

New and Returning Board Member Training for Imperial County School Districts

Imperial County Office of Education
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Overview:

- I. Conflict of Interest/Ethics
- II. The Ralph M. Brown Act
- III. Public Records Act
- IV. Social Media
- V. The Labor Negotiation Process
- VI. Sexual Harassment and Abusive Conduct Prevention

Conflict of Interest/Ethics

Overview

- Transparency in government
- Conflict of interest
- Spotting potential conflicts of interest
- Understanding disclosure of economic interests
- Honest services to the public
- Recognizing that the public's expectations are likely higher

Introduction

- Governmental ethics and avoiding conflicts of interest is **your** personal responsibility.

Conflict of Interest

- Disclosure of Economic Interests
 - Political Reform Act
- Economic Interest in Contracts

Common Law

Conflict of Interest

- Personal interest can also interfere with your ability to act in a fair and impartial manner, resulting in a conflict of interest.
 - Includes familial relationships, friendships, or general sympathy for a particular viewpoint
- Ask yourself whether there is a non-economic situation which makes you unable to make a decision in a fair manner primarily for the benefit of the public.
 - If so, you may not participate
- Quasi-Judicial matters – Due process issues

Disclosure of Economic Interests

- **WHO:** Candidates, Elected Officials, Department Heads, and Some Employees Must File
 - See District's Conflict of Interest Code for a complete list.
- **HOW:** Submit Statement of Economic Interests to District Filing Officer
 - Also known as: SEI, "Form 700"
- **WHEN:** Different Obligations for Different People
 - Candidates: When they declare their candidacy
 - Officials: Within 30 days of assuming office; Annually by April 1 for the Preceding Calendar Year; Within 30 days of leaving office
- **WHAT:** Investments, Real Property, Income, Gifts, Business Positions

Consult Your District Conflict Code

Disclosure: What to Disclose

- Investments:
 - \$2,000 or more in value
 - Generally, in businesses that have contracted with the District (in the past two years) or which may contract with the District in the future to provide services, supplies, materials, machinery, or equipment
 - Suggestion: Disclose investments in all publicly-traded and local companies
- Income:
 - A payment or other benefit provided in return for goods or services of equal or greater value
 - \$500 or more per year from any one source
 - Half of your spouse's non-government salary
 - Salary from government entities does not have to be disclosed

Disclosure: What to Disclose

- Real Property Interests
 - \$2,000 or more in value
 - Generally, property that is located in or may be considered by the District for any school use
 - Includes BOTH ownership and leases/may include property owned by or through a business or a trust
- Business Positions
 - Any “reportable” business entity, in which the filer is a director, officer, partner, trustee, employee, or holds a management position.
 - Service on a non-profit board of directors is not a business position
 - Your share of income from the business
 - Additional disclosures when you own 10% or more

Disclosure: Gifts

- A payment or other benefit for which the official does not provide goods or services of equal or greater value in return
- \$50 disclosure threshold
- \$460 per calendar year limit from a single reportable source (\$470 in 2017)
- Generally, from individuals or entities that have contracted with the District (currently or in the past two years) or which may contract with the District in the future to provide services, supplies materials, machinery, or equipment
 - Includes rebate/discounts not available to the public
- Disclose both the source and any intermediary
- California Fair Public Practice Commission FAQs:
http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Form%20700/2016-17/Form_700_FAQs.pdf

Disclosure: Valuation of Gifts

- Fair market value at the time received
 - Regardless of what the giver paid
- Face value – events open to the public
 - Otherwise, pro-rata cost of all expenses associated with the event not just the food and beverage
- Good-faith assessment by recipient
 - Keep records
 - Ask the donor
 - Value of similar items

Gifts: Disclosure Exceptions

- The following do **not** have to be disclosed as gifts:
 - Gifts from close relatives
 - Personalized plaques
 - Hospitality in a friend's home
 - Tickets to campaign and 501(c)(3) fundraisers
 - Campaign contributions
 - Inheritances
 - Informational Material (assist in official duties – limitations)
 - Unused (by anyone) tickets or passes to specific events
 - Returned to giver or donated to charity
 - Travel expenses paid by your own district

Gifts: Disclosure Exceptions

- Travel
 - Travel paid for by another governmental agency, educational institution or tax-exempt non-profit that is reasonably related to a legislative or governmental purpose must be disclosed but is not subject to the gift limit.
- Non-Profit/Political Fundraisers
 - An official may only receive one ticket and the source must be the non-profit or the campaign. Tickets received from third parties are considered gifts from that individual or entity.

Gifts: Disclosure Exceptions

- You do not have to disclose a gift if you do any of the following within 30 days of receiving it:
 - Return it unused to the giver
 - Unused tickets to one-time events can be thrown away
 - Give it to a charitable organization or governmental agency without claiming the gift as a tax deduction
 - But if you give the gift to anyone else or even throw it away, you must disclose it
 - Reimburse the giver the fair market value
 - Partial reimbursement reduces the disclosure value

Political Reform Act

- Public officials must not participate in decisions if it is reasonably foreseeable that the decision will affect an economic interest of that official.
- Applies to any decision
 - Examples: Permit, Licenses, Contract
- Requires Recusal
- Penalties include fines, criminal prosecution, removal from office

Economic Interest in Contracts

- A public official may not have an *economic interest* in any *contract made* by his or her agency.
 - This applies to participation at any stage of contract
- State law strictly forbids public officials from having an economic interest in their agencies' contracts.
 - This is often referred to as a “Section 1090 problem,” after the Government Code section containing the prohibition.
- These restrictions on contracts are in addition to the restrictions of the Political Reform Act.

Economic Interest in Contracts

- Broadly applied by courts
- Includes the following relationships with contracting party:
 - Employee
 - Attorney, Agent, or Broker
 - Supplier of Services or Goods
 - Landlord-Tenant
 - Creditor-Debtor
 - Officer or Employee of Non-Profit Corporation
 - Includes Spouse Community and Separate Property
- The relationship can be complicated or involve intermediaries

Economic Interest in Contracts

- Penalties are severe:
- Violation: Contract is “void”
 - Local agency does not have to pay for goods or services received under the contract and may even seek repayment of amounts already paid
- Criminal Penalties
 - Felonies for willful violations
 - Fines - up to \$1,000
 - Imprisonment
 - Disqualification from ever holding public office again

Government Code section 1090

- Limited to Contracts
- Economic interests broader
- **VOIDS** contract, cannot be enforced
- Criminal Penalties for willful violation (fine or prison up to 3 years, lifetime ban on holding office)

Do I Have a Conflict of Interest?

- 1) Am I a public official?
- 2) Am I making a decision?
- 3) Do I have an economic interest?
- 4) Is that economic interest related to the decision?
- 5) Is it likely the decision will have a material effect on my economic interest?
- 6) Is the effect distinguishable from the effect on the public?
- 7) Is my action legally required?

Conflict of Interest?

- Public Official
 - Includes: Elective office holders; Consultants; High level employees who have the ability to make discretionary decisions for the District
 - Rule of Thumb: If you are filing an SEI in your jurisdiction, you are a public official.
- Decision
 - Includes: Voting; Appointing; Entering into Contracts; Otherwise obligating the District
 - Decisions also include preliminary negotiations, advising, and making recommendations leading up to a decision.

Conflict of Interest?

- Economic Interest

- This is the most important step in the process.
- An economic interest *may* be any of the following:
 - Owning a business
 - Being on a company's board of directors
 - Owning or leasing property (near or affected by a decision)
 - Owning stock or having an investment interest
 - Personal Financial Effect - saving or having to spend \$250 or more as a result of decision
 - Campaign contributions in excess of \$250 (limited circumstances)
 - Income of more than \$500 from an individual or private entity
 - Your spouse, dependent child, or registered domestic partner having any of the interests above
 - Gift(s) greater than \$460 (\$470 in 2017) during the *12 months* prior to the decision

Conflict of Interest?

- Relationship to the Decision
 - Direct: person or entity:
 - Initiates the proceeding
 - A named party to the proceeding
 - The *subject* of the decision
 - Real property interests within 500 feet
 - Indirect: person or entity benefits because of the governmental decision but is not directly involved
- Material Economic Effect
 - Is the decision important enough that you will have to recuse yourself?
 - Consider: What kind of interest is involved? The size and situation of the interest? Direct versus indirect involvement?

Conflict of Interest?

- A conflict is **presumed** when:
 - An interest is directly involved
 - Property interest is the subject of a decision or within 500 feet of property that is the subject
 - Gifts of more than \$460 received in *past 12 months* (\$470 in 2017)
 - Cumulative of all participants
 - Campaign contributions received of more than \$250
 - Cumulative of all participants
 - Limited to certain appointed positions
- Exceptions
 - Public Generally
 - Legally Required Participation

Conflict of Interest Exceptions

- Public Generally Exception:
 - If an official has an economic interest in a decision that would otherwise require disqualification, but that interest is no different than that of the public generally, then he or she may not be precluded from participating.
 - Not a rule of thumb – specific percentages to determine “significant segment.”
- Legally Required Participation Exception:
 - When a public official is disqualified and that disqualification makes it impossible for the government to act, the official may be allowed to participate under very strict rules if there is no reasonable alternative manner of decision-making.
 - The need to break a tie vote is never legally required
 - Cure quorum when multiple disqualifications

What to do if You are Disqualified

- Identify the disqualifying interest on the record when the decision is being considered.
- Leave the room while the matter is discussed **and** voted on.
 - However, if a disqualified official has personal property or business interests at stake, they may be able to remain in the room and participate as a member of the public. Rule is limited.

Legal Penalties

- Failure to disclose economic interest or failure to disqualify where a conflict exists may result in:
 - Administrative or civil monetary penalties
 - Criminal prosecution which in turn may lead to removal from office

Conflict Summary

- Know your interests – financial/personal
- Think public first
- When in doubt – Ask
 - Recusal works for FPPC/Common Law Conflict
 - 1090 Conflict means voids contract

Honest Services to the Public

Public Contracting (Competitive Bid)

Misuse of Public Funds

Personal Financial Gain

Competitive Bidding

- Designed to give all interested parties the opportunity to do business with the government on an equal basis, eliminate favoritism, and ensure the public gets the best deal by promoting competition.
- Competitive bidding is **required**:
 - Under state law, public works projects over \$5,000 are subject to the state's competitive bidding requirements
- Agency policies/Education Code may require competitive bidding in other situations as well
- Opportunities to bid on contracts must be publicized
- Award to the lowest responsible-responsive bidder

Misuse of Public Funds

- The California Constitution prohibits officials from making gifts of public funds.
- Ensure all public entity expenses have a demonstrable public purpose and necessity.
- In general, the law prohibits:
 - Using public agency resources for personal or political purposes
 - Sending mass mailings at public expense
 - Making a gift of public resources or funds

Mass Mailing Restrictions

- Do not use public funds to enhance your visibility/image.
- Government resources may not be used to send more than 199 substantially similar pieces of mail (mass mailings).
- Violations can occur when sending newsletters, invitations, or announcements.

Personal Financial Gain

- Bribery & Extortion
 - Bribery: You may not receive something of value in exchange for an action or vote. Even agreeing to a bribe is forbidden.
 - Extortion: You may not demand something of value from someone else in exchange for an action or vote.
 - Penalties include: Criminal prosecution with possible prison time; fines, loss of one's office; permanent disqualification from holding public office.
- Honoraria
 - Public officials generally may not receive payment for giving speeches, participating on panels or meetings, or attending events.
 - Exceptions apply to officials who also work in professions which routinely include paid speaking.

Additional Provisions

- Post Employment Restrictions
 - Local elected and some high level administrative officers may not represent others before their former agency for one year after leaving office
 - Only applies to compensated work
 - Applies to attorneys
- Incompatible Offices
 - Public officials may not hold two incompatible public offices simultaneously
 - Both positions must be “public offices” (not just employment - unless the position is on his/her own governing body)
 - Potential conflict or overlap in the functions or responsibilities (i.e. audit or budgetary control, significant clash of duties, other public policy)

Conclusion

- **REMEMBER:**

- You are doing the public's business
- When it seems like you are receiving a personal benefit, there may be a problem
- Know your own economic interests so you will recognize situations when you may have a conflict of interest

- **ASK BEFORE YOU ACT:**

- If you think you are faced with an ethical dilemma, consult legal counsel BEFORE you act
- Not all problems can be fixed after you have acted

Additional Resources

- Fair Political Practices Commission www.fppc.ca.gov
 - Anonymous toll-free advice line 1-866-ASK-FPPC
- Institute for Local Government (www.ca-ilg.org/ethics-education-and-training-ab-1234)
- California Attorney General www.oag.ca.gov

The Ralph M. Brown Act

Areas To Be Covered

- Purpose and Intent
- To what does the act apply?
- Which meetings are subject to the Brown Act?
- Prohibited Meetings
- Which meetings are not subject to the Brown Act?
- Meeting Location
- Agenda and Posting Requirements: Public and Closed
- Closed Meetings
- Rights of the Public
- Criminal Actions and Civil Remedies

Purpose and Intent

- Guarantees the public's ability to witness, and participate in, meetings held by local legislative bodies.
- “It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.” (§ 54950.).
- “The people...do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.” (§ 54950.).

To What Does the Act Apply?

- Meetings held by legislative bodies *of* local agencies
 - This includes elected members who have not yet assumed duties of the legislative body.
- Local Agencies: “[A] county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission, or agency thereof, or other local public agency”. (§ 54951.)
- Legislative Bodies (LB): “The governing body of a *local* agency or any other local body created by state or federal statute.” (§ 54952; emphasis added.)
 - Ex: City councils, boards of supervisors, school boards
 - Advisory committees consisting of members of a legislative body that are less than a quorum of that body, are *not* legislative bodies.
 - Ad hoc committees
 - Standing committees which have a continuing subject matter jurisdiction or a fixed meeting schedule are legislative bodies.

Meetings subject to Brown Act

- Any time a majority of the members of a legislative body congregate to hear, discuss, deliberate, or take action on items within the body's subject matter jurisdiction. (§ 54952.2.)
 - This includes teleconferences.
- Regular
 - Occur at a prescheduled time and place as established by ordinance, resolution, or bylaws. (§ 54950(a).)
- Special
 - A majority of the members of the LB or the presiding officer may call a special meeting (§ 54956(a).)
- Emergency
 - As determined by a majority of members of the LB, an emergency meeting may be called when:
 - A Crippling activity impairs public health and/or safety (§ 54956.5)
 - i.e. Work stoppage, terrorist attack, natural disaster

Prohibited Meetings

- Any series of communications among a majority of members regarding business within the subject matter jurisdiction of the legislative body. (§ 54952.2(b)(1).)
 - i.e. Serial Meetings where a collective concurrence by a majority of the members has occurred.
 - Secret ballots are prohibited. (54953(c)(1).)

Meetings Not Subject to Brown Act

- Provided that a majority of the members of a LB do not discuss items within that LB's subjects matter jurisdiction, the following meetings are permissible (§ 54952.2.)
 - 1. Conversations between individuals.
 - Ex: Contact between a school board member and his or her staff members.
 - 2. Conferences open to the public.
 - 3. Open and publicized meetings held by an entity *other* than the legislative body.
 - 4. Open and noticed meeting of another body of a local agency.
 - 5. Purely social or ceremonial event.
 - 6. Open and noticed meeting of a standing committee meeting of a LB, provided that non-members act as observers.

Meeting Location

- Regular and special meetings must be held in the boundaries in which the LB has jurisdiction, except in the following cases.
 - Comply with state or federal court order, or to attend a judicial/administrative proceeding. (§ 54954(1).)
 - Inspect real/personal property that cannot feasibly be brought within boundaries. (§ 54954(2).)
 - Multiagency meetings outside the jurisdiction. (§ 54954(3).)
 - If there is no meeting facility within the LB's jurisdiction. (§ 54954(4).)
 - Meeting with US or California officials (§ 54954(5).)
 - At or near a facility owned by the LG, insofar as the only topic discussed is that facility. (§ 54954(6).)
 - Meeting with legal counsel. (§ 54954(7).)

Agenda and Posting Requirements

- Regular meetings:
 - Must be posted in publically accessible location at least 72 hours in advance; must contain location/time of meeting; and must contain a brief description of each item to be discussed.
 - Items must be within the LB's subject matter jurisdiction.
 - All items included in the agenda *must* be presented in a way that is easily understood by the public.
- Special meetings:
 - Same requirements as regular meetings, except agendas need only be posted 24 hours in advance and local press must be notified.
- LBs must post agendas to website. (§ 54954.2(2)(A).)
- Emergency meetings
 - Except under dire circumstances, the press and public must be notified 1 hour prior to the meeting.
 - Permitted to be closed sessions.
 - *No* posted agenda required.

Agenda Requirements: Public Meetings

- Public must be given time to comment either before or during the consideration of an item on the agenda.
 - This applies to open and public meetings (i.e. regular, special)
- In most cases, no action or discussion should be undertaken on items not on the posted agenda (§ 54954.2(a)(3).)
 - Exemptions:
 - Upon majority vote that an emergency situation exists. (§ 54954.2(b)(1).)
 - Upon 2/3 or unanimous vote that there is need to take immediate action that arose subsequent to the agenda being posted. (§ 54954.2(b)(2).)
 - Item was continued from a meeting held not more than 5 days before. (§ 54954.2(c)(3).)

Agenda Requirements: Closed Meetings

- Prior to holding any closed sessions, the LB must disclose in an open meeting the items to be discussed.
- If an item is to be considered in the meeting, it must be mentioned in the notice or agenda.
 - Generally, members cannot discuss things not included in notice or agenda. (§54957.7(a).)
- After any closed session, the LB must reconvene in a public meeting to discuss actions taken.
 - In general, any action taken during a closed meeting, and any vote/abstention by each member on that action, must be publicly disclosed. (§ 54957.1.)

Closed Meetings

- (§ 54954.2(3).)
- License/Permit Determination
- Conference with real property negotiators
- Conference with Legal Counsel
 - Existing litigation
 - Anticipated litigation
 - Liability
- Threat to public facilities or services
- Public employee
 - Appointment
 - Performance evaluation
 - Discipline/dismissal/release
- Conference with labor negotiators

Closed Meetings

- Case review/planning
- Report involving trade secret, hearings,
- Charge or complaint involving information protected by federal law
- Conference involving a joint powers agency
- Audit by CA state Auditor's Office

Rights of the Public

- Except in a few instances, “All meetings of the legislative body of a local agency shall be open and public...” (§ 54952.7(a).)
 - Open meetings are required to meet the protections and prohibitions established by the Americans with Disabilities Act. (54953.2.)
- During open meetings, the public must be allowed the opportunity to comment either before or during the consideration of an item. (§ 54954.3(a).)
- Meetings must be held in non-discriminatory facilities. (§ 54953.2)
- All material distributed to at least a majority of the members of a LB must be made accessible to the public, unless they are exempt from public disclosure. (§ 54957.5(a).)
- Recording an open and public meeting must be permissible so long as it is not deemed disruptive. (§ 54953.5 (a).)
- Members of the public are not required to register their names or provide any other information at open meetings. (§ 54953.3.)
- Broadcasting of an open and public meeting must be permissible so long as it not deemed disruptive. (§ 54953.6.)

Disruptive Members of the Public

- Importantly, meetings subject to the Brown Act are conducted *in front* of the public, not *with* them.
- If a member of the public is disruptive:
 - Ask them stop.
 - If they continue to be disruptive, warn them that they will be asked to leave, and take a break.
 - Once reconvened, if they continue to be disruptive, members of the LB may request that they leave the meeting

Criminal Actions

- Member is guilty of a misdemeanor if:
 - Action is taken in violation of Brown Act
 - Member intended to deprive the public of information to which they were entitled (§ 54960(a).)

Civil Remedies

- Any person may commence an action by mandamus, injunction, or declaratory relief to:
 - Stop or prevent violations or threatened violations of the Brown Act
 - Determine applicability of the Brown Act to past, ongoing, and future actions
 - Determine the validity of the legislative body's action in discouraging the expression of a member
 - Compel the LB to record its meeting (§ 54960)

Civil Remedies

- Any person may commence an action by mandamus, injunction, or declaratory relief to:
 - Determine if an action is *null* and *void*. (§ 54960.1(a).)
 - The LB must be offered the opportunity to cure or correct the violation before further litigation.
- In some cases, attorney fees may be awarded to plaintiff or defendant. (§ 54960.5)

Sources

- The Brown Act, California Government Code 54950
- League of California Cities Publication, “Open & Public IV: A *Guide to the Ralph M. Brown Act*,” revised 2010.
- California First Amendment Coalition: CFAC.org
- California Attorney General’s Office Publication, “The Brown Act: Open Meetings For Local Legislative Bodies,” 2003.

Public Records Act

Public Records

The California Public Records Act (PRA) provides two basic rights to the public:

- To inspect public records during normal office hours; and
- To obtain copies of them as desired.

Response Time

- An agency has 10 calendar days from receipt of the request, to notify the requester whether records will be disclosed. Gov. Code, § 6253, subd. (c).
 - The response period starts with the first calendar day after the date of receipt
 - If the tenth day falls on a weekend or holiday, the next business day is considered the deadline for responding to the request

Extension of Response Time

- A local agency may extend the 10-day response period for copies of public records for up to 14 additional calendar days because of the need:
 - Search for/collect records from field facilities or other establishments separate from the office processing the request;
 - Search for/collect/examine a voluminous amount of separate and distinct records;
 - Consult with another agency, or among two or more components of the local agency, having substantial interest in the request; or
 - In the case of electronic records, to compile data, write programming language or a computer program, or to construct a computer report to extract data.
- Gov. Code, § 6253, subd. (c)(1)-(4).

No Duty to Create a Record

There is no duty to create a record that does not exist at the time of the request. Gov. Code, § 6252, subd. (e).

There is no duty to reconstruct a record that was lawfully discarded prior to receipt of the request.

There is no requirement to create a “privilege log” or list that identifies the specific records being withheld.

The response only needs to identify the legal grounds for non-disclosure.

Public Records

- Identifiable public records. Govt. Code § 6253
- All communications related to public business “regardless of physical form or characteristics, including any writing, picture, sound, or symbol, whether paper, . . . magnetic or other media.” §6252(e).
- Email and text messages included.

Exemptions

The PRA does not require the disclosure of the following records (highlighted records most common for school districts):

- Architectural and Official Building Plans
- Attorney-Client Communications and Attorney Work Product
- CEQA Proceedings
- Code Enforcement Records
- Deliberative Process Privilege
- Drafts
- Elections – Voter Registration Information; Initiative, Recall, and Referendum Petitions
- Identity of Informants
- Information Technology Systems Security Records
- Law Enforcement Records
- Library Patron Use Records; Library Circulation Records

Exemptions – cont'd.

- Licensee Financial Information
- Medical Records
- Official Information Privilege
- Pending Litigation or Claims
- Personal Contact Information
- Personnel Records
- Public Contracting Documents
- Real Estate Appraisals and Engineering Evaluations
- Recipients of Public Services
- Taxpayer Information
- Trade Secrets and Other Proprietary Information
- Utility Customer Information

Gov. Code, § 6254.

Tips

- Be mindful of what you write. Assume the public will see it.
- Be mindful of what you use to communicate. Use official email. Avoid text messages.
- Promptly forward records requests to your administration.
- You can ask your administration for help answering questions.

Legal Challenges with Social Media in the Workplace

REACHING THE BALANCE BETWEEN EMPLOYER'S RIGHTS AND EMPLOYEE'S RIGHTS REGARDING SOCIAL MEDIA

- There is no doubt that social networking is here to stay. The number of users continues to grow and it has become a fundamental part of life for large sectors of the population. To illustrate this point, the leading source of social media, Facebook has 1.15 billion users, over 600 million of which are daily users, and Facebook's latest self-reported statistics say that the average user spends 55 minutes a day on the site, which implies nearly 30 hours a month.
- With the advent of the smartphone and associated Facebook app, smartphone users check Facebook's website on average 13.8 times a day, and spend a total of half an hour each day on the social network on their smartphones. The use of Facebook, and other social networking sites, has become a part of life for users and this is not going to change anytime soon; therefore, employers need to know how to handle it.

REACHING THE BALANCE (CONT.)

- A key interest to employers is the wealth of information available about users on these social networking sites. Again, using Facebook by example, the users have profiles which describe where they work, where they went to school, whom they are in relationships with, where they were born, what books they like, what kind of music they like, what websites or companies they like, and there is even a place for a personal mantra: almost everything about a person can be found on Facebook.
- What's more, users share events on Facebook, from major life events such as getting married or having children, to something as simple as going to the grocery store or what they had for dinner. Users can also “check-in” where they are at any given moment and “tag” others who are with them.

REACHING THE BALANCE (CONT.)

- Let's not forget pictures, pictures are worth a thousand words after all, and you can upload as many pictures as you want to your profile. You can learn a tremendous amount about a person from only a few seconds on their Facebook page, so it is no surprise employers wanted access to this incredible source when making hiring decisions.
- Our Goal is to address:
 - (1) The balance of privacy interests between employees and employers;
 - (2) The current status of the law regarding social media and the workplace; and
 - (3) How to avoid employee social media challenges.

BALANCE OF PRIVACY INTEREST BETWEEN EMPLOYEES AND EMPLOYERS

- Employers have a legitimate interest in monitoring employee performance in the workplace, especially their productivity, safety, and efficiency. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272.)
- Recent advances in technology have resulted in employers using new methods of employee monitoring, including electronic monitoring of e-mail, telephone calls, and computer usage.
- Employers are permitted to monitor e-mail usage where the employer owns and provides the computer equipment and it is intended to be used for work purposes only.
- To the extent the employee is exchanging social media over the employer's networks, through its email systems, or on its computers, the employer is permitted to access to this social media.

BALANCE OF PRIVACY INTEREST BETWEEN EMPLOYEES AND EMPLOYERS (CONT.)

- Employees do not drop all rights of privacy at the workplace door. The law protects employees from an invasion of privacy by their employers in regard to their personal possessions and private lives by preventing unreasonable intrusion upon an employee's privacy. (Const. Art. 1, §; *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1.)
- The United States Constitution does not expressly provide for the right of privacy; rather, it is implied in the penumbras. California's Constitution however, expressly grants an express right of privacy. While California's privacy protections are greater than those granted in by the Federal Government and many other states, it is not absolute.
- There has always been, and will continue to be, a conflict between the employee's right to privacy in the workplace and the employer's right to further its legitimate interest.

OF COURSE,

- ... as with every statute, there are exceptions and fortunately, these exceptions favor the employer.
- There are three ways an employer can legally access an individual's social media or require an individual to turnover login credentials:
 - (1) to obtain access to an employer-issued device;
 - (2) to investigate a reasonable suspicion of employee misconduct or violation of the law;
 - (3) by accessing social media available to the public.

OBTAINING ACCESS TO AN EMPLOYER ISSUED DEVICE

- An employer may require the disclosure of a password, or username, or other method of accessing an employer-issued or employer-owned electronic device, meaning the employee cannot use this section to lock the employer out of its own devices. This is in line with rights an employer currently holds to search employer-owned computers and email systems.

The Labor Negotiation Process

What is Negotiable

- The scope of Negotiations is limited to matters relating to wages, hours of employment, and other terms and conditions of employment.
- Terms and conditions of employment are defined as:
 - Health and welfare benefits;
 - Leave, transfer and reassignment policies;
 - Safety conditions of employment;
 - Class size;
 - Procedures to be used for the evaluation of employees; and
 - Organizational security and procedures for processing grievances;
- Certificated employees have the right to consult on:
 - The definition of education objectives;
 - The determination of the content of course and curriculum; and
 - The selection of textbooks to the extent such matters are within the discretion of the public school employer.

Scope of Representation

- Government Code section 3543.2 regarding the scope of representation.
- Matters within the scope of representation must be negotiated with the bargaining unit.
- Government Code section 3543.2(a)(2), as amended, states that a public school employer shall give reasonable written notice to the exclusive representative of the public school employer's intent to make any changes to matters within the scope of representation of the employees represented by the exclusive representative for purposes of providing the exclusive representative a reasonable amount of time to negotiate with the public school employer regarding the proposed changes.
- This makes it more difficult for public school employers to make any unilateral changes within first advising the employee unions.

Scope of Representation (cont.)

- The scope of representation, pursuant to Government Code section 3543.2(a)(1) includes:
 - wages
 - hours of employment;
 - health and welfare benefits;
 - leave;
 - transfer and reassignment policies;
 - safety conditions of employment;
 - class size;
 - procedures to be used for the evaluation of employees;
 - organizational security;
 - procedures for processing grievances;
 - the layoff of probationary certificated employees; and
 - alternative compensation or benefits for employees adversely affected by certain pension limitations.

The California Supreme Court's Definition of the Scope of Bargaining

- In *San Mateo City School District v. Public Employment Relations Board* 33 Cal.3d 850, (1983), the California Supreme Court held that a subject is if it is logically and reasonably related to hours, wages or an enumerated term and condition of employment.
- However, the Supreme Court also held that provisions in the Education Code which cover employee work conditions preempted the employer's duty to negotiate the subject only where such provisions leave no room for discretionary action by the employer.
- Where a contract proposal would replace or set aside a section of the Education Code it is nonnegotiable.

Negotiations can be held in Closed Session

- Any meeting and negotiating discussion between a public school employer and the exclusive representative, mediation, fact finding or arbitration and any meeting of the public school employer between the public school employer and its designated representative for the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representatives is exempt from the public meeting provisions of the Brown Act and may be held in closed session.

Negotiations must be Conducted in Good Faith

- The public school employer and the employee organization are required to meet and negotiate in good faith.
- The duty to negotiate in good faith includes:
 - the duty to recognize the union and to bargain in good faith over mandatory subjects of bargaining and respond to union proposals;
 - the duty to bargain in good faith before initiating changes in a current contract or other working conditions; and
 - the duty to furnish information relating to bargaining or contract administration and the duty to participate in post bargaining impasse procedures in good faith.

Examples of Good Faith

- Good faith is determined on a case-by-case basis.
- PERB will review the totality of conduct by the parties or look to see whether a single incident or conduct by one party constitutes a per se violation of the good faith requirement.
- For Example:
 - 1. A union can be found to bargain in bad faith when it refuses to schedule a negotiating session for three and a half months during the summer.
 - 2. An employer's delay of one month between negotiating sessions with respect to the effects of a pending layoff was held to be in bad faith where the employer arrived late and failed to respond to proposals.

Watch out for per se violations

- A per se violation of the duty to negotiate in good faith occurs when the employer takes unilateral action.
- Other instances of per se violations of the duty to bargain in good faith are the outright refusal to bargain with the union after a factfinder's report is issued but prior to the completion of impasse.
- The technical refusal to recognize the union or bargaining unit by refusing to bargain.
- The refusal to bargain over a proposal which covers a bargainable subject.
- The bypassing of a union to bargain directly with the employees through verbal or written communications.
- The insistence on bargaining a nonbargainable subject to impasse and the refusal to provide information relevant to the bargaining or contract administration to the union.

SEXUAL HARASSMENT AND ABUSIVE CONDUCT PREVENTION

OVERVIEW OF LAWS AGAINST SEXUAL HARASSMENT

Who is Protected by the Law?

- Employees
- Applicants
- Contractors
- Volunteers
- Unpaid Interns

Who is Liable Under the Law?

- Every employer or prospective employer.
- Every person in the workplace: supervisor, subordinate, or co-worker found liable for sexual harassment is personally liable for the damages caused by the unlawful harassment.

Personal Liability of Harasser

The individual harasser is personally liable for the damages caused by his or her unlawful actions.

Liability of Employer

An employer is strictly liable for the unlawful harassment by its supervisors and agents.

“Supervisor” Explained

A person qualifies as a supervisor for purposes of the California Fair Employment and Housing Act (FEHA) if they had the discretion and authority (a) to hire, transfer, promote, assign, reward, discipline, or discharge other employees, or effectively recommend any of these actions; (b) to act on the grievances of other employees or to effectively recommend action on grievances; or (c) to direct the claimant’s daily work activities.

Harassment by non-supervisory employees

Employers can be liable for harassment by non-supervisory employees if the employer knew or should have known about the harassing behavior and failed to take immediate and effective corrective action.

Two Forms of Sexual Harassment

Sexual harassment is defined by case law in two ways:

1. Quid Pro Quo

- A. Demanding sexual favors in exchange for employment benefits
- B. Demanding sexual favors by threatening negative employment actions; OR

2. Hostile Work Environment

- A. Harassing behavior directed toward the complainant
- B. Harassing behavior witnessed by the complainant
- C. Widespread sexual favoritism that infects the workplace creating a hostile or abusive environment

Remedies

- Injunctive Relief
 - Training
 - Development or changes in policies/procedures
- Economic Damages
 - Lost wages
 - Medical expenses
 - Job search expenses
- Non-Economic Damages
 - Emotional Distress
 - Loss of Enjoyment of Life
- Punitive Damages

Three Varieties of Hostile Work Environment Sexual Harassment

The courts have recognized three varieties of hostile work environment sexual harassment:

1. Hostile Work Environment – Conduct Directed at Claimant.
2. Hostile Work Environment – Conduct Directed at Others.
3. Hostile Work Environment – Widespread Sexual Favoritism.

“Harassing Conduct” Explained

Harassing conduct includes unwanted sexual advances that can be:

- Verbal
- Visual
- Physical

Hostile Work Environment: Verbal

- Foul or obscene language
- Derogatory comments
- Explicit discussions about sexual activities
- Comments about other people's physical attributes

Hostile Work Environment: Visual

- Leering
- Staring
- Making sexual gestures
- Displaying sexually explicit objects, pictures, cartoons, graffiti, or posters
- Sending graphic emails, text messages, or jokes

Hostile Work Environment: Physical

- Kissing
- Hugging
- Grabbing
- Impeding or blocking movement
- Assault

“Severe or Pervasive” Explained

To be actionable, the unwanted behavior must be “severe or pervasive” and alter the conditions of employment to the extent that it creates a hostile or abusive work environment.

Considerations

- The nature of the conduct.
- The frequency of the conduct.
- The period of time over which it occurred.
- Whether the conduct was physically threatening or humiliating.
- The extent to which the conduct unreasonably interfered with an employee's work performance.

Sexual Harassment Can Occur Between Individuals of the Same Sex

It has been settled law for some time that “same sex” sexual harassment is actionable under the FEHA.

Sexual Desire is NOT Required

Recent legislation clarified existing law by expressly stating that “Sexually harassing conduct need not be motivated by sexual desire.” The legislation, SB 292 (Corbett) was passed to repudiate the contrary decision in *Kelley v. Conco Companies* (2011) 196 Cal.App.4th 191.

Adverse Employment Action NOT Required

- The complainant does not have to have a tangible economic loss or other adverse employment action.
- The crux of a harassment claim is the assault on the complainant's personal sense of dignity and well-being.

Defense: Lack of Action by the Victim

1. The victim could have avoided part or most of the harm if they had taken advantage of the employer's procedures for addressing sexual harassment (Avoidable Consequences Doctrine)
2. The amount of harm to the victim could have been less if the employee had taken action (Failure to Mitigate Damages)

Federal TITLE VII

- Negligence theory only [Employer not automatically liable].
- Employer not liable if:
Employer exercised reasonable care; and
Employee unreasonably failed to take advantage of opportunities to avoid harm.
- 15 employees or more.
- No application to independent contractors, volunteers and unpaid interns.

California FEHA

- Strict liability [Employer automatically liable for harassment by managers and supervisors].
- Employer has no defense if manager or supervisor is harasser.
- All employers, even those employing one person or sole proprietors.
- Includes independent contractors, volunteers and unpaid interns.

Harassment Based on Any of These Characteristics is Illegal

1. Race
2. Color
3. National Origin
4. Sex
5. Sexual Orientation
6. Gender
7. Gender Identity
8. Gender Expression
9. Religious Creed
10. Mental Disability
11. Physical Disability
12. Medical Condition
13. Military/Veteran Status
14. Marital Status
15. Age
16. Genetic Characteristics
17. Ancestry

Employers Must Take All Reasonable Steps

It is unlawful for employers to fail to take all reasonable steps to prevent discrimination, harassment and retaliation. A determination as to whether an employer has complied with Government Code section 12940(k) includes an individualized assessment dependent upon numerous factors sometimes unique to the particular employer, including, but not limited to: workforce size, budget, nature of the business, and the facts of the case.

Policies & Procedures: Basic Steps in an Investigation

The employer is obligated to conduct an effective workplace investigation of a harassment complaint, and should:

- Conduct a thorough interview with the complaining party.
- Give the accused party a chance to share their perspective of the events.
- Interview relevant witnesses.

Policies & Procedures: Basic Steps in an Investigation

- Obtain all relevant documents.
- Investigate all relevant avenues applicable to the allegations.
- Reach a reasonable and fair conclusion based on the facts.

Supervisory Note:

- Supervisors should be provided specific protocols to follow should they be accused of harassment.

Training

1. Provide training as required by the law.
2. Provide training even if it is not required by the law.
 - Implicit bias training
 - Interaction with certain groups
 - Bystander intervention
3. Keep training records.
4. Keep materials readily available in multiple formats (e.g., paper, online).

Leadership

Policies and training must be reinforced by leadership. The managers and supervisors must understand that their adherence to the standards of the law and internal policies is required.

Top management should model desired behavior and provide appropriate support to managers and supervisors on the front lines.

Resources

1. California Department of Fair Employment and Housing – www.dfeh.ca.gov
2. Federal Equal Employment Opportunity Commission – www.eeoc.gov

ABUSIVE WORKPLACE CONDUCT

Abusive Conduct

Conduct in the workplace that a reasonable person would find hostile, offensive and unrelated to an employer's legitimate business interests, including:

- Repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets.
- Verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating.
- The gratuitous sabotage or undermining of a person's work performance.

A single act shall not constitute abusive conduct, unless especially severe and egregious.

Learning Objectives Revisited

We appreciate your participation and hope that we have provided useful information regarding:

1. The elements of sexual harassment and the remedies available to victims of sexual harassment under California and federal law.
2. Other forms of unlawful discrimination, harassment, and retaliation under the FEHA and other statutes enforced by DFEH.
3. Strategies for preventing and responding to unlawful discrimination, harassment and retaliation.
4. Abusive conduct in the workplace.

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