COMMITTEE REPORT

May 4, 2022

**H. 4048**

Introduced by Rep. G.M. Smith

S. Printed 5/4/22--S. [SEC 5/5/22 2:46 PM]

Read the first time April 7, 2022.

**THE COMMITTEE ON JUDICIARY**

To whom was referred a Bill (H. 4048) to amend the Code of Laws of South Carolina, 1976, by adding Section 1‑11‑445 so as provide that the State of South Carolina must provide a legal, etc., respectfully

**REPORT:**

That they have duly and carefully considered the same and recommend that the same do pass with amendment:

Amend the bill, as and if amended, by striking all after the enacting words and inserting therein the following:

/ SECTION 1. Chapter 11, Title 1 of the 1976 Code is amended by adding:

“Section 1-11-445. (A) The State of South Carolina, by and through its agencies, departments, and instrumentalities, must defend the state agency, department, or instrumentality, and the members of a governing board of the state agency, department, or instrumentality, as applicable, against an uninsured claim or suit that arises out of or by virtue of the performance of official duties on behalf of the state agency, department, or instrumentality, and must indemnify them for an uninsured loss or judgment incurred by them as a result of the claim or suit, without regard to whether the claim or suit is brought against them in their individual or official capacities, or both. The State also must defend directors, officers, and employees of the entity, and legislative employees performing duties for the entity, against an uninsured claim or suit that arises out of or by virtue of the performance of official duties unless the director, officer, employee, or legislative employee was acting in bad faith including, but not limited to, acting outside the scope of his official duties, or that the actions constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. The State shall indemnify these directors, officers, employees, and legislative employees for a loss or judgment incurred by them as a result of such uninsured claim or suit, without regard to whether the claim or suit is brought against them in their individual or official capacities, or both. This commitment to defend and indemnify extends to members of the entity, the entity’s officers, the entity’s director, the entity’s employees, and legislative employees after they have left their employment with the entity or the General Assembly, as applicable, if the uninsured claim or suit arises out of or by virtue of their performance of official duties on behalf of their employer.

(B) The term ‘instrumentality’ as used in this section includes an entity where a specific duty or function is imposed on the entity by law and includes any function where the entity must exercise a portion of the state’s sovereignty. Entities to which this provision applies include, but are not limited to, the State Fiscal Accountability Authority, the Judicial Merit Selection Commission, the Public Utilities Review Committee, the Retirement Systems Investment Panel, and all joint special legislative committees.

(C) The provisions of subsection (A) also apply to employees and officers while acting within the scope of their employment when administering any South Carolina statute which has not been held to be unconstitutional or unlawful by a final decision of a court of competent jurisdiction. For purposes of this section, a final decision is the decision of a court declaring the South Carolina statute unconstitutional or otherwise unlawful, and from which the appropriate officials of this State may not or do not take an appeal or request a rehearing.

(D) This section does not waive any defense, immunity, limitation, or jurisdictional bar including, but not limited to, the Tort Claims Act. This section does not affect the terms or conditions of any applicable policy of insurance.”

SECTION 2. Sections 1‑11‑440 and 12‑4‑325 are repealed on the effective date of this act.

SECTION 3. This act takes effect upon approval by the Governor. /

Renumber sections to conform.

Amend title to conform.

LUKE A. RANKIN for Committee.

**STATEMENT OF ESTIMATED FISCAL IMPACT**

**Explanation of Fiscal Impact**

**State Expenditure**

This bill establishes the State’s duty, by and through its agencies, departments, and instrumentalities, to defend and indemnify these state entities and the entities’ officers and management employees against any uninsured claim or suit that arises out of the performance of official duties. This bill also repeals the separate indemnity clauses for DOR and SFAA. This repeal eliminates the redundancy of coverage as both agencies will be granted defense and indemnity as state agencies under this bill.

Currently, state agencies are covered under the Torts Claims Act, pursuant to Chapter 78 of Title 15, with liability limits of $300,000 for one person for a single occurrence and $600,000 for a single occurrence, regardless of the number of persons involved. This bill expands the state’s duty to defend and indemnify to include any uninsured claims.

The expenditure impact will depend upon the implementation of this duty to defend and indemnify and whether each agency is responsible for its own defense and damages or if one state agency, such as SFAA or the Attorney General Office, is held responsible to defend and indemnify these uninsured actions. Additionally, the impact depends upon the number and size of claims and lawsuits that fall outside of the scope of current liability coverage. Therefore, this bill will have an undetermined expenditure impact.

**Amended by House Ways and Means on March 31, 2022**

**State Expenditure**

This bill establishes the State’s duty, by and through the IRF, within SFAA, to defend and indemnify all state agencies, departments, and other such entities and employees. This bill also repeals the separate indemnity clauses for DOR and SFAA. This repeal eliminates the redundancy of coverage as both agencies will be granted defense and indemnity as state agencies under this bill.

Currently, the IRF operates as a governmental insurance operation with the mission to provide insurance specifically designed to meet the needs of governmental entities. The IRF is authorized by statute to provide tort liability insurance, automobile liability insurance, and insure public buildings and content, among other insurance coverage.

SFAA indicates this bill will increase the scope of responsibility for the IRF beyond the current scope of insurance coverage to include the duty to defend and indemnify a state agency even if the claim arises under a cause of action that is not covered within the IRF’s current insurance coverage. SFAA is unable to estimate the number or size of claims and lawsuits that will become the IRF’s responsibility to defend and indemnify due to this bill. Therefore, this bill may have an undetermined expenditure impact for SFAA, depending upon the number and size of claims and lawsuits that fall outside of the scope of current insurance coverage. Additionally, RFA anticipates this may result in an increase in premiums for state agencies to cover the cost of these responsibilities.

Frank A. Rainwater, Executive Director

Revenue and Fiscal Affairs Office

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 1‑11‑445 SO AS PROVIDE THAT THE STATE OF SOUTH CAROLINA MUST PROVIDE A LEGAL DEFENSE FOR AND INDEMNIFICATION TO A STATE AGENCY, DEPARTMENT, OR INSTRUMENTALITY AGAINST A CLAIM OR SUIT THAT ARISES OUT OF OR BY VIRTUE OF THE PERFORMANCE OF OFFICIAL DUTIES ON BEHALF OF A STATE AGENCY, DEPARTMENT, OR INSTRUMENTALITY, AND TO PROVIDE A SIMILAR DEFENSE AND INDEMNIFICATION TO BOARD MEMBERS AND EMPLOYEES, AND OFFICERS OF THE ENTITY; TO REPEAL SECTION 1‑11‑440 RELATING TO LEGAL DEFENSES AND INDEMNIFICATIONS PROVIDED TO MEMBERS OF THE FISCAL ACCOUNTABILITY AUTHORITY AND ITS DIRECTOR; AND TO REPEAL SECTION 12‑4‑325 RELATING TO LEGAL DEFENSES AND INDEMNIFICATION PROVIDED TO OFFICERS AND EMPLOYEES OF THE DEPARTMENT OF REVENUE.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Chapter 11, Title 1 of the 1976 Code is amended by adding:

“Section 1-11-445 (A) The State of South Carolina, by and through its agencies, departments, and instrumentalities, must defend the state agency, department, or instrumentality, and the members of a governing board of the state agency, department, or instrumentality, as applicable, against an uninsured claim or suit that arises out of or by virtue of the performance of official duties on behalf of the state agency, department, or instrumentality and must indemnify them for an uninsured loss or judgment incurred by them as a result of the claim or suit, without regard to whether the claim or suit is brought against them in their individual or official capacities, or both. The State also must defend officers and management employees of the entity, and legislative employees performing duties for the entity, against an uninsured claim or suit that arises out of or by virtue of the performance of official duties unless the officer, management employee, or legislative employee was acting in bad faith including, but not limited to, acting outside the scope of their official duties or that the actions constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. The State shall indemnify these officers, management employees, and legislative employees for a loss or judgment incurred by them as a result of such uninsured claim or suit, without regard to whether the claim or suit is brought against them in their individual or official capacities, or both. This commitment to defend and indemnify extends to members of the entity, the entity’s officers and management employees, the entity’s director and officers and management employees, and legislative employees after they have left their employment with the entity, the General Assembly, or the entity, as applicable, if the uninsured claim or suit arises out of or by virtue of their performance of official duties on behalf of their employer.

(B) The term ‘instrumentality’ as used in this section includes an entity where a specific duty or function is imposed on the entity by law and includes any function where the entity must exercise a portion of the state’s sovereignty. Entities to which this provision applies includes, but is not limited to, the State Fiscal Accountability Authority, the Joint Legislative Merit Selection Commission, the Public Utilities Review Commission, the Retirement Systems Investment Panel, and all joint special legislative committees.

(C) The provisions of subsection (A) also apply to employees and officers while acting within the scope of their employment when administering any South Carolina statute which has not been held to be unconstitutional or unlawful by a final decision of a court of competent jurisdiction. For purposes of this section, a final decision is the decision of a court declaring the South Carolina statute unconstitutional or otherwise unlawful and from which the appropriate officials of this State may not or do not take an appeal or request a rehearing.”

SECTION 2. Sections 1‑11‑440 and 12‑4‑325 are repealed on the effective date of this act.

SECTION 3. This act takes effect upon approval by the Governor.

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