

Montana State Fire Chiefs' Association



Voluntary Fire Service
White Paper
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The Risk Associated with being a Volunteer Firefighter in Montana

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Purpose

The purpose of this white paper is to evaluate the status of volunteer firefighter insurance coverage for work related injuries. It has come to the attention of the Montana Fire Chiefs Association (MFCA) that on at least one recent occasion a volunteer firefighter received a critical disabling injury while performing work for their fire department. The injury costs far exceeded the coverage provided for this firefighter. Montana Fire Chiefs Association is seeking preliminary information to determine:

1. What coverage, if any, is legally required in the state of Montana for volunteers?
2. If a gap in protection is found, how expansive is it?
3. What coverages are departments providing for their firefighters at this time?
4. What is the risk factor of injury to Montana firefighters?
5. What factors are influencing a department's decision concerning the purchase of adequate coverage for volunteer firefighters?
6. If there is a coverage issue, what would be a "best practices" solution?
7. If the solution requires a legislative change, is there model legislation to mimic?
8. If cost is a primary concern, can MFCA have a positive impact on rates?

Historical Perspective

In 1899, in its original form, Montana Code Annotated, MCA 7-33-1010 was enacted that defines Montana's Statutes regarding fire departments. Even today, this statute set the standard on how volunteer firefighters were assessed for workers' compensation coverage.

"Fire department authorized and required. In every city and town of this state there must be a fire department, which must be organized, managed, and controlled as provided in this part except that a third-class city or town may contract for fire protection services or consolidate its fire department with another fire protection provider created under this part."

"In addition to a paid department, the city council, city commission, or other governing body in cities of the second class may make provision for a volunteer fire department."

For reference purposes:

Class 1 - every city having a population of 10,000 or more

Class 2 - every city having a population of 5,000 but less than 10,000

Class 3 - every city having a population of 1,000 but less than 5,000

Much that has been written in regards to volunteers over the years is in line with this citation from the Montana State Fund:

"Under the Montana Workers' Compensation Act, volunteers of any type have been generally been exempt from coverage requirement.

Volunteers of a *rural* fire district are not "employees as the term is used in the workers' compensation context because a 'volunteer' by definition does not receive earnings as a result of an employment contract of hire. The "contract of hire" requirement of the law presumes payment for services and absent any expectation of payment for services, volunteers are not "employees". The Montana Attorney General has held that volunteer firefighters in an "incorporated" city or town are employees because they must be "appointed" by the mayor or manager, and meet the requirement of an appointment or contract of hire required by the Workers' Compensation Act. 39 Op. Att'y Gen. No. 36 (1981). However, the same is not true for volunteers of rural fire districts who are not under contract or an appointment of hire. In addition, the Volunteer Firefighters Compensation Act provided benefits for work related injury or death. 40 Op. Att'y Gen. No. 9 (1983).

Prior to 1991, the State Compensation Insurance Fund (State Fund) provided workers' compensation coverage by special endorsement for rural fire district volunteers that were created by county commissioners AND if the county was insured by the State Fund. The State Fund did not insure a purely volunteer group. An insurer must provide coverage for all operations of an employer and rural fire districts, being a creation of the county, are operations of the county. Many counties were self-insured under the Montana Association of Counties (MACo) and any rural fire district created by such a county would have to obtain coverage under MACo or simply rely on the benefits available under the Volunteer Firefighters Compensation Act (VFCA).

In 1991 Montana Legislature enacted an amendment, 39-71-118, to define what a "volunteer firefighter" is and providing for election of coverage for rural fire districts, counties or fire service areas. A volunteer covered under the Workers' Compensation Act was not entitled to disability benefits provided under the Volunteer Firefighters Compensation Act (19-121-501) MCA, et seq). In addition, any benefits provided under the VFCA were limited to medical expenses to a maximum of \$25,000. Benefits under the VFCA were often inadequate to protect the injured volunteer from wage loss from concurrent employments and medical benefits that could easily exceed the limitations contained in the VFCA.

If a rural fire district, county, or fire service area elects coverage for a volunteer firefighter, the law provided for a reporting of "wages" for compensation benefit and workers' compensation premium purposes. Under 39-71-123 (5), MCA an employer was required to report "wages" of not less than \$900.00 per month and not more than 1 ½ times the state's average weekly wage.

In 1995, with the cooperation between firefighter associations, the State Fund and other interested parties, legislation was successfully passed to alleviate the cost of workers' compensation for volunteer firefighters and to more equitably distribute the cost of coverage based upon the actual exposure of injury to covered volunteers. House Bill 168 provides for coverage of "volunteer firefighters" in essentially the same manner as before except that an employer must report wages of a volunteer based on the number of volunteer hours of each firefighter times the average weekly wage divided by 40 hours, subject to a maximum of 1 ½ times the average weekly wage. 39-71-118 (& (b), MCA. The term "volunteer hours" means "all the time spent by a volunteer firefighter in the service of an employer, including but not limited to training time, response time, and time spent at the employer's premises".

In trying to reconcile wage loss benefits, 39-71-118 (7)(c) was enacted so that the compensation benefits for a covered volunteer must be based on the average actual wages in the volunteer's regular employment, except self-employment as a sole proprietor or partner who elected not to be covered, from which the volunteer is disabled by the injury incurred.

According to the National Council on Compensation Insurance (NCCI) Scopes manual for class code 7704, which applies to both paid and volunteer firefighters, there is an assumed minimum wage for reporting firefighters of \$300 per year per covered person. However, some insurers use the current minimum wage of \$7.35/hour. The Montana State Fund follows some but not all of NCCI rules and can assign other assumed wages.

Montana Code Annotated 2011 again tries to define the calculation of compensation benefits for a volunteer who has concurrent employments. Concurrent employment means employment in which the employee was actually employed at the time of the injury and would have continued to be employed without a break in the term of employment if not for the injury.

Volunteers essentially who have paid employment that are injured while performing volunteer duties that are covered by workers' compensation, are eligible for workers' compensation benefits based on that paid employment. However, owners, partners and corporate officers who are not-subject and don't elect coverage under their own workers' compensation policy, are not eligible for benefits if injured as a covered volunteer.

Again, in 2010, Senate Bill 0552 addressed compensation benefits for volunteers. The coverage is to be based on a "per hour of actual duty" premium rate as opposed to a monthly established wage. Volunteer firefighter organizations must now track actual hours used by each member. This recent legislation is of concern and appears to be a set-back in making volunteers whole in case of a severe or catastrophic incident.

The consequence of some of the legislation that has been passed since 1899 has not advanced the cause of covering the volunteer firefighter.

Supplemental Insurance

The law that governs Volunteer Firefighters' Compensation Act is found in Title 19, Chapter 17 and Title 7, Chapter 33, MCA.

Fire Companies are encouraged to carry supplemental insurance as an alternative to workers' compensation to provide benefits if a member is injured or killed. Supplemental insurance could include accidental death and dismemberment and survivor benefits. It is just that – a supplemental policy that fills the gaps for income replacement and provides many other benefits independently of other programs. The maximum payout from the trust fund is \$50,000.

Perceived Problem

A lack of clear law and well defined standards has volunteers and departments in the position of financial uncertainty if and when injuries occur. Potentially our greatest assets, a volunteer firefighter could have little or no coverage for medical cost, loss of wages, rehabilitation, and or the loss of life. The cost to the firefighter, their family, and the department is staggering. A volunteer's assets and physical well-being are at risk while performing the department's lifesaving work. As this is a high risk profession, personal exposure to loss of health and loss of financial security is extremely high.

It should be noted that the potential cost to the department in loss of morale and the potential for volunteer turnover in addition to the financial impact is also very high. For every dollar loss in the direct cost of an injury it has been well documented that an additional four dollars are indirectly lost by the departments.

As workers' compensation is the legal "exclusive or sole remedy" for a salaried employee, a department could be found to have legal obligations to an injured volunteer and their family.

It should be noted that this concern goes beyond the lack of a standard expectable injury compensation option to include a lack of "due diligence" of basic education of the risk and potential harm that could come to current and prospective volunteer firefighters.

Standard

Each state and each department approach the issue of volunteer coverage significantly differently. A general belief and standard that is desired by most departments nationwide is to minimize the medical financial impact of injuries that occur to volunteers while in the "course and scope" of their duties representing the fire department. This would include fighting fire, training, and most other duties including emergency medical services.

It is common that some limited "loss of wage, or lost time" is a form of disability benefit that is provided for many volunteer firefighters. This benefit varies wildly, but rarely makes the volunteer 100% financially whole.

It is also common that a small lump sum death benefit is offered to volunteer firefighters that die in the line of duty. The amount of death benefit varies from a low of \$10,000 to a high of \$100,000.

Few departments extend benefits to "non-fire department" exposures, or "off the job" events. This coverage is not uncommon with paid firefighters. An example would be life or health insurance.

Best Practice

It should be the goal of every department to make every volunteer whole in the event of a work related injury.

As workers' compensation is the legal "sole remedy" this coverage should be the foundation of benefits provided to volunteers. This coverage offers a minimum of benefits to the firefighter and a strong line of defense against potential litigation for the fire department.

This coverage, and its limitations, and the risk associated with firefighting, should be clearly, and regularly explained to all volunteers.

As budgets allow, departments should weigh the advantages and disadvantages to "supplemental benefits insurance". The most commonly used supplemental benefit is disability income coverage. Secondary benefits should include a reasonable accidental death benefit.

Overview

Montana's laws, culture, and practices are varied and complex. Montana is a three way state that offers workers' compensation through a state fund, private insurers and risk pools. The rates vary widely and are expensive for the firefighting industry.

Workers' compensation is available for volunteer firefighters. However, it appears there is a lack of understanding surrounding the understanding and purpose of the "sole remedy" that workers' compensation affords for both volunteers and agencies. The high costs of coverage suggest that the priorities should be a legislative fix, coupled with a strong emphasis on firefighter safety.

1. What coverage, if any, is legally required in the state of Montana for volunteers?

Conclusion:

Montana does have a history of making workers' compensation benefits available to volunteer firefighters. As of this analysis we have not found conclusive legislation that requires workers' compensation coverage be provided for volunteer firefighters.

The issue of volunteer workers' compensation has received a great deal of legislation over the years. Some of that legislation has been included in the support data offered to the Montana Fire Chiefs Association with this report. In addition to the specific volunteer firefighter legislation, there have been other significant bills that impact cost and coverage over the years.

The layering of legislation has created a complex issue that in the best of circumstances inadequately covers volunteer firefighters. The current system is one of the most expensive in the country. Even with the high cost of workers' compensation in Montana, the limited coverage available to departments for volunteers, we believe is financial unsustainable for the insurers.

Traditional workers' compensation policies offer medical benefits, rehabilitation benefits, and disability, or income replacement benefits. A limitation under the current system could restrict disability income for volunteers to an hourly wage of only the hours per week spent at the department. This limitation could offer a disabled firefighter less than a hundred dollars per month to replace loss wages. An injured volunteer firefighter that is unable to work at their regular job could have a significant shortfall. A long term disabling injury could cause the firefighter to default on loans and potentially place them into bankruptcy.

Firefighters that are self-employed as sole proprietors, partners or corporate officers who do not choose coverage in their regular job or the unemployed, retired, or who work for the federal government could face additional challenges, if the benefits are based on reported income under their regular employer's workers' compensation. This issue is an example of how complex and challenging it is to adequately insure a volunteer firefighter.

Some states have mandated that departments provide specific additional benefits. Accidental death coverage is required in some states for emergency service personnel. As of this writing we have not found any such requirements. More research is required before we are able to state Montana does not have any such mandates.

Recommendation:

It is important to note that some fire service agencies have failed to understand the importance of the protection provided them through the "sole remedy" of workers' compensation. Workers' compensation limits an injured worker ability to file a lawsuit against their employer. This "sole remedy" is designed to protect both the worker and the employer and prevent litigation from the employee or threats to the employee by the employer.

Montana law does provide for a "test" to determine if an individual is subject to workers' compensation. Theoretically a volunteer should not be subject. However it should be noted that when the "test" is applied, it is our conclusion that a court may find the fire service agency responsible to make the volunteer whole for any costs associated from an injury the volunteer received while doing agency business. This conclusion is consistent with case law in other states.

It should be further noted that liability policies the fire service agency may have purchased most likely exclude coverage for injuries to volunteers. These exclusions leave the agency solely responsible if a lawsuit is pursued by an injured volunteer.

It is our recommendation that an education campaign be conducted by the MFCA to assist fire service agencies in the state in better understanding the risk associated with injuries suffered by volunteers.

Injuries to volunteers come with a hidden cost. Studies dating back to Heinrich in the 1950's suggest an injury has a hidden cost of at least 4 times the direct cost of medical attention and lost wages. In volunteer organizations we know this to be true, as subsequent to a major injury the turnover rate of volunteers dramatically increases. Morale drops and internal complaints to OSHA increase. It becomes more difficult to hire and retain good volunteers.

2. *If a gap in protection is found, how expansive is it?***Conclusion:**

As of 2010, the U.S. Administration lists fewer than 700 paid firefighters and just over 5000 volunteers. We have been able to identify through various insurers who offer workers' compensation for firefighters, that their numbers are consistent with the reported 700 paid firefighters. The same insurers report just over 3000 volunteers who are currently covered by workers' compensation. Still, some reporting groups list the number of Montana fire departments under 300, while others indicate the numbers of firefighting organizations could be over 400. For reporting purposes in the

future, the use of the terms organizations or agencies includes both public and non-public.

It is our conclusion that a significant number of volunteer firefighters in the state of Montana are still not covered under a workers' compensation policy. There are city government departments, rural government departments, and fire brigades that are non-taxing entities. Some of these non-government agencies are formed under non-profit status. It is our belief that the largest number of unreported firefighting organizations, and volunteer firefighters are associated with non-profit brigades.

More work needs to be performed to identify all firefighting agencies.

Further, it is important to note that the volunteer firefighters covered under a workers' compensation policy may lack sufficient disability income limits to make them whole in the event they are unable to work at gainful employment. The significance of this short fall should not be over looked.

Recommendation:

The expanse of the gap identified in this study is inconclusive and needs further study. Simultaneously with the study, it is recommended that as fire service agencies are identified, they are informed of the risk and provided written firefighter safety information.

3. *What coverages are departments providing for their firefighters at this time?*

Conclusion:

Some departments have purchased workers' compensation coverage for their volunteers. Some departments have purchased a "supplemental accident" policy. Some departments maybe have no benefit coverages for volunteers.

An ideal protection scenario for volunteers would be to be covered under both a primary policy offering workers' compensation and a supplemental accident policy that addresses some of short falls in volunteer workers' compensation coverage.

Some departments are currently offering this more superior benefit combination.

It is important to note that even with a combination of both coverages, firefighters could lack adequate coverage to make them whole in the event of an injury. The primary concerns extend to disability income, heart attacks both at a scene and latent, as well as infectious diseases, for example hepatitis, cancer, and others.

Recommendation:

Partnerships should be forged with workers' compensation providers and supplemental accident policy insurers to better educate all agencies and their volunteers of what coverage are being provided and what limitations they could be faced with.

4. What is the risk factor of injury to Montana firefighters?

Conclusion:

National firefighter risk factor numbers are available through:

- o National Fire Protection Association (NFPA)
- o U.S. Fire Administration
- o International Association of Firefighters (IAFF)
- o National Council on Compensation Insurance (NCCI)

U.S. fire fighting has long been listed as a dangerous profession. Over the last 25 years, the fire service in the U.S. has averaged over 100 work related deaths annually, and nearly 80,000 injuries to a work force of roughly 1,100,000 paid and volunteers.

Included in the supplemental information documentation is an NCCI report comparing Montana to other states. In 2010, the report indicates that Montana is reporting among the highest expected cost for firefighter injuries in the country.

Firefighting is a dangerous profession and in Montana the cost of injuries is notably high. Armed with this knowledge, it is an extreme concern that many volunteer firefighters lack sufficient coverage to make them whole in the event of an injuring while acting in the behalf of a fire organization.

Recommendation:

MFCA should develop a firefighter safety program targeted at reducing the current high risk factor. The initial education focus should be on high severity and high frequency injuries. Key components would focus on:

- i. Heart attack
- ii. Driver error
- iii. Sprains and Strains
- iv. Injures that could be prevented through proper use of Personal Protective Equipment (burns, smoke inhalation, cuts, punctures, etc.)

A secondary education would develop a foundational understanding of safety and risk management.

A long range education would target the fire culture and move toward a "High Reliability Organization" safety philosophy.

5. What factors are influencing department decision concerning the purchase of adequate coverage for volunteer firefighters?

Conclusion:

There are three primary factors that are influencing the decision not to properly cover volunteers from injuries associated with firefighting, they are:

A. The Cost of Workers' Compensation

As noted above, the cost of workers' compensation for volunteers in Montana is among the highest in the nation. The cost impact is further exacerbated by the limited funds available to many of the smaller rural fire agencies.

One of the most cost effective insurers is an association pool known as Montana Municipal Interlocal Authority (MMIA). This pool has among the lowest rates in the state. The pool is open to most publicly formed fire departments. The non-profits best alternative may cost over 3 times as much as MMIA. This cost difference in a state that already has elevated rates limits the buying power of small non-profit fire organizations.

B. Coverage Knowledge

As workers' compensation may not be mandatory for volunteers and the disability income can be inadequate for many firefighters, some agencies may feel better serviced by purchasing a "supplemental accident" policy. This thought process does have several flaws that will be addressed in the recommendation section.

C. Risk Knowledge

The infrequent call volume of some of the rural organizations may promote the misguided belief that their risk exposure is low, and of little concern. It is somewhat ironic that risk managers are more concerned about low frequency events than high frequency events. It is understood amongst professional risk managers that events we perform infrequently are much more likely to have errors than events we do often.

Recommendation:

The primary influencer of cost should be addressed through safety (loss prevention and mitigation) and legislatively. The foundation of a safety MFCA program was mentioned in this section and should be completely developed as a long term goal in your next strategic plan.

A suggested legislative solution will be addressed later in this section.

With the knowledge of coverage and the knowledge of risk as two of the three influencers, it is recommended that part of an education program promoted by the MFCA address these issues.

6. If there is a coverage issue, what would be a "best practices" solution?

Conclusion:

Our limited research indicates few fire service agencies in Montana meet a "best practices" model.

Recommendation:

The volunteer coverage "best practices" should be:

1. Purchase workers' compensation as primary coverage.
2. Purchase supplemental accident coverage to pick up exposures that are limited under the primary workers' compensation policy.
3. Purchase limited non-work additional coverage supplements for "latent" occurrences including heart and infectious disease coverage for both medical and disability.
4. Verify that each volunteer is protected under a health insurance policy either personal or through their gainful employment.

It is recommended that a "best practice" policy be developed and distributed to all MFCA members to assist them in future discussions concerning volunteer coverage.

7. If the solution requires a legislative change is there a model legislation to mimic?

Conclusion:

A solution must include a legislative resolution. Current law does not adequately offer coverage for the volunteer, or funding for the insurer. This quandary will require a well thought out option to fairly protect both sides of the equation.

Recommendation:

Washington, Oregon, and California all have legislation that bifurcate the unique issues of volunteer firefighters from those of paid firefighters. We believe Oregon's laws offer the best coverage options and cost controls. It is recommended that each of the three states systems be reviewed and the one that best fits Montana's needs be developed into a legislative goal in your next strategic plan. Some of the steps might include:

- Analyze all the current law that impacts volunteers
- Develop strategy
- Identify logical partners
- Draft a legislative fix
- Educate and seek support

8. If cost is a primary concern, can MFCA have a positive impact on rates?

Conclusion:

Several other West Coast states are addressing volunteer workers' compensation through a different legislative approach. If MFCA were successful in changing Montana's current law to the rate - coverage issues could be mitigated.

Unit statistical data from all insurers may not be currently used in the establishing of rate equity.

Recommendations:

MFCA can impact the firefighter safety with a legislative solution. As recommended in # 4 and # 7 in this section, costs can be reduced and can be managed.

Future Initiatives

- 1. Educate departments and volunteer firefighters of the risks they currently face.**
- 2. Immediately coordinate through MSFCA a statewide injury prevention program.**
- 3. Work with MSFCA to develop a strategic plan identifying the goals in changing the Montana workers' compensation law. Potential goals might include:**
 - o Development of splinter class code for volunteers**
 - o Address cost versus risk associated with loss of income for volunteers**
 - o Pursue additional safety grants to support the MSFCA efforts**