Issues Confronting the 2011 Kentucky General Assembly

Informational Bulletin No. 233

Legislative Research Commission
Frankfort, Kentucky

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Prepared by

Members of the Legislative Research Commission Staff

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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 2011 General Assembly. It is by no means an exhaustive list; new issues will arise with the needs of Kentucky's citizens.

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

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

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

Robert Sherman
Director

Legislative Research Commission
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Cost-of-care Bonds for Impounded Animals

Prepared by Tanya Monsanto

Should the General Assembly require owners of impounded animals for reasons of cruelty or neglect to post a cost-of-care bond to pay for the impounded animals' expenses?

Background

Cost-of-care bond legislation sometimes allows the agency that is caring for an animal to draw against the bond as the expenses are incurred rather than to wait for the case to be resolved and the bond paid. The bond can be a personal bond or a lien and covers the expenses associated with the care of the animal, including feeding, boarding, and any necessary medical treatment. Another common provision is a forfeiture provision that requires the owner to forfeit ownership of the animal if the bond is not paid. Several states have adopted legislation that requires the owner of an animal seized because of the owner's cruelty or neglect to post a cost-of-care bond.

Kentucky does not require a cost-of-care bond and is one of only eight states that do not require compensation from the owners for costs incurred for animal cruelty cases (Otto). Because the owner does not pay for the cost of temporary care, usually the county assumes that financial responsibility (Rogers. Humane. "Re: One"). The Kentucky Humane Society estimates that the total cost of temporary care of animals is on average $75 per dog, $60 per cat, and $800 to $1,000 per horse to provide food, veterinary examinations, vaccinations, transport, and shelter. Actual costs are dependent on the duration of temporary care. In Kentucky, dogs and cats in cruelty cases may require temporary shelter for 5 to 7 days; horses may require 4 to 6 weeks. Animals seized for reasons of cruelty may need to be euthanized. The cost to euthanize an animal in Kentucky is estimated to be $20 to $30 per dog or cat depending on its size; the cost is considerably more for horses (Rogers. Humane. Personal).

Over the past 10 years, 24 states have enacted laws authorizing the bonding of animals in cruelty cases (Otto). This is due in part to the national campaign launched by the Humane Society of the United States and the Animal Legal Defense Fund to encourage states to adopt cost-of-care bonding legislation. These two national organizations assert that the care of animals seized for reasons of cruelty places too much financial burden on shelters and local governments.

Some counties have contracted with the Kentucky Humane Society for the expenses they incur for the care of the animal seized, and the Humane Society is then given the right to charge the owners directly (Rogers. Humane. Personal). In the majority of cases, however, the county pays for the costs of temporary care. The costs can be considerable. In 2009, authorities in Breckinridge County conducted a raid that involved the seizure of 48 horses and the proper disposal of 11 dead horses (American). The cost to the county was between $15,000 and $16,000. According to the Breckinridge County Judge/Executive, donations and outside aid were critical; otherwise, the county would have found it difficult to budget for the enforcement action (Powers).

Discussion

Proponents of cost-of-care bonding claim it should be the owner's responsibility to pay for temporary shelter rather than passing the burden to local governments, animal shelters, or citizens. They argue that most shelters are already at capacity, and adoptable dogs and cats are euthanized because the county has to make room for the impounded animals.

Proponents also claim that if counties were not responsible for the cost of temporary care, local law enforcement would be more vigilant about prosecuting cruelty cases. They contend that cost-of-care bonding would strengthen enforcement of cruelty statutes because the owners would pay for care of their animals until the court decided the animal's custody.

Opponents argue that passage of animal bonding requirements in Kentucky may be prohibited by constitutional law. An ordinance in Louisville, similar in nature to past cost-of-care bonding bills filed in the General Assembly, was struck down in 2009. In October 2009, the U.S. District Court Western District of Kentucky ruled two sections of the ordinance unconstitutional on the basis of due process (*Louisville*). If an animal owner does not pay the bond, the animal is automatically forfeited. If that owner is later acquitted of the cruelty charge, then the owner has had property improperly confiscated by the government.

Proponents responded that due process concerns can be addressed by providing waivers for inability to pay. Also, instead of forfeiture provisions, owners may relinquish custody of the animal until a ruling is made at the hearing. If animal cruelty is ruled by the court to have occurred, the former owner is still responsible for compensating the agency that took custody of the animal during the interim.

Opponents assert that cost-of-care bonding is an overreach of government intervention in private property matters. Some farming interests fear that such measures amount to a first step by animal activists to apply standards of animal care derived for pets to livestock intended for food production. Proponents counter that absent cost-of-care bonding, the county is so overwhelmed by the cost of enforcement that standards of care become a moot issue.

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Veterinarian Confidentiality Restrictions

Prepared by Lowell Atchley

Should the General Assembly clarify veterinarians' confidentiality restrictions in cases of suspected animal abuse?

Background

Under KRS 321.185, a veterinarian "shall not violate the confidential relationship" with the veterinarian's client unless the client agrees to the release of information in writing or unless the veterinarian is compelled to release information under court order or subpoena.

In the 2009 Regular Session, one proposal provided immunity from civil or criminal actions to veterinarians that reported to proper authorities suspected incidents of animal abuse or torture. In the 2010 Regular Session, a similar proposal would have amended KRS 321.185 to provide such immunity. Neither measure passed.

According to the American Veterinary Medical Association, the reporting of suspected animal abuse in states falls under two general categories: a licensed veterinarian is required to report instances of animal abuse or cruelty, either by statute or regulation; or immunity from civil lawsuit is provided for good-faith reporting.

Discussion

Comprehensive data on the number of cases of animal abuse in Kentucky is not readily available. The Kentucky State Police publication *Crime in Kentucky* does not contain data on animal abuse arrests; rather, the report covers crimes affecting people. The Web site Pet-Abuse.com, which maintains an animal abuse database, listed 14 animal cruelty cases in Kentucky in 2009, a decline from 26 cases in 2008 and 39 in 2007. According to the site, neglect/abandonment is the most common type of animal abuse (almost 33 percent).

Proponents of changing the confidentiality restriction state that KRS 321.185, as it relates to the confidential relationship between a veterinarian and the client, does not allow veterinarians to report suspected cases of animal abuse to appropriate authorities. Proponents argue that being able to report would help protect the health and welfare of both animals and people. They also point out that a number of researchers have studied and analyzed the relationship between animal abuse and domestic violence (Weber).

According to the American Legal and Historical Center, veterinarians are concerned about breaking client confidentiality and about accurately detecting signs of animal abuse. For that reason, the center indicated that some veterinarians and professional organizations hesitate to embrace reporting laws.

Some question the propriety of granting legal immunity from civil or criminal actions. It can be argued there are state constitutional prohibitions against granting immunity (Fawns). Sections 14, 54, and 241 of the Kentucky Constitution address the issue of seeking redress in court.

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Soring Show Horses

Prepared by Lowell Atchley

Should the General Assembly enact legislation relating to the offense of soring show horses?

Background

The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) defines "soring" as applying a chemical or mechanical agent on the limb of a horse or any practice that causes physical pain to produce an exaggerated show gait for competition. Soring has been evident since at least the 1950s, mainly on Tennessee walking horses, racking horses, and related breeds (Horse). Objections from the public regarding soring led to passage of the U.S. Horse Protection Act in 1970.

APHIS administers and enforces the Horse Protection Act. The agency is responsible for inspecting horse events using inspection teams that include veterinary medical officers and others. But the agency also relies considerably on "designated qualified persons" to inspect horses at shows and sales. Designated qualified persons must be licensed by a horse industry organization certified by APHIS (U.S. Dept. Animal. Horse. "Inspection").

Kentucky's statute relating to soring, KRS 436.185, has not been amended since it was created in 1956. The statute carries a maximum $100 fine and/or 10 days in jail on a first offense of soring and 30 days for each subsequent offense.

Discussion

Despite a federal law that has been in place for about 40 years, soring remains a problem. For example, as shown in the following table, inspections conducted by APHIS at horse shows as of September 2010 and in 2009 found about a third of horses inspected were in violation of the Horse Protection Act. However, the violation rate in 2008 was lower, 17 percent. On the other hand, according to a partial 2010 designated qualified person show report, 368 shows were visited. In those shows, inspectors conducted 53,729 inspections and noted 1,048 violations, a violation rate that was considerably lower than those found in the APHIS reports. (U.S. Dept. Animal. Animal Welfare).

Walking Horse Shows Attended by APHIS

Year	Shows	Entries	Inspections	Violations	Violation Rate
2010*	50	6,019	1,434	479	33%
2009	36	5,798	2,087	761	36%
2008	37	7,245	2,158	371	17%

Source: Staff compilation of reports filed on APHIS Animal Welfare Web site.
*Partial-year data

Proponents of expanded soring legislation in Kentucky emphasize that the practice continues unabated. Proponents also assert that the Horse Protection Act has failed to stop soring because of inadequate funding, political interference, and conflicts of interest by industry self-inspection. The Humane Society of the United States reported that Kentucky has the second-highest soring violation rate in the U.S. behind Tennessee. Humane Society officials argued that legislation is needed in Kentucky to assign heavier criminal penalties for soring as a deterrent to end the practice (Dane and Rogers).

Those opposing expanded state regulation against soring have argued that the vast majority of horse show participants are in compliance and that only a few involved are violating the law. They have cited inconsistent horse show inspections, personal biases among inspectors, and questionable results from equipment used to detect soring of horses (Dorton). In addition, the Chair of the Kentucky Horse Racing Commission (KHRC) rules committee urged that a plan it developed be allowed to operate for a period of time to gauge its effectiveness. Under the plan, breeder incentive funds would be offered only on shows affiliated with approved horse industry organizations. Further, breeders cited for violating the Horse Protection Act would be ineligible for the funds (Bonnie).

An official with the Humane Society of the United States said horse show enthusiasts have purposely avoided some competitions in 2010 if rigorous inspections were imminent (Dane. Humane. “Re: Soring”). An official with the KHRC indicated that participation in breeders incentive-sanctioned shows was down in 2010 because riders were trying to become comfortable with the new KHRC rules (Eads).

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Stockyard Sales Receipts

Prepared by Biff Baker

Should the General Assembly require stockyards to provide seller identification to livestock buyers on sales receipts?

Background

Kentucky's 47 licensed stockyards operate as public markets in which livestock are received and sold. The livestock that are sold at these markets include cattle, goats, sheep, and swine. Federal Packers and Stockyards Act regulations require that stockyards keep records identifying buyers and sellers of livestock, though the regulations do not specifically require that the information be automatically distributed to the parties involved in the transaction. A representative of the Packers and Stockyards Administration confirmed that Kentucky stockyards are complying with the regulation by having the information available (Powers). According to the Packers and Stockyards Administration, if a buyer requests a stockyard to provide seller identification, the stockyard is required to furnish it. The representative stated that she was not aware of any complaints being received in Kentucky in the past 4 years, nor was she aware of her colleagues in Illinois or Indiana receiving any complaints.

Kentucky law requires stockyards to file monthly reports to the Department of Agriculture showing the number of livestock received and sold. Department personnel confirmed that reports are being filed and that information regarding the identification of sellers is readily available (Billings).

Discussion

Some have proposed amending Kentucky's law to make the disclosure of seller identification mandatory rather than voluntary and to include the seller identification information on sales receipts. Proponents report that more transparency in sales transactions would make sellers more accountable for the quality of their livestock. Transparency also would make it easier to trace the origin of livestock should there be a disease outbreak. Proponents contend that many livestock buyers are not aware of the federal regulation regarding seller identification.

Opponents argue that disclosing the identity of the seller could lead to potential liability on the part of the seller. They state that once a seller's livestock is mingled with other livestock, the seller loses control over diseases to which the animals might be exposed. If an animal later gets sick or dies, the seller does not want a buyer claiming that the seller is liable. There is also a concern by the stockyards that disclosing the seller's identity would lead to buyers circumventing the auction system and dealing directly with sellers.

House Bill 234 was introduced in the 2010 Regular Session and would have required stockyards to provide the name and county of sellers on sales receipt forms.

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Apportionment of Income for Tax Purposes

Prepared by Jennifer C. Hays

Should the General Assembly modify the apportionment formula used in calculating income tax for multistate businesses?

Background

During the 2009 and 2010 Regular Sessions of the General Assembly, the Kentucky Single Sales Factor Coalition, a trade association representing more than 15 of Kentucky's larger business taxpayers, advocated a change to Kentucky's apportionment formula. The coalition's proposal would likely reduce the amount of income tax owed in Kentucky by business entities that have a significant investment in property and employees in Kentucky but sell most of their products or services outside the state.

When a state taxes a business entity, the process is not as straightforward as taxing an individual. This is partly because many business entities operate in multiple states, and each state may only tax that portion of the entity's income that is attributable to activity conducted within that state. After computing the amount of net income of the business, a formula is then used to apportion how much of that income should be taxed in each state where the entity does business.

In 1957, the National Conference of Commissioners on Uniform State Laws (NCCUSL) recommended that every state imposing an income tax adopt the Uniform Division of Income for Tax Purposes Act (UDITPA). The formula endorsed by UDITPA was to apportion income based on the two basic factors of production within the jurisdiction (property and payroll) and a third factor representing the market within the jurisdiction (sales). The property factor is the average value of property owned or leased and is used to measure capital. The payroll factor contains the amounts of compensation paid to employees of the entity for the taxable year and is used to measure labor. The sales factor considers all the sales made by the entity by reporting gross receipts for the taxable year.

Each factor is displayed as a fraction; the numerator is the activity within the state, and the denominator is the entity's entire activity, both inside and outside the taxing state. The results from the three factors are added and divided by 3, making each factor equally weighted in determining the percentage to apply to net income apportioned to the state. This approach is commonly called a three-factor apportionment formula.

$$\frac{\frac{\text{Property in KY}}{\text{Property Everywhere}} + \frac{\text{Payroll in KY}}{\text{Payroll Everywhere}} + \frac{\text{Sales in KY}}{\text{Sales Everywhere}}}{3}$$

From 1957 through 1964, three states—Alaska, Arkansas, and Kansas—adopted UDITPA. In 1964, a congressional committee (known as the Willis Committee) issued a report on the impact of state taxes on interstate commerce. The report concluded that the lack of uniformity was

harming the national market. Many states, including Kentucky in 1966, responded to prevent the passage of proposed federal legislation by adopting the UDITPA language. Kentucky's version of the UDITPA language is found in KRS 141.120.

The UDITPA apportionment method was substantially adopted by 44 of the 45 states imposing an income tax. However, Iowa, the remaining state, never adopted the three-factor formula; instead, it apportioned income based on sales only. In 1978, the United States Supreme Court held that the apportionment method used by Iowa did not run afoul of either the Due Process or Commerce Clause of the Constitution even though Iowa's single sales factor considered only the market influences and totally discounted UDITPA's production factors (*Moorman*). Like the three-factor apportionment formula, the single sales factor is displayed as a fraction; the numerator is the sales within the state, and the denominator is the entity's entire sales inside and outside the state.

$$\frac{\text{Sales in the State}}{\text{Sales Everywhere}}$$

Following that opinion, states began to follow Iowa's lead by either adopting a single sales factor formula or by more than doubling the weight of the sales factor within the apportionment formula. When a state increases the weight of the sales factor, the formula is commonly called a super-weighted formula. Today, Ohio is a state that has a super-weighted formula. The super-weighted formula is illustrated below:

$$\frac{\left(\frac{\text{Property in OH}}{\text{Property Everywhere}} \times 0.125\right) + \left(\frac{\text{Payroll in OH}}{\text{Payroll Everywhere}} \times 0.125\right) + \left(\frac{\text{Sales in OH}}{\text{Sales Everywhere}} \times 0.75\right)}{3}$$

Many states that modified their apportionment formula did so to further economic development, hoping to entice manufacturers to locate in the state because property and payroll located in the state would not be considered equally in determining the company's tax liability.

During the 1985 Extraordinary Session, the General Assembly followed this trend by enacting a double-weighted sales factor apportionment formula, as depicted below. In the double-weighted sales factor apportionment formula, the sales factor is multiplied by 2, giving it double the weight of each of the other factors—property and payroll.

$$\frac{\frac{\text{Property in KY}}{\text{Property Everywhere}} + \frac{\text{Payroll in KY}}{\text{Payroll Everywhere}} + \left(\frac{\text{Sales in KY}}{\text{Sales Everywhere}} \times 2\right)}{4}$$

Eleven states still maintain the original UDITPA three-factor formula, 20 states use a double-weighted formula like Kentucky's, and 16 states use a super-weighted factor or a single sales factor apportionment formula.

Discussion

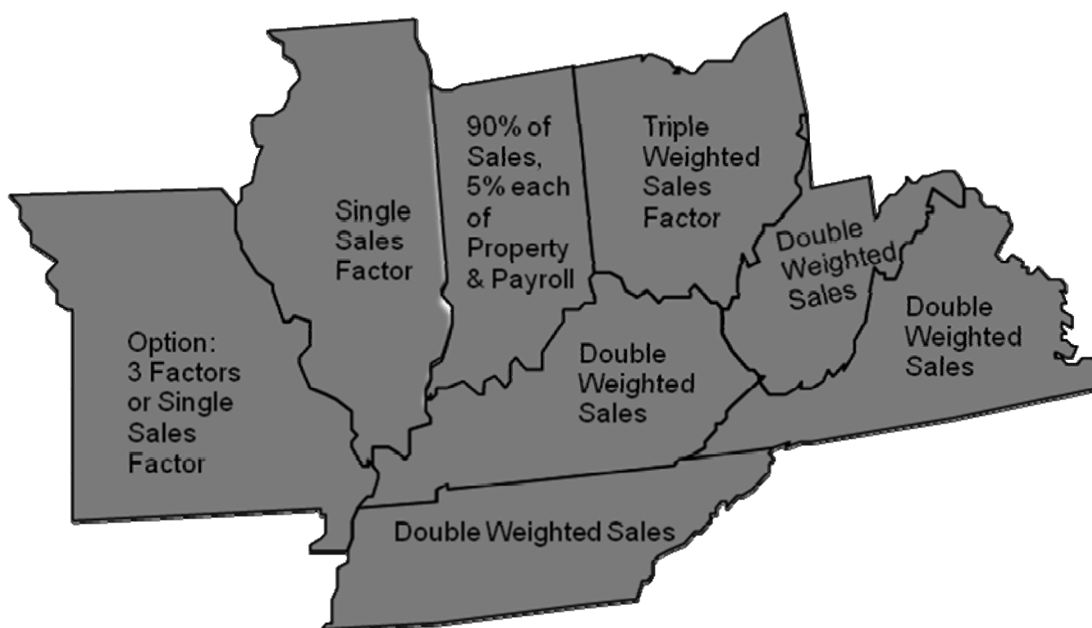
It is anticipated that the coalition will again lobby the 2011 General Assembly to enact a single sales factor apportionment formula. To minimize the fiscal impact of adopting a single sales

factor, the coalition has proposed that a phased-in approach be adopted. The phase-in would require increasing the weight of the sales factor over a period of time, while decreasing the weight associated with the other factors in the apportionment formula. The result would be that Kentucky would have a super-weighted formula, until a single sales factor formula is eventually implemented.

Proponents of a single sales factor maintain that the formula makes a state more competitive by allowing the state to attract or retain investment in property and people. This is because a company's investment in land, buildings, equipment, and people in the state is not taken into account in determining the company's taxable income in the state (Ernst & Young).

However, this competitive edge will only continue as long as other states continue to take property and payroll into account in their apportionment formulas. As demonstrated by the following map, states to the north and west of Kentucky have already begun using a super-weighted or a single sales factor formula.

2010 Income Tax Apportionment



Source: Staff compilation of information from the Federation of Tax Administrators.

Because Kentucky would be a late adopter if a super-weighted or single sales factor were enacted, the argument becomes one of protecting the existing manufacturing base, rather than attracting new business.

Opponents of a super-weighted or single sales factor formula believe that the claims regarding economic development are overstated. Opponents note that a large body of research on the effect of state and local taxes on state economic competitiveness contradicts this claim. Nine studies have concluded that low business taxes had no statistically significant impact on state economic

development. The literature points to the availability of an adequately skilled labor pool, high-quality roads and other public infrastructure, and good public schools and universities as more important contributors to economic development (Mazerov).

There will be both positive and negative implications for taxpayers if any modification is made to Kentucky's apportionment formula. A redistribution of the tax burden will occur. Some businesses will pay more, while others will pay less tax. A business with significant investments of property and employees in Kentucky that sells the majority of its products or services outside the state would likely experience a reduction in taxes paid in Kentucky because the property and payroll will no longer be considered in the apportionment formula. A business with significant sales in Kentucky but without investments in property and payroll here would likely experience an increase in taxes paid because sales in the state would be the only factor considered in the apportionment formula (Institute on Taxation). Therefore, it is understandable that proponents such as the coalition are primarily composed of businesses with significant infrastructure and employees in Kentucky.

If all states adopted a sales-only apportionment formula, most of the tax savings received by a particular business in a particular state would be offset by higher tax payments by these same businesses in other states. By creating a situation in which apportionment formulas are not uniform among the states, multistate businesses can minimize their overall aggregate tax liability in all the states in which they do business by ensuring that the tax cuts they receive in some states are not offset by tax increases in other states. The lack of uniformity causes behavioral adjustments by the businesses. These adjustments are seen as a business moves the capital and labor to states that discount or eliminate the effect within the apportionment formula.

If Kentucky were to adopt a super-weighted or single sales factor apportionment formula, it is estimated that the Commonwealth would experience a negative fiscal impact. The experience of other states that have already adopted a single sales factor formula demonstrates that a small number of in-state businesses receive a larger tax decrease and that a higher number of out-of-state businesses receive a smaller tax increase. The overall result is generally a reduction in tax receipts in states similar to Kentucky in size and market structure. The staff from the Office of State Budget Director reviewed prior-year data and predicted an anticipated revenue loss of approximately $25 million during the first fiscal year, $45 million in the second fiscal year, and $55 million at full implementation in the third fiscal year if Kentucky adopted a single sales factor formula. These estimates could change as the economy changes, and updated estimates will be required if the proposal is recommended again.

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Property Taxes

Prepared by Pam Thomas

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 Extraordinary Session, generally limits to 4 percent per year the overall revenue growth from the tax that may be levied by any local taxing jurisdiction on real property, exclusive of new property, without the possibility of a voter recall. However, there are some circumstances in which a rate may be levied that produces revenue growth greater than 4 percent per year without the possibility of a voter recall. The purpose of House Bill 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 by statute. [2]

Section 171 of the Constitution allows the General Assembly to divide property into classes and to determine which class or classes are subject to local taxation. The General Assembly has addressed the classification, taxation, and exemption of tangible 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 of 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]

[1] School districts are not included in this discussion.

[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] The reliance on property taxes varies among local jurisdictions. Most special taxing districts are only authorized to levy property taxes, while cities and counties also have the ability to levy occupational taxes, license taxes, and insurance premium taxes.

The constitutional rate limitations described above are the only mandatory limits placed on local governments with regard to establishing tax rates. It is widely perceived, however, that the public disclosure and recall provisions of House Bill 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, and 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 by allowing a higher rate to be imposed against the real property tax base. A jurisdiction that is authorized to use the adjusted rate from the second calculation as its compensating rate will almost always generate more revenue from real property than was generated the prior year, and because the second calculation is part of the compensating rate, there is no requirement for a public hearing to impose the higher rate.

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 second rate that is calculated is the 4 percent rate. This is the rate that will produce revenue from real property, excluding 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.

Rate Exceeding the 4 Percent Rate

Any portion of a proposed levy that will produce revenue that exceeds the revenue produced by the compensating rate by more than 4 percent is subject to recall by the voters in the jurisdiction (KRS 132.017).

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[4] In calculating the compensating rate, the rate determined is rounded to the next-highest one-tenth of 1 cent per $100 of assessed value.

Tangible Personal Property Rate

After passage of HB 44, some argued that the rate-setting process did not adequately account for reductions in the tangible personal property tax base because the rate calculation was 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 against 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 is that the current rate calculation process, with 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 the percentage increase from tangible personal property is consistent with the percentage increase from real property, sometimes allows jurisdictions to impose rates in excess of what is commonly thought of as the compensating rate without a public hearing and to impose rates higher than the 4 percent rate without the possibility of recall. This situation occurs primarily in taxing districts that have personal property rates that are higher than real property rates.

This has become an issue because with the recent economic downturn, 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 differences between the real and tangible personal property tax rates in these jurisdictions.

The reduction in the tangible personal property tax base and in the amount of new property, combined with the large differences in the real and personal rates in some taxing jurisdictions, makes it more likely that the compensating rate will be adjusted upward under the second part of

the compensating rate calculation because the original rate, when applied against the entire current year base, will not generate as much revenue as was generated the prior year. This combination of factors also makes 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 can 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 each year thereafter. This occurs 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 the tangible personal property rate grows. The increasing disparity between the rates makes it more likely that in the next year, both higher compensating rate calculation and the increased tangible personal property tax calculation will be triggered. This may create a cycle in which rates calculated will always be higher than what is traditionally thought of as the compensating rate and the 4 percent rate.

Rate Calculation Example

Assume that a local jurisdiction had the following property tax assessment base for 2009 and 2010. Note that the 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.

	2009	2010	Rate imposed in 2009
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

For this example, assume there is no new property.

Part I—The rate in 2010 would be the same as the rate imposed in 2009 (15 cents 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, the jurisdiction may impose a compensating rate in 2010 of 16 cents per $100 rather than 15 cents per $100.[5]

[5] Note that the rate increase is actually greater than the calculations produce because of the requirement that the rate be rounded up. Note that the permissible 4 percent rate would also increase because it is calculated based on the compensating rate.

Description of calculations to be made	Calculations
First, determine the revenues expected to be generated in 2010 using the rate calculated under Part I when applied to the entire 2010 assessment base of $950,000	$950,000/100 x .15 = $1,425 total 2010 base/100 x 2010 Part I rate
Second, calculate the total revenues generated from the entire assessment base in 2009 of $1,000,000	$1,000,000/100 x .15 = $1,500 total 2009 base/100 x 2009 rate imposed
Finally, determine the rate for 2010 that will result in the same amount of revenues that were generated in 2009	$1,500/$950,000 = $0.1579 rounded to $0.16 per $100 2009 revenues/2010 base = rate that may be imposed to generate same revenues as prior year

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 2010; 2) Determine the real property revenues based on the real property base and rate in 2009; and 3) Determine the percentage difference between the two	1) $750,000/100 x .16 = $1,200 real property base in 2010/100 x comp rate for 2010 = anticipated real property revenues in 2010 2) $750,000/100 x .15 = $1,125 real property base in 2009/100 x rate imposed in 2009 = 2009 revenues $1,200 - $1,125 = $75 (projected revenue increase) 3) $75/$1,125 = 6.67% increase Projected revenue increase/2009 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 2010 if the compensating rate were imposed against the 2010 tangible personal property tax base 2) Determine the revenues generated from tangible personal property using the base and actual rate imposed in 2009 3) Determine the percentage difference between the two	1) $200,000/100 x .16 = $320 Tangible personal property base in 2010/100 x comp rate for 2010 2) $250,000/100 x .15 = $375 Tangible personal property base in 2009/100 x rate imposed against tangible personal property in 2009 3) $320- $375 = -$55 Difference in revenues between 2009 and 2010 -$55/$375 = -14.7% Projected revenue loss/2009 revenues = % loss $375 x 1.0667 = $400 2009 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 is fairly large (20 percent of the value of the base: $50,000 is 20 percent of $250,000), the adjustment that could be made to the tangible personal property tax rate is significant. The rate may be increased from the 2009 rate of 15 cents per $100 to 20 cents 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 without the possibility of 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 these taxing provisions will further hamper the ability of local governments to raise sufficient revenues.

Work Cited

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Estate Taxes

Prepared by John Scott

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

Kentucky statutes include both an estate tax that is assessed on the estate of a deceased person and an inheritance tax that is assessed against the value passed to a beneficiary of an estate. This discussion relates only to the estate tax and does not address Kentucky's inheritance tax, which continues as a separate tax and is generally not impacted by any federal action.

The federal government assesses an estate tax but not an inheritance tax. Estates that exceed an amount determined in federal statute are subject to the federal estate tax. Absent changes to federal law, for deaths occurring on or after January 1, 2011, that amount will be $1 million.

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

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

Unless an impacted state chose to change its statutes, the pick-up tax would no longer apply, and revenues related to the pick-up tax would not be collected by that state. Because Kentucky did not amend its estate tax statutes during the phase-out period, anticipated revenues from the Kentucky estate tax have ultimately been reduced to zero as the estate tax provisions of EGTRRA were phased in.

All provisions of EGTRRA are set to expire January 1, 2011. Accordingly, for deaths occurring on or after that date, the federal estate tax laws in effect in 2001 will be used to determine any estate tax liability. Under the 2001 law, the state credit for federal purposes would once again apply. Absent federal changes, the estate tax would once again provide a revenue stream into Kentucky's General Fund through the pick-up tax. A review of annual tax receipts compiled by the Office of State Budget Director reveals that Kentucky's estate tax receipts declined by approximately $40 million annually after the phase-out of the estate pick up tax. However, discussions are currently underway at the federal level to modify and extend the expiring provisions of EGTRRA. If that extension includes a continued revocation of the state credit,

Kentucky's estimated revenues for fiscal years 2013 and 2014 and into the future could be impacted negatively.

Delinquent Property Taxes

Prepared by Eric Kennedy

Should the General Assembly modify the fees that third-party purchasers of certificates of (property tax) delinquency are statutorily allowed to collect?

Background

When state and local property taxes become delinquent, a lien attaches to the property and the tax claim becomes a certificate of delinquency. So that government entities may receive amounts owed from property taxes as quickly as possible, Kentucky law allows certificates of delinquency to be sold to any qualified buyer, known as a third-party purchaser.

Certificates of delinquency are initially offered for sale annually by the county clerk according to a master sale schedule established by the Kentucky Department of Revenue (KRS 134.128). Any certificates left after the sale may be purchased from the clerk. Currently, in many counties, the amount of money collected from the sale is substantial. For example, in recent years, the total delinquent property tax roll in Jefferson County, the state's most populous county, has reportedly averaged approximately $14 million dollars, constituting about 15,000 individual bills (Wolfson).

The third-party purchaser pays the original taxes owed and then may collect from the property owner the full amount paid for the certificate, the statutory interest that accrues from the date of purchase, and certain statutorily authorized administrative fees. Prior to 2005, there were no statutory provisions either specifically allowing or limiting administrative or legal fees imposed by third-party purchasers. Few third-party purchasers actually bought certificates of delinquency because it was often not economically feasible. In 2005, the Kentucky Court of Appeals held in *Flag Drilling Company v. Erco* that in addition to interest, third-party purchasers could recover costs and reasonable attorneys' fees when collecting on certificates of delinquency. After this court decision, the purchase of certificates became more profitable to investors.

As a direct result of this court decision, the market for certificates of delinquency quickly developed, with some large third-party purchasers operating in multiple states and making tens of thousands of dollars worth of purchases each year in counties across the Commonwealth. In time, however, anecdotal evidence began to suggest that some third-party purchasers were charging excessive attorneys' fees that in some cases doubled or tripled the total amount due on the certificates. One third-party purchaser cited by the Fayette County Attorney had imposed fees and costs of more than $5,000 related to two certificates with original tax assessments of approximately $1,800. In that matter, the circuit court agreed that the fees were excessive and ultimately reduced the amount to $892, which the court found to be reasonable under the circumstances (*Commonwealth*).

In response to this issue, the General Assembly enacted House Bill 321 during the 2007 Regular Session. This bill established a schedule of fees allowable to third-party purchasers:

- One hundred percent of the amount of a certificate purchased for up to $350, not to exceed $350
- Eighty percent of the amount of a certificate purchased for between $351 and $700, not to exceed $560
- Seventy percent of the amount of a certificate purchased for more than $701, not to exceed cap of $700
- An additional administrative fee not to exceed $100 for actual costs incurred due to collection remedies actually prosecuted (KRS 134.452)

Since the statutory fees were established, several bills have been introduced to decrease the allowable fees limits; however, none passed.

Discussion

This issue has remained the subject of discussion. Legislators continue to receive inquires and complaints from constituents regarding the overall issue of the sale of certificates of delinquency, and the imposition of third-party administrative and legal fees in particular. Several newspaper articles have highlighted the issue. At least one lawsuit has been filed and is currently pending in which several taxpayers have alleged that the third-party purchasers of certificates of their delinquent tax bills have imposed “outrageous” and “unlawful” attorneys’ fees (*Bailey*).

The General Assembly could either maintain the current fee cap structure as enacted in 2007, or it could reduce those caps, as has been proposed by several pieces of legislation in subsequent sessions. Advocates for reduced fee caps argue that high fees unfairly and unreasonably drive up the costs for property owners who are trying to satisfy their tax debts and retain ownership of their properties.

Those in favor of the current structure maintain that if the allowable attorneys’ fees and costs are reduced or eliminated, it will no longer be economical for many third parties to purchase certificates. A reduction in allowable attorney’s fees would be detrimental to the governmental entities that depend on property tax revenues to operate, as the amounts collected through the annual sale of certificates of delinquency are often substantial, amounting to millions of dollars each year in some larger jurisdictions.

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Health Care Reform Issues

Prepared by Emily Bottoms

Should the General Assembly conform health insurance laws to the requirements of federal health care reform?

Background

The national health care reform law makes significant changes to private market health insurance and how it is regulated. Many of its provisions establish uniform federal standards in areas previously regulated only by state laws and regulations. In addition, some key provisions affect states as of September 23, 2010:

- Extending health insurance coverage for young adults to 26 years of age
- Eliminating co-payments and deductibles for preventive care
- Prohibiting plans from imposing preexisting condition exclusions on children
- Forbidding plans from imposing lifetime and annual limits on insurance coverage
- Preventing insurance companies from arbitrarily rescinding coverage
- Requiring insurance companies to report medical loss ratios
- Strengthening the processes for approval of rate increases and reporting of premium increases

The Affordable Care Act (ACA) does not preempt any provision of state law that does not prevent its operation. Upon the effective date for each provision, any state law that does not meet the federal minimum standards will be preempted, and the federal Department of Health and Human Services will assume regulatory authority for that provision of federal law. Conversely, if Kentucky has a requirement that meets or exceeds the federal standards, or adopts such a requirement in the future, then the state will retain the authority to enforce it. Kentucky's commissioner of insurance has general authority to enforce the provisions of the ACA (KRS 304.2-100 and 304.2-110). The commissioner also has authority to regulate unfair or deceptive trade practices in the writing of insurance in Kentucky in accordance with KRS 304.12-010 and 304.12-130. However, without specific legislation addressing the provisions of the Act, as well as clarification of the commissioner's enforcement authority, Kentucky's regulatory power over domestic insurance companies may be challenged.

Discussion

Extending health insurance coverage for young adults to 26 years of age. Effective September 23, 2010, the Act requires insurance companies to provide dependent coverage for children up to age 26 for all individual and group policies. A plan may not deny or restrict coverage for that child based on financial dependency, residency, student status, employment, or marital status. However, plan years beginning before January 1, 2014, are grandfathered and may exclude adult children who are not yet 26 years of age from coverage if the child is enrolled in an

eligible employer-sponsored health plan.[1] Under current Kentucky law, insurance companies have the option to allow unmarried dependent children to stay on their parents' health insurance plan to age 25. If the General Assembly does not amend statutes to conform with federal law, Kentucky's age limitation will be preempted by the ACA, and the Department of Insurance will lose its enforcement authority over insurance companies doing business in the state with regard to age limitations for dependent health care coverage.

Eliminating co-payments and deductibles for preventive care. Effective September 23, 2010, the Act prohibits health plans from requiring cost-sharing for

- services recommended by the United States Preventive Services Task Force.
- immunizations recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention.
- preventive care and screenings for infants, children, and adolescents supported by the Health Resources and Services Administration.
- preventive care and screenings for women supported by the Health Resources and Services Administration.

This provision applies only to new plans, not to grandfathered plans. Under Kentucky law, 806 KAR 17:180 defines Kentucky's standard health benefit plan. If the General Assembly wishes to maintain state regulatory control over insurance companies with regard to this provision of the ACA, it may consider prohibiting insurers from imposing cost-sharing requirements on preventive services.

Prohibiting plans from imposing preexisting condition exclusions on children. Effective September 23, 2010, the Act prohibits new health plans in all markets from denying health insurance coverage to children to age 19 with preexisting conditions. While the provision covers grandfathered group plans, it does not apply to grandfathered plans in the individual market. Beginning in 2014, this prohibition will apply to plans for all individuals, including adults. In the meantime, between now and 2014, adults who have preexisting conditions who have been uninsured for 6 months or longer may purchase coverage through federal high-risk pools that were also created by the Act, or they may be eligible to purchase coverage through Kentucky Access. Kentucky law, KRS 304.17A-220 and 304.17A-230, addresses preexisting condition exclusions in the group and individual markets, but it does not specifically address children ages 19 and younger. The General Assembly, in an effort to maintain state control over insurers, may consider explicitly prohibiting health plans from imposing preexisting condition exclusions against children up to age 19.

Forbidding plans from imposing lifetime and annual limits on insurance coverage. Effective September 23, 2010, the Act prohibits lifetime limits on the amount the plan will pay for health care services. Beginning in January 2014, the Act will also prohibit annual limits on the amount the plan will pay for health care services. Kentucky law allows lifetime and annual benefit caps in both the individual and group markets. The General Assembly may consider amending its insurance code to specifically prohibit health insurance issuers from establishing lifetime limits

[1] A "grandfathered plan" is defined as an existing group health plan or health insurance coverage, including coverage from the individual health insurance market, in which a person was enrolled on the date of enactment of the health reform legislation.

for enrollees. Further, the General Assembly may consider prohibiting health insurers from establishing an annual limit on the dollar amount of benefits that are essential health benefits.

Preventing insurance companies from rescinding coverage. Effective September 23, 2010, the Act prohibits insurers from rescinding coverage except in cases of fraud or intentional misrepresentation of material fact. Kentucky law provides that all statements and descriptions in an application for an insurance policy are deemed to be representations and not warranties. Misrepresentations, omissions, and incorrect statements do not prevent a recovery under the policy unless they are fraudulent or material, or the insurer would not have issued the policy if the insurer had known the facts (KRS 304.14-110). The General Assembly may consider clarifying that insurers are specifically prohibited from rescinding coverage except in cases of fraud or intentional misrepresentation of material fact.

Requiring insurance companies to report medical loss ratios. Effective January 1, 2011, the Act requires health plans to report to the federal government the proportion of consumers' premium dollars the plans spent on consumers' medical care claims, known as the medical loss ratio. Large-group health plans must spend at least 85 percent on medical care claims; small-group and individual health plans must spend at least 80 percent on medical care claims. The remainder—15 percent for large-group plans and 20 percent for small-group or individual plans—can be spent on administrative costs. If the plans spend more than the 15 percent or 20 percent maximum on administrative costs, they must issue rebates to customers. To allow the commissioner of the Department of Insurance to maintain enforcement authority over insurers doing business in the state, the General Assembly may consider requiring health insurance issuers to provide reports concerning the medical loss ratios for large-group, small-group, and individual plans. Further, the General Assembly may consider requiring insurers to issue refunds to enrollees if the medical loss ratio is less than 85 percent for large-group plans or 80 percent for small-group or individual plans.

New Federal Credit and Gift Card Laws

Prepared by Jens Fugal

Should the General Assembly repeal the laws regarding credit cards and gift cards, or provide additional protections for Kentucky's consumers?

Background

New federal laws—the Credit Card Accountability, Responsibility and Disclosure Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act—require lenders to deliver timely and understandable disclosures to consumers, dictate terms to be included in card agreements, and specify billing and accounting procedures. These new laws place limits on penalty interest rates and other rate adjustments; mandate methods for calculating average account balances and finance charges; require that all payment due dates remain the same from month to month; prohibit early cut-off deadlines on payment due dates; limit late fees; restrict over-the-limit fees to only customer authorized over-limit transactions; and prohibit any credit card agreements with consumers younger than 21, unless a person older than 21 with the demonstrated ability to pay the debt signs as a co-signer. These new laws also impose limits on dormancy, inactivity, and service fees that can be assessed against, and expiration dates that can be placed on, gift certificates, store gift cards (those redeemable at a single merchant or a group of merchants), and general-use prepaid cards (those redeemable at multiple, unaffiliated merchants, service providers, or automated teller machines).

Discussion

State legislatures are empowered to provide additional protection for consumers because only conflicting state laws that are less protective of consumers are preempted by these laws. Kentucky law restricts late fees to $5, which is not preempted because it is more protective than federal law. In contrast, federal law limits late fees to no more than $25, unless one of the last six payments was late, in which case the limit may be up to $35 or a higher fee established by the company showing that the costs it incurs as a result of late payments justifies the higher fee. However, credit card companies may not charge a late fee greater than the minimum payment due on the card. For example, if the minimum payment due was $15 dollars, the maximum late fee would be $15.

Kentucky law provides that no interest can be charged if the entire balance is paid in full prior to the next statement date and caps the annual interest rate at 21 percent. Neither of these limits is preempted. Federal law prohibits any increases in the annual percentage rate during the first year, except increases following the expiration of an introductory rate, an increase in the index rate (for variable-rate accounts), the consumer failing to satisfy a workout arrangement, or the consumer's failure to pay the required minimum payment within 60 days. Companies must also give consumers 45 days' notice of their right to cancel before any rate increase. The increased rate applies only to charges made after the rate adjustment date, while prior balances bear interest at the old rate. A customer who chooses to cancel the credit card within that 45-day period is not

required to pay the remaining balance in full. Federal law requires that lenders apply any amount in excess of the minimum payment due, first to any deferred interest balance, then to the highest rate balance, and lastly to the lower rate balance.

The protections of these new laws come with a cost. In the second quarter of 2010, the average interest rate on existing cards was 14.7 percent, compared to 13.1 percent in 2009. The gap between the prime rate and the average credit card rate was 11.45 percentage points, which was the largest spread in at least 22 years (Simon). Upon determining the adequacy of these federal protections, the General Assembly could consider legislation to repeal, modify, or supplement the protections found in KRS 286.3-710 to 286.3-770.

Kentucky's gift card law also differs from its federal counterpart. Federal law regulates gift cards issued by banks and general-use cards issued under brand names such as Visa, MasterCard, and Discover, while KRS 367.890 excludes them from coverage. Federal law excludes from coverage cards issued for admission to events and entertainment venues, while Kentucky law does not. Federal law requires that gift cards be valid for a minimum of 5 years and prohibits deducting any dormancy fee against a card balance until after 1 year of inactivity. In contrast, Kentucky's law permits gift cards to expire after 1 year and prohibits any service, inactivity, or dormancy fees until after the card expires. Because the federal requirement that gift cards be valid for 5 years is more protective of consumers, Kentucky's 1-year minimum is preempted, while the prohibitions against imposing any fees until the card expires are not. Federal law requires that all fees must be clearly disclosed on the gift card or its packaging; Kentucky has no similar provision.

A survey of the gift card laws of 38 states reveals different approaches regarding types of cards regulated, required disclosures, and restrictions on expiration dates and fees. The General Assembly could consider legislation to repeal, modify, or supplement KRS 367.890.

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Health Benefit Exchanges

Prepared by Rhonda Franklin

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

Background

Federal health care reform legislation became law on March 23, 2010, with enactment of the Patient Protection and Affordable Care Act as amended by the Health Care and Education Affordability Reconciliation Act of 2010. The two bills are referred to as the Affordable Care Act (ACA). Implementation began immediately after passage, with the bulk of the provisions taking effect in 2014.

Unless amended, the Affordable Care Act will affect all aspects of health care and health insurance coverage. A key component is the establishment of health benefit exchanges in each state. Exchanges are intended to serve as an organized marketplace for individuals and small-group employers to purchase health insurance. Large-group employers will be allowed to participate in the exchanges in 2017. The determination of qualified plans will be made by the states based on rules to be issued by the secretary of Health and Human Services. Participation in an exchange is not required, but having health insurance will be required. Individuals and small-group employers may continue to purchase health benefit plans in the open market after the exchanges are implemented.

All states are required to begin development of exchanges by January 1, 2013, and to implement exchanges by January 1, 2014, including an American Health Benefit Exchange for individuals and a Small Business Health Options Program for small employer groups. Exchanges are intended to allow individuals and small-group employers to compare available plans and to purchase health insurance in a "one-stop-shop." States may combine the individual and small-group employer into a single exchange to facilitate purchase of qualified health plans. A state agency may operate the exchange, or the state may select a nonprofit entity to operate the exchange. If a state does not implement an exchange, the federal government will operate it either directly or through an agreement with a nonprofit entity.

The theory behind exchanges is to capitalize on the economy of scale. The more people included in the risk pool results in more money being paid into the pool, with healthy participants financially balancing the cost of unhealthy participants. When individuals or small groups join to form a larger group for insurance purposes, it is called a voluntary risk pool because the entities are choosing to join forces to be a larger insurance plan group for increased buying power. Existing large groups by their nature are already established and are not voluntary. While enlarging the pool should theoretically raise individual and small-group pools to the same plane as a large group in terms of reduced premiums and more health plan options, experience has shown that voluntary risk pools are unstable (Curtis and Neuschler). Healthy individuals and small groups with healthy members historically purchase less expensive coverage available

outside the pool. The result is that the anticipated purchasing power is lost because of an increasing percentage of unhealthy members in the pool. Some insurers have not been eager to cooperate in expanding the size of a pool because they can negotiate directly with small-group employers or with individuals and achieve higher profits.

Several provisions of the ACA were enacted to provide more purchasing power and stability that have been lacking in a true voluntary pool:

- Coverage cannot be denied because of a preexisting condition.
- Each U.S. citizen must maintain minimum health insurance coverage.
- Individuals may be eligible for premium subsidies for coverage obtained through an exchange, and businesses may receive tax credits.
- Each exchange is required to inform individuals who contact the exchange if they are eligible for Medicaid, the Children's Health Insurance Program, or any state or local health benefit program.

All 50 states are in different stages of planning their exchanges. In September 2010, Kentucky received $1 million from the U.S. Department of Health and Human Services to help plan for the establishment of health insurance exchanges. Massachusetts and Utah have functioning exchanges, Oregon and Wisconsin are working on implementation, and California recently enacted enabling legislation to begin the implementation process.

Discussion

A representative of the National Association of Insurance Commissioners said that if the General Assembly intends to create and implement an exchange, it should have a "blueprint" of the exchange as soon as possible and have design and construction completed by the middle of 2011 (Webb). Some of the factors of an initial plan for a health benefit exchange require

- designation of the executive agency charged with oversight of the implementation process;
- determination of the roles of the various state agencies to operate the exchange;
- determination of the type of exchange: individual exchange, small-group exchange, or a combined exchange; and multiple geographic exchanges within the state, single-state exchange, or multistate exchange by interstate compact;
- incorporation of the federal eligibility and enrollment standards; and
- development of Internet technology, including a Web-based portal to disseminate insurance information regarding qualified plans that is capable of allowing a flow of information between the insurance exchange and other programs, including linking to health and human services systems and the ability to interface with insurers offering qualified plans in the state (Clark and Moore; Moore).

Proponents of exchanges argue that the current health insurance market is highly fragmented, resulting in individual and group purchasers not having a reliable source to view and compare plans and make informed choices (Health Reform GPS). They contend that exchanges will serve as a marketplace for consumers to shop for health insurance at competitive rates, with a source for information, a number of private health insurance choices, and centralized enrollment. They assert that exchanges will force competition among insurers and create more stringent standards

for insurers. They also contend that exchanges will provide greater purchasing power for individuals and small businesses as they form a large group (Connors and Gostin).

Proponents assert that a properly designed health insurance exchange will provide transparency and accountability, provide meaningful coverage, aid enrollment, slow health care inflation, and help to subsidize the cost of health insurance for low- and moderate- income citizens. Proponents state that exchanges will have oversight of all participating plans and will be able to provide risk adjustments so that one insurer does not have a disproportionate number of high-risk individuals. They contend that exchanges can be designed to provide for even distribution of risks across all qualified plans to ensure that premiums reflect the average cost of medical care and not the average cost for sick and healthy enrollees. Further, they contend that in the current health insurance market, policies are highly variable and may leave policyholders underinsured, which will also be addressed by exchanges (Blumberg and Pollitz).

Opponents contend that the exchanges are supposed to be operated by the states, but the states will in effect serve as a vendor for the federal government, which will set rules and regulations about who can participate and what benefits must be offered (Turner).

Opponents assert that small employers will abandon health insurance coverage for their employees because the employees will qualify for Medicaid or subsidies. They also contend that large employers will abandon their health insurance coverage if most of their workforce qualifies for subsidized coverage, as the savings from abandonment of employee coverage will be greater than the fines that will be levied for not continuing coverage (Haislmaier and Blasé).

Opponents encourage the states to refuse to establish exchanges under the federal law to slow implementation of the ACA. As an alternative, they recommend that states establish their own "market friendly" exchanges to encourage any willing insurer in the state to participate in the exchange and to provide subsidies through expanded state high-risk pools to cap out-of-pocket, risk-based premium costs for the high-risk population (Gottlieb and Miller).

If the General Assembly decides to establish an exchange, legislation could be enacted to address the type of exchange to be established and to designate the state agency or agencies to oversee implementation. If the General Assembly does not begin development of an exchange by January 1, 2013, the federal government will determine if Kentucky will be able to implement an exchange by January 1, 2014. If not, the federal government will establish and operate an exchange within the state directly or through an agreement with a nonprofit entity.

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Cultural Economy

Prepared by Karen Armstrong-Cummings

Should the General Assembly strengthen the state's cultural economy?

Background

Kentucky's economy includes a range of cultural enterprises, from craftspeople, writers, and Bluegrass musicians to performing arts centers, theatrical groups, and film businesses. The Commonwealth has promoted and marketed cultural products and events in and out of the state for decades. Kentucky's Craft Marketing Program was established to strengthen the state's craft industry and support economic viability of craftspeople. The National Governors Association Center for Best Practices, in its 2009 review of states using arts and cultural programs to stimulate economic development, featured Kentucky's craft marketing to exemplify tourism development through the arts.

Some local governments have integrated the cultural economy into community economic development programs. In 2010, legislators learned about Paducah's LowerTown arts initiative, where local officials reported that each dollar invested by the city returned $11 in private investment.

Discussion

Few state laws specifically provide economic incentives for arts industries. Several states have incorporated the cultural economy into their overall economic incentive programs, providing loans and tax credits and creating special arts districts. Louisiana and Michigan have enacted tax incentive economic development programs focused on the cultural economy (Mt. Auburn). Other states have implemented artist-based tax incentives; place-based incentives such as arts districts in which income tax is exempt from the sale of work in the area; or art galleries, performing arts venues, and museums that are exempt from certain taxes.

Though proponents favor expanding tax credits and similar economic incentives to the cultural industries, others question the basis for incentives specifically for arts and culture. Critics point out that many of the cultural economy terms are ill defined and inconsistently applied, which raise questions regarding methods to measure the impact of public investment. Others argue that arts and culture exist in society for benefits that cannot, or perhaps even should not, be measured in economic terms (Galloway). These considerations could provide the groundwork for discussion and research, should the legislature choose consider this issue further.

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Recreational Access to State-owned Land

Prepared by Karen Armstrong-Cummings

Should the General Assembly allow additional access to state-owned natural resource lands?

Background

The Commonwealth of Kentucky holds title to more than 750,000 acres of land designated for outdoor recreation. Management of these state-owned lands is distributed among four agencies:
- Department of Fish and Wildlife Resources in the Tourism, Arts and Heritage Cabinet
- Department of State Parks in the Tourism, Arts and Heritage Cabinet
- Division of Forestry in the Energy and Environment Cabinet
- State Nature Preserves Commission, attached to the Energy and Environment Cabinet

The Kentucky Department of Fish and Wildlife Resources (KDFWR) manages as wildlife management areas (WMAs) more than 85 percent of the state-owned recreational land—nearly 639,000 areas in 94 properties. Kentucky's 52 state parks comprise nearly 50,000 acres. The Division of Forestry administers eight state forests that make up almost 40,000 acres. The State Nature Preserves Commission owns 59 properties, with nearly 25,000 total acres. More specific detail about each agency's properties is provided in Table 1.

Table 1
Kentucky State Agencies: Land Holdings With Recreation-related Uses

State Agency	# Properties	Size (in acres)	% Total	Public Access Trail Systems	User Fees
Department of Fish and Wildlife Resources	94	638,529	85	Yes	For hunters and fishers
Department of Parks	52	49,191	7	Yes	No
Division of Forestry	8	39,401	5	Yes	No
State Nature Preserves	59	24,689	3	Yes, on 36 of the 59 sites	No
Total	213	751,810	100		

Source: Staff compilation.

With some exceptions for specific state nature preserves, all state-owned properties provide public access through systems of designated trails. For decades, outdoor enthusiasts have hiked trails on these lands managed as state WMAs, state parks, forests, and nature preserves. As greater numbers of people seek nature-based outdoor recreation, their types of trail access have

expanded beyond foot travel. In keeping with national trends, Kentuckians are seeking more varied outdoor experiences, including riding mountain bikes, horses, and all-terrain vehicles (ATVs).

Table 2 summarizes trail access by state agency and by type of trail access. Nonmotorized trail users have access to almost every type of state outdoor recreational land, though the access varies by location and by restrictions based on the purpose of the land management. For example, KDFWR, though providing access at some sites to equestrians, reports that its properties are prioritized by funding constraints to hunters, fishers, and boat owners.

Table 2
Kentucky State Agencies Trail Access

State Agency	ATV	Equestrian	Cycling	Hiking
Department of Fish and Wildlife Resources	No*	Yes**	Yes ***	Yes
Department of Parks	No	6 of 52	13 of 52	Yes
Division of Forestry	No	5 of 8	No	Yes
State Nature Preserves	No	No	No	Yes; 36 of 59
Total	0	3	2	4

Source: Staff compilation.
Notes: *ATV users who are mobility impaired are permitted at some wildlife management areas. **Horseback riding allowed on 500 miles of unpaved WMA trails; 12 WMAs have designated horseback trails. ***Cycling is allowed on maintained roads in wildlife management areas but not on trails.

State budget cuts have reduced each agency's capacity to manage existing state-owned properties, even for the existing user base. The demands for increased types of outdoor recreation experiences have stretched the resources of state-owned land management programs. New trail uses require greater attention to planning, maintenance, and enforcement.

Since 2002, Kentucky legislators have introduced bills proposing to establish new trail systems, to examine trail user needs, or to establish more varied access to state-owned recreational lands. Of almost 24 bills to increase access to state-owned land that have been introduced since 2002, the legislature has enacted 3:

- 2002 House Bill 556 created the Pine Mountain State Scenic Trail that, when completed, will extend almost 120 miles.
- 2006 Senate Bill 89 established the Kentucky Recreational Trails Authority (KRTA) to implement programs for trails and related recreational tourism, specifically including nonmotorized and motorized vehicle use. 2008 Senate Bill 196 expanded KRTA's scope and responsibilities and required a report on impacts of ATV trespassing.

- 2010 House Joint Resolution 192 encouraged the state's land-holding agencies to cooperate, through a memorandum of understanding, in protecting the Brush Mountain Trail in Harlan County.

Although these laws have launched programs for more and varied trail experiences on state-owned land, specific trail user groups continue to pursue greater access in more areas of the state.

Discussion

ATV Access. Legislation was introduced, though not enacted, in 2006, 2008, and 2010 to establish a new state agency that would create a fee-based trail system similar to that operating as West Virginia's Hatfield-McCoy program. The 2010 legislation, House Bill 173, would have created new multiple-use trails, including ATV, equine, cycling, and hiking, in eastern Kentucky counties. Legislation to establish a pilot project for evaluating impacts of ATV access to WMAs, House Bill 613, was introduced in 2008. Neither bill passed.

Bicycling. In 1992, legislators established, at KRS 174.125, the Kentucky Bicycle and Bikeway Commission, which released reports in 2007 and 2008 recommending greater state support for multiuse trail development. Though the report called for legislation to implement this recommendation, none has been introduced in subsequent sessions. The commission and cycling organizations report that they have focused on trail access to land owned by municipalities and local governments, rather than on access to state-owned lands.

Equine. At the urging of equine groups, House Bill 312 was introduced in the 2010 Regular Session to examine programs that increase equine access to WMAs and other state lands through a permit fee system. The registration and fee program would provide new revenue to state agencies for maintenance and enforcement of trail use and to diversify the current user base. In supporting the fee-based access system, equine groups emphasized their opposition to opening state-owned lands to ATVs. The bill did not pass.

Those opposed to expanding access to existing state-owned recreational land testified that there is a conflict between each agency's mission with that of the legislative proposals. Opponents argued that the enabling legislation that had originally established each agency mission would be overridden by the new legislation and would change the overall mission of the agency. Refocusing the programs would jeopardize existing land management agreements established in deeds and federal funding restrictions.

After the 2010 Regular Session, the Tourism, Arts and Heritage Cabinet released its *Kentucky State Parks Financial and Operations Strategic Plan*. A number of the plan's goals, strategies, and recommendations related to attracting and cultivating new user groups to state parks and to diversifying parks' program funding.

The plan included a goal of repositioning the state park system to meet new and existing user demands and interests, such as adventure tourism opportunities in mountain biking and horseback riding. The plan also made recommendations to increase revenues from existing users

through a combination of different fee and price adjustments, though specific fees for trail access were not discussed in the plan.

Other state land management agencies have implemented strategies to address the interest in more varied access to state-owned land. The Kentucky Department of Fish and Wildlife Resources now distributes maps showing WMAs with designated horse trails. KRTA, together with the Tourism, Arts and Heritage Cabinet, has published information about the state parks, forests, and WMAs that have trails designated for hiking, cycling, and horseback riding.

These state agency actions, together with more resources dedicated to the emerging KRTA, have established a track record of responding to increased access demand to state owned lands. However, several issues that have emerged during legislative discussions remain:

- The feasibility of fee systems to fund new and existing trail access
- The need for trespass statutory changes
- Methods to build, maintain, expand, and enforce trail use designations, with declining state resources
- Requests for comprehensive evaluations of all state recreational trails and their suitability for expanded use, including multipurpose trails
- Proposals for trail operation and maintenance agreements with citizens' user groups, such as volunteers that have completed the National Trails Training Partnership programs, in order to defray agency costs and provide additional trail building and maintenance assistance

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Bluegrass State Skills Corporation

Prepared by Louis DiBiase

Should the General Assembly amend employment requirements and increase grant limits for assistance through the Bluegrass State Skills Corporation?

Background

The Bluegrass State Skills Corporation (BSSC) is an independent corporation attached to the Cabinet for Economic Development. It oversees programs to help qualified Kentucky businesses provide customized and industry-specific workforce training for their employees.

BSSC's Skills Training Investment Credit Program provides reimbursement for eligible employee training costs in the form of a tax credit. For a business to receive the credit, the individuals to be trained must have been employed at the business for 12 months before the training and must be retained at the business for 90 days after the training. BSSC's Grant-in-Aid program reimburses businesses directly for similar employee training costs. Grants may cover up to $2,000 per employee, but there is a limit of $200,000 per grant project.

House Bill 280, introduced in the 2010 Regular Session, sought to change some of the qualifications for assistance under these programs. Under the tax credit program, the bill would have eliminated individual employment and retention requirements. Under the grant program, the bill would have increased the project limit from $200,000 to $500,000. The bill did not pass.

Discussion

Proponents of the proposed changes argue that current law does not adequately encourage businesses and job-training efforts. They claim the 90-day employment retention requirement is unfair because a business cannot control when its employees leave. The business may pay for training and then lose the tax credit. Moreover, BSSC cannot reallocate the credit, so it is lost as a job-training incentive altogether. Proponents also claim that the 12-month employment requirement may restrict businesses from expanding their operations sooner because they are not able to train new employees for the expanded operations. Finally, they claim the current grant project limit makes it more difficult for BSSC to fund large projects that could benefit major industries.

Opponents of the proposed changes are concerned with the effects on individual employees and the allocation of government resources. They claim that relaxing employment retention requirements would allow business to take state benefits in the name of their employees and then immediately lay off those same employees. They are also concerned that government would thereby be rewarding short-term business gain rather than investment in long-term employees and job retention. Regarding the grant project limits, there may be some concern of increased spending or of shifting resources toward larger projects at the expense of smaller businesses.

In response to some of these concerns, proponents note that businesses would still have an incentive not to lay off employees because they still have to fund a portion of the training themselves. Therefore, there is no net gain to the business from job-training incentives. Proponents also note that the changes involve no additional spending, merely greater flexibility to BSSC in allocating existing resources.

Micro Distilleries

Prepared by John Buckner

Should the General Assembly facilitate the development of micro distilleries?

Background

Bourbon whiskey has long been closely identified with Kentucky. As early as 1775, settlers in Kentucky distilled whiskey as a way to convert corn crops to a marketable commodity for sale or trade.

Kentucky historically has dominated bourbon production, and today more than 95 percent of the world's bourbon is produced in the Commonwealth. Kentucky and Tennessee combined account for more than 70 percent of the total United States distilled spirits exports. Bourbon production in Kentucky has increased 75 percent in the past decade, from 455,078 barrels to 794,091 barrels. There are currently more than 5 million barrels of bourbon and other whiskey aging in Kentucky warehouses, with a 2010 taxable assessed value in excess of $1.5 billion, which is an increase of $324 million from 2008. More than 3,200 jobs, with an annual payroll of $244 million, are directly attributable to bourbon production in Kentucky. Indirect employment in areas such as cooperage, warehousing, bottling, and trucking employ approximately 10,000 people with an annual payroll of $422 million. Bourbon production in the Commonwealth generates more than $125 million in state and local taxes (Kentucky Distillers' Association).

The recent increase in bourbon consumption is being driven by a demand for more expensive premium, small-batch, and single-barrel bourbons. A result of this increase is a growing interest in micro distilleries. There is no agreed-upon standard for what constitutes a micro distillery, but it is typically characterized by owner-operator proprietorship, small-volume production, and the use of locally grown grains or other ingredients. Kentucky statutes do not provide a definition of a "micro distillery." States that have sought to provide a statutory definition of a micro distillery as a way to differentiate it from large distillers place a ceiling on the amount of distilled spirits that may be produced annually: Washington state established a maximum of 20,000 gallons; Michigan 60,000 gallons; and South Carolina 125,000 cases. Data from the American Distilling Institute show that few micro distillers approach maximum production levels. Nationally, there are 725 licensed distilleries, which represent a 200 percent increase in the past decade (Wilson). In Kentucky, there are currently 19 distillers, 4 of which describe themselves as micro distilleries.

Three pieces of congressional legislation provide much of the structure for federal laws governing distilled spirits. In 1891, there were 172 distilleries in operation in Kentucky, and while that was more than any other state, the quality of the product varied greatly (Nally). This was both a problem for consumers that had no assurance that the product they were purchasing was what it claimed to be on the label, but it also served to undermine the identity of bourbon itself. Congress addressed the problem of varying quality by passing the Federal Bottled-in-Bond Act of 1897 that set forth minimum proof, distilling, and storage requirements that had to be met

for distilled alcohol production. The Act was enhanced some 40 years later with the passage of the Federal Alcohol Administration Act that required permits for persons or businesses engaged in producing or wholesaling alcohol, established minimum labeling standards, and regulated marketing practices. In 1964, Congress passed a joint resolution that named bourbon as America's only "native spirit." This resolution further strengthened the identity of the product by standing as an official branding of bourbon (United States).

Discussion

Kentucky does not provide targeted assistance for micro distillers, although they are eligible to apply for state economic development assistance, providing they meet the statutory requirements applicable to all manufacturing entities. Those who argue that Kentucky should do more to assist the development of micro distilleries note that it is important to understand that, when compared to other distilled spirits such as gin, rum, and vodka, bourbon production is a lengthy and expensive process to bring a product from distillation to a retailer. The first barrier is the required time that the distilled product must remain in a barrel. Federal law requires that bourbon be distilled at less than 160 proof and then aged for a minimum of 2 years in new oak barrels that have been charred. Proponents note that although a product can be sold after aging for 2 years, it is common to find median-priced bourbon aged from 5 to 7 years and premium bourbons aged for more than 12 years. Because of the length of time the product remains in the barrel, the more expensive it is. First, because the barrels are porous, loss through evaporation can exceed 33 percent in barrels aged 7 year (Boudreau). While the cost of storage increases over time, the amount of product for sale decreases

Second, the time between distillation and bottling for sale presents a significant hurdle for start-up micro distillers because of the length of time that capital is tied up. Obtaining private financing to produce a product that will not reach the market for upwards of a decade is a concern for those who wish to enter the business. To counter this difficulty, some argue that the state should consider financial assistance to qualified micro distillers in which repayment would not begin until the product reaches the market. Opponents to state-offered financial assistance argue that direct state loans come from a limited financial pool in which money would be better used to assist manufacturing or other traditional businesses. Moreover, opponents say that there are adverse health and social costs directly attributable to alcohol consumption and that the state should not provide assistance to any alcohol-related business.

Third, the annual costs of warehousing casks before the product is ready for market, insurance, and taxes increase expenses for distillers. Proponents of state assistance for micro distillers argue that the property tax placed on bourbon in storage, commonly known as the aging barrel tax, should be eliminated. The *Lexington Herald-Leader* reported that the president of Maker's Mark Distillery said Kentucky now has the nation's second-highest liquor taxes, with more than half the cost of a bottle of bourbon purchased consisting of federal, state, and local taxes. He said that no other state taxes spirits aging in warehouses. He also suggested that because of this tax, only 2 of the nation's 16 recent start-up distilleries are in Kentucky (Eblen). Opponents contend that the property tax of 5 cents per $100 of assessed value is a nominal tax placed on a discretionary product and that the existing tax revenue source should be maintained. They also argue that some start-up distilleries manufacture other spirits that are ready for bottling and sale immediately

after distillation, such as vodka, gin, and rum, as a way to generate income until the bourbon has aged sufficiently.

Another issue identified by proponents of state assistance is state license fees. Similar to the license for a small winery, a tiered license fee is suggested for micro distillers. Currently, KRS 243.030 requires an annual state license fee of $2,500 for distillers regardless of the number of gallons produced, and KRS 243.070 allows cities or consolidated local governments in wet counties to charge an annual license fee of up to $500. By contrast, the state fee for a winery license is $1,000 per year, and a small-winery license is $100. All states seeking to encourage micro distilleries impose a reduced license fee associated with the maximum number of gallons permitted to be produced. Proponents argue that the distiller's license fee should be reduced for micro distillers to reflect the smaller amount of distilled product produced. Those who are opposed to reducing license fees argue that the fee is already low compared to the distiller's license fees charged in some other states. They also argue that the money collected from the fee is needed to monitor the additional requirements placed on the manufacture of distilled spirits.

Finally, proponents argue that micro distilleries are best seen as another type of agricultural production and should not be subject to local zoning ordinances that may be placed on manufacturing. Some micro distillers are grain farmers for whom a small distillery would supplement their incomes and would be a way to use their corn crops. Proponents argue that they should not be subject to zoning restrictions that equate distilling with manufacturing. Opponents argue that zoning restrictions are a matter best resolved by city and county governments. They also argue that there is no necessary requirement for distilleries of any size to be considered manufacturing facilities; therefore, it is presumptive to assume that local governments would necessarily treat a micro distillery as a manufacturing entity.

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Professional Development Relating to Content Standards

Prepared by Ken Warlick

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

Background

Senate Bill 1, adopted in the 2009 Regular Session, made sweeping changes to the public education system. One aspect, content standards, will have implications beyond what is taught in the state's elementary and secondary classrooms. The state adopted new content standards for English/language arts and math in 2010.

Changing course content standards for schools also will affect course content in postsecondary educator preparation programs. Therefore, professional development of teachers, administrators, and university faculty will be critical in order for the new standards to be effectively implemented. All entities acknowledged 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.

SB 1 includes professional development requirements and programmatic changes relating to all content standards, including training school teachers and administrators as well as postsecondary content and teacher education faculty.

Other components of the bill also have professional development implications. Among those components are the school district requirements relating to curriculum, program review guidelines, classroom assessment strategies, effective writing programs, and planning classroom instruction.

Discussion

The Kentucky Department of Education (KDE) has indicated that professional development on the new content standards is being provided through KDE-led training of regional trainers identified by Kentucky's eight education cooperatives. Some researchers have argued that this type of "train-the-trainer" model may not be sufficient to sustain significant changes in practice because of inconsistencies in the content delivery from one trainer to another. KDE announced the option for voluntary participation of districts in "communities of practice"—a different model for scaling up research-based practices that promotes ongoing discussion between trainers and those who have been trained.

Some Kentucky educators may question whether there is sufficient capacity, support, and structure to adequately implement the changes called for by SB 1. Moreover, there does not appear to be a systematic, coordinated assessment of the quality of professional development and its impact on classroom practices, student achievement, and implementation.

The General Assembly might consider

- supporting measurement of the adequacy and effectiveness of the training that has occurred;
- providing resources to assist schools in developing and aligning grade-level curriculum, adopting research-based practices, participating in implementation discussions, and enhancing and sustaining changes in instructional practice; and
- assisting educator preparation programs to support changes in the content of the programs.

Student Financial Aid

Prepared by Ken Warlick

Should the General Assembly modify state student financial aid programs?

Background

Nationwide, the cost of postsecondary education has increased steadily, claiming higher percentages of family incomes. Family contributions, grants, and tax credits do not cover the median costs at a public 4-year college for median-income families in Southern Regional Education Board (SREB) states. In 2009, families in these states needed an additional $5,840 to meet expenses; in Kentucky, families needed an additional $6,300.

In 2008-2009, Kentucky awarded Kentucky Educational Excellence Scholarship (KEES) merit-based awards to 65,440 students. The base amount for KEES awards has not increased over time. College Access Program and Kentucky Tuition Grant needs-based awards were offered to 53,053 students, but 54,470 eligible students did not receive awards because funds were exhausted.

Discussions about student financial aid by members of the Governor's Task Force on Higher Education focused on the unmet need in the grant programs and whether there are options for making more funds available for students most in need of financial assistance. Recent state budgets have not appropriated the full amount of lottery proceeds designated for these programs in statute. Discussions regarding KEES awards included the program's current early intervention and access focus versus whether the program's merit requirements should be more stringent or if a need-based component should be added. In November 2009, the task force recommended adjusting the KEES award criteria to include new college-readiness standards that have been adopted by the Kentucky Board of Education; increasing the appropriation for need-based aid; structuring the state's financial aid programs so that they better address the needs of part-time, nontraditional students; and ensuring that, with the exception of literacy development, all net lottery revenues be directed to student financial aid programs.

Discussion

The College Access Program and the Kentucky Tuition Grant programs are administered on a first-come, first-served basis. The number of qualified applicants for these needs-based scholarships has historically exceeded the biennial financial allocations. The result has been that 50 percent of eligible applicants do not receive awards. Subsequently, these students may delay enrollment in postsecondary education, enroll in fewer courses, or find other funding sources such as student loans. Although the supplemental KEES awards that became effective in 2008 provide some additional opportunities to meet the needs of low-income students, some policy makers favor a reassessment of the funding priorities for merit-based versus need-based scholarships. Any alteration of these priorities will impact students and their families.

High school curriculum requirements for KEES will mirror the state's implementation of a more rigorous graduation curriculum. Adding the new college-readiness standards to the KEES award criteria involves formal assessment of student performance on these standards. Some policy makers may argue that the current practice of using grade point average and ACT to assess college readiness should only be changed after validity and reliability studies have been conducted on any new standards.

The Council on Postsecondary Education (CPE) reports that an increasing number of postsecondary students have work or family obligations that require them to enroll as part-time students. With the exception of the Go Higher Grants, most state aid programs require students to be enrolled either full time or at least half time. Reports from CPE suggest that many of these students are demonstrating persistence in pursuing their postsecondary educations but that they could more readily earn their degrees and credentials if they had better access to financial aid.

Personnel Evaluation for Teachers

Prepared by Janet Stevens

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

Background

The Kentucky Board of Education is required to establish statewide standards and written guidelines for local school districts' certified personnel evaluation systems. An existing statute identifies the required performance criteria for staff evaluation but directs each district to develop its own plan, which may include additional criteria. The Kentucky Department of Education must approve all local evaluation plans.

State law requires all administrators and all teachers with less than 4 years of service to be evaluated annually. Tenured teachers, or those teachers who have completed 4 years of satisfactory continuous service, are to be evaluated at least once every 3 years. The current teacher evaluation system assesses performance of professional responsibilities, identifies areas for professional growth, and provides a method to assist an ineffective teacher. Currently, evaluation results are not based on student performance or test scores and do not affect merit pay or performance pay.

Discussion

A local personnel evaluation system is intended to improve professional performance. Teachers should receive feedback to build on current strengths and to improve areas identified as weaknesses.

Introduced in the 2010 Regular Session, House Bill 539 would have required the state board to review and amend its administrative regulations relating to personnel evaluation. The bill also would have required the state board to design an evaluation system that promotes continuous professional growth and development of skills needed to be a highly effective classroom teacher or educational leader. The bill required the statewide system to be based on multiple sources of data including observations, peer surveys, parent surveys, student products, and evidence of student learning progress.

Although HB 539 did not pass, the Commissioner of Education and the Kentucky Board of Education acknowledged that expectations for professional growth and evaluation should be universal and explicit. The Commissioner established the Effective Teachers Steering Committee to lead in the development of a new statewide evaluation system based on

- evidence of student growth;
- evidence that the teacher has used information about student growth to inform, improve, and differentiate instruction;

- multiple observations of instructional practice by principals, peer reviewers, and other trained evaluators; and
- progress toward goals identified in a teacher's professional growth plan.

Selected school districts are piloting components of the new system during the 2010-2011 school year. Based on findings from the pilot districts, the Commissioner has indicated that a new statewide evaluation system will be implemented during the 2013-2014 school year. He also indicated that local school districts will be permitted to make modifications to the statewide evaluation system, provided that the same expectations are included and the modifications receive Kentucky Department of Education approval.

Proponents indicate that a statewide, annual evaluation system would allow all Kentucky teachers to be evaluated using the same set of criteria at the same rate of frequency. Some see it as a way to improve teachers' performance and a way to assist teachers with continuous growth. In addition, some see it as a way to hold teachers more accountable for their own improvement and more accountable for student learning.

Opponents indicate that local input will be greatly reduced if a statewide, annual evaluation system is required. Some feel conducting a formal evaluation annually for every teacher will be labor intensive and time consuming and may require hiring additional administrators or staff. Opponents also say that while student growth is affected by teacher quality, numerous variables that teachers cannot control contribute to student performance.

The General Assembly may consider amending the statutes dealing with certified personnel evaluation to require the use of a statewide teacher evaluation plan, to adjust teacher evaluation frequency, or to revise criteria to be included in teacher evaluations.

School Calendars

Prepared by Sandra Deaton

Should the General Assembly change the statutory instructional time requirements?

Background

Under House Bill 1, the 2010-2012 budget bill, local school districts are required to submit to the Kentucky Department of Education a school calendar that provides 177, 6-hour instructional days, which is the equivalent of 1,062 instructional hours for students in a school year. In addition, the district is required to include 4 staff development days without students present. The district must exclude Primary Election Day, General Election Day, and Martin Luther King Day, unless the day is counted as one of the four permitted holidays. The district is permitted to include 2 planning days without students present and a maximum of four holidays. Under Kentucky Board of Education administrative regulations, the calendar must identify make-up days equal to the greatest number of days missed in the district over the preceding 5 school years.

Discussion

During the last 2 school years, Kentucky was affected by severe storms, floods, and health epidemics that required many school districts to close schools. Even with flexible time built into the calendar, some districts had difficulty making up all the days and meeting all statutory requirements and administrative regulations. During the 2009-2010 school year, 11 districts had to make up 15 to 24 days above the number of make-up days included in the calendar, based on prior years' history of missed days. All of these districts were in eastern Kentucky. Local school administrators, teachers, and parents often ask legislators to fix the problem by forgiving the required instructional time or by making other adjustments to the statutes, such as allowing additional minutes to be added to lengthen a school day or by changing the requirement that schools be closed on election days. Legislation passed in 2002 and 2009 that offered relief to school districts. The Commissioner of Education has stated that he is opposed to allowing waivers because students need the required instructional time. He also believes there should be other options, such as virtual learning opportunities, for students when schools are closed.

The Subcommittee on Elementary and Secondary Education heard testimony from superintendents of three eastern Kentucky school districts representing the area of the state that is generally most affected by weather-related emergencies. They agreed that virtual learning resources would be helpful, though many remote areas do not have Internet access or computers available in the students' homes. They suggested that the local districts need more flexibility in developing their calendars and making up the days missed without excessive approval requirements by the Kentucky Department of Education. Flexibility could be provided by amending the statutes to specify the number of instructional hours required, rather than specifying a minimum number of days. Also, some believe that the law requiring schools to be

unilaterally closed on election days may be too arbitrary and that alternative language could allow the local school district to determine how to provide voting facilities.

School Choice

Prepared by Audrey Carr

Should the General Assembly increase school choice options?

Background

Options for school choice, including the ability of parents to enroll their children in charter schools, neighborhood schools, or schools in adjoining counties, continue to interest policy makers at the state and federal levels. U.S. Department of Education officials expressed support for charter schools through grant criteria under the Race to the Top competition. Charter schools are publicly funded schools that have been granted a charter exempting them from selected state or local rules and regulations. In addition, charter school staff generally share a common philosophy and curriculum focus that may be different from other public schools.

In recent sessions, various bills have been introduced regarding charter school proposals. In addition, a school choice bill was introduced to permit a student to attend a school in a neighboring county if that school is closest to the student's home. Prefiled legislation for the 2011 Regular Session would permit children to attend neighborhood schools under certain conditions.

Discussion

Public school educators in Kentucky have historically expressed opposition to charter schools. Opposition is tied to a concern that resources would be taken from traditional public schools, thereby decreasing the ability of those schools to serve the remaining students effectively. Another concern is that charter schools would be selective in admissions, including recruiting academically high-performing students from traditional public schools, thereby potentially lowering the overall student academic achievement levels in the traditional schools.

A school leader of an academically high-performing public charter school for disadvantaged students in Oklahoma City testified to the Interim Joint Committee on Education that charter schools have proven effective in serving low-income, minority students and do not limit access. However, he also pointed out that the instructional processes, school culture, and expectations for students were keys to success and that the same methods would work in traditional public schools if freed from some of the rules and regulations relating to staffing, curriculum, and management and operational procedures (McDaniel).

Student assignment options in Jefferson County have recently been tested in court, based on a suit brought by parents who contended that the district's student assignment plan was unfair and prevented students from attending a school closest to their homes. The recent court ruling upheld the district's assignment plan. Jefferson County Public Schools opposes legislation that would require that students be able to attend the school closest to their homes, contending that allowing students to attend neighborhood schools would require redrawing attendance areas, would be

difficult to implement, would have a negative impact on magnet schools, and would result in a return to segregation within the district.

Some believe that students should also have an option to attend schools that are closest to them, even if the schools are located across county lines.

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Independent Voters in Kentucky Primaries

Prepared by Bill VanArsdall

Should the General Assembly allow independent voters to participate in the primaries of political parties?

Background

According to the Kentucky State Board of Elections, in September 2010, 1,627,673 Kentucky voters were registered as Democrats; 1,064,962 were registered as Republicans; and 192,798 (about 7 percent) were registered as "other" (Commonwealth). Most of Kentucky's primaries are closed to voters who are not registered members of a political party.

Kentucky is classified as a state with a "closed primary"—one of 11 such states, according to the National Conference of State Legislatures, which groups states' primary systems into the following categories:

- **Closed primary**. As in Kentucky, voters must be registered members of the party holding the primary.
- **Partially closed primary**. Voters must be registered members of the party holding the primary, but parties may choose whether to allow unaffiliated voters to participate.
- **Open primary**. Voters may choose to vote in any party's primary, and the choice does not constitute registration with the party.
- **Partially open primary**. Voters may choose which party's primary to vote in but must go on the record as having chosen a particular party and perhaps have their party choice regarded as a form of party registration.
- **Alternative system**. A few states have adopted systems that do not fit any of these categories.

The practical effect of Kentucky's closed primary system is to allow only members of the Republican and Democratic parties to vote in most primary races. KRS 116.055 requires a voter in a primary to be a registered member of the party in whose primary he or she seeks to vote. To be considered a party, an organization must have nominated a candidate who has received at least 20 percent of the total vote cast at the last preceding presidential election (KRS 118.015(1)). In recent years, only the Democratic and Republican parties have met that threshold, so only their voters have met the statutory standard.

Voters are thus excluded from most primary contests if they are registered as members of political organizations (groups that do not constitute political parties but whose candidates received 2 percent or more of the vote in the most recent presidential election), members of political groups (groups that do not qualify as political parties or organizations), and persons registered as independent voters (KRS 118.015). Persons who are not Republicans or Democrats are not entirely barred from the primaries. Any voter, regardless of how he or she may be registered, may cast votes in nonpartisan primaries—in judicial races and in races for office in

cities that have chosen to hold nonpartisan elections and that have not waived the primary entirely (KRS 116.055).

Some elections in Kentucky, including school board elections, some city races, and elections to choose the commissioners of soil and water districts, have no primary; therefore, party affiliation does not affect the November ballot.

But for many elections in Kentucky, a voter's choice of how to register—as an independent, as a member of a party, or as a member of a political group—does have an effect on whether he or she is allowed to participate in the primary. Some voters have objected to this limitation, and in recent years, the topic has received considerable discussion. Since 1976, 10 bills have been introduced in the General Assembly to make Kentucky's primaries more accessible to independent voters. In the 2010 Regular Session, two bills—Senate Bill 53 and House Bill 382—were introduced proposing to open primaries to independents. Neither measure passed.

Discussion

Proponents of opening Kentucky's primaries to independent voters assert that voters who are not affiliated with a party are excluded from the electoral process and are given a limited voice in choosing their governmental representatives. Independent voters are taxpayers, and their tax money is used to finance primaries, even though they are not allowed to participate. Proponents argue that a primary system that shuts some voters out is tantamount to taxation without representation.

In addition, these proponents argue, there are some districts in which independent voters are effectively given no choice at all. Some districts are dominated by one party, and the winner of a primary is almost certain to be the winner in the general election. In such a case, the primary effectively becomes the election, and the winner of the contest is determined before independent voters have a chance to participate.

Proponents also argue that opening Kentucky's primaries to independent voters would decrease voter apathy. When people feel they have a greater voice in the selection of candidates, voters' interest and participation in elections might increase.

Moderation in political debate will also increase when primaries are opened up, according to another argument. Open primaries might cut down on political extremism and encourage an end to gridlock. When primaries are closed, candidates can be tempted to aim their campaigns toward their more extreme supporters, trying to attract the party faithful and ignoring moderate voters. As a result, the candidates who appear on the ballots in general elections represent the far ends of the political spectrum. A more open primary, supporters say, would promote the election of centrist candidates.

Opponents of open primaries claim that opening the primaries might invite mischief from voters who want to skew the election results or to damage the chances of a particular party. Rather than voting for the candidates they support, voters might choose to cast their ballots for candidates who might hurt a particular party's chances in the regular election. Voters could move from one

party's primary in one year to another party's primary in a later year, depending on where they think they can do the most damage.

Opponents also warn that open primaries can dilute a party's message. If independent voters are allowed to vote in a particular party's primary, that party's candidate might not be someone who authentically represents the party's views. Candidates who must get votes from independent voters as well as from party members will be forced to change their messages to appeal to a wider group of voters. The party's identity might be lost.

Closed primaries, some say, represent the only fair way for a political party to have an unrestricted choice to decide who will represent it in the regular election. Except in some cases involving vacancies and unopposed candidates, the statutes provide only one way for members of a party to choose their candidates: primaries (KRS 118.015). If a party's members cannot choose the people who will represent them in an election, the party is being deprived of its freedom of association.

That principle—freedom of association under the First Amendment to the United States Constitution—has been the subject of several federal court cases involving state primaries. In 2000, the United States Supreme Court struck down a "blanket primary" system in California.[1] The court held that a political party should not be required to permit unlimited participation by nonparty voters in its primaries (*Cal. Democratic Party v. Jones)*. But in a 2008 case considering the primary system in Washington state, the U.S. Supreme Court upheld a plan in which the top two vote-getters in the primary advance to the general election, regardless of their party affiliation. The court ruled that this system did not unfairly burden a party's right to association (*Wash. State)*.

In Kentucky, what are the consequences if a bill is enacted to make primary voting accessible to persons who are not registered as members of a political party? If the bill enacted is similar to 2010 Senate Bill 53 and the other recent bills on the subject, voters who choose to register as "other" or as "independent status" will be allowed to vote in party primaries. But those who are registered as members of political groups that do not qualify as political parties might still be prevented from participating in party primaries because the amendment proposed to KRS 116.055 opens each primary to "a registered independent," and this phrase might not be interpreted to include those voters who have registered as members of political groups that do not qualify as parties.

The Kentucky County Clerks Association said that if the state created an open primary system, elections might become more expensive and poll workers might be harder to recruit. According to the association, county clerks and local boards of elections, which operate the polls and maintain the elections, could be faced with extra expenses. Not knowing which party's primary independent voters might choose, clerks would be forced to order enough extra paper ballots to cover both parties' primaries. Other expenses might also increase, including those for maintaining voter rosters, programming voting machines, and training. Election officers could find themselves with additional functions, and the new duties might complicate their jobs and

[1] In a blanket primary, any person who is entitled to vote may vote for any candidate of any party, and the candidate of each party who wins the greatest number of votes becomes the party's nominee.

make their training more difficult. This could discourage people from volunteering to work at the polls (Lewis).

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Voter Identification Cards

Prepared by Greg Woosley

Should the General Assembly change the methods by which a voter's identification is confirmed by an election officer?

Background

KRS 117.227 requires election officers to confirm the identity of each voter by personal acquaintance or by a document, such as a motor vehicle operator's license, Social Security card, or credit card. If a voter's identification cannot be confirmed, the voter may cast a provisional ballot under 31 KAR 6:020, but only in an election for a federal office.

According to the National Conference of State Legislatures, 12 states have passed voter identification laws since 2003. Several of the recently passed laws, including those in Georgia and Indiana, require a voter to present a valid photo identification card prior to voting. The strict photo identification requirement in Indiana was challenged as unconstitutional on its face, but the United States Supreme Court rejected that challenge in *Crawford v. Marion County Election Board* (2008).

In the states that have considered the issue, the debate has largely focused on a balance between stricter controls to ensure the integrity of elections versus more relaxed standards to reduce barriers to voting.

Discussion

Proponents of a strict voter identification verification system argue that a voter should be required to present a government-issued photo identification card prior to voting to reduce the possibility of in-person election fraud (*Crawford* 194-196). They further argue that requiring a photo identification card is not an onerous requirement. Proponents contend that concerns about limited access to a card due to income or handicap are exaggerated, and that even if legitimate, these concerns can be alleviated by free or reduced-cost identification cards.

Opponents of a strict voter identification verification system argue that there is little evidence to suggest that voter identity election fraud is occurring (Levitt 6-8). They further argue that strict photo identification card requirements disproportionately affect, and therefore suppress, the votes of lower-income, handicapped, and homeless voters who are less likely to have a driver's license or other photo identification card because of the cost of the cards, limited access to government facilities, or their lack of a residence (*Crawford* 198-199).

Additionally, in Kentucky, approximately half of all verifications in the May 2010 primary were by personal acquaintance (Grayson). Therefore, opponents could argue that eliminating this method of verification will create an obstacle to voting that could ultimately reduce voter turnout.

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Carbon Storage Legal Issues

Prepared by D. Todd Littlefield

Should the General Assembly resolve legal impediments to storing carbon dioxide so that Kentucky is better positioned to move forward if federal carbon constraints are imposed?

Background

Unresolved legal issues relating to carbon dioxide storage include liability, designation of a regulatory agency, and the determination of ownership of geologic pore space where carbon would be stored.

The emission of carbon dioxide into the atmosphere has become one of the leading environmental issues of today. Evidence of global climate change has sparked a debate over its causes. Although not everyone agrees, scientific groups, including the American Meteorological Society, the U.S. National Academy of Sciences, and the United Nations Intergovernmental Panel on Climate Change, have reported broad consensus that atmospheric and oceanic temperatures are rising and that human activity, including carbon dioxide emissions, contribute to that rise. Some scientists and others maintain that human activity is not the cause of climate change.

International consensus that carbon dioxide emissions should be controlled resulted in the Kyoto Protocol. Kyoto came into effect in 2005 and binds most developed countries to reduce carbon emissions. The United States did not ratify the Kyoto Protocol. Utility, industrial, and environmental groups expect that growing political pressure from domestic and international sources will eventually result in American action to control carbon emissions. Because President Obama campaigned on a promise to reduce U.S. carbon emissions by 80 percent below 1990 levels, many expected that action would come early in his administration. The U.S. House of Representatives passed a bill that includes a cap and trade system for carbon that is similar to the ones that have reduced nitrogen oxide and sulfur dioxide emissions. The bill faces an uncertain future in the U.S. Senate. With or without cap and trade, passage of a comprehensive energy bill in the coming year is unlikely.

The possibility of government action on carbon exists even if Congress does not act. In December 2009, the U.S. Environmental Protection Agency (EPA) issued two final findings regarding greenhouse gases in response to a 2007 U.S. Supreme Court decision. In that decision, *Massachusetts v. Environmental Protection Agency*, the court ruled that the EPA violated the Clean Air Act by failing to regulate greenhouse gas emissions. The agency's subsequent endangerment finding states that the current and projected concentrations of six greenhouse gases in the atmosphere, including carbon dioxide, threaten the health and welfare of present and future generations. While the establishment of formal rules to implement the finding could take many months, congressional inaction on the issue could cause the agency to increase the pace of its regulatory process.

If carbon emissions are constrained by law, regulation, or judicial action, states such as Kentucky that rely heavily on fossil fuels to generate electricity will face difficult decisions. The mining, processing, transporting, and sale of coal provide Kentucky jobs and are a significant economic engine. A large-scale switch to other fuels that emit less carbon dioxide (natural gas, nuclear, renewables) would be expensive, difficult, and time consuming. Because no one has argued that a viable alternative exists for replacing all coal in electric generation, coal is seen to play a significant role in energy generation into the future. Coal advocates say that the best method to address the carbon problem is to find better ways to burn coal (known as "clean coal"). These new technologies would then be coupled with technology to capture the carbon dioxide before it is emitted into the atmosphere and then store it deep underground in geologic strata where it can never escape.

The General Assembly has enacted legislation that seeks to ensure that Kentucky will be among the nation's leaders in addressing carbon management. Through House Bill 1, enacted in the 2007 Extraordinary Session, $5 million was appropriated to drill test wells in both eastern and western Kentucky to gather data and to demonstrate whether these areas are suitable for the safe and effective storage of carbon dioxide. Recognizing "the importance of proactively addressing the issue of carbon management in existing coal-fired power plants," the bill directed state agencies to perform a carbon management study addressing, among other things, "the current status of…technology in the capture and sequestration of carbon dioxide" and "assessment of long-term risks and uncertainties associated with carbon-management options."

Discussion

While there is increasing optimism about the technical ability to store carbon underground, legal and economic issues remain. "Regulatory certainty" is often mentioned as a prerequisite to attracting investment, whether the object is a pilot/demonstration carbon storage project or the development of an industrial-scale facility. Advocates believe that Kentucky cannot attract or win demonstration projects in the carbon storage area unless fundamental legal questions have been resolved.

An ad hoc group of lawyers, industry representatives, and scientists formed in late 2008 to look at the legal issues of geologic storage of carbon dioxide in Kentucky. That group presented a report in January 2010 that focused on three of these issues:

- Who owns the geologic "pore space" where carbon would be stored?
- Where should the liability lie for stored carbon dioxide?
- What agency or entity should regulate the storage of carbon dioxide?

Ownership of the geologic strata suitable for carbon storage (the pore space) could be resolved in one of two ways. Declaring that the strata belong to the surface owner or to the mineral rights owner is the more likely option. The drawback to this approach is the necessity of negotiating with hundreds or thousands of landowners for the right to store carbon deep beneath their homes or farms. Such rights will be difficult to value because, even though there is likely to be little or nothing of value that could be commercially recovered at such depth, the substance to be stored there is toxic. Some surface owners may refuse to sell at any price. Forced pooling or unitization, similar to the methods employed in current natural gas developments, could be included in

legislation to allow private entities operating a storage site to bring in reluctant or missing landowners. Concerns about recoverable minerals or usable water supplies at intermediate depths compound the difficulties. If public utilities should be the entities that own and operate carbon storage facilities, they will have the power of eminent domain to bring reluctant surface owners on board. For the large reservoirs that will be necessary, perhaps hundreds of lawsuits might be necessary. Widespread use of eminent domain could be unpalatable for some utilities. Legislative action would be required to give powers of eminent domain to operators that are not public utilities. During the 2010 Regular Session, House Bill 491 proposed eminent domain action by a state agency to acquire subsurface rights for carbon storage. It ran into opposition from landowner interests.

The second path to acquiring sufficient pore space for carbon storage would be to declare all geologic strata below a certain depth or meeting certain criteria to be the property of the state. This would certainly be characterized as a “taking” by plaintiffs. An advantage might be that one large lawsuit is substituted for the many involved in the first scenario. Whether rights are voluntarily sold or taken by judicial action, acquiring rights underlying large tracts of land will be expensive.

Adding to the expense of carbon storage plans will be the need to indemnify surface owners or nearby residents for migration of the stored carbon dioxide beyond set limits or for leakage back into the atmosphere. It will also be necessary to maintain and monitor storage reservoirs for many years. Long-term liability exposure is difficult to calculate or insure against where an endeavor has no history or track record. The options are for the producers of the carbon dioxide to remain liable for its storage, for the state or federal government to accept liability, or a combination of the two.

Advocates that wish to see a rapid transition to a robust carbon storage industry voice concerns that saddling producers with endless liability will damage or eliminate carbon storage as an option. Those concerned with environmental protection worry that corporations may declare bankruptcy or otherwise disappear from the scene, leaving no responsible party.

There has been mention of the federal government taking responsibility for stored carbon, and at least one state—Pennsylvania—has moved to assume ownership of carbon stored there. Governmental liability offers some certainty that the responsible party will be around if trouble strikes. There is concern that the taxpayer would be responsible for costs resulting from the actions or inactions of others. A carefully crafted and well-executed legal framework would help to ensure that fees paid into a fund by carbon producers would remain available to pay for cleanup and damages in the future.

HB 491 proposed that producers or other storage reservoir operators would be responsible for an initial period of at least 10 years following the closure of the facility. After the initial period, if the closed reservoir is determined to be stable, ownership and liability would pass to a governmental entity, either state or federal. Fees collected at the time of storage would be placed in a fund and managed to ensure their availability for future cleanup or damages. Shielding such a fund from attempts to appropriate its funds for other purposes would be a challenge.

The EPA has authority over geologic storage of carbon dioxide under the Safe Drinking Water Act, Underground Injection Control program. Although Kentucky has not yet done so, states may qualify for primacy with the EPA and thereby act as coregulators to protect underground sources of drinking water. Primacy for Class II (oil and gas related wells) and Class VI (carbon geologic storage wells) would be required if Kentucky seeks to regulate injection of carbon for underground storage. Significant autonomy for state regulators would result from obtaining primacy but would require significant investment. If Kentucky should decide to seek primacy for Class II and Class VI wells, the funding and staffing that currently exist within the Division of Oil and Gas should be addressed.

The Kentucky work group exploring legal issues of carbon storage recommended in its January 2010 report that Kentucky establish the regulatory structure necessary to properly permit and oversee carbon storage. Such a structure could be set up in conjunction with EPA Region IV or independently if the state obtains primacy. The report recommended that the Division of Oil and Gas, as the agency with the most knowledge and experience with the types of structures and risks inherent in drilling activity, should be given authority and oversight of carbon storage activities.

The costs related to any mandated limit on carbon emissions will be passed on to ratepayers, thereby increasing the price of electricity in Kentucky. The goal is to find the most effective strategy to limit the impact on ratepayers, on large industrial users, and on economic development. Some climate change skeptics contend that money spent on controlling carbon emissions is money wasted. Others argue that the debate over climate change is now irrelevant and that carbon constraints are on the way. If so, they argue, Kentucky would be wise to take action now to capture research and demonstration projects, funds, and jobs in the near term and to prepare to mitigate the impact that carbon constraints would have on Kentucky power generation in the long term.

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Renewable Energy Portfolio Standards

Prepared by Taylor Moore

Should the General Assembly establish renewable portfolio standards for electricity produced or sold in Kentucky?

Discussion

State-level renewable portfolio standards (RPSs) have proliferated since the late 1990s and are now becoming a key driver for the addition of renewable electric generating capacity in the United States. Renewable forms of energy include wind, hydro, solar, geothermal, and biomass.

An RPS is a mechanism to increase renewable energy generation using a cost-effective, market-based approach. A state RPS requires electric utilities and other retail electric providers to supply a specified amount of customer load with electricity from renewable sources. The goal of an RPS is to create market demand for technology development so that, ultimately, renewable and clean energy supplies will be economically competitive with conventional forms of electric power.

To date, 29 states and the District of Columbia have enacted mandatory RPS policies. States have also enacted numerous incentives for renewable energy, including tax credits, to drive technology development and electricity market transformation. Many states see renewable energy as a critical resource to meeting their growing demands for energy while promoting job creation and addressing the risks of climate change. The landscape is changing rapidly as many states and the federal government are ramping up efforts to increase production of electricity from renewable sources. Many state RPSs also permit the trading of renewable energy certificates with qualified buyers.

Advocates of renewable resources for electricity generation note that their use can help limit the rate increases that will follow if limits on carbon emissions are instituted. There remains the possibility of either a congressional mandate or a new U.S. Environmental Protection Agency rule limiting emissions of carbon dioxide.

Opponents of establishing an RPS note that, in areas with abundant reserves of fossil fuels, the costs of integrating renewable energy resources within the existing electricity supply system would likely substantially increase the current costs of electricity in areas that are highly dependent on fossil fuels. About 95 percent of Kentucky's electricity is produced by burning coal.

Advocates for increasing the use of renewable energy resources maintain that such energy forms provide a relatively low-cost approach to diversification of fuels for generating electricity. Opponents of renewable energy insist that renewable sources of electricity cannot be a complete substitute for coal in Kentucky and will inevitably cost more than power generated by fossil fuels.

Use of Naloxone for Opiod Overdoses

Prepared by Jonathan Scott

Should the General Assembly expand the legal use of naloxone for opioid overdose?

Background

The death rate from drug overdose increased more than fivefold between 1990 and 2007 in the United States, from about 2 per 100,000 to nearly 10 per 100,000 population. This increase is largely due to the tenfold increase over the last 20 years in the use and abuse of prescription opioids such as hydrocodone, oxycodone, and methadone as well as illegal opioids such as heroin. Kentucky, particularly affected by this increase, had the sixth highest rate of deaths from drug overdose in 2007—15.1 deaths per 100,000 population. The highest rate of 21.1 deaths per 100,000 population was in West Virginia, and the lowest rate of 3.1 deaths per 100,000 population was in South Dakota (U.S.).

Opioid overdoses occur for several reasons, including when legitimate users accidentally take too much of their prescription medication or when illegal opioid users take a tainted street drug or an incorrectly labeled dosage. One way to combat the rising numbers of opioid overdose deaths, is to expand availability of naloxone hydrochloride. Naloxone is a prescription medication that acts to quickly reverse opioid overdose. Naloxone, approved by the Federal Drug Administration in 1971, is not addictive and rarely produces side effects. Naloxone costs approximately 27 cents per dose (American). Opioid overdose kits that include a dose of naloxone cost about $9.50 (Knox).

Because death from an opioid overdose usually occurs over 1 to 3 hours, timely administration of naloxone is important in saving the life of a victim. Qualified medical professionals typically inject naloxone immediately upon arriving at the scene of an overdose or suspected overdose.

In Kentucky, only certain medical professionals and first responders, such as paramedics and some emergency medical technicians (EMTs), with advanced training are authorized to administer naloxone (KRS 311A.170). Furthermore, ambulance services operating outside heavily populated areas are less likely to be able to pay the higher salaries expected by first responders that have the advanced training to administer naloxone (Wermeling). Consequently, naloxone sometimes is not administered until the overdose victim arrives at a hospital or reaches a medical professional qualified to administer naloxone.

Discussion

There are potential options for improving the likelihood that an opioid overdose victim will receive naloxone in a timely manner. One possible option is to use a nasal method of delivery. Intranasal naloxone could be provided to emergency service providers not otherwise qualified to administer injections or could be given as a prescription to care givers of individuals at risk of an

opioid overdose. In Kentucky, however, only qualified medical professionals are legally authorized to administer intranasal, intramuscular, or intravenous naloxone.

Beyond expanding the use of intranasal naloxone, several states have authorized the administration of naloxone to individuals overdosing on opioids by lay savers, including police, firefighters, family members, known abusers, and recovering addicts (American; Kelly; Kukami; Wermeling). Lay savers are trained to identify who is at risk of opioid overdose, to identify the symptoms of opioid overdose, and to respond appropriately to an overdosing individual.

In 2001, New Mexico was the first state to enact legislation related to permitting lay savers to administer naloxone. Individuals who administer naloxone must file a report that includes the name, address, and telephone number of the individual saved. This information is transmitted to the New Mexico Department of Health (NMAC 7.32.7.10(c)(5)). New Mexico's reported rate of overdoses has dropped overall by 20 percent since passage of its law (Drug).

New York City in 2005 passed a law similar to that of New Mexico (10 NYCRR 80.138). In New York, physician assistants and advanced practice nurses were added as qualified medical professionals to prescribe naloxone. After passage of this law, New York City reported a 27 percent drop in drug-related fatalities from 2006 to 2008.

A community program in Cook County, Illinois, has been successful but is not authorized by law, which places a legal liability on individuals working in the program to provide overdose treatment.

House Bill 263, introduced during the 2010 Regular Session, would have established an Opioid Drug Overdose Prevention Program in the Department for Public Health. The bill would have allowed all emergency medical technicians working under a standing order or medical protocol to administer naloxone to someone they have been called to attend who is exhibiting symptoms consistent with opioid overdose. Ambulance providers would have been permitted to equip ambulances with naloxone and establish necessary medical protocols relating to naloxone administration. The bill did not pass.

Proponents contend that naloxone has been used successfully by medical professionals as well as by many lay savers to treat opioid overdoses. They also note that it is accepted as a safe, cost-effective treatment with few side effects.

Opponents have expressed concern that the formal use of any naloxone treatment may encourage opioid abusers to continue abusing the drugs because there would be fewer risks to fear. Another concern is that the administration of naloxone to an overdosing individual by someone who is not a qualified medical provider is practicing medicine without a license. Opponents also argue that lay savers do not have enough training and medical knowledge to fully administer treatment if complications occur.

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Staffing Ratios for Long-term Care Facilities

Prepared by Ben M. Payne

Should the General Assembly require minimum staffing ratios for long-term care facilities?

Background

Currently, there are more than 280 licensed nursing homes in Kentucky serving nearly 23,000 individuals. These long-term care facilities operate under the regulatory authority of 902 KAR Chapter 20. Kentucky does not have direct care staff-to-resident minimum ratios but does follow the federal minimum number of licensed staff required for a facility to be licensed. Direct care staff include nursing aides, registered nurses (RNs), and licensed practical nurses (LPNs). The federal minimum facility staffing requirement is an RN director of nursing (DON); an RN on duty at least 8 hours a day, 7 days a week; a licensed nurse—RN or LPN—on duty the rest of the time; and a minimum of 75 hours of training for nurse's aides. The federal requirement allows the DON also to serve in the capacity as the RN on duty in facilities with fewer than 60 residents (Harrington).

Over the past 8 years, there have been 10 bills introduced in the General Assembly directly related to staffing requirements in long-term care facilities. The various pieces of legislation focused on establishing direct care staff-to-resident ratios and establishing ratio standards. None of the legislative proposals was enacted.

Discussion

Several states have established direct care staff-to-resident minimum ratios. At least 33 states and the District of Columbia require and have implemented direct care staff-to-resident ratios. Four of Kentucky's border states—Illinois, Ohio, Tennessee, and West Virginia—have implemented direct care staff-to-resident minimum ratios, while two—Indiana and Missouri—have not. Illinois does not allow the DON to serve in the capacity as the RN on duty, and Ohio establishes ratios for nurse assistants (Harrington).

There is some evidence from nursing home staffing studies that raising the state minimum staffing ratio has a direct positive impact on quality of care for residents (Harrington). However, study evidence also suggests that minimum staffing requirements may not be a cost-effective way to increase quality of care because they are only one of many factors that affect quality of care. The degree of care needed by facility residents and average state Medicaid rates are also shown to relate to staffing levels (Mueller et al.).

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Expanding Health Care Professions

Prepared by Miriam Fordham

Should the General Assembly expand health care professions in anticipation of delivering services to the newly insured?

Background

Like many states of similar demographics, Kentucky historically has had problems with a lack of available services by health care providers in particular regions of the state. Currently, only about 84 percent of Kentucky's citizens have health insurance coverage (U.S. Census). However, both sides of the ongoing debate over national health insurance reform cite an expansion of health insurance coverage as a goal. It is likely that the percentage of Kentuckians covered by health insurance will rise in the near future, which will result in greater demand for health services providers.

The federal government has designated 39 Kentucky counties as health professional shortage areas, which means they may have shortages of primary care, dental, or mental health providers (U.S. Dept. of Health). A report by the University of Kentucky's Center for Rural Health noted that fewer medical students are choosing family medicine, instead choosing specialties that will pay more but that will leave more areas underserved by basic health care.

Discussion

Across the country, programs to increase the number of health care providers have included expanding student loan programs, increasing medical residency positions, providing tax incentives to professionals practicing in underserved areas, and providing grants to states for workforce planning. Recruitment, training, and retention are key elements to building and maintaining an adequate health care workforce.

Many states, including Kentucky, have put in place programs to prepare students for training in health careers. The Kentucky Professional Education and Placement Program and the Health Careers Opportunity Program encourage and prepare students from underserved areas to pursue health professions.

In addition to existing training programs, the Kentucky Institute of Medicine recommended increasing the applicant pool, class sizes, and residency programs in the state's medical schools; developing regional clinical medical school campuses; increasing the number of students trained at clinical sites in underserved areas; and selecting more students from underserved areas of the state. Recruiting initiatives such as scholarship or loan repayment programs for physicians who practice in health profession shortage areas are used in many states, including Kentucky.

After health professionals are in place, the challenge is then to retain them, particularly in underserved areas. Strategies such as higher Medicaid and private insurance reimbursement for

practitioners in shortage areas have been recommended (Kentucky). Some states have established locum tenens programs that provide temporary backup to allow practitioners in underserved areas time away from their practices to take vacations and to attend professional conferences that can help alleviate the professional isolation that some practitioners may experience (Robert Wood).

Some have suggested expanding the scope of practice of mid-level professionals, such as physician assistants, nurse practitioners, and nurse midwives, to meet the needs of the newly insured. However, expanding the scope of practice for mid-level practitioners has raised concerns among many physicians about sharing responsibilities with mid-level practitioners (Robert Wood).

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Ephedrine, Pseudoephedrine, and Phenylpropanolamine

Prepared by Norman W. Lawson, Jr.

Should the General Assembly require a prescription to purchase ephedrine, pseudoephedrine, and phenylpropanolamine?

Background

Ephedrine, pseudoephedrine, and phenylpropanolamine are common cold remedies to relieve nasal and sinus congestion and are available over the counter without a prescription. They are also used as ingredients in the illegal manufacture of methamphetamine.

Methamphetamine addiction is a problem throughout the United States and Kentucky. It is produced in illegal "meth labs," and in 2009, 716 meth labs were raided in Kentucky by police (Kentucky). Many chemicals used to make methamphetamine are hazardous. They are a fire and explosion hazard. They also pose a health risk for persons in the immediate area where it is being made, including burns and poisoning if inhaled or swallowed. Police and other personnel responding to a meth lab need to wear protective clothing and be decontaminated after handling the chemicals. The chemicals used must be taken to a hazardous materials facility. The Kentucky State Police reported that the cost of discovering labs, paying certified lab responder salaries, removing and transporting waste from the scene, and paying hazardous waste disposal fees totaled nearly $1.4 million in 2009. The area where meth was made must be inspected, certified as decontaminated by a licensed contractor, and inspected by the local health department at a cost that may be thousands of dollars, which the property owner must pay.

In 2002, in an effort to reduce the availability of pseudoephedrine, the General Assembly enacted KRS 218A.1437 relating to unlawful possession of a methamphetamine ingredient. This statute specified that possession of more than 24 grams of ephedrine, pseudoephedrine, or phenylpropanolamine constituted sufficient evidence of intent to use the substance to manufacture methamphetamine.

As methamphetamine production methods became more efficient and lesser quantities of precursors were required, the 2005 General Assembly enacted Senate Bill 63 that amended KRS 218A.1446 to reduce the quantity of ephedrine, pseudoephedrine, or phenylpropanolamine that could be purchased from 24 grams (10, 2.4 gram packages) to 9 grams (3 packages). The bill also amended KRS 218A.1437 to add a provision that a person could not possess more than 9 grams in a 30-day period. Only pharmacists, pharmacy technicians, and pharmacy interns can sell these medications, and the purchaser must show valid photo identification.

KRS 218A.1446 also authorizes electronic recordkeeping by the Office of Drug Control Policy of purchases of ephedrine, pseudoephedrine, and phenylpropanolamine. The electronic files are accessible by law enforcement officers without a warrant and are designed to block purchases in excess of statutory limits by any one purchaser.

Illegal producers of methamphetamine have attempted to evade the recordkeeping requirements of the law by having surrogates make purchases of pseudoephedrine and related products. This practice is known as "smurfing."

These statutes initially decreased the number of meth labs in Kentucky. The U.S. Drug Enforcement Administration reported that Kentucky had 576 meth lab seizures in 2004, 573 in 2005, 343 in 2006, and 261 in 2007. Despite the recent drop in illegal methamphetamine production, the Kentucky State Police reported 716 clandestine labs in 2009; a record for the state.

In an effort to reduce the availability of pseudoephedrine, Oregon initiated a series of steps to limit access. In 2004, the state began requiring pseudoephedrine products to be kept behind the counter and requiring a photo identification for each purchase. In 2005, the state began requiring purchase information to be logged into a database. In 2006, the state began requiring a prescription for purchase of ephedrine, pseudoephedrine, or phenylpropanolamine. The Oregon Narcotics Enforcement Association reported in 2010 that the number of meth lab incidents decreased from 448 in 2004 to 13 in 2009, a 97 percent decline (Bovett). Mississippi enacted similar legislation that became effective July 1, 2010.

Discussion

During the 2010 Regular Session, House Bill 497 was introduced to follow the Oregon example by requiring a prescription to purchase ephedrine, pseudoephedrine or phenylpropanolamine. The bill did not pass.

Proponents of requiring a prescription to purchase pseudoephedrine argue that current laws are ineffective because the number of clandestine methamphetamine laboratories is increasing and that new methods of manufacturing methamphetamine require a smaller quantity of pseudoephedrine. Proponents point to the Oregon experience with requiring prescriptions and reducing the number of meth labs with their attendant hazards. Other proponents assert that other over-the-counter cold medications are as effective as pseudoephedrine and do not need a prescription.

Opponents of requiring a prescription to purchase pseudoephedrine contend that requiring a prescription would impose substantial new costs on consumers and health care systems. Opponents also note that Kentuckians seeking pseudoephedrine could go to any of the seven border states to obtain the substance. No Kentucky border state currently requires a prescription to purchase pseudoephedrine. While all states require presentation of identification to purchase pseudoephedrine, record sharing between states is not universal, which makes it easier for smurfers to obtain the drugs from out of state without the detailed centralized recordkeeping that is available to police and required in Kentucky. At present, only Ohio shares drug purchase information with Kentucky. Opponents admit that the Oregon legislation was effective in reducing the number of clandestine meth labs, has improved public safety, reduced danger to peace officers and the public, and substantially reduced the costs and problems associated with meth lab clean-up; however, they argue that Oregon did not reduce the availability of methamphetamine because it is now obtained from Mexican drug cartels.

Senate Bill 211, introduced in the 2010 Regular Session, would have required a person convicted of a drug offense or an anhydrous ammonia offense to have a prescription from a physician to obtain ephedrine, pseudoephedrine, or phenylpropanolamine. Anhydrous ammonia is an agricultural fertilizer that has been used to manufacture methamphetamine. The bill would have established a "precursor block list" whereby the convicted person attempting to purchase ephedrine, pseudoephedrine, or phenylpropanolamine would be blocked when the pharmacist entered the purchaser's information into the tracking system and received a notification not to sell the drugs to the person unless that person presented a prescription. The bill did not pass.

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Sexting

Prepared by Ray DeBolt

Should the General Assembly address the issue of sexting?

Background

Sexting generally refers to the practice of a minor sending nude or sexually suggestive photographs or videos of himself or herself by cell phone to a romantic partner.

Sexting has raised concerns among parents, schools, the justice system, and children's advocates because of the permanency of such electronic information and because of the potential humiliation and emotional problems that may result from the redistribution of images as the perceived relationship between the original parties change.

Discussion

Kentucky law, predominately found within KRS Chapters 510 and 531, prohibits the viewing or distributing of sexual matter related to minors and could be interpreted to include conduct defined as sexting. A conviction in a circuit court or an adjudication of guilt in a juvenile court for the proscribed conduct generally results in Class D felony sanctions and could result in classification and registration as a sex offender. For a juvenile offender, this could result in prosecution in the adult system as a youthful offender if the juvenile offender has any prior felony adjudication. House Bill 143, introduced in the 2010 Regular Session, attempted to reduce the penalty for first-time juvenile offenders to a violation. A violation, for criminal sanctioning purposes, is limited to a monetary fine and would preclude such adjudication from being used to establish the requisite criminal history for a subsequent youthful offender proceeding.

Because sexting is a relatively new phenomenon in the use of technology, there are no clear proponents or opponents of topic legislation. Prosecutors want legislators to be aware of any unintended consequences that may result from the wording of a statute or amendment that may lead to an inability to prosecute juvenile pornography cases. While proponents of sexting legislation feel a need for action, they differ on whether the issue should be addressed by parents, schools, and retailers through education or by enacting specific legislation to either impose or significantly reduce penalties associated with the proscribed conduct as between consenting individuals.

Researchers estimate that between 4 percent and 25 percent of the teenage population may have participated in sexting (Kopel and Jones). As of September 4, 2010, 10 states—Arizona, Colorado, Connecticut, Illinois, Louisiana, Missouri, Nebraska, North Dakota, Utah, and Vermont—have adopted or amended statutes to address the issue of sexting. In their 2009 and 2010 legislative sessions, 11 other state legislatures—Florida, Indiana, Kentucky, Mississippi, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, and South Carolina—introduced but did not pass legislation on sexting. The approaches taken by these states included

imposing criminal penalties ranging from fines to incarceration; providing affirmative defenses under specific scenarios, such as a dating relationship between the parties and their ages being within defined parameters; and instituting education and awareness campaigns.

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Low-profit Limited Liability Companies

Prepared by Jonathan R. Grate

Should the General Assembly allow the creation of low-profit limited liability companies?

Background

A low-profit limited liability company (L3C) is a business entity that is restricted to socially beneficial activities. The goal is to draw more investment dollars into socially beneficial activities that would otherwise be overlooked by charities and investors. Examples of such activities would be developing low-cost housing for the working poor or developing green office, retail, or industrial space. Although an L3C can make a profit, that cannot be its primary goal. To date, L3Cs have been authorized in Illinois, Maine, Michigan, North Carolina, Utah, Vermont, and Wyoming.

Discussion

An L3C is a specific type of limited liability company (LLC). They both allow flexibility in their organization and governance, liability protections, and pass-through tax attributes. However, L3Cs must significantly further a charitable or educational purpose, not have making a profit as a significant purpose, and not be organized for a political or legislative purpose. These requirements are designed to match federal tax provisions relating to charitable foundations.

Kentucky law would allow the creation of an LLC with all the organizational attributes of an L3C. However, the Kentucky entity would not be able to use the "L3C" in its name, which may place it at a marketing disadvantage when seeking charitable funding.

L3C proponents argue that allowing an entity to identify itself as an L3C would significantly enhance its ability to market itself as an attractive and available vehicle for program-related investments by charitable foundations, which bring more of those dollars to the Commonwealth. Proponents also argue that the requirement that an entity using the L3C designation continuously meet the statutory requirements relating to its activities provides a measure of security to an interested charitable foundation that its funds will be used appropriately, again functioning to attract those dollars to Kentucky.

Opponents argue that the L3C concept is new and relatively untested, and Kentucky should observe its development and operation in the early adopter states before authorizing such a new entity here. Moreover, because existing law allows the creation of an LLC in Kentucky that operates as an L3C in all but name, there may be little gained, beyond marketing, in authorizing L3C creation in Kentucky. Finally, opponents argue that there would be little governmental oversight of L3Cs in terms of monitoring compliance with the statute's requirement as to the allowable and prohibited purposes of the business entity.

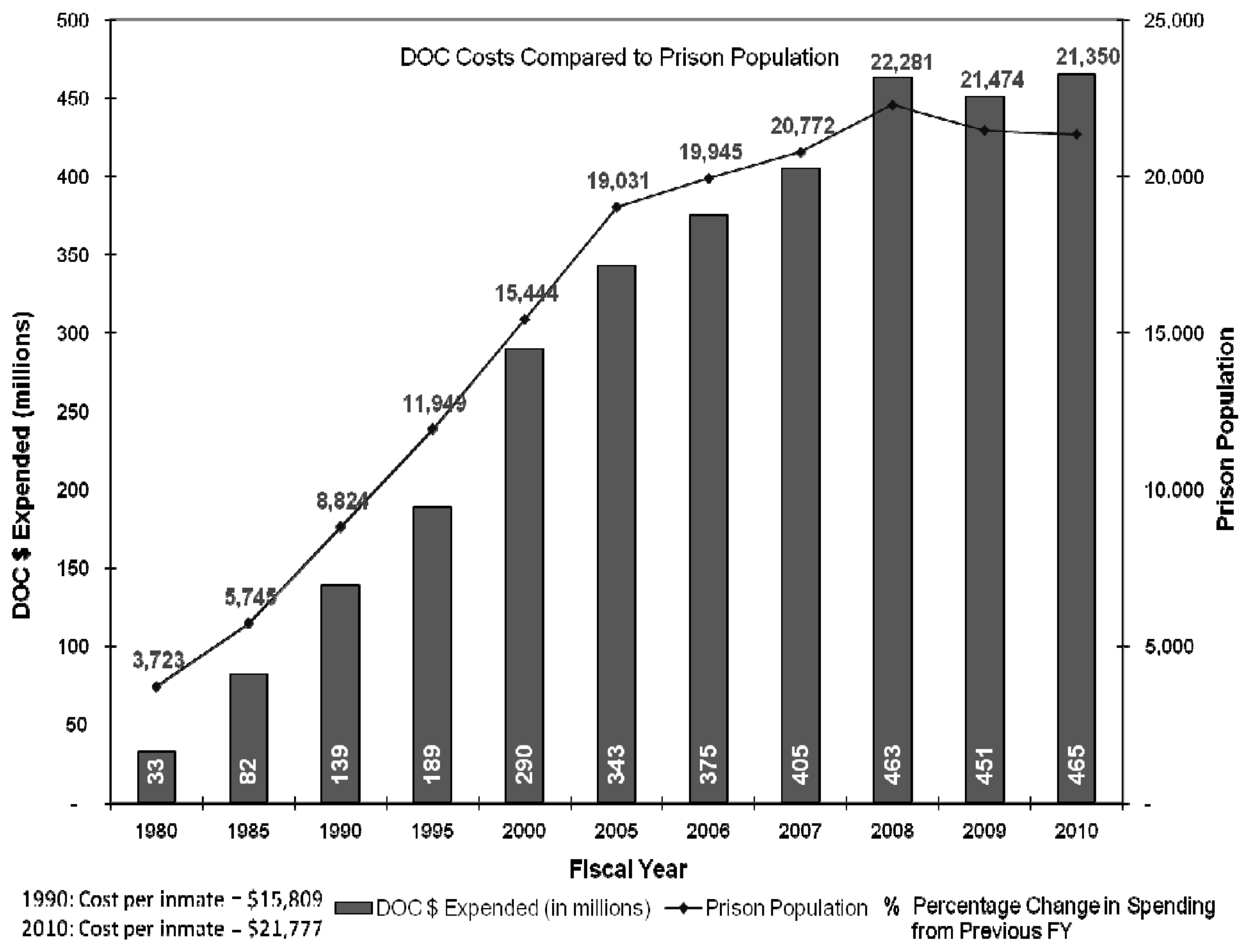
Criminal Justice Reform

Prepared by Joanna Decker

Should the General Assembly adopt changes to the Penal Code and Controlled Substances Act and related statutes?

Background

Despite a slight decline over the last 2 fiscal years, Kentucky has had one of the nation's fastest growing prison populations since 2000. The Commonwealth's prison population has grown 38 percent over the last decade, while the U.S. state prison system overall has increased 13 percent. As seen in the chart below, between fiscal years 1980 and 2010, the Department of Corrections (DOC) reported that the state's prison population grew approximately 473 percent, and experts predict a continued growth over the next 10 years. One way the state has managed the increased volume of inmates is by housing some lower-level felony inmates in county jails. Kentucky ranks second in the nation in percentage of sentenced felony inmates incarcerated in local jails, 34 percent, compared to the nation as a whole at 6 percent (JFA Institute 5, 19). With the increase in inmate population, the corrections budget has grown. The chart shows total



Source: Staff compilation.

corrections expenditures reached $465 million in FY 2010, which is up from $139 million in FY 1990.

This growth in incarceration has not been the result of increased crime rates. Since 1960, Kentucky has had one of the nation's lower serious crime rates. In 2008, compared to the national violent crime rate of 455 per 100,000 residents, Kentucky had a rate of 296 per 100,000 residents. That same year, the state's property crime rate was also lower than the national rate, at 2,584 per 100,000 versus 3,213 per 100,000, respectively (U.S.). The state's current crime rate is similar to the rate in 1974 (JFA Institute 2, 19).

During the 2010 Regular Session, the General Assembly created the Task Force on the Penal Code and Controlled Substances Act to study ways to control the growth in incarceration and correction expenditures and to reduce recidivism while improving public safety.

The task force requested technical assistance from the Pew Center on the States' Public Safety Performance Project (PSPP). The goal is to give the state a better return on its public safety investment by analyzing the prison population and its associated cost drivers to develop policy options that will generate savings that could be reinvested in evidence-based public safety measures.

Pew, along with its partners the Crime and Justice Institute and JFA Associates, will provide a statistical analysis of Kentucky's criminal justice data to determine what is driving the prison population and costs; to compare the state's sentencing and corrections policies and practices with nationally recognized, evidence-based and fiscally responsible best practices; to develop a set of policy options; and to run simulations to model the costs and effects of recommended policy changes. In order to incorporate perspectives and recommendations from across the criminal justice system and to build consensus, Pew is conducting targeted outreach to key criminal justice stakeholders, including judges, prosecutors, defense attorneys, law enforcement, jailers, local government officials, advocates for crime victims and survivors as well as faith-based organizations and business groups. Through this process, the goal of the task force will be to construct a package of legislative and administrative options.

Upon completion of the PSPP's recommended policy options, the task force will make its recommendations to the General Assembly by the beginning of the 2011 Regular Session, and legislation based on those recommendations may be introduced shortly thereafter.

Discussion

Proponents for reforming Kentucky's criminal justice policies claim that, for Kentucky's large public safety investment, the state is receiving an inadequate return on that investment in terms of public safety outcomes. They acknowledge that while prisons have an impact on crime reduction, research shows that incarceration can account for only 25 percent of that reduction. Advocates also point out that the state's recidivism rate, which is the number of offenders who are released from prison and return within 3 years, has increased from 37 percent in 1997 to 43 percent in 2006. They also point out that, even though the state's overall crime rate has declined in recent years, the national crime rate has declined at a greater rate, and property crime in the state has begun to rise.

Proponents argue that a vast majority of offenders will, at some point, be in the community and placed under some form of mandatory supervision, like probation or parole. They maintain that resources focused on these offenders in the community to reduce recidivism and hold the offenders accountable are dwindling. They note that spending per offender on probation and parole has decreased significantly over the past few years, from $3.43 per day in 2003 to $2.64 per day in 2008.

Advocates for reform support options that focus on keeping the most dangerous offenders in prison while diverting low-level, low-risk offenders into other options. They want to divert more public safety dollars from the back end of the criminal justice system in prison spending and reinvest those dollars into evidence-based strategies that have been proven to reduce recidivism. These advocates place a strong emphasis on rehabilitation and treatment coupled with mandatory supervision of the offender in a nonprison setting. This could be accomplished by spending more money on probation and parole, substance abuse treatment, cognitive behavioral therapy, job training, education, and other programs.

Policy options that proponents for reform would like to explore include the increased use of validated assessment tools that will more effectively identify the specific risks and needs of offenders, increased use of evidence-based treatment and supervision options to reduce the number of nonviolent offenders entering prison, increased use of mandatory supervision and electronic monitoring, implementation of graduated sanctions for technical violators, elimination of or reduction in the use of double enhancements, th expansion of prisoner reentry and other community-based programs to reduce recidivism rates, improved tracking of restitution to crime victims, and modification of controlled substance statutes to recognize different levels of drug dealers and the reality of relapse for people who have addictions.

Proponents cite Texas and Kansas as examples of the benefits of instituting these policy options. Texas was facing the prospect of spending $900 million on new prisons. Instead, it invested $120 million it would have spent to build new prisons to establish programs such as the expanded use of residential, community diversion, and treatment centers; and increased its parole grant rate for nonviolent offenders. These measures saved Texas taxpayers $500 million in fiscal years 2008 and 2009. Kansas was facing a 22 percent growth in its prison population, at a cost of $500 million. Instead of building new prisons, the state implemented community corrections programs to reduce recidivism, initiated a performance-based incentive grant for local communities to reduce revocations by 20 percent, and created incentives for inmates. These changes saved Kansas $80 million; decreased the state’s prison population; and decreased the number of new crimes by parolees, which are at record lows. Proponents note that both states decreased violent and property crimes.

Opponents of these approaches argue that they sacrifice the primary goals of the criminal justice system: punishment and deterrence. It is asserted that alterations of the criminal justice system often suggested by proponents create less accountability for criminal behavior and less punishment. Some say that sweeping reform of the type proposed by the PSPP rewards criminal behavior.

Opponents of reform also contend that higher incarceration rates are responsible for lower crime rates. Their view is that alternatives to incarceration do not work to protect the public from offenders who should be incarcerated. They argue that there are not enough community resources, treatment centers, or probation and parole officers to handle the demand that would flow from the increased use of alternatives to incarceration. They are skeptical that sufficient funds would ever be reinvested into these programs to manage the increased number of offenders that would be diverted from prison.

In addition to the lack of funding for the alternatives, critics are concerned that diverting offenders from incarceration would result in fewer felony offenders being sent to local jails, which would fiscally damage counties that rely on state reimbursement for lower-level state prisoners housed in local jails to pay for the bonds on jails that the counties have constructed.

Opponents say that these types of reforms are sacrificing public safety for the sake of saving money in corrections costs. These opponents maintain that citizens living in high-crime neighborhoods or in neighborhoods where many offenders reenter society deserve the same sense of security that other citizens enjoy.

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Workers' Compensation: Income Benefits for Intentional Safety Standard Violations

Prepared by Carla Montgomery

Should the General Assembly clarify the workers' compensation statute that provides enhanced income benefits when an employee's injury occurs as a result of an employer's intentional violation of a safety standard?

Background

Kentucky's workers' compensation law, KRS Chapter 342, provides income and medical benefits to workers for work-related injuries. Workers' compensation is an exclusive remedy. This means that in exchange for the protections and benefits provided by the workers' compensation law, an injured worker gives up his or her right to sue the employer except in very limited situations. Injured workers are required to file workers' compensation claims and seek remedies through the workers' compensation adjudicatory system. Employers are protected from civil lawsuits by injured workers; however, employers are required by statute to purchase workers' compensation insurance for all of their employees. In turn, the law is designed to give employees a quick resolution with appropriate income and medical benefits without necessity of a private lawsuit.

The workers' compensation law specifies the amount and duration of income benefits awarded to an injured worker. The income benefit may be enhanced if the worker's injury or disability was caused by the intentional failure of an employer to comply with a safety standard or administrative regulation. KRS 342.165 provides a 30 percent benefit enhancement for the employee. The provision also protects employers whose employees violate safety standards by imposing a 15 percent income benefit reduction for the employee. The historic purpose of KRS 342.165 was to encourage compliance with safety requirements; prevent injuries in the workplace; and penalize those parties, whether employer or employee, that intentionally fail to comply with safety requirements.

Although KRS 342.165 states that the benefit enhancement is provided if a worker's injury or disability results "in any degree by the intentional failure of an employer to comply with a safety standard or requirement…," it is a strict standard of review that has not resulted in a large number of enhanced benefits to injured workers. According to data collected by the Kentucky Department of Workers' Claims, injured workers made 31 claims for safety penalty enhancements in fiscal year 2010. Enhanced benefits were awarded in nine cases.

Discussion

KRS 342.165 does not distinguish between the types of employees, such as permanent employees, temporary employees, or permanent or temporary employees of subcontractors. A temporary employee is employed by an agency that places the employee with a customer. The customer may control the employee's work production and environment but is not considered the

employee's employer. A subcontractor's employee, whether permanent or temporary, is not the general contractor's employee but is placed in a work environment controlled for the most part by a general contractor.

In many cases, a safety violation is committed by a person who is not the actual employer of the employee. Normally, an employee who is caused harm by a third party has a right to file a private lawsuit against the third party. Both a temporary employee and a temporary or permanent employee of a subcontractor have "up-the-ladder" protection through KRS 342.610(2) and 342.700(2) if the employer (a temporary employment agency or a subcontractor) does not provide workers' compensation coverage. If an employer does not have workers' compensation insurance, up-the-ladder protection allows an employee to file a claim for benefits against the person who contracted with the employer. However, that same protection prohibits an employee from filing a private lawsuit for the benefit enhancement if the employee's injury or disability was caused by the intentional violation of a safety standard by the general contractor or by the customer of a temporary employment agency.

The Kentucky Court of Appeals decided in *Louis Jones v. Aerotek* that the plaintiff was a temporary employee who was assigned by a temporary employment agency to work for a company. The court stated that the evidence in the case demonstrated that a safety device had been disabled and that supervisors at the company knew it. In the workers' compensation case, although a safety violation had been committed by the company, the company was the customer of the temporary agency. Because the temporary employment agency was the employee's actual employer and did not commit the violation, the employee was not entitled to the benefit enhancement from the temporary agency. Accordingly, because the company that was the customer of the temporary agency was not the employee's actual employer, the customer was not liable for the enhanced benefit. The Court of Appeals decision held that only the actual employer could be held liable for the enhanced benefit.

In a similar case decided by the Kentucky Supreme Court, a subcontractor's employee was killed because of an intentional safety violation of the general contractor. The subcontractor provided workers' compensation coverage for its employees; therefore, the court found that the employee of the subcontractor could not use the up-the ladder liability protection to make the general contractor responsible for the enhanced benefit for the safety violation. The Supreme Court held that only the actual employer of the employee could be held liable for the enhanced benefit. The employee's estate had no recourse against the general contractor whose violation of a safety standard caused the employee's death (*Ernest Simpson Construction Co. v. Conn*).

Many states have similar statutes granting enhanced benefits where safety violations have occurred. Other states' courts, including those in Arkansas and Ohio, have ruled that temporary employees are entitled to enhanced income benefits. When an intentional violation of a safety standard is committed by customers of temporary employment agencies, those customers are considered employers and are liable to pay enhanced benefits to the injured employee. The courts have held that a contrary finding would result in businesses being able to avoid safety requirements by hiring temporary employees.

While the courts in Kentucky have applied the plain language of the statute and required that a safety violation had to be committed by the employee's actual employer before enhanced benefits are awarded, the courts have commented that some rulings seem unjust to injured workers and their families. The Court of Appeals sent a letter imploring the General Assembly to take action to remedy the anomaly through enactment of legislation.

In the 2010 Regular Session, House Bill 435 was considered to clarify the application of KRS 342.165. The bill did not pass. In the 2011 Regular Session, the General Assembly may consider whether an amendment of KRS 342.165 is necessary to clarify application of the statute. Injured workers would likely support a legislative clarification to ensure that all employees, temporary or permanent, receive the statutory benefit enhancement when intentional violations of safety standards result in injury, disability, or death. Employers and their insurance carriers would likely oppose a legislative change that would intentionally or unintentionally expand application of the statute that would increase their workers' compensation costs. As more temporary employees are used in the workplace, issues similar to this are likely to occur in the future.

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Unemployment Insurance

Prepared by Linda Bussell

Should the General Assembly provide a mechanism for the payment of interest on federal loans to the state for the payment of unemployment benefits?

Background

Unemployment benefits paid to unemployed Kentucky workers are funded by employer payroll taxes. Employers pay a state-determined unemployment insurance tax on the first $8,000 of each worker's wages. These taxes are paid into the unemployment insurance trust fund, and weekly unemployment benefits are paid from this fund.

Employers also pay a federal unemployment tax. The Federal Unemployment Tax Act (FUTA) imposes a payroll tax of 6.2 percent on the first $7,000 of a worker's wages. Because Kentucky's unemployment insurance program complies with certain federal requirements, employers receive a 5.4 percent credit against the federal tax, resulting in a net FUTA tax rate of 0.8 percent. The FUTA tax is paid to the federal government. These funds are used to pay all administrative costs of the state unemployment insurance program, to pay half of extended unemployment benefits, and to make loans to the state when its unemployment insurance trust fund does not generate sufficient revenue to pay benefits.

Because the recession has lasted longer than any recession since World War II, unemployment insurance trust funds in most states have been drained to the point that the states have had to borrow federal funds in order to continue paying benefits. To date, 35 states have borrowed $41 billion. Since late January 2009, Kentucky has borrowed $795 million and is expected to borrow approximately $100 million more by the end of 2010 (Meyer). Additional borrowing is likely to occur in 2011, unless there is a dramatic increase in the number of available jobs.

Federal law requires states to repay the federal unemployment loans with interest and imposes significant penalties for failure to do so within specific time frames. If a state has an outstanding loan balance for 2 consecutive years, federal law reduces the FUTA tax credit available to employers by 0.3 percent each year until the loan balance is paid. The members of the Unemployment Insurance Task Force, in formulating its recommendations in late 2009, assumed that the principal on the federal loans would be paid by future reductions in the FUTA tax credit.

The American Recovery and Reinvestment Act, enacted in February 2009, waived interest on the federal unemployment insurance loans until the end of 2010. Interest will start accruing, however, in 2011. Federal law prohibits, either directly or indirectly, payment of interest from a state's unemployment insurance trust fund. Failure to pay the interest in a timely manner could potentially result in a loss of the entire FUTA offset credit to employers. This means that employers' federal unemployment tax would be 6.2 percent rather than 0.8 percent. In addition, all federal funding to administer the state's unemployment insurance program would potentially be withdrawn.

Discussion

The General Assembly enacted House Bill 5 in the 2010 Extraordinary Session to restore solvency and stability in Kentucky's unemployment insurance system. HB 5 contains provisions that will increase employers' taxable wage base and reduce benefit payments beginning in January 2012. These changes were designed to make the unemployment insurance program self-sustaining in the future. The bill did not contain provisions relating to the payment of the principal or interest on the federal unemployment insurance loans.

The principal on the federal loans, without legislative action to require otherwise, will be paid by employers, as it was in the 1980s, through a reduction in their FUTA tax credit. The first reduction of 0.3 percent will occur on employers' 2011 FUTA tax payment, due by January 31, 2012, and will continue each year until the loan is repaid. Currently, an employer's FUTA tax rate of 0.8 percent means that the FUTA tax amount per employee is $56 ($7,000 x 0.8% = $56). Each annual 0.3 percent reduction in the FUTA tax credit will increase an employer's annual FUTA tax by $21 ($7,000 x 0.3% = $21).

Federal Unemployment Tax Act
Credit Reductions on Outstanding Federal Unemployment Loans

Years After First Loan	Basic Credit Reduction	Total FUTA Rate/ (Amount per employee)
1	0.0%	0.8% ($56)
2	0.3%	1.1% ($77)
3	0.6%	1.4% ($98)
4	0.9%	1.7% ($119)
5	1.2%	2.0% ($140)

Source: Staff compilation.

Some consultants believe that Kentucky will have an interest obligation in 2011 of approximately $60 million due by September 30, 2011, and will continue to have interest obligations in each year until 2018 (*Ensuring*). Kentucky's unemployment insurance law does not contain a provision or means to pay the interest on federal unemployment insurance loans. There was concern during the deliberations of the Unemployment Insurance Task Force about how to adequately address the complex interest issue in the broad context of the other reform initiatives that formed the basis of the recommendations ultimately included in HB 5. Also, there was uncertainty about whether Congress would further extend the interest waiver.

During the recession in the 1980s, Kentucky borrowed approximately $332 million from the federal government over a 4 ½-year period in order to pay benefits. The loan principal was paid by employers over a 6-year period by a gradual reduction in their FUTA tax credit. The interest on the loans was approximately $11 million. The interest was paid from the penalty and interest account established in KRS Chapter 341 and a surcharge on each employer's payroll. The amount of each employer's surcharge was based on the amount of benefit charges against the employer. The surcharge provision was repealed in 1996. Kentucky's penalty and interest account that is devoted to payment of interest on federal unemployment insurance loans has a

current balance of approximately $6 million—a fraction of the estimated $60 million due in interest in 2011.

According to the U.S. Department of Labor, 31 states, including Kentucky, will be required to make interest payments of $1.42 billion in 2011. Thirteen of those states have separate payroll taxes to pay interest charges on federal unemployment insurance loans. In the past, some states have funded the interest payments out of their general budgets, and some have issued bonds. With double-digit unemployment continuing in many states, many of which have already increased employer taxes during the recent recession, imposing additional taxes on employers to pay the interest is a problematic issue. Because of this, states individually and through national organizations continue to urge Congress to extend the waiver of interest through at least 2011.

The 2011 General Assembly may choose to delay addressing the interest issue until Congress decides whether it will grant states a further extension of the interest waiver. Other options for discussion could include requesting deferral of the interest based on Kentucky's continued high unemployment rate and the state's solvency efforts contained in HB 5; adopting measures taken in the recession of the 1980s that include imposition of an employer payroll surcharge sufficient to pay the interest due, with any remaining to be credited to the unemployment insurance trust fund; issuing bonds and using the proceeds to pay the interest; appropriating funds from another state fund with repayment requirements; and imposing a surcharge on employees or further restricting or reducing benefit amounts to unemployed workers in amounts sufficient to pay the interest due. Any option that further increases employers' unemployment costs would be controversial among employers that will begin paying higher taxes in 2012 under the provisions of HB 5. Likewise, any option that imposes a tax on employees or that further reduces or limits weekly income benefits would be opposed by employees whose benefits will be less beginning in 2012 under the provisions of HB 5. Similarly, any option that would increase the indebtedness of the Commonwealth could present additional impediments to economic recovery and further increase the stress on the state budget.

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Workers' Compensation: Occupational Disease

Prepared By Carla Montgomery

Should the General Assembly impose the same eligibility determination process for coal-related (black lung) and non-coal-related workers' compensation occupational disease claims?

The Kentucky workers' compensation law provides income and medical benefits for occupational disease as it does for work-related physical injuries. The eligibility standards and benefit levels are essentially the same for injury and non-coal-related occupational disease claims, except that x-ray interpretations and breathing impairment tests are required for non-coal-related occupational disease claims. The workers' compensation law, however, imposes different eligibility standards and different benefit levels for coal-related (black lung) claims.

In 1996, the General Assembly enacted major reforms in the workers' compensation law in order to reduce the cost of the system, which had increased dramatically in previous years. The 1996 reforms resulted in a significant reduction in the number of workers' compensation awards for black lung. The 2002 General Assembly enacted legislation that imposed a consensus procedure for determining eligibility for black lung benefits in an attempt to lessen some of the restrictions imposed in 1996. Under the consensus procedure, if x-ray interpretations submitted by the employee and employer are not in consensus or agreement, the commissioner of the Department of Workers' Claims is required to forward both x-rays to a panel of three expert physicians (known as "B" readers) certified by the National Institute for Occupational Safety and Health within the Centers for Disease Control and Prevention. The consensus procedure has been controversial because the 2002 revisions have not resulted in a significant increase in the number of black lung awards. A workers' compensation administrative law judge has greater discretion to award benefits in non-coal-related occupational disease claims than in black lung claims.

In an opinion issued earlier this year in *Martinez v. Peabody Coal Company*, the Kentucky Court of Appeals found that the consensus procedure required for black lung claims violates the equal protection clause of the U.S. Constitution. The court ruled that the consensus procedure required under KRS 342.316 is a stricter eligibility standard for black lung claims than for non-coal-related occupational disease claims. This decision was appealed to the Kentucky Supreme Court on June 30, 2010. The Department of Workers' Claims placed all new and pending black lung claims, approximately 114, in abeyance until the Supreme Court reaches a decision.

In the 2011 legislative session, the General Assembly may consider legislation to resolve the aspects of the consensus procedure found unconstitutional by the Court of Appeals in an attempt to avoid further delay in the adjudication of the pending black lung claims, or the General Assembly could wait for the ruling of the Supreme Court to ensure that Kentucky's highest court is in agreement with the Court of Appeals. If the Supreme Court affirms the decision of the Court of Appeals, a revision in the consensus procedure will be necessary. If the Supreme Court reverses the decision of the Court of Appeals, the consensus procedure will likely remain in place unless the General Assembly enacts legislation that adopts another eligibility determination

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

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Workers' Compensation: Medical Disputes

Prepared by Linda Bussell

Should the General Assembly amend the medical provisions in the workers' compensation law to reduce the volume of medical disputes and to improve the delivery of quality medical services?

Workers' compensation medical benefits are paid for the duration of the disability under the provisions of the Kentucky workers' compensation law, KRS Chapter 342, and are referred to as lifetime medical benefits. Medical benefits are the largest cost element of a workers' compensation claim in Kentucky and most other states. Currently, medical expenses make up 65 percent of the total cost of workers' compensation claims in Kentucky, while income benefits make up the remainder.

Even though the medical cost of an average claim has stabilized during recent years and the number of workers' compensation claims has significantly decreased, medical disputes have risen sharply. In the mid-1990s, there were approximately 200 medical disputes per year. For the past 3 years, the number of medical disputes has exceeded 1,700 per year.

Injured workers complain that workers' compensation insurance carriers often refuse to pay medical benefits awarded and that they cannot afford legal representation to challenge the carrier's refusal to pay for medical services. If the maximum allowable attorney fee of $12,000 provided under KRS 342.320 has been exhausted in litigating the original benefit claim, the workers' compensation statute, with narrow exceptions, does not provide for additional attorney fees for medical disputes. Without legal representation, it is difficult for most injured workers to maneuver the workers' compensation system on their own, and most do not have sufficient funds to obtain legal representation. Employers and their insurance carriers complain that medical costs are too high primarily because of overutilization by injured workers and that the procedures for contesting medical treatment are time consuming and expensive.

In 1994, the General Assembly enacted legislation designed to reduce workers' compensation medical costs and to ensure appropriate, prompt, and efficient delivery of medical services mandated by the workers' compensation law. Medical fee schedules for physicians and hospitals were implemented. Utilization review of contested medical services was required, and managed care was authorized for employers to better manage their workers' compensation claims. In 2005, the Department of Workers' Claims promulgated an administrative regulation that provided a mediation mechanism in an effort to contain and reduce the number of disputes. Mediation did not achieve the intended results because attorneys for both injured workers and insurance carriers found that it added another step that prolonged the claims process without significant successful outcomes. Consequently, the mediation effort was abolished in 2006. In previous legislative sessions, legislation was proposed that would have increased attorney fees for injured workers' attorneys or that would have provided an additional attorney fee specifically for medical disputes.

The General Assembly may consider mandating that one or more of the workers' compensation administrative law judges be assigned to consider only medical dispute issues, or it may consider other options such as requiring the use of medical treatment guidelines or practice parameters for treating specific workers' compensation injuries in an attempt to decrease disputes over the medical treatment required by law. While some states have adopted treatment guidelines and practice parameters, development and implementation of them requires extensive research and are controversial in both the medical and legal arenas.

Instant Racing

Prepared by Tom Hewlett

Should the General Assembly clarify the definition of "pari-mutuel wagering" as to whether it includes wagering on historical races?

Background

Wagering on historical racing, also referred to as instant racing, is a gaming option that makes use of tens of thousands of previously recorded horse races. A video terminal randomly selects a race. Players have access to limited amounts of performance information about entrants in each race, but they do not know which race was selected or the identity of the horses, jockeys, or track. Bets are placed and the race is viewed.

In January 2010, the Kentucky Attorney General issued an opinion stating that instant racing was not permissible in Kentucky because then-existing administrative regulations governing pari-mutuel wagering were restricted to live racing. KRS Chapter 528 prohibits gambling, but KRS 436.480 specifically excludes pari-mutuel wagering from the prohibition (Commonwealth. Attorney). The Kentucky Horse Racing Commission in July 2010 approved changes to its administrative regulations to define pari-mutuel wagering. 810 KAR 1:001(49) defines pari-mutuel wagering as:

> "a system or method of wagering approved by the commission in which patrons are wagering among themselves and not against the association and amounts wagered are placed in one or more designated wagering pools and the net pool is returned to the winning patrons."

The changes to the regulations also included wagering on historical races as an acceptable form of pari-mutuel wagering.

In an effort to forestall anticipated legal challenges, the commission, the Department of Revenue, and the state's horse racing tracks immediately filed a petition for declaration of rights in Franklin Circuit Court asking the court to rule on the legality of implementing the games (Commonwealth. Franklin). On September 1, 2010, the Family Foundation, an advocacy group opposed to instant racing, joined the petition. No matter what the Franklin Circuit Court finds on this issue, appeals to higher courts are likely.

Discussion

Tracks in Arkansas have used instant racing as a way to supplement purses. In 2009, bettors at Oaklawn, Arkansas's only thoroughbred track with instant racing machines, wagered $248 million on instant racing. The track retained $22 million of the amount wagered, with $3.5 million of that amount being dedicated to purses (Patton). Advocates argue that adopting instant racing in Kentucky would be a way to supplement purses.

Opponents of instant racing argue that wagering on instant races is not a legitimate form of pari-mutuel wagering. They assert that instant racing is simply a form of gambling prohibited by the Kentucky Constitution. The Chair of the Kentucky Horse Racing Commission, however, has stated that the commission has determined that instant racing is a pari-mutuel wagering product and that the commission has the authority to regulate it through administrative regulations (Patton, Wincze, and Brammer).

The case filed in Franklin Circuit Court is concerned with changes made to administrative regulations relating to the inclusion of instant racing within the category of pari-mutuel wagering. Legislators may be asked to address the issue during the upcoming General Assembly through statutory changes to clarify the nature of instant racing and pari-mutuel wagering.

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Advanced Practice Registered Nurses

Prepared by Carrie Klaber

Should the General Assembly change limitations on prescriptive authority that require written collaborative agreements with physicians for Advanced Practice Registered Nurses?

Background

Formerly known as Advanced Registered Nurse Practitioners, an Advance Practice Registered Nurse (APRN) must hold an active registered nurse license and national certification. In Kentucky, national certification for APRNs includes the designations nurse anesthetist, nurse practitioner, nurse midwife, and clinical nurse specialist. APRNs may prescribe drugs under two separate collaborative agreements entered into with physicians, with one agreement governing general prescription drugs and the other controlled substances (KRS Chapter 314). General prescription drugs require a prescription but are regulated differently than controlled substances. Controlled substances pose a risk of abuse or addiction and are grouped into five schedules based on potential for abuse, accepted medical use, and potential for physical and psychological dependence (KRS Chapter 218A). APRNs may prescribe or dispense general prescription drugs and may prescribe but not dispense controlled substances. In Kentucky, APRNs were first granted authority to prescribe nonscheduled general prescription drugs in 1996. Senate Bill 65 from the 2006 Regular Session expanded APRN prescriptive authority to include controlled substances falling under schedules II through V.

Discussion

Collaborative agreements continue to be a source of contention in the expansion of prescriptive authority. APRNs may practice independently without supervision from a physician but must obtain a signed agreement when prescribing drugs, even though the physician may not directly work with the nurse. Proponents for expanding prescriptive authority want to give APRNs more authority to prescribe general prescription drugs without an agreement with a physician or to phase out the requirement for a written agreement for controlled substances. Proponents contend that APRNs improve access to health care in rural areas and improve affordability in the face of a shortage of primary care physicians. Proponents are also concerned with the fees physicians charge for signing the collaborative agreements. According to one nurse practitioner, the fees range from $1,500 a month to a percentage of income from the practice (Yetter). Some proponents contend that if collaborative agreements are left in place, there should be a statutory prohibition or limit on fees or commissions charged by physicians for those agreements.

Opponents argue that APRNs are not physicians and that the existing limitations are appropriate. They say APRNs play a role but that a physician needs to be involved in the delivery of health care services. Opponents point out that APRNs have not attended medical school and have less training in pharmacology than do physicians. Opponents also point to patient safety and the drug

abuse problems in Kentucky. They contend that expanding prescriptive authority is likely to increase the drug diversion that occurs.

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Radon Abatement Professionals

Prepared by Carrie Klaber

Should the General Assembly mandate certification for radon abatement professionals?

Background

Radon is the nation's second leading cause of lung cancer, behind smoking. It is a colorless, odorless, tasteless, and radioactive soil gas resulting from the breakdown of uranium. The U.S. Environmental Protection Agency (EPA) estimated that radon is linked to about 21,000 lung cancer deaths per year (EPA Assessment). Radon abatement professionals can determine if there is a problem and then help the property owner decide how to lower the radon levels. According to the EPA, radon testing is quick, inexpensive, and easy. However, the EPA recommends hiring a professional to fix a home because lowering radon levels requires specialized knowledge and skills. The EPA states that, without a professional, there is a risk of actually increasing the radon level, creating other hazards, or generating additional costs. Abatement costs vary depending on the radon reduction method used and the size and design of the home. In 2006, the cost generally ranged from $800 to $2,500, with an average cost of $1,200 (EPA Consumer's. Sept. and Dec.).

The Kentucky Office of the Attorney General and the Department of Housing, Buildings and Construction have not receive complaints and do not have any records of any complaints because radon abatement professionals are not regulated in the state. The Better Business Bureau of the Bluegrass received five complaints in the last 3 years against radon businesses, with two of these complaints against the same firm (Kingery). In the 2010 Regular Session, House Bill 494 would have created a Kentucky Board of Radon Professionals attached to the Cabinet for Health and Family Services to oversee state certification of radon abatement professionals. The bill did not pass.

Discussion

Proponents of mandating certification of radon abatement professionals note that 38 other states have laws dealing with licensure, certification, mandatory testing, disclosure, or radon control. House Bill 494 was requested because KRS 211.855 to 211.858 placed regulatory authority over radon control with the Cabinet for Health and Family Services in 2005, but a program regarding the state certification and qualifications of radon professionals was never established (Univ. of Kentucky 3-4). Proponents argue that because of the lack of state regulation, radon professionals may not follow recognized standards for testing and mitigation. Proponents argue that if Kentucky fails to have comprehensive radon laws, families may be at risk because all radon abatement professionals do not follow the same levels of proficiency, quality, or practice (Kentucky). The EPA establishes guidelines for identifying and fixing radon problems, but certification at a national level is voluntary through two privately run programs. Proponents indicate that requiring state certification rather than relying on voluntary national certification would ensure that all professionals operating in the state follow the same standards of practice.

Opponents of additional regulation question the validity of studies supporting the assertion that radon is harmful to homeowners and indicate there are studies contradicting this assumption. Others believe radon is a hoax meant to scare the public, noting that there is no consensus on what is a safe level of radon exposure (McAdam). Opponents of additional certification programs argue that if Kentucky mandates certification, it will limit competition and increase costs. In the 2010 Regular Session, House Bill 276 became law creating standards for smaller boards because of concerns over the increasing number of independent boards.

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Interstate Racing Compacts

Prepared by Bryce H. Amburgey

Should the General Assembly adopt a new interstate compact on horse racing?

Background

Kentucky is one of 24 pari-mutuel wagering states that recognize the National Racing Compact, which is an agreement designed to give owners, trainers, jockeys, and drivers licensed in their respective horse racing occupations a system of seamless licensure reciprocity within the member states. The 24 states award about 95 percent of total purses in the country. Six of the 24 states—California, Kentucky, Louisiana, New Jersey, New York, and Pennsylvania—account for about 60 percent of purses nationwide (Blake). Purse amounts have a direct effect on the level of wagering in a racing state, as larger purses draw more prominent horses and well-known owners, trainers, jockeys, and drivers. Having more well-known participants in a race usually increases the number of wagers and the amounts of wagering.

A national racing license is issued under the current compact to provide licensure for horse owners, trainers, jockeys, and drivers. The current compact is an independent, interstate governmental entity that participating pari-mutuel wagering states have authorized, through model legislation, to issue the national license. The multistate license originated with the current compact. Prior to the current compact, if the FBI gave a state the license applicant's criminal history record information, the FBI forbade that state from sharing the information with any other state. Under the current compact, the FBI gives the criminal history record information directly to the compact, and compact members have access to and share this information (National. Participating).

Various interested parties have suggested other ways to create uniformity within the industry. One proposal would create the U.S. Thoroughbred Health and Safety Commission that would oversee a variety of industry issues, including safety and medication, breeding, and minimum racing ages (Angst). Some members of the U.S. Congress have proposed or supported federal legislation to create this commission.

Other industry members and observers have proposed a new multistate horse racing compact to deal simultaneously with multiple issues facing the horse racing industry. While the current compact deals only with individual professional licensure, the new compact would be designed to standardize racing rules on various topics among the states and streamline the rule-making process. The new compact would create a commission authorized to collaborate with the racing industry to draft uniform, model rules. Member states would vote on any proposed model rule. If a new compact state votes in favor of the rule, the proposed uniform rule takes effect as the state rule (Goodell). If a new compact state votes against the rule, then the rule would not be in effect or enforceable in that state. Each racing commission would still create and enforce its own rules, especially on controversial issues. The new compact rules would be viewed as supplemental to the state's own rules. Funding could be provided through license and other fees from current

Racing Commissioners International or state racing commission resources. The new compact would most likely be under the National Racing Compact umbrella and would potentially absorb the current licensing compact within its jurisdiction (Goodell).

The new compact is not yet in existence and would only become operational after six states have joined. Racing states would each need to enact their own enabling legislation before that state could join. Colorado has enacted a bill authorizing that state to enter into the new interstate racing compact once the opportunity arises. New York also is in the process of drafting legislation to approve the new compact in that state.

Discussion

Proponents of the new compact generally wish to avoid control of the racing industry by either the federal government or a nationalized racing federation. Therefore, they feel that the new compact would be advantageous to member states because the new compact could prevent federal intervention and would keep access and influence over regulatory decisions at the state level. Additionally, proponents argue that the new compact would use existing agencies and experience and would avoid multiple layers of bureaucracy. Proponents also assert that racing jurisdictions currently lack a mechanism for joint action. Further, proponents maintain that, since pari-mutuel wagering is legal in 38 states, there are currently 38 different sets of rules, creating a multitude of rule differences that the industry cannot fully monitor (Blake). However, because only six states represent a large percentage of pari-mutuel wagering nationwide, proponents note that as few as 16 large-purse jurisdictions would create practical uniformity without needing adoption by all 38 pari-mutuel states (Hendershot).

Proponents also stress that, in addition to preventing federal intervention, the new compact would build on existing state relationships and would streamline some testing, licensing, and wagering programs. They believe that any transition period would create little to no cost, and once implemented, resources could be used for a national-level staff and administration of the new compact (Goodell). Speed of the process is also cited. Proponents argue that under the new compact, a rule could be proposed, discussed, and implemented in multiple states within months, while the process now takes years, given the varying legislative calendars and state priorities (Blake).

Opponents of the new compact believe it would give too much regulatory control over each state’s racing to a new multistate entity that has no duty to protect the interests of individual state’s racing participants and racetracks. They also feel that vesting regulatory power to states with lesser standards would create a lower level of standards in the quest for uniformity. They assert that the new compact could create an additional, unnecessary level of regulation that could incur greater cost, decrease the state legislatures’ oversight role, and render state racing commissions powerless (The Standardbred 1).

Opponents cite a concern that a majority of the new compact’s commissioners may be able to apportion fees based on purses, “overtaxing” the states with the highest purses and forcing them to subsidize the failing states in the new compact (The Standardbred 2). Other issues that have been noted include state rule makers being unduly influenced by other states, each state’s one

representative to the new compact having too much control, horsemen losing access to the rule-making process, and creating an expensive "super agency" (National. Proposed).

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Funding 911 Services

Prepared by Kris Shera

Should the General Assembly adopt a statewide fee for 911 services to be levied on all communications devices capable of making 911 emergency requests?

Background

Since the beginning of the 911 system, there have been several advances in communications technology. Kentuckians can place 911 calls using cellular phones, voice over Internet protocol (VoIP) calling services such as Skype or Vonage, and telematics services such as On Star.[1]

The current 911 system in Kentucky, and most other states, is developed around telephone technology and is not equipped to handle the text, data, images, and video that are increasingly common in personal communication. In an effort to develop a 911 system that is capable of handling 911 calls made with newly developed modes of communication, the National Highway Transportation Safety Administration established the Next Generation 911 Initiative, known as NG911. The goal is to design a 911 system that is a digital, Internet-based system where each Public Safety Answering Point (PSAP) has the capability to accept and handle 911 emergency requests from all modes of communication that currently exist and those that may be developed in the future. A PSAP is a communications facility that can receive 911 calls and dispatch public safety services or can transfer the call to the appropriate public safety agency.

Many advances in personal communications technology in the 42 years since the first 911 call have required policy makers to make changes to the 911 system to provide an effective and functional 911 system. However, the method for funding the 911 system has gone largely unchanged (Boerner). Users pay 911 fees that are collected by the communication service providers. The money is then remitted to a state or local government agency and is subsequently disbursed to state or local governments to operate PSAPs and pay for the 911 system. The 911 fees are sometimes combined with grants from state or federal governments or money from general funds.

Discussion

The rapid rate of development in mobile communication technology has created challenges for state and local governments in terms of 911 system capabilities and funding. As the number of landlines decreases, local governments are trying to find additional ways to fund 911 services. The increased use of the 911 system by an increasing array of communication devices will increase the cost of maintaining and upgrading the 911 system. Questions that commonly confront policy makers in this area are how to fund the NG911 system and how to make sure that newly developed communication devices capable of making 911 emergency requests are assessed 911 fees in an equitable manner to pay for system upgrades and increased use.

[1] Telematics are wireless systems sometimes used in automobiles that link the automobile to a Public Safety Answering Point.

Currently in Kentucky, 911 fees on landline telephones are assessed by local governments (KRS 65.760). These fees range from 25 cents to $4 per month per landline telephone connection and are among the highest landline 911 fees in the country (Hamilton). The 911 fee imposed by the Commercial Mobile Radio Services (CMRS) board on cellular phone users, known as the CMRS service charge, is 70 cents per month per connection. An alternate method is provided in statutes for collecting the fee from prepaid wireless telephone service providers (KRS 65.7629). One of the responsibilities of the CMRS board is to fulfill the requirements of the mandate contained in FCC order 94-102 by guiding the transition to wireless enhanced 911 in Kentucky and managing the CMRS fund to reimburse wireless providers and local governments for costs associated with the transition to wireless enhanced 911.

One option for funding Kentucky's 911 system as it makes the transition to NG911 involves a statewide fee with uniform application on all users with communication devices capable of accessing the 911 system that is administered at the state level. Proponents of a statewide, state-administered 911 funding model claim that the general trend in 911 systems is toward consolidation and that a state-administered 911 system is a more cost-effective way to offer 911 services. Proponents also claim that a statewide funding model helps to ensure that users of all communication devices that can make 911 emergency requests are paying an equitable fee. Virginia is the only state bordering Kentucky with a statewide 911 funding model.

The Commercial Mobile Radio Service board of Kentucky recommends a state-managed uniform 911 system. The board recommends changes to KRS 65.760 that include "a consolidated funding model that is equitable across all platforms and users" (5-5). The plan also recommends changes to KRS 65.7629 and 65.7631 that would include in any 911 fee collected users of any devices that have access to the 911 system. The board also recommends the 911 system be able to support text messages, telematics, video streams, images, and any other way to place a 911 emergency request (5-6). In Kentucky, statutes do not require 911 service fees on users of VoIP or telematics services.

Fifteen states have a statewide 911 system funding model. North Carolina established a consolidated, state-level board that administers both landline and wireless 911 systems. The state assesses a 60-cent 911 service charge per connection on all users with communication devices capable of accessing 911 services.

Florida's state 911 board assesses a maximum of 50 cents per month per connection on users of VoIP and telematics communication devices. Florida allows counties to adopt 911 fees that are less than 50 cents per month per connection. Counties that impose the lower fee receive less money from the state 911 fund.

Delaware's state 911 board assesses 50 cents on users of all communication devices capable of accessing the 911 system, including VoIP and telematics. In making the transition to a statewide funding model, Delaware guaranteed local governments the same amount of revenue they collected for landline 911 fees in the year prior to the passage of legislation creating the statewide funding system.

The National Emergency Number Association noted that legislation for a statewide 911 funding model is usually drafted in such a way that each time a new communication device comes out, changes are required to add users of those devices to the list of devices that are charged a 911 fee. The association recommends that legislation imposing a statewide fee is drafted in such a way that would automatically include new communications technology as it emerges (5).

The Kentucky League of Cities supports changes that would enable the application of 911 fees on users of all current or future communication devices capable of making 911 emergency requests but opposes any changes to Kentucky's 911 funding model that erode local authority to establish and collect 911 fees on landline telephones as provided in KRS 65.760 (Chaney).

Local governments have maintained a consistent position to oppose any legislation that would replace local revenue collection with a centralized state-administered collection system since the General Assembly imposed a state telecommunications tax with the passage of HB 272 in 2005. With HB 272, local governments lost the ability to impose local cable franchise fees, which were replaced with the state telecommunications tax. Local governments understood that they would be held harmless for historical collections. Local governments maintain that they are receiving approximately $7.5 million less per year since the passage of HB 272. Kentucky is a home-rule state, and the collection of 911 fees on landlines has long been considered a local issue.

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Regional Waste Water Authorities

Prepared by Joe Pinczewski-Lee

Background

An Regional Waste Water Authorities (RWWA) is a regional network of waste water transportation pipelines and bulk waste water treatment facilities. An RWWA transports and treats the multicounty region's waste water but does not provide local waste water impoundment or transport. Local government authorities would have been responsible for local waste water lines, impoundment, and transportation to the regional system.

Both the 2009 and 2010 Regular Sessions the General Assembly were presented with bills dealing with the creation of RWWAs. House Bill 422 in 2009 proposed creating RWWAs on a statewide basis. HB 221 in 2010 would have created a pilot program for Jefferson and surrounding counties. The RWWA would have been open to all cities, counties, sanitation districts, water districts that operate waste water programs, and municipal sewer districts within these seven counties. The bill established procedures for the creation of the RWWA and provided that it was to be the wholesale collection and waste water treatment program for the area. Neither measure passed.

Objections were made to creating a specific range of statutes for the creation of RWWAs, rather than using of the Interlocal Cooperation Act (KRS 65.210 to 65.300). The Act allows local governments, special districts, sheriffs, and agencies to pool resources, including tax revenues, for joint projects through the use of an interlocal agreement made between the collaborating parties. The parties may act jointly on any project in which they could act separately.

Current statutory procedures must be followed to create a special district in order to qualify for state or federal aid, including the issuance of bonded indebtedness. Under an interlocal agreement, the entities creating the agreement, rather than the entity itself, may issue revenue bonds. That complicates the matters for the issuance of debt, according to proponents of Regional Waste Water Authorities. With an RWWA, the RWWA has the ability to issue bonds for material improvements. This speeds the process for the issuance of bonds and guarantees that the funds generated go to the RWWA, not to the issuing entities.

Discussion

Opponents of RWWAs believe that it is unnecessary to create a specific set of statutes for the creation of RWWAs, arguing that local governments already have the capacity to create such entities. Opponents argue that statutorily created RWWAs are unnecessary because waste water commissions can already be created through interlocal agreements. They contend that KRS 65.240(2) allows two or more agencies to create cooperative projects, such as an RWWA. Opponents argue that this makes statutory language authorizing an RWWA redundant.

Opponents also argue that the level of debt necessary to operate an RWWA would be excessive. They argue that as a “public agency,” the RWWA debt would be the responsibility of the Commonwealth in the event of a default. Opponents contend such would not be the case for a joint project established through the Interlocal Cooperation Act. Opponents point to KRS 65.270 that makes the entities creating the joint project responsible for issuing revenue bonds for the project and therefore responsible for any fiscal default.

Proponents argue that specific statutory language would be preferable to the generalized authority granted by the Interlocal Cooperation Act. Proponents of RWWAs argue for a specific range of statues on the basis of completeness and ease of use. That is, a Regional Waste Water Authority Act would make rights, duties, and responsibilities clear, without need for extensive negotiations and time-consuming revisions and further administrative actions.

Proponents of RWWAs say that they can be set up faster and easier than can interlocal agreements. Proponents cited the example of Clay City and Stanton that entered into an interlocal agreement to provide waste water treatment. It took 8 months to negotiate the terms of the agreement. Proponents contend that the length of the negotiations could have been shortened to approximately 2 ½ months if there had been a specific statue authorizing the creation of an RWWA. Also, because it took 8 months to negotiate this interlocal agreement, the established joint agency missed a funding deadline and was forced to wait almost a year before it could seek federal or state aid (Rechtenwald).

Proponents point out that even when an interlocal agreement has been reached, there is more administrative work necessary for effective operation of an RWWA. Proponents contend that, generally, an interlocal agreement then has to be supported by the creation of a special district, either a Chapter 76 municipal sanitation district under KRS Chapter 76 or a nonprofit corporation under KRS Chapter 273. Proponents also contend that under an interlocal agreement, aid goes to the entities that have entered into the agreement, not to the RWWA created by the agreement. Proponents of an RWWA contend that an RWWA can issue bonds or receive aid, making the start of operations for an RWWA faster than it would be under an interlocal agreement.

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Cap on Occupational License Fees

Prepared by John V. Ryan

Should the General Assembly modify or remove the 1 percent cap on occupational license fees in counties with populations of 30,000 to 300,000?

Background

Through the County Home Rule Act, counties are granted a broad delegation of the power to tax by allowing them to levy all taxes not in conflict with the Kentucky Constitution or statutes.

Counties with a population between 30,000 and 300,000 may impose occupational license fees on businesses, trades, occupations, or professions so long as they do so at a rate that does not exceed 1 percent of salaries, wages, or net profits (KRS 68.197). Counties with populations of 300,000 or more, which currently applies only to Jefferson County, may impose occupational license fees not to exceed 1.25 percent (KRS 68.180). Counties with populations below 30,000 may also impose occupational license fees; however, there is no statutory limit on the rate (KRS 67.083).

The occupational license fee is essentially a license granted for the privilege of doing business in the county. There are 35 counties with populations between 30,000 and 300,000 (United). These counties are also subject to a credit for any city license tax. Consequently, persons who owe occupational license fees both to the county and to the city in that county are allowed to credit their city occupational license fees against their county occupational license fees. For other counties that are not within the 30,000-300,000 population range and without the 1 percent limitation, persons may credit their city occupational license fees against their county occupational license fees only upon agreement between the city and the county.

Occupational license fees for counties with populations between 30,000 and 300,000 are automatically subject to a credit (also known as an offset) of the city occupational license fees against the county occupational license fees. In 2002, the General Assembly enacted "grandfathering" provisions, making such occupational license fee credits essentially mandatory for these counties. In other words, a city located in a county that first enacted an occupational tax after 1986 can come in after the county enacted its tax and enact a city occupational tax. Because the city tax can be offset against the county tax, the enactment of the city tax results in a direct reduction in tax receipts for the county.

Discussion

Current law places an increasing number of Kentucky counties and their cities in competition for occupational license tax revenues. In addition to the 1 percent limitation on counties of populations between 30,000 and 300,000, KRS 68.197 mandates that city occupational taxes be credited against the county levy, inducing annexation for cities needing additional revenues to fund services. Consequently, the city tax offset requirement, on top of the 1 percent cap on

occupational taxes in these counties, has the effect of substantially limiting the potential tax base for county governments.

Data compiled by the Department for Local Government, in conjunction with the Kentucky Association of Counties and the Kentucky League of Cities, indicate that from 1987 to 2000, the number of local governments with occupational license taxes increased by 75 percent and that nearly half of the counties with this tax have populations between 30,000 and 300,000. Currently, 72 counties have occupational license fees (Kentucky). Only 35 of those have the 1 percent limitation based on population. After each federal decennial census, counties have to ensure they meet the 1 percent level if they cross the 30,000 population threshold.

If a county of 30,000 to 300,000 were permitted to raise its occupational license fee above the 1 percent limit and did so and a city within that county adopted a similar increase to its occupational license tax, the tax credit, or offset, allowed for residents of the city under current law may substantially reduce or eliminate anticipated tax receipts realized by the county.

Proponents of review of this tax argue that the 1 percent cap should be reevaluated to determine the appropriateness of the limitation, particularly in these difficult economic times. As an alternative to modification or elimination of the 1 percent cap, the range to which the cap applies (counties with populations of 30,000 to 300,000) may be reconsidered.

Potential opposition to this measure might object on the grounds that modifying or removing the 1 percent cap would remove statutory safeguards against increased taxes and would enable local governments to subsequently increase their occupational license fees.

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Waste Tire Disposal Program

Prepared by Tanya Monsanto

Should the General Assembly allow counties to directly receive waste tire funds to conduct their own local waste tire clean-up programs?

Background

Improper disposal of waste tires is a public health and environmental issue. Tires are difficult to ignite, but once ignited, the fires can create oils and particulates that are hazardous to both ground and surface water. Waste tires do not decompose, so placing whole tires in landfills is an ineffective solution. Additionally, tire dumps create standing water, which is prime breeding habitat for mosquitoes. The proper disposal of waste tires is necessary to prevent the spread of diseases such as West Nile, dengue, yellow fever, encephalitis, and heart worms in canines (State of Illinois).

In 1991, the nation generated 242 million scrap tires; 78 million were placed in landfills, stockpiled, or dumped illegally (U.S. Environmental. Office). Waste tire problems stemmed from a lack of disposal alternatives and from a lack of revenue to clean up abandoned or orphaned tire piles. "Orphan piles" means there was no way to legally tie clean up back to any responsible party.

Scott County ran a county-based tire amnesty program for 2 years prior to 1997 that took in more than 14,000 tires. The county had to end the program because of its high cost (Washington). In 1997, the Commonwealth's Division of Waste Management identified 259 waste tire piles in the Commonwealth. The majority of the tire piles were orphan waste. By 2001, Kentucky had about 10 million waste and unmanaged scrap tires that needed to be cleaned up ("Waste").

Kentucky was one of 12 states that passed legislation in 1990 to control the disposal of waste tires. Kentucky's legislation was similar to that passed in other states at the time. It focused on three main issues: generating revenue, cleaning up tires, and creating restrictions. Like other programs, tire clean up was conceived of as a state-directed venture with money going to some local entities in the form of grants for tire removal and the development of new uses for tire products, such as tire-derived fuel. Tire-derived fuel is when chipped tires are combined with another fuel feedstock like coal and burned to produce electricity. The state created a $1 waste tire fee assessed on the sale of new retail tires that was collected by the Department of Revenue. If, however, there was an interlocal agreement in place, a portion of the fee generated in that locality would be redirected to counties participating in the interlocal agreement to fund their own waste tire clean-up efforts.

The newly created waste tire program addressed accumulations of waste tires, required the state to clean up abandoned tire piles, imposed registration requirements on those who stockpile tires, and created landfill restrictions. The 1990 legislation, however, created unintended consequences by encouraging the stockpiling of tires in anticipation of profitable downstream markets, such as tire-derived fuel, for waste tire products (Commonwealth. Division. "A Report"). Those downstream

markets did not materialize as fast as new tires were sold into the U.S. marketplace. The law also imposed immediate disposal costs, including paying haulers, disposal fees, and fines for noncompliance. Exemptions for farmers and for new motor vehicle retailers may have created an unintended incentive for others to dispose of tires improperly. Finally, when the law went into effect, the number of shredding companies in the state could not handle the volume of waste tires. Additionally, the retread market began to shrink as the prices for new tires fell (U.S.).

After the legislative updates, the waste tire problem improved. Various reports have shown that between 1991 and 2009, the number of waste tire disposals increased by a rate of roughly 1 percent per year, while the number of waste tires in Kentucky fell by a rate of 3.5 percent per year. Updates to the waste tire law redirected the program focus from cleaning up abandoned tire piles to finding recycling alternatives and to developing downstream markets for waste tires. The updates created tighter restrictions on different types of entities that could stockpile tires and improved registration requirements for accumulators, transporters, and processors. The cabinet required financial assurance, such as surety bond or letter of credit, from those registered entities and removed the exemptions for retailers of automotive tires.

The Energy and Environment Cabinet's Division of Waste Management began the Waste Tire Amnesty Program in 1998 after the General Assembly created the Waste Tire Fund. The program allows individuals to bring unwanted tires to a designated location at no cost to the individual for disposal. According to the cabinet, the amnesty program has resulted in the proper disposal of nearly 17 million waste tires. The General Assembly's 1998 amendment legislation removed the interlocal agreement provision that redirected a portion of funds to counties for the disposal of waste tires. However, in 2002, the cabinet allowed counties to directly obtain waste tire funds through Commonwealth Clean-Up Week. Under this mechanism, counties could apply for direct funding through an application at their local area development district. According to several solid waste coordinators, both of these mechanisms became critical methods for local governments to manage waste tire disposal (Dickey; Washington).

Kentucky's success began to falter in 2007 as the economy began to weaken, prompting the state to begin reexamining internal budgets to find temporary fixes to fiscal deficits. Funding priorities within the cabinet began to change. More money was put into cabinet operations, such as personnel and operating expenditures, leaving less money to allocate to the waste tire program. The cabinet discontinued the direct funding through Commonwealth Clean-Up Week and removed funding for the tire-derived fuel grants until 2010. From 2006 to the present, tire amnesties have been occurring in every county on a 4-year cycle, and a tire amnesty has been scheduled for outgoing years until 2014. Counties are concerned that funding priorities will compete for funds needed to maintain the amnesty (Gilbert; Hatton). With the General Assembly facing general revenue shortfalls and departmental budget cuts, funding for the waste tire program has been redirected to support other departmental needs (Hatton). Some local solid waste coordinators assert that they are picking up more of the cost of storing and processing waste tires (Dickey). Boone County spends $10,000 per year, and Scott County spends $14,000 on average for waste tire disposal. Like many counties, they rely on a consistent tire amnesty schedule to be able to augment the high cost of recycling waste tires (Dickey; Washington).

Discussion

Solid waste coordinators and local governments argue that direct funding to counties allows the county the discretion on how to spend the money. State-directed clean ups do not address the specifics of the county's waste tire disposal problems. For example, some counties need more money for equipment to haul tires out of ditches and waterways, but waste tire program grants do not pay for this type of equipment. Also, waste tire amnesties have rules regarding the number and place where tires will be picked up. The amnesty rules specify that tires must be accessible to a tractor trailer and be in loads of 1,500 to 5,000 tires. Smaller loads must be transported to receiving centers at the county's expense (Dickey).

Counties also argue that direct funding has been a component of the waste tire program in the past and was a feature that worked particularly well. The grant money available through Commonwealth Clean-Up Week assisted counties with some of the costs of clean up that the current program does not cover, such as contracts for small tire-pile clean up and equipment. On the other hand, there have been concerns about providing money directly to counties. Those concerns include a loss of fiscal transparency and a fear that the cost of auditing the counties would offset the benefit obtained from the small amount of money generated by the waste tire fee. The cabinet also contends that its fiscal reprioritization is a temporary, unprecedented measure that was taken because of the extraordinary economic downturn. As the economy improves and the budget situation is relieved, the funds will be redirected to program.

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Depredating Wildlife

Prepared by Stefan Kasacavage

Should the General Assembly authorize landowners and tenants to remove destructive wildlife without first obtaining a permit from the Department of Fish and Wildlife Resources?

Background

As deer, wild elk, and black bear populations continue to grow within the Commonwealth, residents are increasingly complaining of property damage caused by overly destructive (known as depredating) wildlife. The bear population more than doubled in the United States between 1989 and 2006, and as a result, bears are repopulating their natural range that includes large portions of Kentucky (Alford). Kentucky's elk herd of almost 10,000 has become more of a nuisance to rural landowners as its numbers continue to grow (Hjalmarson). Several factors, including the weather and the timing of the hunting season, have contributed to a projected above-average harvest of deer this year.

Under KRS 150.170, a resident landowner or tenant may take an animal that is causing damage to land or personal property without a hunting license and without regard to whether it is open season for that animal. Taking is defined in KRS 150.010 as any trapping, hunting, or killing of wildlife or any lesser act designed to lure or attract wildlife for that purpose. Only after the animal is destroyed must the Department of Fish and Wildlife Resources be notified. A disposal tag or other authorizing document is needed only if the animal is to be used, but no depredation permit is required. KRS 150.105 allows conservation officers to destroy animals causing damage to people, property, or other animals with the permission of the Fish and Wildlife commissioner and commission.

KRS 150.390 requires the department to promulgate administrative regulations relating to the issuance of depredation permits for the taking of depredating wild elk. The department does not have specific statutory authority to require depredation permits for the taking of other depredating wildlife, but it has promulgated administrative regulations that require such permits for certain damage-causing animals, including deer and black bear, under its general statutory authority to regulate the taking of wildlife.

Discussion

Some believe that the department should be prohibited from requiring resident landowners or tenants to obtain any prior authorization before taking depredating wildlife. They argue that the varying requirements that depend on the species of wildlife to be taken are confusing. Further, the requirement of prior approval from the department is at odds with the expectation of citizens that taking depredating wildlife on one's land is authorized by statute and not subject to regulation by the department. As a result, residents are subject to fines from the department for taking depredating wildlife that they believed they had the right to take.

Others argue that if resident landowners or tenants were allowed to take depredating wildlife without prior approval from the department, it would be difficult to distinguish between residents who legitimately take depredating wildlife and poachers who want to take out-of-season or otherwise restricted wildlife under the claim that it was depredating. The department has an interest in effectively managing wildlife populations to ensure their continued viability; allowing the indiscriminate taking of depredating wildlife would hamper this goal. Additionally, certain depredating species, such as black bear, can be dangerous, and residents should not be encouraged to take them alone, even if they are causing property damage.

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Payment Plans for Logging Violations

Prepared by Stefan Kasacavage

Should the General Assembly prohibit loggers that have repeatedly violated forest conservation laws from participating in any logging operations until they agree to payment plans for their fines?

Background

The Kentucky Forest Conservation Act (KFCA) requires commercial loggers and operators to use best management practices during tree harvesting operations and to correct any damage to land or water that occurs as a result of an operation (KRS 149.330 to 149.355). Additionally, KFCA requires that each operation site have at least one logger in charge of the harvest who has completed the Master Logger Program, which is an environmental and safety program administered through the Department of Forestry at the University of Kentucky.

Under KRS 149.344, a KFCA violation triggers a process whereby the accused violator is given warnings and opportunities to abate and comply or challenge the violation. After this process is exhausted, or if the violation presents an imminent and substantial danger to public safety or wildlife, the Energy and Environment Cabinet may issue a special order for the logger or operator to cease either all or the portion of the timber harvesting operation constituting the violation until it is abated. Only after the violator fails to cease the activity prohibited by the special order will the violator be designated a bad actor and subject to civil penalties under KRS 149.348. Violators that have already received two or more bad actor designations are subject to an expedited process to cease operations. Since 2001, the Energy and Environment Cabinet has assessed $430,000 in bad actor fines on more than 150 violators; however, only about $77,700 has been collected (MacSwords). Many of the fines are owed by repeat offenders (University of Kentucky). The collected fines are deposited in the forest stewardship incentives fund to be used for cost-share programs to provide financial assistance to landowners for the development of stewardship plans and for stewardship practices, including reforestation, soil and water protection, and wildlife habitat improvement.

Discussion

Due to the low collection rate for the fines imposed on bad actors and the high rate of recidivism for KFCA violators, the cabinet and some industry groups believe that loggers or operators that have two or more bad actor designations should be prohibited from participating in any logging operations until they have agreed to a payment plan for their fines. They argue that this prohibition would give the cabinet more leverage in collecting outstanding fines, deter repeat bad actors from accumulating more fines with impunity, and eliminate the advantage gained by bad actors that disregard the KFCA legal requirements that add time and expense to logging operations.

Others believe that prohibiting bad actors from participating in any logging operations until they are on payment plans for their fines would do little to reduce the number of violations. They argue that many of the repeat bad actors already regularly reorganize their businesses in order to avoid collection of fines for KFCA violations. This prohibition would do little to stop them from continuing their operations and may encourage more operators to seek to evade penalties from the cabinet using similar means.

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Transparency for State Financial Transactions

Prepared by Karen A. Powell

Should the General Assembly require state government financial information to be published on a government Web site?

Background

While financial documents relating to the state's three branches of government have been available to the public through the Open Records Act since 1976, improvements in technology have made it possible for the public to view, and even search, government financial records if placed on a Web site. In 2008, the Governor issued an executive order establishing an e-Transparency Task Force whose recommendations resulted in the Web site OpenDoor.ky.gov. This Web site allows electronic access to certain state financial information, including expenditures and related documentation. The legislative branch in August 2010 approved the establishment of a Web site that will allow public access to documents available under the open records statutes, including agency expenditures, personal service contracts, and salaries. While the Open Records law requires access to certain documents, there is no statutory requirement for that information to be available electronically or on the Web.

In the 2008, 2009, and 2010 sessions of the General Assembly, legislation was introduced that would have required the Finance and Administration Cabinet to create a Web site containing state government financial information. For the 2011 Regular Session, two bills have been prefiled requiring state financial information to be placed on a Web site. One proposal would require the three branches of government to create Web sites containing specified financial information and would require state universities to provide their information through the executive branch's Web site. Another proposal would require each branch of government to provide public access to its respective financial information and would require state universities to include their budgets, financial statements, and board minutes on university Web sites.

Discussion

Proponents of government transparency say it empowers the legislature to properly assess expenditures, directs funds to programs of worth and away from programs that do not work, and demonstrates that taxpayer money provides real benefit (Musser). Representatives from each branch of state government have said that having the government's financial information available on a Web site would increase accountability to the public and participation in the governmental process.

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Privatization of State Parks

Prepared by Alisha Miller

Should the General Assembly more specifically regulate privatization of state park functions?

Background

Kentucky has 52 state parks that include resort parks, recreational areas, historical sites, and golf courses. These parks average $85 million a year in operating expenses with revenues of approximately $53 million annually. Each year, the Department of Parks receives an average of $30 million from the state budget to subsidize its operations (Commonwealth). However, the annual appropriation does not always cover the department's operating losses.

Representatives from the Tourism, Arts, and Heritage Cabinet reported that the Department of Parks plans to implement cost-saving measures, including privatizing certain state park functions. Privatization means any process aimed at shifting functions and responsibilities, in whole or in part, from the government to the private sector. The department plans to privatize food services by using food vendors called concessionaires for golf courses and select restaurants at the state parks and by using contractors to run golf operations. According to cabinet representatives, the lack of available state funding, lagging revenue, increasing personnel costs, and major maintenance concerns require the parks system to find other revenue streams and implement cost-saving measures in order to avoid closures.

Discussion

According to the Kentucky State Parks Financial and Operations Strategic Plan and proponents, privatizing golf operations would allow the state to avoid operational costs of $500,000 in the first year and $1 million in the second year. In addition, the parks would avoid nearly $1.2 million in operational costs in the first year and $1.7 million in the second year if food and dining services were privatized. The department stated that these savings would be realized by the relief of almost all associated costs, including all of the employee costs for those who choose to work for the concessionaire (Commonwealth).

Opponents of privatization question whether contracting out food services and golf operations would actually save money because workers' compensation costs are built into contract prices. Another question is whether current merit employees would choose to leave their positions for a position with no merit protections. Because they are merit employees, those employees would have to be placed in a state government position if they declined the option to be hired by the contractor. Other issues critics of privatization cite are possible price increases by contractors to park visitors and lack of oversight of contractors.

Whether contracting golf and dining operations will be successful also depends on the interest of contractors to bid. During the early 1990s, Request for Proposals (RFPs) were issued to allow

private contractors to build lodges at General Burnside and Green River State Parks. These RFPs were not successful because there was little interest by private contractors to bid under the RFP's provisions. However, certain marinas at the state parks have been privatized since 1962. The Finance and Administration Cabinet is in the process of determining if there is interest by private companies to operate the golf and dining operations at state parks. Requests for information have been released for both golf and dining operations.

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Kentucky Retirement Systems Cost of Living Adjustment

Prepared by Brad Gross

Should the General Assembly discontinue the cost of living adjustment provided to retirees of the Kentucky Retirement Systems?

Background

The Kentucky Retirement Systems provides pension and retiree health benefits to more than 333,000 current and former employees, including 87,279 retirees and beneficiaries, through one of three retirement systems: the Kentucky Employees Retirement System (KERS), the County Employees Retirement System, and the State Police Retirement System (SPRS). Each of the these pension systems is a defined benefit plan, which means pension benefits are paid based on a formula established in state statute rather than an account balance. Following retirement, these pension benefits are increased annually by a statutory cost of living adjustment, known as a COLA (Kentucky. *Comprehensive*).

Since 2002, the recommended employer contribution rate for each of these pension systems has increased due to a variety of factors: from less-than-favorable investment returns to budget reductions to the actuarially required contribution for employers. One other factor increasing the employer contribution rate has been the COLA provided to retirees and beneficiaries. In 2008, the COLA provisions were amended. However, as employer rates continue to increase, particularly in light of the recent stock market downturns, further amendments to the COLA provisions have been discussed because this benefit remains one of the few options generally perceived as not being covered by the inviolable contract.[1]

Over time, the method for calculating the COLA has changed. From 1996 to 2008, the annual COLA varied based on the percent increase in the Consumer Price Index. During this time, the COLA averaged 2.61 percent annually (Sparks). In 2008, the General Assembly passed House Bill 1 that set the annual COLA at a flat 1.5 percent beginning in 2009.

Although the method for calculating the COLA has changed, the method for funding the COLA has not. Since 1996, state statute has prohibited the retirement systems from prefunding the benefit like other pension benefits by requiring the systems to recognize only prior COLAs given to retirees and beneficiaries in determining the annual employer contribution rate. This means that no funds are set aside during a working employee's career to fund future COLAs during his or her retirement. As a result, each annual COLA creates additional unfunded liabilities and ultimately higher employer contributions as these new liabilities are financed over the life of the plan, which typically has been 30 years. For example, the 2.8 percent COLA in 1996 increased the KERS nonhazardous employer contribution rate by an estimated 0.16 percent of payroll for the next 30 years. Because of the long-term nature of financing COLAs, each new COLA

[1] The term "inviolable contract" comes from the provisions of KRS 16.652, 61.692, and 78.852, which state that the benefits provided to members of these systems shall "constitute an inviolable contract of the Commonwealth, and the benefits provided therein shall…not be subject to reduction or impairment by alteration, amendment, or repeal."

awarded since 1996 has resulted in a cumulative increase in the employer contribution rate. Based on information provided in the annual actuarial valuations of the systems, all COLAs since 1996 have increased the KERS nonhazardous employer contribution rate by an estimated 4.42 percent of payroll (Kentucky. Reports).

Discussion

The COLA provision has been a discussed for several years as it relates to pension funding issues. In 2007, the Governor's Blue Ribbon Commission on Public Retirement Systems concluded that the retiree COLA was one of the few benefits not covered by the inviolable contract provisions of KRS 16.652, 61.692, and 78.852. The commission recommended that the General Assembly discontinue the COLA or provide a set COLA based on the Commonwealth's ability to prefund.

Ultimately, employer contribution rates for each of the systems are projected to increase in the coming years, and part of the projected increase can be attributed to future COLA adjustments. For example, KERS nonhazardous employer contribution rates are projected to increase from 16.98 percent to 40.33 percent of payroll by fiscal year 2019, with 28.12 percent of payroll going to fund pension benefits and the remainder funding retiree health. If no COLAs are provided in the future, the projected pension contribution would decrease by 2.53 percent to 25.59 percent of payroll (Thielen).

Proponents of discontinuing the COLA contend it represents one of the few benefits not covered by the inviolable contract provisions and doing so would help reduce future employer contribution rate increases, which are already placing financial pressures on state and local governments. They also point to the problems facing the KERS nonhazardous pension fund that is facing a negative cash flow and an eroding asset base, particularly in light of the recent stock market downturn.

Opponents of discontinuing the COLA contend that retirees depend on the annual adjustment to offset rising costs in health insurance and basic living needs. They also contend that the primary funding problems facing KERS and SPRS are due in large part to the reductions in the employer contribution rate to these systems in past years.

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Kentucky Waterways

Prepared by Brandon White

Should the General Assembly invest more in the infrastructure of Kentucky's navigable waterways?

Background

Kentucky, with 1,070 miles of commercially navigable waters and its centralized geographical location on the inland waterways system, is in prime position to take advantage of international and state waterway infrastructure projects currently in construction. The state also could see positive effects from a newly established federal maritime transportation program.

The U.S. Army Corps of Engineers is currently involved in constructing the Olmsted Locks and Dam project on the Ohio River in Kentucky waters near Olmsted, Illinois. The project is scheduled for completion in 2016. When completed, the Olmsted locks will replace locks 52 and 53 that are located between Cairo, Illinois, and Paducah. At that point, Olmsted will become the busiest spot on the national waterways system, with an estimated 25 percent of the nation's coal moving through the locks (Landry).

The U.S. Department of Transportation's Maritime Administration implemented the America's Marine Highway Program to move more cargo by water than by roadway. The program initially identified 18 marine corridors, 8 projects, and 6 initiatives that are eligible to receive federal assistance under the program. The M-70 corridor on this network is of particular interest to the Commonwealth because it includes a portion of the Ohio River.

Global barge traffic, including barge traffic in Kentucky, is expected to experience a major increase due to the expansion project currently in construction at the Panama Canal. The canal expansion consists of the construction of two new sets of locks—one on the Pacific and one on the Atlantic side of the canal. The locks will be wider and able to accommodate larger vessels that are becoming more prevalent. Currently, the canal is capable of handling vessels that can hold around 5,000 shipping containers. The new locks will be able to handle vessels that have the ability to haul up to 13,000 containers. The estimated completion date for the Panama Canal expansion project is 2014.

Discussion

In 2008, Hanson Professional Services released its findings from the Kentucky Riverport Improvement Project, a project commissioned by the state Transportation Cabinet. The intent of the project was to evaluate the current status of assistance to public riverports in Kentucky and to provide recommendations that would help improve utilization of the Commonwealth's waterways and help Kentucky compete within the water transportation industry. The findings recommended the creation of a full-time position within the cabinet to work exclusively on behalf of ports and on other water transportation needs. The findings also recommended the

creation of a financial assistance program to help public riverports with capital investments that would assist with port improvements and a marketing program that would provide grants for advertising and marketing research. The findings also recommended the creation of a Water Transportation Advisory Board.

In the 2010 Regular Session, the General Assembly took a step toward improving the Commonwealth's waterways infrastructure through the passage of House Bill 28. The Water Transportation Advisory Board has been established under the provisions of KRS 174.200, and its members have been appointed by the Governor. The board's task is to recommend action to enable the Commonwealth to make best use of its waterways and riverports for future economic growth. The board also will develop criteria and evaluate grant applications for both the riverport marketing assistance trust fund established in KRS 154.80-140 and the riverport financial assistance trust fund established in KRS 174.210. HB 28 did not include an appropriation to these funds, which were created in hopes of receiving appropriations in the future.

Kentucky is constitutionally restricted from spending on waterways any funds received from the excise tax on motor vehicle fuel; the funds may only be spent on highway- and bridge-related projects. Therefore, investments in Kentucky's waterway infrastructure will have to depend on funds from other sources. With current budgetary constraints, investment in the state's waterways infrastructure would be forced to compete with other projects for state funds.

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Fees for Special Motor Vehicle License Plates

Prepared by Dana Fugazzi

Should the General Assembly require county clerks to identify existence of voluntary fees for special license plates?

Background

Approximately 4.5 million license plate renewal notices are mailed each year by the state Department of Revenue. Of those, approximately 300,000 notices fall under the category "special plates." Special plates are nonstandard plates that promote certain groups, civic organizations, social organizations, and universities. Some special license plates require a mandatory extra fee to benefit various causes, and some are free of these fees (KRS 186.162). However, pursuant to KRS 186.050 and 186.164(12), farm vehicles and approximately 30 other special plates have a $10 voluntary contribution that the plate holder may opt out of paying. The majority of the 300,000 special plate renewal notices are for plates that have optional special fees. These notices do not indicate the voluntary nature of the contributions (Zawacki).

Discussion

Introduced during the 2010 Regular Session, House Bill 489 would have amended KRS 186.050 and 186.164 to require that voluntary donations to the agricultural program trust fund accompanying farm truck registration and for voluntary donations accompanying special license plates be listed separately on any notices sent to the vehicle owners by the Department of Vehicle Regulation and not be automatically added to the cost of registration. The bill did not pass.

The Commissioner of the Department of Vehicle Regulation stated that the registration renewal notice does not indicate that the $10 fee on these special plates is optional. Also, it does not break out the special fee from the total registration fee. In addition, the registration receipt provided by the county clerk does not provide a breakdown of the fees paid. Therefore, applicants are sometimes unaware that they are making the contributions and are not given the opportunity to opt out as is allowed by statute. The Commissioner stated that in order to separate mandatory fees from optional fees, the registration renewal notice and the registration receipt would have to be redesigned and reprogrammed at an estimated cost of $120,000. This $120,000 represents a fraction of the Department of Vehicle Regulation budget, which is approximately $37 million for the current biennium. The Commissioner stated that there probably would be a decrease in contributions after plate holders are aware that the contribution is optional (Zawacki).

Members of the Interim Joint Committee on Transportation expressed concern that citizens do not know the contributions are voluntary and that citizens should be informed and have the opportunity to opt out of the fee. It was suggested that county clerks be responsible for informing the public of the voluntary fees. It was noted that county clerks may not want the additional duty of informing citizens of the ability to opt out of the fee.

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Motor Vehicle Plate-to-Customer Transfer Process

Prepared by John Snyder

Should the General Assembly change the motor vehicle transfer process so that the vehicle plate does not remain with the vehicle?

Background

In 2009, there were more than 672,000 motor vehicle transfers in Kentucky. Currently, when ownership of a motor vehicle is transferred, the vehicle's license plate remains with the vehicle. Kentucky is one of 12 states to use this plate-to-vehicle (P2V) system. The remaining 38 states employ a plate-to-customer (P2C) system in which the vehicle plate remains with the original owner to be transferred onto another motor vehicle obtained by that individual (Zawacki).

Discussion

During the 2010 Regular Session, the General Assembly considered House Bill 470 that would have changed Kentucky's motor vehicle licensing system to a plate-to-customer system. The Commissioner of the Department of Vehicle Regulation discussed advantages of the P2C system:

- **Law Enforcement.** Information on violations or citations would be more easily tracked to the responsible party, not to the new owner of the vehicle. This often has been a problem with out-of-state violations, especially when automated enforcement is used.
- **Cost Avoidance.** The vendor chosen to supply programming for Kentucky's new vehicle information system uses the P2C format as its base. Having the vendor reprogram its system to a P2V system for Kentucky would cost the state an additional $125,000 at a minimum. The state would spend even more if it later switched to a P2C system.
- **Convenience.** Customers will no longer have to update personal records. The customer will simply need to inform the county clerk to transfer the plate (and the remaining registration) to the new vehicle (Zawacki).

Under the current P2V system, when a vehicle is sold with valid registration remaining on the plate, the buyer will sometimes not complete the transfer at the county clerk's office. Under a P2C system, there is an incentive to the seller to retain the plate to place on another vehicle. The change is expected to increase the timeliness of vehicle transfers (Zawacki).

Several county clerks expressed concern that HB 470 did not explicitly spell out the requirements for vehicle transfer, the guidelines for the use of temporary tags, and other procedural issues. The bill did not pass.

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Military Retirement Pay During a Divorce

Prepared by Tiffany Opii

Should the General Assembly revise statutes to clarify the division of military retirement pay during a divorce?

Background

Military divorce rates are rising nationally. In 2001, 2.6 percent of military marriages ended in divorce, compared to 3.6 percent in 2009 (Jelinek). For the population overall, the divorce rate has declined from 4 percent in 2001 to 3.4 percent in 2009 (United States). One of the major issues in military divorces is whether military retirement pay should be treated as marital property, which is divisible in the event of a divorce, and how the former spouse's award should be calculated. Most forms of retirement pay can be considered marital property in Kentucky, although teacher retirement pay is exempted under KRS 161.700. The specific issue of division of military retirement pay is not addressed statutorily.

Discussion

After federal and state courts came to differing decisions regarding how military retirement should be treated in a divorce, Congress settled the issue by permitting but not requiring states to treat disposable military retirement pay as marital property that is divisible during a divorce. However, the Defense Finance and Accounting Service, the agency that handles the payment of Department of Defense employees and retirees, will not garnish disposable military retirement pay for direct payment to the former spouse unless the court order is for less than 50 percent of the service member's disposable retirement pay, the marriage was for at least 10 years of the service member's career, and the court order lists the award as a percentage of the pay or as a fixed amount. Disposable military retirement pay refers to the gross monthly retirement pay minus deductions such as debt owed to the United States or court orders (10 U.S.C. App. § 1408).

KRS 403.190 defines "marital property" as "all property acquired by either spouse subsequent to the marriage," with a few exceptions such as property acquired by gift or property acquired after the decree of legal separation. This definition is broad enough to include disposable military retirement pay. However, authority is granted to the courts to divide marital property "in just proportions," taking into consideration issues such as acquisition of the property, value of the property, duration of the marriage, and the economic circumstances of each spouse (KRS 403.190(1)). Kentucky courts have ruled that military retirement pay is divisible as marital property if it was "accumulated entirely during the marriage" (*Jones v. Jones*). Because there are no statutes that specifically address the issue, the courts could rule that if a person married a service member and divorced a short time later, the spouse could be awarded a portion of the service member's retirement pay.

The General Assembly may choose to clarify whether military retirement pay is considered marital property and how the award to a former spouse should be calculated, especially in circumstances where the military person is not yet retired.

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Parental Rights of Service Members

Prepared by Tiffany Opii

Should the General Assembly expand the laws relating to parental rights of military service members?

Background

Child custody and visitation are issues that many single and divorced parents grapple with but that may be compounded for military personnel who are deployed or otherwise relocated during their service. Soldiers facing deployment must settle these issues before leaving, but they still may be vulnerable to losing their parental rights while deployed. In some instances, while service members are deployed, the other parent may sue for and win permanent custody, leaving the service member to try to regain custody upon return from deployment (Sexton 9).

Thirty-seven states, including Kentucky, have laws that provide some protection of the parental rights of service members (Kringer). Under KRS 403.340, modifications to a child custody order based on the active duty parent's deployment are temporary and revert to the previous custody order upon the deployed parent's return. The federal Servicemembers Civil Relief Act also aids in protecting the parental rights of service members by allowing deployed service members to request a stay of civil proceedings.

Discussion

The United States Department of Defense advises that to comprehensively address the issue, states should consider not allowing permanent changes to custodial orders during a parent's deployment, ensuring that temporary orders revert back when deployment ends, not allowing absences due to military service to be the sole reason for custodial order changes, allowing visitation rights to be transferred to family members, allowing electronic testimony when service members are deployed, and allowing expedited hearings. Additionally, the National Conference of Commissioners on Uniform State Laws through its Uniform Law Commission has created a drafting committee to prepare a uniform law to address the issue of parental rights for military personnel and their families.

House Bill 512, introduced during the 2010 Regular Session, would have allowed various forms of temporary physical exchange of custody, such as granting a noncustodial military parent the ability to transfer visitation rights to a family member during deployment. The bill also would have ensured that a temporary physical change of custody would not alter an existing child custody order. The bill did not pass.

The General Assembly may consider adopting the Department of Defense provisions not already addressed under current state laws. Proponents of expanding the laws relating to parental rights of military service members believe that while the best interest of the child is important, states sometimes fail to consider the "unique aspects of military service when making custody

determinations (United States 1).” However, opponents may think that child custody issues should not be subject to temporary orders or waiting until the deployed parent returns, especially when considering the best interest of the child and the plight of the nonmilitary parent.

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Military and Overseas Voting

Prepared by Erica Warren

Should the General Assembly adopt the Uniform Military and Overseas Voters Act?

Background

It is estimated that there are approximately 6 million voters that are either members of the Armed Forces deployed outside the United States or are civilians living and working overseas. These numbers are rough estimates because while it is easy to track military deployment numbers, there is no accurate way to determine how many nonmilitary United States citizens live abroad. In the 2008 general election, the United States Election Assistance Commission reported that states transmitted almost 1 million ballots to military and overseas voters, but that only 69 percent were returned, and only 94 percent of those that were returned were counted. The most common reasons ballots were not returned were that requested ballots were never received or were received after the submission deadline. Ballots that were returned but were not counted typically were received too late (2). For civilians living overseas, 22 percent of voters surveyed did not receive the official ballot, and 31 percent who had experience in voting overseas still encountered problems (Overseas 5). In Kentucky, more than 6,500 ballots were transmitted to military and overseas voters, and 90 percent were returned and counted (Johnson).

In 2009, the Pew Center on the States detailed how a myriad of state laws relating to when absentee ballots were issued, to reliance on mail delivery, and to the deadline for returning a completed ballot made it virtually impossible for military and overseas voters registered in many states to have their votes counted in federal elections. The Pew Center's study focused on deployed military voting only and found that many members of the Armed Forces were so frustrated by the complicated requirements to vote that they did not request a ballot. Kentucky's voting laws fared well in the Pew Center's analysis for providing a sufficient amount of time from when an absentee ballot was requested through return of the ballot to the county clerk (39).

The National Conference of Commissioners on Uniform State Laws through its Uniform Law Commission provides states with nonpartisan model legislation that helps provide consistency from state to state. In July 2010, the Uniform Law Commission approved the Uniform Military and Overseas Voters Act (UMOVA) as model legislation that states could adopt that would extend the voting rights to state and local elections and would provide uniformity in the absentee ballot process across the states.

Discussion

UMOVA has several key provisions for the General Assembly to consider enacting in order to streamline the absentee voting process for military and overseas voters. Kentucky law and administrative regulations already address some of these provisions, but others are not addressed. Still others present constitutional questions.

Two issues that the proposed uniform law suggest are the requirements that absentee ballots be sent out no later than 45 days before a regularly scheduled election and that there are no notarization or witness requirements for voter registration. KRS 117.085 already meets these requirements.

UMOVA's suggested language requires use of electronic technologies for transmitting and receiving registration materials, ballot applications, and unvoted absentee ballots, which Kentucky already contemplates through administrative regulation. UMOVA leaves it up to each state to determine whether or not to also allow receipt of the voted ballot by electronic transmission. To date, the General Assembly has not considered using any form of electronic transmission of completed ballots. Section 147 of the Kentucky Constitution requires that "all elections by the people shall be by secret official ballot." Allowing ballots to be returned by facsimile or electronic mail presents questions as to whether the ballot could remain secret until such time that the ballot is counted.

UMOVA proposes to include members of the National Guard on active duty in the definition of a "military voter." Kentucky statutes only reference members serving in the Armed Forces, so if the General Assembly chose to enact this language, it would be an extension of the federal protections to members of the National Guard. Another change from current federal law that UMOVA suggests is including all military voters whether or not they are absent from their home voting jurisdictions on an election day. This concept appears to run counter to the provisions of Section 147 of the Constitution, which requires that an individual be physically absent from the county or state of residence in order to vote by absentee ballot.

The proposed Act would extend voting provisions to include state and local elections for primary, general, special, and runoff elections. Kentucky currently allows a military or overseas voter to use an individual ballot that includes local and state elections if the voter applies for an absentee ballot through the county clerk rather than using the Federal Write-in Absentee Ballot, which Kentucky does not allow.

UMOVA would allow a military or overseas voter to apply for an absentee ballot up to 5 days before an election. KRS 117.085 requires all absentee ballot applications be submitted no fewer than 7 days before an election. If the General Assembly adopted the UMOVA language solely for military and overseas voters, there would be two different deadlines for absentee ballot applications.

UMOVA would allow absentee ballots to be received and counted as late the deadline for completing the local canvas, which in Kentucky is 2 weeks after Election Day. KRS 117.086 only allows absentee votes to be counted that are physically received by the county clerk by 6 p.m. local time on Election Day. If the General Assembly adopted UMOVA, vote totals would be delayed until the end of the canvassing period.

UMOVA also proposes to extend voting privileges to United States citizens born abroad who have never lived in the U.S. but whose parents were once residents. The reasoning given by the Uniform Law Commissioners in explicitly including these citizens in UMOVA is that they are subject to federal taxation, selective service registration, and other federal obligations. Eighteen

states currently allow these nondomiciled citizens to vote. Of these 18 states, 5 permit voting in federal offices only. Kentucky law is silent on this issue.

UMOVA would permit a voter to provide an e-mail address to be used as a standing request to receive absentee ballots automatically for all elections through the end of the next calendar year. This presumption of being absent on the day of the election may be in conflict with Section 147 of the Constitution.

Since the Uniform Law Commission proposed UMOVA in July 2010, overseas civilian organizations have indicated broad support for all of the provisions in the model act because they feel UMOVA will reenfranchise many overseas citizens who have not been able to vote. No direct opposition has been voiced by any single group.

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Hazardous Material Response Program

Prepared by Mustapha Jammeh

Should the General Assembly create a cost-recovery program for weapons of mass destruction/hazardous materials response teams?

Background

Kentucky currently has a loose confederation of 14 weapons of mass destruction/hazardous material regional response teams spread out geographically across the state. Each team supports a specifically designated emergency management area and can be activated locally, regionally, or statewide in the event of a spillage or explosion of chemical or hazardous material of any nature. Teams are made up of volunteers from within the respective emergency management areas and can be activated by the director of emergency management or by local and regional emergency management officials, depending on the level of activation needed. For administrative purposes, teams are under the supervision of the respective local emergency management agency. The statewide network of response teams was created through federal grant funding in 2002, and since then, there has been no available source of funding for the teams either from the federal government or from the state. The initial grant was limited to start-up funds to purchase equipment and to train response teams across the state (Commonwealth. Div. *Kentucky*). The Kentucky Division of Emergency Management provides training and seminars for response personnel (Bobo).

In 2009, Kentucky was ranked 9th in the nation for hazardous material incidents, with 424 reported incidents. More than half of the total incidents occurred at places other than highways and rail tracks, and 187 occurred on the state's highways. The total aggregate cost of the clean up was reported to be approximately $484,000 (Commonwealth. Div. *Kentucky*).

As required by KRS 39C.110(3), the response teams are limited to only initial emergency control or stabilization when there is a clear risk of harm to people. Their response is limited to

- mass decontamination of people during an incident.
- identifying specific hazardous materials involved in an incident and determining and implementing appropriate actions to control or stabilize the situation.
- monitoring, tracking, and making sure that the effects of any leak or spill of hazardous materials are minimized.
- evacuating trapped victims to safe areas where they can receive medical treatment.
- consulting with the National Incident Management System on issues relating to weapons of mass destruction/hazardous material operations and recommending appropriate protective measures.

Even though federal funds are still available, they are restricted to training and preparedness aspects of hazardous material mitigation. In 2010, the Division of Emergency Management received a $270,000 Hazardous Materials Emergency Planning grant for continuing training for

the response teams. The grant was funded through the Department of Transportation and Pipeline Hazardous Materials Safety Administration (Commonwealth. Div. Governor's).

Discussion

The response teams were funded primarily by the federal government. As those funds continue to decline, the response teams must find other funding sources. The only response teams operating fully are the Northern Kentucky Regional Weapons of Mass Destruction/Hazardous Material Unit, Bluegrass Emergency Response Team in Winchester, Metro Louisville Hazardous Materials Team, and Deacon and Rapid Response Team in Bowling Green. Areas of the state with higher population concentrations are more likely to be able to financially support a full response team. Almost all the response teams in rural areas are close to being inoperable because of lack of funds (Bobo). Each team requires a recommended minimum of 52 technician-qualified personnel and supporting staff and approximately $1.1 million in equipment to meet the basic response capabilities (Commonwealth. Div. *Kentucky*).

One of the main challenges facing these response teams is recovering the clean-up costs from the parties responsible for the incidents. Most agencies and businesses do not have the capability to respond to or clean up a spill or chemical release, so the responsibility falls on the response teams. During the 2010 Regular Session, House Bill 595 would have created a cost-recovery program to assist response teams with reimbursement for clean-up work completed. The bill did not pass.

The argument for creating a cost-recovery program is that current law relating to reimbursement for operations and clean-up work lacks enforcement, particularly at the local level. There is no schedule to determine the actual cost of a hazardous material mitigation operation. The result is that localities have resorted to enacting ordinances that attempt to give response teams some form of legal recourse for compensation and reimbursement. Potential opponents might question whether the state should create another program for which administration and funding would be needed.

Works Cited

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