Legislative Priorities

(Updated December 3, 2017)

Investment Reform:

S-2663 (Sweeney and Cardinale): Adopted by the full Senate 12/16/2016
A-4234 (Burzichelli and Mazzeo): Adopted by the Assembly Finance and Insurance Committee 11/30/17

Existing law limits JIFs to investments otherwise authorized for local governmental entities and Boards of Education. This greatly limits the potential investment earnings, currently less than 1% on investments of approximately $1 billion. Insurance mechanisms such as JIFs have different cash flow needs than local government and Boards of Education because claims are paid over a long period of time.

S-2663 and A-4234 would permit JIFs to invest in debt obligations of any governmental entity established under the laws of the State of New Jersey and federal agencies or governmental corporations. While the range of investments permitted by this legislation is still very conservative, it would save the taxpayers at least $10 million per year. These bills would also reduce interest expense for local units of government and Boards of Education by creating an additional purchaser of their bonds. Further, these bills also permit JIFs to join together and create a joint investment and cash management program further increasing investment income.

Firefighter Cancer Presumption:
S2407 (Greenstein)

Over the last decade, the MEL has raised serious concerns about this bill and has consistently offered to sit down with the bill's advocates to work out the problems in the existing draft.

Much of this bill is already existing law as clarified by the New Jersey Supreme Court's 2003 decision in Lindquist v. Jersey City. What S-2407 is really about is expanding the firefighter cancer presumption. Based on the evaluation of the MEL's actuary, this bill would create the most expensive cancer presumption program in the country. This estimate is heavily influenced by the fact that this bill (1) covers all cancers even if there is no evidence that there is any causal relation with the exposures experienced by firefighters (2) uses an impossible "clear and convincing" standard to defend against questionable claims, and (3) triggers substantial payments to the Federal government in Medicare offsets.

> (1) S-2407 presumes that all cancers are due to on the job exposures. The current scientific evidence does not support this broad presumption. The most comprehensive study to date was published by the prestigious National Institute for Occupational Safety and Health (NIOSH). This study focused on 30,000 career firefighters in three major cities who were for the most part exposed before the widespread use of air breathing apparatus. The study concluded that these firefighters had a significantly higher rate of mesothelioma and elevated rates of respiratory, digestive, and urinary cancers. However,

the study does not support the provision in S-2407 that presumes that all cancers are related.

(2) S-2407 as written will make it almost impossible to contest questionable claims. Under current New Jersey law the standard to rebut a presumption is "preponderance of the evidence". In S-2407 the standard is raised to the impossible "clear and convincing". The other states (except Oregon) with cancer presumptions use the more reasonable "preponderance of the evidence" standard currently used in New Jersey. However, Oregon excludes volunteers from the presumption and requires career firefighters to report any claims within 7 years of retirement. S-2407 covers both career and volunteer firefighters and has no statute of limitations on the presumption.

(3) Under S-2407, New Jersey local taxpayers will substantially subsidize the Federal Government through the Social Security Medicare Program because Medicare will require municipalities to reimburse it for medical payments incurred by retirees collecting workers' compensation under this Act. Many other states avoid this problem by creating their presumption outside of the workers' compensation law. Of the 31 states with cancer presumption laws, only 17 use workers' compensation for the benefit. Most of the remaining 14 states either created a special program or adopted the presumption in their pension law.

Most (14) of the 17 states with cancer presumptions in their workers' compensation laws substantially limit the exposure with a statute of limitations on the presumption. In two of these states (Arizona and Vermont), the presumption ends at age 65. Most of the rest have a 5 year statute of limitations from the date of retirement. In Minnesota, the presumption ends as soon as the fire fighter retires. Four states (Alaska, Indiana, Texas and Washington) also exclude smokers from the presumption. As indicated before, S-2407 has no statute of limitations for the presumption.

Another serious deficiency in S-2407 is that while both career and volunteer firefighters must have at least seven years service to be eligible for the cancer presumption, the bill fails to establish any minimum amount of calls that volunteers must complete. Therefore, a volunteer firefighter who responds to only one call a year for seven years is eligible for the same presumption as a career firefighter who responds to hundreds of calls during the seven year period.

To reiterate, we are willing to sit down and work out a balanced solution that is fair both to first responders and taxpayers. We are also prepared to submit a draft revision that can be used as a starting point in the discussion. If the benefit is outside of workers' compensation, it should be possible to develop a program that covers both career and volunteer firefighters. Otherwise, the program should be limited to career firefighters.

Firefighter Heart Attacks:

The MEL believes that all firefighters should receive annual heart risk screening in accordance with NFPA (National Fire Protection Association) standards. Heart attack is the most common cause of on-duty firefighter fatalities. Yet, existing regulations do not require firefighters to pass periodic medical examinations. This is especially a problem with volunteer firefighters who often tend to be older than their counterparts in career departments. The MEL recommends that Departments require annual reexaminations consistent with NFPA Standard 1582, Chapter 7.4-7.7.

Define when Volunteer Fire Fighters are "On Duty":

The New Jersey workers' compensation law has proven to be troublesome when applied to passive or "life" volunteers. In its 2003 decision in Capano v. Bound Brook, the New Jersey Supreme Court ruled that the law even extends to a 93 year-old member who slipped while putting a log into a wood burning stove in the fire house. The court held that under the current law, Capano was in the "line of duty", but asked the legislature to reexamine this question.

As a result of the Capano decision, the current workers' compensation law often requires New Jersey taxpayers to cover medical bills that would otherwise be paid by Medicare. Therefore, the MEL agrees with the New Jersey Supreme Court that the legislature should take up this issue and limit workers' compensation to work related injuries as opposed to injuries incurred in social situations.

Sick Leave Injury Reform (SLI):

The MEL urges the legislature to reform sick leave injury programs so that the rules that currently apply to state employees also apply to local unit and school employees. Currently under NJSA 18A:30-2.1 and NJSA 11A:6-8, local units and BOEs are permitted to extend for a period up to one year full pay for workers injured in the course of their employment. In 2010, the similar provision for state workers was repealed.

The New Jersey legislature determined that Sick Leave Injury programs are unnecessary because state workers are also covered by workers' compensation and the retirement disability programs. municipal, county and BOE employees are covered by these same programs. The problem with SLI programs is that the employer must continue to pay the employer portion of payroll taxes etc. while the employer is not be responsible for these extra costs if the employee is paid through workers' compensation. SLI also acts as a disincentive to return to work because even though the employee is being paid full salary, the employee pays taxes on only a small part of the income. This disincentive increases the total amount of the claim.

The State currently saves $10s of millions each year because it eliminated its SLI program. The MEL contends that state, county, municipal and BOE employees should be treated the same with respect to these benefits. Since SLI was eliminated for state workers, it should be eliminated for workers at the other levels of government as well.

Employment Practices Liability Reform (CEPA, LAD, etc.):

In the past decade, New Jersey has seen an explosion of employment practices liability suits under New Jersey's conscientious employee protection act (CEPA) and New Jersey's law against discrimination (LAD) because New Jersey rules with respect to attorney fee shifting are substantially more favorable than in Federal Court. Further, it is substantially more difficult to receive a summary judgment (SJ) dismissal in New Jersey State Court than in Federal Court, and New Jersey's standards concerning what constitutes whistle blowing and an adverse employment action are far more expansive than under Federal practice.

Fee Shifting:

In most liability cases, the claimant's attorney is paid from the award and the fee is capped at between 25% and 33%, depending on the size of the judgment. However, in employment liability cases, the defendant must pay the prevailing plaintiff's fees as determined by the court, and there is no cap. In other states and in Federal Court, the fee runs between $300 and $350 per hour. New Jersey goes a step further and awards an "enhancement", ordinarily up to an additional 50% to compensate the claimant's attorney for the risk that the case is unsuccessful. Further, while in the other 49 states and in Federal Court, judges take into consideration the relationship between the requested fee and the award to the plaintiff, not in New Jersey. In one New Jersey lawsuit, a retired police officer rejected a settlement offer of $75,000 and was subsequently awarded only $20,000 by the jury. However, the judge awarded the plaintiff's attorney a fee of $450,000!

This system encourages attorneys to waste time in endless depositions and to make unreasonable demands to stretch out the proceedings and build up legal fees, especially if the case has any merit. This is taxpayer's money.

The MEL proposes legislation to cap fee applications as follows:

- For awards (damages and punitive awards) of $50,000 or less, the maximum award shall be $50,000 subject to considerations of reasonableness (i.e. Rendine v. Pantzer)
- For awards over $50,000, the fee cap shall equal the award, again subject to considerations of reasonableness (Rendine v. Pantzer)

Direct Right of Appeal

The MEL also supports adding provisions that would grant public entities a "direct right of appeal" on all lower court rulings involving immunities and notice provisions. Currently, a public entity may only apply to the appellate court through an interlocutory appeal which is seldom granted. As a result, public entities are forced to either try the case or settle without the benefit of an appellate ruling with respect to immunities and other protections under Title 59.

Offers against Judgement

The MEL also proposes that New Jersey's rule on Offers of Judgment be conformed to Federal Practice. Under the U.S. Supreme Courts ruling in Marek v. Chesney, when a defendant in a fee shifting case offers a sum certain plus fees and costs to date and the award to the plaintiff is ultimately lower than the amount offered, the plaintiff's counsel's fees are frozen as of the date of the offer. New Jersey adopted a convoluted rule that is more difficult to use.

Catastrophic Claims:

All levels of government in New Jersey should coordinate their risk management programs to reduce costs and better protect the taxpayers. Every year, New Jersey governmental entities spend tens of millions for excess liability and workers' compensation insurance coverage, but most governmental units, including the state itself still lack sufficient limits to address truly catastrophic claims.

One approach to reduce costs is to create a statewide catastrophic coverage fund including the state as well as all local units and BOEs that would cover liability and workers' compensation claims excess of $10 million. Premiums should be risk based. Inter-level risk management cooperation should also include planning for catastrophic claims that impact multiple levels of government as well as sharing safety and claims control programs.

Another approach is to follow the practice in half of the states by enacting provisions in their public entity tort liability statutes that cap jury awards. These caps range from $100,000 per occurrence in Illinois and Rhode Island to Georgia's $3 million per occurrence. While a number this low would not be acceptable in New Jersey, some reasonable cap should be enacted with a provision that the legislature can increase the award if the facts warrant.

Public Entity Tort Liability Limits by State:

Delaware: $300,000 per occurrence
Florida: $100,000 per claimant, $200,000 per occurrence
Georgia: $1 million per claimant, $3 million per occurrence
Illinois: $100,000 per occurrence
Kansas: $500,000 per occurrence
Kentucky: $100,000 per claimant, $250,000 per occurrence
Louisiana: $500,000 per claimant
Maine: $400,000 per occurrence
Maryland: $200,000 per claimant
Massachusetts: $100,000 per claimant
Minnesota: $300,000 per claimant, $1 million per occurrence
Montana: $750,000 per claimant, $1.5 million per occurrence
New Hampshire: $250,000 per claimant, $2 million per occurrence
New Mexico: $400,000 per claimant, $750,000 per occurrence
North Carolina: $500,000 per occurrence
Oklahoma: $125,000 per claimant
Oregon: $100,000 per claimant, $500,000 per occurrence
Pennsylvania: $250,000 per claimant, $1 million per occurrence
Rhode Island $100,000 per tort action
South Carolina: $300,000 per claimant, $600,000 per occurrence
Texas: $250,000 per claimant, $500,000 per occurrence
Utah: $500,000 per claimant, $1 million per occurrence
Vermont: $250,000 per claimant, $500,000 per occurrence
Virginia $100,000 per occurrence
Wyoming: $250,000 per claimant, $500,000 per occurrence