



Client Memorandum

To: All Florida Firefighter Pension Plans
From: Klausner, Kaufman, Jensen & Levinson
Date: August 25, 2020
Re: Issues Relating to Disability Applications from Firefighters Utilizing the Cancer Presumption in Florida Statute §112.1816

Firefighting is an inherently dangerous job. Over time, studies have been conducted proving that firefighters are at a higher risk of developing cancer because of the smoke and hazardous chemicals they are exposed to in the line of duty. In 2019, the Florida Legislature, recognizing that swift action needed to be taken to address this devastating problem, voted unanimously to provide firefighters benefits related to certain cancer diagnoses and the treatment thereof. The purpose of this memo is to discuss the interpretation and application of this new law codified in F.S. §112.1816.

Florida Statute §112.1816 was adopted July 1, 2019. The law enumerates twenty-one forms of cancer that are identified as occupational hazards automatically triggering cancer-related benefits for eligible firefighters in lieu of receiving workers' compensation. Nothing can reverse the emotional, physical, and financial stress triggered by a cancer diagnosis, however the benefits provided under F.S. §112.1816, are intended to make going through the process a bit easier.

The structure of F.S. §112.1816 is as follows:

Subsection (1) provides for the definitions of key terms in the statute including the list of twenty-one covered cancers as well as who is a firefighter;

Subsection (2) provides for a lump sum payment and insurance payments instead of workers' compensation upon diagnosis of a listed cancer;

Client Memorandum

Re: Issues Relating to Disability Applications from Firefighters Utilizing the Cancer Presumption in F.S. §112.1816

Page 2

Subsection (3) provides a nonrebuttable presumption that the twenty-one listed cancers are job related for disability pension purposes; and

Subsection (4) provides a nonrebuttable presumption that the twenty-one listed cancers are job related for death benefits, including the state death benefits under F.S. §112.191.

ELIGIBILITY REQUIREMENTS FOR LUMP SUM AND INSURANCE BENEFITS

To meet the eligibility requirements under F.S. §112.1816(2), a firefighter must have a cancer diagnosis and meet the following criteria: “been employed by his or her employer for at least 5 continuous years; not used tobacco products for at least the preceding 5 years; and has not been employed in any other position in the preceding 5 years which is proven to create a higher risk for any cancer.”

CANCER-RELATED BENEFITS PROVIDED UNDER F.S. §112.1816(2)

Upon a diagnosis of cancer and meeting the enumerated criteria mentioned above, a firefighter is entitled to have:

(a) cancer treatment covered within an employer-sponsored health plan or through a group health insurance trust fund. The employer must timely reimburse the firefighter for any out-of-pocket deductible, copayment, or coinsurance costs incurred due to the treatment of cancer.

(b) a one-time cash payout of \$25,000, upon the firefighter's initial diagnosis of cancer.

DISPUTE OVER INTERPRETATION AND APPLICATION OF THE LAW

Since the law's passage in mid-2019, there has been significant discussion regarding which firefighters are covered and which firefighters are not. Some employers want to establish a hard and fast effective date of July 1, 2019, limiting the application of the law to only firefighters diagnosed with a qualifying cancer on or after that date. This means firefighters who were diagnosed with cancer prior to July 1, 2019, will not receive the benefits the law intended to provide. On the contrary, the law is meant to apply to all firefighters who have developed or who will develop an enumerate type(s) of cancer. Florida Statute §112.1816(2) affords all qualifying firefighters a means to seek relief “upon a diagnosis of cancer,” as of July 1, 2019.

Litigation has already begun over this new law. A St. Petersburg, Florida, Fire Lieutenant was diagnosed with thyroid cancer in January 2019. In mid-July 2019, he applied for the cancer-related benefits provided under F.S. §112.1816. The City of St. Petersburg denied his request stating that his diagnosis occurred prior to the law taking effect. Then in August 2019, the Lieutenant filed for declaratory judgment in the Sixth Judicial Circuit. The issue in this case was “[w]hether the fact that the Plaintiff was diagnosed with thyroid cancer prior to [the] effective date of the Statute precluded him from recovering any of the benefits afforded by the Statute.” *Francis v. City of St. Petersburg, Florida*, No. 19-005598-CI-19, (Fla. 6th Cir. Ct. 2019). This is the first case interpreting F.S. §112.1816.

In the Circuit Court’s Order deciding in favor of the Lieutenant, the judge opined “[t]his Court finds that the Statute does not restrict benefits based upon a diagnosis of cancer that occurred prior to the effective date thereof.” *Id.* at 3. The Court’s rationale explained “. . . the Statute does not state that a diagnosis of cancer shall have occurred subsequent to the effective date of the Statute, and the Statute does not expressly prohibit application of a diagnosis that occurred prior to such effective date.” *Id.* at 2. Specifically, the Court held “[i]n harmonizing and reconciling an alternative claim to worker’s compensation, this Court finds that the provisions of §112.1816 are remedial in nature.” *Id.* at 3.

Florida Statute §112.1816(2), plainly states that the benefits conferred are “an alternative to workers’ compensation benefits.” In accordance with the *Francis* decision, no new rights or duties were created, so the law may be applied retroactively. Firefighters who developed a qualifying cancer and were diagnosed prior to July 1, 2019, are as entitled to the presumption that their illness is duty related as those firefighters who develop cancer on or after July 1, 2019.

RETROACTIVE APPLICATION OF REMEDIAL LEGISLATION

The Court found the automatic cancer-related benefits contained in F.S. §112.1816 are remedial in nature. This was critical to the Court’s decision and will likely be persuasive in future litigation on this issue. Remedial laws operate in furtherance of existing remedies but do not create new rights or take away vested rights. *Love v. State*, 286 So.3d 177 (Fla. 2019), (See also, *City of Lakeland v. Catinella*, 129 So. 2d 133 (Fla. 1961)).

Florida law has long recognized remedial legislation as applying to “pending cases to fully effectuate the legislation’s intended purpose.” *City of Orlando v. Desjardins*, 493 So. 2d 1027, (Fla. 1986), (See also, *Arrow Air, Inc., v. Walsh*, 645, So. 2d. 422 (Fla.

1994) noting that “[w]e recognize that the presumption in favor of prospective application generally does not apply to ‘remedial’ legislation, rather, whenever possible, such legislation should be applied to pending cases in order to fully effectuate the legislatures intended purpose.”)

When interpreting a statute, the court must “adopt a construction . . . which harmonizes and reconciles it to other provisions of the same act.” *Woodgate Dev. Corp. v. Hamilton Investment Trust*, 351 So. 2d 14 (Fla. 1977). Included in the *Francis* court’s reasoning was that F.S. §112.1816(2) describes the benefits as “an alternative to pursuing worker’s compensation benefits under chapter 440.” As such, the court’s construction of F.S. §112.1816 is harmonized and reconciled with other provisions of the same act.

Importantly, the court’s ruling was not appealed by the City of St. Petersburg. Equally important, Circuit Court rulings do not create precedent, therefore this case is only binding in St. Petersburg. In other words, the issue of whether a firefighter diagnosed with a qualifying type of cancer prior to July 1, 2019, is precluded from recovering any of the benefits afforded by the statute remains unresolved.

PRESUMPTION OF PROSPECTIVE APPLICATION OF SUBSTANTIVE LEGISLATION

Opponents to the retroactive application of F.S. §112.1816 argue that this law is substantive, rather than remedial. They argue that the law creates new duties and rights. Substantive laws are presumed to apply prospectively only. *See supra* at pp. 424 (providing that a statute is presumed to apply prospectively in the absence of express statutory language for retroactive application.)

Opponents disagree with the finding in *Francis*. In support of their argument, opponents cite to Florida caselaw they contend illustrates F.S. §112.1816 is substantive in nature. There is no caselaw precedent on this issue. A finding that the law is substantive would mean only those firefighters who develop and are diagnosed with a qualifying cancer on or after July 1, 2019, would be entitled to receive benefits.

CANCER PRESUMPTION IN DISABILITY AND DEATH CASES

Your Board will likely hear cancer-related disability and death applications. When it does, the Board will interpret and apply the provisions of its plan document to these cases. Generally, an applicant is deemed disabled under the terms of Florida Statutes, Chapter 175, if they suffered an illness, injury or disease which renders them “wholly prevented from rendering useful and efficient service as a firefighter” and they are “likely to remain so disabled continuously and permanently.” Under F.S. §112.1816, an

Client Memorandum

Re: Issues Relating to Disability Applications from Firefighters Utilizing the Cancer Presumption in F.S. §112.1816

Page 5

applicant who becomes disabled or dies after July 1, 2019, as a result of developing an enumerated form of cancer, or from the treatment thereof, is presumed to have contracted the disease in the line of duty and therefore, is entitled to the benefits regardless of their date of diagnosis. This presumption is irrebuttable; it cannot be disputed by contradictory evidence.

The following steps may be taken to streamline the disability process rather than proceeding with the application as if it were an ordinary disability claim.

- Obtain a letter from the employer advising that the applicant is or will be medically discharged from employment due to his or her cancer diagnosis, including confirmation of coverage under F.S. 112.1816(2);
- Obtain a signed medical release of information form (HIPAA form) from the applicant so that the Board may receive all relevant medical records and confer with staff all issues related to the disability application;
- Obtain the report(s) from the treating Oncologist and other treating physicians;
- Review and adopt the medical report(s) of the applicant's treating physician and medical team as its own report(s) in lieu of sending the applicant to an Independent Medical Examination; and
- Present the above evidence at a scheduled meeting, including the employer's letter advising that the applicant is or will be discharged from their position due their cancer diagnosis and the Board adopted medical report.

After obtaining and reviewing the aforementioned documentation, the Board must interpret the plan document and the applicable state law to determine whether an applicant has established a cancer-related disability. Importantly, a cancer diagnosis of any one of the twenty-one enumerated types listed in F.S. §112.1816 satisfies the applicant's burden of establishing entitlement to disability retirement benefits.

Client Memorandum

Re: Issues Relating to Disability Applications from Firefighters Utilizing the Cancer Presumption in F.S. §112.1816

Page 6

ELIGIBILITY OF CANCER-RELATED BENEFITS TO FIREFIGHTERS WHO SEPARATE SERVICE PRIOR TO JULY 1, 2019

A separate issue raised is whether a retiree is entitled to benefits under F.S. §112.1816 if they separated service prior to July 1, 2019, but remain within ten years of retirement. This issue was not argued in the *Francis* case, nor in any other case. However, the *Francis* court ruled that all qualifying firefighters may seek relief under the statute on or after July 1, 2019. Based on this ruling, it seems likely that a retiree who separated service prior to July 1, 2019, who is within ten years of retirement, and who otherwise qualifies for benefits under the statute is entitled to receive the benefits provided thereunder. Remember, although not all firefighters will qualify for benefits provided under the statute, they may still qualify for workers' compensation benefits.

CONCLUSION

Florida courts concede that determining whether a law is remedial or substantive is a difficult task. The *Francis* court ruled that F.S. §112.1816 is remedial legislation. Specifically, the court found the cancer-related benefits afforded under the law became available effective July 1, 2019. The court *did not* find that a firefighter must be diagnosed with a qualifying cancer on or after July 1, 2019. This is a very important distinction to be made, one that provides all qualifying firefighters with the presumption that their cancer diagnosis is duty related and that they are entitled to the benefits provided under the law.

As always, feel free to contact our office if you have any questions.