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MEMORANDUM

To: Treasurer Kopp

From: Laura C. McWeeney (Original October 9, 2002)

Date: March 11, 2016

Via: Joyce Miller

Subject: Revised - Risks and Liabilities of Automobile Use within the
Scope of Public Duties

INTRODUCTION

The purpose of this memo is to discuss the State's self-insurance coverage and the risks and liabilities of automobile use within the scope of an employee's public duties. The most important consideration for a determination of coverage and liability is whether the accident occurred within or outside of State borders. The second most important consideration is whether the automobile involved in the accident was a State-owned vehicle or the employee's private vehicle. A chart setting forth the parameters of basic coverage under each scenario (i.e. in-State accident in an employee's personal vehicle) is attached to this memo for short-hand reference. This memo augments the chart and considers broader topics such as representation by the Attorney General's Office, compensation for employee injury, and the factors determining whether a commute from home to office falls within the scope of public duties.

SUMMARY

- A State employee involved in an accident within the scope of his public duties is immune from suit and judgment if the accident occurs in Maryland. The employee may have such immunity if the accident occurs in another state. If the accident involves the employee's personal vehicle, he may have additional or alternative liability coverage under the terms of his personal policy of insurance.
- A State employee authorized to drive a State-owned car to commute to and from work is by law, considered to be acting within the scope of his public duties. State employee who is driving his personal vehicle to commute to and from work is generally not considered to be acting within the scope of his public duties. Therefore, a State employee commuting to work in a State vehicle has the immunities and protections of a State employee acting within the scope of his public duties, but a State employee driving his personal vehicle does not.
- Workers' compensation is the exclusive source of coverage for injured drivers of State-owned vehicles because the State is not required to and does not maintain personal injury protection (PIP) which covers medical, hospital, disability expenses and lost wages, or uninsured motorist (UM) protection. State employees driving their private vehicles within the scope of their public duties have both Workers' compensation coverage and the additional protection of their PIP and UM coverage. PIP and UM coverage would most likely be the exclusive coverage for employees injured while commuting to work in their personal vehicles.
- The State maintains collision insurance coverage for its vehicles, but not for an employee's personal vehicle damaged in an accident. Accordingly, a State employee whose vehicle is damaged must rely on his personal insurance for damage to his personal vehicle and would be responsible for any deductible. The driver of a State-owned vehicle would rely on the collision coverage maintained by the State and would not have any out-of-pocket expenses.

SELF INSURANCE PROTECTION UNDER THE MARYLAND TORT CLAIMS ACT

The Maryland Tort Claims Act (MTCA), Md. State Gov't Code Ann. §12-101, et seq., is the sole method for suing the State and its personnel for their negligent acts and omissions, including negligent driving, committed within the scope of their public duties. One of the conditions that the State has placed on its consent to suit is that the employees may not be sued or be held personally liable unless their actions are outside the scope of their public duties, or are committed with gross negligence or malice. Md. State Gov't Code Ann. §12-105; Md. Cts. & Jud. Proc. Code Ann. §5-522(b).

The State's liability under the MTCA is further limited to \$200,000 on any claim with a date of loss on or before September 30, 2015, per claimant. Any claim with a date of loss on or after October 1, 2015, the tort cap amount is \$400,000, per claimant to each claimant for injuries arising from a single incident or occurrence. Md. State Gov't Code Ann. §12-104(a)(1) and (2). However, both of these limitations, the grant of personal immunity and cap on liability, only apply in this State's courts unless another state chooses to honor the limitations on the basis of comity. Thus, a state employee may be sued in another state for negligence committed in that state even if the act or omission occurred within the scope of his public duties (i.e., for legitimate out-of-State travel.) In that event, the Board of Public Works will be requested, but is not required, to pay a judgment rendered against an employee.

A. Representation by Attorney General.

The Attorney General represents the State when it is sued. Sometimes State employees are sued along with or instead of the State. In such cases, the employee may request the Office of the Attorney General (OAG) to represent him. If representation is requested, the OAG will represent the employee unless it believes that the employee's actions were outside the scope of his public duties or were characterized by gross negligence or malice.

If represented by the OAG, the employee will be required to enter into a representation agreement that sets forth his rights and obligations as provided by law. These representation agreements generally provide that if the employee is judicially determined to have acted outside the scope of his employment or with malice or gross negligence, the Board of Public Works may be requested, but is not required, to pay any judgment rendered individually against the employee. The agreement further provides that an employee may be required to reimburse the OAG for attorney's fees, court costs, and other expenses if the information provided by the employee was false, misleading or incomplete. Finally, the agreement sets forth the conditions and obligations of both the OAG and employee in the event of settlement.

The same representation process, rights, and liabilities apply regardless of whether a State or personal vehicle was involved in the accident and regardless of whether suit was brought in Maryland or in another state.

B. Scope of Public Duties-Commuting to and from work.

State employees frequently drive State-owned and/or personal vehicles within the scope of their public duties. For example, a State employee may drive a vehicle from his office to a meeting at another location and then return to his place of work. If such a driver is involved in an accident in the State, he would be immune from suit and liability unless he was grossly negligent or acted with malice.

Generally, a State employee who is commuting to and from work in his personal vehicle is not considered to be acting within the scope of his public duties. Accordingly, if he is involved in an accident, he will not be immune from suit and the State is not responsible for his negligence. However, any authorized use of a State-owned vehicle, including commuting to and from work, is considered to be acting within the scope of public duties for purposes of immunity from suit and liability. Md. Cts. & Jud. Proc. Code Ann. §5-522(c)(1).

Whether an employee is driving a State-owned or his personal vehicle while commuting to or from work will determine: whether the employee is immune from suit and the State is responsible for the accident, or whether

the employee must rely on his personal policy of insurance for protection. That is not, however, to say that a employee could never be acting within the scope of his public duties while commuting to and from work. Factual situations such as where the employee drives out of his normal commute route to attend a meeting or visit a job site might occur. In that event, the employee is acting within the scope of his duties even though he is commuting to work.

INJURIES TO THE STATE DRIVER

Whether an employee is traveling in a State-owned or a personal vehicle while commuting to or from work may affect his ability to recover workers' compensation for his injuries. Ordinarily, an employee is not considered to be acting within the course of employment and thus, able to recover workers' compensation, for an injury incurred when traveling to and from work. *Alitalia Linee Aeree Italiane v. Tornillo*, 329 Md. 40 (1993). However, a State employee authorized to drive a State-owned car to commute to and from work is by law, considered to be acting within the scope of his public duties.

An employee is also acting within the course of employment and able to file a compensation claim when traveling on a special mission or errand in furtherance of the employer's business, even if the journey is one that is to or from the workplace. *Huffman v. Koppers Co.*, 94 Md. App. 180 (1982). Therefore, a State employee who is injured while driving to a job site or to make a home visitation on his way to work in his personal vehicle would be entitled to workers' compensation.

In sum, the following drivers are eligible to recover workers' compensation:

1. drivers of State-owned vehicles on a special mission or errand in furtherance of State business;
2. drivers of State-owned vehicles commuting to or from work; and;
3. drivers of personal vehicles on a special mission or errand in furtherance of State business.

Since the driver of a personal vehicle commuting to or from work and not on a special mission or errand in furtherance of the State's business would not be able to recover workers' compensation, those drivers must avail themselves of coverage under their own policy of insurance including: personal injury protection (PIP) to cover medical, hospital, disability expenses, and lost earnings, and/or uninsured motorist protection (UM).

PIP and UM coverage is not available to drivers of State-owned vehicles because the State, unlike private owners, is not required to and does not maintain PIP and UM coverage. *Nationwide Mutual Ins. Co. v. USF&G*, 314 Md. 131 (1988) and *Harden v. Mass Transit Administration*, 277 Md. 399 (1976). Drivers of their personal vehicles on a special mission or errand in furtherance of the State's business have both workers' compensation coverage and PIP and UM coverage under their own policies of insurance.

COLLISION COVERAGE

The State is required, through commercial or self-insurance, to maintain insurance on its vehicles to cover bodily injury claims and damage to the property of others. Md. Trans. Code Ann. 17-103; Md. Cts. & Jud. Proc. Code Ann. §5-524. Therefore, the State maintains collision coverage for its vehicles, but not for the personal vehicles of State employees driving within the scope of their public duties. The driver of a State-owned vehicle would rely on the collision coverage maintained by the State and would not have any out of pocket expenses.

A State employee whose vehicle is damaged would most likely rely on his personal insurance for damage to his vehicle and would be responsible for any deductible. In some instances, the driver of a State-owned vehicle can be held responsible for damage to the vehicle operated by them. For instance, it is State policy that if damage results through misuse or gross negligence, a driver will be required to make restitution to the State.

ADDITIONAL OR ALTERNATIVE COVERAGE FOR DRIVERS OF PERSONAL VEHICLES

In addition to the protections previously discussed, an employee involved in an accident while driving his own vehicle would have additional or alternative liability coverage under his contract of insurance on his personal vehicle. Coverage, limits of coverage, and limitations based on an employment-related use of the vehicle may vary, but such policies typically require the insurer to defend the State employee if sued and pay any judgment up to the limits of liability coverage. This is true regardless of whether the accident occurs in Maryland or outside of the State, but would be especially important and beneficial for an accident occurring outside of the State where the employee is not immune from suit and a judgment could be rendered against him personally.

Automobile Insurance Coverage for State Drivers

These coverage descriptions pertain to State personnel driving within the scope of their public duties:

State vehicle involved in an in-State accident.

- State employee retains personal immunity if in scope of public duties and acting without malice or gross negligence.
- \$200,000 cap on liability per claimant occurring on or before September 20, 2015 and \$400,000 on any claim on or after October 1, 2015.
- Workers compensation coverage for bodily injury.
- OAG provides defense.
- No theft coverage.
- Collision (property damage) coverage.

State vehicle involved in an out-of-state accident and suit is brought in that state court.

- No employee immunity unless granted by that State under doctrine of comity.
- No cap on liability.
- The Board of Public Works may pay a settlement/judgment.
- OAG provides defense.
- No theft coverage.
- Collision coverage.

Personal vehicle involved in an in-State accident.

- Same coverage as that for a State vehicle involved in an in-State accident except,
- No collision coverage.

Personal vehicle involved in an out-of-state accident and suit is brought in that state court.

- Same coverage as that for a State vehicle in an out-of-state accident.
- Private automobile insurance may be required for additional or alternative coverage.
- No collision coverage.