

LEGAL SERVICES

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MEMORANDUM

March 18, 2023

SUBJECT: Cause of Action; Relief (SB 63; Work Order No. 33-LS0425\A)

TO: Senator Scott Kawasaki
Attn: Joe Hayes

FROM: Claire Radford
Legislative Counsel 

You asked three questions relating to the cause of action and relief provisions in SB 63, as provided below.

1. Does SB 63 create a private right of action where individual officers, national guardsmen, and aide workers could be sued for doing their job to protect the public? The short answer is no. Section 44.99.510(c) of the draft bill states in part "[a] person may bring a civil action in superior court if the person is adversely affected by a violation of (a) of this section." Section 44.99.510(a) specifically prohibits the governor, a state agency, or a municipality from issuing or adopting an order, proclamation, regulation, ordinance, or policy concerning certain actions relating to firearms during a disaster emergency. The cause of action under subsection (a) would therefore be for issuing or adopting an order, proclamation, regulation, ordinance, or policy by the governor, a state agency, or a municipality in violation of that subsection. Liability would therefore accrue to the individual or entity issuing or adopting the order, proclamation, regulation, ordinance, or policy and would not extend to individual officers, national guardsmen, aide workers, or other emergency workers or individuals enforcing that order.

2. Is injunctive relief or specific performance a more typical remedy versus treble damages? This bill allows a prevailing plaintiff to recover the greater amount of actual economic damages or punitive damages in the amount of three times the plaintiff's attorney fees, court costs, and attorney fees under sec. 44.99.510(d). While the punitive damages are in the amount of three times the plaintiff's attorney fees, these damages are not what is typically referred to in statute as "treble damages." Instead, "treble damages" as defined by Black's Law Dictionary are "damages that, by statute, are three times the amount of *actual damages* that the fact-finder determines is owed."¹

¹ DAMAGES, TREBLE DAMAGES, Black's Law Dictionary (11th ed. 2019) (emphasis added).

Treble or triple damages are authorized in fourteen different statutes.² In comparison, "injunctive relief" appears in the Alaska Statutes 46 times, and "injunction" is used 125 times in statute.³ "Specific performance" as a remedy is used in 12 places.⁴ While injunctive relief is frequently used in statute and specific performance is used slightly less often than treble damages, it is unclear how often injunctive relief, specific performance, or awards of treble damages are ordered by Alaska courts. You may want to discuss how often each remedy is used in practice with the Department of Law.

3. With treble damages, does the governor in a personal capacity have to pay that or would the government as a whole? The governor is protected by qualified immunity for acts or omissions taken within the scope of the governor's office or employment.⁵ "The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known."⁶ While it is possible that an action taken during a disaster emergency in violation of sec. 44.99.510(a) could violate clearly established

² See AS 09.45.730 (trespass by cutting or injuring trees or shrubs), 09.45.735 (trespass related to geotechnical surveys and mining), and 09.45.740 (right of action for waste); AS 09.17.020(f)(1) (maximum amount for punitive damages); AS 09.58.010(c)(2) (false claims for medical assistance); AS 12.61.017(c) (interference by a victim's employer); AS 23.30.250(c) (fraudulent or misleading acts in workers' compensation claims); AS 34.70.090(c) (disclosures in residential real property transfers); AS 42.20.030 (taking utility service and for damages to or interference with a utility line); AS 45.50.180(b) (trademarks), 45.50.531(a) (unfair trade practices and consumer protection), and 45.50.576(a)(1) (violations relating to monopolies and restraint of trade); AS 45.56.690(d) (violations of the Alaska Securities Act against an older person or vulnerable adult); and AS 47.32.090(c) (retaliatory actions taken by certain facilities licensed by the Department of Health or the Department of Family and Community Services against complainants).

³ See, i.e., AS 02.25.090 (airport zoning); AS 14.48.180 (enforcement of provisions relating to the regulation of postsecondary educational institutions); AS 17.20.280 (enforcement of the Alaska Food, Drug, and Cosmetic Act); AS 23.10.115 (enforcement of the Alaska Wage and Hour Act).

⁴ AS 09.25.010(b) (statute of frauds); AS 10.15.265(a) (relief against breach or threatened breach of contract); AS 13.26.665(i)(1) (powers of attorney); AS 38.05.065(c) (sales of state land); AS 45.02.711(b)(2) and 45.02.716(a) and (b) (buyer's remedies); AS 45.05.111(a) (letters of credit); AS 45.12.508(b)(2) and 45.12.521(a) and (b) (lessee's remedies).

⁵ AS 09.50.253(a).

⁶ See *Blanford v. Dunleavy*, 566 F.Supp.3d 969, 992 (D. Alaska 2021) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015)).

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constitutional rights and result in the suspension of qualified immunity, whether the violation satisfies that requirement would be fact specific. It is more likely that the governor would be protected by qualified immunity and would not be personally responsible for any damages, court costs, and attorney fees a plaintiff could recover under sec. 44.99.510(d) of this bill. If the governor is not personally liable, the state would be responsible for any damages, court costs, and attorney fees awarded by the court.

Please let me know if you have any additional questions.

CER:mjt

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