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FISCAL IMPACT REPORT

ORIGINAL DATE 1/31/08
 SPONSOR Stapleton LAST UPDATED 2/5/08 HB 607/aHLC
 SHORT TITLE Firefighter Disease Causation Rebuttal SB _____
 ANALYST Lucero

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY08	FY09	FY10	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	\$0.1	\$0.1	\$0.1	\$0.1	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to Appropriation in the General Appropriation Act

SOURCES OF INFORMATION

LFC Files

Responses Received From

Energy, Minerals and Natural Resources Department (EMNRD)
 Public Regulation Commission (PRC)
 Department of Workforce Solutions (DWS)
 Workers' Compensation Administration (WCA)
 New Mexico Municipal League
 Public Employees Retirement Association (PERA)

SUMMARY

Synopsis of House Labor Committee Amendment

House Labor Committee (HLC) amendment to HB607:

1. On page 1, line 18, after "matters," inserts "and".
2. On page 1, lines 18 and 19, strikes "and the public employees retirement association".
3. On page 3, lines 4 and 5, strikes "secretary of workforce solutions" and insert in lieu thereof "appropriate agency".
4. On page 3, line 10, strikes "full- or part-time" and insert in lieu thereof "career paid".

HLC amendment clears up the applicability of the presumption to exclude volunteer and part-time fire fighters by defining a fire fighter as a "career paid" member of a fire department. The amendment also removes PERA from the effect of the presumption.

It is unclear if the sponsor of the bill, by defining a fire fighter as a "career paid" **member** of a fire department, seeks to include management and office staff in the presumption.

The bill as amended retains the technical issue of retroactivity. Generally, case law has stated that laws should not be retroactively applied.

The amendment strikes the Workforce Solutions Department as the department responsible for determining whether a disease not specifically listed in the Act is related to occupational hazards of a fire fighter and places that responsibility with the “appropriate agency”. It is unclear who will determine which agency is most appropriate in making the determination. Making a decision as to whether a presumption of causation exists requires appropriate credentials and training.

The Workers’ Compensation Administration department notes that the Advisory Council on Workers’ Compensation and Occupational Disease has not approved this bill.

Synopsis of Original Bill

House Bill 607 creates a rebuttal presumption of the causation of disease, disability or death for certain purposes. The bill states if a firefighter is diagnosed with the following diseases, the cause is presumed to be proximately caused by the firefighter’s employment as a firefighter. The presumption shall not apply to a firefighter who was diagnosed with the disease prior to employment as a firefighter. Disability or death caused by personal injury sustained while in the performance of the firefighter’s duty or caused by the following diseases will also be presumed to be proximately caused by the firefighter’s employment, unless the disease was diagnosed prior to employment. The diseases are:

1. heart disease or cardiovascular events;
2. respiratory disease;
3. brain cancer;
4. cancer of the blood system or the lymphatic system
5. leukemia;
6. lymphoma, except Hodgkin’s disease;
7. multiple myeloma;
8. bladder cancer;
9. kidney cancer;
10. prostate cancer;
11. testicular cancer;
12. cancer of the digestive system;
13. colon cancer;
14. liver cancer;
15. skin cancer;
16. breast cancer;
17. lung cancer;
18. tuberculosis;
19. hepatitis A, B, or C;
20. human immunodeficiency virus;
21. diphtheria;
22. hemorrhagic fever;
23. meningococcal disease;
24. rabies; and
25. any uncommon infectious disease the contraction of which is determined by the Secretary of Workforce Solutions to be related to occupational hazards of the firefighter.

The presumption may be rebutted by a preponderance of the evidence.

The definition of a firefighter is a full- or part-time member of a fire department that is part of or administered by the state or any political subdivision of the state and any red-carded firefighter trained in wildland firefighting skills and hired by the State of New Mexico.

This would apply to claims made on or after July 1, 2008, even if the disability or death occurred prior to July 1, 2008.

FISCAL IMPLICATIONS

This bill would have fiscal implications to the Energy, Minerals and Natural Resources Department (EMNRD) Forestry Division if workers compensation rates increase as a result of associated increased claims. The bill would apply to a death or a disability that occurred prior to July 1, 2008, but does not specify how far in past, the number of potential claims can not be determined.

Public Employees Retirement Association (PERA) will incur operating costs related to staff, Board and Disability Review Committee member training and redesign and reprinting of educational and informative material and forms relating to the disability retirement process and duty death benefits. In addition, PERA's actuary will need to be involved to project the costs associated with this change at a cost to be determined.

The Public Regulation Commission (PRC) notes that the fiscal impact is undeterminable at this time based on the following:

- 1) If the State Fire Marshall Office (SFMO), State Fire Fighting Training Academy (SFFTA), fire marshal, deputy fire marshal, inspectors and trainers qualify for the benefit as related in the bill, then
- 2) The Risk Management Division of the General Services Department would need, at a minimum, to perform an actuarial analysis/study of the exposure by SFMO and SFFTA staff, and then
- 3) If the study determines that qualified SFMO and SFFTA staff do have exposure, then both the workers' compensation and employee liability premiums may increase to the agency if previous studies did not take the exposure factor into previous studies and assessments. Even actuarial studies may not be adequate to determine exposures for various agencies or branches of government. The magnitude of such increases cannot be estimated at this time.

The New Mexico Municipal League notes that HB607 would provide unprecedented special workers' compensation benefits to firefighters in the State of New Mexico by establishing a presumption that certain diseases are causally related to their service as a firefighter and that the presumption can only be rebutted by the employer by a "preponderance of the evidence". This presumption would change the traditional worker's compensation system in New Mexico where it has always provided for the worker to have the burden of proof that the illness or injury is causally related to his employment.

Predictability of the costs associated with the Workers' Compensation System would be placed in serious jeopardy because of an insurers or self-insurers inability to predict the long term costs of the exposure to the presumption. It is a likely outcome of adoption of this type of

presumption that the cost of Workers' Compensation Coverage for firefighters will increase and possibly dramatically to account for the unknown future claims that will be filed long after employment is terminated. This bill would be a potentially huge unfunded mandate on the state and its political subdivisions. Additionally, this bill would create liability for diseases that will occur in firefighters that were employed prior to the bills passage. This type of presumption and coverage was not considered in determining the rate to be charged to employers by insurers or in the amount of funds that should be set aside to account for future claims by insurers and self-insurers alike.

Finally, defining a firefighter as a full-time or part-time member of a fire department administered by the state or a political subdivision of the state could very well bring volunteer firefighters under the definition. Current law does not cover volunteers for Worker's Compensation purposes and neither the state or political subdivisions currently pay premium for or otherwise provide for coverage under the Act.

The Workers' Compensation Administration (WCA) adds that the bill eliminates the burden on the firefighter or the firefighter's estate to prove that certain illnesses were work-related. The bill further eliminates a significant portion of litigation that would normally be dedicated to proving causation, thereby reducing the expense of litigation, including attorney fees, for the firefighter and the employer.

SIGNIFICANT ISSUES

Presumption of causation means that a person with a disease could be compensated on the pure assumption that the disease was caused by work place conditions without evidence of direct exposure.

PERA provides the following:

1. As drafted, House Bill 607 would violate Article XX, Section 22 of the New Mexico Constitution. That section states: "The legislature shall not enact any law that increases the benefits paid by the system in any manner or changes the funding formula for a retirement plan unless adequate funding is provided." House Bill 607 will create a cost to the Public Employees Retirement Trust Fund by increasing the incidence of duty disability retirees receiving an enhanced disability pension and increasing the number of pre-retirement death survivor pensions payable and the amount of those survivor pensions without making any proposal for funding those enhanced benefits. In many cases, the enhanced benefits would be payable for the life of the retiree or beneficiary. Presently under the provisions of the Public Employees Retirement Act, the standard for duty-related disability pension benefits and duty death survivor pension benefits requires the applicant to establish that the death or the disability was "the natural and proximate result of causes arising solely and exclusively out of and in the course of the member's performance of duty with an affiliated public employer." Using this standard, it is rare for an applicant to establish that diseases such as heart or cardiovascular disease or skin cancer or HIV were solely and exclusively caused by the performance of duty. In addition, the legislature's use of the words "solely and exclusively" effectively rules out duty-related benefits where performance of duty may have aggravated a pre-existing condition. Duty-related disability and death benefits create a greater cost to the Public Employees Retirement Trust Fund payable as a pension, frequently for the life of the retiree or the beneficiary. House Bill 607 would make more firefighters eligible for enhanced duty-related disability pension

benefits and would make more family members, dependents and designated survivor beneficiaries eligible for survivor pensions and increase the amount of those survivor pensions. Current PERA contribution rates are actuarially determined to pay the costs associated with the duty disability and death benefits expected under the current statutory standard. However, the costs associated with the expected increase in the number of duty-related benefits and the increased amount of those benefits has not been funded.

2. As drafted, House Bill 607 conflicts with the statutory standards and the detailed disability retirement framework present in NMSA 1978, Section 10-11-10.1 and the survivor pension provisions of NMSA 1978, Section 10-11-14.5. NMSA 1978, Section 10-11-10.1 contains a detailed statutory framework for the award of PERA disability retirement benefits. Among many other things, the Disability Review Committee of the Public Employees Retirement Board determines whether the disability is “the natural and proximate result of causes arising solely and exclusively out of and in the course of the member's performance of duty with an affiliated public employer.” By contrast, House Bill 607 would, without any amendment to the Public Employees Retirement Act, require the Public Employees Retirement Association to engage in a rebuttable presumption that the listed diseases, if diagnosed in a firefighter, are proximately caused by the firefighter’s employment and that the disability of the firefighter caused by the listed diseases is “presumed to result from personal injury sustained while in the performance of the firefighter’s duty.” These standards are in conflict.
3. In addition to disability retirements, the concept that death can be caused by a PERA member’s employment is present in the Public Employees Retirement Act. NMSA 1978, Section 10-11-14.5 of the Public Employees Retirement Act provides that survivor pensions can be payable to “certain persons related to or designated by a member who dies before normal or disability retirement.” If a death is “the natural and proximate result of causes arising solely and exclusively out of and in the course of the member's performance of duty with an affiliated public employer...” Here again House Bill 607 conflicts with the present standard in the Public Employees Retirement Act.
4. House Bill 607 conflicts with the Public Employees Retirement Act and the Volunteer Firefighters Act to the extent that it may be construed to suggest that volunteer firefighters are eligible for disability benefits or their survivors are eligible for survivor benefits from the Public Employees Retirement Association. House Bill 607 defines a “firefighter” as “a full or part-time member of a fire department that is part of or administered by the state or any political subdivision of the state and any red-carded firefighter trained in wildland firefighting skills hired by the state of New Mexico.” NMSA 1978, Section 10-11A-1 through 10-11A-7, the Volunteer Firefighters Retirement Act provides a set monthly retirement benefit to volunteer firefighter members who have reached the age of fifty-five with twenty-five years of service credit and defines “member” as “any volunteer non-salaried firefighter who is listed as an active member on the rolls of the fire department and whose first year of service credit was accumulated during or after the year he attained the age of sixteen.” It is not clear whether House Bill 607 intends to include volunteer firefighters. However, neither the Public Employees Retirement Act nor the Volunteer Firefighters Retirement Act provides disability or death benefits to volunteer firefighters or to beneficiaries and PERA has no need to determine whether any disease suffered by a volunteer firefighter was cause by that firefighter’s service.

EMNRD has approximately 46 full time, red card qualified employees. During a severe fire season, the EMNRD may also employ approximately 200 additional emergency firefighters, who would also be covered under the provisions of this bill. The bill would apply to a death or a disability that occurred prior to July 1, 2008, but does not specify how far in past, so the number of potential claims can not be determined. A database of eligible firefighters would have to be developed and maintained throughout the life of a firefighter and it is not clear which entity would be responsible for this. If a red carded fire fighter worked for the EMNRD for a period of one week, that fighter would be covered under the provisions of this bill for the remainder of the firefighter's life.

The PRC states that the cost of every firefighter who develops the listed illnesses on local government, without a requirement of proof that firefighting activities caused the illness. Instead, the governmental entity would bear the burden of showing that the firefighting activities did NOT cause the illness. For example, it covers HIV; therefore, even if the firefighter contracted the virus through unsafe sex practices, the firefighter's employer would have to prove that it was contracted through unsafe sex practices and not through emergency medical activities. This could be an unreasonable burden for local governments, particularly small towns and villages. In addition, it is unclear from the terms of the bill whether any state employees would be covered under this bill, such as the SFMO and the SFFTA, State Forestry, or other state employees who are employed fighting fires. The term "firefighter" is not defined.

The Department of Workforce Solutions (DWS) reports that the bill identifies the Secretary of the Department of Workforce Solutions as the entity to determine any uncommon infections disease related to occupational hazards of the firefighter not specifically listed in the bill. The Secretary of the Department of Workforce Solutions has no jurisdiction or relationship on this subject. DWS is charged with the administration of unemployment insurance, job referrals, job placement, administration of training for individuals under the Workforce Investment Act, enforcement of the minimum wage law, enforcing the Public Works Act, Wage and Hour Act and administration of the Human Rights Act. DWS does not currently possess the expertise to carryout the intent of the bill.

The New Mexico Municipal League notes that this legislation could create a situation where, anyone that was employed for any length of time as a firefighter, even as little as one day and having never fought a fire, could make a claim for benefits 20, 30, 40 or 50 years after the time of employment with the employer having the burden of proof that the employment did not cause the disease.

PERFORMANCE IMPLICATIONS

While it may slightly reduce the caseload of the WCA, it is not expected to have significant performance implications for the WCA.

ADMINISTRATIVE IMPLICATIONS

This legislation will require employers to maintain employment records for a significantly longer period of time than currently required to verify employment many years after an employee has terminated his employment with the State or a political subdivision.

This legislation will also increase the cost of administration of claims for insurers and self-insurers by requiring that the employer prove by a preponderance of the evidence that the disease was not related to a person's employment as a firefighter. The employer/insurer would be required to gather medical and other evidence about the employee claiming that the disease is related and the employee's family to either prove or disprove the causal relationship.

PERA's administrative system for administering disability benefits and duty-related death benefits will have to be modified to implement this change.

TECHNICAL ISSUES

The term "firefighter" is not defined.

Conflicts with Article XX, Section 22 of the New Mexico Constitution and with NMSA 1978, Section 10-11-10.1 and Section 10-11-14.5 of the Public Employees Retirement Act. Possible conflict with NMSA 1978, Section 10-11A-1 through 10-11A-7, the Volunteer Firefighters Retirement Act.

NMSA 1978, §52-3-32 places the burden for proving an occupational disease on the worker, who must establish that a causal connection as a medical probability by medical expert testimony exists. This bill would specifically exclude firefighters from this requirement.

The bill would apply to claims made on or after July 1, 2008, even if the exposure causing the disease, disability or death occurred prior to July 1, 2008. Generally, case law has stated that laws should not be retroactively applied. It would also be difficult for insurance companies to set reserves on exposures that have already occurred for which they may now be liable where causation is now presumed. Typically, for the purpose of determining the date of injury for an occupational disease, the date of injury shall be taken to be the last date of injurious exposure to the hazards of such disease or the date on which the employee first knew or reasonably should have known of the condition. Applying the Act retroactively without documentation to support the date and dose of exposure could create a significant cost burden to insurers, employers, and retirement funds.

OTHER SUBSTANTIVE ISSUES

EMNRD states that many of the diseases listed in this bill occur frequently in the non-firefighting population and EMNRD does not know if scientific evidence supports the link to firefighting activities.

The New Mexico Municipal League notes that there is no conclusive empirical evidence that firefighters are more prone to develop the types of diseases enumerated in this bill than the general public and the US Department of Homeland Security's US Fire Administration notes "there is, as yet, no mechanism for identifying on-duty fatalities that are due to illnesses that develop over a long period of time".

WCA reports that 40 other states that have enacted similar legislation. The United States House of Representatives and the Senate have both introduced separate bills.

ALTERNATIVES

The Act could specify certain types of preponderance evidence such as, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or non-employment activities as rebuttal.

The Act could limit the time to file a claim. Other states extend benefits to employees following termination for a period of three calendar months for each year of requisite service, but not to extend more than sixty months following the last date of employment.

The Act could be amended to require a pre-employment physical exam to screen for the diseases listed in the Act to identify pre-existing conditions.

The Act could be amended to require employees to give notice of exposure to hazardous materials.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Eligible firefighters will continue to receive disability benefits and their survivors will continue to receive death benefits in accordance with the statutory standards outlined in the Public Employees Retirement Act. Firefighters who become disabled from the diseases listed in House Bill 607 may receive non-duty disability benefits if they have worked for a PERA-affiliated employer for at least 5 years before applying for disability benefits.

AMENDMENTS

The bill should be amended and strike on page 3, line 4 “secretary of” and strike on page 3, line 5, “workforce solutions”.

DL/bb