

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 11, 2016

SUBJECT: State liability disability designation
(CSHB 77(FIN); Work Order No. 29-LS0072\p)

TO: Representative Steve Thompson
Attn: Lynette Bergh

FROM: Hilary V. Martin *Hilary Martin*
Legislative Counsel

You have asked whether the training requirements and disability designation on an identification card or license could result in increased liability to the state.¹

CSHB 77(FIN) requires the Police Standards Council (Council) to train peace officers in recognizing people with disabilities, appropriate interactions with persons with disabilities, to make resources available to persons with disabilities and to those interacting with persons with disabilities, and the requirements of Title II of the Americans with Disabilities Act. The CS also allows a person with a disability to voluntarily designate on an identification card or driver's license that the person has a disability.

AS 09.50.250 sets out the types of actions that may be brought against the state. Specifically, the statute limits the types of claims that can be brought, and prevents claims if the claim

(1) is an action for tort, and is based upon an act or omission of an employee of the state exercising due care in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused;

(2) is for damages caused by the imposition or establishment of, or the failure to impose or establish, a quarantine or isolation, or by other actions, by the state or its agents, officers, or employees under AS 18.15.355 - 18.15.395, except for damages caused by negligent medical

¹ Please be aware that any litigation based on actions of peace officers will be highly fact specific and it is impossible to predict how a court might rule on a specific case.

treatment provided under AS 18.15.355 - 18.15.395 by a state employee, or except that, if a state employee quarantines or isolates a person with gross negligence or in intentional violation of AS 18.15.385, the state shall pay to the person who was quarantined or isolated a penalty of \$500 for each day of the improper quarantine;

(3) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(4) arises out of the use of an ignition interlock device certified under AS 33.05.020(c); or

(5) arises out of injury, illness, or death of a seaman that occurs or manifests itself during or in the course of, or arises out of, employment with the state; AS 23.30 provides the exclusive remedy for such a claim, and no action may be brought against the state, its vessels, or its employees under the Jones Act (46 U.S.C. 30104 - 30105), in admiralty, or under the general maritime law.

For actions of peace officers, a number of claims would be barred under this language.² The key consideration is if a peace officer exercised due care in the execution of the peace officer's duties and whether there is a duty to act. In analyzing whether the officer exercised due care, a court will likely look at and analyze the required training under this bill and whether the peace officer's acts were consistent with the training. If the officer failed to follow the training in a manner that causes damages or injury, a court could find that the officer did not exercise due care, or acted negligently, and the state could be liable for that peace officer's actions.

Whether the state or a peace officer owes a duty to a person that could give rise to liability is a highly fact-specific finding. In *City of Kotzebue v. McLean*, for example, the Alaska Supreme Court found that the City owed a duty to a victim who was injured after the police department ignored a call regarding a life-threatening situation and did not respond in a timely manner, leading to injury to the victim.³ The court stated that when analyzing whether a duty of care exists under particular circumstances, the following factors apply:

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of

² You should be aware that while state troopers are state employees, municipal police officers are municipal employees and their actions would not give rise to a claim of liability against the state. Municipal immunity is laid out in AS 09.65.070.

³ 702 P.2d 1309, 1314 - 1315 (Alaska 1985).

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the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.^[4]

Therefore, while the criteria for whether the state would be immune from suit if HB 77 is adopted is not changed by this bill, the factors that a court will consider in a case to determine if a peace officer exercised due care and if the state owed a duty to a person injured would include whether a peace officer acted in line with the training regarding disability that the officer received.

If I may be of further assistance, please advise.

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⁴ *Id.* at 1314.