



Legislative Fiscal Bureau

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TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Assembly Bill 548 and Senate Bill 456: Claims By and Treatment of Wrongfully Imprisoned Persons and Making Appropriations

Assembly Bill 548 and Senate Bill 456 (AB 548/SB 456) are companion bills relating to claims by, and treatment of, wrongfully imprisoned persons and making appropriations. Assembly Bill 548 was introduced on October 19, 2017, and referred to the Committee on State Affairs. A public hearing was held on December 20, 2017, for AB 548 and on January 11, 2018, for SB 456. On December 28, 2017, Assembly Substitute Amendment 1 (ASA 1) was offered to AB 548. Senate Bill 456 was introduced on October 18, 2017, and referred to the Committee on Judiciary and Public Safety. The bills, generally, make changes to the requirements for claims by wrongfully imprisoned persons for state compensation and provide health care coverage and other assistance for such persons.

On January 3, 2018, the Assembly Committee on State Affairs adopted and recommended passage of ASA 1 to AB 548 by votes of 10-0. On January 5, 2018, AB 548 was referred to the Joint Committee on Finance. On January 16, 2018, the Senate Committee on Judiciary and Public Safety adopted and recommended passage of SSA 1 to SB 456 by votes of 5-0. The Senate Substitute Amendment is identical to ASA 1 to AB 548. The Senate bill was referred to the Joint Committee on Finance on January 26, 2018. This memorandum addresses both bills.

CURRENT LAW

The Claims Board is a five-member body, attached to the Department of Administration (DOA). The Board consists of a representative of the Governor's Office, a representative of DOA, a representative of the Department of Justice (DOJ), and the Co-chairs of the Joint Committee on Finance (or their designees who are members of the Joint Committee on Finance).

Under current law, any person who is imprisoned as the result of his or her conviction for a crime in any court in Wisconsin, of which crime the person claims to be innocent, and who is

released from imprisonment for that crime after March 13, 1980, may petition the Claims Board for compensation for such imprisonment. The Board is statutorily required to give such filed petitions a hearing. Upon receipt of the petition, the Board must transmit a copy to the prosecutor who prosecuted the case and the judge who sentenced (or their successors in office) the petitioner in order to gather information from these parties. After hearing the evidence on the petition, the Claims Board must find either that: (a) the evidence is clear and convincing that the petitioner was innocent of the crime for which he or she suffered imprisonment; or (b) the evidence is not clear and convincing that the individual was innocent. The Board must keep a complete record of its proceedings in each case and of all evidence.

If the Board finds that the petitioner was innocent and that he or she did not, by his or her act or failure to act, contribute to bring about the conviction and imprisonment for which he or she seeks compensation, the Claims Board must find the amount which will equitably compensate the petitioner, not to exceed \$25,000 in total, and at a rate of compensation not greater than \$5,000 per year for the imprisonment. Compensation awarded by the Board must include any amount to which the Board finds the petitioner is entitled for attorney fees, costs and disbursements.

If the Board finds that the amount it is able to award is not adequate compensation, it must submit a report specifying an amount which it considers adequate to the Chief Clerk of each house of the Legislature, for distribution to the Legislature. The findings and the award of the Claims Board are subject to administrative review.

SUMMARY OF BILLS

Assembly Bill 548 and Senate Bill 456 modify current law as follows: (a) changes the requirements for claims for state compensation by wrongfully imprisoned persons; and (b) provides health care coverage and other assistance for such persons. Except as noted below, the bills apply with respect to claims filed by persons who are released on or after January 1, 1990, from imprisonment for crimes of which they claim to be innocent. Current law requirements are modified by the process described below.

Requirements for Claims. The bill provides that when the Claims Board receives a claim for wrongful imprisonment filed by a petitioner who has been released from imprisonment and who claims to be innocent of the crime for which he or she was imprisoned, the Board must refer the petition to the Division of Hearings and Appeals (DHA) in DOA. The bill then allows either DOA or the office of the prosecutor who prosecuted the petitioner to file a written request with the Claims Board for a hearing within 30 days after the original petition is filed with the Board. If a timely request for a hearing is filed, or if DHA concludes that it cannot determine the petitioner's eligibility for compensation without a hearing, DHA must hold a hearing within 60 days after the petition is filed. If a timely request for a hearing is not filed and DHA is able to determine that the petitioner is eligible for compensation without a hearing, DHA must decide the matter without a hearing, except that DHA must afford a petitioner an opportunity for a hearing before denying compensation to the petitioner. If a hearing is held, the bill allows the petitioner to be represented by a public defender. If a hearing is held, DHA appoints a hearing examiner to hear the petition. If no hearing is held, DHA decides the matter without a hearing.

The hearing examiner makes findings and issues a decision concerning whether the petitioner is entitled to compensation. Under the bill, the findings must be based upon the preponderance of evidence (a lesser evidentiary standard than the current law requirement of clear and convincing evidence). The current law requirement that the petitioner show that he or she did not by his or her act or failure to act contribute to bring about the conviction and imprisonment for which he or she seeks compensation is removed.

If the hearing examiner's finding supports the petitioner's claim, the examiner must transmit its findings to the Claims Board, which then awards compensation to the petitioner in an amount that the Board considers to be adequate and the Board must pay that amount to the petitioner. Under the bill, the maximum \$25,000 claim is replaced by provision specifying that the amount of compensation is fixed at a rate of \$50,000 per year, prorated daily, with a \$1,000,000 limit on the total amount of an award. In addition, subject to the \$1,000,000 limit, each award must include reimbursement for reasonable, actual attorney fees, together with all costs and disbursements incurred by the petitioner in his or her defense, postconviction, and compensation proceedings and all fees, surcharges, and restitution paid by the petitioner as a result of his or her arrest and imprisonment. The \$50,000 annual rate is subject to annual adjustments based on changes in the consumer price index. The bill requires the Board to make, every five years beginning January 1, 2022, a recommendation to the Legislature as to whether the \$1 million limit should be changed.

The bill provides that no person may file a claim for wrongful imprisonment, or be paid an award for wrongful imprisonment, as a result of a conviction resulting in imprisonment for a crime if the person is also imprisoned for a conviction for a felony arising from the same course of conduct that resulted in conviction for the crime of which the person claims to be innocent if the person does not claim to be innocent of that felony. In addition, no person may file a claim for wrongful imprisonment if the imprisoned person is convicted of a violent crime, specified in the bill, after his or her release from imprisonment.

With certain exceptions, the bill provides that a surviving spouse or domestic partner, child, parent, or sibling of a person who is entitled to compensation for wrongful imprisonment but who does not receive payment of an award may, within one year of the death of that person, file or pursue on behalf of the deceased person a claim for wrongful imprisonment. Under the bill, any payment that would have been payable to the deceased person then becomes payable to the individual who files or pursues the claim, except that if that person is entitled only under the law governing inheritances to inherit a portion of the estate of a deceased person, the individual may receive only the same portion of the payment. Any compensation is independent of any rights that a claimant or any other person may have to inherit assets under any will of the decedent.

The bill also creates requirements that apply if a person who petitions for compensation obtains any settlement, judgment, or award against a third party in a federal or state action for damages related to wrongful imprisonment for the crime that is the subject of the petition. If a person obtains such a settlement, judgment, or award in such an action before the Claims Board pays a claim, the Claims Board must subtract the amount of the judgment, settlement, or award from the compensation. The bill provides that for any petition filed on or after the effective date of the bill, the petitioner automatically assigns to the Claims Board the petitioner's right to any

settlement, judgment, or award obtained against a third party in such an action. The bill specifies that the assignment is a condition of eligibility to receive compensation from the Claims Board. Also, the assignment is considered to be a statutory lien on the settlement, judgment, or award. The amount of the lien is equal to the amount of the settlement, judgment, or award, or the amount of compensation awarded by the Claims Board, whichever is less.

If a person who is awarded compensation owes money for outstanding restitution, court fees, and fines (collectively deductions) related to any conviction that remains in place and is not subject to a finding of innocence, the Claims Board must withhold and deduct from the compensation award any such money that is owed. The bill requires the prosecutor of such convictions to provide the Claims Board with an accounting of all unpaid deductions, and the Claims Board must distribute the deductions to the person to whom they are owed.

The statute of limitations for a civil claim for damages brought by a person who was injured because of an intentional tort that resulted in an earlier criminal conviction of the person who has received compensation for wrongful imprisonment for a later crime. Under current law, an injured person must bring a claim for damages due to an intentional tort within three years after the cause of action accrues or be barred. Under the bill, an injured person may bring a claim within three years, or within one year after a defendant receives compensation for wrongful imprisonment, whichever is later. If the injured person brings his or her claim more than three years after the cause of action accrues but within one year after the defendant receives compensation for wrongful imprisonment, the damages awarded due to the tort may not exceed 50 percent of the total compensation received for wrongful imprisonment.

In addition, the bill exempts from state taxation the payments that an individual, or his or her estate, receives from the Claims Board or from the Legislature as a result of Claims Board action, or from the state as payment for the individual's health insurance premiums.

Health Care Coverage. Under current law, the Group Insurance Board, attached to the Department of Employee Trust Funds (ETF), contracts on behalf of the state for the purpose of providing health care coverage to state employees. The bill permits individuals who receive compensation from the state for wrongful imprisonment and who are not eligible to obtain health care coverage from an employer to elect, for up to five years, health care coverage under plans offered by the Group Insurance Board to state employees beginning on January 1, 2019.

Individuals would be required to pay the same health insurance premium amounts that state employees are required to pay, with the balance of the premium cost paid by the state. The bill creates an appropriation into which the wrongfully convicted person's portion of the health care premium can be received and a sum sufficient appropriation to pay the state's share of premium costs for wrongfully imprisoned individuals. During the time before January 1, 2019, the bill makes these individuals eligible for health care benefits through the Medical Assistance program BadgerCare Plus, if the federal government does not disapprove of the Department of Health Services providing Medical Assistance to these individuals.

Temporary Assistance and Transition Plan. Under the bill, if a person's conviction for a crime is reversed, set aside, or vacated on grounds consistent with the person's innocence, and the person is ordered released from prison by a trial court, the court must grant the person, upon request, temporary financial assistance, transition assistance from the Department of Corrections (DOC) and local aid agencies, and sealing of all records related to his or her conviction. Corrections would be required to maintain an up-to-date list of contact information for the transition plan. The temporary financial assistance would be paid from the Claims Board's sum sufficient appropriation. If the person pursues a successful petition for wrongful imprisonment, any temporary financial assistance he or she received upon release from prison is subtracted from any compensation he or she receives for wrongful imprisonment.

AMENDMENTS

On October 31, 2017, Assembly Amendment 1 (AA 1) was introduced. On December 14, 2017, Senate Amendment 2 (SA 2) was introduced. The amendments remove the requirement that DOC "maintain up-to-date lists with contact information for each county in the state."

On December 20, 2017, Assembly Amendment 2 (AA 2) was introduced. On December 14, 2017, Senate Amendment 1 (SA 1) was introduced. The amendments clarify who may file a petition as those "whose convictions have been vacated and who have been subsequently acquitted, or whose conviction have been vacated and the charges have been dismissed, or who have received a pardon on the basis of innocence."

On December 28, 2017, Assembly Substitute Amendment 1 (ASA 1) to AB 548 was introduced. The substitute amendment incorporates provisions of AB 548 and AA 1 and 2. Likewise, on January 5, 2018, Senate Substitute Amendment 1 was introduced which incorporates SB 456, SA 1 and SA 2. In addition, the substitute amendments change the eligibility date from January 1, 1990, to March 13, 1980, which is consistent with current law. Further, substitute amendments specify that the "administrator of DHA may set the fees to be charged for any services rendered to the Claims Board by a hearing examiner under this section. The fee shall cover the total cost of the services. In no case may a fee that is set under this paragraph be imposed on, or passed down to, a petitioner..."

In addition to requiring that an individual has been released from prison, the substitute amendments require that one of the following conditions apply before a person may petition the State Claims Board for compensation for wrongful imprisonment: (a) the person's conviction has been vacated and the person has been subsequently acquitted; (b) the person's conviction has been vacated and the charges have been dismissed; or (c) the person received a pardon on the basis of innocence.

The substitute amendments make the following changes to certain timelines and procedures governing the review of petitions submitted to the State Claims Board for compensation for wrongful imprisonment: (a) clarifies that DOA must refer a petition to DHA only if the petitioner satisfies the statutory eligibility criteria; (b) removes authority for DOA to file a written request with the State Claims Board for an evidentiary hearing on a petition for compensation for wrongful

imprisonment; (c) specifies that the office of the prosecutor who was responsible for prosecuting the petitioner must represent the state in any evidentiary hearing on a petition filed for compensation for wrongful imprisonment; and (d) removes a provision specifying that DOA must represent the interests of the state in proceedings before the State Claims Board on a petition for compensation for wrongful imprisonment.

FISCAL EFFECT

Claims Payments. Under the bill, the amount of compensation is fixed at a rate of \$50,000 per year, prorated daily, with a \$1,000,000 limit on the total amount of an award. In addition, subject to the \$1,000,000 limit, each award must include reimbursement for reasonable, actual attorney fees, together with all costs and disbursements incurred by the petitioner in his or her defense, postconviction, and compensation proceedings and all fees, surcharges, and restitution paid by the petitioner as a result of his or her arrest and imprisonment. The \$50,000 annual rate is subject to annual adjustments based on changes in the consumer price index. The bill requires the board to make, every five years, a recommendation to the legislature as to whether the \$1,000,000 limit should be changed.

In DOA's fiscal estimate, the agency indicates that "it is difficult to estimate the impact on the number and level of claims that would occur under the bill, and the ongoing impact of the bill on the number of wrongful imprisonment claims filed and the size of the awards is indeterminate." Factors contributing to this uncertainty include: (a) the revision of the standard of evidence; (b) the increase in potential award amounts; and (c) the retroactive nature of the bill allowing previously compensated claimants to petition the Claims Board for additional compensation under the new dollar amounts. The Department of Administration indicates that "there are currently 11 claimants who would be eligible for additional compensation. If the maximum additional compensation was awarded to all of the claimants, the total cost would be in excess of \$3.2 million. It is anticipated that these claims would come before the Board within the first year after the effective date of this legislation."

In estimating the annual cost of additional claims the agency assumed the average number of years served by successful wrongful imprisonment claimant would be eight years. Assuming payment of \$50,000 per year and three successful claims per year, the estimated cost for new wrongful imprisonment claims is \$1.2 million per year. This amount does not include additional awards for attorney's fees, which vary by claim, and therefore, are indeterminate.

Transition Payments. The bill allows for a financial assistance award from the Claims Board appropriation not to exceed 133% of the federal poverty level, approximately \$1,300 per month for an individual, for up to 14 months. Awards are made by the count prior to an individual filing a claim with the Claims Board, and prior to a determination of whether a claim will be awarded. This award would be deducted from any compensation awarded to successful claimants. Historically, one third of innocent convict claimants are awarded compensation. Therefore, assuming seven unsuccessful claims per year based on the individual level, the estimated cost of financial assistance awards is approximately \$130,000 per year. To the extent that judges award fewer months or a family level of assistance, costs may vary from the estimate.

Division of Hearings and Appeals. The Department anticipates that the bill would increase the number of claims filed as "the standard of evidence is less, potential awards are higher, and claimants would be able to request attorney fees and costs above the award for wrongful imprisonment." But, while provisions of the bill would generate additional workload, the agency "would not require additional staffing." However, the agency also indicates that the "bill creates short deadlines which could exacerbate DHA's current need for additional staff." As discussed above, the agency expects individuals who have already received an award to file within a year after the effective date of the bill. These claims, in addition to claimants that would file shortly after the effective date due to changes in standards, could initially create high demand on agency resources.

The Department indicates that the requirement that a hearing must be held before a claim is dismissed means that even if a claim with little chance of success is filed, the costs of going to hearing must be incurred before the case can be dismissed. Because of the possibility of judicial review of a dismissal, both parties would need to develop a complete record. In the event the decision is appealed, the costs of a transcripts and additional attorney fees to the state would increase. The Division estimates the additional costs, including staff time, for assembling the case record in order to undertake a review to be approximately \$75,000 annually. The Department estimates that it could not accommodate these additional costs without a corresponding increase in DHA's spending authority.

The bill creates a new hearing process and assigns DHA to conduct the hearings outside of its current authority. The Department indicated that while the bill required DHA to hold evidentiary hearings for wrongfully imprisoned person claims, it did not create a method for the hearings to be funded for the assessment-funded DHA. The bill does not provide DHA with statutory authority to set fees to be charged for services under the bill. According to DOA, if DHA is required to absorb the costs of wrongful imprisonment claim hearings, DHA may technically be using fees from other hearings to subsidize the costs of the wrongful imprisonment hearings. Some of the funding for hearings comes from federal funding. Since federal funding may be used only for specific purposes, DHA may be required to pay back to the federal government amounts related to the cost of providing the services under the bill in proportion to the percentage of all DHA hearing costs paid by federal sources. Note that under the substitute amendments, DHA may assess the Claims Board for hearings conducted by DHA.

Claims Board. The Claims Board receives an average of three to four wrongful imprisonment claims per year. The Board also annually receives two to three attempts to file wrongful imprisonment claims which are rejected because they do not meet the statutory requirements. It is estimated an increase in the number of claims filed annually by approximately 14 accepted claims and 10 rejected claims. The Claims Board is staffed by DOA. The current Claims Board staff cost for processing claims is approximately \$225 per accepted claim and \$28 per rejected claim. Assuming 24 claims (14 accepted and 10 rejected), the annual cost would be estimated at \$3,430.

Legal Services Staffing. The State Claims Board is supported by staff in DOA's Division of Legal Services. The Department's obligation to support the Board continues and the workload may increase if the number of claims rises as a result of the changes in the bill noted above.

Agency Costs. The Circuit Court System, District Attorneys, DOC, Department of Justice, Department of Revenue, ETF, and State Public Defenders Office (SPD) all filed fiscal estimates for the bill and indicated indeterminate costs. The SPD, Circuit Court System, and DOC indicate that due to the small number of potential cases, it is unlikely that the bill will have a significant fiscal effect.

Healthcare. The bill creates an appropriation into which the wrongfully convicted person's portion of the health care premium can be received and a sum sufficient appropriation to pay the state's share of premium costs for wrongfully imprisoned individuals. The fiscal estimate submitted by ETF indicates that the "annual cost per individual is \$7,804 and the five year cost per individual is estimated to be \$39,020," which is 88% of \$44,340, and assumes an average 2018 premium of \$739 per month. In addition, ETF indicates that the "total cost of this bill is indeterminate and is dependent upon the number of individuals who become eligible for state health insurance, for which we do not have a specific estimate."

Department of Revenue. The Department of Revenue's fiscal estimate indicates that under 2017 Act 59, as part of updating state Internal Revenue Code references, the state adopted a federal exclusion from income related to wrongful convictions. Revenue estimates that the revenue from taxable income in the form of wrongful conviction awards would be approximately \$32,000 annually. The bill allows a deduction to the extent that the Wisconsin exclusion exceeds the federal exclusion, so the annual revenue loss from this exception would be less than \$32,000 annually.

District Attorneys. The bill provides that the district attorney's office responsible for prosecuting the claimant may file a request for an evidentiary hearing with DHA. The district attorney's office could incur costs associated with participation in such hearings. District Attorneys indicate the fiscal effect of the bill could have between no impact and a substantial impact on DA resources. According to the State Prosecutor's Office, however, concerns expressed in their fiscal estimate about the bill, as introduced, are mitigated by the substitute amendment due to the further clarification of who can file a wrongful imprisonment claim. Under the bill, any person who is "imprisoned as the result of his or her conviction for a crime in any court of this state, of which crime the person claims to be innocent, and who is released from imprisonment for that crime" may petition the Claims Board for compensation. Under the substitute amendments, who can file a petition is limited to persons "whose conviction has been vacated and who has been subsequently acquitted, or whose conviction has been vacated and the charges have been dismissed, or who has received a pardon on the basis of innocence." Thus, the potential workload would be reduced.

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