

Employment Practices *Update*

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Retaliation and wrongful termination: *Links to Liability*

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Emergency service organizations (ESOs) often 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 ESO may be held civilly liable for damages.

To help prevent claims of workplace retaliation and unlawful termination, there are various options available to ESOs.

Ask the question; Is it possible that there is a causal link between the desire to terminate an ESO worker and that worker having participated in a legally protected activity?

Respect the risks

It's important for ESO leaders to understand the increased exposure to claims and lawsuits from former workers alleging retaliation and wrongful discharge. By recognizing the heightened risks to such claims, ESO leaders can take appropriate measures to ensure equity and consistency in handling personnel matters. Risk awareness allows the ESO to diligently examine the circumstances behind the termination and carefully scrutinize any possible link of retaliation.

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

Whenever an employee or volunteer 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 question the “real reasons” for the termination.

A discharged ESO member may look back at the work experience and wonder if having participated in a legally protected activity is the ultimate reason for termination. Knowing this, an ESO must be able to prove the legitimate, documented reasons for the termination are unrelated to the member's prior complaint or participation in other protected activities.

Participation in legally protected activities

It's necessary for ESO leaders to make the impactful personnel decision on termination of employment or membership. For purposes of mitigating exposure to retaliation and wrongful termination claims, it is essential for an ESO to identify links between a possible termination and prior participation in legally protected activities.

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Workers fear retaliation, primarily in the form of termination, for participating in legally protected activities. Consider 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 coworkers 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

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

- **Non-retaliation policy** – It is recommended that an ESO implement a stand-alone non-retaliation or whistleblower policy that includes multiple avenues of internal complaint. Moreover, provide external avenues for reporting retaliation to board members or a third-party human resources consulting group in order to eliminate blockage of internal reporting or resolution. A well written policy includes conflict of interest protections such that anyone named in a complaint will not be part of the investigative team. Consider stating that the organization will conduct a prompt and thorough investigation and may utilize an outside third-party investigator to help resolve allegations of retaliation. Lastly, consider requesting 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 an ESO worker 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 ESO designees 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 ESO to keep tabs on morale and promote a safe and productive work environment.

- **Exit interviews** – If an ESO member is leaving voluntarily or involuntarily, consider conducting an exit interview. 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. Include the following questions in exit interviews: 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?

Special concern – constructive discharge

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 ESO worker may argue, I may as well have been terminated, because I had no other reasonable option but to quit and avoid further intolerable working conditions.

By understanding the constructive discharge doctrine, leadership may protect against co-workers that “run off” an ESO member that previously engaged in a legally protected activity. Once again, offering face-to-face exit interviews or through the mail is an advisable risk management process.

Conclusion

Ask the question; Is it possible there is a causal link between the desire to terminate an ESO worker and that worker having

participated in a legally protected activity? In practicing sound risk management, an ESO can be its own toughest critic when analyzing the documented support for the termination as well as ruling out the possible link of causation between the worker participating in a legally protected activity and the decision to terminate.

By understanding the constructive discharge doctrine, leadership may protect against coworkers that “run off” an ESO member that previously engaged in a legally protected activity.