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MEMORANDUM

To: CSFCA Board of Directors/Legislative Committee
From: Paul L. Cooke, Executive Director
Subject: Legislation of General Interest
Date: February 20, 2010

At the Combination Chiefs Section meeting of February 19, 2010, Dino Ross reported on several bills that could have an impact on fire departments that are not on the CSFCA tracking list and recommended positions on these bills.

Unfortunately, I could not attend the meeting and, as a result, could not participate in the discussion. However, I believe it is important to provide a response. All of the bills identified by Dino, that are not on our tracking list, fall into the category of "Legislation of General Interest." A few of these bills had been referred out to the Legislative Committee for general information and solicitation of input, but neither the Legislative Committee nor the BOD has formally taken them up.

Part of the reason for this was the decision made by the BOD last October that, with few exceptions, we would leave "general interest" or "general governmental issues" up to CML, CCI and/or SDA to address. The reason for this is we don't have the resources that CML, CCI and SDA have to address every bill that could potentially affect the fire service; it is generally difficult to engage our members on "general governmental issues"; and our credibility and effectiveness (as well as some of the legislative support and good-will we have developed) can be adversely impacted if we start weighing in on all bills.

While I have a great deal of respect for Dino, we simply cannot get involved on every legislative issue that could potentially affect fire departments. That is not to say that individual fire chiefs and the governing bodies of their fire department should not get involved if they feel compelled to do so. Nor does it mean that the CSFCA should not provide information on potential impacts to CML, CCI and SDA (and, in some cases, we have done so).

Legislation Identified by Dino Ross

Following is a discussion of the bills identified by Dino, which are not on our tracking list, with his recommendation concerning CSFCA position:

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- **HB10-1269, Workplace Fairness Civil Remedies Act** (Rep. Levy, Sen. M. Carroll) – Dino’s recommended position is to oppose.
- **HB10-1012, Limit Surveillance Workers' Comp Claims** (Rep. Pace, Sen. M. Carroll) – Dino’s recommended position is to oppose.
- **HB10-1023, Employer Liability Negligent Hiring** (Rep. Waller, Sen. Hudak) – Dino’s recommended position is to support.
- **HB10-1266, Health Insurance for Local Government & Small Business** (Rep. Frangas) – Dino’s recommended position is to support.
- **HB10-1162, Retainage Construction Contracts** (Rep. Soper, Sen. Bacon) – Dino’s recommended position is to oppose.
- **SB10-116, Change Orders on Public Works Contracts** (Sen. Kopp, Rep. Rice & Priola) – Dino’s recommended position is to oppose.
- **HB10-1056, ID Theft Disposal of Records** (Rep. Frangas, Sen. M. Carroll) – Dino’s recommended position is not known.

Following is a discussion of these bills, with my recommendation concerning a CSFCA position:

HB10-1269, Concerning the Creation of Remedies Available in Employment Discrimination Cases
(Rep. Levy, Sen. M. Carroll)

Bill Summary: Current law does not allow an award of compensatory or punitive damages or attorney fees and costs to a plaintiff who prevails in a lawsuit alleging a discriminatory or unfair employment practice under state law. While federal employment antidiscrimination laws allow such damages and reasonable attorney fees and costs, only employers who employ 15 or more employees are subject to federal law. Moreover, victims of employment discrimination on the basis of sexual orientation are not afforded protections under federal law. Thus, employees who work for employers with fewer than 15 employees or who claim employment discrimination on the basis of sexual orientation are not allowed compensatory or punitive damages or to recover reasonable attorney fees and costs when they prove a case of employment discrimination.

The bill establishes the "Workplace Fairness and Civil Rights and Remedies Act of 2010", which would allow the additional remedies of compensatory and punitive damages in employment discrimination cases brought under state law. These damages would be in addition to the remedies allowed under current law, namely, front pay, back pay, interest on back pay, reinstatement or hiring, and other equitable relief that may be awarded. Compensatory damages are to compensate a plaintiff for other pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. If the plaintiff shows by a preponderance of the evidence that the defendant engaged in a discriminatory or unfair employment practice with malice or reckless indifference to the rights of the plaintiff, the plaintiff may recover punitive damages.

The bill caps the overall damages, including both compensatory and punitive, if applicable, that may be awarded to a plaintiff, based on the size of the employer defendant, as follows:

- For employers with 14 or fewer employees, not more than \$25,000;

- For employers with between 15 and 100 employees, not more than \$50,000;
- For employers with between 101 and 200 employees, not more than \$100,000;
- For employers with between 201 and 500 employees, not more than \$200,000; and
- For employers with more than 500 employees, not more than \$300,000.

When a plaintiff claims compensatory or punitive damages in a civil lawsuit, either party to the action is entitled to demand a jury trial. If the case is tried by a jury, the court is not to inform the jury of the damage caps. Additionally, the court may award the prevailing party reasonable attorney fees and costs.

In the first year after the bill takes effect, compensatory and punitive damages and reasonable attorney fees and costs would only be available against an employer with 15 or more employees. For actions accruing on or after August 11, 2011, these remedies would be available against any employer, regardless of the number of employees it employs.

Link to Bill: http://www.colofirechiefs.org/10Legislature/1269_01.pdf

Status: 02/05/2010 Introduced In House - Assigned to Judiciary

In the Words of the Sponsors:

Rep. Levy: Colorado was a leader when it enacted anti-discrimination legislation in 1951. Colorado was the third state in the nation to create an agency to protect the civil rights of its residents. Unfortunately, we are among thirteen states that never created monetary remedies for civil rights violations. Worse, we are one of only eight states that does not provide for attorney fees if the plaintiff prevails. So while there is protection from discrimination on the books, civil rights violations often go unremediated. My bill will allow victims of discrimination to recover compensatory damages against their employers that will be similar to the damages that are available to people protected under the federal anti-discrimination statutes. The legislation will also allow the plaintiff to recover attorney fees if they are successful in their law suit. Without the ability to recover attorney fees, it is simply not possible in the majority of cases for the plaintiff to afford to protect their rights.

Sen. M. Carroll: This bill brings the remedies of the Civil Rights Act of 1964, Title VII into state law to ensure all basic civil rights of Coloradans in the workplace are protected.

Commentary/Recommendation: The bill would allow a complaining party or plaintiff to recover compensatory damages against a respondent or defendant [other than the state and any commission, department, or institution of the state], for other pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. The bill does not allow a complaining party or plaintiff to recover punitive damages from any governmental entity. Other than this disparity, I am not sure it would be in the best interest of the CSFCA to argue that a complaining party or plaintiff should not be entitled to recover damages in an employment discrimination case. My recommendation is to take no position and let the lawyers fight this one out.

HB10-1012, Concerning Limitations on the Use of Surveillance of Employees Who Have Submitted a Workers' Compensation Claim (Rep. Pace, Sen. M. Carroll)

Bill Summary: Interim Committee to Study Issues Related to Pinnacol Assurance.

Section 1 of the bill:

- Prohibits an insurer or employer from conducting surveillance of an employee who has submitted a workers' compensation claim unless the insurer or employer has a reasonable basis to suspect that the employee has committed fraud or made a material misstatement concerning the claim;
- Allows the employee to request an expedited hearing before a prehearing administrative law judge;
- Requires the insurer or employer to provide all materials collected during the surveillance to the injured worker and to destroy all materials collected during the surveillance unless the materials are reasonably necessary to resolve an ongoing claim of fraud;
- Requires persons conducting surveillance to answer the employee's questions truthfully; and
- Creates a \$1,000-per-day penalty for violations.

Section 2 of the bill:

- Directs the prehearing administrative law judge to issue an injunction against the surveillance unless the insurer or employer shows that it has a reasonable basis to suspect that the employee has committed fraud or made a material misstatement concerning the claim; and
- Allows the identity of a witness or whistleblower who provides evidence in good faith to be withheld or limited to an in camera review.

Link to Bill: http://www.colofirechiefs.org/10Legislature/1012jud_01.pdf

Status: 02/11/2010 House Committee on Judiciary Refer Amended to Appropriations

In the Words of the Sponsors:

Rep. Pace: I was proud to serve as the vice-chair of the Pinnacol Interim Committee, which met over the summer. The committee examined issues related to Colorado's quasi-government workers' compensation insurance company. The committee met six times and discovered several problem areas with Pinnacol, including: small businesses are paying workers comp insurance rates 10% higher than they should, Pinnacol has a bonus incentive system to deny claims, and Pinnacol spent \$4.7 million to spy on thousands of injured workers even though only 11 were convicted of fraud.

We passed seven bills to address those specific concerns among others. I passed a bill through the interim committee to limit spying by workers' comp insurance companies of injured workers to only cases where the insurer has a reasonable basis to suspect fraud. Currently, Pinnacol initiates spying even if there is no suspicion of a worker conducting fraud. We heard testimony from several injured workers who believe that Pinnacol has been abusing its ability to spy, perhaps even using it as an

intimidation technique to help secure a settlement. Many injured workers felt treated like criminals after being spied on by Pinnacol. We should remember that these are injured workers; and a videotape of someone does not compensate for a medical care. While Pinnacol spent \$4.7 million in surveillance on thousands of workers, only 10 (out of 50,000+ claims) were actually convicted of fraud in 2008 (0.02%). The bill would:

- Require that surveillance may only occur in cases where the insurer or employer has a reasonable basis to suspect fraud or the worker made a material misstatement concerning the claim
- If surveillance is taking place that the injured worker may request an expedited hearing before a pre-administrative law judge where the insurer must provide the injured worker with copies of materials collected
- In the expedited hearing, the Pre-ALJ may put an injunction against the surveillance if there's no reasonable basis shown or if the worker didn't make a material misstatement or if the insurer didn't have a reasonable basis to initiate surveillance
- If surveillance material is collected without a reasonable basis, a \$1000 fine would be charged for unauthorized surveillance
- Finally, the bill provides for protecting the identity for a witness of whistleblower who provides evidence used to prove fraud.

Sen. M. Carroll: Current law gives no standards for when it is or is not appropriate to surveil injured workers. This bill requires that there be a reasonable basis to suspect fraud or material misstatement in order to justify the loss of privacy to the injured worker. Many workers will significant legitimate injuries reported use of surveillance as a harassment tool to get them to settle their claims for less than the law provides.

Commentary/Recommendation: This bill truly falls into the category of "Legislation of General Interest." I am not sure it would be in the best interest of the CSFCA to argue that it is acceptable practice to surveil injured workers except when the insurer or employer has a reasonable basis to suspect that the employee has committed fraud. My recommendation is to take no position and let the lawyers fight this one out.

HB10-1023, Concerning Clarifying Civil Liability Regarding Negligent Hiring Practices for an Employer that Hires a Person with a Criminal Record (Rep. Waller, Sen. Hudak)

Bill Summary: Economic Opportunity Poverty Reduction Task Force. The bill prohibits information regarding an employee's criminal history from being introduced as evidence in a civil action against an employer if:

- The nature of the criminal history does not bear a direct relationship to the facts underlying the cause of action;
- A court order sealed any record of a criminal case or a pardon was issued before the occurrence of the civil action; or
- The record of an arrest or charge did not result in a criminal conviction.

The bill does not eliminate the requirement for criminal history background checks in hiring for certain employment.

Link to Bill: http://www.colofirechiefs.org/10Legislature/1023_ren.pdf

Status: 02/09/2010 Introduced in Senate - Assigned to Judiciary (Bill has already passed House, amended)

In the Words of the Sponsors:

Sen. Hudak: I am the Senate sponsor of this House bill sponsored by Rep. Waller. It comes from the Economic Opportunity & Poverty Reduction Task Force. The bill prohibits information on the criminal record of former felons to be used in a civil action by an employer if the employee's criminal history bears no relationship to the cause of action.

Commentary/Recommendation: This bill enjoys bipartisan support. It passed out of House Judiciary Committee unanimously and passed final reading in the House on a vote of 63-0-2. This bill will pass (or fail) on its own merits. I am not sure what the CSFCA would bring to the table to aid the deliberations. My recommendation is to take no position.

HB10-1266, Concerning the Inclusion of Employees of Specified Employers in Certain Aspects of State Group Benefit Plans at the Option of the Employer (Rep. Frangas)

Bill Summary: The bill allows certain local governments, small businesses, and nonprofit organizations to offer participation in fully funded state group benefit plans for medical and dental coverages to their employees. The bill:

- Specifies that participation in state group benefit plans for medical and dental coverages is voluntary for local government, small businesses, and nonprofit organizations and that local government, small business, and nonprofit organization employees cannot participate in state group benefit plans if their employer has not chosen to offer participation to its employees.
- Allows the state personnel director to charge an administrative fee to participating local government, small business, and nonprofit organization employees to cover the state's cost of administering group benefit plans for local government, small business, and nonprofit organization employees.
- Precludes participating local governments, small businesses, and nonprofit organizations from offering any other medical and dental benefit coverages to their employees and requires the local governments, small businesses, and nonprofit organizations to agree to participate in state group benefit plans for at least 3 years.
- Requires participating local governments, small businesses, and nonprofit organizations to contribute on behalf of their participating employees a minimum amount as determined by the director of the department of personnel.

- Requires participating local government, small business, and nonprofit organization employees to comply with all rules and procedures adopted by the director.
- Allows local governments, small businesses, and nonprofit organizations to determine eligibility of their employees and their dependents for participation in state group benefit plans for medical and dental coverages.
- Establishes the local government, small business, and nonprofit organization group benefit plans fund in the state treasury and specifies that the fund contains the premium account and the administration account.
- Specifies that group benefit plan premium costs received by the director for local government, small business, and nonprofit organization employee premiums shall be deposited into the premium account and that expenditures shall be made from the premium account for the payment to carriers of premiums, claims costs, and other administrative fees and costs associated with the group benefit plans for local government, small business, and nonprofit organization employees.
- Specifies that moneys credited to or expended from the premium account for payment to carriers who provide fully funded group benefit plans to local government, small business, and nonprofit organization employees do not constitute state fiscal year spending for purposes of the state constitutional limitation on spending.

Link to Bill: http://www.colofirechiefs.org/10Legislature/1266_01.pdf

Status: 02/04/2010 Introduced In House - Assigned to Business Affairs and Labor

This bill is scheduled to be heard by House Business Affairs & Labor Committee on Wednesday, February 24, 2010, upon adjournment, in Room 0112.

Commentary/Recommendation: I concur with Dino's assessment that this bill is worthy of support; however, since it falls into the "Legislation of General Interest" category, I believe we should look to CML and SDA to lobby it. To my knowledge, neither has taken a position on this bill. I recommend the CSFCA support the bill in concept and ask CML and SDA to actively support it.

HB10-1162, Concerning Payment of Amounts Due Under a Construction Contract (Rep. Soper, Sen. Bacon)

Bill Summary: The bill prohibits retaining more than 5% of the payments due to a contractor to ensure that work is satisfactorily completed (retainage) for the first 50% of a construction project. For the remaining 50% of the work, the bill prohibits retainage of more than 2.5%. More retainage may be withheld for work that is unsatisfactorily completed.

A building client is required to deposit retainage in an interest-bearing escrow account that the contractor may access with an arbitration or court order. The bill sets standards for the account. If the building client fails to deposit the money in an account, the building client is required to pay the contractor 15% interest on the retainage.

The bill requires a contractor to forward payment to a subcontractor for work the subcontractor performed within 7 days. The building client is required to pay the contractor retainage within 30 days after substantial completion of the construction project. A violator is required to pay interest plus a penalty of 15% interest. Contractors are authorized to give the building client a substitute security and have retainage paid. Standards are set for the security. Failure to pay interest subjects the property to a lien.

Link to Bill: http://www.colofirechiefs.org/10Legislature/1162_01.pdf

Status: 01/20/2010 Introduced In House - Assigned to Business Affairs and Labor

The bill is scheduled to be heard by Business Affairs & Labor Committee on Wednesday, February 24, 2010 at 1:30 p.m. in Room 0112.

Commentary/Recommendation: The bill would cut in half the amount of retainage public entities would be able to include in their construction contracts. Public entities are currently allowed to hold back 10 percent of contract payments pending satisfactory completion of a project. This bill reduces the retainage to 5 percent during the first half of a project and 2.5 percent thereafter. The bill is opposed by CML. Since it falls into the "Legislation of General Interest" category, I recommend the CSFCA take no formal position, but look to CML to continue to oppose it (and ask SDA to do likewise).

SB10-116, Concerning the Reimbursement of Costs Incurred on Change Orders in Public Works Contracts (Sen. Kopp, Rep. Rice & Priola)

Bill Summary: The bill adds a required clause to any contract between a public entity and a contractor or designer for a public works project. The new clause requires the public entity to pay the contractor on a periodic basis for any costs incurred by the contractor for work performed until the change order is finalized.

Link to Bill: http://www.colofirechiefs.org/10Legislature/116sblt_01.pdf

Status: 02/17/2010 Senate Committee on Business, Labor and Technology Refer Amended to Senate Committee of the Whole

In the Words of the Sponsors:

Sen. Kopp: This bill requires local governments to add a clause to their contracts with private construction companies that would stipulate that the local government must make timely payment to the private construction companies for any new costs incurred during a public works project.

Here's the problem: Some cities are chronic late-payers in instances where they make changes to a building project they've contracted to have done for them. So contractors and sub contractors then are often forced to stretch their cash extra thin -- or take out lines of credit -- in order to accomplish

the change they've been asked to make on the project. Lines of credit cost private contractors money off of their bottom line and can consume a significant portion of profit. On the other hand, if the interest payments happened to be factored in by the contractor to begin with, then the project just winds up costing the taxpayers more money to have that line item added to the construction bill. It's all avoidable. The construction guys I've been working with believe this will provide significant relief to this problem.

The bill has passed its first committee. I do not anticipate problems with it when it gets to the full senate.

Commentary/Recommendation: The bill passed Senate Business, Labor and Technology Committee with amendments on a 6-0-1 vote. This bill falls into the category of "Legislation of General Interest." I am not sure it would be in the best interest of the CSFCA to argue against the requirement that local governments must make timely payments to private construction companies for any new costs incurred during a construction project. My recommendation is for the CSFCA to take no position on this bill.

HB10-1056, Concerning the Disposal of Business Records Containing Personal Identifying Information (Rep. Frangas, Sen. M. Carroll)

Bill Summary: The bill prohibits a public or private entity in the state that uses paper or electronic documents or records during the course of business that contain personal identifying information from disposing of such a document or record unless, prior to the disposal of the document or record, the affected entity, in the case of a paper document or record, shreds the document or record or, in the case of an electronic document or record, erases and renders indecipherable and irretrievable all personal identifying information contained in the document or record.

An affected entity that violates this prohibition is liable for a civil penalty. The attorney general or the district attorney of the judicial district in which the violation occurs is authorized to bring an action against an affected entity that violates the prohibition. An affected entity is required to include in its policy for the destruction or proper disposal of paper or electronic documents and records containing personal identifying information a requirement that such documents and records shall be shredded or erased and rendered indecipherable and irretrievable before the affected entity disposes of the documents or records.

Link to Bill: http://www.colofirechiefs.org/10Legislature/1056_01.pdf.

Status: 01/13/2010 Introduced In House - Assigned to Judiciary

The bill is scheduled to be heard by House Judiciary Committee on Thursday, February 25, 2010 at 1:30 p.m. in Room 0107.

In the Words of the Sponsors:

Sen. M. Carroll: This bill requires that entities in the course of disposal of documents with your personal identifying information that poses a risk for identity theft (social security numbers, bank accounts, etc.) be shredded.

Commentary/Recommendation: This bill creates a new cause for action against public entities; however, many public entities already comply with the requirements for destruction of personal identifying information and the proper disposal of documents and records. My recommendation is for the CSFCA to take no position on this bill.

Please let me know if you have any questions concerning this memo, or any of the bills listed herein. Also let me know if you recommend the CSFCA take a position on any of these bills different than I have proposed.