

Employment Practices *Update*

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Human Resources

Help avoid *mistakes* that lead to *retaliation claims*

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Work-related harassment and discrimination allegations may grab the most headlines, but retaliation claims pose equally serious risks for emergency services organizations (ESOs). In fact, work-related retaliation claims make up over one-third of all Equal Employment Opportunity Commission (EEOC) claims and can devastate an ESO's reputation, morale, productivity and financial integrity.

ESOs can take steps to help avoid retaliation against employees or volunteers. Risk management guidance is offered to best prepare the organization:

- Before a personnel complaint is ever lodged.
- During the investigative process.
- After the perceived resolution of the personnel dispute.

In today's hyper-litigious environment, preparedness is the key to managing personnel problems equitably and legally.

What constitutes retaliation?

Retaliation laws are designed to protect workers engaged in legally protected activities. ESO employees or volunteers may suffer real or perceived work-related retaliation in a variety of circumstances, including these common scenarios:

- Making an allegation or claim of workplace discrimination, harassment, safety violations, financial improprieties or other wrongdoing (whistleblower protections).
- Threatening to oppose unlawful workplace practices.
- Serving as a witness in an internal or external investigation or other formal proceeding such as a deposition or trial.
- Supporting or otherwise being closely associated with co-workers that have engaged in legally protected activities.
- Filing or otherwise participating in an employee or volunteer grievance.

ESOs should avoid taking "adverse action" against an employee or volunteer that participates in a legally protected activity. Personnel should not be dissuaded from engaging in legally protected activities out of fear of retaliation. The ESOs may encourage supervisors and non-supervisors to avoid engaging in real or perceived retaliatory actions. Common forms of retaliation include:

- Tangible action taken that negatively impacts employment or volunteer membership, such as termination, demotion, suspension, other forms of discipline, poorly rated performance evaluations, reduction in shifts or pay or denial of a promotion.

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- Assigning demeaning or undesirable job duties or finding other unjustifiable ways to punish the worker.
- Supervisors and/or non-supervisory personnel negatively altering the work environment or experience such that any reasonable worker would be compelled to quit.
- Isolating an employee or volunteer, giving the “silent treatment” or otherwise making the work environment unreasonably intolerable without taking negative tangible employment or membership action.

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Preventing retaliation before, during and after an incident

Given the severe risks associated with retaliation claims and litigation, ESO leaders may benefit by creating clear policies and processes for preventing, identifying and rectifying work-related retaliation. Take retaliation prevention measures before, during and after an incident occurs in the work environment.

Before – An ESO’s open door policy for reporting retaliation may not be as open as some leaders believe. Build a level of trust in the internal reporting, investigative and resolution processes. Continue reaffirming non-retaliation policies and provide a training forum to ask questions and discuss issues like harassment, discrimination and retaliation prevention to help earn the workers’ trust.

Before an actual incident or allegation of misconduct, consider taking steps to develop and periodically disseminate a non-retaliation or whistleblower policy and internal reporting procedure. Involving board members or a designated third-party human resources consulting group may help diminish any blockage of internal reporting or resolution. Consider including these external avenues for whistleblower or retaliation reporting..

Importantly, provide details to ESO workers about the steps the organization has taken to promptly and thoroughly investigate workplace wrongdoings, stop such wrongs and prevent future occurrences and related retaliation. Inform personnel about who is designated and trained within the

organization to conduct investigations and take non-retaliatory measures. Reiterate how confidentiality cannot be absolutely guaranteed so as to allow for a broad investigation, but information will only be shared on a “need-to-know basis.” Offering insight into the ESO’s level of preparedness may help encourage common sense reporting and resolution of personnel disputes.

During – When a worker lodges an internal complaint of workplace misconduct or other policy violation, begin investigative procedures. During the investigation, however, take retaliation prevention measures. This involves frequent communications with the complainant, accused, witnesses and other co-workers that could conceivably know of or even suffer retaliation because of their affiliation with the involved parties. Document these communications during the investigative period and reemphasize the multiple avenues of internal complaint for real or perceived retaliation.

Until the investigative report is finalized and findings communicated, be sensitive to the possibility of retaliation and monitor for changes in the work environment, such as adverse actions or treatment. Consider presenting the whistleblower or non-retaliation policy in writing to those directly involved in the investigation and ask them to sign the document as an acknowledgement of their understanding of the multiple options for reporting known or suspected retaliation.

After – Upon completion of the investigation and determination of whether discipline is appropriate, the ESO’s duty to protect against retaliation continues. In fact, work-related retaliation often occurs well after the perceived resolution of the personnel incident and investigation.

Those with supervisory authority are legally in the position to be the eyes and ears for the organization. Reaffirm the ESO’s no tolerance policy for retaliation and educate those with supervisory responsibilities on the warning signs of retaliation under their watch. Inform supervisors that retaliation may occur weeks

or months after the apparent resolution of the incident or completion of the associated investigation. Advise supervisors to document their communications with personnel that are designed to prevent, discover and stop retaliation.

Separate the co-workers as retaliation prevention?

Consider the risk management option of separating workers that are directly involved in a sensitive personnel dispute. For instance, it may be wise to separate an employee who accuses a supervisor of ignoring safety or training standards. Likewise, contemplate separating a member that alleges a co-worker engaged in harassing or discriminatory behaviors. Separation may be a sound business practice on temporary basis, pending the outcome of the investigation.

There is no steadfast rule in regards to an organization moving the complaining worker or the person being accused of misconduct. Instead, consider all factors to determine what makes the most sense for protecting the

personnel involved, while allowing for a productive operational structure.

Be aware that long-term or permanent changes in the work environment can be a red flag of retaliation. It is recommended an ESO document a worker’s request and/or agreement to a job reassignment. Overall, an ESO’s equitable decision and reasoning to separate co-workers may help to be well supported by documentation.

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Conclusion

Many individuals associate the concept of managing the risk of work-related retaliation as a reactive business practice. In other words, what must be done to protect workers from retaliation after a complaint is lodged, such as harassment, discrimination or safety violations? But it is recommended to take retaliation protection measures before a complaint is made. An ESO is encouraged to be proactive in frequently educating members of the retaliation protection measures that are in place so its members know retaliation can be reported safely, and swift and decisive action will be taken to maintain a productive work environment.