



Municipal Excess Liability Joint Insurance Fund

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Assemblyman Joseph V. Egan
 Chairman of the Assembly Labor Committee

June 12, 2018

Re: S-716

Dear Honorable Chairman

Research has established that firefighters incur cancer at a rate 9% higher than the general public. Over the last decade, the Municipal Excess Liability Joint Insurance Fund (MEL) has urged amendments to this bill that will balance the needs of both the first responders and the taxpayers. S-716 as currently worded will be prohibitively expensive.

Cost Projections:

- \$40 million per year assuming that the bill is adopted as currently written.¹ The cost to New Jersey cities could be considerably higher based on the experience of Los Angeles.
- \$13 million per year if S-716 is amended to include the controls adopted by other states with cancer presumptions in workers' compensation. This projection is based on the experience of Pennsylvania.
- \$5 million per year if New Jersey enacts a program outside of workers' compensation along the lines recently adopted by New York, Connecticut, Colorado, Michigan, and Georgia

Analysis:

The problem is that S-716 as currently written does not include any of the controls adopted by other states to prevent the costs from becoming unaffordable. (See Exhibit A for a state-by-state comparison).

¹ If all eligible career and volunteer firefighters with cancer make a claim under S-716 as currently written, the projected cost is \$218 million per year. However, the experience in other states is that volunteers rarely file claims under cancer presumption statutes even when eligible. The \$40 million per year projection assumes that New Jersey volunteer firefighters file claims at the same rate as Pennsylvania.

Types of cancers included in the presumption: Following the example of other states, the presumption should be based on scientific evidence that establishes those cancers that firefighters develop at a higher rate than the general population. According to the National Cancer Society, the US lifetime cancer rate for the general population is 39.6 per 100. The most comprehensive study to date concerning firefighters published by the prestigious National Institute for Occupational Safety and Health (NIOSH) estimated that the rate for firefighters is 9% higher, or approximately 43 per 100. The NIOSH 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 testicular cancer, as well as elevated rates of respiratory, digestive, and urinary cancers. The potential cost of any presumption legislation is substantially higher unless the presumption is limited to the specific types of cancers linked to firefighting.

Statute of limitations: In the other states, the most common cutoff for the presumption is five years from the date an individual retires from the fire service, or age 65 when the firefighter becomes eligible for Medicare. Under S-716 as currently written, firefighters can claim the presumption at any age.² As a result, municipalities will also pay medical bills that will otherwise be paid by Medicare and health insurers. S-716 will prove to be even more expensive during the first few years because there will be a large influx of claims from retired firefighters.

Legal standard to rebut the presumption: S-716 as written will make it almost impossible to question claims. Under current New Jersey law, the standard to rebut a presumption is “preponderance of the evidence”. In S-716, the standard is raised to “clear and convincing” evidence that equates to blanket compensability. No expert will be able to say that exposures to dusts, fumes, chemical odors, etc. had de Minimis contributions to a given cancer because there are no scientific studies that focus on “de Minimis” levels of contribution. The studies focus on possible causes or likely causes but not on specific agents that have no effect whatsoever on a given condition. The effect of the legal standard in S-716 is to make all cancers compensable.

Volunteers: Seven of the 24 states with workers’ compensation cancer presumptions exclude volunteers from the presumption. Based on the experience in states such as Pennsylvania, the annual cost for volunteers is under \$100 per firefighter when the legislation includes a science based definition of the cancers covered, a statute of limitations and a reasonable standard to rebut the presumption. Unfortunately, S-716 currently lacks these controls making the costs difficult to project.

² Under current New Jersey law, workers compensation claimants have two years to file a claim from the date of injury or the date the claimant realizes that a medical condition is work related. Unless S-716 is amended to be consistent with other states, claims will be reported in New Jersey decades after career and volunteer firefighters retire from service.

Impact on cities: During a three-year study, Los Angeles with 2,850 career firefighters reported 170 cancer presumption claims, or 56.6 claims per year. ³If New Jersey's cities incur claims at this rate, New Jersey's 7,287 career firefighters will report 148 claims per year at a projected cost of \$66.4 million, not including volunteers. This cost will fall largely on the cities that are almost universally self-insured.

Cancer Benefit Programs outside Workers' Compensation: Because of the uncertainty and high cost of workers' compensation based presumptions, the recent trend is to cover firefighters in a program outside of the workers' compensation law. This approach was recently adopted by New York, Connecticut, Colorado, Michigan, and Georgia and was supported by both firefighters and municipalities. The problem with including the presumption in workers' compensation is that it requires local tax payers to pay medical bills that would otherwise be paid by the federal government or health insurers. This dramatically increases the cost. Therefore, for the last decade we have proposed that New Jersey also create a special firefighter cancer program outside of workers' compensation. If the usual controls are not added to S-716, we strongly urge that volunteers be removed from this legislation and placed in a separate program outside of workers' compensation such as was recently adopted in five states.

Thomas P. Canzanella was a career firefighter who tragically died at age 50 of a heart attack while on duty. The MEL contends that all firefighters should be required to undergo annual heart risk evaluation in accordance with NFPA (National Fire Protection Association) standards. The legislation should be expanded to include this requirement.

To summarize, the bill as currently written would dramatically increase workers' compensation costs for municipalities, especially cities. This projection is driven by the fact that using the workers' compensation system requires local taxpayers to pay for medical expenses that would otherwise be paid by Medicare and health insurers. Unlike almost every other state, the presumption in proposed New Jersey legislation applies to all cancers and retired firefighters at any age. The proposed "clear and convincing" standard for the rebuttable presumption will also make it impossible to contest claims even when it is highly unlikely that firefighting was involved.

We again reiterate our willingness to work with supporters to find a fair balance between the concerns of firefighters as well as local government.

Sincerely

David N. Grubb
Executive Director

³ California's cancer presumption ends 10 years after retirement. S-716 does not have a similar cutoff. Therefore it is reasonable to conclude that New Jersey's costs will be higher than California.

Exhibit A

Comparison of State Fire Fighter Cancer Presumption Laws

- **Alabama:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption. The firefighter must establish exposure to a carcinogen linked to the type of cancer. The presumption can be rebutted by the "preponderance of the evidence."
- **Alaska:** 7 years minimum employment required for a workers' compensation presumption that expires 5 years after retirement from the fire service. The presumption only applies to certain types of cancer and is rebuttable by "the preponderance of the evidence". The presumption does not apply to smokers.
- **Arizona:** 5 years minimum employment required for a workers' compensation presumption that expires at age of 65. The presumption only applies to certain types of cancer and does not apply to volunteers and smokers.
- **Arkansas:** No workers' compensation cancer presumption. Firefighters who are diagnosed with cancer before age 68 may receive a special \$150,000 benefit from the Arkansas State Claims Commission.
- **California:** The presumption in workers' compensation expires 10 years after retirement. Claims may be rebutted by evidence that the type of cancer is not reasonably related to the fire fighter's exposure.
- **Colorado:** 5 years minimum employment required for a workers' compensation presumption. The presumption is limited to certain types of cancer and may be rebutted by the preponderance of the evidence. In 2016, a Colorado Supreme Court decision (Zukowski v Castle Rock) made it substantially more difficult to establish a claim under the presumption. As a result, a 2017 amendment to the statute permits departments to opt out of the workers' compensation cancer presumption by joining a special heart and cancer benefits trust.
- **Connecticut:** No workers' compensation cancer presumption. In 2016, the state established a firefighters' cancer relief fund.
- **Delaware:** No workers' compensation cancer presumption.
- **Florida:** No workers' compensation cancer presumption.
- **Georgia:** No workers' compensation cancer presumption. Under legislation adopted in 2016, Fire Departments are required purchase a special policy that provides a lump sum benefit when a firefighter is diagnosed with cancer.
- **Hawaii:** No workers' compensation cancer presumption.
- **Idaho:** No workers' compensation cancer presumption

- **Illinois:** 5 years minimum employment required for a workers' compensation presumption. The claimant must be an "active" firefighter when diagnosed. To rebut the presumption, the employer only must offer some evidence to support a finding that something other than the claimant's occupation as a fire fighter caused the condition.
- **Indiana:** Presumption in workers' compensation expires 5 years after retiring from the fire service and only applies to certain types of cancer. The presumption does not apply to volunteers and recent smokers (in the last 5 years).
- **Iowa:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption.
- **Kansas:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption that requires 5 years minimum employment.
- **Kentucky:** No workers' compensation cancer presumption.
- **Louisiana:** 10 years minimum employment required for a workers' compensation presumption and the presumption expires 5 years after retiring from the fire service. The presumption is limited to certain types of cancer and is rebuttable by "evidence meeting judicial standards." The presumption does not apply to volunteers.
- **Maine:** 5 years minimum employment required for a workers' compensation presumption that expires 10 years after leaving the fire service or at age 70. The presumption is limited to certain types of cancer.
- **Maryland:** 5 years minimum employment required in the department "where the individual is currently employed or serves."
- **Massachusetts:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption that requires 5 years minimum employment and expires 5 years after retirement.
- **Michigan:** No workers' compensation cancer presumption. In 2016, Michigan established a special "First Responders Fund". Coverage requires 5 years minimum employment and limited to full-time firefighters. The cancer must manifest while the firefighter is employed.
- **Minnesota:** To be eligible for a presumption in workers' compensation, the claimant must be an active fire fighter *immediately* prior to reporting the claim. The presumption is limited to certain cancers and may be rebutted by "substantial factors."
- **Mississippi:** No workers' compensation cancer presumption.
- **Missouri:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption.
- **Montana:** No workers' compensation cancer presumption.

- **Nebraska:** The workers' compensation presumption expires 3 months after retirement and is limited to certain cancers.
- **Nevada:** 5 years minimum employment required and the presumption expires 5 years after leaving the fire service. The presumption is rebuttable.
- **New Hampshire:** The workers' compensation presumption expires 20 years after leaving the fire service or age 65. The presumption is limited to certain cancers.
- **New Jersey:** The workers' compensation presumption was established by the NJ Supreme Court in the 2003 decision in Lindquist v Jersey City.
- **New Mexico:** The minimum period of employment for the workers' compensation presumption varies by disease. Volunteers are excluded from the presumption.
- **New York:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption. In 2017, New York adopted legislation that requires Fire Departments to purchase cancer disability insurance for volunteers.
- **North Carolina:** No workers' compensation cancer presumption.
- **North Dakota:** 5 years minimum employment required and the presumption expires 5 years after retirement from the fire service. Volunteers excluded from the presumption.
- **Ohio:** 6 years minimum employment required and the presumption expires 20 years after retirement or at age 70. The presumption may be rebutted by "competence evidence to the contrary" or that the use of tobacco was a significant factor.
- **Oklahoma:** The workers' compensation presumption is limited to firefighters while they are employed and the benefit is limited to medical treatment. Eligibility for a disability pension also includes a cancer presumption.
- **Oregon:** 5 years minimum employment required and the presumption expires 84 months after retirement from the fire service. Volunteers are excluded from the presumption. The presumption is limited to certain cancers and the claim may be rebutted by "clear and convincing evidence" that the condition is not work related or that the use of tobacco was a major contributing cause.
- **Pennsylvania:** 4 years minimum employment required and presumption expires 300 weeks after retirement.
- **Rhode Island:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption.
- **South Carolina:** No workers' compensation cancer presumption.
- **South Dakota:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption.

- **Tennessee:** No workers' compensation cancer presumption. Eligibility for a disability pension includes a cancer presumption.
- **Texas:** 5 years minimum employment required and the presumption expires when the fire fighter retires. Texas excludes smokers from the presumption.
- **Utah:** No workers' compensation cancer presumption.
- **Vermont:** 5 years minimum employment required and the presumption expires 10 years after retirement. Claims must also be reported before age 65 and can be rebutted by "the preponderance of the evidence." The presumption does not apply to fire fighters who used tobacco products within 10 years of the date of diagnosis.
- **Virginia:** 12 years minimum employment required and the claim must be reported within 5 years of leaving the fire service. The presumption can be rebutted by the "preponderance of the evidence." The presumption is limited to certain cancers.
- **Washington:** 10 years minimum employment required and the presumption expires 5 years after retirement. The presumption can be rebutted by the "preponderance of the evidence". Washington excludes volunteers and smokers from the presumption.
- **West Virginia:** No workers' compensation cancer presumption.
- **Wisconsin:** 10 years minimum employment required and the presumption excludes volunteers and smokers.
- **Wyoming:** No workers' compensation cancer presumption.