



OFFICE OF CORPORATION COUNSEL

Milwaukee County

TIMOTHY R. SCHOEWE
Acting Corporation Counsel

ROBERT E. ANDREWS
Deputy Corporation Counsel

JOHN F. JORGENSEN
MARK A. GRADY
JOHN E. SCHAPEKAHM
TIMOTHY R. KARASKIEWICZ
JEANEEN J. DEHRING
ROY L. WILLIAMS
COLLEEN A. FOLEY
LEE R. JONES
MOLLY J. ZILLIG
Principal Assistant
Corporation Counsel

DATE: January 25, 2010
TO: Roy De La Rosa, Intergovernmental Relations
FROM: Mark A. Grady, Principal Assistant Corporation Counsel
SUBJECT: AB 644 & SB 429

Your office has requested comments regarding the potential impact of AB 644 on Milwaukee County. As the attorney in the Office of Corporation Counsel with the primary day-to-day responsibility for advising the Employees Retirement System of Milwaukee County on pension matters and with the primary day-to-day responsibility for advising Risk Management on workers' compensation matters, I have been asked to respond to your request.

This bill would create a presumption that any county firefighter, deputy sheriff or correction officer who becomes disabled or dies due to an infectious disease (including, but not limited to, HIV, AIDS, Hepatitis A, B, C or D, and tuberculosis) that the disease was caused by employment. The only apparent defense would be a pre-employment physical examination that demonstrated that the individual had the disease prior to employment. Otherwise, the bill creates a presumption that the individual would be entitled to a disability pension or death benefit from the county retirement system due to the disease (assuming the individual could no longer work due to the disease). Under the current county retirement system, any of these employees can obtain a disability or death benefit if they become disabled by such a disease, but only if they can prove that the disease was caused by a work exposure. Thus, this bill does not create a new benefit or increase the amount of any retirement benefits that such an individual could obtain, but makes it substantially more likely that such an individual could obtain them.

First, it should be noted that this bill contravenes longstanding policy of the State of Wisconsin that leaves the adoption and administration of the county retirement to the county and disavows any State interest in the county retirement system. In section 2 of Chapter 405 of the Laws of 1965, the state legislature provided that the operation of the county retirement system is declared to be a "local affair" and

“not a matter of state-wide concern.” That law essentially gave the county home rule authority over the county pension system, subject to the requirement to have a review process by a pension study commission. Because AB 644 creates presumptions for benefits in the county retirement system, AB 644 is contrary to this past history, legislation and policy. For 45 years the State has avoided any legislative involvement in any issue related to determining county employee pension benefits (as opposed to the funding of benefits through pension obligation bonds). As set forth below, there does not appear to be any compelling reason for the State to invade the previously-granted county home rule authority over the county retirement system in order to address diseases suffered by this limited group of county employees. It should also be noted that the City of Milwaukee retirement system was granted this same home rule authority in 1965 and this bill would affect the City ERS in the same manner with respect to its police officers, firefighters and EMTs.

Based on Milwaukee County’s experience, the bill does not have any empirical support for its presumption. In the past two decades, it is the recollection of those persons involved in administering the county’s self-insured workers compensation program that there has not been a single case of a county employee actually suffering any disability, not even temporarily, as a result of contracting one of these infectious diseases due to a work exposure. In fact, staff cannot recall any cases of employees actually contracting any of these diseases from work exposure. There have been exposures and prophylactic medications provided, but we do not believe that anyone has actually contracted one of these diseases. Therefore, the bill seems to be addressing a non-issue, from the county’s experience.

Consistent with this experience, we do not know of any logical reason to assume that one of these employees is more likely to contract one of the listed infectious diseases from a work exposure than from a personal, non-work exposure. Given the protections provided at work and the fact that many of these diseases are commonly contracted from personal exposures, the factual basis for the bill’s presumption is inconsistent with our knowledge and experience.

Furthermore, the bill creates inequities between classes of employees without an obvious rationale for doing so. First, other employees, such as health care workers, have the same potential work exposures as the employees referenced in the bill, but these other employees are not granted the presumption. Second, and

more fundamentally, other employees suffer other kinds of disability as a result of work exposures, but do not receive a similar presumption. Perhaps the most common such example is an employee who engages in long-term physically intensive work that can create spinal disabilities. In order to receive a disability pension, these employees must demonstrate that their disability was a result of a work exposure. It is not readily apparent why the medical conditions and employees addressed by the bill are given greater protection than other medical conditions suffered by other employees. The current burden of proof to demonstrate that their disability is work-related does not appear to be any more onerous or difficult to meet for the conditions and employees addressed by the bill than it is on any other employee. On the other hand, to address this inconsistency by granting a similar presumption to all employees who suffer disabilities from work exposures would be a dramatic change to the current legal framework for disability retirement.

Last, the bill might have the practical effect of requiring the county to begin conducting pre-employment testing for these diseases. This poses financial costs and also increases the chance that this testing will lead to other employment related claims and litigation.

I hope these comments are helpful. If you have further questions, please let me know.