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TO: Legislative Council

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RE: Legislative Branch Tort Liability Based on COVID-19

INTRODUCTION

At the request of the 2021 Session Planning subcommittee of the Legislative Council, we were asked to analyze the extent of tort liability that the Legislative Branch could be exposed to during the 67th Legislative Session based on the COVID-19 pandemic and whether there are any strategies to mitigate risk.

This memorandum assumes that state employees, legislative employees, and legislators would pursue a claim under the workers' compensation system given that section 39-71-403, MCA, makes it the exclusive, compulsory, and obligatory remedy.

Before we provide you with our opinion and analysis, a few caveats are necessary. Due to the constitutional constraints inherent in the separate powers of each branch of state government, a legal opinion provided to you by Legislative Branch attorneys is obviously not binding on the Executive Branch.

QUESTIONS PRESENTED

1. Is the Legislative Branch exposed to tort liability if a state employee, a legislative employee, a legislator, or a member of the public is exposed to COVID-19 while engaged in the legislative process and becomes ill from COVID-19?
2. If a member of the public pursues a successful tort claim for a COVID-19 injury against the Legislative Branch, what is the extent of potential damages?
3. How can the Legislative Branch mitigate risks and lower liability from tort claims by a member of the public based on a COVID-19 illness that was contracted while engaging in the legislative process?

BRIEF ANSWER

1. Pursuant to section 39-71-403, MCA, the Legislative Branch is not exposed to tort liability if a state employee, a legislative employee, or a legislator is exposed to COVID-19 while engaged in the legislative process given that the workers' compensation system is the exclusive, compulsory, and obligatory remedy.

The Legislative Branch has potential tort liability if a member of the public contracts COVID-19 while engaged in the legislative process and becomes ill from COVID-19. However, the Legislative Branch can mitigate risks by following a reasonable standard of care (see question 3). Additionally, a member of the public may have a hard time proving that he or she contracted COVID-19 while engaged in the legislative process, as opposed to somewhere else, which would be a positive factor in defending a lawsuit.

2. Pursuant to section 2-9-108(1), MCA, the Legislative Branch is not liable in a tort action for damages suffered as a result of an act or omission of an officer, agent, or employee in excess of \$750,000 for each claim. Additionally, pursuant to section 2-9-105, MCA, the Legislative Branch is immune from exemplary and punitive damages.
3. The Legislative Branch can mitigate risks and lower liability from COVID-19 tort claims by following safety protocols recommended by the Centers for Disease Control and Prevention (CDC) as well as other government entities and state legislatures with a similar level of public involvement. This would include sanitary and social distancing measures. The Legislature could also attempt to gain immunity by adopting a declaration of public policy by Joint Resolution that defines live public involvement as a legislative act as opposed to an administrative act. Lastly, if the Legislature desires guaranteed immunity from a COVID-19 claim, it could pursue statutory immunity legislation pursuant to Article II, section 18, of the Montana Constitution, which would require approval by two-thirds of each house of the Legislature.

LEGAL ANALYSIS

State employees conducting state legislative business are treated differently for the purposes of tort law than members of the public. A state employee, a legislative employee, and a legislator would generally only be able to claim workers' compensation as part of a tort lawsuit, while a member of the public could file a lawsuit for personal injury. As such, these groups of individuals are discussed separately.

I. TORT LIABILITY

A. State Employee, Legislative Employee, and Legislators

As a threshold matter, section 39-71-403, MCA, provides that “if a state agency is the employer, the terms, conditions, and provisions of compensation plan No. 3, state fund, are exclusive, compulsory, and obligatory upon both employer and employee.” The statute then defines “state agency” to include the Legislative Branch. Section 39-71-118, MCA, provides that an “employee” or “worker” includes “each person in this state [...] who is in the service of an employer [and] all of the elected and appointed paid public officers.” In sum, the Legislature has workers’ compensation insurance through the Montana State Fund, including legislative staff and legislators.

Relating to compensable claims, the Workers’ Compensation Act generally provides that an insurer is liable to an employee for any occupational disease. Section 39-71-116(23) defines “occupational disease” as “harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a single day or work shift.” Specifically, section 39-71-407(12) provides that “[a]n insurer is liable for an occupational disease only if the occupational disease: (a) is established by objective medical findings; and (b) arises out of or is contracted in the course and scope of employment.” The statute further provides that “[a]n occupational disease is considered to arise out of or be contracted in the course and scope of employment if the events occurring on more than a single day or work shift are the major contributing cause of the occupational disease in relation to other factors contributing to the occupational disease.”

Thus under the Workers’ Compensation Act, it is possible that an employee of the legislature who contracts COVID-19 may file a workers’ compensation claim as an occupational disease. However, the claimant will need to establish, through objective medical findings, that the injury or occupational disease arose out of the course and scope of their employment. Establishing that a particular claimant contracted COVID-19 through work-related activity may be difficult. Indeed, the Montana Department of Labor and Industry provided a fact sheet relating to remedies available to workers: <http://dli.mt.gov/Portals/57/Documents/covid-19/COVID-19-ScenariosAndBenefits.pdf?ver=2020-03-18-113453-153>. Note that under the Department’s interpretation, workers’ compensation is generally unavailable unless it involves a health care worker, food supply worker, or first responder who is ill with COVID-19 and the work-related exposure was the major contributing cause. This demonstrates the practical difficulties of establishing that the employee contracted the occupational disease through objective medical findings that the disease arose out of the course and scope of employment.

B. Member of the Public

In tort law, actionable “negligence arises only from a breach of legal duty, and to sustain an action for damages resulting from negligence, the complaint must allege the duty, its breach, the

damages, and that the breach of duty was the proximate cause of the injury." *Pretty On Top v. Hardin*, 182 Mont. 311, 597 P.2d 58 (1979).

1. *Duty -- Reasonable Care -- Breach of Duty*

It should be easy to establish that the state owes a duty of care to a member of the public entering a state building. Consequently, the first question is whether the Legislative Branch breaches a duty of care by having a Legislative session that could potentially expose members of the public to COVID-19.

In *Schmidt v. Washington Contractors Group, Inc.*, 1998 MT 194, 290 Mont. 276, 964 P.2d 34, the plaintiff sustained injuries when he crashed his motorcycle while descending a temporary freeway entrance ramp in a construction zone. The Supreme Court noted that the construction company owed a **duty of ordinary care** in maintaining the road construction site in a **reasonably safe** condition. *Id.* ¶ 15 (emphasis added). The construction company argued that it was not negligent as it properly had posted warning signs as required by the Manual of Uniform Traffic Control Devices (MUTCD). *Id.* ¶ 12. The Court stated that "evidence of compliance with the MUTCD does not necessarily establish due care because the MUTCD, like any other national industry standard or code, is only a minimum standard." *Id.* ¶ 17. Since reasonable minds could differ regarding whether a breach of the contractors' duty of ordinary care caused the plaintiff's accident and subsequent damages, the case was remanded to District Court to consider: (1) whether the contractors complied with the MUTCD and, if so, whether mere compliance equated with the exercise of due care, given the condition of the exit ramp; (2) where warning road signs were placed and whether the placement complied with the MUTCD; (3) whether the pavement height differential was unreasonably dangerous to motorcycles; and (4) whether evidence of three other motorcycle accidents that happened at the same spot within 72 hours of the plaintiff's accident was sufficient to raise a genuine issue of material fact regarding whether the contractors were on notice of an unreasonably dangerous condition that required remediation and possibly warnings over and above the requirements of the MUTCD. *Id.* ¶¶ 17-18, 25.

In *Steichen v. Talcott Properties, LLC*, 2013 MT 2, ¶¶3, 17, 368 Mont. 169, 292 P.3d 458, the plaintiff sued the defendant who owned a building where an injury occurred while the plaintiff was cleaning the floor by a leaking urinal. The Supreme Court determined that despite the plaintiff's "knowledge of the leaking urinal and frequent presence of water on the floor, whether [the defendant] nonetheless should have anticipated harm is a jury question, since it depends on the **degree of ordinary care that reasonable persons would use** under the same or similar circumstances."

In *Bridges v. Moritz*, 149 Mont. 273, 280, 425 P.2d 721, 725 (1967), the owner of a building destroyed by a gas explosion was entitled to a directed verdict against a general contractor who was clearly liable based on the evidence, but not against a gas company that "took every **reasonable precaution** to protect its facilities and customers".

Based on the above cases regarding duty, one common theme is present. In order to pursue a successful tort claim, a member of the public would need to show that the Legislative Branch breached the duty of care by failing to take reasonable precautions or failing to provide a reasonably safe environment. The duty of care that the Legislative Branch would be required to satisfy is the degree of ordinary care that reasonable persons would use under the same or similar circumstances. In other words, what would a reasonable Legislature do during the COVID-19 pandemic to protect the public? As shown in *Schmidt*, uniform guidelines regarding COVID-19 operating procedures would be relevant. In this regard, the Legislative Branch could follow guidance issued by the CDC. It would also be reasonable for the Legislative Branch to comply with COVID-19 standards utilized by other government organizations and legislatures, including other state agencies and state courts. Additional procedures to mitigate risk are discussed in more detail in section III.A of this analysis.

2. Causation

In the event the Legislative Branch does not satisfy a duty of care and a person becomes ill from COVID-19, the illness would still need to be caused from a breach of the standard of care. That is, the person would need to prove that the Legislative Branch's conduct caused the COVID-19 illness. In *Hinkle v. Shepherd School District No. 37*, 2004 MT 175, 322 Mont. 80, 93 P.3d 1239, a student returning home on a school bus from a performance with the school pep band asked the director to stop the bus so that the student could use the restroom, but the director refused. The student was subsequently disciplined by the school for various actions related to the incident and soon after became seriously ill. The student and his parents filed an action against the school district, the director, and the bus driver, alleging that various breaches of the duty of care triggered or accelerated the student's development of diabetes and caused his posttraumatic stress disorder. The question remained whether plaintiffs' experts adequately established causation, and the Supreme Court held that they did not. The experts testified that defendants' conduct could have caused or accelerated the student's injuries, but the testimony did not meet the threshold of establishing that defendants' actions *more than likely caused the injuries*. Absent a causal connection between defendants' actions and the student's injuries, summary judgment for defendants was proper.

As applied here, a person may have a difficult time proving that actions of the Legislative Branch more than likely caused the a COVID-19 illness given that exposure could happen anywhere a person is exposed to other people, not to mention exposure from objects touched by other people. This area of law will undoubtedly expand in the future.

II. POTENTIAL DAMAGES

Pursuant to section 2-9-102, MCA, every "governmental entity is subject to liability for its torts and those of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function except as specifically provided by the legislature

under Article II, section 18, of The Constitution of the State of Montana." However, pursuant to section 2-9-105, MCA, the state and other governmental entities are immune from exemplary and punitive damages. And importantly, section 2-9-108(1), MCA, provides as follows:

2-9-108. Limitation on governmental liability for damages in tort. (1) The state, a county, municipality, taxing district, or any other political subdivision of the state is not liable in tort action for damages suffered as a result of an act or omission of an officer, agent, or employee of that entity in excess of \$750,000 for each claim and \$1.5 million for each occurrence.

Given that the Legislative Branch is both a governmental entity and part of the state, it is not immune from a tort action that falls outside the scope of a legislative act (discussed in section III.B., below). However, pursuant to section 2-9-108(1), MCA, if a member of the public pursues a successful tort claim for a COVID-19 injury against the Legislative Branch, the damages could not exceed \$750,000.

III. MITIGATION OF RISK

A. Follow Standards of Care Followed by Other Government Entities and Legislatures During the COVID-19 Pandemic

As mentioned above in section I.B.1 of the analysis, in order to pursue a successful tort claim a member of the public would need to show that the Legislative Branch breached the duty of care by failing to take reasonable precautions or failing to provide a reasonably safe environment. In order to bolster the reasonableness argument, the Legislative Branch could comply with COVID-19 standards utilized by other government organizations and legislatures, including other state agencies and state courts.

In *Disability Rights Montana v. Montana Judicial Districts 1-22*, No. OP 20-0189, 2020 Mont. LEXIS 2061 (Apr. 14, 2020), Disability Rights Montana (DRM) petitioned the Supreme Court to exercise its powers of original jurisdiction and supervisory control to immediately reduce the population of Montana jails, prisons, and houses of correction because Montana is under a state of emergency due to the COVID-19 pandemic. While not a tort case, the Supreme Court cited a duty to provide "*reasonable safety*" and it cited to the use of guidance from CDC as a positive factor in finding a material change in circumstances for certain prisoners. Additionally, the Court noted that the Department of Corrections was instructed in Governor Bullock's April 1, 2020, Directive regarding the COVID-19 pandemic to follow some of the CDC recommendations, such as modifying programming to accommodate social distancing and limit crowding, while further noting that the CDC recognized that its guidance may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions. Given that the Supreme Court cited CDC guidelines as a reasonable safety measure, the

Legislative Branch could also implement CDC measures to mitigate risk that are relevant to a legislative environment.

There is CDC guidance for a variety of places, including but not limited to businesses and workplaces, schools, colleges and universities, and gatherings and community events. See <https://www.cdc.gov/coronavirus/2019-ncov/community/index.html>. There is no specific guidance for state legislatures, but relevant guidance can be obtained from the CDC guidelines on "events and gatherings". See <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html>. The guidelines mention:

"personal prevention practices (such as handwashing, staying home when sick, maintaining 6 feet of distance, and wearing a cloth face covering) and environmental prevention practices (such as cleaning and disinfection) are important ways to prevent the virus's spread.

The guidelines are extensive and beyond the scope of this memorandum. However, implementation of portions of the "[events and gathering](#)" guidelines would lower the risk of a successful tort claim.

The Legislative Branch could also mitigate risk by following what other state legislatures are doing with regard to COVID-19 prevention strategies. The National Conference of State Legislatures (NCSL) has an updated listing of "[State Actions Related to Legislative Operations](#)" on its website. See <https://www.ncsl.org/research/about-state-legislatures/covid-19-state-actions-related-to-legislative-operations.aspx>.

B. Enact a Declaration of Public Policy Regarding Benefits of a Legislative Session with Public Involvement and Standard of Care Provided -- Enact a Law Providing for Immunity

Even though Montana has abolished sovereign immunity, Article II, section 18, of the Montana Constitution explicitly provides that immunity may be established when approved by two-thirds of each house of the Legislature. In accordance with the Constitution, the Legislature enacted section 2-9-111, MCA, in 1977. Section 2-9-111, MCA, provides governmental entities immunity from suit in the context of legislative acts or omissions. See also section 2-9-112, MCA (providing immunity from suit for judicial acts and omissions), and section 2-9-113, MCA (providing immunity from suit to the state and the Governor for certain gubernatorial actions).

Prior to 1991, a number of cases examined the scope of the immunity provided in section 2-9-111, MCA, as applied to local governmental entities. Over time, a line of decisions from the Montana Supreme Court substantially expanded the scope of immunity provided to governmental entities. See, e.g., *State ex rel. Eccleston v. Mont. Third Judicial Dist. Court*, 240 Mont. 44, 783 P.2d 363 (1989) (granting immunity to a school district for injuries sustained by a woman after she fell down an icy stairway in a school gymnasium).

In response to these decisions, the Legislature amended section 2-9-111, MCA, in 1991 to clarify that the immunity afforded to governmental entities extends only to legislative acts or omissions. The amendments also provided a definition of what constitutes a legislative act for purposes of legislative immunity, which previously had been a source of dispute. *See Crowell v. School Dist. No. 7 of Gallatin County*, 247 Mont. 38, 805 P.2d 522 (1991). Under the 1991 amendments, which are still the law today, the term “legislative act” is defined as “actions by a legislative body that result in creation of law or declaration of public policy”. *See* Sec. 1, Ch. 821, Laws of 1991 (emphasis added). The 1991 amendments also clarified that administrative acts taken by a governmental entity do not constitute legislative acts for purposes of legislative immunity. *See* Sec. 1, Ch. 821, Laws of 1991.

Given that Montana law provides absolute immunity from suit to the Legislature for actions that result in a ***declaration of public policy***, the Legislature may desire to pursue a Joint Resolution entitled "declaration of public policy" which essentially provides that live public participation during the 67th session of the Legislature, despite the COVID-19 pandemic, is a legislative act as opposed to an administrative act given that public participation in the legislative process is required under Article V, section 10(3), of the Montana Constitution regarding legislative organization and procedure. The resolution should establish what actions by the public are part of a legislative act that result in the creation of law, which should include most aspects of public involvement in the creation of law. Please note, while public involvement is undoubtedly the most important part of the legislative process, there is no guarantee that a court would provide immunity under this approach. As such, if the Legislature desires guaranteed immunity, it could pursue statutory immunity legislation pursuant to Article II, section 18, of the Montana Constitution, for COVID-19 injuries, which would require approval by two-thirds of each house of the Legislature.