

# 12 Steps to Avoiding Liability

Bay Area CCD ERC | April 22, 2022

Presented by: T. Oliver Yee

**LCW** LIEBERT CASSIDY WHITMORE

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T. Oliver Yee

**Unions**      *Whistle Blower*      **Constitution**  
**Harassment**      **Brown Act**      **Hiring**  
*Discrimination*      PERS/STRS  
**FMLA**      **FLSA**      Wrongful Termination  
**Due Process**      **Discipline**      **Politics**

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## 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



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## Step 1: Follow the Rules



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## 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



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## Follow the Rules

**Audit Your Rules,  
Policies, Etc.**



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### Follow the Rules

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



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### Follow the Rules

**Your Failure to Follow  
the Rules Will Become  
Their Primary Exhibit**



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## Step 2: Train and Re-Train



### Train & 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



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### Train & Re-Train

#### Training is Important

- Provides a Defense in Lawsuits
- Maintains Consistency within the Agency



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



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### Surround Yourself With Competent People

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

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### 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

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### Surround Yourself With Competent People

#### Mentor and Reward Good Employees

Evaluations

Recognition

Reward



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### 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



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### 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



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### Accountability for All

- Promote Goals
- Act Ethically
- Maintain Training



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### 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

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### 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



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## 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



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### Be Honest, Consistent, and Fair

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



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### Step 6: Communicate, Communicate, Communicate



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## Communicate

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



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## Communicate

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



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### Communicate

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

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### Communicate

**Listen**

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## 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



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## Step 7: Pick Your Battles Wisely



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### 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

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### 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?

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## Pick Your Battles Wisely

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



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## 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



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## Pick Your Battles Wisely

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



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## 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



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## 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



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## 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



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## 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



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## Due Process Matters

### Understand Your Role in the *Skelly* Process

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## Due Process Matters

- Understand Your Role in the Post-Disciplinary Due Process Hearing
- What is Your/Board's Role in Final Decision

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## Step 9: Investigate Before It's Too Late



### 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



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### Investigate Before It's Too Late

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



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### Step 10: Everything is “Discoverable”



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## Everything is “Discoverable”

### Understand the Public Records Act and Brown Act



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## 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!



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## Step 11: Litigate to Win



### 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**

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## Litigate to Win

**“I don’t recall”**

**VS.**

**“I don’t know”**

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### Step 12: Don't Take It Personally



### 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



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## 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**

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# Thank You!

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