Issues Confronting the 2012 Kentucky General Assembly

Informational Bulletin No. 236

Legislative Research Commission
Frankfort, Kentucky

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Prepared by

**Members of the
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Foreword

As public servants, legislators confront many issues potentially affecting citizens across the Commonwealth. These issues are varied and far-reaching. The staff of the Legislative Research Commission each year attempt to compile and to explain those issues that may be addressed during the upcoming legislative session.

This publication is a compilation of major issues confronting the 2012 General Assembly. It is by no means an exhaustive list; new issues will arise with the needs of Kentucky's citizens.

Effort has been made to present these issues objectively and concisely, given the complex nature of the subjects. The discussion of each issue is not necessarily exhaustive but provides a balanced look at some of the possible alternatives.

The issues are grouped according to the jurisdictions of the interim joint committees of the Legislative Research Commission; no particular meaning should be placed on the order in which they appear.

LRC staff members who prepared these issue briefs were selected on the basis of their knowledge of the subject.

Robert Sherman
Director

Legislative Research Commission
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Amusement Rides and Attractions

Prepared by Biff Baker

Should the General Assembly authorize Kentucky Department of Agriculture inspectors to prohibit the reopening of an amusement ride or attraction after an accident that results in personal injury or death?

Background

The Kentucky Department of Agriculture is the regulatory agency that oversees the inspection of amusement rides and attractions in the state, and it employs 10 people who are responsible for conducting those inspections. KRS 247.234 requires a mandatory initial inspection of all amusement rides and attractions and allows unannounced inspections. All amusement rides and attractions must be inspected and tested daily by the owner, and the owner must keep records of those inspections. From January through September 2011, the department inspected more than 1,650 mobile rides and more than 350 permanent rides.

All owners of amusement rides and attractions are required to have a business identification number issued by the department and are required to show proof of liability insurance. From January through September 2011, the department issued more than 400 business identification numbers to business owners. KRS 247.2351 requires that all amusement rides and attractions be operated and maintained according to the manufacturer's specifications and recommendations, the most recent National Electrical Code and National Fire Protection Association codes and standards, and any other applicable state or federal laws.

Despite the inspections and oversight, accidents do occur. Any accident that results in a serious injury or death, or that results in damage to an amusement ride or attraction that affects the future safe operation of the ride or attraction is required to be reported to the department. From January through September 2011, there were 30 reportable incidents resulting in 29 injuries and no deaths, according to the department.

In July 2011, an accident on a Kentucky amusement ride resulted in the partial amputation of a child's finger. Following the accident, the owner of the ride shut the ride down, and the Kentucky Department of Agriculture was notified. The ride was inspected by department personnel for any indication of mechanical failure or operational error that may have caused the accident. No mechanical or operational deficiencies were found by the department. After reinspection by the department, the department allowed the ride to reopen the day following the accident. No violations were issued by the department.

Discussion

Some have proposed amending Kentucky's law to give Department of Agriculture inspectors the authority to prohibit the reopening of an amusement ride or attraction after an accident that results in personal injury or death. Proponents argue that department inspectors should have the

discretion to prohibit that ride or attraction from reopening despite the absence of mechanical failure or operator error. Proponents also suggest that the department be allowed to require an amusement ride or attraction to be retrofitted to eliminate the cause of the accident.

Opponents argue that amusement rides and attractions are already subject to a vigorous regimen of inspections and recordkeeping. They contend that if an amusement ride or attraction meets the manufacturer's specifications and recommendations, department inspectors should not be given the subjective authority to prevent a ride or attraction from reopening. Opponents also argue that giving the department the authority to make retrofitting recommendations that do not conform to the manufacturer's guidelines would expose the department to liability should another accident occur on the ride or attraction.

Work Cited

Commonwealth of Kentucky. Department of Agriculture. Investigation Report. Belle City Amusements, Fun Zone, Lexington, Kentucky. Aug. 2, 2011.

Raw Milk for Consumption

Prepared by Lowell Atchley

Should the General Assembly allow consumers to acquire raw cow's milk for consumption?

Background

By adopting US Food and Drug Administration (FDA) rules, Kentucky law essentially prohibits the sale of raw cow's milk (902 KAR 50:110). The FDA prohibits the sale under interstate commerce of any unpasteurized milk product in final package form intended for human consumption because it deems the product to be unsafe. The sale of unpasteurized goat's milk, by written prescription from a doctor, is allowed in Kentucky (some believe goat's milk is easier to digest than cow's milk). Such sale must occur at the farm on which the goat's milk is produced.

Some consumers wishing to buy raw, unpasteurized milk have considered purchasing "cow shares" or "herd shares" as a means of acquiring the dairy product for consumption. Typically, under a cow share arrangement, a person enters into an agreement with a farmer to buy a share of a cow from the farmer. Share buyers pay the farmer a fee for boarding and caring for the cow and, in return, receive milk from the cow. KRS Chapter 217C, Kentucky's milk and milk products law, does not address cow or herd shares.

The issue may be a legal question of the rights of ownership and state law. Because the share holder is an owner of the cow, the raw milk is not being sold to the public and, therefore, should not violate the FDA ban (Coit).

Discussion

In its 2011 Raw Milk Survey, the National Association of State Departments of Agriculture indicated that 30 states, including Kentucky, allow the sale of raw milk, usually from cows, goats, or sheep, for human consumption. Colorado, Idaho, Tennessee, and Washington by statute allow herd shares that include goat and sheep shares. Each state's approach varies. Colorado allows herd shares with no required testing or inspections, although a producer must register with the state. Herd shares are allowed in Washington, but the producer must register with that state's agriculture department.

In 2006, House Concurrent Resolution 209 would have created a task force to study raw milk and milk product regulation. In 2007, Senate Bill 184 and House Bill 298 would have established conditions under which unpasteurized milk and milk products could be produced, processed, and sold. None of the proposed measures included provisions for cow or herd shares.

Proponents of cow shares argue the arrangements would give them access to what they consider to be a nutritious food under a system that does not violate the FDA raw milk prohibition. Dairy farmers also would benefit with increased sales.

Opponents argue that the consumption of raw milk obtained under a cow share or otherwise is unsafe because the unpasteurized milk may contain harmful foodborne pathogens, which would be reduced through pasteurization.

Work Cited

Coit, Marne. "Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement." *The National Agricultural Law Center*. Feb. 2009. <http://www.nationalaglawcenter.org/assets/articles/coit_bandwagon.pdf> (accessed Aug. 19, 2011).

Livestock Lien

Prepared by Lowell Atchley

Should the General Assembly create a statutory lien for farmers who sell livestock?

Background

Livestock production, particularly cows and calves, has grown in Kentucky in recent years. The value of beef cattle production in 2010 totaled almost $616 million, up from about $541 million in 2000.

How producers market their cattle and other livestock varies, with most opting to sell by auction at a stockyard. Stockyards either are regulated by the United States Department of Agriculture (USDA) or are private and unregulated. At an auction, animals are sold one at a time or in groupings, with the owner of the auction receiving a commission, or per-head fee, for selling the stock. Selling at a USDA-regulated stockyard provides payment protection, while selling at an unregulated stockyard offers no payment protection.

The cattle industry was adversely affected in the winter of 2011 when cattle producers throughout the Midwest and South, including Kentucky, received bad checks from one of the largest cattle brokerage companies in the United States. A primary lender for the company, which bought and resold cattle throughout the country, froze the company's accounts, resulting in hundreds of cattle producers holding checks they could not cash. The company was bonded but failed to maintain an adequate bond, according to a complaint the USDA filed against the company.

The company is in bankruptcy, and creditors and producers, many of whom received bad checks for cattle sold at a buying facility in south-central Kentucky, may receive only a fraction of debts owed. Producers and sellers who sold cattle at USDA-regulated stockyards in the state were largely unaffected because those regulated livestock auctions maintain custodial bank accounts, set up to promptly pay sellers for their livestock.

Discussion

In most financial transactions, sellers have some recourse to collect payment from buyers in the form of liens. Kentucky law specifies several types of liens, some described as statutory liens because they are created specifically pursuant to the law. Kentucky's Uniform Commercial Code (UCC) includes a general definition for an agricultural lien and establishes a means to secure and enforce payments for farm-related goods and services. However, establishing a security interest under the UCC's general agricultural lien mechanism depends on the creation of a specific statutory lien. Creating a statutory lien for livestock sales, depending on how the legislation is drafted, would place livestock producers in a position of holding a secured claim, as either a stand-alone lien or as an agricultural lien under the UCC. In either case, the lien could be created so that it would place the livestock sellers in an order of priority to collect the debts owed to

them. Agriculture-related statutory liens include a lien for livery stable owners who feed and graze livestock for others (an agister's lien) and a veterinarian's lien for providing veterinary services.

Proponents contend that creating a statutory lien for livestock producers would offer a measure of protection if a producer sells cattle or other livestock to a buyer who then breaches payment responsibilities. With a lien properly documented and filed with the state, a livestock producer would be in a position of priority should a buyer declare bankruptcy. Proponents also argue that creating a statutory lien status for livestock producers may serve as a deterrent against buyers potentially reneging on their payment responsibilities.

Opponents caution that establishing a statutory livestock lien could cause lenders to become wary of lending money to livestock buyers, for fear their security may lose its more favorable position in the priority established to repay creditors. Opponents worry that creating a statutory lien may give sellers a false sense of confidence, prompting them to opt for private sales and shun federally regulated livestock markets where they are assured of prompt payment but are charged fees for their transactions. Also, some opponents argue that the livestock lien could affect commerce in Kentucky livestock or depress prices received by producers by discouraging the resale or secondary purchase of Kentucky livestock out of a concern that a lien would follow the livestock to good-faith third-party purchasers.

The 2011 General Assembly considered but did not pass Senate Bill 94 that would have created a livestock seller's lien when a seller does not receive payment for livestock within 3 days of delivery. The bill set out the types of property to which the lien would attach, established procedures for filing documentation related to the lien, and stipulated its priority.

Estate Taxes

Prepared by John Scott

Should the General Assembly alter Kentucky's estate tax because of changes to the federal estate tax?

Background

Kentucky statutes include both an estate tax that is assessed against the estate of a deceased person and an inheritance tax that is assessed against the value passed to a beneficiary of an estate. The federal government assesses an estate tax but not an inheritance tax. Estates that exceed an amount determined in federal statute are subject to the federal estate tax. This discussion relates only to the estate tax and does not address Kentucky's inheritance tax because it is generally not affected by any federal action.

In 2001 and prior years, the federal estate tax computation allowed a credit against the federal tax for an estate tax assessed by any state government. Kentucky's estate tax consisted only of the amount of credit that the federal government allowed to be claimed against the federal return. This credit was often referred to as a "pick-up tax" because the federal law allowed the state to pick up a portion of the estate tax that would otherwise be paid to the federal government. The net effect was that the estate did not pay any more total tax, but a portion of the tax was paid to the state instead of to the federal government.

In 2001, Congress passed the Economic Growth and Tax Relief Reconciliation Act (EGTRRA), which addressed a multitude of federal taxes. One significant component of this legislation was a 10-year phase-out of the federal estate tax, removing entirely the federal estate tax for 2010. The state credit portion of the federal estate tax was also phased out.

In states like Kentucky with an estate tax tied directly to the federal credit, the federal reduction and ultimate elimination of the state credit resulted in a reduction and ultimately a complete loss of revenues from the estate tax.

All provisions of EGTRRA were to expire January 1, 2011. If this had occurred, the federal estate tax laws in effect in 2001 would once again have been used to determine any estate tax liability. Under the 2001 law, the state credit for federal purposes would once again apply, and Kentucky would once again receive revenue from its estate tax.

However, on December 17, 2010, the federal Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act (TRA 2010) was signed into law. Among other things, it extended the provisions of EGTRRA, including the discontinuance of the state tax credit for deaths occurring during 2010, 2011, or 2012. It also modified exclusion amounts and tax rates. For those 3 years, the estate tax exemption was set at $5 million and the estate tax rate at 35 percent of the taxable estate. Since the federal credit for state taxes was not restored, Kentucky's pick-up tax remains at zero for these 3 years. If TRA 2010 had not been enacted and

the provisions of EGTRRA were allowed to expire, the federal estate tax would have been removed entirely for deaths occurring during 2010, and the provisions for deaths occurring during 2011 and thereafter would have reverted to a maximum exclusion of $1 million and a maximum tax rate of 55 percent.

A special federal allowance was made for deaths occurring during 2010, since federal law had already changed before enactment of TRA 2010. For 2010, the estate could elect to use

- the $5 million exclusion amount, and all assets that passed from the decedent were revalued to the value as of the date of death, or
- a full exclusion of the entire estate from the tax, but all assets would retain their tax basis as it existed in the hands of the decedent.

Discussion

Unless Congress makes additional changes, the federal estate tax law for deaths occurring on or after January 1, 2013, will revert to the law and rates in effect prior to 2002. If federal law is not changed, Kentucky will again receive pick-up tax revenue.

A review of annual tax receipts compiled by the Office of State Budget Director revealed that Kentucky's inheritance and estate tax receipts declined by approximately $40 million annually after the phase-out of the estate pick-up tax. Discussions continue at the federal level about whether to modify and extend the federal estate tax. Statements from the President and from the leadership of both chambers of Congress indicate that existing law will likely be changed. It is not likely that those changes will include a reinstatement of the state pick-up tax. If those changes include a continued revocation of the state credit, Kentucky's estimated revenues for fiscal years 2015 and 2016 and into the future could be impacted negatively.

If the General Assembly wants additional receipts from the estate tax, and if Congress does make changes as anticipated, it will be necessary to "decouple" and remove the calculation of any Kentucky estate tax from a dependence on federal tax law. The majority of states that have used the pick-up tax and that have decoupled from the federal estate tax have simply defined within their statutes the reference date for the federal estate tax. If Kentucky chose to decouple, the statute could require that the Kentucky estate tax be calculated based on the federal estate tax law in effect on a date prior to the phase-out of the federal credit allowed for state tax paid. If no action is taken by the General Assembly, additional receipts from this source will occur only if the federal government does not modify existing federal law.

Proponents of a move to reinstate Kentucky's estate tax by decoupling from the federal law assert that federal actions should not be the cause for changes in Kentucky law and that Kentucky's reliance on revenues from the estate tax should not have been removed by federal action. They also assert that the use of an estate tax imposes a tax only on relatively large estates, with the tax paid by the estate before the remaining estate is passed to heirs or beneficiaries.

Opponents of the reinstatement of the Kentucky estate tax point out that the net result for the estate will be a tax increase because federal estate tax law will not allow a credit for any Kentucky estate tax that must be paid by the estate. Some opponents also assert that the estate tax

at both the federal and state level should be removed or the exemption amount should be significantly expanded because it impedes the transfer of small businesses from one generation to the next.

Transient Room Taxes

Prepared by Eric Kennedy

Should the General Assembly clarify that online travel companies are required to remit state and local transient room taxes based on the full amount of the rental charged to the consumer?

Background

Kentucky imposes a statewide transient room tax on the rental of hotel rooms and allows local governments to impose similar taxes. Taxes are imposed at varying rates upon the rent charged by the hotel, motel, or like or similar accommodations businesses. Online travel companies (OTCs) such as Expedia.com, Hotels.com, and Priceline.com, have been accused by many states and municipalities across the nation, including Kentucky, of failing to collect or remit the full amount of such taxes due on accommodations acquired through their websites. Numerous jurisdictions have filed lawsuits seeking back taxes against OTCs in both state and federal courts, and have also addressed the issue legislatively through statutory language aimed specifically at the OTCs.

Discussion

KRS 142.390, the state tax provision, and the various statutes allowing for local government taxes (KRS 91A.390, 91A.392, 153.440, and 153.450) impose the taxes on hotels, motels, and "like or similar accommodations businesses." These tax revenues are devoted to tourism-related purposes. The OTCs typically claim that they do not qualify as accommodations businesses because they have neither ownership nor physical control over the actual rooms and therefore are not liable for the taxes. They claim to act only as brokers of the accommodations, working under contractual relationships with the actual accommodations businesses. Under this argument, the OTCs remit no taxes at all or do so only on the wholesale rate they pay the hotel as broker, rather than on the full retail rate that the customer pays the OTC in exchange for the room. In some cases, consumers and taxing jurisdictions have claimed that the OTC collected the full tax due from the consumer but remitted only the lesser wholesale amount to the jurisdiction, retaining the difference as profit.

Three Kentucky municipalities have sued various OTCs on this issue. Louisville and Lexington jointly sued in federal court, and Bowling Green sued in state court. In all three actions, the courts dismissed the suit in favor of the OTCs on the grounds that the OTCs do not qualify as accommodations businesses and therefore are not liable to pay the tax on the rents they collect from customers. The US Sixth Circuit Court of Appeals noted that the relevant statute lacked clarity and echoed the lower court in stating that the statutes predated the advent of OTCs and had "simply failed to keep up with the times" (*Louisville/Jefferson County*). The state Court of Appeals held that the statutes "should [not] be interpreted so broadly as to include OTCs" and that it was up to the General Assembly to "close any such potential loophole" (*City of Bowling Green*).

Taking these rulings into consideration, the General Assembly could amend the various statutes to clarify that the taxes are to be imposed on the full rental amount paid by the customer occupying the room, whether that amount is collected by the hotel itself or by a broker working in conjunction with the hotel. During the 2009 Regular Session, HB 482 was introduced that would have made such amendments, but it was not enacted. Similar legislation has been enacted in several states in recent months.

Alternatively, the General Assembly could let the situation stand as it is at this time and continue to monitor the developments occurring in state and federal courts across the nation.

Works Cited

City of Bowling Green v. Hotels.com, LP, No. 2010-CA-000825-MR (Ky. App. 2011) (Motion for discretionary review pending before Kentucky Supreme Court as of Sept. 19, 2011).

Louisville/Jefferson County Metro Government and Lexington-Fayette Urban County Government v. Hotels.com, LP, 590 F.3d 381 (6th Cir. 2009).

Federal Conformity

Prepared by Jennifer C. Hays

Should the General Assembly update the Internal Revenue Code reference date?

Background

KRS 141.050 requires the application of Kentucky's income tax law to be as identical as practicable to federal income tax law. The purpose of the requirement is to assist taxpayers and to ease the administrative burden of compliance. Basing Kentucky's tax computation on the federal computation simplifies the calculation of income tax due to Kentucky. Taxpayers restate on the Kentucky return the same items already calculated for their federal returns.

Because of this link between the application of Kentucky income tax law and federal income tax law, enactments by the federal government relating to the federal tax code could result in increases or decreases to Kentucky's revenues. To avoid this situation and to prevent the delegation to the federal government of the General Assembly's duty to administer Kentucky's tax laws, KRS 141.010(3) defines "Internal Revenue Code" as the Internal Revenue Code in effect as of a specific date. By referencing a specific date, the General Assembly assures that it has the ability to consider whether to adopt federal changes that occur when the General Assembly is not in session.

As an example, during 2010, the federal government repealed the overall limitation on itemized deductions for individual income tax. The Congressional Interim Joint Committee on Taxation estimated that this change would result in a decrease to federal revenues of more than $10.4 billion during the federal fiscal year of 2012. If Kentucky's statutes were automatically updated as federal changes are enacted, this one change would have resulted in a decrease to Kentucky revenues of approximately $80 million.

The current date for Kentucky's adoption of the Internal Revenue Code is December 31, 2006. Therefore, changes made at the federal level since December 31, 2006, have not been adopted by Kentucky, creating differences between the current federal and Kentucky computations for income tax. As time passes and more federal changes are enacted, Kentucky's income tax computations become more complex.

Increased complexity occurs because the starting point for calculating the income tax in Kentucky is the federal adjusted gross income. For federal purposes, a taxpayer must account for all income. This includes wages and business income like rents, royalties, and capital gains. Deductions from total income are allowed based on that income. This may include deductions for moving expenses, alimony paid, student loan interest, tuition and fees, and expenses related to the business income reported. After reporting all income and deducting allowable expenses, the federal income tax return computes adjusted gross income.

On the Kentucky income tax return, the taxpayer then must compute the amounts associated with the differences created because Kentucky's statutes have not been updated to reflect the most recent Internal Revenue Code. These differences are commonly called additions and subtractions from the federal adjusted gross income.

Additions consist of income taxed by Kentucky but not taxed by the federal government and deductions not allowed by Kentucky but allowed by the federal government. Common additions include interest income from municipal bonds issued by other states that is not taxable by the federal government but is taxable by Kentucky and the bonus depreciation deduction allowed by the federal government but not allowed by Kentucky.

Subtractions consist of income not taxed by Kentucky but taxed by the federal government and deductions allowed by Kentucky but not allowed by the federal government. Common subtractions include certain retirement income that is taxable by the federal government but is exempted by Kentucky and certain wage expenses paid by the taxpayer that are not allowed by the federal government but are allowed by Kentucky.

To compute Kentucky adjusted gross income, the additions and subtractions must be combined with the federal adjusted gross income.

Discussion

Between December 31, 2006, and December 31, 2010, there have been 18 federal enactments containing 47 provisions impacting the computation of taxable income that have not been adopted by Kentucky because the Internal Revenue Code reference date is December 31, 2006. The majority of the federal provisions have been aimed at fostering economic recovery or providing tax relief. Many of the recovery and relief provisions resulting in reduced federal tax receipts are currently set to expire at the end of fiscal year 2013. Some of the enacted federal provisions close loopholes and raise federal revenues in future years to offset the negative fiscal impact of the recovery and relief items in current years. Therefore, in future fiscal years, updating the Internal Revenue Code reference date may increase revenues to the Commonwealth.

However, Congress may extend the expiration dates, thereby eliminating any increase in Kentucky revenues for the future if Kentucky updates the code reference date. Once adopted by Kentucky, an extension of a federal provision would also be extended for Kentucky purposes, without specific action by the General Assembly related to that federal action.

Since the 2007 Regular Session, there have been three bills introduced to update the Internal Revenue Code reference date to a more current date. These bills were proposed to eliminate the computational complications created by differences between Kentucky and federal law and to ease the administrative burden on taxpayers. However, the bills were not enacted, due in part to the estimated fiscal impact. For example, the fiscal impact related to 2011 House Bill 447 was estimated to create decreases in Kentucky revenues of $190 million for FY 2012 and $95 million for FY 2013. An increase to Kentucky revenues of $57 million for FY 2014 was also estimated.

Increases or decreases to Kentucky's revenues occur as the various federal enactments are implemented and expire for federal purposes.

Proponents of updating the Internal Revenue Code date argue that updating the code reference date will decrease the administrative burden on taxpayers. Opponents argue that any proposal to update the Internal Revenue Code reference date will require additional analysis to determine the fiscal impact to Kentucky.

Kentucky's Internal Revenue Code reference date was first enacted in 1954. With a few exceptions, Kentucky has updated the reference date about every 2 years. The last update was during the 2007 Regular Session.

Property Tax Relief for Veterans

Prepared by Clinton Newman

Should the Kentucky General Assembly enact legislation designed to give property tax relief to veterans?

Background

Recognizing the hardships of military personnel, at least 30 states have extended some form of property tax relief for veterans. This is true of the states that surround Kentucky, with the exception of Ohio. Kentucky's disabled veterans receive some property tax relief, but the property tax relief does not extend to all veterans. If a service member retired from the military, that veteran's military retirement is exempt from state income tax. Kentucky also provides some benefits for active duty military, such as income tax relief.

Discussion

States that have granted property tax relief to veterans use different eligibility criteria, including honorable discharge, disability due to service, specific service requirements, and commendation. Some states provide property tax relief to an unremarried spouse of a deceased veteran.

The types of relief granted vary by state as well. Some states exempt the value of a veteran's primary residence, or the value of property up to a specified dollar amount. Other states base the exclusion on various levels of total assessment values. One state excludes the penalty and interest incurred on property taxes assessed during time of war, and one refunds local property taxes paid by disabled veterans under certain conditions.

Section 3 of the Kentucky Constitution provides that "no property shall be exempt from taxation except as provided in this Constitution." Section 170 provides a homestead exemption that exempts from taxation "real property maintained as the permanent residence of the owner, who is sixty-five years of age or older." In 1998, Section 170 was amended to expand the scope of the homestead exemption to the permanent residence of any totally disabled person classified as disabled by a program of the federal government or by any retirement system and who receives disability payments. The exemption amount set in the constitution is $6,500; however, that amount is adjusted every 2 years in accordance with the provisions of KRS 132.810(2)(e), which provides that "if the cost of living index of the United States Department of Labor has changed as much as one percent (1%) the maximum exemption shall be adjusted accordingly." The amount of the exemption is currently $34,000. Veterans who meet the requirements set forth in the constitution and KRS 132.810 are entitled to the homestead exemption; however, these provisions are not specifically targeted at veterans.

If the Kentucky General Assembly wants to expand property tax relief for veterans and their families, due to Section 3 of the Kentucky Constitution it would need to place a constitutional

amendment question on the ballot to be voted on and ratified or rejected by the Kentucky electorate in a general election.

Because of the way property tax rates are set, both at the state and local levels, it is likely that there would be no reduction in tax receipts due to enactment of the exemption for veterans; however, depending on the size of the exemption, there could be an overall shift in the tax burden from one group of taxpayers to another. This is because the state property tax rate is automatically set by statute to generate approximately 4 percent more revenues than were generated the year before, with the rate being adjusted to take into account changes in the assessment base (KRS 132.020(2)). At the local level, property tax rates are established by local governing bodies and school boards, and the mechanism for establishing the rate allows local districts to levy what is known as a compensating rate, which is the rate that when applied to the current year real property tax assessments generates the same amount of revenue generated during the prior year, without a public hearing or the possibility of recall. Thus, the state rate would automatically adjust to make up lost revenues from other taxpayers, and local governments would have the ability to make up any lost revenues through a general increase in the rate they levy against all property taxpayers.

Opposition to a constitutional amendment could come from those concerned about a shift in the property tax burden from veterans to other property tax taxpayers. Others simply may be reluctant to make any amendment to Kentucky's constitution. Proponents of a constitutional amendment may argue that a property tax break would be of great benefit to Kentucky's veterans.

Three attempts have been made to amend the Kentucky Constitution to expand property tax relief for veterans. 2009 House Bill 260 (referred to the House Elections, Constitutional Amendments, and Intergovernmental Affairs Committee), and 2010 House Bill 209 and 2011 House Bill 206 (identical bills, both referred to the House Appropriations and Revenue Committee) attempted to raise the property tax exemption for residences of service-connected totally disabled veterans from $6,500 to $13,000 of assessed property valuation. These bills were not acted on by the committees.

Annuities Regulation

Prepared by Rhonda Franklin

Should the General Assembly authorize the commissioner of insurance to establish suitability requirements and standards for the marketing and sales of state-regulated annuities?

Background

There are two basic types of annuities: fixed annuities that are sold by insurance companies and regulated by state insurance commissioners; and variable annuities that are sold by the securities industry and are regulated by the Securities and Exchange Commission (SEC). The sale of fixed annuities has increased annually over the past decade due to the growth of a senior population that uses fixed annuities to supplement retirement income. There are numerous subcategories of fixed and variable annuities. The indexed annuity emerged in the 1990s as a hybrid of the fixed and variable annuity but is classified as a fixed annuity and is sold by insurers and is regulated by state insurance commissioners.

The fixed indexed annuity has a rate of return based on the performance of a securities market index, such as Standard and Poor's, subject to a cap established by the annuity contract. The fixed indexed annuity is subject to a specified maturity period and early withdrawal penalties. Because of a guaranteed rate of return and aggressive marketing techniques, sales of fixed indexed annuities increased fourfold over the past decade.

As sales of fixed indexed annuities grew, complaints about marketing and sales tactics for fixed indexed annuities began to surface from senior citizens. Seniors contend they were sold an annuity product inappropriate for their ages and circumstances, and as a result, many annuity owners had to withdraw their investments at a loss. Suitability of annuities became a major issue in the annuity industry because an annuity that is suitable for one person may not be suitable for another. A fixed indexed annuity with a 15- or 20-year term is a suitable product for a 50-year-old who will not need the annuity proceeds until retirement; it is unsuitable for a 75-year-old.

In the mid-1990s, the securities industry argued that because the return on an indexed annuity is based on financial market changes, it should be regulated like variable annuities by the SEC and the Financial Industry Regulatory Authority (FINRA), applying the same suitability requirements that are applied by the securities industry to variable annuities. Financial advisers endorsed the regulation of fixed indexed annuities by the SEC, citing the stronger protections afforded consumers by the federal regulator rather than the state regulators. In 2008, the SEC adopted a rule that regulated fixed indexed annuities, but the rule was challenged and the court vacated the rule.

Discussion

The Dodd-Frank Wall Street Reform Act, enacted in 2010, settled the argument about indexed annuity regulation and established suitability standards for marketing fixed indexed annuities. The "Senior Investor Protections" portion of the Act lodged control of fixed indexed annuities with the states. Dodd-Frank requires states to adopt the National Association of Insurance Commissioners 2010 NAIC Suitability in Annuity Transactions Model Regulation by June 16, 2013. This model imposes suitability standards on insurers for marketing and sales of indexed annuities similar to those standards imposed on the securities industry for the marketing and sale of variable annuities. Financial advisers have expressed concerns with Dodd-Frank and continue to contend that fixed indexed annuities should be regulated by the SEC.

Since Congress required states to adopt the NAIC suitability model, fewer than half have done so. Kentucky's commissioner of insurance amended 806 KAR 12:120 to adopt the suitability provisions of the NAIC annuity suitability model and submitted the proposed regulation to the Legislative Research Commission in April 2011, effective January 1, 2012.

There may be an issue concerning statutory authority for promulgation of Kentucky's annuity suitability regulation. The regulation adopting the NAIC annuity suitability model was promulgated pursuant to the general authority granted to the commissioner of insurance by KRS 304.2-110, which provides that the commissioner "may make reasonable rules and regulations necessary for or as an aid to the effectuation of any provision of this code." However, the state insurance code provides minimal regulation of fixed annuity products. There is no specific statute recognizing fixed annuities as life insurance products and no statute granting the commissioner authority to regulate annuity suitability sales requirements.

There may also be issues relating to FINRA members who sell variable and fixed annuities. The NAIC suitability model provides that sales made pursuant to FINRA requirements will satisfy the state regulation but requires that an insurer oversee the FINRA members for the regulation to apply to the FINRA member selling fixed annuities. This provision is included in the Kentucky administrative regulation and may exceed any previous authority the state insurance commissioners have held with respect to annuities. FINRA members in Kentucky may challenge the commissioner's authority to regulate their sales when the regulation takes effect if specific authority is not granted by the General Assembly.

The General Assembly may want to consider enacting legislation to specifically recognize fixed annuities and fixed indexed annuities as life insurance products and authorize the commissioner of insurance to promulgate regulations relating to fixed indexed annuities as provided by the Dodd-Frank Act and the recommendation of the NAIC suitability model.

Life Insurance Beneficiaries

Prepared by Jens Fugal

Should the General Assembly require life insurers to register specific life insurance policy information with the Department of Insurance?

Background

Frequently, family members of a deceased relative contact the Kentucky Department of Insurance to determine whether the deceased relative had an insurance policy. KRS 304.15-175 requires insurers to notify the commissioner within 30 days of completion of premium payments and to provide the name and last known address of the policy holder, the policy number, and the date premium payments were completed. Only a small fraction of the inquiries to the department can be satisfied with information from this limited database.

According to the provisions of KRS 393.062, insurers are required to deliver insurance proceeds as unclaimed property 3 years after the money becomes due and payable. Beneficiaries of lost policies may then consult an unclaimed property database with information from 37 states to find the money. However, hundreds of thousands of low-value policies have lapsed and were not reported as unclaimed property because insurers deducted the premium payments until the cash value of the policies was exhausted. In the past 3 years, 35 states have conducted unclaimed property audits of insurance companies, resulting in some state officials claiming there is an industry-wide practice of failing to pay death benefits to the beneficiaries of the policies.

Discussion

Some insurance industry representatives contend that establishing a comprehensive database of the names of policyholders, beneficiaries, and amounts owed could lead to deceptions, scams, frauds, and even homicide, and would leave insurers vulnerable to lawsuits in each instance. They contend the risks involved outweigh potential benefits. Moreover, opponents argue that the information that would be necessary to identify the beneficiaries of a deceased policyholder changes constantly and consists of protected trade secret information.

The National Conference of Insurance Legislators has addressed the lost life insurance policy problem by proposing amendments to the Beneficiary's Bill of Rights model law. A draft version of the amendments would require that insurers match the Social Security Administration's Death Master List or an equally comprehensive database with policy, contract, and account information, then locate the beneficiaries and make timely payments. If the beneficiaries cannot be located after a good-faith search has been conducted, the company is required to report and remit the proceeds as provided by the unclaimed property laws of the state. Failure to meet the requirements of the law would be treated as a violation of the state's Unfair Trade Practices Statute. The National Association of Insurance Commissioners has also drafted a model law with somewhat similar provisions.

As an alternative to establishing a database, the General Assembly could consider requiring insurers to use the Death Master List or a similar database periodically and to make a good-faith effort to locate and pay the beneficiaries of life insurance policies in a timely manner.

Health Benefit Exchanges

Prepared by Rhonda Franklin

Should the General Assembly develop a health benefit exchange for individual and small-group plans in response to federal health care reform?

Background

The Affordable Care Act (ACA), enacted in March 2010, requires each state to begin development of a health benefit exchange for individuals and small-group employers by January 1, 2013, and to implement the exchange by January 1, 2014. Exchanges are intended to serve as an organized marketplace through a web-based portal for individuals and small-group employers to purchase health insurance. Large-group employers will be allowed to participate in the exchanges in 2017. Qualified health insurance plans will be selected by the states to participate in the exchange based on rules issued by the secretary of Health and Human Services.

Discussion

The Cabinet for Health and Family Services received a federal Exchange Planning Grant of $1 million in 2010 to help plan for and establish an exchange. Kentucky also received a second planning grant of nearly $7.7 million in August 2011 to continue planning efforts for an exchange, with much of the funding to be used to develop information technology for the exchange business operations.

The ACA provides that state exchange plans will be subject to review on January 1, 2013, by the secretary of Health and Human Services, who is authorized to determine if the state will be able to implement the exchange by January 1, 2014. If the secretary determines that a state will not be able to operate an exchange by January 1, 2014, the ACA provides for the federal government to establish and operate a federal exchange within the state directly or through an agreement with a nonprofit entity.

Several states have considered exchange legislation to avoid federal takeover. A federally operated exchange is expected to provide states and consumers less flexibility because it is expected to be “one size fits all” and will not address the unique health issues of each individual state. In addition to lack of control and flexibility, federal oversight of a state exchange may result in the loss of federal funding for the state’s role in the exchange.

Oversight of health insurance has historically been a state function, in part due to the demographic health needs of the state’s citizens. A state will have more flexibility in operating an exchange to conform to the needs of its population and insurance market. If a state establishes and operates an exchange, it will have flexibility in selecting the criteria for health insurance plans, selecting health insurers to participate in the exchange, facilitating enrollment of consumers through operation of the required website for consumers to compare health plans, and providing the required hotline for consumer support.

Even while the constitutionality of mandated health care works its way through the courts, states remain under the deadline of January 1, 2013, to make progress in establishing exchanges. As long as the Affordable Care Act is law and exchanges are required to be implemented, the General Assembly has several options with respect to establishment of a health insurance exchange:

- Enact legislation to authorize a state exchange in 2012 to ensure adequate progress by January 1, 2013, for implementation by January 1, 2014;
- Enact legislation to work with other states to develop a multistate exchange;
- Develop a partnership with the federal government to establish an exchange; or
- Take no action and allow the federal government to establish an exchange for Kentucky.

Out-of-State Health Insurers

Prepared by Jens Fugal

Should the General Assembly permit out-of-state insurers to sell health insurance in Kentucky?

Background

The health insurance system makes insurance available through employer-sponsored group plans or individual plans. Employer-sponsored plans may be self-insured, which are regulated by the federal law, or purchased from a state-regulated health insurer. Individuals may purchase health insurance from a health insurer licensed to conduct business in the state, subject to state regulation. Paying for health insurance is often challenging for uninsured individuals and families that are not eligible for existing government programs. Sixteen percent of the state's population is uninsured.

The Affordable Care Act (ACA) mandates that beginning in 2014, a health benefit exchange will be operated in each state either by the state or by the federal government. Health benefit exchanges are intended to provide access to more affordable individual and small-group coverage. Kentucky is among the 35 states that have not enacted any legislation to establish an exchange.

The ACA also authorizes states to form interstate health insurance compacts that permit insurers to sell policies in any state participating in the compact, subject to the laws of the state in which it was written. Legislation authorizing interstate compacts that permit the interstate sale of health insurance has been drafted or introduced in 14 states. Georgia, Oklahoma, Missouri, Texas, and Wyoming have enacted interstate compact laws that permit health insurance policies authorized by any compact member state to be sold within their states.

Discussion

The option of allowing out-of-state insurers to offer health benefit plans that do not include Kentucky's mandates has generated increased discussion. HB 494 introduced in the 2011 Regular Session would have allowed out-of-state insurance companies to offer health insurance plans, while exempting them from state-mandated health benefit requirements. The measure did not include provisions relating to an interstate compact. This bill was not considered in committee.

Federal and state regulations require insurers to provide insurance plans that do not favor the young and healthy and do not exclude the sick and elderly. As a result, states have enacted health insurance laws that mandate coverage of certain conditions and treatments. However, some health insurers have been reluctant to provide such coverage. Each health benefit mandate adopted by a state may increase premiums by less than 1 percent, but the cumulative cost of

multiple mandates may cause health insurance to become less affordable for many individuals and families. Kentucky has 45 mandates.

Proponents of permitting out-of-state insurers to sell health plans in Kentucky contend that the ability to purchase health plans from outside the state will allow uninsured individuals to purchase basic coverage at a lower cost, without all of the coverage mandated by Kentucky law. They argue that while Kentucky's average premium rate for employer-based family coverage is competitive with the rates of surrounding states, the average individual plan rate in Kentucky is significantly higher than in the states with the lowest average premium rates. Proponents assert that interstate competition would increase the likelihood of the uninsured finding policies that fit their budgets. Proponents also note that consumers could select policies tailored to their specific health care needs without paying for those that they do not need. And because many states have added dozens of insurance mandates to their basic plans, proponents contend that those markets have become dominated by a few large insurers and that with fewer companies competing for market share, there may be less incentive to offer competitive premium rates to consumers.

Opponents of permitting the sale of out-of-state plans contend that resolving disputes between residents and out-of-state insurers could be more difficult. Opponents contend that a person who purchases an out-of-state plan may discover too late that a diagnosed condition is not covered by the out-of-state plan, if out-of-state carriers are not held to the benefit mandates as the Kentucky policies. If out-of-state insurance policies are not mandated to cover the same conditions as Kentucky policies, opponents contend that people will opt to buy the less expensive, less comprehensive out-of-state coverage, which will cause premiums of licensed in-state insurers to rise for the older and sicker population who need the more comprehensive coverage provided by Kentucky law.

The General Assembly could continue to allow out-of-state insurers to sell policies that meet Kentucky's established health benefit mandates; could wait to see what action the federal government takes with the health benefit exchange plans; or could allow out-of-state insurers to sell policies that provide coverage allowed in the state where the carrier is located.

Tourism Development Act

Prepared by John Buckner

Should the General Assembly require companies that receive economic development incentives for tourism-related projects to meet job and wage requirements?

Background

With the passage of 1992 House Bill 89, which created the Cabinet for Economic Development and provided the structure for Kentucky's contemporary economic development assistance programs, the General Assembly declared the mission of the state's economic development system is, in part, to achieve the best quality of life for its citizens "through long-term strategic planning and implementation that fosters sustainable growth in jobs and incomes." Each of the original tax credit incentive programs emphasized job creation, with the General Assembly declaring in KRS 154.22-020(2):

> …it is in the best interest of the Commonwealth to induce to location of manufacturing facilities… in order to advance the public purposes of relieving unemployment by creating new jobs…

1996 Senate Bill 219 added language to the economic development tax incentive programs that required a minimum number of jobs to be created by an eligible project, and 2002 HB 372 added a wage floor for jobs created by an eligible project.

Tourism-related projects that sought economic development assistance were held to the same requirements as other eligible manufacturing and industrial projects. Those requirements included that investments in approved capital expenses must exceed a statutorily established minimum level; that the recipient of the assistance state that the project would likely not occur or would occur outside the Commonwealth but for the incentives offered; that no significant number of jobs within the state would be lost or adversely affected if the project was approved; and after the 1996 changes, that a minimum number of jobs were to be created by the project.

Because value-added production is not involved, many tourism-related projects and business strategies are similar to those in the retail sector. Some argued that tourism projects were fundamentally different from manufacturing and industrial development and that different standards were needed to address the concerns of the tourism industry. In response, 2001 HB 87 reorganized tourism development assistance by placing it under the jurisdiction of the newly created Tourism Development Finance Authority within the Tourism Development Cabinet. The legislative findings for the newly created Tourism Development Act were largely the same.

> … it is in the best interest of the Commonwealth to provide incentives for the creation of new tourism attractions and the expansion of existing tourism attractions… in order to advance the public purposes of relieving unemployment by preserving and creating jobs that would not exist if not for the incentives offered… (KRS 148.853(1)(b)).

Although qualifying criteria vary depending on the type of tourism-related project, the basic requirements are a floor on total eligible costs, a requirement that an attraction remain open to the public for a specified minimum number of days, and that a project attract a specified minimum percentage of visitors who are not Kentucky residents. There are no requirements concerning a minimum number of jobs to be created or a minimum wage floor for employees at the project.

Discussion

Those who call for a required minimum number of jobs to be created by an eligible tourism development project often point to the large capital investments of approved projects and the potential tax credits that may be claimed. Proponents argue that the state should require the same minimum number of full-time employees and wage rates as are required under the Kentucky Business Investment Act and similar programs within the Cabinet for Economic Development because approved tourism development projects are allowed to recoup 25 percent of eligible capital expenditures by recapturing sales tax. They argue that the stated public purpose of the Tourism Development Act calls for preserving and creating jobs, and that existing requirements should be changed in the same manner as other economic development programs to reflect a commitment to job creation by specifying a minimum number of full-time jobs with an established wage floor.

Opponents to these proposals argue that tourism attractions are nearly always seasonal and that staffing requirements are too variable to require a minimum number of full-time employees. They argue that many tourism attractions provide jobs to high school and college students who seek supplemental income and that wage requirements that exceed existing federal minimum wage standards would compel many tourism attractions to hire fewer temporary workers. They also point to jobs created by other businesses within the vicinity of a tourism development project, such as hotels, restaurants, and gas stations, and note that the jobs indirectly created by increased tourism at the project site should be credited to the project.

Angel Investor Tax Credits

Prepared by Louis DiBiase

Should the General Assembly amend the Kentucky Investment Fund Act to allow individual angel investor tax credits?

Background

Angel investors are individuals who invest in high-risk start-up companies, such as science and technology firms. They provide early or "seed-stage" funding in exchange for an ownership stake in the company and in expectation of high yields down the road. In addition to funding, they often provide expertise, guidance, and connections to help the start-up get established. Angel investments can fill the gap between a company's initial efforts to raise capital and the kinds of financing available to more mature firms.

Governments at the state and federal levels have sought to use tax incentives to encourage angel investments. More than 20 states, including Ohio and Indiana, currently have such tax incentive programs, with several states recently extending or expanding theirs. Illinois enacted its Angel Investment Tax Credit Program in 2010 to provide a 25 percent credit on investments up to $2 million. In 2011, a bill was introduced in Congress to grant a similar credit against federal income taxes. While the various state programs differ in the amount of credit given and the kinds of qualifying investments to which they apply, all but three allow credits to individual investors and to investment funds, according to the Northern Kentucky Tri-County Economic Development Corporation, known as Tri-Ed.

Kentucky allows tax credits for angel investments made through investment funds, but not for those made directly by individual investors. The Kentucky Investment Fund Act (KIFA) provides a credit "equal to forty percent (40%) of the investor's proportional ownership share of all qualified investments made by its investment fund" (KRS 154.20-258). The Cabinet for Economic Development stated that the structure "contemplates a paid fund manager making investment decisions and controlling a pool of money invested by individuals."

There has been discussion about expanding KIFA to allow tax credits for individual angel investors. In 2010, the General Assembly directed the Cabinet for Economic Development to study this issue. The cabinet submitted a report that supported the concept but that also noted it should be weighed against budget constraints and policy alternatives. In 2011, House Bill 448 would have created an individual angel investor credit within KIFA's current financial caps.

Discussion

Proponents of an individual angel investor tax credit argue that it would create jobs by encouraging greater investment in new science and technology firms. The National Governors Association and Tri-Ed claim that most job creation comes from new firms, particularly those in the area of innovation and technology. However, these businesses can struggle to find adequate

financing at critical stages of their development, creating a high risk of failure. The argument is that more angel investment would increase the chance of business success and thereby increase the number of jobs.

Proponents point out that in the typical life cycle of a technology business, initial funding comes from friends, family, and government and university sources, while somewhat mature firms can attract venture capital. But funding for the critical growth period in between can be difficult to obtain. It is this funding gap that is filled by angel investments. The National Governors Association has reported that angel investments may be responsible for “up to 90 percent” of the funding at this critical stage.

Tri-Ed has estimate that in 2007 “angel investments created 200,000 new jobs in the United States, or about 3.3 jobs per angel investment.” The corporation also projected that amending KIFA to allow an individual credit in Kentucky, under at least one proposal, would create about 5,700 net new jobs over a 10-year period.

Proponents also claim that individual credits are needed because KIFA, as currently structured, does not sufficiently incentivize angel investments. The credit cap under KIFA is $40 million, but in the past 11 years only $6.7 million in credits have been taken, according to Tri-Ed. Moreover, the Cabinet for Economic Development reported that only $13 million in investments have been made during that time. Meanwhile, states that allow credits for individual investors have experienced greater use. Ohio, for example, has a credit cap of $45 million and has issued more than $33 million in tax credits and generated over $100 million in private investment.

Those arguing for an individual angel investor credit believe that it would result in a positive return on investment for the state. In addition to generating investment in local businesses, they believe the cost of the credit would be more than offset by the increased income tax revenues from the jobs created. Expanded angel investor credits would also dovetail with other economic development strategies, such as the work of Kentucky’s Innovation and Commercialization Centers.

On the other hand, opponents of an individual angel investor tax credit are concerned about the cost of such a credit. Tax credits are essentially government expenditures. House Bill 448 from the 2011 Regular Session, for example, had a fiscal note identifying a maximum potential cost to the budget of about $16 million. The actual cost would depend on how much the credit was used, and most likely it would be spread over a period of years. The fiscal note also does not account for potential offsetting financial gains stemming from economic development. But it does indicate that there may be significant expenses involved.

Opponents also note that the economic impact of individual angel investor credits is uncertain because of the lack of data. Individual investor credits are often part of a larger economic development strategy. The success of states that have these credits could be due to other economic factors. Ohio’s Third Frontier Program, for instance, involves more than individual angel investor credits, and it operates among a population substantially different from Kentucky’s. There is no guarantee that having a tax credit like Ohio’s would yield the same results.

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Incentives for Kentucky's Export Industry

Prepared by Karen Armstrong-Cummings

Should the General Assembly provide specific incentives for Kentucky's export industry?

Background

One growth area in Kentucky's economy has been increasing demand for state exports. According to the Cabinet for Economic Development, Kentucky's major products exported in 2010 were

- Transportation equipment, $6.65 billion;
- Chemicals, $4.1 billion;
- Machinery (non-electrical), $1.8 billion, and;
- Computer and electronic products, $1.4 billion.

Kentucky exported more than $19.3 billion in goods during 2010, resulting in the state ranking 19th in total exports among the 50 states and the District of Columbia. Kentucky exported products to 177 foreign countries, including its major markets of Canada, France, Mexico, Japan, and the United Kingdom.

Kentucky's executive branch agencies have established state export programs through partnerships with trade-related organizations and the federal government. The Cabinet for Economic Development houses the state's overall export programs, while the Department of Agriculture assists in international exporting of state agricultural commodities, products, and services. Both agencies work with Kentucky's World Trade Center, a business organization. The federal partner is the US Commercial Service, the trade promotion arm of the Department of Commerce's International Trade Administration. This federal program maintains offices in Louisville and Lexington, providing links to export promotion professionals internationally.

The state agencies work with the World Trade Center and the US Commercial Service, providing several types of assistance, including

- foreign market opportunities for potential Kentucky exporters,
- information about destination country requirements including legal issues and price structures,
- potential distributors or other partners essential to product delivery,
- methods to ensure payment, and
- other information to help identify potential opportunities and challenges and to reduce risk.

In March 2010, the White House announced the National Export Initiative, establishing a national goal to double American exports over the next 5 years. The initiative provides more funding, nationally and through the states, for export promotion and requires coordination between government agencies. The initiative outlined the need for state governments to partner in export assistance to businesses, particularly small business. Also in 2010, Congress enacted

the State Trade and Export Promotion grant program, establishing a 3-year trade and export promotion pilot program to make grants to states.

State legislatures have enacted a wide variety of specific state export promotion laws. These range from establishing broad legislative authority to promote exports to statutes creating state export authority agencies with systems for export lending and other incentives. Some states have created export programs based on general economic development statutory authority, with funding and prioritization resting with executive branch authority.

Discussion

Kentucky's legislature provided economic development statutory authority for all the state's economic development options, including export promotion, in KRS Chapter 154. Through this statute, the executive branch has a range of options for achieving state economic development goals. This statute establishes the Kentucky Economic Development Finance Authority, creates tax incentives, and outlines overall goals for improving the state's economic condition. Kentucky's law does not detail the state export promotion program structure.

Under the general authority in KRS Chapter 154, the Cabinet for Economic Development established export promotion programs. Kentucky also launched the Kentucky Export Initiative (KEI), a partnership of several public and private export entities, funded primarily through federal funds. KEI partners have conducted export seminars in communities around the state during 2011.

In reviewing state economic development legislation in states contiguous to Kentucky, state export promotion program legislation ranges from broad statutory authority, which can include export promotion, such as in Tennessee, to incentive programs such as export promotion loan funds enacted in Indiana, Virginia, and West Virginia. Other states' economic development statutes include incentive programs such as partial exclusion of export sales tax from state taxation, deferrals of income tax on export sales, income tax credits based on export sales, and export loan funds. A few states authorize export incentive programs to provide travel costs for trade missions or to pay fees required by federal US Commercial Services export assistance.

Critics of state export programs have argued that these programs have had little, if any, effect on the level of exports, the local jobs created, or the enhancement to the state's economy. Instead, many have pointed out that these achievements are more attributable to a weak dollar and other economic trends over which states have little control.

Additionally, opponents to export programs point out that reports of state exporting numbers often are not segregated by the type of state assistance received nor to what degree the potential exporter used and implemented agencies' recommendations. Thus, the state programs cannot consistently claim clear cost-benefit analysis for the program, nor establish a direct connection between state dollars expended and their economic returns.

Another criticism has arisen from the growing emphasis, both in Kentucky law and nationally, on focusing limited state resources on local economic growth, promoting locally grown products

and emphasizing family-owned or small businesses. Proponents of this economic development approach argue that if state revenues are to be spent on economic development, the focus should be within local communities or regions.

Even proponents of state export programs have discussed the need for clear evaluation programs, not only to ensure responsible budget management but also to demonstrate to state policy makers the export promotion programs' effectiveness. Several states have worked to establish programs that document the return on revenue investment and to ensure political and business leaders understand the effectiveness, reach, and impact of state-sponsored export assistance.

The Brookings-Rockefeller Project on State and Metropolitan Innovation found that state export offices across the nation have little reliable data to assess and analyze their export promotion activities. The project recommended that if states move to create or expand their export programs, they should establish mechanisms to clearly assess exports and the performance of their export promotion activities and work more closely with private and federal agencies to avoid duplication of services.

With Kentucky continuing to face economic challenges, and state economic development and agricultural leaders emphasizing the need for state export assistance, the Kentucky legislature continues to play a role, including by receiving reports and by evaluating funding requests. Should the legislature consider additional involvement in export promotion policies, other states' experiences could provide some guidance on the various approaches.

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Construction Loan Guarantee Program

Prepared by Louis DiBiase

Should the General Assembly create a construction loan guarantee program?

Background

The Education and Workforce Development Cabinet reported that the construction industry lost 11,000 jobs in 2009, or about 13 percent of its workforce. It lost another 6,200 jobs, or about 8 percent, in 2010. While job losses have stabilized in 2011 along with the rest of the economy, industry employment still declined approximately 1,000 jobs from this time last year.

In response to the economic downturn's affect on the construction industry, the General Assembly considered a proposal in the last two sessions to provide loan guarantees for commercial construction projects. In 2011, House Bill 407 would have allowed the Kentucky Economic Development Finance Authority to guarantee up to 25 percent of the principal on approved construction loans between private lenders and project developers. The authority would have been directed to consider the potential impact on economic development and other factors relating to creditworthiness before issuing a guarantee.

Discussion

Those in favor of construction loan guarantees claim that difficulty in obtaining financing is part of the problem facing the construction industry. They believe a loan guarantee program would encourage lending for construction projects, allowing more projects to go forward. This in turn would help both the construction industry and the state's economy. Private nonresidential construction spending in Kentucky was $2.9 billion in 2010, making it an important economic contributor, according to the Associated General Contractors of America. Proponents also note that loan guarantees are only a pledge, so no money is actually paid from state funds unless there is a default.

Those opposed to construction loan guarantees argue that the state should not use its limited financial resources to back the loans. A provision in HB 407 would have used sales tax receipts generated by approved projects to pay for the loan program. But some objected that this might impair other economic development strategies that target the same receipts, such as tax increment financing. Without a funding mechanism, the program would be left to compete with other proposals for scarce general fund revenues.

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Performance-based Funding for Postsecondary Education Institutions

Prepared by Ben Boggs

Should the General Assembly consider including student outcomes in a postsecondary education accountability and funding model?

Background

Traditionally, most states have allocated funding to their postsecondary institutions based upon a formula without the direct use of outcomes-based performance targets. However, since the mid-1980s, an increasing number of states have sought better ways to hold their public postsecondary institutions more accountable in meeting state needs. Over time, those efforts have resulted in development of accountability measures by which student outcomes may be included as one factor in institutional performance review and funding considerations.

According to the Education Commission of the States, 27 states have incorporated some form of student outcomes measurements in postsecondary institutional performance assessment and funding allocations. These measures include such indicators as graduation rates, transfer rates, remediation activities/effectiveness, degrees awarded, and pass rates on licensure exams.

Senate Bill 37 introduced in the 2011 Regular Session would have required public postsecondary education institutions to improve the rate of student completion of bachelor's degrees. The bill did not pass. Senate Bill 1, which became law in 2009, requires a 50 percent reduction in college remediation rates by 2014 from the 2010 levels and a 3 percent annual increase in the college completion rates of students enrolled in one or more remedial classes by 2014 from 2009 levels.

Consideration of postsecondary education accountability models that include additional student outcomes measures, such as retention, remediation, transfer, graduation rates, and credentials earned, could be designed with possible implications for base and incentive funding. Assessment of each indicator could be based on the institution reaching a specific target (such as a specified graduation rate) or the institution demonstrating a specific rate of improvement (such as a specific increase in the percentage of degrees awarded).

Discussion

The purpose of student outcomes-based performance funding is to connect a portion of the state allocations to specific results in order to provide tangible institutional incentives to improve student outcomes. If an institution meets its goals, it automatically receives the funds linked to the performance measures.

The Council on Postsecondary Education staff is working on proposed statewide and institutional outcomes-based performance measurements in student success that include degrees conferred; bachelor's and associate degree graduation rates, graduation rate gaps of underprepared students,

and transfer rates from the Kentucky Community and Technical College System to 4-year institutions.

Proponents who favor student outcomes performance-based funding argue that such systems focus on student success and how well the postsecondary institutions produce degrees in comparison to their state allocations. They also contend that these funding systems hold institutions accountable while allowing them the flexibility to determine how best to reach their outcome goals. Proponents also say that student outcomes-based funding models include successful student transfer measures. The community colleges and public universities could be rewarded for successful student transfers leading to bachelor degrees.

Opponents of student outcomes performance-based funding argue that such systems underemphasize other institutional contributions to state needs, such as the benefit of university research on the state's economy. Opponents also contend that these funding models focus on "quantity versus quality," with the emphasis being on granting degrees or certificates rather than on improving student learning.

The General Assembly could require the Council on Postsecondary Education to work with the postsecondary institutions to set and meet student outcomes-based performance goals as part of an incentive funding model. In such a funding model, the allocation would be available as a reward above the base funding level that an institution would already receive. Therefore, if an institution met its goals on the student outcomes performance metrics, then it would receive additional funding. Another option is that the General Assembly require the council to set and meet student outcomes-based performance goals as part of a base funding model. A base funding model would include student outcomes performance metrics as part of the funding formula. Therefore an institution would need to meet its goals in order to receive its entire base allocation, or be penalized accordingly.

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Personnel Evaluations for Teachers

Prepared by Jo Carole Ellis

Should the General Assembly revise the personnel evaluation system requirements for teachers?

Background

KRS 156.557 requires the Kentucky Board of Education to establish statewide standards for teacher evaluations and identifies required performance criteria and provisions that should be part of the evaluations developed by school districts. State law requires all administrators and all teachers with less than 4 years of service to be evaluated annually. Teachers who have completed 4 years of satisfactory continuous service (tenured teachers) are to be evaluated at least once every 3 years. 704 KAR 3:345 provides guidelines for local school districts to follow in developing and implementing their evaluation systems. Within this general framework, evaluation systems may vary significantly among districts and schools, and there is no required connection to student growth and achievement. Because of the variance in implementation, the commissioner of education has called Kentucky's system of 174 district evaluation systems a "broken process."

In 2010, Kentucky applied for the federal Race to the Top education grant, which included a focus on increasing teacher and administrator effectiveness. The grant requires that a state have no barrier to linking student achievement and growth to the evaluation of teachers and principals. Moreover, one of the scoring criteria for the grant is based on a state's plan for linking teacher and administrator effectiveness to student achievement. Although Kentucky did not receive funding for Phase 1 or 2 of the grant, it has been named one of nine states eligible to apply for a Phase 3 grant of $12.2 million. Phase 3 scoring criteria includes the same provisions regarding teacher evaluation and student achievement.

As a result of the Race to the Top provisions, the commissioner of education established the Teacher Effectiveness Steering Committee to develop a voluntary statewide evaluation system that would consist of multiple measures of student growth and achievement as well as components to measure leadership, professionalism, instruction, learning climate, and assessment practices.

During the 2010-2011 academic year, 25 school districts participated in the design and development of the proposed system. Field testing is occurring during 2011-2012. A larger pilot program is planned for 2012-13, with statewide implementation scheduled for 2013-2014 for those districts that choose to participate.

Discussion

Like most teacher evaluation systems across the country, most Kentucky school districts judge performance on a "meets" or "does not meet standard," which is not linked to student

achievement. According to the Southern Regional Education Board, nearly all teachers earn a meets standard rating, leading many to question the usefulness of the evaluations because they do not provide clear information about a teacher's effectiveness. Critics of such practices contend teacher effectiveness is not measured, recorded, or used to inform decision-making in any meaningful way, although it is the most important factor in improving student achievement. Many critics contend that the evaluation systems often fail to improve teacher practice and enhance student growth and learning because they do not identify teachers' professional growth needs and provide learning opportunities to meet those needs.

Proponents of a comprehensive, statewide evaluation system indicate it would allow all Kentucky teachers to be evaluated using the same process, leading to a fair, uniform and comparable system to measure teacher effectiveness. Some see it as a way to improve teachers' performance by strengthening their knowledge, skills, and classroom practices. Some might argue that it would hold teachers more accountable for their own improvement and for student learning. Some might also say that professional development funds currently under local control must be included in the statewide system to provide the necessary support for teachers.

Opponents indicate that local input will be greatly reduced if a statewide evaluation system is required. Some feel conducting a comprehensive evaluation with multiple measures for every teacher will be labor intensive and time consuming and may require hiring additional staff. Some are concerned such a program would be too big to manage and would require a high level of training for which time and resources are not available. Others may say that such a program will be used to eliminate teachers instead of to help support and develop more effective teachers. Opponents also say that while student growth is affected by teacher quality, numerous variables beyond teachers' direct control contribute to student performance.

The General Assembly may consider amending the statutes dealing with certified personnel evaluation to increase uniformity in implementing a statewide system of teacher evaluation, to revise criteria to be included in teacher evaluations such as student growth and achievement, or to link compensation to evaluation results or student performance.

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Broadband Development

Prepared by D. Todd Littlefield

Should the General Assembly encourage wider deployment and adoption of broadband in unserved and underserved portions of the state?

Background

Broadband is high-speed advanced telecommunications service that can include Internet, e-mail, e-commerce, and data storage. It can be supplied by telephone wire, cable, fiber-optic cable, power lines, and satellite or other wireless technologies. As uses for broadband and other advanced telecommunications technology have proliferated, some question what role the government should play in providing equal access to this technology to all households. Phone service has long been considered to be so vital that consumers pay a fee with each bill to subsidize phone service to low-income and rural users.

The digital divide between people and areas with access to broadband and those without is viewed by many as a divide between areas that can attract economic development and those that cannot. Federal and state government entities have devoted considerable attention to the subject, but real progress waits for either a technological breakthrough that will make it cheap and easy to connect remote homes and businesses or a large infusion of cash.

Discussion

A city or county that cannot include robust broadband service among its attributes is at a competitive disadvantage when seeking growth and job opportunities. Broadband is vital for e-commerce and as a quality-of-life attribute for citizens. Broadband availability has long been seen as an important economic development goal.

In the Telecommunications Act of 1996, Congress declared that:

> Consumers in all regions of the nation, including low-income consumers and those in rural, insular, and high cost areas should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas (Section 254(b)(3)).

The lack of language mandating universal service reflects the need to balance the potential negative effects of government intervention in the marketplace against providing government help for areas where the private sector is not meeting the need.

Quantifying need includes a number of sub-issues. Reliable data on what areas have service available is difficult and expensive to obtain. Whether efforts should focus on availability of broadband service (what portion of the population *could* obtain the service if they chose to) or

adoption (what portion of the population actually subscribes to the service) or both is part of the discussion.

Also part of the discussion is how broadband is defined. The difference between service that is characterized as broadband and service that is not is the speed with which data is sent to and from the consumer. Higher speeds are necessary to meet the demands of more sophisticated content, such as streaming high-quality video.

Section 706 of the Telecommunications Act of 1996 requires the FCC to determine annually whether broadband is being deployed to all households in a reasonable and timely fashion. The FCC found for the first time in 2010 that it was not. The finding triggers a mandate, found in the same section, that the FCC "take immediate action to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

The FCC declared support for a number of actions recommended in its National Broadband Plan, completed in 2010. The commission supports a comprehensive reform of both contributions to and disbursements from the Universal Service Fund (USF) to support universal access to broadband. In a similar vein, the FCC recommends expansion of USF's Lifeline and Link-Up programs to include broadband. These programs subsidize phone service for low-income households. The FCC approved a measure on October 27, 2011, to redirect money from the USF to broadband expansion. Called the Connect America fund, it was created to push broadband access into rural areas. Eleven percent of the funds will go to a Mobility Fund to build out mobile broadband.

In April 2011, the Congressional Research Service noted that broadband is available in about 95 percent of households in the nation. However, only about 30 percent choose to subscribe, with cost being the most common reason for not subscribing. Cost is also a driving factor in why areas remain unserved. Unserved areas are largely rural and have lower income levels.

In 2004, the General Assembly declared that "The provision of broadband services shall be market-based and not subject to state administrative regulation" (KRS 278.5462). As with cell phones, the Public Service Commission was given jurisdiction to resolve consumer complaints about broadband but no authority over providers.

In 2002, ConnectKentucky, a public private partnership, in conjunction with the Kentucky Infrastructure Authority, set out to complete an interactive map that showed the areas within the state where broadband was available and from what provider. The mapping and data collection was part of an effort to push broadband into unserved areas. At the conclusion of the mapping project, ConnectKentucky stated that a very high percentage of the state had availability. The data used was voluntarily submitted by providers and was found in some cases to be inaccurate. Some providers claimed that areas were served when they were not.

In 2007, the General Assembly passed what would become KRS 147A.023, charging the Department for Local Government with tracking broadband deployment in the state and encouraging public-private partnerships among providers and government entities to foster

deployment. Reports to the Legislative Research Commission, required by the statute, have been irregular. The final subsection of the bill states that the department has no “authority, regulatory or otherwise, over providers of telecommunications and information technology.”

A broadband deployment account was created without appropriation within the Kentucky Infrastructure Authority (KIA) by the legislature in 2006 (KRS 224A.1121). The statute directs KIA to establish an incentive program and to establish funding criteria and prioritization schedules for deployment projects. The account and the program are largely dormant. According to the director of KIA, small loans have been made in recent years for six broadband projects.

In October 2010, the Governor created the Commonwealth Office of Broadband Outreach and Development. Since that time, the office contracted with consultant Strategic Networks Group to survey homes and businesses about broadband use and to prepare a map showing availability. The survey found that of those with access to broadband, 65 percent of respondents strongly agreed that not having broadband would have a negative impact on their lifestyles. Twenty-eight percent would definitely or very likely relocate to another community if broadband were not offered. Thirty-nine percent either work for their employers at home computers or have a home business. One of the survey’s key findings was that broadband contributes to greater employment opportunities and a stronger local economy.

There is uncertainty over what states are empowered to do. FCC decisions from 1998 through 2007 assert authority over all common forms of providing broadband. The commission has said that its jurisdiction has expanded to remove regulatory uncertainty, and yet uncertainty remains.

The state must decide if there are any public or common benefits from expanding broadband availability that are desirable but that market forces are unlikely to provide. Kentucky has made two efforts to map broadband availability. The value of the data already collected could be enhanced by efforts to verify its accuracy. This would make the map more reliable and valuable as a resource. It is possible that traditional regulatory authority over telecom companies can be expanded to include some broadband functions. The concept of “carrier of last resort,” used in telecom regulation to require an incumbent phone company to serve certain unserved households might be expanded to cover facilities used for broadband. Cable franchises might include conditions requiring some service to unserved households.

The General Assembly could create a universal service fund program for broadband deployment that could be modeled after the federal program that charges fees on phone bills to support universal service. Such a fund could be used to extend broadband service into areas that are unserved because it is too expensive for a provider to do so. The fund also could provide subsidies for low-income households to be able to subscribe to broadband.

Although a specific state grant, loan, or bond program would have difficulty in these budget times, broadband expansion might increase if piggybacked with investments in regional transmission improvements. Similarly, broadband expansion could be increased by promoting shared wireless platforms and by sharing public structures and rights-of-way.

Some states have worked to find pockets of demand and expand them by promoting the benefits of broadband to others in the same area. Combining these customers with projected future demand, the state offers "aggregated demand" packages to service providers as proof of market potential.

Proponents of state initiatives argue that, on its own, the market is not likely to move into areas where no strong business case can be made. Broadband providers and other opponents of state initiatives argue that deregulation has produced good results: large capital expenditures have been made, network use has increased, service has improved, and rates have gone down.

Opponents of regulation argue that regulation will inhibit technological progress and that regulatory agencies are often influenced by powerful stakeholders. Proponents counter that market power still exists and that even those currently served sometimes have only one option.

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Utility Terminations During Extreme Weather

Prepared by Sarah Kidder

Should the General Assembly limit or prohibit terminations of service by public utilities during extreme weather?

Background

The federal Low Income Home Energy Assistance Program (LIHEAP) provides limited assistance to low-income households to help with energy costs. Kentucky authorizes the reconnection of utility services following termination for certain eligible individuals during winter months but does not offer energy assistance or protection for low-income households prior to disconnection. Many states have passed legislation requiring public utilities to limit or prohibit the termination of service for certain populations during periods of extreme heat or cold.

Kentucky administrative regulations permit terminations of utility services for outstanding indebtedness, nonpayment of bills, or noncompliance with applicable codes and regulations. However, regulations permit the reconnection of electric or gas utilities from November through March for certain eligible individuals. These individuals must have had their utilities disconnected due to nonpayment; must be able to pay at least one-third of the outstanding bill or $200, whichever is less; must agree to a repayment schedule; and must accept a referral from the department for weatherization services, which include weather stripping, insulation, and caulking homes to increase energy efficiency. Eligibility requirements also include the submission of a certificate of financial need from the Cabinet for Health and Family Services Department of Social Insurance. To receive this certificate, individuals must meet LIHEAP eligibility requirements. Last winter, 9,928 households received certificates of financial need.

On the federal level, LIHEAP provides assistance to low-income households in meeting their home heating and/or cooling needs. There are two main components of this program that operate throughout the winter, one of which provides subsidies to residents at or below 130 percent of the federal poverty level ($29,055 for a family of four) who meet specific eligibility requirements to help them pay home heating costs in November and December. The other component uses the remaining funds from January through March for crisis situations. To receive crisis services, customers must be LIHEAP eligible and have received a past-due/disconnect notice. The Department for Community Based Services reported that last winter in Kentucky, 113,884 households received an average of $141.80 in subsidy assistance, and 190,147 households received an average of $219.40 in crisis assistance; 69,496 of those households received both subsidy and crisis assistance.

Federal funding for LIHEAP may be reduced, which would affect Kentucky's share. Some estimates are that the state's share would decrease by 46 percent, from $57.74 million to $26.65 million.

Discussion

To date, 34 states have enacted legislation containing some sort of restrictions on the termination of utilities. Most state legislatures have considered prohibiting or limiting the terminations of public utility services for certain populations during periods of extreme weather. A number of states require eligible individuals to meet certain requirements to qualify, including individuals with documented illnesses or disabilities, those below the federal poverty level, the elderly, or families with young children or infants. Some states require utilities to offer payment plans, and others have moratoria on the loss of heat during winter.

Advocates of prohibiting or limiting the terminations of public utility services during periods of extreme weather note that the economic recession has created a difficult financial situation for many households. According to the Kentucky Center for Economic Policy, in 2010, more than 32 percent of Kentucky households had incomes below $25,000. Amid cuts to the state and federal budgets, including proposed cuts to LIHEAP, and increased home heating costs, advocates argue there is a need to establish more protections for the poor, the very old and very young, and those with disabilities.

Opponents of prohibiting or limiting the terminations of public utility services note that consumers of public utility services enter into contracts in which they are required to pay for certain services and are therefore responsible for submitting payments in a timely manner. To prohibit or limit terminations requires utilities to extend credit to customers who have not proven themselves to be creditworthy. Opponents raise questions regarding the methods that could be used to determine extreme weather. If a certain temperature is used, there are concerns over the process for verification of that temperature for specific geographic locations; if a specific time frame is used, there are concerns that the prohibition would cover times of moderate or warm weather. Opponents also note the possibility for logistical problems with implementing any sort of limits on termination of services, potentially leading to complex or bureaucratic processes for determining eligibility and verifying the existence of extreme weather.

In 2006, the Kentucky General Assembly appropriated $10 million from natural gas severance tax receipts for the crisis component of LIHEAP. An emergency clause was included in the bill requiring the appropriation immediately upon passage due to that year's dramatic increases in home heating costs and overall lack of funding for the program in comparison to the need for services. That is the only time state funds were used to supplement the federal LIHEAP appropriation for Kentucky, though nothing prohibits the General Assembly from taking such action again. In recent years, some members of the Kentucky General Assembly have sponsored bills related to prohibiting or limiting the termination of heating utility service for low-income customers during winter months. None of these bills passed.

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Opportunities for Physical Activity

Prepared by DeeAnn Mansfield

Should the General Assembly provide support to local communities to develop safe, easily accessible, and low-cost opportunities for adults and children to engage in physical activity?

Background

More than 67 percent of Kentucky's adult population is either overweight or obese, according to a report from the Trust for America's Health and the Robert Wood Johnson Foundation. The Data Resource Center for Child and Adolescent Health reported that in 2007, more than 37 percent of Kentucky children were overweight or obese, compared to 31.6 percent nationally.

One possible avenue to address the obesity problem is to provide support to local communities to offer safe, easily accessible, low-cost environments for physical activities including walking, bicycling, and playing. Three options states and communities most often use include "complete streets" policies that develop plans to build streets to accommodate bicycling and walking; Safe Routes to Schools programs that create safe routes for walking and biking to schools; and shared use agreements that open public facilities, such as school buildings, to community use for physical activities after school hours.

Discussion

Complete streets policies require state or local roadways to accommodate the needs of motorists, pedestrians, transit users, and bicyclists. Lexington and Louisville have adopted local complete streets policies. Twenty-six states now have some form of complete streets policy; 14 of the states enacted the policies through legislation.

Kentucky has a statewide bicycle and bikeways program (KRS 174.120) but does not have complete streets legislation. In 2002, the Transportation Cabinet adopted a nationally recognized pedestrian and bicycle travel policy, which required consideration of bicycle and pedestrian use during roadway project design; however, implementation is not required. In 2008, Senate Bill 145 would have required full consideration of bicycle and pedestrian ways in the planning and development of state transportation facilities. The bill did not pass.

Space, funding constraints, and a perceived lack of demand may prevent the development of walking and biking paths. Roadway planners work from the centerline out, often running out of space before bike lanes, paved shoulders, and sidewalks can be included. Some express concern that space is scarce and that providing paths for bicyclists and pedestrians will necessarily remove space or convenience for motor vehicles. Encouraging walking and biking along roadways, which some perceive to be dangerous, raises concern for liability issues. Interested parties are challenged with balancing competing interests to develop a transportation infrastructure that provides access for all users and encourages physical activity.

Safe Routes to School is a federal grant program designed to make walking and bicycling to school safer for and more appealing to elementary and middle school students. In 2011, Kentucky received $2.6 million in federal grant money for the Safe Routes to School Program, which is administered by the Office of Local Programs of the Transportation Cabinet as a reimbursement program. Thirty-eight Kentucky counties received grants from 2005-2010.

Safe Routes to School programs must be sponsored and supported by a local government or school district that demonstrates its ability to meet program requirements, including soliciting public support, administering the project, and identifying the project in its financial accounting and annual audit. State funds have not been appropriated for the programs. State legislation could provide support to local governments and school districts to meet program requirements for securing federal funding.

Shared use agreements could be one avenue through which public facilities, such as schools, and local governments could partner to provide greater access to safe, adequate facilities for exercise and play, such as gymnasiums, playgrounds, fields, courts, tracks, and other sports facilities. Shared use agreements exist between two separate government entities, such as a school and a city or county, and establish terms and conditions for shared use of public property or facilities. The costs involved include energy and maintenance. The agreements would assign responsibility for those costs.

Local school boards of education have authorization under KRS Chapter 162 to enter into agreements with public agencies to develop and maintain recreational facilities on school property for school and community use. Some Kentucky communities, such as the William Wells Brown Elementary School in Fayette County, have implemented joint use agreements for after-school physical activities. However, school districts may have concerns, such as cost, vandalism, security, maintenance, and liability in the event of injury, related to entering a joint use agreement. Such concerns may prevent school districts from opening facilities to communities after hours. State legislation can encourage joint use agreements as a means of providing physical activity opportunities for children by providing funding for after-hours use. Arkansas and North Carolina passed such laws in 2010. State legislation could also support joint use agreements by providing extended liability coverage and security to schools after hours.

State legislation could require full consideration of bicycle and pedestrian ways in the planning and development of state transportation facilities, provide support to local governments and school districts to meet program requirements for securing federal funding for Safe Routes to School programs, and support shared use agreements by providing extended liability coverage and security after school hours. All of these options would involve some cost to the state.

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Public Assistance Recipients

Prepared by Jonathan Scott

Should the General Assembly enact legislation to address substance abuse among public assistance recipients?

Background

In 1996, Congress implemented major welfare reform legislation with the Personal Responsibility and Work Opportunity Reconciliation Act. Welfare reform transformed the cash welfare system under Aid to Families with Dependent Children into the transitional program Temporary Assistance to Needy Families (TANF) that requires most recipients to work after 2 years of receiving assistance, or earlier at state option. TANF also limits public assistance to 60 months in a lifetime, with few exceptions. Amid concerns that substance abuse may be a barrier to obtaining self-sufficiency, the Act banned individuals with felony convictions for illegal drug offenses from receiving TANF, Supplemental Nutrition Assistance Program (SNAP), and Social Security Disability. The Act also authorized, but did not mandate, states to use chemical testing to detect substance abuse.

Since 1996, at least 27 states, including Kentucky, have proposed some type of substance abuse screening law based on suspicionless searches of persons who receive at least one kind of public assistance. Federal legislation has been filed to mandate drug testing of recipients of TANF. Since 2010, Florida, Missouri, and Indiana have acted to require some kind of suspicionless drug testing of public assistance applicants. These laws attempt to test all recipients of public assistance funds or attempt to test recipients of only certain public assistance programs, such as TANF or job training programs.

Discussion

Over the last 5 years, Kentucky has proposed several initiatives to address substance abuse among public assistance recipients. In 2008, House Bills 190 and 221 would have created a program to test recipients of monetary public assistance, SNAP, food stamps, and Medicaid. In 2009, HB 15 would have created two pilot programs to screen public assistance recipients based on suspected drug use; an identical bill, HB 417, was filed in 2010. In 2011, HB 208 and HB 402 would have created a program to test recipients of public assistance.

While states may drug test TANF recipients, Medicaid and SNAP eligibility is based on specific federal statutory requirements; unlike TANF, those requirements do not allow states to enact a drug testing requirement and exclude individuals from receiving benefits on the basis of that test.

The programs in other states use varying types of screening mechanisms to identify substance abusers. Primary methods include urinalysis and written questionnaires. Urinalysis was the main testing method used in Florida and Michigan and the job training program in Indiana. In

addition, about half of the states currently use different types of written questionnaires to determine drug abuse.

There have been constitutional issues raised about suspicionless drug tests. A federal district court in 2000 declared Michigan's law unconstitutional because of the 4th Amendment's protection of an expectation of privacy. As a government entity, Michigan would only be allowed to use random drug testing if it had some reason to suspect that welfare recipients were using drugs, or if it could justify the testing on public safety grounds. Florida passed a mandatory drug testing statute in 2011 that has been temporarily blocked by federal district court.

An additional concern involves the usefulness of drug abuse as a predictor for how long a person stays on public assistance. The Robert Wood Johnson Foundation's Substance Abuse Policy Research Program reported that drug abusers do not stay on welfare for a longer amount of time than their nonabusing fellow recipients.

Proponents of drug testing programs may point out that such drug testing would save money, although estimates of savings vary. Also, the existence of a drug testing program may discourage drug-abusing individuals from attempting to apply for public assistance benefits.

Opponents may argue that although program costs may decrease through a reduction of total recipients, this reduction may come at the cost of a screening program that is substantially more expensive than taking no action. Opponents argue that individuals on welfare are no more likely to use and abuse drugs than the rest of the population; therefore, drug testing of public assistance recipients may be inefficient and unnecessarily intrusive. Opponents argue that if testing recipients of public assistance is justified, then recipients of economic development funds or tax breaks may also merit substance abuse testing to receive funds. Opponents may also point out that the additional staff needed to administer drug screening programs would take away funding that could be used to assist more applicants. Because of the increased numbers of applicants, Texas and California have streamlined their application processes and removed a longstanding fingerprinting requirement.

Potential legislative action could include targeting different types of public assistance and requiring public assistance recipients to be tested for drugs. Part of such action could include mandating and providing substance abuse treatment for those identified by the screening.

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Minimum Staffing Rates for Personal Care Homes

Prepared by Miriam Fordham

Should the General Assembly create minimum staffing rates for personal care homes?

Background

Personal care homes provide care to individuals with mental health and mental disabilities who do not need skilled medical care and assistance. The homes provide meals and some assistance with medications and daily tasks. Personal care homes are licensed by the Office of Inspector General in the Cabinet for Health and Family Services and operate under the regulatory authority of 902 KAR Chapter 20. There are 83 free-standing personal care homes, with a total of 4,479 licensed beds, with an additional 1,800 licensed personal care beds in nursing homes. In 2009, the Office of Health Policy reported that 5,144 individuals were cared for in personal care homes.

The quality of care provided to and safety of residents in personal care homes has recently come under scrutiny after the deaths of two residents who wandered away from personal care homes and issuance of citations for negligent care.

Discussion

In order to improve the quality of care provided to and safety of residents of personal care homes, some have suggested that minimum staffing ratios should be established for personal care homes, as have been proposed for other types of long-term care facilities, such as nursing homes. Under 907 KAR 20:036, the staff-to-resident ratio is to be based on the number of patients, the amount and kind of personal care, supervision, and programs necessary to meet the needs of the residents. One attendant is required to be on duty on each floor of the facility at all times. There is a lack of readily available data on the type or level of disability and average length of stay of the residents of personal care homes. Nursing homes, which provide a more intense level of care, have a federally required minimum staffing level, and some states have established direct staff-to-resident ratios.

There are three sources of payment for the care of residents in personal care home: federal Supplemental Security Income (SSI), state supplemental disability payments, and private funds. SSI and state supplemental disability payments represent the majority of payments. The combined SSI and state supplemental disability payment for residents of personal care homes is $1,194 per month (907 KAR 2:015). In fiscal year 2011, state supplemental payments were made to 2,964 residents of personal care homes, for a total of approximately $16.4 million, at an average payment of about $460. Personal care homes that have at least 35 percent of their residents diagnosed as mentally ill or mentally disabled may receive a quarterly supplemental payment of 50 cents per day for a state supplementation recipient (907 KAR 2:015). Personal care homes do not qualify for Medicaid payments because the homes are considered to fall into the social model of care rather than the medical model of care.

Legislation introduced in the 2010 Regular Session—Senate Bill 143 and House Bill 476—would have established two levels of personal care homes. One level for individuals who need minimal assistance and another level for individuals who have been diagnosed as mentally ill but do not need require care in a hospital or psychiatric facility. Neither proposal was enacted.

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Pain Management Facilities

Prepared by Ben Payne

Should the General Assembly establish a new facility licensure category for pain management facilities to prevent prescription medication abuse?

Background

902 KAR 20:260 allows for the operation of special health clinics that provide limited health services on an outpatient basis. These services include family planning, pulmonary care, disability determination, weight loss, speech and hearing, wellness, counseling, and diagnostic services. According to the Cabinet for Health and Family Services, there are 94 special health clinics licensed in Kentucky.

Pain management facilities operate in the Commonwealth as licensed special health clinics. The exact number of pain management facilities is not known because they are not required to identify themselves as such. State statutes and regulations do not require pain management facilities to specify ownership or detailed operational standards directly related to the treatment of patients with chronic pain conditions. A special health clinic may be owned and operated by nonmedical personnel, with the facility contracting with temporary doctors to see patients.

During the 2011 Regular Session the legislature considered Senate Bill 47 and SB 138 that both proposed to separately license pain management facilities.

Discussion

The US Department of Health and Human Services Substance Abuse and Mental Health Administration reported that 6.5 percent of Kentuckians have used prescription drugs for nonmedical purposes in the last year. This contrasts with the national average of 5 percent. The Office of Inspector General, of the Kentucky Cabinet for Health and Family Services, and the Kentucky Attorney General have investigated numerous pain management clinics for alleged criminal activity related to prescription drug abuse. Some of the investigations have led to grand jury indictments.

In the last few years, some states have considered more strict regulation and licensure of pain management facilities in response to alleged prescription drug abuse. Texas, Florida, and Ohio enacted legislation to provide greater regulation and more detailed licensure of pain management facilities to attempt to stop prescription drug abuse. The approaches vary but carry the core components of facility licensure, ownership, and employee requirements. These core components may provide oversight of and accountability for the legal prescribing of prescription drugs at pain management facilities. These approaches may result in less prescription drug abuse but may also lead to decreased access to needed care by individuals who suffer from chronic pain. The Centers for Disease Control and Prevention recommends states pass, enforce, and

evaluate pill mill, doctor shopping, and other laws to reduce the abuse of some prescription medications.

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Criminal Gang Legislation

Prepared by Norman W. Lawson, Jr.

Should the General Assembly enhance law enforcement's focus on gang activity?

Background

Police and prosecutors allege that criminal gang activity is in nearly every county of the state and involves high school students, ethnic groups, and groups with criminal interests. Commonwealth's attorneys report that activities of criminal gangs include drug manufacturing, drug trafficking, theft, physical assault, witness intimidation, and murder.

KRS 506.150 specifies a list of characteristics of a gang that include a common name, insignia, flag, or means or recognition; common identifying hand or body signs, signals, or code; a common identifying mode, style, or color of dress; an identifying tattoo or body marking; membership criteria, age, or other qualifications; creed of belief; an organizational or command structure; a de facto claim of territory or jurisdiction; an initiation ritual; or a concentration or specialty. Being a member of a criminal syndicate is a Class B felony under KRS 506.120.

KRS 506.140, relating to criminal gang membership, requires that a member of the group has been convicted of two felony or two violent misdemeanor offenses within the previous 2 years, or one felony and one misdemeanor. The law specifies that the members do not have to know each other or that others have been convicted of an offense. Department of Kentucky State Police data show this statute has resulted in six first-offense arrests from 2003 to 2010 and no second- or subsequent-offense arrests. Prosecutors allege that the misdemeanor penalties are too low and detract from the statute's use.

Discussion

Police and prosecutors seek a database of persons suspected of being gang members with a means of validating who should be placed on the database. The list would be available to law enforcement authorities worldwide but would not be a public record, and a person would not know he or she is on the list. The elements of the validation process were not detailed in testimony before the interim joint committee; however, a Department of Corrections staff member explained that having only one of the many characteristics listed in the current law would be sufficient to place a convict on the list of gang members and that the crime for which the person was incarcerated did not have to be gang related.

Proponents believe that establishment and maintenance of a criminal gang database will make it easier to track and prosecute gang members and reduce gang activity. Proponents seek a gang member validation process to limit declaring innocent persons as criminal gang members. A person can be placed on the list by any police officer who believes that the person meets any of the criteria for being a gang member. The information could be shared with other states, federal agencies, and law enforcement agencies and courts in other nations.

Police and prosecutors also seek enhanced penalties for crimes committed by gang members, such as forfeiture of gang assets and service of 50 percent of the sentence before being eligible for parole for nonviolent offenses. Violent offenses currently require 85 percent of the sentence to be served prior to being eligible for parole for everyone, not just gang members. Such legislation has been introduced in recent sessions of the General Assembly but has not passed.

Proponents argue that enhanced sentences and restrictions on parole eligibility will discourage gang membership or hold gang members in prison for longer periods. Proponents believe this will enhance public protection. Proponents also believe that forfeiture of gang assets will provide additional needed funding for law enforcement and prosecutors.

Opponents argue that the gang legislation is overly broad with characteristics that could ensnare any group and subject otherwise innocent persons to scrutiny. Opponents contend that the database of gang members that may contain the names of persons who have not been convicted of a crime is inappropriate and a violation of constitutional protections. If people do not know that they are on the list, they cannot challenge their being placed on the list. Opponents argue that accountability is necessary and that police should not be able to place persons in the database without the possibility of scrutiny by a court.

Opponents are also concerned about the stacking effect, which is the use of multiple statutes to enhance a relatively low-level crime into a higher-level crime or increase the length of the sentence. For example, a theft of $500 to $10,000 is a Class D felony with a sentence of 1 to 5 years and with parole eligibility after 15 percent of the sentence has been served. Proponents want to increase the crime to a Class C felony with a sentence of 5 to 10 years with a current parole eligibility of 20 percent of the sentence being served. Defense attorneys argue that sentencing enhancements produce unduly lengthy sentences for what some believe to be relatively minor crimes.

Defense attorneys and persons who favor rehabilitation over punishment are concerned that requiring enhanced penalties for the commission of any offense committed by a gang member will increase the cost of incarceration. Incarceration costs approximately $21,000 annually; therefore, a Class D felony would cost the Commonwealth between $21,000 to $105,000. Enhancements could increase some sentences to 30 years, which would cost an estimated $630,000 at the current rate. They also allege that the enhancements would negate recently enacted legislation that calls for rehabilitation of felony offenders through alternatives to incarceration and the use of counseling, training, and monitoring while on parole or probation. Defense attorneys also argue that prosecutors use the threat of lengthy sentences to convince defendants that they should plead guilty in a plea bargain for a lesser sentence rather than go to trial.

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Age for Criminal Responsibility

Prepared by Ray DeBolt

Should the General Assembly establish a minimum age for criminal responsibility?

Background

The "minimum age for criminal responsibility" is the age at which a child is presumed to be able to understand the nature and wrongfulness of conduct. In Kentucky, criminal complaints are filed against children as young as 5. Offenses include animal cruelty, arson, assault, burglary, destruction of property, theft and receipt of stolen property, complicity and conspiracy to commit crimes, indecent exposure, and sexual offenses. In 2010, there were 359 complaints filed against children 10 or younger, including 36 complaints against children 7 or younger, 4 of whom were 5 years old and charged with terroristic threatening, criminal trespass, criminal mischief, and abuse of a teacher. While many of the complaints filed are informally handled through diversion programs created by the Administrative Office of the Courts, Kentucky law grants the state's prosecutors the final voice as to whether a complaint is referred for formal court action.

Kentucky has several statutes that provide some form of immunity from prosecution. KRS 504.020 provides that a person is not responsible for criminal conduct if at the time of such conduct, and as a result of mental illness or retardation, the person lacks substantial capacity either to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law. KRS 504.090 provides that an incompetent person cannot be tried, convicted, or sentenced so long as the incompetency continues. KRS 501.020 provides the *mens rea*, the state of mind that makes the performance of a particular act a crime and which the state must prove. While any of these statutes may preclude a specific child from prosecution, Kentucky law does not provide by statute a minimum age upon which criminal responsibility attaches. Kentucky law does provide, however, that no child 10 years of age or younger shall be placed in a Department of Juvenile Justice facility, except for a child who has committed a capital offense or an offense designated as a Class A or Class B felony offense and then only in a state-operated detention facility if no less-restrictive alternative is available (KRS 605.090). Offenses designated as Class A and Class B felonies include murder, rape, kidnapping, arson, and armed robbery.

Discussion

While several hundred criminal complaints have been filed against children 10 and younger, this represents less than 1 percent of the juvenile complaints filed. Complaints filed against children 10 and younger include allegations of assault, disorderly conduct, criminal mischief, sexual offenses, arson, and weapon offenses. Representatives from the Department of Juvenile Justice, the Department of Public Advocacy, and the Administrative Office of the Courts recommend that the General Assembly enact legislation to establish a minimum age of criminal responsibility, specifically that no child 10 or younger shall be held criminally liable. This group

further recommends that youth of this age be referred to social service agencies and, where appropriate, to mental health agencies for family or behavior intervention services.

A review of data from the Administrative Office of the Courts and the US Department of Justice Office of Juvenile Justice and Delinquency Prevention shows that 11 states—Arkansas, Colorado, Kansas, Louisiana, Minnesota, Mississippi, Pennsylvania, South Dakota, Texas, Vermont, and Wisconsin—have established 10 as the age of criminal responsibility. Maryland, Massachusetts, New York, and Oklahoma have established a minimum age of criminal responsibility at 7. In Arizona, the minimum age is 8 years, and Washington State has established the age at 11 or younger. In Oklahoma, a child between 7 and 13 may be charged, but the prosecution must produce sufficient evidence to overcome the presumed immaturity of the child prior to the trial of the criminal offense. No other states have established a minimum age of responsibility.

Internationally, the Convention on the Rights of the Child, through the United Nations Children's Fund, called for nations to establish a minimum age of criminal responsibility based on emotional, mental, and intellectual maturity. Countries of Western Europe have established the age of responsibility at 13 and 14; countries of Eastern Europe have established the age at between 10 and 13; and some Asian and middle-eastern nations have established the age between 7 and 9. The United Kingdom has established 10 as the minimum age of criminal responsibility.

Kentucky's prosecutors contend that existing law, specifically KRS 635.010, requires them to review all juvenile complaints and, if applicable, a victim's request for special review prior to determining whether to proceed with formal court action. They have the authority, regardless of the offense, to decide to take no action, and they look at each child individually in making their decision. As a community's elected official, they contend that they should be left the discretion to determine whether a child's conduct warrants formal court action. They further state that the vast majority of the youngest children are diverted or informally handled through Kentucky's Court Designated Worker program, where children determined not to need formal court action have their charges dismissed upon the completion of a program of services tailored to meet the child's needs.

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Illegal Methamphetamine Laboratories

Prepared by Jon Grate

Should the General Assembly require a prescription for the purchase of pseudoephedrine, ephedrine, or phenylpropanolamine?

Background

The known number of illegal methamphetamine labs increased from 428 in 2008 to 1,078 in 2010, according to the Kentucky State Police. Making methamphetamine requires the common cold and allergy medications pseudoephedrine, ephedrine, or phenylpropanolamine (collectively known as "PSE"). In an attempt to stop methamphetamine production, both Kentucky and federal laws impose daily and monthly quantity limits on PSE purchasers. The laws also require a log to be kept and the identity of the purchaser to be checked by retail sellers of these drugs, with that data being centrally collected for access by state and federal law enforcement. To circumvent these quantity and tracking provisions, many involved in making methamphetamine pay others to buy packages of PSE product, a practice known as "smurfing." With the increase in this practice, drug control advocates suggest imposing a prescription requirement for the purchase of PSE products.

Discussion

Proponents of requiring prescriptions for PSE argue that the additional costs associated with obtaining PSE prescriptions by paying for a doctor visit will cause the price of Kentucky-manufactured methamphetamine to rise above market level. As evidence for this, proponents point to the success of the two states that have imposed a prescription requirement. Oregon first imposed a prescription requirement in 2006 and saw a reduction in meth labs from 55 in 2006 to 13 in 2010. Mississippi's prescription law became effective on July 1, 2010, with the number of labs dropping from 1,002 to 351 in the year following enactment. Proponents acknowledge the additional burden in terms of time and expense on ordinary citizens but believe the curtailing of illicit methamphetamine labs to be worth the cost. Proponents also note that many alternative cold and allergy remedies are available over the counter. Some proponents have suggested continuing to allow the sale of PSE gelcaps without a prescription because extracting PSE is substantially more difficult from a gelcap than from a solid tablet.

Opponents to requiring prescriptions argue the time and economic burdens a prescription requirement would entail for the general public are disproportionate to the methamphetamine lab problem. They also contend that the prescription solution is not the most viable option available. Opponents foresee higher insurance premiums, higher Medicaid costs, and higher out-of-pocket costs for consumers, particularly for those without insurance. Kentucky tracks all PSE drug purchases and maintains a database of these transactions, which is separate from the state's Kentucky All Schedule Prescription Electronic Reporting tracking system for prescription medications. Opponents argue that this system should be used more broadly and linked to similar tracking systems from other states to track persons who cross state lines to avoid a single state's

surveillance system. Opponents also suggest measures such as prohibiting the sale of PSE-based products to persons with certain drug convictions, principally those related to methamphetamine trafficking or possession. This proposal would require the court system to report qualifying convictions to a state agency, which would place the names of those convicted on a PSE block list. When a merchant electronically logs a pending sale with the state, an offender's presence on the block list would flag that sale as a prohibited transaction.

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Prescription Drug Abuse

Prepared by Jon Grate

Should the General Assembly place additional controls on prescribing practices for controlled substances?

Background

According to the Office of the State Medical Examiner's 2010 Annual Report, more people die each year in Kentucky from prescription drug overdoses than from overdosing on all other substances combined. This corresponds with national trends, with the Centers for Disease Control and Prevention reporting that overdose deaths from prescription painkillers now outnumber the combined death totals for cocaine and heroin. Historically, a significant portion of the prescription drug trade could be attributed to Kentuckians traveling to other states to obtain both the actual prescriptions and the drug product itself, typically from facilities that purported to specialize in pain management. As other states move to regulate these facilities more closely, Kentucky faces the prospect of these facilities relocating closer to or within Kentucky.

Discussion

A primary method of monitoring prescription drug activity is the establishment and operation of a state prescription drug database, an area where Kentucky helped lead the nation, with its creation of the Kentucky All Schedule Prescription Electronic Reporting (KASPER) system. KASPER data may be accessed by prescribing physicians, law enforcement when conducting bona fide investigations, and professional licensure and regulatory boards, among others. According to the Alliance of States with Prescription Monitoring Programs, all but two states have authorized prescription monitoring programs, although only 35 programs are currently operational. Drug control advocates are urging measures to increase the use and utility of KASPER within the state, including linking KASPER with monitoring systems in other states.

In terms of increasing in-state KASPER use and utility, advocates note that mandatory data entry occurs only when a drug is dispensed and that prescribers are not required to run a report on a patient before prescribing medication. Advocates have suggested requiring a pre-prescription KASPER report on each patient seeking a controlled substance prescription, requiring a prescriber to enter prescription information into KASPER when a prescription is written, or at the least requiring every prescriber to maintain a KASPER account. For all system participants, advocates have suggested moving from a 7-day to a 24-hour data reporting deadline. Advocates also believe the analysis and hand-off of KASPER data to regulatory boards and law enforcement needs to be improved. Opponents of these efforts point to the professional time and administrative costs associated with compliance, with some medical professionals cautioning that requiring a pre-prescription KASPER report creates a de facto state-mandated standard of care, which would be an intrusion into the practice of medicine.

As for increasing KASPER use across state lines, advocates continue to push for interoperability with other state systems. The General Assembly first authorized this interoperability in 2004, and Kentucky and Ohio have now share live patient data, with several other states, including Indiana and Virginia, in line to join that system. This connection would allow a Kentucky doctor to see a patient's controlled substance activity in both Kentucky and participating states. Drug control proponents believe this information will greatly hamper persons who travel from state to state seeking controlled substance prescriptions by fraudulently misrepresenting their prescription history to each prescriber from whom they are seeking prescriptions. Opponents worry about an expansion of government control and surveillance and question the increased likelihood of data breaches revealing personal medical information.

In regard to illegal prescription activity coming into Kentucky, drug control advocates believe Kentucky should adopt many of the controls placed on health facilities by other states, such as Florida and Ohio. Currently, a Kentucky "special health clinic" may be owned and operated by nonmedical personnel, with the facility contracting with temporary doctors to see patients. Advocates have suggested requiring these clinics be owned and operated by a physician, whose license would be at risk if there were any misconduct at the clinic; requiring the clinics be staffed by persons who have received professional education and licensure specific to pain medicine; or requiring that clinics seeking licensure be subject to a certificate of need process. Opponents argue that current regulatory controls are sufficient because prescribers who work in these facilities are subject to professional discipline and criminal sanctions for illegal activity; that licensure boards have the expertise needed to determine the education requirements for their members as they practice; and that a certificate of need process is unduly cumbersome and costly, particularly for a state with underserved areas of medical need.

Finally, as to illegal prescription drug activity in general, some drug control advocates have suggested measures to spur increased enforcement activity by professional licensure boards because those boards have existing authority and tools at their disposal. As part of this effort, advocates seek to better cooperation between these licensing boards and law enforcement because preventing illegal drug activity should be a common goal. Other proposals range from requiring photo identification at the pharmacy for persons picking up controlled substance prescriptions to creating local safe disposal days for people seeking to dispose of leftover medications. Opponents believe that existing controls are sufficient, and more controls will increase costs on the health care system (and thus patients) without achieving results worth those costs.

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Human Trafficking

Prepared by Joanna Decker

Should the General Assembly change Kentucky's human trafficking laws to increase penalties for offenders and decriminalize victims of human trafficking?

Background

"Human trafficking" is generally defined as labor or services or commercial sex acts obtained through the use of force, fraud, or coercion. The most common types of human trafficking include forced labor, sex trafficking, bonded labor or debt bondage, and involuntary domestic servitude. Victims of human trafficking can be found working as prostitutes or in massage parlors, strip clubs, domestic service, agriculture, construction, manufacturing, landscaping, and hospitality industries. Traffickers recruit and transport their victims internationally or within the U.S. from state to state. Victims are held against their will through various means, including the use of threats, confiscation of documents, or violence. Adults, as well as children, can be victims.

In 2000, Congress enacted the Trafficking Victims Protection Act (TVPA), making trafficking in persons a federal crime and providing protection and assistance to victims. Federal prosecutions remain relatively low, and many states have enacted legislation to increase the likelihood of local police uncovering trafficking. Kentucky enacted human trafficking legislation in 2007 that provided certain protections for victims, such as the right not to be held in a detention center pending trial. Under both Kentucky and federal law, force, fraud, or coercion need not be present in sex trafficking if the person is under the age of 18.

Since the enactment of these laws, few cases have been brought against traffickers in Kentucky, and statistics regarding the number of trafficking victims in Kentucky and other states remain scarce. A self-report study published in 2007 of a small group of law enforcement, lawyers and victim advocates documented 69 cases of human trafficking in Kentucky; however, this study's author noted that the findings were not to be generalized to the larger population of the state due to the limitations of self-report data (Logan). From 2008 until present, Kentucky Rescue and Restore, one of five federally funded agencies charged with providing outreach to victims, has served 123 victims of human trafficking. Although there have been 11 human trafficking cases charged under Kentucky law, none has yet resulted in a prosecution. There has been one federal indictment in a Kentucky human trafficking case, although federal prosecutions in Tennessee found that victims were trafficked into Kentucky.

Discussion

National and local advocates, including police, prosecutors, and victim advocates, argue for additional state legislation. They say Kentucky can do more to protect victims of human trafficking. Advocates point out that the Polaris Project, the agency funded by the federal government to run the National Trafficking Victims Hotline, rated Kentucky in the second-lowest tier of state legislation combating trafficking. They suggest Kentucky enhance its laws to

include measures such as not holding a victim, especially a minor, criminally liable for crimes resulting from being trafficked, vacating past convictions for prostitution, adding a wage theft crime, and using the cost savings to fund services to victims. National and local advocates would also argue the state needs an asset forfeiture provision for human trafficking offenders as well as civil remedies for trafficking victims.

Some groups, such as adult businesses, the agricultural industry, and other employers, may oppose any enhancements to human trafficking legislation on the grounds that it might hurt their businesses, or that their businesses could be targeted as a result of a third-party trafficker's actions they know nothing about. Prosecutors could argue that not holding people criminally responsible for their actions might encourage defendants to claim they are victims of human trafficking in order to avoid prosecution. Prosecutors might also argue that vacating previous convictions for prostitution would open the floodgates for people seeking to erase convictions after a period of time, resulting in problems of locating witnesses and evidence. The defense bar might oppose asset forfeiture because it is an increased punishment but may support other measures that would decriminalize victims for crimes committed as a result of their being trafficked. Some groups may oppose additional specific human trafficking legislation, citing the existing state and federal laws that can be used to prosecute those engaged in human trafficking. They would point to the fact that current state human trafficking laws enacted in 2007 are rarely used. Proponents point out the current statutes are rarely used because there is little public awareness of the seriousness or the extent of the problem, and they would argue there is a need for more education of law enforcement to strengthen its ability to identify victims of trafficking.

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Unemployment Insurance

Prepared by Linda Bussell

Should the General Assembly provide additional mechanisms for the payment of interest on federal unemployment insurance loans to the state?

Background

Unemployment insurance is a social insurance program designed to provide temporary assistance to workers who become unemployed through no fault of their own and is funded by state and federal payroll taxes paid by employers. The system was created in 1935 as part of the Social Security Act (SSA). The SSA and the Federal Unemployment Tax Act (FUTA) form the framework of the system. The US Department of Labor oversees the system, but states administer their own programs and are generally free to establish their own tax structures, benefit levels, and eligibility standards within certain parameters established in federal law.

FUTA establishes the federal unemployment tax rate and taxable wage base. The FUTA tax base is currently $7,000 of a worker's wages, and the tax rate is 6 percent. Employers in states that are in compliance with federal law receive a tax credit of 5.4 percent, resulting in an effective federal tax unemployment tax of 0.6 percent. The federal unemployment tax funds administrative costs of state programs, pays half of extended unemployment benefits during periods of high unemployment, and provides loans to a state when its unemployment taxes are insufficient to pay benefits provided by its unemployment insurance program. The state unemployment insurance taxes are paid into a state unemployment insurance trust fund that can be used only to pay unemployment benefits.

The unemployment insurance trust funds in most states have been drained to the point that more than two-thirds of the states have had to borrow federal unemployment funds in order to continue paying benefits. Currently, 27 states have outstanding federal loans totaling $37 billion. Since late January 2009, Kentucky has borrowed $948 million and is expected to borrow more in future years unless there is a dramatic improvement in the economy resulting in a significant increase in employment.

Federal law requires states to repay the federal unemployment loans with interest and imposes significant penalties for failure to do so within specific time frames. If a state has an outstanding loan balance on January 1 for 2 consecutive years, federal law reduces the FUTA tax credit available to employers by 0.3 percent each year until the loan balance is paid. While failure to repay the principal on the federal loans in a timely manner results in an annual reduction in the FUTA tax credit, failure to pay the interest on the outstanding loans in a timely manner could result in a loss of the entire FUTA tax credit. This means that an employer's FUTA tax would be 6 percent rather than 0.6 percent. In addition, all federal funding to administer the state's unemployment insurance program, approximately $30 million, could be withdrawn. Kentucky's unemployment insurance law, KRS Chapter 341, contains a provision that, in the absence of

federal administrative funding for the unemployment insurance program, would impose an additional 0.3 percent tax on employers to cover administrative costs of the program.

The American Recovery and Reinvestment Act, enacted in February 2009, waived interest on the federal unemployment insurance loans until the end of 2010. Interest started accruing, however, in January 2011. Federal law prohibits payment of interest from a state's unemployment insurance trust fund.

Discussion

Since Kentucky has had an outstanding federal unemployment loan balance for 2 consecutive years and there is no other source of funding to repay the loan, Kentucky employers will experience a 0.3 percent FUTA tax credit reduction for tax year 2011 and in subsequent years until the loan is paid.

Kentucky's interest obligation for 2011 on the federal unemployment loans was approximately $28 million and due by October 1, 2011. Interest payments will be due each year until the federal loans are repaid. Kentucky's unemployment insurance law requires that interest payments on outstanding federal loans be paid in a timely manner and that such interest be paid from the penalty and interest account. The penalty and interest account receives fines for late tax payments and for other violations of the unemployment insurance law. The penalty and interest account is the only existing source of funding for the payment of interest on federal unemployment loans.

The penalty and interest account had a balance of approximately $9.7 million in September 2011 leaving a balance due of approximately $18.4 million. The Governor paid the interest due for 2011 from the penalty and interest account and from the state's general fund. It is highly unlikely that the penalty and interest account will be sufficient to pay Kentucky's interest obligations in future years. Therefore, developing a plan to provide for future interest payments will be an issue facing the 2012 General Assembly.

According to the US Department of Treasury, more than 30 states incurred interest obligations for tax year 2011. Most of those states have separate taxes to pay interest charges on federal unemployment loans. In the past, some states have funded the interest payments out of their general budgets, and some have issued bonds.

The 2012 General Assembly may choose among several options to address the payment of interest on federal unemployment loans. Federal law strictly prohibits using the unemployment insurance trust fund to pay interest. Aside from that prohibition, federal law does not restrict the source of funds a state may use to meet its interest obligations. Federal law does not prohibit payment of interest from the general funds of a state or from loans from any particular state fund. Bonding is also permitted and has been used in some states to pay both principal and interest on the federal loans. The General Assembly may consider legislation that would authorize an interest assessment or surcharge on employers similar to a provision that was in the unemployment insurance law before 1996.

Any option that further increases employers' unemployment costs may be opposed by employers, which will begin paying more state unemployment taxes in 2012 as a result of legislation enacted in 2010 that increases the state taxable wage base beginning in January 2012, and more FUTA taxes as a result of the tax credit reduction. Likewise, any option that further limits income benefits would be opposed by employees who continue to experience long-term unemployment. Similarly, any option that would increase the bonded indebtedness of the Commonwealth or reduce the state's general fund could present additional impediments to economic recovery and further increase the stress on the state budget.

Workers' Compensation

Prepared by Carla Montgomery

Should the General Assembly revise the eligibility determination process for coal-related (black lung) occupational disease claims under the workers' compensation law?

Background

The workers' compensation law imposes different eligibility standards and different benefit levels for black lung claims than it does for other occupational disease claims.

Prior to 1996, black lung benefit costs had increased to approximately $100 million annually. In 1993 and 1994, more than 1,100 black lung claims were awarded. In 1996, the General Assembly enacted major reforms in the workers' compensation law that imposed more stringent medical criteria to reduce the cost of black lung claims. The 1996 reforms resulted in a significant reduction in the number of workers' compensation awards for black lung. In the years following the 1996 black lung reforms, there were few black lung benefit awards. The 2002 General Assembly enacted House Bill 348 that imposed a consensus procedure for determining eligibility for black lung benefits in an attempt to lessen some of the medical restrictions imposed in 1996.

The consensus procedure established a process based on X-ray interpretations to establish the existence of black lung and the level and severity of the disease. Under this consensus procedure, if X-ray interpretations submitted by the employee and employer are not in consensus, the commissioner of the Department of Workers' Claims is required to forward both X-rays to a panel of three expert physicians certified as "B" readers by the National Institute of Occupational Safety and Health. The consensus findings of the "B" reader panel are presumed to be correct unless overcome by clear and convincing evidence. The consensus procedure has been extremely controversial because the 2002 revisions have not resulted in a significant increase in the number of black lung awards. A workers' compensation administrative law judge has greater discretion to award benefits in non-coal-related occupational disease claims than in black lung claims.

Discussion

Since implementation of HB 348 in 2002, 1,644 black lung claims have been filed with the Department of Workers' Claims. The "B" reader panel reached consensus in 1,569 of these claims. The consensus was negative in 1,291 claims, indicating no presence of black lung disease.

There have been several court challenges to the constitutionality of the black lung consensus process. The black lung statutes have been challenged based on the equal protection clause of the US Constitution because of the different eligibility criteria and evidentiary standards that apply to black lung and not to other occupational disease claims.

In September 2011, the Kentucky Supreme Court heard oral arguments in two of the cases challenging the constitutionality of the consensus process. A decision is currently pending with the Supreme Court. The Department of Workers' Claims placed all new and pending black lung claims in abeyance until the Supreme Court reaches a decision.

The action of the General Assembly may depend on the decision of the Supreme Court. If the Supreme Court affirms the decision of the Court of Appeals, a revision in the procedure will be necessary to comply with constitutional mandates. If the Supreme Court reverses the decision of the Court of Appeals, the consensus procedure will remain in place unless the General Assembly enacts legislation that adopts another eligibility determination procedure for black lung claims.

Legislation that results in more black lung awards has been supported by coal miners since the 1996 workers' compensation reforms were enacted. Coal industry employers have opposed liberalization of the black lung benefit provisions because their workers compensation costs would increase.

Electrical Inspectors

Prepared by Tom Hewlett

Should the General Assembly establish a single statewide entity to certify and oversee electrical inspectors?

Background

To be certified as an electrical inspector by the Department of Housing, Buildings and Construction, an individual must be able to document 5 years of experience in residential, commercial, and industrial wiring. Inspectors are also required to pass a national examination given by the International Code Council. Electrical inspectors operating in Kentucky fall into three categories: inspectors who are state employees who generally inspect state facilities or hospitals and perform inspections in counties without local inspectors; inspectors who contract with local governments to perform inspections; and independent inspectors who act as private contractors. House Bill 487, introduced in the 2011 Regular Session, would have consolidated electrical inspectors under a single statewide program. The measure did not pass.

Discussion

Proponents of consolidating the certification and oversight of electrical inspectors contend that a single oversight body would provide greater enforcement authority and accountability for the inspection process, including standardizing fees and inspection criteria. The Interim Joint Committee on Licensing and Occupations heard testimony during the 2011 Interim about a number of problems with the current situation, including the use of different inspection criteria by different inspectors. Proponents attribute part of the problem to the unique nature of the electrical inspection system, where inspectors who are not state inspectors or under contract with a local government may be hired. Another concern is inspectors who abuse their authority by charging multiple or excessive fees or who perform incomplete inspections to justify repeated site visits.

Opponents of changing the current system maintain that converting to a system centralized at the state level could result in delayed local inspections and lost jobs for local inspectors. Opponents also argue that a change in the current system could lead to unfamiliar workers coming into areas to conduct inspections. Opponents fear that a single statewide system could make it more difficult to schedule electrical inspections in some areas of the state.

Proprietary Education

Prepared by Michel Sanderson

Should the General Assembly require more oversight of the State Board for Proprietary Education?

Background

Proprietary schools are for-profit institutions that offer courses in the business, trade, technical, and industrial fields. Some proprietary schools also offer associate, bachelor's, master's, and doctoral degree programs. Typically, proprietary schools are independently owned or publicly traded corporations and are nationally accredited. There are two regulatory authorities that oversee proprietary education in Kentucky. Institutions that offer bachelor's degree programs or higher fall under the purview of the Council on Postsecondary Education. All other proprietary colleges and universities are regulated by the Board for Proprietary Education (BPE) pursuant to KRS Chapter 165A. According to the BPE, there are 165 proprietary schools licensed in the Commonwealth, 135 resident (primary location or headquartered in Kentucky), and 30 nonresident (branch locations in Kentucky but with main campuses out of state). Additionally, there are 168 licensed school agents (recruiters), and 47 commercial driver's license instructors.

Discussion

Issues of concern regarding oversight of proprietary schools include the lack of published student data relating to graduation and job placement rates, high levels of student debt and loan default rates, and deceptive recruiting practices.

In the last decade, student populations at proprietary schools across the nation have increased. The College Board Advocacy and Policy Center reported that full-time enrollment in proprietary institutions that grant degrees more than quadrupled, to 1.5 million students in 2009, from 366,000 in 2000.

Likewise, federal aid to students at proprietary schools has increased. The National Conference of State Legislatures reported that during the 2008-2009 academic year, federal aid surpassed more than $4.3 billion in Pell grants and $20 billion in federal loans, an escalation of 109 percent since 2005. As proprietary student enrollment and revenues have risen, the post-degree default rate on student loans has also risen The United States Department of Education reported that students at proprietary schools represented 26 percent of students who took out loans to pay for their programs. Additionally, these students represented 43 percent of students who defaulted on their student loans. In Kentucky, the overall federal student loan default rate is 10.25 percent.

At the federal level, the Government Accountability Office (GAO) investigated 15 proprietary schools nationawide and reported instances in which applicants were encouraged to falsify applications to qualify for more student aid, pressured into signing enrollment contracts before being apprised of actual program costs by a financial adviser, and were misled about potential

salary earnings upon graduation. In July 2010, the US Department of Education released "gainful employment" regulations that prohibit proprietary school recruiters from receiving incentive compensation for recruitment and admissions and that require schools to disclose to potential students the median student debt, graduation rates, and postgraduation employment statistics for specific programs.

Several states have addressed proprietary education issues. Maryland prohibits unfair or deceptive practices relating to specified educational services and prohibits financial incentives based on admissions. Michigan's Proprietary Schools Act transferred regulatory authority from the State Board of Education to the Michigan Department of Energy, Labor, and Economic Growth. The North Carolina General Assembly created a student protection fund to indemnify students who suffer financial losses when their schools or programs abruptly close.

Kentucky has also taken steps to address concerns associated with the industry. Kentucky's Attorney General reached an agreement with bankruptcy trustees to absolve collection of nearly $4 million in private student loans from students who attended Decker College before that institution's 2005 collapse following its failure to acquire accreditation for its applied science degree program. Consequently, the college was barred from receiving federal student aid by the US Department of Education. Decker later filed for bankruptcy and closed its doors. The Attorney General reported that his office had reached a similar agreement with Student Loan Express to forgo collecting approximately $3.6 million from students attending the American Justice School of Law in Western Kentucky after the school was denied accreditation by the American Bar Association and closed.

Additionally, the Auditor of Public Accounts conducted an audit of the BPE and the Office of Occupations and Professions (O&P), which provides administrative services to the board. Five of the audit's nine findings rose to the level of a material weakness pertaining to the operation of the board. The audit suggested the board should assess and develop internal protocols to improve its retention of original licensing documentation, provide better inspection of licensed schools and institute consequences for those that fail to comply or operate without a license, and properly account for transactions involving the student protection fund while strengthening oversight of the fund. The remaining four findings were described as significant deficiencies in the administrative functions provided by O&P. The audit suggested that O&P implement better policies and procedures for monitoring expenditures; provide better separation of internal controls; and secure written agreements when procuring administrative and legal services.

House Bill 125, introduced during the 2011 Regular Session, sought to transfer the authority over all proprietary schools to the Council on Postsecondary Education. It also defined proprietary schools in the Commonwealth as for-profit institutions, implemented measures to ensure the transfer of credits, and strengthened the Student Protection Fund created in KRS 165A.450. The measure did not pass.

Proponents of requiring more oversight of the State Board for Proprietary Education maintain that schools receive a significant amount of federal funding to operate and should be held to a high degree of accountability. Under the federal regulation known as the 90/10 rule, a proprietary school can generate up to 90 percent of its revenue from federal subsidies. Some proprietary

schools are at or near that threshold. Proponents maintain that since federal student loans are not dischargeable in bankruptcy, the board has the responsibility both to adequately monitor and ensure compliance of proprietary schools and to protect the students who attend these institutions. Supporters of more oversight contend that some proprietary schools are more focused on turning a profit than serving the educational needs of the students and that they target minorities and low-income families.

Opponents of more oversight of the board maintain that proprietary schools fill a unique niche in postsecondary education by catering to the needs of the nontraditional student who may not fit into the traditional model of postsecondary education. They contend that only a few schools have garnered scrutiny for questionable practices and that if the board continues to carry out the suggestions in the Auditor's report, no additional oversight would be necessary. Opponents assert that a majority of proprietary schools create job opportunities and contribute to the economies of the communities in which they operate while providing valuable degrees that help graduates achieve their educational and occupational goals.

If the Kentucky General Assembly chooses to address concerns in the field of proprietary education, policy options it may consider include

- reorganizing the Board for Proprietary Education to reduce the number of for-profit school members (currently 7 of the 11 board members are representatives of proprietary schools). By reducing the number of representatives from proprietary schools, the board would be able to provide more equitable and unbiased oversight of the schools;
- fortifying the Student Protection Fund to ensure the protection of students when a career college or program closes; and
- mandating the disclosure to applicants of tuition costs, graduation rates, and job placement data in specific occupations, thus providing an applicant with a clear understanding of the risks and rewards associated with pursuing a chosen degree or specific course of study.

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Internet-based Gaming

Prepared by Carrie Klaber

Should the General Assembly respond to federal clarification of the Unlawful Internet Gambling Enforcement Act?

Background

All online bets on games of chance were banned under the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), unless these games were specifically authorized under state law. Under the UIGEA, states may still choose to authorize these online games. Because of the specific federal language about games of chance and language giving states latitude to allow some forms of online wagering, states are unclear about what authority they have. In Kentucky, online wagering on poker and other types of gambling is illegal. However, Internet pari-mutuel wagering on horse racing is permitted.

Financial institutions also are uncertain about what types of financial transactions they can allow for online wagering. Credit card companies, banks, and other payment systems are required to block any money transfers to gambling businesses that engage in unlawful Internet gambling. However, it is not the financial transaction provider's role to determine whether transactions are illegal; that is the role of the Treasury Department and the Federal Reserve Board.

Discussion

The UIGEA preserves the right of states to determine and enforce their applicable gambling policies. While state law cannot violate pre-existing federal law, some say federal law needs clarification of what constitutes lawful and unlawful Internet gambling. The UIGEA states that Internet wagering is unlawful if it violates federal law or state law where the wager is placed or received. Its definition of "bet or wager" specifically names games "subject to chance." However, Internet poker may be excluded from the UIGEA's definition of unlawful Internet gambling if the outcome is determined by skill. Therefore, it is unclear whether online poker constitutes unlawful Internet gambling under the UIGEA. Some characterize poker as a game of skill and others as a game of chance.

If Congress passes legislation to allow Internet poker or other forms of Internet gaming, states retain the option to opt out of the federal legislation. Alternatively, the General Assembly may choose to legalize some forms of online gambling. Any action by the General Assembly may well hinge upon whether poker is a game of skill or a game of chance. If poker is a game of skill, the legislature could authorize Internet poker through statutory changes. If poker is deemed to be a game of chance, it could be included with other forms of lotteries. An amendment to the Kentucky Constitution might be necessary to authorize Internet wagering on poker. Section 226(3) of the constitution does not define a "lottery" or "game of chance" but distinguishes lotteries from other forms of gaming that are forbidden unless falling under an exception, including the Kentucky state lottery, charitable lotteries, and charitable gift enterprises.

If the federal and state issues are clarified, and online wagering is legalized, horse racing industry representatives have expressed interest in supporting and participating in online gaming, specifically online poker, as a way to boost purses. The industry would expect clarification of the legality of interstate and online pari-mutuel wagering on horse racing, tax exemptions for advance deposit wagering, elimination of the pari-mutuel withholding tax, and changes in reporting requirements for winnings to mirror casinos. Other proponents argue that legislation is necessary because the UIGEA did not explicitly outlaw poker or clearly define what is illegal. They contend that Internet poker is exempt from the UIGEA as a game of skill.

Opponents contend that states should wait for clearer federal guidance before proceeding with Internet gambling proposals. They argue that states legislating separately will lead to inconsistent practices and confusion. Opponents assert that poker is predominately a game of chance.

Medical Imaging Technologists and Radiation Therapists

Prepared by Bryce Amburgey

Should the General Assembly create a practitioner-based board to regulate medical imaging technologists and radiation therapists?

Background

Medical imaging technologists and radiation therapists use radiation to assist in the diagnosis and treatment of patients. These practitioners also include X-ray machine operators, nuclear medicine technologists, radiographers, and radiologist assistants. Kentucky has more than 8,000 professionals working in medical imaging and radiation therapy. States employ a variety of approaches to licensing and regulating these practices. In Kentucky, the Cabinet for Health and Family Services (CHFS) certifies radiation operators through its Radiation Health Branch. House Bill 486, introduced during the 2011 Regular Session, would have regulated medical imaging technologists and radiation therapists through a separate, practitioner-based board rather than under CHFS.

The use of radiation for patient imaging and therapy can affect diseased tissue or reveal problems and can reduce the need for exploratory surgeries. However, radiation can become harmful when administered improperly. Amid incidents around the country involving mistakes in the quantity, frequency, or location of radiation, those who administer therapeutic radiation have come under increasing scrutiny.

Because the practice of medical imaging and radiation therapy involves radioactive materials, it is federally monitored more than most professions. The US Nuclear Regulatory Commission already licenses—or works with states that license—authorized users of radioactive materials, such as doctors and dentists.

Discussion

Many feel that further federal intervention specific to the licensure of medical imaging and radiation therapy professionals may be warranted. The American Society of Radiologic Technologists has repeatedly asked Congress to establish minimum educational and certification requirements for most of the medical imaging and radiation therapy professions.

Proponents of a practitioner-based board argue that the cabinet has insufficient staffing and resources to properly oversee the professions. They assert that a self-governing and self-financed practitioner-based board would have more incentive to maintain the profession and a better working knowledge of the risks of incorrect radiation exposure. Proponents contend that this board could play a stronger role in governance and enforcement, thereby regulating practice and assuring that ethical and professional standards are met. They also contend that CHFS, with the small staff it devotes to this issue, cannot match the practitioner-based board's ability to monitor licensees and integrate emerging technology.

Opponents of a practitioner-based board argue that regulation of health care professions is too often dominated by the practitioners themselves, when these practitioners may have conflicts of interest, such as the desire to exclude others from practice. They contend that tying state regulation to a private organization's standards could prove contrary to the public interest. Opponents also argue that the practitioner-based board would artificially create limits on entry into practice, thus driving up costs and limiting public access to care.

Policy options before the Kentucky General Assembly include changing regulation of medical imaging technologists and radiation therapists to a practitioner-based board, leaving jurisdiction solely in CHFS, or waiting for specific federal guidance before proceeding. If a practitioner-based board is chosen, the next decision is that board's place in state government: as a part of CHFS, independent but using the services of the Office of Occupations and Professions, fully independent, or as a part of another cabinet or agency. Keeping jurisdiction in CHFS is a known quantity that would provide continuity and an extra level of resources beyond those of an independent board; this would also be true if the board were placed within another state agency. Also, remaining with CHFS could give Kentucky time to follow the lead of the federal government. Either type of independent board most likely would be self-sufficient, drawing its funding from licensure fees and taking that budget cost away from CHFS.

City Classification

Prepared by Mark Mitchell and Jessica Causey

Should the General Assembly consider a new method of city classification?

Background

The current classification system for cities was established in 1891, with cities being classified into six classifications based on population. Table 1 shows the population ranges used to determine a city's classification.

Table 1
City Classifications by Population Range

Class	Population Range
First	100,000 or more
Second	20,000 to 99,999
Third	8,000 to 19,999
Fourth	3,000 to 7,999
Fifth	1,000 to 2,999
Sixth	999 or less

Source: Staff compilation.

In 1994, the General Assembly passed legislation that sought to amend Section 156 of the Kentucky Constitution by removing the population figures assigned to each class and requiring the General Assembly to use the classification system that was previously in use until it established a new system of classification. The public ratified the amendment, but to date the General Assembly has not created a new classification system and still relies on the previous system.

Data from census estimates are the basic instrument used to measure a city's population, but other population data can be used if the city leaders feel census data are not accurate. A city's initial classification is determined by a circuit judge when the city is incorporated. As its population grows or shrinks, a city may make a formal request to the General Assembly to be reclassified. There is no statutory requirement that cities seek reclassification, and there is no statutory construct that automatically reclassifies a city to the class of city reflecting its population. As a result, some cities' classifications do not align with the population ranges for their classifications.

Discussion

Table 2 compares cities' actual classifications to what their classifications would be based on their 2010 populations. For example, of the 114 cities of the fifth class, 55 would be classified as cities of the sixth class based on 2010 populations. Only 53 have populations that match their actual class. The table does not include either the Louisville/Jefferson County Metro

Government or the Lexington-Fayette Urban County Government because these municipal corporations are technically not cities.

Table 2
Comparison of Cities' Assigned Class to Their Classes
Based On 2010 Population

Assigned Class	Class Based on Population of City						
	First	**Second**	**Third**	**Fourth**	**Fifth**	**Sixth**	**Total**
First	0						0
Second		11	1				12
Third		3	12	3			18
Fourth		2	18	48	41	2	111
Fifth				6	53	55	114
Sixth			1		4	158	163

Note: The highlighted cells indicate the number of cities whose classifications match the classification by population range as shown in Table 1; the Louisville/Jefferson County Metro Government and the Lexington-Fayette Urban County Government are not included.
Source: Staff analysis using State Data Center figures.

Certain classifications have requirements placed upon them that others might not, such as cities of a certain class having to maintain full-time fire departments, or having yearly audits—cities of the sixth class are required to have audits done only every other year (KRS 91A.040). Other laws confer powers or flexibilities upon certain classes. One of the most familiar cases is that of the restaurant tax being applicable to cities of the fourth and fifth classes and no others. Cities of certain classes can conduct differing levels of alcohol sales.

A preference for a particular classification might be traced back to the statutory powers assigned cities of a particular class. Being a city of the fourth or fifth class seems to hold a particular attraction for city leaders. Such preferences can be inferred by the number of reclassification requests based upon the character of the request. From 2000 to 2010, the largest number of reclassification requests were to be reclassified from a city of the sixth class to a city of the fifth class or to be reclassified from a city of the fifth class to a city of the fourth class. Of 39 requests in that 10-year period, 14 cities requested to go from a city of the sixth class to a city of the fifth. Twenty-two cities requested to be reclassified from a city of the fifth class to a city of the fourth, leaving only three requests for reclassification dealing with other city classes.

Whenever a privilege or restriction is placed on a class of cities, other cities may either wish the same privilege or attempt to avoid the restrictions. With that said, there may be practical reasons for requiring certain cities to comply with a certain action, such as audits. Larger cities' budgets may be in the millions of dollars, while some smaller cities' budgets are in the tens of thousands. Setting different standards for these cities might be accomplished by a formal classification system or by a simple measure of population without using a name for the population range.

Population is a common measurement used to classify cities, but not every state assigns classifications to cities. The Kentucky League of Cities indicated that one-third of the states have no classification system, and the legislatures of those states uniformly distribute powers to the

municipal governments. Of the states that do have classification systems, most use population to guide the classifications. Of the seven states surrounding Kentucky, three use classes like Kentucky's system; three classify their municipal corporations through a description of government types, using terms such as town, village, or city, and set each type based on population; and one has no classification system but does assert legislative controls by citing population ranges in statute designed to single out a particular city or group of cities.

The Kentucky League of Cities prefers two classifications: that of merged governments and that of governments that are not merged.

Population is not the only method of determining classification. Classification could be determined by characteristics of a government type (for example, merged governments or charter governments) or could be geographically determined. Classification could be based on revenue or other factors.

The General Assembly could take no action and continue with the current system of classification. If lawmakers were to contemplate fundamentally changing city classification, they would need to decide which powers and duties to assign each classification. Legislative Research Commission staff estimated that as many as 700 statutes govern city classifications. Legislators would need to evaluate each statutory change in light of the privileges, requirements, and responsibilities conferred on cities and to consider their effects on the governments of and citizens within the cities.

Special District Fees and Taxes

Prepared by Joseph Pinczewski-Lee

Should the General Assembly allow local control of special district fees and taxes?

Background

A special district is an autonomous public corporation created by a local government to provide a specified service in a specific geographic area. Examples include fire protection, water, public health, and library districts. These districts may be funded by a variety of means, such as local general fund appropriation (soil and water conservation districts), fees or service charges (water districts), or *ad valorem* taxes (library or fire protection districts). A special district has a separate governing body apart from the local executive and legislative body, and its taxes and indebtedness do not count against the creating local jurisdiction's statutory or constitutional tax and debt limits. The governing body of a special district is usually appointed by the creating jurisdiction, though some districts, such as fire protection districts, also have elected members as well. The Kentucky Department for Local Government currently lists 1,149 special districts.

Discussion

The question of local control of special district financial matters, such as fees and taxes, emerges from the autonomy of the districts. This autonomy can be both positive and negative. Special districts are not counted toward a jurisdiction's debt and taxation limits, but being autonomous means less local accountability.

Some individuals who would like additional local control object to having unelected officials making decisions on taxes without the ability to vote them out of office if unhappy with these decisions. Previous proposals have been to require local legislative bodies to approve any rate or tax increase of special districts. These proposals have included the idea of public hearings on rate or tax increases as well as a public vote. Proponents of local control of special districts contend that the benefits are twofold: A special district must explain its need for increased funding to the public, and elected officials must then agree to any increases. It is argued that this will increase the financial accountability of special districts and hold down costs to the public. The Kentucky Association of Counties (KACo) does not believe that such a restriction on taxation would constitute a violation of the district's autonomy.

Others who are wary of greater local control would argue that if any proposal ends the autonomy of a special district, the district would become an agency of the local jurisdiction, and its taxes and its indebtedness would fall upon the local government. Even if the autonomy is maintained, there may be potential legal consequences for indebtedness. KACo has noted that debt agreements include language that requires the special district to raise taxes, if need be, to pay the bond requirements. Limits on the ability to increase taxes or fees may impinge on this contractual liability. If a special district is limited in its ability to increase revenue and is forced to choose between providing services or meeting debt service, the district might choose

providing services over its responsibility for debt service. The bond underwriters or bondholders could conceivably go to court to enforce their contracts to compel payment of the debt service, even if this required tax increases.

Any legislation to increase local fiscal control should be careful not to jeopardize the autonomy of the districts affected.

Constables

Prepared by John V. Ryan

Should the General Assembly amend or abolish those parts of the Kentucky Constitution relating to constables?

Background

Constables are defined as peace officers, and they possess the same law enforcement powers as sheriffs, coroners, and jailers. Constables have the same countywide jurisdiction as the sheriff, including power to arrest and to execute warrants, subpoenas, summonses, and other court documents, and are required to execute any court process given to them. Kentucky has approximately 561 constables.

They are eligible for the same police training as other peace officers. However, because they are constitutional peace officers, constables are exempt from attending the mandatory Department of Criminal Justice Training academy, although they may choose to do so.

Discussion

Proposals before the 2007, 2008, and 2009 General Assemblies attempted to enhance the qualifications for constables. These included a program to require a 40-hour training course; procedures for serving civil and criminal process; provisions for local governments to dispatch constables under the same conditions as for any other law enforcement agency; provisions for qualified constables to wear approved uniforms and badges; provisions for local government to pay bond required; and provisions for qualified constables or a certified peace officers to equip official vehicles with blue lights and sirens. In the 2011 Regular Session, a proposal would have created a new section of the Constitution to allow a county to abolish the office of constable. The measures did not pass.

Some constables and sheriffs have voiced conflicts that may relate to both being constitutional officers with similar law enforcement duties, including service of civil process responsibility for the courts. In all counties, except Fayette and Jefferson, constables are compensated from the fees they collect. Under KRS 64.190, constables may receive the same fee allowed sheriffs for similar services. They may also receive fees from the State Treasury under KRS 64.060 for providing services such as apprehending a fugitive charged with a felony or summoning a jury in a county other than that in which the action is pending. Constables also may serve as backup or supplemental law enforcement because they have the powers of arrest along with sheriffs, coroners, and jailers. In addition, they serve the court system by assisting with service of process. In some counties, sheriffs and constables work well together; in others, they do not. Many counties support making the constable position voluntary or abolishing it.

Law enforcement groups, including the Kentucky Constable Association (KCA) and the Kentucky Sheriffs' Association have noted concern about lack of hiring and training standards

for constables. KCA might support a 40-hour training for newly elected constables. The Kentucky Association of Chiefs of Police has indicated that if abolishment is not feasible or successful, it would support training and certification for both constables and deputy constables.

Standards for hiring and law enforcement training enhance professional status, improve officer and public safety, and reduce potential liability. The cost of implementing constable hiring and training standards should be considered because these costs, if state facilities are used, would impact existing training programs and funding sources. The average cost to the department of Criminal Justice to provide the training for the 40-hour in-service for the Peace Officers Professional Standards Training is $1,100 per participant. This may serve as a guide for estimating costs for constable training if the department does not conduct the training. The Kentucky Association of Chiefs of Police noted that a fiscal evaluation would be necessary to comprehend the full impact on the Kentucky Law Enforcement Foundation Program Fund if all constables and deputies were required to be trained by the Department of Criminal Justice Training. A question remains whether mandatory training could be imposed on constables because the qualifications are set out in the constitution.

Legislative efforts relating to constables range from an attempt to upgrade their qualifications to allowing counties to abolish the office of constable.

Polluted Water

Prepared by Tanya Monsanto

Should the General Assembly encourage more permittee-responsible mitigation that includes funding for sewer projects and straight pipes?

Background

Kentucky has 92,000 miles of streams and rivers and 300,000 acres of wetlands. These aquatic resources are important for drinking water, tourism, and food production among other things. Kentucky also has many economically important industries, such as agriculture, construction, transportation, and coal mining, that can affect water quality.

Unpermitted discharges and untreated sewage pollute Kentucky's rivers and streams. Straight pipes are septic systems that discharge untreated sewage onto the ground or directly into bodies of water. Straight pipes, failing septic systems, sewer overflows, and other untreated wastewater discharges from decentralized waste water treatment plants, called package plants, have resulted in high levels of bacteria and pathogens, including *E. coli*, in streams, lakes, and rivers.

Section 404 of the federal Clean Water Act requires any activity that will impact the waters of the United States to be approved under a 404 permit from the United States Army Corps of Engineers (USACE). Industries such as construction, transportation, and coal mining are the most common permittees because of the disturbances caused by their activities. Under a 404 permit, the permittee must first avoid or minimize impact on water quality, and second compensate for losses of aquatic resources caused by their activities. Finally, the permittee or an agent authorized by USACE must perform compensatory mitigation under a plan approved by USACE. Each regional USACE has broad latitude to interpret federal rules and guidelines for effective program implementation. Compensatory mitigation plans are approved on a case-by-case basis and may include restoration components.

Compensation may be made in three ways: by payment to a private mitigation bank, by payment to an authorized "in-lieu-fee" (ILF) program, or by individual mitigation conducted by the permit holder. Private mitigation banks are institutions that have purchased aquatic resources to be restored or preserved and that use the money received from the sale of credits to fund the bank's restoration and preservation efforts. These restoration and preservation efforts are a form of compensatory mitigation. Under federal rules, private mitigation banks are the preferred method for undertaking compensatory mitigation. ILF programs, such as the program under the direction of the Kentucky Department of Fish and Wildlife Resources (KDFWR), receive money as compensation for loss of aquatic resources. Under ILF, the permittee is relieved of the duty to undertake any further compensatory mitigation, and the ILF program performs compensatory mitigation. The Section 404 permit holder also may pay for and undertake compensatory mitigation itself in conjunction with a plan approved by USACE.

In Kentucky, compensatory mitigation involves only aquatic resource preservation and restoration of the physical characteristics of water resources. Preservation involves purchasing un-degraded water resources and placing the resource under a permanent conservation easement. Restoration of physical characteristics includes activities such as bank stabilization and erosion control. It does not involve improving the chemical and biological characteristics of the water from pollutants and contaminants.

Prohibiting the use of compensatory mitigation funds to improve degraded waters has become more controversial over time. Several bills and resolutions have been introduced trying to redirect in-lieu-fee money in the state's Stream and Restoration fund, and two measures passed. 2005 Senate Bill 175 directed the Department of Natural Resources to produce a feasibility study in anticipation of state assumption of the Section 404 regulatory program. After the study was completed, Kentucky never petitioned to assume control of the 404 program. 2008 House Bill 717 authorized the creation of mitigation authorities that would use mitigation dollars for restoration of degraded waters. However, none of Kentucky's degraded or impaired waters has been cleaned up using Section 404 dollars as a result of either measure.

Discussion

The Louisville district of the United States Army Corps of Engineers has exclusive jurisdiction over and controls the compensatory mitigation process in Kentucky. USACE-Louisville may approve or reject any proposed mitigation plan. The General Assembly cannot prescribe how ILF money is used. According to a 2002 agreement between USACE-Louisville and KDFWR, an interagency has exclusive authority to determine how the money is spent. However, USACE-Louisville allows up to 25 percent of mitigation dollars to be paid to sewer plants and to alleviate straight-pipe problems in the county where the disturbance has occurred. This may be done as a part of permittee-responsible mitigation rather than ILF or private bank mitigation.

Proponents of allowing permittees to pay a portion of their mitigation requirement for alleviation of straight pipes and sewer improvements argue that there are fewer state and federal funds available. Allowing a portion of mitigation money to be used would assist counties that have insufficient funding resources. Proponents contend that this is one method of redirecting funds back to the counties where the disturbance occurred. Finally, there is increased hostility toward any federal action in programs that affect water quality. The Environmental Protection Agency increased its standard for the level of pollutants that affect water conductivity, which is one measure used to determine whether a water is considered un-degraded. This standard applies only in eastern Kentucky, and it is a result of increased federal scrutiny of mountaintop removal mining permits. As a result of the more restrictive conductivity standard for un-degraded waters, the concern is that there are fewer waters in eastern Kentucky that would qualify as un-degraded, forcing more money further away from the affected county.

Opponents argue that there is no possibility of improving degraded waters to an extent where there is true restoration of the stream's aquatic functions. Opponents argue that money is better spent trying to preserve good water rather than subsidizing the continued pollution of degraded waters. Second, more dollars paid in permittee-responsible mitigation may have the unintended effect of reducing money being paid to KDFWR's Stream and Restoration Fund. Finally,

opponents argue that there are no specific methods for translating the value of a dollar in mitigation to a credit of restoration when improving water quality via sewer system improvements. The money is better spent on programs where there is an established methodology that is reliable and effective for determining a restoration credit's value.

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Flame-retardant Chemicals

Prepared by Stefan Kasacavage

Should the General Assembly prohibit the sale of consumer products containing certain flame retardant chemicals?

Background

Polybrominated diphenylethers (PBDEs) are a class of flame retardant chemicals used in consumer products such as furniture foam, plastics for television cabinets, consumer electronics, wire insulation, back coatings for draperies and upholstery, and plastics for personal computers and small appliances. Although they have been used for years to slow the ignition rate and speed of fire growth in these products, there is growing evidence that PBDEs can accumulate in living tissue, which may lead to liver, thyroid, and neurodevelopment toxicities. Environmental monitoring has revealed traces of several PBDEs in human breast milk, fish, aquatic birds, and other places in the environment.

Two particular PBDEs, known as penta-BDE and octa-BDE, are no longer manufactured in the United States but may enter the country in imported products. Twelve states have banned using penta-BDE and octa-BDE in consumer products. A third major type of PBDE, deca-BDE, is not federally regulated, but several states, including Maine and Washington, have banned its use in furniture, mattresses, and electronic devices.

Discussion

Some consumer protection advocacy groups believe that the sale of consumer products containing PBDEs should be prohibited in Kentucky. They contend that scientific evidence shows that PBDEs persist in the environment long after the products containing them have been discarded and that their accumulation in living tissue could have serious health and developmental consequences. These groups believe that consumers are mostly unaware of the risks that these chemicals pose and that Kentucky should join the growing number of states and foreign countries banning PBDEs in consumer products.

Some manufacturers believe that the health risks associated with PBDE accumulation have not been established with sufficient certainty to justify banning them, especially given the public safety benefits associated with including these flame retardants in consumer products. They argue that penta-BDE and octa-BDE have already been phased out of production in the United States, which demonstrates that the market is capable of responding to these concerns without government intervention.

Coal Ash

Prepared by Stefan Kasacavage

Should the General Assembly establish more stringent requirements for the management of coal ash?

Background

Coal ash is produced at coal-fired power plants as a by-product of the coal combustion process. Being heavily reliant on coal to produce electricity, Kentucky produces a large volume of coal ash that is often mixed with water and stored in large coal ash impoundments near the combustion sites. There are currently 43 coal ash impoundments in Kentucky, according to the Kentucky Coal Association. Coal ash is not federally regulated because it is considered exempt waste under the federal Resource Conservation and Recovery Act. Coal ash may be regulated at the state level, but Kentucky regulations do not always require lining for coal ash impoundments or emergency action plans if an impoundment fails. For the first time, the United States Environmental Protection Agency is proposing to regulate coal ash as either special waste or nonhazardous waste. If it isconsidered special waste, the EPA would directly regulate coal ash. If it is considered nonhazardous waste, states would retain much of their regulatory authority over coal ash.

Discussion

Given the history of federal forbearance on the issue and the perceived likelihood that most future coal ash regulation will be left to the states, some environmental groups believe Kentucky should act now to more stringently regulate the management of coal ash. These groups argue that coal ash contains trace amounts of arsenic, lead, mercury, and selenium, which may seep from ash ponds and contaminate groundwater unless pond liners and increased environmental monitoring are required at all coal ash impoundments. They further argue that several of the coal ash impoundments in Kentucky are located near populated areas that would be in danger if the ponds were to fail. Therefore, emergency action plans should be required.

Electric utility companies and coal industry groups argue that passing stricter regulation of coal ash would be premature and likely counterproductive. They argue that Kentucky should wait until the EPA adopts a final rule with regard to the management of coal ash to see whether any further regulation is necessary. Even if the issue is left to the states, these groups argue that increased regulation of coal ash would likely increase the cost of burning coal, which would increase electricity rates and hamper future demand for coal. Additionally, overregulation could undermine the market for the beneficial reuse of coal ash in building and paving materials.

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Placement Agents in Public Pension Investments

Prepared by Brad Gross

Should the General Assembly prohibit or regulate placement agents in Kentucky public pension investments?

Background

Placement agents are hired by an investment firm, typically in the private equity sector, to market its products to institutional investors like public pension funds. While placement agents are paid not by the public pension funds but rather by the investment firms who employ them, their involvement in public fund investments has come under scrutiny in recent years. Most of the concern has grown from "pay to play" allegations arising in New York and California, where public pension officials have been accused of receiving compensation, gifts, or political contributions from placement agents in exchange for investing pension fund assets in firms the placement agents represented.

In Kentucky, concerns over the use of placement agents in public pension fund investments arose in 2010 after a Kentucky Retirement Systems (KRS)[1] internal audit determined $13 million in fees was paid to placement agents from 2004 to 2009 by investment firms doing business with the systems. Although the audit reported no evidence of wrongdoing on the part of the systems' board and staff, the board requested and received notification that a formal audit of the systems, including a review of placement agents, would be conducted by the Kentucky Auditor of Public Accounts in 2011.

In response to the systems' internal audit and issues involving placement agents in New York and California, the 2011 General Assembly considered but did not pass House Bill 480, a measure to ban placement agent involvement in Kentucky public pension plan investments. In June 2011, the Auditor of Public Accounts completed an audit of Kentucky Retirement Systems and a review of placement agents. As in the systems' internal audit, no pay-to-play issues were found between placement agents and the systems' board and employees. Furthermore, the Auditor noted that investment fees paid by KRS did not appear to be higher among investments where placement agents were used as compared to investments where marketing was done solely by the investment firm's internal staff. However, the Auditor found that the use of placement agents at KRS was not transparent and made several recommendations for improving the disclosure of placement agent involvement in plan investments. In regard to legislative action, the Auditor recommended the General Assembly consider requiring placement agents to register as executive branch lobbyists with the Executive Branch Ethics Commission to provide greater transparency and reporting for placement agents.

[1] Kentucky Retirement System (KRS) administers retirement benefits for state and local government employees through three separate retirement systems: the Kentucky Employees Retirement System, the County Employees Retirement System, and the State Police Retirement System.

Discussion

At the public pension fund level, some pension fund boards have established disclosure policies to identify and evaluate placement agent use, including state boards in California, New Mexico, North Carolina, Tennessee, Missouri, and Kentucky. The New York State Common Pension Fund has administratively banned the use of placement agents in the fund's investments. Pension funds for the city of New York initially banned placement agent use in fund investments but later eased this ban, allowing placement agents to be used if they provide additional value to the fund and they meet certain investment and disclosure requirements.

At the federal level, the Securities and Exchange Commission (SEC) chose to regulate placement agents in 2010 by banning payments from investment companies to placement agents who are not registered with the SEC and by limiting campaign contributions by investment firms and placement agents to elected officials who influence public pension plan investments.

Among state legislatures, legislation has been varied. Some states have introduced but have not passed legislation to ban placement agents, including Florida, New York, and Kentucky. The New York State Comptroller is seeking legislation to make permanent a ban on placement agents. Illinois enacted legislation to prohibit payments contingent on the outcome of an Illinois public pension investment decision. California banned payments contingent on pension investment decisions and required placement agents to register as executive branch lobbyists.

Opinions on the use of placement agents vary significantly. Proponents of banning or regulating the use of placement agents in public pension investments contend that placement agents create potential pay-to-play issues and increase the risk of higher investment fees and the selection of investments that may not be in the best interests of the systems. They contend that most public pension funds have sufficient internal staff and external investment consultants to identify alternative asset investment opportunities. Proponents also point to the allegations in New York and California as examples of why placement agents should be banned or regulated.

Opponents of banning or regulating placements in public pension funds contend that these third-party marketers serve a role by connecting pension funds with investment firms that are smaller or do not have in-house marketing staff. They contend that fees paid by investment firms that use placement agents are no different from those that do not and that banning or regulating them could potentially reduce pension fund investment returns by limiting access to good investments.

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County Judge/Executive and Fiscal Court in Counties With Merged Governments

Prepared by Kevin Devlin

Should the General Assembly propose a constitutional amendment to eliminate the offices of county judge/executive and other members of the fiscal court in counties where county and city governments have merged?

Background

The governments of Kentucky's two most populous counties have merged with city governments: the Lexington-Fayette Urban County Government and the Louisville Metro Government. The offices of county judge/executive and the fiscal court exist through Sections 99, 124, and 144 of the Kentucky Constitution.

The Fayette County judge/executive makes an annual salary of $8,000. Duties of the office include swearing in airport police, authorizing the sheriff's department to go out of state to pick up prisoners, appointing members of the board of assessment appeals, and appointing replacements when certain county offices are vacated. The Fayette County Fiscal Court is composed of the judge/executive and three commissioners. The commissioners are not compensated aside from a $50 annual payment to each commissioner. The fiscal court votes each year on a county road budget, which in 2011 totaled $1.45 million. The 2011 budget for the office of the Fayette County judge/executive is approximately $18,000, including the salary and benefits of the judge/executive, a telephone line, and the $150 paid to the three commissioners.

The Jefferson County judge/executive's responsibilities include serving on boards and commissions, such as the Kentucky Derby Festival and a community relations council. The Jefferson County judge/executive is not paid a salary, and the office has no budget. The Louisville Metro Government reports there is currently no compensation for members of its fiscal court, though if the position of Jefferson County judge/executive were eliminated, it would save $100 in bonding costs.

When a proposed amendment to the Kentucky Constitution is approved by the General Assembly, all county clerks in the Commonwealth are required to place it on the ballot for the next general election. Since any question would be an additional item on an already scheduled statewide election, the only increased election costs would relate to the programming needed for the voting machines. The vendor that provides electronic voting machines to 97 counties estimated it would cost an average of $300 to $400 per county to put the first proposed amendment to the Kentucky Constitution on the ballot and about $100 per county for each additional amendment. The Fayette and Jefferson County Clerks' offices estimated that adding proposed constitutional amendments or deleting local offices from the ballot would not result in major cost differences. One exception would be if a proposed constitutional amendment would cause Jefferson County to use a 16-inch paper ballot instead of a 14-inch paper ballot, which would add about $6,000 to the cost of administering the election.

Discussion

Proponents of a constitutional amendment to abolish the offices of county judge/executive and fiscal court contend that the offices are antiquated in counties where the city and county governments are merged, thus leaving those offices with few responsibilities. Any responsibilities remaining with the offices of county judge/executive and fiscal court in counties with merged governments could easily be transferred to the merged government. Furthermore, eliminating those offices could help taxpayers save money on the salary for the Fayette County judge/executive and other expenses. The current Fayette County judge/executive has stated he is in favor of elimination of the office.

Opponents of an amendment argue that amendments to the Kentucky Constitution should pertain only to issues that directly impact the quality of life of voters. Also, the cost of maintaining the offices of county judge/executive and fiscal court is minimal, and eliminating the offices would not result in any significant savings to taxpayers. The current Jefferson County judge/executive, even though he receives no salary and has no budget, has said that serving on boards and commissions and representing Jefferson County at statewide judge/executive meetings offer opportunities for public service.

Vehicle Escort Requirements for Farm Implements

Prepared by Dana Fugazzi

Should the General Assembly provide a limited exemption from vehicle escort requirements for farm implements used exclusively in a farm or agricultural operation?

Background

The Transportation Cabinet has the authority to restrict the transportation of overweight and overdimensional loads (KRS 189.270). Overweight and overdimensional (oversized) loads are those loads that exceed the basic height, width, length, and weight requirements for trucks, trailers, manufactured homes, and vehicles as set forth in KRS 189.221. 601 KAR 1:018 establishes the procedures and requirements for issuing overweight and overdimensional permits and also establishes safety requirements for overweight and overdimensional loads. Overdimensional farm implements, such as combines, are exempt from the requirement of obtaining an overdimensional permit but must follow safety requirements set forth in the regulation, such as displaying flags and warning signs and having escort vehicles accompany the overdimensional vehicle. The size of the vehicle and load determines the necessity of having a lead escort vehicle, a trail escort vehicle, or both.

Questions have arisen over the necessity of having escort vehicles for overweight and overdimensional farm implements that are traveling short distances. In addition, over the past several years, legislators have heard concerns from the farm community that Commercial Vehicle Enforcement is more aggressively targeting farm vehicles for enforcement, which has resulted in reduced enforcement on other types of commercial vehicle traffic.

Discussion

In August 2010, the Transportation Cabinet issued an emergency regulation to increase the requirements for farm implement escort vehicles. This proposed regulation added the requirements that pilot car escort vehicles have two or more top mounted flashing or rotating amber lights, have a top-mounted “oversize load” sign attached to the vehicle, and post identification signs or placards showing the name of the pilot car escort business and the state of business operation on both sides of the vehicles. The proposed regulation also allowed the cabinet to require additional pilot car escort vehicles, additional lighting and warning flags, and marked police escort vehicles due to safety considerations. The farm community opposed the increased requirements. After public input, the cabinet allowed the emergency regulation to expire.

Those opposed to the proposed increased requirements for escort vehicles are concerned that they are too burdensome for farmers moving farm implements from field to field. There are also questions as to the necessity of escort vehicles for the movement of farm implements because they are generally on the roadways for only short periods of time as they travel from field to field. According to statistics from the Kentucky State Police, there were 194 collisions involving

tractors and other farm equipment on Kentucky roadways in 2010, compared to 209,656 collisions involving passenger cars and 8,564 collisions involving trucks weighing greater than 6,000 pounds. Although public roadway crashes involving agricultural equipment are few when compared to all public roadway crashes, they are an important part of overall crashes involving agricultural populations. A 2004 publication by the Department of Health and Human Services on work-related roadway crashes reports that from 1992 through 2001, roadway crashes were the leading cause of occupational fatalities in the United States. The third highest fatality rates by industry were in agricultural, forestry, and fishing, with the frequency of fatal crashes at a rate of 2.58 per 100,000 full-time equivalent workers.

The cabinet is concerned about safety on the roadways during the movement of these overweight and overdimensional loads. Currently, farm implements narrower than 12 feet do not need an escort vehicle; anything wider than 12 feet requires an escort vehicle front and rear. A review of statutes from other states shows different approaches to agricultural equipment on the roadways, and there are no clear-cut universal standards for escort vehicles for farm vehicles. The General Assembly may consider legislation to exempt farm vehicles from certain vehicle escort requirements.

Certificates of Public Convenience and Necessity

Prepared by Brandon White

Should the General Assembly revise regulations to the passenger transportation industry?

Background

Passenger transportation carrier certificates are required for taxicabs, disabled persons vehicles, charter buses, limousines, contract carriers, and airport shuttles. The passenger transportation industry in Kentucky is governed by the provisions of KRS Chapter 281. In almost all instances, in order to enter into the passenger transportation business, one must have a certificate of public convenience and necessity issued by the Transportation Cabinet.

Entry into the passenger transportation industry can be a lengthy process. Persons wishing to start a passenger transportation company, such as limousine, taxicab, shuttle, or charter bus, must submit an application to the Transportation Cabinet. The Transportation Cabinet is required to set a date for a hearing to be conducted under the provisions of KRS Chapter 13B, for each application. Applicants for certificates of public convenience and necessity are required to prove that they are properly able to perform the service proposed, that there is a public need for the service, and that the existing transportation service is inadequate. The cabinet is also required to notify all known interested parties, including existing companies providing services. The notified parties then have 30 days to submit a written protest to the application. In accordance with 601 KAR 1:030, notified parties have the right to object. If no protest is filed, the application could be approved within 60-90 days. If there is a protest to the application, the process of approving or denying it can take more than a year.

Discussion

Government regulation of entry into the passenger transportation industry might restrict competition. Some have argued that government regulation may be necessary to correct market imperfections and to prevent an influx of independent operators. The Transportation Cabinet has indicated that the current process may create a barrier to those wishing to enter the passenger transportation industry.

In addition to the length of the application process, concern has been raised over the standards placed on applicants. Proponents of change oppose the burden of proof that exists to the applicant of a certificate of public convenience and necessity, citing problems that exist with the applicant having to prove that there is a public need for the applicant's business. To establish necessity, the applicant must prove that there is a substantial inadequacy in existing service due to deficiency of facilities, indifference, poor management, or disregard of the rights of consumers. The criteria for evaluating a public need is not explicitly stated in Kentucky statute or regulation. If existing carriers express a desire and willingness to render any additional service that the cabinet may find necessary, then no necessity for an additional carrier exists. The

existing carrier will be able to submit a new application and be given priority to expand service to meet the need identified by the Transportation Cabinet.

Kentucky Taxi and Limousine Application Data, 2009 and 2010
(Data Do Not Include Applications Pending)

	Filed	Protested		Granted		Denied		Denied on Merit		Denied Due To Failure To Proceed	
Taxi											
2009	59	22	37%	34	58%	25	42%	3	12%	22	88%
2010	46	16	35%	32	70%	13	28%	5	38%	8	62%
Limo											
2009	21	9	43%	12	57%	9	43%	0	0%	9	100%
2010	23	9	39%	13	57%	8	35%	2	25%	6	75%

Source: Transportation Cabinet.

Data on the dispositions of 2009 and 2010 applications for taxi and limousine services do not necessarily point to protests as a barrier to entry. Most of the denials (an average of 81.25 percent over the 2 years) were because of failure to proceed, meaning that the applicant gave up or failed to submit the proper papers in the required time. Only an average of 18.75 percent were denied on merit, meaning that the cabinet did not find the applicant fit to operate. This would suggest that the real issue is with the process, which commonly can take more than a year. The length of the process also drives up the costs to those applicants wishing to enter the passenger transportation industry in the form of legal fees in order to retain counsel throughout the process.

Concerns have also been raised by the industry pertaining to the protest process in the administrative application hearing process for certificates of public convenience and necessity. One concern is that the process is lengthy and cumbersome. Also, the strength of an application protest is not stated in Kentucky statute or regulation. Some members of industry would like the General Assembly to impose limitations or sanctions for perpetual protesters of applications for certificates of public convenience and necessity. It has also been suggested that the protest portion of the hearing process be eliminated and that the Transportation Cabinet alone determine whether a carrier is fit to operate.

Proponents of the current system have argued that the certificate of convenience and necessity process prevents flooding the market with an influx of independent operators. Flooding the market could reduce the quality and reliability of service to customers. Proponents argue that the current system provides stability to the market and protects consumers by assuring that there is ample supply to meet the demands of each market.

Kentucky has considered statutory changes to the passenger transportation industry in the past. In the 2000 Regular Session, Senate Bill 5 sought to deregulate taxis and limousines. The measure would have allowed an owner to be granted a license if the owner complied with financial,

safety, and insurance requirements. The measure did not pass. In the 2002 Regular Session, SB 189 was enacted and gave Louisville and Lexington the authority to regulate taxicabs, eliminating state involvement. Only Lexington has chosen to do so. There are four taxi companies currently operating in Lexington.

The most recent state to consider changes related to certificates of public convenience and necessity was Colorado. Legislation introduced in 2011 would have restructured the rules for issuing certificates of authority for taxicabs in certain jurisdictions. The measure sought to eliminate the protest portion of the certificate process and create service, safety, and financial standards for potential applicants to meet. It did not pass.

Motor Vehicle Title Applications

Prepared by Dana Fugazzi

Should the General Assembly eliminate the prohibition against requiring a Social Security number on a vehicle title application?

Background

KRS 186A.060 provides that an applicant for a motor vehicle title cannot be required to provide a Social Security number as part of the application process. The Transportation Cabinet had been accepting federal Individual Tax Identification Numbers (ITINs), in addition to Social Security numbers, for the titling process until their use was discontinued in July 2011. In making this change, the cabinet cited a federal prohibition against the use of ITINs for any reason other than the collection of federal income taxes. This policy change by the cabinet has affected several hundred people who do not have Social Security numbers and are attempting to transfer motor vehicles.

Prior to July 2011, people could register and title motor vehicles by providing their ITINs if they did not have Social Security numbers. The decision by the Transportation Cabinet to no longer allow the use of ITINs, in conjunction with KRS 186A.060 not requiring a Social Security number as part of the application process, has caused confusion as well as the rejection by the state of title applications that use ITINs. The Department of Revenue uses either the ITIN or a Social Security number to track purchasers of motor vehicles to ensure the statutorily required collection of motor vehicle usage taxes (KRS 138.460). Motor vehicle usage tax is levied at 6 percent and is a tax on the privilege of using a motor vehicle upon the public highways of Kentucky (KRS 138.455 and 138.460). Receipts from the motor vehicle usage tax go into the road fund.

Discussion

The Transportation Cabinet changed its policy regarding the acceptance of ITINs at the request of the Federal Bureau of Investigation and the Kentucky State Police. The Internal Revenue Service (IRS) does not subject ITIN applicants to the same document verification standards as Social Security number or visa or passport applicants. Proof of identity documents provided by ITIN applicants are accepted at face value without validating their authenticity, third parties may submit applications on behalf of others, and the applicant's legal presence in the United States is not verified because the ITINs are issued for tax filing purposes. The position of the IRS is that ITINs are for federal tax reporting only, are not intended to serve any other purpose, are not valid identification outside the tax system, and create potential security risks if ITINs are used for other purposes.

The cabinet accepts other proof of residency for motor vehicle registration such as being registered to vote in Kentucky, which can be verified through voter registration rolls, or possessing a Kentucky driver's license (601 KAR 9:130). However, with the discontinued use of

ITINs, the Department of Revenue needs some method to track purchasers of motor vehicles to ensure the collection of motor vehicle usage taxes. The tax is collected by the county clerk when the vehicle is transferred or when a vehicle is offered for registration for the first time in Kentucky and remitted to the Department of Revenue.

A motor vehicle cannot be registered without the payment of the usage tax, and the only way to track the usage tax is through either an ITIN or a Social Security number. Therefore, practically speaking, Social Security numbers are now required for the transfer of a motor vehicle despite the language of KRS 186A.060. The General Assembly may need to consider changes to KRS 186A.060 to eliminate confusion in the public's mind.

Licensure Requirements for Military Service Members

Prepared by Kris Shera

Should the General Assembly allow members of the Armed Forces leaving the military to transition from their military occupations to the civilian equivalent without going through typical state licensing procedures?

Background

Policies to remove typical licensure and certification requirements for military service members who are returning to civilian life are becoming more popular among policy makers to address unemployment among veterans. According to the US Bureau of Labor Statistics, the unemployment rate for post-9/11 veterans was 11.5 percent in 2010, compared to the national average of 9.4 percent for the same year.

The National Conference of State Legislatures Task Force on Military and Veterans Affairs noted that military service members who are leaving the military are generally unfamiliar with state licensing procedures that typically recognize licenses attained through private-sector experience and testing. In most cases, attaining a state license or certification requires the applicant to receive a degree or certification from an accredited educational institution. The Department of Defense has a training system in place that prepares service members for a variety of jobs that mirror private-sector occupations in fields such as construction, transportation, and ancillary health services. If military training is not recognized, veterans may find it difficult to transition to equivalent civilian occupations.

The department has developed websites to assist veterans with correlating civilian certifications and licenses with military occupations. The websites also help veterans understand the requirements to obtain licensure in the civilian equivalent of their military occupations. The department encourages states to review military occupations, training, and experience to see how they could apply toward obtaining a civilian license or certification. It remains the prerogative of the states to make such determinations.

Discussion

No state has adopted a policy that removes typical state licensure procedures for all military occupations. Some states focus on specific occupational fields and allow the licensure and certification boards to adopt methods for evaluating and accepting military training toward obtaining a license or certification. For example, Virginia requires its Boards of Medicine and Nursing to consider and possibly accept relevant military training and experience toward licensure in a variety of ancillary health professions. Utah allows its Department of Health to take into account military training and experience when certifying or licensing persons under its Emergency Medical Services System. Washington has also introduced similar legislation that affects both medical and nonmedical professions.

Proponents of legislation that would seek to remove typical state licensure requirements for military members leaving the military may argue that such policies should be adopted to honor military veterans and to mitigate high unemployment among veterans.

Opponents may argue that it could be difficult to adopt such a policy because military training standards may differ from state training standards. Other considerations that may arise are what military occupations this policy would apply to, how states might ensure that veterans are qualified and competent in their professions, and how administrative bodies might verify the level and quality of military training.

Veteran Designation on Driver's Licenses and Personal Identification Cards

Prepared by Tiffany Opii

Should the General Assembly add a veteran designation to Kentucky driver's licenses and personal identification cards?

Background

There is no official federal veteran identification card given to all veterans upon separation from the military. However, two groups of veterans may receive identification cards verifying their status: veterans who receive Veteran Affairs health care benefits and veterans who retire from a military career. But many veterans do not fall into either category. To prove their veteran status, most veterans must present either their Certificate of Release or Discharge from Active Duty, also referred to as the DD Form 214, or when accepted, a membership card to a veterans service organization. This can be cumbersome for veterans who wish to access veterans' discounts and benefits offered by businesses and organizations because the veterans must carry their DD Form 214 to prove their veteran status.

Some states have added a veteran's designation to state-issued driver's licenses and personal identification cards. About one-third of states, including Indiana, Ohio, and Tennessee, offer this option. Several other states have proposed legislation on the issue. States have made these designations by including a blue "V" on the front of the card, a veteran insignia or stamp on the front of the card, and a veteran insignia or stamp on the back of the card.

House Bill 147, introduced during the 2011 Regular Session, would have created a veteran designation on driver's licenses and personal identification cards. The bill allowed the Transportation Cabinet to manage the design of the veteran designation. The cost to the state for adding the veteran designation would have depended on style and formatting decisions made by the Transportation Cabinet. The bill did not pass.

Discussion

Proponents of designating veteran status on state driver's licenses and state identification cards may argue that it is a way to honor veterans. Proponents may also argue that this designation will make veterans' lives a little easier by allowing them to access veteran benefits and discounts without having to carry their DD Form 214 as proof of their veteran status.

Opponents of this designation may argue that it could cost the state money if the Transportation Cabinet has to create a new template to designate veteran status on the driver's license and personal identification card. Opponents may also argue that additional work could be placed on circuit clerks if they have to review documentation or paperwork to verify veteran status.