

12 Steps to Avoiding Liability



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ALL ABOUT THE AUTHORS

With offices in Los Angeles, San Francisco, Fresno, San Diego and Sacramento, the law firm of **Liebert Cassidy Whitmore** represents Community College District management in all aspects of labor and employment law, labor relations, and education law as well as providing advice and representation in business and facility matters, both transactional and litigation. The Firm's representation of Community College Districts throughout California, encompasses all phases of counseling and representational services in negotiations, arbitrations, fact findings, and administrative proceedings before local, state and federal boards and commissions, including the Public Employment Relations Board, Fair Employment and Housing Commission, Equal Employment Opportunity Commission, Department of Labor and the Office for Civil Rights of the U.S. Department of Education (OCR). In addition, the Firm handles bidding questions, contract review and revision as well as other contracting issues. The Firm regularly handles a wide variety of labor and employment litigation and litigation regarding business and facilities issues, from the inception of complaints through trial and appeal, in state and federal courts.

Liebert Cassidy Whitmore places a unique emphasis on preventive measures to ensure compliance with the law and to avoid costly litigation. For more than thirty years, the Firm has successfully developed and presented training workshops and speeches on all aspects of employment relations for numerous public agencies and state and federal public sector coalitions, including the Community College League of California (CCLC), Association of California Community College Administrators (ACCCA), Association of Chief Human Resources Officers for Community College Districts (ACHRO), California Community College and University Police Chiefs Association (CA CUPCA), Association of Chief Business Officials (ACBO), California Community College Chief Information Service Officers (CCCCISO), Community College Facility Coalition (CCFC), National Employment Law Institute (NELI), and the Public Agency Risk Management Authority (PARMA).

This workbook contains generalized legal information as it existed at the time the workbook was prepared. Changes in the law occur on an on going basis. For these reasons, the legal information cited in this workbook should not be acted upon in any particular situation without professional advice.

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PURPOSE OF THIS WORKBOOK

This workbook provides guidance for community college district administrators on how to avoid or minimize legal liability. The 12 Steps to Avoiding Liability are based on the many years of experience of the firm's attorneys in advising and defending public agencies. Each of the Steps focuses on actions that administrators can take to avoid situations that commonly lead to or increase legal liability for community colleges.

In today's complicated society, administrators and supervisors are expected to navigate a field of legal "land mines" on a daily basis. Federal and state constitutions, federal and state laws, the Education Code, the California Code of Regulations, board policies and procedures, collective bargaining agreements, memoranda of understanding, work rules, local arbitration decisions and personnel commission decisions define the laws districts must follow. This workbook is intended to serve as a basic survival kit. We hope the checklists included in the 12 Steps will assist you in analyzing a situation and point you in the right direction.

The 12 Steps are written to serve as general guides for quick reference by administrators, for situations which commonly create liability for a district, without legalese or exhaustive detail. Most of the 12 Steps topics have their own in depth and detailed workbooks. You should consult with your human resources department, and/or labor and employment attorneys regarding specific employee relations situations.

TYPES OF LIABILITY

The sources of potential liability that a district must confront are extensive. The following is a list of some of the sources of claims commonly asserted against community college districts:

- Accreditation Standards of the Accrediting Commission for Community and Junior Colleges
- Affordable Care Act (ACA)
- Americans with Disabilities Act (ADA)
- Age Discrimination in Employment Act (ADEA)
- Brown Act
- Civil Code
- California Family Rights Act (CFRA)
- Civil Rights Laws¹
- Civil Service and/or Personnel Rules
- Collective Bargaining Agreements

- Confidentiality in Medical Information Act (CMIA)
- Constitution (federal and state) – e.g., First Amendment, Privacy, Due Process
- Defamation
- Education Code
- Educational Employment Relations Act (EERA)
- Equal Pay Act of 1963 (EPA)
- Government Code, including the Fair Employment and Housing Act (FEHA) – discrimination, harassment, and retaliation
- Fair Labor Standards Act (FLSA)
- Family Educational Rights and Privacy Act (FERPA)
- Family and Medical Leave Act (FMLA)
- Health & Safety Code
-
- Invasion of Privacy laws
- Labor Code
- Negligent Hiring and/or Retention of Employees
- Pregnancy Disability Act (PDA)
- Public Employee Retirement Law (PERL) and Public Employees’ Pension Reform Act (PEPRA)
- Public Records Act
- Public Safety Officers Procedural Bill of Rights Act (POBR)
- Section 504 of the Rehabilitation Act of 1973
- State Teachers Retirement Law (STRL)
- Titles 2, 5 and 8 of the California Code of Regulations
- Title VI of the Civil Rights Act of 1964
- Title VII – discrimination, sexual harassment, retaliation
- Title IX of the Education Amendments of 1972
-
- Whistleblower statutes
- Workers’ Compensation Act

A district's liability for potential claims under the above-mentioned authorities is extensive. An employee may recover monetary damages, including punitive damages, against the individual employees of the district, including administrators, managers and supervisors. An employee may obtain compensatory damages, back pay and liquidated damages. Additionally, a district may be subjected to an injunction, court order or writ of mandate ordering it to perform or cease to perform an act, including reinstatement of a terminated employee or retirement of a disabled employee.

Administrators of a district may also be sued for acts performed in their role as administrators. If an employee proves that a violation of the law was intentional and malicious, the employee can recover punitive damages against the administrator. The employee may also recover punitive damages against a non-supervisory employee for harassment if the non-supervisory employee was the individual who engaged in intentional and malicious harassing conduct.² The amount of punitive damages is based in part upon the amount of the administrator or non-supervisory employee's personal wealth and is designed to punish and deter wrongdoing. Some of the above-mentioned statutes also allow an employee to obtain attorney's fees, which can be substantial even if the monetary award to the employee is minimal.

Although the potential liability of a district may seem overwhelming, there are many practical steps you can take to reduce or even eliminate the risk of liability to the district and to yourself. If some of the 12 Steps listed below appear to be common sense, it's because they are! A significant portion of the litigation our firm handles could have been avoided through common sense measures. Therefore, we offer these 12 Steps as a practical guide to reduce liability for community college districts.

Section 3 **STEP 1 – FOLLOW THE RULES**

In addition to state and federal statutes and regulations, whenever a district is faced with an employment issue, whether it is the termination of an employee, a grievance, or a negotiation with a union, the district must always assess whether the issue is addressed by any rules that bind the district. The rules that typically bind a district, in addition to existing law, are:

- Board Policies and corresponding Administrative Procedures;
- Collective Bargaining Agreements (CBA) including any side letter agreements or memoranda of understanding (MOU);
- Department Rules;
- Personnel Commission Rules;
- Past practices which have become binding;
- Prior arbitration decisions; or
- Other judicial or quasi-judicial precedents.

The district's governing board or personnel commission (if any) adopts policies to establish employment practices that are consistent with state law.³ This includes requirements set forth in the Education Code and Title 5 of the California Code of Regulations.

The board or commission is also empowered to adopt rules and regulations necessary to carry out the policies. As a best practice, boards delegate the authority to establish these administrative procedures to the Chancellor or Superintendent/President.

The Community College League of California provides an up-to-date set of model board policies and administrative procedures, which are developed and kept up-to-date by LCW.⁴ For example, Board Policies 7360 and 7365 address discipline and dismissal of academic and classified employees. Merit districts that maintain personnel commissions to handle classified employee matters must also comply with the Education Code sections 88060-88139. It is important to make sure that board policies, administrative procedures and personnel commission rules are kept current with changes in the law. When faced with an employment issue, always check the district's applicable board policies and administrative procedures.

The applicable CBA is another critical source of rules and procedures governing employment issues. The CBA establishes contractual obligations between the parties under which management and labor must operate. When a district adopts and ratifies a CBA, it is obligated to comply with the provisions of that contract for the term (length) of the agreement. The district must make sure that supervisors are familiar with the CBA and that they abide its provisions. This familiarity is also important for supervisors in order to insure that employees and their bargaining representative (employee organization) meet their obligations. While one hopes the employee organization would ensure that employees play by the rules set out in the contract, you can be certain that the employee organization will monitor whether the district is meeting its obligations. When faced with an employment issue, in addition to checking the district's applicable board policies and administrative procedures, always also check the district's applicable CBA. The provisions of a particular CBA may provide for different procedures than the applicable board policies and administrative procedures. Where distinctions exist, the provisions of the applicable CBA generally control.

Generally any change to wages, hours, or the terms and conditions of employment must be negotiated with the employees' exclusive representative. Where CBA language does not address a specific situation, a district may be bound by its "past practice" or the manner in which it has addressed the same situation in the past. However, if the practice of the district is different than the express language of the CBA, the district may still legally be bound by the terms of the contract.

If a district desires to change an existing practice that will impact the terms and conditions of employment, ordinarily it must negotiate any such change with the exclusive bargaining representative before implementing the change.⁵ If a district does not negotiate, the association may file an unfair practice charge with the Public Employment Relations Board (PERB) to stop the district's action. Also, a failure to communicate changes in existing practices to your employees will likely create confusion, anger employees and damage relations with the union.

Often districts justify deviations from the language of the CBA on the basis of past practice. Past practice cannot replace clear language in a CBA. Administrators and Human Resources personnel should be particularly careful before relying on past practice when taking any action that affects the terms and conditions of employment.

A. THE CONSEQUENCES OF A DISTRICT FAILING TO FOLLOW ITS OWN RULES

A district's failure to follow its own rules may result in grievances, tort claims and/or lawsuits. As will be explained in Step Eight, failure to follow the rules may invalidate an action taken by the district and subject the district to monetary liability. An employee or a union may file an unfair practice charge with PERB⁶ or a petition in Superior Court to compel the district to follow its own rules (Writ of Mandamus). The employee or the union may also be able to obtain monetary damages and attorneys' fees through a court action for the employer's violation of its rules.

B. FAILURE TO FOLLOW DISTRICT POLICIES AND PROCEDURES MAY BE A PLAINTIFF'S MAIN EXHIBIT IN A DISCRIMINATION LAWSUIT

A district's failure to follow its own board policies, administrative procedures and personnel rules may support claims for discrimination, retaliation, harassment, and other unfair treatment and violations of employees' civil rights. A plaintiff in a discrimination lawsuit will often attempt to prove their case through "circumstantial" evidence, which is indirect evidence from which the jury can infer that discriminatory conduct occurred. Evidence that a district failed to follow its own policies and procedures can be persuasive circumstantial evidence to support a discrimination claim.

Example: Title 5 requires each district to identify a single person as the district officer responsible for receiving discrimination and harassment complaints,⁷ and that requirement should be incorporated in district policies and procedures. If an administrator receives a harassment complaint, and decides to "handle it" themselves without notifying the responsible officer, the evidence that the district did not follow its own anti-harassment procedures can be used by an alleged victim of harassment to substantiate a claim against the district.

C. ENSURING COMPLIANCE WITH A DISTRICT'S POLICIES AND PROCEDURES MAY BAR CLAIMS OR HELP DISTRICTS DEFEND AGAINST LIABILITY IN CIVIL LITIGATION

Districts should ensure that employees follow their district's internal complaint procedures as a means of protecting against future liability. For example, California courts have found that under some circumstances, an employee's failure to follow an employer's internal grievance

process before filing a lawsuit can bar the employee from bringing the lawsuit, or result in the dismissal of her claims.⁸

The best mechanism for ensuring that your employees follow the policies and procedures that apply to your district is to provide comprehensive training. The district should make sure that it provides copies of its board policies and administrative procedures, or personnel rules, to its employees. Supervisors, managers, administrators and Human Resources personnel should be trained on the policies, procedures and rules. In addition, the policies, procedures and rules should be reviewed on at least an annual basis to ensure that the district's practices conform to its policies, procedures and rules.

D. CHECKLIST ON HOW TO AVOID VIOLATIONS OF A DISTRICT'S POLICIES, PROCEDURES AND OTHER RULES

- Know rules applicable to employment issues, such as discipline or harassment complaints as set forth in board policies, administrative procedures, personnel rules and each collective bargaining agreement
- Train administrators, managers, supervisors and Human Resources personnel on district policies and procedures at least on an annual basis
- Publish the policies, procedures, personnel rules and CBA's on the district's website in an easy-to-find location. During orientation processes, make new employees aware of the rules and where they can locate copies of the rules.
- Maintain a positive working relationship with the union
- Encourage dialogue with union representatives
- Keep an open mind and be flexible
- Do not make promises to employees without checking the applicable rules and consulting with your Human Resources personnel
- Encourage your employees to utilize Human Resources personnel before taking employment actions
- Hold your employees, including your administrators, accountable for violations of the rules
- Understand privileges, obligations, and protections for Union members and their representatives, as provided in the CBA and the Educational Employment Relations Act (EERA)
- Fully investigate grievances and tort claims to ensure that employees are complying with the rules
- Review your policies, procedures, personnel rules and CBAs on at least an annual basis and analyze whether current practices are in compliance

The importance of providing regular training to all employees, including all supervisors, cannot be overemphasized. The cost of training is much less than the cost of litigation. Nonetheless, some agencies choose (whether purposefully or by default) to take the risk of substantial legal fees (and potentially substantial liability verdicts) in defense of a lawsuit rather than spending a much lesser amount to prevent liability through effective training.

Training can serve several purposes. The obvious purpose is to educate employees. However, adequate training can also provide a defense to liability in litigation. An employee's attendance at a training session can often refute a claim that they were not aware of the district's policies or procedures. Moreover, evidence of inadequate training can be devastating in a lawsuit and create an appearance that the district did not care whether its employees were complying with board policies and administrative procedures, or personnel rules, which implement applicable provisions of the law.

All employees, including executive-level administrators and supervisors, should participate in training. It is important to emphasize training from the top down, as employees will not subscribe to the importance of training if their administrators are not attending. Equally important is the administration's application and reinforcement of the principles learned in training. If the administration does not implement the skills or knowledge learned in training, the administration cannot expect its employees to put their training to good use.

Education and training can take many forms including, but not limited to:

- Orientation sessions for all new employees;
- Administration/supervisory training and department meetings with a trainer/facilitator;
- Annual refresher training for all employees on various topics;
- Working lunch meetings with topics such as discrimination prevention or sexual harassment as the agenda items; and
- Speakers from distinguished organizations.

A district should provide training for employees on a wide variety of topics. Training should at a minimum include preventing discrimination, harassment, retaliation and abusive conduct. An often overlooked aspect of training is training on the district's board policies, administrative procedures, personnel rules and particularly its CBAs.

Harassment prevention training is mandated in California.⁹ Employers with more than five (5) employees must provide all supervisors with at least two (2) hours of such training every two years, in an interactive format. Additionally, as of January 1, 2020, employers must also provide all non-supervisory employees with at least one (1) hour of such training every two years. Also as of January 1, 2020, an employer must provide sexual harassment trainings to all seasonal

employees, temporary employees, and any employee hired to work for less than six months within 30 calendar days or within 100 hours worked, whichever comes first.¹⁰ Training must include “abusive conduct” as a component of the training, which is defined to mean the conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests.¹¹ Abusive conduct is coupled with sexual harassment training as it is common for the two to occur hand-in-hand.

Harassment prevention training must occur within six (6) months of being appointed to a position.¹²

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Any employee who has any level of supervisory discretion, as opposed to routine clerical duties, is a “supervisor” as defined in the Fair Employment and Housing Act.¹³

Training of supervisors in the rules that apply to your district includes:

- Review of CBA language, bargaining history and past practice to interpret the meaning of ambiguous CBA provisions.
- A review of board policies and administrative procedures, and an understanding of the relationship between them and the provisions of the CBA.
- A review of past practices, (informal rules or ways of doing things which develop over time) are important in the collective bargaining process. The CBA may change the established way of doing things. If negotiations did not deal with these issues, these past practices may take on the force of a formal rule.
- A review of the district’s previous decisions, such as grievance responses or arbitrations, involving the district’s interpretation of contract language.
- Consistent application of CBA provisions.

Section 5 **STEP 3 – ESTABLISH AN EFFECTIVE HIRING AND EMPLOYEE RETENTION PROCESS**

Surrounding yourself with the right people involves more than the recruitment and interview process. It involves identifying intelligent, motivated, dedicated and loyal employees and placing those employees in critical positions within the district. The district must consider the detrimental effects associated with hiring a poor performer or placing an employee in the wrong position.

A district can significantly reduce its risk of liability by paying careful attention to the hiring process. A comprehensive and effective screening, interview, and verification process improves the quality of the district's work force and minimizes legal challenges arising from the hiring process. There are many important "do's" and "don'ts" to follow in the interview and selection process, but the process is inherently discretionary. It requires not only great preparation and methodical follow through, but also keen insight and intuition.

The purpose of the pre-employment screening, interview and verification process is to select the best candidate for the position and ensure that the district does not hire a candidate with a demonstrated history of poor job performance. Yet many agencies do not perform reference checks on applicants. Your Human Resources Department should always attempt to contact the applicant's former employers and require the applicant to provide meaningful references that the district should also contact.

During litigation, attorneys often explore an employee's work history and discover that the employee had similar problems at prior jobs. Good reference checking procedures should minimize the chance of hiring an applicant who has a demonstrated history of poor performance. Hiring good employees also prevents liability. A poor employee can create liability for a district by:

- Engaging in misconduct on or off the job;
- Damaging morale by creating an unpleasant atmosphere, forcing other employees to "pick up the slack;"
- Impairing efficiency and disrupting operations;
- Pursuing legal action against the district if the employee is disciplined or terminated.

There is no single "right way" to interview employment applicants. Rather, the approach an employer will use to interview applicants and select employees will depend on many factors, such as the nature of the job opening, the philosophy of the supervisor, the goals of the district, and the applicant pool. One of the most fundamental errors made in the selection process is to view the interview simply as a means of weeding out the less competitive candidates and finding the most qualified ones. Indeed, the most important steps in the selection process are taken outside of the interview room.

A. UTILIZE ACCURATE JOB DESCRIPTIONS

At the very outset of the hiring process, it is critical to develop accurate and sufficiently detailed job descriptions. An accurate job description will help the district focus questions included in job applications, as well as during interviews, so that the hiring process elicits only those facts that are job-related.

Additionally, to prevent disability discrimination in both the hiring process and during employment, the district's identification of and focus on the "essential functions" of the job is

critical. Courts generally treat the job description the employer prepares prior to the posting of the position as evidence of the job's essential functions.¹⁴

B. HAVE GOOD REASONS FOR YOUR HIRING DECISIONS

Have good reasons for your hiring decisions. Any hiring decision can be challenged by a disgruntled applicant. While many claims may be meritless, a district must be prepared to articulate legitimate reasons for its hiring decision. The district must also document all hiring decisions to establish legitimate reasons for its hiring decisions.

In addition, agencies should carefully review any education, experience or physical requirements for the position to ensure all applicants have a fair shot at the position and that the job requirements are not unintentionally discriminatory against any particular group. All criteria for the selection must be job-related. For example, can the district make being bilingual a mandatory criteria for a position? The answer is that the employer cannot require applicants for a position to be bilingual unless the job duties include the need to speak on a regular basis with those who speak the other language.

Similarly, a district cannot require a specified number of years of experience unless the district has data that shows the required number of years of experience equates to better qualified candidates. This is because including the criteria is likely to have the effect of attracting a less diverse pool of candidates. Accordingly, there must be a rational basis for inclusion of the criteria. For example, when hiring an instructor to teach automotive mechanics, a more recently trained candidate with knowledge of current technologies (e.g., for hybrid cars) may be equal to or better than a candidate with more years of teaching experience. Thus, if there is no data to show that years of teaching experience is an indicator of holding superior job-related qualifications, then years of teaching experience should not be included in the requirements for the position.

Employers are also prohibited from asking an applicant's salary history, either directly or indirectly through a former employer, the applicant's references or a background investigator, unless the employee's salary history is a public record by virtue of the applicant's former employment by a federal, state or local government agency.¹⁵ Such salary history covers both compensation and benefits. This is because the California Legislature has found that such information could have an adverse impact on race, ethnicity and gender-based pay inequities.¹⁶ If an employer happens to receive such past salary history, it cannot use past salary as a factor when making hiring decisions. However, if the applicant voluntarily provides their compensation history, an employer may use that information to determine what salary to offer the applicant.

C. AVOID THE APPEARANCE OF FAVORITISM

Do not let personal relationships cloud hiring decisions. Even the appearance of nepotism or favoritism is difficult to defend against. If an administrator becomes involved in a routine hiring decision because the applicant has a relationship with the executive, it can be inferred that the

decision is based upon factors other than the merit of the applicant. Applicants suing the district over a hiring decision can argue that the reason for a decision was a pretext for discrimination even if the decision was perfectly legitimate.

D. RETAIN GOOD EMPLOYEES BY MENTORSHIP, RECOGNITION AND REWARD

A long-term employee with a good performance record poses a minimal risk to the district from a liability standpoint. Such an employee is also presumably a productive contributor. The district should seek to retain those employees through the process of mentoring, recognition and reward. Make sure those above you as well as those below you are aware of your subordinates' successes and accomplishments. A critical factor in this process is providing regular feedback to the employee, both positive and negative, using effective communication techniques.

Section 6 **STEP 4 – ACCOUNTABILITY FOR ALL**

Administrators and supervisors must hold all of their employees accountable, including themselves, for their actions. An administrator who leads by example and holds everyone accountable sets a high standard for other administrators and employees to follow. Districts should evaluate administrators and supervisors and, if appropriate, discipline them in cases of misconduct and/or poor performance.

Administrators and supervisors should utilize the following suggestions to promote accountability:

- Timely complete accurate and honest performance evaluations, especially for probationary employees, applying standards consistently (see below)
- Accurately document performance, both positive and negative (see below)
- Maintain a safe and productive workplace environment
- Maintain a good working relationship with the employee organizations and their representatives (see Steps 6 and 7)
- Train employees (see Step 2)
- Conduct prompt, thorough and fair investigation of employee grievances/complaints (see Step 9)
- Adhere to laws, board policies, administrative procedures, and CBAs (see Step 1)
- Promptly and fully cooperate with attorneys representing the district in litigation (see Step 11)
- Consult with Human Resources personnel whenever appropriate

- Notify executives of potential liability, before a grievance, tort claim or lawsuit is filed
- Maintain the morale of a department/unit
- Promote the goals of employee relations

A. PERFORMANCE EVALUATIONS MUST BE ACCURATE

Evaluations are an opportunity to talk to employees about their duties, responsibilities, areas on which they must improve, and areas in which they are exceeding expectations. It provides a continuing and frequent process for knowing what your employees are doing and how well they are doing it. The importance of constant and accurate communication with employees cannot be understated. In fact, many grievances, claims and lawsuits arise because employers take innocent or necessary actions that are perceived as being hostile or unfair by employees due to miscommunication.

Administrators, managers, and front line supervisors must understand that performance evaluations are extremely important and should be prepared carefully and accurately. Do not delegate the preparation of performance evaluations. An employee's direct supervisor should prepare the employee's evaluation and then share the draft with the department manager or director, if any, for additional input. Managers and administrators should also discuss with front line supervisors their expectations regarding the drafting of evaluations. For example, one supervisor may have a very different perspective about what "meets standards" or "satisfactory" means than another supervisor. If general standards are not communicated to all supervisors and applied consistently, employees may receive varying evaluations even if they performed equal work.

If your district requires department or division heads to sign off on performance evaluations prepared by front line supervisors, department or division heads must pay careful attention to the evaluation before signing it. If your administrators are approving or writing performance evaluations that later are determined to be inaccurate, you must hold them accountable. Each administrator, manager or front line supervisor should realize that their signature on a performance evaluation can become a significant event. If discipline has been imposed on an employee in the past year, their performance evaluation should reflect the discipline and the rating should be consistent with the discipline.

B. THE IMPORTANCE OF DOCUMENTATION AND RECORDKEEPING

Proper documentation and recordkeeping are key to correcting deficient behavior or establishing a defense to claims brought by an employee. Administrators must be trained to supervise aggressively in terms of communicating with employees and documenting both positive and negative performance. Failure to document violations of district rules gives an employee an opportunity to overturn discipline. Additionally, in a discrimination lawsuit, an employee may be required to prove that other employees, who were not members of their protected class, were

treated differently for similar infractions. A failure to document a violation by one employee may support another employee's discrimination or retaliation case.

Any action taken by an administrator which may affect the terms of employment should be documented in writing, with sufficient detail. Date all documentation. This includes documentation of verbal warnings or reprimands. Record your interactions with employees accurately and objectively. Subjective opinions should not be reflected in employment decisions.

Keep in mind that these documents could later become exhibits in a subsequent litigation. Professional, non-subjective documents will be more credible. Also, be consistent and fair in your documentation and record keeping practices. It can do more harm than good if a district's records only focus on one employee, especially if other employees engage in the same conduct but are not counseled or disciplined. This alone could be taken as evidence of discrimination.

Failure to document reasons for taking employment actions may lead to claims that the employment action was pretext for discrimination or retaliation. Importantly, in order to defend against certain types of retaliation claims, Districts will need to present "clear and convincing" evidence that they had legitimate business reasons for taking a particular employment action.¹⁷

C. EMPOWER YOUR HUMAN RESOURCES DEPARTMENT

Human Resources personnel are a vital aspect of your district's risk management. They provide daily advice to administrators and supervisors about employee issues which, if handled improperly, could subject the district to liability. Therefore, the Human Resources department should contain quality employees who are professional, level-headed, knowledgeable and willing to learn the law. Such employees must be able to make difficult decisions, but also be willing to seek assistance from legal counsel when faced with difficult or unusual situations.

Districts need to provide proper training for Human Resources employees. Employment law is filled with land mines. Extensive training is required to navigate successfully through this mine field. Training should include not only equal employment opportunity laws (*i.e.*, Title VII, FEHA, ADEA, ADA, Civil Rights Act, etc.) but also the district's board policies and administrative regulations, personnel rules and rules and procedures contained in CBAs.

Managers and supervisors must be trained to consult Human Resources whenever they plan to take action that may impact an employee's status. For example, Districts should consider as a best practice having Human Resources personnel review performance evaluations *before* they are given to an employee. Also, discipline should be cleared through Human Resources before being given to an employee. Each supervisor is accountable for discipline of their subordinates, but let your Human Resources department help you do it right.

Honesty, consistency and fairness will insure that all employees feel they are treated reasonably and equally. These traits will maintain high morale and establish a level playing field for all employees. A good, but professional, relationship with your employees depends upon your ability to break down the distrust that employees may have of management's intentions. Trust can be established through honesty, consistency and fairness.

A. HONESTY

Honesty with your employees is an obvious step to good employee and labor relations. However, honesty is also very important in handling grievances, claims and litigation. Your attorneys depend upon you to disclose all relevant information, good or bad, about the case. Full disclosure includes production of all relevant documents requested by your attorney or opposing counsel. A failure to disclose requested information can have serious consequences to the district in the form of monetary sanctions or an adverse judgment or award. Moreover, failure to testify honestly is a criminal act. Thus, it is imperative from both an ethical and a risk management perspective that agencies stress to supervisors and other employees who may become witnesses the importance of honest communications.

B. CONSISTENCY

Employee counseling and discipline is often considered in light of whether employees in similar situations received the same counseling and discipline. Consistency may also be judged by whether a district follows its rules, including applicable deadlines. Acts which should be consistently performed in a timely manner include:

- The issuance of performance evaluations.
- Updating job descriptions. Job descriptions are sometimes out of date and bear little or no resemblance to the actual duties currently being performed by the employee in that position.
- Revising employment-related board policies, administrative procedures or personnel rules to reflect any changes in law. Make revisions a priority and assign responsibility for systematic review to the Human Resources Department.
- Providing responses to discovery requests in litigation to your attorneys in a timely manner.

The importance of consistency is evident when evaluating probationary employees. If a district fails to evaluate a probationary employee within the appropriate time frame, the probationary employee will become a permanent employee by default.¹⁸ Accordingly, a district should take the probationary process seriously and evaluate whether the probationary employee meets the relevant job requirements. A failure to evaluate probationary employees consistently will lead to the district being required to retain poor performing employees.

C. FAIRNESS

The concept of fairness is very important to employees and is related to honesty and consistency. Employees will be upset if they perceive that they are being treated unfairly. While administrators are often forced to make decisions that will result in unhappy employees, the negative impact of such decisions can be minimized by communicating the honest reasons for the decision. A lack of communication about the reasons for a decision is often perceived by employees as evidence that the decision was unfair or made for improper reasons. If an employer is honest with its employees and applies the rules consistently, employees will be more likely to believe that the employer is acting in a fair manner.

The application of the basic concepts of honesty, consistency and fairness is an integral part of the liability reduction strategy of any district.

Section 8 **STEP 6 – COMMUNICATE, COMMUNICATE, COMMUNICATE**

Litigation is often triggered by poor communication between management and employees. Actions taken by management that are not adequately explained to employees may anger employees and increase their distrust of management. Conversely, good communication may result in employees attempting to communicate with management to solve problems instead of resorting to lawsuits or grievances.

A. PRINCIPLES OF EFFECTIVE COMMUNICATION

Communicate the district's goals to your employees. Their understanding of the goals and their role in achieving them are critical to success. Ideas and decisions can only be effective if they are communicated clearly and accurately. Good communication is therefore a vital tool at all levels of management. Communication involves more than mere words. Actions, reactions, and attitudes are also means of communicating.

Communicate important or difficult issues in person and allow employees an opportunity to respond. Have the conversation as soon as possible following an event or incident. Don't wait until the performance review to discuss a problem with an employee. An employee's performance review should not be the first time the employee learns of a supervisor or manager's concerns. Discuss problems as they arise and before they grow or become habits. Avoid hinting or being too subtle in your comments as they may be misunderstood. When communicating in person avoid emotional responses. Provide concrete and accurate reasons for your decisions. Let employees know that their viewpoints matter and will be considered by management when decisions are made.

The following principles may assist you to communicate more effectively:

- Clarify your ideas before communicating them to the employee.
- Determine what you want to accomplish with each communication.
- Consider the environment of your communication – *i.e.*, the timing, physical setting, political climate, custom and past practice and your audience.
- If appropriate, consult with others when planning a communication.
- Avoid deceitful or defensive attitudes.
- Help the employee understand how their conduct impacts the agency.
- Convey something of help or value to the recipient.
- Evaluate your communication effectiveness regularly.
- Support your communications with actions.
- Be a good listener; seek to understand as well as to be understood.
- Think through what you want to accomplish.
- Make sure you have the facts straight, *i.e.* don't go into communications making assumptions.
- Follow through with promises/assurances made and only make promises on which you can deliver.

B. DEALING WITH THE PUBLIC AND THE MEDIA

A district will sometimes need to respond to questions from the public and the media. For this reason, administrators should be aware of the impact that public statements can generate. Media requests should be responded to promptly to disseminate the district's position. The goal of any communication with the public or the media should be to state the district's position in a clear, understandable and positive light.

It is important for the district to designate which administrators are authorized to publicly represent the district in regard to specific issues. This should be made sufficiently clear that each administrator will know upon receiving a question whether they are authorized to respond or to whom they should refer the questioner for a response. If any questions involve personnel issues, be careful not to violate the privacy rights of individual employees. Finally, if the media requests information regarding labor negotiations, consult with the district's lead negotiator to ensure that your public comments do not undermine the district's position in the negotiations.

C. LISTEN TO YOUR EMPLOYEES

Some employee grievances or complaints result from the belief that managers or supervisors are ignoring employee concerns. Sometimes the employee does not desire to file a grievance or

lawsuit, but pursues that avenue simply to obtain a forum in which their concerns will be addressed. In such cases, problems can be avoided if management listens to the concerns of employees. Listening to employees is not the same as allowing employees to dictate how to run the district. Rather, listening will satisfy the employee's desire to be heard while allowing management to act in the manner which is most appropriate for the district. By listening, you may also learn useful information. In short, listening to employees is a critical component in your efforts to resolve situations prior to litigation.

D. TRAINING AND PERFORMANCE EVALUATIONS ARE OTHER MEANS OF COMMUNICATION

Use training to communicate with employees and receive feedback on what employees think of management rules and policies. Use performance evaluations to communicate with employees on *both* positive and negative issues. Give employees the opportunity to provide written feedback. An employee's choice not to respond in writing may preclude the employee from later claiming they did not understand.

E. COMMUNICATE EXPECTATIONS

Even if an employee's performance has been satisfactory, performance reviews should be written to encourage improvement and identify area(s) where improvement is most needed or encourage the attainment of goals for the upcoming review period that allow the employee to further progress in their position. An effective performance evaluation should also communicate a plan of improvement which employees can follow. Additionally, what is documented in the review, good or bad, should never be a surprise to the employee. As a result of day-to-day communication, the employee should have a clear understanding of their performance before going into a formal evaluation meeting.

Communicate the district's policies and procedures to the employees. Communicate the district's expectations to the employees, and give them feedback as to whether they are meeting, exceeding or falling short of expectations. Be specific, objective, consistent and fair. The employee must understand what level of performance they are expected to meet; and, if improvement is needed, a time period should be specified for bringing about the necessary improvement.

F. COMMUNICATION REQUIRES FEEDBACK

The act of communicating is only complete when feedback confirms that the information was received and understood. When communication goes wrong, people often tend to blame the receiver of the information. Communication, to be effective, should be a two way street. The supervisor must always remember to listen to the employee with sincerity and full attention. A follow-up email message or memorandum summarizing important verbal communications can help to clarify any ambiguities and double-check against misunderstandings. Similarly, requesting an employee to provide a written summary of their understanding of a verbal

communication is a good way to double check for understanding and to identify potential misunderstandings.

G. AVOID STRAY REMARKS

The administrator should be particularly careful of making offhanded remarks about employees which may later be used against them. While employees, especially management personnel, should be trained not to base employment decision on an individual's protected status, but rather on their merit, they should also be counseled on the risks of making "stray remarks" that may be interpreted as demonstrating a discriminatory intent. Such stray remarks can create liability for a district where no discriminatory intent exists.¹⁹ Therefore, administrators should never make stray remarks which might offend or reflect on an individual's protected status. For example, avoid comments or jokes about physical appearances, gender, gender identity, race, national origin, religion, age, sexual orientation, or comments that could be associated with other protected classifications under the FEHA.

Section 9 **STEP 7 – PICK YOUR BATTLES WISELY**

Each decision that a district makes can have long term ramifications. Virtually every issue which arises in the workplace pits management against the employee and/or the employee's association. The way in which disputes are resolved can have far reaching and binding effects for years. Management should always consider whether taking a position to achieve a short term victory may turn out to be detrimental to the district in the long run.

A. BE REALISTIC – MANAGEMENT WILL NOT PREVAIL IN EVERY LABOR RELATIONS DISPUTE

The district should recognize that management will not win every labor relations dispute. And, even if management did, it would come at a great price. Moreover, it is usually not necessary for management to challenge every grievance and every lawsuit vigorously. Management must recognize and quickly resolve those situations where it has acted inappropriately or where the issue is so minor that granting the grievance or resolving the dispute will satisfy the employee and not adversely affect the district. Management's adoption of a reasonable and flexible approach to handling employment issues will prove beneficial in subsequent employee relations, whether it involves settling grievances or negotiating contracts.

B. THINK BROADLY AND LONG TERM

An administrator must balance the risk and reward of each decision. The long-term effect of each decision must also be considered. Since management must work with its employees on a daily basis, a poor relationship can prove to be very difficult and expensive for management. Management should be flexible and avoid rigid approaches.

C. SUCCESSFUL LABOR NEGOTIATIONS INVOLVE MORE THAN FINANCIAL GOALS

In the context of labor negotiations, management should carefully consider the positions that it asserts and their potential long-term impact. Employees and their associations do not forget the positions that management takes in negotiations. A negotiations strategy which involves disparaging its employees may haunt management for years to come in the form of job actions, grievances and lawsuits.

D. REALIZE THAT CHANGE MAY BE UNSETTLING AND THREATENING TO EMPLOYEES

Many lawsuits result from changes which upset employees. Change is almost always unsettling and possibly threatening for employees. Once the district initiates a policy change, the employees may decide to sue the district. However, such litigation may be avoidable through the following steps:

- Provide employees and employee organizations with written notice of proposed policy changes.
- Maintain an upbeat, positive and enthusiastic approach toward intended changes.
- Clearly define the objectives and the goals of the change, including how they relate to the efficiency or effectiveness of operations.
- Provide subordinates a clear understanding of the rationale for change, including what the alternatives were, and the trade-offs involved.
- Give the employees an opportunity to be part of the decision-making process in instituting the change.
- Negotiate with employee organizations regarding the impacts of changes prior to implementation.
- Provide an opportunity for feedback before implementing significant change.
- Don't make promises in regard to the proposed change that you cannot keep. Deliver on the promises made.

Section 10 **STEP 8 – DUE PROCESS MATTERS**

There are numerous due process requirements a district must follow before disciplinary action can be taken against an employee. Failure to follow due process can result in a court or an arbitrator ordering a district to reverse or reconsider a personnel decision.

A. DUE PROCESS ARISING FROM COMPLAINTS OF DISCRIMINATION, HARASSMENT OR RETALIATION

California Department of Fair Employment and Housing (DFEH) regulations require employers to develop a harassment, discrimination, and retaliation prevention policy that includes when an employer receives allegations of misconduct, not only will it conduct a fair, timely, and thorough investigation, it will also provide all parties with appropriate due process and will reach conclusions based on the evidence collected.²⁰ (See Step 9 below.) DFEH guidance to these regulations provides insight into what “due process” means – employers should be fair to all parties during an investigation. From a practical perspective, this means the investigator should:

- Conduct a thorough interview with the complaining party, preferably in person, and where possible, the investigation should start with this step;
- Give the accused party a chance to tell their side of the story, preferably in person. The accused party is entitled to know the allegations. However, it is good investigatory process to only reveal the allegations during the interview. It may not be necessary to disclose the identity of the complaining party in some cases. Due process does not require showing the accused party a written complaint. It means making the allegations clear and getting a clear response;
- Interview relevant witnesses and review relevant documents. This does not mean an investigator must interview every witness or review every document suggested by the complainant or accused party. The investigator should exercise discretion and interview witnesses whose information could impact the findings of the investigation and attempt to gather any documents that could reasonably confirm or undermine the allegations or the response to the allegations;
- Do all work that might be necessary to collect all the relevant facts; and
- Reach a reasonable and fair conclusion based on the information collected, reviewed, and analyzed during the investigation.

B. DUE PROCESS IN DISCIPLINARY MATTERS

The primary pre-action due process requirement for serious discipline, such as a suspension without pay, is the employee’s right to respond to proposed disciplinary charges, referred to as a *Skelly*²¹ meeting. The following tips should be considered when conducting a *Skelly* meeting:

- The *Skelly* meeting is the employee’s legally-mandated opportunity to convince the district representative that the discipline as proposed should not be imposed or should be reduced.
- The district representative has no obligation to respond to questions or verbal attacks made by the employee.
- The district representative should not engage in argument or extensive discussion with the employee, except to clarify the employee’s position.

- The district representative should be a patient and attentive listener in the *Skelly* meeting, thanking the employee for presenting information at the end of the meeting.
- Assume that anything the district representative does in a *Skelly* meeting, other than listening to the employee, can and will be used against the district.
- If the employee makes claims that, if true, might affect the district's decision, the district representative should ask the employee to provide evidence to support those claims.
- The district representative should consult Human Resources personnel prior to any *Skelly* meeting.

C. AVOID PERSONAL AND DISTRICT LIABILITY

Due process is often the first thing that a court, arbitrator or hearing officer will examine in reviewing a district's disciplinary action. If an arbitrator, hearing officer or judicial officer can dispose of a case because of a due process violation, they very well may do so. In addition to *Skelly*, there are a variety of other due process rights on which a district's supervisors should receive training. The most frequently occurring due process right is an employee's right to representation at an interview in which the employee reasonably believes may result in disciplinary action against them. Another potential trap can arise from not paying careful attention to and meeting timelines. Other traps include a district's failure to follow due process guidelines articulated in CBAs and personnel commission. Additional specific due process rights exist for public law enforcement officers under the Public Safety Officers Procedural Bill of Rights Act.

District administrators should be trained in due process rights to avoid losing a grievance or a lawsuit on procedural grounds. Additionally, administrators should consult with Human Resources personnel whenever an employee claims a due process violation.

Section 11 **STEP 9 – INVESTIGATE BEFORE IT'S TOO LATE**

Investigation of claims or potential claims against the district is a critical step in minimizing liability. Use tort claims, grievances and informal complaints as an opportunity to assess the district's potential liability at an early stage. Thorough investigations in response to grievances or informal complaints can significantly reduce the liability to a district created by litigation. Furthermore, prompt and thorough investigation is mandated by law in some instances. For example, employers are legally mandated to take all reasonable steps necessary to prevent discrimination, harassment and retaliation from occurring in the workplace.

Any time a complaint of harassment, discrimination, or retaliation is received, either formally or informally, the district must conduct an investigation. In fact, case law establishes that, once an

employer knows or should have known of possible harassment, discrimination or retaliation, failure to conduct any investigation at all may constitute an independent violation of state (FEHA) and federal law (Title VII). Also, investigations send a message to employees that complaints will be taken seriously. Finally, a prompt and thorough investigation may allow a district to assert a defense to of harassment, discrimination and retaliation claims, or seek to mitigate damages claimed by an alleged victim.

It is critical that administrators and supervisors promptly report every complaint of harassment, discrimination or retaliation to the district officer who has been designated as the person responsible for receiving and addressing such complaints. This is true even where the complaint initially appears to be without merit. An investigation may also be triggered by the following:

- When a person, other than the aggrieved person, complains about harassment, discrimination, or retaliation;
- When someone indicates that inappropriate conduct is occurring, even if the words “harassment,” “discrimination,” or “retaliation” are not used. For example, while bullying may not rise to the level of illegal harassment, a complaint of bullying should be investigated;
- When a supervisor personally observes inappropriate conduct or language, or has general knowledge of a potentially hostile work environment. In this situation, the supervisor must request that any inappropriate conduct cease and report the facts to the designated district officer responsible for receiving discrimination, harassment and retaliation complaints.

The responsible district officer should proceed with an investigation in accordance with legal obligations, collective bargaining provisions, applicable board policies and administrative procedures, even when the alleged victim or other complainant does not request or consent to an investigation. Once a district has notice of alleged harassment, discrimination, or retaliation, the employer must investigate (despite the complainant’s request to “do nothing,” keep the information confidential, or not investigate). The district should advise the complainant that it must investigate the complaint, but it should also elicit and address any specific concerns that the complainant has regarding an investigation, such as concerns about retaliation or confidentiality.

Title 5 of the California Code of Regulations, requires the District to investigate complaints of discrimination. The District is required to conduct an impartial fact-finding investigation and notify the complainant and the Chancellor it is doing so.²² The investigation report has to include:

- A description of the circumstances giving rise to the complaint;
- A summary of each witness, including the complainant;
- An analysis of any relevant data or evidence collected during the course of the investigation;

- A specific finding as to whether there is probable cause to believe that discrimination occurred with respect to each allegation in the complaint; and
- Any other appropriate information.²³

Additionally, Title IX of the Education Amendments of 1972²⁴ is a comprehensive federal law that prohibits discrimination and harassment on the basis of sex in federally funded education programs or activities. As many districts may know, standards under Title IX’s implementing regulations are currently in flux. For example, as of August 14, 2020, a district’s obligations to investigate claims of sexual harassment or gender discrimination under Title IX depends on the nature of an employee’s complaint. Specifically, Title IX’s regulations require that a district investigate allegations of sexual harassment or gender discrimination *only if* it receives a formal complaint.²⁵ The regulations define a formal complaint as a written document filed and signed by a complainant or Title IX Coordinator alleging sexual harassment, as defined in the regulations, and requesting that the school investigate the allegations against a respondent.²⁶ Districts will therefore need to analyze the nature of a particular complaint before they can determine how to respond to a complaint of discrimination or harassment on the basis of sex. This would include engaging with a district’s Title IX coordinator in the process.

While districts may already be aware that the standards for application of Title IX’s implementing regulations are currently in flux, California law under Title 5 is more comprehensive and stringent than Title IX. Therefore, districts should understand that despite changes to federal law, it must still comply with California law. To the extent that state law already provides statutes or regulations that protect individuals at schools from sexual harassment and discrimination, a school should comply with both the state requirements and the new regulations.²⁷ However, if there is a conflict, the Title IX regulations preempt state law.²⁸ This preemption will also affect collective bargaining agreements with faculty and staff that conflict with the Title IX regulations.

Additionally, DFEH regulations require “qualified personnel” to investigate complaints in a timely and impartial manner.²⁹ These regulations also require a fair, timely, and thorough investigation that provides all parties due process and reaches reasonable conclusions based on evidence collected.³⁰ The regulations address other issues such as confidentiality, remedial actions, and retaliation.³¹ Guidance³² to these regulations provides recommended practices for conducting workplace investigations, which include:

- The investigation should be impartial;
- The investigator should be qualified and trained;
- The investigation should not be an interrogation and investigators should ask open-ended questions;
- The investigator should make credibility determinations;
- The investigator should make findings based on a “preponderance of the evidence” standard;

- The investigator should reach factual conclusions, not legal conclusions; and
- The investigator should carefully and objectively document witness interviews, findings, and steps taken to investigate the matter.

To avoid liability for failing to promptly and adequately investigate complaints, Districts should:

- Audit and comply with district board policies and procedures, as well as state and federal statutes and regulations, governing investigations;
- Conduct timely and thorough investigations of complaints;
- Train district employees on the board policies and procedures and what their respective roles are in the investigation process;
- Have an action plan in place for when the district receives a complaint; and
- Offer supportive measures to both the complainant and respondent.

A. INVESTIGATIONS SHOULD BE CONDUCTED PROMPTLY

The investigation should start as soon as possible after the district becomes aware of a situation or complaint. If an investigation is delayed, witnesses' memories may fade, evidence may disappear, and the employer may be accused of failing to take prompt and effective remedial action, which can be a separate basis for liability.

B. DISTRICTS MUST FOLLOW THEIR OWN RULES DURING INVESTIGATIONS

Districts must establish thorough complaint investigation procedures and are expected by the courts, the U.S. Equal Employment Opportunity Commission ("EEOC"), the DFEH, and the U.S. Department of Education Office for Civil Rights ("OCR") to follow those procedures. It is particularly important to abide by all applicable time requirements, such as the deadlines mandated by Title 5 for the completion of discrimination or harassment investigations.³³ These procedures should be specified in applicable board policies and administrative procedures. The absence of such a procedure may result in incomplete investigations, inconsistencies in the way the employer handles harassment complaints and the inability to assert a defense to a harassment claim. In addition, missing or inadequate procedures can result in a negative finding by the EEOC, the DFEH or the OCR. It might also call into question the commitment of your district to eliminate unlawful discrimination and harassment. Indeed, certain regulations and affirmative defenses to lawsuits require implementation of a formal investigation procedure.

C. IF INVESTIGATIONS REVEAL VIOLATIONS OF RULES OR LAW, ACT PROMPTLY TO REMEDY THE SITUATION AND PREVENT RE-OCCURRENCES

If the investigation reveals that the claim is meritorious or may have merit, the district should act quickly to attempt to remedy the situation. The district should consult its attorneys and Human Resource personnel to determine the potential exposure from the claim and the claimant's likelihood of prevailing on the claim. The district should obtain sufficient information from its attorneys to weigh the options accurately and determine if the district should resolve the claim prior to litigation. In some instances, a remedy prior to litigation may not be possible because the claimant has unrealistic expectations about the monetary value of the claim. However, in many instances the district will be able to obtain a better settlement of the claim before litigation or formal proceedings are commenced.

By using complaints, claims and grievances as an opportunity to explore the situation fully, the district can greatly reduce its liability. The district must be able to admit its mistakes quickly, rectify the situation, and move on. Protracted litigation affects employee morale and may result in negative publicity for the district. So investigate before it's too late!

Section 12 **STEP 10 – EVERYTHING IS “DISCOVERABLE”**

There are very few documents in a district's files that are truly “confidential.” Stamping or labeling a document as confidential has absolutely no bearing on whether the document is legally “confidential.” The California Public Records Act (CPRA) mandates that nearly all documents prepared or possessed by public agencies are available to the public with limited exceptions, most notably for employee personnel matters that would constitute an unwarranted invasion of privacy and documents generated during litigation. However, documents such as settlement agreements and employee contracts are not confidential, even if the document states it is confidential. Districts must be careful when creating documents to avoid generating future liability and must assume that almost all documents may be obtained in a lawsuit.

A. MOST DOCUMENTS CONSTITUTE PUBLIC RECORDS UNDER THE CALIFORNIA PUBLIC RECORDS ACT³⁴

The CPRA is intended to permit public access to every conceivable kind of record that is involved in the governmental process. However, purely personal information unrelated to the conduct of the public's business is considered exempt. The following documents are disclosable as public records:

- Board or Trustees meeting records, except for records of closed sessions;

- Government Tort Claims;³⁵
- Personnel records, except where the disclosure would subject the individual to an unwarranted invasion of privacy, such as employee medical records;
- Employment contracts between a state or local district and a public official or employee;
- Financial records, except where the disclosure of this information is against the public interest, or injury to the district would result from revealing data;
- Itemized statement of total expenditures and disbursements;
- Litigation settlement agreements, even if such agreements state they are to be confidential; and
- Communications sent using a personal device or account, such as a non-agency email account, phone or computer, regarding agency business.³⁶

However, communications from attorneys to the district or its governing body generally are not required to be disclosed if the communication is requesting or providing legal advice. As noted under Step Five, if a category of document is requested under the CPRA or a discovery request during litigation, the district usually has an obligation to provide all responsive documents. The district also has an obligation to conduct a diligent search for the documents. If such documents are later discovered in litigation, the district could face severe sanctions from the court, including being precluded from offering a defense or asserting a claim. Therefore, the district should consult with its attorney to determine whether a particular document must be disclosed pursuant to a CPRA or a discovery request.

B. CARELESS STATEMENTS IN E-MAIL ARE A PLAINTIFF’S BEST FRIEND

Attorneys now routinely request copies of electronic mail (“e-mail”) through discovery. In addition, districts and their employees are prohibited from deleting or destroying documents when the threat of litigation arises. A failure to comply with a “litigation hold” prohibiting the destruction of documents (including those in electronic form), may subject the district to severe sanctions. It is important to confer with legal counsel early in the process when the threat of litigation arises to address this legal requirement for document management.

Districts should inform employees that all e-mail is potentially discoverable and can be used against the district. Off-color, crude or negative remarks contained in e-mail, as well as symbols that could be interpreted as having an inappropriate connotation, such as “winky face” emoticons, may have a devastating impact in a lawsuit for discrimination or retaliation. A district should consider that any document, whether an e-mail, a memo or a letter, may be the primary exhibit for a plaintiff in a lawsuit, regardless of how remote such a scenario appears at the time the document is written. The fact that the document is in written form and only distributed at the time to other administrators or elected officials should not lure the district into a false sense of security. The district should assume that all such documents will end up in the

“wrong” hands. A supervisor or manager should not write anything in an e-mail that they does not want a jury, judge, hearing officer or member of the public to see.

C. THE BROWN ACT³⁷

The Brown Act generally requires that all meetings of a legislative body of a local public agency, including community college districts, be open to the public, with limited exceptions. The Brown Act also applies to a district’s auxiliary organizations, even though they are organized as separate non-profit corporations and are distinct and separate from the district.

The Brown Act contains numerous detailed and technical requirements that can subject a district to liability. An action taken by a district at a meeting in violation of the Brown Act may also be invalid. Because of the complicated requirements of the Act, the district should have designated individuals who are familiar with the Act and/or a knowledgeable attorney to ensure that the district complies with the Act.

Checklist for the Brown Act:

- The Act applies to any meeting of a “legislative body,” which may include committees, of a community college district’s governing board.
- A meeting can be a telephone conference call, a luncheon, or any other formal or informal gathering of a majority of governing board members to discuss any item within the board’s subject matter jurisdiction.
- A legislative body may not take action by a secret ballot.
- A legislative body must designate a time and place for holding regular meetings.
- A legislative body must provide agenda materials to any person upon request.
- An emergency meeting may be held without 24 hour notice but must be in open session.
- Agendas of a legislative body must be posted at least 72 hours before a regular meeting with the time and place of the meeting.
- Deliver meeting agendas and agenda packets to a member of the public through mail or e-mail, upon their request.³⁸
- A notice of a special meeting must be posted at least 24 hours before the meeting.
- A legislative body may not discuss items not on the agenda, with limited exceptions.
- A legislative body must allow public comment.
- Where a legislative body limits time for public comment, it must provide at least twice the allocated time to a member of the public who utilizes a translator, unless the legislative body utilizes translation equipment that allows the legislative body to hear the translated testimony simultaneously.³⁹
- Any document distributed to a majority of the members of a legislative body is subject to disclosure unless otherwise exempt under the CRPA.

- ❑ A legislative body may convene in closed session for limited purposes, such as employee discipline, and must state on the agenda the items to be discussed in the closed session, the reason for discussing the item in closed session and the authority for holding a closed session.
- ❑ While a legislative body may discuss salaries, salary schedules, or compensation of a “local agency executive” in closed session, any final action or vote taken must occur in open session. The legislative body must orally report out to the public a summary of the recommendations made by the agency’s designated representative regarding any final action on the salary, salary schedule, or fringe benefits a “local agency executive” will be paid. The oral report must take place during the open session meeting in which the final action is to take place.⁴⁰
- ❑ Pending or threatened litigation may be discussed in closed session. However, if litigation has been threatened outside a district’s public meeting, it may be discussed in closed session only if a record of the threat is made before the meeting, which must be included in the agenda packet and made available for public inspection upon request pursuant to Section 54957.5 of the Government Code.⁴¹
- ❑ If a vote is taken in a closed session, the decision must be reported to the public when the legislative body reconvenes in public session in accordance with certain requirements.
- ❑ Under certain circumstances, if complaints against an employee will be heard by the board, the employee is entitled to advance notice and to have the matter heard in a public (open) session.
- ❑ A member of a legislative body may commit a misdemeanor by violating the Brown Act.
- ❑ A plaintiff is entitled to costs and attorneys’ fees for a successful action alleging a violation of the Brown Act.

Section 13 **STEP 11 – LITIGATE TO WIN!**

No matter how careful a district is at following its rules, complying with applicable laws, communicating well with its employees, and fostering a good relationship with the unions, a district will get sued. Once a district is in litigation, an administrator’s most important role is to emphasize to their management staff the importance of defending the lawsuit. The employees must realize that management is serious about the district prevailing in the litigation. A strong stand by management may facilitate a more favorable settlement. A vigorous defense requires a significant commitment of district resources, even if the lawsuit is frivolous and the district acted in an appropriate manner.

A. HELP YOUR ATTORNEY HELP YOU!

The importance of taking the time to assist attorneys with defending litigation cannot be understated. The witnesses, information and documents necessary to defend the lawsuit are

often located in several different areas or departments of the district. Attorneys usually require employee assistance in locating witnesses, information and documents. Attorneys are often under court-imposed deadlines, with serious consequences to the district if its attorneys fail to meet those deadlines.

Therefore, the district should designate employees to provide the required information to the attorneys in a timely manner. Strong management includes making employees realize that their assistance is a high priority task. Management must explain to employees that the attorneys are doing everything they can to assist the district and the district's attorneys should not be viewed as a burden, as adversaries, or as an ancillary responsibility.

B. ALL TESTIMONY SHOULD BE TAKEN SERIOUSLY

In many instances an administrator was the decision-maker for a matter which winds up in litigation. If the administrator was a decision-maker, or played a role in reaching the decision at issue, they will usually be a critical witness in the litigation. The testimony of the decision-maker is often given greater weight by a jury than the testimony of lower-level administrators. If a jury or hearing officer does not believe the decision-maker, the district will have a difficult time prevailing in the lawsuit. If the decision-maker testifies differently than lower-level employees or appears to be unaware of significant events or issues in a district, the jury or hearing officer may discredit their testimony. Such an occurrence can be devastating or even fatal to a district's defense of a lawsuit.

Accordingly, proper preparation, whether it be at a deposition or at trial, is critical. Remember that deposition testimony can be just as damaging as trial testimony. Prepare for a deposition with the same diligence as testimony at a trial. Prepare to spend significant time with the district's attorney in preparation for deposition and trial testimony. A few hours of preparation can be the difference between winning or losing a lawsuit.

C. CHECKLIST FOR TESTIFYING AS A WITNESS

- TELL THE TRUTH.** Every material truth should be readily admitted, even if to the disadvantage of the party for whom you testify. Do not stop to figure out whether your answer will help or hurt your side. Just answer the questions to the best of your memory and ability.
- Dress professionally and tastefully. It is usually proper to wear what you normally wear to work.
- Speak distinctly and in a strong voice.
- Answer verbally; do not nod your head or say "uh-uh" for a "yes" or "no" answer.
- Do not cover your mouth with your hand.
- Maintain appropriate posture (i.e., sit up straight!). Depositions are often videotaped by opposing counsel.

- Avoid using slang and/or technical terms without further explanation.
- Allow the attorney asking questions to finish asking their question before you answer. Sometimes witnesses they think they know where a question is headed when in fact, it is headed in an entirely differently direction.
- Think and pause briefly before answering each question. Gather your thoughts carefully before answering and do not permit yourself to be hurried.
- Listen carefully and then answer the exact question asked by counsel. A simple “yes” or “no” may be adequate, but where such an answer would be misleading if left standing by itself, explain more fully what you mean. Avoid volunteering information.
- If your answer was wrong, correct it immediately.
- Don’t say, “That’s all of the conversation,” or “Nothing else happened.” Say, “That’s all I remember happening,” or “That’s all I recall right now.” It is possible you will remember something important later.
- Never “guess” at an answer. If you don’t know the answer, or don’t recall, that is your answer.
- If the question is about distances or time and your answer is only an estimate, be sure that you say it is only an estimate.
- Do not attempt to answer a question that you did not hear or did not understand. If you don’t understand a question, tell the attorney asking the questions that you don’t understand.
- If the district’s attorney or your personal representative/attorney begins to speak, stop whatever answer you may be giving and allow them to make their comments. If your representative is making an objection to the question that is being asked of you, do not answer the question until your representative has made their objection, and only if you are advised to go ahead and complete your answer.
- Give only factual information in answer to a question. Do not base your answer upon hearsay information (something someone else said) unless the questioner specifically asks for it. The hearing officer is not interested in your opinion or conclusion unless you have already been established as an expert in the field in which you are testifying.
- Do not exaggerate or attempt to sell a particular point of view while testifying.
- Show a respectful attitude to all those present, even though your true feelings may be different. Avoid demonstrations of anger, belligerence, sarcasm, or discourtesy.
- If an objection has been made to a question, please do not attempt to answer the question unless the hearing officer or attorney indicates that you should do so.
- Be well versed on the subject on which you will be testifying. Review your records before coming to the hearing. It is permissible for a witness to refer to their own notes or records while testifying. These should be so well organized, however, that the witness does not waste the hearing officer’s time by looking for a particular piece of paper while on the

witness stand. Remember, however, that opposing counsel has the right to inspect any notes or documents you refer to during your testimony.

- ❑ The hearing officer expects a witness to be somewhat uneasy while testifying, and will sympathize with you to some degree. The hearing officer is interested in what you have to say and will listen closely especially if you are well prepared.
- ❑ Be careful not to discuss the case with strangers or in the halls, rest rooms, or elsewhere in the building. Also avoid discussing the case in restaurants and other places where you can be overheard.

Section 14 **STEP 12 – DON'T TAKE IT PERSONALLY**

Most employees name individual supervisors or management employees (in addition to the district) as defendants in a lawsuit. Given this fact, and the number of lawsuits filed against public entities, you are at risk of being named as a defendant in a lawsuit. If you are named as a defendant, you may be held personally liable for damages to the plaintiff. In some situations, you could be liable as a supervisor even if you had very little involvement with the event in question. If your conduct was malicious or outrageous, you could also be held liable for punitive damages to the plaintiff. Punitive damages are awarded based upon your wealth, in an amount designed to punish you for violating the law and discourage you and others from similar violations in the future. As an administrator, manager or supervisor, the stakes are very high with little room for error.

Adherence to the twelve steps will assist you in minimizing the risk of being sued. You also should realize that you may be sued despite exercising the utmost caution and following every possible law or personnel rule. You are an attractive target for a plaintiff, even if you did nothing wrong.

If you are sued, you must be careful not to overreact to the lawsuit. Do not take it personally. Lawsuits come with the territory as an administrator or manager at a community college. You must exercise restraint. You still have responsibilities to perform and do not want to bolster the allegations to include retaliation.

If you are sued, you must be especially sensitive to claims of retaliation if the plaintiff is a district employee. Do not treat the plaintiff any differently as a result of the lawsuit being filed, and make sure that other employees are aware that they should not retaliate against someone who is suing the district or against someone who is serving as a witness in the litigation. If the plaintiff is your subordinate, do not ignore or avoid the plaintiff during work hours. It is part of your job duties to provide supervision to the plaintiff and failing to do could be considered an adverse employment action that leads to a claim of retaliation. Being a defendant or key witness is not a comfortable situation, but remain objective, let the process follow its course and trust in your attorneys.

ENDNOTES

- ¹ 42 U.S.C. §§ 1981, 1983, 1985.
- ² Gov. Code, § 12940, subd. (j)(1) and (3); *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706–07 [101 Cal.Rptr.3d 773, 788, 219 P.3d 749], *as modified* (Feb. 10, 2010) [“Because a harasser need not exercise delegated power on behalf of the employer to communicate an offensive message, it does not matter for purposes of proving harassment whether the harasser is the president of the company or an entry-level clerk, although harassment by a high-level manager of an organization may be more injurious to the victim because of the prestige and authority that the manager enjoys. When the harasser is a supervisor, the employer is strictly liable for the supervisor’s actions. . . . When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action).” (Gov. Code, § 12940, subd. (j)(1).)].
- ³ Ed. Code, § 70902; 88060 *et seq.*
- ⁴ <https://www.ccleague.org/district-services/boarddocs>.
- ⁵ Trustees of the California State University (2012) PERB Dec. No. 2287-H; Newman-Crows Landing USD (1982) PERB Dec. No. 223E [6 PERC ¶ 13162]; One exception to the general rule is where the district seeks to change past practice and instead, follow the clear language of the collective bargaining agreement. *Marysville Joint USD* (1983) PERB No. 0314E.
- ⁶ PERB Reg. §§ 32602-32609; Gov. Code, § 3500 *et seq.*
- ⁷ Cal. Code Regs., tit. 5, § 59324.
- ⁸ *See, e.g., Terris v. County of Santa Barbara* (2018) 20 Cal.App.5th 551 [229 Cal.Rptr.3d 407], *review denied* (May 23, 2018).]; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074 [6 Cal.Rptr.3d 457]; *Tielsch v. Anaheim* (1984) 160 Cal.App.3d 570 [206 Cal.Rptr. 738].
- ⁹ Gov. Code, § 12950.1.
- ¹⁰ Gov. Code, § 12950.1, subd. (h).
- ¹¹ Gov. Code, § 12950.1.
- ¹² Gov. Code, § 12950.1.
- ¹³ Gov. Code, § 12926, subd. (s); *Chapman v. Enos* (2004) 116 Cal.App.4th 920 [10 Cal.Rptr.3d 852].
- ¹⁴ *See, e.g., Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359 [184 Cal.Rptr.3d 9] (Superseded by statute on other grounds in *Ruiz v. ParadigmWorks Group, Inc.* (9th Cir. 2019) 787 Fed.Appx. 384.).
- ¹⁵ Lab. Code, § 432.3.
- ¹⁶ Lab. Code, § 1197.5.
- ¹⁷ *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703.
- ¹⁸ The California Legislature recently amended the Education Code to shorten the probationary period for classified employees. Under the new law, the maximum length of a classified employee’s probationary period at a community college district is 6 months or 130 days of paid service, whichever is longer. This shortened probationary period does not apply to full-time peace officers or public safety dispatchers employed by a community college district operating a dispatch center certified by the Commission on Peace Officer Standards and Trainings. However, the changes to the law do not apply to a conflicting collective bargaining agreement entered into before January 1, 2022, until the collective bargaining agreement expires or is renewed.
- ¹⁹ Gov. Code, § 12923, subd. (c); *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 [113 Cal.Rptr.3d 327, 235 P.3d 988].
- ²⁰ Cal. Code Regs., tit. 2, § 11023, subd. (b)(7).
- ²¹ *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14, 539 P.2d 774].

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- 22 Cal. Code Regs., tit. 5, § 59334.
- 23 Cal. Code Regs., tit. 5, § 59334.
- 24 20 U.S.C. §§ 1681-1688.
- 25 34 C.F.R. § 106.44(b)(1).
- 26 34 C.F.R. § 106.30.
- 27 34 C.F.R. § 106.6 , subd. (a).
- 28 34 C.F.R. § 106.6 , subd. (a).
- 29 Cal. Code Regs., tit. 2, § 11023, subd. (b)(4)(C).
- 30 Cal. Code Regs., tit. 2, § 11023, subd. (b)(7).
- 31 Cal. Code Regs., tit. 2, § 11023.
- 32 California Department of Fair Employment and Housing Workplace Harassment Prevention Guide for
California Employers: [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Workplace-
Harassment-Guide.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Workplace-Harassment-Guide.pdf).
- 33 Cal. Code Regs., tit. 5, § 59328, subd. (e).
- 34 Gov. Code, § 6250 et seq.
- 35 Gov. Code, § 810 et seq.
- 36 *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608 [214 Cal.Rptr.3d 274, 389 P.3d 848].
- 37 Gov. Code, § 54950, et seq.
- 38 Gov. Code, § 54954.1.
- 39 Gov. Code, § 54954.3
- 40 Gov. Code, § 54953
- 41 Gov. Code, §54956.9(e)(5); *Fowler v. City of Lafayette* (2020) 46 Cal.App.5th 360, 369 [258 Cal.Rptr.3d 353, 359].

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