



NYMIR Law Enforcement

NEWSLETTER

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TEN WAYS LAW ENFORCEMENT AGENCIES CAN STAY OUT OF THE EMPLOYMENT PRACTICES LIABILITY (EPL) QUAGMIRE

By Robert Bambino, Director of Risk Management

1 ADOPT ANTI-HARASSMENT AND ANTI-DISCRIMINATION POLICIES

Anti-harassment and discrimination policies are the foundation of a department's EPL prevention program. When properly drafted, these policies help the department's leadership send a message to officers that the department prohibits unlawful harassment and discrimination. Policies also instruct employees how to register a complaint, as well as inform supervisors of their responsibilities when a complaint is initiated. Overall, anti-harassment and discrimination policies function as a loss prevention technique, inasmuch as they can prevent illegal acts from occurring.

2 IMPLEMENT WORKABLE COMPLAINT PROCEDURES

Law enforcement executives and supervising officers need to recognize a bona fide "complaint." A complaint to a command officer or shift supervisor—including front line supervisors, such as sergeants—is considered a complaint to the department. These complaints should be referred to the "intake" person(s) identified in the policy. Additionally, management's observation of inappropriate behavior, or receipt of a "confidential" complaint compels the department to investigate, even when a complaining employee asks for the complaint to remain confidential.

There are certain actions or scenarios that constitute "red flags." They must be acted upon and followed up appropriately. Examples include:

- Dirty or sexually explicit jokes
- Sexual comments
- Propositions or requests for sexual favors
- E-mail jokes or pictures of a sexual nature
- Pin-up posters or calendars
- Inappropriate touching
- Stalking

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WORKERS' COMPENSATION: SECTION 207-C BENEFITS

In 1961, the State of New York enacted Section 207-c of the General Municipal Law. This law provides specific benefits to police officers, provided they are "injured in the performance of duties," or "taken sick as a result of the performance of duties." Initially the benefits, which include full salary as well as certain tax exemptions, were intended to provide uninterrupted income to police officers who were injured while performing the special activities related to the criminal justice process, such as performing arrests and supervising criminals. Standard workers' compensation benefits were granted to injured officers for ordinary employment duties. Thus an injured officer would qualify for standard workers' compensation benefits, not Section 207-c benefits, if the injury did not involve the "heightened risk" that accompanies police work.

The law changed dramatically in June 2003 when the New York Court of Appeals removed the "heightened risk" standard. The law now requires that 207-c benefits be granted to police officers injured in the course of employment, even if no

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“heightened risk” for the officer occurred during the course of the accident. This change has naturally led to a widening of the pool of claims administered under Section 207-c, and has increased the cost of the program to employers and taxpayers.

Each employer must negotiate a procedure with its PBA to administer claims made by police officers seeking 207-c benefits. When an officer recovers from the injury and is ready for a full assignment, a negotiated procedure must be in place for removing the officer from 207-c status.

At claim inception, the burden of proof is on the police officer to show he or she is entitled to 207-c benefits. The employer has the right to fully investigate the claim, including arranging for independent medical examinations, and must ultimately make a determination of whether to award 207-c benefits or not. Should 207-c benefits not be granted, the injured officer has the option of proceeding to an appeal process.

Once the injured officer is granted 207-c benefits, the officer should regularly submit proof of an ongoing medical disability from his or her treating physician in order for benefits to continue. In addition, the employer is allowed to arrange periodic independent medical examinations to verify the degree of ongoing disability. Employers should develop and provide a detailed job description of the injured officer’s position to the medical examiner so that the doctor can make a knowledgeable determination whether the officer can return to duty.

Employers must remove an officer from 207-c status when the officer returns to work. Additionally, employers may discontinue providing benefits if an officer fails to return to full or light duty after medical documentation shows the officer has recovered sufficiently from the injury. The officer is entitled to a hearing before the benefits are stopped if the officer submits medical evidence

showing he or she is still unable to return to work.

The benefits under 207-c are not meant to be permanent but are intended to provide a disability indemnity payment equal to the full amount of wages while the employee recovers from the injury. In those cases where an employee receiving 207-c benefits appears to be permanently disabled and unable to return to work, it may be worthwhile for the employer to investigate the viability of filing an application for disability retirement on behalf of the employee. Should the state approve disability retirement, the employer is no longer obligated to pay salary benefits to the employee under Section 207-c.

Employers are eligible for reimbursement from their workers’ compensation carriers at the standard compensation rate. A Workers’ Compensation Board Hearing Judge will ultimately order reimbursement when Section 207-c benefits have been forwarded to the employee. It is therefore imperative that employers complete a C-107 Wage Reimbursement form on a periodic basis and send it to their workers’ compensation carrier while an employee is out and receiving 207-c benefits. It is important to be aware that employers may not charge any Section 207-c benefits to an officer’s accrued sick leave or vacation bank. Any resulting reimbursement award is not intended to be applied to the officer’s accrued benefits.

The widening of the availability of the benefit by the courts has increased the frequency of Section 207-c cases in New York, making it that much more important for employers to become fully aware of the laws and procedures governing this complicated benefit. Please contact your workers’ compensation carrier with any inquiries you may have about Section 207-c benefits. Your carrier should make local attorneys available to you as a resource in seeking answers to your difficult questions.

Howard Bitner and James Cookingham

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TEN WAYS TO STAY OUT OF THE EPL QUAGMIRE *continued*

3 SUPERVISE THE “SUPERVISORS”

Why? Actions taken by a supervisor can impute negligence to the department/employer. An employer is always liable when a supervisor engages in harassment that culminates in a tangible employment action (hiring and firing; promotion and failure to promote; demotion; discipline; change in benefits, etc.). An employer is not automatically liable for a supervisor’s action that does not result in a tangible employment action, such as a hostile work environment. If there is no tangible employment action, there are defenses available to the employer. They include:

- Reasonable care taken by employer to prevent and promptly correct illegal harassment.
- Complainant failed to take advantage of preventive or corrective opportunities.

However, an employer is liable if it knew or should have known about the harassment and did not take prompt action to remedy the situation.

4 LOOK FOR INFORMAL RESOLUTIONS

Informal resolutions, essentially, compromises and settlements that do not involve formal hearings or trials, work best with minor complaints or situations. They typically involve changes in the work environment, reassignments, reinstatements, or other forms and conditions. Municipal counsel should draft an agreement, with the approval of the local governing board, whenever a compromise or settlement is reached. The alleged harasser should be made aware of the action taken. It is a good idea for department leadership to follow up and monitor the environment. Since the Public Officials Liability Policy doesn’t allow policyholders to settle claims without the insurer’s consent, check with NYMIR before agreeing to any settlements or compromises.

5 INVESTIGATE FAIRLY

Select the right investigator. The investigator must be fair, impartial and objective; have no conflicts of interest; maintain confidentiality; be familiar with the department’s policy and harassment law, and have conducted investigations in the past.

Conduct a fair and comprehensive investigation. Specifically, this means to: start the investigation

promptly; review the department’s complaint procedure with the complainant and the accused; involve counsel; document interviews, secure evidence and maintain confidentiality.

Investigators should keep in mind that the content of the investigation is discoverable during litigation. Also, in some cases, it may be wise to consider outside counsel.

6 TRAIN, TRAIN AND THEN TRAIN AGAIN

Why? Properly conducted, training prevents harassment and demonstrates the department’s commitment to prevent and promptly rectify harassment. It also provides guidance to employees. Training explains what behavior is prohibited and it can clear up confusion about workplace behavior.

Training can also reduce a department’s liability in the event of litigation. A comprehensive training program is a viable defense for harassment claims. Lack of training weakens the defense that the department reasonably attempted to prevent harassment. Keep records of training and maintain them in a file.

7 PREVENT RETALIATION

Actions that could constitute retaliation include ultimate employment decisions (hiring, granting leave, firing, promotions, compensation, transfers and changes in work assignments), as well as other negative employment decisions (declining reasonable requests for training, delaying expense reimbursement, unfair criticism, “shunning”). Actions that could constitute retaliation also include negative employer responses to the complaint (moving complainant to an undesirable location/assignment/shift).

Law enforcement agencies should make sure that anti-retaliation statements are included in all anti-harassment and discrimination policies. Employee training should include statements that retaliation is illegal and information on how to properly identify it when it occurs. All claims of retaliation must be promptly and thoroughly investigated.

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EPL QUAGMIRE *continued*

8 DON'T CUT HUMAN RESOURCES (HR) STAFF

HR staff often function as the front line experts in complying with the department's policies and procedures. They can help calm workplace disputes, train staff, and keep employment issues and decisions within legal bounds. Cuts in HR staff can result in an escalation of workplace disputes and harassment and discrimination claims.

9 MAINTAIN A GOOD RELATIONSHIP WITH MUNICIPAL COUNSEL

Advance consultations with counsel can prevent small issues from escalating into complaints to the Equal Employment Opportunity Commission (EEOC) or the New York State Division of Human Rights. Claims against the municipality can be mitigated as well. Legal fees incurred early on are small when compared to fees usually incurred at a later time.

10 REPORT ALL POTENTIAL CLAIMS TO YOUR INSURANCE REP AND/OR NYMIR AND FORWARD

ALL LEGAL DOCUMENTS

The NYMIR Public Officials Liability Policy requires prompt notice in the event of any error or omission which could rise to a claim. It also requires the subscriber to cooperate with NYMIR's claims staff and/or defense counsel.

Not giving us notice, or not forwarding legal papers can jeopardize coverage. Contact NYMIR claims or your insurance representative if you are not sure if an incident needs to be reported.

DO YOU GET THE SHIELD?



NYMIR Risk Management created a Law Enforcement Liability list server about 18 months ago called NYMIRShield. This list server provides a forum for NYMIR law enforcement subscribers to ask questions and seek assistance on issues in their departments. Periodically, timely law enforcement articles will be sent to NYMIRShield members. These articles range from Supreme Court Decisions, to training methodologies, to the latest in law enforcement research. NYMIRShield subscribers receive an electronic version of the NYMIR Law Enforcement Newsletter a few weeks ahead of the print version.

How do you become a member of NYMIRShield? It's simple. Email or call Brett Carruthers with your name and email address. He can be reached at 716.282.4890 or bcarruthers@wrightrisk.com

WHAT'S NEW ON THE WEB: WWW.NYMIR.ORG

The law enforcement liability presence on NYMIR's website has been greatly enhanced. On the home page there is a button for "Law Enforcement". This will take you to the Law Enforcement section of the website. There you will find sample policies, relevant law enforcement liability articles, past issues of the NYMIR Law Enforcement Newsletter, and numerous law enforcement links.

Law Enforcement

Have an idea for something you would like added to the website? Have a favorite "link" that you think others would find useful? Have a policy you would like to share? Please contact Brett Carruthers at 716.282.4890 or bcarruthers@wrightrisk.com. He will arrange for the information to be added to the website.

We appreciate comments on the newsletter and suggestions for future articles on relevant law enforcement topics. Please feel free to contact us.

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