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

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

**JOINT LEGISLATIVE COUNCIL PREFATORY NOTE:** This draft, developed by 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 (a tribal law enforcement officer) when enforcing the laws of this state.

Background

Tribal law enforcement 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. Most commonly, a county sheriff will deputize qualified tribal law enforcement officers.

Second, state statutes may grant such power. The most notable example of this is s. 165.92, stats., which authorizes a tribal law enforcement 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 officer and the tribe meet several conditions. One condition is that the tribe must adopt a resolution waiving the tribe’s sovereign immunity to the extent necessary to allow the enforcement of liability for its officers’ actions in the courts of this state, or adopts another resolution that the Department of Justice (DOJ) determines has substantially the same result.

In addition, s. 175.40 (6) and (7), stats., gives the power to enforce 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. The definition of “peace officer” used in this statute includes tribal officers who are empowered to act under s. 165.92.

The most recent example is s. 175.40 (6m), stats., created by 2005 Wisconsin Act 414, which 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 new 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).

Liability Under s. 165.92

The draft provides an alternative to the waiver of sovereign immunity by the tribe that is currently required for a tribal law enforcement officer to exercise the powers specified in s. 165.92. It allows the tribe to instead maintain liability insurance with a limit of at least \$2,000,000 (or an alternative amount specified by the committee) for any claim. 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 draft 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 officers.

Liability Under s. 175.40 (6m)

As noted above, s. 175.40 (6m) specifies that an officer acting under its authority is considered to be acting as an officer, agent, or employee 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 draft clarifies that the liability provisions in s. 175.40 (6m) apply to a tribal officer acting under the authority of that subsection.

- 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 otherwise
- 3           provided in a joint program plan under s. 165.90 (2) or an agreement between a political
- 4           subdivision of this state and a tribe, the tribe that employs a tribal law enforcement officer is

1 liable for all acts or omissions of the officer while acting within the scope of his or her  
2 employment and neither the state nor any political subdivision of the state may be held liable  
3 for any action of the officer taken under the authority of sub. (2) (a).

**NOTE:** Clarifies that the liability provisions of s. 175.40 (6m) apply to a tribal 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 it 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).

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

5 165.92 (3) (b) 1. ~~No~~ Except as provided in par. (c), no tribal law enforcement officer  
6 may exercise or perform the powers or duties described under sub. (2) (a) unless the governing  
7 body of the tribe that employs the officer adopts and has in effect a resolution under this  
8 paragraph. Except as provided in subd. 2., a resolution under this paragraph shall include a  
9 statement that the tribe waives its sovereign immunity to the extent necessary to allow the  
10 enforcement in the courts of this state of its liability under par. (a).

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

12 165.92 (3) (c) 1. As an alternative to a resolution under par. (b), the tribe may maintain  
13 liability insurance that does all of the following:

14 a. Covers the tribe for negligence of the tribe and tribal law enforcement officers for  
15 acts under par. (a).

16 b. Has a limit of coverage not less than [\$2,000,000] [\$\_\_\_\_\_] for any claim.

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

19 2. This paragraph applies only if the tribe has presented evidence to the department of  
20 justice of the insurance under subd. 1. Upon receipt of evidence of insurance under this  
21 subdivision, the department of justice shall notify the sheriff of each county and the chief of

1 police of each municipality in which the tribe has a reservation or trust land that the tribe has  
2 met this criterion for performing the powers and duties described under sub. (2) (a).

3 (END)