

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE

House Bill 890
Judiciary

(Delegate Carter, *et al.*)

State and Local Police Officers - Liability Insurance - Required

This bill prohibits the Police Training Commission (PTC) from certifying an individual as a police officer unless the individual provides proof of professional liability insurance in an amount consistent with the Local Government Tort Claims Act (LGTCA) or the Maryland Tort Claims Act (MTCA). Specified requirements are established.

Fiscal Summary

State Effect: The Treasurer's Office and the Maryland Insurance Administration (MIA) advise that insurance policies meeting the bill's requirements are not currently available in the State. Thus, the impact on State expenditures relating to MTCA is unclear. If the bill is implemented, general fund expenditures increase by \$38,400 in FY 2016 for the Department of Public Safety and Correctional Services (DPSCS) to track and verify proof of insurance for police officers. Future year costs reflect annualization and inflation.

(in dollars)	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	38,400	43,100	45,000	46,900	49,000
Net Effect	(\$38,400)	(\$43,100)	(\$45,000)	(\$46,900)	(\$49,000)

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

Local Effect: Potential significant costs are likely for any local law enforcement agency, but only to the extent that an agency reimburses officers or covers the cost of the professional liability insurance coverage required under the bill, if available. The extent to which the bill may impact the cost of current liability coverage for law enforcement officers within the scope of an officer's duties cannot be reliably quantified.

Small Business Effect: Minimal or none.

Analysis

Bill Summary: A police officer must maintain the specified professional liability coverage for as long as the police officer is employed as a police officer by the State, a county, a municipality, or a unit of any of these entities.

The professional liability insurance required under the bill must:

- be primary coverage for tortious acts or omissions committed by the police officer within the scope of employment; and
- include coverage for malicious acts or omissions committed by the police officer outside the scope of employment of the police officer.

If the law enforcement agency that employs the police officer chooses, it may reimburse the police officer for the base rate of the liability insurance coverage. However, the officer is responsible for any additional premium costs due to the officer's claims history under the professional liability insurance policy.

The State, a county, or a municipality may not indemnify a police officer for a judgment against the officer in an amount greater than the limits of liability under LGTCA or MTCA unless the officer's professional liability insurance is exhausted.

The bill also specifies that the immunity of State personnel under certain circumstances is subject to the provisions of this bill and that the authority of the State Treasurer to pay a tort claim under certain circumstances is also subject to the provisions of this bill.

Current Law:

Police Training Commission: PTC, which is within DPSCS, was created in 1966. It is chaired by the Superintendent of State Police. The commission operates approved police training schools and prescribes standards for and certifies schools that offer police and security training. The commission also sets minimum qualifications for instructors and certifies qualified instructors for approved training schools.

PTC certifies persons as police officers who have met commission standards. Persons not satisfactorily trained in the 12-month probationary period may not be employed as police officers, nor may a police officer serve after certification has been revoked, suspended, or allowed to lapse. Training for the certification of law enforcement officers in the State may be conducted at the commission's facilities or at any of 20 police training academies in the State certified by the commission.

Local Government Tort Claims Act: LGTCA 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.

LGTCA 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, LGTCA prevents local governments from asserting a common law claim of governmental immunity from liability for such acts of its employees. An employee of a local government is fully liable for all damages awarded in an action in which it is found that the employee acted with actual malice.

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 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.

Background: There are approximately 16,500 individuals certified by PTC as law enforcement officers. PTC advises that certifying and recertifying individuals as police officers is an ongoing process. An individual who has not been previously certified as a police officer in Maryland receives certification from PTC at the request of the law enforcement agency that employs the individual. An individual’s certification ends at the

end of the calendar year. The individual receives renewal of certification automatically at the end of the calendar year if PTC receives information from the employing agency verifying that the individual has met all the requirements to maintain certification. This bill adds another requirement (*i.e.*, liability insurance coverage) for which PTC must receive verification.

In 2014, an effort to put a provision on the ballot in Minneapolis similar to this bill failed.

State/Local Fiscal Effect:

Impact on MTCA/Treasurer's Office

As noted above in the Current Law section of this fiscal and policy note, State law enforcement officers are immune from suit by virtue of common law and statute. That means the officers cannot be sued in their personal capacities unless the officer is outside of the scope of the employment, acting with gross negligence, or with malice. According to the Treasurer's Office, the State already provides coverage (self-insured) for police officers for all actions within the scope of their employment, done without malice and without gross negligence. If the officer is outside of his/her immunity, then the State has no liability and it will not provide coverage to the officer. Therefore, the portion of the bill that requires the officers to obtain "primary" coverage for tortious acts and omissions within the scope of their employment is already encompassed in the existing coverages and does not necessarily provide an additional revenue stream to fund settlements/judgments.

The bill makes the officer liable instead of the State for those initial limits. The Treasurer's Office advises that this is contrary to the entire concept of sovereign immunity. Under sovereign immunity, the State exchanges its liability for that of its employees. The employees are not intended to be sued unless they act with malice, gross negligence, or outside of the scope of their public duties. The bill changes the applicable coverage and treats these officers differently from every other State employee. Under the bill, the officers would have to self-insure what is already insured by the State in accordance with the statute. Sovereign immunity prohibits the State from indemnifying its employees or potential plaintiffs. So, even if the policy is exhausted, the State would not indemnify any party. In no event would the State indemnify its employees for malice, etc.

The professional liability insurance required by the bill must cover both tortious acts committed within the scope of employment *and* malicious acts committed outside the scope of employment. The added coverage the bill seeks to encompass is coverage for acts of malice or omissions committed outside the scope of employment. The State has not waived its sovereign immunity for these types of claims, but under specified circumstances, may choose, subject to the approval of the Board of Public Works and the advice of the Attorney General, to pay claims in excess of the liability limits under MTCA.

The Insurance Division of the Treasurer's Office has conducted a survey and has found that there is no commercially available policy on an individual basis anywhere in the country that conforms to this bill's requirements. There are, however, 15 states that purchase a commercial/association group policy for their employees. It is unknown whether or not these states have already waived and/or abolished their sovereign immunity, therefore requiring such coverage. While the Treasurer's Office advises that this blanket policy is not available in Maryland, the decision to self-insure or to commercially insure rests solely with the Treasurer in accordance with the Treasurer's proscribed duties. In other words, a State agency that employs law enforcement officers does *not* have the authority to purchase any such insurance. Moreover, as SITF already encompasses liability for its employees, the Treasurer's Office advises that it is highly unlikely that the officers would be reimbursed for the purchase price of such a policy, even if it did exist.

Consistent with the information provided by the Treasurer's Office, MIA reports that there are currently no professional liability insurance policies for police officers that cover both tortious acts committed within the scope of employment *and* malicious acts committed outside the scope of employment on file with MIA. If such policies are filed in the future, MIA advises that premiums for such products would likely be cost-prohibitive for individual police officers.

Impact on LGTCA/Local Government Insurance Trust

This fiscal and policy note assumes that the issues raised above regarding insurance for State law enforcement officers generally also apply to local jurisdictions that employ law enforcement officers.

Since 1987, many local government entities in Maryland have covered their primary and excess liability through the Local Government Insurance Trust (LGIT). LGIT is a nonprofit association authorized under State law and is wholly owned and managed by its local government members. LGIT provides joint self-insurance programs or pools for towns, cities, and counties in the State. Rather than paying premiums to buy insurance from an insurance company, local governments contribute those premiums into a jointly owned fund. The money in that fund is used to pay for the members' claims, losses, and expenses.

LGIT currently provides liability insurance to all police officers employed by its members who have procured such coverage. LGIT cannot insure any officer who is certified unless the officer is employed as a law enforcement officer. In addition, LGIT coverage only applies when an officer is within the scope of and working as a law enforcement officer. LGIT also advises that it too is not aware of any professional liability coverage currently

available for malicious acts outside the scope of employment. Further, LGIT does not believe that any insurance company would likely provide such coverage.

Under the bill, each individual police officer is required to obtain professional liability coverage *prior to certification* as a law enforcement officer. However, if such coverage can be obtained, it is possible that a local law enforcement agency could choose to reimburse its officers for post-employment premiums. The extent to which any local government entities reimburse law enforcement officers for the base rate of insurance coverage, as authorized by the bill, is unknown. If reimbursements are provided, local expenditures increase, likely significantly. When there are multiple individuals under a single insurance policy, premiums may be smaller due to the larger risk pool. Therefore, requiring each law enforcement officer to obtain insurance as an individual may result in a net increase in total premiums paid to cover all officers, compared to if the officers were all covered under a single policy.

Police Training Commission

In the event the bill can be implemented, general fund expenditures increase by \$38,355 in fiscal 2016 for DPSCS, which accounts for the bill's October 1, 2015 effective date. This estimate reflects the cost of hiring one full-time contractual employee for PTC to receive and track proof of professional liability insurance coverage for 16,500 certified law enforcement officers for each initial certification, each recertification, and each renewal of a certification. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Contractual Position	1
Salary and Fringe Benefits	\$33,631
Additional Equipment	4,285
Other Operating Expenses	<u>439</u>
Total FY 2016 DPSCS Expenditures	\$38,355

PTC advises that its current resources are insufficient to meet the bill's monitoring and tracking requirements. The monitoring requires that the employee profile record for each certified officer reflect that the individual has professional liability insurance. This requires that the existing employee profile document in the existing electronic recordkeeping system be modified to include liability insurance information for each individual certified as a police officer by PTC. These modifications to the system and the current reporting forms can likely be made without significant cost. However, the additional daily monitoring and updating of records for all 16,500 certified police officers requires the additional personnel described above.

Future year expenditures reflect a full salary with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

This estimate does not include any health insurance costs that could be incurred for specified contractual employees under the State's implementation of the federal Patient Protection and Affordable Care Act.

Recruitment of Police Officers

It is likely that the bill significantly hampers future recruitment efforts for State and local law enforcement officers if similar employment can be found in other states where such coverage is not required.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Baltimore, Carroll, Harford, Montgomery, and St. Mary's counties; towns of Bel Air and Leonardtown; City of Salisbury; Maryland Association of Counties; Local Government Insurance Trust; IMRI; Maryland Municipal League; Department of Natural Resources; Department of General Services; Maryland Insurance Administration; Comptroller's Office; Judiciary (Administrative Office of the Courts); Department of State Police; Department of Public Safety and Correctional Services; Maryland Department of Transportation; Treasurer's Office; University System of Maryland; National Conference of State Legislatures; Department of Legislative Services

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