


*Preventing Legal Fires*



*Laws and Policies That Matter*

Washington Fire Chief's Association  
May 22, 2018

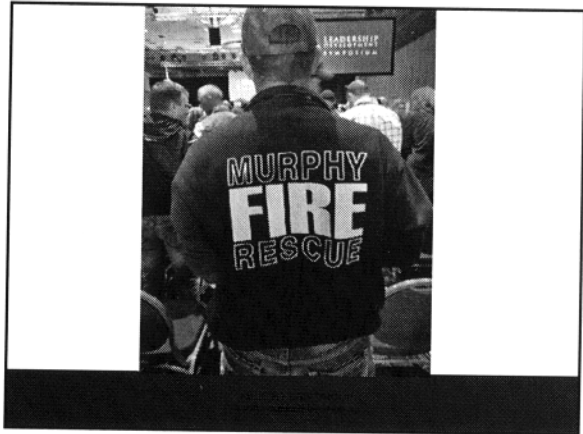
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Disclaimer

- I am licensed to practice law in Washington and New York State.
- Today's presentation does not constitute legal advice (**but darned good advice**) and you are encouraged to consult your local attorney if you have a legal question



Free Legal Advice

- There are many laws or Policies we must follow
- Don't break them
- You won't get sued

GOALS

- Managing and avoiding risk
  - Awareness of your legal leadership responsibilities and liabilities
  - Understanding your professional and personal accountabilities
- Create a safe work environment for your employees

## Preventing Legal Fires



## How you are viewed

- Fire and EMS Departments are a different employer
- Leadership is responsible for all activities in the organization
- Held to a higher standard by society
- Applies equally to volunteer, combination and career fire and EMS organizations
- High Profile Issues - Example
  - Fire Chief and his secretary wife arrested for embezzlement
  - Fire Chief stalking firefighter employee for sexual purposes threatening to kill her children and her dog
  - Fire Chief photographed in uniform at the 2016 FDIC conference at a lingerie show.
    - Placed on Facebook - Disciplined by his department
    - Terminated after being caught impersonating a police officer in his home town.

## NY Volunteer pleads guilty to stealing \$5.6 Million from NY Fire Company

- In one of the largest cases of theft in the history of the volunteer fire service, the treasurer of the Mahopac Volunteer Fire Department pled guilty today to wire fraud, submitting false tax returns, obstructing a grand jury investigation, and making a false statement.
- Michael Klein was accused of embezzling over \$5.6 million from the fire company over a thirteen-year period, starting in January 2002 until September 2015.

## Cases

- Alabama rescue squad captain has been charged with criminally negligent homicide over the death of a squad member during a water rescue.
  - The firefighter was killed when the rescue boat she was in capsized while searching for a missing kayaker as the boat reportedly got too close to a lowhead dam, as did another rescue boat.
  - A total of nine rescuers ended up in the water resulting in her death and injuries to three others.
- FLSA Overtime lawsuit – City of -----
  - Managing Volunteer Firefighters for FLSA Compliance: A Guide for Fire Chiefs and Community Leaders [https://www.iafc.org/docs/default-source/1VCOS/flsamanual\\_small.pdf?sfvrsn=0](https://www.iafc.org/docs/default-source/1VCOS/flsamanual_small.pdf?sfvrsn=0)
- Fire Chief terminated over recording of meeting without others consenting
  - RCW 9.73.030 - Intercepting, recording, or divulging private communication— Consent required.

## Fire Department Sued For \$3.5 Million Over Sexual Assault of Junior Firefighter

- The girl, identified in Benton County Circuit Court (Oregon) filings as Donna Doe, filed suit last Friday against the Monroe Rural Fire Protection District.
  - The suit alleges firefighter sexually abused her starting when she was 14.
  - The senior firefighter was supervising the junior firefighter program at the time.
  - Criminal charges have not been filed at this time against senior firefighter.
  - The fire department is a mandatory reporter related to child abuse and failed to protect the junior firefighter

## Cases – Washington State

- A Washington state firefighter has filed suit claiming he was denied full-time employment and removed from a part-time position on account of his Middle-Eastern descent and non-citizenship – City of Lynden
  - The city has agreed to a \$250,000 settlement
- Spokane Valley Fire Department (SVFD) filed a federal civil suit against the International Association of Firefighters (IAFF) Local 3701 in the Eastern District of Washington state.
  - SVFD is looking for the court to issue a "declaratory judgement" that battalion chiefs and fire marshals are exempt from FLSA overtime.
- A former Lewis County Fire District 9 volunteer accused of spending thousands of dollars of taxpayer money on fuel for his personal vehicle was sentenced to 30 days of electronic home monitoring.
  - It was his second set of convictions for thefts from the district.

### Cases – Washington State

- A Washington state firefighter has agreed to settle two sexual discrimination lawsuits she filed against her fire department and several officers for \$600,000.
  - The firefighter claims that she had been subjected to a hostile work environment, sex discrimination, and retaliation during her 11 years as a firefighter.
  - She agreed to settle her claims in exchange for \$349,000 in back wages and damages, and \$251,000 in attorneys fees.
- Discrimination lawsuits involving the Chicago Fire Department’s hiring and promotions have cost taxpayers nearly \$92 million over the past nine years — easily outpacing all other major cities except New York.

## WHAT DO YOU BELIEVE ARE THE FIVE MOST HIGH RISK ISSUES FACING THE FIRE SERVICE TODAY?

### OF THOSE FIVE, WHICH RANKS NUMBER 1?

#### FIRE DEPARTMENT HIGH RISK ISSUES

- People - Discrimination
  - Sexual Harassment
  - Non- Sexual Harassment
  - Hazing/Bullying
- Civil Rights Violations
- Termination and Discipline Issues
- Hiring Issues
- Whistle Blower Retaliation
  - A former deputy chief in the Seattle Fire Department claims he was demoted after complaining about a fire inspector who was blasted in an ethics report for failing to bill Qwest Field for nearly \$200,000 in fire services and misusing his position to get backstage passes to a concert.
- Employer Liability
  - Violation of Federal Law
- Vehicle Accidents
  - Intersection most often
  - Excessive Speed
- Training Liabilities
- Promotional Process
  - Discrimination
  - Reverse discrimination

----- Cont.

- Criminal and Civil Issues
  - Assault
  - 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

#### FIRE DEPARTMENT TRIGGER POINTS

✓ Miami Florida – 9 firefighters and 3 civilians injured



- Employer Issues
  - Age Discrimination in Employment Act (ADEA)
  - Sex Discrimination and Harassment
  - Hiring Discrimination
  - Pregnancy Discrimination
  - USERRA – Military Leave
  - Immigration Reform and Control Act
  - Religious Discrimination
  - FMLA
  - FLSA
  - HIPAA Violations
    - Release of Patient Information
  - Retaliation
  - Wrongful Terminations

### Firefighter Trigger Points

- Creating a Hostile Work Environment
  - Harassment/hazing
  - Bullying
- Supervisory Issues
  - Personal Liability?
- Internet Abuse
  - Cyberbullying
  - Stalking
  - Child Porn
    - FDNY FF Hit with Child Porn Charges after Router Traced to Firehouse
- Policy Violations
- Violation of Email Use
- Off Duty Behavior
- Domestic Violence
- Social Media Postings
- Substance Abuse
- Driving Violations
  - On duty
  - Off Duty
- Theft

### FIRE LEADERSHIP DUTIES

- Lead
- Involvement
- Manage
- Political Involvement
- Educate
  - Developing future leaders
- Train
  - Improving performance
- Response
  - EMS, Suppression, Rescue, Service Calls
- Customer Service
  - External
  - Internal
- PERSONNEL MANAGEMENT

### PERSONEL MANAGEMENT

- Your staff is your greatest asset
- Your staff is your greatest liability

### HIGH RISK ISSUES Todays Discussion

- Polices and Best Practices
  - Code of Conduct
  - Ethics
- Hostile Work Discrimination and Harassment
- Documentation
- Social Media
  - 1<sup>st</sup> Ammendment and Freedom of Speech
- Driving

### Who is suing the fire department?

- A fire department is 6.9 times more likely to be sued by a subordinate than by Mrs. Smith
- A fire chief is 5.0 times more likely to be sued by a subordinate than by Mrs. Smith
- A chief officer is 4.0 times more likely to be sued by a subordinate/colleague than by Mrs. Smith
- A company officer is 1.8 times more likely to be sued by a subordinate/colleague than by Mrs. Smith
- A firefighter is 2.6 times more likely to be sued by Mrs. Smith than by a colleague (with the most likely cause being EMS related (51%) or driving apparatus (32%).

• Varone 2018

### A TRUISM

- Fire Leadership, Fire Fighters and EMS Providers acting within the discretionary scope of their job are generally immune:
- 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.

### Laws and Organizations Affecting the Fire Service

- **Federal**
  - Constitutional Protections
- **State**
  - RCW 52 – Fire Protection Districts
  - WAC's
- **Local**
  - Statutes and Ordinances
- **NFPA - Guidelines unless Adopted**
- **OSHA**
  - The Washington State Plan is administered by the Department of Labor and Industries, Division of Occupational Safety and Health (DOSH)
  - Federal OSHA covers the issues not covered by the Washington State Plan

### POLICY AND BEST PRACTICES



"Can't say, it's private."

### Management Scenario


- Firefighter is chronically late for work and appears to have been drinking when arriving at the fire station.
- What would you do?
  - Terminate
  - Test
  - Rehab and Counseling
  - Last Chance Agreement
    - Random Drug and Alcohol Testing

### POLICY

- Detailed
  - Establish a Bright line outline desired and undesired conduct
  - Black and White
- Outlines Consequences
  - Outlines Due Process
  - Provides an Appeal Process
- Updated Frequently
- Providers
  - Lexipol
  - Insurance Providers
  - Policy Bank – Fire Engineering
  - Your legal counsel
  - Self Generated

### Policy vs. SOG/SOP

- "Standard Operating Procedures" or "Standard Operating Guidelines"
  - More flexible than a policy"
  - Some departments use the words "Best Practices".
- **Can bring a Policy to Court.**
  - Hard to bring a SOG/SOP
  - These are not "policies".
- Create two separate documents:
  - Operational SOG/SOP
    - Guidance, discretionary
  - Policies
    - Non-waivable, non-discretionary



### 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.
  - How is that defined?
    - California Police Officer making porn videos in a police uniform?
    - Selling drugs
    - Downloading kiddy porn
    - Domestic Violence
    - Running a prostitution ring

### Codes of Ethics and Conduct

A set of principles of conduct within an organization that guide decision making and behavior

Meant to clarify an organization's mission, values and principles, linking them with standards of professional conduct

- Outlines prohibited conflicts
- Requires disclosure of potential conflicts
- Creates an atmosphere of fair dealing and protects against favoritism.

Can discipline with violations of the Code of Conduct or Ethics

- Conduct Unbecoming

### Conduct Unbecoming

- The incident precipitating the discipline was in 2013, the plaintiff was at a bar with several other firefighters.
- On that night, one of the other firefighters got into an altercation with off-duty police officers.
- Plaintiff failed to report the incident and was suspended for twenty-one days for having violated certain sections of the Departments Code and SOP.
- The court found that the fire departments Code of Conduct and Standard Operating Procedures which prohibit conduct that would discredit the organization were not overly broad or vague under the US Constitution.

*Thomas Bensfield, William Ruska, A.J. Ruska and Ray Williamson v. Village of Riverside & Fire Chief Spencer Kimura, Northern District of Illinois, No. 14 C 5329*



### Management Scenario

- Minority in recruit academy – Drill Instructor states that she will never make it through the academy and in fact blatantly discriminates against her.
- Maher v. City of Fresno (Ca)
  - Wins a \$3 million dollar in trial
  - Attorney receives \$900,000.0
  - City is Self Insured

DISCRIMINATION  
HOSTILE WORK ENVIRONMENT  
AND HARASSMENT

ONE OF THE LARGEST AREAS OF LITIGATION  
IN FIRE AND EMS SERVICES  
WITH THE  
MOST COSTLY PAYOUT

### Constitutional Protections TITLE VII

- Title VII of the Civil Rights Act of 1964
  - 42 U.S.C. subsection 2000(e)
    - Sexual Harassment by employers against employees is actionable and a recognized cause of action.
- Civil Rights Act of 1991 Amendments
  - 42 U.S.C. § 1981a
    - Provide for damages in employment discrimination cases, and to clarify provisions of the 1964 act relating to "disparate impact" actions.

### Constitutional Protections

The 1<sup>st</sup> Amendment protects the right to free speech and free association.

The 4<sup>th</sup> Amendment protects against unreasonable searches and seizures.

The 5<sup>th</sup> Amendment provides protections against compelled self-incrimination, and against denials of due process in connection with discipline and discharge

The 14<sup>th</sup> 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.

Under Federal and State law, employers cannot discriminate against employees on the basis of:

- |                                   |  |
|-----------------------------------|--|
| • Race                            | • Age - for workers over 40  |
| • Gender                          | • Military service or affiliation  |
| • Pregnancy                       | • Bankruptcy or bad debts  |
| • Religion                        | • Genetic information  |
| • National Origin                 | • Citizenship status - for citizens, permanent residents, temporary residents, refugees, and asylees |
| • Disability (physical or mental) |  |

## 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.

### VARIOUS FORMS OF HARASSMENT

- Verbal
- Visual
- Bullying
- Psychological
- Hazing
- Physical confrontation
- Physical Assault
  - Rape
- Gender bias
- Religious bias
- Stalking
- Cyber stalking

### Purpose of a 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.

### 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
- "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

### Pranks or 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.

### LOS ANGELES FIRE

- Firefighter's Racial Discrimination Lawsuit Settled by Los Angeles for \$1.43 Million - 2007
  - Prank on one of their co-employees whose team won the volleyball game.
  - The object of the prank, is an African-American, while the pranksters are two Anglos and a Hispanic.
  - One of them, a fire captain, purchased a canned dog food while another one mixed the dog food into the firefighters spaghetti dinner.



### EXPENSIVE DOG FOOD

- Two officers, Burton, 62, and Tohill, 51, both worked at the Westchester station with Pierce and were suspended without pay for 30 and 24 days, respectively.
- The third firefighter, Jorge Arevalo received a six day suspension
- Burton and Tohill maintained their race and skin color caused them to be punished more harshly than the Latino perpetrator of the prank so they sued the department for discrimination.

### Continue-----

- The two white fire captains were collectively awarded more than \$1.6 million by a jury that found their race played a factor in their punishment when a firefighter they supervised was fed dog food as a prank.
- The award comes about six months after Tennie Pierce, the victim of the dog food prank, received a \$1.43 million settlement in his lawsuit against the city.

### -----continued

- The antics (pranks) of firefighters have cost the city of LA \$13.5 million in legal payouts during 2009
  - \$6.2 million to a black lesbian firefighter whose mouthwash bottle was filled with urine in a station-house prank,
  - \$2 million to two white male firefighters who were retaliated against for going to her defense,
  - \$320,000 to a female firefighter sexually harassed by her male captain.

### Remember

In order to discipline an employee there **MUST BE A POLICY** developed by the department to apply in a situation requiring a discipline action

## DOCUMENTATION A Double Edge Sword



### Why Document?

- You are creating a legal document
- Creates a Record of an event
- May be required by State Law or Policy
- Is your "recall memory" during a deposition or trial
  - Refreshes your memory
- Must be created "real time" and not in anticipation of litigation
  - Can be a writing, a voice recording, or video to include pictures
  - Used as an affirmative defense
- Can be used to improve your position during budget time
- Can be used to demonstrate Efficiency and Proficiency
- A double edged sword
  - Your documentation will be used for or against you in a court of law.
- Read - Death by Documentation Fire Engineering 9/2015

### Who Reads Your Writings?

- Your Elected Officials
- Media
- Public
- Staff
- Other Departments
- Plaintiff's Attorneys
- District Attorneys
- Defense Attorneys
- In Fire Responses
  - Investigators
  - Cops
  - Insurance Companies
  - 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

### Public Records Law

- The Washington State Public Records Law is a series of laws designed to guarantee that the public has access to the records of government bodies at all levels.
- Emails
- Cell Phones
- Correspondence

### 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

### SPELLING and SENTENCE STRUCTURE COUNTS

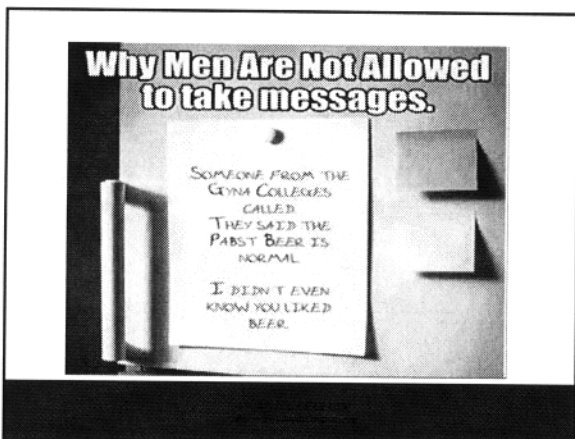
- Be objective and factual
  - Personal opinion and bias not included
- Use correct sentence structure
- Do not make up abbreviations not recognized by everyone
- Do not write in your Tweeting language
- With hand written documents make sure you provide legible documentation and the spelling is correct
  - Use a dictionary if necessary
- Even using WORD, check your spellchecking as it may interpret a word incorrectly

**Let's eat Grandpa!  
Let's eat, Grandpa!**

**COMMAS**  
They save lives!

### Technology is Dumbing Us Down

- Writing
  - Tweets
  - Spellcheck on Word
  - Less use of reference Material
    - Books
    - Magazine Articles
    - Even in Law School, on-line research is the norm
- 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



### Time of Document Creation

- ▶ Create your record soon after the event
  - ▶ Before you go off shift or leave the station
- ▶ Do not attempt to create a document "after the fact"
  - ▶ Created after receiving a letter from a claimant or in response to a Summons and Complaint

### COMPLIANCE IN DOCUMENTATION

- Medical 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)
- Fire Incidents
  - After the event – include photos, videos
  - Add crew/staff on the fire
  - May be multiple reports from each responding Officer.
    - Have Command review those submissions
- Investigations and Discipline
  - Record pertinent part of conversations, all phases of the process and outcomes
    - Record or Write?
- Citizen Complaints

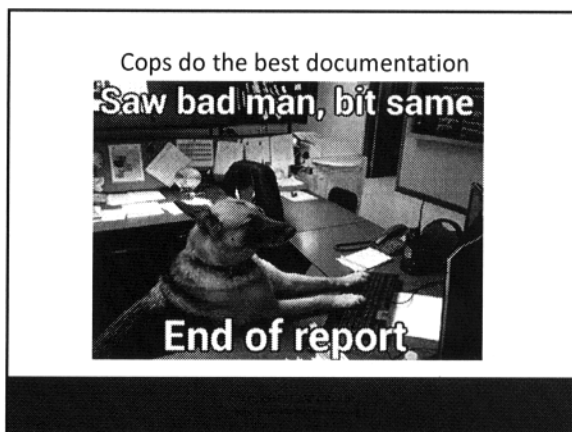
### EMS and NFIRS

#### Click the Box or Narrative

- Which is better?
  - Narratives are your substituted memory
  - Narratives describing actual fire or rescue condition
  - It is your best defense

### Retention of Records

<ul style="list-style-type: none"> <li>• Statutory Period                             <ul style="list-style-type: none"> <li>– i.e. Medical Malpractice varies from state to state</li> </ul> </li> <li>• Policy period:                             <ul style="list-style-type: none"> <li>– 3 years, 5 years, 10 years;</li> <li>– Duration of employment?</li> </ul> </li> <li>• Employment records?</li> </ul>	<ul style="list-style-type: none"> <li>• Medical Exposure Records                             <ul style="list-style-type: none"> <li>– OSHA indicates for the duration of employment plus 30 years</li> </ul> </li> <li>• Destruction of Records                             <ul style="list-style-type: none"> <li>– State Retention Guidelines</li> <li>– Department Policy</li> <li>– Shred - do not place in dumpster</li> </ul> </li> </ul>
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### •How Much to Document ? \*

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.

- What the attorney wants to see -
  - EMS
    - Patient condition upon arrival
    - Vitals signs
    - Level of consciousness
    - Examination
    - Treatment
      - if any
    - Refusals
    - Disposition
  - Fire
    - Everything
      - Initial Call - 911
      - Pictures
      - Recordings
      - Recorded Radio
    - Think long term about property loss or fire fatality
    - Think about the potential of litigation

\* Murphy's Law

### RELEASE OF INFORMATION

- Release of medical reports requires written permission from patient or legal guardian
- Permission not required for release of select information
  - To provide others with the "need to know" to provide care
  - When required by law
  - When required for a third party billing
  - In response to a proper subpoena

### HIPAA

- Health Insurance Portability & Accountability Act
  - Federal protections related to release of medical information to other agencies.
  - EMS and Fire Departments fall under this regulation if there is a fee for service.
    - Most Fire and EMS Agencies have adopted a form HIPAA release and medical record protection rule by policy

### Improper Release Confidentiality Violation

- Invasion of privacy
  - Defamation - is the communication of a false statement that harms the reputation of an individual, business, product etc.
  - Libel - the act of publishing a false statement that causes people to have a bad opinion of someone
  - 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
- Possible HIPAA Violation

### DELETING DATA Spoliation

- Spoliation of evidence occurs when an individual or entity violates its duty to preserve relevant evidence.
- A finding of spoliation will often result in the imposition of sanctions and can significantly impact a litigation.
  - Includes
    - Medical Records
    - EKG's
    - Stuff out of your cell phones
    - Data Recorders
    - A/V Recordings
    - Scene Photography

### DOCUMENTING THE "UNTHINKABLE" THE CRIME SCENE

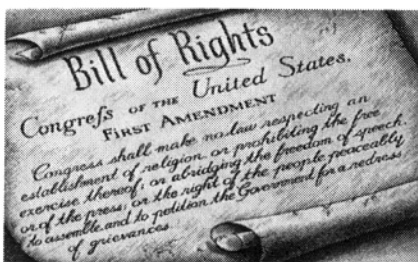
## NFIRS

- 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.
  - Section for reporting exposures – long term health issues including presumptive diseases
- WHY PARTICIPATE
  - Grant SSS Access
  - Market your department to the Community
- Statistics and Data provides important information for your use
  - State Funding
  - Federal Funding
  - Local Funding
  - Provide national data and local on fire incidents
- Assist in staffing justifications for your department
- Narratives
  - Assist in Arson Investigations
  - Document injuries to firefighters
  - Document deaths of civilians
  - Substituted memory
  - Best Defense in case of litigation

## Management Scenario

- A firefighter was posting religious content on the fire departments email system distributed internally
  - He was told to stop and he did not
  - The fire department then terminated the firefighter
- Does he have a 1<sup>st</sup> Amendment Right??

## 1<sup>st</sup> Amendment Rights Freedom of Speech



## Free Speech

- First Amendment to the Constitution of the United States of America:
  - Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .
- Fourteenth Amendment to the Constitution of the United States of America:
  - No state shall make of enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .
- You must prove that there has been "state action" to prove that your right to free speech has been abridged.

## Government v. Private employers

- First Amendment protects an employee's speech.
  - However - Not all Speech is Free**
- Government and private employers may treat free speech concerns differently.
  - Government employers must respect the First Amendment rights to free speech.
  - Private employers do not need to respect an employee's rights to free speech.
- "Absent contrary legislation, a private employer may regulate the workplace environment, and hire, fire, and promote as it pleases.
- Government may not discriminate arbitrarily.

Fire, EMS, police and other public employees have only limited First Amendment rights under the "balancing test" of U.S. Supreme Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968)

### Free Speech

*Pickering v. Board of Education*, 391 U.S. 563 (1968)

- 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. ...
- 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."

### Free Speech

*Pickering v. Board of Education*, 391 U.S. 563 (1968)

- 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.

### *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

- A decision by the Supreme Court of the United States involving the First Amendment free speech protections for government employees.
  - The plaintiff in the case was a district attorney who claimed that he had been passed up for a promotion for criticizing the legitimacy of a warrant.
  - SCOTUS ruled, in a 5-4 decision, because his statements were made pursuant to his position as a **public employee**, rather than as a **private citizen**, his speech had **no First Amendment protection**.

### Sprague v. Spokane Valley Fire Department

- The Washington Supreme Court ruled that a Fire District's policy of prohibiting employees from discussing religious issues over the District's email system violated an employee's First Amendment right to free speech.
  - The Spokane Valley Fire District's email policy prohibited any personal use of department email accounts.
- After a Spokane Valley firefighter committed suicide, the District provided its employees with information about suicide prevention through its Employee Assistance Program (EAP) email newsletter and invited employees to use their email accounts to discuss the issue and provide other resources.

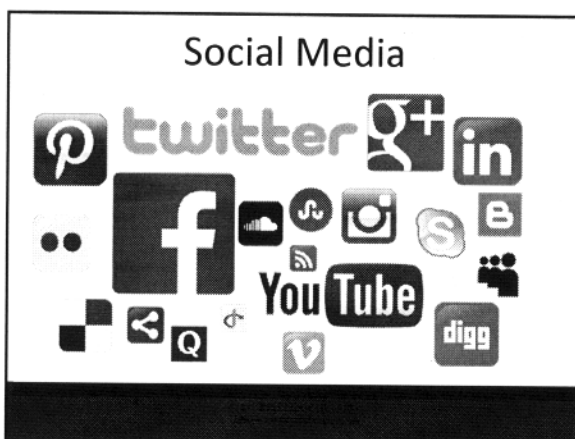
### Continued -----

- When Captain Sprague weighed in on the issue from a Christian perspective and included scripture quotations in his emails sent to other firefighters who shared his beliefs, he was told that the District policy prohibit discussion of religious issues over District email accounts.
- After Captain Sprague refused to comply and continued to send emails that provided a religious perspective on suicide and other issues raised in EAP email newsletters, he was terminated.

### Cont.-----

- The Washington State Supreme Court ruled in the Captain's favor finding that the District's policy of permitting the use of email for some social issues but prohibiting employees from providing a religious perspective on those issues amounted to "viewpoint" discrimination that violated Captain Sprague's First Amendment free speech rights.

WA Sup. Ct., No. 93800-8  
Decided: January 25, 2018



### Social Media Assisted Career Suicide (SMACS)

- A Columbia fire captain has been fired for conduct unbecoming as a result of a post he made to social media on his Facebook regarding the Black Lives/All Lives protest that took place in Columbia (7/16)
  - In his post, *"Idiots shutting down I-126. Better not be there when I get off work or there is gonna be some run over dumb asses."*
  - Two additional Columbia Firefighters were terminated as well related to the comments in support of the Fire Captains postings in the following days after the termination of the Captain
  - Another FF was terminated for bringing a handgun to work
    - Feared for his safety
- City Implements a Policy related to Social Media use

### Social Media

About 212 active sites

Blogs	Face book	Twitter	Cell Phone Cameras	Helmet Cameras
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**Must have a policy in place related to social media use by your firefighters and staff**

### Social Media Policy - Essential Elements

- Don't post inappropriate pictures or images
- Don't link your work activities to your Facebook postings.
- Don't complain about your job, supervisors, or co-workers in a public forum.
- Don't post inappropriate "statuses"
- Be particular about your "friends" and associations.
- Check your privacy and security settings and know their rules.
- Be particular about your "friends" and associations.
- Consider establishing a "professional" profile page.
- Don't use social networking while engaged in patient care or work activities
- Don't misrepresent yourself or others.
- Be who you are.
- Respect copyright and fair use laws.

### Discipline based upon social media

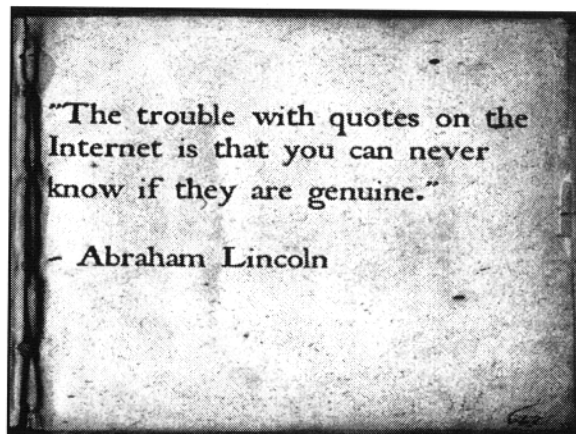
- A Houston firefighter has been placed on administrative duties as the department investigates offensive anti-Islamic posts on his personal Facebook page.
- A veteran Boston firefighter has been suspended over a social media post that depicted a man carrying a decapitated head.
- Firefighters in Queensland, Australia are under investigation for creating a Facebook "poll" to rate which of their female colleagues would be best in bed.
  - Several female firefighters who were targets of the poll have been transferred and an outside investigation is now underway.

### ----- continued

- West Virginia EMT is accused of taking photos of the body of a 30 year old UPS driver killed in a vehicle accident.
  - The EMT allegedly shared the photos with others.
  - The family filed suit against the EMT and his employer
- Three states have enacted laws to make it a crime for emergency personnel to take photos of victims (CT, West Virginia and NJ) and NY has introduced similar types of laws.

### Extreme Cases

- Florida Firefighters were on scene of a medical call, and had taken refuge in their apparatus from a vicious pit-bull. A police officer attempted to restrain the dog with a Taser but was forced to shoot the animal.
  - Unfortunately the firefighters made three mistakes:
    - First, one of them filmed the incident on a cellphone camera in violation of department policy.
    - Second, oblivious to how it would later appear to viewers, firefighters could be heard laughing and joking on the recording as the officer shot the dog (which not surprisingly is not sitting very well with many people).
    - Third, the video was shared publically, including the audio, with others including the media sending a very bad image to the public.
- Israel Defense Forces called off a raid in Palestinian territory
  - The Israel Defense Forces called off a raid in Palestinian territory after a soldier posted details, including the time and place, on his social networking website Facebook.



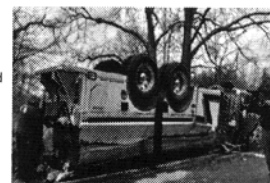
### DRIVING



### Deaths 2016

NFPA and USFA

- **MOTOR VEHICLE CRASHES**
  - 14,000 vehicle crashes in department apparatus
  - 750 POV crashes
  - 6 firefighters died in 2016 as the result of vehicle crashes
  - These two vehicle types have historically been most often involved in crashes that take the lives of firefighters.
- 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
- **Speed and a lack of seat belt use** historically contribute to these incidents.



### Accidents

- **ARE ALWAYS YOUR FAULT!!**
  - Tens of thousands every year
  - Overuse of lights and sirens
- **Not covered under many immunity Statutes**
  - Held to a standard of care in an emergency situation
    - Many states have laws related to Emergency Vehicles Response Policies
- **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

### 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

- EVOC/EVAP
- Driving at Speed
- FTO - Driving
- Documentation of Training
- Recertification – Annual
- Medical Physical
- NFPA 1002 – Driver Operator Training

### NIOSH Investigation

F2008-10

- On March 28, 2008, a 33-year-old male volunteer fire fighter (the victim) was fatally injured after the tanker truck he was driving left the roadway and overturned. The victim was enroute to a structure fire, took an unfamiliar route, and failed to negotiate a 90° curve to the right. The tanker left the roadway rolling onto the driver's side then slid through a ditch into a row of pine trees crushing the cab. The victim was extricated by emergency personnel, air-lifted to a local medical center, and later pronounced dead.
- NIOSH investigators concluded that, in order to minimize the risk of similar occurrences, fire departments should:
  - ensure that tankers are driven at a safe and reasonable speed
  - ensure that fire fighters are familiar with the location of the roads in their coverage areas
  - consider staffing tankers with a minimum of two fire fighters
  - consider supplying responding units with maps or verbal directions to incident scenes, using computer aided dispatch (CAD) or a global positioning system (GPS) device
  - develop oversight of the preventive maintenance program for fire apparatus

### NIOSH Investigation

F2008-10

- The NIOSH investigators met with the Chief of the victim's fire department, his training officer, the crash scene Incident Commander (IC), the civilian who made the 911 call and the Sheriff's Office personnel involved with the crash investigation.
- The investigators reviewed the victim's driver/operator training records, inspected the apparatus, visited the incident site and took photographs and measurements.
- The investigators also reviewed the 911 dispatch logs, the vehicle's maintenance log, the State of Louisiana Uniform Motor Vehicle Traffic Crash Report, law enforcement photographs of the incident, and the victim's patient care report.

### LITIGATION

- A 53-year-old father who lost his right leg after a crash sent a fire engine careening into a restaurant will receive a \$15 million settlement from Alhambra and Monterey Park Fire (CA) Departments.
- An Alhambra fire ladder truck heading south on Garfield Avenue collided with a Monterey Park fire engine going eastbound.
- Both emergency vehicles had lights and sirens activated and were responding to a house fire in Monterey Park.
- Monterey Park's fire engine veered onto the sidewalk, hit the victim, pushed him through the wall of restaurant and left him pinned underneath the massive vehicle.
- Fifteen people were injured in the accident, including six firefighters, five restaurant patrons and four pedestrians

### Questions?



### Emerging Legal Issues

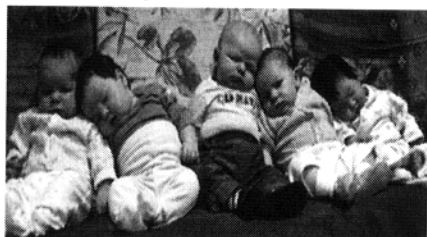
- Substance Abuse
  - Prescription and non prescription
  - Reasonable Suspicion, testing and training
- Behavioral Health –
  - Mental Health Policies and Suicide Prevention
- Return to work under 1582
  - Adoption, interpretation of the correct section
- Inspection Liability – Ghost Ship Fire
  - CA court opined Mandatory Duty to inspect
- Training for Success
  - Without killing yourself
- Vests and Guns
  - Training, carrying, deploying, liability
- Use of Drones
  - Purchase, license and training
- Rights of Privacy
  - Electronic Privacy
  - Women Firefighters
  - Social Media
- Diversity, Discrimination and Workplace Harassment

### Mitigate your known risks

- Hire Right
- Train all levels of the organization on customer service
  - Internal and External
  - Develop Leaders and Managers in your organization
- Have a solid Policy Manual – up to date and complies with the law
- Have a working SOP/SOG documents
- Support all firefighters
- Do not discriminate – treat your firefighters right
- Be the Leaders – the buck starts and stops with you



### Questions?



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