting the residents of the State against illegal and unconstitutional federal immigration and travel restrictions; or (9) otherwise protecting as *parens patriae*, the State's interest in the general health and well-being of its residents.

Before commencing a suit or action, the Attorney General must provide the Governor with written notice and an opportunity for review and comment, unless the Attorney General determines that emergency circumstances require immediate action. If the Governor objects to the intended suit or action, then the Governor must provide in writing to the Attorney General the reasons for the objection within 10 days after receiving the notice. Unless there are emergency circumstances that require the immediate commencement of the suit or action, the Attorney General must consider the Governor's objection before proceeding. If the Attorney General determines that emergency circumstances require the immediate commencement of a suit or action to protect the public interest and welfare of the residents of the State, as specified, the Attorney General must provide the Governor notice of the suit or action as soon as reasonably practicable.

Annually by December 1, the Attorney General must report to the Governor and the Legislative Policy Committee on actions taken pursuant to the bill's provisions.

In addition to any other staff appointed to the office, the Attorney General may employ any assistant counsel that the Attorney General considers necessary to carry out any duty of OAG if the employment (1) is on a pro bono basis; (2) does not result in more than minimal cost to the State; and (3) does not result in the payment to the assistant counsel of any portion of the State's recovery in any case or matter.

The following findings of the General Assembly are expressed in the bill: (1) the federal government's action or failure to take action may pose a threat to the health and welfare of

the residents of the State and (2) the State should investigate and obtain relief from any arbitrary, unlawful, or unconstitutional federal action or inaction and prevent such action or inaction from harming the residents of the State.

The bill must be construed to expand the powers of the Attorney General and may not be construed to limit in any way the constitutional and statutory authority of the Attorney General that existed before the bill's enactment.

The bill also establishes that its provisions are severable, and that if any provision of the bill or its application is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application that can be given effect without the invalid provision or application.

Current Law/Background: The Attorney General is an elected official who serves a four-year term of office. Pursuant to the State Constitution, the Attorney General has enumerated responsibilities, including investigating, commencing, and prosecuting or defending any civil or criminal suit or actions, as specified, which the General Assembly, by law or joint resolution, or the Governor, directs to be investigated, commenced, and prosecuted or defended. The Attorney General also has and must perform any other duties and possess any other powers as the General Assembly prescribes by law.

According to the National Association of Attorneys General (NAAG), the common law is the origin of an attorney general's authority to represent, defend, and enforce the legal interests of the public and is a critical source of power for attorneys general seeking to protect public interests in developing areas of the law. NAAG notes that, in the vast majority of states, the attorney general retains common law authority in addition to the power and duties specifically enumerated by state constitutions and statutory language. However, Maryland was one of only a handful of states in which the attorney general expressly lacks common law authority and has only the powers as are vested by the State Constitution and various enactments of the General Assembly. See, *e.g.*, *State v. Burning Tree Club*, 301 Md. 9, 481 (1984).

Recently, attorneys general from several states have used common law or prescribed authority on behalf of individuals impacted as a result of President Trump's Executive Order of January 27, 2017, restricting travel into the United States by refugees and visitors from seven countries. The attorneys general in Washington and Minnesota initiated action against the President on behalf of their states and a federal judge issued a temporary restraining order banning enforcement of the executive order. In a *per curiam* order filed February 9, 2017, the U.S. Court of Appeals for the Ninth Circuit denied the U.S. Government's motion for an emergency stay of the temporary restraining order while the case proceeds through the appellate process. On March 6, 2017, President Trump issued a second executive order regarding, among other things, travel restrictions; a federal

judge in Hawaii issued a temporary restraining order banning enforcement of the executive order. A federal judge in Maryland issued a preliminary injunction against portions of the order.

In the time period between these two executive orders, Senate Joint Resolution 5 passed the State Senate and the State House of Delegates, and was signed as Joint Resolution 1 on February 15, 2017. The resolution directs the Attorney General to investigate, commence, and prosecute or defend any civil or criminal suit or action that is based on the federal government's action or inaction that threatens the public interest and welfare of the State's residents, thereby giving the Attorney General the ability to take specified measures to commence litigation against the federal government. Accordingly, Maryland's Attorney General has joined attorneys general in other states in court challenges regarding the travel bans.

These actions follow a trend over the past several decades of attorneys general joining together to take proactive measures deemed to be on behalf of the public interests of states, such as lawsuits against the tobacco and cable television industries.

State Expenditures: General fund expenditures increase by \$1.0 million annually beginning in fiscal 2019, which reflects the bill's minimum mandated appropriation. This funding is anticipated to support the salaries and fringe benefits for the five attorneys required by the bill (estimated at \$731,690 in fiscal 2019 and a minimum of \$760,000 annually thereafter), one-time start-up costs, and ongoing operating expenses.

The actual cost to comply with the bill's provisions may be less than the mandated appropriation each year through fiscal 2021. For example, the estimated cost for salaries, fringe benefits, and associated operating requirements for five assistant attorneys general at the grade and step requested by OAG is \$770,515 in fiscal 2019, increasing to \$839,765 in fiscal 2022. Even if the additional work potentially undertaken by OAG necessitates additional administrative support staff in future years, such expenses are still likely to be less than the mandated appropriation through fiscal 2021. However, in fiscal 2022 and beyond, increasing personnel and associated costs could equate to or exceed the specified minimum mandated appropriation in the bill.

Also, as the bill only *authorizes* the Attorney General to initiate an action or defend against an action, as specified, and does not *require* the Attorney General to take a specific action, there may be years in which no legal actions occur. Even with the joint resolution, which requires the Attorney General to take specified actions, the Attorney General still retains some degree of discretion in determining what matters rise to the level of threatening the public interest and welfare of State residents as contemplated in the bill, thereby requiring action by the State. As such, there may be years in which no legal actions occur and additional funds (outside of personnel and associated costs incurred) may not be used.

Because the mandated appropriations may only be used for the functions specified in the bill, any unused funds revert to the general fund at the end of each fiscal year, as required by State law, although this impact has not been accounted for in this analysis.

Any potential minimal costs associated with the Attorney General's authority to employ assistant counsel on a pro bono basis is not anticipated to materially affect State finances.

Additional Information

Prior Introductions: None.

Cross File: SB 665 (Senator Kasemeyer, *et al.*) - Budget and Taxation.

Information Source(s): Office of the Attorney General; Governor's Office; National Association of Attorneys General; Washington State Office of Attorney General; Department of Legislative Services

Fiscal Note History: First Reader - February 13, 2017
md/kdm Third Reader - March 24, 2017
Revised - Amendment(s) - March 24, 2017
Revised - Updated Information - March 24, 2017

Analysis by: Jennifer K. Botts

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