



CIRSA 101 – Real-Life Risk Management

Employment Liability

Presented by Sam Light, CIRSA General Counsel

Employment Liability

- Every employer has workplace issues, and every employer will at some point face employment-related claims. From CIRSA's perspective—and probably yours too—employment disputes and claims are among the most difficult to handle:
- Time-consuming and emotionally draining – issues are personal. Everything a supervisor says, does, and writes will be scrutinized and second-guessed.
- They are difficult to settle, and once they are in litigation, they are difficult to have dismissed on summary judgment motion.
- And most are federal claims – prevailing plaintiff can get his/her attorney's fees as well as any judgment paid by defendant.

Sources of Employment Liability

- Federal/state anti-discrimination employment laws – Title VII, the Colorado Anti-Discrimination Act, Pregnancy Discrimination Act, Age Discrimination in Employment Act, and others.
- Federal and state wage laws, including the Fair Labor Standards Act.
- Worker injuries: primarily governed by workers' compensation law
- Americans with Disabilities Act.
- Family Medical Leave Act.
- Employment based civil rights claims under 42 U.S.C. Section 1983 - provides a money damages remedy for violation of rights guaranteed by U.S. constitutional/federal law.
- Wrongful discharge.
- Breach of contract.
- Torts claims – subject to GIA.

Sources of Employment Liability

- In real life, you don't often get deep into the intricacies of state and federal employment statutes and regulations, but...
- Your city/town operates within them and issues pop up all the time – management and others in the organization:
 - Need to have a working familiarity
 - Need to be good issue-spotters
 - Need to know where some of the big liability “traps” are
 - Need to know when to reach out for assistance, and where resources are
- Develop a good “liability radar” for the organization - and keep it on!

The Big Employment Risks

- Bad workplace conduct (discrimination, harassment, bullying, etc.)
- Employment terminations
- Bad process – due process claims
- ADA/FMLA – leave and accommodation issues
- Problems with personnel policies and chain of command
- FLSA issues
- Retaliation

Harassment & Bullying

- Every municipality needs to have an up-to-date harassment policy in place covering all protected classes.
- The policy should address unacceptable conduct, define when unacceptable conduct constitutes harassment, set out a complaint procedure that includes multiple avenues, establish an investigation process, set out consequences, and protect against retaliation.
- Policy's purpose is two-fold: you want to define, deter, and prevent unacceptable conduct, and having/carrying out an effective policy is a significant liability protection for the entity.
- Provide regular training on the policy.
- Bullying is harassment's first cousin and should also be addressed.

Harassment & Bullying

- In the legal realm, “hostile work environment” is a legal term of art. However, “hostile work environment” is sometimes used in common parlance as a synonym for “people are being mean to me” when in fact the definition calls for the hostile work environment to be connected to a protected class, such as gender, age, etc.
- This legal framework isn’t intended to set a “civility code,” BUT, it also does prevent your organization from setting & enforcing other expectations of acceptable conduct. Thus,
 - Have both expectations for professionalism, civility, respectful conduct, etc., *and* an up-to-date harassment policy.
 - This can better enable the organization to deal effectively with a full spectrum of bad workplace conduct.

Harassment & Bullying

- Consider these scenarios:

- “A few Board members are always bugging the Town Clerk’s office about the timeliness of the meeting packets and sometimes they get pretty annoyed. The Deputy Clerk, who is primarily responsible for the packet, says she’s being harassed by the Board members and it’s a ‘hostile work environment.’”

- “A new department head is very blunt. He doesn’t hesitate to criticize staff at Board or staff meetings. One employee recently observed that she feels like he comes down especially hard on her and other women. He seems to be overly critical of their work but doesn’t seem to take his “buddies” to task when they make mistakes.”

Harassment & Bullying - What Do You Think?

- While one of these scenarios—the second—presents more like a liability claim, these scenarios illustrate how organizations need to have not only methods for handling complaints, but also for spotting and addressing problems before they become full-blown employment claims.
- For example, while the first scenario may not fall within the types of conduct proscribed by typical harassment policy, does your organization have systems to address it?
- “Disrespect” is a key concept; employees who aren’t treated like adults, or are viewed with suspicion, or are not accorded basic dignities, are going to search for reasons why - “Is it because I’m _____?” is a natural question that will come to people’s minds.

Employment Claims From Bad Process

- In general, employers get to set the rules and procedures surrounding discipline and termination. Make sure you follow them—you will be held to them!
- Note that public employment often is not “at will”—perhaps even if you say it’s “at-will” in your policies. For example:
 - If your policies also state an employee can only be fired for cause, and/or only after a hearing, that’s not “at-will.” See this CIRSA article: <https://www.cirsa.org/news/employment-at-will/>.
 - And some positions by statute, charter, ordinance, collective bargaining agreement or otherwise, simply are not “at will.”
- A failure to follow process can give rise to federal due process claims!

FMLA Risks

- The federal Family & Medical Leave Act (FMLA) provides for unpaid leave for certain family and medical reasons, but a violation of the FMLA can result in money damages!
- The FMLA regulations are complex and either alone, or in combination with the ADA and workers compensation laws, can require an employer provide leave beyond what's required in the “usual” circumstances.
- Be aware FLMA COVID leave issues and, if you are a smaller city/town—less than 50 employees—look closely at how you handle family leave in your policies. See these CIRSA articles: <https://www.cirsa.org/news/qa-with-sam-does-the-fmla-apply-to-municipalities-with-less-than-fifty-employees/> and <https://www.cirsa.org/blog/coronavirus-the-fmla-and-small-municipalities/>.

FLSA Risks

- The Fair Labor Standards Act (FLSA) regulates, among other matters, overtime pay and work hours.
 - Be sure your overtime policies and practices are current, clear and consistent, and that overtime is properly documented and paid.
 - FLSA overtime liability is generally an uninsured employer liability. (CIRSA coverage is limited to a sublimit amount of coverage for wages for “claims” arising out of “employment practices.”)
- The FLSA also regulates the use of volunteers and, along with the Colorado Youth Employment Act, the use of minors in employment. Be sure your practices in these areas are consistent with legal requirements.

Retaliation Risks

- Retaliation is one of the more common and troublesome employment claims. In general, retaliation can become actionable where an employer takes some adverse action against an employee because of their exercise of a protected right or engagement in some protected activity. Examples:
 - Whistleblower? Filing a harassment complaint?
- For retaliation claims, everyone is in this “protected class,” and timing alone can support a retaliation claim.
- Train supervisors on this issue. Before taking employment action, the supervisor should soul-search to make sure there’s not even a whiff of retaliation in what they are about to do, including being aware of timing issues (but don’t let a threat alone prevent doing the right thing).

Tips for Managing Employment Risks

- Give employment issues prompt and appropriate attention & follow-up. Fully review the facts of a situation before taking action.
- Follow your own procedures.
- Train supervisors on their obligations and your procedures.
- Be sure involvement in personnel matters is appropriately limited.
- Utilize available resources before taking action—check with HR and legal staff, consult with other resources as needed.
- Avoid any whiff of retaliatory action.
- Expect and commit to a workplace based on fairness, dignity and respect.



Liability Risk Management **HOTLINE**

Do you have questions about liability risks related to:

- Employee Termination and Discipline Issues
- Personnel Policies or Personnel Management
- Public Works, Parks and Rec or Police Liability
- Conducting Quasi-Judicial Proceedings
- Zoning or Land Use Liability
- Drug Testing Policies
- Marijuana – Related Issues

Call CIRSA's Liability Risk Management Hotline and Sam Light, CIRSA General Counsel, can assist. The Hotline is a free service to CIRSA Property/Casualty members to help you identify, manage and avoid potential claims, and assist with your municipal liability questions.

CONTACT THE LIABILITY RISK MANAGEMENT HOTLINE IF:

- you're considering taking an employment action that could lead to liability;
- you'd like a policy or contract document reviewed from CIRSA's liability risk management perspective;
- you'd like help identifying options for handling a potential claim situation;
- you need to get up-to-speed on a current municipal liability issue; or
- you just need to bounce an idea or issue off a neutral source.

Please Note: At CIRSA's discretion, a courtesy contact may be made by CIRSA to the member's chief administrative officer and/or legal counsel to inform them of any Hotline inquiry. The Hotline is not a substitute for legal advice from the member's municipal attorney.

To make an inquiry, or if you have questions, please contact General Counsel Sam Light at 720-605-8002 or 1-800-228-7136, or saml@cirsa.org.



Thank you for your time and your public service!

CIRSA Liability Hotline

1-800-228-7136

<https://www.cirsa.org/wp-content/uploads/2020/04/Liability-Hotline-2020.pdf>

