

Employment Practices

UPDATE

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Addressing Off-Duty Conduct: *Big Mistakes & Best Practices*

What Is "Off-Duty" Conduct?

Distinguishing between on-duty and off-duty conduct is not always an easy task, and a mistake can cost your organization dearly in legal fees, court costs, and adverse judgements. Some believe that an emergency service organization has the ability to address employee or volunteer behaviors only while that member is on-duty, on-shift, or otherwise "on the clock." In reality, off-duty behavior or conduct often spills over into the work environment.



Big Mistake Scenario #1

While off-duty, a group of fire department members congregate at a local restaurant. In the presence of other firefighters and their spouses, one firefighter makes comments and tells jokes that are sexually offensive. A department Deputy Chief in attendance doesn't address the matter with the

offending firefighter at the time.

The next work day, the Deputy Chief discusses the incident with another Chief Officer who was not at the restaurant. Neither officer is aware of the firefighter ever making sexually offensive remarks while on the job. Both officers conclude the comments

were clearly uttered while off-duty and the department has no legal responsibility or right to regulate off-duty behavior.

A month later, a female firefighter resigns and files a lawsuit against the department. The lawsuit asserts the department permitted the existence of a hostile work environment.

The ex-member argues that sexually charged comments were routinely allowed while on-duty and at off-duty events. The offensive comments made at the restaurant are cited and the Deputy Chief and department are criticized for not taking appropriate action to stop the harassment and prevent future occurrences.

Off-duty behaviors or incidents can affect the work environment, member performance, morale, and the organization's reputation in the community.

We welcome comments, suggestions and questions from our readers.

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Addressing Off-Duty Conduct: Big Mistakes & Best Practices

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Furthermore, the lawsuit claims other sexually disparaging comments and jokes are part of the work culture and tolerance is expected.



Best Practices Analysis #1

Failing to take remedial action regarding off-duty conduct may infer similar discriminatory actions are condoned on-the-job. This communicates tolerance for improper or illegal behavior. If offensive comments are directed to you while off-duty, it will be difficult to work with the offending party the next day as if nothing happened. Also, experience tells us that a discriminatory bias exhibited off-duty will likely manifest itself in the work environment.

Off-duty behaviors or incidents can affect the work environment, member performance, morale, and the organization's reputation in the community. Each off-duty incident in question should be assessed on a case by case basis **with the consultation of the organization's employment/liason attorney.** Snap decisions should be avoided.



Big Mistake Scenario #2

Work related conflict exists between two firefighters during normal business operations. At a local bar while off-duty, the conflict escalates into a war of words and fist fight. One firefighter directs racial slurs and subsequently strikes his fellow firefighter in the face with a beer bottle, resulting in 25 stitches.



Best Practices Analysis #2

Learning of the incident, the Fire Chief immediately contacts legal counsel to help navigate through any possible civil and criminal actions, department policies, procedures, and collective bargaining agreement.

The Fire Chief understands the department serves the community, and its members are held to a high standard for appropriate behavior both on and off-duty. The department stands behind its strict no-tolerance policy for work-related violence and racial discrimination.

The Chief knows that the off-duty altercation between firefighters will likely affect the work environment and the community's perception of the department. While the prohibited and likely illegal conduct occurred between members of the department is not the main issue to consider, the department and its members are under a more primary legal obligation to take remedial action to prevent future incidents. After a comprehensive investigation, disciplinary action may be appropriate.

Risk Management for Your Organization

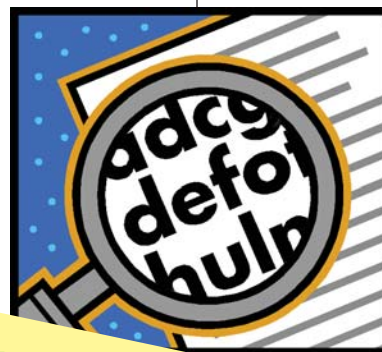
Emergency service organizations should be cautious about addressing a member's off-duty conduct that, while legal, may be considered immoral, offensive, or inappropriate. Disciplining or terminating an employee or volunteer for off-duty activities **should be scrutinized by your organization's legal counsel with a specialty in labor and employment law.**

In recent years, many high profile lawsuits have been filed against emergency service organizations for terminating or disciplining a member for conduct including

legal off-duty conduct. Some of the most difficult situations involve non-job-related behaviors that may be deemed objectionable, offensive, inappropriate, or non-mainstream.

There are numerous examples of questionable off-duty conduct. The employee who frequents strip clubs. A member of the workforce that drinks heavily. The employee carrying on an extramarital affair. A member who cross-dresses.

In many cases, the courts have upheld the legality of termination or discipline for off-duty behavior that negatively impacts the work environment, job performance, or employer's image.



Emergency service organization members are held to a high standard for appropriate behavior both on- and off-duty.

The common law employment at-will doctrine gives employers broad authority and discretion to sever the employment relationship, except for an unlawful reason. However, the at-will doctrine has been eroded in many respects and should not be considered absolute.

Many jurisdictions recognize one or more exceptions to the at-will doctrine. The most recognized exceptions are: (1) **public policy exception** – which prevents terminations that violate a State’s public policy; (2) **implied contract exceptions**, such as verbal assurances of continued employment or employer created expectations in handbooks or policies; and (3) **covenant of good faith and fair dealing** – prohibiting terminations in bad faith or with malice intended.

A prudent employment attorney advising an emergency service organization should consider many factors when deciding whether to address a member’s off-duty conduct.

What effect does the off-duty behavior have on the work environment, morale, job performance, and the organization’s reputation in the community? The general rule is the more off-duty behavior negatively affects the work environment, the more termination or discipline becomes a legal and valid option. An emergency service organization should be able to cite examples and situations demonstrating how the off-duty activities have affected the workplace.

Many high profile lawsuits have been filed for terminating or disciplining an employee or volunteer for conduct involving legal off-duty conduct.



Is the off-duty behavior protected in any way?

Jurisdictional questions need to be answered. A limited number of states restrict an employer’s right to terminate or discipline based on off-duty conduct and its influence on the workplace. For instance, California, Colorado, New York and North Dakota prohibit firing workers based on lawful off-the-job activities. Some states protect the off-duty use of tobacco products, while others protect workers for off-the-job use of other lawful products. Any organization should take its time and explore any unique legal challenges in regard to its jurisdiction.

Collective bargaining agreements, individual employment contracts, or personnel handbooks may articulate an emergency service organization’s authority to discipline or terminate an employee for off-duty actions. Often these documents state employees may only be terminated “for cause” and discipline for off-duty behavior must directly affect job performance. It is imperative for organizations to strictly follow the workplace rules and guidelines.



Conclusion

Citizens in the community must trust the people who provide emergency services. Community members need to have faith in the integrity of their public servants.

Employees and volunteers have rights, as do emergency service organizations. When analyzing members’ off-duty conduct, carefully balance members’ rights and the organization’s interest to preserve a safe and productive work environment. **Seek legal advice before rendering discipline for situations related to off-duty conduct.**

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What's Your Opinion?

Should emergency service organizations have the legal right to discipline or terminate an employee or volunteer for off-duty conduct that negatively impacts the work environment or job performance?

“Fire departments and ambulance districts are in the public eye. If an employee or volunteer tarnishes our reputation in the community because of unwise choices, the organization should be able to discipline or even terminate. If I as Fire Chief frequent bars and then act in a way that undermines the integrity of the fire department, the Board should have the right to discipline or terminate *me*. Why should we have lower standards set for a front-line firefighter?”

- Colorado Fire Chief



“If an employee or volunteer is found guilty of a crime involving moral turpitude, that conviction will very likely reflect poorly on our district. Can you imagine how a community member would react knowing we allowed an EMT who had been convicted of a crime involving violence or drugs to walk into their home to provide medical care?”

- Director of an Illinois ambulance district

“Our union members can only be terminated for cause. The fire district knows its boundaries of authority,

which cease when we're off-shift. My off-duty conduct must directly and negatively impact my ability to perform essential functions of the job. If that direct causal connection cannot be made, the district has no say in my legal off-duty actions.”

- Union President, Washington fire district

“What I do on my own time is my business. If I adequately fulfill my job duties, my employer should have no right to judge my personal life.”

- Arizona EMT

“Our organization could be considered negligent to ignore an employee or volunteer's off the job actions. We had an employee act violently off-duty and later committed workplace violence. We were exposed to a negligent supervision and retention claim based on his violent acts.”

- Manager, Michigan ambulance district

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