

Department of Legislative Services
Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 402
Appropriations

(Delegates Barron and Korman)

Finance

**Washington Metropolitan Area Transit Authority - Sovereign Immunity -
Employee Whistleblower Protection**

This bill applies the Maryland Whistleblower Law to all employees of the Washington Metropolitan Transit Area Authority (WMATA), subject to the Commonwealth of Virginia and the District of Columbia either enacting similar whistleblower protections or waiving their sovereign immunity as applied to WMATA for the purpose of providing whistleblower protections, as specified. The bill also amends the WMATA Compact to specify that the sovereign immunity of the District of Columbia, Maryland, and Virginia does not extend to WMATA for the purposes of claims brought against WMATA by an employee or former employee under (1) the federal False Claims Act (FCA) or (2) a law enacted by one of the Compact signatories that authorizes a private right of action for an alleged violation of a law intended to provide whistleblower protections. The bill's changes to the WMATA Compact are contingent on similar laws being enacted by the Commonwealth of Virginia and the District of Columbia.

Fiscal Summary

State Effect: The bill does not materially affect State operations or finances.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: The bill states that it is the intent of the General Assembly that the sovereign immunity of the State not extend to WMATA for the purposes of claims brought

against WMATA by an employee or former employee under FCA and Title 5, Subtitle 3 of the State Personnel and Pensions Article (the Maryland Whistleblower Law).

For purposes of the bill's provisions that apply the Maryland Whistleblower Law to WMATA employees, the bill lists specific laws that the General Assembly considers to be similar to the Maryland Whistleblower Law.

Current Law/Background:

Washington Metropolitan Area Transit Authority

WMATA was established in 1967 through an interstate compact among Maryland, Virginia, and the District of Columbia. The original purpose was construction and operation of a rapid rail transit system for the Washington metropolitan area. In 1973, WMATA purchased the assets of four major private bus companies operating in the area. Maryland's overall participation in the Washington metropolitan transit system consists of the provision of annual funding to WMATA for capital and operating costs of the Metrorail, Metrobus, and MetroAccess systems.

Maryland Whistleblower Law

The Maryland Whistleblower Law protects State Executive Branch employees who "blow the whistle" by disclosing information believed to evidence abuse of authority, gross mismanagement or waste of money, a substantial and specific danger to public health or safety, and/or a violation of the law.

The Whistleblower Law prohibits reprisal against an employee who, after making a disclosure, seeks a remedy provided by any law or policy. A complaint under this statute must be brought within six months after the complainant first knew of, or reasonably should have known of, the violation of the whistleblower protection. The Secretary of Budget and Management, or a designee thereof, is required to conduct an investigation and determine whether a violation occurred within 60 days. After reviewing a final decision under the Whistleblower Law, the court may award costs of litigation and reasonable attorney's fees to a prevailing complainant.

Federal False Claims Act

FCA was originally enacted in 1863 in response to defense contractor fraud during the American Civil War. Generally, under FCA, a person who knowingly makes false claims to the government is liable for damages and civil penalties. In addition to allowing the United States to pursue perpetrators of fraud, FCA allows private citizens to file suits on behalf of the government (called "qui tam" suits) against those who have defrauded the

government. The U.S. Department of Justice advises that it obtained more than \$3 billion in settlements and judgments from civil cases involving fraud and false claims against the government in federal fiscal 2019.

Sovereign Immunity

Under the common law doctrine of sovereign immunity, the State cannot be sued unless it waives its immunity and consents to be sued.

WMATA has sovereign immunity through the WMATA Compact "...as a result of the Compact's signatories "confer[ring] their respective sovereign immunities upon it." *Morris v. Washington Metropolitan Transit Authority*, 781 F.2d 218, 219 (D.C. Cir. 1986). However, WMATA waives this sovereign immunity for particular types of claims and situations in Section 80 of the Compact. Under Section 80, which is codified in § 10-204(80) of the Transportation Article, WMATA is liable in contract and torts for the proprietary functions of its agents and employees, but not for torts that occur in the performance of a governmental function. The only remedy for cases involving this liability is a suit against WMATA, and the provisions in the Compact may not be "...construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone of any immunity from suit."

States have sovereign immunity in federal courts through the Eleventh Amendment to the U.S. Constitution. In August 2018, the U.S. District Court for the District of Columbia dismissed an FCA whistleblower retaliation lawsuit against WMATA by a former employee due to sovereign immunity because FCA does not clearly abrogate WMATA's Eleventh Amendment immunity and WMATA did not waive its Eleventh Amendment immunity by receiving federal funds that were conditioned on WMATA waiving its sovereign immunity in FCA claims. *Slack v. WMATA, et al.*, 325 F. Supp. 3d 146 (D.D.C. 2018).

The court also dismissed the plaintiff's whistleblower claim against WMATA under D.C.'s whistleblower law. According to the court, Virginia and Maryland did not waive their sovereign immunity from lawsuits under D.C.'s whistleblower law.

D.C.'s law "shall apply to employees off WMATA when the Commonwealth of Virginia and the State of Maryland enact similar provisions for WMATA whistleblowers." D.C. Code § 2-203.7. However, neither Maryland nor Virginia's statutes have a similar provision, and there are other substantive differences between the D.C. law and the statutes in those states. The court used similar logic in its decision to dismiss the plaintiff's argument that the WMATA Compact waives sovereign immunity in lawsuits under D.C.'s whistleblower law.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Maryland Department of Transportation; Judiciary (Administrative Office of the Courts); Department of Budget and Management; Office of Administrative Hearings; Treasurer's Office; U.S. Department of Justice; Department of Legislative Services

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