

# MAINE STATE LEGISLATURE

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**LAWS**  
OF THE  
**STATE OF MAINE**

AS PASSED BY THE  
ONE HUNDRED AND THIRTEENTH LEGISLATURE

**FIRST SPECIAL SESSION**

October 9, 1987 to October 10, 1987

**SECOND SPECIAL SESSION**

October 21, 1987 to November 20, 1987

and the

**SECOND REGULAR SESSION**

January 6, 1988 to May 5, 1988

PUBLISHED BY THE REVISOR OF STATUTES  
IN ACCORDANCE WITH MAINE REVISED STATUTES ANNOTATED,  
TITLE 3, SECTION 163-A, SUBSECTION 4.

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1988

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**PUBLIC LAWS**

OF THE

**STATE OF MAINE**

AS PASSED AT THE  
FIRST AND SECOND SPECIAL SESSIONS  
and  
SECOND REGULAR SESSION  
of the  
ONE HUNDRED AND THIRTEENTH LEGISLATURE  
1987

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ice under the United States Code, Title 26, Section 414(h)(2), the provisions of this Act shall become effective as of the date of approval of the pick-up plan by the Internal Revenue Service. The Maine State Retirement System shall put the pick-up plan into operation within a reasonable period of time after approval by the Internal Revenue Service. If the employer pick-up plan is not approved by the Internal Revenue Service, this Act shall be null, void and of no effect.

**Sec. 49. Changes in option.** Persons whose membership in the Maine State Retirement System is optional under the Maine Revised Statutes, Title 5, section 17652 shall have 60 days after the implementation of the pick-up plan to change their option under Public Law 1981, chapter 453. The Maine State Retirement System with assistance from the Department of Administration shall provide notice to these employees. New employees whose membership is optional shall continue to exercise their option at the time of appointment.

Legislative employees who chose an option providing for state payment of the members' contribution to the Maine State Retirement System under an option provided by the Legislative Council pursuant to the authority granted under Public Law 1981, chapter 700 shall have 60 days after implementation of the pick-up plan to change their option. This enables them to participate in the pick-up plan on an equal basis with other similarly situated legislative employees who did not choose the option providing for state payment of the members' contributions pursuant to Public Law 1981, chapter 700.

Effective August 4, 1988, unless otherwise indicated.

## CHAPTER 740

S.P. 932 — L.D. 2443

### AN ACT to Amend the Maine Tort Claims Act.

Be it enacted by the People of the State of Maine as follows:

**Sec. 1.** 14 MRSA §8103, sub-§2, as amended by PL 1987, c. 402, Pt. A, §103, is repealed.

**Sec. 2.** 14 MRSA §8103, sub-§3, as amended by PL 1987, c. 110, is repealed.

**Sec. 3.** 14 MRSA §8104, as amended by PL 1985, c. 569, §5, is repealed.

**Sec. 4.** 14 MRSA §§8104-A, 8104-B, 8104-C and 8104-D are enacted to read:

§8104-A. Exceptions to immunity

Except as specified in section 8104-B, a governmental entity is liable for property damage, bodily injury or death in the following instances.

1. Ownership; maintenance or use of vehicles, machinery and equipment. A governmental entity is liable for its negligent acts or omissions in its ownership, maintenance or use of any:

A. Motor vehicle, as defined in Title 29, section 1, subsection 7;

B. Special mobile equipment, as defined in Title 29, section 1, subsection 14;

C. Trailers, as defined in Title 29, section 1, subsection 18;

D. Aircraft, as defined in Title 6, section 3, subsection 5;

E. Watercraft, as defined in Title 12, section 662, subsection 12;

F. Snowmobiles, as defined in Title 12, section 7821, subsection 5; and

G. Other machinery or equipment, whether mobile or stationary.

The provisions of this section do not apply to the sales of motor vehicles and equipment at auction by a governmental entity.

2. Public buildings. A governmental entity is liable for its negligent acts or omissions in the construction, operation or maintenance of any public building or the appurtenances to any public building. Notwithstanding this subsection, a governmental entity is not liable for any claim which results from:

A. The construction, ownership, maintenance or use of:

(1) Unimproved land;

(2) Historic sites, including, but not limited to, memorials, as defined in Title 12, section 601, subsection 1; or

(3) Land, buildings, structures, facilities or equipment designed for use primarily by the public in connection with public outdoor recreation;

B. The ownership, maintenance or use of any building acquired by a governmental entity for reasons of tax delinquency, from the date of foreclosure and until actual possession by the delinquent taxpayer or the taxpayer's lessee or licensee has ceased for a period of 60 days; or

C. The ownership, maintenance or use of any building acquired by a governmental entity by eminent domain or by condemnation until actual possession by the former owner or the owner's lessee or licensee has ceased for a period of 60 days;

3. Discharge of pollutants. A governmental entity is liable for its negligent acts or omissions in the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, but only to the extent that the discharge, dispersal, release or escape complained of is sudden and accidental.

4. Road construction, street cleaning or repair. A governmental entity is liable for its negligent acts or omissions arising out of and occurring during the performance of construction, street cleaning or repair operations on any highway, town way, sidewalk, parking area, causeway, bridge, airport runway or taxiway, including appurtenances necessary for the control of those ways including, but not limited to, street signs, traffic lights, parking meters and guardrails. A governmental entity is not liable for any defect, lack of repair or lack of sufficient railing in any highway, town way, sidewalk, parking area, causeway, bridge, airport runway or taxiway or in any appurtenance thereto.

#### §8104-B. Immunity notwithstanding waiver

Notwithstanding section 8104-A, a governmental entity is not liable for any claim which results from:

1. Undertaking of legislative act. Undertaking or failing to undertake any legislative or quasi-legislative act, including, but not limited to, the adoption or failure to adopt any statute, charter, ordinance, order, rule, policy, resolution or resolve;

2. Undertaking of judicial act. Undertaking or failing to undertake any judicial or quasi-judicial act, including, but not limited to, the granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial;

3. Performing discretionary function. Performing or failing to perform a discretionary function or duty, whether or not the discretion is abused and whether or not any statute, charter, ordinance, order, resolution or policy under which the discretionary function or duty is performed is valid or invalid;

4. Performing prosecutorial function. Performing or failing to perform any prosecutorial function involving civil, criminal or administrative enforcement;

5. Activities of state military forces. The activities of the state military forces when receiving state active duty pay under Title 37-B, section 143, in accordance with Title 37-B, sections 181 and 182, intervention in insurrections and Title 37-B, section 183, human health emergency assistance;

6. Leasing of governmental property. The leasing of governmental property, including buildings, to other organizations; and

7. Certain services. A decision not to provide communications, heat, light, water, electricity or solid or liquid waste collection, disposal or treatment services.

#### §8104-C. Wrongful death action

Subject to any immunity provided by this chapter or otherwise provided by law, actions for the death of a person brought by the personal representatives of the deceased person against a governmental entity or employee shall be brought in the same manner that is provided for similar actions in Title 18-A, section 2-804 and amounts recovered shall be disposed of as required in that section; provided that the limitations of sections 8104-D and 8105 shall apply.

#### §8104-D. Personal liability of employees of a governmental entity

Except as otherwise expressly provided by section 8111 or by any other law, and notwithstanding the common law, the personal liability of an employee of a governmental entity for negligent acts or omissions within the course and scope of employment shall be subject to a limit of \$10,000 for any such claims arising out of a single occurrence and the employee is not liable for any amount in excess of that limit on any such claims.

Sec. 5. 14 MRSA §8105, sub-§1, as enacted by PL 1977, c. 2, §2, is amended to read:

1. Limit established. In any action for damages claim or cause of action permitted by this chapter, the claim for and award of damages, including costs, against both either a governmental entity and or its employees, or both, shall not exceed \$300,000 for any and all claims arising out of a single occurrence.

Sec. 6. 14 MRSA §8107, sub-§1, as enacted by PL 1977, c. 2, §2, is amended to read:

1. Notice requirements for filing. Within 180 days after a any claim or cause of action against a governmental entity permitted by this chapter accrues, or at a later time within the limits of section 8110, when a claimant shows good cause why notice could not have reasonably been filed within the 180-day limit, a claimant or his personal representative shall file a written notice containing:

A. The name and address of the claimant, and the name and address of his attorney or other representative, if any;

B. A concise statement of the basis of the claim, including the date, time, place and circumstances of the act, omission or occurrence complained of;

C. The name and address of any governmental employee involved, if known;

D. A concise statement of the nature and extent of the injury claimed to have been suffered; and

E. A statement of the amount of monetary damages claimed.

Sec. 7. 14 MRSA §8109, sub-§4 is enacted to read:

4. Release. The acceptance by a claimant of any settlement under this section shall be final and conclusive on the claimant and shall constitute a complete release of any further claims against the governmental entity and against any employees of the governmental entity whose acts or omissions gave rise to the claim.

Sec. 8. 14 MRSA §8111, sub-§1, as amended by PL 1987, c. 427, §§1 and 2, is repealed and the following enacted in its place:

1. Immunity. Notwithstanding any liability that may have existed at common law, employees of governmental entities shall be absolutely immune from personal civil liability for the following:

A. Undertaking or failing to undertake any legislative or quasi-legislative act, including, but not limited to, the adoption or failure to adopt any statute, charter, ordinance, order, rule, policy, resolution or resolve;

B. Undertaking or failing to undertake any judicial or quasi-judicial act, including, but not limited to, the granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial;

C. Performing or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is performed is valid;

D. Performing or failing to perform any prosecutorial function involving civil, criminal or administrative enforcement; or

E. Any intentional act or omission within the course and scope of employment; provided that such immunity shall not exist in any case in which an employee's actions are found to have been in bad faith.

The absolute immunity provided by this subsection shall be applicable whenever a discretionary act is reasonably encompassed by the duties of the governmental employee in question, regardless of whether the exercise of discretion is specifically authorized by statute, charter, ordinance, order, resolution, rule or resolve and shall be available to all governmental employees, including police officers and governmental employees involved in child welfare cases, who are required to exercise judgment or discretion in performing their official duties.

Sec. 9. 14 MRSA §8111, sub-§2, as enacted by PL 1977, c. 2, §2, is amended to read:

2. Attachment and trustee process. Attachment, pursuant to Rule 4A, Maine Rules of Civil Procedure, and trustee process, pursuant to Rule 4B, Maine Rules of Civil Procedure, shall not be used in connection with the commencement of a civil action against an employee of a governmental entity based on a negligent any act or omission of ~~such~~ the employee in the course ~~or~~ and scope of his duties employment.

Sec. 10. 14 MRSA §8112, sub-§1, as repealed and replaced by PL 1987, c. 427, §3, is repealed and the following enacted in its place:

1. When a governmental entity is not liable. A governmental entity, with the consent of the employee, shall assume the defense of and, in its discretion, may indemnify any employee against a claim which arises out of an act or omission occurring within the course and scope of employment and for which the governmental entity is not liable. Except as otherwise provided herein, in lieu of assuming the defense of an employee, a governmental entity may pay the reasonable attorneys' fees and court costs of the employee. If the defense of its employee creates a conflict of interest between the governmental entity and the employee, the governmental entity shall pay the reasonable attorneys' fees and court costs of the employee.

A governmental entity is not liable for the attorneys' fees and defense costs of its employee under this subsection in the event that the employee is determined to be criminally liable for the acts or omissions in question. In addition, after the litigation against the employee is concluded, a governmental entity may recoup any attorneys' fees and costs paid to outside counsel on behalf of the employee if the governmental entity proves that the employee acted in bad faith.

This subsection does not apply if the employee settles the claim without the consent of the governmental entity.

This subsection does not apply if notice is not required to have been filed as provided in section 8107 or if the employee does not notify the governmental entity within 30 days after receiving actual written notice of the claim or within 15 days after the service of a summons and complaint, if the governmental entity is prejudiced by the lack of such notice.

Sec. 11. 14 MRSA §8112, sub-§2, as repealed and replaced by PL 1977, c. 578, §4, is repealed and the following enacted in its place:

2. When the governmental entity is liable. A governmental entity shall, with the consent of the employee, assume the defense of and shall indemnify any employee against a claim which arises out of an act or omission occurring within the course and scope of employment and for which sovereign immunity has been waived under section 8104-A, under another law or by legislative authorization. Except as otherwise provided herein, in lieu of assuming the defense of an employee,

the governmental entity may pay the reasonable attorneys' fees and court costs of the employee. If the defense of its employee creates a conflict of interest between the governmental entity and the employee, the governmental entity shall pay the reasonable attorneys' fees and court costs of the employee.

A governmental entity shall not be required to indemnify its employee and is not liable for the attorneys' fees and court costs of its employee under this subsection in the event that the employee is determined to be criminally liable for the acts or omissions in question. In addition, after the litigation against the employee is concluded, a governmental entity shall be relieved of any obligation to indemnify the employee for punitive damages and may recoup any attorneys' fees and costs paid to outside counsel if the governmental entity proves that the employee acted in bad faith.

This subsection does not apply if the employee settles the claim without the consent of the governmental entity.

This subsection does not apply if notice is not required to have been filed as provided in section 8107 or if the employee does not notify the governmental entity within 30 days after receiving actual written notice of the claim or within 15 days after the service of a summons and complaint if the governmental entity is prejudiced by the lack of such notice.

Sec. 12. 14 MRSA §8112, sub-§2-A, is enacted to read:

2-A. Suits against employees under federal law. A governmental entity, with the consent of the employee, shall assume the defense of and, in its discretion, may indemnify any employee against any claim that is brought against the employee under any federal law and that arises out of an act or omission occurring within the course and scope of employment. Except as otherwise provided herein, in lieu of assuming the defense of an employee, the governmental entity may pay the reasonable attorneys' fees and court costs of the employee. If the defense of its employee creates a conflict of interest between the governmental entity and the employee, the governmental entity shall pay the reasonable attorneys' fees and court costs of the employee.

A governmental entity is not liable for the attorneys' fees and court costs of its employee under this subsection in the event that the employee is determined to be criminally liable for the acts or omission in question. In addition, after the litigation against the employee is concluded, a governmental entity may recoup any attorneys' fees and costs paid to outside counsel if the governmental entity proves the employee acted in bad faith.

This subsection does not apply if the employee settles the claim without the consent of the governmental entity.

This subsection does not apply if the employee does not notify the governmental entity within 15 days after

the service of a summons and complaint if the governmental entity is prejudiced by the lack of such notice.

Sec. 13. 14 MRSA §8112, sub-§3, as repealed and replaced by PL 1987, c. 427, §4, is amended to read:

3. Act or omission outside course or scope of employment. When a governmental entity assumes the defense of In cases when a governmental entity is obligated to indemnify an employee under subsection 1 or 2, the governmental entity may refuse to indemnify its employee if the a court determines that the act or omission of the employee occurred outside the course or and scope of his that employment.

Sec. 14. 14 MRSA §8112, sub-§8 is enacted to read:

8. Liability under section 8104-D. A governmental entity shall purchase insurance or self-insure on behalf of its employees to insure them against their personal liability to the limit of their liability under section 8104-D and, to the extent that insurance coverage is not available, shall assume the defense of and indemnify those employees to the limit of their liability under section 8104-D.

Sec. 15. 14 MRSA §8116, first ¶, as amended by PL 1985, c. 713, §1, is further amended to read:

The legislative or executive body or any department of the State or any political subdivision may procure insurance against liability for any claim against it or its employees for which immunity is waived under this chapter and including any activity not described in this chapter, but for which immunity is waived by another act or under any other law. If the insurance provides protection in excess of the limit of liability imposed by section 8105, then the limits provided in the insurance policy shall replace the limit imposed by section 8105. If the insurance provides coverage in areas where the governmental entity is immune, the governmental entity shall be liable in those substantive areas but only to the limits of the insurance coverage. Reserve funds, excess insurance or reinsurance contracts maintained by a governmental entity, by an insurer providing liability insurance or by a public self-funded pool to meet obligations imposed by this Act shall not increase the limits of liability imposed by section 8105.

Sec. 16. 14 MRSA §8116, 3rd ¶, as amended by PL 1985, c. 599, §3, is repealed and the following enacted in its place:

A governmental entity may purchase insurance or may self-insure on behalf of its employees to insure them against any personal liability for which a governmental entity is obligated or entitled to provide defense or indemnity under section 8112.

Sec. 17. 14 MRSA §8116, 4th ¶, as enacted by PL 1977, c. 2, §2, is amended to read:

Any insurance purchased by the State under this sec-

tion shall be purchased through the Maine Insurance Advisory Board Department of Administration, Risk Management Division.

Effective August 4, 1988.

## CHAPTER 741

H.P. 1678 — L.D. 2307

### AN ACT to Establish On-Site Day Care at the Capitol Complex.

Be it enacted by the People of the State of Maine as follows:

**Sec. 1.** 5 MRSA §1742, sub-§22, as amended by PL 1987, c. 407, §2, is further amended to read:

22. Drug-related seized property. To review and comment on all records provided by the Commissioner of Public Safety relating to the disposition of drug-related seized property pursuant to Title 22, section 2387, subsection 5; and

**Sec. 2.** 5 MRSA §1742, sub-§23, as enacted by PL 1987, c. 407, §3, is amended to read:

23. Inventory of land. To periodically inventory all land owned by any state agency and, together with other state agencies, determine land that is needed by state agencies for other uses and land that is surplus. Prior to offering any land for sale, the commissioner shall review with the Maine State Housing Authority and other state agencies the information derived from the inventory.

A. By February 1, 1988, the commissioner shall provide an initial report on the status of the land inventory to the joint standing committees of the Legislature having jurisdiction over economic development; state and local government; and appropriations and financial affairs.

B. Notwithstanding any other provision of law, the procedure for the distribution of surplus state property for the purpose of this subsection shall take priority over any other procedure for the disbursement of surplus state land.

C. Nothing in this subsection shall be construed to pertain to public reserved lands which are exempt from this subsection; and

**Sec. 3.** 5 MRSA §1742, sub-§24 is enacted to read:

24. Sites for child care programs. To review, in cooperation with the Office of Child Care Coordination in the Department of Human Services, feasible sites for child care programs offered primarily as a service to state employees pursuant to Title 22, section 8307, subsection 2.

**Sec. 4.** 22 MRSA §8307 is enacted to read:

§8307. State employee child care programs

The Office of Child Care Coordination annually shall evaluate the status of state financed or operated child care facilities and programs which are operated primarily as a service for children of state employees, and shall set forth plans for the development of additional facilities. For the purpose of this section, "state employee" includes employees subject to the civil service law, employees defined in Title 5, chapter 71, and legislative employees.

1. Evaluation and report. The Office of Child Care Coordination shall report its findings and recommendations annually to the joint standing committee of the Legislature having jurisdiction over human resources no later than the 3rd Wednesday in January of each first regular session of the Legislature. This report, at a minimum, shall include the following:

A. The number and location of child care sites operated or planned for operation primarily for children of state employees;

B. The number and ages of children at each site;

C. The number and ages of children of state employees on waiting lists for admittance to the programs;

D. The types of activities and programs provided to the children;

E. The budget for each site, including expenditures and income. Income shall be further described to include fees charged and income from other sources. Any deficits shall also be described;

F. Assistance provided for children of low-income state employee households, including sliding scale fees and any other assistance. The number of children for whom this assistance is being provided shall also be included;

G. Any problems encountered in the operation of the child care facilities and programs and the reasons for these problems;

H. The successes that have been realized as a result of this service to state employees, including state employee successes relating directly to the program;

I. The hours of operation of each facility; and

J. Any other information deemed relevant and useful by the Office of Child Care Coordination.

2. Feasibility study of other child care facilities and programs. Prior to the creation of new or additional state financed or operated child care facilities provided