INTRODUCTION

All employers face the potential of dealing with workers who act in ways that are contrary to the best interests of the organization, whether it be a unit of government, private business, or other entity. Indeed, personnel issues may consume a large percentage of the emergency manager’s time. While employment law has many potential intricacies, understanding the basics will help emergency managers plan ahead to avoid personnel disputes and also provide insight into the best way to react when problems do occur.

Ideally, both the employer and employee understand it is to their mutual benefit to cooperate in helping the enterprise to succeed. Unhappy workers mean lower performance and decreased satisfaction for the head of the organization. The boss benefits when the group does well, so it is in his or her best interest to assist in that effort. In reality, however, disputes between people at different levels of authority are a daily part of economic and social life. As such, employment law can be very political.

Employment law includes a lot of federal and state regulation, and employers frequently also have extensive standards and guidelines for employees. This is particularly true when a job involves significant potential hazards, as is the case with emergency response and emergency management (EM). Four kinds of legal rules govern the daily life of employees. These include:

1. statutes, which often authorize administrative agencies to take action;
2. the body of law that comprises the rules, regulations, and rulings of administrative agencies;
3. common law tort and contract rules; and
4. state and federal constitutional specifications that delineate employee rights, mostly regarding government employees.

Two types of statutes govern the employment relationship: those that govern collective action (union activity), and those that cover all employees. Collective action is governed by the National Labor Relations Act¹ and primarily relates to federal employment. Federal EM employees, such as those working in the Department of Homeland Security, have extremely limited rights compared with their counterparts in other agencies.² State regulation of union activities is frequently preempted by the broad federal statutes.

TORTS

Work-related torts cover an assortment of interests. They are discussed briefly below.

Invasion of privacy

An employee has only a limited expectation of privacy at work. Generally, however, conduct that can
be described as “snooping” by the employer goes too far. This does not mean that the employer cannot obtain information on the employee that directly affects workplace performance (like reasonable and impartial testing for drugs or alcohol) or may endanger the employer’s reputation or the safety of other employees. Also, because EM has a role in public safety, employees may have access to classified information. As such, a greater degree of intrusion into employees’ affairs may be appropriate. It is very important, however, to consult with legal counsel before taking intrusive action to avoid potential litigation.

Defamation

Employers may not do harm to their employees’ fame, character, or reputation by means of false or malicious declarations. The declaration may be in the form of gestures or action rather than words. In one case, an employer fired an employee, stood over him while he packed his belongings, and escorted him to the door. This was found to be defamatory activity, because it implied that the employee was dishonest and untrustworthy.3

False imprisonment

False imprisonment means detaining a person without cause and not permitting him or her liberty to leave, and the person knows he or she may not leave. An example is found in a case where a security guard and the owner of the security service kept a grocery clerk in a room and would not let her use the telephone other than to receive one call during a three-hour interrogation. The guard put himself between her and the door and told her he would decide if she was going to jail.4

Intentional infliction of emotional distress

To prove intentional infliction of emotional distress, the employer must have acted in an extreme and outrageous way, must have intended to cause emotional distress or had a substantial certainty that it would ensue, and the behavior must have resulted in substantial emotional distress. Courts have differing ideas about what is outrageous. In one case, an employer ordered an employee to lower his trousers and expose himself to fellow employees. The trial court found for the employee, the appeals court reversed, and the state supreme court reversed again, holding for the employee.5

Fraudulent misrepresentation

Fraudulent misrepresentation happens when an employer falsely makes a statement of opinion, fact, law, or intention, intending the employee to act based on it. One employer told an employee that if the employee would accept a job in California, the employer would buy his house. After accepting the transfer, the employee tried to get the employer to buy the home and was fired. The employer’s lie changed the way the employee evaluated the job offer, and recovery was permitted.6

Intentional interference with contractual relations

In this case, the employer must act, with knowledge of an existing or possible contract between the employee and a third party, with the intent of interfering with that contract and causing the intended harm. This tort must be carefully kept in mind by EM supervisors, since many contractors attempt to “cherry pick” the best employees to work for them. Interfering with this process, despite understandable anger with the employee, may expose the supervisor and employer to liability.

Malicious prosecution

For this action to succeed, one must prove that the antagonist began a legal action, the antagonist lost the case, the antagonist did not have probable cause to begin the case, the antagonist began the case with “malice,” and the case caused harm for which damages may be had. Either employer or employee may use this approach, but courts do not like this type of action. When successful, however, large damages may be won.

Abuse of process

Like malicious prosecution, this type of case springs from misuse of the legal system and may be used by either employer or employee. One must prove
that the adversary used the legal system due to an ulterior bad motive, and as such, the legal process was used for a purpose other than that for which it was intended. This occurs, for instance, when someone plants evidence to discredit a person and calls the police to arrest the person.

Blacklisting

This tort involves preventing or trying to prevent an employee from getting future employment. The employee must establish that the employer did this out of malice. Employers have a limited privilege to talk about matters that concern them both. Giving a bad reference is the classic example of this. If false information is given out, there will be a basis to get damages. If the statements are on overall “suitability,” they may be held to be mere opinion or information.  

Constitutional provisions

The US Constitution defines the relationships between the federal and state governments as well as between the government and its citizens. It does not regulate conduct between citizens. It is, therefore, not relevant to many employment relationships. The Constitution does, however, regulate employment relationships in the public sector, as these are between the government and its citizens. Constitutional provisions control government EM programs.

As a general matter, no level of government may exercise its power to take away constitutionally guaranteed rights of employees. The rights of privacy, free speech, and association are those most often at issue.

Right to privacy

Searching a government employee’s desk has been found to be unconstitutional. As mentioned above, however, the fact that EM is a public safety entity may create greater opportunities for employee oversight. Again, an attorney should be consulted prior to any potentially invasive oversight action.

Free speech and association

The Supreme Court has ruled that hiring, promotions, transfers, and recalls of a low-ranking government employee may not be based on support for a particular political party. The employee’s First Amendment rights of free speech and association would be improperly limited by such a requirement unless party membership can be shown to be a proper prerequisite for effective performance in the job. This would be a difficult matter to prove. In a similar vein, the Fourteenth Amendment’s equal protection clause prohibits racial discrimination by government employers.

Regulations of Special Interest to Emergency Management

There are many governmental regulatory programs that affect employment, and their full scope is well beyond this article. Some must be mentioned, if only in passing, because of their effect on EM activities.

Health and safety

Occupational Safety and Health Administration (OSHA). OSHA regulations apply to all workplace activities, including those of government entities. The OSHA statute permits states to have responsibility for workplace safety if their programs meet specific guidelines. The state standards must be at least as strict as those of the federal government. The emergency manager should become familiar with the regulations that exist pertaining to his or her workplace.

OSHA imposes two duties on employers: provision of a hazard-free workplace and compliance with OSHA standards. The OSH Act gives employees several important rights:

- to question unsafe conditions and request a federal inspection;
- to assist OSHA inspectors;
- to bring an action to make the Secretary of Labor seek injunctive relief where there is imminent danger to employees; and
- to gain access to records about the employee’s health and exposure to hazardous substances.
Employers of 11 or more employees must keep records of occupational diseases and injuries. Failure to do so may result in huge fines.

Workers’ compensation. Government and private-sector employees are typically compensated for their on-duty injuries through workers’ compensation regulations. These vary from state to state. Workers’ compensation programs include “exclusive remedy” clauses, which prevent all but a very small number of lawsuits against employers for workplace injuries. The big exception occurs when the employer clearly intended to harm workers. Federal civilian employees are covered by the Federal Employees Compensation Act (FECA), which provides coverage for temporary or permanent disability due to employment-related injury or disease as well as partial wage compensation.

PROGRESSIVE DISCIPLINE

Many employment contracts use a system called “progressive discipline” to deal with employees who perform below par or contrary to the employer’s rules. Such programs typically call for a graduated set of penalties before an employee can be terminated. An example of progressive discipline would be a verbal reprimand for a first offense, a written reprimand for a second offense, uncompensated suspension for a third offense (typically a period of two weeks), and then termination. Frequently, the written reprimand and suspension periods will be accompanied by a plan for correction. This is a sort of mini-contract in which the manager specifies areas of shortfall, and the employee agrees to correct shortcomings on a schedule. Failure to comply with the plan may result in further discipline.

One challenge with this system is its requirement that managers actually manage. All too often, an underperforming employee is given one verbal reprimand after another, with no written documentation. Eventually, the sum of failures to perform may be sufficient for termination, but the fact that these events have not been noted in the employee’s file may mean the employee stays on for additional time while a sufficient record for termination is compiled. Such a situation may be the basis for discipline of the manager by his or her superiors. This situation is frustrating for the attorney who must explain the need for such documentation and fight the employee’s appeal.

Of course, where an employee’s actions are illegal or bring the employer into disrepute, like running a gambling ring from one’s desk, immediate termination may be appropriate. Similarly, putting oneself or one’s fellow employees at risk through unsafe behavior, such as a heavy equipment operator who drinks on the job, may also be grounds for immediate termination. Any possible deviation from the system must, however, be discussed with legal counsel before taking place.

AVOIDING ETHICAL LAPSES IN EMERGENCY MANAGEMENT

Both government and business employees are bound by ethical standards. The difference between the two is that ethical standards for business are largely self-imposed, while those binding government employees may be matters of law or policy. Government ethics guidelines apply to the actions of employees whether they are at work or not. The reason for this intrusion into employees’ private lives is that they are seen as representing the government at all times. Public service is a public trust; therefore, government employees must behave in ways that promote trust by the general public. As such, situations such as conflict of interest, moonlighting, or use of government resources for private purposes must be avoided.

The following are minimum standards of conduct for government employees (excerpted from the Indiana Ethics Commission standards):

- Employees are to be impartial in the discharge of their duties.
- Decisions and policies must not be made outside the proper channels of government.
- Public office is not to be used for private gain.
- Employees may not make unapproved use of government property, personnel, or facilities.
- Employees may not use government time for other than official duties.

- Employees may not benefit financially from information of a confidential nature gained through government employment.

- Employees may not solicit or accept outside payments for the performance of official duties.

- An employee may not accept a gift, favor, service, entertainment, food, or drink which could influence the employee’s action.

- Payment for an appearance, speech, or article may not be accepted if the appearance, speech, or article could be considered part of the employee’s official duties.

- An employee may not accept payment of expense for travel, conventions, conferences, or similar activities that could influence the employee’s action.

- Employees may not have outside employment incompatible with their government employment or against their agency’s rules.

- Supervisors may not solicit political contributions from employees they supervise.

- An employee may not solicit political contributions from persons or entities that have a business relationship with the employee’s agency.

THE HATCH ACT

The Hatch Act applies to state and local employees of the executive branch. They must be principally employed by programs financed in whole or in part by loans or grants made by the United States or a federal agency. EM agencies that operate using federal funds made available through EM performance grants as well as employees whose salary is partially paid by programs like the Chemical Stockpile Emergency Preparedness Program (CSEPP) are subject to the Hatch Act. State law and agency regulations also apply to such employees.

State and local employees covered by the Hatch Act may:

- run for public office in nonpartisan elections;

- campaign for and hold office in political clubs and organizations;

- actively campaign for candidates for public office in partisan and nonpartisan elections; and

- contribute money to political organizations and attend political fundraising functions.

Covered state and local employees may not, however, be candidates for public office in a partisan election, use official authority or influence to interfere with or affect the results of an election or nomination, or directly or indirectly coerce contributions from subordinates in support of a political party or candidate.

Violation of the Hatch Act may result in significant penalties. If the Merit Systems Protection Board finds a violation that calls for discharge from employment, the agency must either remove the employee or surrender a part of the federal assistance equal to two years’ salary of the employee. If the board decides the violation does not warrant the employee’s firing, there will be no penalty.17

CONCLUSION

All employers, and particularly those in the field of EM where contract and high-risk employment occur more frequently, will at some point be faced with employee conflicts. When both employers and employees know their rights and limitations under local, state, and federal law, both will be better
protected from unlawful practices and undue risk. Basic knowledge of employment law and clear guidelines for employees provide the best means for avoiding personnel disputes.

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REFERENCES
2. The extremely limited rights of Department of Homeland Security employees was the subject of vigorous debate during the adoption of the HS Act.
11. 29 USC § 667.
12. 29 USC § 634(a).
13. 29 USC § 657.
14. 29 USC § 657 (c).
15. 5 USC §§ 8101-8151.
16. Indiana ethics laws and enforcement procedures are detailed at 40 Indiana Administrative Code Article 2 (2004).
17. For further information on the Hatch Act, see www.osc.gov/hatchact.htm.