Table of Contents

Contents

Chapter 1: Employment Practices Litigation Exposures and Risk Management .............................................1
Chapter 2: Develop Written Personnel Policies ..............................................................................................3
Chapter 3: Equal Employment Opportunity and Diversity ................................................................................7
Chapter 4: Sexual Harassment .....................................................................................................................11
Chapter 5: Importance of Training on Personnel Practice Risks ..................................................................17
Chapter 6: Problems Associated with Employees/Volunteers Who Fail to Report Workplace Misconduct .......19
Chapter 7: Internal Investigations of Personnel Problems .............................................................................21
Chapter 8: Technology Increases Exposure to Personnel Claims ...................................................................27
Chapter 9: Performance Development/Evaluations .......................................................................................31
Chapter 10: Progressive Discipline/Terminations .......................................................................................35
Chapter 11: Workplace Retaliation and Risk Management ...........................................................................45
Chapter 12: Drug and Alcohol Free Workplace Program ..............................................................................49
Chapter 13: Protection of ESO Junior Members/Volunteers .......................................................................53
Chapter 14: Conclusion – Are You at Risk? ..................................................................................................59
Appendix A: Summary Questions ................................................................................................................60
Please Read Carefully

The information contained in this manual is intended for educational purposes only. VFIS specifically disclaims any liability for any act or omission by any person in connection with the use or implementation of any information contained in this manual.

VFIS does not make any representation or warranty, expressed or implied, with respect to the results obtained by the use, adherence or implementation of any material contained in this manual. The implementation of this manual is not a guarantee that you will achieve a certain desired result. Your continued effort in all areas of loss control, safety education and the implementation of operating procedures is the most effective way to assure that you are providing a safe environment for your employees, volunteers and the public.

About the Author

Michael McCall, J.D., is President of MJ Consulting located in the Dallas/Fort Worth metroplex. McCall’s national consulting practice focuses primarily on conducting employment practices audits and facilitating live training for employers. A Phi Beta Kappa member, McCall earned his undergraduate degree from the University of Oklahoma. He studied law at Oxford University, received his Juris Doctor degree from the University of Oklahoma College of Law, and is a member of the Oklahoma Bar Association.
Chapter 1:
Employment Practices Litigation
Exposures and Risk Management

Personnel or employment-related exposures include, but are not limited to, lawsuits based on allegations of workplace discrimination, harassment, retaliation and improper termination. These Employment Practices Liability claims could involve employees or volunteers within an emergency service organization (ESO).

The multitude of federal, state and local statutes and court decisions cannot be expansively covered in this one document. Importantly, ESO leaders are not expected to act as in-house legal counsel. However, they have a duty to familiarize themselves with employment practice risks and take necessary steps to manage equitably and prevent, identify and rectify work-related wrongdoing.

This document is designed to educate fire chiefs, administrators, presidents, commissioners, directors and trustees about employment practices exposures. Risk management analysis and suggestions are provided for improving personnel relations and reducing exposure to claims for your ESO.

Why Are There So Many Personnel-Related Lawsuits?

Issues at the center of personnel law are not going away any time soon. Sexual comments, innuendoes and advances are often part of people working together. Discrimination based on race, gender, religion, age, national origin, disability and other legally protected classes is, unfortunately, still prevalent in society. Emotions, interpersonal conflict and misunderstandings are part of any workplace environment. Every day, complex personnel-related laws are passed, amended and interpreted.

ESOs are also vulnerable to the employment practices litigation boom, particularly claims like harassment, discrimination, retaliation and wrongful discharge. Living in the information age and with attorney advertising at an all-time high, the number of personnel-related claims is not likely to drastically decline any time soon. The flood of civil litigation impacts American business operations, regardless of their size, location or mission.

Personnel-related litigation contradicts the close knit, caring, family work environment fostered by most ESOs. Unfortunately, the belief that, “no employee or volunteer would ever sue our organization,” can greatly increase exposure to liability for personnel claims. Awareness of personnel-related risk and wrongdoing is the first step to help ensure a safe, productive and respectful work environment.
How Can the ESO Protect Itself?

Start by answering the following two questions:

1. What steps has the organization taken in the past year to review and enhance personnel policies and practices?
2. Can evidence be produced regarding actions the organization took to prevent, properly investigate and resolve workplace wrongdoing?

This Employment Practices Manual provides tools to help organizations mitigate personnel liability risks.
Chapter 2: Develop Written Personnel Policies

Poorly written personnel policy manuals can cause problems for an organization. The key to a well-run organization is effective communication of expectations, rules, regulations and procedures. Personnel-related policies and procedures are no different, serving as the foundation for employment practices compliance programs.

Assess and Regularly Update

Thoroughly review personnel policies, procedures and guidelines on a reasonably periodic basis. Whenever possible, a qualified employment practices consultant, attorney or human resources professional should assist in the assessment or audit of the ESO’s personnel policies and guidelines to help ensure compliance with current laws, court decisions and trends. Consider establishing an internal personnel policy committee made up of those responsible for the human resources function of the organization, select administrators and managers as well as those without supervisory duties. The number of committee members should be manageable, yet diverse enough to help capture different perspectives of the organization’s workforce. If applicable, consider involving representatives from the union or recognized collective bargaining group in the policy updating process.

Assessments or audits often uncover outdated policies that fail to fully protect the membership and ESO. Incomplete or confusing policies can create the perception to employees/members (and jurors) that the ESO does not place sufficient importance on workplace fairness, preventing wrongdoing and preparing the organization to address personnel concerns.

Determine rules and regulations that pertain to personnel functions and put them in writing for all members to read and understand. Focus primarily on the issues that provide the greatest protections for a safe and productive work environment. At a minimum, maintain policies or guidelines that address the following personnel issues:

- Hiring procedures (background checks, requirements for employment/volunteer status and consequences for providing false information on applications).
- Nature of employment or working relationship (at-will employment or volunteer status if applicable).
- Orientation.
- Attendance requirements.
- Equal employment/volunteer opportunity.
• Introductory or probationary period (if applicable).
• Rules of conduct.
• Progressive discipline.
• Drugs/Alcohol.
• Anti-discrimination.
• Sexual harassment.
• Reporting procedures for workplace wrongdoing.
• Weapons in the workplace.
• Workplace violence.
• Anti-retaliation.
• FMLA.
• Disability and accommodation requests.
• Electronic communications systems (e.g., Internet, email, smart phones, social media).

Comprehensive Policies and Procedures

A detailed personnel policy and procedure manual should include:

• Table of Contents.
• Key issues addressed as separate policies (for instance, a stand alone harassment and discrimination prevention policy should be found in a personnel manual rather than addressing harassment and discrimination within the text of a code of conduct policy.)
• Easy to understand (from an employee’s, volunteer’s or juror’s perspective) policies and procedures.
• No conflicting or confusing policies or procedures.
• Zero tolerance policy for workplace wrongdoing (e.g., sexual harassment, discrimination, drug and alcohol use).
• Definitions and examples for clarification of pertinent issues.
• More than two reporting alternatives for policy violations.
• Consistent reporting procedures for various types of policy violations.
• Non-retaliation for those who report wrongdoing or participate in related investigations.
• Non-confrontation statement that would allow an alleged victim of workplace wrongdoing to bypass the alleged wrongdoer and report to other available persons affiliated with the organization.
• Prohibitions for knowingly false or malicious allegations or reports.
• Application of organization rules (e.g., no tolerance of sexual harassment) to all business-related functions – such as celebrations or other off-duty organization sponsored activities.
• Assurances that investigations of alleged workplace wrongdoing will be conducted as confidentially as possible while still allowing for a prompt and effective investigation.
• Investigation guidelines provided for reports of wrongdoing or personnel problems.
• Disciplinary consequences of rules violations.

Heighten Awareness of Policies and Procedures

Each time an ESO reviews and updates its personnel policies and procedures, it is important that members are trained and allowed an opportunity to ask questions and seek clarification. Provide periodic training sessions to communicate no tolerance for workplace misconduct or policy violations and designate who can further assist personnel with any questions or concerns. Distribute copies of personnel policies and procedures to each employee or otherwise make them easily available, such as on the organization’s internal Web site or in each location.

Personnel Practices Consistent With Personnel Policies

Written policies that are not followed in practice lead to diminishing the credibility of the rules that help govern a workplace. Moreover, morale is lowered in the work environment if written policies are ignored or followed inconsistently. This could lead to favoritism or disparity in how organizations treat personnel. One of the most important questions to be answered by an organization is, “Are all written personnel policies and procedures being followed exactly as written?”
Chapter 3: Equal Employment Opportunity and Diversity

Equal Employment/Volunteer Opportunity and Nondiscrimination

ESO leaders should promote diversity and strive to maintain a work culture free from unlawful harassment and discrimination. Personnel claims often involve allegations of harassment or discrimination based on legally protected grounds such as race, color, religion, gender, age, national origin, veteran status, genetic information or disability. ESO leaders must be able to demonstrate that their organization takes active steps to prevent and promptly correct workplace harassment and discrimination.

State and local jurisdictions may provide additional protections against workplace discrimination that aren’t covered by federal law. Consult with locally retained legal counsel to ensure personnel policies and practices adhere to applicable laws.

Generally, it is illegal to discriminate in any aspect of employment or volunteer status, including:

- Recruitment.
- Testing.
- Hiring and selection.
- Terminations.
- Compensation, assignment or classification of personnel.
- Transfer, promotion, layoff or recall.
- Advertising for jobs or positions.
- Use of organization facilities or equipment.
- Training opportunities.
- Benefits programs.
- Pay, retirement plans or disability leave.
- Other terms and conditions of employment or volunteer status.
Role of Diversity in Emergency Services

ESOs work daily with an increasingly diverse population. Understanding the organization’s multicultural community allows for safer and more effective delivery of services. A reflection of the variety of people in society today includes, but is not limited to the following:

- Race.
- Color.
- Gender.
- Age.
- National origin.
- Religion/spiritual beliefs.
- Disability (mental or physical).
- Sexual orientation.
- Gender identity or expression.
- Physical, mental and emotional abilities.
- Position or job within the workplace.
- Work experience.
- Socio-economic status.
- Educational background.
- Geographic location (where reside).
- Military experience.
- Parental status.
- Political views.
- Values.
- Work style.
- Communication style.
- Language skills.

Understanding your cultural community – Unique challenges may arise because of the nature of providing emergency services to a diverse community. Examples of cultural differences that may need to be considered include:

- Language and communication.
- Gender appropriate physical contact.
- Culturally inappropriate touching.
- Modesty concerns and customs.
• Religious customs.
• Citizens reluctant to call 911 out of fears associated with the inability to pay for services, deportation or embarrassment for causing an emergency.

Leadership, education & public safety – ESO leaders should set the example for nondiscrimination and awareness of cultural diversity. Top administrators may initiate contact with cultural groups’ leaders in the community to help improve communication, delivery of services, safety, and multicultural education. For instance, citizens can assist the ESO in providing language translation for public relations, educational materials and in-person communications. Another example is to seek persons from outside the organization who can educate personnel on specific community groups’ cultural practices, rituals and customs.

Understanding diversity is essential to serving citizens of various cultural groups and maintaining a respectful work environment. Take proactive steps to better educate ESO personnel and importantly build bridges of communication with various community groups.
Chapter 4: Sexual Harassment

Sexual harassment may begin with a joke, but the negative impact of a sexual harassment allegation is no laughing matter. This chapter explores some of the reasons why sexual harassment claims or lawsuits continue to harm the reputations, morale, productivity and financial health of ESOs nationwide. Most importantly, risk management guidelines are offered to help prevent sexual harassment incidents and lawsuits and prepare an ESO to respond to employee and volunteer complaints. Please note that the suggestions provided herein are also appropriate risk management strategies to combat workplace discrimination and harassment based on all legally protected classes.

Risks That Won't Go Away

Unfortunately, sexual advances, innuendoes and comments have been, and will continue to be, part of human beings working together. It is arguable whether behavior that would constitute sexual harassment is more or less common today as compared to the work environment 25 years ago. Nevertheless, legal claims of sexual harassment are prevalent in today’s society.

Establishing a Work Culture Free of Unlawful Harassment

Laws and court decisions addressing sexual harassment are not intended to create a workplace civility code. ESO leaders are not required to sterilize the work environment or take the fun out of the workplace. However, leaders are under an obligation to be able to distinguish between innocent joking and banter and behaviors that cross the line and would be deemed unlawful. Consider the following questions to help determine whether behaviors constitute unlawful sexual harassment:

- Is the verbal or physical conduct unwelcome and offensive to the individual(s) complaining of harassment?
- Is the behavior in question so severe, pervasive or persistent that it would be considered offensive to most reasonable people?
- Does the behavior unreasonably interfere with the complainant’s work environment or ability to do his or her job?

It is difficult to administer workplace rules that have become more stringent, whereas virtually every other aspect of society tells employees/members that sexually-related conversation and behavior is acceptable.
Update Sexual Harassment Prevention Policy

Have a qualified employment attorney and/or human resources professional review and update the sexual harassment policy on an annual basis to ensure member and volunteer protections are in place. The following points should be addressed in a tailored policy:

- **Scope of the policy** – No tolerance for harassing behavior should extend to all ESO-related activities, including off-site. The policy applies to employees, volunteers, customers, clients and other persons not affiliated with the organization, regardless of their title, position or gender.

- **Definition and examples of sexual harassment** – Sexual harassment is a form of sex discrimination that can occur in a variety of different circumstances. Examples of unlawful work-related sexual harassment, include, but are not limited to:
  
  - Conduct unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.
  - Direct or implied threats that submission to sexual advances will be a condition of employment or continued service with the organization.
  - Sexually related material such as pornography, objects, pictures or Internet sites.
  - Unwelcome verbal or visual conduct of a sexual nature such as comments, innuendoes, jokes, email, voicemail or text messages, gestures, leering or stalking.
  - Unwelcome physical sexual contact such as grabbing, groping, pinching, patting, massaging someone’s neck or shoulders, pulling against another’s body, rape, molestation or any attempts to commit such misconduct.

- **Social media usage** – Members' usage, written content, as well as photographic and video-based images on their social media sites can create a multitude of problems for them as individuals and the ESOs they work for. A policy should address members’ and volunteers’ social media communications that are considered inappropriate, offensive, unprofessional, disparaging, defamatory, discriminatory or harassing.

- **Investigation of allegations** – The organization takes allegations of sexual harassment seriously and will promptly and thoroughly investigate all complaints.

- **Multiple avenues of complaint** – Courts make it clear that multiple avenues of internal complaint must be made available for personnel who are subjected to workplace harassment. A clear reporting procedure should be easily identified as a bolded, separately marked section of the policy.

The policy should also articulate that an alleged victim of harassment is not required to confront the person who is the source of the problem or closely associated with the person who is the source of the problem. Instead, the employee or volunteer may utilize any of the other various avenues of internal complaint. This helps eliminate real or perceived barriers to reporting. Should an employee or volunteer fear reporting via the traditional chain of command, consider offering the organization’s board of directors as an alternative avenue of complaint. Lastly, an organization can implement a third-party monitored “harassment hotline” that allows for personnel to lodge anonymous complaints via telephone, email or website.
Refine Investigation Procedures

An ESO member may ask, “Why should I make a complaint of harassment if the organization is not prepared to investigate the incident?” Others may suggest that those designated to respond internally to complaints haven’t received formal education on conducting harassment investigations. To address these types of concerns, train those responsible for sexual harassment investigations and communicate to personnel about how the ESO is prepared to promptly and effectively respond. Increasing awareness throughout the organization makes it more likely a complaint will be brought forward and resolved in a common sense manner.

Romantic Relations Between Co-workers and Liability Risks

Organizations are forced to deal with drama, conflict and potential legal problems associated with co-workers being romantically involved with each other. ESOs must be fully aware of the variety of legal risks that accompany co-workers’ romantic relationships.

Some organizations may elect to implement a no dating policy, but enforcing such a policy will prove to be difficult. It is more realistic to institute a policy prohibiting romantic relationships between direct supervisors and subordinates. Moreover, periodic training for the entire workforce should be provided to explain risks, set expectations, establish resolution processes and enhance communications. ESO leaders tasked with managing conflict arising from co-workers’ romantic relationships must maintain professional boundaries and stress how the agency is committed to fostering an environment free from harassment, discrimination and retaliation.

The following are examples of potential problems associated with co-workers’ romantic relationships:

- **Wedded bliss** – Marriage is the “best” possible result when two ESO members become involved in a romantic relationship. However, numerous problems can follow when co-workers marry.
• When married, do their personal problems spill over into the work environment? Does one directly supervise the other? When possible, transferring or moving one spouse is a common risk management tactic but may be difficult given the size of the organization. At a minimum, there will be the inevitable perception among co-workers that favoritism or nepotism exists when spouses work for the same organization.

• Extra-marital affairs – A personnel nightmare involves co-workers that are romantically involved with each other while one or both is married to another person. First, a serious risk of workplace violence exists should a spouse discover the affair. Second, other ESO employees with knowledge of the affair may question the ethics, credibility and leadership of co-workers that are involved. Third, morale is further negatively impacted if co-workers feel complicit because they have knowledge of the affair and may be friends with the unknowing spouses.

• Divorce – Once a divorce is finalized, is it possible for former spouses to work with each other in any capacity? Does one former spouse have any greater influence in the workplace than the other? Claims of a hostile work environment would be difficult to avoid when bitter ex-spouses work under the same organizational roof.

• Non-marital break-up – Romantic, dating or sexual relationships between co-workers may not end well. Hurt feelings can cause people to act irrationally. It is the responsibility of the ESO to help ensure the negative fallout from a break-up will not reach the point of an unlawful hostile work environment, retaliation or constructive discharge.

The following are examples of legal concerns for an ESO:

• Hostile work environment – An individual no longer involved in a romantic relationship with a co-worker may be subjected to a hostile work environment. The offensive or intimidating environment could be created by the former romantic interest and/or other co-workers. The severe or pervasive harassing behavior cannot be a minor irritant but must unreasonably interfere with the workers' ability to do the job.

• Quid pro quo harassment – This form of harassment may involve the classic example of a supervisor making job-related threats to a subordinate who doesn’t wish to engage in sexual or romantic relations. The threat alone of job-related harm is sufficient to be considered unlawful harassment and actual retaliation against the subordinate is actionable.

• Reverse discrimination – These legal claims are made by those not participating in a romantic relationship with a supervisor, manager or other superior. Those alleging discrimination argue their working conditions were altered and they failed to receive equal job opportunities such as promotions, training, career development and desirable shifts.

• Retaliation – This claim may involve work-related retribution taken against one of the ESO members of the break-up. It is not advisable for professionals with supervisory duties to turn a blind eye to co-workers’ break-ups. Consider measures to help ensure non-retaliation for parties involved.

• Constructive discharge – This claim may involve an ESO member that had no reasonable choice but to quit because of the hostile work environment he or she was subjected to after the romantic relationship ended.
• **Restraining orders, stalking, or assault and battery** – Criminal charges may be brought by an employee against a co-worker and the organization is left to manage the work environment.

### Training on Harassment Prevention and Reporting

*Train all ESO members on harassment and discrimination prevention* – Employees, volunteers and board members should attend mandatory sexual harassment prevention training on a periodic basis. Nothing communicates and affirms an ESO’s no tolerance policy for sexual harassment more than effective training sessions led by credible and knowledgeable professionals. Take time and care to select a trainer or facilitator who understands the world of ESOs and can speak your language.

Due to the personal and sensitive subject matter, consider face-to-face training to encourage ESO members to ask questions and raise concerns. Consistent training helps demonstrate the organization’s sexual harassment policy doesn’t simply sit on the shelf gathering dust but is an active policy.

*Training for those with supervisory duties* – ESOs are legally required to take steps to prevent workplace harassment and discrimination, properly respond to allegations and prevent future occurrences. Limit risk for liability for harassment and discrimination claims by periodically educating those with supervisory authority.

• **Supervisor as the worst offender** – An ESO is at great risk for liability if a person with supervisory responsibilities is the worst offender. Supervisors should be reminded through training that they are expected to behave as ethical leaders, setting positive examples. It is viewed as particularly offensive if a supervisor at any level participates in behavior that is demeaning, harassing or discriminatory.

• **Don’t allow or condone sexual harassment** – Supervisors must not tolerate behavior that could be considered as creating or contributing to a hostile work environment. An ESO could be held liable for allowing a hostile work environment to foster if a supervisor condones or participates in sexual banter, innuendos, teasing, mistreatment or jokes. ESOs must demonstrate they took every reasonable measure to educate those granted with supervisory authority, in an effort to prevent a hostile work environment.

• **Harassment investigations should be handled by trained designees** – Select members of an ESO should be designated as internal investigators for harassment and discrimination complaints. Supervisors should funnel allegations to designated and trained internal investigators. Supervisors not named in a harassment complaint will be kept in the loop to help ensure a productive work environment is maintained, free from retaliation or further harassment. ESOs employees/volunteers are best protected if investigations are facilitated by those with experience and/or training in handling complaints.
Identify Internal and External Resources

What professionals would an ESO call upon to address a sexual harassment allegation? Does the ESO have an employee with experience or education in human resource management? If circumstances warrant, would the organization know whom to contact as a third-party investigator? Has the ESO established a relationship with an attorney who has experience investigating and/or helping to resolve harassment complaints? An attorney with a labor and employment practice will likely be more effective than a generalist.
Chapter 5: Importance of Training on Personnel Practice Risks

Most ESOs understand the importance of keeping operational skills current by regularly offering practical training sessions to employees/volunteers. However, training on personnel-related topics is often overlooked. ESO employees and volunteers should receive periodic training on personnel subjects, frequent enough to help demonstrate the organization's commitment to equitable workplace practices and maintaining a work environment free from misconduct.

Training Topics for Personnel

In order to strengthen working relations, prevent wrongdoing and reduce exposure to personnel-related claims, consider the relevant training topics below for employees/volunteers and supervisors:

- Orientation for new employees/volunteers.
- Nature of working relationship (e.g., employment at-will).
- Internal reporting and investigatory procedures.
- Rules of conduct.
- Equal employment opportunity.
- Nondiscrimination.
- Sexual harassment.
- Retaliation prevention.
- Violence/threats of violence.
- Weapons in the workplace.
- Family and medical leave.
- Drug and alcohol use/abuse.
- Employee Assistance Program (EAP).
- Electronic communication systems usage (e.g., Internet, email, mobile phones, personal digital assistants and social media).

Supervisor and Management Training

*How supervisors pose risks* – There is no question that those with supervisory authority pose the greatest threat for civil liability for an ESO. Front-line supervisors and managers are typically the first to know about personnel problems or workplace wrongdoing.

Supervisors, managers, administrators and chief officers are granted authority to impact co-
workers' jobs or positions. Anyone with supervisory authority can be viewed as acting as an agent on behalf of the ESO. This legal organization principle means that a supervisor's actions or failure to act can put the ESO on the hook for liability. Supervisors' actions are carefully scrutinized when handling sensitive personnel matters like harassment and discrimination or responding to other conflicts or incidents of workplace misconduct.

Supervisory training can also decrease exposures to personnel claims by providing tools to help equitably manage, develop and improve workers’ performance. Uniform disciplinary decisions are more easily supported in court, whereas decisions that are inconsistent can appear discriminatory. The following training topics should be customized to assist supervisors in meeting their heightened legal responsibilities:

- Hiring/selection.
- Performance evaluations/management.
- Coaching/counseling/warnings.
- Disciplinary procedures (reprimands, suspensions, demotions).
- Termination/dismissal.
- Promotion processes.
- Record keeping/file maintenance.
- Conflict management.
- Managing difficult personnel relations.
- Reporting and properly responding to allegations, claims or incidents of workplace risk and wrongdoing (e.g., sexual harassment, discrimination, retaliation).

Retain accurate records for those who receive training on managing personnel issues. Records should reflect total hours spent per training session, the frequency of training and who served as the trainer.

Qualify an Outside Trainer

Many ESOs find educating and training members on personnel-related topics is best accomplished by an outside professional. The following checklist can aid in qualifying the right trainer for the needs of an organization:

- Request a resume/biography to learn about experience and education in employment law and/or human resources.
- Determine the trainer’s level of experience in working with a number of business entities.
- Contact a number of references – find out their level of satisfaction.
- Ask to sit in on a training session to observe firsthand the presenter’s communication style, effectiveness and interaction with the attendees.
- If not possible to attend another training session, ask the presenter to facilitate a brief, mock presentation on relevant subject matter.
- Request samples of handout materials to ensure quality and professionalism.
Chapter 6: Problems Associated with Employees/Volunteers Who Fail to Report Workplace Misconduct

An employment practices liability trend involves an ESO first receiving notification of alleged harassment or discrimination after an employee’s voluntary or involuntary termination. It is common for a member to allege workplace wrongdoing only after the working relationship is severed. While it may not seem fair, an ESO can be held civilly liable for workplace harassment or discrimination it was never given the opportunity to investigate or stop.

Why Do ESO Members Fail to Report?

There are a variety of reasons an employee/member may argue that he or she did not complain during the working relationship. Courts and juries may accept these reasons, which include fear of retaliation, isolation and intimidation from superiors or co-workers. Some ESO members may believe their complaints will be ignored or that they will experience a loss of dignity or privacy. Additionally, employees/volunteers may argue they were confused about who within the organization is designated to respond to an allegation and, importantly, who is qualified to investigate the complaint.

Encourage ESO Members to Report

An ESO promptly investigating and resolving incidents of workplace misconduct must be the first priority when an allegation surfaces. However, an ESO is unable to respond when unaware of alleged wrongdoing such as harassment or discrimination. A key to fostering a true open door environment is maintaining a written policy with several clear reporting alternatives. Policies should include easily identifiable reporting procedures. Encourage internal reporting by continually educating employees on how to report and their responsibility to do so.

Opportunities to Advertise Internal Reporting Procedures and Investigation Processes

There are several opportunities during the working relationship to encourage reporting and reinforce various avenues of internal complaint. Importantly, ESO members should be educated about what internal and external processes have been established to ensure a prompt, thorough and equitable investigation and resolution of complaints.
Written policies and practices must be active in that the organization consistently advertise its policies to its employees. Policies that sit on a shelf do not provide proper employee awareness.

**Orientation** – New member orientation serves as the first opportunity to establish a work culture that values respect and prohibits wrongdoing. Many organizations use orientation to familiarize new personnel with policy and procedure manual information. After reviewing the personnel manual, a signed employee acknowledgement form should be returned to the organization. Employees should acknowledge their understanding of the multiple avenues of internal reporting available and an agreement to report internally any work-related wrongdoing they observe or are personally subjected to.

**Periodic training** – During the course of the working relationship, consistent training should focus on the prevention of workplace misconduct as well as retaliation against anyone who brings a complaint forward or provides information during an investigation. Personnel policies and procedures should be reaffirmed beyond the introductory or probationary period.

**Evaluations/Performance Management** – Annual evaluations/performance management meetings are effective communication vehicles in many ways. Generally, supervisors use this opportunity to review employees' goals and focus on performance development. This also is a prime opportunity to ask ESO members if they are aware of any workplace misconduct or have any other concerns or issues that should be addressed. Include a written statement with the formal evaluation acknowledging employees’ awareness of reporting procedures, as well as the agreement to report. The end result is encouraging reporting and making the organization’s open door policy more of a reality.

**Workplace climate surveys** – ESOs are increasingly utilizing workplace climate surveys or questionnaires as a tool to learn about how employees view their work environment. Climate surveys are often taken by agency employees electronically and administered by a third-party company to help ensure confidentiality and trust in the process. By providing individuals with another opportunity to bring to light concerns about the work environment, the ESO will better protect its employees and institution.

**Exit interviews** – Exit interviews provide an ESO a final opportunity to learn of any workplace misconduct or other problems that may have occurred during an employee's tenure. Members leaving the organization may feel they have nothing to lose and be more willing to make suggestions to improve the work environment. Simply asking thoughtful questions may be enough to encourage a member to come forward with an allegation of work-related wrongdoing, rather than hold on to the information until a later date or not at all. The main objective is for the ESO to discover alleged personnel problems or misconduct, thus allowing for a prompt and thorough investigation. By conducting an exit interview the organization will also strengthen its position that it took every reasonable measure to learn of and rectify workplace wrongs.

**Accountability**

ESOs and their members share responsibilities in preventing and stopping workplace harassment, discrimination and other wrongdoing. ESOs are accountable for establishing reasonable measures to prevent and correct workplace misconduct. In turn, members are held accountable to avail themselves to the organization’s preventive and corrective opportunities. In court, members may have a difficult time explaining their failure to make an internal complaint during the working relationship, thus not giving the ESO an opportunity for an internal or external investigation and subsequent resolution of problems.
Chapter 7: Internal Investigations of Personnel Problems

Investigating allegations of workplace misconduct such as discrimination, harassment, retaliation, theft, and threats of violence is not an everyday occurrence for ESOs. Not dissimilar from other employers, many ESOs find themselves negligently unprepared to properly investigate internal allegations of work-related misconduct or personnel disputes. A lack of practical experience of investigating personnel matters may actually make an ESO more vulnerable to liability for personnel-related claims. What steps can an ESO take to refine its internal investigation policies and procedures?

Investigate Investigation Procedures

A prominent plaintiff’s attorney stated that exploiting supervisors’ mistakes for the client’s benefit is the fuel that drives his practice, “I live to depose managers and will be there to ask you about the things you should have done in an investigation.”

An ESO’s investigation processes may be harshly questioned and scrutinized.

- How does the ESO investigate employee or volunteer allegations of workplace misconduct or other personnel problems?
- Was the allegation of work-related misconduct taken seriously and promptly investigated?
- Did the ESO conduct a thorough investigation that was equitable to all parties involved – the accuser, accused, as well as witnesses?
- Are uniform investigation procedures followed for every allegation of harassment, discrimination, retaliation, violence or other misconduct? Did the organization follow guidelines that were in place well before the investigation of an incident in question?
- Were the members tasked with conducting internal investigations ever trained on how to conduct impartial and comprehensive investigations?

Understand What Triggers an Investigation

The ESOs duty to respond to official notice or complaints is clear. But don't make the mistake of believing that only formal complaints of workplace misconduct require an investigation. An ESO can be held liable for workplace harassment, discrimination, retaliation or other wrongdoing that it should have known about, even when an official complaint wasn't lodged. Be prepared to conduct internal fact finding or an investigation under the following circumstances:
• Member complains that he or she is the target of behavior that may constitute harassment or discrimination.
• Another ESO member reports that a co-worker is being subjected to workplace wrongdoing or behavior.
• Supervisor’s personal observation.
• Informal complaints.
• A non-ESO member brings information or an allegation forward.
• Anonymous complaints are lodged.
• Rumors circulate.

Consider These Risk Management Tips

Tip #1: Establish an Internal Investigation Team

In the world of risk management, two heads can be considered better than one. Avoid situations where individual supervisors are responsible for conducting investigations. Before an actual incident arises, designate who will serve as the organization’s internal investigators.

A predetermined team of two to five employees should be in place to promptly and thoroughly investigate allegations of personnel conflict or wrongdoing. The Internal Investigation Team should consist of those whose job descriptions include administrative leadership and human resources management. The team should also reflect the diversity and makeup of the workforce. Consider the additional characteristics of Investigation Team members:

• Trusted and well respected by the workforce.
• Keep matters confidential.
• Unbiased, reasonable decision makers.
• Interviewing skills.
• Detail oriented/well organized.
• Document well.
• Available for follow up.

Tip #2: Train the Investigation Team

It is recommended that an attorney or human resources expert periodically (e.g., annually) train the Investigation Team to prepare for the variety of potential complaints of workplace misconduct. Training on case scenarios is a productive trial run for investigations, designed to help avoid mistakes with an actual complaint. Proactive training familiarizes team members with established investigation guidelines and also strengthens employees’ confidence in the ESOs fair internal processes.

Tip #3: Know what constitutes an effective investigation

An investigation should promptly and effectively stop any workplace wrongdoing and prevent
future occurrences. Sound investigations include many factors, including but not limited to:

- Fairness to all involved.
- Prompt action taken.
- Review of relevant policies and procedures.
- Non-retaliation measures.
- Protect confidentiality to the greatest extent possible while allowing for a thorough investigation.
- Outline investigation steps for all involved parties.
- Inform involved parties that knowingly false or malicious allegations or participation in the investigation will lead to discipline.
- Communicate an estimated timeframe for completion of the investigation.
- Reaffirming the multiple avenues of complaint in the event of further wrongdoing or retaliation.
- Ensuring objectivity by using investigators not directly involved with the incident or close associated with interested parties.
- Specialized fact-finding by facilitating interviews, reviewing documents or personnel files.
- Methodical and well documented interview notes and formulation of an Investigation Findings Report.

**Tip #4: Incorporate standardized investigation forms**

Supervisors should not come up with their own methods of documentation and investigation. Simply taking copious notes on a blank pad of paper may not demonstrate a high level of preparedness for investigating personnel complaints. Instead, the Internal Investigation Team should utilize standardized forms and questions for interviewing the person making the complaint (accuser), the accused and any witnesses. Pre-drafted forms help develop consistency from one investigation to the next, yet allow for customization depending upon who is being interviewed.

Designate a gatekeeper for interview forms and other associated documentation once the investigation is complete to help ensure confidentiality of records. Work under the premise that all documentation surrounding the investigation may be discoverable and ultimately produced to opposing legal counsel, a judge or jury.

**Tip #5: Consider utilizing a third-party investigator**

Circumstances may arise where any internal investigation may be perceived as biased for the ESO’s benefit. Examples of when an outside third-party investigation may be appropriate include:

- A high-ranking member of the ESO is accused of wrongdoing.
- Multiple complainants.
- Nobody qualified internally to investigate a complex complaint.
• An employee argues he/she has nowhere to turn because the ESO is small, has limited resources available and conflicts of interests exist.
• Expressed distrust or lack of confidence in the internal investigation process.
• Publicized complaint in the workplace or in the media.
• Complainant has hired an attorney, filed a complaint with the EEOC, other governmental agency or lawsuit.
• Other real or perceived internal conflicts of interest exist.

A human resources consultant, private investigator or external legal counsel may serve as a third-party investigator. Consider qualifying external investigators well before the need arises. Select the appropriate investigator based on the level of experience and education in regards to the nature of the complaint.

**Tip #6: Prepare an Investigation Findings Report**

The ESO is responsible for conducting a thorough investigation, making every reasonable effort to uncover the facts. A prudent investigator’s findings are based on the most reliable and detailed information available at the time, but conducting investigations is not a perfect science. Many investigations result in clear findings or conclusions, whereas others may be inconclusive. Any conclusions should be supported by the investigation, rather than tainted by personal biases.

After completing interviews and the fact-finding process, draft a report of investigation findings. An Investigation Findings Report should include:

- Statements of alleged wrongdoing, identifying the complainant and accused employee(s).
- Description of investigation steps taken.
- Names of persons interviewed and information gathered.
- Documents reviewed.

The Investigation Findings Report may evaluate whether there is factual evidence to substantiate the complaint. The report may contain the following findings:

- Wrongdoing did occur.
- Wrongdoing did not occur.
- An incident did occur, but may not be considered unlawful or against organization policy.
- Definitive determination cannot be made.

In the end, the findings of the Investigation Report may not be as important as the organization’s process used in investigating the complaint. Take reasonable measures to ensure the organization can defend the consistency and fairness of its investigation practices.

**Does the ESO have knowledge of any incidents or allegations that would cause a reasonable person to believe a personnel claim or lawsuit might result?** Investigations can reveal information that may lead your ESO to believe an existing or former employee/member may file or has filed a personnel-related claim. As an example, your investigation may bring to
light an employee has demanded or plans to demand monetary relief related to an incident of workplace misconduct, such as harassment. Serving as another example, the investigation may indicate a former employee is filing an administrative or civil claim of unlawful workplace discrimination against your ESO. It is essential your ESO understand its claims reporting obligations under its insurance policy or contract. Included herein (see pages 25-26) is language from VFIS’ Management Liability policy/contract pertaining to an ESO’s claim reporting responsibilities. Contact the ESO’s insurance agent or VFIS directly regarding claims reporting obligations or questions.

**Tip #7: Consider involving outside legal counsel**

Help avoid the ESO’s legal counsel asking, “Why didn’t you tell me about this personnel complaint until now?” Many personnel problems don’t require retaining outside legal counsel. However, depending upon the nature and severity of the allegation or incident, don’t hesitate involving an experienced labor and employment attorney.

There are valid reasons for and against using the ESO’s regular legal counsel as a third-party investigator. One of the reasons behind utilizing retained legal counsel would be attempting to keep all or part of the documentation surrounding the investigation confidential for subsequent litigation. For this, protected documentation should be labeled attorney work product and/or privileged attorney-client communication. Also, legal counsel can help navigate requirements set forth in labor agreements with respect to investigations that may result in disciplinary action.

One possible disadvantage of using the ESO’s regular attorney for conducting an investigation of workplace misconduct could be that the attorney may be called to serve as a witness in subsequent litigation and therefore be unable to represent the organization in litigation. Consult with outside legal counsel to determine what investigation strategies will be incorporated should the organization face a personnel-related complaint.
Sample Policy Language

Duties in the Event of an Offense, "Wrongful Act," "Claim" or "Suit"

a. You must see to it that we are notified as soon as practicable of an offense or "wrongful act" which may result in a "Claim" or "Suit." To the extent possible, notice should include:

   (1) How, when and where the offense of "wrongful act" took place; and

   (2) The names and addresses of any persons seeking damages or of any witnesses.

b. If a "Claim" is made or "Suit" is brought against any insured, you must:

   (1) Immediately record the specifics of the "Claim" or "Suit" and the date received; and

   (2) Notify us as soon as practicable. You must see to it that we receive written notice of the "Claim" or "Suit" as soon as practicable.

c. You and any other involved insured must:

   (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "Claim" or "Suit";

   (2) Authorize us to obtain records and other information;

   (3) Cooperate with us in the investigation, settlement or defense of the "Claim" or "Suit"; and

   (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of damages to which this insurance may also apply.

d. No insureds will, except at their cost, voluntarily make a payment, assume any obligation, or incur any expense without our written consent.

e. Notice shall be deemed given as soon as practicable if it is given by the person to whom you have delegated such responsibility as soon as practicable after they become aware of an offense or "wrongful act."
Chapter 8: Technology Increases Exposure to Personnel Claims

Who could have imagined that technological advancements would have drastically heightened exposure to personnel-related litigation for ESOs? Availability of computers, Internet, email, social media, television and mobile/camera phones increases the number of incidents and costly lawsuits. Hostile work environment claims often include elements of technology. ESOs frequently are forced to address employees’ inappropriate usage of technology, resulting in discipline such as reprimand, suspension, demotion and termination. What steps can an ESO take to prevent technology abuses and reduce exposure to personnel-related claims?

Television

Unlike most businesses, watching television while on shift at an ESO may be a common activity. Cable and regular broadcast television programming today is different than the Andy Griffith or Leave it to Beaver generation. Some members, due to moral and/or religious convictions, may be offended by programming that includes controversial issues such as sex, race, sexuality and profanity. ESO leaders are responsible for regulating the work environment in such that television viewing does not cross the often subjective line of being considered unreasonably offensive, thus contributing to a hostile work environment.

Internet and Email

A sexual harassment hostile environment claim could uncover ESO members accessing the Internet or email to view and/or disseminate inappropriate jokes, pictures or Web sites. Most workplace surveys reveal it is common for employees to abuse Internet privileges, often resulting in decreased productivity and heightened exposure to harassment and discrimination claims. Moreover, a growing concern involves ESO members bringing their personal laptop, smart phone or personal digital assistant (PDA) to work and accessing inappropriate materials.

Social Media

ESO members are utilizing social media networks and Web sites at a rapid pace. Organizations could be held liable for its employees’ posting on their personal social media networking sites.

Can the content of an employee’s/member’s social media site be kept private?

An inherent conflict regarding social media is an individual’s reasonable expectation of privacy or confidentiality when the content (written text, pictures or videos) is being disseminated on the Internet. Any person posting a video online, for example, is essentially the owner of his or her own international Internet distribution center. Even when not intended, a member’s social media
content could be distributed for the world to see. An email, social media post, photograph, blog or video could be passed along to an endless number of recipients.

Inappropriate, offensive or personal communications may be called to the attention of ESO leaders who are left to determine what actions, if any, could or should be taken against the member who authored the written content or posted pictures or videos.

**Personal privacy versus the ESO’s interest in objecting to members’ social media usage:**

- **On ESO time or within facilities** – ESOs have a vested interest in what behavior or activities its members are engaged in while on the clock, within facilities or otherwise engaged in ESO-related activities. Members should be cognizant of their inappropriate usage of electronic communications.

- **Off-duty** – Members may post pictures, videos or written text while on their personal social media site while off-duty. It’s important for individuals to understand that postings made on their own time can still harm the organization, co-workers and the community served. Under a variety of circumstances, these off-duty communications can be tied directly to business-related activities, co-worker relationships and personal or professional reputation within the community.

- **ESO-related information** – Use of personal social media networks to discuss business-related information could violate confidentiality laws and/or ESO policies. Individuals may communicate sensitive or confidential information about the ESO’s financial, operational and personnel functions. Similarly, social media postings may contain medical or personal information about citizens served by the organization.

- **Co-workers as subjects of posting** – Problems result when a member posts information, allegations, pictures or videos about co-workers that could be considered harmful to that individual. It may be considered irrelevant if the offending party posts such information while on or off-duty.

**Blogging**

Blogs provide a forum for persons to write or post personal observations and opinions often pertaining to work-related experiences. Organizations should be concerned what their members are communicating on personal blogs and what the ESO can do about it, if anything. In most cases, a member’s First Amendment freedoms of speech are limited in the private employment context. Employees may be free to say what they want to say, but suffer the repercussions at work for making statements that harm the organization or its workers. Constitutional protections generally limit governmental action, which may apply to public employers but not private employers. An individual’s personal privacy and expression interests need to be balanced with the ESO’s need to protect against discrimination, confidentiality breaches and harm to professional reputation.

**Mobile/Camera Phones and Personal Digital Assistants (PDAs)**

Reasonable measures should be taken by ESOs to protect its members as well as community members from privacy violations stemming from abuses of mobile/camera phone or PDA usage. Mobile phones and PDAs are equipped with digital cameras, camcorders and audio recorders and the potential for abuse is multifaceted. There are many issues to consider for developing and
implementing a stand-alone policy regarding mobile/camera phone and PDA usage.

**Should the ESO ban or simply limit mobile phone or PDA usage?** An ESO may limit how, where and importantly when an employee may utilize his/her mobile phone or PDA. Consider silent or vibrate modes while on duty. The increase of text messaging with mobile phones or PDAs has also lead to decreased workplace production. The goal is for technological devices to not distract from or otherwise interfere with the member’s ability to perform the essential functions of the job.

**How should the ESO policy address the camera, video, audio functions on mobile phones or PDAs?** While on the job, members occasionally need to use the telephone or text messaging functions of their personally owned mobile phone or PDA but problems arise when they utilize the camera, video or audio functions. It is difficult to come up with many scenarios when members must, for business-related purposes, use their personal camera, email, Internet or audio recording functions. Many ESOs prohibit camera, video and audio functions while on the job. This stance can help limit the possibility of unauthorized photos or other sensitive images.

**How to define permissible camera and PDA usage?** ESOs should be careful to assign who within the organization has the authority to take photos while clearly defining the limited usage of the resulting images. Policies and procedures should communicate clearly that any photos, videos or other images taken within the scope of employment duties are the sole property of the organization. Members should not distribute photographs, video or other images to any individual or entity outside the organization such as the media or a Web site. Designate a Privacy Officer or Administrator to help the agency comply with HIPAA or other confidentiality regulations or laws.

**Policy Development and Review**

ESOs are under a duty to implement written policies and procedures designed to provide a workplace free from harassment and discrimination. Develop or update the organization’s policy governing all electronic communications, which includes text messages, blogging and social media. Legal counsel, specializing in employment and labor law, should review and approve any policy language prior to implementation.

**Harassment Prevention**

Policies should clearly communicate that electronic communication systems, including social media, are not to be used in any way that may be offensive to others or harmful to morale. Prohibit viewing or sharing any images, messages or other communications that could be construed as discriminating or harassing to others based on legally protected grounds such as race, color, gender, national origin, disability, religion, marital status or veteran status. Computer software programs may also be purchased to help filter inappropriate subject matter.

**Right to Monitor**

Granting members access to electronic communications systems while on the job is a privilege and not a right. Availability of technology at work is designed to enhance business practices rather than decrease productivity and increase legal liability. While members are entitled to a reasonable expectation of personal privacy at work, communicate that privacy interests are limited while conducting business, on the organization’s property or using organization-owned equipment.
Policies should indicate all computer files, including emails sent or received, are considered and treated as business-related information. A policy should also reflect that the organization reserves the right, with or without notice, to access, monitor, copy and/or delete any computer files, including email sent or received and all Web site communications and/or transactions.

**Personal Use**

"Cyber-slacking," defined as usage of the Internet or mobile technology at work for personal reasons, has negatively impacted productivity on the job. Consequently, many ESOs allow only incidental personal use of electronic communications systems. Knowledge of the organization’s right to monitor computer and other technological systems usage may help deter abusing the privilege of personal use. Some organizations may even prohibit personal use or deny access to Internet or email to avoid decreased productivity and liability exposures.

**Reporting Procedure**

For reporting technology usage policy violations, make several avenues of internal complaint available to agency employees. Policies addressing harassment or discrimination, including those governing electronic communications should articulate that an alleged victim of harassment or discrimination is *not required to confront* the person who violated policy or is closely associated with the person who is the source of the problem. Instead, the employee may utilize any of the other various avenues of internal complaint.

**Acknowledgement Form**

Employees should also receive and sign a form acknowledging their understanding of the parameters of the electronic communications systems policy. The form should include the ESO’s ability to monitor members’ usage while on duty, within business facilities or otherwise engaged in ESO-related activities.

**Discipline**

A progressive discipline typically applies to those who violate policy and engage in harassing, discriminatory or other inappropriate behavior. However, in some circumstances, a first violation may be severe enough that termination may be the most appropriate finding. Disciplinary consequences should be included in an electronic communications policy and administered uniformly.

**Training**

Once instituted, train employees on the electronic communications systems policy. Living in the information age, it is crucial to clearly define the parameters of utilizing technology while on-the-job as well as provide a forum for answering employees’ questions.
Chapter 9: 
Performance Development/Evaluations

Communication through effective performance evaluations helps strengthen personnel relations. Not completing performance evaluations communicates to ESO members that their professional development is a low priority. Moreover, personnel-related litigation often involves analysis of written performance evaluations.

ESOs are plagued by costly lawsuits for wrongful termination, discipline and failure to promote. Many wrongful termination or discharge lawsuits hinge on whether the organization can sufficiently defend its decision to terminate an employee. Claims often involve a former employee alleging the organization’s decision to terminate was based on unlawful reasons such as discrimination. In turn, organizations must be able to point to documentation regarding the former employee’s work performance that helps support the termination. Documentation of performance evaluations may help or hurt an ESO in the event of litigation.

Maintaining an Effective Evaluation Process

Buy-in from employees – Those participating in the performance management system must believe it is a valuable process that benefits members and the ESOs alike. Supervisors and non-supervisors should be given the opportunity to provide input so the system will fit the organization’s needs and job descriptions.

For developing or revising performance evaluation procedures, consider establishing a Performance Management Committee to analyze evaluation forms and processes from other healthcare organizations. Customization allows personnel to believe more in the fairness and purpose of the performance management system. Consider utilizing a human resources consultant and/or legal counsel to help ensure evaluations accurately measure the essential mental and physical job functions and address other pertinent performance standards.

Training – Too often, those with supervisory authority receive little or no formal instruction concerning how to conduct fair and uniform performance evaluations for subordinates. Periodic education for supervisors helps emphasize the importance of this communication process and standardize measurement criteria. Without uniform training, it is easier to argue a particular supervisor targeted an employee by using poor evaluations as a weapon to discharge an employee or force him out of the organization.

Timeliness and quality – Evaluations should be performed on or around the date as set forth in written procedures. Gaps or delays in the completion of performance evaluations show a lack of
guidance from ESO management. It is also recommended more than one level of supervision review each evaluation to help build consistency and fairness throughout the organization.

**Willingness to confront personnel problems** – It can be difficult for some supervisors to confront problems with ESO members, not wishing to damage relationships and avoid conflict. It may seem easier to avoid discussing minor incidents with the expectation they will resolve themselves. However, it is far more difficult to rectify a problem that escalates to a major issue. Allowing problems and concerns to progress can lead to frustrated members who perceive their needs and concerns are not valued. Open and honest communication is a key to strengthening productivity, morale and retention. Moreover, ignoring poor performance also often leads to other members’ resentment for picking up the slack.

**Facilitation of the evaluation meeting** – Counseling and constructive criticism can be sensitive especially when dealing with a difficult ESO member or one performing below expectations. Similar to discipline or termination sessions, emotions can run high during evaluation meetings. With only two people in a room, conversation can sometimes turn into a matter of “he said, she said.” Organizations should consider including a third person in evaluation meetings, preferably another supervisor that is trusted by the worker being evaluated.

Before the evaluation session, review all documentation pertaining to the member’s performance such as prior evaluations, commendations, counseling records, warnings, reprimands and performance improvement plans. The face-to-face meeting is especially important to the subject of the evaluation. Being prepared as a supervisor communicates a level of commitment and care.

**Give more commentary** – When reading completed performance evaluations, it is not uncommon to find a lack of supervisors’ commentary. Job categories are rated but there may be only one sentence supporting or explaining the rating. ESO members are begging to know why their supervisor gave them a particular rating. It is the supervisor’s job to provide substantive and objective detail as to why a rating was given. Supervisors should receive training on the importance of giving appropriate written feedback and commentary.

**Soft skills addressed** – Often performance evaluations primarily focus on the hard skills or operational skills necessary for performing the functions of the job. Evaluations either overlook or fail to weigh the importance of a worker’s soft skills, meaning the non-operational job functions such as work ethic, professionalism, teamwork, leadership, initiative and communication (good listener, comments contribute to conversations). It is not uncommon for an ESO member to be an outstanding worker from a hard skills perspective but deficient in the soft skills aspects of job performance. Soft skills should be spelled out in every job/position description and measured in performance evaluations.

**Self-evaluations** – Completing self-evaluations prior to meeting with their supervisors allows ESO members to take ownership of the process. This opportunity for self-reflection allows ESO members to identify their accomplishments, areas for improvement and goals for the next evaluation period. Without self-evaluations, the evaluation process is viewed as one-way communication, flowing only from the higher ranking supervisor.

Some employees more harshly scrutinize their own performance than their supervisors. Others may classify themselves as surpassing expectations, whereas the supervisor’s perspective is different. Ultimately, avenues of communication are opened and expectations clarified.
**360 degree evaluations** – Organizations with well-running supervisor-to-subordinate performance evaluation processes may consider instituting 360 degree evaluations. The 360 degree terminology references a worker being reviewed from supervisors above, subordinates below and co-workers on the same level.

The 360 degree evaluations help gain a more complete and accurate picture of how an individual is perceived in performing the hard skills and soft skills of the position. It also allows for personnel problems to be uncovered such as a worker that “kisses up, but kicks down.” This means that a worker may treat superiors with respect but abuses subordinates or co-workers on an equal level.

**Performance Improvement Plan (PIP)** – Many are unfamiliar with implementing a PIP, which may be necessary when an employee’s performance and/or behavior is unsatisfactory. A PIP is a joint effort between a supervisor and subordinate to develop a plan of increased communication, guidance and accountability. Supervisors ask questions like, “How can the ESO and I enable you to better meet the responsibilities of your position?” In turn, a documented PIP holds the ESO member accountable for meeting time specific goals.

**Accuracy of job descriptions** – Is the written job description an accurate depiction of what the member is actually doing on the job? Periodic performance evaluations allow for employees to review their job description and offer suggestions for updating. When assessing performance, it is essential to review the essential and non-essential job functions found in a job description.

By making job descriptions an integral part of the performance management or evaluation process, every employee in the same position will be measured on uniform and objective performance criteria. This helps build consistency throughout the organization in managing performance. Moreover, personnel relations are strengthened because subjectivity is reduced.

**Protect against workplace misconduct** – Are members given the opportunity to answer the question, “Since your last evaluation, have you observed or been personally subjected to any workplace risk or wrongdoing, such as harassment, discrimination or threats of violence?” This provides them an opportunity to step forward to make an allegation and allows the organization the ability to investigate, stop any misconduct and prevent future occurrences.

**Evaluate supervisors** – Are supervisors evaluated, in part, on whether they complete evaluations in a timely and thorough manner? Performance management is a substantial responsibility and should be quantified in measuring a supervisor’s performance.

**Consider renaming the process** – Some employees feel threatened by possible subjectivity of evaluations. Referring to the performance development meeting rather than performance evaluation may help employees focus on the true purpose of the process, which is personal and institutional growth.
Chapter 10: Progressive Discipline/Terminations

ESOs are unique. Unlike typical private industry employees, those in ESOs consider their fellow workers as family members. An obvious bond exists between ESO professionals due to the mission and nature of the work required. Nevertheless, wrongful termination lawsuits are at the top of the list for the most frequent and severe personnel claims facing ESOs. The family environment still should be treated as a professional workplace and personnel laws and regulations must be observed.

Emotions Fuel Wrongful Termination Claims

When involuntarily dismissed, ESO members typically are angry and refuse to accept their performance was subpar or conduct warranted dismissal. Many wrongful termination claims are rooted in the former member’s belief that there must be some unlawful reason for the separation, as opposed to the reason offered by the ESO. Facts generally will overcome emotional arguments. An ESO must take care to diligently document the legitimate business interests behind terminations.

Rehabilitate Rather Than Terminate

In order to best protect the legal liability interests of the organization, as well as strengthen productivity and morale, leaders should consider the approach of rehabilitate rather than terminate. Members that are given a second chance could serve as model workers and turn out to be the best contributors in the long run. Additionally, other members will take notice that the organization is equitable and caring in treatment of its personnel.

Alternatives to termination – Rather than termination, consider the following options available to ESO leaders that may turn around an underperforming employee or volunteer:

- **PIP (Performance Improvement Plan)** – A directed plan for setting performance goals, seeking employee or volunteer input and scheduling dates to revisit the PIP’s effectiveness.
- **"Last Chance" agreement** – Documentation of the ESO’s clearly communicated expectations and standards, which, if not met, will result in termination
- **Training** – A variety of training subjects can address issues like safety and operational deficiencies, communication skills, team-building, interpersonal relationships, conflict management and customer service.
• **EAP (Employee Assistance Program)** – A benefit that is provided to allow an ESO employee/member to address personal problems that negatively impact job performance.

• **Substance abuse treatment** – Supporting an ESO member participating in substance abuse rehabilitation or treatment.

**Utilize Progressive Discipline Processes**

Addressing ESO member performance deficiencies or conflict can be a difficult aspect of anyone’s job duties. To reaffirm a work culture of fairness, provide supervisors with training and necessary tools to build confidence and consistently administer the progressive disciplinary process.

**Non-punitive counseling or coaching** – Before initiating the progressive disciplinary steps or measures, consider whether attempting non-punitive counseling or coaching if appropriate for the circumstances. To label a conversation and corresponding documentation as counseling or coaching, rather than a written warning, pinpoints the non-punitive purpose of the exchange. The goal of verbal and written counseling or coaching is to provide the ESO member specific detail as to what should change and constructive ideas or instruction as to how the behavior or performance should improve. Be sure to ask the subject of the counseling session to provide his or her ideas of how performance can be enhanced, conflict resolved or behaviors altered. Emphasize the documentation of a counseling session is for the purpose of development and not punitive in nature.

**Written warning** – Most progressive disciplinary processes include steps to assist a member or volunteer by correcting specific deficiencies. A written warning follows the counseling or coaching session where the supervisor facilitates a formal discussion with the employee and a written record is placed in the employee’s personnel file. As a next step, written reprimands generally outline specific improvement steps and a required timeline, which also may include a formal Performance Improvement Plan (PIP).

**Demotion or suspension** – Levying a demotion or suspension is a common phase of discipline before termination. One may be suspended with or without pay, but the organization should be consistent with similar past infractions.

**Termination** – After the progressive discipline process is followed, employees who fail to meet their performance improvement goals are generally terminated. It is recommended that written policies include examples of conduct that may warrant discipline. Policy language should also allow the organization flexibility to determine more severe discipline, such as a suspension or termination for a first offense, if the serious nature of the violation so warrants.

**At-Will Employment or Membership**

At-will employment is a reality for most private industry employees across the country, meaning they can be terminated, at any time and for any reason, except for an unlawful reason. The at-will doctrine for employment or membership may or may not apply to an ESO. Some ESO employees benefit from many due process protections, often enumerated in union and employment contracts. Consult with legal counsel to determine whether the at-will doctrine applies to the ESO.
Improve Disciplinary and Termination Practices

Attorneys defending ESOs in wrongful termination lawsuits often say, “During litigation we teach the agency what it should have done to properly manage its disciplinary, grievance or termination procedures.” These processes are typically cumbersome to administer and an ESO is susceptible to not following procedures exactly as written in a personnel manual or collective bargaining agreement. By not following stated procedures, a member may argue breach of contract or wrongful termination. Ensure personnel policy manuals do not create explicit or implicit contractual obligations.

Determining Discipline and Termination Checklists

The following checklists are designed to assist an ESO in determining whether disciplinary action is appropriate and conducting proper terminations. Not every risk management procedure in these checklists will apply to each disciplinary decision, but an ESO may consider each point.

**Determining Discipline/Dismissal**

- □ Consult with the ESO’s legal counsel (the attorney should be experienced in labor and employment law).
- □ Has the ESO followed what is required by personnel policies and/or collective bargaining agreement?
- □ Did the ESO follow its progressive discipline policies?
- □ When applicable, follow the terms and conditions of an employee’s individual employment contract.
- □ Has the ESO conducted an impartial review of the facts and circumstances surrounding the potential discipline or termination?
- □ Has the ESO considered the member’s point of view?
- □ Has the disciplinary decision been reviewed by appropriate persons as designated in the Personnel Manual and/or collective bargaining agreement?
- □ What harmful impact did the employee’s/member’s conduct or wrongdoing have on other personnel, the ESO or community members? Consider future possible impact as well.
- □ If little or no harm was caused, what was or could be the potential harm to coworkers, the ESO or community members?
- □ Did the ESO member have sufficient time and opportunity to correct behavior or conduct that lead to the disciplinary action?
- □ Was the member’s conduct malicious, intentional or negligent?
- □ Is the member likely to commit future wrongdoing or misconduct?
- □ What are the legitimate business reasons for the discipline or termination?
- □ What does the member’s personnel record/file reflect concerning the circumstances surrounding the disciplinary or termination decision?
- □ What prior notice or disciplinary documentation exists with respect to deficiencies regarding performance, misconduct and an opportunity to correct such actions?
☐ In the event of litigation, what witnesses and documentation would be available to justify the disciplinary or termination decision?

☐ How were other members treated or disciplined for similar acts in the past?

☐ Did the member cooperate with investigation efforts?

☐ If the member committed workplace wrongdoing or otherwise violated ESO rules, did the employee/member show remorse?

☐ What is the impact of the member’s continued presence on fellow workers and community members?

☐ What action best prevents further wrongdoing or misconduct while protecting co-workers, outsiders and providing a safe and productive work environment?

☐ Is an alternative to termination appropriate in order to allow for additional time to investigate and deliberate before termination or otherwise allow the employee’s performance to “turn around”? Examples include suspension, probation, leave of absence, reassignment, demotion or instituting a performance improvement plan.

☐ Has the ESO hired or does it plan to hire another person to take over the terminated member’s job responsibilities? Be prepared to explain how, when, and why those arrangements were made. What are the qualifications of the replacement employee/member? Are there any facts present that could suggest unlawful discrimination or nepotism?

☐ Would a jury conclude that the ESO’s treatment of the dismissed member was unquestionably fair and reasonable?

Termination Administration

☐ Did the ESO consult with legal counsel (experienced in employment and labor laws) before the termination meeting?

☐ Did the ESO follow its written policies and procedures regarding discipline and termination (e.g., progressive discipline and collective bargaining agreement)?

☐ All termination letters, severance agreements and other correspondence should be reviewed internally by those responsible for personnel administration and legal counsel.

☐ Have those conducting the termination session received training on proper procedures?

☐ Has a written outline been prepared to make sure all necessary points are covered in a termination session?

☐ Has the dismissal interview been scheduled at a time that will eliminate or minimize the member’s personal contact with other employees/members before he or she leaves the premises?

☐ Termination meeting documented (e.g., exit interview form).

☐ Be careful what is said and written during the termination session. Everything written could be seen by others outside of the ESO (e.g., attorneys, judges, juries).

☐ Listen to what the member has to say and write down everything for the record.

☐ Let the member read and sign the exit interview form. If the member refuses to sign, note the refusal on the form.
Send an exit interview form to the former member if he/she refuses to meet in person to conduct an exit interview.

Place the exit interview form in the member’s personnel file.

Is it necessary to have a witness present for the termination meeting? It is recommended to have a witness present to help corroborate what was said to reduce exposure to defamation claims and also protect against potential violence.

Prepare documentation and other materials for presentation during the meeting and be prepared to explain. Examples include severance agreements and releases, confidentiality agreements, final paycheck and particulars of compensation and benefits.

Has the ESO considered whether outplacement counseling is appropriate?

Exit Interviews

Lower Turnover By Asking Simple Questions – Employee and volunteer turnover costs an organization money, time, energy and lost productivity. Asking smart questions during the exit interview process can help discover why turnover is occurring and what can be done to increase personnel retention. Exit interviews allow for a friendly and personal forum to discuss the member’s experience with the ESO and the potentially sensitive circumstances that surround the severing of the working relationship.

Exit interview processes – ESO leaders should examine their exit interview procedures to help increase communication and discover potential work-related misconduct. Below are additional suggestions for planning the exit interview:

- Consider having two persons facilitate the oral exit interview with the departing employee, which helps clarify what is said during the meeting.
- Interviews can be conducted orally (face-to-face or over the telephone) or in writing. Oral interviews are preferred because personal interaction is important for the sensitive nature of ending the working relationship. However, members may be asked to complete a written exit interview form or questionnaire if an oral interview cannot be scheduled or it would be more appropriate or comfortable for the individual to answer in written format, on his or her own time schedule.
- Carefully select the interviewers. Choose neutral persons the departing ESO member trusts and can keep issues confidential. Consider giving the departing member the option to select another interviewer if he or she would be more comfortable.
- Review the departing individual’s personnel file and visit with appropriate supervisors in order to fully understand the known circumstances leading to the separation of the working relationship.
- If applicable, be prepared to reiterate the ESO’s legitimate reasons for the dismissal.
- Schedule the exit interview session as close as possible to the employee’s departure. The meeting may be planned as the member’s last official business with the ESO.
- Assure the departing member understands that comments made during the exit interview will remain as confidential as possible, while still allowing for a prompt and thorough investigation should allegations of workplace misconduct be raised.
- Make assurances the organization does not tolerate retaliation against anyone for making
a complaint of workplace misconduct or for participating in an investigation.

- Listen to the departing employee's comments and diligently document. Don't give personal opinions, but instead remain objective.
- Don’t argue with a departing member.
- Expect the unexpected. Don't be surprised if the departing member makes new allegations.
- Preferably don’t conduct an exit interview alone, particularly if the departing ESO member has ever demonstrated irrational or violent propensities. Before the meeting, review the organization’s workplace violence and safety policies and procedures.
- Be prepared to explain the organization’s policy on providing references.

**Sample exit interview questions** – Exit interviews represent a prime opportunity to gain candid information on employment or working conditions within the organization. Not only can the organization gain important feedback on its strengths and weaknesses (as perceived by the individual), but exit interviews may also provide an opportunity for a departing employee to bring forward any allegations (e.g., discrimination or harassment) should they exist. This is also an opportunity to cover continuation of health insurance or other benefits a former employee may be eligible for. Consider the following sample exit interview questions:

1. Specifically, why are you leaving the ESO?
2. Do you believe you were treated fairly while with the ESO?
3. Did you feel valued as an employee or volunteer?
4. What aspects of your job or position were most satisfying?
5. What did you like most about your job or position with the ESO?
6. What did you like least about your job or position with the ESO?
7. Do you have any suggestions for improving work conditions, productivity, or morale?
8. Do you have any recommendations for improving the ESO’s training and personnel development programs?
9. Please comment on your working relationship with your supervisor. Was your supervisor supportive and communicative with you?
10. Did your supervisor seek your input on issues affecting your work?
11. How frequently did you have discussions with your supervisor(s) about your career goals?
12. How would you evaluate the performance of your supervisor(s)?
13. How would you describe employee morale within the ESO? What factors influence your answer?
14. If applicable, please comment on the employee/member benefit plans. Did the benefits meet your needs sufficiently? Are there other benefits that could have been offered?
15. Were you ever denied benefits that you thought you were entitled to receive?
16. Do you know of any unreported workplace related accidents, injuries or illnesses involving yourself or others?
18. Do you presently suffer from an injury that is work-related?

19. During your employment or affiliation, did you understand the ESO’s policies and reporting procedures/grievance procedures?

20. Did you observe or were you personally subjected to work-related harassment during your employment or membership with the ESO?

21. During your employment or affiliation with the ESO, did you ever think that you were discriminated or retaliated against because of your race, color, religion, sex, sexual orientation, religion, age, national origin, veteran status, disability, genetic information or for filing a workers’ compensation or disability claim? If so, please explain in detail these circumstances.

22. During your working relationship with the ESO, did you observe or were you personally subjected to any other forms of misconduct? If so, please explain in detail these circumstances.

23. Any additional comments?

By asking the questions above, an ESO once again attempts to discover any alleged injuries or wrongdoing that took place during the relationship with the employee or volunteer. If a member does not speak up during the exit interview about alleged workplace injuries or wrongdoing, it strengthens the organization’s position that it did everything in its power to prevent, discover and properly rectify any unlawful conduct.

**Utilize information obtained from exit interviews** – Information brought forward by departing members in exit interviews should be retained, analyzed and if necessary, thoroughly investigated.

- Assess any trends such as high turnover or problems with specific co-workers or supervisors.

- Utilize information gathered in exit interviews to improve working conditions, productivity and morale. Share information with those in the organization that can implement change for the better of the ESO and its members.

- Follow up immediately on any allegations of workplace risk or wrongdoing. Don’t assume the departing member made false allegations because he or she was walking out the door, had nothing to lose or is simply a vengeful person. Instead, utilize the organization’s internal investigation procedures to discover whether the accusations were valid and prevent future incidents of workplace wrongdoing.

**Discipline and Termination Myths**

**Myth #1 – There must be a written agency policy directly applicable to the misconduct or action that warrants discipline.** It is impossible to implement a written policy manual that addresses every possible operational or behavioral problem, mistake or misdeed. An ESO has the reasonable discretion to discipline and terminate its employees based upon common sense judgment. If a worker’s actions are contrary to the expectations for running a safe, productive and respectful work environment, the ESO has the legal discretion to take necessary disciplinary action, up to and including termination.
Myth #2 – The ESO must demonstrate that progressive discipline was used before termination is viewed as equitable and legal. While it is true that it shows fairness and reasonableness if the ESOs can show documentation of unsatisfactory conduct or operational abilities, it is not mandatory under certain circumstances. Depending upon the nature and severity of the workplace incident, a member may be terminated for a first offense. Beware of written policies within the organization’s manual that suggest a three strikes and you’re out rule for operational or behavioral violations. Certain policies may be written in a manner that limit an ESO’s discretion in deciding to discipline or terminate for a first or second offense or violation.

Myth #3 – For two ESO members that commit the same offense or violate the same policy, the organization is legally required to administer the exact level of discipline for both. While it is crucial that ESOs use consistent analysis in determining what level of discipline is most appropriate, it is possible varying discipline can be determined for two different employees. For example, the situation should be assessed according to the totality of the circumstances. That is, discipline for each person should be analyzed consistently but may have varying outcomes.

Constructive Discharge Claims

ESOs must be aware of the legal doctrine of constructive discharge, which hinges upon the belief that an ESO member quitting constitutes an unlawful termination. A former member would argue, “I may as well have been terminated, because I had no other reasonable option but to quit and avoid further intolerable working conditions.”

At the core of many constructive discharge claims, ESO members allege they were forced out of the organization because they didn’t fit in. For instance, a member may claim he/she could no longer be subjected to the hostile work environment or discrimination based on protected class status, such as gender, race, color, national origin, age, sexual orientation, marital status, veteran status, genetic information or any other characteristic protected by federal, state or local law. Therefore, a claimant may allege an abusive, hostile or discriminatory working environment was so intolerable that resignation was an appropriate or reasonable response.

Exposure to constructive discharge claims often increase when an ESO fails to take proactive and ongoing measures to prevent workplace misconduct such as harassment, discrimination, retaliation or hazing. Members may be deterred from participating in behaviors that create a hostile work environment or leads to constructive discharge if they know safeguards are in place to discover misconduct and punish wrongdoers.

Prevention of constructive discharge:

- **Take the pulse of the work environment** – Top ESO officials are often last to know of workplace conflict between front-line workers. A member may be able to tolerate certain behaviors for a limited period of time but eventually the cumulative effect of such wrongdoing may compel the member to quit.

- **Periodically disseminate a Workplace Misconduct policy** – A policy is impactful if periodically disseminated to ESO members that acknowledge their understanding in writing. To best protect members, it is recommended the organization revisit workplace misconduct policies annually at a minimum.

- **Training** – ESO leaders should assess the organization’s training programs designed to foster a positive work environment. Don’t forget to view the effectiveness of the training
program from the perspective of the least powerful employees of the workforce. Provide a forum where members feel comfortable asking sensitive and personal questions about their work experiences. Rather than plugging in a video, consider utilizing an external trainer with expertise in employment law and familiarity with the industry. A member subjected to or aware of a hostile work environment may be more likely to raise concerns with a third-party trainer, so an unbiased internal or external investigation may commence.

- **Explain investigative processes** – Educate members of the internal and possible external investigation procedures that will be taken to stop workplace misconduct. Transparency and open communication will increase the likelihood that members will avail themselves of the reasonable complaint and investigative processes, thus avoiding constructive discharge claims.

**Preparedness Means Fairness**

It is strongly recommended that an ESO take appropriate personnel and board members through extensive training on its existing disciplinary and termination guidelines. Practice means preparedness. The goal is to ensure a fair process is in place that benefits all personnel and helps eliminate procedural mistakes. Organizations are not immune to wrongful termination or constructive discharge claims and can take immediate steps to reduce the exposure to liability.
Chapter 11:
Workplace Retaliation and Risk Management

Unlawful retaliation can be defined as an ESO taking adverse action or punishing an employee or volunteer for engaging in a legally protected activity, such as lodging a complaint of workplace misconduct or participating in a related investigation. Generally, the action taken against the worker must materially injure or harm the worker and would dissuade a reasonable person from participating in the legally protected activity. Thus, the ESO’s conduct would need to be materially adverse to the worker to rise to the level of actionable retaliation. It is important to distinguish between significant and trivial harms, as ordinary tribulations in the workplace would not be considered unlawful retaliation.

Retaliation When Underlying Claim Is Unfounded

An ESO can be held liable for work-related retaliation even when the underlying cause of action (e.g., harassment or discrimination) is unfounded. For example, a member may complain about perceived harassment. In actuality, the behavior in question may not qualify as harassment according to legal standards. Regardless of whether the underlying conduct constitutes unlawful harassment, the original complainant or others participating in the associated investigation can suffer retaliation, which may stand on its own as a cause of action.

Retaliation After Perceived “Resolution” Of A Problem

Many retaliation claims stem from alleged retaliation that occurred well after the perceived resolution of the underlying problem. For instance, a member complains internally of workplace harassment. Then the ESO promptly and effectively stops the harassment, conducts an investigation, disciplines the wrongdoers, warns against retaliation and instructs the harmed member to inform the organization of further harassment or future retaliation. The ESO may perceive the issue has been resolved.

Be aware, however, that many occurrences of retaliation take place well after agency employees are put back to work. Thus, ESO leaders are encouraged to monitor the work environment by checking in periodically with the interested parties. Take time to document frequent communications with the persons who lodged the initial complaint, those accused of wrongdoing, witnesses and co-workers. Be proactive and monitor the work environment for real or perceived retaliation or other associated personnel problems.
Retaliatory Discharge Claims

ESOs face increased exposures to litigation when an employee or volunteer is discharged. Wrongful discharge or termination lawsuits are commonly linked to an underlying allegation of retaliation. This unlawful work practice may also be referred to as retaliatory discharge and an agency may be held civilly liable for damages.

**ESO workers wonder, “Why was I really terminated?”**

Whenever a member is terminated, he or she may experience a wide range of emotions – surprise, anger, embarrassment, confusion and defensiveness. Psychologically, individuals are often in denial about whether their performance or conduct warranted termination. Looking for answers, workers will question the real reasons for the termination.

A discharged member will look back at the work experience and wonder if having participated in a legally protected activity is the ultimate reason for termination. Former workers and even some remaining personnel may perceive that there is a connection between the termination and having engaged in legally protected activities. Knowing this, it’s important for an ESO to be able to prove the legitimate, documented reasons for the termination are unrelated to the employee’s prior complaint or participation in other protected activities.

**Careful examination of ESO’s termination decision**

ESO leaders make many important personnel decisions such as hiring/selection, evaluations, promotion, demotion and discipline. However, there is no more impactful personnel decision an organization can make than termination of employment. For purposes of mitigating exposure to retaliation and wrongful termination claims, it is essential for an ESO to identify real or perceived links between a possible termination and prior participation in legally protected activities.

**Participation in legally protected activities**

Workers fear retaliation, primarily in the form of termination, for participating in legally protected activities. ESO leaders should be on guard of the possibility of retaliation against workers who are involved in protected activities such as the following:

- Making an allegation or claim of workplace discrimination or harassment.
- Acting as a witness in a discrimination or harassment investigation or other formal proceeding such as a deposition or trial.
- Filing or otherwise participating in an employee or volunteer grievance procedure.
- Opposing unlawful workplace practices that they or others have been subjected to.
- Threatening to oppose unlawful workplace practices.
- Serving as a witness in any internal or external investigation.
- Supporting co-workers that have engaged in protected activities.
- Close associations with someone who has engaged in protected activities.
- Reporting unsafe working conditions or financial or ethical improprieties (whistleblower laws).
• Complaining about wage and hour violations.
• Forming or attempting to form a union or participating in legitimate union activities (unfair labor practices).
• Filing a workers’ compensation claim or suffering from a work-related injury or illness.
• Refusing to obey a directive from a supervisor or superior that is reasonably believed to be discriminatory.
• Requesting accommodations related to legally protected class status like disability or religion.
• Requesting or taking leave, such as family and medical leave, maternity or paternity leave, sick leave or disability.

Best Practices for Retaliation Prevention

ESOs should examine what processes are in place to protect against retaliation. For claims that the organization’s termination of a member was because of retaliation, the organization’s formal processes that protect against retaliation may be under the microscope. Consider the following best practices for retaliation prevention:

• **Non-retaliation policy** – Consider implementing a stand-alone non-retaliation or whistleblower policy that includes multiple avenues (preferably three) of internal complaint. Moreover, the policy should include:
  o External avenues for reporting retaliation such as to board members or a third-party human resources consulting group, to ensure there is no blockage of internal reporting or resolution.
  o Conflict of interest protections, such that anyone named in a complaint will not be part of the investigative team.
  o ESO members subjected to real or perceived retaliation should not be required to confront the person(s) creating or participating in the retaliation.
  o The organization will conduct a prompt and thorough investigation and may utilize an outside third-party investigator to help resolve allegations of retaliation.
  o All personnel sign an acknowledgement form annually that reiterates their understanding of the non-retaliation policy and various avenues of internal and external complaint and resolution.

• **Reaffirm non-retaliation policies with parties engaging in legally protected activities** – Retaliation typically occurs after a member exercises a legally protected right such as lodging a complaint of workplace wrongdoing. Therefore, ESO leaders are encouraged to positively and frequently communicate with those involved to protect against retaliation. For example, appropriate designees should reissue the non-retaliation policy and periodically check in with any member that makes a complaint of harassment, discrimination or other wrongdoing to protect against retaliation. It is a sound risk management step to communicate with the person accused of wrongdoing and witnesses to prevent retaliation. Finally, checking in with co-workers of the parties directly involved allows the organization to keep tabs on morale and promote a safe and productive work environment.
• **Exit interviews** – If an ESO member is leaving voluntarily or involuntarily, conducting an exit interview should be considered. Individuals who believe they were retaliated against may be reluctant to speak out immediately out of fear of further retaliation. Offering an exit interview with neutral persons such as those not acting as the departing member’s immediate supervisor, may encourage reporting. Exit interviews should include the following questions, “During your work experience, did you suffer any form of retaliation? If so, could you please provide detailed information so the ESO can commence a comprehensive investigation?”
Chapter 12: Drug and Alcohol Free Workplace Program

Of all the workplaces in a community, the public reasonably expects emergency services providers to have the most ironclad risk management program for substance abuse possible. ESOs should ensure the use and abuse of drugs and alcohol does not jeopardize safety standards. Implementing an effective substance abuse prevention program is not as simple as issuing a policy. There are many risk management options available to protect ESO members and the public at large.

Risk Management Program

Instituting a drug and alcohol risk management program entails more than stating in policy that the organization doesn't tolerate illegal drugs or alcohol usage that impacts work performance. A comprehensive drug-free workplace program may include:

- Drug and alcohol free workplace policy.
- Supervisory level training.
- Employee education and awareness.
- Employee assistance programs.
- Drug testing.

ESOs may choose not to implement the five components listed above in their entirety but it is recommended that all components are considered when developing a risk management program. Establishing goals or objectives for the substance abuse prevention program may include:

- Safety for employees and the public served.
- Build community trust and confidence that employees are working safely.
- Prevent hiring employees who use illegal drugs.
- Eliminate drug-related accidents, illnesses, absenteeism and loss of productivity.
- Promote worker health and wellness.
- Detect drug or alcohol use that may impact job performance.
- Educate employees about the risks associated with drug and alcohol use and provide resources for assistance and treatment.
- Protect employees' confidentiality and other legal rights.
- Equitable enforcement and application of the drug-free workplace program.
- Adhere to applicable laws and regulations.
Policy Development

A well-constructed drug and alcohol policy serves as the foundation for a drug-free workplace program. Topics that should be addressed in the policy include:

- **Illegal drugs and alcohol** – At a minimum, the ESO should clearly prohibit the use, influence, manufacture and distribution of alcohol or illegal drugs in the workplace or during any business-related activity and communicate consequences of a policy violation. Members must report to work with the mental and physical abilities to perform the essential job functions and no detectible levels of alcohol or illegal drugs should be in their system.

- **Legal/prescription drugs** – For safety reasons, the policy should address employees who have reason to believe their use of legal or prescription drugs may impair their ability to do the job and thus pose a threat of injury or harm to themselves, coworkers or citizens. Members may be asked to report usage of legal or prescription drugs to their immediate supervisor, others within the chain of command or a human resources representative so a medical determination can be made as to whether job restrictions are necessary.

- **Drug-testing** – If the policy includes a drug-testing program, spell out exactly what substances will be tested for, who may be tested, when they may be tested and the consequences for positive test results. Clarify whether testing will be conducted for alcohol or prescription drugs that may present safety risks.

Training Those With Supervisory Authority

Those with supervisory responsibilities should receive periodic training on monitoring and enforcing the ESO’s substance abuse prevention program. Topics may include:

- Understanding the ESO’s policy and prevention program.
- Recognizing signs of substance abuse.
- Defining what constitutes reasonable belief or just cause to warrant issuing a drug test.
- Making lawful referrals to available resources such as an Employee/Member Assistance Program.
- What steps a supervisor should take if an ESO member divulges substance abuse problems or dependency on alcohol or drugs.

Employee/Member Education and Awareness

Take ample time, at least annually, to review the organization’s written drug-free workplace policy with employees/members. ESO leaders should review the purpose of the drug and alcohol risk management program, examine drug testing procedures, reinforce consequences for
violating policy and allow for questions and answers. Emphasize the dangers of substance abuse and available support and assistance mechanisms provided. Focus on protecting all personnel and the community from safety risks as well as the organization’s commitment to detection and rehabilitation.

Employee/Member Assistance Programs

The ESO should offer what is commonly referred to as an EAP (Employee Assistance Program), which allows personnel to confidentially access substance abuse and mental health professionals at a time of need. Employees/members may voluntarily seek EAP resources, an EAP may be utilized as part of a referral process or EAP participation may be part of a rehabilitation program after a positive drug test. The ESO may also provide education about other programs such as Alcoholics Anonymous or Narcotics Anonymous.

When to Conduct Drug and Alcohol Testing

1. **Pre-employment or selection** – Part of the application process may include drug screening to help prevent hiring or selecting illegal drug users. The test is typically conducted after making a conditional offer of employment or membership. Testing normally does not include alcohol screening.

2. **Reasonable suspicion** – Also referred to as probable or just cause screening, this test is conducted after persons with supervisory responsibilities document observable signs or symptoms that lead them to suspect drug or alcohol use on the job or during a business-related activity.

3. **Post-accident, injury or incident** – Employees/members involved in a job-related accident, injury or incident may be tested. Objective criteria should be established to determine under what circumstances a drug test is necessary, such as injuries requiring medical care or an accident involving damages of a certain estimated monetary amount.

4. **Annual physicals** – This periodic testing helps ensure personnel are not using illegal drugs.

5. **Random** – This testing should be a third-party administered program where members are randomly selected to submit at a local facility for drug or alcohol testing. This program is designed to discourage drug and alcohol use by using the element of surprise in testing.

6. **Follow-up or post-rehabilitation** – Screening may be conducted on an employee/member who has violated the policy but was not terminated. Generally, the individual must submit to this testing as a condition of keeping his/her job following a violation of the policy.

Legal Review

Involve the ESO’s labor and employment attorney in the development and implementation of a drug-free workplace policy and program. Legal counsel can help navigate the complexities of federal, state and local laws that may apply to the risk management program, particularly drug testing. Moreover, legal guidance is necessary when working with a collective bargaining group.
Chapter 13: Protection of ESO Junior Members/Volunteers

It's important for ESOs to protect its most vulnerable employees, volunteers and others associated with the organization from wrongdoing. Special risk management considerations should be made by ESOs with junior firefighters, emergency responders or other programs designed to introduce community youth to the emergency services industry. This chapter focuses on the heightened need for ESOs to protect junior members from sexual abuse or misconduct, hazing, harassment, discrimination and other wrongdoing.

Junior Members’ First Professional Environment

An ESO’s junior member program could likely be youths’ first exposure to a professional work environment. This places even more of a responsibility on the ESO leadership to set expectations with all workers for proper behavior and appropriate boundaries for working with junior members. Those with supervisory duties serve as the eyes and ears of the organization and uphold the ESO’s policies prohibiting misconduct.

Sexual Abuse and Misconduct

Like any organization that supervises youth, ESOs are under a legal and moral obligation to protect against sexual abuse and misconduct for junior members. An ESO’s risk management program should be clearly defined, strongly supported by leadership and implemented throughout the organization.

Background checks – Mitigate risk by conducting thorough background checks for employees, volunteers, board members and others (e.g., contractors) affiliated or doing regular work with the organization. Regardless of the organization’s size, due diligence must be performed to ensure persons with criminal backgrounds are not being put in situations to harm anyone associated with the organization, particularly minors. In addition to criminal background checks, complete professional and personal references and face-to-face applicant interviews.

• Increase awareness of how to report sexual abuse and misconduct – Victims and witnesses of abuse or misconduct often don’t complain because of a lack of knowledge and trust of internal reporting, investigative and resolution processes. Take action to ensure persons affiliated with the ESO are fully aware of internal and external complaint and investigation procedures. Publish a written sexual abuse and misconduct prevention policy that is easy to understand and delivered to everyone associating with the ESO.
• **Lack of knowledge** – Periodic and wide dissemination of how to report sexual abuse or misconduct helps empower the most vulnerable to seek internal or external resolution.

• **Lack of power** – Victims of abuse and misconduct are often persons without power, authority or tenure. They may fear lodging a complaint against a long-term and well respected individual within the ESO. Often victims, witnesses or others made aware of wrongdoing may not trust the neutrality and transparency of the organization’s internal investigation or response processes because the alleged offender is a prominent figure in the organization. Consider an ongoing business relationship with an outside risk management consultant or group in order to highlight the ESO’s pledge to avoid an abuse of power, internal cover-up or lack of transparency.

• **Deterrent effect** – A perpetrator is less likely to commit misconduct if he or she knows the victim(s) and witnesses receive periodic prevention training, have a clear understanding of the available avenues of complaint and the ESO will take decisive actions to stop wrongdoing.

**Training for all groups** – Employees, volunteers, youth associated with the ESO and the parents or guardians of the youth should be trained on the prevention of sexual abuse and misconduct. Annual training sends the organization’s strong message that wrongdoing is not tolerated and immediate response processes are in place. These individuals should be educated on the ESO’s policy against sexual abuse and misconduct, which provides multiple avenues of internal and external complaint and resolution.

Training should allow the opportunity for questions to be answered during and after sessions. A victim, witness or other person that suspects or learns of sexual abuse or misconduct may feel most comfortable asking a trainer questions in confidence after a group training session because of the serious nature of the subject matter. Not providing a periodic training forum may keep inappropriate behavior or incidents in the dark and fosters an environment where problems continue or escalate.

Consider utilizing a professional from outside the organization to facilitate credible training on sexual abuse and misconduct prevention for all groups. A third-party expert helps demonstrate the ESO’s transparency and willingness to prevent, learn of and promptly respond to misconduct.

**Training topics for sexual abuse and misconduct prevention** – In addition to distributing a written policy, also consider the following topics for educating all ESO employees, volunteers, junior members and junior members’ parents and guardians:

• Define sexual grooming and other risky behaviors.
  • Methods by which abusers get victims to comply with their sexual wishes.
  • Intent of grooming is to lull the youth into a sense of ease and gaining the youth’s trust.
  • Sexual grooming may be easiest when there is a preexisting relationship.
  • Sexual grooming typically progresses through various phases, each more outrageous.

• Warning signs or red flags of an inappropriate relationship with a minor or youth affiliated with the ESO.
  • More attention given to an individual youth.
• Gifts given to youth such as money, clothes, video games or movie tickets.
• Activities with youth that are outside the scope of business-sponsored or related functions.
• Giving a particular youth additional or unneeded assistance.
• Allowing a particular youth to get away with inappropriate behaviors more than other youths.

• Other warning signs of child sexual abuse or misconduct.
  • Common behaviors or emotions exhibited by a victim of abuse such as withdrawal, depression, unexplained rebellion or anger.
  • Physical signs of abuse.

• Avoid allowing youth to be put in locations where sexual abuse or misconduct is more likely to take place.
  • Meeting privately in unsupervised settings.
  • Behind closed doors.
  • Off-duty or away from work.
  • Home visits (in offender’s or victim’s home).
  • Out of town trips, such as business-related conferences.
  • Car rides.
  • Sleepovers.

• One-adult/one-youth policy.
  • Prohibit situations where one youth is alone with one adult and is not directly visible by others.
  • If one-adult/one-youth instruction or mentoring is required, measures should be taken to ensure that others can observe the private meeting and be able to interrupt at any time.
  • Other options for safety policies may require two adults with one youth or one adult with two youths.

• Inappropriate physical touching.
  • Purpose of the offender is to desensitize the youth to touching.
  • Rub shoulders or other massage.
  • Lingering touches.
  • Tickling, wrestling, horseplay or lap sitting.
  • Accidental touches in inappropriate places.
  • Frequent touches.

• Define appropriate electronic communications between youths and supervising adults.
  • Various methods of communication.
  • Frequency, duration and context of these communications should be examined.
• Subject matter of conversations or communication.
  o Sexual in nature (jokes, innuendoes or banter).
  o Flattery or flirting.
  o Gifts given to a youth.

• Adults providing alcohol, drugs or pornography to youths.

• Mandatory reporters – persons mandated by law to report child abuse and neglect.
  o Knowledge of applicable mandatory reporting laws in the jurisdiction.
  o Penalties will be imposed for those who fail to report reasonable suspicions or known child abuse.

Signed Acknowledgement Forms – It is essential to ensure all persons affiliated with the ESO acknowledge their understanding of the multiple avenues of internal and external reporting of suspected or known sexual abuse or misconduct. Employees, volunteers, board members, junior members, youth affiliated with the organization and their parents or guardians should receive and sign these acknowledgement forms. Well written forms include statements that the ESO will conduct a prompt and thorough internal investigation and complete a conflict of interest check to ensure persons named in a complaint will not be part of the investigative team or efforts. Persons should also acknowledge their understanding that an outside third-party investigator may be utilized to resolve allegations of wrongdoing, which emphasizes the ESO’s transparency. Lastly, give persons an opportunity to ask questions about the organization’s sexual abuse and misconduct policy, accompanying training and content of the acknowledgement form.

Investigation and response procedures – Because of the serious nature of sexual abuse or misconduct, ESOs must never ignore allegations, even if the accusation may seem unbelievable to some. Be aware of the legal requirements to report allegations or incidents of sexual abuse or misconduct to appropriate law enforcement or child protective services organizations.

• Internal investigation procedures – Because of the progressive nature of sexual grooming or inappropriate behaviors, be prepared to respond to reports of possible inappropriate conduct or red flags between a youth and adult member or other person affiliated with the ESO. Following standardized internal investigation and interviewing procedures will help ensure uniformity and fairness. Moreover, it is recommended that those within the ESO designated as internal investigators also receive training on how to respond appropriately and legally to sexual abuse or misconduct suspicions or accusations.

• External investigation resources – Persons accused of inappropriate sexual behavior, misconduct or abuse are typically in more powerful positions of authority than those making the accusations. Therefore, utilizing an outside third-party investigator for sexual abuse or misconduct allegations may be an appropriate risk management step to defend the integrity of the investigative process. External third-party professionals can help protect against any real or perceived cover-up in the investigation or resolution of the misconduct allegation.

• Several factors may be considered when determining whether utilization of a third-party investigator would be beneficial in responding to an allegation of wrongdoing:
  o Nature and severity of the alleged offense.
High ranking official accused of wrongdoing.

Real or perceived conflict of interest with facilitation of an in-house investigation.

Perception that the internal investigation would be insufficient due to a lack of specially trained or educated internal resources.

Multiple complainants.

Hazing, Pranks and Horseplay Involving Junior ESO Members

Junior ESO members being subjected to pranks, horseplay or hazing may result in an ESO facing significant safety and legal risks. It can be a fine line between pranks, horseplay or hazing and what may constitute unlawful harassment or discrimination. ESO leaders must set the tone that inappropriate, unsafe or unlawful behaviors will not be allowed or tolerated. Junior members may not be confident enough to speak out about questionable behavior that may be part of the traditional rite of passage.

Defining Unlawful Workplace Harassment – Those supervising junior ESO members must be able to distinguish between what may be acceptable banter, joking or horseplay and what constitutes unlawful harassment. Below is analysis to help assess workplace conduct to determine whether a legal line of harassment or discrimination has been crossed.

- **Was the conduct severe?** Would the behavior in question be considered so severe that the work environment was significantly altered even though the incident occurred once or rarely? Examples of severe physical conduct include groping or violence.

- **Was the behavior pervasive?** Did the physical or verbal conduct take place frequently enough and over a long enough period of time that an unlawful hostile work environment resulted? Did being subjected to the pervasive behavior become a defining condition of the ESO environment? Did the behavior unreasonably interfere with the junior member’s ability to do his or her job?

- **Offensive to the junior member/complainant?** Did the junior member welcome the behavior in question or actively participate? This can be a dangerous issue to assess because often a junior ESO member will stay silent and from outward appearances go along with the joking, banter or horseplay. It is important to remember that those in the least powerful positions, such as junior ESO members minors, may endure inappropriate conduct for an extended period of time in an effort to gain acceptance with the current organization employees, volunteers or board members.

- **Offensive to most reasonable people?** Under this objective test, it must be determined whether the conduct would be considered unlawful harassment by most reasonable workers. Remember that this analysis isn’t limited to what behavior would be considered inappropriate or offensive to most emergency services personnel.

- **Subjected to the behavior because of legally protected class status?** It is sometimes difficult to know for sure whether certain inappropriate or harassing conduct is directed at an individual because of legally protected class status (race, gender, national origin, religion, disability, age, etc.). However, by allowing questionable behavior to permeate the ESO environment, an organization leaves itself vulnerable to the perception that certain protected groups are subjected to more severe or pervasive conduct that may be rooted in discrimination.
Chapter 14: Conclusion – Are You at Risk?

Can your ESO objectively prove that it took every reasonable measure in the last 12 months to prevent workplace wrongdoing and prepare the organization to promptly respond to any allegations? Is there a close working relationship with legal counsel specializing in labor and employment matters? Your organization can control its level of vulnerability for personnel-related lawsuits by implementing sound risk management processes.
Appendix A: Summary Questions

1. List five possible employment practices risk management training topics that could be provided to supervisory personnel within your ESO.

2. Explain different opportunities during the working relationship to encourage reporting and reinforce various avenues of internal complaint for incidents of workplace wrongdoing.

3. Explain what steps an ESO should take in establishing or revising a performance evaluation/management process.

4. List five ways an ESO can demonstrate its level of preparedness for investigating an allegation of workplace wrongdoing, such as unlawful harassment or discrimination.

5. Explain the concept of constructive discharge and with an ESO can do to protect against constructive discharge claims.

6. Explain some of the potential personnel litigation risks associated with ESO members utilizing technology such as Internet, email and social media. List appropriate risk management procedures to address technology-related exposures.