

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 210

(Senator West, *et al.*)

Judicial Proceedings

COVID-19 Claim - Civil Immunity

This bill provides immunity from civil liability for claims related to COVID-19 for all “persons” who follow applicable federal, State, and local statutes, rules, regulations, executive orders, and agency orders related to COVID-19 (COVID-19 rules and regulations), so long as the person’s actions do not amount to gross negligence or intentional wrongdoing. An isolated, minor deviation from strict compliance with COVID-19 rules and regulations does not deny a person this immunity if the deviation is not related to the plaintiff’s injuries. The bill also specifies exceptions to application of this immunity, including proceedings and causes of action that are not “COVID-19 claims.” The bill’s provisions are severable. **The bill takes effect July 1, 2021, and applies retroactively to affect any claim arising between March 5, 2020, and 180 days after the expiration or rescission of the Governor’s proclamation of March 5, 2020, “Declaration of State of Emergency and Existence of Catastrophic Health Emergency – COVID-19.”**

Fiscal Summary

State Effect: Potential decrease in special fund expenditures and general fund expenditures due to reduced litigation and payment of claims under the bill. Revenues are not affected.

Local Effect: Potential reduction in local expenditures for litigation and payment of claims under the bill. Revenues are not affected.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: “COVID-19 claim” is a claim or cause of action for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to exposure or potential exposure to COVID-19 or to conduct intended to reduce transmission of COVID-19. The bill specifically includes certain types of claims as COVID-19 claims. However, an administrative proceeding or civil action brought by a State or local government prosecutor or agency to enforce State statutes, regulations or orders applicable to COVID-19 is not a “COVID-19 claim.”

For purposes of the bill, a “person” means an individual, a business entity, a governmental entity, or other legal entity, including specified organizations and entities such as a school and an institution of higher education. A paid or unpaid employee, agent, or independent contractor is also considered a “person” under the bill.

Immunity granted under the bill does not (1) create, recognize, or ratify a claim or cause of action; (2) eliminate a required element of any claim, including causation and proximate cause elements; (3) affect rights, remedies, or protections under the Maryland Workers’ Compensation Act, including the exclusive application of that Act; (4) amend, repeal, alter, or affect any other immunity or limitation of liability; or (5) create a defense to liability in an administrative proceeding or civil action brought by a State or local government prosecutor or agency to enforce State statutes, regulations or orders applicable to COVID-19.

Current Law: No statute specifically addresses immunity from civil liability for a claim related to exposure to COVID-19. However, the Maryland Tort Claims Act (MTCA) and the Local Government Tort Claims Act (LGTCA) address liability of the State and local governments, respectively.

MTCA

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 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 \$400,000 to a single claimant for injuries arising from a single incident. (Chapter 132 of 2015 increased the liability limit under MTCA from \$200,000 to \$400,000 for causes of action arising on or after October 1, 2015.)

MTCA covers a multitude of personnel, including some local officials and nonprofit organizations. 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.

LGTC

LGTC 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. Pursuant to Chapter 131 of 2015, for causes of action arising on or after October 1, 2015, LGTC limits the liability of a local government to \$400,000 per individual claim and \$800,000 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 the tortious acts or omissions of its employees acting within the scope of employment. Thus, LGTC prevents local governments from asserting a common law claim of governmental immunity from liability for such acts or omissions of its employees.

County Boards of Education

County boards of education are not covered under LGTC. However, a county board of education may raise the defense of sovereign immunity to any amount claimed above the limit of its insurance policy or, if self-insured or a member of an insurance pool, above \$400,000. A county board of education may not raise the defense of sovereign immunity to any claim of \$400,000 or less. A county board employee acting within the scope of employment, without malice and gross negligence, is not personally liable for damages resulting from a tortious act or omission for which a limitation of liability is provided for the county board, including damages that exceed the limitation on the county board's liability.

Gross Negligence

Gross negligence involves "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them. Stated conversely, a wrongdoer is [liable] of gross negligence or acts wantonly and

willfully only when he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist.” *Barbre v. Pope*, 402 Md. 157, 187 (2007) (citations omitted). Gross negligence is a level of neglect more egregious than simple negligence. *Holloway-Johnson v. Beall*, 220 Md. App. 195 (2014). However, “...a fine line exists between allegations of negligence and gross negligence.” *Barbre* at 187. The existence of gross negligence depends on the facts and circumstances of the case. *Rodriguez v. State*, 218 Md. App. 573 (2014).

State Expenditures: Special fund expenditures for the State Insurance Trust Fund (SITF) decrease to the extent the bill reduces payment of COVID-19 claims by the State and deters the filing of claims against the State. General fund expenditures for affected State agencies decrease if agencies are able to avoid higher SITF assessments under the bill.

The magnitude of the effect of the bill’s provisions on State finances is difficult to determine given (1) how recently the COVID-19 pandemic commenced and its ongoing status; (2) the lack of information regarding the number of COVID-19 claims filed; (3) the lack of information on the number of potential COVID-19 claims, the nature of those claims, and the strength of those claims; and (4) the extent to which existing legal defenses, remedies, and doctrines would allow the State to prevail on a COVID-19 claim absent the bill.

However, to the extent the bill deters the filing of claims and allows the State to prevail on a COVID-19 claim, special fund expenditures decrease for SITF and general fund expenditures decrease for State agencies that would otherwise be subject to higher SITF assessments. Given the general three-year statute of limitations applicable to civil lawsuits, the majority of the bill’s effect will likely be experienced in the near future. Furthermore, MTCA 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.

Claims under MTCA are paid out of SITF, which is administered by the Treasurer’s Office. 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. 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.

Baltimore City Community College (BCCC) advises that the liability BCCC would face absent the bill is unclear at this time, given limits on liability under MTCA and a lack of

knowledge of how many, if any, COVID-19 claims may be filed against BCCC. However, the University System of Maryland and Morgan State University advise that the bill is not anticipated to have a fiscal impact on their institutions.

The bill is not anticipated to materially impact the finances or operations of the Judiciary, as discussed in further detail below.

Local Expenditures: For reasons similar to the ones stated above, local expenditures decrease to the extent the bill reduces litigation and payment of COVID-19 claims and prevents increases in insurance obligations for local governments and boards of education.

Some local governments covered under LGTCA obtain insurance coverage through the Local Government Insurance Trust (LGIT), a self-insurer that is wholly owned by its member local governments. LGIT assesses premiums based on the projected claims and losses of its members. LGIT advises that it cannot determine the bill's effect on the trust and its members, given the ongoing nature of the COVID-19 pandemic and the three-year statute of limitations.

Assuming that COVID-19 lawsuits are most likely to be filed in the circuit courts, the bill may affect circuit court operations if it (1) shortens the course of litigation of COVID-19 claims or (2) deters COVID-19 cases from being filed. However, any such operational impact is not anticipated to materially affect circuit court finances.

Small Business Effect: The bill has a meaningful effect on small businesses that are able to avoid litigation, liability, and potential increased costs of insurance coverage as a result of the bill's provisions.

Additional Information

Prior Introductions: None.

Designated Cross File: HB 508 (Delegate Attar) - Judiciary.

Information Source(s): Maryland Association of County Health Officers; Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Local Government Insurance Trust; Maryland State Department of Education; Baltimore City Community College; University System of Maryland; Morgan State University; St. Mary's College of Maryland; Baltimore City Public Schools; Department of Legislative Services

Fiscal Note History: First Reader - January 25, 2021
rh/jkb

Analysis by: Amy A. Devadas

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