Issues Confronting the 2010 Kentucky General Assembly

Informational Bulletin No. 230

Legislative Research Commission
Frankfort, Kentucky

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Prepared by

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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 2010 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.

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Legislative Research Commission
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Agriculture

Should the General Assembly address the issue of horse abandonment?

Background

In the last 2 to 3 years, the state has experienced an increase in incidents of abandoned or unwanted horses. While there may exist no clear-cut statistical evidence documenting horses left abandoned, horse industry representatives, animal shelter officials, the State Veterinarian, and horse rescue operators verify incidents of horses being left abandoned. Abandonment can lead to animal cruelty charges, which are prosecuted under the state Penal Code.

People involved in the issue describe incidents of horses left to wander on farmland, given up at stockyards, found roaming within city limits, found on interstate highways, and spotted on former mining land. Horse owners also are leaving animals unclaimed at boarding facilities.

No group officially tracks the number of abandonments. But an official with the Kentucky Horse Council said it logged 15 abandonments in several counties from the summer of 2008 into 2009 and that those numbers probably do not account for the total number of horses running at large or abandoned (Rogers). Also, the director of a horse rescue center in central Kentucky reported receiving seven abandoned horses from five counties in 2009 (Neagle).

Citizens and local authorities who find themselves with an abandoned horse often do not know what to do, and facilities may not be readily available locally to confine the animals. It can cost $2,000-$3,000 a year to feed and care for a horse.

Respondents to a national survey conducted by the Unwanted Horse Coalition, a group under the American Horse Council, indicated that the most common reasons for the increase in abandoned horses are the downturn in the economy and the closing of the nation’s processing facilities. Other reasons noted are changing demands for breeds and the high cost of euthanasia.

The Kentucky Horse Council sponsors some initiatives, in cooperation with public and private interest groups, aimed at providing an equine safety net for private citizens and professionals. The initiatives include equine abuse investigation training, a geld voucher program, support of existing horse rescue facilities through grants and donations, and offering financial support for feeding horses and providing veterinarian care for horses confiscated by county officials.

The issue of abandoned horses is covered in KRS Chapter 259. KRS 259.120, last amended in 1966, outlines several steps the person who finds the animal, known as a "taker up," may follow in case a stray appears on his or her property. Those steps involve appearing before a justice of the peace who posts and places a value on the animal, filing a record with the county clerk, and publishing a notice. The statute sets out steps to follow in cases when the owner is known or when the owner is unknown. Under KRS 259.130, a horse becomes the property of a taker-up 2 years after the initial actions by the justice of the peace. For cattle, the period is 12 months.

Violations of KRS 259.110 to 259.140 are punishable by a $10 fine.

In addition, KRS 257.100 allows a peace officer to destroy an animal if it is abandoned, suffering, and not properly cared for, or if it is injured, diseased, or suffering beyond recovery. There is a verification process the peace officer must go through before the animal can be destroyed.

Under KRS 525.130, a person can be convicted of cruelty to animals in the second degree if, among other things, he or she "subjects any animal to or causes cruel or injurious mistreatment through abandonment." Anyone convicted of second degree cruelty to animals can face up to a year in jail and be fined up to $500.

During the 2009 Regular Session, the General Assembly considered two bills related to the issue: House Bill 331 and HB 418. HB 331, which was enacted, allows persons providing care to and maintenance of animals to elect to sell the animal to recover their costs in lieu of taking a lien against the animal. HB 418, which did not pass, would have updated sections of KRS Chapter 259 related to taking, holding, and selling stray equines. It also would have adjusted fees for holding stray equines.

Discussion

Those dealing with incidents of horse abandonment must rely on KRS Chapter 259 for guidance. The General Assembly may want to amend sections of the chapter to account for changes that have taken place in the last 40 years.

According to the American Veterinary Medical Association, most other state legislation on the issue has focused on urging Congress to oppose federal legislation that interferes with states' abilities to provide for equine slaughter. Most of these measures have been in the form of resolutions. Other state legislative efforts are similar, by authorizing investor-owned equine slaughter or processing facilities in states. The opinion of some is that the slaughter issue has become intertwined with the issue of abandoned, neglected, or abused horses because there are no slaughter facilities currently available in the United States. Horses bound for slaughter must be shipped to Mexico or Canada.

Under a newly enacted Montana law, a horse owner can surrender ownership of a horse to that state's Department of Livestock at a licensed livestock market if the owner is unable to provide food and water to sustain the animal's health (MCA 81-10-101 to 104). In 2009, Oregon added horses to its animal abandonment law (ORS 167.310 and ORS 167.340). In California, CA Penal 597.2 sets out requirements for agencies to deal with abandoned equines, including sale or adoption. Most states, including Kentucky, include abandonment as an offense in animal cruelty or animal abuse statutes.

A final note is that horse abandonment could become less of a problem as the economy recovers, given that the top reason for the problem is the downturn of the economy.

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Appropriations and Revenue

Should the General Assembly adopt combined reporting for determining taxable corporate income?

Background

As part of its tax code, Kentucky imposes an income tax on corporations (KRS 141.040). One important determination that must be made in taxing corporations is how income from related corporations should be reported to and taxed by Kentucky.

Among states, the three generally accepted methodologies used to determine which corporations should report income within a single return are

- a separate return filed by each corporation;
- a consolidated return filed by a group of corporations in which the members of the group are included based solely upon ownership; and
- a combined return filed by a group of corporations in which the members of the group are included based on how the corporations relate to one another functionally.

A separate return presents the most options to avoid tax, while a combined return has the least. The combined reporting methodology is supported by several U.S. Supreme Court decisions as an appropriate measurement of in-state income and a as means of protection against tax-avoidance strategies (*Container*).

When determining which corporations should be included in a combined report, one must consider the ownership relation among corporations, as well as the other functional relationships between the corporations. These relationships may include a common management team; consolidated administrative functions such as accounting, legal, or payroll; and other circumstances that create a flow of value between the corporations. When the transactions among the corporations create a value as a whole that is more than the value of the separate entities, they are commonly called a unitary business. It is this group of corporations that would be included in a combined report.

Prior to 1996, the Kentucky Revised Statutes did not explicitly allow or deny combined reporting. Combined reports were allowed or denied based on policy directives from the Revenue Cabinet. In 1988, the Revenue Cabinet issued a policy statement disallowing the use of combined reporting. This action prompted litigation. In 1994, the Kentucky Supreme Court decided in *GTE v. Revenue Cabinet* to permit unitary businesses to resume the practice of filing combined reports (Ky., 889 S.W.2d 788). The General

Assembly followed by expressly disallowing a combined report using the unitary business concept (KRS 141.200(15)) and allowing related corporations with appropriate ownership structures to elect to file a consolidated return (KRS 141.200(2)-(7)).

In 2002, the findings from a Kentucky tax study reported that:

> Voluntary consolidated reporting expands the tax avoidance options available for businesses, and reduces Kentucky's ability to collect corporate taxes…Related companies can be expected to combine their activities for tax purposes when the combination will reduce their tax burden and to file separate returns when it does not (Fox).

The 2002 report recommended that Kentucky move to combined reporting, or at a minimum, require consolidated reporting instead of allowing it to be voluntary (Fox).

In 2005, as part of a broader tax reform initiative, the Kentucky General Assembly enacted several corporate tax provisions intended to close corporate tax loopholes. Many of the loopholes existed because Kentucky's corporate filing method allowed corporations to engage in tax-saving strategies through income shifting and corporate restructuring. Beginning in 2005, a consolidated income tax return is required from commonly owned corporations doing business in the Commonwealth with at least an 80 percent ownership interest (KRS 141.200(9)-(14)).

In 2006, the Multistate Tax Commission adopted a proposed model statute for combined reporting and defined a "unitary business."[1] The model statute provides uniform language for any state wishing to adopt this corporate tax provision. Kentucky has not adopted these provisions.

In 2007, the General Assembly took action in House Bill 258 to address a loophole in the corporation tax structure that allowed Kentucky income to be shifted from a corporation doing business within the Commonwealth to a real estate investment trust (REIT) related through ownership. Other states have realized that legislation targeted at specific tax avoidance techniques such as the

[1] The Multistate Tax Commission is an intergovernmental state tax agency working on behalf of states and taxpayers to administer, equitably and efficiently, tax laws that apply to multistate and multinational enterprises. The organization is created by the Multistate Tax Compact that states may adopt within their respective statutes. The commission was created in 1967 as an effort by states to protect their tax authority in the face of previous proposals to transfer the writing of key features of state tax laws from the state legislature.

REIT transaction does little to deter large multistate companies from seeking other income shifting avenues (Gardner).

Discussion

Today, 23 of the 45 states that impose corporation income and similar business taxes have implemented combined reporting, including 7 since 2004. In 2004, Vermont became the first state in more than 20 years to adopt combined reporting. Texas, West Virginia, New York, Michigan, Massachusetts, and Wisconsin have subsequently adopted combined reporting. At least 11 other states are considering the measure as a means to prohibit corporate income-tax-avoidance strategies (Mazerov).

Some economists voice support for combined reporting. In states without a combined reporting requirement, large multistate corporations with complex organizational structures may construct transactions that automatically reduce the amount of tax they pay (McLure).

Legal experts note that combined reporting is a neutral accounting system that neither favors nor penalizes the taxpayer or the state. In some cases, a group of corporations would pay more tax; while in other cases, a group of corporations would pay less tax. They note that combined reporting, if enacted, must be enacted as a mandatory provision (McIntyre).

The Institute on Taxation and Economic Policy has released a primer on this issue. Its position is that combined reporting ensures that all profitable corporations pay their fair share of tax for the public services they use. Combined reporting also creates a level playing field between multistate corporations and locally based companies that cannot avail themselves of sophisticated tax avoidance schemes.

Many tax practitioners believe that the most difficult part of combined reporting is the initial step of determining which business entities belong in the report and which do not. This determination involves a case-by-case analysis based on facts and circumstances of the group evaluated for the combined report. As a result, the Department of Revenue has noted that there will be additional administrative burdens placed upon its compliance staff to determine the correct composition of business entities included in the combined report.

Some argue that moving to combined reporting will lead to increased litigation.

While Kentucky data are not available to determine the number of business entities that would be impacted, it is generally accepted that those most affected will be large multistate corporate groups with diverse organizational structures. Recent studies in Iowa, Maryland, Massachusetts, and Wisconsin have projected a 10 percent to 20 percent increase in tax revenue from combined reporting (Massachusetts). For fiscal year 2009, Kentucky collected approximately $268 million in corporate income tax. Using the estimated percentages for FY 2009 corporate data, Kentucky might expect increased revenue of $27 million to $54 million at full implementation and with full compliance.

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Should the General Assembly examine the limitations established by House Bill 44 relating to property taxes imposed by cities, counties, and special taxing districts?

Background

House Bill 44, enacted during the 1979 Special Session, generally limits to 4 percent per year the overall revenue growth from the tax that may be levied on real property by any local taxing jurisdiction without the possibility of a voter recall, exclusive of new property. The purpose of HB 44 was to respond to high inflation rates that were causing property values to increase quickly, which dramatically increased property taxes paid by some property owners. The bill established specific revenue benchmarks at which a requirement for a public hearing and the possibility of voter recall would be triggered.[1]

Property taxes (ad valorem taxes) are an important revenue source for Kentucky's local governments, generally comprising between 30 percent and 100 percent of local tax revenue. The Kentucky Constitution requires that all property, both real and personal, be subject to the ad valorem tax unless exempted by the Constitution or statute.[2] Section 171 of the Constitution provides that the General Assembly may divide property into classes and may determine which classes are subject to local taxation. The General Assembly has addressed the classification, taxation, and exemption of personal property for local tax purposes in KRS 132.200.

Section 157 of the Constitution establishes maximum property tax rates for local governments ranging from 50 cents per $100 of assessed value for counties to $1.50 per $100 in assessed value for cities with more than 15,000 in population. Taxes imposed by a special taxing district, such as a water or fire district, within a county are not considered to be taxes levied by the county and are not included in determining whether a county is levying a rate above the constitutionally permitted maximum rate (*Boggs v. Reep*).[3]

The constitutional rate limitations described above are the only mandatory limits placed on local governments with regard to

[1] School districts are not included in this discussion because there are other complications and interactions relating to school districts that are beyond the scope of this paper.
[2] "Real property" includes all lands within this state and improvements thereon (KRS 132.010(2)). "Personal property" includes every species and character of property, tangible and intangible, other than real property (KRS 132.010(4)). "Intangible personal property" means stocks, mutual funds, money market funds, bonds, loans, notes, mortgages, accounts receivable, land contracts, cash, credits, patents, trademarks, copyrights, tobacco base, allotments, annuities, deferred compensation, retirement plans, and any other type of personal property that is not tangible personal property (KRS 132.010(22)).
[3] Most special taxing districts are only authorized to levy property taxes. Cities and counties may also levy occupational taxes, license taxes, and insurance premium taxes.

establishing tax rates; it is widely perceived, however, that the public disclosure and recall provisions of HB 44 have also constrained the revenue raising abilities of local governments.

Tax Rate Calculations Under House Bill 44

Compensating Rate

The compensating rate is the first rate calculated under HB 44. Calculation of the compensating rate requires two separate calculations. The first calculation determines the rate that, when applied to the current year real property assessment, excluding new property, produces the same amount of revenue as was produced in the prior year from real property.[4] The second calculation requires that the rate determined under the first calculation be applied to the entire current year assessment base of all classes of taxable property. If the rate would produce less revenue than was produced from all classes of taxable property in the prior year, the compensating rate is adjusted upward (KRS 132.010(6)). The adjustment in the rate is designed to compensate for a substantial loss in the tangible personal property tax base.

Local governments levying the compensating rate are required to advertise the rates but are not required to hold a public hearing.

4 Percent Rate

The 4 percent rate is the second calculated rate. This is the rate that will produce revenue from real property, not including new property, that is 4 percent over the revenue produced by the compensating rate.

A local government that wants to levy a rate that exceeds the compensating tax rate must hold a public hearing. Any portion of a proposed levy that will produce revenue that exceeds revenue produced by the compensating rate by more than 4 percent is subject to recall by the voters in the jurisdiction. A voter recall is initiated by petition proceedings by at least five qualified voters who reside in the area where the proposed tax will be imposed. The general requirements for a petition are set forth in KRS 132.017.

Tangible Personal Property Rate

After the passage of HB 44, some argued that the rate- setting process did not adequately account for reductions in the tangible

[4] In calculating the compensating rate, the rate determined is rounded to the next higher one-tenth of 1 cent per $100 of assessed value. “New property” is defined as the net difference in taxable value between real property additions and deletions to the property tax roll for the current year (KRS 132.010(8)).

personal property tax base because the rate calculation was determined based on changes to the real property tax base.

To address this issue, the 1982 General Assembly enacted legislation that allows a local taxing jurisdiction to increase the rate imposed on tangible personal property in any year in which the real property tax rate levied, when applied to the tangible personal property base, will produce a percentage increase in revenue from tangible personal property that is less than the percentage increase in revenue from real property. The rate that may be levied is that which will produce the same percentage increase in revenue from tangible personal property as from real property. A rate increase imposed under these circumstances is not subject to public hearing or recall. In the same legislation, the General Assembly allowed for a "catch up" for taxing jurisdictions that had lost money from levying an insufficient rate on tangible personal property after passage of HB 44.

Discussion

There have been discussions about whether HB 44's provisions should be amended. Some argue that the 4 percent level at which the possibility of a recall is triggered should be deleted, increased, or indexed to allow local jurisdictions to raise revenue at a level commensurate with changes in the cost of living. Others note that the 4 percent limitation establishes a level at which public input is required and should not be viewed as a barrier to jurisdictions raising the amount of revenue necessary to meet expenditures. Another issue with the rate calculation process is that the combination of the adjustment that can be made to the compensating rate for real property to account for a reduction in the tangible property tax base, and the adjustments that can be made to the tangible personal property rate to ensure that that percentage increase is consistent with the percentage increase from real property sometimes can allow rates in excess of what is commonly thought of as the compensating rate without a public hearing or the possibility of recall.

This has become an issue this year because for the first time in many years, several taxing jurisdictions have experienced a reduction in the tangible personal property assessment base and in new property. In addition, many of the same jurisdictions have, over the years, levied higher rates against tangible personal property as allowed by statute. This has created a large difference between the real and tangible personal property tax rates.[5]

[5] Statutes allowing the adjustment are KRS 68.248 for counties, KRS 132.024 for special districts, and KRS 132.029 for cities and urban-county governments.

The reduction in the tangible personal property tax base and in the amount of new property, combined with the large differences in rates, makes it more likely that the compensating rate will be adjusted upward for the current year under the second compensating rate calculation so that the compensating rate imposed will generate as much revenue from the entire taxable base as was generated the prior year from the entire taxable base.

This combination of factors also make it more likely that the personal property rate will be adjusted upward to ensure that the percentage increase from personal property matches the percentage increase from real property. These rate adjustments occur automatically and also result in an increase in the rate that may be levied under the 4 percent benchmark, increasing the potential revenue that could be generated by a local jurisdiction without being subject to recall.

When a jurisdiction begins using the higher compensating rate and higher tangible personal property rates, it will likely continue to do so in each year following because each time the jurisdiction is permitted to increase the tangible personal property tax rate to match the real property rate percentage increase, the disparity between the real property rate and tangible personal property rate grows, which makes it more likely that the next year, both the higher compensating rate calculation and the increased tangible personal property tax calculation will be triggered. This often creates a cycle in which the rates calculated will always be higher.

Rate Calculation Example

Assume that local jurisdiction X had the following real property tax base for 2008 and 2009. Note that the tangible personal property base has decreased by $50,000 between the 2 years but that everything else remains the same. This could happen if a local business had a substantial decrease in inventory and equipment from one year to the next.

	2008	**2009**	**Rate imposed in 2008**
Real property base	$750,000	$750,000	$0.15 per $100
Tangible personal property base	$250,000	$200,000	$0.15 per $100
Total base	$1,000,000	$950,000	NA

Compensating Rate Calculation
Assume that there is no new property.

Part I—The rate in 2009 would be the same as the rate imposed in 2008 ($0.15 per $100) because the real property tax base has not changed.

Part II—The second calculation takes into account the reduction in the tangible personal property tax base. As is illustrated below, because of the $50,000 reduction in the tangible personal property tax base, jurisdiction X may impose a compensating rate in 2009 of $0.16 per $100 rather than $0.15 per $100.[6]

Compensating Rate: **Description of calculations to be made**	**Calculations**
First, determine the revenues expected to be generated in 2009 using the rate calculated under Part I ($0.15) when applied to the entire 2009 base of $950,000	$950,000/100 x .15 = $1,425 total 2009 base/100 x 2009 Part I rate
Second, calculate the total revenues generated from the entire base in 2008 of $1,000,000	$1,000,000/100 x .15 = $1,500 total 2008 base/100 x 2008 rate imposed –
Finally, determine the rate for 2009 that will result in the same amount of revenues that were generated in 2008	$1,500/$950,000 = $0.1579 rounded to $0.16 per $100 2008 revenues/2009 base = rate that may be imposed to generate same revenues as prior year

[6] Note that the rate increase is actually greater than the calculations produce because of the requirement that the rate be rounded up. Note also that the permissible four percent rate would also increase because it is calculated based on the compensating rate.

Tangible Personal Property Rate Calculation

Tangible Personal Property Rate: Description of the calculations to be made	Calculations
Determine the percentage increase in real property revenues resulting from the compensating rate established above. This calculation involves three steps: 1) Determine the anticipated revenues from real property in 2009; 2) Determine the real property revenues based on the real property base and rate in 2008; and 3) Determine the percentage difference between the two	1) $750,000/100 x .16 = $1,200 real property base in 2009/100 x comp rate for 2009 = anticipated real property revenues in 2009 2) $750,000/100 x .15 = $1,125 real property base in 2008/100 x rate imposed in 2008 = 2008 revenues $1,200 - $1,125 = $75 (projected revenue increase) 3) $75/$1,125 = 6.67% increase Projected revenue increase/2008 revenues = % increase
Determine what rate may be levied against tangible personal property to produce the same percentage increase as the increase in the real property revenues: 1) Determine the revenues from tangible personal property in 2009 if the compensating rate were imposed against the 2009 tangible personal property tax base 2) Determine the revenues generated from tangible personal property using the base and actual rate imposed in 2008 3) Determine the percentage difference between the two	1) $200,000/100 x .16 = $320 Tangible personal property base in 2009/100 x comp rate for 2009 2) $250,000/100 x .15 = $375 Tangible personal property base in 2008/100 x rate imposed against tangible personal property in 2008 3) $320- $375 = -$55 Difference in revenues between 2008 and 2009 -$55/$375 = -14.7% Projected revenue loss/2008 revenues = % loss $375 x 1.0667 = $400 2008 revenues x percentage increase in real property = permitted revenue from tangible personal property ($400/$200,000) x 100 = $0.20 per $100 Permitted revenue from tangible personal property divided by tangible personal property base x 100 = rate that may be levied against tangible personal property without hearing or recall

In this example, because the reduction in the tangible personal property tax base was fairly large (20 percent of the value of the base: $50,000 is 20 percent of $250,000), the adjustment that could have been made to the tangible personal property tax rate was significant. The rate could have been increased from the 2008 rate of $0.15 per $100 to $0.20 per $100 without any public hearing or possibility of recall.

Proponents for changing the property tax provisions argue that the current system allows a local taxing jurisdiction to circumvent the public input portion of HB 44 by allowing rates to be levied that are beyond what is traditionally thought of as the compensating rate without a public hearing, and in some cases, beyond the 4 percent rate without the possibility of a recall. Those favoring the existing system argue that local jurisdictions need to be able to raise sufficient revenues to meet their funding needs and that amending the taxing provisions will further hamper the ability of local governments to raise sufficient revenues.

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Banking and Insurance

Should the General Assembly increase the mandated health insurance coverage for the diagnosis and treatment of autism spectrum disorders?

Background

About 1 out of every 150 children in the United States suffers from an autism spectrum disorder (United States). Specific conditions that are contained within the spectrum include autism, Asperger Syndrome, and pervasive developmental disorder-not otherwise specified (Kentucky 2).

Kentucky requires that all health benefit plans provide coverage for autism spectrum disorders (ASDs), including therapeutic, respite, and rehabilitative care, for children ages 2 through 21 (KRS 304.17A-143). The maximum benefit is $500 per month or $6,000 per year. The primary method of treatment, Applied Behavior Analysis, is not specifically addressed by this statutory mandate.

From 1992 to 2003, Kentucky saw a 3,295 percent increase in the number of diagnoses of ASDs. This increase represents an average annual growth rate of 37 percent (Hollenbeck 1). The causes of the condition itself and of this increase are not known.

It has been estimated that lifetime costs for treatment of ASDs can be between $3.5 million and $5 million (Autism Society. *About*). However, research indicates that early detection and treatment can reduce these lifetime costs by as much as two thirds (Autism Society. *What*).

Discussion

During the 2009 Regular Session, the Kentucky General Assembly considered a number of bills relating to autism spectrum disorders. Senate Bills 54 and 74 and House Bill 190 proposed increasing the limits for ASD treatment and diagnosis to levels equal to those for any other medical services provided by a state-licensed health plan. The provisions also would have applied to adults as well as children covered under the plan. None of the proposals passed.

Recently, various legislatures across the United States, including Indiana and Pennsylvania, have enacted legislation that has created or increased mandated health insurance coverage for the diagnosis and treatment of ASDs. Some of these mandates include coverage for all individuals regardless of age. The dollar limits contained in these pieces of legislation generally range from $25,000 to $36,000 per year, but some have no limits on the mandated coverage (Indiana Code 27-8-14.2-4; Pennsylvania Statutes Title 40 Section 764h).

Proponents of an increase in the amount of required coverage cite the individual costs as a primary factor in their position. With lifetime costs being as much as $5 million, proponents state that without insurance coverage, effective treatment is simply not affordable. Proponents also contend that increasing required coverage would not significantly increase monthly premiums (Kaiser. *Parents*). The Kentucky Department of Insurance estimated that the proposed legislation to expand mandated coverage would increase the premium for group policies between $1.52 and 1.91 per subscriber per month (Commonwealth).

Proponents also argue that being uninsured or partially uninsured causes some families to file bankruptcy. It has been estimated that three-quarters of people who file for bankruptcy as a result of medical problems actually had insurance, but the insurer did not cover the costs of the necessary treatment (Kaiser. *Underinsured*).

Those who disagree with any increased mandate also cite costs. They argue that the increased costs associated with an increased mandate will be passed on to the consumer. They cite research that estimates a possible 2.31 percent increase in premiums as a result of any increased mandate relating to ASDs (Bouder 1). Questions also arise as to how families can afford an increase when they are struggling to pay for their current coverage (MSNBC).

Opponents also challenge the veracity of the documented increase in the diagnoses of ASDs. Milder forms of ASDs including Asperger Syndrome have only recently come to light and have led to more diagnoses. The diagnostic criteria for these conditions results in individuals who are now diagnosed with ASDs but would not have been in the past (Jacobson).

Opponents also argue that much of the treatment for autism is actually educational in nature, as opposed to medical, and should be a part of the educational curriculum provided by schools (Kaiser. *Autism*).

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Should the General Assembly modify the regulation of the deferred deposit transaction industry?

Background

Deferred deposit transactions, commonly referred to as payday loans or cash advances, are "small dollar, short-term, unsecured loans that borrowers promise to repay out of their next paycheck or regular source of income payment" (Federal. FYI). A deferred deposit transaction requires the borrower to present a post-dated check to the lender for the amount of the loan. The borrower in return receives cash in the amount of the loan, less the fee charged by the lender. The lender defers depositing the check for an agreed upon period of time. When the loan is due, the borrower may pay the lender directly with cash, or the lender may deposit the check.

Generally, payday lenders provide small loans to the "underbanked," people who have bank accounts but lack funds for the short term if they encounter unexpected expenses or they fail to budget appropriately to make it to the next payday.

Deferred deposit businesses began operating in Kentucky under the umbrella of the 1992 state check-cashing legislation enacted as KRS 368.010 to 386.990. In 1997, a federal court held in *Hamilton v. York* that a Kentucky deferred deposit business was charging interest on short-term loans in violation of the state's usury statute, finding that the loans were an extension of credit and not check cashing. In 1998, the General Assembly amended the check-cashing legislation to include a licensure requirement for deferred deposit businesses. The 1998 legislation required written agreements between the deferred deposit business and the customer, placed a cap on the amount of the fees, banned "roll-over" transactions, and limited the maximum amount of the transaction and the length of time the transaction could be outstanding.

The provisions of the check-cashing and deferred deposit statutes are currently contained in Subtitle 9 of KRS Chapter 286 that authorizes licensed deferred deposit businesses to charge a service fee not to exceed $15 per $100 borrowed. The service fee is for a period of 14 days. Borrowers may obtain one loan not to exceed $500 at any one time, and rollovers are prohibited. The deferred deposit transaction statutes were amended in 2009, effective July 1, 2010, by House Bill 444 to expand regulation of the deferred deposit by

- increasing the number of outstanding transactions allowed for an individual from one to two, not to exceed a total of $500 for both transactions;
- requiring compliance with applicable federal currency laws and enhanced reporting requirements;
- authorizing the Office of Financial Institutions to establish a database for entry of transactions by deferred deposit businesses on the date of the transaction; and
- requiring that the loan term be for a period of **at least** 14 days, rather than a period of 14 days.

The legislation also provides for a 10-year moratorium on licensure of new businesses after July 1, 2009. A review by staff of the Kentucky Office of Financial Institutions annual reports found that the number of licensed payday locations in Kentucky increased from 214 in 1998 to 754 currently.

The National Conference of State Legislatures and the Consumer Federation of America periodically report on the status of payday lending laws in the 50 states and the District of Columbia. Table 1 is a staff compilation of the reports' findings.

Table 1
Payday Lending Laws

36% or less max APR (6 states and D.C.)	**$15 - $20 per $100 loan (391% - 520% APR based on 14-day term) (8 states)**	**10% - 20% of the face amount of the loan (240% - 480% APR based on 14-day term) (16 states)**	**Maxi loan amount of $500 - $1,000 but no max fee or interest. (6 states)**	**No max amount or max fee or interest, subject to parties' agreement (1 state)**	**No specific payday lending statutory authorization, usury laws prohibit payday lending (2 states)**	**Payday lending prohibited by statute or usury law (9 states)**
D.C.	Alabama	Arizona	Delaware	Missouri **	Maine	Connecticut
Montana	Alaska	Arkansas	Idaho	Wisconsin	Utah	Georgia
Nevada	Hawaii	California	Missouri**			Massachusetts
New Hampshire	Iowa	Colorado	Indiana			New Jersey
Ohio	Illinois	Florida	South Dakota			New York
Oregon	Kansas	Louisiana	Tennessee			North Carolina
Virginia	Kentucky	Mississippi				Pennsylvania
	Nebraska	Michigan				Vermont
		Minnesota				West Virginia
		North Dakota				
		New Mexico				
		Oklahoma				
		Rhode Island				
		South Carolina				
		Washington				
		Wyoming				

Notes: Texas is not included in the chart due to the complexity of its regulatory scheme. **Missouri has a $500 loan maximum at rates agreed to by the parties, not to exceed 75% of the total loan amount (MRS, Sections 408.500 to 408.50).
Source: Staff compilation of National Conference of State Legislatures and the Consumer Federation of America. Small Dollar.

The Arkansas Attorney General sent letters in March 2008 to payday lenders in the state "demanding that they stop making high-interest short term loans in violation of the Arkansas Deceptive Trade Practices Act and the Arkansas Constitution, which prohibits usury." As of January 1, 2009, the Attorney General reported "that almost all of these stores are now closed or in the process of closing" (State of Arkansas 19).

In addition to state regulation, the Department of Defense capped the interest rate on payday loans to military members and their immediate family members at 36 percent APR (32 CFR 232). Currently, legislation is pending in Congress to amend the Truth in Lending Act to establish a minimum repayment term and a maximum annual percentage rate for consumer loans but that does not preempt state legislation (Payday).

Discussion

On its face, a $15 fee per $100 borrowed appears to be interest in the amount of 15 percent. However, because of the 14 day loan term, a new loan can be obtained 26 times per year, which results in an annual percentage rate of 391 percent. Reportedly, most borrowers are unable to repay the loan with their next paycheck. As a result, borrowers often take out a new loan before their next paycheck, resulting in an additional fee (Federal. FYI). Several sources report that 87 percent of new loans are opened within 2 weeks or before the borrower's next payday, indicating they are unable to repay the original or previous loan and sustain the cost of living expenses without taking out a new loan (Parrish; Huckstep). This common practice is referred to as "rollover" Making multiple rollovers, referred to as "churning," results in an annual percentage rate of 391 percent in Kentucky. Nationwide, churning accounts for 76 percent of the deferred deposit total loan volume (Parrish).

States can regulate maximum fees, loan amounts, rollover, loan term, and legal recourse for defaults (Flannery). Opponents of payday lending argue that a 36 percent interest rate cap is the only method of reform that will have an impact on payday lending (Parrish; Center) The reported rollover of debt suggests that amortization of the debt over several pay periods would address the issue of the "cycle of debt" (Flannery).

Proponents of payday lending contend that the industry is regulated in most states and provides an alternative for a borrower who needs a small, short-term loan. Payday lenders argue that their loans do not generate large profits for the industry (Huckstep). Payday lenders say they have higher operating costs compared to other lenders because of the high default rates and the high cost of doing business (Flannery). In addition, payday lenders compare a $15 fee for a $100 loan at 391 percent APR with merchant fees for nonsufficient funds and late fees for credit cards, citing interest rates ranging from 965 percent to 1,409 percent (Community).

There are also alternative methods of providing small, short term loans up to $1,000. In an effort to reach the unbanked population, the Federal Deposit Insurance Corporation is currently conducting a 2-year pilot program for banks to provide small loans up to $1,000 to borrowers, even if they have poor credit (Small). Thirty-one banks in 15 states are enrolled in the project, including two banks in Kentucky—Citizens Union Bank in Shelbyville and Kentucky Bank in Paris. The Shelbyville bank is offering small loans at 18 percent annual percentage rate with no closing costs or other fees. It also provides the required education component of the program and requires each borrower to deposit 5 percent of the loan amount into a savings plan. Additionally, credit union loans and credit counseling are possible alternatives to payday loans. Credit unions across the country have launched small loan programs with more affordable rates for their members (Bankrate).

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Should the General Assembly increase the regulation of health discount plans?

Background

With the increasing cost of health insurance and many employees losing employer-sponsored health insurance coverage, many consumers are seeking to obtain more affordable health coverage. In recent years, a growing number of commercial companies have begun to aggressively market a product referred to as a "health discount plan." A health discount plan is any card, program, device, or mechanism that is not insurance that purports to offer discounts or access to discounts for health care services, doctor visits, and prescription medications (KRS 367.828). Health discount plans are often advertised through unsolicited faxes, spam e-mails, Internet pop-ups, or signs posted on telephone poles. With the increasing presence of the health discount plan product, it is becoming ever more important for purchasers to be aware of the difference between health insurance and health discount plans, and to be able to distinguish between legitimate and fraudulent health discount plans (National Association).

State regulation of health discount plans varies considerably. Presently, 25 states, including Kentucky, have enacted statutes that provide for a broad spectrum of regulation (National Conference). In general, these laws include such features as

- Requiring plans to have individual signed contracts with health providers before listing them as a participant in the plan;
- Regulating or restricting the types of claims that can be made in ads, oftentimes requiring the statement that the plan is "not insurance";

- Requiring a right of rescission guarantee, allowing consumers to cancel their enrollment and receive a refund of fees paid within a certain time period;
- Granting regulatory and enforcement authority to a state agency such as the Department of Insurance or the Attorney General's Office; and
- Requiring registration, proof, or reporting of financial stability and annual payment to the state for the privilege of operating a health discount plan.

An additional six states have nonstatutory requirements, primarily relating to consumer alert notices and disclosures (National Conference).

Discussion

Issues surrounding health discount plans include the following: lack of consumer education; confusing and misleading product descriptions; unauthorized billing; inadequacies in plan administration; and lack of accountability to state agencies (Maryland, 14-18).

Under current Kentucky law, a health discount plan cannot be sold, marketed, promoted, or distributed within the state unless the plan meets specific requirements. Those requirements include clearly stating in bold and prominent type on all cards or purchasing devices, as well as on all promotional and advertising materials that the discount plan is not insurance. Further, all discounts offered by the plan must be authorized by an individual and separate contract with each health care provider listed by the plan. Additionally, the discounts or range of discounts advertised or offered by the plan must be clearly and conspicuously disclosed to the consumer. Exempted from these requirements, however, are retailers who issue discount cards for use in their own facilities, as well as discount cards administered by health insurers authorized to transact the business of insurance in Kentucky. The Office of the Attorney General currently has authority over the plans through the use of Kentucky's consumer protection statutes, which have broad investigatory and enforcement powers (KRS 367.170 and KRS 367.190 to 367.300). In an effort to promote consumer education of the plans, the Kentucky Department of Insurance has published a consumer alert outlining cautionary measures consumers should take when considering the purchase of a health discount plan (Commonwealth).

Opponents to increased regulation of health discount plans argue that for many purchasers who are uninsured or underinsured, the health discount plans fill a void by allowing access to discounted health care, since the plans aim to provide “membership” or “association” type benefits for a monthly fee. The benefits provided by such an affiliation are similar to the discounted prices large employer-sponsored groups might pay. Many believe that the demand for discount cards will increase as high-deductible health plans become more prevalent. These opponents to increased regulatory oversight argue that health discount cards play a significant role in a consumer directed portfolio of products to manage health care costs. Therefore, “additional regulation should be weighed against the need for the industry to innovate” (Kofman 1, 25, 36).

Proponents of increased regulation of health discount plans contend that because discount plans are not insurance and, therefore, not regulated by the Department of Insurance, fewer consumer protections exist for consumers (National Association). Other states have enacted more stringent requirements. Such disclosures include stating the discount plan does not make payments to providers, stating the plan requires participants to pay for services at the time they are rendered, and requiring preapproval of plan advertisements (IC 27-17-1, et. seq.). Many states require health discount plans to offer participants a right to cancel the agreement, often within 30 days of entering into a signed contract (National Conference).

Although currently regulated by the Office of the Attorney General, proponents of enhanced regulation might argue that Kentucky’s Department of Insurance would be the more suitable regulatory agency to handle the supervision of health discount plans. Several states have assigned the task to their insurance departments (National Conference). In an effort to increase the accountability of the plans, the departments have required measures such as filing of applications to do business within the state, registration requirements and fees, filing and preapproval of advertising materials, and posting of surety bonds (IC 27-17-1, et. seq.).

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Economic Development and Tourism

Should the General Assembly enact legislation to address all-terrain vehicle access to state-owned wildlife areas?

Background

Kentucky owns or manages 94 wildlife management areas (WMAs), varying in size from fewer than 100 to more than 100,000 acres.[1] Of these, the Kentucky Department of Fish and Wildlife Resources (KDFWR) owns 51; the federal government owns 33; and other state agencies, universities, local governments, and private entities own the remaining 10.

These state-owned and managed properties comprise a system of public land-holdings for Kentucky's outdoor recreation, which also includes wild and scenic rivers, parks, nature preserves, forests, and natural areas. The department, which is the governing agency, does not permit all-terrain vehicles (ATVs) on wildlife areas. Hunters who have been diagnosed with mobility restrictions can apply for ATV permits to hunt in one of the 15 wildlife areas in which trails have been designated for their use.

In 2008, the legislature expanded the Kentucky Recreational Trails Authority (KRTA), authorizing it to coordinate statewide trail development and to increase access to public and private lands for recreational trails, including both motorized and nonmotorized travel. The legislation was part of a state adventure tourism plan released in 2007. A central component of the plan emphasizes trail sports, which include ATV riding (PROSConsulting 25).

The plan discussed several trail parks that have been initiated by local governments, private organizations, and businesses. Harlan County's Outdoor Recreation Board Authority reported local economic benefits from its 6,000-acre trail park that opened in June 2006. The park led to new local ATV and tourism business and to increased county tourism revenues. Knott County's fiscal court established countywide trail systems that include ATV, motorcycle, horseback and hiking. The Knott County Rider Training Center was developed by the county's fiscal court, the Safety Vehicle Institute of America, American Honda, and KRTA. It is the only training facility in the state to offer safety courses for ATVs (Knott County Trails).

[1] Wildlife management areas listed by the Kentucky Department of Fish and Wildlife Resources include those owned by the federal government and managed by Kentucky in which portions of the area are considered as WMAs, including the Daniel Boone National Forest, with 638,529 acres across 21 counties; Land Between the Lakes National Recreation Area, with 107,594 acres; and Ft. Knox Military Reservation, with 109,684 acres.

Although KRTA has prioritized its trail development on privately owned lands, ATV groups emphasize that Kentucky's existing state-owned lands, particularly the wildlife areas, should expand trail-riding opportunities. The Department of Fish and Wildlife Resources and other groups cite several reasons for restricting ATV access:

- Wildlife management areas are bought and managed with funds from state hunting and fishing fees, along with federal wildlife restoration grants derived from excise taxes on wildlife-related equipment. The funding sources require KDFWRA to restrict activities not compatible with its mission.
- Kentucky ranks among the lowest nationally for the amount of land under state ownership for protected management. With more than 92 percent of Kentucky's land in private ownership, department officials have suggested that KRTA and trail groups focus on private lands for developing new trails and trail parks.
- ATVs may cause environmental damage to wildlife habitat, disrupt conditions necessary for wildlife development; create excessive noise that disturbs wildlife and other hunters; and cause erosion and sedimentation to streams, rivers, and wetlands create downstream consequences.
- Recreational safety could be jeopardized for riders, hunters, and wildlife. Kentucky was reported to have the 3rd-highest rate of deaths caused by ATVs from 2005-2007 (Commonwealth).
- Permitting ATV's on wildlife areas would create unbudgeted workforce loads for enforcement staff. Some argue that enforcement problems increase in a range of areas beyond illegal trail use, including deliberate damage to streams, alcohol use while driving, baiting wildlife, and other activities requiring enforcement resources (Josephson).

In 2008 and 2009, legislators proposed measures to permit ATV access to certain wildlife areas. ATV advocates point out that Kentucky's existing system of state-owned lands already exists to achieve economic and tourism development initiatives. Opening the WMAs to more and varied types of users would create new user groups for the areas and bring additional revenue into the surrounding communities.

A staff review of other states' rules on ATV trails in state-owned wildlife management areas presents a patchwork of differing options. Currently, 30 state wildlife management programs permit ATVs to access WMAs. Some states permit ATVs only on area roads, while others permit travel on WMA roads and specifically designated trails. Almost every state that allows access by ATVs prohibits their use on off-road areas or on trails not designated for ATVs.

Federal programs have provided funds for both motorized and nonmotorized state trail development, with some groups arguing that these programs have pushed states to open state-owned land to motorized development. In 1991, Congress authorized the Recreational Trails Program, allocating funds to states for trails, including those for ATVs. States could receive funds as long as the state reserved part of its fuel tax for nonhighway uses, with a goal of encouraging a balance of types of trails: 30 percent nonmotorized; 30 percent motorized; and 40 percent for multiple use. Some states used these funds to increase ATV access to publicly owned lands (Coalition).

Federal land agencies also began processes for permitting motorized vehicles on public lands more than 30 years ago, based on federal executive orders. In 2005, the U.S. Forest Service released its final rule for motorized vehicle use on forest land, requiring each forest to work with local and state governments and the public to designate routes and areas for off-highway vehicles, or OHVs, which include all-terrain vehicles. As a result, Kentucky's motorized and nonmotorized trail users can access designated trails in the Daniel Boone National Forest (Recreation Staff).

Since the early 1990s, 22 states have established OHV fee programs similar to the user fee system that funds WMAs. Though the programs vary state by state, a staff review found that some components are consistent: an OHV registration program, with fees; a dedicated fund into which fees are directed and used for OHV trail programs; and a grants program for local governments and nonprofit organizations, such as trail groups, to establish OHV parks or trails, or to restore sites damaged by OHVs. In Arizona, Montana, Wisconsin, and Wyoming, the state fish and wildlife offices administer the program, using the funds to build and maintain OHV trails in wildlife areas.

Discussion

The General Assembly has a variety of approaches to consider if it decides to examine options for increasing ATV access to wildlife management areas. It could clarify, in statute, that state wildlife areas will not permit ATV travel, other than that allowed for mobility-impaired hunters.

Alternatively, it could decide to consider allowing limited ATV access for existing roads and for designated trails, as has been done in the majority of states.

The General Assembly may wish to examine the methods by which other states allow ATV access without jeopardizing federal funding. Exiting programs in other states for trail access programs on state and federal lands could provide a track record of performance in efforts to address the issues and public demand for access to recreational trails.

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Education

Should the General Assembly change how professional development is implemented and how its effectiveness is measured?

Background

The Kentucky Board of Education defines "high quality professional development" as "those experiences that systematically, over a sustained period of time, enable educators to facilitate the learning of students by acquiring and applying knowledge, understanding, skills, and abilities that address the instructional improvement goals of the school district, the individual school, or the individual professional growth needs of the educator" (704 KAR 3:035). Professional development for educators is an integral part of Kentucky's education system.

The General Assembly recognized that professional development is a needs-driven process and directed the Kentucky Department of Education (KDE) to establish, direct, and maintain a statewide professional development program. At the local level, a minimum of 4 days of the school term must be used for professional development of staff, with the content of at least 3 of the days planned by the school-based decision making council. Local districts may use one of the allocated professional development days to address district-wide needs (KRS 158.070).

However, professional development is not limited to 4 days. Long-term school and district improvement plans identify ongoing professional development strategies for schools and individuals, such as participation in subject matter academies; teacher networks; training institutes; workshops, seminars, and study groups; collegial planning; action research; mentoring programs; and appropriate university courses (KRS 156.095).

The General Assembly has spread the responsibility of providing comprehensive statewide professional development among schools, local school districts, and several state agencies.

- School-based decision making councils are given the responsibility of determining professional development needs based on the premise that those who are closest to the classroom have the best knowledge and understanding of what is needed to improve teaching and classroom practices in order to increase student achievement (KRS 160.345; Commonwealth. Legislative. Task Force 17). Schools are encouraged to review the "Kentucky Standards for High Quality Professional Development" developed by KDE and to use these standards when assessing prospective professional development activities.

- Local districts must identify a district professional development coordinator to disseminate professional development information and provide technical assistance upon request by a school (KRS 156.095).
- Local districts must allocate at least 65 percent of the state general funds for professional development to school councils (KRS 160.345).
- KDE is responsible for providing guidance, assistance, and training to local districts and schools to help them meet the learning goals established for school accountability. The department is also required to maintain an electronic consumer bulletin board that posts information regarding professional development programs. Vendors or providers voluntarily request to post information on the bulletin board. KDE's posting of information is not viewed as an endorsement of the quality of any specific provider or program (KRS 156.095).
- The Education Professional Standards Board (EPSB) is responsible for certification and licensure of preservice educators (postsecondary students not yet teaching) and continuing education for renewal of certificates (KRS 161.028).
- The Council on Postsecondary Education (CPE) shares responsibility with the EPSB to approve and assure quality educator preparation programs (KRS 161.020, KRS 161.028, KRS 164.097).

Local districts and schools receive state general funds and may receive federal funds to support professional development. Funds are allocated to support initiatives that are consistent with local school improvement and professional development plans and teachers' individual growth plans (KRS 156.095). The general fund appropriations have been decreasing since they reached a high of $15.8 million in fiscal years 2000, 2001, and 2002. Appropriations for professional development are $6.2 million for each year of the current biennium, which is approximately 59 percent less than the prior biennium.

Beginning in 2003, the General Assembly permitted the state and local school districts flexibility to reallocate state-appropriated funds among the following programs: professional development, extended school services, preschool, textbooks, and safe schools to accommodate local needs and priorities. This policy was reviewed in a 2007 report issued by the Legislative Research Commission's Office of Education Accountability. The review found that some funds were shifted from professional development in FY 2004, FY 2005, and FY 2007. The largest move was in FY 2007, when local school districts shifted just over $1 million to other purposes (Commonwealth. Legislative. Office 22). The current biennial budget allows continuation of flexible program options. However, the preschool program may receive funds, but those funds may not be used for any other program. It remains to be seen if program funds will be shifted back to professional development to offset the current fund reduction. Further, it is unknown how incremental decreases in funding have affected the quality of professional development in local districts.

In 1999, the Governor appointed the Task Force on Teacher Quality, which included legislative members. Based on some of the task force's recommendations, the General Assembly created and funded teacher academies and the Teachers' Professional Growth Fund in 2000 to provide ongoing professional development. The growth funds are to be used to enhance knowledge and teaching skills in specific content areas. In the current biennial budget, funds are allocated to support programs for reading and literacy development, mathematics, teacher academies, leadership, and mentoring.

Discussion

New requirements, whether at the state or federal level, necessitate expanded professional development efforts. For example, Senate Bill 1 enacted in the 2009 Regular Session requires a revision of academic content standards and a revision of the annual statewide student assessment and accountability program. The president of CPE noted that in-depth professional development is critical to facilitate teachers' understanding of the revised content standards, to increase the effective use of those standards in instruction, and to promote advances in student achievement. KDE staff concurred and said funding is needed to support the provisions of SB 1 (King). The General Assembly could realign funding priorities for the next 2 years to provide the responsible agencies with resources to give assistance to local districts and schools, including a research unit to assess the quality of professional development.

Currently, there is no ongoing statewide coordinated assessment of the quality of professional development and its effect on teachers' classroom practices and student achievement.

The General Assembly could require a process to register and certify vendors; to validate results; and to allow for consumer ratings of professional development vendors, programs, and activities.

The Legislative Research Commission's Program Review and Investigation Committee in its August 2009 review of the EPSB included a discussion of professional development. The report recommended that the EPSB, in collaboration with KDE and CPE, present a plan for tracking the quality of professional development. It was suggested that the plan may include moving oversight of teacher professional development to EPSB for the purpose of linking professional development to certification (Commonwealth. Legislative. Program 47).

The General Assembly could consider the following issues:

- the appropriate relationship of professional development in the recertification processes for educators;
- how emerging research on best practices can be used to help teachers and schools implement and sustain effective practices, including a monitoring process to assess the fidelity of the implementation;
- how accountability measures for expenditures of funds may be implemented;
- the appropriateness of the existing roles and responsibilities of state agencies, postsecondary education institutions, school districts, and school councils;
- what leadership structures are needed to support capacity building for implementing and sustaining professional best practices in local classrooms; and
- a process to analyze the adequacy of resources, including funding and time available for professional development.

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Should the General Assembly increase school choice options?

Background

States have adopted a broad array of school choice options to provide parents flexibility in programs and schools for their children. Among the alternatives are intradistrict and interdistrict enrollment choices, homeschools, private and parochial schools, dual credit and dual enrollment programs, charter schools, vouchers, and tax credits and tax deductions.

School choice proponents suggest that choice provides parents an opportunity for greater involvement in their children's education, creates competition for students that can motivate public schools to increase student achievement, and provides low-income and minority students access to high-quality programs otherwise unavailable to them. Opponents say school choice options that involve private institutions are an inappropriate use of public money; programs that "force public schools to compete in the open marketplace reduce the importance of the civic and socializing missions of education;" and certain types of school choice programs, such as tax credits and tax deductions, primarily benefit affluent parents (Education. Choice 1).

Kentucky currently provides several school and program choices. A student

- is exempt from compulsory attendance in a public school if the student is homeschooled or attends a private, parochial, or other nonpublic school in the state (KRS 159.030). In 2007-2008, there were 671,466 students in 1,249 public schools; a reported 9,956 homeschools, serving 12,875 students (Commonwealth); and 63,995 students served in 207 certified private and parochial schools (Koplay). The number of students served in private schools not seeking certification is unknown.
- may attend a school in another school district by paying a reasonable tuition fee as a nonresident student or without paying tuition if the district has entered into a nonresident student contract to share costs (KRS 158.120). In fiscal year 2009, there were nonresident student contracts in 26 districts, involving 75 schools and 735 students (McKinney).
- is allowed to transfer from a low-performing school to another school within the district or if none is available to another district (KRS 158.6455; 703 KAR 5:120). In 2007-2008, there were 72,247 students eligible for transfer, with 614 students who accepted; in 2008-2009, there were 60,343 students eligible for transfer, with 370 students who accepted (Davis).
- may attend another school within the district if the local board of education has established an intradistrict open access policy

permitting parents to request a particular school (KRS 160.290). It is unknown how many districts offer open enrollment.

- may enroll as a secondary student in a postsecondary course and apply the credit at the secondary school, the postsecondary institution, or both, if the local school district has an agreement with a postsecondary education institution (KRS 158.007). In fall 2008, there were 14,722 students enrolled in dual credit and dual enrollment classes in the Kentucky Community and Technical College System, as compared to 676 in fall 2000 (McCall).

Ten states, including Kentucky, do not have charter schools (Education. School Choice 1, 10). Charter schools are semi-autonomous public schools that are founded by educators, parents, or community groups that operate under a written contract with a state, district, or other entity such as a postsecondary education institution. The contract or charter contains information describing how the school will be organized and managed, what the curriculum will be, and how success will be determined. Charter schools are generally exempt from many of the rules and regulations governing other public schools (Education. Charter 1).

In Kentucky, schools with school-based decision making (SBDM) councils have authority for many of the same decisions that charter schools in other states have, such as curriculum decisions, assignment of staff, scheduling of time and space, professional development, and discipline procedures (KRS 160.345). Additionally, a school council may request waiver by the Kentucky Board of Education from some paperwork reporting requirements (KRS 156.072). A council may also request a waiver of specific administrative regulations (KRS 156.160). Opponents of charter schools may argue that having SBDM councils negates the need for public charter schools; whereas, proponents of charter schools may argue that having a SBDM council does not provide parental choice in determining a child's placement in a school, which is a key element of charter schools.

Kentucky does not provide school choice options through tax credits, tax deductions, or vouchers. Tax credits and deductions are designed to offset some of the expenses parents incur by choosing to send their children to private or parochial schools. A tax credit provides reductions to an individual's tax liability; a tax deduction is a reduction in taxable income made prior to the calculation of tax liability. Vouchers are payments made to a parent or an institution on the parents' behalf, to be used for a child's education expenses, usually at a private or parochial school. Proponents of these options argue that competition for students can improve school performance. Opponents argue that the use of public money in private and parochial schools may diminish the quality of public schools by reducing the amount of resources available. Others contend that these options are in conflict with state constitutions. Seven states have some limited tax credit or deductions provisions, and four states and the District of Columbia have publicly funded voucher programs (Education. Vouchers).

Discussion

The General Assembly could consider the following options for expanding school choices:

- Mandate that each local board of education establish an intradistrict choice program on a space-available basis. Proponents may include parents who think some local boards of education are unaccommodating to their needs. Opponents may include those districts that have a limited number of schools or limited transportation, or those that believe intradistrict agreements should be voluntary.
- Authorize the establishment of public charter schools. Proponents of charter schools typically include individuals and advocacy groups who favor more choice, flexibility, and freedom from local and state regulations to create high-performing schools. Proponents may also include those who believe that Kentucky would be more competitive for federal funds that appear to promote charter schools as an innovative practice (Blankenship). Opponents may include those who believe that charter schools may be selective in who they will enroll and, may deplete human and fiscal resources from existing public schools, and may create additional administrative costs. Opponents may also include those who believe that public charter schools may conflict with Section 183 of the Kentucky Constitution that states: “General Assembly shall, by appropriate legislation, provide for an efficient system of common schools, throughout the State.”
- Amend existing laws to guarantee that any student who lives nearer to an appropriate grade level school in an adjoining county may enroll in that school without paying tuition, if space permits.

If the General Assembly is interested in establishing tax credits, tax deductions, or vouchers, it may wish to consider the implications of Sections 186 and 189 of the Kentucky Constitution before proceeding.

Section 186 states:

> All funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth, and for no other purpose, and the General Assembly shall by general law prescribe the manner of the distribution of the public school fund among the school districts and its use for public school purposes.

Section 189 states:

> No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes; shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school.

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Should the General Assembly modify state student financial aid programs to address the affordability of postsecondary education?

Background

In response to the requirements of the Postsecondary Education Improvement Act of 1997, the Commonwealth's Council on Postsecondary Education (CPE) established a goal that Kentucky "double the number of college-educated adults…by 2020 to reach the national average" (A Public 8). Since 1997, the number of college graduates has been on the rise. In 2007, 20 percent of Kentucky's adults had earned a bachelor's degree or higher compared with 27 percent nationally (Commonwealth. Council. Educational Attainment). However, for many students, affordability is a major barrier to higher education, which limits the ability of the state to reach its goal.

Over the last decade, tuition and fees to attend Kentucky's public colleges and universities have risen sharply. From 1998 to 2008, median undergraduate tuition and fees, when adjusted for inflation, have increased at public 4-year institutions 48 percent nationally and 109 percent in Kentucky; tuition and fees at public 2-year colleges have increased 28 percent nationally and 142 percent in Kentucky (Southern 22-23).

Over that same period, on average, the percentage of family income needed to pay for college expenses at public 4-year institutions minus financial aid has increased from 19 percent to 28 percent. However, Kentucky families making less than $50,000 per year must devote 39 percent of their income, even after financial aid, to pay for costs at public 4-year colleges (National Center 1, 7).

At the national level, there has been a call to reform the student financial aid system. On September 17, 2009, the U.S. House of Representatives passed the Student Loan and Fiscal Responsibility Act (H.R. 3221). The bill, if enacted, would eliminate federal subsidy of private lenders but would allow eligible state-based non-profit lenders to maintain the service rights for up to 100,000 students in each state. (Federal Funds Information 1)

However, if the proposed legislation passes, the Kentucky Higher Education Assistance Authority (KHEAA) and the Kentucky Higher Education Student Loan Corporation (KHESLC) may lose some recurring federal revenue. This source of funds is currently used for loan counseling, interest reductions, debt management assistance, default prevention, administration, and development of additional state loan programs. It is unclear how these services would be affected if the provisions of H.R. 3221 are enacted.

In addition to originating and managing student loans, KHEEA and KHESLC administer several grant and scholarship programs. Need-based financial aid is available through the College Access Program (CAP) and the Kentucky Tuition Grant (KTG) Program. In addition, the Kentucky Educational Excellence Scholarship (KEES) Program provides merit-based scholarships for students who meet certain academic criteria.

The KEES program is viewed as a useful incentive to keep Kentucky's academically successful high school students in state for college. Eighty-eight percent of all Kentucky high school graduates attend Kentucky colleges (Hiemstra 18). However, the program tends to benefit higher-income students whose economic advantages may better prepare them to meet academic requirements for eligibility (Commonwealth. Legislative 17). Since the 2008-2009 school year, a bonus award has been available to students who qualify for the federal free or reduced-price lunch program, who enroll in Advanced Placement or International Baccalaureate classes, and who achieve the requisite test scores (Hiemstra 4). However, the KEES awards are not adjusted for inflation.

Nationally, nearly 40 percent of the students enrolled in postsecondary institutions are not in the traditional age group of 18 to 24. Nontraditional students are older, attend school part time, work or have other limitations on time commitment, and often attend 2-year public institutions. Nontraditional students generally have greater difficulty accessing state student financial aid (National Conference 2). Yet Kentucky's merit- and need-based financial aid programs require college students to be enrolled at least half time to be eligible. And although a supplemental KEES award is based on a student's ACT score, the majority of KEES awards are determined by a student's high school grade point average and must be used within 5 years of high school graduation. Therefore, students enrolled less than half time, GED recipients, and older adult students are largely ineligible for Kentucky's primary state-supported student financial aid programs.

In 2007, KHEAA began offering Go Higher Grants of $1,000 to Kentucky students with financial need who are 24 or older and are enrolled in less than 6 credit hours. In FY 2008, funding was available for 80 applicants. It is anticipated that the number of applications will increase as more adults seek additional postsecondary education.

Discussion

While several policy options are available to lawmakers to improve the affordability of higher education in Kentucky, the current economic situation limits available revenue and makes programmatic funding more challenging.

In FY 2008, the General Assembly appropriated more than $182 million to support state financial aid: $89 million to support the merit-based KEES program and $93 million to support the need-based CAP and KTG student grant aid programs.

At current funding rates, sufficient money is not available for all students who qualify for the CAP and KTG programs. Both programs are administered on a first-come, first-served basis. In FY 2008, of the 96,552 students who were eligible for the grants, 45,029, or nearly 47 percent, did not receive awards because of limited funding. The two programs, which are funded through profits from the Kentucky Lottery, disbursed $181 million but were unable to fund $73 million in awards (Hiemstra 11). Shifting some funds from the merit-based KEES financial aid program could provide additional money for these need-based programs.

One challenge to providing affordable higher education opportunities is the increasing number of nontraditional students pursuing higher education. Establishing financial aid and debt management counseling and support for these and other underserved populations could improve enrollment, retention, and graduation rates. Expanding the Go Higher program, instituting low-interest forgivable loans, and other financial aid programs for students enrolled less than half-time, transfer students, and GED graduates would also improve affordability for these students (Commonwealth. Council. A Public 7).

Another financial aid option is to implement a “shared responsibility model.” This model includes the student as sharing responsibility for funding his or her education. The student’s contribution comes from sources such as earnings, savings, borrowing, or scholarships. That contribution is combined with the parents’ expected contribution, any applicable federal funding such as Pell grants or tuition tax credits, and state grant awards (Prescott 1-2).

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Elections, Constitutional Amendments, and Intergovernmental Affairs

Should the General Assembly require electronic filing of campaign finance reports?

Background

Campaign finance reports must be filed with the Kentucky Registry of Election Finance and may be submitted by paper copy or by electronic file. Reports submitted in a paper format are not immediately available for public review via the registry's Web site because the information must be entered by hand into the data system by registry staff. The expenditure data from the paper reports are not available online because of the complexity of entering such detailed and lengthy information. Hand-entering data delays public access to the content of the paper report and denies access to campaign expenditure information (Grayson). Expenditure data from campaign reports filed electronically are available online. The registry provides the necessary software at no cost to those who want to file campaign finance reports online.

Campaign finance reports disclose to the public the identity and occupation of a contributor, the dollar amount of the contribution and how the contributions were spent (Commonwealth 55, 58). KRS Chapter 121 sets out the provisions for reporting and disclosing campaign finances. Reporting and financial disclosure is required when candidates, committees, political parties, and political action committees intend to raise or spend more than $3,000. Reporting is also required when individuals and groups make independent expenditures exceeding $500 in the aggregate in any one primary or election.[1]

Discussion

The Campaign Disclosure Project encourages disclosure of campaign finance information.[2] Each year, the project publishes an evaluation of the campaign disclosure laws of each state, called the Grading State Disclosure. States are given marks in various categories regarding the oversight and regulation of campaign finance reporting and disclosure.

[1] "Independent expenditure" means the expenditure of money or other things of value for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, and which is made without any coordination, consultation, or cooperation with any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them , and which is not made in concert with, or at the request or suggestion of any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them" (KRS 121.015(12)).

[2] The Campaign Disclosure Project is a collaboration of the UCLA School of Law, the California Voter Foundation, and the Center For Governmental Studies. It is supported by The Pew Charitable Trusts.

In 2008, Kentucky received a B- as an overall grade and was ranked 21 nationally. However, because electronic filing of campaign finance reports is voluntary and the public does not have ready access to all campaign finance information, the Commonwealth's electronic filing program received a failing grade.

The subcategory results for Kentucky were as follows:

Subcategory	**Grade**	**Rank**
Campaign Disclosure Law	B+	11
Electronic Filing Program	F	31
Disclosure Content Accessibility	B-	26
Online Contextual & Technical Usability	B-	16

Though the registry's Web site was stated to "feature excellent electronic filing tutorials, brochures, and helpful hints pages…" the absence of "an online, searchable database of campaign expenditures" was considered a primary weakness. "Further, itemized expenditures are only available online for electronic filers…" (Grading. State-by-State).

Thirty states mandate that all statewide primary and election campaign finance reports be filed electronically; 24 states require statewide and legislative primary and election campaign finance reports be filed electronically; 12 states have voluntary electronic filing of finance reports; and 8 states do not have an electronic filing program available. The majority of states that require electronic filing have set a dollar threshold that triggers the mandated electronic filing. In Hawaii, campaign contributions of any amount must be reported; in Connecticut, the threshold is $250,000. On average, the threshold amounts for campaign finance reports are $20,000 for statewide and $10,000 for legislative primaries and elections (Grading. Electronic).

During the 2009 Regular Session, Senate Bill 62 would have required candidates and slates of candidates running for statewide office to file campaign finance reports electronically when contributions, loans, or a balance in a campaign account is in the aggregate of $25,000 or more. The bill did not pass.

A point of concern for some candidates may be whether they would be subject to wire or mail fraud if an electronically filed campaign finance report contained errors. An official with the registry stated that such fraud could be a potential problem and that electronic files could be hand delivered to the registry on a disc to avoid such a complication (Jackson).

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Energy

Should the General Assembly require the Energy and Environment Cabinet to gather public input on whether nuclear power should be added to Kentucky's list of energy options?

Background

Kentucky law requires a federally approved "method for the permanent and terminal disposal of high-level nuclear waste" before construction of a nuclear power facility may begin (KRS 278.600; KRS 278.605). Because there is no federally approved method for permanent disposal of nuclear waste, this 1984 law is regarded as a practical ban on constructing nuclear power facilities in the Commonwealth. These statutes have remained unamended for 25 years and may be part of the reason that Kentucky now relies on coal for almost all (92.2 percent) of its electric generation ("Kentucky Coal").

Carbon dioxide is produced and regulated naturally through plants and oceans. It is also produced by burning coal, oil, and natural gas. Kentucky's reliance on coal makes it among the top producers of carbon dioxide emissions in the nation. It is possible that limits on carbon emissions will become part of federal law in the near future.

The Governor included an "examination" of nuclear power as one of the strategies outlined in the 2008 document "Intelligent Energy Choices for Kentucky's Future; Kentucky's 7-Point Strategy for Energy Independence." The 2009 General Assembly considered but did not pass Senate Bill 13, which would have repealed KRS 278.610 and replaced references to high-level nuclear waste "disposal" with "storage."

Discussion

Carbon dioxide emissions from Kentucky's electric power industry totaled more than 93 million metric tons in 2006, which constitutes 3.8 percent of the U.S. total. The Public Service Commission projects that the state will need 7,000 additional megawatts by 2025. There will also be a need to replace some of Kentucky's existing generation plants because of their age (Commonwealth. Public). Any plan to expand or replace generation capacity must include plans to reduce or eliminate carbon dioxide emissions.

Nuclear power is one of the few generation sources that have no direct carbon dioxide emissions. Thirty-one countries employ the technology, with 443 reactors in operation—104 of these are in the U.S. Although the United States has the most nuclear capacity of any nation, no new commercial reactor has come on line here since May 1996 (United States). Of the seven states bordering Kentucky, five have operating nuclear power plants, and much of the eastern half of the U.S. gets a significant portion of its electric power from nuclear plants. Nearly all the U.S. reactors store their high-level nuclear waste on-site because the federal government has not constructed and approved a facility for permanent disposal of these wastes as it has been obligated to do. The changes proposed by SB 13 from "disposal" to "storage" presumably would allow on-site waste storage to occur in Kentucky.

In the Governor's energy plan, a stated goal is that "…Kentucky must decide whether nuclear power will become a significant part of meeting the state's energy needs…" (Commonwealth. Energy). Such decisions are sometimes undertaken by policy makers without public input. Nuclear energy is a topic that stirs considerable passion on both sides of the issue. The Governor's report acknowledged this in the action plan for Strategy 7: "Develop and implement a public engagement plan to gather and address stakeholder feedback and concerns" (Commonwealth. Energy). Opponents of SB 13 argued that the removal of the statutory restrictions of KRS Chapter 278 was the end, rather than the beginning, of the discussion. Proponents contended that public and industry viewpoints could receive sufficient airing in any actual licensing or siting procedure that would precede the construction of a reactor in Kentucky.

Prior to deciding to seek input, it is important to consider and determine the role that any input gathered will play in the final policy decision making. Consideration should also be given to the cost of collecting such input relative to its ultimate value or level of influence on the decision making. Collection of input could be seen by the public as an initial step to deciding the issue. This might make it difficult for the General Assembly to then defer such a decision.

If the General Assembly wishes to take no action amending the existing statutes, it is unlikely that any entity seeking to build a nuclear reactor in the state could do so. Proponents of continued reliance on coal may view that as positive, although the problem of reducing carbon emissions would remain. If the General Assembly wishes to expedite implementation of the Governor's plan, it could direct the cabinet to conduct surveys, gather input electronically, or hold a series of public meetings. Surveys can reach many citizens, but if they are conducted randomly, they can exclude many citizens who may wish to be heard. Internet message boards could gather comments from many individuals at a low cost, but eliminating duplicate entries complicates the process. In addition, citizens without Internet access would be excluded.

It is by no means a given that public and stakeholder input must be weighed as policy makers contend with this issue. However, the Governor's strategy document indicates a preference for such a "public engagement plan." The Energy and Environment Cabinet has not yet publicized any planned effort to collect public input.

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Health and Welfare

Should the General Assembly modify the definition of "abuse and neglect" relating to the exposure of children to illegal substance abuse?

Background

The Cabinet for Health and Family Services reports that 57 percent of the 10,784 substantiated findings of child abuse and neglect in fiscal year 2009 involved some type of substance abuse (Commonwealth of Kentucky). Parental substance abuse, however, does not mark the beginning of social worker involvement with families. Often, that involvement begins as a result of the effects of parental substance abuse, such as domestic violence, mental health issues, and income issues. Substance abusing adults can display a range of confusing behaviors that can lead to emotional and physical manifestations as children develop (Phoenix House). A definition of child abuse and neglect that more specifically includes provisions related to illegal substance abuse in a child's home may permit the Cabinet for Health and Family Services to provide needed treatment and services for the family before negative outcomes for children begin.

The definition of child abuse and neglect that is used by the Cabinet for Health and Family Services to determine the need for an investigation and the need for family services is found in the Juvenile Code in KRS 600.020(1). This definition includes "a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including but not limited to parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005." The definition describes a dysfunctional use of alcohol or other drugs or both but does not specifically address abuse in relationship to a dependent child. Some states have modified their definitions of child abuse and neglect to specifically address three situations involving illegal substance abuse: children living or present where methamphetamine is manufactured, substance abuse during pregnancy, and parents or guardians that give illegal drugs to their children.

In 2007, Kentucky had 261 meth lab incidents and 32 children affected by methamphetamine laboratory sites. In 2006, there were 1,188 methamphetamine convictions in Kentucky (United States). These incidents have sparked awareness of the physical, social, and developmental damage suffered by children living around home-based methamphetamine laboratories (Swetlow).

When a lab is discovered, children are removed from the home by the cabinet. The state can incur substantial costs in caring for those children. In addition, states often must pay to clean up these meth labs, which can be as high as $70,000 (Foulkes).

Statistics show that in 2002 and 2003, 4.3 percent of pregnant women had used an illicit drug in the past month (National Survey). Prenatal injuries are another result of exposure to drugs; 1 of every 10 children suffers exposure to illegal drugs (Besharov).

Prenatal exposure can lead to significant problems such as increased risk of fetal death, placental abruption, decreased blood flow to the fetus, and premature delivery (University of Kentucky). Children could face birth defects stemming from drugs passing through the placenta and suffer withdrawal symptoms, including seizures.

Prenatal exposure to illegal substances has a fiscal impact on states. Each drug-exposed newborn can cost a state as much as $50,000 in the first year of life. The lifetime costs can run as high as $1 million. Washington, D.C., spends $5.9 million each year to treat drug-exposed infants (Cruz).

Children living in homes where an adult uses illegal substances may be as high as 13 percent (Markel). The exact number of parents who make illegal substances available to their children is unknown. Under current Kentucky law, the actions of these guardians would not specifically fall under any definitions of child abuse. KRS 600.020 defines an abused or neglected child as one who has a parent who engages in conduct that prevents the parent from "caring for the immediate and ongoing needs of the child." Theoretically, parents who permit or teach their children to use illegal substances could still retain the ability to care for the immediate and ongoing needs of their children.

Discussion

States have attempted various methods of combating the above problems with varying degrees of success.

States have taken numerous initiatives in recent years to combat the presence of children at home-based methamphetamine labs. At least 10 states classify manufacturing meth in the presence of a child or on the premises occupied by a child as child abuse. Additional definitions include allowing children to be present where the chemicals or equipment for illegal substance production are stored (U.S. Dept.). Kentucky has criminalized controlled substance endangerment of a child, including exposure of a child to methamphetamine manufacturing, but this is not in the statutory definition of child abuse and neglect.

States have enacted a variety of reforms and initiatives to combat fetal exposure to illegal substances. Medical professionals in several states, including Kentucky, must conduct toxicology tests of pregnant women when illegal substance abuse is suspected (National Abandoned). KRS 214.160 requires a positive toxicology finding to be evaluated by attending health care provider to determine whether an investigation of abuse and neglect by the cabinet is necessary.

Additional actions that states have taken include expanding the definition of abuse and neglect to include prenatal exposure to illegal substances. At least 15 states and the District of Columbia have classified prenatal exposure as child abuse (Guttmacher). The mother, by taking illegal substances, has shown an inability to provide sufficient care for the child (Cruz). In these situations, however, the state's authority to protect begins after birth and results in the child being removed from the mother's care.

Some states have also pursued criminalization and involuntary hospitalization of pregnant substance abusers. Three states—Minnesota, South Dakota, and Wisconsin—allow for involuntary hospitalization in inpatient treatment programs when a substance abuser is pregnant and tests positive for controlled substances (Guttmacher).

Criticisms of these laws concern the impact on the behaviors of expectant mothers. Many mothers may avoid seeking prenatal care if they are concerned about criminal charges or involuntary hospitalizations, which and can create other problems for their unborn children. South Carolina, the only state to criminalize prenatal exposure, saw declines in admissions of 80 percent and 54 percent, respectively, in two treatment centers for pregnant women the first year that it began to prosecute these cases. Infant mortality also increased for the first time in a decade, and there was a 20 percent increase in abandoned babies (Cruz). Involuntary hospitalizations and changes in child abuse laws may cause similar effects.

Another criticism could be that these laws and initiatives ignore the improvements in treatment programs and the possibility that the mother could voluntarily complete a program and become an effective parent. Proponents could point to the usefulness of the ability to commit a mother who cannot overcome her addictions and is a danger to her child (Cruz).

Arkansas, Ohio, Florida, Guam, Hawaii, Illinois, Minnesota, and Texas have laws that classify giving drugs by guardians to their wards as child abuse (United States). The language used in these states classifies “selling, distributing, or giving drugs to a child” as child abuse. Under such a statute, Kentucky parents who are currently providing or teaching their children to use drugs could be subject to a child abuse and neglect investigation by the Cabinet for Health and Family Services.

If Kentucky amends the definition of child abuse and neglect under KRS 600.020 to include specific provisions related to child exposure to methamphetamine, prenatal exposure to illegal substances, and providing children with illegal substances, the Cabinet for Health and Family Services may be able to intervene earlier to provide families with needed treatments and services. The negative effects on children may be abated if families receive help early and children may be more likely to remain with their parents. This may result in a lower number of children in foster care and less cost to the state. However, one possible drawback for expanding the Juvenile Code in this way is that the language of KRS 600.020 does allow for courts to expand the definition of abuse and neglect by finding that the current definition already includes the addressed behaviors. For example, a court could apply the language already in the statute to permit a finding that parents who are abusing illegal substances in the presence of their children are “incapable of caring for the immediate and ongoing needs of their children” (KRS 600.020(1)(c)).

Some argue that expanding the definition of abuse and neglect would give social workers too broad of an authority to remove children from their homes, which would create an increased financial burden for the state and violate parental rights. Also, by taking more children out of their homes, a greater strain on state courts and the foster care system could result. Finally, some may point out that the best way to proceed against parents who use illegal substances is through the criminal courts and that expanding the child abuse statutes in this way would be redundant.

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Should the General Assembly consider modifying the Governor's emergency powers during natural disasters to include authority for pharmacists to prescribe medications?

Background

In natural disaster situations, access to medication is a significant issue, not only for acute medical conditions that are caused by the natural disaster itself but also for other illnesses such as asthma, heart disease, diabetes, cancer, and HIV/AIDS. Medications for these and other chronic conditions must be taken without interruption and require an office visit before the prescription can be renewed (HealthSquare). In the wake of natural disasters, many healthcare providers may be without the means to provide patients with these needed medicines. Additionally, chronic conditions may become acute because of the local environmental conditions after the disaster. The results for individuals with chronic conditions could be severe. Lack of access to healthcare, including medication, is a leading cause of mortality after natural disasters (Mensah).

During the ice storm in January 2009, approximately 700,000 Kentuckians lost electricity, while 200,000 were without water. Some rural hospitals, in addition to temporarily losing power, lost Internet services and phone lines and, therefore, communication with other hospitals and healthcare providers (Commins). A number of pharmacies in the hardest hit areas of the state managed to stay open. However, many residents encountered difficulties in obtaining prescriptions because of office closures, power outages, and increased demand at hospitals and doctor offices.

One solution to managing some of the routine medication access issues that occur after disasters would be to temporarily modify the powers of pharmacists during declared natural disasters. Pharmacists receive advanced training in drug therapy and have a "quasi-prescriptive role" for some types of medications that require an added degree of medical supervision (Gibson).

Currently, KRS 217.215(3) allows a pharmacist to distribute a one-time only 72-hour supply of maintenance medications after a prescription has ended. Pharmacists are not allowed to issue new prescriptions for nonmaintenance medications. After that 72-hour supply has been dispensed, the patient must get a new prescription from a doctor. Many people find that the 72-hour limitation is not sufficient because of the environmental conditions after a disaster.

Discussion

Currently, the governor's emergency powers include the ability to seize, take, or condemn property for the protection of the public, and the ability to sell, lend, give, or distribute that property among the inhabitants of the Commonwealth. Other emergency powers include the authority to enforce Kentucky disaster and emergency response laws, prohibit or limit the sale of certain goods, declare curfews, and move the date of elections (KRS 39A.100(1)). These powers do not include the ability to extend prescriptive authority.

Several states have passed laws that grant powers to the governor or executive branch officials to increase access to critical medications during emergencies, disasters, or terrorist attacks. In 2007, Arizona expanded the powers of its pharmacists during declared states of emergencies by allowing pharmacists to dispense an emergency 30-day supply of certain types of prescriptions "regardless of whether the prescription meets statutory requirements for refilling" (HB 2155). Following a recent law, the governor of South Dakota arguably has the authority to expand pharmacists' powers to address emergency prescription needs during natural disasters, terrorist attacks, or other epidemics (SDCL 33-15-8). Also, the Centers for Disease Control and Prevention has developed language for model legislation that states could use to grant a governor expanded authority during states of emergency (Gostin).

Some professionals advocate for the creation of a new class of "pharmacist-only" over-the-counter medication for emergency and chronic conditions. Pharmacists would be required to consult with patients before distributing the medications, but a physician's prescription would not be required (Gibson). Similar classes of drugs are available in the United Kingdom, Canada, and Australia (Sheffer). In an emergency, a pharmacist-only drug class could be temporarily created and then allowed to expire when the crisis is over.

Opponents of these plans express concern about a further expansion of prescriptive authority. They could argue that pharmacists may not be prepared to diagnose medical conditions (KidsHealth). Additionally, such an arrangement could create difficulty in assuring insurance coverage during the disaster. Also, doctors keep extensive files on each patient and record all medications those patients are taking. During a natural disaster, the ability to access these files could be compromised (Risoldi). Such a situation could allow for an increase in medical errors, side effects, or potential negative drug interactions. Concern also has been expressed about the potential for abuse of prescription medication by patients when another class of medical professional gains increased authority to prescribe (Gilchrist).

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Judiciary

Should the General Assembly expand the use of alternatives to incarceration?

Background

According to a recent report by the Pew Center on the States, Kentucky has the fastest growing prison system in the nation. More specifically, the number of inmates held in state facilities has increased by 50 percent in eight years (15). A Council of State Governments report revealed that in 2008, 28 percent of newly admitted offenders consisted of parole violators and that the most common crimes for which inmates are serving time are nonviolent offenses such as property and drug crimes (Gary 12-14, 67-68). The Department of Corrections reported that 35 percent of offenders will be reincarcerated for either a parole violation or a new offense within two years of being released (Thompson. "Re: LRC Stats"). There are 21,667 offenders currently serving time for felony offenses with 14,107 held in state facilities and 7,560 held in local jails (Commonwealth. Dept. of Corrections. *Statewide*) In addition, 8 of the state's 17 prisons are operating at a capacity exceeding 100 percent (Raisor).

Since 1974, the General Assembly has authorized various alternatives to incarceration. Under KRS 533.010, the courts are mandated to grant alternatives such as probation, shock probation, parole, conditional discharge, pretrial release, home incarceration, and drug courts. However, the statute states that courts are given the discretion to use incarceration in lieu of alternatives if judges believe the alternatives would "depreciate the seriousness of the crime" or that the offender would "benefit from incarceration."

Discussion

Kentucky drug courts were created in 1993 to reduce recidivism by treating those offenders who suffer from substance abuse. Nonviolent offenders are eligible for drug court if they demonstrate evidence of substance abuse and are willing to acknowledge their addiction. In addition, they must have committed drug or drug-related crimes, be eligible for probation or pretrial diversion or have violated current terms of probation related to substance abuse issues. Drug courts operate in 115 counties; and as of June 30, 2008, approximately 2,626 offenders had graduated. In addition, the recidivism rate for graduates was 20 percent compared to 57 percent of similar offenders not participating in the program. Nearly $3 million has been collected in child support, fines, fees, and restitution (Commonwealth. Administrative).

For fiscal year 2010, the estimated statewide cost for drug courts is $5,350 per participant, which amounts to approximately $16.2 million based on slightly more than 3,000 participants (Payne). The Department of Corrections has reported that it costs on average $19,030 to incarcerate one offender for 1 year.

Some offenders may not be able to access drug court because their driver's licenses may have been revoked or they do not have a vehicle or access to other transportation. In addition, some counties have long waiting lists because of lack of funding.

In 2006, the General Assembly provided funding for the Department of Public Advocacy to implement the DPA Social Work Pilot Project. This project consists of a case manager working in liaison with the department to provide assistance in identifying offenders that would benefit from sentencing alternatives such as substance abuse treatment and other alternatives in order to be successfully reintegrated into the community. The social worker works with the offender to identify and overcome barriers to rehabilitation, build a support system, and provide referrals to community resources. The approximate cost of the program was $205,700 for the employment of four social workers over 2 years (Monahan. "Re: Social"). The project has reduced the rate of recidivism to 18 percent for persons participating in the program and is projected to save $3.1 million per year in incarceration costs (Monahan and Damon 26).

The Campbell County Community Corrections Program, has demonstrated savings in correctional costs since it was created in 1999. During the first phase of the program, offenders are provided with substance abuse treatment, counseling, and vocational training. In addition, offenders are required to maintain employment, pay restitution and child support costs, and abide by a daily curfew. A total of $253,803 has been collected in child support, along with $18,893 in restitution fees. More than $1 million has been saved in corrections costs. A second phase of the program began in July 2009 and targets inmates who are awaiting entrance into a substance abuse inpatient program. The offenders are put on home incarceration and required to undergo outpatient treatment with regular drug testing until space is available. The annual program cost for the first phase is $25,000 and an estimated $67,000 for the second phase (Vissman. Presentation and Telephone).

In 2007, Texas faced overcrowded prisons and had the second-highest incarceration rate in the United States. With a corrections budget similar to that of Kentucky, Texas lawmakers allocated nearly one-half of the state's corrections budget to expand substance abuse treatment and diversion programs for offenders who were on probation. They also increased the use of parole. Lawmakers also created more room for substance abuse treatment programs in prisons and jails. Probation terms for drug and property offenders were reduced from a maximum of 10 years to a maximum of 5 years. Drug courts were expanded to increase availability to those convicted of minor crimes in effort to reduce recidivism. Texas reported savings of $210.5 million for the 2008-2009 biennial and projects an additional savings of $233.4 million if more prisons are not constructed. The prison rate is expected to remain flat for the next 5 years. A portion of the savings has been reinvested into the communities with higher crime rates (Pew 17-21).

Another factor contributing to prison growth in Kentucky is the high rate of parole violations. In 2008, 28 percent of newly admitted offenders consisted of parole violators (Thompson. "Re: Southern"). Many violations are technical, such as curfew violations or failure to report to correctional officers. Instead of automatically revoking probation or parole, some states have created a sanctions system. For example, Ohio has created a system where sanctions are considered after reviewing factors such as the risk level of the offender, the number of violations, and the severity of the violation. The types of sanctions include substance abuse testing, mandated treatment, community service, fines, home incarceration, and increased supervision. Some benefits of the system are reductions in the number revocation hearings, increased efficiency of hearings, and less reincarceration that results in cost savings (Fialkoff 1).

During the 2008 Regular Session, House Bill 406 was introduced and included several provisions relating to granting earned time credits for parole. Provisions of the bill included granting eligibility for parole review to nonviolent offenders convicted of Class D felonies after they have served 15 percent of their original sentence. In addition, the bill would have granted a 90 day sentence reduction for those who completed educational, drug treatment or vocational training and a seven day credit per month served for each performance of a meritorious act. It would allow for the Department of Corrections to release some nonviolent and nonsexual offenders to serve out the remaining 180 days of their sentence under home incarceration. The bill did not pass. However, during the 2009 Regular Session, House Bill 372 did pass and included some of those provisions. Offenders convicted of Class D felonies are eligible for parole review after having served

15 percent of their sentences or 2 months, whichever is greater under KRS 439.340. HB 372 granted the Department of Corrections the discretion to release some offenders under home incarceration. In 2009, the Kentucky Attorney General filed suit to prevent the Department of Corrections from releasing offenders. This matter is pending before the Kentucky Supreme Court.

There is a debate as to whether sentencing alternatives should be expanded in order to reduce prison costs. Those who advocate for expanding sentencing alternatives argue that incarcerating offenders does not reduce recidivism. Instead, prison costs could be reduced through the use of rehabilitation for nonviolent offenders such as substance abuse treatment, educational programs and vocational training (Sentencing Project 2). They also maintain that the public favors rehabilitative measures over incarceration for nonviolent offenders (Monahan and Damon 26). Proposals to expand sentencing alternatives include increasing funding of current programs to serve more offenders, expanding programs into counties that do not have them, and mandating courts to use sentencing alternatives. Currently, judges can use discretion whether to award sentencing alternatives in lieu of incarceration for nonviolent and nonsexual offenses.

Opponents contend that sentencing alternatives should not be expanded. Some argue that tougher penalties will deter criminals from committing crimes and that incarcerating offenders prevents more crime from occurring. During a meeting of the Interim Committee on the Judiciary, the County Attorney of Todd County testified that rehabilitative programs are ineffective if the offenders who suffer from substance abuse are hesitant to acknowledge their addictions or demonstrate a genuine desire to overcome their addictions. He also pointed out that the public favors punishment for those who commit crimes against property. Another point of contention is that while sentencing alternatives may save money at the state level, they can have a negative impact on county jails that rely on reimbursements received for housing state prisoners.

During the 2009 Regular Session, the General Assembly passed Senate Bill 4 to address the substance abuse problems of felony offenders. It provides for a substance abuse recovery program where offenders are to remain supervised. The main program is codified under KRS 196.285. The statute

- mandates the Department of Corrections to develop a secured substance abuse recovery program for offenders who seek pretrial diversion.

- requires screening of felony substance offenders who seek pretrial diversion and require drug testing and treatment as a condition of pretrial release.
- requires felony substance abusers to participate and comply with substance abuse treatment in other secular or faith based programs before being eligible for pretrial diversion.
- grants credit for time served in the secured substance abuse recovery program implemented by the Department of Corrections or alternative drug treatment program.

By statute, the Department of Corrections' secured substance abuse treatment program must hold at least 200 inmates. Based on the bill's corrections impact statement, the estimated annual cost would be $2.3 million to treat 200 inmates. The projected total cost to incarceration this number in a state prison would be $3.8 million. Therefore, this program is projected to save an estimated $1.5 million per year. The pretrial diversion program is available to those charged with a Class D felony under the Controlled Substances Act or other nonviolent Class C and D felonies if the offender has a record indicating a need for substance abuse treatment. In addition, those convicted of a felony are not eligible for pretrial diversion if they have been convicted of a prior felony 10 years prior to their current conviction.

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Should the General Assembly take actions to lessen pretrial incarceration and ensure prompt trials?

Background

The pretrial detention cost for inmates in county jails has created a financial burden for many counties. Daily incarceration costs among the local detention facilities range from $19 per prisoner day in one county to $84.44 in another (Commonwealth 1-2). While local governments must assume all pretrial costs from arrest to sentencing, state government will reimburse counties in two situations. First, the state will pay for those inmates convicted of a felony who remain in the county jail while they await transfer to a state prison; however, counties must assume all costs prior to their conviction. Because of heavy caseloads, many inmates wait as long as 12 months before their court cases are processed. Second, county jails contract with the state to hold some Class C and D felons. For fiscal year 2009, the reimbursement amount is $31.34 per prisoner (Burton).

Housing these inmates generates profit for some county jails but longer pretrial detentions often contribute to a profit loss. In 2008, the total cost to county governments for the pretrial detention of felony offenders was $140 million (Long). The 2009 enactment of House Bill 369 amended numerous theft offenses in KRS Chapter 434 relating to credit and debit cards and in KRS Chapter 514 relating to theft offenses. The result of these changes is that county jails may incur more costs because the provisions raise the felony threshold limit of theft and receiving stolen property from $300 to $500. Therefore, more offenses will be categorized as misdemeanors than as felonies, which will increase the populations of county jails.

During the 2007 Regular Session, SB 173 and HB 551 were introduced. Had the bills passed, they would have required courts to bring a defendant to trial within a specific number of days from the date of indictment: 30 days for misdemeanors and 60 days for felonies. If the trials did not occur within the specified time limits, the courts would be responsible for reimbursing counties for the costs of pretrial detention.

During the 2008 Regular Session, HB 513 contained various provisions that would have reduced the sentence of a Class B misdemeanor to a maximum of 30 days and Class A misdemeanors to a maximum of 6 months. The bill did not pass.

Also during the 2008 Regular Session, Senate Bill 92 was enacted and amends KRS 431.540 relating to uniform schedule amounts of bail. The statute now allows the Supreme Court to prescribe a uniform bail schedule to those charged with Class D felonies. Courts also are permitted to refuse to set bail under the Supreme Court rule provided that the lower courts describe in writing the reason for refusal. A uniform schedule was proposed to the Supreme Court, but it has yet to be adopted. This schedule would help to alleviate the pretrial detention costs for counties by making bail more affordable for those charged with Class D felonies.

During the 2009 Regular Session, SB 76 was introduced. The bill would have required the state to reimburse local jails for pretrial detention costs of convicted felons regardless of credit for time served. In addition, the state would have been required to cover the costs for state inmates housed in county jails from the date of their conviction. Finally, for those charged with misdemeanors, the bail amount would not exceed the cost of the fine associated with the misdemeanor. The bill did not pass.

Discussion

One option for reducing pretrial detention would be to limit the arrest of persons for nonviolent misdemeanors. In such cases, instead of arresting offender and taking them to jail, police would be required to issue a citation containing a court date. Proponents claim that this would eliminate pretrial jail costs saving counties millions of dollars, pretrial release costs, and judge time in determining whether such persons should be released from jail because the defendants never go to jail prior to trial. Opponents argue that some persons such as repeat offenders should be jailed and released only after a judge considers their offense. The Administrative Office of the Courts reported that between 2007 and 2009, there were 320,646 persons charged with misdemeanors who were jailed prior to trial (Klute. "Re: Pretrial Data").

The "rocket docket" program is being used in some counties to expedite the plea bargaining process. It relies on the cooperation of the judge, prosecutor, and defense counsel to quickly negotiate a plea agreement. Those who advocate this process say it reduces costs because it shortens the length of pretrial detention, thereby reducing the number of inmates. The Jefferson County Commonwealth Attorney reported that since 2003, the rocket docket program in Jefferson County has saved $5 million in corrections costs (Rothgerber). Opponents say this can lead to an innocent person pleading guilty to a lesser charge to avoid a longer prison sentence .

The Pretrial Services Agency was created within the Administrative Office of the Courts to provide risk assessments to judges who are making decisions about whether to release recently arrested persons. By doing so, those who are assessed as being likely to appear in court could be released on bail until their court date. Defendants can be released on nonfinancial or financial bonds. When defendants are released upon recognizance—a nonfinancial bond—they are not required to post bail but must promise to appear in court. Courts are reluctant to grant nonfinancial bonds because of the possibility that a defendant will not appear in court. Instead, financial bonds, such as full cash or property bonds, are often issued because the money or property must be forfeited if the defendant does not appear in court. Some caution that it is difficult to predict whether financial bail is an effective method of ensuring that an individual will appear in court.

According to the Administrative Office of the Courts, between FY 2007 and FY 2009, there were 531,451 pretrial cases (Klute.

"Re: Pretrial Data"). The majority of these cases involved Class D felonies, Class A misdemeanors, Class B misdemeanors, and violations. Thirty percent (161,861) of the total were not released because they were unable to afford bail. Of the pretrial detainees who were not released, nearly 4 percent (6,084) were jailed between 6 months and 1 year pending trial; less than 1 percent (1,352) were jailed for more than 1 year pending trial (Klute. "Re: Jail Days").

Although defendants are often required to post bail, data obtained from the Administrative Office of the Courts from July 1, 2009, and August 25, 2009 suggest little difference in the failure-to-appear rates between those released on financial bonds and those released on nonfinancial bonds. Out of the total 15,652 people released, the failure-to-appear rate was 6.87 percent (1,076). For those released on financial bonds, the failure to appear rate was 3.33 percent (521), and for those released on nonfinancial bonds, the rate was 3.55 percent (555) (Klute. "Re: FTA"). It must be noted that this data may not accurately reflect the true failure-to-appear rates because data prior to July 2009 are unavailable. If the rates are tracked over a longer period of time and continue to remain similar between both types of bonds, there may be more reason to grant nonfinancial bonds to those who remain incarcerated because they cannot afford bail. Granting more nonfinancial bonds may reduce the costs associated with pretrial detention by decreasing the number of those held in pretrial detention who cannot afford bail.

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Should the General Assembly limit the use of sentence enhancements and the persistent felony offender statute?

Background

According to a recent report by the Pew Center on the States, Kentucky has the fastest growing prison system in the nation. More specifically, the number of felony offenders held in state prisons and local jails has increased by 50 percent in 8 years (15). According to the Department of Corrections, there are 21,667 offenders currently serving time for felony offenses, with 14,107 held in state facilities, and 7,560 held in local jails (Commonwealth. Dept. *Statewide*). In addition, 8 of the state's 17 prisons are operating at a capacity exceeding 100 percent (Raisor).

The average annual cost per prisoner in state facilities was $19,030 and $12,650 in county jails (Commonwealth. Dept. *Cost*). The prison population is projected to grow by 40.7 percent during the next decade. If the prison population continues to increase, there will be a need for more or larger facilities to house those inmates. One estimate projects the cost to construct a new prison to hold approximately 500 inmates would be $92 million (Gary 7, 28). Many attribute the rising incarceration rates and costs to "tough-on-crime" policies enacted during the past three decades (Lawson 3-4). In the effort to reduce crime, since the 1970s in Kentucky and nationally, legislation in the form of sentencing enhancements, the persistent felony offender statute, and the truth-in-sentencing statute has been enacted to increase the prison sentences of some offenders.

Sentencing enhancements occur when the penalties for an offense are increased through statutory amendments. There are two basic types of sentencing enhancements, the first provides for a higher penalty for a second or subsequent offense. If an offense is a Class D felony (1-5 years in penitentiary) and a second or subsequent offense is a Class C felony (5-10 years in penitentiary) the sentence is said to be enhanced. The second type is known as a simple enhancement, which increases the penalty previously provided for committing the offense, for example, from a Class A misdemeanor (12 months in jail) to a Class D felony (1-5 years in prison) and does not rely on a repeat commission of the offense. Table 1 shows the penalty scheme for felonies and misdemeanors as listed in the Penal Code.

The Kentucky Revised Statutes have used both types of enhancements for many offenses. In KRS 514.030, the severity of the penalty is based on a classification of the amount stolen. If less than $500 is stolen, it is a Class A misdemeanor. If more than $500 is stolen, it is a Class D felony. If $10,000 or more is stolen, it is a Class C felony. This statute also contains provisions for certain types of items that are stolen regardless of their worth. Theft of a firearm is a Class D felony. Stealing anhydrous ammonia is a Class B felony if it is stolen with the intent to manufacture methamphetamine. Finally, the anhydrous ammonia provisions also contain a second and subsequent offense enhancement as well as a simple enhancement.

Table 1
Penalty Scheme for Felonies and Misdemeanors

Offense	**Penalty**
Class A Felony	20-50 years or imprisonment for life without parole
Class B Felony	10-20 years
Class C Felony	5-10 years
Class D Felony	1-5 years
Class A Misdemeanor	90 days–12 months
Class B Misdemeanor	Less than 90 days

In Kentucky, sentencing enhancements have been applied to numerous nonviolent and nonsexual offenses under the Penal Code and Controlled Substances Act. The following table lists some examples.

Table 2
Various Sentencing Enhancements to Nonviolent and Nonsexual Offenses Under Kentucky Revised Statutes

	Description	Original Penalty	Amended	Enhanced Penalty
KRS 520.095	Fleeing or evading police in the first degree	Class A misdemeanor	Created two degrees of the offense	First degree is Class D felony; Second degree remains a Class A misdemeanor
KRS 527.040	Possession of a firearm by a convicted felon	Class D felony	Amended to a Class C felony if it is a handgun	Class C felony
KRS 530.050	Nonsupport and flagrant nonsupport	Class A misdemeanor	Created two degrees of the offense; Flagrant nonsupport is set at $1000	Nonsupport Class A misdemeanor; flagrant nonsupport class D felony
KRS 218A.1411	Trafficking within 1,000 yards of a school	Class A	Misdemeanor trafficking offense elevated to a Class D felony	Class D felony unless there is a higher penalty for the offense
KRS 218A. 1432	Unlawful manufacture of methamphetamine	Class B felony	Possessing a combination of two or more chemicals or equipment necessary to produce methamphetamine	Elevates to Class A felony for each subsequent offense
KRS 218A.1437	Unlawful possession of methamphetamine	Class D felony	Amended to reduce amount of ephedrine that an individual can purchase	Each subsequent offense is a Class C felony

Source: Staff compilation of Kentucky Revised Statutes.

The persistent felony offender (PFO) statute, KRS 532.080, provides enhanced penalties for persons who commit additional felony offenses. Unlike penalty enhancements that require committing the same offense a second or subsequent time, the persistent felony offender statute applies to any new felony committed. When first enacted in 1974, the PFO law required that the person must be convicted and imprisoned on two separate occasions before the law was applied. On the third conviction, the felon received the maximum sentence. The statute provides that a person cannot be granted probation, shock probation, or conditional discharge. Currently, a prosecutor may elect to use both a penalty enhancement and the persistent felony offender statute.

The PFO law has been changed so that a person does not have to be imprisoned on two separate occasions but merely convicted on two separate occasions. In addition, the General Assembly amended the law to create two categories, PFO in the first degree and PFO in the second degree. Sentencing and eligibility for parole for PFO in the first degree is based on the class of felony for which the offender has been convicted—the higher the class, the longer the mandatory sentence required to be served before being eligible for parole, probation, or shock probation. Offenders convicted of Class C or D felonies are not eligible for parole, probation, or shock probation unless all previous felonies were nonviolent or nonsexual Class D felonies.

In PFO in the second degree, the person need only have been convicted of one prior felony offense. Those who qualify under this category are sentenced based on the next-highest felony degree than the offense for which they are convicted. For example, if the offender was convicted of a Class D felony, the sentence would under the range of a Class C felony. Like the PFO in the first degree, those sentenced under PFO in the second degree are not eligible for parole, probation, or shock probation unless all previous felonies were nonviolent or nonsexual Class D felonies.

In both categories, those convicted as violent offenders are not eligible for parole until they have served 85 percent of their sentences.

There are two typical truth-in-sentencing provisions. The first, found in KRS 532.055, is to inform the jury during the penalty phase of a trial of the potential penalties, whether probation may be granted, and when the defendant may be eligible for parole. The second is found in KRS 439.3401 relating to a person statutorily defined as a "violent offender." These statutes increase the amount of time a defendant must serve prior to being eligible for parole. As originally enacted in Kentucky, the violent offender had to serve 50 percent of a term of years sentence prior to being eligible for parole. This was later increased to 85 percent on a term of years and 20 years on a life sentence.

In 2009, the General Assembly passed Senate Joint Resolution 12 that reauthorized the Subcommittee on the Penal Code and the

Controlled Substances Act of the Interim Joint Committee on Judiciary, created in 2008 under Senate Joint Resolution 80. The subcommittee will study the policies that may be causing the increase in prison growth and determine what, if any of the following proposals should be implemented.

- Prohibit the prosecutor from combining sentence enhancements and prosecution under the PFO law.
- Amend the PFO laws to apply only to violent offenders and the most serious felonies (Class A, B, C).
- Limit the use of PFO laws to offenses within the Penal Code.
- Create an additional felony category with a sentencing range of 1-2 years for low-level nonviolent or nonsexual offenses.
- Lower the penalties for second or subsequent offenses for drug paraphernalia.

House Bill 378 was introduced during to 2009 Regular Session to address the combined use of sentencing enhancements and the persistent felony offender statute. The bill contained provisions that would have prohibited prosecutors and courts from applying both laws during prosecution and the sentencing phase unless the offender was charged with a violent or sexual offense under KRS 439.3401. The bill did not pass.

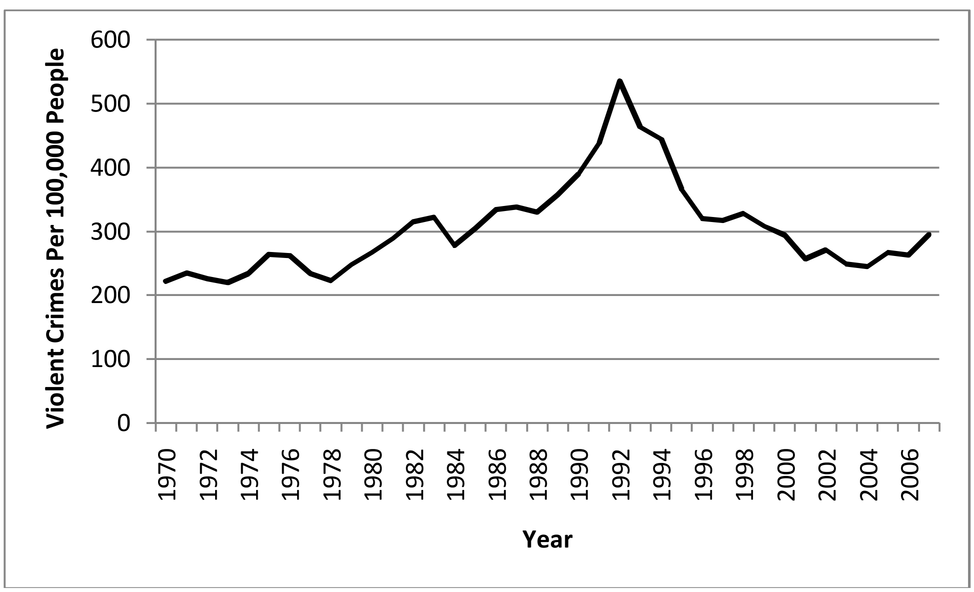
Discussion

There is a debate as to whether tough-on-crime policies should be minimized in order to reduce prison costs. Some argue that the policies should be limited only to those who are convicted of violent and sexual crimes. Advocates of relaxing tough-on-crime policies contend that the policies have been disproportionately applied to offenders convicted of property and drug crimes, which have contributed to the increase in the prison population, without a significant reduction in crime (Lawson 3-4). Proponents further argue that prison costs could be reduced through the use of rehabilitation for nonviolent offenders such as substance abuse treatment, educational programs, and vocational training that would reduce recidivism by treating the underlying causes of crime—drug addiction and poverty (Sentencing Project 2). They also contend that the public favors rehabilitative measures over incarceration for nonviolent offenders (Monahan 14).

Opponents contend that tough-on-crime policies should not be changed because they ensure public safety by reducing crime. Some argue that tougher penalties will deter criminals from committing crimes and that incarcerating offenders prevents more crime from occurring. During a meeting of the Interim Committee on the Judiciary, the County Attorney of Todd County maintained that rehabilitative programs are ineffective if the offenders who suffer from substance abuse are hesitant to acknowledge or demonstrate a genuine desire to overcome their addictions. He also stated that tough-on-crime policies are often used as a last resort to incarcerate offenders who continue to commit crimes despite being given numerous chances to reform their behavior. He pointed out that the public favors punishment for those who commit crimes against their property (Johns). Opponents argue that decreasing the use of tough-on-crime policies will not prevent crime and that public safety should not be compromised to save money.

The following figures show Kentucky's rates of violent and property crimes per 100,000 people from 1970 to 2007. The rate of violent crimes grew steadily from 1970 and reached its highest levels during the late 1980s to mid-1990s. The rates steadily declined from 1996, and although they have fluctuated, they have remained consistent with the crime levels prior to 1987. Overall, the rate of violent crimes has increased 33 percent since 1970.

Figure 1
Kentucky's Rate of Violent Crime Per 100,000 People
1970-2007

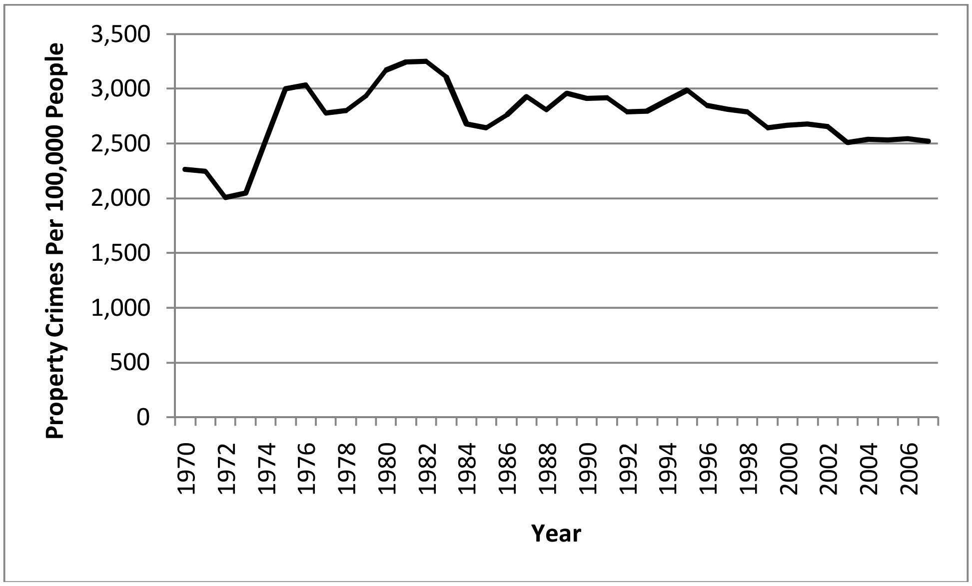


Note: Violent crimes are based on the number of reported crimes including murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault.
Source: Developed by Judiciary Committee staff from information obtained from Bureau of Justice Statistics.

Property crimes in Kentucky have had an overall increase of 11 percent since 1970. Crime rates were at the lowest level in the early 1970s; however, a dramatic increase occurred from 1973 to

1977. The crime rate reached its highest peak during the early 1980s and started declining in the mid-1980s. Since then, the crime rates have fluctuated but have continued to decline slightly since 1996.

Figure 2
Kentucky's Rate of Property Crime Per 100,000 People
1970-2007



Note: Property crimes are based on the number of reported crimes including burglary, larceny theft, and motor vehicle theft.
Source: Developed by Judiciary Committee staff from information obtained from Bureau of Justice Statistics.

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Labor and Industry

Should the General Assembly address solvency and financial stability issues in the unemployment insurance program?

Background

According to the National Bureau of Economic Research, the current recession began in December 2007 (National Bureau). It is now the longest of the 11 post-war recessions (Lynch). Kentucky's August unemployment rate was 11.1 percent. The highest recorded unemployment rate for Kentucky was 12.1 percent in December 1982 (U.S. Dept. of Labor. Bureau). Approximately 227,000 Kentucky workers are currently unemployed and approximately 130,000 are receiving unemployment insurance benefits (Mountjoy). Claims for unemployment insurance benefits in Kentucky and most other states are at record high levels.

Each state has an unemployment insurance program, and each state program has a trust fund that pays income benefits to eligible workers who have become unemployed. State unemployment insurance trust funds are funded by employers through payroll taxes imposed on a portion of wages paid to workers. Employers also pay a federal unemployment tax of 0.8 percent on the first $7,000 of each worker's annual wages. Primarily, the federal tax funds administrative costs of state programs, provides loans to states from a federal unemployment account, and pays a portion of extended unemployment benefits. A federal-state partnership, created in 1935 as part of the Social Security Act, is the basis for the unemployment insurance system in the United States. The system is regulated by the federal government but administered by the states. States determine their own benefit levels, eligibility requirements, tax structure, and taxable wage base, except that a state's minimum taxable wage base must be at least $7,000 or the amount of the federal tax base (U.S. Dept. of Labor. Unemployment Compensation).

In late January 2009, revenues produced from the unemployment tax structure and reserve funds in Kentucky's unemployment insurance trust fund became insufficient to meet benefit payment obligations to Kentucky's unemployed workers (Mountjoy). Since late January, Kentucky has borrowed approximately $426 million from the federal unemployment account, and state officials cannot predict how long borrowing will be necessary (U.S. Dept. of Labor. Unemployment Insurance). Unlike several other states, Kentucky has only borrowed federal funds one other time to pay benefits. Currently, 21 states have received such loans, and by the end of the year, more than half the states are expected to be paying unemployment insurance benefits with loans from the federal unemployment account.

Kentucky unemployment insurance officials attribute the financial difficulties of the trust fund to a structural imbalance in the program's financing and benefit mechanisms. This imbalance is the result of a taxable wage base of $8,000 established by statute in 1982 that has not changed. The weekly benefit level, however, is adjusted annually with inflation. In 1982, the taxable wage base of $8,000 represented about 50 percent of a Kentucky worker's average annual wages. Currently, it represents about 25 percent (Mountjoy). Kentucky's taxable wage base of $8,000 would now be approximately $18,000 if it had increased with inflation. Kentucky's maximum weekly benefit increased from $140 in 1982 to the current maximum of $415.

Kentucky's unemployment insurance trust fund problems are mirrored in other states. Many states have not increased their taxable wage bases since the early 1980s. Most state unemployment tax structures do not contain indexing features that automatically adjust the taxable wage base (Berglund). Several states, like Kentucky, experienced benefit payouts in excess of tax revenues before the current recession began.

Discussion

In response to Kentucky's unemployment insurance trust fund problems, the Governor appointed a task force in March to study the issue and to make recommendations by October 1, 2009, to restore solvency and stability in the unemployment insurance program. Members of the task force include legislators and representatives of employers and employees in Kentucky.

The recession has dealt a severe blow to state unemployment insurance trust funds, but many state trust funds were experiencing significant financing and solvency issues before the recession began. The national Advisory Council on Unemployment Compensation recommended that states maintain trust fund reserves sufficient to pay at least one year of benefits at levels comparable to its previous average high costs (Economic). At the end of 2006, state trust funds, on average, had about 6 months of reserves sufficient to pay benefits at average recessionary levels. At the beginning of this recession, state unemployment insurance trust fund reserves were at the lowest level of pre-recessionary reserves ever recorded (Pavosevich). Unemployment insurance experts have attributed most of the solvency problems states are experiencing to a structural imbalance between the revenue produced by the unemployment insurance tax structures and benefit mechanisms.

Options to correct solvency and financing issues in Kentucky's unemployment insurance trust fund include increasing Kentucky's taxable wage base from the current $8,000, and possibly indexing taxable wage base to reflect increases in average annual wages, imposing a waiting period before benefits are paid, limiting increases in the maximum weekly benefit levels or freezing current benefit levels, limiting voluntary payments by employers in order to achieve a lower tax rate, and imposing an administrative fee on employers who reimburse the trust fund rather than make regular tax payments to the fund.

Taxable wage base. The taxable wage bases for states range from $7,000 in six states to $35,700 in Washington. The taxable wage bases in at least 18 states are indexed to some measure of previous annual wages (U.S. Dept. of Labor. *Significant*).

Proponents of increasing the taxable wage base and indexing it to growth in wages maintain this is crucial to achieve equilibrium between the financing and benefit mechanisms and to allow adequate reserve growth that ensures availability of sufficient funds to meet benefit obligations during periods of high unemployment. Proponents further argue that most states with indexed taxable wage bases do not experience the financial difficulties that other states are currently experiencing.

Opponents contend that increasing taxes on employers stifles job creation, diminishes employers' ability to compete with employers in other states, threatens employers' survival during tough economic times, promotes increases in benefit levels that ultimately lead to increased taxes on employers, and creates a potential for legislative diversion of funds for other purposes.

Waiting period. Kentucky is one of 13 states that do not require a waiting period before benefit payments begin. Waiting periods generally range from 1 to 3 weeks and most cannot be compensated for the duration of the claim (U.S. Dept. of Labor. *Comparison*). Recent estimates indicate a 1-week waiting period would result in an annual savings to the unemployment insurance trust fund of approximately $41 million (Commonwealth).

Proponents of a waiting period argue that it is a significant cost savings to the system and is a way for workers to share in the overall costs of the program. They also argue that newly unemployed workers can more easily afford losing a week of benefits at the beginning of a claim.

Opponents argue that the original purpose of a waiting week was to allow time for a worker's wage history to be collected by the unemployment agency but that modern technological efficiencies in claims processing nullify the original purpose. They further argue that a waiting period requirement is an unjustified withholding of a week of badly needed income replacement for unemployed workers.

Freezing or limiting increases in maximum benefit levels. Kentucky's maximum weekly benefit level increases annually according to increases in the average annual wages; however, it is frozen if annual tax rates increase or if the trust fund balance at the end of the year is below $120 million. Consequently, Kentucky's maximum weekly benefit of $415 has not increased since 2006. Maximum weekly benefit levels range from $230 in Mississippi to a maximum of $942 in Massachusetts (U.S. Dept. of Labor. *Significant*). The national average is approximately $309.

Proponents of freezing or limiting increases in maximum benefit levels argue that the financial problems of the unemployment insurance trust funds should not fall solely on employers and that higher benefit levels promote longer periods of unemployment.

Opponents argue that it is unfair to cut benefits to unemployed workers who are experiencing longer periods of unemployment and permanent loss of jobs. Opponents further argue that reform of unemployment insurance programs is long overdue, that benefit levels are too low, and that the unemployment insurance system overall does not reflect growth in part-time employment and other changes in the workforce that have occurred since the system was created in the 1930s.

Voluntary payments. Voluntary payments by employers are permitted in about half of the state unemployment insurance programs. Employers use voluntary payments to increase the balance in their reserve accounts, which lowers their unemployment tax rate. Some states limit voluntary payments and some suspend voluntary payments based on the unemployment trust fund balance and other factors. In 2008, 197 Kentucky employers exercised their option to make voluntary payments to the trust fund to achieve a better tax rate. Savings to some of those employers were significant. Even though some employers realize significant savings by making voluntary payments, the maximum number of employers making such payments has never exceeded 300 in any year. The maximum impact on the trust fund has not exceeded $4 million annually (Commonwealth).

Proponents of limiting or eliminating voluntary payments argue that excessive voluntary payments manipulates the experience rating process that assigns employer tax rates based on prior claims of employees, and results in inequities for employers who do not have the financial resources to "buy down" the rate assigned them.

Opponents argue that voluntary payments assist employers in controlling the cost of doing business and possibly delays or eliminates the necessity to reduce their workforces.

Reimbursing employers. Contributing employers make regular contributions to the unemployment insurance trust fund in the form of tax payments. Reimbursing employers do not. Rather, reimbursing employers reimburse benefit payments made on their behalf when they receive a bill from the state agency. The Federal Unemployment Tax Act requires that governmental employers and certain nonprofits be granted the option to be reimbursing or contributing employers (26 U.S.C. 3301-3311). However, state may impose administrative fees or surcharges on reimbursing employers to cover the cost of claim processing or for other services, or require deposits to guarantee availability of funds for reimbursements.

Proponents complain that reimbursing employers, such as state and local governments, school districts, and nonprofit organizations, have an unfair advantage over contributing employers and should be required to bear some of the costs of the program.

Opponents oppose imposition of fees or surcharges on reimbursing employers to cover the cost of claims administration because the federal government funds administrative costs of state unemployment insurance programs.

If the Governor's Task Force on Unemployment Insurance offers recommendations, the General Assembly may consider those recommendations as well as legislation adopted or considered in other states. Tennessee recently increased its taxable wage base from $7,000 to $9,000, and West Virginia increased its taxable wage base from $8,000 to $12,000. Both states made the increases retroactive to January 1, 2009. The legislation in both states contained provisions that reduce the wage base if the unemployment insurance trust fund exceeds a certain level. Effective in 2010, the taxable wage base in Arkansas will increase from $10,000 to $12,000, and Indiana's taxable wage base will increase from $7,000 to $9,500, along with increases in employer tax rates.

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Should the General Assembly adopt the unemployment insurance modernization provisions in the 2009 American Recovery and Reinvestment Act to receive federal incentive funds?

Background

On February 17, 2009, the American Recovery and Reinvestment Act (ARRA) was signed into law (Public Law 111-5). The Act is an effort to stimulate the economy and create jobs through various avenues. ARRA contains several provisions fully funded by the federal government that provided immediate assistance to unemployed workers and state unemployment insurance programs:

- increased weekly unemployment benefits by $25 until January 1, 2010
- extended the Federal Emergency Compensation program through December 26,2009, making additional weeks of benefits available to unemployed workers
- provided full federal funding of the federal Extended Benefits program until January 1, 2010, and permitted states to temporarily modify eligibility requirements, making more unemployed workers eligible
- exempted from taxation the first $2,400 of unemployment benefits received in 2009
- suspended interest on federal loans to states until December 31,2010
- transferred $500 million to states to assist in processing the increase in volume of unemployment claims received during the recent recession

These ARRA provisions impose no additional costs to the states.

Another major unemployment initiative in ARRA relates to modernizing state unemployment insurance programs. As an incentive to states, ARRA has allocated $7 billion for the modernization initiative. An individual state's share of the $7 billion is based on the state's proportionate share of the total federal unemployment insurance taxes paid. According to the U.S. Department of Labor, Kentucky's portion of the $7 billion would be approximately $90 million. (U.S. Dept. of Labor. Directives). Kentucky's deadline for adopting modernization provisions and applying for these benefits is August 22, 2011.

States that expand eligibility and access to unemployment insurance benefits in three major areas are eligible to receive incentive funds. One-third of the incentive funds would be paid to states that have or that adopt an alternative base period that considers a worker's most recent earnings to establish a monetarily valid claim. Before ARRA, most states defined "base period" as the first 4 of the last 5 completed calendar quarters and a worker's wages during that base period determined eligibility for benefits. An alternative base period would require consideration of a worker's wages from the most recently completed calendar quarter. The incentive funds would be payable if a state adopts a base period using the most recent wages or if a state requires consideration of the most recent wages when an otherwise eligible worker is denied benefits because of insufficient wages earned during the first 4 of the last 5 completed calendar quarters.

If a state does not adopt an alternative base period, it cannot pursue the second two-thirds of the incentive funds. In order to receive the remaining two-thirds, a state must expand benefit eligibility by adopting two of the following four options:

1. Prohibit disqualification of otherwise eligible part-time workers who seek part-time jobs.
2. Prohibit disqualification of otherwise eligible workers who quit their jobs because of compelling family reasons that include
    a. documented domestic violence in which the worker's safety is in jeopardy if employment is continued;
    b. illness or disability of a worker's immediate family; or
    c. moving to accompany a spouse who has received employment at a location too far for the employee to commute.
3. Provide additional weeks of benefits to workers enrolled and making satisfactory progress in state-approved training programs.
4. Provide income allowance of $15 to $50 per dependent.

State adoption of any or all of the modernization provisions cannot be temporary or contain a sunset provision. Amendments to a state's law must be permanent; however, the Department of Labor has relented and stated that a state could repeal the provisions pursuant to legislative procedure at a later time. A state must adopt the modernization provisions before the end of the 2011 federal fiscal year in order to receive the incentive funds. (U.S. Dept. of Labor. Directives).

Discussion

Kentucky's unemployment insurance law does not contain any of the unemployment insurance modernization provisions. Kentucky would be eligible for $90 million of the $7 billion of federal incentive funds set aside for unemployment insurance modernization distributions. Kentucky would receive $30 million if an alternative base period is adopted, and an additional $60 million if two of the four benefit expansion provisions are adopted (U.S. Dept. of Labor. Directives).

By September 9, 2009, 19 states had been approved to receive their full share of the modernization incentive funds, and 13 states had been approved to receive the one-third incentive payments for adoption of an alternative base period (U.S. Dept. of Labor. DOL-ETA). Before ARRA, 18 states had alternative base period provisions in their laws. Since ARRA, another 18 states have adopted alternative base period provisions. Fifteen states have enacted legislation to provide benefits to part-time workers, while 2 states already had such provisions. Thirteen states have enacted legislation to provide benefits to workers in approved training programs. Fourteen states have enacted legislation that does not disqualify a worker who quits a job for compelling family reasons. Two states have enacted legislation that provides dependents allowance, while one state already provided a dependents allowance (National).

Proponents of the unemployment insurance modernization provisions of ARRA argue that Kentucky should take advantage of the potential to receive the $90 million in incentive funds because such an infusion into the unemployment insurance trust fund could decrease future borrowing of federal funds for benefit payment obligations. Supporters of these provisions state that an increase in employees eligible for benefits helps maintain stability for businesses and the economy. The alternative base period is designed to help low-wage workers who may not receive benefits if wages from the most recent calendar quarter are not considered. In addition, the base period currently used in Kentucky was enacted prior to electronic filings when paper filings created a "lag" time to obtain these wage records. With electronic filings, wages from the most recent quarter are readily available. Further arguments in support of unemployment insurance modernization include fairer unemployment insurance rules for part- time workers, workers displaced for compelling family reasons, workers desiring further training, and workers who need additional financial assistance for dependents (Stettner).

Opponents of ARRA's unemployment insurance modernization provisions argue that the provisions unduly expand unemployment insurance benefits. Even with $90 million of federal incentive funds, the expansion of benefits will increase costs and place a financial strain on unemployment insurance trust funds and ultimately increase employer taxes. Opponents argue that increases in employer taxes prohibit the creation of jobs and increase duration of unemployment. Opponents contend that each state has different situations depending on its job market; therefore, a one-size-fits-all solution is not in the best interests of individual states or their employees. In addition, opponents argue that expanded benefits negate the original purpose of unemployment insurance and that employees impacted by the modernization provisions may be eligible for assistance through other social programs (Holmes).

In March 2009, the Governor appointed the Unemployment Insurance Task Force to study and propose long-term changes in Kentucky's unemployment insurance program and to determine the feasibility of adopting the modernization provisions in ARRA. The task force has six legislators in its membership. The task force is required to provide recommendations to the Governor on or before October 1, 2009. The General Assembly may consider recommendations of the task force and any legislative proposals incorporating the recommendations presented by the Governor. The U.S. Department of Labor has reserved Kentucky's potential share of the modernization incentive funds until the close of federal fiscal year 2011, and an application for certification must be received no later than August 22, 2011.

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Licensing and Occupations

Should the General Assembly review the number and necessity of independent occupational boards and commissions?

Background

In Kentucky, 51 different occupational boards, commissions, or agencies regulate at least 97 occupations. Of these 51 entities, 17 have been created since 1994, and 10 have been created since 2002. Twenty of the 51 regulatory entities are independent occupational boards and commissions that are neither controlled by nor attached to any other agency. Several of these 20 oversee more than one profession. For example, the Kentucky Board of Medical Licensure supervises at least five professions, including physicians, physician assistants, surgical assistants, acupuncturists, and athletic trainers (KRS Chapter 311).

Other boards and commissions are either administratively attached to or completely controlled by a larger agency. The primary agency with several boards attached is the Finance Cabinet's Division of Occupations and Professions. This office is administratively attached to but does not directly control 20 unrelated occupational boards comprising more than 40,000 licensees (Short). Professionals regulated by these boards include psychologists, veterinarians, private investigators, and audiologists. In contrast, the Kentucky Department of Housing, Buildings and Construction directly oversees at least 19 professions, and 12 of these professions are directed through internal boards or advisory committees that are a part of the department. Professions controlled by the department include plumbers, electricians, building inspectors, manufactured home installers, and fire protection sprinkler contractors.

Kentucky does not have specific statutory standards for when an occupational board or commission may or should exist independently. Further, Kentucky statutes do not provide criteria or a systematic approach for determining which professions the state should regulate. Other states have reviewed this issue, and there are four primary routes to occupational regulation reform: adding public members to a board, centralizing regulatory activities, adopting "sunrise" legislation when new regulatory boards are sought, and adopting "sunset" legislation to evaluate existing boards (State of Minnesota 7).

Legislatures in two of Kentucky's border states have looked into board consolidation or elimination. In 2005, Ohio passed House Bill 66, part of which proposed consolidating several independent occupational boards under cabinet control (State of Ohio 1). The Virginia General Assembly directed research into collegial bodies, which were defined as boards, commissions, and councils that have power vested equally among members, are established by law or executive order, and typically provide advice to an agency, promulgate public policies or regulations, or oversee the operations of an agency. The resulting report recommended the elimination of 46 collegial bodies and one foundation, three separate mergers for four collegial bodies and two agencies, and no action regarding 15 bodies. The report's recommendations were based on criteria such as determining whether critical functions were performed efficiently and effectively, identifying duplicative functions and activities, determining whether the entity is properly funded, and comparing and evaluating the entity's work and results with its stated statutory mission (Commonwealth 3-6).

Discussion

Those who favor reducing the number of independent occupational boards in Kentucky argue that some of the current boards are so small that their membership cannot pay enough to perpetuate each board, which may lead to increased licensing fees. Also, advocates for merger or greater oversight fear that small independent boards risk creating an artificial restriction on free trade or having the balance of power skewed too favorably toward the licensees rather than the board.

Those who favor maintaining the current approach argue that independent occupational boards provide greater public protection through more scrutiny by actual experts in the field. Independence also improves member service and removes interagency conflicts of interest. Proponents of independent boards cite widespread fraud prior to board licensure and regulation of practice. They contend that board oversight helps to assure the public that a practitioner is qualified (King). An alternative approach supported by some in favor of retaining independent occupational boards is establishing stronger reporting and transparency requirements for the existing boards without forcing merger or agency supervision.

One blended proposal is to allow independent boards or commissions for professions where close regulation is critical for public safety, such as physicians, nurses, and pharmacists; but to require cabinet oversight or merged boards for those professions where public safety is not as urgent, such as interior designers and art therapists. Opponents of this approach argue that cabinet oversight better protects public safety through greater resources and objectivity. The overall question is whether to leave these boards independent, whether to merge boards or deregulate certain professions, or whether to attach boards to a larger agency such as the Division of Occupations and Professions.

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Should the General Assembly take steps to increase the number of types of legalized gambling in the Commonwealth?

Background

Currently, three types of gambling are legal in Kentucky: pari-mutuel wagering, the Kentucky Lottery, and charitable gaming. Pari-mutuel wagering at horse tracks has a long history in the state, dating to the 19th century, and a 1931 Kentucky Supreme Court decision in *Commonwealth v. Kentucky Jockey Club* found that pari-mutuel wagering at race tracks was not prohibited by the state Constitution. The Kentucky Lottery was authorized by constitutional amendment in 1988, and charitable gaming was authorized by a constitutional amendment in 1992. The lottery is the largest revenue-producing form of gambling in the Commonwealth.

A report by the Commonwealth's Auditor of Public Accounts provided the following breakout of gambling revenue for 2007:

- Kentucky Lottery sales, $744 million
- Charitable gaming receipts, $489 million
- All wagers placed in Kentucky on Kentucky races, $470 million

There has been debate about increasing the number of legal gambling options in the state. Since 2000, nearly every regular session of the General Assembly has included at least one bill introduced to expand the types of authorized gambling. The bills have generally provided for either free-standing casinos, casinos at racetracks, some form of electronic gaming at racetracks, or a combination of these provisions.

During the 2008 Regular Session, a constitutional amendment and accompanying legislation were introduced that would have allowed casino gambling at racetracks and other locations. In the 2009 Regular Session, two bills were introduced to permit video lottery terminals to be placed at racetracks under the oversight of the Kentucky Lottery Corporation. The 2009 Special Session saw a similar measure to allow video lottery terminals at racetracks.

Discussion

Proponents of expanded gaming argue that revenue generated by licensing fees and the taxation of gambling proceeds could be used to meet a variety of needs. Recent proposals to expand gambling have included using the proceeds to fund education, reduce the property taxes on motor vehicles, supplement purses at racetracks, expand drug addiction rehabilitation services, and offset the elimination of state income tax on military pay. (The state income tax on military pay was eliminated during the 2009 Special Session by House Bill 3.) Proponents have also stated that Kentuckians are already traveling to nearby states to engage in forms of expanded gambling, allowing those states to capture revenue that would have gone to Kentucky, had more gambling options been available in the Commonwealth.

Opponents of expanded gambling state that gambling contributes to a variety of social problems, including gambling addiction, bankruptcies, and divorce. Opponents of expanded gambling also argue that there are alternative ways to fund state programs and to supplement purses at racetracks. They also argue that evidence is increasing that states that are relying on revenue from gambling to support their general funds are seeing those revenues shrink because of a decline in aspects of the horse racing industry and the economy overall. Additionally, opponents of expanded gambling predict that the revenues of the Kentucky Lottery Corporation and of organizations involved in charitable gaming would decrease if other gambling options were available in Kentucky.

Debate continues over the need for a constitutional amendment to authorize expanded gambling. Opinions issued by the Attorneys General in 1993 and 1999 stated that a constitutional amendment would be required to authorize either casino gambling or the operation of video lottery terminals through the state lottery. Opinions issued in 2005 and 2009, however, asserted that no constitutional amendment would be required to statutorily permit video lottery terminals. While the earlier expansions of gambling through the lottery and charitable gaming were accomplished by constitutional amendments, proposals during the 2009 Regular and Special Sessions to place video lottery terminals at horse racetracks did not include provisions to amend the state's constitution. It is possible that any debate about the necessity of a constitutional amendment to authorize expanded gambling will be resolved by the courts.

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Should the General Assembly address Sunday sales of wine at small farm wineries?

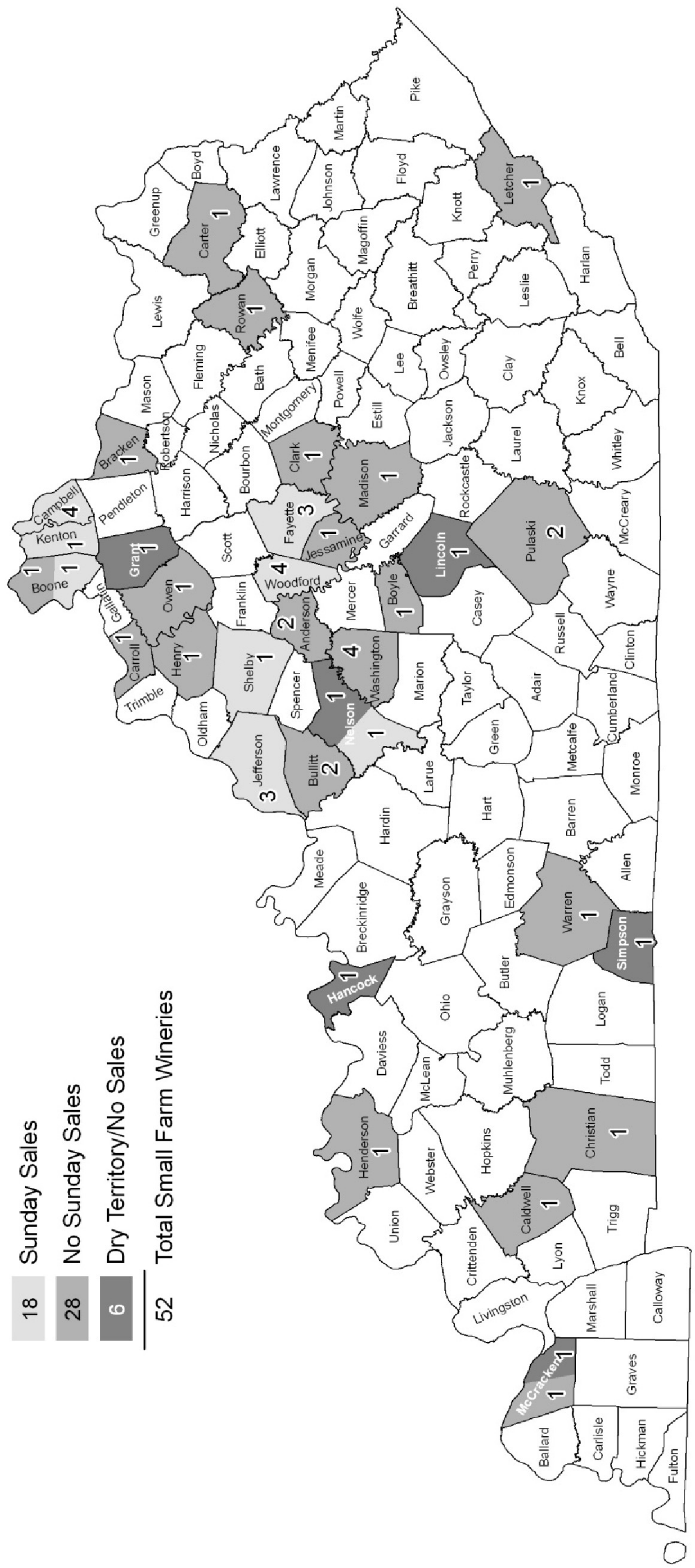
Background

In 2003, there were four small farm wineries in the Commonwealth (Kentucky). As of August 2009, the Kentucky Department of Alcoholic Beverage Control reported 52 licensed small farm wineries situated in nearly every geographic region of the state (Davis). Each winery must be licensed by the department under KRS Chapter 243. In addition to authorizing a winery to manufacture wine up to 50,000 gallons per year, a small farm winery license permits a winery to serve a limited number of complimentary samples to a person per day; to allow the consumption of wine purchased at the winery on the licensed premises; to ship up to two cases of wine purchased by a customer in person; and to sell wine produced at the winery by the package or drink.

However, a winery's ability to sell its product is subject to the wet/dry status of its home precinct within a county. Local jurisdictions may authorize the retail sale of wine in dry areas, including Sunday sales, by local option election or by local ordinance (KRS 243.155). Because some jurisdictions have approved wine sales on Sunday and some have not, there exists a disparity among wineries across the state. The following map shows the current status of Sunday sales at wineries. Of the 52 licensed wineries, 18 are able to sell wine on Sundays either by the drink, by the package, or both. The remaining 34 licensed wineries are either in jurisdictions that do not allow Sunday sales or in dry territories. Those wineries located in totally dry territories cannot sell on Sunday, or any other day of the week. Their sales are largely dependent on the wholesale distribution system and sales at liquor and drug stores in wet territories.

Sunday Sales At Small Farm Wineries

(August, 2009)



Number within a county represents number of wineries in that county.
White or unshaded counties denote those that do not contain a small farm winery.

Source: LRC Analysis based upon data received from Kentucky Department of Alcoholic Beverage Control.

Discussion

Proponents of legislation allowing Sunday sales maintain that tourism is a major aspect of a winery's business and that Sunday sales are necessary to attract weekend tourists who often travel from out of state to visit a Kentucky winery. Other advocates maintain that a state exemption for wineries to sell wine on Sunday is necessary to level the playing field amongst competition in the same industry. The owner of a winery in Richmond stated that there are wet counties that adjoin his winery but because there are no Sunday sales, he cannot be a part of Sunday tours associated with the Wine Trail (Land).

Opponents argue that Sunday sales should remain the decision of the local community. KRS 244.290, 244.480, and 243.050 contain courses of action that wineries may pursue to obtain local approval. However, local officials in traditionally dry territories may be hesitant to address the issue. Voters in those areas may fear that allowing the retail sale of wine on Sunday at wineries will lead to the service of alcohol in restaurants, grocery and convenience stores; and eventually, to the establishment of bars and nightclubs. Other opponents maintain that a Sunday sales exemption for wineries would grant undue favoritism to the industry and would create a disadvantage for beer retailers and distillers in the same localities because the winery exemption would not apply to selling beer or liquor on Sunday.

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Local Government

Should the General Assembly increase the hold harmless amount that was originally set in HB 272 of the 2005 Regular Session?

Background

Prior to January 1, 2006, telecommunications companies and cable providers were subject to the public service company property tax for both state and local purposes and to locally imposed franchise fees. Direct broadcast service (DBS) providers, such as satellite television companies, were not included, nor were they classified as a public service company for property tax purposes. A telecommunication or cable company's state and local property tax was based on the total unit value of the company including the value of real property, tangible property, and intangible property.[1] The intangible portion of the unit value was difficult to determine and was often contested by the company. Local governments imposed franchise fees on most telecommunications companies and cable companies. However, local governments were prohibited by federal law from imposing a franchise fee on DBS providers (47 U.S.C. § 152). Franchise fees can be any tax, charge, or fee required by ordinance or agreement to be paid to a local government by a provider for the ability to conduct business within that jurisdiction. The types of franchise fees are explained in KRS 136.660.

With the passage of HB 272 during the 2005 Regular Session, the General Assembly changed the way in which telecommunications companies, cable providers, and DBS providers were taxed at both the state and local levels. The legislation took effect January 1, 2006. The revenues that were previously generated by locally imposed franchise fees and the public service company property taxes on telecommunications companies and cable providers for both state and local taxing jurisdictions were replaced with a 2.4 percent gross receipts tax on cable providers and a 1.3 percent gross receipts tax on telecommunications service providers. DBS providers were also subject to the same 2.4 percent gross receipts tax as cable providers. In addition, a 3 percent excise tax was also imposed on cable and DBS providers and applied to the retail purchase of services. Local jurisdictions were also prohibited from imposing a franchise fee or tax in the future (KRS 136.616; KRS 136.604; KRS 136.660).

[1] "Real property" includes all lands within this state and improvements thereon (KRS 132.010(2)). "Personal property" includes every species and character of property, tangible and intangible, other than real property (KRS 132.010(4)). "Intangible personal property" means stocks, mutual funds, money market funds, bonds, loans, notes, mortgages, accounts receivable, land contracts, cash, credits, patents, trademarks, copyrights, tobacco base, allotments, annuities, deferred compensation, retirement plans, and any other type of personal property that is not tangible personal property (KRS 132.010(22)).

These taxes are collected on one return by the Department of Revenue and deposited into the gross receipts and excise tax fund within the Treasury Department and then distributed by formula to the state's general fund and to the participating local governments (KRS 136.648). The purpose of HB 272 was to help simplify and streamline the reporting process for telecommunications and cable providers because these companies now only had one tax return for the state rather than one for each local government that levied such a tax (KRS 136.600).

HB 272 sought to ensure that local jurisdictions including school districts that had previously collected the public service company property taxes and franchise fees would get the same amount of revenue under the new system as they did before January 1, 2006. To achieve this, a specific "hold harmless" amount was established in statute to compensate the local jurisdictions (KRS 136.650). The hold harmless amount in 2005 was set at $36.4 million, which was an estimate of the total potential collections of each local government. In estimating the amount of hold harmless for 2005, the Department of Revenue, working jointly with the State Budget Office, used franchise fees that were reported to the Department for Local Government for fiscal years 2001 and 2002. The data were reported voluntarily by cities and counties to the Department for Local Government. The Department of Revenue stated that the amount of collections was increased by 3.6 percent annually from the available franchise fee reports to project collections for FY 2005.

HB 272 required each local jurisdiction to report on or before December 1, 2005, the actual amount of collections it received from franchise fees for the period between July 1, 2004, and June 30, 2005. However, many local jurisdictions did not meet that deadline. Officials from the Department of Revenue stated that it made efforts to contact all local governments to inform them of the reporting requirements. These efforts included mailing letters, telephone calls, and personal visits from Department of Revenue field officers. The Department of Revenue made an internal decision to allow local governments that did not meet the reporting deadline to participate in the hold harmless amount after fulfilling their reporting requirements. The Department of Revenue determined the amount attributable to the property tax that was collected from the intangible portions of the company valued as a unit. To determine what percentage of the hold harmless amount each local jurisdiction would receive, each local jurisdiction was assigned a "historical percentage" based on the amount of its collections as compared to the total amount of collections made by all local governments participating in the gross receipts and excise tax fund (KRS 136.650).

HB 272 also gave local governments a window from June 30, 2005 to December 31, 2005, to report any substantial changes to the amount of franchise fees collected if those changes were enacted before June 30, 2005 (KRS 136.650). This allowed local governments to modify their franchise fees in an effort to increase their portion of the hold harmless amount during the time in which they were to record the amount of collections to be reported to the department. However, according to the Department of Revenue, with a finite hold harmless amount of $36.4 million, any increase to one local government would result in a proportional decrease in funds distributed to every other local government.

Discussion

Soon after January 1, 2006, it became evident that the hold harmless amount that was provided for in statute was insufficient; local jurisdictions and the state's General Fund were not receiving as much revenue as they were under the previous taxing system.

The Department of Revenue claims that changes in the telecommunication industry also help account for the insufficient hold harmless amount. Whereas telecommunications and cable companies were previously taxed based on the unit value of their businesses, the state now taxes telecommunications companies, cable providers, and DBS providers on the value of the services they offer. Increased competition in the telecommunications industry has driven the price of these services down, which has resulted in less state and local revenue than was expected.

The Department of Revenue has found that the actual hold harmless amount is approximately $42.4 million. This is based on the most recent annual report prepared by the Department of Revenue that outlines distributions from the gross receipts and excise tax fund to each city, county, school district, special district, and sheriff's department that has filed a report as required by KRS 136.650. This represents the amount needed by local governments to get the amount of revenue that they were receiving under the tax system prior to HB 272 and is approximately 15 percent more than the original hold harmless amount. One proposal has been to change the hold harmless amount to $44 million. The Kentucky League of Cities has also reported that cities are experiencing a shortfall of about 12 percent to 15 percent compared to what they were previously collecting.

At least one local government has sought a legal remedy to this issue. The Lexington-Fayette County Urban County Government (LFUCG) has appealed a ruling of the Kentucky Board of Tax Appeals to Franklin Circuit Court to recoup the shortfall it is experiencing as a result of the insufficient hold harmless amount. The Kentucky Board of Tax Appeals ruling in *Lexington-Fayette Urban County Gov't. v. Fin. and Admin. Cabinet Dep't. of Revenue* affirmed the findings of the Department of Revenue that there is a statutory limit on distributions from the hold harmless amount and that the department could not distribute more to LFUCG than was allowed by statute.

The shortfall could be made up by increasing the gross receipts and excise tax rates set for telecommunications, cable, and DBS providers. The shortfall could also be made up by appropriating money from the state's General Fund. There may be reluctance toward either of these solutions because of the current economic recession the current state budget shortfalls.

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Should the General Assembly require the Kentucky Retirement Systems board to adopt a less aggressive funding strategy for the County Employees Retirement System retiree health portion of the employer contribution rate?

Background

Roughly 1,400 local school board, city, and county employers provide pension and retiree health benefits for nearly 200,000 current and former employees through their participation in the County Employees Retirement System (CERS). The benefits and funding requirements for CERS are codified in KRS Chapters 78, 61, and 16 and are divided into two classes of employees: nonhazardous and hazardous duty. Per statutory requirements, administration of the CERS is the responsibility of the Kentucky Retirement Systems Board of Trustees, which also administers the Kentucky Employees Retirement System and the State Police Retirement System.

Funding for CERS pension and retiree health benefits is provided through three sources.

Employee contributions. These contributions are a fixed percentage of pay established by state statute. Table 1 shows the employee contribution rate as a percentage of pay.

Table 1
CERS Employee Contribution Rates
As percentage of pay

Participation Date	CERS Nonhazardous	CERS Hazardous
Prior to 9/1/2008	5% to fund pension benefits	8% to fund pension benefits
On or After 9/1/2008	5% to fund pension benefits 1% to fund retiree health 6% total	8% to fund pension benefits 1% to fund retiree health 9% total

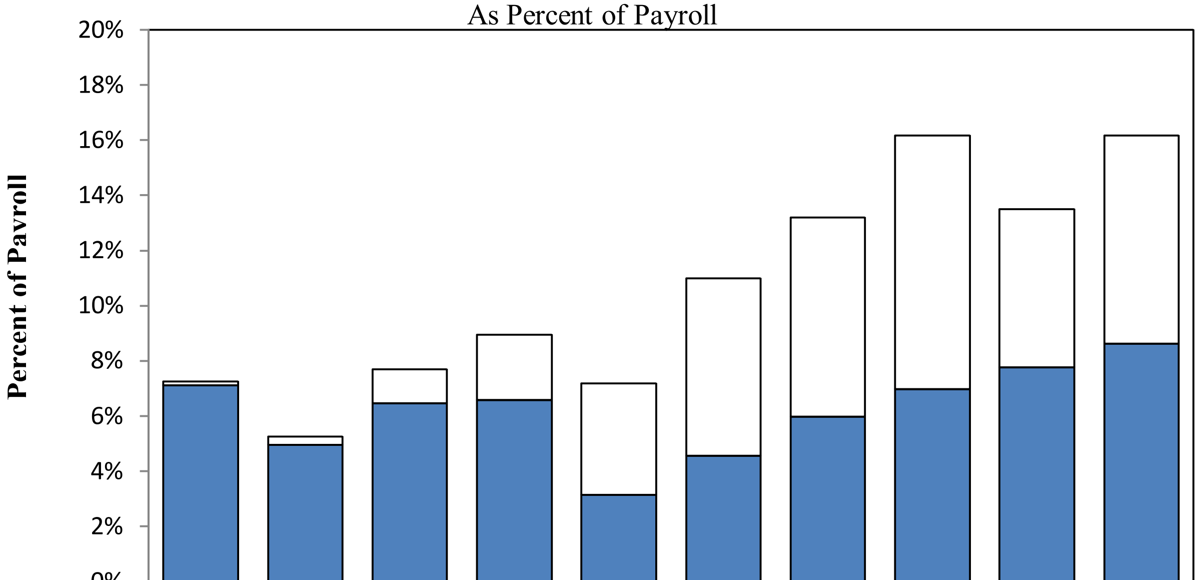
Source: Staff compilation from Kentucky Revised Statutes.

Employer contributions. CERS employers contribute at a rate determined by the Kentucky Retirement Systems Board of Trustees and its consulting actuary to be necessary for the actuarial soundness of the system in accordance with KRS 61.565 and KRS 61.702. The employer contribution rate is determined annually upon the completion of the actuarial valuation and comprises two employer contributions: one to fund pension benefits and one to fund retiree health benefits. In determining the employer rates, the consulting actuary uses actuarial assumptions, funding methods, and funding policies that the actuary typically recommends and the board adopts. From year to year, rates vary based on actual plan experience versus actuarial assumptions, such as when investment returns are more or less than estimated; changes in benefits established in statute; changes in funding methods, assumptions, or funding policies adopted by the board; and changes in contributions in prior years, such as when an employer fails to pay the recommended employer rate.

Return on investments. Of the three funding sources, return on investment is typically the largest income generator. Across state and local pension plans, the percentage of income generated by investment income from 1993-2006 was roughly 70 percent (National 8).

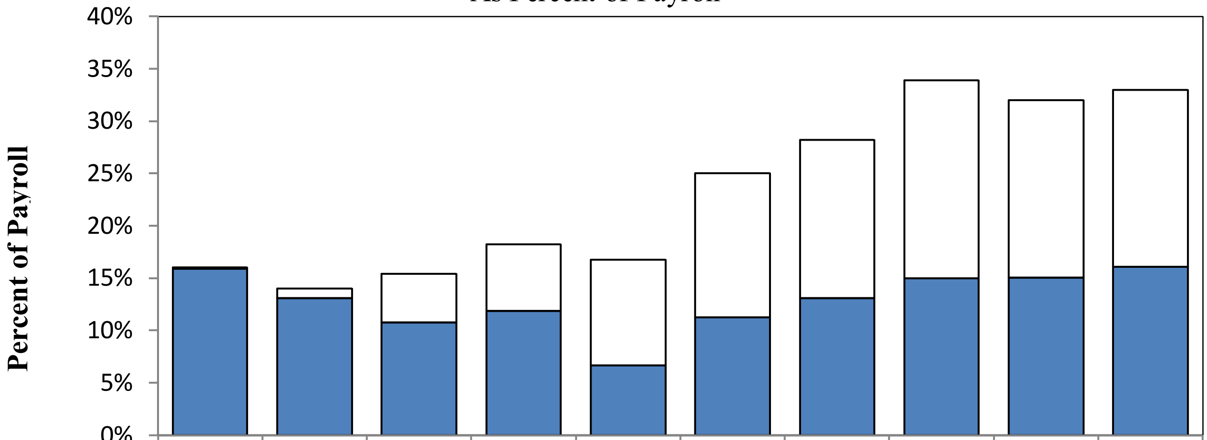
As Figures 1 and 2 show, in recent years, the CERS contribution rates for nonhazardous and hazardous-duty employers have more than doubled over levels in the 1980s and 1990s. A significant share of this increase is due to the growth in the contribution to fund retiree health benefits. Since 1980, the retiree health contribution has increased from 0.15 percent to 7.54 percent of payroll for nonhazardous employers and from 0.13 percent to 16.86 percent of payroll for hazardous employers. In the past two fiscal years, there has been a slight reduction in contribution rates. These reductions are primarily attributable to actions by the KRS Board of Trustees to lower assumptions regarding future medical inflation rates and by passage in 2008 of HB 1 and in 2009 of HB 117 that lowered employer contribution rates. Ultimately, the trend is that CERS employer contributions for retiree health are increasing. According to the retirement systems' consulting actuary, CERS employer contributions for retiree health benefits are projected to rise from 7.54 percent to 12.44 percent for nonhazardous employers and from 16.86 percent to 28.27 percent by FY 2018 (Kentucky Retirement. Actuarial 2-3).

Figure 1
CERS Nonhazardous Employer Contribution Rates
For Selected Fiscal Years 1981-2010
As Percent of Payroll



	1981	1986	1991	1996	2001	2006	2007	2008	2009	2010
Total	7.25%	5.25%	7.68%	8.94%	7.17%	10.98%	13.19%	16.17%	13.50%	16.16%
□ Insurance	0.15%	0.29%	1.21%	2.36%	4.03%	6.43%	7.22%	9.19%	5.74%	7.54%
■ Pension	7.10%	4.96%	6.47%	6.58%	3.14%	4.55%	5.97%	6.98%	7.76%	8.62%

Figure 2
CERS Hazardous Employer Contribution Rates
For Selected Fiscal Years 1981-2010
As Percent of Payroll



	1981	1986	1991	1996	2001	2006	2007	2008	2009	2010
Total	16.00%	14.00%	15.43%	18.21%	16.78%	25.01%	28.21%	33.87%	31.99%	32.97%
Insurance	0.13%	0.91%	4.65%	6.33%	10.15%	13.79%	15.10%	18.86%	16.95%	16.86%
Pension	15.87%	13.09%	10.78%	11.88%	6.63%	11.22%	13.11%	15.01%	15.04%	16.11%

Source: Kentucky Retirement Systems actuarial valuations and annual reports.

Several factors affect the increase in retiree health contribution rates including higher than anticipated medical inflation rates, changes in benefits and assumptions used to determine the rate, and a higher number of retirees receiving health benefits. However, the increase can also be attributed to changes in the retiree health benefit funding strategies adopted by the retirement systems' board of trustees (Blue Ribbon 17-20).

Under the provisions of KRS 61.702, the board is required to develop a retiree health contribution rate that is "necessary to provide hospital and medical insurance" and that is "developed by appropriate actuarial method." Over time, the board's strategy for funding retiree health benefits under this statutory guideline has changed. From the date retiree health benefits were created in 1978 until 1985, the funding strategy adopted by the board was essentially a "pay as you go" method, where the employer contribution for retiree health benefits was set at a level to ensure enough funds were available to pay benefits over the ensuing 4-year period. After changing again in 1986, the board, in consultation with its actuary, changed its funding strategy for retiree health benefits in 1989 to begin funding these benefits in the same fashion as pension benefits by using a prefunding strategy. Through the prefunding strategy, funds are set aside in a trust and are invested to pay for future benefits. In order to limit the amount of annual increase to CERS employers, the board adopted a policy to phase in to the full prefunding rate by FY 2008 through incremental increases. In 1996, recognizing the impact that double-digit medical inflation rates would have on employers, the retirement board extended this schedule to FY 2018 (Kentucky Retirement. History 1). In 2006, the Governmental Accounting Standards Board (GASB) released statements 43 and 45 that established reporting requirements for other post-employment benefits. such as retiree health, for all governmental agencies. As a result, the retirement systems board revisited the retiree health benefits funding policy and lowered the phase-in date to FY 2013 (Blue Ribbon 17-20). However, during the 2009 Regular Session, the General Assembly passed HB 117 to require the board to return the phase-in period to FY 2018. The current estimated phase-in schedule for the CERS retiree health contribution (not including pension costs) through FY 2018 is provided in Table 2.

Table 2
Projected CERS Employer Contribution Rates as Provided by 2009 HB 117

Fiscal Year	CERS Nonhazardous	CERS Hazardous
2011	7.54%	16.86%
2012	8.36%	18.65%
2013	9.17%	20.43%
2014	9.99%	22.22%
2015	10.81%	24.00%
2016	11.62%	25.79%
2017	12.44%	27.57%
2018	12.44%	28.27%
2019	12.34%	28.10%

Source: Kentucky Retirement Systems. Actuarial Analysis for 2009 HB 117.

Under KRS 61.702, each CERS employer is required to pay the contribution rate for retiree health benefits established by the KRS Board of Trustees. The Kentucky League of Cities has noted its concerns regarding the higher contributions to fund retiree health benefits and their desire to pursue a less aggressive funding strategy for retiree health benefits (Kentucky League. “2010” 2).

Discussion

The GASB standards implemented in 2006 require governmental employers to conduct an actuarial valuation for their other post-employment benefits, such as retiree health care, and to begin reporting future liabilities and costs in their financial statements (Center. Prefunding 2-4). The new standards do not require government agencies to begin prefunding other post-employment benefits but do come with special reporting requirements. Under these requirements, governments could use a discount rate (the rate at which future liabilities are quantified in today's dollars) that was equivalent to their expected rate of return on assets, provided that the agency paid the full actuarially required contribution rate necessary to prefund retiree health benefits. Otherwise, the standards require a lower discount rate to be used. The lower the discount rate, the higher the liabilities that are reported on the government's financial statements, which can have an adverse impact on the government's credit rating and could increase the cost of borrowing money (Gilberson 6).

As state and local governments have become aware of these liabilities and resulting issues, some are beginning to focus on potential solutions, including limiting benefits and transitioning from a pay-as-you-go funding strategy to a prefunded strategy. However, the pay-as-you-go funding strategy remains the predominant funding mechanism used by state and local governments. A 2008 survey conducted by the Center for State and Local Government Excellence shows that of the states that provide retiree health benefits, 60 percent employ a pay-as-you-go method of funding retiree health benefits, while 30 percent are partially prefunding retiree health benefits, and 2 percent are fully prefunding retiree health benefits (Center. Retiree 5).

In Kentucky, the funding strategies for retiree health benefits vary based upon the specific retirement system. While CERS is pursuing a prefunded strategy through incremental increases in the employer contribution for retiree health over the 10-year period required by 2009 RS HB 117, the Kentucky Teachers' Retirement System uses a pay-as-you-go funding strategy. The Kentucky Employees Retirement System and the State Police Retirement System are phasing in the full prefunding rate for retiree health care over a 15- and 10-year period, respectively, in accordance with the provisions of 2008 SS HB 1.

Cost is the major factor in selecting a funding strategy for retiree health care. Although the pay-as-you-go funding method is less expensive in the short term, it is typically more expensive over the long term, as compared to a prefunding strategy, because prefunding strategies rely heavily on investment returns to fund retiree health benefits (Center. Prefunding 3).

CERS nonhazardous employers paid roughly double the amount of employer contributions for retiree health care in FY 2008 than it paid out in benefits: $196 million in contributions versus $99 million in paid benefits. The same was true for CERS hazardous employers: $90 million in contributions versus $36 million in paid benefits. While it is conceivable that pursuing a pay-as-you-go funding strategy for retiree health benefits would be less expensive in the short run for CERS employers, those employers would likely face increasing costs as the number of retirees continues to grow and as medical premiums for retirees increase. From 2003 to 2008, CERS benefit payments for retiree health care increased from $40 million to $99 million for nonhazardous retirees and from $15 million to $36 million for hazardous retirees (Kentucky Retirement. Comprehensive 205, 207). Additionally, CERS employers would likely be reporting higher liabilities on their financial statements if a pay-as-you-go funding strategy was adopted because the GASB statements require the use of a lower discount rate if the full prefunding rate is not paid.

The Kentucky League of Cities has proposed that full funding under the prefunding strategy employed by the KRS Board of Trustees for retiree health benefits be defined as 80 percent rather than 100 percent. The Kentucky League of Cities contends that this funding strategy would produce an immediate employer contribution reduction while maintaining the actuarial soundness of the plan ("2010" 3). Because the full prefunding rate would not be paid as determined by the actuary, the question remains as to whether this funding strategy would require a reduction in the discount rate, which would increase the liabilities for CERS retiree health benefits.

Proponents of using a less aggressive funding strategy for CERS retiree health benefits contend that such strategies will provide immediate relief to employers through lower contribution rates. Proponents also point out that on a national level state and local governments have not moved toward prefunding retiree health benefits and are still largely funding retiree health benefits on a pay-as-you-go basis.

Opponents of using a less aggressive funding strategy for retiree health benefits point to recent legislation as proof that CERS employers have already been given legislative relief. Opponents also contend that because retiree health benefits are covered by the inviolable contract under state law, avoiding the costs of prefunding the benefits only puts off the obligation to future generations of taxpayers. Opponents further contend that the primary issue to address is controlling medical inflation below the actuarially-assumed rates established by the retirement systems. They point to recent increases in retiree premiums, such as the

43.4 percent increase in the Kentucky Employees Health Plan in 2005 that covers pre-Medicare retirees as well as state and school employees, as examples of how costs have increased to fund this benefit (Blue Ribbon 17).

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Natural Resource and Environment

Should the General Assembly authorize the lease of mineral rights to oil and gas from state-owned lands?

Background

Kentucky does not authorize the lease of oil and gas from state-owned lands, although some local governments in Kentucky have entered into oil and gas leases that involve drilling under navigable rivers. There are no specific statutes that authorize leases of mineral rights from political subdivisions of the state .

A mineral lease is a contract between the owner of the mineral estate and another party, typically an oil and gas company. The owner of the mineral estate can be a private, public, or quasi-public entity like a university.

In Kentucky, state lands are lands in which the Commonwealth holds title and may include just the surface or both the surface and subsurface. The Division of Real Properties estimates that there are 251,448 acres of state-owned lands, most of which is held by the Departments of Fish and Wildlife Resources, the Department of Parks, and the Division of Forestry (Aubrey). In many of the land acquisitions by these large land-holding agencies, the state owns both the surface and the subsurface mineral estate. In order for mineral rights to be leased for state land, the state needs to own the subsurface estate.

Many states allow for some type of lease of mineral rights for oil and gas from state-owned lands. Sometimes authorization is made for a political subdivision or an entity such as a commission or public school. This is the case for West Virginia and Virginia, which make explicit authorizations for counties and for the Marine Resources Commission, respectively, to lease mineral rights and return a portion of the proceeds to the state.

Of the surrounding states, Indiana, West Virginia, Missouri, and Illinois allow the lease of mineral rights from state lands; Tennessee does not; Ohio authorizes only for Department of Transportation.

Nationally, there is growing interest in the lease of oil and gas from state- or publicly owned lands. Mirroring the trend, there is an increase in the number oil and gas leases in the Appalachian basin states—Tennessee, Kentucky, Ohio, West Virginia, Pennsylvania, and New York—that run along the Marcellus, Devonian shale, and Trenton-Black River carbonates formations (State of New York).

There are a few factors related to the increase in oil and gas leasing in the Appalachian basin. First, new drilling and production techniques for extracting gas from shale formations have made accessible previously unreachable natural gas (Gjelten. “Who’s”). Natural gas is considered a cleaner-burning fuel, which could be an important opportunity for reducing greenhouse gas emissions, particularly if the U.S. Congress passes climate change legislation (Overby).

Second, the United States Geological Survey reported that Marcellus and Devonian shale are important oil and natural gas resources in the Appalachian Basin in 2005 (U.S. Geological) These resources could increase United States domestic natural gas reserves by a minimum of 168 trillion cubic feet to as much as 516 trillion cubic feet (*Tri-State*). The increase is sizable. Louisville Gas and Electric reported that the average Midwest home uses between 60 and 80 million BTUs each winter. That equates to between 58,000 and 77,000 cubic feet of natural gas (American Gas Association).

Third, the recent uptick in consumer retail fuel prices has led to some speculation along the Marcellus formation (Watson). Reported increases in the number of signed oil and gas leases both private and public are concentrated in high production states like Pennsylvania and West Virginia (Wright).

A fourth factor is national and state policies that now call for greater independence from foreign energy sources. Perhaps as a result of these calls, more federal land through the Bureau of Land Management has been offered for lease. In addition, states such as Ohio, Arkansas, and New York have opened large parcels of state park land for oil and gas leasing (Smyth; Venesky).

Kentucky is not a major producer of oil and gas, and the U.S. Geological Survey does not indicate that Kentucky has substantial quantities of oil and gas compared to other states in the Marcellus formation. However, Kentucky’s oil production is similar to both Indiana and Ohio, and Kentucky’s natural gas production is higher than in both states.

In 2007, the most recent data available, Kentucky produced 2.6 million barrels of petroleum and 93 billion cubic feet of natural gas (U.S. Dept. of Energy. Energy. “Natural Gas”) Roughly half the counties in Kentucky report some oil and gas production (Kentucky Geological Survey). Kentucky also has substantial nonproducing reserves of associated dissolved gas or gas that is in a solution with crude oil (U.S. Dept. of Energy. Energy. *U.S. Crude Oil* Table D.10).

In 2007, Indiana produced roughly 1.7 million barrels of oil but only 3.6 billion cubic feet natural gas . Ohio's petroleum production is greater at 5.4 million barrels of oil and 88 billion cubic feet of natural gas (U.S. Dept. of Energy. Energy. "Natural Gas").

Kentucky, like many other states, enacted policies to foster greater energy independence from foreign energy sources. One component of the Governor's 2008 Kentucky Energy Plan is to explore options for increased state production of energy resources including oil and gas (Commonwealth). During the 2009 Regular Session, the General Assembly passed Senate Joint Resolution 67 that requires the Kentucky Geological Survey in conjunction with the Kentucky Energy and Environment Cabinet to study and determine the potential from oil and gas resources from state- and university-owned lands. The study is due December 1, 2009.

Discussion

Proponents of authorizing the leasing of oil and gas from state-owned lands contend that the state would gain revenues from these leases. The money could come from speculation with no wells going into production; however, if the well went to production, the state could also benefit from severance taxes paid. This is the model that Indiana has followed.

Some contend that the state should go slowly and deliberatively before granting the authorization. This group argues that the state should determine the value of the assets underlying the land. There may be regulatory or administrative impediments that need to be addressed before authorizing a program that would receive immediate pressure to grant public access.

Opponents believe that the program is not worth the cost to the public interest because the industry's regulation is insufficient to protect the environment and ensure the intended use of the land. Private operators will create another competing interest for access to the already limited amount of public land across the state. Intense competition exists now among various entities including hunters, horseback riders, hikers, and other recreational users for unimpeded use of public land. Oil and gas operations, they contend, would not be compatible with any recreational uses.

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Should the General Assembly implement a funding mechanism for the reclamation of abandoned tank batteries at oil well sites?

Background

A tank battery is the system of storage tanks, flow lines, fittings, pumps, and associated structures on an oil well site that separates the gas, basic sediment, and water from the oil produced from the well. Tank battery configurations vary depending on the particular characteristics of an oil well site, including the compounds present in the produced oil, the volume of oil and gas produced, and the age of the oil well (Langston).

Under KRS Chapters 224 and 353 and KAR Title 401, well operators not only must plug an oil well upon its completion, but they also must take a number of steps to reclaim the tank battery. As part of the reclamation process, well operators are required to dispose of the produced fluids, solidify the tank bottom sediments and haul them to a permitted landfill or recycler, remove all aboveground tanks, remove all wastes and contaminated soils, backfill associated pits with clean material, and take steps to avoid soil erosion from the site (Commonwealth). It is important that well operators properly dispose of tank batteries as part of the oil well site reclamation process because improperly reclaimed tank batteries can pose threats to the surrounding environment. Leakage of produced water and associated hydrocarbons from abandoned tank batteries can contaminate groundwater, kill nearby vegetation, and render affected soils uncultivable (Kharaka).

There are thousands of permanently abandoned well sites throughout the Commonwealth that have not been properly reclaimed and for which there is no financially solvent party responsible for reclamation. Many of these sites have existed since before oil and gas well plugging and reclamation was required, but well operators continue to permanently abandon new sites every year. The Division of Oil and Gas Conservation estimates that of the approximately 11,000 identified abandoned oil and gas wells in need of plugging within the Commonwealth, 65 percent are oil wells with associated tank batteries that also need to be reclaimed. More abandoned well sites are identified on a daily basis.

Currently, the division pays for the plugging of abandoned wells using money from the abandoned oil and gas well plugging fund. The money for the fund comes from forfeited bonds posted by well operators who have failed to comply with relevant statutory and regulatory provisions relating to the operating or plugging of oil and gas wells. Under KRS 353.590, money from the well plugging fund can only be used for the plugging of abandoned oil and gas wells, and not for the reclamation of tank batteries or any other associated facilities on the well site. Even given this use of the funds, there is not enough money to plug all of the identified abandoned wells within the Commonwealth, much less to cover the additional cost of reclaiming the tank batteries at each oil well site. From January to August 2009, the division had plugged 320 wells, with approximately $1.5 million left in the abandoned well plugging fund. The average cost of plugging a well is approximately $3,000. While the costs of reclaiming tank batteries can vary greatly depending on their composition and any site contamination that may have occurred, the division estimates that it would cost at least an additional $2,500 per oil well site to reclaim the tank battery. Multiplying this per-site reclamation estimate by the approximately 7,150 identified abandoned tank batteries to be reclaimed, the total reclamation costs could be estimated at $17.9 million.

Discussion

Some contend that the General Assembly should adopt a funding mechanism to provide for the reclamation of tank batteries on permanently abandoned oil well sites. Surface rights holders, especially owners and leaseholders of agricultural land, do not want to be burdened with the cleanup costs of tank batteries that interfere with their land use and have the potential to contaminate their land and groundwater. Environmentalists are also concerned about the ecological threat posed by accidental discharges from abandoned tank batteries.

Several mechanisms could be implemented to provide for the reclamation of abandoned tank batteries. One option, taken by Senate Bill 134 as introduced during the 2009 Regular Session, would be to allow money from the well plugging fund to be used for the reclamation of abandoned tank batteries. The Division of Oil and Gas Conservation could consider the dangerousness of tank batteries when prioritizing permanently abandoned well sites that pose the greatest risk to human health and the environment. If a tank battery posed a greater risk than an unplugged well, then the funds could be used to reclaim that tank battery first. Additionally, if there was any salvage value for the tank battery or any hydrocarbons left behind, the state could sell them to help offset the cost of reclamation. Arkansas, Illinois and Ohio take this approach (AR ADC 178-00-001; 225 ILCS 725/19.6; ORC 1509.02 and 1509.071).

Some oppose this option because there is only enough money in the fund to plug a small portion of the abandoned wells that are in need of plugging. If the fund were to be used to pay for the reclamation of abandoned tank batteries without any additional revenues, even fewer wells could be plugged.

The General Assembly could appropriate money from an existing environmental remediation fund to the oil and gas well plugging fund for the purpose of reclaiming abandoned tank batteries. House Committee Substitute 1 to SB 134 would have transferred $500,000 each fiscal year from the petroleum storage tank environmental assurance fund to the oil and gas well plugging fund for the purpose of remediating tank batteries and associated pits. Some opposed taking money from an existing fund for purposes unrelated to the establishment of that fund. Further, opponents of using this mechanism argue that there is not enough money in the existing fund to accomplish its goal of providing for the cleanup of underground petroleum storage tanks for motor fuels.

A third option would be to create a new dedicated revenue stream to be used solely for the purpose of reclaiming improperly abandoned tank batteries. The revenue could be raised by requiring a bond sufficient to cover reclamation costs to be posted when a new tank battery is installed at a well site. A problem with this method is that it would only keep the number of improperly abandoned tank batteries from growing instead of addressing the thousands of existing sites. Other methods for raising the necessary revenue include collecting additional severance tax on crude oil or imposing new fees relating to the installation of tank batteries. Some would oppose a new bond, tax, or fee structure that would increase the cost of drilling and producing oil. They argue that it would be too burdensome on oil well operators and that the cost would be passed on to consumers through higher prices for petroleum products.

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Should the General Assembly extend the probable cause exception for warrantless arrests to boating under the influence?

Background

A law enforcement officer observes a motorist driving erratically. The officer suspects the motorist may be operating under the influence of alcohol or other banned substances and decides to stop the motorist and perform customary tests to confirm suspicions. If the motorist is driving an automobile, the officer has this discretion; if the motorist is piloting a boat, the officer does not.

While Kentucky is 28th in the nation in the number of registered boats, it is 8th in the nation in alcohol-related boating fatalities. In 2008, approximately 50 percent of boating fatalities in Kentucky were alcohol-related (Commonwealth). The United States Coast Guard reported that the national average was 17 percent. For Kentucky from 2004-2008, the Coast Guard also reported that alcohol was a contributing factor in 34 accidents and 21 deaths (19, 22).

KRS 431.005 lists a number of circumstances in which a law enforcement officer can make an arrest without a warrant. These include instances in which a felony or misdemeanor is committed in the officer's presence, or when the officer has probable cause to believe a felony has been committed. There are also a number of statutes listed specifically in a separate provision—mainly traffic violations, harassment, and trespass—for which an officer can make a warrantless arrest without the violations being committed in his or her presence. The boating under the influence (BUI) statute is not included in this list.

Driving under the influence (DUI) is governed by KRS Chapter 189A. While first offenses are misdemeanors and would generally require observance of a violation by a law enforcement officer to justify a warrantless arrest, KRS Chapter 189A is specifically listed in KRS 431.005(1)(e) as a violation that requires only probable cause by a law enforcement officer to make an arrest without a warrant.

BUI is governed by KRS 235.240, with penalties delineated in KRS 235.990. Because BUI offenses are at most misdemeanors (first and second offenses are only violations), a law enforcement officer can only make an arrest when the offense is committed in his or her presence. Unlike DUI, the BUI statute is not included in KRS 431.005(1)(e) to allow arrests without a warrant based on probable cause alone. While the boundaries of probable cause are defined by judicial interpretation rather than by statute, allowing an officer to arrest on probable cause rather than requiring the officer to have witnessed a violation certainly gives the officer broader discretion.

The most likely way to address this issue would be to amend KRS 431.005 to allow the same probable cause exception for BUI situations as is currently allowed for DUI situations. Some other states have addressed this issue in essentially this manner, allowing officers to test individuals for illegal substance limits if they have probable cause to do so. Examples of these states are Colorado (CRS 33-13-108.1) and Arizona (ARS 5-395).

Discussion

In the 2008 Regular Session, House Bill 528 was introduced but did not pass. This bill would have amended KRS 431.005 to allow a law enforcement officer to arrest at the scene of an accident without a warrant if the law enforcement officer has probable cause to believe the person is intoxicated or under the influence of drugs. Because alcohol continues to be a significant contributor to boating accidents and fatalities, this will continue to be an issue of concern to law enforcement officers as well as boaters.

Proponents of probable cause argue that the increased authority for law enforcement officers to make arrests is necessary to prevent accidents and fatalities from boaters' alcohol use. They also argue that officers should have the same authority on Kentucky waterways as they do on Kentucky highways.

Opponents of probable cause argue that such an action would lead to further efforts to make BUI laws mirror DUI laws; imposing the same penalty and enforcement scheme on BUI violations as that applicable to DUI violations would be overly harsh and problematic. Currently, BUI is addressed almost entirely within one section of the KRS; an entire chapter is devoted to DUI.

Opponents also contend that greater discretion to make arrests for BUI violations would lead to over-enforcement, which would adversely affect the culture and tradition of boating recreation in Kentucky. They argue that operating a boat is not analogous enough to operating a car to justify similar treatment. For example, if a houseboat is moored and the operator intoxicated, the question is if there is probable cause to suspect that the operator is committing a BUI offense.

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State Government

Should the General Assembly require the state-administered retirement systems to accept qualified domestic relations orders (QDROs)?

Background

A qualified domestic relations order (QDRO) is a court order telling a retirement plan to pay a portion of the employee's retirement benefits to someone else, which is most often the participant's former spouse. To be considered qualified, the order must meet certain Internal Revenue Code guidelines so that the tax liability is shared between the participant and the former spouse at the time of payment.

Neither the Kentucky Retirement Systems, administrator of the Kentucky Employees Retirement System, the County Employees Retirement System, and the State Police Retirement System; nor the Kentucky Teachers' Retirement System honors QDROs (Kentucky Retirement. Member; Kentucky Teachers'. Summary). However, both of these systems are required by statute to honor child support orders. The Judicial Form Retirement System, which administers the Legislators Retirement Plan and the Judicial Form Retirement System, does administer QDROs. This does not necessarily mean that the benefits provided by Kentucky Retirement Systems or Kentucky Teachers' Retirement System are not subject to division in dissolution of marriage under the provisions of KRS 403.190. Rather, the responsibility for issuing a check to the alternate payee (such as a former spouse in the case of divorce) is the responsibility of the employee rather than the retirement systems.

Discussion

Prior to a statute change in 2000, the Kentucky Retirement Systems was required by KRS 61.690 to honor QDROs. However, this statute was amended in the 2000 Regular Session, and the only QDROs that Kentucky Retirement Systems administers today are those filed prior to the effective date of the statute change. Data from Kentucky Retirement Systems indicated that the systems had on file 458 QDROs for its nearly 242,000 members, or roughly 0.19 percent of the membership population, at the close of fiscal year 2001. In 2009, that number has fallen to 333, while the membership population has increased to roughly 328,000 (Kentucky Retirement. Comprehensive 2005 and 2008; Thielen).

Kentucky Teachers' Retirement Systems does not and has not previously administered QDROs. Overarching this issue is whether pension benefits from the system can qualify as marital property and be subject to division in the case of divorce. Under KRS 161.700(2), the benefits provided by Kentucky Teachers'

Retirement System are not subject to classification or division as marital property in the dissolution of a marriage and cannot be considered an "economic circumstance" when dividing the assets of the marriage under the provisions of KRS 403.190. However, a 2007 ruling from the Kentucky Supreme Court in *Shown vs. Shown* (2005-SC-000855) concluded that Kentucky Teachers' Retirement System benefits may be subject to classification and division as marital property in dissolution of marriage in cases where the other spouse also has accumulated a retirement benefit in accordance with KRS 403.190(4) (Kentucky Teachers'. Active). Even taking into account the court ruling, the exemption from marital property would likely help reduce the number of QDROs the system would administer if legislation requiring the system to do so was enacted.

For the Judicial Form Retirement System, no statutory provisions require that the system honor QDROs. Instead, the system has chosen to honor QDROs that meet the requirements established by the system (Early. QDRO). Currently, it administers 8 QDROs for its 324 retired members, or roughly 2.47 percent of the retired membership population (Early. Phone).

Based on data from the Pension Rights Center, 45 of 50 states have some mechanism, either by QDROs, domestic relations orders, or a state- or system-specific order, to provide for retirement system benefit payments to a divorced spouse. With the exception of Tennessee and Indiana, all states that border Kentucky provide for some form of payment to the former spouse from the retirement systems. Additionally, private-sector pension plans governed by the Employee Retirement in Security Act are required to honor QDROs (Calhoun).

Proponents of requiring the state-administered retirement systems to honor QDROs are concerned that relying on the former spouse to make benefit payments results in delayed payments and in potential increased court and legal fees to secure court-ordered payments. Proponents also contend that this requirement would allow for a more equitable division of the tax liability during the year because both the member and the former spouse would be taxed at the time of payment rather than the tax liability being adjusted at year's end.

Opponents contend that the administration of QDROs will increase costs to the systems by requiring added staff hours to evaluate the QDROs. Opponents are concerned with providing a former spouse with an interest in an account earned through employment for many years after the divorce was final.

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Transportation

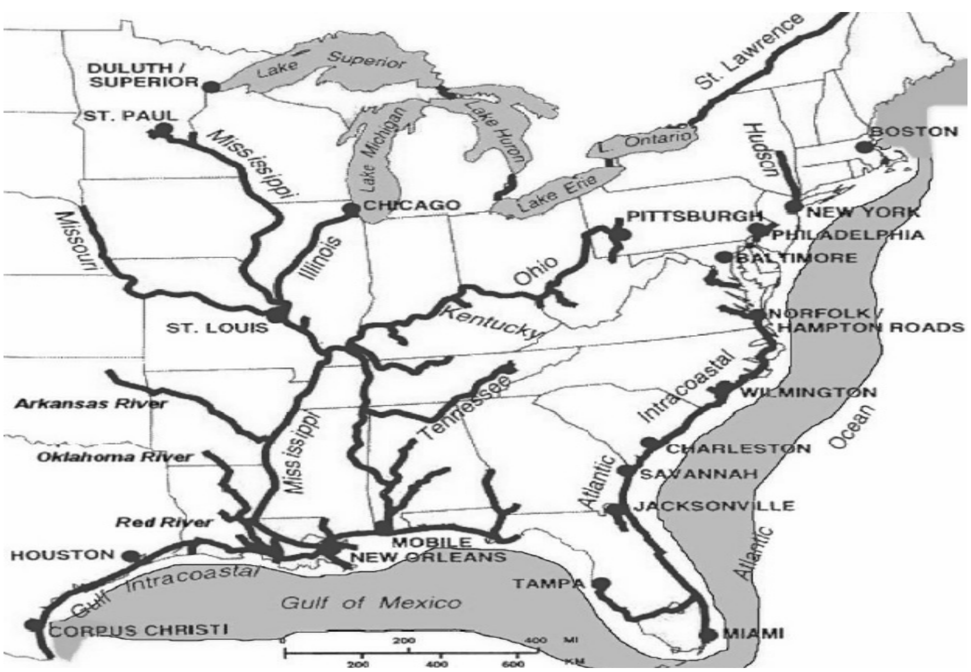
Should the General Assembly promote the growth of commercial waterway traffic?

Background

Kentucky has more than 1,070 miles of commercially navigable waterways as defined by federal regulation, the most in the lower 48 states (Commonwealth). These waterways include the Ohio, Kentucky, Tennessee, Mississippi, Licking, Big Sandy, Cumberland, and Green Rivers.

The state's navigable waterways are also home to more than 160 private terminals and 11 public riverports, 7 of which are currently in operation and 4 that are authorized, but not yet developed (Commonwealth). The seven operating public riverports are the Hickman-Fulton County, Paducah-McCracken County, Henderson County, Owensboro, Louisville-Jefferson County, and the Greenup-Boyd County Riverport Authorities, as well as the Eddyville Riverport and Industrial Development Authority. Map 1 shows that Kentucky's geographical location gives it access to a number of navigable waterways, making it a prime state to take advantage of waterway transportation.

Map1
Kentucky's Location Relative to Major Navigable Waterways



Source: Pritchett.

According to advocates for riverports, there are many economic, environmental, and safety benefits of waterway freight transportation. A single barge vessel can shift more than 450 trucks or 225 rail cars from road and rail corridors to navigable waters, leading to a reduction of highway and rail congestion. Barge vessels on average generate 38 percent less greenhouse gases than trucks and 28 percent less than rail per ton-mile (Pritchett). According to the Texas Transportation Institute, 1 gallon of fuel can move 1 ton of cargo 155 miles by truck, 413 miles by train, or 576 miles by barge. In terms of safety, for the same distance traveled, inland marine transportation results in one fatality, compared to 155 by truck and 22 by rail (5).

Discussion

According to a report from the United States Department of Transportation, freight shipments to and from Kentucky will increase by 57 percent between 1998 and 2020 (Hanson 5-1). In 2007, 83.9 million tons of cargo was shipped to or from Kentucky via waterways, including 56.5 million intrastate; 10.9 million of the intrastate cargo being coal or coal byproducts (Tagert). An increase in waterway transportation will likely mean an increase in the need to improve the infrastructure of Kentucky's navigable waterways. Nearly $96 million in major rehabilitation and infrastructure improvements have been identified by Kentucky riverports to remain competitive and sustain growth (Hanson 2-58). A few of the needs identified were improvements to facilities and equipment, acquisition of land and property, and creation of more storage facilities.

Some states, including Alabama, Georgia, Indiana, and Virginia, have invested more in waterway freight transportation by owning their own ports and establishing state port authorities. The creation of financial assistance, technical assistance, and marketing assistance programs are other trends in the promotion of waterway transportation (Hanson 3-19, 3-2).

Some states face constitutional limitations when it comes to funding waterways through transportation-related projects. In many states, including Kentucky, the state's constitution restricts the spending of motor vehicle fuel excise taxes to highways and bridges. Mississippi has taken a liberal approach to the interpretation of its constitution to include waterway transportation programs. Louisiana amended its constitution to provide $15 million of fuel tax revenue each year for port improvements (Hanson 3-3, 3-4).

In May 2009, the Legislative Research Commission authorized the Subcommittee on Kentucky Waterways of the Interim Joint Committee on Transportation. The subcommittee was formed to "facilitate consideration of economic development, growth of the Commonwealth's commercial and industrial base, and the promotion of tourism and recreation through optimal use of Kentucky's waterways."

The House co-chair of the subcommittee pre-filed legislation (BR 135) for the 2010 Regular Session that would

establish the Water Transportation Advisory Board as an advisory body to the executive and legislative branches of government;

create a riverport marketing assistance trust fund to be administered by the Cabinet for Economic Development to provide grants for specific marketing activities; and

create a riverport financial assistance trust fund to be administered by the Transportation Cabinet to provide grants for financial assistance for new construction and major replacement or repair projects for Kentucky's riverports.

The proposed legislation does not appropriate money to any of the funds created. These funds are established in hopes of receiving appropriation in the future. In the 2008 Regular Session, similar legislation was considered by the General Assembly but was not enacted.

Funding is the key to promoting the growth of commercial waterway traffic in the Commonwealth. Kentucky is constitutionally restricted to allow funds received from the excise tax on motor vehicle fuel to be spent only on highway and bridge related projects. Therefore, in this current time of budgetary constraints, the promotion of commercial waterway transportation is forced to vie for state funds along with myriad other issues that, if funded, would also benefit the Commonwealth.

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Should the General Assembly restrict the use of personal telecommunication devices by minor drivers?

Background

In 2007, the National Highway Traffic Safety Administration (NHTSA) conducted a survey on electronic device use by using roadside observers of vehicles stopped at randomly selected intersections during daylight hours. Based on these observations, NHTSA estimated that, at any given moment, 6 percent of drivers were using hand-held personal telecommunication devices. It further estimated that the highest hand-held personal telecommunication device use, 8.8 percent, was among drivers who appeared to be 16- to 24-years old. About 1 percent of the 16 to 24 age group was visibly manipulating hand-held devices. The use of personal telecommunication devices by minor drivers, and the related safety issues, has led many state legislatures to consider driver distraction legislation directed to minor drivers ("Driver").

In 2009, the Virginia Tech Transportation Institute conducted naturalistic driving studies by placing cameras and instrumentation in volunteer subjects' personal vehicles and continuously observing drivers for more than 6 million miles of driving. These studies indicated that dialing and texting with a personal telecommunication devices lead to a substantial increase in crash risk because these activities take a driver's eyes off the road. Text messaging was associated with the highest risk, with the risk of a crash or near crash estimated at 23 times as high while texting as compared to the risk for non-distracted driving. It was estimated that texting resulted in the driver's eyes being off the road for 4.6 seconds over a 6-second interval. This is the equivalent of a driver traveling the length of a football field at 55 miles per hour without looking at the roadway. The research also showed that teens engage in personal telecommunication device tasks much more frequently, and in more risky situations, than adults.

Kentucky motor vehicle accident reports include a category where cell phone use may be identified as a contributing factor to a traffic accident. From 2005 to 2007, cell phone use is cited as a contributing factor in less than 1 percent of both total accidents and fatal accidents (Kentucky Transportation). This is not a precise measurement, however, because it relies on self-reporting by drivers involved in the accidents, there may be no witness testimony, and the accident reports are not amended at a later date.

The top three contributing factors for all accidents in Kentucky from 2005 to 2007 were driver inattention, cited in just over 40 percent of all accidents; failure to yield right of way (12 percent); and vehicle not under proper control (11.5 percent) (Kentucky Transportation). In "Teen Driver Crashes," a 2008 report to Congress, NHTSA stated that nationally, motor vehicle crashes are the leading cause of death of 15- to 20-year olds. It further reported that a contributing factor to teen driver crash rates appears to be their use of personal telecommunication devices at a greater rate than older people.

Discussion

The increased use of personal telecommunication devices while driving has led to greater concerns about driver distraction. In 2008, legislators in 33 states considered 113 driver distraction bills. State legislation usually addresses a range of issues, including the use of personal telecommunication devices by minor drivers and particular wireless technologies (Savage 9). There are currently Kentucky laws regarding cell phone use. KRS 281A.205 prohibits the use of cellular telephones by school bus drivers and imposes a $50 fine for the first violation, and a 6-month suspension of bus-driving privileges, and a $100 fine for subsequent violations. KRS 65.873 prohibits local governments from adopting ordinances restricting the use of mobile telephones in a motor vehicle. The following table shows the number of states that have enacted cell phone bans across the nation.

Table 1
Number of States With Laws Banning Cell Phone Use
2009

Type of Law	Number of States
Bans hand-held cell phone use by all drivers	7 and the District of Columbia
Bans use of all cell phones by novice drivers	21 and the District of Columbia
Bans text messaging by all drivers	17 and the District of Columbia
Bans text messaging by novice drivers	9

Source: Insurance Institute. Cellphone Laws 2009.

Bans prohibiting the use of personal telecommunicating devices by any operator of a motor vehicle have been considered by the General Assembly since 2000. The bills have generally made exceptions for emergency personnel and citizens reporting emergency situations. During the 2009 Regular Session, the General Assembly considered HB 267, a measure that would have prohibited persons under age 18 with an instruction permit or intermediate license from using a personal telecommunication device while operating a motor vehicle. The proposal would have required a decal to be affixed to the vehicle signifying that the operator of the vehicle was subject to the restrictions.

Congress also is considering the issue. On July 29, 2009, S. 1536, known as the Avoiding Life-Endangering and Reckless Texting Act of 2009, or the ALERT Driving Act, was introduced. The legislation would reduce by 25 percent annually the amount of federal highway funding available for states that do not enact a law prohibiting an individual from writing, sending, or reading text messages while operating a motor vehicle.

Proponents of a ban on minors using personal telecommunication devices while driving argue that such devices distract drivers. The American Automobile Association estimates that driver distraction is a factor in 25 percent to 50 percent of all crashes. Research also shows that teenagers drive less than all but the oldest people, but their immaturity combined with lack of driving experience causes their number of crashes and crash deaths to be disproportionately high. Based on crashes of all severities, the crash rate per mile for 16- to 19-year-olds is 4 times the risk for adult drivers (Insurance Institute. Fatality Facts).

Opponents of legislation barring personal telecommunication devices while driving cite the difficulty in enforcing such bans. The Insurance Institute for Highway Safety stated that while drivers with hand-held personal telecommunication devices are not hard to spot, it is nearly impossible for police officers to see hand-free devices or to see phones being used below window level (Insurance Institute. *Status*). The four major wireless carriers agree that activities such as texting while driving are dangerous. Other opponents argue that the larger issue is distracted driving and that the best approach to the problem would be through educating youths about avoiding distractions while driving (Perez 1).

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Veterans, Military Affairs, and Public Protection

Should the General Assembly change the funding provisions for 911 call center services?

Background

There are many components involved in the operation of 911 services including the funding and disbursements of 911 call center services. There are two types of funding for 911 call center services: a 911 landline surcharge and a 911 wireless surcharge. These two revenue streams for 911 call center services differ in many ways, including how the fee amount is established, how the revenue is collected, and how that revenue is used to fund 911 services in Kentucky. For example, the 911 landline surcharges are established and disbursed by local governments; and the 911 wireless surcharges are set by the state and disbursed by the state Commercial Mobile Radio Service (CMRS) Board, which then returns the majority of that revenue to 911 call centers.

Traditionally, landlines were the predominate type of phone used, but the number of wireless devices has surpassed that of landlines. As of August 2009, there were nearly 3.5 million cell phone subscribers (Hubbard. Aug. 10). According to the Public Service Commission, there are nearly 2.7 million landline subscribers. Over the past several years, the number of landline telephone subscribers has decreased steadily across the state at a rate of 5 percent to 6 percent each year (Stovall). Two percent of households each year are becoming completely wireless subscribers (Lucas. Chair). These changes in consumer patterns of landline subscriptions are affecting the funding of the 911 emergency communications system.

Under KRS 65.7629, the General Assembly established the 911 wireless surcharge at 70 cents per month. The statute gives the CMRS power to decrease the rate or recommend to the General Assembly that it increase the rate. The 911 wireless surcharge is collected by the cell phone companies and given directly to the CMRS Board. After the surcharge is received, 20 percent of the surcharge is distributed to the CMRS Board for grants provided to 911 call centers, administrative costs, and reimbursements to the cell phone companies for the costs they incur to collect the surcharge. The other 80 percent of the surcharge goes to the 911 call centers. Half of the 80 percent is disbursed equally to the call centers that are certified by the CMRS Board. The other half of the 80 percent is disbursed based on the volume of wireless 911 calls answered by each call center. Although 80 percent of the surcharges is allocated for the wireless 911 centers, the average 911 call center receives about 69 percent, or about 42 cents, of the wireless assessment (Lucas. Chair).

State law allows local governments to levy a special tax on all landline telephone subscribers to fund the 911 emergency communications system. A local government is allowed to tax the subscribers at any rate necessary to cover the cost of funding its 911 system. However, local governments do not have the same authority to tax wireless cell phone subscribers (KRS 65.760). In Kentucky, 104 counties have a landline surcharge of more than 70 cents, and 16 counties have a surcharge at 70 cents or lower. The landline surcharges are as high as $4.50 (Hubbard. Aug. 5). Across the state, 911 call centers receive 98.5 percent of the landline surcharges collected.

Because the 911 wireless surcharge is limited by statute, many local governments have increased landline fees to cover costs of operating 911 call centers. For example, in July 2009, the Lexington-Fayette Urban County Government (LFUCG) increased its landline surcharge from $1.31 to $2.10. That surcharge is set to increase 4.5 percent annually (Lucas. Chair) Two-thirds of the LFUCG center's funding comes from the landline surcharge and a third comes from the wireless surcharge (Lucas. Dir). Butler County increased its surcharge from $1 to $2 and Campbell County increased its surcharge from $2 to $3. Other counties have made larger increases: Hardin County increased its surcharge from 83 cents to $2.40. The greatest increase was in Jackson County, where the surcharge went from zero to $3 (Hubbard. Aug. 5).

On average, the percentage of the state's 911 calls are 60 percent wireless, 30 percent landline, and 10 percent from other devices such as Voice Over Internet Protocol devices. While other factors such as overhead and inflation increase the cost of operating a 911 call center, the increase in wireless calls is the predominant factor. The location of a wireless call is harder to pinpoint because a 911 call center only receives a search area and not a specific address. This means that the 911 operator may have to stay on the line longer, asking questions, until the location is identified (Lucas. Chair).

Discussion

Twelve states have laws with a uniform fee for landline and wireless subscribers for 911 emergency systems. Those uniform fees range from 25 cents to $1. The range is due to a number of factors such as technology, geography, and the number of wireless versus landline users. Montana and Tennessee have state-mandated limits on both wireless and landline surcharges, but the limit differs for wireless and landline subscribers. In Montana, the wireless surcharge is higher than the landline surcharge (MCA §10-4-201). In North Carolina, telephone companies wanted new legislation because many counties had landline fees that were higher than the wireless fees. The companies worried that those higher fees were driving landline subscribers to wireless devices, which would not cover the costs of 911 services (Bonner). North Carolina repealed its separate landline and wireless 911 statutes and created a uniform fee for all "voice communications" subscribers that access the 911 system. The uniform fee is 70 cents (NCGS Chapter 62A).

In recent years, the General Assembly has considered the funding of 911 call centers as a part of the broader issue of oversight and regulation of 911 call centers. During the 2008 Regular Session, the General Assembly considered but did not pass House Bill 725 that would have allowed a local government to designate a third party, other than the landline service provider, to collect the 911 surcharge. The bill proposed placing the surcharge on the electric bill, which has more access to households than telephone companies do because of the decrease in landline subscribers.

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Should the General Assembly modify public health emergency and preparedness laws?

Background

The advent of the H1N1 pandemic brings to the forefront questions about the ability of the state's public health emergency and preparedness laws to stand up to modern threats. State officials note that some current statutes "were written in a different time and have not been tested in modern times" on a scale of a pandemic. Public health and emergency preparedness is a broad topic that encompasses various issues including inoculation and quarantine, planning, and business and school closures. One area about which state officials have expressed concern is the liability protection provided to volunteer health practitioners under current state law (Jagnow).

The H1N1 pandemic is the most immediate public health threat facing the state. In April 2009, the first human case of the virus in the United States was confirmed (U.S. Dept. Centers. Nove1). By June 2009, the H1N1 virus was declared a pandemic by the World Health Organization (Chan). As recently as September 2009, Kentucky's H1N1 status was upgraded from regional activity to widespread, indicating that there is a significant level of H1N1 infection throughout the state (U.S. Dept. Centers. FluView). Additionally, the state reported its first H1N1 death in early September (Commonwealth).

Early in this decade, the General Assembly considered the issues of public health emergency and preparedness within the framework of the Model State Emergency Health Powers Act (MSEHPA). The MSEHPA was created in 2001 by the Center for Law and Public's Health at Georgetown and Johns Hopkins University in response to the September 11, 2001, terrorist attacks. The Act proposes an integrated system that would allow state governments to respond to public health emergency situations. The MSEHPA defines the powers and roles of public offices as well as establishes reporting and public health emergency planning requirements (Hodge and Gostin 7-12). Since 2001, more than two-thirds of states have passed public health legislation that includes some provisions of or language aligned with the Model State Emergency Health Powers Act (Center 1). Kentucky has not adopted the MSEHPA.

While MSEHPA is a broadly written proposal covering many aspects of public health emergency and preparedness law, a specific issue that is a cause for concern in any public health emergency is the need to allow volunteer health practitioners to provide services to victims. KRS Chapter 39A.350 defines "volunteer health practitioner" to include a person licensed to perform health services such as preventative, diagnostic, physical or mental treatment, and other forms of medical treatment with or without pay, provided that the pay is not from an employer for services the practitioner is already required to perform. Kentucky's state plan for a public health emergency relies on the role volunteer health practitioners play.

In 1996, the Emergency Management Assistance Compact was signed into federal law. The compact allows licensed health practitioners to provide public health assistance during emergencies in states outside their state of licensure. All 50 states have adopted this compact (U.S. Dept. Centers. CDC Support). While the compact does provide for interstate license recognition, it only applies to government employees and practitioners who entered into the agreement in their home states. This left many private practitioners unable to provide assistance as volunteers. This problem became evident during Hurricane Katrina in 2005. Volunteer health practitioners were unable to expeditiously obtain authorizations to assist in the disaster area, which delayed or prevented practitioners from providing health services to people in need. In an effort to address this situation, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Emergency Volunteer Health Practitioners Act (UEVHPA) that allows volunteer health professionals to register in any state in advance of or during a public health emergency. In 2007, this Act was amended to address issues of civil liability by stipulating that a volunteer health practitioner cannot be held liable when acting in good faith (Uniform. National. "Summary"). Currently, 10 states, including Kentucky, are in compliance with the Act and six have introduced it this year (Uniform. National. "A Few Facts").

Discussion

There is some debate about the level of statutory control a state should have over preparation and response to public health emergencies. An official with the Centers for Disease Control and Prevention noted that because state public health departments are the first responders to public health emergencies, they must be granted the "flexible and scalable capacity" to respond to various public health emergencies as they see fit (Sosin 2). Statutes created with this in mind would give public health officials broad powers that could be applied to any public health emergency, regardless of its scope. In contrast, the MSEHPA proposes that states statutorily designate the roles and expand the responsibilities of departments of public health during emergencies by giving the public health officials power to respond without the governor's approval (Hodge. "A Brief" 3).

Kentucky law is not particularly restrictive with respect to the manner in which public health officials should respond to public health emergencies. Under KRS 214.020, the Cabinet for Health and Family Services has the authority to act in the manner it "deems efficient" when the state is threatened by an infectious or contagious disease. However, when the governor declares a state of emergency under KRS 39A.100, he or she has the power to direct the manner in which state and local governmental agencies respond to the emergency. This does not negate the fact that the Department for Public Health and other public health responders still play a role in public health emergency and preparedness situations. While the statutes do not follow the MSEHPA, they do allow the Department for Public Health the ability to prepare for and respond to public health emergencies.

The Department for Public Health is generally content with its flexibility granted through public health emergency and preparedness laws, but it is uncertain as to the ability of the current laws to respond to contemporary public health threats (Jagnow). Ongoing experience will help clarify whether the state's statutes on public health preparedness are sufficient.

An official with the Kentucky Department for Public Health suggested that although the General Assembly is in compliance with recommended provisions in the Emergency Management Assistance Compact and the Uniform Emergency Volunteer Health Practitioners Act, volunteer health practitioners may need further statutory protection. The department is specifically concerned about the lack of insurance funds to assist volunteers in the event of a civil law suit (Jagnow). While volunteer health practitioners who are licensed physicians, registered or practical nurses, certified emergency medical technicians, or persons certified to perform cardiopulmonary resuscitation are protected if they act in good faith, that does not prohibit law suits or the costs inherent in a defense (KRS 411.148).

The General Assembly actively considered public health emergency and preparedness options over the past decade and has adopted many proposals that keep the state current with federally suggested practices. Kentucky's experience with H1N1 will help determine if the general powers given are sufficient and may well help the General Assembly assess whether current laws provide a sufficient level of liability coverage for volunteer health practitioners.

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