



2009 ASSEMBLY BILL 212

April 14, 2009 – Introduced by JOINT LEGISLATIVE COUNCIL. Referred to Committee on Judiciary and Ethics.

1 **AN ACT** *to amend* 165.92 (3) (a) and 165.92 (3) (b) 1.; and *to create* 165.92 (3)
2 (c) of the statutes; **relating to:** liability for actions of tribal law enforcement
3 officers when enforcing state laws.

Analysis by the Legislative Reference Bureau

This bill is explained in the NOTES provided by the Joint Legislative Council in the bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This bill, prepared for the Joint Legislative Council's Special Committee on State-Tribal Relations, addresses liability for the actions of a law enforcement officer employed by an American Indian tribe or band in this state (tribal officer) when enforcing the laws of this state.

Background

Tribal officers do not have the inherent power to enforce state laws but, in Wisconsin, may acquire this power in one of two ways. First, the state or a subdivision of the state may grant this power on an individual basis. For example, a county sheriff may deputize qualified tribal officers.

Second, state statutes may grant such power. The most notable example of this is s. 165.92, stats., which authorizes a tribal officer to enforce the laws of this state with respect to any person within the boundaries of the tribe's reservation or off-reservation trust lands, if the tribal officer and the tribe meet several conditions. One condition is

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that the tribe must either: adopt a resolution waiving the tribe's sovereign immunity to the extent necessary to allow the enforcement of liability for its tribal officers' actions in the courts of this state; or adopt another resolution that the Department of Justice (DOJ) determines has substantially the same result. (Section 165.92 provides that, unless a joint program plan under s. 165.90, stats. (the county-tribal cooperative law enforcement program) or an agreement between a political subdivision of the state and the tribe provides otherwise, the tribe that employs the tribal officer is liable for the acts of that tribal officer while acting within the scope of his or her employment.)

In addition, s. 175.40 (6) and (7), stats., gives the power to enforce certain state criminal laws and the authority to aid and assist to peace officers outside their territorial jurisdiction and to federal law enforcement officers anywhere in the state, under specified circumstances. The definition of "peace officer" used in this statute includes tribal officers who are empowered to act under s. 165.92.

Also, s. 175.40 (6m), stats., created by 2005 Wisconsin Act 414, gives the power to enforce state criminal laws and the authority to aid and assist to *off-duty* peace officers outside their territorial jurisdiction, under specified circumstances. Again, "peace officer" includes tribal officers who are empowered to act under s. 165.92. Unlike ss. 165.92 and 175.40 (6) and (7), the statute addressing off-duty officers states that, for purposes of civil and criminal liability (including legal representation and payment of judgments) and worker's compensation, an off-duty officer acting under that authority is considered to be acting in an official capacity as an officer of the state, state employee, or agent of the state. In other words, the state may be liable for the actions of an officer acting under s. 175.40 (6m).

The Bill*Liability Under s. 165.92*

The bill provides an alternative to the waiver of sovereign immunity by the tribe that is currently required for a tribal officer to exercise the powers specified in s. 165.92 (and, by extension, the powers under s. 175.40). It allows the tribe to instead maintain liability insurance with a limit of at least \$2,000,000 for any occurrence. It requires that the insurance policy provide that the insurer may not raise the defense of tribal sovereign immunity in defending a claim against the policy, up to the limits of the policy. This alternative applies only if the tribe has provided evidence of the required insurance to DOJ.

The bill also makes a cross-reference change to clarify that a tribe's liability includes liability for actions when transporting an arrested person and clarifies that the tribe's liability is for the acts and omissions of its tribal officers.

Liability Under s. 175.40 (6m)

As noted above, s. 175.40 (6m) specifies that an officer acting under the authority of this statute is considered to be acting as an officer, employee, or agent of the state, meaning that the state may be liable for the actions of a tribal officer empowered to act under s. 165.92, among others, when acting under the authority of s. 175.40 (6m). At the same time, s. 165.92 (3) states that the employing tribe is liable for the actions of a tribal officer acting under s. 165.92. To remove any ambiguity regarding which liability provision applies, the bill clarifies that the liability provisions in s. 165.92 (3) do not apply to a tribal officer acting under the authority of s. 175.40 (6m), meaning that the liability provisions of s. 175.40 (6m) apply, instead.

- 1 **SECTION 1.** 165.92 (3) (a) of the statutes is amended to read:
- 2 165.92 (3) (a) Unless Except as provided in s. 175.40 (6m) (c) 1. and unless
- 3 otherwise provided in a joint program plan under s. 165.90 (2) or an agreement

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1 between a political subdivision of this state and a tribe, the tribe that employs a tribal
2 law enforcement officer is liable for all acts and omissions of the officer while acting
3 within the scope of his or her employment, and neither the state nor any political
4 subdivision of the state may be held liable for any action of the officer taken under
5 the authority of sub. (2) (a).

NOTE: Clarifies that the liability provisions of s. 175.40 (6m) apply to a tribal law enforcement officer acting under that subsection. This provision also clarifies that a tribe's liability is for the acts *and omissions* of its officers and that a tribe's liability applies to the transportation of an arrested person under s. 165.92 (2) (c), as well as actions empowered under s. 165.92 (2) (a).

6 **SECTION 2.** 165.92 (3) (b) 1. of the statutes is amended to read:

7 165.92 (3) (b) 1. ~~No~~ Except as provided in par. (c), no tribal law enforcement
8 officer may exercise or perform the powers or duties described under sub. (2) (a)
9 unless the governing body of the tribe that employs the officer adopts and has in
10 effect a resolution under this paragraph. Except as provided in subd. 2., a resolution
11 under this paragraph shall include a statement that the tribe waives its sovereign
12 immunity to the extent necessary to allow the enforcement in the courts of this state
13 of its liability under par. (a).

14 **SECTION 3.** 165.92 (3) (c) of the statutes is created to read:

15 165.92 (3) (c) 1. As an alternative to a resolution under par. (b), the tribe may
16 maintain liability insurance that does all of the following:

17 a. Covers the tribe and tribal law enforcement officers for acts and omissions
18 under par. (a).

19 b. Has a limit of coverage not less than \$2,000,000 for any occurrence.

20 c. Provides that the insurer, in defending a claim against the policy, may not
21 raise the defense of sovereign immunity of the insured up to the limits of the policy.

