

Legislative Analysis



AUTHORITY FOR CERTAIN LEGAL SERVICES

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Senate Bill 1244 as enacted

Public Act 357 of 2020

Sponsor: Sen. Tom Barrett

House Committee: Judiciary

Senate Committee: Government Operations [Discharged]

Complete to 4-9-21

Analysis available at
<http://www.legislature.mi.gov>

BRIEF SUMMARY: Senate Bill 1244 amends the Governmental Liability for Negligence Act to provide that a governmental agency may pay for, engage, or furnish the services of an attorney for an employee or volunteer before a claim is made or a civil or criminal action is filed.

FISCAL IMPACT: Senate Bill 1244 would have no fiscal impact on the state or on local units of government.

THE APPARENT PROBLEM:

According to committee testimony, the current provisions allowing a governmental agency to pay for, engage, or furnish the services of an attorney do not clearly allow these services to be provided or paid for before a claim is made or a civil or criminal action is commenced. The bill would specifically provide that authorization.

THE CONTENT OF THE BILL:

Under the act, when a claim is made or a civil or criminal action is commenced against an officer, employee, or volunteer of a governmental agency based on that individual's conduct while engaged in the course of his or her employment or acting on behalf of the agency, the governmental agency can pay for, engage, or furnish the services of an attorney to advise the officer, employee, or volunteer in the action. Additionally, expenses incurred during the course of the claim or action can be indemnified and paid for by the governmental agency.

Under the bill, the above provisions continue to govern a governmental agency's authority to pay for, engage, or furnish services of an attorney to advise, appear for, or represent an officer, employee, or volunteer with regard to a claim or action *after* a claim is made or a civil or criminal action is commenced.

The bill additionally provides that a governmental agency may pay for, engage, or furnish the services of an attorney to advise, appear for, and represent an officer, employee, or volunteer with regard to civil or criminal litigation or an investigation or proceeding that involves the individual due to conduct in the course of his or her employment or his or her actions taken on behalf of the governmental agency (i.e., *before* a claim is made or action is commenced).

The bill states that it is not intended to affect existing constitutional, statutory, and common law powers and duties of the attorney general. The bill also states that it applies retroactively (with no specified beginning date).

MCL 691.1408

BACKGROUND:

Of note, in a 2005 opinion concerning a governmental body's discretionary authority under the act to pay for an employee's legal services in a criminal action, the Michigan Supreme Court observed that the act "confers discretionary decision-making authority on a governmental agency if three criteria are met: (1) a criminal action has been commenced against an employee; (2) the criminal action is based on the conduct of the employee occurring in the course of employment; and (3) the employee has a reasonable basis for believing that he or she was acting within the scope of his or her authority at the time of the conduct. If any of these three criteria are not satisfied, a legislative or executive agency would lack the statutory discretion to award attorney fees."¹

Among other things, the bill addresses cases in which condition (1) above is not satisfied because a criminal action has not yet been commenced against an employee.

HOUSE COMMITTEE ACTION:

The House Judiciary committee reported the Senate-passed version of the bill without amendment.

ARGUMENTS:

For:

Supporters of the bill argued that the services attorneys provide can be helpful before a claim is made or action commenced to ensure that the officer, employee, or volunteer is complying with the procedural aspects of an investigation or other proceeding, to ensure that the individual is complying with the law, or to prevent any further possible harm to the public on behalf of the relevant individual. If the services of an attorney could prevent actual claims or charges from being filed (by negotiating a settlement or other resolution, for example), they would save governmental time and resources while perhaps also helping the agency to prevent future missteps that could lead to claims or actions.

Against:

Critics argued that the blanket retroactivity provision provides too much discretion for governmental agencies to pick up the tab for legal services going back as far as the effective date of the underlying act (July 1, 1965). Although the bill is permissive and not mandatory (it allows governmental entities to provide or pay for legal services, but does not require them to do so), expenses for claims and actions filed since that date could be a tremendous cost for a governmental agency and should not go unchecked.

Legislative Analyst: Emily S. Smith
Fiscal Analyst: Robin Risko

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

¹ *Warda v City Council of Flushing*, 472 Mich 326, 332 n 3 (2005).
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/SCT/20050518_S125561_66_warda125561-op.pdf