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# Florida Association of County Attorneys 2021 CLE Seminar

## Firefighter Cancer Benefits

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# Firefighter Cancer Benefits

## What does Section 112.1816 do?

- ▶ Creates a conclusive presumption that a diagnosis of cancer by a firefighter is an injury or illness incurred in the line of duty. No ability to demonstrate the contrary with competent evidence.
- ▶ Creates 2 new benefits
- ▶ Expands existing disability and death benefits



# Components of Section 112.1816

## New Benefits

- ▶ Cancer treatment, covered by an employer health plan at no cost to the firefighter
- ▶ One-time cash payout of \$25,000

## Expanded Benefits

- ▶ Line-of-duty disability benefits
- ▶ Line-of-duty death benefits
- ▶ Death benefits under 112.191



# Current Employees

Upon a diagnosis of cancer, eligible firefighters are entitled to the following benefits, as an alternative to workers' compensation benefits:

- ▶ Cancer treatment, covered by an employer health plan or group insurance trust at no cost to the firefighter and employer must timely reimburse any out of pocket deductible, copayment or co-insurance costs incurred due to the treatment of cancer
- ▶ One-time cash payout of \$25,000



# Former Employees

Both benefits are available to former employees for 10 years after termination of employment, if:

- ▶ employee elects to continue coverage in the employer health plan or group insurance trust after termination of employment; and
- ▶ employee met the eligibility criteria at time of termination of employment, and is not subsequently employed as a firefighter.



# Eligibility Requirements

## Eligibility for Cancer Treatment Benefits:

- Must have been with the same employer for 5 continuous years
- Not used tobacco products for the preceding 5 years
- Not employed in another position with a higher risk of cancer in the last five years

Note: these requirements apply only to the benefits under 112.1816(2) - Cancer treatment at no cost and \$25,000 payment.



## Subsections (3) and (4): Retirement Benefits

Section 112.1816 contains 2 distinct types of benefits:

- ▶ Reimbursement of cancer treatment expenses/one-time payment of \$25,000 (Subsection 2)
- ▶ Retirement benefits: Disability and Death benefits (Subsections 3 and 4)



# Application to FRS Benefits

- ▶ Line-of-duty disability and death benefits apply to FRS benefits, as well as local retirement plan benefits
- ▶ In order to fund the benefit changes provided by the firefighter cancer law to the Florida Retirement System, FRS employer contribution rates were increased by:
  - ▶ 0.08 percentage point for Special Risk Class employer contribution rate
  - ▶ 0.01 percentage point for Special Risk Class unfunded liability contribution rate
  - ▶ 0.02 percentage point for the DROP rate





# Disability Benefits Background

- ▶ A firefighter who retires due to a disability is eligible for disability retirement benefits in accordance with his or her retirement plan.
  - ▶ Employer sponsored local plan
  - ▶ Employer sponsored chapter plan (Chapter 175)
  - ▶ FRS
- ▶ Disability retirement benefits are governed by retirement plan document and paid out of retirement fund.



# Example: Chapter 175 plan

- ▶ Firefighter may retire from service if he or she becomes totally and permanently disabled.
- ▶ A firefighter will be considered totally and permanently disabled if he or she is:
  - ▶ Wholly prevented from rendering useful and efficient service as a firefighter; and
  - ▶ Likely to remain so disabled continuously and permanently.
- ▶ Disability determination is made by the Board of Trustees, not the employer.
- ▶ No firefighter may be permitted to retire until he or she is examined by a duly qualified physician or surgeon, to be selected by the Board of Trustees for that purpose, and is found to be disabled.



# Two Types of Disability Benefits (Chapter 175)

- ▶ **Non-Line-of-Duty Disability benefits:**
  - ▶ Must have 10 years of service to be eligible for disability benefits
  - ▶ Monthly benefits = greater of accrued benefit or 25% of monthly salary at the time of disability.
- ▶ **Line-of-duty Disability Benefits:**
  - ▶ No minimum service requirement in order to be eligible
  - ▶ Monthly benefits = greater of accrued benefit or 42% of monthly salary at the time of disability.



# How Does F.S. 112.1816 Change This?

- ▶ Conclusive presumption that the disability occurred in the line of duty only. 112.1816(3)(a):  
“If the firefighter participates in an employer-sponsored retirement plan, the retirement plan must consider the firefighter totally and permanently disabled in the line of duty if he or she meets the retirement plan’s definition of totally and permanently disabled due to the diagnosis of cancer or circumstances that arise out of the treatment of cancer.”
- ▶ Not a conclusive presumption that the firefighter is disabled. Board must still determine whether firefighter is totally and permanently disabled as a result of cancer or treatment.
- ▶ All other Plan requirements apply (medical exam, etc).



# Cancer presumption vs. Other presumptions

- ▶ Example: F.S. 112.18 and 112.181
- ▶ If a firefighter suffers any condition caused by hepatitis, meningococcal meningitis, tuberculosis, heart disease, or hypertension that results in total or partial disability or death, the condition shall be presumed to have been accidental and to have been suffered in the line of duty unless the contrary be shown by competent evidence.
- ▶ Other states require firefighter to prove cancer was caused by workplace exposure in order to receive line-of-duty disability.
- ▶ Alabama: Firefighter *must demonstrate that he or she was exposed, while in the employ of the city, to a known carcinogen which is reasonably linked to the disabling cancer* AND the city has the opportunity to prove by preponderance of evidence the cancer was caused by other means.

§ 11-43-144 Alabama Code



# Disability and Death Benefits

- ▶ If no Firefighter retirement plan, employer must provide at no cost:
  - ▶ Disability benefit equal to Ch. 175 (e.g. min. 42% of annual salary for life) for disabilities attributable to cancer or the treatment of cancer.
  - ▶ Death benefit of at least 42 percent of the firefighter's most recent annual salary for at least 10 years.



# Recovery from Disability

- ▶ If the board of trustees finds that a firefighter who is receiving a disability retirement income is no longer disabled, disability retirement income is discontinued.
- ▶ “Recovery from disability” means the ability to render useful and efficient service as a firefighter.
- ▶ Board will often request firefighters to annually or biannually certify they are still disabled and unable to render useful and efficient service as a firefighter.



# Disability vs Pre-retirement Death Benefits

- ▶ Disability retirement benefits paid when plan member ends service as a result of a disability.
- ▶ Pre-retirement death benefits paid when member ends service as a result of a death prior to retirement.
- ▶ Under 112.1816 (4)(a), a member's beneficiary will be entitled to pre-retirement death benefits even if member was collecting disability retirement benefits.





# Other Provisions

- ▶ Firefighter defined as “full-time firefighter”. Does not apply to volunteers
- ▶ Fire Marshal must adopt rules to establish employer cancer prevention best practices for equipment, decontamination, fire suppression apparatus, and fire stations.
- ▶ For determining leave time and employee retention policies, employer must consider cancer as line-of-duty illness



# Other Line-of-Duty Death Benefits

- ▶ Firefighter who dies as a result of cancer or treatment of cancer considered to have accidentally died in the line of duty for the purpose of death benefits payable under sec. 112.191(2)(a), F.S.



# 2019 Legislation - SB 7098 Death Benefits

Law provides a one-time payment to beneficiaries of LEO, correctional or probation officer or FF killed in the line of duty.

- ▶ \$50,000 if accidentally killed in the line of duty.
- ▶ Additional \$50,000 if death occurred at a traffic accident, enforcing traffic laws or ordinances or responding to emergency
- ▶ \$150,000 if the death was the result of an intentional act.



## SB 7098 Death Benefits

- ▶ Increases benefit amounts to \$75,000, \$75,000 and \$225,000.
- ▶ Applies the changes to firefighter benefits.
- ▶ Provides for line of duty death benefits to EMTs, paramedics and Florida residents on active duty in the United States Armed Forces killed in the line of duty.



# Potential Issues

- ▶ Is a firefighter eligible for disability and death benefits if he or she does not meet the eligibility requirements for Section 2 benefits (one-time payment and cancer treatment reimbursement)?
- ▶ Could a firefighter be eligible for disability benefits but not one-time payment and cancer treatment reimbursement. For example, the firefighter is a tobacco user?
- ▶ What happens if cancer goes into remission?



# Potential Implementation Issues

## ▶ Retroactivity

- ▶ Firefighter diagnosed with Cancer before 7/1/19

## ▶ Ambiguity

- ▶ “Proven to create higher risk of cancer”
- ▶ “met the criteria...when he or she terminated employment”
- ▶ “participates” or “participated” in a retirement plan

## ▶ Procedural

- ▶ Denial of claim for ineligibility
- ▶ Proving tobacco use



# Retroactivity Issue

- ▶ What constitutes Retroactive Application?
  - ▶ “Whether the new provision attaches new legal consequences to events completed before its enactment.” *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994)
- ▶ What is Evidence of Intent by Legislature?
  - ▶ 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”.



# Retroactivity Issue

- ▶ General Rule in Florida
  - ▶ A substantive statute will operate prospectively absent clear legislative intent to the contrary.
  - ▶ A procedural or remedial statute will operate retrospectively.
- ▶ Substantive v. procedural law
  - ▶ Substantive law prescribes duties and rights
  - ▶ procedural law concerns the means and methods to enforce those duties and rights





# Relevant Court Cases

## Francis v St. Petersburg (Case #19-005598—CI)

- ▶ FF Diagnosed with Cancer in January 2019 - Denied cancer benefits by employer.
- ▶ Cross-motions for summary judgment
- ▶ Summary judgment in favor of Plaintiff. Court held \$112,181.60 was remedial, based on the law's function as an alternative to Workers' Compensation, and therefore applied retroactively.



# Relevant Court Cases

## Weaver v. Volusia County (Case # 2020-10651-CIDL-02, 7th Judicial Circuit)

- ▶ FF Diagnosed with Cancer in in June 2017. Filed claim for benefits under the statute in December 2019.
- ▶ Cross-Motions for summary judgment
- ▶ Summary Judgment granted to Defendant. Section 112.1816 creates a new substantive right, is not remedial in nature, and does not apply retroactively to cancer diagnoses occurring prior to its effective date of July 1, 2019.



# Relevant Administrative Case

- ▶ **Symonette v. Town of Palm Beach/PGCS OJCC**  
**Case No. 20-015526GJJ**
  - ▶ Firefighter was diagnosed with prostate cancer in March 2014 while employed with Town. Firefighter retired from the Town in 2016.
  - ▶ Hearing Officer found F.S. 112.1816 to be substantive law in that it prescribes specific duties of employers and grants specific rights to firefighters. Hearing officer found no language in the law evidencing an intent to apply retroactively.



# Addressing Implementation Issues

1. Adopt a reimbursement policy which defines eligibility
2. Create forms for reimbursement:
  - ▶ Waiver of workers compensation claim
  - ▶ Evidence of non-tobacco use
  - ▶ Affidavit of other employment
3. Amend the retirement plan
4. Plan for financial impacts



# 1. Reimbursement policy

- ▶ Identify the department or staff member responsible for administration.
- ▶ Define “timely reimburse” for one-time payment and cancer treatment reimbursement. Example:
  - ▶ 60 days from request or receipt of appropriate documentation
- ▶ Describe documentation required to get reimbursed for cancer treatment and deadline to submit it. Examples:
  - ▶ Receipts must be received no more than 120 days after treatment.
  - ▶ Receipts dated prior to July 1, 2019 not acceptable.
  - ▶ Employer to pay health care provider or reimburse firefighter?



# Define Eligibility Requirements

- ▶ Continuous employment for five years: full-time or part-time?
- ▶ Not employed in another other position proven to create a high risk of cancer:
  - ▶ Does this include volunteer firefighter positions?
- ▶ Non-user of tobacco: define tobacco use
- ▶ Eligibility for reimbursement even if they do not continue coverage in health plan upon termination?



# Non-user of tobacco

- ▶ F.S. 633.34(6): Any person applying for employment for a firefighter must be a nonuser of tobacco or tobacco products for at least 1 year immediately preceding application, as evidenced by the sworn affidavit of the applicant (“tobacco or tobacco products” not defined).
- ▶ No legal requirement that firefighters remain non-users of tobacco (but Collective Bargaining Agreement may require it).
- ▶ Sworn affidavit or screening test?
- ▶ Define tobacco use: vaping, hookahs?



## 2. Suggested Forms for Reimbursement Policy

- ▶ Waiver of Medical Treatment under Worker Compensation
- ▶ Non-user of Tobacco Sworn affidavit (signed and notarized)
- ▶ Sworn Affidavit of Employment in Preceding Five Years from Date of Diagnosis (signed and notarized)
- ▶ Sworn affidavit of post-employment (signed and notarized)
- ▶ Request for One-time Payment Upon Diagnosis:
  - ▶ Affirmation of Diagnosis section completed by physician
- ▶ Cancer Treatment Out-of-pocket Expense Reimbursement Request.





# 3. Amend the Retirement Plan

- ▶ Amend Disability benefits to include line of duty benefits for cancer diagnosis or treatment
- ▶ Amend Death benefits to include line-of-duty benefits for cancer diagnosis or treatment, including post-employment.
- ▶ Make sure disability benefits address line-of-duty death benefits (and vice versa).



## 4. Funding Options for \$25,000

- ▶ Make the payment directly to the firefighter when notified of the diagnosis (“pay as you go” model).
  - ▶ Cons: Difficult to plan and budget for.
- ▶ Obtain an insurance policy.
  - ▶ FMIT offers specialized insurance policy
- ▶ Set up or use an existing trust
  - ▶ Trust must be funded by employer contributions only (no employee contributions)
- ▶ One-time payment will mostly likely be included in employees gross income.



# Out-of-Pocket Costs

- ▶ Pay directly to health care or insurance provider upon receipt of bills
- ▶ Reimburse the firefighter directly
- ▶ Set up a health reimbursement arrangement (HRA)

**Note:** Reimbursement of all out of pocket expenses is not required; only “deductible, copayment, or co-insurance costs”



# Health Reimbursement Arrangement

HRA is an employer-funded account that reimburses employees for qualified medical expenses and insurance premiums for certain group health plans.

- ▶ Reimbursement payments made to employee under HRA may be tax-free up to a maximum dollar amount for a coverage period.
- ▶ Reimbursements may be tax-deductible to employers.
- ▶ No limit on the amount of employer contributions.
- ▶ Reimbursements can be made to current and former employees.
- ▶ Must be integrated with group medical plan.



# How to Fund HRA

- ▶ Notional HRA (“pay as you go”): Employer funds the account as claims are incurred.
- ▶ Funded HRA: Employer establishes a dedicated account and proactively funds that account.
- ▶ Employer can set up a trust to fund the HRA
  - ▶ OPEB Trust: Can only be used to reimburse expenses for retired members.
  - ▶ 115 Governmental Trust: Employer establishes and funds a government trust that operates as an HRA.
  - ▶ Voluntary Employees Beneficiary Association (VEBA) Plans.
  - ▶ Since out of pocket expenses must be funded solely by employer, the trust cannot be funded in whole or in part by employee contributions.





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# Any Questions?

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