

# Issues Confronting the 2013 Kentucky General Assembly



Informational Bulletin No. 239

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 2013 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  
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Frankfort, Kentucky  
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## **Agricultural Fencing Laws**

Prepared by Kelly Ludwig

### **Should the General Assembly update agricultural fencing laws to address property owners' responsibilities for maintaining fences between adjoining properties?**

#### **Background**

Kentucky's fence laws have not been updated since they were adopted in 1942. As agricultural land has been developed, the relationships between landowners have changed. KRS 256.010 defines a "lawful" agricultural fence as one through which cattle cannot creep. Responsibility for the construction and maintenance of agricultural fences is equally shared by adjoining landowners, regardless of whether they own livestock.

Fence laws were written to smooth disputes in a predominately agricultural society. Today, land use has changed. In Fayette County, for example, the Fayette Alliance reported that 19,000 agricultural acres have been converted to nonagricultural use since 1997. As a result, the number of nonagricultural property owners who share a fence line with an agricultural property has increased, and so have the number of disagreements over fence construction and maintenance costs. Many new landowners claim they are unaware of their responsibility to share the cost. Others complain they should not be held liable for costs because they do not own livestock or cultivate crops. In Pennsylvania, the Superior Court ruled that existing law was unconstitutional and the obligation to share the costs would not apply to an adjoining property owner who does not keep livestock on the property. In 2001, Missouri updated its fencing laws to reflect similar legislation to that of Pennsylvania. In Kentucky's 2010 Regular Session, legislation was introduced requiring licensed real estate agents to provide a prospective buyer a copy of the Kentucky fence law when the transaction included real estate adjoining agricultural land. The bill did not pass.

#### **Discussion**

In Ohio, Iowa, and Minnesota, adjoining landowners share the cost of construction and maintenance because the courts recognize that all landowners receive a benefit from having the fence.

It has been estimated that the cost of constructing a three-strand barbed wire fence in an agricultural environment runs about \$5-\$10 per foot for clearing and construction. Fencing for a 40-acre parcel of land is estimated between \$6,600 and \$13,200 per side to complete an enclosure, meaning a four-sided fence would cost between \$26,400 and \$52,800 (Molloy).

Proponents and organizations such as Kentucky Farm Bureau see Kentucky's law as a benefit to all landowners and believe the fences add value to the landowners' property.

Opponents of the current fencing law argue that nonagricultural landowners should not be responsible for construction and maintenance cost to fence in a neighbor's livestock and that such fencing cost should be considered the livestock owner's cost of doing business. They argue that it is the real estate agent's responsibility to include fencing costs and expectations in the property disclosure so that those unfamiliar with Kentucky's agricultural fencing laws are aware of their responsibilities prior to purchasing a residence adjoining an agricultural property. Opponents contend that the law should be updated to reflect changes to Kentucky's land use.

### **Works Cited**

Molloy, James L., and Linda A. Reid. "The Constitutionality of Partition Fence Statutes in the Midwest." Aug. 2004. <[http://www.nationalaglawcenter.org/assets/articles/molloy&reid\\_fence.pdf](http://www.nationalaglawcenter.org/assets/articles/molloy&reid_fence.pdf)> (accessed Aug. 20, 2012).

## **Industrial Hemp**

Prepared by Lowell Atchley

### **Should the General Assembly authorize a licensing system for the regulation of industrial hemp?**

#### **Background**

The Controlled Substances Act of 1970 does not make growing hemp illegal; rather, it places strict controls on the production of hemp, making it illegal to grow in the United States without a permit. The Drug Enforcement Administration (DEA) determines whether any industrial hemp production authorized under a state statute will be permitted. The DEA has not issued a permit for industrial hemp production in Kentucky. Furthermore, reports indicate the DEA has not granted any permits in recent years to grow hemp in the United States, even for research. The only permit was issued in Hawaii in 1999, but it has expired.

The possibility of hemp being cultivated as an alternative crop received increased discussion in Kentucky in the mid- to late 1990s. At the time, the decline of tobacco in the burley-growing states brought attention to hemp as a possible replacement crop. In 2001, the General Assembly created the Kentucky Industrial Hemp Commission. The legislation creating the commission, House Bill 100, also directed research and development of markets for Kentucky industrial hemp and hemp products. The commission has not been active for several years and did not issue a report of its activities. As an outgrowth of the 2001 legislation, the University of Kentucky applied to the Council on Postsecondary Education for permission to experiment with industrial hemp, but the proposed endeavor never came to fruition.

Three industrial hemp bills were introduced in the 2012 Kentucky General Assembly: Senate Bill 41, HB 286, and HB 272. Each bill would have created a licensing system within the Department of Agriculture, allowing farmers to grow hemp under controlled and monitored conditions. A fiscal analysis of one bill found minimal impact on sheriffs' departments, which would have been required to conduct background checks on potential growers and monitor fields. The analysis did not look at the impact on the Department of Agriculture, although it is presumed the establishment of a licensing system in the department would have come with some administrative costs. The three bills, which were similar, stipulated that in the case of conflicts with federal law regarding industrial hemp, federal provisions would prevail. The bills did not pass.

#### **Discussion**

Proponents of industrial hemp cultivation argue that creating a licensing system would put the state a step ahead of the process, should the federal law change or should the DEA begin issuing permits. They have argued hemp production would help with agriculture diversification or transition from tobacco and that hemp would have potential as a cash crop that can be used to

make many value-added products, such as fabrics and textiles, cordage, paper, carpeting, home furnishings, construction and insulation materials, auto parts, foods and beverages, body-care products and nutritional supplements. Industrial hemp could be used as a biofuels feedstock and would have environmental advantages in terms of forest conservation, decreased use of pesticides and chemicals, and fuel savings because of less cultivation. Hemp production also could have positive economic impact through job creation.

Opponents argue that the market potential for hemp may not materialize, should domestic production become legal. Any start-up industrial hemp production in the US would face immediate competition from production taking place in other countries. Law enforcement personnel have argued that hemp and marijuana look similar and are difficult to distinguish in field, and that legalization would give the perception that marijuana use is acceptable, and perhaps help pave the way toward legalization of marijuana.

## **Federal Conformity**

Prepared by Jennifer C. Hays

### **Should the General Assembly update the Internal Revenue Code reference date relating to the state income tax?**

#### **Background**

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

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

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

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

For federal purposes, a taxpayer must account for all income. Deductions from total income are allowed based on that income. After reporting all income and deducting allowable expenses, the federal income tax return computes "adjusted gross income." The federal adjusted gross income is the starting point for Kentucky income tax calculations. The taxpayer then must calculate the differences created because Kentucky still uses the federal code in place in 2006.

#### **Discussion**

Between December 31, 2006, and December 31, 2011, there were 53 federal changes to the computation of taxable income. The majority of the federal provisions were aimed at fostering

economic recovery or providing tax relief. Many of the recovery and relief provisions resulting in reduced federal tax receipts are currently set to expire at the end of FY 2013. Some of the enacted federal provisions close loopholes and raise federal revenues in future years to offset the negative fiscal impact of the recovery and relief items in current years. Therefore, in future fiscal years, updating the Internal Revenue Code reference date may actually increase state revenues.

However, if Congress extends the expiration dates and if Kentucky updated its reference code date, Kentucky would not see an increase to its income tax revenues but would see drastic decreases to its income tax revenues instead.

Since the 2007 Regular Session, there have been three bills introduced to update the Internal Revenue Code reference date. The bills were not enacted, perhaps due in part to their estimated fiscal impacts. For example, the fiscal impact related to House Bill 447 from the 2011 Regular Session was estimated to create decreases in Kentucky revenues of \$190 million for FY 2012 and \$95 million for FY 2013. An increase to Kentucky revenues of \$57 million for FY 2014 was also estimated. Increases or decreases to Kentucky's revenues occur as the various federal enactments are implemented and expire for federal purposes.

In a September 2012 report, consultants hired by the Governor's Blue Ribbon Commission on Tax Reform listed conforming Kentucky's income tax code to the federal Internal Revenue Code on a specific date for both individuals and businesses as one option for reform. The consultants acknowledged that the precise impact of this option depends on the federal code at the date of conformity. Based on the current Internal Revenue Code, the consultants estimated the revenue impact of conforming to be a negative \$25 million, with this amount decreasing over time.

Proponents of updating the Internal Revenue Code date argue that updating the code reference date will decrease how difficult it is for taxpayers to complete their tax returns. Opponents argue that any proposal to update the Internal Revenue Code reference will impact Kentucky's revenues by imposing either a tax decrease or a tax increase, depending on when the change occurs.

## **Property Tax on Commercial Watercraft**

Prepared by Eric Kennedy

### **Should the General Assembly amend the formula used to value commercial watercraft, such as towboats and barges, for state and local property taxes?**

#### **Background**

Watercraft operated for commercial purposes, such as towboats and barges, are subject to property tax at the state and local level. Because watercraft routinely move into and out of Kentucky and through many local taxing districts, their value must be apportioned among all the taxing districts through which they pass. This prevents a taxing district from taxing more than its reasonable and fair share of a watercraft's value. Some owners of watercraft have alleged that the current apportionment process, which the General Assembly established in 2008, is unconstitutional because, when applied to them, it taxes more than Kentucky's fair share of the watercraft's value and does not allow for any alternative process to be used.

#### **Discussion**

Prior to 2008, under statute and administrative regulation, the Department of Revenue apportioned a watercraft's value according to the actual mileage it operated inside and outside Kentucky. The department was also allowed by statute to consider any other reasonable evidence of value in addition to miles traveled, to arrive at an apportionment that accurately represented the watercraft's activity in the state.

Beginning in 2008, the apportionment method was revised by statute. The new calculation, set out in KRS 136.1802, divides the length of a watercraft's "route" operated inside the state by the length of all its routes nationwide to determine the proportion of the watercraft owner's business in Kentucky. However, the statute does not define the term "route," and the change in process from measuring actual mileage to measuring the route has created some confusion and disagreement among the watercraft business community.

At the time, this change was estimated to reduce both state and total local tax revenues by approximately \$900,000 each on an annual basis. The changes were also projected to reduce taxpayer compliance requirements. As part of these amendments, the statute no longer provides for an alternative methodology if this calculation does not accurately represent the watercraft's activity in Kentucky.

Some taxpayers have protested their assessed value under the 2008 calculation. They argue that it does not fairly represent the extent of their activity in Kentucky and therefore violates the commerce clause of the United States Constitution. Under KRS 136.1804, during the time a protest is pending, taxpayers are only required to pay tax on the amount of assessed value they believe is fair. As a result, state and local tax revenues have decreased in recent years because some watercraft companies have remitted an amount less than the amount assessed by the

department. In some cases, the decrease has caused actual local collections to fall below estimates relied on by local taxing district officials.

To address this issue, the Department of Revenue promulgated an administrative regulation that would have allowed the department to use any other method, apart from the statutory formula, that would fairly represent an equitable apportionment of a watercraft owner's activity in Kentucky, either at the request of the owner or at the discretion of the department. In December 2011, the Administrative Regulation Review Subcommittee found the administrative regulation deficient as exceeding statutory authority because the statute mandates the apportionment calculation and does not authorize an alternative. Legislation introduced during the 2012 Regular Session would have given the department the same powers as provided in the proposed regulation, but the bill was not enacted.

Proponents of allowing the Department of Revenue to use an alternative apportionment method, based on factors other than the route traveled, argue that the current calculation violates the United States Constitution. Until the issue is resolved either in the courts or through legislation, taxpayers may continue to protest the department's assessment and pay tax on only the amount of value on which they agree. This negatively affects the revenues of the state and many local tax districts. If the General Assembly allowed an alternative, it might help to resolve the issue and prevent a court challenge.

Opponents to an alternative method argue that the current statute is fair and reasonable and would likely be upheld by the courts if challenged. In addition, allowing alternative methods for different taxpayers could become complicated and lead to unpredictable assessments. It could also possibly reduce tax revenues at a time when state and local governments are experiencing budget shortfalls.

## **Property Tax on Distilled Spirits**

Prepared by Pam Thomas

### **Should the General Assembly provide tax relief to the distilled spirits industry relating to the state and local property tax on inventory?**

#### **Background**

Over the past few years, there has been much discussion about the tangible personal property tax imposed on distilled spirits inventory. Distilled spirits, especially bourbon, must sit in barrels for many years before the alcohol can be bottled and sold, which results in distillers having a large amount of inventory sitting in warehouses subject to the tangible personal property tax each year. At the state level, these distilled spirits inventories are subject to a reduced tax rate of 5 cents per \$100 of assessed value. At the local level, the rate varies among tax jurisdictions.

#### **Discussion**

The primary beneficiaries of the tangible personal property tax on distilled spirits aging in barrels are local governments and school districts, which together account for the majority of the taxes imposed.

Proponents of providing property tax relief for distillers note the special nature of the distilled spirits industry and that the distillation process requires a large amount of inventory to be maintained on a continuing basis, which is not the case for most manufacturers or businesses. Thus, when compared to other businesses, distillers pay a disproportionately high tangible property tax on inventory. Proponents also note that Kentucky's bourbon industry produces 95 percent of the world's supply and that no other state imposes an inventory tax on distillers. For these reasons, proponents advocate either an exemption from, or significant rate reduction of, the inventory tax to sustain and support the industry.

Opponents of providing property tax relief for distillers note the potential impact an exemption or substantial rate reduction would have on local governments, school districts, and the state. Distilled spirits warehouses are located in nine counties and 10 school districts. In some of these jurisdictions, the inventory in the warehouses makes up a substantial portion of the tangible personal property tax base. If distilled spirits inventories were exempted, or the maximum rate that could be levied by local governments was reduced, local jurisdictions would have the option to increase the tax rate applied on all other taxable property to offset the loss of revenues without being subject to recall on the increased rate. However, in some jurisdictions with particularly high volumes of distilled spirits inventories, the necessary rate increase could be very large, resulting in a large tax increase on the remaining taxable property.

As to the possible fiscal impact on state revenues, in fiscal year, 2011 the property tax on distilled spirits generated \$754,636 for the state. These would be lost revenues to the state if the distilled spirits inventories were exempted or if the rate were substantially reduced because the

automatic state property tax rate adjustment, which is established in statute, does not take into account any reductions in the tangible personal property tax.

To address the issues noted by opponents regarding exemptions or rate reductions for distilled spirits inventory, proponents of tax relief for distillers have also advocated for a state income tax credit for distillers. The amount of the credit would be equal to the full amount of the state and local tangible personal property tax paid on distilled spirits inventories. Under this proposal, local tax jurisdictions would not see any change in their property tax assessments or revenues; however, the distillers would still receive the full amount of those taxes paid in the form of a reduction in their state income tax liability. Bills were introduced during the past three sessions to provide distillers with this type of income tax credit; however, those proposals were not enacted.

Opponents to this proposal would argue that the full fiscal impact of the credit would be borne entirely by the state because the distillers would continue to pay the normal property tax on their inventories to the state and local jurisdictions, while receiving a full state income tax credit. The estimated state fiscal impact of providing this type of income tax credit is approximately \$13 million annually at full implementation.

## **Sales Tax Law**

Prepared by Charlotte Quarles

### **Should the General Assembly subject additional services to the sales tax?**

#### **Background**

Kentucky's sales tax applies to the sale of most goods but to only a few services. The sales tax law was enacted in 1960 when consumers were primarily purchasing goods rather than services. Since the enactment, consumer purchasing has shifted to more services and fewer goods. The shift in consumer purchasing has resulted in consumers paying less sales tax on their total purchases, which has reduced tax revenues that otherwise would be available to the state. To counter this effect, some advocate that the General Assembly should expand the sales tax to include additional services.

#### **Discussion**

Proponents of expanding the sales tax base to include additional services believe that adding services could help maintain or increase funding for schools, universities, health care, public safety, and other governmental functions. Proponents also maintain that increasing the sales tax base to include additional services may prevent an increase in the sales tax rate or the elimination of existing sales tax exemptions on the sale of certain goods, or may allow the elimination or reduction in other taxes.

Proponents also argue that taxing additional services will make the tax system fairer by taxing goods and services that could serve as a substitute for one another. For example, the purchase of lawn services may be a substitute for the purchase of a lawn mower. Still other proponents maintain that the expansion of the sales tax base to include more services may make the tax easier to administer and simplify compliance. When retailers sell both taxable goods and exempt services, it may be costly for the retailer and the Department of Revenue alike to ensure that the proper amount of tax is collected and paid.

Some opponents argue that expanding the sales tax base to include household services, such as vehicle repair labor, would have a disproportionate impact on low-income or fixed-income households that spend a larger percentage of their income on these services than the higher-income households. Other opponents argue that imposing the sales tax on services purchased by businesses that sell taxable goods or services will cause tax pyramiding. For example, a customer might ultimately pay more than the state's 6 percent sales tax on dry cleaning services. The dry cleaner would pay a 6 percent sales tax on its cleaning chemicals, then pass that cost onto the customer in the form of a higher price. As a result, the customer would pay 6 percent on the cost of dry cleaner's supplies and another 6 percent on the final price of the dry cleaning services, resulting in a final tax higher than 6 percent. Goods and services that involve more stages of production would be subject to greater levels of pyramiding.

Opponents also cite the difficulties in administering and enforcing a tax on services, especially if the services are those offered by a large number of small businesses such as barbers and beauticians, or if the service is offered on an informal basis such as a teenager mowing the neighbor's lawn. Other opponents point to the complexities of defining the taxable service and determining when the tax will apply. Some service providers in areas that border other states are concerned that they will suffer a loss in business if their customers can go to the border state to obtain the service without the additional sales tax, or that their customers may choose to no longer purchase the service but instead have the service provided by an employee, such as payroll preparation or legal services.

The amount of potential revenue generated from expanding the sales tax base to services will depend on the services ultimately included in the tax base, the effect of the increase in price of the service on the amount of services purchased, the ability of the seller or purchaser to avoid the tax, and the ease of administration.

A significant expansion of the sales tax base will likely require additional staff and resources in the Department of Revenue to locate and register new taxpayers, inform and educate the taxpayers and consumers through the preparation of educational materials and promulgation of administrative regulations, process returns, and audit taxpayers for proper compliance. The time frame for implementation would depend on the number of additional services added to the tax base.

## **All-Payer Claims Database**

Prepared by Sean Donaldson

### **Should the General Assembly establish an all-payer claims database?**

#### **Background**

An all-payer claims database (APCD) is a collection of medical, pharmaceutical, and dental eligibility and claims information. The database collects from private and public payers information on cost, use, and quality, including charges and payments, provider information, clinical diagnoses and procedures, and patient demographics. Payers include insurance providers, third-party administrators, Medicaid, Medicare, and others. Payers submit data to an organization charged with implementing and maintaining the database. With one exception, in all states where APCDs have been implemented, the submission of data is mandatory, and the penalties for failure to do so range from \$100 per day in Tennessee to up to \$10,000 per day in Utah.

There is no fee to submit data; however, businesses, consumers, and providers can request access to the data, usually for a fee. The data can be used to provide detailed answers about what hospitals and facilities have the highest prices, what percentage of individuals over 65 is given recommended preventive care, or how far consumers have to travel for services. In Massachusetts, the fee for a business seeking information for its own use ranges from \$2,025 to \$13,500, depending on the type of information requested and whether the business is in state or out of state. The range of fees for individuals and small organizations starts at \$45 and increases for more restricted information or if the requester is an out-of-state entity.

Nine states have established databases to collect, organize, and disseminate health care data that can be used by providers, consumers, and legislators. An additional seven states are implementing these databases.

#### **Discussion**

An APCD could provide a number of potential benefits for businesses, consumers, and policy makers. Insurance providers could use the demographic data as a resource for determining rates in a specific geographic area, or they could request cost data for specific services or procedures to determine how their plans compare to other insurance providers, both in pricing and coverage. Private businesses could compare their current or potential insurance coverage costs and included services.

These databases may provide information to help consumers to make informed decisions. In Maine, the state has built a website that allows the consumer to access average cost information on 29 frequently preformed procedures and to compare charges from different providers. This information is provided at no cost to the consumer. New Hampshire has a website that provides general information on the number of claims generated in different categories. The data allow for more detailed analysis of where services are lacking, distance to the nearest hospital that

performs a particular service, the effectiveness of certain treatments, whether the treatment had to be repeated, and general quality of care offered by health care providers and facilities.

Data could also be used to monitor more generally the cost of health care. New Hampshire has compared differences in child health between State Children's Health Insurance Program participants and commercial insurance members. Maine has used its APCD to identify the needs of, use by, and cost for chronically ill patients, the need for and use of mental health medications by children, and geographical variation and costs in emergency department use across the state. Utah used APCD data in the creation of its health exchange in 2008. Some state insurance regulators have used the data as a component for insurance rate reviews. Other states have used the data to monitor specific communities' health care costs, learn from successful community programs dealing with health care costs, monitor Medicaid expenditures, and help formulate future health care reform policy.

Costs to implement and maintain the database have been a major concern. Oregon's Office for Health Policy and Research estimated an initial cost for implementation at around \$1 million. After the initial start-up costs, the ongoing maintenance costs tend to be significantly less. States that have already adopted APCDs have used different mechanisms to fund the annual maintenance. In Maine, the funds come mostly from annual provider fees. These fees are variable percentages based on the total amount needed to fund the organization in charge of the APCD and are assessed to all payers and providers. The minimum fee assessed to payers and providers is \$100. Other states generate the funds from general appropriations from the legislature, and from fees from data sales. Because the information regarding health care costs is not gathered until after implementation of an APCD and the accompanying fees, there is little data to show the effect fees have on health care costs. The National Conference of State Legislatures has stated that it is still too early to determine whether these databases offer any direct costs savings by themselves.

Establishing and administering an APCD is not without issues and concerns. There is some concern about individuals' privacy and the government gathering data about a private transaction. In most cases, APCDs collect information every time a provider sees an insured individual and creates a claim. Included in this personal information are Social Security number, age, gender, and residence. In some states where APCDs have been implemented, concerns have been raised about the collection of this sensitive information and the fact that the information is available to the public, even though sensitive identifiers are encrypted to protect patient identity. In addition, the security of sensitive information stored on servers has also raised privacy concerns.

The General Assembly may want to consider enacting legislation to create an APCD as a way of monitoring the quality and costs of health care and as a source of information for future health care policy decision making.

## Health Benefit Exchanges

Prepared by Rhonda Franklin

### **Should the General Assembly confirm establishment of the Office of the Kentucky Health Benefit Exchange to develop a health benefit exchange in response to federal health care reform?**

#### **Background**

In June 2012, the United States Supreme Court upheld the Affordable Care Act, including the requirement for establishment of health benefit exchanges. In July 2012, the Governor issued Executive Order 2012-0587 to establish the Office of the Kentucky Health Benefit Exchange within the Cabinet for Health and Family Services to develop the framework for a health benefit exchange for individuals and small-group employers by January 1, 2013, and to implement the exchange by January 1, 2014. According to the executive order, the office will facilitate the purchase and sale of qualified health plans. The Affordable Care Act requires each state to establish or participate in a health benefit exchange for individuals and small-group employers to purchase health insurance. Qualified health insurance plans will be selected by the state to participate in the exchange based on federal rules. States that plan to operate their own exchanges must, by November 16, 2012, demonstrate to the federal Department of Health and Human Services that they will be capable of fully operating an exchange on January 1, 2014.

Health benefit exchanges are intended to serve as an optional organized marketplace to assist individuals and small-group employers in purchasing health insurance. The Act provides that a state may develop an exchange, participate in a multistate exchange, develop a partnership with the federal government to establish an exchange, or take no action and have the federal government develop an exchange for the state directly or through an agreement with a nonprofit entity. Individuals and small-group employers may continue to purchase health insurance in the open market after exchanges are implemented. Large-group employers will be allowed to participate in health benefit exchanges beginning in 2017.

According to the National Conference of State Legislatures, as of October 2012,

- 13 state legislatures had enacted legislation to establish a health benefit exchange and are in various stages of implementation;
- governors in 13 states, including Kentucky, had issued executive orders to establish an exchange or to direct a planning group to advise on development of an exchange;
- 8 governors had announced that their states will not develop state-run health insurance exchanges;
- 6 states had pending legislation to establish an exchange; and
- 17 states failed to enact legislation introduced in 2012 to establish an exchange.

These numbers take into account separate actions by state legislatures and by governors. There is no indication that any states are considering a multistate exchange or a federal-state partnership to operate an exchange.

## Discussion

The General Assembly could confirm the Governor's executive order and authorize development of a state health benefit exchange by January 1, 2014. If the General Assembly does not confirm the executive order, there are several options available under the Affordable Care Act and federal rules:

- enact legislation to work with other states to develop a multistate exchange,
- develop a partnership with the federal government to establish an exchange, or
- take no action and allow the federal government to establish an exchange for Kentucky.

The potential advantage of any health benefit exchange is the economy of scale that allows individuals and small-group employers to gain the purchasing clout of a large group to obtain less expensive health plans for participants. Some of the potential benefits of the different forms of an exchange are as follows:

- The main advantage of a state-run health benefit exchange is that state government is better positioned to determine benefits provided because it is familiar with the health status of its citizens, available medical services, current health plans, and geographic impediments to accessing health care services.
- The benefits of a multistate exchange include combining resources and technology among states, coupled with creating a larger pool to reduce the cost of health insurance.
- A state-federal partnership could reduce the administrative burden and avoid duplication of effort in areas including eligibility and enrollment systems, financial management, and health plan management.
- A federally operated exchange would shift operational oversight from the state to the federal government.

A concern with any health benefit exchange at this stage of development is the uncertainty of the impact of the federal rules on states and their citizens. Potential problems for each form of health benefit exchanges are as follows:

- A state-run exchange may increase cost to the taxpayers in coming years to operate the exchange.
- A multistate exchange may result in "turf battles" among the states' officials and the probable inability to have a multistate exchange operable by 2014 because no states have opted for a multistate exchange, although groups of states are looking at sharing resources and technology to reduce costs.
- A state-federal partnership may need clarification of the roles of federal and state government to jointly operate a health benefit exchange.
- Federal operation of the exchange includes the possibility of "one size fits all" for the states that do not operate exchanges, and the potential lack of input of the state officials' knowledge of the population, health care, and geographical impediments unique to each state.

## **Economic Development Incentives**

Prepared by Louis DiBiase

### **Should the General Assembly expand incentives to encourage investment in research and development?**

#### **Background**

It is widely believed that investments in research and development (R&D) contribute positively to economic growth and productivity. The US Congressional Budget Office reports that while it is difficult to measure precisely, R&D probably increases productivity and contributes to economic growth. Some studies suggest that increased investment in R&D results in higher employment and wages. Others suggest that it lowers prices and raises the quality of goods, and that it boosts the Gross Domestic Product.

To encourage investment in R&D, a number of jurisdictions provide tax incentives to private individuals and companies, mostly in the form of income tax credits against amounts invested. The federal government has had such a program since 1981. Several of Kentucky's peer states have similar programs: Arkansas, Georgia, Ohio, West Virginia, and North Carolina offer income tax credits for R&D spending, with some other states also offering sales or property tax incentives.

Kentucky offers a 5 percent income tax credit against costs for construction of research facilities (KRS 141.395). A study by the Anderson Economic Group of Kentucky's economic development incentives programs recommended expanding that credit, stating that Kentucky "lags behind its peers" in R&D. A consulting report prepared for the Kentucky Cabinet for Economic Development also recommended expanding incentives for investments in R&D, again noting the more generous incentives offered by some other states (Boyette 50).

#### **Discussion**

Those in favor of expanding Kentucky's R&D incentives claim that incentives are a cost-effective way to increase R&D investment. Ernst & Young reported that the federal R&D credit has increased annual private research spending \$10 billion in the short term and \$20 billion in the long term while costing about \$7 billion in annual revenue (Carroll i).

Proponents of an increased R&D credit claim that Kentucky lags behind peer states in promoting R&D. The Anderson report noted that Arkansas offers a tax credit of 33 percent on R&D expenditures, Georgia offers 10 percent, Ohio 7 percent, and North Carolina up to 35 percent in certain situations. Some states such as South Carolina, Ohio, and West Virginia extend the credit to sales or property taxes. The Anderson report also noted that as of 2009, only 5 percent of Kentucky's workforce was employed in knowledge-based industries, compared to an average of 8 percent for peer states. Similarly, wages and overall payroll in knowledge-based industries are lower in Kentucky than in peer states.

Proponents argue that there are benefits from R&D that do not immediately appear in statistics but that have a significant positive effect on the economy. These benefits include knowledge gained through R&D that gets spread out to other sectors, leading to greater long-term productivity. It is also possible to target expanded credits to encourage research specifically in conjunction with state universities, similar to the practice in North Carolina, thereby forging helpful and potentially productive connections between businesses, students, and Kentucky's research institutions.

Opponents of expanding Kentucky's R&D incentives note that it is difficult to measure both the impact of R&D on the economy and the cost-effectiveness of tax incentives to promote it. Studies vary significantly depending on the methodologies used. While the impact of R&D overall is positive, one cannot be precise about the costs and benefits involved. Opponents also argue that tax credits may provide incentives for some development that would have occurred regardless of the incentives.

Opponents also note that Kentucky's position relative to peer states is not all bad. Kentucky lags behind in knowledge-based employment compared to the peer average but does better than states such as Arkansas and West Virginia that have more generous R&D incentives. According to Anderson, Kentucky is growing at an average annual rate that is nearly twice the peer average. Additionally, Kentucky has a broader range of incentives available to high-tech firms than most peer states, so simply focusing on the R&D credit may be misleading.

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## **Neighborhood Schools**

Prepared by Janet Stevens

### **Should the General Assembly require local boards of education to permit a student to attend the school closest to home?**

#### **Background**

KRS 159.070 states: “Within the appropriate school district attendance area, parents or legal guardians shall be permitted to enroll their children in the public school nearest their home.” On September 20, 2012, the Kentucky Supreme Court held that the right to enroll does not mean the right to attend and that state law grants local school boards the authority to distribute students throughout the district based on what the board sees as the best method.

#### **Discussion**

Introduced during the 2012 Regular Session, Senate Bill 9 would have required local school districts to enroll a student in the school closest to the student’s home and allow the student to attend that specific school. Exemptions could be made but only under specific conditions. The bill did not pass.

Proponents argue that local school districts should allow a child to attend the neighborhood school closest to his or her home. They contend that neighborhood schools

- decrease student bus-riding time,
- decrease district transportation costs,
- allow children to attend the same school as neighborhood peers,
- allow opportunity for more parental involvement, and
- promote a sense of community.

Opponents argue that requiring all children to attend a school closest to their home could result in

- schools becoming resegregated,
- overcrowding in existing buildings,
- cost increases to build and staff new schools,
- cost increases to remodel existing buildings, and
- loss of local district control to draw attendance boundaries.

If the General Assembly chooses to do anything, options include requiring local school boards to make neighborhood schools available so that a student is allowed to attend the school closest to home; establishing a task force to study the positive and negative effects of making neighborhood schools available for attendance; or clarifying that school attendance areas should be decided by local boards of education.

## **Requirement for Enrolling in Public Higher Education**

Prepared by Jo Carole Ellis

### **Should the General Assembly require all Kentucky residents who enroll in a public college or university to complete the Free Application for Federal Student Aid?**

#### **Background**

The Free Application for Federal Student Aid (FAFSA) is the application all postsecondary students must complete to be considered for federal financial aid such as Pell grants, work-study, and student loans, and for Kentucky grant programs including the College Access Program grant and Kentucky Tuition Grant. The state's largest student financial aid program, the Kentucky Educational Excellence Scholarship, does not require FAFSA completion.

Kentucky public postsecondary institutions do not require students to complete the FAFSA; however, some private postsecondary institutions do. For the 2010-2011 academic year, 30 percent of undergraduates (62,000) enrolled in Kentucky public colleges and universities did not complete the FAFSA.

Some of the reasons students give for not completing the FAFSA include an assumption of ineligibility, an aversion to student loan debt, not having information on how to apply, and the complexity of the application. Part-time students and students attending community colleges are less likely to file FAFSAs.

#### **Discussion**

College affordability impacts the ability of Kentucky's citizens to access the Commonwealth's postsecondary system and increase educational attainment. Students who do not complete the FAFSA may lose out on student financial aid funds for which they would have qualified if they had completed the form. Research also shows that students who file a FAFSA have a 72 percent higher likelihood of persisting in college than their peers who do not file.

Nationally, at least 1.7 million students fail to file the FAFSA each year because they incorrectly think they are ineligible. Nearly a third of students who do not complete the FAFSA would have qualified for a Pell grant and about a sixth would have received a full Pell grant. Most students would qualify for federal student loans, which entail lower costs than other loan options.

In Kentucky, about 10 percent of the students who graduated from high school in 2010 and enrolled in a Kentucky public or independent institution for the 2010-2011 academic year did not complete a FAFSA. Of this 10 percent, around one-third would have qualified for a Pell grant, and consequently these Kentucky college freshmen lost approximately \$2.3 million in Pell grant aid.

Proponents of requiring FAFSA completion say it will improve access and persistence and will reduce financial burden by ensuring students receive all the aid for which they qualify. Proponents also indicate mandatory completion will provide better and more data for analysis of college affordability and access issues and the effectiveness of the Commonwealth's financial aid programs and policies.

Opponents indicate mandating FAFSA completion oversteps privacy boundaries for those who do not want to provide the personal financial information required on the FAFSA. Others are concerned that requiring students to complete the FAFSA will intimidate students and discourage them from attending college.

The General Assembly could require mandatory FAFSA completion for attendance at all public colleges and universities; create a pilot program for mandatory completion at one or more public colleges and universities to evaluate the effectiveness; or do nothing and continue voluntary completion of the FAFSA.

## Student Achievement Data

Prepared by Ben Boggs

### **Should the General Assembly require the use of P-12 student achievement data as a component in assessing the effectiveness of public university teacher preparation programs?**

#### **Background**

Kentucky's 28 public and independent college and university teacher preparation programs are approved and assessed by the Education Professional Standards Board (EPSB), pursuant to KRS 161.028. The statute specifies that EPSB shall "set standards for, approve, and evaluate college, university, and school district programs for the preparation of teachers and other professional school personnel." In 2001, EPSB developed the Kentucky Educator Preparation Program report card to provide information on the quality of the teacher preparation programs as demonstrated through available indicators such as program admission and graduation standards, institutional pass rates on Praxis tests (the standardized tests for candidates entering the teaching profession), and new-teacher surveys.

According to a report released by the Kentucky P-20 Data Collaborative, almost half of Kentucky's public school districts hire a majority of their teachers from colleges and universities closest to or in the school districts. Also, approximately 43 percent of Kentucky's 174 school districts hire more than half of their teachers from a single college or university. The report noted the relationship between those school districts and the college or university by identifying trends as to the districts in which university graduates chose to teach and those districts' P-12 student achievement scores. Such information was reportedly to help the colleges and universities identify academic subject areas in which their graduates may need more attention or assistance in order to better address P-12 classroom needs.

While Kentucky has made efforts to monitor the quality of its teacher preparation programs, a national study of teachers and principals sponsored by the US Department of Education found that 62 percent of new teachers are unprepared to begin teaching after graduating from university teacher preparation programs. In response, the department, joined by such nonpartisan organizations as the National Council on Teacher Quality, the Center for American Progress, and Education Sector, has proposed that university teacher preparation programs be assessed for quality as measured in their graduates' classrooms by the achievement data of elementary and secondary students on standardized tests. The rationale for using student achievement data to assess the quality of university teacher preparation programs is twofold: to strengthen the assessment and accountability of college and university teacher preparation programs, and to better connect a postsecondary institution's teacher training program curricula to the needs of P-12 schools.

Some states are already making preliminary efforts to change how teacher preparation programs are assessed by developing measures that incorporate the performance of elementary and

secondary students. These states include Colorado, Illinois, Indiana, Louisiana, New Mexico, Tennessee, and Washington. Similar preliminary discussions are occurring in Kentucky as well. The Prichard Committee has formed a task force to examine teacher effectiveness, as has the Kentucky Department of Education on principal and teacher effectiveness.

## **Discussion**

Proponents favor using student achievement data to assess teacher preparation programs for reasons that include the creation of an achievement data-driven approach to university accountability, the identification of trends needing attention among specific teacher-preparation programs, the ability to help assess which alternative teacher credentialing programs are effective, and the ability to motivate greater public university efforts in addressing public P-12 challenges.

Opponents discourage such a system for reasons that include the difficulty in identifying the teacher's contribution to student achievement from all the other factors that affect student performance, such as the school's culture and the student's home support; the possible over-focus on a particular school district by a teacher preparation program, leading to a limitation of its graduates' ability to obtain teaching positions in other states or even other regions within the state; and the risk of good teachers with low-performing students appearing unprepared or ineffective.

The General Assembly could require the Education Professional Standards Board, the Council on Postsecondary Education, and the Kentucky Board of Education, working with the Commonwealth's postsecondary institutions and school districts, to establish an assessment by which teacher preparation programs would be measured for quality by the performance of their graduates' elementary and secondary students on standardized tests.

The General Assembly also could take no action. In that case, state educational agencies could explore federal and private grants to support an initiative to develop an assessment program by which college and university teacher preparation programs might obtain student achievement data from the local school districts that employ their graduates. Similarly, individual colleges and universities and the school districts of their service regions may seek federal or private grants to pursue this initiative to strengthen existing efforts to meet enhanced ACT and college- and career-readiness proficiency standards.



## **Nuclear Power**

Prepared by D. Todd Littlefield

### **Should the General Assembly lift the moratorium on nuclear generation of electricity?**

#### **Background**

From 1963-1977, the Maxey Flat Low Level Radioactive Waste Facility near Morehead served as a disposal site for radioactive waste. Following radioactive contamination and containment problems at the site, the General Assembly in 1984 barred construction of nuclear power facilities until “a method for the permanent and terminal disposal of high-level nuclear waste” is in place (KRS 278.600). As of 2012, there is no method for disposal.

The Governor called for an examination of nuclear power as one of the strategies outlined in the 2008 document “Intelligent Energy Choices for Kentucky’s Future; Kentucky’s 7-Point Strategy for Energy Independence.”

#### **Discussion**

Legislation seeking to lift the nuclear moratorium by changing “disposal” to “storage” would allow a nuclear power plant to store waste onsite, as most US nuclear plants do now. Such legislation has failed in recent sessions of the General Assembly.

The first change to the nuclear statutes came in House Bill 559 in the 2012 Regular Session. Although this bill allowed recycling and reprocessing activities to go forward at the Paducah gaseous diffusion plant, it also allowed for nuclear power to provide process heat in facilities engaged in “coal or gas conversion processes.” No facilities employing such nuclear process heat have been announced, but the passage of HB 559 indicates that the General Assembly’s longstanding prohibition against nuclear waste has been lifted, so long as the primary output of the processes is not electricity.

Finding financing for new nuclear power facilities is difficult. Among the challenges contributing to this reluctance are the large sums of money involved, long time frames required for completion, experiences with defaults and unfinished projects, and the 2011 nuclear disaster in Japan. Until private investors’ fears can be allayed, government funding is the only option to push nuclear power projects forward.

In light of the financing issue, there may not be much that the General Assembly can do to encourage nuclear generation of electricity in Kentucky beyond lifting the moratorium on nuclear generation facilities. Proponents point out that it takes approximately 10 years from plan to completion of a nuclear power facility. Opponents argue that nothing has been done to address the lack of long-term waste disposal. They argue that onsite storage greatly increases the potential for a nuclear accident or a terrorist strike.

## Vehicles Powered by Natural Gas

Prepared by D. Todd Littlefield

### **Should the General Assembly adopt incentives for constructing a fueling infrastructure for vehicles powered by natural gas and for consumers to increase use of vehicles powered by natural gas?**

#### **Background**

America's demand for gasoline creates increasing dependence on foreign sources of oil. This has led to unprecedented gasoline price volatility. High gas and diesel prices impact the price of all commodities that rely on trucks, planes, trains, or boats to be delivered to the point of purchase.

Strategies for dealing with high oil prices include increasing supply, reducing demand, and developing non-petroleum-based motor fuels. Such alternative motor fuels include natural gas, electricity, fuel cells, and hydrogen. Adoption of alternative fuels faces challenges. Consumers are not interested in purchasing vehicles that are difficult or impossible to fuel, and investors are slow to invest in fueling infrastructure to service a small market. Until now, the most successful alternative fuels have been ethanol and biodiesel, both of which are usually mixed with petroleum-based fuels and used in existing engines without significant modifications. Government incentives may be one way to increase the use of natural gas as motor fuel.

#### **Discussion**

House Bill 245 from the 2012 Regular Session, as introduced, sought to increase the use of vehicles powered by natural gas by encouraging some and requiring others to convert to natural gas. The bill mandated the conversion to natural gas of some fleet vehicles, required safety inspections and emissions testing for natural gas vehicles (NGVs), and created a tax credit for the original purchase of an NGV or the conversion of another vehicle to burn natural gas. Opponents found the mandate too severe. An amendment eliminated the mandated conversion for fleet vehicles and the emissions testing. The bill did not pass.

Large supplies of natural gas derived from shale deposits have flooded the market and depressed prices. Since 2005, natural gas output is up 27 percent. Prices are down 75 percent since 2008, to less than a third of what most industrialized nations pay (Kiplinger). As of July 2012, a driver of a vehicle fueled by compressed natural gas saved between \$1.30 and \$1.75 per gasoline gallon equivalent (Yborra). Some observers are not confident that the projected abundance will prevent price volatility that could quickly reduce or eliminate the advantage over petroleum-based fuels.

Gasoline-powered vehicles create more harmful emissions than NGVs. Some sources estimate that light-duty NGVs, such as cars and pickup trucks, reduce greenhouse gas emissions by as much as 29 percent. Emissions of greenhouse gases from heavy-duty vehicles, such as semi-trailer trucks that run on natural gas, could be reduced by as much as 23 percent.

Proponents of natural gas as a motor fuel argue that it would help America become energy independent. Opponents of government incentives point to growth in the adoption of NGVs that is taking place in the absence of intervention. There is also growth in the number of high-fuel-use commercial fleet vehicles that return to a central location for refueling. Examples include local buses, garbage trucks, taxis, and airport shuttles. In Louisville, Waste Management, Inc. has purchased 40 garbage trucks that run on natural gas, with plans to reach 120. It also has opened its compressed natural gas (CNG) fueling facility to the public. Indiana Geothermal has opened a public-access CNG fueling station for its own trucks and those of FedEx and has plans to open another. Somerset has purchased five vehicles that run on CNG and has plans to add five more. Somerset also is opening the city fueling center to the public.

Adoption of NGVs outside the realm of high-use fleets is proceeding slowly. The cost of converting an existing vehicle from gasoline to CNG can vary between \$4,000 and \$14,000 and higher depending on the type of vehicle (Pierantoni; Kline). Proponents argue that costs can be recovered in the much lower price of fuel, but the break-even point can be years away for the average driver of a passenger vehicle.

Utah passed a bill in 2010 that provided tax credits up to \$2,500 for the purchase of a new NGV or the conversion of an existing vehicle. Kentucky's 2012 House Bill 245 contained similar provisions. However, the Utah market is significantly more developed because a private company has a network of publicly available CNG fueling stations in many parts of the state.

Fueling infrastructure is another challenge. In the absence of government incentives, among the first locations available for public CNG or liquid natural gas fueling are where businesses are already fueling their own fleets of high-mileage NGVs. Also, some convenience stores in Wisconsin, Arkansas, and Oklahoma offer natural gas. The high cost of installing new natural gas fueling facilities can be a barrier to entry into this new market. Without government incentives or high demand, rapid growth in NGV fueling infrastructure appears unlikely. An exception may be businesses such as local gas distribution companies and natural gas retailers.

While the benefits of NGVs may include reduced fuel cost, reduced emissions, and energy independence, lawmakers should consider whether providing incentives to facilitate more rapid adoption of this alternative motor fuel is worth the cost, whether the industry will grow on its own, and whether it is proper for government to favor one fuel over another.

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## **Court-Ordered Outpatient Mental Health Treatment**

Prepared by Sarah Kidder

### **Should the General Assembly expand requirements for court-ordered community-based outpatient mental health treatment?**

#### **Background**

District courts may order individuals who have serious mental illnesses to receive community-based mental health treatment. The treatment is provided on an outpatient basis for individuals who do not need the more restrictive setting of inpatient care. While each state has laws that govern court-ordered inpatient mental health treatment, 44 states have court-ordered outpatient commitment laws.

In Kentucky, people with serious mental illness who present a danger or threat of danger to themselves or others can be ordered by a district court to receive mental health treatment. There are two types of court-ordered treatment: inpatient and outpatient. The court conducts a preliminary hearing to determine whether the individual could reasonably benefit from inpatient care where a hospital is the least restrictive setting available. Inpatient treatment is the first step in the process. The court cannot order outpatient treatment before or in lieu of inpatient treatment. Before agreeing to release the individual from inpatient treatment, the court may order the person to be released from inpatient care to community-based outpatient treatment. The court may order outpatient treatment for up to 60 days and may extend the order once for up to 60 more days.

#### **Discussion**

Advocates of expanding court-ordered outpatient treatment requirements contend that some individuals whose mental illness has not deteriorated to the point of requiring hospitalization could benefit from community-based outpatient treatment that is aimed at preventing hospitalizations or even incarceration. Some argue that the current requirement of not allowing court-ordered outpatient treatment without first ordering inpatient treatment creates a cycle of hospitalizations and releases that may potentially result in incarceration.

Some states do not require that an individual be hospitalized on an inpatient basis to qualify for court-ordered outpatient treatment. Some legislatures have expanded requirements for court-ordered community-based outpatient treatment by authorizing courts to use more discretion, increasing the length of treatment, or requiring treatment plan compliance or medication compliance. Other states have broadened eligibility beyond dangerousness to include those with the inability to make informed medical decisions, to care for their own welfare, or to seek psychiatric care.

Proponents argue that expanded court-ordered outpatient commitment laws have been shown to reduce the incidence and duration of hospitalization by treating individuals in the community

before dangerousness escalates to the point of requiring intervention by the criminal justice system. They also contend that expanded access to involuntary outpatient care promotes long-term voluntary compliance with mental health treatment.

Opponents argue that involuntary treatment, whether on an inpatient or outpatient basis, erodes the civil liberties of individuals with mental illness. They contend that some studies have shown that involuntary outpatient commitment is no more effective than voluntary treatment and that there is no evidence that court-ordered outpatient mental health care improves public safety. Opponents also argue that voluntary outpatient mental health care increases the likelihood that individuals will be engaged in the treatment process long term. They also contend that involuntary treatment places mental health care in the realm of the judicial system as opposed to being in the social services or health care system.

## **External Child Fatality Review Panel**

Prepared by Ben M. Payne

### **Should the General Assembly establish an external panel to review records related to child fatalities due to abuse or neglect?**

#### **Background**

The number of child fatalities due to abuse or neglect in Kentucky has not declined in spite of investigations by the Cabinet for Health and Family Services and legislative attention. In 2012, the cabinet reported 31 child abuse deaths for fiscal year 2011, 36 child abuse deaths for FY 2010, 29 child abuse deaths for FY 2009, and 30 child abuse deaths for FY 2008. The US Department of Health and Human Services reported that Kentucky has one of the highest rates of child fatality due to abuse or neglect: 2.96 per 100,000 children compared to 2.07 per 100,000 nationally.

The cabinet is required to conduct internal reviews to analyze its actions related to child fatalities due to abuse or neglect (KRS 620.050). However, the comprehensiveness of these reviews is limited. The cabinet is not required to release to the public complete findings and recommendations from the reviews. However, the cabinet is required to submit an annual analysis of summaries of its actions and any policy changes taken in relation to a child fatality due to abuse or neglect. The cabinet investigates only child deaths due to abuse or neglect for children who have had prior involvement with the cabinet. The number of children who have never had involvement with the cabinet who died due to abuse or neglect is not known. The cause of death may be inappropriately recorded as accidental even though a closer review of the circumstances may indicate abuse or neglect. The cabinet only investigates its own actions. Entities such as schools, the Department of Juvenile Justice, and health care providers also have involvement with abused or neglected children. There may have been actions that these entities could have taken to prevent a child's death from abuse or neglect.

To address the issues of full disclosure, the deaths of children both having and not having involvement with the cabinet, and the actions of entities other than cabinet, the General Assembly introduced legislation in 2010, 2011, and 2012 that would have established a review process of child fatalities and near fatalities due to abuse or neglect. None of the bills passed.

On July 16, 2012, the Governor issued Executive Order 2012-585 that established the Child Fatality and Near Fatality External Review Panel in the Justice and Public Safety Cabinet to allow for a review process independent of the Cabinet for Health and Family Services. The panel is to conduct comprehensive reviews of child fatalities and near fatalities determined to be due to child abuse or neglect.

## Discussion

Statewide child advocacy, media groups, and some members of the General Assembly have charged that the cabinet's internal review process does not permit a public discussion of actions the cabinet and other entities may have taken to prevent a child fatality due to abuse or neglect.

The external review panel established by executive order addresses some of these concerns. Members include experts who have been involved with abused or neglected children who have not been under the responsibility of the cabinet. The panel is to review all official state government agency records, case files, and information related to child fatalities or near fatalities determined to result from abuse or neglect. The panel also is directed to analyze the medical, psychosocial, and legal circumstances of the child to identify conditions that contributed to the child's death or serious injury and to recommend improvements.

The executive order is not a permanent legal requirement and therefore operates without oversight or input from the General Assembly. The executive order does not increase full disclosure by requiring actions taken or not taken by specific entities in relation to a child death from abuse or neglect to be made public. The executive order also does not require the review of the death of a child suspected to be due to abuse or neglect who did not have prior involvement with the cabinet.

The General Assembly may choose to establish a legal requirement for an external review process and to modify the scope of the reviews.

## Medicaid Expansion

Prepared by Jonathan Scott

### Should the General Assembly expand Medicaid eligibility as permitted under the Patient Protection and Affordable Care Act of 2010?

#### Background

Under the Patient Protection and Affordable Care Act of 2010 (ACA), states are required to expand Medicaid coverage by 2014 to adults younger than 65 who have incomes of up to 138 percent of the federal poverty level if they satisfy residency, immigration, and citizenship requirements. However, the United States Supreme Court held that the threat of lost funding for existing Medicaid programs was unconstitutional, effectively making the decision to expand Medicaid voluntary (*National Federation of Independent Business v. Sebelius*). The Act still requires all individuals to have health insurance by 2014.

In 2012, Kentucky served about 826,400 Medicaid recipients. If Kentucky chooses to expand Medicaid eligibility, 288,000 uninsured adults younger than 65 would be newly eligible for Medicaid in 2014, and by 2019, the total number of Medicaid recipients could increase by 37 percent to 48 percent.

The federal government funds approximately 80 percent of the Kentucky Medicaid program, while the state pays 20 percent. In fiscal year 2012, the federal government paid \$4.7 billion, and state paid \$1.3 billion. The federal government would pay an enhanced match rate for individuals who qualify under the expansion. For individuals who qualify under the expansion, the federal government would pay 100 percent of the expenses from 2014 to 2016, 95 percent in 2017, 94 percent in 2018, and 93 percent in 2019. In 2020 and subsequent years, the federal government would pay 90 percent.

#### Federal Enhanced Match Rate for Qualified Individuals

Fiscal Year	Rate Percent
2014	100
2017	95
2018	94
2019	93
2020	90

Source: LRC staff compilation.

States may choose to raise the eligibility threshold to less than 138 percent of the federal poverty level or to limit the expansion to specific populations. However, the federal government will not provide the enhanced match rate to states that do not include the complete eligible population. States may also choose to wait to expand Medicaid or opt in and then opt out of the expansion when the match rate falls.

Approximately 12 states and the District of Columbia intend to expand Medicaid; 6 states have announced that they will not expand Medicaid; and 32 states, including Kentucky, are undecided. Of Kentucky's surrounding states, only Illinois has decided to expand.

## **Discussion**

Factors to consider when deciding to expand Medicaid may include the impact on the economy, the budget, and uninsured residents.

Proponents of a Medicaid expansion may point to the federal dollars that will be spent in Kentucky if the program is expanded. Some estimates have indicated that Kentucky would receive about \$11 billion in federal funds during the first 6 years of the expansion. During that time, Kentucky would spend between \$515 million and \$695 million on the newly covered adults, representing a 3.5 percent to 4.7 percent increase over projected Medicaid funding without expansion.

Opponents may note that the initial expansion's enhanced match rates will decrease when the state is required to pay 10 percent of the health costs of expanding care to these individuals. This ongoing commitment could create state budget problems in the future and reduce available state funding for other priorities. The 90 percent match rate also could be modified by future federal legislation. Others point out that a Medicaid expansion could increase state expenditures because persons already eligible for Medicaid, but not enrolled, will not be included at the enhanced federal match rate under the ACA. Kentucky has an estimated 78,000 uninsured adults younger than 65 who are eligible but not receiving Medicaid.

Some proponents argue that a gap in health coverage would be created if Kentucky does not expand Medicaid because the ACA requires all individuals to have insurance by 2014. The health insurance exchanges mandated by the ACA are available for individuals with incomes of 100 percent to 400 percent of the federal poverty level. Failure to expand Medicaid would leave healthy adults with incomes below 100 percent of the poverty level with no access to health insurance coverage.

Waiting to expand could allow Kentucky additional flexibility. For example, some states are waiting for a decision from the federal government on their requests to expand their Medicaid programs to all adults younger than 65 with incomes less than 100 percent of the federal poverty level instead of 138 percent of the federal poverty level. This would cover the gap for healthy adults with incomes below 100 percent of the poverty level who have no access or support for obtaining health insurance coverage.

The federal government allows a state to expand its Medicaid program and then return to a previous level at a later date. A temporary expansion could allow for receipt of the initial expansion funds then, as the enhanced match rate drops and the state share increases, expansion could be scaled back if funding becomes too challenging to the state budget. However, reducing coverage after expanding might be a politically difficult decision. In addition, scaling back the expansion could leave many Kentuckians without health coverage.

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## **Controls on Prescribing and Dispensing Prescription Drugs**

Prepared by Jon Grate

### **Will the General Assembly approve the implementation of House Bill 1?**

#### **Background**

Acting in special session in 2012, the General Assembly passed House Bill 1, which placed additional controls on pain clinics, including a requirement for physician ownership and a requirement that clinics have on site a physician with specialized training or certification in pain management. The bill also established mandatory minimum treatment protocols before some of the state's most highly regulated drugs could be prescribed, specifically all Schedule II drugs and any Schedule III drug containing hydrocodone. These protocols required, except in cases of emergency, performing and charting a physical exam of the patient, patient education and consent specific to the prescribed drug, and querying the state's prescription drug database (the KASPER system) to obtain the patient's previous prescription history. The bill contained a number of provisions to enhance the state's KASPER system, including provisions to enhance interstate connectivity, to increase access to the system, and to provide funding to improve the system's functionality and responsiveness. The bill also placed additional responsibilities on the boards that regulate the professions that prescribe and dispense controlled substances, including physicians, nurses, pharmacists, and dentists.

Given the comprehensive nature of the bill and the reliance on regulations to accomplish many of the bill's objectives, the bill also established a HB 1 Implementation Oversight Committee composed of three senators and three representatives to operate during the 2012 Interim.

#### **Discussion**

The committee focused its work on the promulgation and enforcement of new administrative regulations by the regulatory boards and the implementation of the bill's statutory provisions by both the boards and the health care community as a whole.

The committee has heard testimony on the regulations pertaining to prescribing and dispensing controlled substances from both the regulating boards and representatives from the various regulated professions and institutions. The committee also heard from representatives of the state's KASPER system, which receives data from pharmacies on the number and types of controlled substances dispensed to customers in Kentucky and the implementation of various upgrades to the system. Another focus of committee activity was hearing testimony from the peer-driven, medication-assisted, faith-based, and comprehensive care center substance abuse treatment communities in Kentucky about the types of treatment available and the effects of HB 1 on those communities. Finally, the law enforcement community discussed the street level effects of HB 1 and the use of new HB 1 investigatory tools.

## **Unified Juvenile Code**

Prepared by Ray DeBolt

### **Will the General Assembly revise the Unified Juvenile Code?**

#### **Background**

The Unified Juvenile Code was enacted in 1986 after a review of its predecessor statutes. The code originally was designed to bring together all components of the juvenile justice system and create an interaction between these varied entities to better serve youth who exhibited unacceptable behaviors, both criminal and noncriminal. As youth crime and violence began to increase, legislation was enacted in nearly every session of the General Assembly to address issues of youth crime. As a result, ambiguity and inconsistency was created within the code. Additionally, the 1996 General Assembly created a new state entity within the Justice and Public Safety Cabinet, the Department of Juvenile Justice, and split code authority between this new department and the Department of Community Based Services within the Cabinet for Health and Family Services.

The 2012 General Assembly adopted House Concurrent Resolution 129, which created the Unified Juvenile Code Task Force to review and to make recommendations on changes necessary to remove inconsistencies and ambiguities in the code.

#### **Discussion**

The task force met monthly during the 2012 Interim and reviewed risk and needs assessments, alternatives to incarceration, use of community resources, reinvestment of savings from the reduction in use of incarceration for expansion of community-based treatment programs, whether to establish an age of criminal responsibility, the impact of domestic violence on youth, and information sharing.

The task force discussed educational issues relating to compulsory attendance, truancy, and access to school records. It also looked at the use of secure detention and the impact on a community's law enforcement capability when personnel are involved in juvenile cases. The task force heard testimony from educators, youth advocates, law enforcement, prosecution, the defense bar, judges, mental health professionals, and the Administrative Office of the Courts, as well as national organizations such as the Council of State Governments and the National Conference of State Legislatures.

## **Coal Workers' Pneumoconiosis**

Prepared by Carla Montgomery

### **Should the General Assembly clarify the procedures used and the benefits awarded in coal workers' pneumoconiosis claims?**

#### **Background**

On December 22, 2011, the Kentucky Supreme Court found that the consensus process used to adjudicate coal workers' pneumoconiosis (CWP), or black lung, claims and the evidentiary standard of clear and convincing evidence were unconstitutional pursuant to the Equal Protection Clause of the United States Constitution (*Vision Mining, Inc. vs. Gardner*, 364 S.W. 3d 455 (2011)).

The consensus process had been used to adjudicate a coal worker's claim for benefits as a result of contracting pneumoconiosis from coal dust. The employee and the employer submitted a lung x-ray. If the submitted x-rays were not in consensus, they were sent to three physicians, known as B-readers, certified by the National Institute of Occupational Safety and Health to read x-rays to determine the extent of dust exposure in an employee's lungs. If the panel of B-readers reached a consensus, that consensus was presumed correct unless it was overcome by clear and convincing evidence.

The Supreme Court found that this process violated the Equal Protection Clause because CWP claims were treated differently from other occupational pneumoconiosis claims. The Court felt that CWP claims were subjected to a more stringent standard than other pneumoconiosis claims, and there was no natural or real distinction between pneumoconiosis from coal dust and other occupational pneumoconiosis to warrant the different standard.

Yet, the process for CWP and other occupational pneumoconiosis is quite different. An employee who has contracted pneumoconiosis from dust other than coal receives a clinical finding of one university evaluator as required by KRS 342.315, which can be disputed on a reasonable basis. A claimant with occupational pneumoconiosis must prove impairment and have pulmonary studies for proof. A black lung claimant has x-rays sent to a panel of three B-readers, and the findings of the panel can be reversed only by clear and convincing evidence.

The consensus process was enacted as legislation in 2002 to bring about a more fair and equitable distribution of benefits to claimants with black lung. Many felt the 1996 changes to benefits for claimants with CWP were too harsh and no benefits were being awarded. Many hoped the consensus process would result in more awards for CWP claimants.

#### **Discussion**

The impact of the Supreme Court ruling is that portions of KRS Chapter 342 are unconstitutional, specifically KRS 342.316 (3) (b) 4 and (13). Other statutory provisions relating

to CWP may be impacted but were not specifically addressed by the court. However, it may be that all portions of KRS Chapter 342 relating to the consensus process are invalid. A result that is clear from the decision is that the consensus process and the clear and convincing evidence standard cannot be used to adjudicate CWP claims only, while a different standard is used for other pneumoconiosis claims.

The Department of Workers' Claims has taken 10 of the 469 CWP cases held in abeyance and has begun sending these claims to a university evaluator for findings pursuant to KRS 342.315. The instructions are for a chest x-ray and pulmonary studies. This is the procedure used for other occupational pneumoconiosis claims. The commissioner of the department has taken the position, with the consensus process being found unconstitutional, that this is the only option without legislative action or further court rulings.

One question regarding the use of university evaluations is whether there are sufficient evaluators. The University of Louisville has seven pulmonary evaluators, but only one evaluates black lung cases. The University of Kentucky has two pulmonary evaluators. There are no B-readers at either university.

The Supreme Court did not address which benefits apply to CWP claims. The court previously upheld statutory provisions requiring a different set of benefits for CWP claims but an argument can be made that the *Vision Mining* ruling effectively eliminated CWP benefits because they are based on a finding of consensus. If CWP claims are paid benefits similar to other occupational disease claims, then an impairment must be shown. Most CWP claims do not demonstrate a breathing impairment and only use x-ray evidence to receive benefits pursuant to KRS 342.732. A successful claim that proves an impairment may be costly for the employer or insurer. One Supreme Court Justice wrote in a dissenting opinion in the *Vision Mining* case that the legislature could impose the same consensus requirements for all pneumoconiosis claims.

Many former claimants may want to reopen claims that were decided with the consensus process; however, a Supreme Court ruling cannot be applied retroactively to previous CWP claims. Employees who adjudicated their claim under the consensus process will not be entitled to reopen their claim without legislative action.

The legislature has options to repeal or amend statutes found unconstitutional. The legislature could use the consensus process for all pneumoconiosis claims, use the university evaluators for all claims, or create another process for pneumoconiosis claims. The legislature has the authority to create a reopening process for CWP claimants who had their claims previously adjudicated by the consensus process. The legislature may take no action, which would mean most CWP claims will remain in abeyance until further issues are resolved by future rulings of the Supreme Court or Court of Appeals.

## **Medical Issues in Workers' Compensation**

Prepared by Carla Montgomery

### **Should the General Assembly address medical issues in workers' compensation injury claims?**

#### **Background**

Medical disputes normally arise from unpaid medical bills following the workers' compensation insurance carrier's denial of medical treatment due to medical necessity and appropriateness. Injured workers are concerned about getting adequate, prompt treatment and how to pay an attorney for representation when carriers deny medical treatment after a claim is adjudicated because there is no provision for attorney fees. Insurance carriers and employers are concerned about overutilization of medical treatment by injured workers and the cost of litigating disputes.

As medical costs have become the largest part of the workers' compensation claim, medical fee disputes have increased. In 1997, the Department of Workers' Claims adjudicated 306 medical disputes. In 2009, the department had its all-time high of 2,471 medical disputes. In 2010 and 2011, there were 2,295 and 2,266, respectively, filed with the department. As of September 2012, 1,711 medical disputes had been filed with the department.

The National Council on Compensation Insurance (NCCI) 2012 State Advisory Forum reported that Kentucky's medical benefits constitute 65 percent of the cost of a worker's compensation claim, compared to an average of 56 percent for Virginia, Illinois, Indiana, and Tennessee. Kentucky has an average cost per claim of \$32,300 versus an average national cost of \$28,000. There has been a moderate increase in medical severity per lost time claim in Kentucky.

#### **Discussion**

Some people believe the General Assembly should address the high cost associated with medical benefits in workers' compensation cases. Statutes permit the commissioner of the Department of Workers' Claims to promulgate regulations to carry on the work of the department and the administrative law judges. More specifically, the commissioner shall promulgate regulations relating to medical benefits as follows:

- to establish the form and content of a statement of services and procedures for the resolution of disputes related to the necessity, effectiveness, frequency, and cost of medical treatment;
- to establish procedures for the filing and approval of managed care plans;
- to adopt fee schedules;
- to govern utilization review activities by an insurance carrier; and
- to establish and fill any positions including medical services.

A few states have taken legislative and administrative action to resolve medical issues. Mississippi has a division designated to handle all medical disputes at its workers' compensation agency. The disputes are not handled by an administrative law judge. Almost all of the disputes

are resolved by the division. Only three to four disputes go to the next level of appeal, which is a peer review. The Kentucky Department of Workers' Claims plans to begin a pilot project in the fall of 2012 to address medical disputes. This project will begin with current in-house staff to administer these claims.

Missouri divides its fee disputes by the amount disputed. The disputes for claims amounting to \$1,000 or less get an administrative ruling to avoid further adjudication.

Several states require a specific party to pay the attorney fees of the injured worker in a medical dispute. In Wisconsin, the cost of the first medical dispute is paid by the insurer. Subsequent disputes are paid by the losing party. In Illinois, an employee may petition for a hearing on unpaid fees and petition for penalties. Indiana allows a 10 percent attorney fee for recovery of unpaid medical fees, out-of-pocket medical expenses, and future medical expenses, but fees must be approved by the workers' compensation board. In KRS 342.320, the General Assembly set specific limits on attorney fees with administrative law judge approval for the original claim, but there is no mention of post-award fees for medical disputes.

Many states are examining or proposing legislation regarding prescription medication. In a 2011 study, NCCI found that the prescription share of medical costs increased to 19 percent as a result of increased utilization. The commissioner will be monitoring the impact on workers' compensation prescriptions as a result of House Bill 1 passed in the 2012 Special Session. The bill sets forth ownership and operational standards for pain clinics and other standards for prescriptions.

Several states have adopted treatment guidelines that for physicians when treating a specific type of injury. In Kentucky, the commissioner has the authority to develop or adopt practice guidelines for medical providers. In 1996, Kentucky adopted a guideline titled "Clinical Practice Parameters on Acute Low Back Problems in Adults," which has not been used in years. The General Assembly could impose treatment guidelines through a statutory mandate.

An administrative law judge in Mississippi appoints a neutral nurse case manager for a difficult claim with significant medical issues. The insurance carrier pays for the nurse case manager. Insurance carriers initially fought this idea; however, many carriers and employees are now requesting the nurse case manager to assist with difficult claims to keep claims on track and avoid problems for the claimant and insurer. Kentucky's commissioner has authority to hire a nurse case manager at the Department of Workers' Claims. It is questionable whether Kentucky's administrative law judges have authority to appoint a nurse case manager, especially if the insurer is required to pay.

A variety of options exist to handle medical issues in workers' compensation claims. The commissioner must work within the scope of statutory authority. In many instances, only the General Assembly has the authority to resolve or address many of the medical issues in workers' compensation injury claims.

## **Unemployment Benefits to Military Spouses**

Prepared by Adanna Hydes

### **Should the General Assembly extend unemployment benefits to employees who voluntarily leave jobs to follow their military spouses reassigned to a military base?**

#### **Background**

The unemployment insurance program was established to provide financial assistance to workers who have lost their jobs. Basic provisions require that employees lost their jobs through no fault of their own and must be able, available, and actively seeking work. Additional requirements include meeting the criteria for the base-period wages and participating in reemployment services. Voluntary separation can be a disqualification for benefits; however, most states recognize particular circumstances as good cause and may award unemployment insurance benefits to a former worker. Circumstances that are commonly recognized by other states include sexual or other harassment, domestic violence, worker's illness, or a move with the spouse.

Approximately half of the states allow benefit coverage to a worker who moves with his or her spouse. Some states require a stipulation that it would be impractical to commute to the change in location of spouse's employment. Forty-five states do not disqualify the voluntary separation of a worker who follows a reassigned military spouse. However, Kentucky's statutes provide that an otherwise eligible worker shall not be disqualified from receiving benefits for leaving work to accompany the worker's spouse to a different state when the spouse is reassigned by the military but only if the state of relocation has adopted a statute substantially similar to Kentucky's.

#### **Discussion**

If a reassignment is made outside Kentucky, the military spouse will most likely receive unemployment benefits because most states do now offer those provisions, meeting Kentucky's eligibility criteria. However, military families reassigned within Kentucky will not receive unemployment insurance benefits. There are two major military bases within Kentucky: Fort Knox and Fort Campbell. These installations are approximately 150 miles apart, negating the feasibility for a spouse to maintain employment by commuting.

According to the Department of Defense, working military spouses lose approximately 6 to 9 months of salary per relocation. In addition to the physical relocation involved with a reassignment, moving from a dual income to a single income can place financial hardships on military families.

Should the General Assembly make the change to extend unemployment benefits to a worker whose military spouse is relocated within Kentucky, the Department of Military Affairs has indicated that the number of people impacted would be small. According to previously prepared fiscal impact statements, while the cost would be indeterminable, it is expected to be small.



## Alcoholic Beverage Control

Prepared by Bryce Amburgey

### Should the General Assembly revise the state's alcoholic beverage control laws?

#### Background

Alcoholic beverage regulation is usually a prominent subject in Kentucky, and it consistently comes before the General Assembly. The issue may come before the 2013 General Assembly, given the convergence of recommendations from an executive branch task force, recent court rulings, and other factors. Potential issues include alcohol business licenses, alcohol sales on election days, craft distilleries, disorderly licensee premises, and the sale of wine and distilled spirits in grocery stores.

**Executive Branch Task Force Recommendations.** The Governor's Task Force on Alcoholic Beverage Control was created by executive order in 2012 to review alcoholic beverage control, while considering such factors as the economic and agricultural importance of the alcohol industry, the potential review of older alcohol statutes, and the impact of global commerce and modern transportation. The task force has been directed to make recommendations about Kentucky's alcoholic beverage control laws in three broad areas: licensing, local option elections, and public safety.

Licensing has become more complex over the years. The Kentucky Department of Alcoholic Beverage Control (ABC) recognizes 65 categories of licenses. In comparison, task force members found that the number of license categories varies across states from 6 or 7 in Alabama and 8 in Texas, to 21 each in Alaska and Indiana and 22 in Oregon.

The task force has reviewed local option statutes and looked at options that include clarifying and defining terms, switching local option statutes out of other chapters and into KRS Chapter 242, moving unrelated alcohol statutes out of that chapter, and codifying the "county unit rule" to allow a precinct in a wet county to return to dry status.

The task force may seek to amend the disorderly premises statute for alcoholic beverage licensees because it may be vulnerable to challenge, as in the recent Circuit Court holding in *Hofbrauhaus Newport v. Commonwealth*. That court found that, under KRS 244.120, an alcohol licensee must prevent unruly customers from fighting, creating hazardous situations, or engaging in other disorderly conduct, but the licensee is not liable for similar behavior from unruly employees.

The task force is also looking at medical amnesty for minors, which means that a minor who requests emergency medical assistance for another minor's potentially lethal alcohol overdose is immune from prosecution for public intoxication or a related offense. Medical amnesty is meant to encourage requests for emergency assistance by minors who may not otherwise seek help out of fear of prosecution.

**Recent Court Rulings.** The existing statute forbids licensing grocery stores, convenience stores, and gas stations to sell wine and distilled spirits. However, the status of that law is uncertain. In 2012, a Kentucky federal court in *Maxwell's Pic-Pac v. Dehner* found that allowing wine and liquor sales at pharmacies and liquor stores but not at grocery stores, convenience stores, and gas stations violates the Equal Protection Clause of the 14<sup>th</sup> Amendment to the US Constitution. ABC has appealed the decision to the 6<sup>th</sup> Circuit Court of Appeals, and the original District Court suspended enforcement of its decision until the appeal is decided.

**Other Factors.** Craft distilleries have been invited to join the Kentucky Distillers Association and now make up 7 of its 13 members. While licenses exist to address the unique challenges facing small-scale producers of wine (small-farm wineries) and malt beverages (microbreweries), no similar license has been established for small-scale distillers. Two bills were introduced during the 2012 Regular Session to create a small-scale distillers license: House Bill 543 and Senate Bill 40. Neither bill passed.

In recent years, efforts have been made to change the law to allow alcohol sales on election days. Two bills have been prefiled on this topic for the 2013 Regular Session.

## Discussion

Proponents of changing the alcoholic beverage licensing statutes argue that the current system is antiquated and unnecessarily complex. They cite other states that have successfully modernized and streamlined their statutes while maintaining the three-tier system, which requires separate producers, wholesalers, and retailers for any alcoholic beverage. Opponents to changing the licensing statutes argue that the current system has served Kentucky well since the end of Prohibition. They contend that since the alcoholic beverage law is so complex and interwoven, any rush to change will have massive unintended consequences, such as increased fees or the loss of licensee privileges if licenses are modified, removed, or bundled.

Proponents of the sale of wine and distilled spirits in grocery stores argue that the restriction against it is a carry-over from the Prohibition era, when pharmacies could still sell alcohol for medicinal purposes. They believe that the distinction between modern grocery stores and pharmacies is insignificant, and both should have the same alcohol sale privileges. Opponents of these sales assert that the state may distinguish between different types of retailers, and this rule is designed for public protection through decreasing access to minors, maintaining prices, and protecting community gathering places.

Proponents of creating a craft distillery license argue that craft distilleries have a different business model than large distilleries, and like small-farm wineries and microbreweries, need a separate license to address the specific logistical and economic considerations facing small-scale producers. Opponents of creating a craft distillery license argue that the proliferation of these businesses could undermine Kentucky's established bourbon industry. They also state that allowing this privilege could create special privileges for small producers to the detriment of larger distilleries.

Proponents of alcohol sales on election days contend that restricting the sale of alcohol during polling hours reduces economic activity and results in less tax revenue for the state. They also indicate that the sales would occur only in areas that otherwise already allow alcohol sales. Opponents of alcohol sales on election days maintain that these closings originate from the effort to reduce vote buying and fraud through the unlawful transfer of alcoholic beverages, and that these concerns are still legitimate.

### **Works Cited**

*Hofbrauhaus Newport v. Commonwealth*, Franklin Circuit Court 11-CI-1345 (Feb. 27, 2012).

*Maxwell's Pic-Pac v. Dehner*, 2012 U.S. Dist. LEXIS 114420 (W.D. Ky. 2012).

## **Professional Licensure Requirements for Veterans**

Prepared by Michel Sanderson

### **Should the Kentucky General Assembly revise the licensure requirements of occupations in which military experience could substitute for education or apprenticeship requirements?**

#### **Background**

During their military service, many veterans receive training in military service trades such as heating, ventilation, and air conditioning; plumbing; or emergency medical services. Upon separating from service, veterans may want to transfer their skills to a civilian career that would require licensure or certification from an administrative board in Kentucky. Many administrative boards that issue occupational licenses or certificates to practice in Kentucky require an applicant to possess a certain degree of education and to pass an exam prior to qualifying for a license. In some cases, serving an apprenticeship is also required. Veterans wishing to apply for an occupational license or certificate in Kentucky face obstacles because they did not obtain their education through traditional methods.

According to the Executive Office of the President “military experience, on average, exposes individuals to highly advanced technology and technology training at a rate that is accelerated relative to non-military, age group peers” (“Military”). Because these veterans have acquired a certain level of education and on-the-job training while serving in the military, many feel that having to serve an apprenticeship creates an unnecessary burden when applying for a career-oriented license or certificate.

#### **Discussion**

Many states have recently taken measures to relieve the incongruity between state licensing requirements and the consideration given to experience a veteran acquired during service. Oregon passed legislation in 2012 that requires state administrative boards to grant occupational licensing credit to qualifying veterans in 23 occupations based on relevant military experience. In 2011, Utah, Virginia, and Washington also passed legislation authorizing consideration of military experience under certain circumstances in various professions.

Proponents of revising the licensure requirements of Kentucky occupations in which relevant military experience could substitute for education or apprenticeship requirements maintain that veterans are well trained while serving in the United States Armed Forces. Veterans should be allowed to simply produce their DD Form 214, a report of separation from the military that specifically lists the veteran’s education and service record, and pass the required exam for licensure or certification.

Opponents contend that that the apprenticeship and education requirements are a measure of public protection and are in place to preserve the integrity of the relevant occupation or profession.

## Work Cited

“Military Skills for America’s Future: Leveraging Military Service and Experience to Put Veterans and Military Spouses Back to Work.” Executive Office of the President. *whitehouse.gov*.  
<[http://www.whitehouse.gov/sites/default/files/docs/veterans\\_report\\_5-31-2012.pdf](http://www.whitehouse.gov/sites/default/files/docs/veterans_report_5-31-2012.pdf)> (accessed Sept. 25, 2012).

## **Race-Day Medication in Horse Racing**

Prepared by Tom Hewlett

### **Should the General Assembly establish standards for the race-day use of furosemide?**

#### **Background**

Furosemide, also known as Salix or Lasix, is a medication given to horses to control bleeding in the lungs due to exercise-induced pulmonary hemorrhage (EIPH). The application of furosemide began in the 1970s, to control EIPH. It is estimated that more than 92 percent of racehorses in the North America are given prerace furosemide (Hinchcliff). While furosemide is virtually unrestricted in the United States and Canada, horse racing jurisdictions throughout most of the world have placed limitations or bans on the use of furosemide on the day of a race.

The Kentucky Horse Racing Commission has considered various options for controlling the use of furosemide, from an outright ban on its use to limitations on its administration. Recently the commission proposed administrative regulations to limit furosemide use on the day of a race. The regulations require that a state-employed or state-contracted veterinarian would be the only person allowed to administer furosemide on race day. On August 27, 2012, the Interim Joint Committee on Licensing and Occupations found the administrative regulations deficient. The Governor overrode the committee's finding, and the new regulations went into effect on August 31, 2012.

#### **Discussion**

Proponents of restricting the use of furosemide do not dispute its effectiveness in controlling EIPH. Rather, they say that, as a side effect, it improves the performance of horses. They also say this is why race-day furosemide use is banned in Europe and throughout much of the rest of the world. Horses that are given furosemide can lose 20 pounds or more of fluid before each race, which can have a significant effect on speed and endurance. Proponents also argue that furosemide masks other medical issues, which can cause life-threatening breakdowns. They point out that 60 percent of sudden deaths in racing are due to severe EIPH, and they assert that furosemide hides the severity of the problem (Hinchcliff).

Proponents also argue that horse racing has a perception problem with the general public. To outsiders, discussion about race-day medication makes it seem as if furosemide is just a performance-enhancing drug for horses. They argue that if performance-enhancing drugs are not permitted in other professional sports, they should not be permitted in horse racing.

Opponents of restricting the use of furosemide argue that the health of the horse is what is at stake. Given that 60 percent of sudden deaths are due to severe EIPH, opponents contend that there would be significantly more deaths without the use of furosemide. Furosemide has been studied since the 1970s and has been found to be effective in preventing EIPH.

Opponents also argue that if furosemide use were restricted in Kentucky, owners would leave the state to race their horses in states with fewer restrictions. They say that Kentucky's purse sizes are already smaller than those in neighboring states, and being the only state to limit furosemide would be more incentive for horse owners to leave. If this were to happen, they argue, there would be a significant downturn in the amount of money the state collects from taxes on racing.

Opponents also point out that furosemide is used in more than 90 percent of all racehorses in the United States. Because it is so widely used, any performance-enhancing effects are irrelevant because the vast majority of horses are subject to the same enhancement. They argue this, combined with the health benefits of using furosemide, provides a net positive for horses, owners, and trainers.

### **Work Cited**

Hinchcliff, KW, PS Morley, and AJ Guthrie. Efficacy of Furosemide for prevention. *Journal of Veterinary Medicine*, 235(1), 76-82. 2009. <[http://www.news.colostate.edu/content/documents/4363\\_1.pdf](http://www.news.colostate.edu/content/documents/4363_1.pdf)>.



## City Reclassification

Prepared by Mark Mitchell and Jessica Causey

### Should the General Assembly adopt a new method of city classification?

#### Background

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

**Table 1**  
**City Classifications by Population Range**  
**Set by the Former Section 156 of the Kentucky Constitution**

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

Source: LRC staff compilation.

In 1994, the General Assembly passed legislation to place before the voters an amendment to Section 156 of the Kentucky Constitution to remove the population figures assigned to each class and to develop a new classification system. The voters ratified the amendment, but the General Assembly has not created a new system and still uses the original population classification system.

Population estimates and data provided by the US Census Bureau are typically used to classify and reclassify cities, but other population data can be used if the city leaders feel census data is not accurate. As its population increases or decreases, a city may ask the General Assembly to reclassify it. There is no statutory requirement that cities seek reclassification, and there is no statutory construct that automatically reclassifies a city to the class reflecting its population. As a result, some cities' classifications do not align with the population ranges for their classifications.

In 2012, the Boyle County Circuit Court in a case involving a city reclassification held that the General Assembly has the authority under the 1994 amendment to change the classification of a city considering "multiple reasonable factors," other than population and that it exercised its discretion in this particular case. According to the court, the population requirements of the

former Section 156 “have effectively been overridden by the Legislature’s decision” not to use them (*Joseph Perry v. Junction City*).

## Discussion

Table 2 compares cities’ actual classifications to what their classifications would be based on their 2010 populations. Of 113 cities of the fourth class, 20 could be classified as second or third class, while 44 could be classified as fifth or sixth. Of the 112 cities of the fifth class, nearly half (55) could be sixth class based on population. The actual classifications are in gray. The table does not include either the Louisville/Jefferson County Metro Government or the Lexington-Fayette Urban County Government because they are merged governments.

**Table 2**  
**Comparison of Cities’ Assigned Class Versus Class Based on Population**

		Class Based on Population of City						
		First	Second	Third	Fourth	Fifth	Sixth	Total
Assigned Class	First	0						0
	Second		11	1				12
	Third		3	12	3			18
	Fourth		2	18	49	42	2	113
	Fifth				6	51	55	112
	Sixth			1		4	158	163

Note: The highlighted cells indicate the number of cities whose classifications match the classification by population as shown in Table 1. The Louisville/Jefferson County Metro Government and the Lexington-Fayette Urban County Government are not included.

Source: LRC staff analysis using State Data Center figures.

Certain classifications have requirements placed upon them that others might not, such as cities of a certain class having to maintain full-time fire departments, or having yearly audits—cities of the sixth class are required to have audits done only every other year (KRS 91A.040). Other laws confer powers or flexibilities on certain classes. For example, only cities of the fourth and fifth classes may levy a restaurant tax. Cities of the fifth class can levy a restaurant tax but cannot tax liquor by the drink. Cities of the fourth class are allowed a restaurant tax and can tax liquor by the drink. While cities of the first three classes can tax liquor by the drink, they cannot levy a restaurant tax.

Population is a common measurement used to classify cities, but not every state assigns classifications to cities. The Kentucky League of Cities indicates that one-third of the states have no classification system, and the legislatures of those states distribute powers equally to the municipal governments. Of the states that do have classification systems, most use population to guide the classifications. Classification systems themselves dictate the differing authorities and responsibilities of cities. Of Kentucky’s seven surrounding states, Indiana, Missouri, and West Virginia use population classes like Kentucky; Illinois, Ohio, and Virginia classify their

municipal corporations through a description of government types, using terms such as town, village, or city, but the criteria used to set each type are based on population; and Tennessee has no classification system but, by citing discrete population ranges in statute to identify a particular city or group of cities, does assert legislative controls or privileges.

The Kentucky League of Cities prefers a system of classification based not on population, but rather on government type: city manager, mayor council, commissioner, and a mayor-aldermen form used by cities of the first class. Louisville was the only city of the first class, but now is a consolidated local government.

Population is not the only method available to determine classification. Classifications could be determined by characteristics of a government type, such as merged governments, charter governments, or commission, city manager, or mayor-council. Classifications could be geographically determined. These would constitute but a sample of possible distinctions.

In any bill draft seeking to fundamentally change city classification, lawmakers would be required at some point to decide which powers and duties to assign each classification. As many as 600 to 700 statutes govern cities that cite one or more classifications of cities. Legislators would need to evaluate each statutory change in light of the privileges, requirements, and responsibilities conferred on cities and to consider their effects on the governments of the cities and the populations residing within the city. The General Assembly could do nothing and continue as before because the current system of classification does function.

### **Work Cited**

*Joseph Perry v. City of Junction City*, No. 11-CI 00617 (Ky. Boyle Cir. Ct. March 12, 2012).

## Fire Tax Districts

Prepared by Jessica Causey

### Should the General Assembly raise the tax cap for fire districts?

#### Background

Fire protection districts and volunteer fire department districts, often referred to as Chapter 75 districts because of their place in statute, depend almost entirely on property taxes for their revenues. Regarding taxing authority, KRS 65.182 allows districts to collect up to 10 cents per \$100 assessed property value on homes and businesses within the boundary of the district. KRS 75.040 allows fire districts that establish and operate an emergency ambulance service to collect up to 20 cents per \$100 assessed property value if it is the primary service provider in the district. There are 119 Chapter 75 fire districts according to the Kentucky Fire Commission. Data from the Department of Revenue reflect that 160 fire districts reported their tax rates in 2011: 51 reported less than 10 cents per \$100, 87 reported 10 cents per \$100, 15 reported rates greater than 10 cents per \$100 but less than 20 cents per \$100, and 7 reported a 20 cent per \$100 rate. It is not immediately clear why the Department of Revenue claims more districts than does the fire commission.

Factors that impact district budgets include the economic recession, decreased property taxes, and rising administrative costs because some are moving from the volunteer structure to a professional firefighter structure.

#### Discussion

According to the Kentucky Fire Commission, some fire districts balance their budgets by lowering employee pay, decreasing or eliminating infrastructure maintenance, going into debt, or relying on new growth and development of previously unused land within their districts to bring in more taxing revenue. Urban and rural areas face different challenges. Eastern Kentucky, for instance, has some of the poorest counties in the state and has land occupied by coal mines. Property taxes in that area often are not sufficient to fund a fire district. The situation is more than geographic, however. Cities and counties in more urban areas have their own challenges: an area could have a high property-value development but a low population density, a high-density population with a low property value, or significant land available for future development and growth. Highly industrialized areas produce higher property tax revenue than residential areas because businesses pay a higher rate than residents.

In addition to a varied property tax scenario, more than 80 percent of fire districts nationwide perform some level of emergency medical services. The role of firefighters changes as they are called on to act as multifaceted first responders, answering not only fire calls but rescue, hazardous materials, and emergency medical calls. In light of this and other factors, some fire districts are beginning to use more career firefighters than volunteers. The shift from mostly volunteer to professional or career firefighters is creating fiscal burdens for many districts. For

volunteer districts, the 10-cent tax cap might have been sufficient, but many are finding it challenging to pay professional firefighters with that rate.

All Kentucky areas have fire protection at some level. As fire districts borrow money to remain solvent, an increase in tax revenue would stabilize, slow, or prevent the dissolution of district departments. Options for fire districts to increase revenue without raising taxes are limited. In counties with many fire districts, merger may provide savings. Fire districts could combine with emergency medical services and need only one dispatcher instead of two. In the 2012 Regular Session, Senate Bill 192 was introduced to change the tax structure of Chapter 75 fire districts to allow the trustees of a fire district in counties containing a consolidated local government to select all the members of the board and have the board set the tax rate without the limitation of the 10- or 20-cent cap. The bill did not pass.

Because fire boards comprise both elected and nonelected trustees, opponents to this option cite a reluctance to have nonelected officials change taxing rates. Fire districts are special districts, and some special districts have been criticized for their lack of transparency and accountability in spending practices.

## **Fiscal Accountability of Special Districts**

Prepared by Joe Pinczewski-Lee and John Ryan

### **Should the General Assembly increase the fiscal accountability of special districts?**

#### **Background**

Special districts are agencies, authorities, or political subdivisions of the state that provide services within limited boundaries of the state. They do not include cities, counties, or school districts (KRS 65.005). There are more than 50 types of special districts.

Special districts provide services such as ambulance, fire protection, garbage disposal, library services, planning, public health, road construction and maintenance, sewage disposal, and water supply. These districts may be funded in various ways, including local general fund appropriation, fees, service charges, or *ad valorem* taxes. The county judge/executive generally makes appointments to the boards of directors for most types of districts and may abolish or combine districts, with fiscal court approval (KRS 67.715).

One reason special districts are created may be the inability of county government to provide all services desired by the citizens of a county or a portion of a county. Constitutional limits on debt or taxing power have, in some cases, kept county governments from providing certain services. Special districts with taxing or bonding power have been a way to address such limits. The Auditor of Public Accounts' office estimates there are between 1,100 and 1,300 special districts created to perform various services. The Auditor's office indicates that districts generate in excess of \$2 billion annually in receipts or expenditures.

In 2012, the Auditor initiated a survey and examination of all special districts to develop recommendations to attain more accountability, transparency, and oversight for taxpayers.

#### **Discussion**

Over the years, a number of statutes have been enacted to identify special districts and make them accountable to county government and the public. Accountability to the public for using tax revenues has been a topic across the nation. Recent bills have been enacted that added accountability and transparency to governmental entities.

Existing statutes contain certain accountability requirements. KRS 65.005 requires new special districts to file information with the county clerk, including names and addresses of the members of the district governing body, the name and address of its chief executive officer, specific reference to the statute or statutes under which the district was created, and a brief description of its service area and activities.

Special districts are required to prepare an annual budget. The requirements for preparation of financial statements and audits vary according to the receipts or expenditures of the district. If the district expends or receives

- less than \$750,000 in a year, a financial statement is required every year, and an audit of funds in the budget is required once every 4 years; or
- more than \$750,000 in a year, an audit of funds in the budget is required annually.

The threshold amount for district receipts or expenditures triggering these requirements was modified in 2007 from \$400,000 to \$750,000.

Copies of district financial statements must be filed with the county judge/executive, and a copy of the audit must be filed with the fiscal court. Additionally, special districts with *ad valorem* taxing powers are required to submit an annual uniform financial information report (UFIR) by July 1 to the Department for Local Government in accordance with KRS 65.910. Special districts without taxing powers are not required to prepare or submit the report.

Proponents argue that enhanced accountability of special district operations requires establishment of a centralized registry. Regarding the audit threshold, proponents may assert that circumstances have changed since financial reporting requirements were amended in 2007 and that thresholds for special district receipts or expenditures triggering financial statements or audits should be readjusted. Proponents argue that UFIR requirements should apply to districts funded by local general fund appropriations, fees, or service charges. They also contend that special district board members should be elected, not appointed, and that code of ethics requirements should apply to special districts as they do to other forms of local government officials and employees under KRS 65.003.

Opponents of expanded fiscal controls may argue that special districts are essential and necessarily autonomous forms of local government and that existing financial reporting and other requirements are appropriate and sufficient. Expanded fiscal controls also would impose more administrative burden.



## **Coal Mine Reclamation Bonds**

Prepared by Mike Clark

### **Should the Kentucky General Assembly restructure the Kentucky Bond Pool program?**

#### **Background**

During the August 2, 2012, meeting of the Interim Joint Committee on Natural Resources and Environment, the Commissioner of Department for Natural Resources proposed restructuring Kentucky's Bond Pool program that helps provide funding to reclaim, or clean up, abandoned coal mines. The proposal was offered as a possible solution to address concerns that existing bonds are not adequate to cover the cost of reclamation in Kentucky.

Federal regulations require that land previously used for coal mining be reclaimed to meet state and federal standards. Coal operators are primarily responsible for the costs of reclamation, but in some cases, the operators are unable to complete the cleanup and they abandon the mine. To help ensure there are sufficient funds available to cover the cost of reclamation when this occurs, federal regulations require that coal operators post a performance bond before the operators are granted a mining permit. A performance bond is a legal guarantee that work will be completed. In the event that a coal operator is unable to complete the reclamation, the bond would provide a specified amount of financial resources to help cover the costs. These financial resources are typically provided either by a surety company that issues performance bonds on behalf of the coal operator or by collateral provided by the coal operator. Smaller coal operators that are financially sound and have good compliance records can also obtain bonds through the Kentucky Bond Pool. In Kentucky, the state's Department of Natural Resources regulates the bonding and permitting process under federal restrictions. The department sets the amount of bonds that coal operators must provide.

If a coal operator fails to reclaim the land, the state assumes responsibility for completing the reclamation. Although the bonds are intended to ensure funds are available for cleanup in these cases, amounts that would be paid by the bonds for some mines are not adequate to cover the reclamation costs. This results in the state paying a portion of the reclamation or the work not being completed. According to the department, the state would need approximately \$4 million to \$4.5 million annually in additional funding to complete needed reclamation projects. In May 2012, the federal Office of Surface Mining and Reclamation and Enforcement (OSM) notified the Energy and Environment Cabinet that the amount of funding provided by existing bonds for Kentucky mines is not sufficient to cover reclamation costs.

To address the adequacy of bonds, the department recently raised the amount of bonds that coal operators are required to provide. These requirements had not been raised in 20 years. The Commissioner reported that some operators have seen the amount of bonds required increase by 2.4 times as a result. These higher requirements increase financial pressure on coal operators. Those that purchase bonds from a surety company will have to pay higher premiums for the bonds, which will reduce their profitability and could potentially cause some mines to shut down.

Operators that provide collateral for bonds may not have sufficient assets to cover the higher amounts of bonds required.

The cabinet has also indicated that the General Assembly could restructure the Kentucky Bond Pool to make it available for more coal operators. Currently, the bond pool provides bonds for less than 10 percent of Kentucky's mining permits.

### **Discussion**

Changes to the existing bond pool could provide coal operators with greater access to bonds and may help to provide adequate funds to reclaim mines. However, there are a number of issues relating to how the pool would be restructured and funded.

One issue on the structure is whether the existing pool would be expanded to include more coal operators or whether a separate pool would be created to operate along with the existing pool. The pool primarily serves smaller operators, as larger operators could threaten the soundness of the pool. Some small operators believe the current bond pool functions well and that large coal operators can obtain bonds without changes. They argue that if changes are made, there should be two pools that operate independently.

If the pool is to make more bonds available to coal operators, it will likely need additional funds. Some have noted that the existing pool for smaller operators could be used to provide initial funds for a larger pool. In addition, fees could be applied based on the amount of coal a mine produces, as in the current pool. Fees based on the amount of coal produced, however, may not accurately reflect the costs to reclaim a mine or the risk that an operator would fail to complete the reclamation. In this situation, operators with lower reclamation costs or less risk of failing to complete reclamation might subsidize those with greater costs and higher risk. Alternatively, fees could be restructured to account for these costs and risks.

If the amount of bonding is not addressed, OSM has indicated that it will assume responsibility for regulating Kentucky's coal mine bonding process and possibly some aspects of the mine permitting process. If this occurs, Kentucky would lose the flexibility to develop and enforce regulations that meet the specific needs of Kentucky's citizens and its coal operators. The Commissioner of the Department of Natural Resources indicated that the required amount of bonds could increase by 10 times under federal regulation, which would further increase the costs to produce coal. Kentucky could also lose federal grants from the Abandoned Mine Land Program, Administrative and Enforcement, and Small Operator Assistance Program. In 2011, Kentucky received \$48 million in Abandoned Mine Land funding alone.

## **Mounted Wildlife Sales**

Prepared by Stefan Kasacavage

### **Should the General Assembly loosen restrictions on the sale of mounted wildlife?**

#### **Background**

Historically, the General Assembly has strictly controlled the sale of mounted wildlife to avoid the creation of commercial markets that could lead to the overharvesting of wildlife. KRS 150.180 prohibits the sale of any wildlife or wildlife parts for which the Department of Fish and Wildlife Resources requires a permit to hunt or take. An exception to this general prohibition is in KRS 150.4111, which allows legally taken wildlife or wildlife parts to be sold to or purchased from a licensed taxidermist. The department's administrative regulations also require any entity engaged in the business of selling mounted skins to have a taxidermist license.

However, instead of strictly applying these laws, the department uses its discretion in enforcing the laws and administrative regulations relating to the sale of wildlife and wildlife parts, focusing on bad actors who poach animals for easily salable parts. Accordingly, occasional sellers, settlors of estates, and sellers of heirloom wildlife mounts are often spared by the department from strict enforcement of the law because they are not seen as threats to conservation and protection efforts. However, recent seizures of wildlife mounts by the department's conservation officers have drawn into question the department's discretionary enforcement policy and the resulting public expectation created by lax enforcement. In February 2012, conservation officers confiscated 31 mounts from an antique mall in Franklin, Kentucky, including some mounts that were considered to be antiques (Rodenberg). Along with other recent seizures, this incident has caused some to question whether the General Assembly should create specific exemptions for mounted wildlife sales that would pose no threat to conservation, rather than relying on the vagaries of the department's enforcement policy.

#### **Discussion**

Some contend that the General Assembly should allow nontaxidermists to sell a small number of mounted wildlife per year, even if the sales were limited to wildlife that were taken over a certain number of years ago and not a threat to today's wildlife population. They argue that the law that prohibits the sale of all mounted wildlife by anyone except licensed taxidermists has not been uniformly enforced, which has led to the perception that isolated sales, especially of older mounted specimens, are legal. Although the department has sometimes exercised discretion to allow these sales, there are currently no statutorily authorized means by which citizens can legally sell their mounts to other nontaxidermists.

The department and some wildlife conservationists argue that the restrictions on, and the department's discretionary enforcement of, the sale of mounted wildlife have been effective at protecting wildlife and preventing the creation of commercial markets for wildlife and wildlife parts. They point out that prior to strict laws governing the sale of wildlife or wildlife parts,

commercial markets for buffalo and waterfowl led to the decimation of those populations. If legal occasional sales of mounted wildlife by nontaxidermists were allowed, then the department believes that stricter penalties for violations must also be enacted.

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Rodenberg, Eric C. "Kentucky Shop Owners Battle Little-Known Law." *Antique Week*, Vol. 42, Issue 2240, July 9, 2012: 1, 3.

## **Kentucky Lottery Advertising**

Prepared by Alisha Miller

### **Should the General Assembly allow the government programs and services that benefit from lottery proceeds to be mentioned in advertising or promoting the lottery?**

#### **Background**

In 1998, then-gubernatorial candidate Wallace Wilkinson campaigned touting the creation of a state lottery that would help to fund various programs including education. After winning the gubernatorial election, the new Governor called the General Assembly into special session to pass legislation implementing the lottery. Prior to final passage of the lottery bill, a Senate floor amendment was proposed that restricted the mention of government programs and services in lottery advertising. The proponents of the amendment felt that education needed more money than the lottery would provide and did not want to “reinforce what they said is a mistaken perception that the lottery will help education” (Cross).

During the 1998 session, KRS 154A.130 was amended, and with its enactment, lottery proceeds became a major funding mechanism for the College Access Program, Kentucky Tuition Grant Program, Kentucky Education Excellence Scholarships, the Collaborative Center for Literacy Development, and the reading diagnostic and intervention fund. Before 1998, lottery proceeds were not specifically earmarked for educational initiatives. However, since 1989, the lottery has delivered approximately \$3.7 billion to the General Fund and distributed to educational programs.

Debate over the prohibition of mentioning government programs and services in lottery advertising is a recurring issue.

#### **Discussion**

Proponents of mentioning programs in lottery advertising contend that it is good public policy to make everyone aware that the lottery helps to fund educational programs. They cite states such as Tennessee, Arkansas, and North Carolina that have used ads to build awareness that their lotteries raise money for education. Proponents contend that more awareness could lead to increased sales that would fund these educational programs. There have been four bills introduced since 2004 that proposed removing the prohibition on mentioning government programs and services that benefit from lottery proceeds in lottery advertising. None has passed.

Opponents argue that removing the prohibition on mentioning government programs and services that benefit from lottery proceeds in lottery advertising is not good public policy because it will encourage more gambling. They state that the goal of increasing sales through promoting that educational programs are funded through lottery dollars persuades people that it is acceptable to gamble.

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Cross, Al. "Legislature Passes Bill Establishing State Lottery." *Courier-Journal* Dec. 15, 1988, A1.

## **Local Redistricting**

Prepared by Greg Woosley

### **Should the General Assembly allow county governments to redraw their local legislative district boundaries after the General Assembly has completed state legislative and congressional redistricting?**

#### **Background**

County governments are required by KRS 67.045 to reapportion or redraw their local legislative district boundaries to nearly equalize population per district beginning in May of the first year following the decennial census of the United States. The county reapportionment process is generally required to be completed within 120 days. In the reapportionment process, the county fiscal court uses census block data to equalize district population and may, if desired, draw districts without reference to existing election precinct boundary lines. However, KRS 117.055 prohibits any precinct boundary line from crossing a local legislative district line, so to the extent a precinct line is impacted by a new local district, county boards of elections must redraw those precinct lines. Because of this requirement, in practice, many counties seek to construct local legislative districts that follow existing election precinct boundaries where possible to avoid numerous precinct changes following reapportionment.

The General Assembly also must redistrict state legislative and congressional district boundaries after the decennial census, a process that has in the recent past been undertaken in the first even-numbered year regular session following the census—or the year after the county reapportionment process. As KRS 117.055 also prohibits precinct boundary lines from crossing state legislative and congressional district boundaries, county boards of elections are required to redraw any precinct lines that are impacted by new state and congressional district lines. Thus, the mandated timing in the county reapportionment statute creates a situation where counties reapportion without knowledge of where the new state legislative and congressional district boundaries will be and, consequently, of what precinct changes might be required by General Assembly redistricting. The result is that county boards of elections may be required to make numerous precinct boundary changes despite a county fiscal court's best efforts to avoid that circumstance.

The mandated timing is also not consistent for all forms of local government. As with counties, consolidated local governments (Louisville Metro Government) are required to conduct local reapportionment in May of the first year following the census. Urban-county governments (Lexington-Fayette Urban County Government), unified, and charter county governments are authorized by statute to defer their local reapportionment proceedings until after completion of redistricting by the General Assembly. The only restriction on the deferral authority is that local reapportionment must be effective no later than 2 years after release of the census data.

The experience of the last two cycles of local reapportionment and state redistricting has led some counties to call for a statutory change that would permit county governments to redraw

their local legislative district boundaries after the General Assembly completes its redistricting process.

### **Discussion**

Proponents of allowing county governments to redraw their local legislative district boundaries after General Assembly redistricting contend that it would be more efficient because counties could reduce or eliminate the need to modify precinct boundaries after both General Assembly redistricting and local reapportionment. Proponents also argue that permitting counties to wait until after General Assembly redistricting would allow local governments to make comprehensive political decisions in one context with all the necessary data. Further, proponents argue that giving counties the option to defer reapportionment provides county governments with more flexibility in allocating scarce local resources for the reapportionment and precinct modification processes.

Opponents of allowing county governments to delay their reapportionment contend that waiting for the General Assembly to enact its redistricting plans might unnecessarily delay county reapportionment if the state legislative and congressional redistricting is delayed. Additionally, opponents argue that because populations may shift after the census, and because a vacancy in a local legislative district could occur at any time, it is important to conduct reapportionment as soon as the population data from the census is available. Further, because General Assembly redistricting typically occurs in an election year, opponents argue that there would not be enough time for county governments to complete their reapportionment process to be effective for that year's election cycle; thus, potentially using unequally populated local districts for another election.

## **National Popular Vote Compact**

Prepared by Kevin Devlin

### **Should the General Assembly authorize Kentucky to join the National Popular Vote Compact regarding US presidential elections, which is designed to ensure that the presidential candidate who receives the most popular votes nationwide be elected?**

#### **Background**

In the United States, the presidential candidate who wins the majority of votes in the Electoral College, rather than the winner of the popular vote, is elected president. There have been four US presidential elections in which the winner of the popular vote was not elected president: 1824, 1876, 1888, and 2000. There have also been several presidential elections in which the shift of a relatively small number of voters in one or two states would have resulted in the election of a candidate who did not win the popular vote. For example, in 2004, the shift of 60,000 votes in Ohio would have changed the outcome of the election, resulting in the election of a candidate who did not win the popular vote nationwide. The National Popular Vote Compact is an attempt to address this issue by assigning the electoral votes from participating states to the candidate who wins the popular vote nationally.

The Electoral College was instituted at the Constitutional Convention of 1787 and is included under Article II, Section 1 of the US Constitution. It was a compromise among the convention delegates, some of whom advocated direct election of the president by popular vote and some of whom advocated election of the president by Congress or through some other method. Ultimately, it was decided that each state would be assigned a number of electors equal to the number of US senators and US representatives representing the state in Congress. The US Constitution allows state legislatures to determine how their electors should be appointed. The number of US representatives, and thus the number of Electoral Votes, assigned to each state is based on population and is determined by a decennial census.

In all states except Maine and Nebraska, the candidate who wins the popular vote receives all of the state's electoral votes. Maine and Nebraska apportion electoral votes by congressional district based on the popular vote of each of those districts, and the two senatorial electors are to vote for the candidate who won the popular vote statewide.

Under the National Popular Vote Compact each participating state would agree to award its members' electoral votes to the presidential candidate who wins the most popular votes nationwide, regardless of which candidate wins the popular vote in each compact state. The National Popular Vote Compact is designed to ensure that a president could not be elected without winning more popular votes nationwide than any other candidate.

The Electoral College has 538 electors. The compact would go into effect if states representing a minimum of 270 Electoral College votes join. Eight states—California, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, Vermont, Washington—and the District of Columbia

have joined the compact and represent 132 Electoral College votes. In 2011, National Popular Vote legislation was introduced in 38 states. The National Popular Vote Compact has been introduced in the Kentucky General Assembly in 2007, 2008, 2009, 2011, and 2012.

## Discussion

Proponents of the National Popular Vote Compact argue that each person's vote should be equal when electing the president of the United States. Proponents contend the National Popular Vote Compact would ensure that the candidate with the most popular votes is elected, and bring more attention from presidential campaigns to states that are not generally viewed as competitive states. Proponents also suggest that under the National Popular Vote Compact, presidential campaign spending would be more evenly spread around the country, producing additional revenue for local radio and television stations instead of concentrating spending in the most competitive states. Proponents of the National Popular Vote Compact contend that many public opinion polls show the public supports a system in which the candidate for president who receives the most votes wins. The League of Women Voters supports the National Popular Vote Compact as one way to have the direct popular vote elect the president.

Opponents contend the compact does not account for instances where the winner of the national popular vote cannot be determined because the popular vote is very close and does not account for the lack of a standardized recount procedure among the states. Opponents argue the compact would lead presidential campaigns to focus on the most populous states and the most populous areas of states instead of appealing to a broad cross section of the population. Opponents observe that compact states can withdraw from the compact after an election has taken place, raising the prospect that a compact might cease at some point after being in effect during one or more presidential elections, which could confuse and frustrate voters. Opponents argue that the National Popular Vote Compact does not account for individual electors who do not vote for their party's designated candidate, something that historically has occurred in several presidential elections.

The issue may have constitutional implications. Proponents of the National Popular Vote Compact argue that Article II, Section 1 of the US Constitution gives state legislatures control over the manner in which they award their electoral votes, while opponents argue that Article 1, Section 10 requires congressional approval of a compact among states. Proponents refer to US Supreme Court cases that appear to indicate that compacts among states need congressional approval only in instances where they could encroach upon federal supremacy, and since Article II, Section 1 gives state legislatures the power to determine how their electoral votes are allocated, proponents contend that federal supremacy is not at issue. Opponents respond that congressional consent is required to ensure that the interest of states not a party to the compact is protected.

## **Voter Identification**

Prepared by Karen Powell

### **Should the General Assembly require voters to present photo identification before they are allowed to vote or have their votes counted?**

#### **Background**

The requirement to present identification to vote began to change in 2000, when only 14 states had provisions requiring some form of identification. Today, 30 states require some form of identification to vote. Prior to the 2006 election, no state required a voter to produce photo identification as a condition of voting. Today, 11 states require photo identification. Three additional states have passed voter photo identification laws that have been challenged in court. In 2011, bills were introduced in 34 states requiring voters to show photo identification.

#### **Discussion**

The type of identification required to vote varies from state to state, as does the procedure to follow if a voter does not have the required identification. Indiana, Georgia, Tennessee, Kansas, and Pennsylvania have strict photo identification laws that do not allow voters to cast regular ballots without first showing valid photo identification. Florida, Hawaii, Idaho, Louisiana, Michigan, and South Dakota require photo identification but provide alternatives if the voter does not show the required photo identification. Mississippi, South Carolina, Texas, Wisconsin, Alabama, Rhode Island, and New Hampshire have enacted voter photo identification laws that have not yet been implemented. In Kentucky, as in 14 other states, no photo identification is required to vote. KRS 117.227 states: "Election officers shall 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."

In states with strict photo identification requirements, a voter who cannot show the proper identification casts a provisional ballot and presents the acceptable photo identification within a few days. The provisional ballots are kept separate from the regular ballots and are counted only if the voter returns within the required time frame and shows the proper identification. The remaining states that require photo identification allow a voter without the photo identification to provide certain nonphoto documents such as a credit card or utility bill, sign an affidavit, or be recognized by election officials, all at the voting location.

Proponents of the voter photo identification laws argue that the measures are to prevent voter fraud and are intended to ensure the identity of the registered voter. Opponents argue that the small number of fraud cases resulting in conviction were not actions photo identification requirements could prevent. Opponents contend that requiring photo identification will result in the disenfranchisement of a disproportionate share of the elderly, minority, and low-income groups, who historically have less access to photo identification documents.

In 2005, Indiana became the first state to enact a strict voter photo identification law. In 2008, the United States Supreme Court upheld Indiana's law in the case of *Crawford vs. Marion County Election Board*, 553 U.S. 181 (2008). In *Crawford*, the court ruled that the burdens placed on voters were limited to a small percentage of the population and were offset by the state's interest in reducing fraud.

Since the *Crawford* case, numerous state and federal legal challenges to voter photo identification laws have been filed. Two significant cases were decided in October 2012. The District of Columbia federal district court upheld South Carolina's photo identification law indicating that because voters could sign an affidavit if they did not have photo identification, there was no discriminatory intent and would not hinder voting rights (Fox). A Pennsylvania judge blocked enforcement of the Pennsylvania photo identification law, stating that even though the state was making it easier for voters to get the needed identification documents, there now was too little time before the 2012 election for voters to acquire them (NBC).

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## **Fees on Alternative Fuel Vehicles**

Prepared by Brandon White

### **Should the General Assembly assess fees on alternative fuel motor vehicles to offset the loss in fuel tax revenue?**

#### **Background**

The primary source of Kentucky's road fund is the motor fuels tax assessed on gasoline, diesel, and other special fuels such as compressed natural gas and liquid propane. In fiscal year 2012, motor fuels taxes accounted for slightly over \$790 million, which is more than 54 percent of the road fund receipts. The remainder of road fund revenues can be attributed to motor vehicle usage taxes, weight/distance taxes, motor vehicle registration fees, and driver's licensing fees. Revenues deposited into the road fund have been insufficient to keep up with rising highway construction and maintenance costs.

When first created, the motor fuels tax was an effective tax on all motor vehicle operators. However, technology is slowly rendering the method less efficient. The increased use of hybrid vehicles reduces the state's motor fuels tax revenue. If the development and adoption of electric vehicles increases, it may create a dilemma because there is no way to impose a fuel tax on electricity used for charging electric vehicles.

#### **Discussion**

An alternative system to the motor fuel tax that some states are considering is a vehicle miles traveled (VMT) system, which taxes all motor vehicle owners based on the mileage actually traveled rather than on fuel consumption. Proponents see this as a system that would encompass all vehicles, regardless of the method of operation. A VMT system would also provide an incentive for the driver to decrease vehicle usage by allowing for adjusted fees in congested areas or during busy times of the day.

Minnesota is testing a VMT-based tax system using a smart phone application to track a user's mileage. Oregon pilot tested a VMT system in 2006-2007 that equipped 260 vehicles with devices that allowed gas stations to monitor vehicle mileage. More than 90 percent of the volunteer users of this system indicated they preferred the VMT system over the motor fuels tax. Oregon's transportation department concluded that the VMT concept was a viable alternative funding method for road projects.

Opponents of the VMT tax system argue that depending on the tracking method, the system would either lead to odometer tampering or privacy issues. Opponents also argue that such a system would penalize rural drivers. Another concern is that it would be cost prohibitive to install monitoring devices in all vehicles.

Some states have chosen other methods for taxing alternative fuel vehicles. Missouri requires owners of alternative fuel vehicles to purchase an annual decal. The price is determined by the vehicle's gross weight and ranges from \$75 to \$1,000. A penalty of \$500 is assessed to any driver who does not purchase a decal or any person who puts liquid propane gas or natural gas into a motor vehicle that does not have a decal. Virginia charges drivers an annual \$50 license fee for the registration of electric vehicles. Oregon will assess a fee of 6 cents per mile for electric and plug-in electric hybrid vehicles beginning with 2014 models. California, Idaho, Kansas, and New Mexico give alternative fuel vehicle owners the option to pay for an annual decal or a permit in lieu of paying sales or excise tax on the fuel.

The General Assembly previously adopted measures in 2006 and 2009 aimed at preventing a decrease in motor fuels tax revenue. Kentucky's motor fuels tax includes a variable component based on the average wholesale price of gasoline. The variable portion of the tax can rise no more than 10 percent in any year. However, a reduction in fuel prices would result in a drop of the tax rate. The General Assembly has passed bills that increased the minimum value of the statutory average wholesale price used in the calculation of the motor fuels tax.

The Environmental Protection Agency established fuel efficiency standards to improve industry fleetwide gas mileage for cars and light trucks to 54.5 miles per gallon by 2025. If achieved, the increase in fuel efficiency will be a benefit for drivers but would negatively impact Kentucky's motor fuels revenue if the current system is left unchanged. The General Assembly may want to address the anticipated reduction of motor fuels tax revenue and debate whether the answer is to tax alternative fuel vehicles or to adopt an alternative fee method.

## **Intrastate Commercial Motor Vehicles**

Prepared by Dana Fugazzi

### **Should the General Assembly exempt smaller intrastate commercial motor vehicles from certain federal safety requirements?**

#### **Background**

Federal motor safety regulations apply to commercial motor vehicles (CMVs) that are driven between states, are driven only within a state and weigh more than 26,000 pounds, transport hazardous materials, or transport 16 or more people. The Kentucky Transportation Cabinet applies the federal regulations to commercial vehicles that weigh 10,001 pounds or more and are driven within the state. Federal law allows states to exempt some commercial vehicles that travel within the state. In 2011, the General Assembly adopted Senate Bill 79, which exempted farm trucks weighing 26,000 pounds or less from some federal safety requirements.

#### **Discussion**

Since the implementation of SB 79, there has been concern that enforcement has targeted nonfarm commercial motor vehicles in the under-26,000-pound weight class, which is negatively impacting small business operations. An issue is that nonfarm CMVs are being held to federal safety standards from which farm vehicles of the same weight class have been exempted. Another concern is the disparate effect that large fines have on smaller businesses as compared to larger businesses. It was suggested that small businesses could benefit if nonfarm CMVs in this weight class were exempted as well.

According to statistics from the Kentucky State Police, in 2011 there were 2,559,395 passenger vehicles and 164,639 commercial motor vehicles registered in Kentucky, meaning commercial motor vehicles account for approximately 6 percent of registered vehicles. Commercial motor vehicles accounted for fewer than 4 percent of vehicles in all collisions but accounted for 8 percent of vehicles in fatal collisions.

It is difficult to determine whether applying the federal regulations reduces the number of accidents. A 2002 safety report by the National Transportation Safety Board on intrastate trucking operations reported that intrastate CMVs weighing less than 26,000 pounds were involved in a greater number of accidents than CMVs weighing more than 26,000 pounds. The report noted that determining the effect of the federal regulations would require information related to whether the vehicle was operating under an exemption and whether the exemption allowed the truck to operate in an unsafe manner that was related to the accident. The report also noted that the greater proportion of lower-weight intrastate carrier trucks involved in accidents may reflect the number of vehicle miles traveled.

There is little uniformity among other states in the exemptions that have been obtained from the federal safety standards.



## **Funding 911 Services**

Prepared by Kris Shera

### **Should the General Assembly adopt a statewide fee for 911 services levied on all communications devices capable of making a 911 emergency request?**

#### **Background**

The 911 emergency system began in 1968 with a fee placed on landline phones to provide funding for the system. Since the system began, there have been many advances in communication 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. Although technology has advanced, the method for funding the 911 system has gone largely unchanged.

Kentucky's and most states' 911 systems are developed around telephone technology that is not equipped to handle the text, data, images, and video that are increasingly common in personal communication. Therefore, a goal is to develop a 911 system capable of accepting 911 emergency requests from all modes of communication that exist and those that may be developed in the future. Such a system will increase the costs of maintaining and upgrading the system as new technology arrives.

In Kentucky, 911 fees on landline telephones are assessed by local governments (KRS 65.760). These fees range from 50 cents to \$4.25 per month per landline telephone connection. Two counties assess a percentage tax on phone rates. Boyd County charges 17 percent on the base phone rate, and Wolfe County charges a 3 percent tax on all local phone charges and long distance tolls. Unlike 911 fees on landline telephones, 911 fees on cellular phones are assessed by the state.

#### **Discussion**

The rapid rate of development in mobile communication technology and the decreasing use of landline telephones create challenges for state and local governments to be able to fund 911 systems. More than one in four households have only cellular phones as a means of communication, and the number of cellular-only households exceeds households with only landline telephones. Policy makers are confronted with the issue of ensuring 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.

As the number of landlines decreases, local governments are trying to find additional ways to fund 911 services. In Kenton County, local officials have passed a new property tax of \$85 per parcel to fund 911 services, while removing landline 911 fees altogether. Garrard and Lincoln Counties share a call center and are beginning to look into a new utility fee on water meters to fund 911 services. No counties have discontinued 911 services due to lack of funding.

The Commercial Mobile Radio Services (CMRS) board is an executive branch agency charged with overseeing the state's transition to Enhanced 911 services whereby call centers will be able to accept and appropriately respond to 911 calls from cellular phones. The CMRS board imposes a 911 fee on cellular phone users, known as the CMRS service charge, which 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). The CMRS board also is studying 911 emergency communications funding procedures and costs as directed by the General Assembly with the passage of Senate Bill 119 from the 2011 Regular Session.

One option for funding the 911 system involves a statewide fee assessed on all users with any communication device 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 administration and funding 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 ensure that users of all communication devices that can make a 911 emergency request are paying an equitable fee.

The CMRS board recommends a state-managed 911 system with a statewide fee assessed on all communication devices. 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. Statutes do not require 911 service fees on users of VoIP or telematics services.

Seventeen states have a statewide 911 system funding model, with others considering legislation to move to a statewide model. Fees for statewide funding for 911 services vary. Indiana established a state 911 board with a 90-cent monthly 911 fee on all communications services. North Carolina established a state-level board and assesses a 60-cent 911 service charge per connection on all users with communication devices capable of accessing 911 services.

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 on the market, changes are required to add that device to the list of devices that are charged a 911 fee. The association recommends imposing a statewide fee in such a way that would automatically include new communications technology as it emerges.

The Kentucky League of Cities supports changes to enable the application of 911 fees on users of all current or future communication devices capable of making a 911 emergency request, but it opposes changes to the 911 funding model that erode local authority to establish and collect 911 fees on landline telephones. The collection of 911 fees on landlines has long been considered a local issue by many local governments, and they are concerned about losing direct control over their portion of 911 fees and whether a state-managed 911 fee would provide adequate funding for 911 services.

## **Kentucky Code of Military Justice**

Prepared by Kris Shera

### **Should the General Assembly update the Kentucky Code of Military Justice?**

#### **Background**

The Kentucky Code of Military Justice covers all members of the Kentucky National Guard who are serving under a call or order of the governor. When National Guard members are activated for federal service under a call or order of the president, they are covered by a federal law known as the Uniform Code of Military Justice (UCMJ). The Kentucky Code of Military Justice was created in 1954 and last updated in 1986.

The differences between the Kentucky Code of Military Justice and the UCMJ can create problems with regard to the administration of judicial and nonjudicial military punishment. For example, when a National Guard member is called into federal service and commits a crime under the UCMJ, the member's unit may not have the time or resources to adjudicate the soldier's offense and may opt to return the member to his or her state. Under state law, the National Guard, in this particular situation of misconduct, lacks the jurisdiction to punish the soldier. In addition, while some forms of unprofessional behavior and misconduct may not be in violation of state or federal law, such as adultery or conduct unbecoming, they reflect negatively on the Kentucky National Guard. Yet, the Kentucky National Guard has no jurisdiction. The potential also exists for constitutional issues because the Kentucky code lacks an appeals process. Some penalties and provisions may not be commensurate with what might be commonly held as reasonable by today's standards. For instance, a summary courts-martial is the standard punishment for enlisted military personnel for non-capital offenses, such as burglary. A fine of \$25 for a summary courts-martial may have been punitive in 1954 when the Kentucky Code for Military Justice was established, but it is now such a small percentage of a soldier's pay that it does not effectively discourage prohibited behavior.

#### **Discussion**

A provision in the 2003 National Defense Authorization Act directed the secretary of Defense to produce a Model State Code of Military Justice that would resolve some of these issues by providing an update to the states' military justice systems, creating a military justice system that is more easily understood by the members it covers, and providing more consistency throughout military service whether under federal service or state service.

There are two approaches to updating the Kentucky Code of Military Justice. The first is to adopt the Model State Code for Military Justice in total. The model code would update the states' systems and provide consistency between state and federal systems. The second approach is to adopt most of the Model State Code while making some changes to ensure that the language conforms to the Kentucky Revised Statutes and the Kentucky Constitution. The second approach is preferred by the Kentucky Department of Military Affairs. No states surrounding the

Commonwealth have adopted the Model State Code in any form. One reason for this could be that the Model State Code was submitted in 2003 during Operation Enduring Freedom and around the start of Operation Iraqi Freedom. State National Guards may now have time to update their codes of military justice.

## **Uniformed Services Employment and Reemployment Rights Act**

Prepared by Tiffany Opii

### **Should the General Assembly extend the state's laws pertaining to employment and reemployment rights of members of the National Guard?**

#### **Background**

Most National Guard members are not full-time military personnel, and many hold civilian jobs when not on active duty. Active duty is classified in three basic ways: federal active duty doing work for the federal government (Title 10 U.S.C.), state active duty being reimbursed by the federal government (Title 32 U.S.C.), or state active duty called by the governor (KRS 38.030). The length of duty varies depending on the mission. Upon returning from active duty missions, some National Guard members find that they have lost their civilian jobs or they have trouble finding a civilian job because of their military service or obligation. As of 2011, there were about 8,500 members of the Kentucky National Guard.

The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) requires a service member to give his or her employer notice of military duty, and the employer is required to reemploy the service member upon return from active duty if the service member was not dishonorably discharged. USERRA applies only to service members on active duty orders under Title 10 or Title 32 of the United States Code, not those on state active duty orders under KRS 38.030.

The Department of Defense suggests that each state should enact a state version of USERRA to protect the employment and reemployment rights of National Guard members on state call to duty by the governor. The department also is calling on states to provide reciprocity for National Guard members who work in one state but belong to Guard units in another state.

#### **Discussion**

Kentucky law clearly protects the employment and reemployment rights of Kentucky National Guard members whose civilian jobs are in Kentucky if called up on active duty orders. Employers are required to give members of the Kentucky National Guard time off to report for active duty and to permit employees to return to their jobs upon completion of their assignments. Employers also may not prevent Kentucky National Guard members from being employed based on National Guard affiliation. Violation of these laws carries penalties ranging from fines to jail time. These laws are in some ways a state-level USERRA because they provide employment protections to National Guard members on state active duty orders under KRS 38.030, when USERRA does not apply.

It is unclear whether current law provides employment and reemployment protections to members of out-of-state National Guard units who work in Kentucky if called up on that state's active duty orders. In example, if a member of an Ohio National Guard unit has a civilian job in

Kentucky duty, it is unclear whether the member would be afforded employment protections if called up on Ohio's state active duty. Conversely, Kentucky National Guard members who have civilian jobs in Ohio would not be afforded employment protections under Kentucky law if summoned for active duty under KRS 38.030, because Kentucky law does not have jurisdiction over non-Kentucky employers.

Proponents argue that the employment and reemployment protections should extend to members of the National Guard who work in Kentucky regardless of whether they are members of a Kentucky National Guard unit or a National Guard unit of another state.

Opponents argue that employment and reemployment protections are sufficiently provided by the state and federal USERRA laws. Opponents also argue that other avenues such as employee and employer education and mediation may be more beneficial.