

# Claims Brief

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Information Maryland Local Governments Need to Know

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## LOCAL GOVERNMENT OFFICIALS AND EMPLOYEES CHARGED WITH CRIMES: WHO (IF ANYONE) PAYS, WHEN, AND WHY

An individual is arrested and charged with a crime. The person arrested retains a criminal defense attorney, at great expense, to provide representation in all proceedings, including trial. If there is a finding of "not guilty," can the person seek reimbursement of the costs of his or her defense? Should there be such a right? Traditionally, the answer has been no, but, in a growing number of states, that is changing.

Statutes providing for some form of reimbursement of trial-level expenses to persons criminally prosecuted are becoming more common, though the statutory schemes are vastly different. One approach has been to pass laws allowing only certain public employees to recover legal costs from the government once the official is acquitted of a criminal charge. Seven states have enacted public-employee reimbursement laws — Louisiana, Mississippi, New Jersey, New York, Pennsylvania, Utah, and Virginia. Maryland has no such law. Ira P. Robbins, *The Price is Wrong: Reimbursement of Expenses for Acquitted Criminal Defendants*, 2014 Mich. St. L. Rev. 1251, 1262-1265, 1268 (2014)

As pointed out by Ira P. Robbins in *The Price is Wrong: Reimbursement of Expenses for Acquitted Criminal Defendants*, public-employee reimbursement laws typically share three characteristics: (1) they require that the employee be acquitted; (2) they require that the

alleged misconduct arise out of the scope of employment; and (3) they apply to all public employees in any type of criminal proceeding. *Id.* at 1262-63. New Jersey and Pennsylvania's laws also limit reimbursement to specific categories of public employees, such as judges, public educators, and municipal police officers. *Id.* at 1264-65. Virginia's reimbursement law is limited to any trustee, advisory committee member, officer, or employee of the Retirement System for alleged securities violations. *Id.* at 1265-66.

Despite the absence of a reimbursement statute for trial-level expenses, Maryland does provide reimbursement to an acquitted defendant for certain expenses related to appellate proceedings, such as unsuccessful appeals by the State. *Id.* at 1268-69; MD. CODE ANN., CTS. & JUD. PROC. § 12-302 (c) (4) (vi); MD. R. 8-306 (c).

The absence of a state statute does not prevent local governments from enacting local laws to address the reimbursement issue. However, any local government that has done so, or is considering doing so, must proceed wisely. The three factors identified above provide more than a worthy framework in which to proceed. First, should reimbursement (in whatever form it ultimately takes) be limited to actual acquittal of the criminal charge? What then happens if a public official, charged with multiple crimes, is acquitted of only



one but found guilty of the others? What if the State's Attorney dismisses the charges through a *nolle prosequi*? What about mistrials or plea bargains? What if the local government employee is investigated by either the police, prosecutor, or grand jury, but no criminal charges are ever brought? Certainly, limiting reimbursement to acquittals and acquittals only limits the relief afforded by a reimbursement law. But the question to be decided by each local government is whether such strict limitation is necessarily a bad thing or whether it is a clear marker that the law is intended for strict and limited application only.

Second, and most understandably, any reimbursement law should be limited to acts allegedly committed by the official and/or employee in the scope of his or her public employment. Relief may also be afforded to board or commission members and volunteers. Scope of public duty/employment is the key. For example, an official charged with a private act of assault, battery, domestic violence, or theft, should not look to his or her public employer for reimbursement of trial-level expenses arising from defending against the charge. But a code enforcement officer charged with criminal trespass, or a municipal police officer charged with criminal assault, should, upon acquittal, be entitled to look to his or her employer for reimbursement of some, if not all, trial-level legal expenses, including attorney's fees.

And what "costs" should be reimbursed? In this regard, any law governing reimbursement must specifically define "costs" and perhaps limit the dollar amount recoverable. At the criminal trial-level, costs most generally include witness fees (including expert witness fees and witness travel expenses), legal document fees (including court

reporter fees), attorney's fees, detention costs (this is rare because the State or municipality likely covers the subsistence costs related to detention), and even "loss of time" (for example, loss of earnings). These costs are generated at various stages of the criminal process, including pre-trial, during trial, on appeal, and during state post-conviction review. All of these proceedings should be included in reimbursement legislation.

Without specific definition, the courts will be called upon to decide which expenses are, and which are not, recoverable. If attorney's fees are included in the law, they, obviously, are of the greatest concern. As such, the limitation of "reasonableness" should be imposed. In Washington State for example, the law encompasses attorney's fees for public employees but limits them to the sum of (a) legal fees the defendant has paid in the past, plus (b) legal fees the defendant has become legally obligated to pay in the future." Robbins, p. 1273-74. In Massachusetts, the "determination of what constitutes a reasonable fee...[is] measured according to what would be reasonable for private counsel to charge in the circumstances," not according to the "the hourly rate paid to court-appointed counsel." *Id.*, p. 1274. Additionally, the "[c]alculation of reasonable hourly rates should begin with the average rates in the attorney's community for similar work by attorneys of the same years' experience." *Id.*, p. 1274. The burden must be placed upon the official or employee seeking reimbursement to establish the reasonableness of the attorney's fees requested. *Id.*, p. 1274.

Third, any reimbursement legislation should establish that it pertains to criminal proceedings in all charges, state or federal, all trial courts, state or federal, and even to all appellate courts, at least as

to the costs of appellate proceedings not encompassed in Maryland's existing law.

Since the cost of "reimbursement" will ultimately be borne by the taxpayer, legislators must proceed cautiously, and openly, in their consideration of a reimbursement law. We must all realize, however, that no such law, no matter how carefully crafted, can ever make the acquitted official or employee whole. To know this, one need only recall the question asked by Ray Donovan, Ronald Reagan's former Secretary of

Labor, after his criminal trial in 1987. After being acquitted in a highly publicized larceny and fraud case unrelated to his government service, Donovan was famously quoted as asking, "Which office do I go to to get my reputation back?" While reimbursement of expenses may not be able to restore reputation, it can aid vindicated defendants, including local government officials, officers, and employees, who have endured financial burden and hardship in defending themselves in the criminal justice system.

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