

Emerging Legal Issues



Avoiding High Risk Legal Events

A Legal Primer Desk Book

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I. FREE LEGAL ADVICE

- (a) There are many laws or Policies we must follow
- (b) Don't break them
- (c) You won't get sued

II. GOALS

- (a) Awareness of your legal leadership responsibilities and liabilities
- (b) Understanding your professional and personal accountabilities
- (c) Managing and avoiding risk
- (d) Create a safe work environment for your employees
- (e) Supplement your readings

III. HOW YOU ARE VIEWED

- (a) Fire and EMS Departments are a different employer
- (b) Leadership is responsible for all activities in the organization
- (c) Held to a higher standard by society
- (d) Applies equally to volunteer, combination and career fire and EMS organizations
- (e) High Profile Issues

IV. FIRE DEPARTMENT HIGH RISK ISSUES

<ul style="list-style-type: none">• Employer Liability• Violation of Federal Law• Vehicle Accidents• Intersection most often• Excessive Speed• Training Liabilities• Promotional Process• Discrimination• Reverse discrimination• People - Discrimination• Sexual Harassment• Non- Sexual Harassment• Hazing/Bullying• Civil Rights Violations• Termination and Discipline Issues• Hiring Issues• Whistle Blower Retaliation• Criminal and Civil Issues• Assault	<ul style="list-style-type: none">• Theft• Getting Lost• Bad Dispatch Information• Crew unfamiliarity with service area• Patient Care Issues• Abandonment• Dropping Patients• Gurney Failures• Failure to Transport• Dropping Patients• General Medical Malpractice• Airway Management• Improper Extrication• Spinal Immobilization• Employee Fatigue• Medical Errors• Equipment Problems• "Dead Defibrillators"• Empty Oxygen Tanks• Inoperable EMS Equipment
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V. FIRE DEPARTMENT TRIGGER POINTS – Mostly Federal Law Violations

<ul style="list-style-type: none"> • Employer Issues • Age Discrimination in Employment Act (ADEA) • Sex Discrimination and Harassment • Hiring Discrimination • Pregnancy Discrimination • USERRA – Military Leave • Immigration Reform and Control Act 	<ul style="list-style-type: none"> • Religious Discrimination • Release of Patient Information • Retaliation • Wrongful Terminations • FMLA • FLSA • HIPAA Violations
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VI. FIREFIGHTER TRIGGER POINTS

<ul style="list-style-type: none"> • Creating a Hostile Work Environment • Harassment/hazing • Bullying • Supervisory Issues • Personal Liability • Internet Abuse • Cyberbullying • Stalking • Policy Violations 	<ul style="list-style-type: none"> • Violation of Email Use • Off Duty Behavior • Domestic Violence • Social Media Postings • Substance Abuse • Driving Violations • On duty • Off Duty • Theft
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VII. FIRE LEADERSHIP DUTIES

<ul style="list-style-type: none"> • Lead • Involvement • Manage • Political Involvement • Educate • Developing future leaders • Train 	<ul style="list-style-type: none"> • Improving performance • Response • EMS, Suppression, Rescue, Service Calls • Customer Service • External & Internal • Personnel Management
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VIII. PERSONEL MANAGEMENT

- (a) Your staff is your greatest asset
- (b) Your staff is your greatest liability

IX. HIGH RISK ISSUES - Today's Discussion

<ul style="list-style-type: none">• Polices and Best Practices• Code of Conduct & Ethics• Hostile Work Discrimination and Harassment• Progressive Discipline	<ul style="list-style-type: none">• Documentation• Social Media & Freedom of Speech• Driving
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X. Is Ms. Smith Suing our Fire Department – Statistically, it is our own people (Varone 2017)

XI. A TRUISM

- (a) Fire Leadership, Fire Fighters and EMS Providers acting within the discretionary scope of their job are generally immune:
- (b) It's egregious actions outside this scope, such as failing to rescue on duty or committing a non-duty violation, that are and should be cause for alarm.

XII. LAWS AND ORGANIZATIONS AFFECTING THE FIRE SERVICE

- (a) Federal
- (b) State
- (c) Washington Administrative Codes (WAC)
 - a. Local
 - b. Statutes and Ordinances
- (d) NFPA - Guidelines unless Adopted
- (e) **OSHA**
 - (a) Washington OSHA (DOSH) covers state and local government employers.
 - (b) Federal OSHA covers federal agencies including USPS.
 - (c) In addition, federal OSHA retains enforcement of the anti-retaliation provision of the Occupational Safety and Health Act of 1970, Section 11(c), 29 USC 660(c), with respect to the private sector

XIII. POLICY AND BEST PRACTICES

- (a) What is a policy?
 - a. Policies are rules.
 - b. They impose a strict, non-discretionary rule.
 - c. The outcome of violating a policy is some sort of discipline, which may include training, counseling, suspension or termination.
 - d. Can bring a Policy to court
 - e. Helps and Harms

- (b) POLICY is:

- a. Detailed
- b. Establish a Bright line
- c. Outline desired and undesired conduct - Black and White
- d. Outlines Consequences
- e. Outlines Due Process
- f. Provides an Appeal Process

XIV. POLICY vs. SOG/SOP

- (a) “Standard Operating Procedures” or “Standard Operating Guidelines”
 - a. More flexible than a policy”
 - b. Some departments use the words “Best Practices”.
 - c. Can bring a Policy to Court.
- (b) Hard to bring a SOG/SOP
 - a. These are not “policies”.
- (c) Create two separate documents:
 - a. Operational SOG/SOP
 - b. Guidance, discretionary
- (d) Policies
 - a. Non-waivable, non-discretionary
- (e) Codes of Ethics and Conduct
 - (a) A set of principles of conduct within an organization that guide decision making and behavior
 - (b) Meant to clarify an organization's mission, values and principles, linking them with standards of professional conduct
 - (c) Outlines prohibited conflicts
 - (d) Requires disclosure of potential conflicts

(e) Creates an atmosphere of fair dealing and protects against favoritism.

- **Can discipline with violations of the Code of Conduct or Ethics - Conduct Unbecoming**

XV. DISCRIMINATION AND WORKPLACE HARASSMENT

(1) CONSTITUTIONAL PROTECTIONS

(a) TITLE VII

- a. Title VII of the Civil Rights Act of 1964
- b. 42 U.S.C. subsection 2000(e)
- c. Sexual Harassment by employers against employees is actionable and a recognized cause of action.

- d. Civil Rights Act of 1991 Amendments
- e. 42 U.S.C. § 1981a
- f. Provide for damages in employment discrimination cases, and to clarify provisions of the 1964 act relating to “disparate impact” actions.

(b) The 1st Amendment protects the right to free speech and free association.

(c) The 4th Amendment protects against unreasonable searches and seizures.

(d) The 5th Amendment provides protections against compelled self-incrimination, and against denials of due process in connection with discipline and discharge

(e) The 14th amendment limits the action of state and local officials. In addition to equal protection under the law to all citizens, the amendment also addresses what is called "due process", which prevents citizens from being illegally deprived of life, liberty, or property.

XVI. UNDER FEDERAL AND STATE LAW, EMPLOYERS CANNOT DISCRIMINATE AGAINST EMPLOYEES ON THE BASIS OF:

<ul style="list-style-type: none">• Race• Gender• Pregnancy• Religion• National Origin• Disability (physical or mental)	<ul style="list-style-type: none">• Age - for workers over 40• Military service or affiliation• Bankruptcy or bad debts• Genetic information• Citizenship status - for citizens, permanent residents, temporary residents, refugees, and asylees
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(1) Washington State Human Rights Division

- (a) The mission of the Washington State Human Rights Commission is to prevent and eliminate discrimination through the fair application of the law, the efficient use of resources, and the establishment of productive partnerships in the community.
- (b) Under the law, everyone has the right to be free from discrimination at work, in housing, in a public accommodation, or when seeking credit and insurance. Any individual who believes that he or she has been discriminated against based on protected class status may file a charge of discrimination with the WSHRC

XVII. PROHIBITED CONDUCT

- Hazing
 - Hazing is the practice of rituals and other activities involving harassment, abuse or humiliation used as a way of initiating a person into a group.
 - Hazing is seen in many different types of social groups, including gangs, sports teams, schools, military units, fire departments, fraternities and sororities.
- Harassment
 - The act of systematic and/or continued unwanted and annoying actions of one party or a group, including threats and demands.
 - The purposes may vary, including racial prejudice, personal malice, an attempt to force someone to quit a job or grant sexual favors, apply illegal pressure to collect a bill, or merely gain sadistic pleasure from making someone fearful or anxious.
 - Tends to be directed towards minorities and women
- Sexual Harassment Defined
 - The EEOC defines sexual harassment as unwelcome verbal or physical conduct of a sexual nature:
 - When submission to such conduct is made a term of condition of employment;
 - When submission to or rejection of such conduct is used as a basis for employment decisions;
 - When such conduct unreasonably interferes with job performance or creates an intimidating, hostile, or offense work environment.

XVIII. VARIOUS FORMS OF HARASSMENT

<ul style="list-style-type: none">• Verbal• Visual• Bullying• Psychological• Hazing• Physical confrontation	<ul style="list-style-type: none">• Physical Assault• Rape• Gender bias• Religious bias• Stalking• Cyber stalking
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- Purpose of an Anti-Harassment Policy
 - To clearly establish the Fire Departments commitment to provide a work environment free from unlawful harassment and hostile behavior, and;
 - To provide guidance to any employee who believes he/she has been a victim of such behavior based on race, color, religion, gender, national origin, age, or disability, or any other status protected by applicable Federal, State, or Local law.
- Practical Jokes
 - A practical joke is a mischievous trick played on someone, generally causing the victim to experience embarrassment, perplexity, confusion or discomfort
 - Practical jokes performed with an intent to commit harm can constitute bullying, whose intent is to harass or exclude.
- Bullying
 - The use superior strength or influence to intimidate (someone), typically to force him or her to do what one wants
 - There are no federal laws defining or regulating workplace bullying.
 - Civil rights laws (Title VII) are not ‘a general civility code for the American workplace.’”
 - The State Laws related to bullying have been created to protect children in schools.
 - The Courts have bootstrapped those laws into protecting others as well
 - (1) “Bullying and harassment have no place in the workplace, but unless they are motivated by the victim’s membership in a protected class, they do not provide the basis for an action under Title VII

(2) Purpose of an Anti-Harassment Policy

- (a) To clearly establish the Fire Departments commitment to provide a work environment free from unlawful harassment and hostile behavior; and to provide guidance to any employee who believes he/she has been a victim of such behavior based on race, color, religion, gender, national origin, age, or disability, or any other status protected by applicable Federal, State, or Local law.

XIX. DOCUMENTATION - A Double Edge Sword

(1) Why Document?

- (a) Creates a Record of an event
- (b) May be required by State Law or Policy
- (c) Is your “recall memory” during a deposition or trial
- (d) Refreshes your memory
- (e) Must be created “real time” and not in anticipation of litigation
- (f) Can be a writing, a voice recording, or video to include pictures
- (g) Used a an affirmative defense
- (h) Can be used to improve your position during budget time
- (i) Can be used to demonstrate Efficiency and Proficiency
- (j) Your documentation will be used for or against you in a court of law.

Who Reads Your Writings?

<ul style="list-style-type: none">• Your Elected Officials• Media• Public• Staff• Other Departments• Plaintiff’s Attorneys• District Attorneys• Defense Attorneys• In Fire Responses• Investigators• Cops• Insurance Companies	<ul style="list-style-type: none">• Owners• Feds• NFIRS• Federal Discrimination Claims• In Disciplinary Matters• Terminated employee and their attorneys• Hearing Officers• Mediators or Arbitrators• Department of Health• MIRF• Medical Examiners• Judges• Police
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- (2) How can you help yourself and your position?
- (a) Is your documentation complete? Read and reread your documentation, make sure you check your spelling and punctuation before filing.
 - (b) Does your documentation show compliance with Department Policy, Procedures and Protocol?
 - (c) Does your documentation follow the State or Federal Law or Labor Agreement
 - (d) Did you utilize terms describing the event with a correct meaning?
 - (e) Did you document the important issues?
 - (f) Did you write something to hurt yourself or your department such as your opinion or hearsay?
 - (g) Did you write enough to avoid reliance on memory?
- (3) So what?
- (a) Legal issues occur years later, memory will not protect you.
 - (b) What you wrote (or did not write) will affect your reliability and veracity as a witness.
 - (c) Can be used in a deposition and trial to refresh your memory

SPELLING and SENTENCE STRUCTURE COUNTS

<ul style="list-style-type: none"> • Be objective and factual • Personal opinion and bias not included • Use correct sentence structure • Do not make up abbreviations not recognized by everyone 	<ul style="list-style-type: none"> • Do not write in your Tweeting language With hand written documents make sure you provide legible documentation and the spelling is correct • Use a dictionary if necessary • Even using WORD check your spellchecking as it may interpret a word incorrectly
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Technology is Dumbing Us Down

<ul style="list-style-type: none">• Writing• Tweets• Spellcheck on Word• Less use of reference Material• Books• Magazine Articles• Even in Law School, on-line research is the norm	<ul style="list-style-type: none">• Critical Thinking• Loss of the ability to think through a problem - “Google it”• Processing Problems • Minimal basis for formulating a process to solve a problem• Math teacher wants to see how you formulated your answer not just the answer• i.e. Pumping Pressure formulas
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XX. COMPLIANCE IN DOCUMENTATION

(1) Fire Incidents

- (a) After the event – include photos, videos
- (b) Add crew/staff on the fire
- (c) May be multiple reports from each responding Officer.
- (d) Have Command review those submissions

(2) Investigations and Discipline

- (a) Record pertinent part of conversations, all phases of the process and outcomes
- (b) Record or Write?
- (c) Citizen Complaints

(3) Do not attempt to create a document “after the fact”

- (a) Created after receiving a letter from a claimant or in response to a Summons and Complaint

(4) Retention of Records

- (a) Statutory Period
- (b) i.e. Medical Malpractice varies from state to state

(5) Policy period:

- (a) 3 years, 5 years, 10 years;
- (b) Duration of employment?
- (c) Employment records?

- (6) Medical Exposure Records
 - (a) OSHA indicates for the duration of employment plus 30 years
- (7) Destruction of Records
 - (a) State Retention Guidelines
 - (b) Department Policy
 - (c) Shred - do not place in dumpster
- (8) EMS DOCUMENTATION
 - (a) Short Story
 - Medical documentation is a legal record that preserves and transmits information.
 - Establishes your professional credibility
 - Documentation must be legible, accurate and complete
 - Will be used in civil and criminal litigation
 - Refusals must be obtained and well documented
 - Follow the rules when releasing information
 - (b) Do NOT post EMS calls on your social media sites
- (9) COMPLIANCE IN DOCUMENTATION - EMS
 - (a) Any documentations should reflect the facts and YOUR independent findings.
 - Do not record other individuals/firefighters opinions
 - (b) Can report civilian declarations
 - (c) Dying declarations
 - (d) Use standardized format for documentation
 - Medical - i.e. SOAP format or some other recognized and consistent format
 - (e) Document special handling and reasons
 - Flight Risk;
 - Use of Restraints;
 - Precautions;
 - Special Positioning;
 - Use of Special Devices
 - Equipment Failures

- (f) Events
 - Medical - A written report shall be left with the patient/ED staff at the emergency department at the time of care transferred (preferred) and a complete report locked and synced within 75 minutes after arrival at the hospital (or clearing the scene). (Policy)
 - Time of Document Creation
 - a. Create your record soon after the event
 - b. Before you go off shift or leave the station
- (g) Documentation is YOUR BEST FRIEND...OR WORST ENEMY

(10) Reality Check

- (a) Your patients will LIE about pertinent details related to the treatment received when they sue you and your department
- (b) They seem to obtain a “super recall memory” when suing you
- (c) Documentation is your best defense as you have recorded in “real time” the events as they occurred.
- (d) Your patient or family probably did not.
- (e) Be aware of camera phones recording your treatment and interaction with the patient.

(11) How Much to Document? * Murphy’s Law

- (a) Rule of thumb
 - Enough to provide detail to the reader to enable them to “see” the complete picture and to refresh your memory during a deposition or trial.
- (b) What the attorney wants to see
 - Patient condition upon arrival
 - Vitals signs
 - Level of consciousness
 - Examination
 - Treatment – if any
 - Disposition
- (c) Fire
 - Everything
 - Initial Call - 911
 - Pictures
 - Recordings
 - Recorded Radio
 - Think long term about property loss or fire fatality
 - Think about the potential of litigation

(12) ACCOUNTABILITY IS PROFESSIONALISM

- (a) A legally defensible report establishes and maintains a provider's reputation for professional accountability.

(13) ELECTRONIC MEDICAL RECORDS (EMR)

- (a) Although use of EMRs is integrally related to improving patient safety, adopting EMRs may raise new risks of
- (b) Malpractice liability. Data loss or destruction, inappropriate corrections to the medical record, inaccurate data entry.
- (c) Unauthorized access, and errors related to problems that arise during the transition to EHRs are potential liability issues.

(14) MODIFYING THE MEDICAL DOCUMENT

- (a) Misconception – “we cannot touch the chart after it is done.”
- (b) Reality – late entries and corrections are permissible.
- (c) Should be appropriately noted and dated
- (d) Should not be represented as contemporary entries
- (e) Addendums are allowed if clearly dated and initialed
- (f) Correction entries should be made by the original author
- (g) Paper errors may be corrected with strikeout lines, initials and date
- (h) EMR – Time stamped notations and changes
- (i) Supplemental narrative sheets are also permissible if space for more narrative or if the call was or had an unusual presentation.

(15) Click the Box or Narrative?

- (a) Which is better?
- (b) Narratives are your substituted memory
- (c) Narratives describing actual patient condition
- (d) Many of the cases which appear to be “routine” on the surface are the ones that will “get” you.

(16) Medical Records Management

- (a) Access
- (b) Limited
- (c) Set up a single point of access
- (d) Set up a time of access limitation (days, weeks, month) for access
- (e) A shorter time frame is better

(17) Storage

- (a) Electronic File – back up periodically
- (b) Store offsite
- (c) Store on a thumb drive, or hard drive and not on a CD
- (d) Cloud is OK but there may be a hacking event
- (e) Paper – store in a dry place

(18) Records Management

(a) Destruction

- Department’s should adhere to the State recommendations for destruction of all records generated by the Department.

(19) RELEASE OF INFORMATION PUBLIC DISCLOSURE

(a) Public Records Law

- All records created by government
- Washington RCW 70.02 – All records
 - a. Cell Phones
 - b. Emails
 - c. Correspondence

(b) Release of medical reports requires written permission from patient or legal guardian

(c) Permission not required for release of select information

(d) To provide others with the “need to know” to provide care

(e) When required by law

(f) When required for a third party billing

(g) In response to a proper subpoena

(20) HIPAA

(a) Health Insurance Portability & Accountability Act (www.hhs.gov)

(b) Federal protections related to release of medical information to other agencies.

(c) EMS and Fire Departments fall under this regulation if there is a fee for service.

(d) Most Fire and EMS Agencies have adopted a form HIPAA release and medical record protection rule by policy

HIPAA

<ul style="list-style-type: none">• Controls release of information to non-authorized individuals• Cops?• Criminal Activity	<ul style="list-style-type: none">• Medical Staff at hospital?• Calling into medical facility for patient outcomes• Coffee Table Discussions?
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- (a) Barber or Beauty Shop discussion?
- (b) Medical Record Reviews?
- (c) QI/QA
 - Privileged discussions
- (d) You and your organization must control access to the document

(21) Improper Release

- (a) Confidentiality Violation
- (b) Invasion of privacy
- (c) Defamation - is the communication of a false statement that harms the reputation of an individual, business, product etc.
- (d) Libel - the act of publishing a false statement that causes people to have a bad opinion of someone
- (e) Slander - oral defamation, in which someone tells one or more persons an untruth about another which untruth will harm the reputation of the person defamed
- (f) Possible HIPAA Violation

(22) REFUSALS

- (a) Always document refusals carefully
- (b) Assessment of Capacity
 - Must consider patient's capacity on every call
 - If patient deemed to have capacity, the provider must respect patient's wishes...
- (c) Disclosure of risks and benefits and benefits to the patient or guardian
- (d) Patient or guardian UNDERSTANDS the content of the refusals.

(23) Be especially aware of the issues with:

- (a) MINORS
- (b) IMPAIRED
- (c) LANGUAGE BARRIERS
- (d) HYPOXIC
- (e) HYPOGLYCEMIC

Never, ever...

<ul style="list-style-type: none">• Falsify any information in a report• Destroy a report• Fail to write a report• The resulting liability may not be covered by your insurance provider!• Your opinions• Assessment rule-outs are OK• Assign blame to another medical provider• Make Assumptions	<ul style="list-style-type: none">• Patient was intoxicated, drunk, mental or an idiot• Administrative complaints• Management/union/staffing and deployment issues• Miami/Dade Case• Frivolous comments• Management• Union• The “EMS system
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(24) **DELETING DATA**

(25) Spoliation - Spoliation of evidence occurs when an individual or entity violates its duty to preserve relevant evidence.

(26) A finding of spoliation will often result in the imposition of sanctions and can significantly impact a litigation.

- (a) Includes
- (b) Medical Records
- (c) A/V Recordings
- (d) EKG's
- (e) Scene Photography
- (f) Stuff out of your cell phones
- (g) Data Recorders

(27) **DOCUMENTING THE “UNTHINKABLE”**

(a) **THE CRIME SCENE**

(28) **How can you help yourself and your position?**

- (a) Is your documentation complete? Read and reread your documentation, make sure you check your spelling and punctuation before filing.
- (b) Did you document the important issues?
- (c) Did you write enough to avoid reliance on memory?
- (d) Does your documentation show compliance with Department Policy, Procedures and Protocol?
- (e) Did you utilize terms describing the event with a correct meaning?
- (f) Did you write something to hurt yourself or your department such as your opinion or hearsay?
- (g) So what?

- Legal issues occur years later, memory will not protect you.
- What you wrote (or did not write) will affect your reliability and veracity as a witness.
- Can be used in a deposition and trial to refresh your memory
- It is your cornerstone for an **affirmative defense** that you did everything right.

(29) Fire Reporting

- (a) NFIRS
 - NFIRS is the local, state, and national fire reporting system. NFIRS is *all incident reporting*.
 - To show and tell the full value of the fire service, all alarms or public service calls should be documented in NFIRS.
- (b) Section for reporting exposures – long term health issues including presumptive diseases

(30) WHY PARTICIPATE

- (a) Grant \$\$\$ Access
- (b) Market your department to the Community
- (c) Statistics and Data provides important information for your use
- (d) State Funding
- (e) Federal Funding
- (f) Local Funding
- (g) Provide national data and local on fire incidents
- (h) Assist in staffing justifications for your department

(31) Narratives

- (a) Assist in Arson Investigations
- (b) Document injuries to firefighters
- (c) Document deaths of civilians
- (d) Substituted memory
- (e) Best Defense in case of litigation

(32) NFIRS Click the Box or Narrative

- (a) Which is better?
- (b) Narratives are your substituted memory
- (c) Narratives describing actual fire or rescue condition
- (d) It is your best defense

XXI. FIRST AMENDMENT AND SOCIAL MEDIA

- (1) 1st AMENDMENT RIGHTS - Freedom of Speech
- (2) First Amendment to the Constitution of the United States of America:
 - (a) Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .
 - (b) Fourteenth Amendment to the Constitution of the United States of America:
 - (c) No state shall make of enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .
- (3) You must prove that there has been “state action” to prove that your right to free speech has been abridged.
- (4) Government v. Private employers
 - (a) First Amendment protects an employee’s speech.
 - (b) However - Not all Speech is Free
 - (c) Government and private employers may treat free speech concerns differently.
 - (d) Government employers must respect the First Amendment rights to free speech.
 - (e) Private employers do not need to respect an employee’s rights to free speech.
 - (f) “Absent contrary legislation, a private employer may regulate the workplace environment, and hire, fire, and promote as it pleases.
 - (g) Government may not discriminate arbitrarily.
- (5) *Pickering v. Board of Education*, 391 U.S. 563 (1968)
 - (a) First, the employee must have been speaking as a *citizen on a matter of public concern*. . . . If this threshold requirement is not met, then there is no First Amendment retaliation claim. . . .
 - (b) If the employee satisfies this threshold, then the Pickering balancing test must be applied to determine if the government was justified in “treating the employee differently from any other member of the general public.”

- (c) So, for the *Pickering* test to be applicable
 - The employee must be addressing a matter of public concern,
 - The speech cannot interfere with the employee's job duties, and
 - The employee must be speaking as a private citizen.

XXII. SOCIAL MEDIA

- (1) About 212 active sites
- (2) Must have a policy in place related to social media use by your firefighters and staff
 - (a) Social Media Policy - Essential Elements
 - (b) Don't post inappropriate pictures or images
 - (c) Don't link your work activities to your Facebook postings.
 - (d) Don't complain about your job, supervisors, or co-workers in a public forum.
 - (e) Don't post inappropriate "statuses"
 - (f) Be particular about your "friends" and associations.
 - (g) Check your privacy and security settings and know their rules.
 - (h) Be particular about your "friends" and associations.
 - (i) Consider establishing a "professional" profile page.
 - (j) Don't use social networking while engaged in patient care or work activities
 - (k) Don't misrepresent yourself or others.
 - (l) Be who you are.
 - (m) Respect copyright and fair use laws.
- (3) Must have Policies
 - (a) Don't post inappropriate pictures or images
 - (b) Don't link your work activities to your Facebook postings.
 - (c) Don't complain about your job, supervisors, or co-workers in a public forum.
 - (d) Don't post inappropriate "statuses"
 - (e) Be particular about your "friends" and associations.
 - (f) Check your privacy and security settings and know their rules.
 - (g) Be particular about your "friends" and associations.
 - (h) Consider establishing a "professional" profile page.
 - (i) Don't use social networking while engaged in patient care or work activities
 - (j) Don't misrepresent yourself or others.
 - (k) Be who you are.
 - (l) Respect copyright and fair use laws.

XXIII. THE PUBLICS RIGHT TO RECORD

<ul style="list-style-type: none">• The Public’s cameras• Be careful how we act on the scene• The public is watching us.• We should be training our firefighters about appropriate behavior on emergency calls.	<ul style="list-style-type: none">• Smiling and joking with other members on scene is not appropriate.• How will public react if they see us joking around on the scene of an automobile crash with fatalities?• A YouTube video will embarrass your department and disrupt your ability to provide services and be trusted.• Comments about the call will be taken out of context.
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(1) Photography of Scenes - Policy

- (a) Department policy regarding any on-scene photography using current technology.
- (b) Helmet Cameras – San Francisco Aircraft crash – deceased passenger
- (c) Establish security measures and procedures that strictly control and track all images captured.
- (d) Deletion of scene photographs can be classified as spoliation or violation of public records law.
- (e) Do not, under any circumstance, transmit scene photographs electronically to anyone for any reason.
- (f) Designate specific individuals authorized to capture images on an emergency scene.
- (g) Specify the image-capturing device.
- (h) Do not use any device capable of transmitting data or images electronically, such as tablets or cell phones.

XXIV. INVESTIGATION AND PROGRESSIVE DISCIPLINE

- (1) Personnel Issues
- (2) One of the largest issues in the fire service
- (3) One of the largest claims made and payout by fire departments
- (4) Violations of State and Federal Laws
- (5) Discrimination
- (6) Harassment

Discipline Must Be:

<ul style="list-style-type: none">• Corrective• Fair• Consistent• Progressive• Due Process	<ul style="list-style-type: none">• Hearing• Representation• Confidential
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(7) Discipline Employees When...

- (a) There are recurring issues such as absenteeism or tardiness.
- (b) Failure to follow Policies, Procedures, SOP's or SOG's
- (c) When there are violations of Safety Procedures
- (d) Off Duty Conduct creates an embarrassment to the Organization
- (e) Creating a Hostile or Disruptive workplace
- (f) There are continuing problems adhering to or following management instructions despite additional training, coaching or counseling.

(8) Do...

- (a) As close to the infraction as possible but not in the heat of the moment.
- (b) Investigate each incident regardless of how it first appears.
- (c) May need to hire an outside investigator
- (d) May be subject to disclosure under the Public Records Act
- (e) Select an appropriate time & place to meet privately with the employee.
- (f) Document Document Document
- (g) Document statements
- (h) Allow the employee to explain his/her understanding of the incident.

(9) LISTEN TO WHAT IS SAID AND CLEAR YOUR MIND OF BIASES

- (a) Don't a preconceived impression of guilt or innocence .

(10) Confer with HR for their recommendations on how to proceed.

(11) Present the disciplinary action in a calm manner.

(12) WHAT IS DISCIPLINE ALL ABOUT?

- (a) Correct Behavior – Immediate and Future
- (b) Protection of other employees
- (c) Exonerate the Innocent
- (d) Improve Performance
- (e) Deterrent for others
- (f) Accountability by the employee and employer
- (g) Fairness in the process

- (h) Providing feedback on behavior or performance
- (i) Disciplinary Process Purpose
 - To ascertain whether claims of misconduct or incompetence have a firm basis in fact;

(13) POLICY

- (a) In order to discipline an employee there **MUST BE A POLICY** developed by the department to apply in a situation requiring a discipline action
- (b) Off-Duty Conduct
 - In order to discipline an employee for off-duty conduct there must be a “job nexus” which means that what the employee did is related to the employee’s job duties.

(14) The Goal of Documentation

- (a) To inform the employee.
- (b) To record the infraction and any coaching and counseling
- (c) Record outcomes after imposing the discipline actions
- (d) To establish an official record of the disciplinary action.

(15) Employee’s Rights

- (a) Right to privacy
- (b) Right to a safe workplace
- (c) Right to Fair Compensation
- (d) Freedom from Discrimination
- (e) Right of Free Speech
- (f) Representation
- (g) Fair Dealing
- (h) Due Process
- (i) Confidentiality
- (j) Right against self-incrimination
- (k) Right to receive a copy of the complaint

(16) EMPLOYERS RIGHTS

- (a) Constrained by Laws and Regulations
- (b) Can be constrained by Contract
- (c) Can terminate at-will employees
- (d) As long as it is not for discriminatory reasons
- (e) Hire, create policy, manage the workforce, discipline and terminate
- (f) Manage the workflow, create policy, correct employee behavior

(17) CONSTITUTIONAL PROTECTIONS

- (a) The Constitution grants certain rights to the people and places certain limitations on the government's power.
- (b) Most of these rights and restraints are procedural.
 - For example:
 - You are entitled to a fair trial before going to jail;
 - You may not be compelled to be a witness against yourself;
 - Your home may not be searched unless the police first obtain a search warrant
 - Spouses cannot testify against another

XXV. DUE PROCESS

(1) 5th Amendment

- (a) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation

(2) The 14th Amendment states:

- (a) No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty or property, without due process of law-----

(3) Substantive and Procedural Due Process

- (a) Substantive Due Process:
 - Is the theory of law through which courts enforce limits on governmental powers and authority.
- (b) Under American jurisprudence, the avenue for use of this theory by courts comes from the Due Process Clauses of the Fifth and Fourteenth Amendments, each of which prohibit the federal and state governments, respectively, from depriving any person of "life, liberty, or property, without due process of law

(c) Procedural Due Process

- In order to protect persons from the unjustified deprivation of life, liberty, or property by the government, there must be some method by which they can contest the means by which the government proposes to deprive them of protected interests; i.e., they must be afforded procedural due process

(4) Five Common Complaints about Fire Department Disciplinary Systems

- (a) How come ____ did the same thing and didn't get punished
- (b) I didn't know it was wrong, everybody does it.
- (c) You punished me because I am ____
- (d) Failure to fully investigate
- (e) Failure to promptly investigate

Characteristics of a Quality Discipline System

<ul style="list-style-type: none">• Immediate• Consistent• Impersonal• Prior warning	<ul style="list-style-type: none">• Acquaintance/Knowledge of rules• Timely action• Fair and just action• Positive approach
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(5) Progressive Discipline

- (a) Progressive discipline is the concept of applying graduated penalties as offenses occur unless the seriousness of the offense warrants more serious discipline

(6) Common Forms of Progressive Discipline

- (a) Verbal Warning
- (b) Verbal Warning with Documentation
- (c) Written Reprimand
 - How many times?
- (d) Suspension
 - With or without pay?
- (e) Demotion
 - How many times?
- (f) Termination
 - Eligible for Rehire?

(7) CONFIDENTIALITY

- (a) Investigation Policies need to:
- (b) Protect the integrity of the investigation.
- (c) It's fair to inform witnesses, including the complaining party, that you "have a duty to investigate" and that you take that duty seriously, and
- (d) Maintain the integrity of their review.

- (e) Discussions among coworkers could taint the objectivity of the investigation, leading employees to modify or even recant statements.

(8) Right of Representation

- (a) Sometimes a person asks to have a union representative or an attorney present when being questioned at the investigatory stage of a potential disciplinary action.
 - No charges at this time? Representation?
- (b) Unless provided for under the terms of a collective bargaining agreement, or under the FBOR, the employee has no right to have an attorney present during an investigatory interview.

(9) Some Protections

- (a) Weingarten Rights - NLRB v. Weingarten, Inc 420 U.S. 251 (1975)
 - In a *Weingarten* hearing, a union employee has the right to request that a representative be present during an investigatory interview that might result in disciplinary action against the employee
- (b) Garrity Rights - Garrity v. New Jersey 385 US 493 (1967)
 - Unconstitutional for Firefighters to answer questions under the threat of losing their jobs and then use the answers to incriminate them.
- (c) Loudermill Meeting - Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)
 - The "Loudermill" hearing is part of the "due process" requirement that must be provided to a government employee prior to removing or impacting the employment property right (e.g. imposing severe discipline).

DOCUMENTATION - DRAFTING THE REPORT

<ul style="list-style-type: none"> • Complaint and Allegations • Executive Summary • Chronology of the Investigation • Interviews • Evidence • Medical Documentation • Communication Records 	<ul style="list-style-type: none"> • EMS, Police or Fire Reports • Criminal Records • Press Clippings • Location of Supportive Materials • Recommended Actions • Submit to Chief or Board
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(10) DOCUMENTATION - WRITTEN DECISION

- (a) Allegations or charges not sustained - Charges and Allegations dismissed
- (b) Exonerated - May have been some substance but not enough to warrant disciplinary action
- (c) Unfounded – Not enough facts to warrant an investigation
- (d) Sustained – Meets the Preponderance Standard

(11) Appeals

- (a) Appeal Process

CORRECTIVE ACTIONS

<ul style="list-style-type: none"> • Fair, Fast and Final • May Include: • Training • Supervisory Counseling • Supervised Field Observation • Professional Counseling • Peer Support Counseling 	<ul style="list-style-type: none"> • Fitness for Duty • Reassignment • Mitigating Factors • Performance Standards • Past misconduct • Commendations • Supervisory Recommendations
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(12) LAST CHANCE AGREEMENTS

- (a) Substance Abuse
- (b) Domestic Misconduct
- (c) Failure to maintain physical fitness & capacity
- (d) Performance deficiencies

(13) FINAL ACTIONS

- (a) Resignation
 - Suggesting this option?
 - i.e. – resign in lieu of termination – it “looks better” in your personnel file
 - Do not recommend “suggesting” this option as courts have construed this recommendations as a “Constructive Discharge”
- (b) Termination - Prepare for a possible legal challenge
- (c) Documentation is your key best defense

(14) SAVING THE SALVAGEABLE

- (a) Part of our organizational responsibilities is to identify and “save” those that can be “saved.”
- (b) Departments invest a lot of time and money on your firefighters
- (c) Think about how to implement this program.

XXVI. DRIVING

(1) MOTOR VEHICLE CRASHES

- (a) 14,000 vehicle crashes in department apparatus
- (b) 750 POV crashes
- (c) 8 firefighters died in 2018 as the result of vehicle crashes
- (d) These two vehicle types have historically been most often involved in crashes that take the lives of firefighters.
- (e) These accidents result in:
 - Deaths to fire truck occupants;
 - Injuries to fire truck occupant injuries,
 - A total of 1,076 injured - both civilian and firefighters involved in these accidents
- (f) Speed and a lack of seat belt use historically contribute to these incidents.

(2) Accidents ARE ALWAYS YOUR FAULT!!

- (a) Tens of thousands every year
- (b) Overuse of lights and sirens
- (c) Not covered under many immunity Statutes
- (d) Held to a standard of care in an emergency situation

- (3) Many states have laws related to Emergency Vehicles Response Policies
- (a) LESS THAN 5% OF EMS RESPONSE IN THE U.S. MEET THE DEFINITION OF “LIFE THREATENING” EMERGENCY
 - Defined as a Life threatening situation requiring immediate medical attention
- (4) When Ambulances Crash
- (a) 4500 crashes per year – average
 - (b) 34% resulted in injury
 - (c) 33 individuals died
 - Driver
 - Passenger
 - Patient
 - Non Occupant
 - (d) 84% of EMS providers were not restrained
 - (e) 33% of the patients were secured with shoulder and lap restraints
 - (f) 44% - Ejected from the gurney
 - (g) 61% - Restrained with lap belts
 - (h) 38% - Shoulder harness available, not used.
- (i) Authorized emergency vehicles – RCW 46.61.035
- (1) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.
 - (2) The driver of an authorized emergency vehicle may:
 - (a) Park or stand, irrespective of the provisions of this chapter;
 - (b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
 - **(c) Exceed the maximum speed limits so long as he or she does not endanger life or property;**
 - (d) Disregard regulations governing direction of movement or turning in specified directions.
 - (3) The exemptions herein granted to an authorized emergency vehicle shall apply only when such vehicle is making use of visual signals meeting the requirements of RCW [46.37.190](#), except that: (a) An authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red light visible from in front of the vehicle; (b) authorized emergency vehicles shall use audible signals when necessary to warn others of the emergency nature of the situation but in no case shall they be required to use audible signals while parked or standing.

- **(4) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his or her reckless disregard for the safety of others.**

Driver Training

<ul style="list-style-type: none"> • EVOC/EVAP • Driving at Speed • FTO - Driving • Documentation of Training 	<ul style="list-style-type: none"> • Recertification – Annual • Medical Physical • NFPA 1002 – Driver Operator Training
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- (5) **LEGAL STANDARD - YOU ARE REQUIRED TO OPERATE YOUR VEHICLE WITH DUE REGARD FOR THE SAFETY OF ALL PERSONS**
- (a) If someone gets hurt – YOU DID IT!
- (b) NO SPECIAL EXEMPTIONS FOR “CODE 3” RUNS

RECAP OF HIGH RISK ISSUES

<ul style="list-style-type: none"> ✓ Polices and Best Practices ✓ Code of Conduct ✓ Ethics ✓ Hostile Work Discrimination and Harassment ✓ Progressive Discipline 	<ul style="list-style-type: none"> ✓ Documentation ✓ EMS ✓ NFIRS ✓ Social Media ✓ Freedom of Speech ✓ Driving
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THANK YOU