



DINO A. ROSS  
Attorney & Counselor at Law  
303 • 628 • 3686 (direct)  
303 • 623 • 2062 (fax)  
dross@irelandstapleton.com

September 14, 2009

**Proposed Changes to the Colorado Volunteer Firefighters Pension Act  
2010 Legislative Session**

**31-30-1102. Definitions.**

(9) (a) "Volunteer firefighter" means a firefighter who renders service to a fire department in a municipality, county, or district, who does not receive compensation as a firefighter, and who is not classified as an employee for purposes of the federal "Fair Labor Standards Act of 1938", as amended, based on payments, fees, or benefits that the firefighter receives. "Volunteer firefighter" may include other designations or titles given to firefighters provided that the firefighter meets all of the requirements for being a volunteer firefighter in this part 11.

(b) For the purposes of this subsection (9), "compensation" does not include:

(I) Actual expenses incurred by and reimbursed to a volunteer firefighter;

~~(II) Salary lost as a consequence of actual firefighting duties causing the absence of the volunteer firefighter from normal employment~~

**Reason:** In its September 17, 2007 Non-Administrator Opinion letter (FLSA2007-3NA), the US Wage and Hour Division made it clear that reimbursement for actual lost salary is compensation and results in the loss of volunteer status:

The City reimburses volunteer firefighters \$550 for income lost from regular employment for taking time off to attend the two-week refresher training course at a Fire School. As you have explained the facts, the purpose of this payment is specifically to compensate the firefighters for their lost days of paid work. Thus, the payment would appear to fail the threshold issue of volunteerism because the firefighters would be receiving compensation for their services rendered. See 29 U.S.C. § 203(e)(4)(A); 29 C.F.R. § 553.101(a) (A volunteer must perform "hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for services rendered."). Accordingly, this payment as described would likely create an employment relationship under the FLSA.

A Non-Administrator Opinion Letter does not carry the same weight as an opinion letter issued by the Administrator of the Wage and Hour Division; however, it likely reflects the position of the US Department of Labor and any court that may consider the issue.

**31-30-1105. Board - fire protection district.**

- (1) In a fire protection district, the board must consist of the following members:
  - (a) The board of directors of the fire protection district for terms equal to their tenure on the fire protection district board;
  - (b) The treasurer of the board of the fire protection district who shall be treasurer of the fund for a term equal to the treasurer's tenure on the fire protection district board; and
  - (c) Two individuals elected from one or more of the following groups to the extent such groups exist at the time of election: fire department members, retired fire department members, or retired fire department members returned to active service pursuant to 31-30-1132, C.R.S. All members in each group existing at the time of election shall be given the opportunity to vote for the two individuals. Two fire department members elected by the fire department members for two-year terms; The two individuals shall serve for two-year terms; except that, at the initial election, one individual member shall be elected for two years and one individual member for one year. In all subsequent elections, these individuals members shall be elected for two years.

**Reason:** Under the Special District Act, retired volunteers and active retirees (31-30-1132, CRS) may be elected to serve on the Fire District Board. Under the Pension Fund Act, the five Fire District Board members also serve on the Pension Board of Trustees. So, it is common for retired volunteers (and some active retirees) to serve on the Pension Board because they are Fire District Board members. It makes no sense for the Pension Fund Act to prohibit what the Special District Act allows for five of the seven Pension Board members.

**31-30-1119. Municipality - Board report.**

The board shall make a report to the governing body of the municipality ~~or the board of directors of its district, whichever is applicable,~~ on the condition of the fund. The board shall submit the report to the governing body ~~or board of directors~~ before the last meeting in February and the last meeting in August of each year.

**Reason:** As discussed above, under the Pension Fund Act, the Board of Trustees of a Pension Fund within a Fire District is comprised of the five members of the Fire District Board. As such, the Fire District Board is as fully aware of the status of the Pension Fund as the Board of Trustees. The reports are meaningless and a waste of time.

**31-30-1113. Fund investments.**

(2) Upon the board's direction, the treasurer of a municipality or district may invest part of the fund available for investment, with or without one or more other volunteer firefighter pension funds, in a noninsured trust pension plan with a bank or trust company authorized to exercise trust powers in this state as a trustee. The trustee's investment of fund moneys is governed by article 1.1 of title 15, C.R.S., ~~but the trustee shall at all times hold fixed-income obligations having a book value or cost of not less than sixty percent of the total contributions made to the trust less the amounts paid out.~~

**Reasons:**

(1) The non-FPPA paid firefighter pension funds are governed by the prudent investor statute set forth in Article 1.1 of Title 15, C.R.S. There is no logical reason why an additional investment restriction is imposed of a non-FPPA Volunteer Pension Fund.

(2) The deleted language is hopelessly vague, as it does not establish the period for which the calculation is to be performed – 1 year? 5 years? the life of the Fund?

(3) The formula is fundamentally flawed because it fails to account for interest earnings. Financial institutions rightfully consider "contributions" to only include payments into the fund by the Fire District and State matching contributions, not interest earned on the money in the fund. This can – and in at least one circumstance has - lead to the absurd result that a well-funded pension fund may be forced to maintain all of its funds in fixed-assets because the amount of contributions over the life of the fund are less than the total amounts paid out, because a significant portion of the fund monies have been generated by interest earnings over the life of the fund.