

HOUSE BILL NO. 1153

Introduced by

Government and Veterans Affairs Committee

(At the request of the Office of Management and Budget)

1 A BILL for an Act to create and enact two new sections to chapter 32-12.2 of the North Dakota
2 Century Code, relating to confidentiality of risk management liability reserve and fund records,
3 and meetings and records of agency loss control committees; to amend and reenact sections
4 32-12.2-01, 32-12.2-02, 32-12.2-03, 32-12.2-04, 32-12.2-07, 32-12.2-08, and 32-12.2-09 of the
5 North Dakota Century Code, relating to definitions, damage limitations, exclusions from liability,
6 employee defense, settlement of claims, payment of claims, and the relationship to insurance
7 coverage of the risk management fund; and to repeal sections 26.1-21-10.1 and 26.1-21-10.2 of
8 the North Dakota Century Code, relating to defense of state employees in tort liability cases and
9 expenses paid from the state bonding fund.

10 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

11 **SECTION 1. AMENDMENT.** Section 32-12.2-01 of the North Dakota Century Code is
12 amended and reenacted as follows:

13 **32-12.2-01. (Contingent expiration date - see Note) Definitions.** As used in this
14 chapter, unless the context otherwise requires:

- 15 1. "Claim" means any claim for ~~relief~~ money damages brought against the state or a
16 state employee for an injury caused by the state or a state employee acting within
17 the scope of the employee's employment whether in the state or outside the state.
- 18 2. "Injury" means personal injury, death, or property damage.
- 19 3. "Occurrence" means an accident, including continuous or repeated exposure to a
20 condition, which results in an injury.
- 21 4. "Personal injury" includes bodily injury, mental injury, sickness or disease
22 sustained by a person and injury to a person's rights or reputation.
- 23 5. "Property damage" includes injury to or destruction of tangible or intangible
24 property.

- 1 6. "Scope of employment" ~~has the same meaning as defined in section 26.1-21-10.1~~
2 means the state employee was acting on behalf of the state in the performance of
3 duties or tasks lawfully assigned to the employee by competent authority. Actions
4 of a state employee that constitute reckless or grossly negligent conduct,
5 malfeasance, or willful or wanton misconduct are not within the scope of the
6 employee's employment for purposes of this chapter.
- 7 7. "State" includes an agency, authority, board, body, branch, bureau, commission,
8 committee, council, department, division, industry, institution, instrumentality, and
9 office of the state.
- 10 8. "State employee" means ~~a state employee as defined in section 26.1-21-10.1~~
11 every present or former officer or employee of the state or any person acting on
12 behalf of the state in an official capacity, temporarily or permanently, with or
13 without compensation. The term does not include an independent contractor.
- 14 9. "State institution" means the state hospital, the developmental center at westwood
15 park, Grafton, the state penitentiary, the Missouri River correctional center, the
16 North Dakota youth correctional center, the school for the blind, ~~and~~ the school for
17 the deaf, and similar facilities providing care, custody, or treatment for individuals.

18 **SECTION 2. AMENDMENT.** Section 32-12.2-02 of the North Dakota Century Code is
19 amended and reenacted as follows:

20 **32-12.2-02. (Contingent expiration date - see Note) Liability of the state -**
21 **Limitations - Statute of limitations.**

- 22 1. The state may only be held liable for money damages for an injury proximately
23 caused by the negligence or wrongful act or omission of a state employee acting
24 within the employee's scope of employment under circumstances in which the
25 employee would be personally liable to a claimant in accordance with the laws of
26 this state, or an injury caused from some condition or use of tangible property
27 under circumstances in which the state, if a private person, would be liable to the
28 claimant. No claim may be brought against the state or a state employee acting
29 within the employee's scope of employment except a claim authorized under this
30 chapter or otherwise authorized by the legislative assembly.

- 1 2. The liability of the state under this chapter is limited to a total of two hundred fifty
2 thousand dollars per person and seven hundred fifty thousand dollars for any
3 number of claims arising from any single occurrence. The state may not be held
4 liable, or be ordered to indemnify a state employee held liable, for punitive or
5 exemplary damages. ~~Any amount of a judgment against the state in excess of the~~
6 ~~seven hundred fifty thousand dollar limit imposed under this subsection may be~~
7 ~~paid only if the legislative assembly adopts an appropriation authorizing payment of~~
8 ~~all or a portion of that amount. A claimant may present proof of the judgment to the~~
9 ~~director of the office of management and budget who shall include within the~~
10 ~~proposed budget for the office of management and budget a request for payment~~
11 ~~for the portion of the judgment in excess of the limit under this section at the next~~
12 ~~regular session of the legislative assembly after the judgment is rendered.~~
- 13 3. Neither the state nor a state employee may be held liable for any of the following
14 claims:
- 15 a. A claim based upon an act or omission of a state employee exercising due
16 care in the execution of a valid or invalid statute or rule.
- 17 b. A claim based upon a decision to exercise or perform or a failure to exercise
18 or perform a discretionary function or duty on the part of the state or its
19 employees, regardless of whether the discretion involved is abused or
20 whether the statute, order, rule, or resolution under which the discretionary
21 function or duty is performed is valid or invalid. Discretionary acts include
22 acts, errors, or omissions in the plan or design of any public project, including
23 the placement, erection, or installation of any traffic control device.
- 24 c. A claim resulting from the decision to undertake or the refusal to undertake
25 any legislative or quasi-legislative act, including the decision to adopt or the
26 refusal to adopt any statute, order, rule, or resolution.
- 27 d. A claim resulting from a decision to undertake or a refusal to undertake any
28 judicial or quasi-judicial act, including a decision to grant, to grant with
29 conditions, to refuse to grant, or to revoke any license, permit, order, or other
30 administrative approval or denial.
- 31 e. A claim resulting from the assessment and collection of taxes.

- 1 f. A claim resulting from snow or ice conditions, water, or debris on a highway or
2 on a public sidewalk that does not abut a state-owned building or parking lot,
3 except when the condition is affirmatively caused by the negligent act of a
4 state employee.
- 5 g. A claim resulting from any injury caused by a wild animal in its natural state.
- 6 h. A claim resulting from the condition of unimproved real property owned by the
7 state.
- 8 i. A claim resulting from the loss of benefits or compensation due under a
9 program of public assistance.
- 10 j. A claim resulting from the reasonable care and treatment, or lack of care and
11 treatment, of a person at a state institution where reasonable use of available
12 appropriations has been made to provide care.
- 13 k. A claim resulting from damage to the property of a patient or inmate of a state
14 institution.
- 15 l. A claim resulting from any injury to a resident or an inmate of a state
16 institution if the injury is caused by another resident or inmate of that
17 institution.
- 18 m. A claim resulting from environmental contamination, except to the extent that
19 federal environmental law permits the claim.
- 20 n. A claim resulting from a natural disaster, an act of God, a military action, or an
21 act or omission taken as part of a disaster relief effort.
- 22 o. A claim for damage to property owned by the state.
- 23 p. A claim for liability assumed under contract, except this exclusion does not
24 apply to liability arising from a state employee's operation of a rental vehicle if
25 the vehicle is rented for a period of thirty days or less and the loss is not
26 covered by the state employee's personal insurance or by the vehicle rental
27 company.
- 28 4. An action brought under this chapter must be commenced within the period
29 provided in section 28-01-22.1.
- 30 5. This chapter does not create or allow any claim that does not exist at common law
31 or has not otherwise been created by law as of April 18, 1995.

1 **SECTION 3. AMENDMENT.** Section 32-12.2-03 of the North Dakota Century Code is
2 amended and reenacted as follows:

3 **32-12.2-03. (Contingent expiration date - see Note) State to be named in action -**
4 **Personal liability and defense of employees - Indemnification of claims and final**
5 **judgments.**

- 6 1. An action for an injury proximately caused by the alleged negligence, wrongful act,
7 or omission of a state employee occurring within the scope of the employee's
8 employment must be brought against the state.
- 9 2. A state employee is not personally liable for money damages for an injury when the
10 injury is proximately caused by the negligence, wrongful act, or omission of the
11 employee acting within the scope of employment.
- 12 3. A state employee may not be held liable in the employee's personal capacity for
13 acts or omissions of the employee occurring within the scope of the employee's
14 employment. A state employee may be personally liable for money damages for
15 an injury when the injury is proximately caused by the negligence, wrongful act, or
16 omission of the employee acting outside the scope of the employee's employment.
17 The plaintiff in such an action bears the burden of proof to show by clear and
18 convincing evidence that the employee was acting outside the scope of the
19 employee's employment. The extent to which an employee may be personally
20 liable under this section and whether the employee was acting within the scope of
21 employment must be specifically stated in a final judgment.
- 22 4. Except for claims or judgments for punitive damages, the state shall indemnify and
23 save harmless a state employee for any claim, whether groundless or not, and final
24 judgment for any act or omission occurring within the scope of employment of the
25 employee if the employee provides complete disclosure and cooperation in the
26 defense of the claim or demand.
- 27 5. A judgment in a claim against the state is a complete bar to any claim by the
28 claimant, resulting from the same injury, against the employee whose act or
29 omission gave rise to the claim.
- 30 6. The state shall defend any state employee in connection with any civil claim or
31 demand, whether groundless or otherwise, arising out of an alleged act or omission

1 occurring within the scope of the employee's employment if the employee provides
2 complete disclosure and cooperation in the defense of the claim or demand and if
3 the employee requests such defense in writing within ten days after being notified
4 of any civil claim or demand. The request for defense must be in writing and
5 provided to the head of the state entity that employs the state employee and the
6 attorney general. The head of the state entity that employs the state employee
7 shall advise the attorney general as to whether that person deems the employee's
8 actions that are the subject of the action to have been within the scope of the
9 employee's employment. The determination of whether a state employee was
10 acting within the scope of employment must be made by the attorney general. If
11 the attorney general determines that the employee was acting within the scope of
12 the employee's employment, the state shall provide the employee with a defense
13 by or under the control of the attorney general or the attorney general's appointee.
14 This section is not a waiver, limitation, or modification of any immunity or other
15 defenses of the state or any of its employees, nor does it create any causes of
16 action against the state or any of its employees.

17 **SECTION 4. AMENDMENT.** Section 32-12.2-04 of the North Dakota Century Code is
18 amended and reenacted as follows:

19 **32-12.2-04. (Contingent expiration date - see Note) Notice required - Payment of**
20 **claims.**

- 21 1. A person bringing a claim against the state or a state employee for an injury shall
22 present to the director of the office of management and budget within one hundred
23 eighty days after the alleged injury is discovered or reasonably should have been
24 discovered a written notice stating the time, place, and circumstances of the injury,
25 the names of any state employees known to be involved, and the amount of
26 compensation or other relief demanded. The time for giving the notice does not
27 include the time during which a person injured is incapacitated by the injury from
28 giving the notice. If the claim is one for death, the notice may be presented by the
29 personal representative, surviving spouse, or next of kin within one year after the
30 alleged injury resulting in the death.

- 1 2. ~~Within two working days after~~ After receipt of notice of a claim, the director of the
2 office of management and budget shall ~~forward the notice of a claim to,~~ in a timely
3 manner, notify the head of the state entity involved, the attorney general, and any
4 other insurer or self-insurance pool providing coverage for that state entity. ~~The~~
5 For claims over five thousand dollars, the director, in consultation with the head of
6 the state entity involved and the attorney general, may settle claims covered by the
7 state risk management fund. ~~For all claims, a settlement made under this section~~
8 ~~is not valid unless it is supported by a~~ if the claim is made in writing and settlement
9 is approved and signed by the attorney general. The director of the office of
10 management and budget may independently settle any claim covered by the state
11 risk management fund if the claim is made in writing and the settlement is for not
12 more than five thousand dollars.
- 13 3. A claim shall be paid out of the risk management fund unless that claim is covered
14 by insurance or participation in a government self-insurance pool. All necessary
15 loss adjustment expenses must be included as a component of the claim and be
16 paid out of the fund. Loss adjustment expenses include investigation costs and
17 attorney fees associated with a claim.
- 18 4. The acceptance by the claimant of a settlement is final and conclusive on the
19 claimant and constitutes a complete release of any claim against the state and the
20 state employee whose act or omission gave rise to the claim.

21 **SECTION 5. AMENDMENT.** Section 32-12.2-07 of the North Dakota Century Code is
22 amended and reenacted as follows:

23 **32-12.2-07. (Contingent expiration date - see Note) Risk management fund -**
24 **Appropriation.**

- 25 1. The director of the office of management and budget shall implement and
26 administer a program of ~~self-insurance~~ self-retention against liability for the state
27 through the establishment of a risk management fund. Each entity of the state
28 shall participate in the program by contributing the appropriate share of its costs as
29 determined by the director.
- 30 2. The state risk management fund is a special fund in the state treasury
31 administered by the director of the office of management and budget. The fund is

a revolving fund consisting of contributions from participating state entities and other appropriations by the legislative assembly. The state investment board shall invest the fund in accordance with chapter 21-10. Funds received as contributions from state entities and interest and income received on investments are hereby appropriated for the purposes of the fund. Section 54-44.1-11 does not apply to the fund.

3. The director of the office of management and budget shall:

- a. Review the state's exposure to various types of potential risks in consultation with affected state entities and advise state entities as to the reduction of risk and fiscal management of those losses.
- b. Be responsible for statewide risk management coordination, evaluation of funding and insuring alternatives, and the approval of all liability insurance purchases or government self-insurance pool participation in consultation with affected state entities.
- c. Identify methods to eliminate redundant efforts in the management of state risk management and insurance programs.
- d. Administer the state risk management fund or contract for a third-party administrator.

4. The director of the office of management and budget may request bids from insurance carriers or government self-insurance pools or negotiate with insurance carriers and government self-insurance pools and may enter into contracts of insurance with carriers or memorandums of coverage with government self-insurance pools that are best qualified to underwrite and service insurance or coverage programs for the state through the risk management fund.

SECTION 6. AMENDMENT. Section 32-12.2-08 of the North Dakota Century Code is amended and reenacted as follows:

32-12.2-08. (Contingent expiration date - see Note) Duties of director of the office of management and budget. The director of the office of management and budget is responsible for determining the specifications for liability insurance or coverage for the state. The director shall require an insurance company or government self-insurance pool providing coverage for the state to guarantee that its policy or memorandum of coverage provides

1 minimum coverages pursuant to required specifications and is primary coverage to any
2 coverage under the risk management fund.

3 **SECTION 7. AMENDMENT.** Section 32-12.2-09 of the North Dakota Century Code is
4 amended and reenacted as follows:

5 **32-12.2-09. (Contingent expiration date - see Note) Insurance no waiver of**
6 **immunity.** No purchase of insurance or participation in a government self-insurance pool or
7 self-retention fund by the state may be construed as a waiver of any immunity to suit.

8 **SECTION 8.** A new section to chapter 32-12.2 of the North Dakota Century Code is
9 created and enacted as follows:

10 **Certain records relating to claims against the state or state employees privileged**
11 **and exempt from open records law.**

12 1. The following records are privileged and are not subject to section 44-04-18 or
13 section 6 of article XI of the Constitution of North Dakota:

14 a. Records containing information relating to that portion of the funds or liability
15 reserves of the risk management fund established for the purpose of
16 satisfying a specific pending or reasonably predictable claim against the state
17 or a state employee; and

18 b. Records of a pending or reasonably predictable claim against the state or a
19 state employee, including an incident report, investigative report, or other
20 records relating to a pending or reasonably predictable claim.

21 2. The office of management and budget shall make available for public disclosure
22 records identified in subsection 1 when disclosure of the record will not prejudice
23 any outstanding claim or reasonably predictable claim against the state or a state
24 employee, all civil litigation or adversarial administrative proceedings, including the
25 exhaustion of all appellate remedies, have been completed, and, in the case of
26 reasonably predictable claims, the applicable statute of limitations has expired.

27 **SECTION 9.** A new section to chapter 32-12.2 of the North Dakota Century Code is
28 created and enacted as follows:

29 **State agency loss control committee records and meetings privileged and exempt**
30 **from open records and open meetings law.** The records and meetings of any state agency
31 loss control committee are not public records or public meetings subject to sections 44-04-18

1 and 44-04-19 and sections 5 and 6 of article XI of the Constitution of North Dakota. The
2 records and meetings of the committee are privileged and are not subject to subpoena or
3 discovery or introduction into evidence in any civil action. The records of the committee include
4 all information, data, reports, or records created by or made available to the committee. Any
5 information, data, report, or record otherwise available from original sources is not confidential
6 or immune from discovery or use in any civil action merely because it was presented or
7 considered during the proceedings of the committee. A person who testified before the
8 committee or who is a member of the committee may testify as to matters within that person's
9 knowledge but may not be asked about the records of, the testimony before, or the discussions
10 of the committee. This section does not relieve any person of any liability incurred as a result of
11 actions reviewed by the committee.

12 **SECTION 10. REPEAL.** Sections 26.1-21-10.1 and 26.1-21-10.2 of the North Dakota
13 Century Code are repealed.