

**Fifty-fifth Legislative Assembly, State of North Dakota, begun in the
Capitol in the City of Bismarck, on Monday, the sixth day of January,
one thousand nine hundred and ninety-seven**

HOUSE BILL NO. 1153
(Government and Veterans Affairs Committee)
(At the request of the Office of Management and Budget)

AN ACT to create and enact three new sections to chapter 32-12.2 of the North Dakota Century Code, relating to confidentiality of risk management liability reserve and fund records, meetings and records of agency loss control committees, and contracts between the state and political subdivisions; to amend and reenact sections 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 North Dakota Century Code, relating to definitions, damage limitations, exclusions from liability, employee defense, settlement of claims, payment of claims, and the relationship to insurance coverage of the risk management fund; and to repeal sections 26.1-21-10.1 and 26.1-21-10.2 of the North Dakota Century Code, relating to defense of state employees in tort liability cases and expenses paid from the state bonding fund.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

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

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

1. "Claim" means any claim for ~~relief~~ money damages brought against the state or a state employee for an injury caused by the state or a state employee acting within the scope of the employee's employment whether in the state or outside the state.
2. "Injury" means personal injury, death, or property damage.
3. "Occurrence" means an accident, including continuous or repeated exposure to a condition, which results in an injury.
4. "Personal injury" includes bodily injury, mental injury, sickness or disease sustained by a person and injury to a person's rights or reputation.
5. "Property damage" includes injury to or destruction of tangible or intangible property.
6. "Scope of employment" ~~has the same meaning as defined in section 26.1-21-10.1~~ means the state employee was acting on behalf of the state in the performance of duties or tasks lawfully assigned to the employee by competent authority. Actions of a state employee that constitute reckless or grossly negligent conduct, malfeasance, or willful or wanton misconduct are not within the scope of the employee's employment for purposes of this chapter.
7. "State" includes an agency, authority, board, body, branch, bureau, commission, committee, council, department, division, industry, institution, instrumentality, and office of the state.
8. "State employee" ~~means a state employee as defined in section 26.1-21-10.1~~ every present or former officer or employee of the state or any person acting on behalf of the state in an official capacity, temporarily or permanently, with or without compensation. The term does not include an independent contractor.

9. "State institution" means the state hospital, the developmental center at westwood park, Grafton, the state penitentiary, the Missouri River correctional center, the North Dakota youth correctional center, the school for the blind, ~~and the school for the deaf,~~ and similar facilities providing care, custody, or treatment for individuals.

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

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

1. The state may only be held liable for money damages for an injury proximately caused by the negligence or wrongful act or omission of a state employee acting within the employee's scope of employment under circumstances in which the employee would be personally liable to a claimant in accordance with the laws of this state, or an injury caused from some condition or use of tangible property under circumstances in which the state, if a private person, would be liable to the claimant. No claim may be brought against the state or a state employee acting within the employee's scope of employment except a claim authorized under this chapter or otherwise authorized by the legislative assembly.
2. The liability of the state under this chapter is limited to a total of two hundred fifty thousand dollars per person and ~~seven hundred fifty thousand~~ one million dollars for any number of claims arising from any single occurrence. The state may not be held liable, or be ordered to indemnify a state employee held liable, for punitive or exemplary damages. Any amount of a judgment against the state in excess of the ~~seven hundred fifty thousand~~ one million dollar limit imposed under this subsection may be paid only if the legislative assembly adopts an appropriation authorizing payment of all or a portion of that amount. A claimant may present proof of the judgment to the director of the office of management and budget who shall include within the proposed budget for the office of management and budget a request for payment for the portion of the judgment in excess of the limit under this section at the next regular session of the legislative assembly after the judgment is rendered.
3. Neither the state nor a state employee may be held liable under this chapter for any of the following claims:
 - a. A claim based upon an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule.
 - b. A claim based upon a decision to exercise or perform or a failure to exercise or perform a discretionary function or duty on the part of the state or its employees, regardless of whether the discretion involved is abused or whether the statute, order, rule, or resolution under which the discretionary function or duty is performed is valid or invalid. Discretionary acts include acts, errors, or omissions in the design of any public project but do not include the drafting of plans and specifications that are provided to a contractor to construct a public project.
 - c. A claim resulting from the decision to undertake or the refusal to undertake any legislative or quasi-legislative act, including the decision to adopt or the refusal to adopt any statute, order, rule, or resolution.
 - d. A claim resulting from a decision to undertake or a refusal to undertake any judicial or quasi-judicial act, including a decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.
 - e. A claim resulting from the assessment and collection of taxes.
 - f. A claim resulting from snow or ice conditions, water, or debris on a highway or on a public sidewalk that does not abut a state-owned building or parking lot, except when the condition is affirmatively caused by the negligent act of a state employee.

- g. A claim resulting from any injury caused by a wild animal in its natural state.
 - h. A claim resulting from the condition of unimproved real property owned or leased by the state.
 - i. A claim resulting from the loss of benefits or compensation due under a program of public assistance.
 - j. A claim resulting from the reasonable care and treatment, or lack of care and treatment, of a person at a state institution where reasonable use of available appropriations has been made to provide care.
 - k. A claim resulting from damage to the property of a patient or inmate of a state institution.
 - l. A claim resulting from any injury to a resident or an inmate of a state institution if the injury is caused by another resident or inmate of that institution.
 - m. A claim resulting from environmental contamination, except to the extent that federal environmental law permits the claim.
 - n. A claim resulting from a natural disaster, an act of God, a military action, or an act or omission taken as part of a disaster relief effort.
 - o. A claim for damage to property owned by the state.
 - p. A claim for liability assumed under contract, except this exclusion does not apply to liability arising from a state employee's operation of a rental vehicle if the vehicle is rented for a period of thirty days or less and the loss is not covered by the state employee's personal insurance or by the vehicle rental company.
- 4. An action brought under this chapter must be commenced within the period provided in section 28-01-22.1.
 - 5. This chapter does not create or allow any claim that does not exist at common law or has not otherwise been created by law as of April ~~18~~ 22, 1995.

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

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

- 1. An action for an injury proximately caused by the alleged negligence, wrongful act, or omission of a state employee occurring within the scope of the employee's employment must be brought against the state.
- 2. A state employee is not personally liable for money damages for an injury when the injury is proximately caused by the negligence, wrongful act, or omission of the employee acting within the scope of employment.
- 3. A state employee may not be held liable in the employee's personal capacity for acts or omissions of the employee occurring within the scope of the employee's employment. A state employee may be personally liable for money damages for an injury when the injury is proximately caused by the negligence, wrongful act, or omission of the employee acting outside the scope of the employee's employment. The plaintiff in such an action bears the burden of proof to show by clear and convincing evidence that the employee was acting outside the scope of the employee's employment. The extent to which an employee may be personally liable under this section and whether the employee was acting within the scope of employment must be specifically stated in a final judgment.

4. Except for claims or judgments for punitive damages, the state shall indemnify and save harmless a state employee for any claim, whether groundless or not, and final judgment for any act or omission occurring within the scope of employment of the employee if the employee provides complete disclosure and cooperation in the defense of the claim or demand and if the employee has given written notice of the claim or demand to the head of the state entity that employs the state employee and to the attorney general within ten days after being served with a summons, complaint, or other legal pleading asserting that claim or demand against the state employee.
5. A judgment in a claim against the state is a complete bar to any claim by the claimant, resulting from the same injury, against the employee whose act or omission gave rise to the claim.
6. The state shall defend any state employee in connection with any civil claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring within the scope of the employee's employment if the employee provides complete disclosure and cooperation in the defense of the claim or demand and if the employee requests such defense in writing within ten days after being served with a summons, complaint, or other legal pleading asserting a cause of action against the state employee arising out of a civil claim or demand. The request for defense must be in writing and provided to the head of the state entity that employs the state employee and the attorney general. The head of the state entity that employs the state employee shall advise the attorney general as to whether that person deems the employee's actions that are the subject of the action to have been within the scope of the employee's employment. The determination of whether a state employee was acting within the scope of employment must be made by the attorney general. If the attorney general determines that the employee was acting within the scope of the employee's employment, the state shall provide the employee with a defense by or under the control of the attorney general or the attorney general's appointee. This section is not a waiver, limitation, or modification of any immunity or other defenses of the state or any of its employees, nor does it create any causes of action against the state or any of its employees.
7. For any claim brought under this chapter, a state employee may choose to hire the employee's own separate defense counsel to represent the state employee in the litigation. If the state employee chooses to hire separate defense counsel, subsections 4 and 6 do not apply to the state employee in that litigation and the state will not indemnify, save harmless, or defend the state employee nor pay for the state employee's defense or any judgment against the state employee.

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

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

1. A person bringing a claim against the state or a state employee for an injury shall present to the director of the office of management and budget within one hundred eighty days after the alleged injury is discovered or reasonably should have been discovered a written notice stating the time, place, and circumstances of the injury, the names of any state employees known to be involved, and the amount of compensation or other relief demanded. The time for giving the notice does not include the time during which a person injured is incapacitated by the injury from giving the notice. If the claim is one for death, the notice may be presented by the personal representative, surviving spouse, or next of kin within one year after the alleged injury resulting in the death.
2. ~~Within two working days after~~ After receipt of notice of a claim, the director of the office of management and budget shall forward the notice of a claim to, in a timely manner, notify the head of the state entity involved, the attorney general, and any other insurer or self-insurance pool providing coverage for that state entity. The ~~For claims over five thousand dollars, the director, in consultation with the head of the state entity involved and the attorney general, may settle claims covered by the state risk management fund. For all~~

~~claims, a settlement made under this section is not valid unless it is supported by a~~ if the claim is made in writing and settlement is approved and signed by the attorney general. The director of the office of management and budget may independently settle any claim covered by the state risk management fund if the claim is made in writing and the settlement is for not more than five thousand dollars.

3. A claim shall be paid out of the risk management fund unless that claim is covered by insurance or participation in a government self-insurance pool. All necessary loss adjustment expenses must be included as a component of the claim and be paid out of the fund. Loss adjustment expenses include investigation costs and attorney fees associated with a claim.
4. The acceptance by the claimant of a settlement is final and conclusive on the claimant and constitutes a complete release of any claim against the state and the state employee whose act or omission gave rise to the claim.
5. A person bringing a legal action against the state or a state employee for a claim shall deliver a copy of the summons, complaint, or other legal pleading in which the claim is first asserted in the action to the director of the office of management and budget at the time the summons, complaint, or other legal pleading is served in the action. This provision is in addition to any applicable rule of civil procedure.

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

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

1. The director of the office of management and budget shall implement and administer a program of ~~self-insurance~~ self-retention against liability for the state through the establishment of a risk management fund. Each entity of the state shall participate in the program by contributing the appropriate share of its costs as determined by the director.
2. The state risk management fund is a special fund in the state treasury 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 minimum coverages pursuant to required specifications and is primary coverage to any coverage under the risk management fund.

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

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

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

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

1. The following records are privileged and are not subject to section 44-04-18 or section 6 of article XI of the Constitution of North Dakota:
 - a. Records containing information relating to that portion of the funds or liability reserves of the risk management fund established for the purpose of satisfying a specific pending or reasonably predictable claim against the state or a state employee; and
 - b. Incident reports, investigation reports, or other risk management fund records of a pending or reasonably predictable claim against the state or a state employee.
2. The office of management and budget shall make available for public disclosure records identified in subsection 1 when disclosure of the record will not prejudice any outstanding claim or reasonably predictable claim against the state or a state employee, all civil litigation or adversarial administrative proceedings, including the exhaustion of all appellate remedies, have been completed, and, in the case of reasonably predictable claims, the applicable statute of limitations has expired.

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

State agency loss control committee records and meetings privileged and exempt from open records and open meetings law. The portions of the records and meetings of any state agency loss control committee dealing with confidential records are not public records or public meetings subject to sections 44-04-18 and 44-04-19 and sections 5 and 6 of article XI of the Constitution of North Dakota. Those records and meetings of the committee are privileged and are not subject to subpoena or discovery or introduction into evidence in any civil action. The records of the committee include all information, data, reports, or records created by or made available to the committee. Any information, data, report, or record otherwise available from original sources is not confidential or immune from discovery or use in any civil action merely because it was presented or considered during the proceedings of the committee. A person who testified before the committee or who is a member of the committee may testify as to matters within that person's knowledge but may not be asked about the records of, the testimony before, or the discussions of the committee. This section does not relieve any person of any liability incurred as a result of actions reviewed by the committee.

SECTION 10. A new section to chapter 32-12.2 of the North Dakota Century Code is created and enacted as follows:

Contract between the state and a political subdivision. A contract between the state and a political subdivision may not contain a provision that requires one party to assume the liability of the other or the liability of a third party or to bear the costs of defense of actions against the other or against a third party, unless the agreement is entered into in good faith and is set forth in a separate writing signed by both parties and supported by adequate consideration which must be stated in the agreement.

SECTION 11. REPEAL. Sections 26.1-21-10.1 and 26.1-21-10.2 of the North Dakota Century Code are repealed.

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Fifty-fifth Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1153.

House Vote: Yeas 88 Nays 3 Absent 6

Senate Vote: Yeas 47 Nays 0 Absent 2

Chief Clerk of the House

Received by the Governor at _____ M. on _____, 1997.

Approved at _____ M. on _____, 1997.

Governor

Filed in this office this _____ day of _____, 1997,

at _____ o'clock _____ M.

Secretary of State