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Background Information for Volunteer Firefighters Workers' Compensation Subcommittee

By Pat Murdo, Legislative Research Analyst

Currently, workers' compensation insurance for volunteer firefighters is dependent on who provides the firefighting service. There are numerous types of providers across Montana; some have financing authority, and some do not. One partial result is that not all volunteer firefighters have workers' compensation insurance and may be fighting fires right beside someone who does.

Beyond the equal protection argument is the concern for liability for counties that do not provide workers' compensation for volunteer firefighters but sign a cooperative equipment agreement with the Department of Natural Resources and Conservation (DNRC) in which the county (as signatory) agrees that firefighters operating the equipment have workers' compensation coverage. These volunteer firefighters help to conduct first-attack firefighting efforts, primarily on wildland fires.

Options for addressing concerns about volunteers fighting fires without workers' compensation coverage in Montana include:

- require workers' compensation coverage, which is now voluntary for volunteers;
- expand the terms of disability coverage under the existing retirement funds to cover medical and indemnity (wage) in lieu of workers' compensation. (This is how many states cover volunteer firefighters. This approach would mean that DNRC might need to consider changes in the cooperative equipment agreement to specify disability coverage pursuant to Title 19. However, that type of change would not offer the exclusive remedy against lawsuits that accompanies workers' compensation coverage.)
- do nothing, which opens the potential for liability whether from fires not immediately put down or an injured firefighter suing.

Volunteer firefighters across the state are found in approximately 420 firefighting groups of some kind, excluding paid and municipal departments, with possibly as many as 12,000 volunteer firefighters.¹

The following questions are put before stakeholders for their consideration before a subcommittee of the Economic Affairs Committee to determine approaches to workers' compensation coverage for volunteer

¹Feb. 8, 2012, e-mail from Harold Blattie, Montana Association of Counties executive director. John Semple with the Montana Fire Alliance said in a March 8, 2012, e-mail that, based on his contact with local fire chiefs, the number of volunteer firefighters may be around 5,000 to 6,000, if the criteria is active participation for 4 to 11 months, and may be as high as 12,000 if those who choose to be active only several times a year are included. He said the larger numbers of volunteers do not meet the minimum requirements of one full year of active service and 30 hours of training, substantiated by their fire chief, necessary to be credited for retirement under the Volunteer Firefighters' Compensation Act. That number of "active" volunteer firefighters under the VFCA was 2,105 in 2011.

firefighters, including financing.

Proposed Policy Questions:

- Is workers' compensation for volunteer firefighters a public benefit as well as a benefit to the firefighter?
- Should DNRC include the volunteer firefighters under its workers' compensation policy from the first day? Advantages/Disadvantages?
- Is expansion of the disability coverage under current retirement systems a better option than workers' compensation?
- Whether workers' compensation or disability coverage is preferred, should coverage be mandatory for volunteer firefighters?
- If workers' compensation is mandatory, is a statewide pool preferred? And if so, who would administer it? How would it be structured? What are the advantages/disadvantages?²
- If workers' compensation is mandatory, should the funding mechanism be a statewide levy on property taxes like the statewide education levies? Or alternatively, if mandatory, is it better to require counties to levy the property taxes based on their particular needs like the county transportation levies for schools, with each fire protection unit determining the amount necessary for workers' compensation premiums? In the latter scenario each county would allocate requested funds back to the fire protection entity for them to purchase workers' compensation insurance (as "employers" of volunteers). Advantages/disadvantages?
- If workers' compensation is addressed, does the statute regarding disability payments under pensions in Title 19 need to be changed to remove medical payments for volunteer firefighter disability? This would let all money go to pensions. Alternatively, paid firefighters get both workers' compensation and disability, so the prohibition on receiving both--currently in statute for volunteer firefighters--might need to be reviewed to allow receipt of both.
- Is a permissive levy the appropriate approach for funding volunteer firefighters' workers' compensation, which would make the levy for this purpose exempt from the limits of 15-10-420?
- How much disability coverage is appropriate if retirement systems were required to expand coverage in lieu of workers' compensation?
- Would it help to consolidate all volunteer firefighter wage calculations in a statute separate from the definition of an employee/worker (39-71-118)?

Workers' Compensation

Workers' compensation typically offers better benefits, with specific use requirements, than the coverage provided under the disability portion of retirement systems. Those covered by workers' compensation may receive benefits up to 5 years. Extended coverage is possible if the injured worker can persuade a medical

²Is expansion of 2-9-211 and 2-9-212 for workers' compensation insurance a possibility?

panel of the need. (This is the new limitation imposed after House Bill No. 334 passed in 2011. Compensation in earlier years ended if there were no medical visits for 5 years; otherwise they could stay open, although indemnity payments ended when a person returned to the preinjury job.) See Table 1.

Table 1: Comparison of Benefits for Workers' Compensation, Disability Payment, Disability Income

	<i>Medical Benefits</i>	<i>Wage Benefits</i>
Workers' Compensation	<ul style="list-style-type: none"> • Provided up to 5 years. May extend if permanently disabled or partially disabled, with physician panel approval. • Payment for certain types of partial and permanent disabilities. 	<ul style="list-style-type: none"> • For volunteer firefighters who are not self-employed, the wage base is the # of volunteer hours x the state's average weekly wage, which for 2012 is \$649.12, divided by 40 hrs. For 30 volunteer hrs, that equals \$486.84.
Disability Through Retirement Fund	<ul style="list-style-type: none"> • Board may require medical examination. • Claimant must be on eligible fire company's roster and not covered by workers' compensation. Injury must have occurred in line of duty. • Claim must be submitted within 12 months of date injury/illness incurred. • Board "shall authorize payment of some or all medical expenses ... that required the services of a physician, surgeon, or nurse, whether or not the member was hospitalized. The payments must equal the member's necessary and reasonable out-of-pocket medical expenses that resulted directly from the injury or illness and that were billed within the 36 months following the date of the injury or illness". (19-17-502) • The total claim may not exceed \$25,000. • If a prosthesis is needed, an additional \$1,500 or the cost of the prosthesis may be provided, whichever is less. 	<p>Volunteer firefighters receiving disability benefits:</p> <ul style="list-style-type: none"> • must have a permanent total disability (as defined in 39-71-116--no reasonable prospect of physically performing regular job) acquired in the line of duty; • must be a member of a fire company; • may not return to service (active or inactive) with any fire company. (19-17-601) <p>Amount is at least 1/2 of full pension benefit (greater if eligible member's service years is more than 10 years). (19-17-602)</p> <p>Benefits may be canceled if the Board determines that the person either is no longer disabled or earns more than \$5,500 in a year.</p>
Disability Income Insurance	None	<ul style="list-style-type: none"> • Lasts 1 year or until the treating physician determines that the beneficiary is no longer disabled, whichever is sooner.

Workers' compensation provides both an indemnity and a medical component. Indemnity (wage) compensation is based for volunteer firefighters on a formula established in 39-71-118(7). That formula provides both a calculation for premium purposes and for benefit purposes.

Billing for premium purposes is based on volunteer hours and may be charged in advance on estimated payroll and then later adjusted (Montana State Fund's approach) or charged on actual payroll for the quarter (the Montana Municipal Interlocal Authority's approach). Unlike regular workers whose hours can be calculated on

the job for premium purposes, fire entity "employers" must calculate volunteer service for premium purposes based on the description of volunteer hours in 39-71-118(4)(c):

all the time spent by a volunteer firefighter or a volunteer emergency medical technician in the service of an employer or as a volunteer for a town, city, or county, including but not limited to training time, response time, and time spent at the employer's premises.

For this reason, 39-71-118(7)(b) provides that for premium and weekly benefit purposes, payroll is to be reported based on "the number of volunteer hours of each firefighter, but no more than 60 hours, times the state's average weekly wage divided by 40 hours". The National Council on Compensation Insurance (NCCI) provides the loss cost rate at which payroll is multiplied. Montana is one of the few states to retain a 7704 NCCI code that allows a minimum payroll of \$300 for each volunteer firefighter.³ Premiums at Montana State Fund for volunteer firefighters average about \$8,000 a year. However, since all premiums are based on payrolls as well as other factors, including a claims experience factor, a volunteer fire group might pay as little as \$385 or more than \$90,000 a year.

To determine benefits, however, the payments must include consideration of 39-71-123, which states that, for volunteers who have regular employment except for the self-employed sole proprietor or partner not choosing to be covered in their regular job, benefits "must be based on the average actual wages in the volunteer's regular employment".

For those self-employed sole proprietors or partners who decide not to be covered by workers' compensation in their regular jobs, the compensation benefits--if covered as a volunteer firefighter and if approved by the group offering workers' compensation coverage--allow the benefit based on volunteer hours plus an additional benefit at an assumed minimum wage of 2,080 hours a year.

These calculations are likely to give a fire chief a headache to determine accurate payroll. But even if a fire department, fire company, or similar entity does not have workers' compensation, calculations at least for training hours (30 hours in a fiscal year) are necessary for the firefighters to receive credit for service under the Volunteer Firefighters Compensation Act (retirement and pension system).

Disability Coverage Through Retirement Funds

There are two main pension systems that cover firefighters and that have a disability element: the Firefighters' Unified Retirement System (T. 19, ch. 13) and the Volunteer Firefighters' Compensation Act (T. 19, ch. 17). These are operated by the Public Employees' Retirement Board (PERB). There also is a separate system for firefighters' retirement (T. 19, ch. 18) that includes a disability component and is operated by fire department relief associations. For all but volunteer firefighters the disability components are in addition to workers' compensation, which by law must be available to employed firefighters.

- The Firefighters' Unified Retirement System or FURS typically covers full-paid firefighters who work in cities with population of more than 5,000 or part-paid firefighters in cities of 5,000 to 10,000 population. If a rural fire district has full-paid firefighters who have been covered by the Public Employees

³National Council on Compensation Insurance, Inc., "NCCI Discussion Paper on Volunteer Firefighters," January 2012.

Retirement System (PERS), they may transfer from PERS into FURS coverage after fulfilling certain requirements (19-13-210). Members of FURS also are covered by a group life and accidental death and dismemberment insurance policy as well as workers' compensation (because they are employees). FURS members also may be eligible for a disability retirement, which is determined by the PERS Board and means that the person has terminated employment because of the disability. The basic payment is one-half the member's highest average compensation.

Active Plan Members in 2011:	579
Members with Disability Retirement:	7
Average Age at Disablement	38.6
Average Annual Benefit	\$25,776 ⁴

- Those who are enrolled in the pension trust fund under the Volunteer Firefighters' Compensation Act (VFCA) in Title 19, chapter 17, are eligible for a disability benefit if they are permanently totally disabled because of a duty-related injury, regardless of age or service. They may not return to inactive or active service. They receive a limited amount of medical coverage if the person is listed on the fire company roster and injured in the line of duty (19-17-501). Total claims may not exceed \$25,000, although there is a provision for a prosthesis (19-17-502). A listed member also may receive disability benefits, as provided in 19-17-602, if the person has a permanent total disability as determined by the board of trustees under 19-17-603. The amount of disability benefit is a portion of the full pension benefit but not less than one-half. The Public Employees' Retirement System has said that no disability benefits have been paid out under the Volunteer Firefighters' Compensation Act.⁵

Active Plan Members in 2011:	2,105
Members with Disability Retirement:	0
Potential Annual Benefit	\$450 with 10 yrs service; \$1,012.50 with 15 yrs service; \$1,800 with 20 yrs service

- A disability and pension fund is offered to all fire departments whether paid, part-paid, volunteer, or a combination of these and recognized by an incorporated city or town council that has established a Fire Department Relief Association. The fund may be used for a pension to a member who is permanently maimed or disabled or as a benefit or allowance for a member who has suffered a permanent disabling injury or sickness, among other uses. The disability pension for a volunteer firefighter may not exceed \$125 a month (19-18-604).

Active Fire Department Relief Associations in 2011 (see Table 2):	86
Dispersed by State Auditors' Office to Active Relief Associations in FY 2011:	\$401,958

Disability Through Disability Income or Supplemental Insurance

Under 7-6-621, if voters approve a levy for the purchase of disability income insurance or workers' compensation coverage, the governing body of a local government may establish a volunteer firefighters' disability income insurance account. Disability income insurance, defined in 33-1-235, is either an individual or

⁴Pages 55 and 136 of the "Montana PERB Comprehensive Annual Financial Report", accessed at: <http://mpera.mt.gov/docs/2011CAFR.pdf>.

⁵Oct. 31, 2011, e-mail from Diann Levandowski at PERS, stating that for FY 2011 there were 2,105 active plan members under the Volunteer Firefighters' Compensation Act and 216 participating companies and saying: "There have been no disability claims that have been paid out under the VFCA".

a group policy that provides income replacement, in whole or in part, when a policyholder is unable to work because of sickness or injury. The payments "may not exceed the lesser of 1 year or until the treating physician determines that the beneficiary is no longer disabled" (7-6-621(1)(b)).

Supplemental insurance also may be purchased by a fire company or an entity buying the insurance for a fire company. This does not include workers' compensation. Payments can be as much \$150 a year for each fire company to help provide benefits for those injured while performing duties as volunteer firefighters if they are injured or killed on the job. (19-17-205). Last year PERB paid out almost \$15,000 under this provision, which would amount to about \$150 to 100 volunteer fire companies (or the agency paying the premiums on the fire company's behalf).

Table 2: Active* Fire Department Relief Associations (must be part of incorporated city or town)

Baker	Columbus	Forsyth	Jordan	Polson	Terry
Belgrade	Conrad	Fort Benton	Judith Gap	Ronan	Thompson Falls
Belt	Culbertson	Fromberg	Kevin	Roundup	Three Forks
Big Timber	Cut Bank	Geraldine	Laurel	Ryegate	Townsend
Boulder	Darby	Glasgow	Lavina	Saco	Troy
Bridger	Deer Lodge	Grass Range	Libby	St. Ignatius	Twin Bridges
Broadus	Denton	Hamilton	Malta	Scobey	Valier
Cascade	Dillon	Hardin	Manhattan	Shelby	Virginia City
Chester	Drummond	Harlem	Medicine Lake	Sheridan	Westby
Chinook	Dutton	Harlowton	Moore	Sidney	Whitehall
Choteau	East Helena	Hobson	Nashua	Stanford	Wh. Sulphur Springs
Circle	Eureka	Hot Springs	Philipsburg	Stevensville	Wibaux
Colstrip	Fairfield	Hysham	Plains	Sunburst	Winifred
Columbia Falls	Fairview	Joliet	Plentywood	Superior	Wolf Point

*Active means they are registered with the Secretary of State. Inactive associations not eligible for funds in FY 2011 were: Broadview, Browning, Ekalaka, Froid, Plevna, Whitefish, and Winnett.

Financing of Disability/Pension Funds

In addition to firefighters having a pay-in responsibility for disability/retirement funds, the state contributes to each of the funds, as follows:

- for FURS, the state contribution is from the general fund and is based on 32.61% of the annual compensation paid to members, minus overtime and various other payments (19-13-604). The state contribution in 2011 was \$11,593,690. The PERB financial report for 2011 indicates that FURS is actuarially sound because it amortizes within 16 years. Currently PERB estimated that as of June 30, 2011, the fund was 61.93% funded.
- for the volunteer firefighters' pension trust fund, the State Auditor is to pay from the general fund to the

pension trust fund an amount equivalent to 5% of the premium taxes collected from insurers authorized to collect premiums for fire risks, among other property and casualty insurance. In 2011 that amount was \$1,596,436. The PERB estimated that as of June 30, 2011, that the volunteer firefighters' pension trust fund was 74.39% funded and would amortize in 8.8 years at current levels.

- for the disability and pension fund for fire department relief associations, the State Auditor is to pay from the general fund an amount equal to 1 1/2 mills of the total taxable value of the city or town that has a fire department relief association entitled to receive payments. The amount paid in calendar year 2011 was \$401,958.

Paying for workers' compensation premiums is the responsibility of the entity that "employs" the volunteer firefighters. Paying for retirement disability systems usually means joint participation by the "employer" and the firefighter. The latter is not true under the VFCA, which receives funding from only the state.

Financing of Workers' Compensation

Current financing of workers' compensation for volunteer firefighters is complex and depends on who the "employer" is. As stated earlier, not all "employers" of volunteer firefighters have the capacity to tax or charge fees. Table 3 provides information on financing as well as the various types of "employers" for volunteer firefighters.

The "employer" is important to determining payment of workers' compensation. At the Economic Affairs Committee meeting, DNRC Director Mary Sexton noted that some volunteer firefighters may be hired by the state as an emergency firefighter (EFF). This does not happen in the first 24 hours, Ms. Sexton said. This is in part because the incident commander (employer) may not yet be determined in the initial hours while first responders are operating under their individual fire companies (or related "employing" entities).

Table 3: Firefighting Organizations and Financing Terms

Terms	Financing Authority?	How many?	Statutory Reference (general Title 7, chapter 33)
Rural Fire District	May tax, subject to 15-10-420, if operated by a Board of Trustees	218 districts	<ul style="list-style-type: none"> • Affects an unincorporated territory. • May include towns of less than 5,000 people and more than 1,000 (3rd-class cities), with approval from the governing body of a town. • Requires a petition signed by owners of 40% or more of the real property in the proposed districts and owners of property representing 40% or more of the taxable value of the property in the proposed district. • Must be approved by the board of county commissioners. • 7-33-2101 and Title 7, ch. 33, part 21.
Volunteer Fire Department		About 131 departments	<ul style="list-style-type: none"> • Authorized for cities of less than 10,000 and more than 5,000 (2nd-class cities).

Volunteer Fire Company	No taxing authority	35	<ul style="list-style-type: none"> • Authorized in unincorporated towns and villages under 7-33-2311. • File with the county clerk of the county in which they are located a certificate signed by the presiding officer and secretary providing data on organization.
Fire Service Area	May charge fee. There's a cap on fees on land not developed & under single owner. Fee not charged if same service obtained from a public agency.	50 fire service areas	<ul style="list-style-type: none"> • Affects an unincorporated area that is not part of a rural fire district. • May not include areas annexed into a city or a town. • Requires a petition signed by at least 30 owners of real property in the proposed service area, or by a majority of the owners of real property if there are no more than 30 owners of real property in the proposed service area. • Must be established by the board of county commissioners. • Financing of fire service area under 7-33-2404 separates rates for structures and undeveloped land (the latter is charged only for wildland fire protection). See 7-33-2401 for creation and Title 7, ch 33, part 24.
Fire Department	For retirement fund, 19-13-214, subject to 15-10-420.	24 employer members of FURS with ~ 579 employees	<ul style="list-style-type: none"> • Required in consolidated municipalities of first through fourth class (basically any city or town of more than 300 people). Optional for municipalities of fifth, sixth, or seventh classes (7-3-1248). • In a consolidated government, there is no effect on the existence, rights, or duties of a voluntary fire department or fire district. The organizations may enter mutual aid agreements (7-3-1345(2)). • Firefighters in FURS vested on first day of service for disability (19-13-802).
Fire Brigade	NA	NA	<ul style="list-style-type: none"> • No definition in Montana codes. Used in Occupational Safety and Health Administration 29 CFR 1910.156.
Mutual Aid Agreement	NA	NA	<ul style="list-style-type: none"> • Under 7-33-2108 fire district trustees may enter mutual aid agreements with other fire districts, incorporated and unincorporated municipalities, state or federal agencies, fire service areas, and governing bodies of fire protection services, EMTs, local governments, and private fire prevention agencies.
Wildland Fire Protection District	NA	NA	<ul style="list-style-type: none"> • a definite land area, the boundaries of which are fixed and in which wildland fire protection is provided through the medium of an agency recognized by the Department of Natural Resources and Conservation (76-13-102).

The effort to provide workers' compensation or disability coverage to volunteer firefighters is an issue that many states are tackling. West Virginia in 2011 set up a statewide subsidy program for volunteer firefighters. The first year's appropriation was \$5 million, and results remain to be seen. The *NCCI Discussion Paper on Volunteer*

Firefighters reviews various state approaches.⁶ Table 4 has selected state approaches based on reviews of state laws.

Table 4: Some Other States That Provide Workers' Compensation to Volunteer Firefighters

State	Financing Mechanism	How Applied
New York	The local political subdivision pays for the insurance.	Active volunteer firefighters associated with a fire company of a county, city, town, village, or fire district have workers' compensation insurance. If not associated with any of these, the workers' compensation insurance is voluntary for the fire company. The state's Workers' Compensation Board determines reasonable earning capacity and indemnity benefits based on that.
Pennsylvania	Article VI, Section 601(a)(7) of the Pennsylvania Workers' Compensation Act says all forest firefighters are employees of the Commonwealth. Section (602)(a)(1) says the municipality that receives services of a volunteer firefighter must reimburse host municipality for a portion of the workers' compensation premium.	Wage loss and medical benefits are paid.
Washington	State Treasury oversees Volunteer Firefighters' and Reserve Officers' Relief and Pension Principal Fund to which municipalities and firefighters (or reserve officers) contribute. Fund includes 40% of money received by state on fire insurance premium taxes. Money must be appropriated for expenses. RCW 41.24.030.	Fund pays for operating expenses, including medical exams and costs of preparing medical reports. Disability payments in line of duty must wholly prevent "engaging in each and every duty of his or her regular occupation". Payment is lesser of the person's monthly wage or \$2,550 for period of up to 6 months or an amount equal to the person's daily wage or \$85, whichever is less, for each day up to a month, after which if incapacitation continues the person may receive \$1,275 for as long as the disability continues (adjusted by cost of living increase). A lump-sum payment may be made, similar to a workers' compensation permanent partial disability payment, instead of monthly disability payments. RCW 41.24.150.
West Virginia	Section 12-4-14a W. Va. Code (based on HB 3271 effective in June 2011) set up a subsidy program for volunteer fire departments in the State Auditor's Office. Subsidy relies on legislative appropriation. The first-year funding was \$5 million.	Volunteer fire department has own policy, shows last year's invoice to State Auditor, which then divvies up program funding among applicants. Law calls for review in 2015, but next legislature also has to fund the program or figure another way to pay for it.

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See <https://www.ncci.com/nccimain/IndustryInformation/RegulatoryActivities/Pages/NCCI-VolunteerFirefighters.aspx>