FIREFIGHTER CANCER BENEFITS: A CASE FOR PROSPECTIVE APPLICATION

Vol. 94, No. 4 July/August 2020 Pg 38 Glenn E. Thomas and Janice D. Rustin City, County and Local Government

In 2019, the Florida Legislature acknowledged the scientific evidence showing a correlation between firefighting and certain cancers when it passed Senate Bill 426, an act mandating employer-funded cancer benefits for firefighters. The act created F.S. §112.1816, under which an eligible firefighter diagnosed with certain types of cancer is automatically entitled to cancer-related benefits at no cost to the firefighter, enhanced retirement disability and death benefits, and duty-related death benefits. But a court's recent decision to award benefits to a firefighter diagnosed before the act's effective date of July 1, 2019, has put local governments in the politically unpopular position of defending their administrative policies that limit claims to cancer diagnoses occurring after July 1, 2019, only. This article provides a review of Florida cases regarding retroactive application of new laws and concludes that there is sound legal basis for local governments to apply the act prospectively.

According to a 2010 study by the National Institute for Occupational Safety and Health (NIOSH), firefighters have a 9% higher risk of being diagnosed with cancer and a 14% higher risk of dying from cancer than the general population in the United States.[1] The cancers mostly responsible for this higher rate were respiratory (lung, mesothelioma), gastrointestinal (buccal, pharynx, esophageal, large intestine), and kidney.[2] This study, and others like it, were a call to action for federal and state lawmakers.

In 2018, President Trump signed into law the Firefighter Cancer Registry Act, which requires the Centers for Disease Control and Prevention (CDC) to develop and maintain a voluntary registry to collect relevant history and occupational information related to the incidence of cancer among firefighters.[3] This law will enable states to collect better data to understand the overall epidemiological cancer trends among firefighters, which will lead to better protective measures and decontamination procedures, thereby reducing some of the long-term occupational hazards that firefighters face.[4]

With the passage of SB 426, Florida became one of 44 states that have passed laws granting certain rights and benefits to firefighters who are diagnosed with cancer. Generally, these laws create a legislative presumption in which firefighters who are diagnosed with certain types of cancer are assumed to have contracted the disease in the line of duty and are, therefore, entitled to compensation. But the extent of the presumption varies. In a number of states, including Alabama, Massachusetts, and Vermont, this presumption can be overcome by a preponderance of evidence that the firefighter's diagnosis was caused by non-service factors.[5] In other states like Michigan, the presumption may be rebutted only by specific scientific evidence to the contrary.[6]

Existing laws in Florida, such as F.S. §§112.18, 112.181, and 175.231, create a rebuttable presumption that disability or death resulting from specified illnesses are accidental and suffered in the line of duty, unless the contrary is shown by competent evidence. In contrast, §112.1816 provides no opportunity to rebut the presumption that a firefighter's cancer was suffered in the line of duty; and the law includes no requirement that in order to receive benefits, a firefighter would have had to undergo a medical exam prior to employment, which failed to disclose evidence of cancer. If a firefighter is totally and permanently disabled due to a diagnosis of cancer or as the result of cancer treatment, the disability or death must be deemed to have been suffered in the line of duty. This makes them automatically eligible for the law's benefits upon diagnosis.

Cancer Treatment Benefits

Section 112.1816(1)(a) defines cancer to include 21 forms of the disease. Once a firefighter notifies his or her employer of an initial diagnosis of one of these cancers, the employer must provide the following benefits: 1) a one-time cash payment of $25,000; 2) full coverage of the firefighter's cancer treatment by the employer's health plan or through a group health insurance trust fund at no cost to the firefighter; and 3) timely reimbursement for any out-of-pocket deductible, copayment, and coinsurance costs incurred by the firefighter for cancer treatment. [7]

These benefits are intended to be an alternative to pursuing workers' compensation benefits, which means that an eligible firefighter cannot receive benefits under §112.1816 *and* file a claim for workers' compensation benefits under F.S. Ch. 440 based on the same diagnosis of cancer.[8] The cost of the $25,000 one-time payment, cancer treatment, and reimbursement of out-of-pocket expenses must be borne solely by the employer.[9] The employer must also consider a firefighter's cancer diagnosis as an injury or disease incurred in the line of duty for the purpose of determining leave time and employee-retention policies.[10]

• *Eligibility* — The benefits described above are available to any full-time firefighter employed by a fire department whose primary responsibilities are the prevention and extinguishing of fires; the protection of life and property; and the enforcement of municipal, county, and state fire prevention codes and laws pertaining to the prevention and control of fires.[11] Volunteer and part-time firefighters, and fire department employees whose primary responsibilities do not include the duties described above, are not eligible for benefits under §112.1816.

For full-time firefighters to be eligible for the one-time payment and cancer treatment benefits, the following requirements apply: 1) The firefighter must have been employed as a firefighter by the employer for at least five continuous years; 2) the firefighter must not have used tobacco products for the preceding five years; 3) the firefighter must not have been employed in any other position in the preceding five years that is proven to have a higher risk of cancer.[12]

The $25,000 one-time payment and health benefits provided under the new law must be made available to an eligible firefighter for 10 years after the date he or she terminates city employment, as long as the firefighter 1) continues coverage in a city-sponsored health plan or group health insurance trust after termination of employment; 2) meets all the other eligibility criteria for an active firefighter at the time of termination of employment; and 3) is not subsequently employed as a firefighter. [13]

• *Line-of-Duty Disability and Death Benefits* — Section 112.1816 also enhances firefighter retirement benefits by allowing firefighters who are disabled as a result of a cancer diagnosis or treatment of cancer to receive line-of-duty disability retirement benefits, and allows the beneficiaries of firefighters who die from cancer or the treatment of cancer to receive line-of-duty death benefits, without having to prove their cancer was caused by their work as a firefighter.[14] To be eligible for disability benefits, a firefighter would still be required to meet the retirement plan's requirements for total and permanent disability, which is generally defined as being "wholly prevented from rendering useful and efficient service as a firefighter and…likely to remain so disabled continuously and permanently."[15] The employer is solely responsible for payment of the contributions necessary to fund the increased actuarial costs of the cancer-related retirement disability and death benefits, and employee contributions may not be increased for this purpose.[16]

It must be noted that the eligibility requirements applicable to the $25,000 one-time payment and cancer treatment benefits outlined above do not apply to the enhanced retirement disability and death benefits. Thus, a firefighter with less than five continuous years of service with an employer who receives a cancer diagnosis may be eligible for line-of-duty disability and death benefits under the employer's retirement plan, without being eligible for the $25,000 one-time payment or treatment-related benefits.

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Section 112.1816 also provides that the beneficiaries of any firefighter who dies as a result of cancer or cancer treatment are entitled to the benefits described in §112.191(2)(a), which provides for a one-time payment of $75,000 by the employer to the beneficiaries of a firefighter who is accidentally killed or receives an accidental bodily injury while performing duties that results in death. The $75,000 death benefit is in addition to the other benefits provided by §112.1816.

Retroactive Application

The first legal test for §112.1816 came only weeks after the law took effect. On August 16, 2019, a declaratory judgment action was filed by a firefighter in the Sixth Judicial Circuit — *Francis v. City of St. Petersburg,* No. 19-005598-CI-19 (Fla. 6th Cir. Ct., Pinellas Cnty.). The plaintiff was initially diagnosed with thyroid cancer in January 2019. On July 1, 2019 — the day the law took effect — he requested from his employer a reimbursement of out-of-pocket expenses related to his cancer treatment, and the one-time $25,000 payment. His employer denied the claim, and the firefighter sued. The deciding issue in the case was whether the provisions of §112.1816 were intended to apply retroactively to cancer diagnosed prior to the effective date of the law.

In a ruling on cross-motions for summary judgement, the trial court ruled in favor of the firefighter, holding the eligibility for benefits under §112.1816 could be applied retroactively.[17] The employer did not appeal. Since final decisions of trial courts do not create precedent,[18] the issue of whether §112.1816 applies to cancer initially diagnosed prior to the effective date remains officially unresolved. Based on a review of relevant court decisions on the issue of retroactivity, the trial court's ruling in *Francis* would have likely been reversed.

On the question of retroactive application of a law, Florida follows the general rule set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which holds that if a statute attaches new legal consequences to events completed before its enactment, the courts will not apply the statute to pending cases unless retroactive application was clearly intended by the legislature.[19] In *Landgraf*, the U.S. Supreme Court addressed whether the right to nominal damages established under the Civil Rights Act of 1991 was available in a hostile work environment case that was pending when the 1991 act was adopted.[20] Until then, only equitable relief was available to the appellant in *Landgraf* under Title VII of the Civil Rights Act of 1964. The Supreme Court concluded that the nominal damages remedy added by the 1991 act could not apply to employer misconduct occurring before the effective date of that act.[21]

Florida courts have consistently applied the U.S. Supreme Court's rationale in *Landgraf* and have reviewed cases with the understanding that a substantive law will operate prospectively absent clear legislative intent to the contrary, while procedural or remedial laws may operate retrospectively.[22] Substantive laws are those that create new rights or take away existing rights, or impose new obligations or duties.[23] Procedural laws address the means and methods under which those duties and rights are enforced.[24] Remedial laws operate in furtherance of existing remedies but do not create new rights or take away vested rights.[25]

Based on these definitions, a law establishing new benefits for firefighters, while imposing new obligations on employers, would appear to fall under the category of substantive law. A conclusion that §112.1816 is not a substantive law requires a conclusion that the law neither creates new rights nor imposes new obligations. It does both. So, how did the trial court in *Francis* apply the law retroactively? The trial court noted that §112.1816 is silent as to whether it is intended to apply retroactively, and that absent such language, a law is presumed to apply prospectively.[26] But the court further noted that the law does not expressly *prohibit* retroactive application, either.[27] The retroactivity issue was resolved by finding §112.1816 is not substantive law. The court explained, in a surprisingly concise analysis, that in "harmonizing and reconciling" §112.1816 as an alternative to workers' compensation, "the provisions of the law are remedial in nature."[28]

• *Substantive vs. Remedial Laws* — While the manner in which courts have defined and distinguished substantive versus remedial law has remained relatively consistent, the lines of distinction are often blurred. This is particularly true when a law creates a new benefit or right that is an alternative to an existing benefit or right. However, even to the extent that §112.1816 provides an alternative to workers' compensation benefits for firefighters, the caselaw in Florida does not support retroactive application of a law that accomplishes what is arguably a remedial purpose, but does so by affecting substantive rights and imposing new burdens.

The Florida Supreme Court addressed such a law in *Walker & LaBerge, Inc. v. Halligan*, 344 So. 2d 239 (Fla. 1977). *Halligan* involved a 1974 amendment to the workers' compensation law eliminating a provision under which a subcontractor was immune from a tort action on account of injury to the employee of another subcontractor.[29] In holding, the amendment did

not operate retroactively to preclude a subcontractor from claiming statutory immunity, the court noted, "the claimant was not deprived of a remedy but, in fact, was supplied with an alternative remedy of compensation for injury."[30] The court explained why it is important that courts apply the workers' compensation law in effect at the time of an injury:

> *It is well established in Florida that the substantive rights of the respective parties under the Workmen's Compensation Law are fixed as of the time of the injury to the employee. This is so because the acceptance of the provisions of the Workmen's Compensation Law by the employer, the employee, and the insurance carrier constitutes a contract between the parties which embraces the provisions of the law as of the time of the injury. Consequently, a subsequent enactment could not impair the substantive rights of the parties established by this contractual relationship.*[31]

This is in contrast to the trial court's reasoning in *Francis*, which based its holding that §112.1816 was remedial on the fact that it was an option that could be used as an alternative to workers' compensation law.

The Florida Supreme Court addressed a similar issue in *L. Ross, Inc. v. R. W. Roberts Const. Co.*, 481 So. 2d 484 (Fla. 1986). In that case, the court resolved a conflict between the Fourth District and the Fifth District on the issue of whether an amendment to F.S. §627.756 should be applied retroactively. Section 627.756 permits the recovery of attorneys' fees on judgments against sureties in actions on payment bonds. The law originally limited attorneys' fees to 12.5% of the judgment recovered, but while the plaintiff's action against a surety was pending, a statutory amendment was passed repealing the 12.5% limitation.[32]

The Fifth District in *L. Ross, Inc. v. R. W. Roberts Construction Co.,* 466 So. 2d 1096 (Fla. 5th DCA 1985), held the amendment to §627.756 was substantive law and affirmed the trial court's refusal to retroactively apply the repeal of the limit on attorneys' fees.[33] The Fifth District acknowledged direct conflict with the Fourth District's decision in *American Cast Iron Pipe Co. v. Foote Brothers Corp*, 458 So. 2d 409 (Fla. 4th DCA 1984), a case involving identical facts.[34] In its holding that the amendment to §627.756 was remedial and *could* be applied retroactively, the Fourth District reasoned:

> *Remedial statutes include statutes which confer a remedy, "and the remedy is the means employed in enforcing a right or in redressing an injury"; those which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing; those which do not affect vested rights or create new obligations; and those which affect only the measure of damages for vindication of a substantive right.*[35]

The Florida Supreme Court acknowledged that remedial statutes present an exception to the general rule against retroactive application of statutes, but disagreed with the Fourth District's characterization of the statutory amendment at issue in *L. Ross, Inc.*, and *American Cast Iron* as remedial.[36] Instead, it adopted the reasoning of the Fifth District that "it cannot be reasoned that a statutory change that affects and changes the measure of damages is merely 'remedial' and thus, procedural, and, therefore is not a change in the substantive law giving the substantive right which is the basis for the damages."[37]

• *Legislative Intent* — If §112.1816 is a substantive law, as the caselaw in Florida would appear to support, it could not apply retroactively absent clear legislative intent. The trial court in *Francis* noted that neither party provided evidence of legislative intent on the issue of retroactivity and that the statute itself was silent on the issue.[38] But while F.S. §121.1816 is silent as to whether the law is intended to apply prospectively, the legislation enacting §112.1816 is not. Section 5 of Ch. 2019-21, Laws of Florida, expressly states: "This act shall take effect July 1, 2019."[39] In *Ramcharitar v. Derosins*, 35 So. 3d 94 (Fla. 3d DCA 2010), the Third District, relying heavily on *Halligan,* refused to apply a 2003 workers' compensation law amendment retroactively. Addressing whether there was any evidence of *retroactive* intent, the court said: "On the contrary, the enacting legislation expressly provided that the revisions to section 440.10 were to become effective on January 1, 2004....The inclusion of this effective date rebuts the suggestion that the [amendment] was intended to apply retroactively."[40] Thus, by expressly including an effective date in the enacting legislation, the Florida Legislature signified its intent for §112.1816 to apply prospectively.

Conclusion

The overwhelming body of law in Florida weighs heavily in favor of classifying §112.1816 as a substantive law and provides legal support for local governments to adopt administrative policies and procedures that limit claims to firefighters initially diagnosed with cancer on or after July 1, 2019. While a local government may want to adopt administrative policies that allow for certain benefits for firefighters diagnosed prior to July 1, 2019 (for example, for a recurring diagnosis), these decisions should be made with a full understanding of what the law requires. Political pressure to "do the right thing" for firefighters stricken with cancer may make it difficult for local governments to avoid adopting policies that expand the provisions of §112.1816 to apply retroactively.

The decision in *Francis* involved a firefighter who was diagnosed with cancer six months prior to the effective date of §112.1816. What will happen when an employer denies benefits to a firefighter whose cancer was diagnosed five years before the effective date? While the decision in *Francis* did not create precedent, an employer's decision to apply §112.1816 retroactively could. It could also result in a patchwork of firefighter cancer benefit policies throughout the state. Additional litigation over the law is probably unavoidable. Ultimately, it appears likely the appellate courts will eventually resolve the issue of whether the law may be applied retroactively.

[1] *See* Robert D. Daniels, *et al*., *Exposure — Response Relationships for Select Cancer and Non-Cancer Health Outcomes in a Cohort of U.S. Firefighters from San Francisco, Chicago and Philadelphia (1950-2009)*, 72 Occupational Evntl. Med. 699 (Oct. 2015), *available at* **https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4558385/.**

[2] *Id.*

[3] 42 U.S.C. §280e-5 (2019).

[4] Firefighter Cancer Registry Act of 2017, H.R. Rep. No. 115-301 at 4 (Sept. 8, 2017).

[5] *See* Ala. Laws §11-43-144(d) (2019); Mass. Gen. Laws §94(B)(1) (2019); 21 V.S.A. §601(11)(E) (2019).

[6] Mich. Comp. Laws §418.405(2) (2019).

[7] Fla. Stat. §112.1816(2)(b) (2019).

[8] Fla. Stat. §112.1816(2) (2019).

[9] Fla. Stat. §112.1816(5)(a) (2019).

[10] Fla. Stat. §112.1816(2)(b) (2019).

[11] Fla. Stat. §112.1816(1)(c) (2019).

[12] Fla. Stat. §112.1816(2) (2019).

[13] Fla. Stat. §112.1816(2)(b) (2019).

[14] Fla. Stat. §§112.1816(3), (4) (2019).

[15] Fla. Stat. §175.191(2) (2019).

[16] Fla. Stat. §§112.1816(3), (4) (2019).

[17] *Francis*, No. 19-005598-CI-19, Order on Summary Judgment at 3 (Dec. 17, 2019).

[18] *See, e.g*., *Wood v. Fraser*, 677 So. 2d 15, 19 (Fla. 2d DCA 1996).

[19] *See, e.g., Coventry First, LLC v. State, Office of Ins. Regulation*, 30 So. 3d 552, 557 (Fla. 1st DCA 2010) (citing *Landgraf*, 511 U.S. at 270).

[20] *Landgraf*, 511 U.S. at 248-49.

[21] *Id*. at 286.

[22] *Coventry First, LLC*, 30 So. 3d at 557-58.

[23] *Morris v. Swanson*, 940 So. 2d 1256, 1257 (Fla. 1st DCA 2006).

[24] *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994).

[25] *City of Lakeland v. Catinella*, 129 So. 2d 133, 136-37 (Fla. 1961).

[26] *Francis*, No. 19-005598-CI-19, Order on Summary Judgment at 2 (Dec. 17, 2019).

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[27] *Id.*

[28] *Id.* at 3.

[29] *Halligan*, 344 So. 2d at 242.

[30] *Id.* at 244.

[31] *Id.* at 243 (emphasis added).

[32] *L. Ross, Inc.*, 481 So. 2d at 484.

[33] *L. Ross, Inc.,* 466 So. 2d at 1099.

[34] *See American Cast Iron Pipe Co. v. Foote Brothers Corp.*, 458 So. 2d 409 (Fla. 4th DCA 1984); *L. Ross, Inc.*, 466 So. 2d at 1099.

[35] *American Cast Iron Pipe Co.,* 458 So. 2d at 410 (citations omitted).

[36] *L. Ross, Inc.*, 481 So. 2d at 485.

[37] *Id.*

[38] *Francis*, No. 19-005598-CI-19, Order on Summary Judgment at 3 (Dec. 17, 2019).

[39] In addition to the effective date for Fla. Stat. §112.1816, under Ch. 2019-21 §5, Laws of Fla., §3 of the legislation includes the same effective date for an increase in employer contributions to the Florida Retirement System for Special Risk Class members, in order to fund line-of-duty death benefits under Fla. Stat. §112.1816.

[40] *Ramcharitar*, 35 So. 3d at 98-99; *see also Rosenwald v. State*, 282 So. 3d 120 (Fla. 4th DCA 2019) (holding a statute that provides an unambiguous effective date is clear and controlling evidence of legislative intent with regard to whether the statute should apply prospectively or retroactively); *State, Dep't of Revenue v. Zuckerman–Vernon Corp.*, 354 So. 2d 353, 358 (Fla. 1977) (finding that the legislature's inclusion of an effective date in enacting legislation amending existing law "effectively rebuts any argument that retroactive application of the law was intended").

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This column is submitted on behalf of the City, County and Local Government Law Section, Donald Stephen Crowell, chair, and Ellie Neiberger, editor.

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