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In 2013, the Massachusetts legislature considered three proposed changes to G.L. c. 258, §§ 1, et seq., the Massachusetts Tort Claims Act ("MTCA"), of which public employers, their officials and insurers should be aware. First, House Bill No. 1170, "An Act to reform the tort claims act," threatened to lift the $100,000 statutory cap on municipal liability for damages caused to real property. At present, Section 2 of the MTCA abrogates sovereign immunity for "injury or loss of property or personal injury or death" caused by the negligence of public employees, but guarantees that such liability shall not be "for any amount in excess of $100,000." Under a bill proposed by State Representatives Denise Andrews of the 2nd Franklin District and Cory Atkins of the 14th Middlesex District, however, the following language would be added to Section 2 immediately after the seven words italicized above: "unless the claim for damage to real property exceeds $100,000. Any amount of compensatory damages in such instance shall reflect the full and fair cash valuation of the real property."

Whether House Bill No. 1170 was proposed in reaction to Morrissey v. New England Deaconess Ass'n, 458 Mass. 580 (2010), where the SJC held that actions for private nuisance against public employers are controlled by the exclusive remedy provisions of the MTCA, is not known. But the financial impact of the proposed amendment to cities and towns could be substantial. Not only does the proposed amendment waive municipal immunity for real property damage claims above the statutory cap, but it replaces such longstanding protection with nothing short of unlimited liability exposure. In other words, if House Bill No. 1170 becomes law, the Commonwealth and its political subdivisions (and, through them, the taxpayers) will be exposed to claims worth potentially millions of dollars in the event a water main break, toxic spill, fire or other incident attributable (or allegedly attributable) to the negligence of public employees should cause harm to a mall, warehouse, commercial structure, single-family dwelling, apartment complex, orchard, cranberry bog, or other real property. Adopting the "full and fair cash valuation" property assessment standard of M.G.L. c. 59, §§ 2A & 38, a municipality, under an amended MTCA, would be on the hook for real property either damaged or destroyed up to its fair market value, rather than the current maximum of $100,000 per plaintiff. Thus, without adequate insurance, a catastrophic loss could effectively bankrupt many cities and towns if House Bill No. 1170 becomes law.

A second proposed amendment to the MTCA appeared in House Bill No. 1267, "An Act relative to the liability standard of public employees." This bill, sponsored by several legislators, including State Representative Nick Collins of the 4th Suffolk District, proposes to add the following paragraph at the end of Section 2:

Notwithstanding any special, general law or regulation to the contrary; in such cases where a public employee injured while in the performance of their duty, or the Executor of the estate of a public employee killed while in the performance of their duty can prove gross negligence of their employer contributed to said injury or death, the employee, or the estate of the employee, may pursue the employer in excess of one hundred thousand dollars.

Most cities and towns routinely protect municipal employees for on-the-job injuries under the Workers' Compensation Statute. Police and firefighters are similarly protected under G.L. c. 41, §§ 100 & 111F. But if a public employee should opt out of the applicable statutory compensation scheme, he can still bring suit against his employer under the MTCA. Monahan v. Town of Methuen, 408 Mass. 381, 387 (1990). If he should do so, his maximum recovery (under the current statute) is limited to $100,000. This is true regardless of whether the employee's injuries were caused by negligence or gross negligence on the part of his superiors, co-workers or fellow employees. See McNamara v. Honeyman, 406 Mass. 43, 46

(1989) (MTCA held applicable to negligence and gross negligence alike). But under House Bill No. 1267, this recovery limit would change. An employee who opts out of the remedies provided under Chapters 152 or 41, and who can prove that gross negligence on the part of his employer "contributed to [his] injury or death," shall be entitled "to pursue the employer in excess of one hundred thousand dollars." In short, there will be no limit on the amount the employee or his estate can recover against the grossly-negligent public employer for injuries or damages sustained as a result of an on-the-job injury.

Admittedly, few public employees waive the statutory benefits available under Chapters 152 and 41. But for those who do, the changes proposed in House Bill No. 1267 could prove a very valuable (and expensive) option. Perhaps more critical for cities and towns is the exposure they would face to injured non-traditional employees in the event House Bill No. 1267 should become law. While part-timers, volunteers, elected and appointed officials might not be entitled to recover Workers Compensation benefits for "on-the-job" injuries, they nonetheless qualify as "public employees" within the meaning of M.G.L. c. 258, § 1. Therefore, if they should suffer injury or death due to the gross negligence of their employer or fellow employees, their right of recovery as against the public employer will be without limit. As a consequence, if House Bill No. 1267 is adopted, cities and towns should consider discouraging the employment of part-timers and volunteers (including school volunteers) in order to minimize the risk of unlimited tort liability.

The final (and perhaps least threatening) proposed change to the MTCA appeared in Senate Bill No. 1294. Sponsored by State Senator James E. Timilty of the Bristol and Norfolk District, Senate Bill No. 1294, captioned "An Act relative to the indemnification of town administrators," recommends that amendments be made to Sections 9 and 13 of Chapter 258 concerning the indemnification of public employees for claims based on intentional torts and the alleged violation of another's civil rights. Specifically, Senate Bill No. 1294 proposes that (1) town managers and town administrators shall enjoy the same indemnification protection as other public employees and municipal officials; (2) such protection for town managers and town administrators shall be available even after they "separat[e] from service in the respective municipality"; and (3) the maximum limit for discretionary indemnification for all employees under Section 9 only (not Section 13) shall be increased from $1,000,000 to $2,000,000.

While Senate Bill No. 1294 (if adopted) would admittedly increase the potential exposure of public employers for the wrongful acts or omissions of their employees (particularly
town managers and town administrators), it is not as troubling as House Bills No. 1170 or 1267, in that it was designed to better protect those who serve (or attempt to serve) municipal interests. In addition, the proposed increase in the maximum amount of discretionary indemnification under Section 9 may come as a welcome option to those communities that wish to "stand behind" their public officials sued for certain acts or omissions committed within the scope of their employment.

On balance, the proposed changes to the MTCA debated by the Massachusetts Legislature in 2013 are not municipally "friendly." Consequently, municipal officials would be well-advised to voice their concerns to legislators about making any statutory changes that may lead to increased municipal exposure at a time when public coffers are nearly bare. Certainly, this is not a time when cities and towns can afford to face additional tort liability.

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