

Department of Planning and Budget 2016 Fiscal Impact Statement

1. Bill Number: SB746

House of Origin ☐ Introduced ☐ Substitute ☒ Engrossed
 Second House ☐ In Committee ☐ Substitute ☐ Enrolled

2. Patron: Wagner

3. Committee: Courts of Justice

4. Title: Government entity; liability for certain inspections.

5. Summary: The engrossed bill provides that the government entity that employs personnel to conduct inspections of private entities is liable to the private entity if the employee conducting inspections intentionally exceeds the scope of his authority when performing an inspection of a private entity to determine compliance with any law, regulation, or ordinance. The provisions of this bill do not apply to law-enforcement officers or fire marshals.

6. Budget Amendment Necessary: No

7. Fiscal Impact Estimates: Potentially significant but indeterminate, See Item 8.

8. Fiscal Implications: The bill adds language to the Code of Virginia that holds government entities that employ personnel who perform inspections liable for damages arising from any enforcement action taken when said employees exceed their scope of authority when performing inspections of private entities. The impact on government entities will vary based on unique circumstances and expenses that arise from actions that are taken and determined to be excessive.

The Office of the Attorney General (OAG) has stated that given the number of state agencies that would be impacted by this bill, the OAG would experience an increase in responsibilities to its client agencies that cannot be met with current staffing resources. The OAG anticipates that at least two additional staff attorneys would need to be hired at an estimated cost of \$294,000 to address the increased workload in defending government investigators against claims arising from this bill.

Additionally the OAG likely would need to hire outside counsel to defend cases that involve OAG investigators. The fiscal impact for the outside counsel would be commensurate with the number of matters that may evolve. This work would be highly specialized; therefore, there may be a limited cadre of qualified attorneys to address these cases. The OAG estimates a minimum of five matters per calendar year that would rise to the level of action contemplated in this legislation; however there could be more. Associated costs could average about \$50,000 in fees for an outside counsel team to defend each matter for a total of \$250,000.

The Virginia Department of Health (VDH) commented that this legislation applies to “inspections of private entities” which would include the myriad of facilities and private holdings that VDH currently inspects, such as assisted living facilities, restaurants, private wells, campgrounds, hotels, onsite sewage systems, autopsies, child and adult care food programs, nursing screenings, emergency medical services (EMS), and x-ray machines. VDH performs over 40,000 inspections each year.

As existing state law and regulations provide a course of redress for private entities relative to VDH inspections (e.g. Administrative Process Act (APA), Virginia Code §2.2-4000; Tort Claims Act, §8.01-195.1; Virginia Administrative Code (VAC) 12VAC5-421-3980 to 12VAC5-421-4000, and 12VAC5-610-200 to 12VAC5-610-230), it is unclear to what degree this legislation would result in additional costs to VDH. The potential fiscal impact considerations include both direct (litigation-related; OAG fees, cost of offsetting loss of staff time) and indirect (longer-term experience-based potential for expansion of existing inspection staff and regulatory program management training) costs.

Judicial response to suits brought by private entities would be required to form a comprehensive fiscal impact. If the existing Code of Virginia, administrative regulations and judicial precedent would continue to guide the determination of intentional regulatory/inspection excess, the fiscal impact to VDH could be minimal or none, except for the cost of legal defense even when a suit may be dismissed. If this legislation allows entities to circumvent the current process, thus leading to excessive law suits, the fiscal impact to VDH could be significant given the agency’s annual 40,000 inspections. Much of this inspection activity is conducted by local health department environmental health and safety staff – so any resulting costs associated with this legislation would be shared by the state and the affected local governments.

According to the Department of Health Professions (DHP), it is not unusual for a practitioner or an entity with whom enforcement action has been taken to not understand the powers and duties of health regulatory boards and believe that an inspector or investigator exceeded his or her authority; for instance, 40 percent of pharmacy inspections result in some violation. To defend against such an accusation, the agency would be required to defend a lawsuit. In 2015, DHP conducted 4,219 investigations of complaints against practitioners or facilities, conducted 2,119 facility/office inspections, and made 40 survey visits for compliance by nursing and nurse aide education programs. Currently, expenditures related to a case in a circuit court range from \$10,000 to \$15,000 for the services of the OAG. In addition, there would be costs related to travel and time for investigators, inspectors and other staff to prepare for and attend court proceedings.

The Department of Labor and Industry (DOLI) estimates the cost to the agency for defending lawsuits as a result of this bill to be between \$10,000 and \$15,000 for services of the Office of the Attorney General (OAG). Additional costs would arise for the agency personnel to prepare for and attend the court proceedings. DOLI conducts around 3,000 occupational safety and health inspections per year and around 1,000 labor law investigations (primarily child labor and payment of wage) per year. If one percent of employers inspected or investigated by DOLI chose to file suit under this bill, it would lead to litigation and associated costs of approximately \$600,000 annually.

DOLI currently litigates cases to enforce the occupational safety and health law in circuit court. These cases do not currently involve the OAG. A defendant in these cases would most likely file a cross claim that the inspector had exceeded their authority in some phase of the inspection. Since that could lead to liability on the part of the agency under this bill, the OAG would have to be involved to defend that part of the case. DOLI files about 10 cases a year in circuit court costing the agency about \$100,000. There would be no additional cost for the agency personnel as they would already be involved in the court case without this bill.

The Department of Mines, Minerals and Energy (DMME) stated that enforcement actions by the agency could result in shutting mines down, which in the event of “intentionally exceeding authority” could result in large liabilities to the state related to damages from lost production. DMME performed 11,717 inspections in FY2015 with 2,156 enforcement actions. According to DMME, this legislation could have a chilling effect on their ability to effectively inspect permitted sites.

According to the Department of Professional and Occupational Regulation (DPOR), this bill could increase the caseload of the Office of the Attorney General and may require outside counsel. The Department estimates that legal fees resulting from litigation and paid to outside counsel could approach \$60,000 per case, based on a recent case in which DPOR defended itself against a claim from a licensee. It is not possible to predict the number of such excessive actions.

Ultimately, the actual impact on governmental entities will vary based on the unique circumstances of each agency and the inspection authority that each agency possesses. Even if no damages are awarded, the cost of litigation is likely to increase in the affected agencies.

- 9. Specific Agency or Political Subdivisions Affected:** Office of the Attorney General, Department of Agriculture and Consumer Services, Department of Alcoholic Beverage Control, Department of Behavioral Health and Developmental Services, Department of Environmental Quality, Department of Game and Inland Fisheries, Department of Health, Department of Health Professions, Department of Housing and Community Development, Department of Labor and Industry, Department of Mines, Minerals and Energy, Department of Motor Vehicles, Department of Professional and Occupational Regulation, Department of Social Services, Department of Taxation, Motor Vehicle Dealer Board, Courts of Justice, Community Services Boards, and all Localities

- 10. Technical Amendment Necessary:** No.

- 11. Other Comments:** The fiscal impact statement was revised due to substantial fiscal information received from several state agencies. The amendment in the nature of a substitute shifts the liability to the government entity that employs the inspector and adds fire marshals to the list of exclusions.