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January 29, 2025

TO: The Honorable Pamela Beidle
Chair, Finance Committee

FROM: Tiffany Clark
Chief, Legislative Affairs, Office of the Attorney General

RE: Senate Bill 26– Labor and Employment - Occupational Safety and Health -
Revisions (Davis Martinez Public Employee Safety and Health Act) - **Letter
of Information**

The Office of the Attorney General (OAG) respectfully offers this letter of information to the Committee on Senate Bill 26- Labor and Employment – Occupational Safety and Health Revisions (Davis Martinez Public Employee Safety and Health Act. Senate Bill 26 aims to improve workplace safety for public employees in Maryland by (1) establishing a Public Employees' Safety and Health Unit within the Division of Labor and Industry, (2) requiring the development of specific standards to prevent workplace violence for public employees, (3) holding public employers accountable for ensuring the safety of their employees, and (4) including both civil and criminal penalties for violations. While improving workplace safety for public employees is a laudable goal, the repeal of the exemption of public bodies from civil penalties and the introduction of a new enforcement framework potentially complicates the role of the OAG.

Background on Senate Bill 26 and Representation Issues

Under current law, public bodies are exempt from civil penalties under the Maryland Occupational Safety and Health Act (MOSH Act). *See* Md. Code. Ann. Lab & Empl. (“L&E”) §§ 5-206(d) and 5-801. HB 176 removes this exemption, making public bodies, including state agencies, subject to penalties for safety violations and escalating fines for non-compliance. *See* § 5-206(d) repeal, SB 26; § 5-801 repeal, SB 26; § 5-212(e) SB 26. The bill also grants the

Assistant Commissioner for Public Employees' Safety and Health, represented by the OAG, expanded authority to enforce these penalties against public bodies. *See* § 5-8-11(a)(2), HB 176.

While the current law allows for public bodies to contest citations and be heard on appeal, it is extraordinarily rare for a public body to do this given that public bodies are presently immune from financial penalties. We would expect a deluge of appeals in the event that the Division of Labor and Industry began a more robust inspection and citation process against public bodies coupled with new financial penalties.

Consequently, under the current language of Senate Bill 26 the OAG may find itself representing both the Assistant Commissioner seeking to impose penalties and the cited public body contesting the citation or penalty. As discussed below, this would create a severe conflict of interest.

Constitutional and Statutory Representation Obligations

The OAG's representation of both the Assistant Commissioner and public bodies is mandated by the Maryland Constitution and state law. Maryland Constitution, Article V, Section 3 provides that the Attorney General has the exclusive authority to represent the State unless additional counsel is authorized by the General Assembly. Likewise, under Maryland Code, State Government Article ("SG") § 6-106, the representation of state units and officials is generally reserved for the Attorney General. However, SG § 6-106(b) provides for an exception to the Attorney General's exclusive representation where the General Assembly passes a law providing for general counsel to a unit or official, and SG § 6-106(c) provides that an officer or unit of State government may be represented by other counsel with the approval of the Attorney General under certain enumerated circumstances.

Potential for Conflicts of Interest

The dual representation which would be imposed by Senate Bill 26 creates a clear conflict of interest:

1. **Advocacy Conflict:** The OAG, tasked with advocating for the Assistant Commissioner in enforcement actions, may be unable to simultaneously defend the cited public body effectively without compromising its duty to one party.
2. **Judicial Review and Appeals:** The proposed amendment would encourage public bodies not only to contest penalties at the administrative level, but would also encourage them to seek judicial review under L&E § 5-215(a). In these cases, the OAG would face divided loyalties in advocating for conflicting outcomes.

Legal and Practical Concerns

The proposed framework under Senate Bill 26 introduces the following challenges:

1. **Undermined Fairness and Impartiality:** The OAG's dual representation risks undermining the perceived and actual fairness of enforcement proceedings, particularly if the cited public body argues for leniency or dismissal of penalties.
2. **Reduced Motivation to Appeal:** Knowing that the OAG also represents the enforcement authority, cited public bodies may hesitate to appeal, fearing that their defense will not be fully pursued, potentially eroding trust in the legal process.
3. **Resource Allocation:** Representing both sides would strain the OAG's resources and require robust ethical screens, complicating the resolution of disputes and delaying enforcement or compliance.

The Office of the Attorney General applauds Senate Bill 26 for seeking to improve workplace safety. However, we urge the Committee to carefully consider the concerns outlined above as it deliberates this critical issue.

cc: The Honorable Benjamin Kramer
Members of the Senate Finance Committee