12 Steps to Avoiding Liability

Part 1: Take Preventive Steps to Avoid a Lawsuit or other Claim

Part 2: Invest Necessary Time and Resources to Defend a Lawsuit

Step 1: Follow the Rules
Follow the Rules

What are the Rules?
- Board Policies and corresponding Administrative Procedures
- Collective Bargaining Agreement
- Education Code
- Government Code
- Title 5
- Due Process procedures
- Other statutes and regulations
  - E.g., Educational Employment Relations Act (EERA); Public Employees’ Retirement Law (PERL), Public Employees Pension Reform Act (PEPRA), State Teachers’ Retirement Law (STRL)
- College, division, department rules

Audit Your Rules, Policies, Etc.
Follow the Rules

- Establish a training program to orient and re-educate employees about rules, regulations, and expectations

Follow the Rules

Your Failure to Follow the Rules Will Become Their Primary Exhibit
Step 2: Train and Re-Train

Establish a Training Procedure

- Orient and Educate New Employees About Rules and Regulations and Expectations
- Re-educate When Necessary
- Have Everyone Attend Training, Including Managers
- Rules Are Useless if Employers and Employees Don’t Know What They Are
- Provide Training At All Levels of the District Where Appropriate, Including Trustees, Chancellor or Superintendent/President & Cabinet
  - E.g., Harassment Training
  - E.g., EEO Training
Train & Re-Train

Training is Important
• Provides a Defense in Lawsuits
• Maintains Consistency within the Agency

Step 3: Establish an Effectively Hiring and Employee Retention Process (Surround Yourself with Competent People)
Surround Yourself With Competent People

- Identify Intelligent, Dedicated and Loyal Employees
- Reduce Liability by Avoiding, Improving or Removing Poor Employees

Surround Yourself With Competent People

1. Invest Necessary Time to Hire the Best Employees By:
   - Establishing job-related criteria
   - Experience-based questions
   - Make sure everyone involved in the hiring process receives Title 5 mandated training (5 CCR § 53000 et seq.)
2. Prepare for Interviews
3. Conduct Thorough Background Investigations
   - Do reference checks
4. Don’t Let Personal Relationships Cloud Hiring Decisions
Surround Yourself With Competent People

Mentor and Reward Good Employees

- Evaluations
- Recognition
- Reward

Surround Yourself With Competent People

Terminate During Probationary Period if in Doubt
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Step 4: Accountability for All

Accountability for All

- Utilize Performance Evaluations to Honestly Assess Performance
- Advise Employees of Performance Expectations
Accountability for All

• Keep Accurate Records of Compliance With Rules
• Document Staff Meetings With Employees
• Document One on One Meetings
• Document Training
• Keep a Supervisor’s File
• Empower Your HR Department

Accountability for All

• Promote Goals
• Act Ethically
• Maintain Training
Accountability for All

- Enforce Rules By Disciplining Employees Who Violate Them
- Supervisors and/or Managers Must Set Proper Examples and Be Subject to Discipline Too

Step 5: Be Honest, Consistent, and Fair
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Be Honest, Consistent, and Fair

• Be Honest
• Don’t Create False Expectations
  ▪ a.k.a. “No good deed goes unpunished”
  ▪ Don’t promise what you can’t deliver
• Don’t Let Poor Performance Slide
• No Surprises

Be Honest, Consistent, and Fair

• Be Consistent
• Apply Rules Consistently
  ▪ If deviation necessary, there should be compelling reasons for doing so
  ▪ Deviation from rules may be seen as unfair or discriminatory
• Timeliness is a Component of Consistency
  ▪ Do Performance Evaluations
  ▪ Do Not Miss Deadlines
Be Honest, Consistent, and Fair

- Be Fair
- Update Job Descriptions to Reflect Actual Duties
- Revise Outdated Policies, Procedures, & Other Rules

Step 6: Communicate, Communicate, Communicate
Communicate

- Communicate Daily
- Communicate Positives and Negatives
- Communicate With Knowledge
- Communicate Clearly

Communicate

- Communicate Rules and Expectations
- Be Clear in Your Communications
- Avoid “Passing in the Hallway” Communications
- Avoid “Stray” Remarks
Communicate

- Document Your Communications
- Document/Record-Keeping of Staff Meetings/Communications
- Document Communications in Supervisor’s File

Listen
Communicate

Press / Public Comments:
- Identify Who Should Speak Publically as District Representative
  - Know if You Are an Authorized Speaker
- Keep Comments to External Parties Focused on Theme and Facts
- Be Careful re: Personnel and Labor Issues
- Keep Your Principals Informed About What You Hear

Step 7: Pick Your Battles Wisely
Pick Your Battles Wisely

• Every Decision has Ramifications
• In Assessing Whether to “Fight” a Battle, Think About Broad and Long-Term Implications
• Don’t Sweat the Small Stuff

Pick Your Battles Wisely

• Evaluate Options and Weigh the Risks
  1. What are the Budget/Monetary Implications?
  2. What will the Effect be on Employees and/or Employees’ Association?
  3. What will the Effect be on Management?
  4. What are the opportunity costs?
Pick Your Battles Wisely

- Change can be unsettling
- Communicate changes and the impact on employees in advance

Pick Your Battles Wisely

**Disciplinary Action**

- Consider Likelihood of Success
- Reversal/Reduction of Discipline Usually Due to:
  - Inconsistent enforcement
  - Wrong rule applied
  - New rule; insufficient notice
  - Unreasonable rule
  - Unreasonable penalty
Pick Your Battles Wisely

To the Extent Possible, Develop Good Relationships With Bargaining Units/Unions

Step 8: Due Process Matters
Due Process Matters

**Essential Components (Skelly)**

- Written Notice of Charges
- Facts and Documents Upon Which Charges are Based
- Opportunity to Respond

Due Process Matters

**The Skelly Procedure Requires:**

- The employee receives a preliminary written notice of the proposed action stating the date it is intended to become effective and the specific grounds and particular facts upon which the proposed action is based
Due Process Matters

The *Skelly* Procedure Requires:

- Providing the employee with any known written materials, reports, or documents upon which the action is based, along with the notice.

Due Process Matters

The *Skelly* Procedure Requires:

- The employee be accorded the right to respond informally either orally, in writing, or both, to the proposed charges.
Due Process Matters

Understand Your Role in the Skelly Process

Due Process Matters

• Understand Your Role in the Post-Disciplinary Due Process Hearing
• What is Your/Board’s Role in Final Decision
Step 9: Investigate Before It’s Too Late

1. Investigate Promptly
2. Follow Your Own Rules
3. Have a Complaint Procedure
4. An Investigation may be Required by Law
   - Fair Employment and Housing Act (FEHA)
   - Title IX of the Education Amendments of 1972
   - Title 5 of the California Code of Regulations
Investigate Before It’s Too Late

- Investigations on Trial
  - Prompt
  - Thorough
  - Effective
  - Fair

Step 10: Everything is “Discoverable”
Everything is “Discoverable”

Understand the Public Records Act and Brown Act

Everything is “Discoverable”

• Imagine Everything You Write will be Used as an Exhibit
• Nothing is Confidential
• This Includes E-mails and Text Messages Too! Be Careful What You Write!
Step 11: Litigate to Win

- Cooperate With Attorney
- Importance of Defending Lawsuits
- Understand and Accept That Winning Lawsuits Costs Money and Requires Expenditure of Staff Time
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Litigate to Win

KNOW HOW TO TESTIFY

Prepare

BE HONEST

Litigate to Win

“I don’t recall”

VS.

“I don’t know”
Step 12: Don’t Take It Personally

- Individual Liability is Often Used By Plaintiff’s Counsel as a Scare Tactic and as Leverage in Settlement
- Individuals Can Be Subject to Punitive Damages
Don’t Take It Personally

Don’t Let Potential Individual Liability Deter You From Performing Your Job

Don’t Take It Personally

Do NOT Retaliate
Thank You!

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