



We Still Don't Get It: Avoiding the "Top Ten" Human Resource (HR) Management Pitfalls in the Fire Service

by Douglas M. Wolfberg, Esq. & Stephen R. Wirth, Esq.
©2008, Used by Permission.

When the phone rings at our law office, we know we have trouble when the first words out of the mouth of the client are "Our state is still an employment at will state, isn't it?" In our law practice, which exclusively represents EMS, ambulance and fire service organizations across the U.S., these words set off the red flags. That's because we know that the manager has *already* fired the employee and is not calling for advice on how to deal with the "problem" staff member. He's calling to have us affirm the decision and tell him its legal, because now the manager is having second thoughts.

The risk of employment lawsuits has gone up exponentially in recent years. Juries tend to be sympathetic to plaintiffs in these cases. Fire service managers need to pay more attention than ever before to the "people" issues in their organizations. In that spirit, we have identified the top ten human resource (HR) management risks and pitfalls, based on actual experience in our EMS and public safety law practice.

1. Lack of Basic Management Training and Supervisory Skill Sets

Many fire service and EMS managers have "come up through the ranks." Many of those managers have been great firefighters or EMS providers, but street savvy does not always equate to an ability to effectively deal with personnel issues. In these situations, "people savvy" is needed to deal with equally complex personnel issues that come up on a daily basis. Many managers have not been fully prepared to deal with these issues. Many lack formal education in human resource management

or don't have access to enough management training. These managers can quickly get their organization in trouble by mishandling the people problems and not understanding the proper and legal approach to dealing with staff.

2. Not Keeping the Bad Apples Out: Poor Selection Procedures

Solid staff evaluation and selection procedures can do wonders in weeding out the "bad apples" and in saving the organization much grief down the road. By only bringing into the organization quality staff members, management's job is much easier and it's easier to develop a workplace that everyone in the organization can feel good about. They take pride in the fact that the organization does not go to the bottom of the barrel and let "just anyone" in the door. There is far less legal risk when you keep out the bad apples in the first place, instead of dealing with them once they are hired or accepted.

Start with the basics. Develop a legally-sound employment application and ask the right questions about the applicant's driving record, criminal history, training and education, and past experience. Have the applicant sign a disclaimer that protects the organization when conducting reference checks and pre-employment testing. Verify licenses and EMS certifications with the issuing body. Ask applicants to explain any negative history. Consider a "post offer" drug testing program, making all offers of employment contingent on successfully passing a drug test. Get good legal advice and work with a professional lab that is expert in implementing these programs.

3. Inadequate Staff Handbooks, Policies and Position Descriptions

Expectations for your employees or members need to be spelled out. It is critical to have up-to-date job descriptions, as well as current and relevant employee handbooks and policies. Keep in mind that many policies are required by law. For example, policies on pay practices describing how overtime is paid, when the pay period starts and ends, and how and when paychecks are issued are essential. These handbooks and policies can be a valuable defense in a lawsuit, and need to be followed by managers and staff members alike.

4. Improper Calculation of Overtime and Other Pay Issues

The fire service seems to be particularly susceptible to errors in overtime calculation. The most common pitfall is the proper application of the so-called "7-K" exemption that allows fire departments to reduce overtime expenses by paying firefighters overtime only after they work 53 hours in a workweek, instead of the traditional 40 hours. Some fire departments improperly classify employees whose primary jobs are to provide EMS as "firefighters" for purposes of this exemption, sometimes resulting in large back pay awards against the department. It is critical to ensure that your pay practices comply with federal and state laws.

5. Ineffective Sexual Harassment and Discrimination Policies

We continue to see many blatant violations in EMS and the fire service of the laws against sex discrimination, primarily in the form of sexual harassment. Some departments seem to have established a "culture" that encourages or tolerates this sort of improper and unlawful conduct. Sexual harassment cases can be costly, and the days of the "good old boys" club in the firehouse are long, long gone.

6. Improper "Workplace" Investigations and Discipline and Termination Procedures

Our late partner and industry giant, Chief Jim Page, was a strong proponent of "due process" for staff members in any investigation of alleged improper conduct. Providing "due process" to the staff member helps ensure that management decisions are not only legal, but that they are fair and reasonable. Due process means that at a minimum the staff member should know the content of the allegations, and be given an "opportunity to be heard" and to explain the conduct, typically *before* an adverse action is taken. Too often we have seen managers who have made arbitrary decisions without fully investigating the situation or before giving the "accused" a chance to be heard. Many times the alleged perpetrator (the accused staff member) is not even interviewed during the investigation! This violates the fundamental foundation of due process, which may lead to a bad decision and potential legal liability.

7. Mishandling Return to Work Issues

The fire service and EMS environment is not easy on the back, and staff members are prone to these and other injuries simply based on the nature of the work. But some managers have a tendency to "write off" the staff member or discriminate against them based on the injury or disability. There are many legal protections for employees under state Workers' Compensation Laws and federal and state discrimination laws, like the Americans with Disabilities Act.

Most discrimination laws don't protect an employee from discrimination when the "disability" is temporary, but the law can be violated when the staff member is "regarded

as having an impairment" or "has a record of an impairment." The classic case is to deny an employee from returning to work solely on the basis that the employee filed a workers' compensation claim, or that you think the back injury has disabled the employee even when they have been cleared for return to their original job.

8. Not Respecting Employee Rights Under a Collective Bargaining Agreement

Many fire departments are unionized. This means that the "collective bargaining agreement" (CBA) becomes the "law" when dealing with the wages, benefits, and other terms and conditions of employment. The CBA transforms the employment relationship from "at will" to "just cause" (where an employee can only be fired when there is a good and legitimate reason). Often the elements of what defines "just cause" are spelled out in the CBA, along with a defined grievance procedure. If management deviates from the terms of the CBA or an employee is fired without just cause, the union can file a grievance and an arbitrator will decide if there was a violation or if there was no just cause for the action.

9. Inadequate "Personnel Documentation" to Support Decisions

Fire departments spend a lot of time on documentation, especially if they provide EMS care. However, they are often lax when it comes to management documentation. Clear and accurate management documentation of "critical incidents" involving a staff member helps ensure an adequate paper trail to support management decisions in a lawsuit or government investigation or hearing. This documentation should also include

positive critical incidents, as in the case where a staff member went above and beyond their normal duties to help the public or to recognize a significant staff member accomplishment. Spending time recognizing the "good incidents" gives management a more "balanced view" of the staff member and enhances job satisfaction.

10. Not Getting Legal Counsel Involved Early Enough

It's the old adage; "you can pay us now or pay us later." But what some fire and EMS managers don't realize is that it is actually less expensive to get qualified legal counsel involved *early* in the situation, often before a final course of action is decided. Lawyers work best when they can prevent a lawsuit in the first place. Spending half an hour on the phone with legal counsel can save hours down the road. When unsure about the law, spending a little time *before* taking action can help ensure that: 1) the action you are about to take is legal, and 2) a formal complaint or lawsuit will be less likely to be filed, and 3) if one is filed, following legal advice may be an effective defense in the event the action is challenged.

Conclusion

Making mistakes when dealing with staff in the myriad of HR issues that fire and EMS managers confront on a daily basis can lead to significant liability. HR mistakes can also have long term impact on the health of the organization when staff members lose respect for their leaders and morale is decreased. Establishing a framework that includes solid management training, effective policies and procedures, and fairness in dealing with staff members will lead to legal decisions, positive morale and a sense of pride in the organization that everyone appreciates and talks about.

About the Author: Doug Wolfberg and Steve Wirth are founding partners of Page, Wolfberg & Wirth, LLC, a national law and consulting firm devoted to EMS and the fire service. Visit their website at www.pwwemslaw.com, where you can sign up for their free e-mail bulletins to stay informed on the latest public safety legal news. You can also catch Doug Wolfberg at the upcoming IAFFD conference June 19-21, 2008.