

Best Practices in Personnel Management



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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.

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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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SECTION 1 INTRODUCTION

Today's community colleges serve widely diverse student populations through a variety of college programs. Students range from transfer students, to students working toward a vocational certificate, to students taking a single class for personal fulfillment. Many dedicated and talented faculty and staff are necessary to support these various educational programs. Instructional faculty, counselors, instructional aides, clerical, and custodial staff all directly affect the quality of the education the District is able to provide.

Community college administrators, managers and supervisors need a wide variety of skills to build these employees into a team providing a positive, student-centered learning environment. These skills include delegation, problem solving and effective communication skills. This workbook is designed to assist managers in building the necessary skills to motivate their teams to carry out the District's objectives and strategic plans.

SECTION 2 LAWS AFFECTING PERSONNEL MANAGEMENT

There are a myriad of State and Federal laws that give rights to California workers. In addition, most public sector employers in California have elaborate workplace rules (e.g., Personnel Rules or Collective Bargaining Agreements) which provide rights to district employees. Rights given to employees necessarily restrict the ability of administrators, managers and supervisors to act with unfettered discretion. A violation of an employee's rights can prove costly to a district – and sometimes to the administrator, manager or supervisor individually – so he or she must take great care to respect employee rights when managing personnel.

An understanding of laws that affect the workplace will aid administrators, managers and supervisors in making personnel decisions, responding to employee complaints and ensuring they do not tolerate unlawful practices. This section is intended to provide a short, non-comprehensive introduction to the most relevant laws that a manager or supervisor may encounter on a daily basis. **This is by no means a comprehensive review of all the laws that may apply to community college district employees.** It is important to consult with your district's human resources professionals and legal counsel when employees' legal rights are implicated (e.g., when considering discipline).

A. THE FAIR EMPLOYMENT AND HOUSING ACT/TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The California Fair Employment and Housing Act ("FEHA") is a state law, which together with federal laws including Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act of 1990 ("ADA") and the Age Discrimination in Employment Act of 1967 ("ADEA"), collectively provide protection from harassment or discrimination in employment on the basis of:

- Age (40 and over);
- Ancestry;
- Color;
- Creed;
- Disability (mental and physical) including HIV and AIDS;
- Marital Status;
- Medical Condition (including cancer and genetic characteristics);
- Genetic Information;
- Military and Veteran Status;
- National Origin (including language use restrictions);
- Race;
- Religion;
- Sex (which includes pregnancy, childbirth, breastfeeding, and medical conditions related to pregnancy, childbirth or breastfeeding);
- Sexual Orientation;
- Gender identity and gender expression;
- Association with or perception of association with a member of a protected class; and
- Action taken in opposition to harassment.

While harassment can be based upon any protected class (e.g., race, religion, sexual orientation), the most common form of harassment is sexual harassment. Sexual harassment is defined as including unwanted sexual advances, or visual, verbal or physical conduct of a sexual nature. This definition includes many forms of offensive behavior. The following is a partial list of conduct that can lead to a sexual harassment claim:

- Unwanted sexual advances;
- Offering employment or educational benefits in exchange for sexual favors;
- Making or threatening reprisals after a negative response to sexual advances;
- Visual conduct: leering, making sexual gestures, displaying of suggestive objects or pictures, cartoon or posters;
- Verbal conduct: making or using derogatory comments, epithets, slurs, and jokes;
- Verbal sexual advances or propositions;

- Verbal abuse of a sexual nature, graphic verbal commentaries about an individual’s body, sexually degrading words used to describe an individual, suggestive or obscene letters, notes or invitations;
- Physical conduct: touching, assaulting, impeding or blocking movements; and
- Dating between subordinates and managers that leads to favoritism.

Administrators, managers and supervisors must take all reasonable steps to prevent discrimination and harassment from occurring. Discrimination, harassment or retaliation can lead to civil liability for an employer (i.e., liability for money damages) and potentially for the manager or supervisor as well (if the manager or supervisor is the one engaging in harassment). Administrators, managers and supervisors must, therefore, review and become familiar with their districts’ discrimination and harassment policies and supervise their workforce aggressively in order to stop any activity that could lead to a claim of discrimination or harassment.

Administrators, managers and supervisors must also be thoroughly familiar with any district rules that identify how the administrator, manager or supervisor is to respond to complaints of discrimination, harassment or retaliation. Managers must respond to discrimination, harassment and retaliation complaints immediately and effectively to prevent any further discrimination, harassment or retaliation from occurring.

B. DISABILITY DISCRIMINATION

Both the FEHA (in California) and the Americans with Disabilities Act (“ADA”) (a federal law) prohibit discrimination in employment against qualified individuals with disabilities. This includes both applicants for employment and current employees. Under the FEHA, a disability consists of any physical or mental impairment that “limits” one or more of an individual’s “major life activities,” regardless of mitigating measures. By contrast, under the ADA, the disability must “substantially limit” a major life activity and mitigating measures may be considered. These laws protect an individual with such a physical or mental impairment, who has a record of such an impairment, or who is regarded as having such an impairment that may qualify as an impairment. Major life activities including seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working among others. The law also protects people discriminated against because they have a known association or relationship with an individual with a disability. Since the FEHA provides the greater protections to employees, Districts should focus on complying with California Law.

A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the “essential functions” of the position with or without reasonable accommodation. Requiring the ability to perform “essential functions” assures that an individual with a disability will not be considered unqualified simply because of inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with reasonable accommodation.

Administrators, managers and supervisors must be aware that disability discrimination is prohibited in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions, and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities.

In addition, administrators, managers and supervisors must be aware that the FEHA and ADA require employers to engage employees or applicants with a disability who request or require a reasonable accommodation in an “interactive process.” The interactive process is a procedure in which the employer meets with the employee (or applicant) and discusses what reasonable accommodations, if any, would allow the employee to perform the essential functions of the job. A reasonable accommodation can be any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities. Administrators, managers and supervisors are crucial to the interactive process and usually are in the best position to review whether proposed accommodations will allow the employee to perform the essential functions of the position.

Administrators, managers and supervisors must also be careful before imposing discipline against an employee considered disabled under state or federal law. Though it is not unlawful to discipline an employee considered disabled, managers must ensure that the necessary documentation is thorough and that the reasons for the discipline are legitimate and non-discriminatory.

C. THE FAMILY AND MEDICAL LEAVE ACT/CALIFORNIA FAMILY RIGHTS ACT

The federal Family and Medical Leave Act (“FMLA”) and the California Family Rights Act (“CFRA”) secure leave rights for the following events:

- Birth of a child for purposes of bonding within a year of birth;
- Placement of a child in the employee’s family for adoption or foster care;
- For the serious health condition of the employee’s child, parent or spouse;
- For the employee’s own serious health condition; and
- To attend to a “qualifying exigency” involving an employee’s spouse, child, or parent who is on active military duty or has been notified of an impending call or order to active duty in support of a contingency operation.
- Leave to care for a spouse, son, daughter, parent, or “next of kin” who is a covered servicemember of the United States Armed Forces who has a

serious injury or illness incurred in the line of duty or aggravated by service in the line of duty on active duty in the Armed Forces.

Serious health condition means illness, injury (including on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent or spouse of the employee that involves:

- In-patient care (i.e., an overnight stay) in a hospital, hospice, or residential health care facility; or
- Continuing treatment or supervision by a health care provider.

To qualify for FMLA or CFRA leave, an employee must be either a full-time or part-time employee working in California, have more than 12 months (52 weeks) of service with the employer and have worked at least 1,250 hours in the 12-month period before the date the leave begins.

Employees who qualify are generally entitled to up to 12 workweeks of leave under the FMLA and CFRA, and employees may take leave intermittently during a 12-month period. Employees are entitled to up to *26 weeks* to care for a spouse, child, parent, or “next of kin” who is a member of the armed services and who becomes seriously injured or ill while on active military duty.

Moreover, in California, an employee may be entitled to more than 12 workweeks of leave if the employee’s disability is due to pregnancy. (See Section 10) Administrators, managers and supervisors should consult with their district’s human resources professionals or legal counsel regarding any FMLA or CFRA leave requests.

D. THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (“FLSA”) provides minimum standards for both wages and overtime entitlement. The Act also includes provisions related to child labor, equal pay, and portal-to-portal activities. In addition, FLSA exempts specified employees or groups of employees from the application of certain of its provisions. The Education Code also contains provisions regarding overtime and work schedules of classified employees.¹

Administrators, managers and supervisors must be familiar with their district’s rules concerning overtime, stand-by pay, call-back pay, travel time, etc. since employees who feel they have not been paid correctly often will bring their concerns to their manager. Administrators, managers, and supervisors must also strictly enforce any district rule that requires employees to obtain prior approval before working overtime.

E. WORKERS' COMPENSATION

Workers' compensation is a social insurance program. It is a no-fault system, meaning that injured employees need not prove the injury was someone else's (or their employer's) fault in order to receive workers' compensation benefits for an on-the-job injury.

The workers' compensation system is premised on a trade-off between employees and employers. Employees are supposed to receive the limited statutory workers' compensation benefits for on-the-job injuries. In return, workers' compensation benefits are the exclusive remedy for injured employees against their employer, even when the employer negligently caused the injury.

This no-fault structure eliminated prevalent litigation over whether employers were negligent in causing workers' injuries. Litigation is now regarding other issues, such as whether the injury arose in the course and scope of employment or how much in benefits an injured worker is entitled to receive.

Although the workers' compensation system is a no-fault system, administrators, managers and supervisors should take all steps possible to ensure a safe and healthy work environment. These steps should include speaking to employees about safety, making sure employees receive safety training, conducting inspections or walk-throughs of the workplace and creating safety committees. Failing to prevent or remedy workplace hazards may result in workers' compensation injuries to the employees. In addition, administrators, managers and supervisors must know what to do in the event of a workplace injury. All employees should report injuries promptly so that the workers' compensation procedures may commence.

F. UNION ISSUES

Most community college administrators, managers and supervisors deal with employees represented by labor organizations or are themselves represented by an exclusive representative. Educational employees are protected by the Educational Employment Relations Act ("EERA").²

All employees have the right to join or participate in an employee organization for purposes of representation in their relationship with their employer. Administrators, managers and supervisors may not discriminate against an employee based on that employee's involvement or participation in a labor organization. Likewise, administrators, managers and supervisors may not discriminate or retaliate against an employee for utilizing an available grievance procedure, or trying to enforce the provisions of a district's personnel rules or a collective bargaining agreement.

Finally, administrators, managers and supervisors should be aware that represented employees have the right to the presence of a union representative during any interview with the employee if the employee reasonably believes that discipline may result. These rights are known as "Weingarten rights" as defined by the United States Supreme Court in a case entitled *National*

*Labor Relations Board v. Weingarten.*³ Employees do not have the right to ask for representation prior to participating in ordinary workplace conversations between a manager and an employee, such as giving routine direction, or giving a performance evaluation. The manager is not required to inform the employee of his or her right to have a representative, but must allow for one if the employee requests it. A manager should not threaten or take retaliatory action against an employee for requesting a representative.

SECTION 3 **THE ADMINISTRATOR/MANAGER/SUPERVISOR AS LEADER**

Administrators, managers and supervisors act as leaders within their district. As such, administrators, managers and supervisors must set the tone for the work place. The quality, character and spirit of the workplace should be the result of the manager’s intent, plan and communication, and not left to the staff to determine or control.

A. CREATE A PROFESSIONAL WORK ENVIRONMENT

While it may sound like a workplace cliché, a professional working environment encourages good performance by employees. It may also remediate – or alleviate – the impact that complaining or marginally performing employees have on their co-workers. Administrators, managers and supervisors, therefore, should create a professional work environment by incorporating these concepts into their overall management style:

- Lead by example – abide by the same rules and standards applicable to subordinates;
- Be objective – base decisions on employee merit and do not play favorites;
- Common courtesy – treat others as you would want to be treated;
- Display a professional demeanor at all times – remember your subordinates are watching your actions;
- Communicate effectively and respectfully; and
- Be a team player – while you are a leader, remember that you and your subordinates are all part of the same team.

B. SET ETHICAL VALUES AND STANDARDS

Ethics are of crucial importance to all community college district employees. Employees in the district owe it to the public to maintain a high standard of ethical conduct. In addition, media and public opinion will politically and publicly penalize a district that they perceive holds substandard ethical values or standards.

On a more self-serving level, administrators, managers and supervisors must have a reputation for credibility and be respected by the employees in the work unit to be effective leaders. Earning a reputation for credibility is dependent upon the manner in which the administrator, manager or supervisor conducts him or herself, as well as the manner in which he or she communicates and interacts with fellow employees.

Administrators, managers and supervisors should review their own standards of conduct and ethics and communicate strong ethical values to their employees. Consider whether you and your employees have the following attitudes:

- A feeling of personal responsibility and accountability for proper expenditure of district funds;
- A feeling of personal responsibility for proper use of district equipment and property;
- A commitment to preparing all data, records and reports accurately including time cards, expense accounts, etc.;
- A commitment to ensure that any meals, gifts or entertainment provided by people doing business with the district are received in strict compliance with legal and ethical standards and district policy;
- A commitment to putting the public interest ahead of self-interest or that of special interests;
- Personal responsibility for maintaining the highest quality of performance on the job; and
- A commitment to accord both respect and consideration to co-workers and the public.

The maintenance of ethical attitudes and standards requires constant reinforcement. Managers may employ a variety of techniques in communicating these values to employees. Some suggested techniques include:

- **Major decisions:** Make and exhibit decisions that embody key values.
- **Ceremonies:** Create and sponsor events that embody or recognize key ethical values as important.
- **Written philosophy:** Prepare and disperse values and mission statements.
- **Code of conduct:** Promote written codes that address key ethical issues and specific standards.
- **Rewards and penalties:** Establish and administer formal and informal rewards and penalties, which highlight desired behavior.
- **Personal example:** Handle issues in your own day-to-day work to exemplify core values.

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Leading by example is probably the single most important communication technique because employees react most to what managers do, not what they say. The manager must set a good example and be a good role model.

Ask yourself: do you actually “walk the walk” or just “talk the talk”?

C. SUPERVISE EFFICIENTLY

Efficiency is also crucial to the ability to manage properly and to prevent marginal performance by subordinate employees. Some tips for developing efficiency include:

- *Organization* – Make sure you explain assignments clearly. Keep your work area as tidy and as organized as you expect your staff to keep their work areas.
- *Well-defined job description* – Employees should be clear about what their job duties are as well as the job duties of others. Managers must also be familiar with the job description and duties of everyone in their department or work group.
- *Quality and quantity* – State performance goals clearly and communicate them effectively to the employees. Quality demands must also be unambiguous. Be specific and hold all employees to the same job standards.
- *Accountability* – You are ultimately responsible for your employees. Make sure your employees understand their role.
- *Time management* – Keep track of time to make sure that you are not wasting time or effort on the wrong things. Keep a daily time sheet to determine where you are spending your time.
- *Support* – Make sure your employees have the appropriate resources to do their jobs well.

D. MOTIVATE SUBORDINATES

Successful administrators, managers and supervisors are those with the ability to motivate personnel to perform to their highest potential. An essential element of effective personnel management is the ability to assess, understand and then integrate each employee’s unique motivational impetus into his or her daily tasks. Employees often have the ability to perform at a superior level, but lack the motivation or ambition to do so. Pay and benefits alone do not necessarily motivate employees to work harder.

Motivational factors that affect employees’ performance include:

- Achievement – Talk with subordinates about their successes and good performance (as well as their problems). It is just as important to keep track of good performance, as it is to document bad performance.
- Recognition – Make sure that those above you as well as those below you are aware of your subordinates’ successes and accomplishments. Employees appreciate even small tokens of appreciation (memos to staff, employee of the month awards, and gift certificates for nominal sums).
- Responsibility – Do not be afraid to appropriately delegate work. Delegation will give employees a feeling of ownership in your district’s mission.
- Advancement – Be an advocate for your employees and help them along the career path if their performance warrants advancement.
- Input – Make sure you listen to your employees and include them in decision making when appropriate. Your employees often know things about the job that you may not know.
- Set an example – The easiest way to motivate employees is to earn their respect. Make sure you practice what you preach. Deal with employees and others in a respectful manner. Produce a good work product. Follow workplace rules.
- Fairness – Be consistent and fair. Do not show favoritism. Set aside personal animosities. Do not give employees an excuse for marginal performance. Remember that they are watching everything that you do.

SECTION 4 **THE ADMINISTRATOR/MANAGER/SUPERVISOR AS DELEGATOR**

A. THE ELEMENTS OF DELEGATION

Most administrators, managers and supervisors are responsible for more tasks than they can personally accomplish. Good managers achieve results through others. The ability to delegate work to others is not merely an important skill; it is an essential requirement of supervision. Managers should avoid saying, “Let me do it”.

Although delegation is not a difficult concept to understand, effective delegation is an acquired skill. Difficulty with delegation is usually the reluctance of managers to practice it. Some administrators, managers and supervisors are afraid to relinquish authority or responsibility for a variety of reasons, such as fear that a task will take too long or that it will not be done correctly. To delegate effectively, a manager must learn the steps and sequence of delegation and why delegation is necessary.

B. DO YOU HAVE A PROBLEM DELEGATING?

The checklist below may prove useful to determine if you have a problem with delegation.

No	Yes	
<input type="checkbox"/>	<input type="checkbox"/>	When you are absent, do your employees perform only routine operations?
<input type="checkbox"/>	<input type="checkbox"/>	Do you ever find that the daily tasks occupies so much of your time that you never have time to plan?
<input type="checkbox"/>	<input type="checkbox"/>	Do emergencies constantly upset daily operations because employees cannot deal with them?
<input type="checkbox"/>	<input type="checkbox"/>	Are you too preoccupied with details?
<input type="checkbox"/>	<input type="checkbox"/>	Are you constantly complaining that work never goes as you had planned?
<input type="checkbox"/>	<input type="checkbox"/>	Do little jobs take too long?
<input type="checkbox"/>	<input type="checkbox"/>	Do employees carry out your orders mechanically, seldom showing enthusiasm or spontaneity?
<input type="checkbox"/>	<input type="checkbox"/>	Is there a designated individual to whom you always delegate?
<input type="checkbox"/>	<input type="checkbox"/>	Do you insist jobs be completed “your way?”

The more “yes” answers you have, the more you will need to work on your delegation skills.

C. BASIC STEPS OF DELEGATION

There are three basic steps of delegation: (1) delegate responsibility; (2) delegate authority; and (3) retain accountability.

1. DELEGATE RESPONSIBILITY

Delegating responsibility simply means that someone else is responsible for a particular assignment.

An administrator, manager or supervisor must decide that there is a task to be delegated and determine how it is to be divided among individual employees or groups. A manager must ask himself or herself “which work responsibilities can or should I delegate?”

a. *Work That May Be Delegated*

- Repetitive or routine work requiring minor decisions within established policies;
- Work which has been done often before and for which there are samples;
- Work which requires large blocks of time such as recurring reports and attendance at some types of meetings;

- Work which can train and develop a subordinate as a back-up for the manager; and
- Less crucial tasks.

Subordinates can and should perform these tasks. Delegation not only frees time for the manager; it benefits employees by increasing morale, providing training and increasing the feeling of involvement within the organization. Delegation is a way to train employees for even greater roles within the district.

b. Work That Should Not Be Delegated

- Preparation of performance evaluations;
- Discipline; and
- Policy making responsibility.

These tasks are the manager’s alone. Managers should not abuse their delegating authority to set up subordinates as sub-managers with inappropriate and duplicated responsibilities.

Finally, administrators, managers and supervisors should keep track of their time during the day to determine if tasks that are taking up too much time should be delegated to other employees. A manager can easily determine whether he or she is performing tasks that should be delegated to others. A “Daily Time Analysis” chart is located at Appendix A of this workbook. Supervisors can use this Analysis to determine if they can be spending their time more effectively.

2. DELEGATE AUTHORITY

Administrators, managers and supervisors often have no qualms about assigning job responsibilities, but are hesitant to relinquish any real authority to the employee delegated to perform a task. When a supervisor delegates responsibility for a task, he or she should also delegate authority commensurate with the responsibility if the delegation is to succeed. Otherwise, employees are going to be unable to complete the assigned task and will need to run back to the manager every time any question arises. Managers must find the right balance between delegating too little authority to finish the task and delegating too much authority (thereby losing control).

When delegating authority, the administrator, manager or supervisor should discuss with the employee receiving the assignment:

- What results are expected?
- From whom can the employee seek assistance?
- What orders can the employee issue? To whom?
- What are the time constraints and deadlines?
- How much money can the employee spend without further approval?

- How much and what kind of materials should be used?
- May the employee get additional help?
- What kinds of progress reports are expected? How often? How detailed?

When delegating authority, the administrator, manager or supervisor should make sure other employees know that the employee to whom an assignment was delegated, has the authority to request help or give orders. This will usually prevent tensions among subordinate employees.

3. RETAIN ACCOUNTABILITY

It is important to distinguish between responsibility and accountability. Supervisors may delegate responsibility; however, managers must never delegate accountability. Delegation is not a process of abdication. The manager is not immune from accountability simply because he or she has delegated a task to someone else. The manager remains accountable for seeing that the work is completed both correctly and on time. In other words, the administrator, manager or supervisor is ultimately accountable to get the work done right, and must therefore establish evaluations, checkpoints, and deadlines to ensure the task will be done correctly and timely.

SECTION 5 THE ADMINISTRATOR/MANAGER/SUPERVISOR AS PROBLEM SOLVER

Administrators, managers and supervisors may experience the same types of problems recurring within their work unit because they do not use a systematic approach to problem solving. Too often managers make decisions “on the fly” or by intuition, without taking the time to think about the problem and its true cause.

While it is impossible to guarantee that a manager will make the best possible decision in every situation, managers who systematically approach problem solving will reach more effective solutions and reduce the possibility of larger problems arising from ineffective solutions. In addition, managers will be less likely to reach inconsistent solutions that can lead to confusion and claims of favoritism or discrimination. There is a simple process that a manager or supervisor can apply to virtually any problem that arises in the workplace.

This process involves the following steps:

A. STEP 1: IDENTIFY THE OBJECTIVE

The first step in problem solving is to establish objectives. An objective is the result the administrator, manager or supervisor wants to achieve or sustain. Every manager must have a sense of what the ideal workplace would look like and strive to reach that goal. If subordinates do not understand the manager’s objective, it will be difficult to improve as a workforce.

Discuss objectives with your employees and make sure they understand the goals of the organization and your expectations of their performance.

Communicating the objectives to your employees is essential and will be easier if the objectives are:

- Understandable to all (enough descriptive detail);
- Expressed in measurable (quantifiable) specific terms;
- Attainable (realistic); and
- Contribute to the objectives of the district.

It is not always possible to begin problem solving with objectives that meet the above criteria. Often, the manager and the employees do not have a clear understanding of the goals and how they relate to the “big picture”. For that reason, administrator, managers and supervisors must start thinking in terms of the overall goals and purpose of their work unit and communicate these goals to the workforce.

B. STEP 2: IDENTIFY THE PROBLEM(S)

Identifying the problem may seem like an obvious step to some, but it is actually a very difficult supervisory skill. The identification of the problem is the most important and difficult step in the problem solving process.

A “problem” is the difference between the way things are and the way the manager or supervisor wants things to be. To use this approach, you must first understand the workplace objectives. In other words, you must know what the ideal workplace should be like. You must also be able to realistically recognize how things in the workplace are actually functioning.

Managers commonly solve only “symptoms” of a problem rather than the true problem. “Symptoms” are often easier to recognize and thus easier to address. Solving “symptoms” often falls into one of two categories:

- The “obvious” problem; or
- The blame game.

1. AVOID THE “OBVIOUS” PROBLEM

When faced with a problem, managers sometimes jump to the obvious problem rather than actually thinking about whether the obvious problem may just be a symptom of a broader or deeper problem. For example:

<i>The obvious problem:</i>	Employees are not meeting deadlines.
<i>The solution:</i>	Crack down on the employees and make sure they meet deadlines.

<i>The obvious problem:</i>	A member of the public complains about a rude employee.
<i>The solution:</i>	Tell the employee that cordial treatment of the public is necessary.
<i>The obvious problem:</i>	Production in the department is down.
<i>The solution:</i>	Tell the workforce to work harder.

While the obvious problem may be easy to spot, it is likely that the solution you apply to the obvious problem will address only a symptom of the real problem. For example, cracking down on your employees and forcing them to meet deadlines may result in a solution to the obvious problem of meeting the deadlines, but at what cost? What is the reason the employees were not meeting the deadlines in the first place? Were the deadlines unrealistic? Are the employees sufficiently trained to meet the demands? Did the employees have sufficient instruction on how to complete the tasks?

In addition, what new problems will arise by forcing the employees to meet the deadlines? Will overtime be required? Will the work contain mistakes? Will morale suffer? Will interpersonal relationships start to deteriorate under the pressure of the deadline?

2. AVOID THE BLAME GAME

Once an administrator, manager or supervisor identifies the problem, he or she should avoid placing blame on any one person. “If the widget meter hadn’t broken down, we could meet our workload.” This type of thinking will result in too narrowly focusing attention on one element – the widget meter. The manager should instead try to state the problem in broader terms in order to examine all of the information that may relate to the situation. Why did the widget meter break down? Was there deferred maintenance? Was there an issue of misuse by employees? Are all employees properly trained on the equipment? Are the employees bored in the workplace?

Addressing symptoms of a problem instead of the real problem will result in the real problem recurring again and again in the workplace. In addition, failing to address the real problem will often lead to further, and sometimes worse, problems down the road.

C. STEP 3: DEVELOP POTENTIAL SOLUTIONS

Once you have given some thought to the real problem, you are now ready to formulate solutions. Note that “solutions” is plural! It is very tempting to use the first solution that comes to mind. Do not judge the solutions as they come. However, the first solution may not be the one that will best solve the problem. A quick decision may put out a current “fire,” but more or worse “fires” will start again as soon as the supervisor puts the first fire out. Make sure you consider the full range of possible solutions before selecting one to implement.

One way to ensure you consider all possible solutions is to “brainstorm.” List all potential solutions that come to mind. Concentrate on developing a wide list of solutions. When the list

of solutions is complete, evaluate the pros and cons of each option. Consult with other people to discuss solutions, such as other managers or your own manager. While an administrator, manager or supervisor should not discuss all problems with subordinates, he or she should also attempt to utilize the experience and opinions of employees whenever possible to increase the likelihood that employees will accept the solution you choose.

Developing solutions requires that the manager analyze the problem. This analysis should include considering all relevant factors, such as work history, interpersonal relationships, your own supervisory approach, your observation of the workforce, the employees' perception of how things are, and what motivates the employees. For example, if an employee is being rude to a co-worker, consider your own observations, the work history of both employees, how each employee perceives themselves in the workforce, whether either employee has recently experienced a stressful or traumatic event, etc. Analyzing all relevant factors will allow the manager or supervisor to reach a better solution.

There are two major difficulties managers and supervisors often have in terms of analyzing a problem:

- Not knowing when to stop analyzing; and
- Reaching a decision before the analysis is complete.

1. WHEN TO STOP ANALYZING

A critical skill in analyzing a problem is to know when to stop. Some managers stop too early and develop solutions without considering all key facts. Other managers do not know when to stop analyzing, which results in the problem not being solved until it may be too late. The best approach is to set a time limit that fits the circumstances and stick to it. It is not always possible to develop the best solution because managers and supervisors work under significant time constraints. The goal is to develop the best solution within a realistic timeframe and to reevaluate the solution if it proves to be ineffective.

2. DO NOT REACH A DECISION BEFORE FACT-FINDING IS COMPLETE

Do not evaluate the problem and reach a decision before you consider all relevant factors. If you reach decisions too early, you will tend to rely heavily upon pre-conceived beliefs or conclusions. Your preliminary evaluation of what is causing a problem may change as you analyze additional factors. Giving your preliminary analysis too much weight will tend to skew the remaining factors so that you will likely reach the preliminary decision you have already made.

D. STEP 4: SELECT THE BEST SOLUTION AND MAKE A DECISION

When you are ready to make the decision, you must consider the solutions you have developed after analyzing the problem. Issues to consider are:

- Short-term versus long-term effects of the solution;

- Difficulties involved in the application of each solution;
- Cost of each solution (not only in terms of money, but personnel hours, morale, time, etc.);
- The willingness of your employees to accept a solution; and
- Results expected from each solution.

The most effective decision (the one that produces the best results) is one that combines the potential effectiveness of the solution with the extent to which the people involved in the problem will accept that solution. If effectiveness is high but acceptance is low, or if effectiveness is low but acceptance is high, you will not have a successful solution. However, you will rarely find a solution in which the results will be perfect or risk-free.

E. STEP 5: IMPLEMENTATION, EVALUATION AND FOLLOW-UP

After you select the best solution, follow-up to make sure that your decision is communicated and carried out. Continue to discuss the solution and the developing results with employees to determine whether it is working. As discussed above, employee involvement in problem solving will increase the likelihood that employees will accept the solution and work toward problem resolution.

One way to gain acceptance from your employees is to try out the solution in a limited area, or for a limited time. If the solutions affect people who were not involved in the process, you may have to work to get them to accept the change. Above all, do not spring a surprise on your employees. The time you spend discussing solutions with your employees and getting employees ready to accept the new solution will pay for itself in the end.

Finally, make sure you evaluate the effectiveness of the solution. Factors to consider in measuring the effectiveness of a solution include:

- Does the solution solve the problem?
- Is the solution applicable to a changing environment?
- Is the solution effective in both the short-term and long-term?

In summary, problem solving is a continuous process of evaluating what is and what ought to be, and whether your decisions have been effective.

THE ADMINISTRATOR/MANAGER/SUPERVISOR AS A COMMUNICATOR

A. PRINCIPLES OF EFFECTIVE COMMUNICATION

Successful personnel management requires effective communication. All levels of staff – faculty members, classified employees and administrators alike – suffer if there is poor communication.

The manager should focus on determining what to communicate and how to communicate it most effectively. Only accurate and clear communication can obtain the desired results. Good communication is a vital tool at all levels of management.

Communication involves more than mere words. Body language, facial expressions, posture, actions, reactions, and demeanor are also means of communicating. All human behavior that results in an exchange of thoughts and ideas is part of communication. The following principles can help an administrator, manager or supervisor begin communicating more effectively.

1. CONSIDER WHETHER COMMUNICATING IN WRITING IS NECESSARY

Written communication is required when communicating complex or lengthy tasks or directions. In addition, you should consider written communication with employees who have a history of not understanding spoken communication or who fail to carry out directions accurately. Indeed, it is prudent to create a “paper trail” in such situations if disciplinary action is foreseeable.

2. CLARIFY YOUR IDEAS BEFORE COMMUNICATING

You must clearly and thoroughly understand the problem, idea, or message you are communicating before attempting its transmission. Normally, the more one analyzes the problem, idea, or message, the clearer it becomes. Outlining what you want to convey is one useful way of organizing your thoughts.

It is important to delay communication when you are angry or frustrated. Taking time to organize your thoughts before communicating them will allow you to take the emotion of what you want to say and permit you communicate in a professional way.

3. DETERMINE THE PURPOSE OF EACH COMMUNICATION

A supervisor can determine the purpose of a communication by asking “what do I really want to accomplish with this message?” Do you want to obtain information, initiate action, change another person’s perception, or present a message? Try to identify your main objective and then tailor your approach to serve that specific objective. Do not attempt to accomplish too much with each communication; the fewer the objectives, the greater chance you have of clearly and effectively communicating your message.

4. CONSIDER THE ENVIRONMENT OF YOUR COMMUNICATION

Words are not the only important aspect of communication. Administrators, managers and supervisors must be aware of the total setting in which they communicate. Consider, for example:

- **Timing.** The circumstances involved when you make a decision or an announcement. In other words, is the time appropriate?
- **Physical setting.** The primary consideration here is privacy. When the situation warrants, can you communicate in private?
- **Custom and past practice.** The degree to which you conform - or depart from—customs and past practices, will partially determine the effectiveness of your communication.
- **Medium.** Should I communicate this message in person, by memos or by e-mail? Different media send different messages to the recipient.

This is only a partial list. Be aware of, and sensitive to, the total setting in which you are communicating. Communication style and content must be adapted to the environment.

5. AVOID UNINTENTIONAL AND UNINTENDED COMMUNICATIONS

The tone of your voice, your expression, your mannerisms, and your receptiveness to the responses of others, all influence your audience. These factors might affect a listener's reaction more than the message itself. Likewise, your choice of words, emotion and expression can predetermine the reaction of your listener. Try to avoid unintentional communications through actions or reactions. Be mindful of your body language. Eye contact communicates your interest in listening to the employee, while standing too close or too far from the employee could send a particular message.

6. CONVEY SOMETHING OF HELP OR VALUE TO THE RECIPIENT

Employees are more responsive to managers and supervisors when the communication considers the employees' interests (i.e., looking at it from their point of view). Even if you have to communicate something negative to an employee, try including something positive into the communication to make it more likely the employee will accept and understand the communication. For example, when counseling an employee about taking too much time on a project, explain that you appreciate the effort the employee gave to the project.

7. EVALUATE YOUR COMMUNICATION EFFECTIVENESS

You may never know whether your communication was effective if you do not follow-up. Follow-up consists of asking questions, encouraging employees to express reactions, and reviewing performance. Always seek feedback on every important communication so that you can take appropriate action, if necessary, to ensure complete understanding.

8. COMMUNICATE FOR THE FUTURE AS WELL AS FOR THE PRESENT

Generally, communications address the present. However, it is just as important that the communication be consistent with long-range interests and goals. An example is the necessity of discussing poor performance with an employee. A discussion now will hopefully discourage more problems from arising in the future. Postponing disagreeable communication only makes such communications more problematic in the long run.

9. SUPPORT YOUR COMMUNICATIONS WITH ACTIONS

What you do is more persuasive than what you say. If your actions contradict or do not support your messages, your audience is not likely to put much faith in what you say. For example, do not show up ten minutes late to a meeting at which you will be discussing tardiness.

10. BE A GOOD LISTENER

Communication is necessarily a two way street. The purpose of communication is not simply to transmit information, but also to gain information and obtain feedback. The act of communicating is only complete when feedback confirms that the recipient has heard the communication.

When a communication goes wrong, some managers tend to blame the employee who received the information. In many cases, however, miscommunication is as much the fault of the manager because he or she wrongly assumed the employee heard and understood the message. Therefore, listening is a major component of effective communication.

Listening is an active task that requires focus, purpose, patience and flexibility. Effective listening requires the administrator, manager or supervisor to listen carefully enough so that he or she has actually understood what the employee communicated. It is essential to actually listen and to leave the other party knowing they have been heard.

At times, managers may cease listening to and observing the unspoken reactions and demeanor of their audience simply because they are thinking of what to say next. The importance of listening is often underestimated. To be a good listener, one must concentrate on both the words the speaker is using and the implicit meanings (i.e., the unspoken words, attitudes, and undertones of the employee in order to get the complete meaning of the message). It is essential to listen with a purpose. Effective listeners only interrupt others by using questions to encourage the dialogue such as: “What do you plan to do about this?” “Do you want to tell me about it?” or “What’s the problem as you see it?” In other words, it is important to listen with a purpose, and convey an interest in what the other is saying.

B. CHECKLIST FOR MORE EFFECTIVE COMMUNICATION SKILLS

The following is a checklist for administrators, managers and supervisors who wish to utilize these steps as a means toward developing more effective communication skills:

- Am I sure of what I want to say?

You cannot make something clear to somebody else unless you thoroughly understand the matter and have already clarified it in your own mind.

- Have I put things in logical order?

If you mix up the important with the unimportant, people will be confused or lose interest.

- Can I draw on experience with the person to whom I will be talking?

Stop to think, "How have I communicated with that person before? What have I learned from my success or failure in the past that will help me this time?"

- Have I aroused the listener's interest?

People's attention is like money—they will give it to you only if they expect something worthwhile in return. To get people to listen, you must motivate them just as you would to get them to do anything else.

- Where is the common ground?

If you want people to agree with you, or even hear you out, try to imagine how they feel about the topic and take their viewpoints into account.

C. CHECKLIST FOR ORIENTATION OF NEW EMPLOYEES

While many districts have their human resources professionals conduct new employee orientations, those orientations typically do not focus on issues specific to the new employee's work unit. Communication with newly hired employees is critical as the manager or supervisor will want to make sure that the new employee understands what the district expects of him or her. Administrators, managers and supervisors should ensure that a new employee receives the following minimal information (it need not be in sequence):

- The job duties, responsibilities, and skill requirements;
- Pay rates, pay days, schedules, and raises;
- Working hours: start, finish, lunch, rest periods, days off, holidays;
- Chain of command: the supervisory staff;
- Promotional opportunities;
- Performance evaluations and probationary periods;
- Available training;
- Physical facilities: parking, lockers, wash rooms, lunch areas, etc.;
- Safety: equipment, first aid kits and procedures, rules;
- Function and organization of the work unit and of the organization; and
- Rules governing personnel practices.

SECTION 7 **THE ADMINISTRATOR/MANAGER/SUPERVISOR AS EVALUATOR**

A. WHY DO PERFORMANCE EVALUATIONS?

Many managers and supervisors view employee performance evaluations with dread because they are time consuming or because they are uncomfortable with having to honestly evaluate their subordinates. However, supervisors should not fear employee performance evaluations. The performance evaluation is a critical tool that administrators, managers and supervisors must effectively utilize to be successful.

The employee performance evaluation provides the administrator, manager or supervisor the opportunity to track, improve and remark upon the performance of the employees. It provides a continuing and frequent process for knowing what your employees are doing and how well they are doing it. The evaluation also provides a basis for clearly communicating to an employee what is going well and what is not, and it provides a written record of an employee's performance.

Well-prepared, thorough, timely and *honest* performance evaluations are invaluable. Properly prepared performance evaluations will produce the following benefits:

- Identify performance problems or problem employees quickly;
- Reinforce positive behavior;
- Increase the employee's self-awareness;
- Encourage self-improvement and give the employee a plan to improve;
- Increase motivation;
- Reward good performance with recognition;
- Require managers to know and understand each employee's job responsibilities;
- Increase the employee's feeling of involvement with the district;
- Define the employee's role with the district and the manager's expectations for the employee;
- Help the manager identify and resolve problems before the problems affect productivity, morale or employee interaction;
- Provide written evidence of reasons behind personnel decisions; and
- Allow the district to defend against challenges to personnel decisions.

B. EMPLOYEE EVALUATION IS A CONSTANT PROCESS

With everything an administrator, manager or supervisor has to do, it may seem impossible to continually evaluate employees on a year-round basis. Nonetheless, it is crucial for any manager to consider performance evaluation as an ongoing process which continues throughout the year, and not a once a year event. Managers who continuously assess and evaluate employees will ensure that the year-end performance evaluation is accurate, effective, detailed, and thorough.

Evaluating employees constantly (e.g., weekly, quarterly, or daily, if necessary) will likely reduce, if not eliminate altogether, the negative aspects of the annual performance appraisal.

Liebert Cassidy Whitmore recommends ongoing review because it:

- Makes the manager an ongoing evaluator, manager, and coach;
- Forces the manager to identify and correct unacceptable performance before the problem becomes more difficult to deal with;
- Isolates and solves problems sooner than the traditional annual evaluation;
- Avoids surprises;
- Encourages two-way dialogue between managers and employees rather than the one-way monologue, which typifies the annual performance review;
- Enhances morale; and
- Balances the manager's workload.

By contrast, evaluating employees only on an annual basis is problematic because it:

- Covers too much information in a single session;
- Is less likely to improve performance because the employee receives no ongoing coaching or training;
- Is less accurate;
- Skews manager workloads;
- Produces one-way dialogue, from manager to employee, which creates a defensive environment on the part of the employee; and
- Often surprises employees because managers frequently raise previously unaddressed issues.

Administrator, managers and supervisors can achieve the goal of continuous evaluation by employing two general concepts:

- Face-to-face discussions; and
- Documentation.

1. FACE-TO-FACE DISCUSSIONS

To be effective, an administrator, manager or supervisor must practice the art of aggressive supervision. Aggressive supervision does not refer to the manager's personality. Rather it refers to the manager's willingness to supervise actively. Throughout the year, managers should meet with the employee and provide both positive *and* negative feedback. On-going, face-to-face discussions will greatly reduce the negative aspects of the annual performance evaluation meeting because the employee will not be surprised. Some of the benefits of face-to-face discussions are:

- Allows the administrator, manager or supervisor to identify and address problems or deficiencies quickly;
- Avoids the problem of an employee being surprised by criticism received during the annual evaluation meeting;
- Encourages a two way dialogue between the manager and the employee throughout the year, rather than the one way dialogue that often typifies the annual evaluation meeting; and
- Enhances morale by allowing employees to see that the manager is interested in their well-being.

2. STRATEGIES FOR CONCURRENT DOCUMENTATION OF EMPLOYEE PERFORMANCE

While face-to-face meetings are a crucial component of the ongoing evaluation process, such meetings are not as useful as they can be if not done in conjunction with documentation. For example, a manager or supervisor can "memorialize" a face-to-face meeting in a follow up-memorandum or email. This will not only create a record of the face-to-face meeting, but it will better assure that the employee understood what the supervisor said during the meeting. Concurrent documentation will make the task of preparing year-end performance evaluations much more manageable as the documentation will refresh the manager's memory of the employee's job performance.

While some managers or supervisors prefer concurrent memoranda or emails, another strategy is to create a manager or supervisor's file for each subordinate employee. In this file, the manager or supervisor can record anything that demonstrates less than or greater than expected performance. Supervisors should document discussions with the employee in order to authenticate what the supervisor said as well as any comments the employee made to the manager. For example, a manager can document when an employee comes in ten minutes late or writes a particularly good report.

An example of a note in a supervisor's file might be:

John Jones reported to work on June 9 at 8:10 a.m., 10 minutes late. I reminded him work starts at 8:00 a.m. He said he was sorry, but he overslept.

The administrator's, manager's or supervisor's file can be maintained in a form that is most convenient for the manager, such as typewritten notes, handwritten entries in a notebook or calendar, or entries onto a computer log. Managers may find that keeping a record of an employee's performance on a computer is easiest as they can "cut and paste" the notes onto the annual performance evaluation. Managers who keep a file on the computer must ensure that the file is confidential and password protected. Managers and supervisors that use a log or notebook must keep these confidential documents in a safe place.

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Administrator, Manager or Supervisor notes should contain only factual information and observations. Do not insert opinions or impressions about the employee as they may be subject to disclosure if the district imposes discipline or litigation ensues! A manager should never use the manager's file to express personal opinions about an employee or the manager's frustration with an employee.

C. PREPARING PERFORMANCE EVALUATIONS

Key points to remember when preparing a performance evaluation include:

- Be honest and do not sugarcoat employees' deficiencies. No employee is perfect, so note areas where an employee could improve.
- If the supervisor identifies deficiencies, the evaluation should recommend steps to improve and include an improvement plan. Be prepared to support criticisms and statements with facts.
- If the employee's performance has been barely satisfactory, the review should encourage improvement and identify the area(s) where improvement is most required.
- The review should never contain statements that are a surprise to the employee. As a result of day-to-day communication, the employee should have a clear understanding of how he or she is performing long before the annual review.
- Make sure there is consistency between what you write and how you feel or speak about the employee's performance.
- Avoid over-using the word "you" in criticizing an employee and be sure to use it in providing compliments as well. When criticizing, stress what is wrong and how it is to be improved rather than who is wrong.
- Do not be subtle in your comments. Clearly say what you mean.
- Avoid generalizations without specific details to back them up.

- Criticisms should correspond to the employee's job description. Do not criticize an employee for not doing duties or having skills that are not part of the job.
- The evaluation should reflect performance over the entire period covered by the employee's evaluation, not just the more recent performance.
- The Human Resources or Personnel Department is a resource to advise, consult, and assist both employees and managers in solving problems. Seek assistance.
- Complete performance reviews on schedule, or, if significant problems continue, schedule more frequent performance reviews in addition to annual reviews, unless prohibited by a collective bargaining agreement.

3. PREPARE BEFORE WRITING THE EVALUATION

An effective evaluator must know the job requirements for the position. It is essential that you know the job description and as much about the position as possible. Look back over the work orders, assignment sheets, or other records that describe what the employee was actually supposed to have accomplished. The manager or supervisor should also review any previous performance evaluations to ascertain whether the employee met documented goals or expectations for the year.

Next, measure the employee's actual performance against the communicated expectations and standards. Gather and review all possible sources of objective information about the employee's performance, and consider the following:

- Was a certain quantity of work required? Did the employee meet this requirement?
- Did the employee meet deadlines and timelines?
- Did the employee perform work accurately and thoroughly?
- Did the employee follow correct methods or procedures?
- Was the employee's dress, appearance, and personal hygiene appropriate?
- Was the employee a team player and did he or she get along well with co-workers?
- Did the employee interact with students and members of the public appropriately and courteously (if applicable)?
- Have you reviewed all appropriate work summaries, records, and accomplishment reports?
- Have you effectively utilized your manager's file?
- Has the employee demonstrated work habits which contribute or detract from individual or group performance?

- Were there instances that have furthered or hindered production?
- Did any patterns of behavior affect performance?
- Was the employee’s production significantly above or below expectations? Prior to writing the evaluation, the manager or supervisor should review previous evaluations and the goals identified in previous evaluations.

2. UTILIZE THE ADMINISTRATOR/MANAGER/SUPERVISOR’S FILE

As noted above, the preparation of a written evaluation should be the culmination of a continuous review process. If so, the administrator, manager or supervisor can use his or her file to record the employee’s performance during the year and transfer that information into the annual performance evaluation. Once the administrator, manager or supervisor has included all the information from his or her file in the annual performance evaluation, these items may be destroyed. Items included in the manager’s file which the manager does not include in the annual evaluation may usually be destroyed since such items were likely not substantial enough to include in the performance evaluation.

3. USE SPECIFICS WHEN WRITING THE EVALUATION

Administrator, managers and supervisors need to be mindful about the language used in the evaluation. Remember that specific comments are a more effective management tool than general ones. Some examples are as follows:

General	Specific
“Your attitude is poor.”	You constantly complain about your workload and try to pass assignments off to others even though your workload is identical to theirs. You have often shown a reluctance to work with other employees on projects. The Department has received five complaints from students who reported that you treated them rudely and failed to follow up with their complaints. You have raised your voice to co-workers on several occasions.
“Your work product is sloppy.”	Your reports contain many misspellings and incomplete sentences. On at least three occasions, your reports did not accurately reflect all the details. Crucial details were missing. We discussed the problems with your reports on two earlier occasions during the year on April 7 and again on September 23, but you have made no notable improvement. Please proofread all reports for spelling and grammatical errors. All reports will be reviewed with me on a weekly basis.

<p>“You were really out to lunch this year.”</p>	<p>Your assignments this year were generally unorganized and incomplete. You have often failed to complete critical tasks on time. Your work appears to lack focus. Several times last year, you lacked the ability to concentrate on your job and I often had to repeat directions to you.</p>
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D. THE EVALUATION MEETING

A good administrator, manager or supervisor must meet with his or her subordinates to discuss their performance evaluations. The manager or supervisor owes the employee time, honest and constructive feedback, recognition of accomplishment and a plan for improving performance, as may be necessary. This is not a meeting or communication that can be effectively handled without adequate preparation and planning on the manager’s part.

Set aside time to review all necessary documents to be completely prepared for this meeting, which may include past performance reviews, the manager’s files and job performance standards. Pay particular attention to job-performance discussions or counseling that may have occurred during the review period.

Factors to consider in planning the meeting with the employee include:

- Do the “strength areas” of the employee’s performance indicate capabilities that ought to be developed even further?
- How can the district strengthen areas of weakness?
- Is training, job instruction, or further orientation necessary?
- If you will counsel the employee, how far should you go?
- If you wish to warn the employee, should you do it done orally or in writing? Should you do it or should your manager?

Whatever you decide to do, it will be necessary to talk with the employee. Plan and practice what you intend to communicate to the employee in this meeting. Anticipate objections, concerns and possible excuses the employee may offer, and practice how you will respond to them. Generally, commence the meeting with a review of performance strengths and successes, and follow with a discussion of performance concerns and areas that need improvement. The employee must understand what level of performance the district expects. If the employee needs to improve, you should include a plan for bringing about the necessary changes, and a timeline for the employee to demonstrate improvement.

E. FOLLOW-UP: IF THE EMPLOYEE NEEDS TO IMPROVE

Evaluations discussing areas for improvement should include a plan for achieving that improvement.

- The administrator, manager or supervisor must carry out follow-up plans.
- Keep necessary records to determine if the employee has met required level of performance.
- Conduct evaluation within time specified.
- Follow all evaluation policies, procedures, and applicable bargaining agreement provisions.

SECTION 8 THE ADMINISTRATOR/MANAGER/SUPERVISOR AS DISCIPLINARIAN

Along with honest performance evaluations, discipline is part of a progressive and corrective process to assist the employee in succeeding. However, many managers and supervisors avoid disciplining employees because they do not like confrontation, or because they view the discipline process as too time consuming. Unfortunately, discipline is sometimes the only means necessary to maintain order and productivity in a work unit. Administrators, managers and supervisors, therefore, must accept the fact that appropriate use of your district’s discipline process is a necessary part of the job.

A. ISSUES TO CONSIDER BEFORE INITIATING A DISCIPLINARY ACTION

1. ALWAYS BE COGNIZANT OF MAKING A RECORD

Consider an employee whom you wish to discipline for excess tardiness, but who has received several performance evaluations that fail to mention tardiness or give the employee a “meets standards” rating for attendance. It will be difficult for the district to defend against a challenge to the discipline since the performance evaluation will be inconsistent with the discipline.

As previously discussed, administrators, managers and supervisors must evaluate employees throughout the year and document substantive communications with employees. In addition, honest performance evaluations are crucial to establish a basis for discipline. This documentation provides evidentiary support for necessary discipline if the employee challenges the discipline.

If the district takes adverse action against an employee resulting from an accident or incident, an incident report and accounts of witnesses will form the basis of proof for the District’s actions. Finally, copies of operational and personnel bulletins, orders and memoranda about rules and policies must be prepared and retained.

2. IMPORTANT: EMPLOYEE RIGHT TO REVIEW DOCUMENTATION

The Education Code requires that the district give an employee notice of and the right to review information of a derogatory nature and the opportunity to review and comment on the information before it is included in the personnel file.⁴ The employee has the right to have his or her own comments attached to any derogatory statement. This right is not limited to information maintained in a formal “personnel file.”

Case in Point – Shadow File Prohibited⁵

Miller v. Chico Unified School District

An associate superintendent of a K-12 district kept notes of his frequent meetings with a school principal. He eventually transcribed these notes and included them in his formal recommendation to reassign the principal. The school board received these confidential memoranda but did not provide the principal with an opportunity to review or rebut any inaccurate derogatory information. According to the Court, this violated the principal’s right to inspect and comment on any derogatory information in his personnel file.

The court found it was unfair to permit a district to rely on derogatory material in reaching any decision affecting the employee’s employment status unless the district had timely provided the employee with adequate notice and an opportunity to review and comment on the information. The Court emphasized that a school district may not evade these requirements by maintaining derogatory information separately from the employee’s official personnel file.

Bottom Line: A district must give proper notice of derogatory information and provide the employee an opportunity to respond to the information before placing the information in the personnel file.

This does not mean the supervisor cannot make appropriate notations on a calendar of employee tardiness, etc. But if the supervisor receives written complaints about the employee or creates a memo about the employee that the district may rely on later to support discipline, it must notify the employee of the document and the right to review it and attach a response.

3. COMPONENTS REQUIRED WHEN DOCUMENTING FOR INCOMPETENCY CHECKLIST

As earlier stated, the proper focus of “disciplinary” policies and procedures should be to improve performance. A district achieves that goal by a number of preliminary steps with disciplinary action as the final step in that process.

Where the problem is one of employee incompetence or unsatisfactory performance, rather than serious misconduct, the initial phase should always be the evaluation process. It is important to note that the employee performance evaluation is essentially a communication process, rather than disciplinary. In that context, the following checklist may be useful:

- Standards of conduct and performance
- Job descriptions
- Operating directions
 - Board policies; administrative regulations
 - Departmental manual, rules, directives
 - Evaluation forms
 - Rules of conduct
 - Personnel Rules
 - Collective Bargaining Agreements
- Communicate the Standards Through:
 - Manuals, directives, memoranda
 - Staff meetings
 - Individual meetings
 - Training
 - Evaluation process
 - Counseling
- Acknowledge and reward performance that exceeds standards
- Counsel regarding marginal, unacceptable performance and conduct
- Offer training and assistance
- Follow a progressive discipline approach whenever appropriate
- Select appropriate action (good cause for action proposed)
- Implement action in the correct procedural manner
- Document at every stage
- Coordinate, consult with appropriate staff and higher management

4. DOCUMENTATION OF INCIDENT OR EVENT

When an incident occurs which may result in discipline, the supervisor should record his or her observations and obtain written statements from witnesses, if any. Prepare the written report while your memory is fresh. The report should include the following:

- Date, time and location of the incident;
- What manager and any witnesses observed or heard;
- What performance standards or rules were violated;

- Discussions, if any, with employee;
- The employee's response.

Attach to the report all witness statements, relevant records or reports and copies of rules, procedures, etc., that the employee violated.

B. DETERMINING WHETHER DISCIPLINE IS APPROPRIATE

Many factors determine whether an employee's conduct or performance justifies disciplinary action. The starting point must be a review of your District's policies and the facts relating to the employee's conduct or performance. As discussed below, there are other legal considerations relevant to the decision whether discipline is appropriate. A manager or supervisor should consider all of these factors before he or she initiates the disciplinary process. In addition, keep in mind that if the district meets with an employee to discuss misconduct that may lead to discipline, the employee is entitled to representation.

C. GROUNDS FOR DISCIPLINE

The grounds for discipline for academic employees are set forth in the Education Code. Those grounds are:

- Immoral or unprofessional conduct.
- Dishonesty.
- Unsatisfactory performance.
- Evident unfitness for service.
- Physical or mental condition unfitting him or her to instruct or associate with children.
- Persistent violation of or refusal to obey the laws or reasonable regulations of the State or district.
- Conviction of a felony or of any crime involving moral turpitude.
- Conduct specified in Government Code Section 1028 which prohibits knowing membership in the Communist Party.⁶

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To avoid potential liability for constitutional (e.g., First Amendment) claims, community college districts should not base any disciplinary action on knowing membership in the Communist Party.

For classified employees, community college districts may establish their own rules and regulations for discipline, subject to the duty to negotiate with an exclusive representative.⁷

Your Personnel or Human Resource Department or legal counsel can be of assistance in identifying appropriate policies, rules and regulations and in reviewing possible disciplinary action. It is important in considering whether discipline is appropriate to review all rules or policies that may be applicable.

D. CHECKLIST OF SOURCE OF DISCIPLINARY GROUNDS

- Education Code provisions
- Personnel Commission rules (if merit system district)
- Workplace violence policy
- Drug and alcohol policy
- Harassment or Discrimination policy
- Job descriptions
- Department rules or procedures
- Collective bargaining agreements
- Written orders
- Other District policies

E. FACTUAL BASES MUST BE VERIFIABLE

A district may only discipline an employee based upon provable facts. The district bears the “burden of proof” as to the facts supporting the disciplinary action. A mere denial of misconduct or the presence of conflicting evidence does not mean that the facts are not provable. In the final analysis, a trier of fact will have to be convinced that the district has proved the facts supporting the discipline by a preponderance of evidence (i.e., more of the evidence supports the charges than does not). The district should prepare disciplinary notices with this in mind.

As discussed below in the section relating to the post-discipline appeal hearings, the district will prove its case through witness testimony and documentation. An administrator, supervisor or manager should conduct an appropriate investigation of the facts before deciding whether to propose disciplinary action. Make sure you have thoroughly analyzed the facts prior to reaching a decision.

F. AVAILABLE DISCIPLINARY ACTIONS

Traditional formal and informal disciplinary actions may range from informal conversations to formal discharge. The manager should have the goal of making discipline be corrective rather than punitive. Generally, discipline should be progressively more severe and fit the nature of the problem.

However, the response to certain first-time serious offenses may not follow a system of progressively more severe discipline and may require serious action even if the employee has not been previously disciplined. A serious offense could endanger the employee, fellow employees or others. If suspected wrongdoing is of a serious nature, a supervisor or manager should always contact the Personnel or Human Resources Department and legal counsel to determine whether an involuntary administrative leave with pay during the investigation would be appropriate.

A typical progressive sequence of disciplinary actions is described below. It is essential to comply with any collective bargaining agreements that include provisions on personnel files, evaluations and progressive discipline.

1. COUNSELING

Counseling is an effective supervision tool. Counseling in a broad sense includes any informal discussion with an employee designed to assist the employee to fully develop his or her skills and abilities. Usually, the immediate supervisor counsels the employee. The discussion may clarify standards, evaluate the employee's strengths and weaknesses, seek information or solve problems. When there is a discipline problem, counseling is usually the action taken to assist the employee in clarifying and remedying the problem.

Conducting the counseling interview is important. Ideally, counseling will resolve the problem early and avoid the need to escalate the punitive approach. Counseling can be effective in correcting marginal behavior before it becomes more serious.

2. ORAL REPRIMAND

The oral reprimand verbally notifies the employee that he or she must improve his or her performance or behavior. Managers and supervisors should use oral warnings when counseling has failed to produce the desired changes or when the employee's conduct warrants a more substantial initial step.

The warning should clearly define the area in which improvement is required, set up goals or a plan leading to improvement, and inform the employee that failure to improve will result in more serious action.

The supervisor should record certain facts in connection with an oral reprimand in a log or documentation notebook, such as the date, time, and content of the warning. The supervisor should also send a confirming memo to the employee. However, no record is placed in the employee's permanent personnel file unless subsequent action is necessary.

3. WRITTEN REPRIMAND

A written reprimand is a formal notice to an employee that his or her performance or behavior is unsatisfactory and further disciplinary action will be taken unless his or her behavior or performance improves. A copy of a written reprimand is placed in the employee's official personnel file.

The content of the written warning is essentially the same as that of the oral warning. It should contain the following information:

- ***What Occurred?*** As basic as this sounds, many letters of reprimand fail to identify what has happened.
- ***The date and time*** of the event which is the cause of the reprimand.
- ***What rule, policy, or contract*** provision has the employee broken or violated? Be specific and spell out the entire rule. If possible, state how the employee became aware of the rule (training, staff meetings, receipt of a copy of the rule, etc.)
- ***Previous counseling or oral reprimands*** that the employee has received regarding the same or similar misconduct, if they exist. If possible, state any training the employee received related to the misconduct.
- ***What the employee is directed to do*** to correct the situation. Avoid general statements; be specific.
- ***Follow-up plan*** describing how the supervisor will assist the employee and ensure the employee's compliance with the remediation plan.
- ***Consequences for failure to improve.***

The supervisor keeps a copy of the written reprimand, the employee receives a copy, and the District places a copy in the employee's personnel file. The supervisor should note that the employee received a copy of the written reprimand. In addition, the employee should be advised of his or her right to respond to the reprimand or to challenge any facts in question through the appropriate procedure, in the event one is provided by rule or collective bargaining agreement. (Whether a procedure exists or not, the employee has the right to respond to the Reprimand, pursuant to the Education Code.)

4. SUSPENSION

Suspension is the temporary removal of an employee from his or her duties without pay. Suspensions are normally imposed in cases involving misconduct or chronic behavioral problems for which there seems to be no other appropriate response (i.e., previous progressive discipline has been ineffective). Normally, a suspension is instituted after consultation with department management and the Personnel or Human Resources Department. Do not impose a suspension on an employee who is exempt from the Fair Labor Standards Act without first checking with legal counsel.

5. REDUCTION-IN-PAY

"Reduction-in-pay" refers to placing the employee in a lower salary step within the employee's current pay range indefinitely or for a specified period of time. Check with legal counsel when

considering a reduction in pay for an employee who is exempt from the Fair Labor Standards Act.

6. DEMOTION

“Demotion” is involuntarily moving the employee into a lower paying classification. Normally, arbitrators and administrative appeals bodies do not look with favor on demotions as a disciplinary action. Demotions are most often used when an employee’s competence at a higher skill level or supervisory level is the source of the problem.

Failure to meet the requirements of promotional probation however, is not considered a disciplinary demotion. Permanent classified employees are entitled to return to their former position if they fail a promotional probationary period.⁸

7. DISCHARGE

Discharge is the permanent removal of an employee from service. This action should only be taken when management is thoroughly satisfied that the employee has been given every reasonable opportunity to meet performance or behavior standards and has clearly failed to do so. Discharge is seldom appropriate for a first offense unless the violation is so serious that no other response is appropriate (e.g., theft, assaults, falsification of records or documents, etc.). Collective bargaining agreements may provide the standard or types of misconduct for which discharge can be imposed without use of progressive discipline.

8. RESIGNATION: AN ALTERNATIVE TO DISCIPLINARY ACTION

Sometimes an employee may offer to resign instead of facing disciplinary action. By doing so, the employee loses the right to appeal. However, the inquiries from future employers regarding the reason for leaving will be answered (in most cases) by the simple statement that the employee resigned. No employee should be compelled to resign; a resignation must be entirely voluntary (i.e., initiated by the employee as opposed to a “take it or leave it” offer from the employer). Adequate time must also be given the employee to decide whether to resign. Otherwise, the employee may later claim the resignation was made under duress, which may constitute a “constructive discharge.”

G. PROGRESSIVE DISCIPLINE CHECKLIST

1. COUNSELING

- Clarify
- Communicate
- Seek Information
- Problem Solve

2. ORAL REPRIMAND

- Define areas of problem
- Review expectations
- Indicate behavior must change
- Offer training or assistance
- Indicate consequences if behavior or conduct does not improve
- Maintain personal documentation

3. WRITTEN REPRIMAND

- Reference problem and prior action taken, if appropriate
- Review performance or behavior expectations
- Indicate behavior must change
- Offer training or assistance
- Advise as to appeals process (if any)
- Allow for rebuttal
- Warn of consequences for failure to improve

4. SUSPENSIONS

- Notice of intended action
 - State intended action
 - State reasons, facts which support intended action
 - Provide copies of materials relied upon
 - Provide opportunity to rebut (written or oral)
 - Warn of consequences for failure to improve
- Consider rebuttal, if any
- Send final notice
- Provide due process hearing

5. REDUCTIONS-IN-PAY

- Same as suspensions

6. DEMOTIONS

- Same as suspensions

7. DISCHARGE

- Same as suspensions

H. ADMINISTRATOR'S CHECKLIST FOR CONDUCTING THE DISCIPLINARY COUNSELING INTERVIEW

- Deal with things that can be changed.
- Consider motives of the employee for giving you certain feedback.
- Give feedback when it is desired.

1. MAKE SURE THE EMPLOYEE UNDERSTANDS

- Discuss the requirements of employee's job. Point out the facts that show how he or she is not meeting these requirements and what the effects are on work group.
- Help the employee to decide how he or she can correct the problem and avoid repetition of the offense.
- Help the employee to uncover the real cause of the problem: not only what employee is doing wrong, but also why he or she is doing it.
- Explain fully the purpose of any action as a corrective measure rather than a punishment.
- Make certain the employee completely understands that his or her behavior must change. Indicate the consequences if behavior doesn't improve.

2. THE USE OF CRITICISM

- Focus on behavior rather than the person.
- Make observations rather than inferences.
- Describe behavior in terms of more or less rather than good or bad.
- Focus on behavior related to specific and recent situations rather than on the abstract.
- Share ideas and information rather than giving advice.
- Explore alternatives.
- Stress the "contract" between the District and the employee to show why cooperation is necessary.
- Limit the amount of different information.
- Concentrate on what is said, rather than why it is said.
- Give positive feedback, where warranted, in a timely manner.

3. PROVIDE FOR FOLLOW-UP

- Set up a plan for improvement with the employee and ask for the employee's input on plan.
- Include in the plan commitments both by the employee and you as to the steps to bring about the desired improvement. Be careful not to promise more than you can deliver.
- Include also specific time limits for accomplishing the desired goals and for formal re-evaluation of the employee's behavior or performance.
- Make a written record of the Interview.

4. MAKE A WRITTEN RECORD OF THE INTERVIEW

- Note in your calendar or diary the time, date and content of the disciplinary counseling; or prepare a confirming Counseling Interview Memorandum to the employee.
- Insure that you keep your supervisor informed and have his or her support.

I. DOCUMENTATION CHECKLIST

- Did you record the documentation promptly while your memory was still fresh?
- Have you indicated the date, time and location of the incident(s) documented?
- Did you record the action taken or the behavior exhibited?
- Did you indicate the person(s) or work products involved?
- Have you listed the specific performance standards violated or exceeded?
- Have you indicated specific rules or regulations violated?
- Did you record the consequences of the action or behavior on the employee's total work performance or the operation of the work unit?
- Have you been objective, recording observations and not impressions?
- Did you indicate your response to the action or behavior?
- Did you indicate the employee's reaction to your efforts to modify his or her behavior?
- Did you sign the document?

If your action does not involve deprivation of pay, normally no formal pre-discipline or post discipline due process is required. The only exceptions are 1) if your rules or collective bargaining agreements provide for such procedures; or 2) if any additional procedures are required because the employee is a peace officer.

J. PRE-DISCIPLINE PROCEDURAL REQUIREMENTS

It is essential to understand the general legal requirements for pre-discipline due process.

Employees who have “for cause” rights are entitled to the following minimal due process procedure (the “*Skelly* procedure”) *before* significant disciplinary action is implemented (i.e., suspensions of five days or more, reductions in pay, demotions, and terminations). So long as the district provides a pre-deprivation “*Skelly* Procedure” to the employee, the District need not provide the employee with the formal evidentiary appeals hearing until sometime after the action has been implemented.

The “*Skelly* procedure” requires that:

- The employee receive 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;
- Along with this notice, the employee is provided with any written materials, reports or documents upon which the action is based;
- The employee is accorded the right to respond informally either verbally, in writing, or both to the proposed charges.

In preparing to implement the above pre-disciplinary procedures, the following suggestions may be helpful to keep in mind:

1. WRITTEN NOTICE REQUIRED

An employee must receive advance written notice of the proposed action. The notice must:

- State the date the proposed action will be effective and the specific grounds and particular facts upon which the action is taken.
- Inform the employee of his right to respond to the proposed action and of his right to receive a copy of the written materials alleged to support the action.

2. EMPLOYEES MUST BE ALLOWED A REASONABLE TIME TO RESPOND

- There is no fixed rule mandated by law stating how much time an employee must be given to exercise his right to respond, but a time period may be stated in the collective bargaining agreement.
- Time to respond is fixed by management and must be “reasonable” under all circumstances. Under normal circumstances, the employee should be given five work days to respond.
- “Reasonableness” is determined by the complexity of the issues involved, the volume of written materials relied upon and good judgment.
- Employee requests for extensions of time to respond should be granted if the request is justifiable and reasonable.

- The employee has the option to respond either in writing or orally.
- Failure to respond within the time specified may result in the employee's waiver of his procedural rights.
- Circumstances surrounding the waiver should be thoroughly documented.

3. OPPORTUNITY TO VERBALLY RESPOND NEED NOT BE A FORMAL HEARING

- Rather, it is a meeting to give the employee a meaningful opportunity to tell his or her "side of the story."
- Its purpose, according to the courts, is to minimize the risk of the employer making an error in the action it takes.
- These "Skelly" due process procedures presume that the employee will be accorded the opportunity for an evidentiary appeals hearing after the action is implemented, if the employee is a permanent employee.

4. COMPLYING WITH "SKELLY"

Due process requires that the employee facing a deprivation of a property interest be given a meaningful opportunity to respond before the deprivation takes place. Depending on the situation, this could be an oral response, a written response, or both. An employee is not entitled to a full evidentiary hearing prior to the discipline taking effect, but merely the opportunity to respond informally to an "individual" authorized to impose or effectively recommend discipline, but who ordinarily did not make the recommendation to discipline. Employees facing a deprivation of property rights are entitled to an evidentiary hearing but such hearing is not part of the *Skelly* process.

a. The Employee's Role:

At a *Skelly* conference, the employee has the opportunity to present facts relevant to the proposed discipline. The employee may want to explain what happened, why it happened or what mitigating circumstances the employee believes exist. This is the employee's opportunity to respond to the proposed discipline and offer any information to convince the manager that the discipline is inappropriate.

b. The Skelly Officer's Role:

The administrator who acts as the *Skelly* Officer is mainly there to listen. The employee may provide information that the administrator was unaware of, or had not considered. This is the supervisor's opportunity to listen to the employee's side of the story and consider the information presented. The administrator should not allow himself or herself to be cross-examined by the employee or the employee's representative. The administrator need not justify his or her actions at the informal conference. If the employee does not want to tell his or her side of the story, but instead wants to use the time to interrogate the *Skelly* Officer, the *Skelly* Officer should end the conference. The *Skelly* officer may take one of three actions after the *Skelly*: (1) uphold the discipline; (2) reduce the discipline; or (3) decline to proceed with the discipline.

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Additional charges should not be added after the *Skelly* conference, or a new *Skelly* conference will be required. In addition, the *Skelly* officer cannot impose additional discipline (e.g., if the recommended discipline is a suspension, the *Skelly* officer cannot increase the discipline to a discharge), or a new *Skelly* conference will be required.

5. MANAGER REVIEWING EMPLOYEE RESPONSE SHOULD BE APPROPRIATE TO LEVEL OF EMPLOYEE RESPONDING

- No fixed rule is mandated by law.
- This may be one or two levels above the employee's immediate supervisor or may be the supervisor imposing the discipline.
- The manager should have enough authority to make effective recommendations concerning the proposed action.
- The manager should not be more than one or two organizational levels removed from the appointing authority.

K. FREQUENT DISCIPLINARY PROBLEMS

Every manager faces the same type of disciplinary problems over and over again. The most frequent types of disciplinary problems are identified below:

1. EXCESSIVE ABSENTEEISM OR TARDINESS

While employees are entitled to legitimate use of authorized leave, employees may be disciplined for illegitimate use of leave, such as absence without leave or legitimate excuse. Excessive absenteeism and tardiness disrupts the work unit, unduly imposes on co-workers and impacts the delivery of district services.

Excessive absenteeism and tardiness are among the most frequent problems encountered by administrators, managers and supervisors. However, imposing discipline on an employee for excessive absenteeism or tardiness is complex and can be dangerous given the host of legally protected "leaves" and other laws available to California employees. Please see Section 10 (below) for a detailed discussion regarding the unique issues associated with absenteeism.

2. INCOMPETENCE OR INEFFICIENCY

As opposed to carelessness, incompetence is the inability to perform satisfactorily in a specific position. Before discipline can be taken on the basis of incompetence, the administrator, manager or supervisor should be comfortable that he or she has given the employee reasonable assistance necessary to succeed. The manager or supervisor should also be comfortable that the

standards of performance for the employee are realistic, that such standards were clearly communicated to the employee, that the employee was given a reasonable opportunity to perform, that the employee was advised of his or her deficiencies (e.g., counseling, performance evaluations, etc.), and that the employee was offered training to improve.

3. INSUBORDINATION

Insubordination occurs when an administrator, manager or supervisor gives a lawful order that the employee understands but refuses or fails to follow. Insubordination also exists when the employee actively resists or defies supervisory authority. A common type of insubordination consists of obscene or insolent language used to challenge a manager's authority. There are only two areas where an employee would be justified in refusing to follow a manager's order. These are when the order poses a danger to the health and safety of the employee or others, or when the order would require the employee to violate the law.

4. DISHONESTY OR FALSIFICATION OF DOCUMENTS

Dishonesty occurs when an employee lies or intentionally omits truthful information. Falsification of documents most commonly occurs when the employee falsifies his or her employment application, time keeping records or similar documents. The falsification of an employment application should be viewed in light of, among other things, the information falsified, the relevance and materiality of the false information to the employee's position, the number of falsifications and whether the true information would have resulted in the employee being rejected for employment.

Falsification of time cards or similar documents is a serious offense. Usually such offenses involve fabricating the time the employee arrived at or left work, or the amount of overtime hours the employee worked. Falsification of time cards is dishonest and a theft of public funds.

5. EMPLOYEE CONDUCT OUTSIDE WORKING HOURS

Generally, an employee's life outside of working hours is the employee's own business. However, there are instances in which the employee's off-duty conduct may warrant discipline. Factors to consider include the employee's duties and the effect of the off-duty conduct on the employee's ability to perform those duties. To support discipline for off-duty conduct, there must be a "nexus," or connection, between the conduct and the employee's job with the district. Before counseling or disciplining any employee for off duty conduct, administrators, managers or supervisors should consult with their agencies' human resources professionals.

6. FIGHTING

An altercation between two employees at the work-site warrants some level of discipline and may constitute a violation of the district's workplace violence policy. The level of discipline warranted depends upon several factors, including whether the fight was premeditated or a momentary flare up, the presence or absence of provocation and the disciplinary records of the employees involved.

A. INTRODUCTION

Workplace bullying has been a longstanding issue in many workplaces, but it has only recently received attention from the media and employers nationwide. Bullying can carry significant hidden costs in terms of the negative impact it has on employee well-being and productivity. While bullying can turn physical in extreme cases, bullying is generally a form of psychological harassment and emotional abuse that uses words, action or even silence, to intimidate employees with less power or standing in the workplace. Workplace bullying can damage the physical, emotional and mental well-being of the “Target” (i.e., the person against whom the behavior is directed) as well as co-workers that observe or learn of the behavior.

The workplace bully abuses power in order to steal the Target’s self-confidence. Bullies often use many tactics to accomplish this goal, including unjustly blaming the Target for errors, unreasonable work demands, insults, putdowns, stealing credit, threatening job loss, and discounting accomplishments. Silence is at the heart of bullying – not only is the Target usually afraid and too intimidated to speak up or report the abusive behavior, but witnesses and observers too are often reluctant and fearful to speak up and assist the Target or report the behavior.

This section is but a brief overview of the dynamics of workplace bullying and suggestions for management’s response thereto.

B. THE PLAYERS

To effectively address workplace bullying, it is first important to remove from the situation the concept of victimization. Accordingly, the most common phrase used to discuss or to define those on the receiving end of bullying behavior is “Target.” Targets are individuals who, usually through no intentional conduct on their part, have nonetheless run into a co-worker with a preset agenda, anger issues or lack of self-esteem that the co-worker focuses on the Target. Target status can be temporary or can exist for years. The individuals undertaking and initiating the bullying behavior are known in the relevant literature as “Perpetrators.”

C. WHAT IS WORKPLACE BULLYING AND WHO IS AFFECTED?

Workplace bullying is repeated, unreasonable actions of a Perpetrator (or a group of Perpetrators) directed towards an employee (or a group of employees), which are intended to intimidate, degrade, humiliate, or undermine; or which create a risk to the health or safety of the employee(s). Workplace bullying may involve an abuse or misuse of power. Bullying behavior creates feelings of defenselessness and injustice in the target and undermines an individual’s right to dignity at work.

Bullying is different from aggression. Whereas aggression may involve a single act, bullying involves **repeated** attacks against the Target, creating a continuing pattern of behavior. A tough or demanding boss is not necessarily a bully so long the supervisor or manager is respectful,

professional and fair and the motivation behind the manager's conduct is legitimate, e.g., the supervisor or manager is simply seeking to obtain the best performance by setting high performance and safety standards.

Bullying situations may involve employee-on-employee bullying as well as supervisor bullying a subordinate employee. "Mobbing" occurs when a group of co-workers target another worker or group of workers. Mobbing behavior is very destructive and requires immediate management intervention.

D. BULLYING IS NOT ILLEGAL HARASSMENT

It is important to understand the distinction between bullying and illegal harassment. In order for an act by a Perpetrator toward a Target to be illegal and actionable harassment, the Perpetrator's bullying conduct must be "because of" the Target's protected status (i.e., the harassing behavior must be because of the Target's age, gender, religion, marital status, medical condition, disability, sexual orientation, etc.).⁹

Bullies, as opposed to illegal harassers, are not motivated by animus towards a protected class. Rather, bullying is for the purposes described above, and may occur between people of like protected statuses. Bullying can occur between workers of the same race, national origin and gender. In fact, according to some studies, as much as 61% of bullying involves same-gender harassment.¹⁰

While bullying itself is not illegal, it can nonetheless lead to claims and complaints of illegal harassment because the Perpetrator's motivations are not always clear. Thus, in order to avoid costly investigations, administrative review and even litigation, an employer should make all reasonable efforts to eradicate bullying behavior in the workplace.

E. HOW BULLYING BEHAVIOR IMPACTS THE WORKPLACE

Bullies extract a significant toll within an organization. Their behavior leads to increased levels of stress among employees, high rates of absenteeism and increased turnover. Because supervisor-bullies can get results by getting more short-term production out of employees, upper management often tolerates them. Studies have shown that bullying has a long-term impact on staff performances, costs in excess of \$200 billion per year and results in psychological and physical ailments similar to those found in soldiers returning from combat.¹¹

Bullying behavior perpetrated by a co-worker and ignored by management impacts productivity, morale and leads to increased workplace injuries and "stress" claims. Bullying behavior perpetrated by a supervisor or manager and either ignored or tolerated by upper management is even more destructive and creates a reign of terror that affects all workers in the unit.

Bullies are not good managers; staff turnover and sick leave will be high while morale and productivity will be low. Employee's stress, depression and physical health problems result in time away from work and result in workers' compensation claims and lost productivity. The

health problems experienced by victims of bullying result in a sense of helplessness and negative emotional states.¹² Low self-esteem and a negative organizational climate negatively affect creativity and employees' abilities to respond to difficult situations or challenging goals. The breakdown of trust in a bullying environment may mean that employees will fail to contribute their best work, do not give extra ideas for improvement, do not provide feedback on failures and may be less honest about performance.

F. EXAMPLES OF BULLYING BEHAVIOR

Bullying can take many forms. Examples of bullying behavior include:

- Profanity directed at the Target;
- Exclusion or social isolation;
- Being shouted at or otherwise being humiliated;
- Any form of physical threat or physical intimidation;
- Demeaning comments about a person's appearance;
- The use of patronizing titles or nicknames;
- Persistent, unwelcome teasing;
- Spreading malicious rumors or insulting someone; and
- Picking on someone or setting him or her up to fail.

G. WHAT SHOULD YOUR DISTRICT DO TO PREVENT WORKPLACE BULLYING?

The highest level of management must make a commitment that it will not tolerate bullying. That commitment translates into conduct that:

- Create a zero tolerance anti-bullying policy, or alternatively, a Code of Conduct that defines professional behaviors and unacceptable behaviors and includes policies and procedures for response;
- Communicate the anti-bullying policy throughout the organization;
- Establish as a job expectation/performance standard respectful, non-bullying behavior;
- Establish an awareness campaign so that staff understands what bullying is and what it may look like;
- Encourage reporting;
- Encourage open door policies;
- Take complaints of bullying seriously and investigate promptly;
- Reassign the Perpetrator when necessary;

- Discipline staff that violate your district’s anti-bullying policies or that otherwise engage in discourteous or destructive behavior toward co-workers;
- Follow-up with known Target to determine if bullying behavior has abated; and
- Establish an independent contact for employees to report the conduct (e.g., Human Resources contact).

H. WHAT CAN MANAGERS DO ABOUT BULLYING BEHAVIOR?

Managers can intervene to build a collaborative and safe workplace by directing attention to safety and creating contexts where people can speak up and problem solve together. Steps to accomplish this include:

- Publish and discuss the district’s anti-bullying policies;
- Make compliance with the district’s policies a job performance standard;
- Encourage reporting at all levels;
- Take reports of bullying behavior very seriously and interface with Human Resources/Personnel to assure compliance with district investigative protocol;
- Discipline employees who violate district policy;
- Follow-up with the Target for an extended period of time to determine if any other issues have arisen;
- Do not reward bullying behavior or accomplishments; and
- Be a good role model.

SECTION 10 THE MARGINAL EMPLOYEE

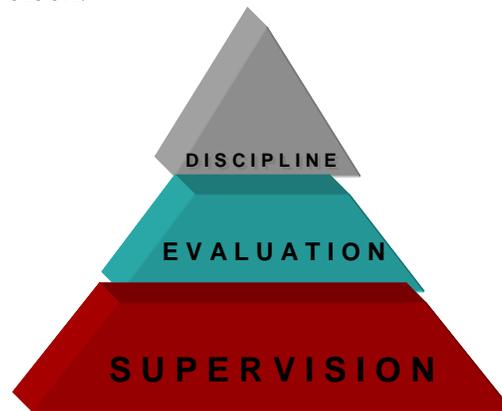
A. THE CHALLENGE OF THE MARGINAL EMPLOYEE

What is a “marginal employee?” For many administrators, supervisors and managers, this phrase conjures up the image of a particular employee. Although the definition of “marginal employee” will vary from circumstance to circumstance, marginal employees share similar characteristics and present similar challenges to community college districts.

The purpose of this section of the workbook is to provide assistance to administrators, supervisors and managers in identifying the marginal employee and to plan an effective course of corrective action to improve his or her performance. By improving the marginal employee’s performance, the supervisor will not only improve the morale of the entire work unit, but also

improve the efficiency and productivity of the entire staff. Once the marginal employee is back on track, the supervisor or manager will be free to concentrate on other, more important, matters.

Management of the marginal employee incorporates much of what this workbook has set forth in previous sections. Particularly important in working with the marginal employee are the three “tools” found in the LCW toolbox:



The most effective tool available to the supervisor, and where most effort and work is required, is the actual aggressive, constant and careful supervision of the marginal employee. Approximately 80% of marginal employees will respond positively to aggressive and focused supervision.

In addition to supervision, the evaluation process and the disciplinary process will provide the supervisor with tools for dealing with marginal employees. Supervisors should use evaluations in conjunction with effective supervision to assist the marginal employee to correct his or her unacceptable behavior and improve his or her performance to an acceptable level. In the event that effective supervision and regular evaluation do not improve the marginal employee’s performance, the evaluation process will aid the supervisor in implementing the disciplinary process. The progressive disciplinary process begins with counseling and may extend all the way to removal of the employee from employment.

B. IDENTIFYING THE REASON FOR THE MARGINAL PERFORMANCE

Determining the reasons for the marginal performance is essential before the supervisor or manager can effectively work with the employee to improve his or her performance. Reasons for marginal performance can vary and may arise from several factors. The supervisor may have some control and impact over the reasons or factors. These are reasons and factors that good supervision, evaluation and discipline may affect:

- “Senior” mentality;
- Lack of advancement;
- Insufficient training
- Lack of personal recognition;

- Lack (or perceived lack) of district support;
- Low salary; and
- Ineffective management techniques.

Some reasons for marginal performance may be beyond the supervisor's or manager's control. These reasons and factors that arise from the employee's personal life or health. These reasons make it very difficult to manage an employee to a higher level of performance. Employees in these circumstances may benefit from a referral to an Employee Assistant Plan ("EAP"):

- Health or psychological issues;
- Family issues, conflicts or responsibilities;
- Drug/Alcohol/Substance Abuse issues;
- Lack of interpersonal skills; and
- Incompetence and inability, despite training and opportunity, to perform the job functions successfully.

Along with the sources of marginal behavior, a supervisor must know how marginal behavior manifests itself. Even before an employee engages in poor work performance, an employee may exhibit one or more of the following "warning signs" which can signal a potential future problem with the employee's performance. Some of the most common warning signs are:

- The "difficult" employee may not listen or respond to directives, fail to follow procedure, and violate department policies or rules.
- The "confrontational" employee openly challenges the supervisor's authority, accuses the supervisor of "picking on" him or her, or questions the supervisor's orders or decisions.
- The "high-maintenance" employee lacks confidence in his or her work product, asks many questions, and requires constant supervision and assurance.
- The "careless" employee produces a sloppy work product, does not check results or facts, or fails to follow clear procedures.
- The "withdrawn" employee shows little initiative, has a poor work attitude, and requires constant prodding or supervision.
- The "rabble-rouser" employee undermines morale, complains about working conditions, and attempts to solicit others to adopt his or her negative view of the workplace.
- The "blaming" employee deflects criticism onto others, disrupts workplace unity, and refuses to take responsibility for his or her actions.

C. IMPACT OF THE MARGINAL EMPLOYEE

The marginal employee can have a significant impact on the employer, co-workers and managers. Many of the characteristics of a marginal employee infect the entire workplace. The result of this type of poor attitude and behavior may be declining productivity, the “flight” of good employees, and an increase in accidents.

In addition to such “internal” effects on the workplace, marginal behavior also has a significant “external” effect. Poor work product may affect the way a district presents itself to the public it serves. If the supervisor allows the marginal performance to continue, the community begins to lose confidence in the district and the district’s credibility suffers. Finally, marginal performance undermines the credibility of the supervisor both in the eyes of the district and other employees. If the supervisor allows the poor performance to continue unchecked, it lowers the standard for all other employees and makes it difficult for a supervisor to provide effective leadership.

D. THE ROLE OF THE SUPERVISOR WITH THE MARGINAL EMPLOYEE

The marginal employee will present the supervisor with perhaps his or her best opportunity to practice and improve upon these critical supervisory skills already discussed in this workbook. Most marginal employees benefit from aggressive supervision. Aggressive supervision is critical. Typically, an employee does not become a “marginal” performer overnight. Rather, employees usually perform at a barely acceptable level for a time before their performance becomes unacceptable. Only through aggressive supervision can a supervisor identify and correct performance deficiencies before they become unacceptable.

A supervisor can alter an employee’s performance by counseling the employee that the employee’s performance is a potential problem, which, if left unchecked, may result in more severe action against him or her. With early detection and aggressive, positive intervention, the supervisor will rarely have to resort to threats of punitive action. The result will be higher morale for the entire workforce. Finally, aggressive supervision encourages uniform application of the rules that will let other employees know that the district will not tolerate unacceptable performance.

The steps a supervisor can take to address and correct marginal performance are set forth below.

1. SPECIAL COMMUNICATION CONSIDERATIONS

The single most important way for a supervisor to address and correct marginal behavior is by effective communication techniques. It is crucial for a supervisor to be able to communicate orders, directives, performance requirements, praise, and criticism to his or her staff. Employees who do not understand the job duties, their supervisor’s expectations, or the requirements of their own positions are more prone to become marginal performers.

It is essential that the supervisor communicate with the marginal employee clearly. The supervisor must plan and practice before the communication. The supervisor will be more effective if he or she thoroughly understands the problem, idea, or message. If the supervisor determines purpose of each communication with a marginal employee, he or she is less likely to make a mistake that the marginal employee might use to undermine improved performance.

Avoid giving instruction in an offhand or casual manner. Be clear, concise and to the point in the communications. Document communications with the marginal employee in writing, either by way of a memorandum or a follow-up email. Immediately communicate when the employee does not meet expectations and praise improved performance.

2. WORKING ON THAT “POOR ATTITUDE”

While it may be accurate that a marginal employee has a “poor attitude,” simple identification of that fact alone will not improve his or her performance. Because of the long-reaching effect a marginal employee’s poor attitude has on the workplace, a supervisor must clearly and specifically identify the behaviors that have led to the conclusion the employee has a poor attitude:

- A lack of courtesy toward co-workers or others;
- Disrespectful, hostile or rude communication to co-workers;
- The refusal to be a team player;
- Talking about co-workers in a derogatory manner behind their backs;
- Insubordination;
- Constant challenging orders and directions;
- Refusal to meaningfully participate in departmental activities such as staff meetings;
- Rolling eyes and petulant behavior toward management;
- Ignoring questions or information requests; and
- Refusal to follow the same rules as other employees.

3. THE SUPERVISOR’S OBLIGATION: MOTIVATE THAT EMPLOYEE

The ability to motivate personnel to perform to their highest potential is critical in effective supervision. Marginal employees often have the ability to perform at an acceptable, or superior level, but lack the motivation or ambition to do so. Pay, benefits, and working conditions do not necessarily motivate employees to work harder. Supervisors may motivate marginal employees by one of the following:

- *Achievement* –Talk with employees about their successes and good performance as well as their problems. It is just as important to keep track of good performance as it is to document bad performance.

- *Recognition* – Recognize an employee’s success. Make sure that those above you as well as those below you are aware of successes and accomplishments. Employees appreciate even small tokens of appreciation such as memos to staff, employee of the month awards, and gift certificates for nominal sums.
- *Responsibility* – Do not be afraid to delegate work. Delegation will give employees a feeling of participation and responsibility. Do not, however, delegate things that you should not delegate to employees (such as preparing performance evaluations or discipline).
- *Advancement* – Be an advocate for your employees and help them along their career path if their performance warrants advancement.
- *Input* – Listen to your employees and include them in decision making when appropriate. Your employees often know things about the job that you may not know.
- *Set an example* – The easiest way to motivate employees is to gain their respect. Practice what you preach. Deal with employees and others in a respectful manner. Produce a good work product. Follow workplace rules.
- *Fairness* – Be consistent and fair. Do not show favoritism. Set aside personal animosities. A marginal performer usually will not improve if he or she feels that the supervisor does not like him or her.

SECTION 11 **MANAGING ABSENTEEISM**

Abuse of leave and excessive absenteeism are some of the most common problems managers and supervisors deal with on a day-to-day basis. While it would appear that supervisors can address absenteeism just like any other disciplinary problem, they cannot. Absenteeism issues must be carefully analyzed to make sure that an employee is not disciplined or discriminated against when he or she has a legal right to be absent from work.

A. DEFINING EXCESSIVE ABSENTEEISM AND ACCEPTABLE ATTENDANCE

Before administrators, managers or supervisors can take effective steps to curb “excessive” absenteeism, they must first define what constitutes “acceptable” attendance. A common misconception is that acceptable attendance standards must be based on the maximum number of “sick days” provided to employees under a district’s policy. This is not necessarily the standard that a district should employ. Rather, the district must examine workplace characteristics and needs that are unique to the district when defining what constitutes “excessive” absenteeism and “abuse” of leave.

While mid-level managers and supervisors should not develop these standards by themselves, they should be involved in the process as they have firsthand knowledge of the attendance

standards in their work units. If a manager or supervisor is unsure of the district's definition of "excessive" absenteeism or "abuse" of leave, he or she should consult with the district's policies or human resources professionals.

Appendix G will assist policy makers in developing definitions for their agencies. Appendix H contains exemplar absenteeism policies that policy makers may wish to consider.

1. CONSIDER STATUTORY CRITERIA

For classified employees, governing boards (non-merit systems) and personnel commissions (merit systems) must define "excessive" to be a level of absenteeism that constitutes reasonable cause for discipline. For academic employees, governing boards should define "excessive" to be a level of absenteeism that will support a charge of unprofessional conduct, unsatisfactory service, or evident unfitness for service.

2. CONSIDER DISTRICT-SPECIFIC CRITERIA

The key to developing a functional definition of "excessive" is to consider the district's unique characteristics. The definition of "excessive" will vary from employer to employer because different employers can tolerate different degrees of absenteeism. Similarly, varying levels of tolerance may exist within districts, colleges, departments and divisions. District, college, and department-specific factors include:

- Size of district, department or division
- Number of employees
- Number of similar positions
- Manner of work organization
- Scheduling methods
- Nature of product or service
- Feasibility of job-reassignment to existing or temporary employees
- Degree of technical skill or expertise required

3. WHAT NOT TO INCLUDE IN THE DEFINITION

a. Do Not Equate With Exhausting Leave Balances

Employers need not define excessive absenteeism as absences in excess of accrued leave. Absenteeism may be "excessive" even when an employee has not exhausted accrued leave accounts, i.e., sick leave, extended sick leave, vacation leave, or compensatory time. The touchstone for "excessive" leave is whether the level of absenteeism interferes with the smooth operation of the district.

b. Exclude Use of Protected Leaves

Because the primary purpose of defining “excessive” is to establish a standard that the District will enforce as a performance standard, it is crucial that the definition expressly exclude use of protected leave. All of the protected leave laws expressly prohibit any form of discipline in response to the exercise of a protected leave right.

4. PRACTICAL METHODS FOR DEFINING “EXCESSIVE”

When developing an objective standard for “excessive” absences, districts may want to use one of the approaches listed below:

- **District average:** A district may define excessive absenteeism as absences that number well above a district or department average. A district wishing to utilize this definition must compile records necessary for the calculation of average absenteeism. Payroll and other personnel records likely provide the required information. However, districts with widespread absenteeism should avoid this method because the current average will not reflect an acceptable standard.
- **Ratio of scheduled hours to worked hours:** A district may also establish standards for acceptable versus unacceptable levels of absence by defining the acceptable minimum ratio of employee scheduled days or hours to days or hours actually worked. The standard may take into account historical information, such as number of separate instances of absenteeism, length of absences and pattern of absences (e.g., Monday/Friday pattern). Thus, different employers may arrive at different levels of acceptable absence.
- **Point system:** Some employers utilize a “point system” to establish standards of acceptable versus unacceptable absenteeism. Under this system, employees receive different point values for each incident of tardiness, failure to call a supervisor in advance of an absence, an absence of a day or less, etc. Under this system, employees have notice of the level of discipline the district will impose based upon the accumulation of point amounts. The point system method is more common in the private sector, but it can be equally effective for public employers.

Case in Point - Point System Upheld¹³

Carrier Air Conditioning Co. (Arbitration)

An employee was discharged for just cause, despite union’s argument that employee did not have enough points to trigger discipline pursuant to the employer’s rules. Employee attempted to establish that his absence on the day his employer discharged him was excused, due to sleep he lost because he and his son were victims of a burglary and theft the day prior. Evidence showed that the discharged employee had used up his personal leave.

Bottom Line: A policy that clearly defines excessive leave will help employers defend discipline.

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Do not forget that employers may need to meet and confer with employee organizations before adopting one of these standards, if the adoption is a new policy or a material and substantive change. See “Duty to Negotiate Policies” below for further discussion of meet and confer obligations.

In any case, be sure to include notice that violation of attendance policies may result in discipline.

Case in Point - Inadequate Discipline Warning

Niemand Industries, Inc. (Arbitration)¹⁴

An employer improperly discharged an employee who utilized sick leave to attend evening college classes where the employee neither knew, nor should have known, that her offense could result in discharge. Additionally, the discipline was not reasonably related to the offense since it was the grievant’s first offense in four years with the company.

Bottom Line: Notice of employer expectations is important for what may seem obvious – employees should only use sick leave for illness.

Case in Point - Ambiguous Attendance Policy

Sprague Devices, Inc. (Arbitration)¹⁵

An employer improperly disciplined an employee under new attendance and absenteeism policies that were unclear and ambiguous. Although the employer had validly modified existing policy, it was required to be “clearly defined and mutually understood” pursuant to the collective bargaining agreement. The arbitration decision stressed that clear communication and uniform treatment of employees was essential.

Bottom Line: Policies must be clear and communicated with clarity!

Case in Point - Policy Failed to State Discipline a Consequence of Excessive Leave

City of Berkeley (Arbitration)¹⁶

Employee was disciplined under the City’s sick leave monitoring policy. However, policy merely stated that if sick leave appears excessive, employees would work with their supervisors to ensure that it is minimized. Arbitrator held that where employee complied with monitoring terms set forth by

employer to provide a doctor's note upon return from sick leave, there was no basis for disciplining her for violating the sick leave policy.

Bottom Line: Excessive leave policies must expressly state that excessive leave will be grounds for discipline.

B. DEFINE ABUSE

The district should define “abuse,” and “excessive,” according to the district’s individual needs and unique characteristics. While “excessive” abuse refers to absences that disrupt the work process or are in excess of the usual absences found in the work place, “abuse” of leave includes misuse of the leave process, disobedience of leave rules and other actions more fully set forth below.

1. CONSIDER STATUTORY CRITERIA

For classified employees, governing boards (non-merit systems) and personnel commissions (merit systems) must define “abuse” to be a level of absenteeism that constitutes reasonable cause for discipline. For academic employees, governing boards must define “abuse” to be a level of absenteeism that will support a charge of unprofessional conduct, unsatisfactory service, “evident unfitness for service,” dishonesty, or persistent violation of or refusal to follow the regulations of the district.

2. CONSIDER DISTRICT-SPECIFIC CRITERIA

Districts may want to consider the following factors:

- The number of employees;
- The history of recurring types of abuse;
- The type of employees, i.e., supervisory or line; and
- Past areas of uncertainty or confusion when the district had to evaluate instances of possible abuse.

3. WHAT TO INCLUDE IN THE DEFINITION

Employers may want to include the following in defining abuse:

- Use of leave for a purpose other than the one set forth in district policy, or otherwise authorized by management;
- Misrepresentations concerning requests for leave or use of leave;
- Taking unauthorized leave;
- Failure to follow district policies on obtaining authorization for leave;
- Failure to maintain scheduled working hours;

- Failure to report or record leave when taken;
- Failure to adhere to district policies on leave entitlement;
- Coming to work late, leaving work early, taking extended breaks, or extending lunch hours beyond the allotted time; and
- Chronic, persistent, or patterned use of sick leave.

Note that abuse of leave is not confined to instances of dishonesty; it can include willful and negligent failures to adhere to attendance and leave policies.

C. OVERVIEW OF PROTECTED LEAVES

In order to evaluate whether an absence is “excessive” or not, administrators, managers and supervisors must have at least a basic understanding of what types of absences or leaves are legally protected. The following is a discussion of the “protected” leaves available to employees of community college districts.

1. DIFFERENTIAL PAY – EDUCATION CODE

The Education Code permits both academic and classified employees to take up to five school months of leave due to illness or accident. During this leave, the employee receives the difference between the employee’s salary for any month in which the absence occurs and the sum that is actually paid a temporary employee employed to fill his or her position during the absence or, if no temporary employees was employed, the amount that would have been paid to the temporary employees had such been employed. The community college district must make every reasonable effort to secure the services of a temporary employee.¹⁷

 Legal Snapshot: Differential Pay Leave	
Applicable Statutes:	<input type="checkbox"/> Education Code §§ 87780 (academic) 88196 (classified)
Employees Protected:	<input type="checkbox"/> Community college faculty and classified employees absent from duties
Leave Entitlement:	<input type="checkbox"/> Permits employees to take up to 5 months school months of leave due to illness or accident and receive the difference between his or her salary and the amount paid a substitute

For classified employees, differential leave does not apply to any community college district that has adopted a rule which provides that a regular classified employee shall be credited once a year with not less than 100 working days of paid sick leave, including regular sick leave days. The district pays these days of sick leave at not less than 50% of the employee’s regular salary.¹⁸ For academic employees, differential leave does not apply to any community college district that has

adopted a rule which provides that when an academic employee is absent for five school months or less, he or she will receive 50% or more of his or her regular salary during the period of absence.¹⁹

2. INDUSTRIAL ACCIDENT AND ILLNESS LEAVE – EDUCATION CODE

The Education Code authorizes a 60 working day leave in addition to leaves provided for in the Labor Code.

 Legal Snapshot: Industrial Accident and Illness Leave (Education Code)	
Applicable Statutes:	<input type="checkbox"/> Education Code, §§ 87787 (academic) 88192 (classified)
Employees Protected:	<input type="checkbox"/> Those who have suffered on the job injuries
Leave Entitlement:	<input type="checkbox"/> Allowable leave is not less than 60 working days in any one fiscal year for the same accident. <input type="checkbox"/> Allowable leave not cumulative from year to year. <input type="checkbox"/> Industrial accident or illness leave of absence commences on the first day of absence. <input type="checkbox"/> Payment for wages lost on any day, when added to an award granted the employee under California’s workers’ compensation laws, may not exceed the normal wage for the day. <input type="checkbox"/> Industrial accident leave may be reduced by one day for each day authorized absence regardless of a compensation award made under workers’ compensation. <input type="checkbox"/> When an industrial accident or illness occurs such that the full 60 days overlaps into the next fiscal year, the employee shall be entitled to only that amount remaining at the end of the fiscal year in which the injury or illness occurred, for the same illness or injury.
Employers Must NOT:	<input type="checkbox"/> Discipline, dismiss, or in any way discriminate against an employee who seeks to exercise or exercises his or her right to such leave. <input type="checkbox"/> Include in absenteeism calculation.

3. INDUSTRIAL INJURY LEAVE – LABOR CODE

The California Workers’ Compensation Act²⁰ extends a number of protections to employees who are injured on the job, including medically necessary leave time. An employee or someone acting on the employee’s behalf must give written and signed notice of the injury to the employer within thirty days of the injury.²¹

 Legal Snapshot: Industrial Injury Leave	
Applicable Statutes:	<input type="checkbox"/> Labor Code §§3600, 132a.
Employees Protected:	<input type="checkbox"/> Those who have suffered on-the-job injuries.
Leave Entitlement:	<input type="checkbox"/> To the same extent as non-work related illnesses, injuries, or disabilities, in light of “reasonable business realities,” or until the employer offers suitable modified or light duty or the employee becomes eligible for and elects vocational rehabilitation.
Employers Must NOT:	<input type="checkbox"/> Discipline, dismiss, or in any way discriminate against an employee who seeks to exercise or exercises his or her right to such leave. <input type="checkbox"/> Include in absenteeism calculation. <input type="checkbox"/> Discriminate against an employee who has testified, or said he or she would testify in the workers’ compensation case of another employee.

a. Be Uniform and Consistent When Granting Leave

If the employer has made minor workplace modifications for one industrially-injured employee, the employer must make the same types of accommodations for other industrially-injured employees. Additionally, employers cannot create more stringent reporting requirements for absences due to work-related injury than for absences due to non-work-related injuries or illnesses.

Case in Point - Inconsistent Leave Extensions

Judson Steel Corp v. WCAB²²

The employer and the union routinely met to extend employees’ workers compensation leaves beyond the times specified in the collective bargaining agreement to avoid the automatic separation or termination of employees whose leave had expired. However, in this case, the union and the employer did not arrange for such an extension, and the employer terminated the employee. When the employee filed his application for benefits, the employer raised the

provisions of the collective bargaining agreement as a defense. The California Supreme Court held that that the employer had engaged in discrimination and that, where a discriminatory act has occurred, the fact that it might be justified under a collective bargaining agreement is not a defense.

Bottom Line: If you make an exception for one employee, be prepared to make the exception for all employees – whether a leave extension or any other form of leave accommodation. Employers must not discriminate among employees in administering the same leave.

4. DISABILITY LEAVES

Both federal law (the Americans with Disabilities Act or “ADA”) and state law (the Fair Employment and Housing Act or “FEHA”) extend a wide array of protections to employees suffering from a disability, including the right to reasonable accommodations that allow the employee to perform the essential functions of his or her job. One such “accommodation” may be a leave of absence for a specified period of time that the employee needs to heal or receive treatment. A leave of absence is a commonly requested and used “reasonable accommodation.”

 Legal Snapshot: Disability Leaves	
Applicable Statutes:	<input type="checkbox"/> Americans with Disabilities Act (ADA), 42 U.S.C. §§12101, et seq. <input type="checkbox"/> Rehabilitation Act of 1973, 29 U.S.C. 710, et seq. <input type="checkbox"/> California Fair Employment and Housing Act (FEHA), Cal. Gov’t Code §§12940 et seq.
Employees Protected:	<input type="checkbox"/> Those disabled but able to perform the essential functions of their job with or without reasonable accommodation.
Leave Entitlement:	<input type="checkbox"/> As needed, provided it is “reasonable” and not an “undue burden” to the employer.
Employers Must NOT:	<input type="checkbox"/> Discriminate on the basis of the actual, perceived, or documented disability in any terms, conditions, or privilege of employment; or <input type="checkbox"/> Fail to initiate or engage in the interactive process and offer available reasonable accommodation(s) for a known disability, absent an undue burden.

a. *What is a Disability?*

Under the ADA, which is federal law, an individual is considered to have a disability if he or she:

- Has a physical or mental impairment which substantially limits one or more of the person’s major life activities, and/or
- Has a record of such impairments, and/or
- Is regarded by the employer as having such an impairment.

FEHA, which is state law, sets forth a broader definition of disability. Under the FEHA, an individual is considered to have a disability if he or she:

- Has a physical or mental disability that limits a major life activity.

The FEHA definition of disability does not take into account mitigating factors such as medications or assistive devices, and specifically includes any health impairments related to or associated with a diagnosis, record or history of cancer.

Since the FEHA, the state law, provides the greater protections to employees, California employers should focus on complying with California law.

b. The Affirmative Duty to Engage in the Interactive Process and Explore “Reasonable Accommodations”

Under both the ADA and FEHA, employers have an affirmative duty to explore reasonable accommodations for their disabled employees through an interactive process. This interactive process is one in which both the employer and the employee engage in a flexible, participatory and interactive communication process to determine the reasonable and appropriate accommodation for the disabled employee. The duty to conduct this process, in good faith, is an ongoing obligation for the employer. Employers may not terminate disabled employees when an available reasonable accommodation will enable the employee to perform the essential functions of his or her job.²³ A reasonable accommodation is one that enables the employee to perform the “essential functions” of a position without unduly burdening the employer.

Reasonable accommodation issues affect employer efforts to manage absenteeism in two respects. First, if an employee is chronically absent due to a disability, the employer may be required to provide reasonable accommodations that would assist the employee to perform his or her job. Second, in certain situations, a leave of absence itself may be an appropriate accommodation, where the leave of absence would allow the employee to become sufficiently rehabilitated that he or she could perform the essential functions of the position upon return. (See below.)

“Essential functions” includes only those job duties that are fundamental to the position. Thus, termination is not appropriate if the employee is unable to perform useful, but nonessential, functions of the position. Courts have begun to accept, in certain circumstances, that regular attendance is an essential job function. Some occupations where regular, reliable attendance has been found to be an essential function include telephone operators, teachers, guidance counselors, and bus drivers.²⁴

However, in other cases, permitting an employee to work from home has been treated as a reasonable accommodation – essentially treating regular physical attendance at work to be non-essential. Thus, whether regular attendance is an essential function of the job is a case-by-case analysis that will depend on the individual circumstances, including the factors listed below. The supervisor should discuss these factors with the employee during the interactive process.

Checklist: Factors to Consider in the Interactive Process

- The process is often managed by the District’s Human Resources/Personnel Department, so be sure to check with HR.
- Consider whether removal of a particular job function fundamentally alters the position. In evaluating this issue, consider:
 - Does the position exist to perform a particular function?
 - Is the physical attendance or production level required an essential function of the job? For example, a dispatcher cannot do his or her job without being onsite, but a grant writer may be able to get the job done just as well at home.
 - Are there other employees available who could perform the job function? For example, if an employee, because of her disability, must receive medical treatment for three mornings a week, can schedules of other employees be adjusted to make up for these absences?
 - What degree of expertise or skill is required to perform the function? Particularly in certain professions and highly skilled positions, where a person’s particular expertise or skill is important, his or her performance of that specialized task may become an essential function.
- Consider whether established job descriptions define “essential” and non-essential functions.
- Consider management’s judgment as to what functions are truly “essential.”
- Consider terms of collective bargaining agreements, if applicable.
- Consider work experience of past employees in the job, or current employees in similar jobs.
- Consider time spent in performing the particular function.
- Consider the consequences of the failure to require the employee to perform a particular function.
- Consider the duties and productivity required of non-disabled employees holding the same position.

Case in Point - Counselor’s Attendance Essential

***Salmon v. Dade County School Board*²⁵**

A school district was not required to allow an elementary school guidance counselor to be 25 minutes late to work to accommodate her disability.

Punctuality and attendance were essential functions of the job, where she was the only guidance counselor and the elementary school had 1200 “low-income, socially and emotionally deprived students, ranging in age from five to eleven years old.”

Bottom Line: Physical attendance at the job site can be an essential function in some circumstances.

c. **Reasonable Accommodation Where Absenteeism Caused by Disability**

In the absenteeism context, a reasonable accommodation may involve changes in the workplace that mitigate the absenteeism, or providing an extended leave so the employee can get necessary treatment.

For example, the Ninth Circuit Court of Appeals has held that a limited, finite leave of absence is a reasonable accommodation under the ADA if it gives the employee sufficient time to recover so that he or she is able to return to work and perform essential work duties.²⁶ FEHA also requires employers who know of an employee’s disability to notify the employee of other suitable and available job opportunities, and determine whether the employee has an interest in, and is qualified for, those positions.

Case in Point - Telecommuting Required

Humphrey v. Memorial Hospital Association²⁷

In this case, a medical transcriptionist began having severe tardiness and absenteeism problems due to compulsive and lengthy rituals in the morning that made it difficult for her to leave the house. Prior to these problems, the employee had excellent ratings on her evaluations. The employee was warned about her attendance record. The employee’s doctor eventually diagnosed her with obsessive-compulsive disorder. After the employer learned of the employee’s condition, the employer accommodated the employee by allowing her to work at any time within a 24-hour period on days she was scheduled to work. However, the employee was still unable to correct her absenteeism problem. The employee’s attendance problems continued and the employer eventually fired the employee. The Court held that the employer had an affirmative duty to explore further arrangements as part of the interactive process, such as: (1) granting the employee a leave of absence, or (2) allowing the employee to become a “home-based transcriptionist.” Here, working at home was a reasonable accommodation because the employee could perform the duties at home. No such accommodation would be required where it would not be feasible, and where it would cause an undue hardship for the employer.

Bottom Line: Working from home may constitute a reasonable accommodation in certain circumstances. Additionally, do not assume that your district has fulfilled its duty to reasonably accommodate just because you have already extended one or more accommodations.

Case in Point – Telecommuting Not Required

EEOC v. Ford Motor Company²⁸

In this case, a resale buyer of steel for Ford Motor Company sought to work from home up to four days per week, due to irritable bowel syndrome. The job required that the employee meet with suppliers, engage in team work, and have face-to-face interactions with others. The employee was generally a poor performer, and suffered significant absenteeism. She attempted work from home arrangements on three prior occasions, but was not able to satisfactorily complete the essential functions of her position. The employee also admitted that she could not perform four of her ten essential job functions from home, as they required interaction with others. The employee refused Ford’s offers of other accommodations, including transfer to another position. Ford ultimately terminated the employee’s employment. The 6th Circuit Court of Appeals held that the requested accommodation was not reasonable. The Court relied on EEOC guidance and “common sense,” stating, “Regular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones.” Ultimately, the interactive nature of the position meant that four days of telecommuting was not a reasonable accommodation.

Bottom Line: Depending upon the employee’s classification, telecommuting may not be a reasonable accommodation. Whether a work from home arrangement is a reasonable accommodation will be based on the specific essential functions of the employee’s job classification and the surrounding facts and circumstances of the employee’s request.

5. CALIFORNIA PREGNANCY DISABILITY LEAVE (PDL)

Pregnancy Disability Leave (PDL) is the California statute that gives employees the right to take up to four months of unpaid leave during any period of disability due to pregnancy, childbirth, or related medical conditions. It should be coordinated with FMLA and CFRA, which are discussed in Section 6 below.

 Legal Snapshot: California PDL	
Applicable Statutes:	<input type="checkbox"/> Cal. Gov’t Code §§ 12945, et seq.
Employees Protected:	<input type="checkbox"/> Those disabled by pregnancy, childbirth, or related medical conditions.
Leave Entitlement:	<input type="checkbox"/> Up to four months of unpaid leave.
Employers Must NOT:	<input type="checkbox"/> Discharge, discipline, or discriminate based on pregnancy disability or exercise of PDL rights. <input type="checkbox"/> Include PDL leave in calculating “excessive” leave.

a. Notice and Eligibility Requirements

The employer may require the employee to give reasonable notice of the date that the leave will commence and the estimated duration of the leave. There is no waiting period; an employee is eligible for PDL as of the date of hire.

b. Right of Reasonable Accommodation

The PDL also gives an employee the right to reasonable accommodation – including transfer to a less strenuous position for the duration of the disability – for conditions related to pregnancy, childbirth, or related medical conditions upon the advice of her health care provider.

6. FAMILY AND MEDICAL CARE LEAVE (FMLA & CFRA)

Eligible employees are entitled to extended leaves pursuant to the California Family Rights Act (“CFRA”) or the Federal Family and Medical Leave Act of 1993 (“FMLA”).

 Legal Snapshot: FMLA & CFRA	
Applicable Statutes:	<input type="checkbox"/> FMLA: 42 U.S.C. §§ 2600, et seq. <input type="checkbox"/> CFRA: Cal. Gov’t Code §§ 12945, et seq.
Employees Protected:	<input type="checkbox"/> Parents bonding with their newborn child within the year of birth; <input type="checkbox"/> Parents bonding with an adopted or foster child within the year of the child joining or being placed with the family; <input type="checkbox"/> Those caring for their child, parent, or a spouse who has a “serious health condition” (Note: CFRA also covers domestic partners); <input type="checkbox"/> Those with a “serious health condition” that makes the employee unable to perform the functions of his or her position; <input type="checkbox"/> Those who are pregnant or who have pregnancy related conditions (Note: Pregnancy is <u>excluded</u> from definition of “serious health condition” under CFRA); <input type="checkbox"/> Those who need leave for a “qualifying exigency” involving the employee’s spouse, child, or parent who is on active military duty or has been notified of an impending call or order to active duty in support of a contingency operation; or <input type="checkbox"/> Those who need leave to care for a spouse, child, parent, or “next of kin” who is a member of the armed services and who becomes seriously injured or ill while

	on active military duty.
Leave Entitlement:	<input type="checkbox"/> Under the FMLA and CFRA, eligible employees are entitled to a total of 12 workweeks of leave during any 12-month period for most reasons. <input type="checkbox"/> However, employees are entitled to up to <i>26 weeks</i> to care for a spouse, child, parent, or “next of kin” who is a member of the armed services and who becomes seriously injured or ill while on active military duty.
Employers Must NOT:	<input type="checkbox"/> Discipline or penalize employees for exercising their rights benefits under these laws. <input type="checkbox"/> Include FMLA or CFRA leave in calculating “excessive” leave.

a. What Qualifies as a Serious Health Condition?

Generally, serious health conditions are those that: 1) require an overnight hospital stay; 2) require continuing medical treatment or more than two medical treatments within 30 days; 3) are chronic; or 4) involve incapacity of three or more days.²⁹

However, pregnancy is treated differently under the FMLA and the CFRA. While FMLA includes any pregnancy-related medical treatment or condition, even prenatal care, as a “serious health condition,” CFRA expressly excludes them. As a result, if a woman’s pregnancy precludes her from performing her job (i.e., her absence from work is medically necessary because she is disabled by pregnancy), she is entitled to FMLA leave and California PDL, but the employer may not run her CFRA leave concurrently with those leaves. For example, if a woman is disabled by pregnancy (e.g., placed on bed rest) for 12 weeks before her delivery, her FMLA leave is exhausted but she will still have 12 weeks of CFRA leave available for bonding time after the baby is born. (This assumes, of course, that the employee is otherwise eligible for the full 12 weeks of FMLA and CFRA leave.)

Voluntary or cosmetic treatments that are not medically necessary (e.g., treatments for orthodontia or acne) are not “serious health conditions” unless inpatient hospital care is required or complications develop. Routine preventive physical examinations are also excluded from FMLA leave. Ordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., also do not meet the definition of a serious health condition.

b. Computing the 12-Month Period

Since eligible employees are limited to 12 (or 26) weeks of leave in a 12-month period, it is important for employers to determine the 12-month period that will be used to calculate leave balances and determine employee leave eligibility. The FMLA and CFRA both permit employers to choose from one of several alternatives to compute the 12-month period, including: the calendar year, a fixed 12-month period for all employees, 12 months measured forward from

the first date leave is used, and a rolling 12-month period measured backward from the date leave is used. The rolling 12-month period measured backward from the date leave is used is the only method that prevents “stacking” of back-to-back leave entitlements. The employer must apply the chosen method consistently and uniformly to all employees.

c. Intermittent Leave or Leave on a Reduced Leave Schedule

Under certain circumstances, an employee may take leave intermittently or on a reduced leave schedule. “Intermittent leave” is leave taken in separate blocks of time due to a single qualifying reason, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. “Reduced leave schedule” means a leave schedule that reduces the employee’s usual number of hours per workweek or workday, usually from full- to part-time.

The leave must be medically necessary (as distinguished from voluntary treatments and procedures) and best accommodated through an intermittent leave or reduced leave schedule. Employees needing such leave must attempt to schedule their leave so as not to disrupt the employer’s operations. In addition, an employer may assign an employee to an alternative position for which he or she is qualified that has equivalent pay and benefits, and that better accommodates the employee’s intermittent or reduced leave schedule.

If an employee takes leave intermittently or on a reduced leave schedule, only the amount of leave actually taken may be counted towards the 12 (or 26) weeks of leave to which an employee is entitled. For example, if an employee takes one day of leave per week, he has used 1/5 of a week of FMLA leave, per week. Similarly, if an employee who regularly works eight-hour days works four-hour days on a reduced leave schedule, the employee is using half of a week of leave per week.

The provisions of the CFRA are virtually identical to the FMLA regarding intermittent leave and leave on a reduced leave schedule. One notable difference, however, is that under the CFRA, an employee must generally take intermittent leave for the birth, adoption or foster care placement of a child in a minimum increment of two weeks. CFRA permits employees to take such leave in smaller than two-week increments on two separate occasions.

7. LABOR CODE SECTION 233 LEAVE (FORMERLY CALIFORNIA FAMILY SICK LEAVE OR “KIN CARE” LEAVE)

California Family Sick Leave entitles employees to utilize up to half of their annual accrual of sick leave for the following reasons:

- The diagnosis, care, or treatment of an existing health condition of, or preventative care for, an employee;
- The diagnosis, care or treatment of an existing health condition of, or preventative care for, an employee’s family member (parent, child, spouse, registered domestic partner, parent-in-law, grandparent, grandchild or sibling); or

- An employee who is a victim of domestic violence, sexual assault, or stalking.

The employee or family member need not have a “disability” or “serious health condition” for this provision to apply. Further, the California Labor Code prohibits employers from counting use of half of the employee’s annual accrual of sick leave toward an absence control policy. Thus, even where an employer has a policy in place under which it considers an employee’s use of sick leave in calculating excessive leave, *the employer may NOT count the employee’s use of half of his or her annual accrual of sick leave.* In other words, employers need to exclude this use of sick leave from their “excessive absenteeism” calculations.

 Legal Snapshot: California Family Sick Leave	
Applicable Statutes:	<input type="checkbox"/> Cal. Labor Code §233
Employees Protected:	<input type="checkbox"/> Employees already entitled to sick leave under employer policy or statute. (The law does not require employers to provide sick leave; it only affects how employees may use accrued sick leave if the employer chooses to provide it.)
Leave Entitlement:	<input type="checkbox"/> Up to one-half of employee’s annual accrual of sick-leave allotment to attend to illness of the employee, or a child, parent, spouse, domestic partner, parent-in-law, grandparent, grandchild or sibling, or if the employee is a victim of domestic violence, sexual assault, or stalking. <input type="checkbox"/> For purposes of this leave, “parent” and “child” include biological, foster, adopted, step or legal guardian relationships. A “child” also includes a child of a domestic partner.
Employers Must NOT:	<input type="checkbox"/> Threaten to discipline, discharge, or in any way discriminate against employees who use or attempt to use leave pursuant to Labor Code Section 233. <input type="checkbox"/> Count Labor Code Section 233 Leave toward absence control policies that may lead to or result in discipline, discharge, demotion or suspension.

8. HEALTHY WORKPLACES, HEALTHY FAMILIES ACT LEAVE

Under the Healthy Workplaces, Healthy Families Act, employees earn up to 24 hours of paid sick leave per year, if they work 30 or more days for the same employer within a year from the commencement of employment. The leave can be used for the following reasons:

- Diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member; or
- For an employee who is a victim of domestic violence, sexual assault, or stalking.

“Family member” is defined as one of the following: biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis, regardless of age or dependency status, biological, adoptive, or foster parent, stepparent, or legal guardian of the employee or the employee’s spouse or registered domestic partner, spouse, registered domestic partner, grandparent, grandchild, and sibling.

 Legal Snapshot: Healthy Workplaces, Healthy Families Act Leave	
Applicable Statutes:	<input type="checkbox"/> Cal. Labor Code §245-249
Employees Protected:	<input type="checkbox"/> Employees who work for 30 or more days for the same employer within a year from the commencement of employment, including substitute, short term, hourly, and student workers. <input type="checkbox"/> Employees are entitled to use accrued sick leave upon their 90th day of employment. <input type="checkbox"/> Does not apply to employees who are covered by a valid CBA that provides sick leave and disputes regarding the CBA are subject to binding arbitration.
Leave Entitlement:	<input type="checkbox"/> At least one hour for every 30 hours worked, or at least 24 hours accrued by the 120th calendar day of employment in each calendar year to attend to diagnosis, care, treatment of an existing health condition for the employee or family member, or care of an employee who is a victim of domestic violence, sexual assault, or stalking.
Employers Must NOT:	<input type="checkbox"/> Threaten to discipline, discharge, or in any way discriminate against employees who use or attempt to use sick leave under the Healthy Workplaces, Healthy Families Act. <input type="checkbox"/> Deny the employee the right to use accrued days of the leave. <input type="checkbox"/> Require an employee to search for or find a replacement worker to fill in for him or her when taking leave under the Act.

9. MILITARY LEAVE

a. Qualifying Exigency Leave

The FMLA allows eligible employees to take FMLA leave while the employee's spouse, son, daughter or parent (the "covered military member") is on active duty or called to active duty status for a "qualifying exigency."³⁰ Unlike military caregiver leave which is available for the care of a covered servicemember in the Regular Armed Forces, Reserves, or National Guard, qualifying exigency leave is only available to an eligible employee with an immediate family member who is on active duty or called to active duty status in support of a contingency operation as a member of the Reserves or National Guard. It is not available to employees with family members in the Regular Armed Forces.³¹

i. Amount of Leave

Eligible employees are entitled to up to 12 workweeks in any 12-month period for qualifying exigency leave.³²

ii. Notice of Need for Qualifying Exigency Leave

For leave due to a qualifying exigency, the district must provide notice as soon as practicable, regardless of how far in advance such leave is foreseeable.³³

iii. Certification

The first time an employee requests leave for a qualifying exigency, the employer may require the employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military. These orders must indicate that the covered military member is on active duty or called to active duty status in support of a contingency operation, and the dates of the covered military member's active duty status.

b. Military Caregiver Leave

Eligible employees are also entitled to take FMLA leave to care for a spouse, son, daughter, parent, or next of kin who is a current member of the Armed Forces, including a member of the National Guard or Reserves, or a member of the Armed Forces, the National Guard or Reserves who is on the temporary disability retired list, who has a serious injury or illness incurred in the line of duty on active duty for which he or she undergoing medical treatment, recuperation, or therapy, who is in outpatient status, or who is otherwise on the temporary disability retired list.³⁴

Eligible employees may not take military caregiver leave to care for former members of the Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability retired list.³⁵

i. Amount of Leave

Eligible employees may take up to 26 weeks of unpaid leave in any single 12-month period to care for a covered servicemember with a serious injury or illness.³⁶

ii. Computing the "Single 12-Month Period" for Military Caregiver Leave

Unlike the 12-month period for other types of FMLA leave, military caregiver leave is based on a “single 12-month period” which begins on the first day the eligible employee takes FMLA leave to take care of a covered servicemember and ends 12 months after that date.³⁷ Because employers can choose the calendaring method for other types of FMLA leave, but not for military caregiver leave, an employer may have to track two different periods of FMLA leave for a single employee.

Unlike with other FMLA leave, the military caregiver leave entitlement is applied on a per-covered-servicemember, per-injury basis.³⁸ In other words, an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any “single 12-month period.”³⁹

iii. Computing FMLA Leave That Qualifies for Military Caregiver Leave and Leave to Care for a Family Member with a Serious Health Condition

Because military caregiver leave is leave to care for a covered servicemember who is the employee’s spouse, son, daughter, parent, or next of kin, the requested leave could be military caregiver leave or leave to care for a family member with a serious health condition.⁴⁰ Under these circumstances, the employer must designate such leave as military caregiver leave in the first instance. The district cannot designate and count this leave as both military caregiver leave and leave to care for a family member with a serious health condition. Thus, even after an employee has exhausted his or her military caregiver leave entitlement, the employee may be entitled to use his or her normal 12-week FMLA leave entitlement to provide care to the servicemember due to the same injury or illness.⁴¹

iv. Notice of Need for Military Caregiver Leave

As with basic FMLA leave, an employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for leave is foreseeable based on the planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days notice is not practicable, the employee must give notice as soon as practicable.⁴²

When the approximate timing of the need for military caregiver leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case.⁴³

v. Certification

Under the FMLA, an employer can require two certifications when an employee requests military caregiver leave — one from the health care provider and one from the employee or the covered servicemember.

c. CFRA

The CFRA does not provide for any military-related leaves. Consequently, if an employee uses military caregiver leave under the FMLA, the employee will be entitled to an additional 12

weeks of CFRA leave to care for the family member with a serious health condition. If, however, the reason for military caregiver leave overlaps with leave provided under the CFRA, the two leaves may run concurrently.

d. Leave for Military Service

 Legal Snapshot: Leave for Military Service	
Applicable Statutes:	<input type="checkbox"/> Federal Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301. <input type="checkbox"/> Cal. Military & Veterans Code § 389 et seq.
Employees Protected:	<input type="checkbox"/> Those on active duty or in training for active duty in voluntary or involuntary uniformed service or serving full-time on National Guard duty for not more than a cumulative period of five years. <input type="checkbox"/> Those who return from military leave and provide timely and proper notice, in accordance with the statute.
Employers Must NOT:	<input type="checkbox"/> Discriminate, discipline, or penalize an employee who is on military leave. <input type="checkbox"/> Refuse to reemploy a returning employee has complied with notice requirements, unless certain limited conditions exist.

The FMLA allows leave when necessary to assist with issues related to:

- Short-term deployment to address family and deployment issues;
- To attend military event, programs and family support or assistance programs;
- To arrange for childcare, school enrollment and to attend school meetings;
- To make or update financial and legal arrangements;
- To attend counseling;
- To spend time with a covered military member to rest and recuperate;
- For post-deployment activities, including ceremonies or to address issues that might arise from the death of a covered member on active duty status; and
- To address other events that might arise from call to active duty, providing employer agrees that leave qualifies as an exigency.

i. Reemployment after Military Leave

An employee returning from military leave is entitled to prompt reemployment if:

- The employee has given advance written or verbal notice of such military service to the employer;
- The cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of military service does not exceed five years; and
- The returning veteran reports to, or submits a reemployment application, to the employer in accordance with the required notice provisions.⁴⁴

ii. Return-From-Leave Notice Requirements

The time requirements for notice by a returning employee in order to receive reinstatement depends on the type and length of service:

- **Leave in time of war or national emergency:** The employee must seek reinstatement with his/her employer within 6 months after completing military service, but not later than 6 months after the end of the war, emergency, etc. In addition, the right to reemployment does not extend to a public employee who fails to return to his or her position within 12 months after the first date he or she could terminate his or her active service.
- **Leave for reasons other than war or national emergency:** *Less than 31 days:* The employee must report to the employer no later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service. *More than 30 days but less than 181 days:* The employee must submit an application for reemployment with the employer not later than 14 days after the completion of the period of service. *More than 180 days:* The employee must submit an application for reemployment with the employer within 90 days after the completion of the period of service.⁴⁵

An employee who fails to apply for reemployment within the appropriate period does not automatically forfeit his or her rights, but is subject to the conduct rules, established policy and general practices of the employer pertaining to unexcused absences from scheduled work.⁴⁶

iii. What to Do if the Returning Employee's Position No Longer Exists

California law states that if the position is abolished or otherwise has ceased to exist, the employer must reinstate the employee in a position of like seniority, status and pay if such a position exists, or to a comparable vacant position for which the employee is qualified. California's Military & Veterans Code does not specify what constitutes a like or comparable position. If this situation arises, the employer should take a common sense and reasonable approach in finding a comparable position.⁴⁷

iv. Conditions That Justify Refusal to Reinstate the Returning Employee

An employer who refuses to reemploy has the burden of proving the existence of statutory conditions that would justify the refusal. These are:

- The employer’s circumstances have so changed as to make such reemployment impossible or unreasonable;
- Reemployment of the person would impose an undue hardship on the employer; or
- The employee’s old position existed for a brief, non-recurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.⁴⁸

10. LEAVES TO APPEAR AT CHILD’S SCHOOL

The Family School Partnership Act provides employees the option of taking leave to participate in four different types of school events: (1) school activities; (2) enrollment or re-enrollment in school or licensed child care provider; (3) child care provider or school emergency; and (4) school suspensions.

 Legal Snapshot: School Leaves	
Applicable Statutes:	<input type="checkbox"/> Cal. Labor Code § 230.7, 230.8. <input type="checkbox"/> Cal. Education Code §§ 48900, 48900.1, 48910.
Employees Protected:	<input type="checkbox"/> Those with employers of 25 or more employees who are a parent, guardian, or grandparent having custody of a child in kindergarten or grades one through twelve, including a licensed childcare provider, who wish to find, enroll, or reenroll their child in school or with a licensed child care provider, or participate in a child’s school activity. School activities include, but are not limited to, field trips, open houses, and extracurricular activities. Also protects employees who request time off to address a child care provider or school emergency. <input type="checkbox"/> Those, regardless of employer size, who are the permanent guardian of a child in kindergarten through twelfth grade and requests to attend a school meeting after the employee’s child has been suspended.
Leave Entitlement:	<input type="checkbox"/> For school activities, up to 40 hours per year, but not to exceed more than 8 hours in one calendar month. If both parents of a child work for the same employer at

	<p>the same worksite, only the parent who first gives notice to the employer is entitled to the leave.</p> <p><input type="checkbox"/> For school suspensions, there is no limit.</p>
Employers Must NOT:	<p><input type="checkbox"/> Discharge or discriminate against an employee for taking leave under the Act, including counting such leaves against an employee under an absenteeism policy.</p>

a. Notice and Documentation Requirements

The employee must give reasonable notice to the employer prior to participating in the school activity. The law does not establish time lines for notice, so agencies may refer to their own rules governing planned absences. If both parents are employed by the same employer, the parent who provided notice first is entitled to the time requested. An employee using leave under the Act may also be required to provide documentation of the activity.

b. Employer May Require the Use of Accrued Leaves

The employer may require the employee to use accumulated leave time such as vacation, personal leave, or compensatory time off, for these school leaves. If the employer does not insist on the concurrent use of paid leave, the employee’s leave may be unpaid.

11. DOMESTIC VIOLENCE AND SEXUAL ASSAULT LEAVE

📖 Legal Snapshot: Domestic Violence Sexual Assault, and Stalking Leave	
Applicable Statutes:	<p><input type="checkbox"/> Cal. Labor Code § 230(c)-(h), 230.1.</p>
Employees Protected:	<p><input type="checkbox"/> Victims of domestic violence, which is abuse perpetrated against a spouse or former spouse, an individual regularly residing in the household, someone in a dating or engagement relationship, an individual with whom the abuser has a child, or other family relation.⁴⁹</p> <p><input type="checkbox"/> Victims of sexual assault by any person.⁵⁰</p> <p><input type="checkbox"/> Victims of stalking by any person.⁵¹</p>
Leave Entitlement:	<p><input type="checkbox"/> Time off from work to seek relief, such as a temporary restraining order, or other assistance to help safeguard the “health, safety, or welfare” of the employee or his or her child.</p>
Employers Must NOT:	<p><input type="checkbox"/> Take adverse employment action against an employee who takes time off pursuant to these provisions.</p>

12. LEAVE FOR VICTIMS OF SPECIFIED CRIMES

 Legal Snapshot: Leave for Victims of Specified Crimes	
Applicable Statutes:	<input type="checkbox"/> Cal. Labor Code §230.5(a)-(f)
Employees Protected:	<input type="checkbox"/> Employees who are victims of the following offenses: vehicular manslaughter while intoxicated, felony child abuse, assault resulting in the death of a child under eight years of age, felony domestic violence, felony physical abuse of an elder or dependent adult, felony stalking, solicitation for murder, a serious felony, hit-and-run causing death or injury, felony driving under the influence causing injury, or sexual assault.
Leave Entitlement:	<input type="checkbox"/> Time off from work to appear in court to be heard at any proceeding, including any delinquency proceeding, involving a post arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which the right of the victim is at issue.
Employers Must NOT:	<input type="checkbox"/> Take adverse action against an employee who takes time off pursuant to these provisions.

13. JURY DUTY AND WITNESS LEAVE

 Legal Snapshot: Jury Duty and Witness Leave	
Applicable Statutes:	<input type="checkbox"/> Federal Jury System Improvement Act of 1978, 28 U.S.C. §§ 1875(a), (c). <input type="checkbox"/> Cal. Labor Code §§ 230(a), (b), (e)-(g).
Employees Protected:	<input type="checkbox"/> Those ordered to serve jury duty in federal or state court. <input type="checkbox"/> Those, including victims of crimes, who are ordered to appear in court to testify as a witness in compliance with a subpoena.

Leave Entitlement:	<input type="checkbox"/> Upon completing jury service, the employee must be reinstated to the same position he or she occupied before the leave. <input type="checkbox"/> Under California law, employees have the right to use vacation, personal leave or compensatory time off pursuant to the employer's leave policies.
Employers Must NOT:	<input type="checkbox"/> Discharge, discriminate, or retaliate for taking time off under these provisions.

14. VOTING LEAVE

📖 Legal Snapshot: Voting Leave	
Applicable Statutes:	<input type="checkbox"/> Cal. Election Code §§ 14000(b),(c).
Employees Protected:	<input type="checkbox"/> Those who do not have sufficient time to vote outside of their working hours. <input type="checkbox"/> The employee must provide the employer with at least two working days advance notice.
Leave Entitlement:	<input type="checkbox"/> Time off to vote at the beginning or the end of the shift. <input type="checkbox"/> The employer is required to pay the employee for the first two hours of time taken to vote.
Employers Must NOT:	<input type="checkbox"/> Discriminate against the employee for taking voting leave.

D. DETERMINE WHETHER OTHER LEAVES PROVIDED BY THE EDUCATION CODE APPLY

The Education Code provides an array leaves for academic and classified employees, some of which community college districts must provide, and others that are discretionary. When a district chooses to adopt and provide discretionary leaves for its employees, it is bound to follow the policy, rule or regulation that it adopted concerning those leaves. This will vary from district to district. This section provides a brief overview of these leaves.

1. CLASSIFIED EMPLOYEES

- **Pregnancy related leave – Education Code section 88193:** Boards may provide for pregnancy-related leave for classified employees.

- **Extended leave – Education Code section 88195:** Boards may provide for an extension of leave for employees who exhaust their entitlement to sick leave, vacation, compensatory, overtime or other available paid leave for nonindustrial accident or illness. The initial leave must not exceed six months; it may be renewed twice, for a total not to exceed 18 months.
- **Vacation leave – Education Code section 88197:** Every district must grant classified employees annual vacation of no less than five-sixths of a day for each month in which the employee is in paid status for more than one-half the working days in the month, if the employee is regularly employed five days per week, seven to eight hours per day or on an hourly basis as set forth in section 88197. Employees in paid status for less than one-half the working days in a month may accrue vacation on an hourly basis as set forth in section 88197.
- **Transferred leave – Education Code section 88202:** Classified employees of a community college district, school district, or county superintendent of schools who have been employed for at least one calendar year, who have not been terminated for cause and accept employment at another district or county superintendent of schools within one year, retain their illness or injury leave.
- **Bereavement leave – Education Code section 88194:** Classified employees are entitled to a leave of absence not to exceed three days, or five days if out-of-state travel is required for the death of any immediate family member.
- **Personnel necessity leave – Education Code section 88207:** A contract or regular employee may use up to seven illness or injury days of leave for personal necessity, including for: a) death of an immediate family member when more time is required than that provided by section 88194 (bereavement leave); b) for accident involving person or property; c) to appear as a witness at a court or administrative proceeding pursuant to order or subpoena; d) other reasons prescribed by the district.
- **Elected employee organization officer leave – Education Code section 88210:** A board must grant, upon request, to a classified employee a paid leave of absence for the purpose of allowing the employee to serve as an elected officer of any district employee organization or state or national affiliate.
- **Bonding Leave – Education Code section 88207.5:** A contract or regular classified employee may use up to 30 days of leave in a school year, less personal necessity leave used, in either of the following circumstances: (1) a biological parent may use leave pursuant to this section within the first year of his or her infant's birth; or (2) a nonbiological parent may use leave pursuant to this section within the first year of legally adopting a child. (If these provisions conflict with a collective bargaining agreement in effect before January 1, 2015, these provisions shall not apply to the employer and

employees subject to that agreement until the expiration or renewal of the agreement.)

2. ACADEMIC EMPLOYEES

- **Pregnancy-related leave – Education Code section 87766:** District governing boards must provide for leave of absence from duty for any academic employee of the district who is required to be absent from duties because of: pregnancy, miscarriage, childbirth, and recovery from childbirth. The length of the leave of absence is determined by the employee and the employee’s physician.
- **Sick leave – Education Code section 87781:** District boards must provide to academic employees 10 days leave of absence for illness or injury and may provide additional days.⁵²
- **Transferred leave (academic to academic) – Education Code section 87782:** Academic employees who have been employed with a community college district for at least one year are entitled to transfer any accumulated leave of absence for illness or injury when moving to another district within the succeeding school year.
- **Transferred leave (academic to administrative) – Education Code section 87785:** Academic employees accepted to a professional position or appointment in the chancellor’s office are entitled to transfer their accumulated leave of absence for illness or injury.
- **Bereavement leave – Education Code section 87788:** Districts must provide all academic employees a leave of absence not to exceed three days, or five days if out-of-state travel is required, for the death of any immediate family member.
- **Bonding Leave – Education Code section 87784.5:** Academic employees may take up to 30 days of leave in a school year , less any days used for personal necessity or compelling personal importance, in either of the following circumstances: (1) a biological parent may use leave pursuant to this section within the first year of his or her infant’s birth; or (2) a nonbiological parent may use leave pursuant to this section within the first year of legally adopting a child. (If these provisions conflict with a collective bargaining agreement in effect before January 1, 2015, these provisions shall not apply to the employer and employees subject to that agreement until the expiration or renewal of the agreement.)

3. EMPLOYEES IN GENERAL

- **Elected employee organization officer leave – Education Code section 87768.5:** District governing boards must grant to any employee, upon request, a paid leave of absence for the purpose of allowing the employee to

serve as an elected officer of any district employee organization or state or national affiliate.

- **Transferred leave – Education Code section 87777:** Any permanent or probationary employee of a high school district who obtains employment at a community college district is entitled to retain all sick and injury, sabbatical, and other leave rights accumulated by service at the high school district.
- **Personal necessity leave and family or accident leave – Education Code section 87784:** Districts must allow employees to use up to six days of their illness or injury leave for personal necessity, as prescribed by the district's board. However, districts must not require an employee to secure advance permission for leave taken for: a) death or serious illness of an immediate family member; or b) an accident involving the employee's person or property.

E. PREVENTING ABSENTEEISM

1. COMMUNICATE STANDARDS

Communication is the best approach to preventing absenteeism before it happens. Once a district has developed standards for acceptable and unacceptable levels of absence in the district, it must communicate those standards to all employees through both written and oral vehicles such as policies, procedures, employee handbooks, memoranda of understanding, employee orientation, and periodic employee training. Administrators, managers and supervisors must take the lead in communicating the district's standards to avoid having to react to absenteeism problems rather than preventing them.

The following are some suggestions on what a manager should discuss with employees about their employer's attendance policy:

- The importance of good attendance and expectations regarding acceptable attendance;
- An explanation of negative impact of poor attendance on:
 - The employee's professional growth and opportunities;
 - Relationship with co-workers;
 - Office morale; and
 - Quality of education offered to students;
- Clearly defined starting and ending times;
- Expectations regarding work schedules;
- Length of breaks and lunch period;

- Holidays;
- Vacation and sick leave accrual and scheduling requirements;
- Procedure for reporting absences and tardiness;
- Available employee assistance programs;
- Explanation of appropriate and inappropriate uses of leave;
- The benefits of accumulating sick leave; and
- The impact that attendance will have on their opportunity for promotions and raises.

2. AGGRESSIVELY SUPERVISE ATTENDANCE

Usually, absenteeism does not become a problem overnight. Both abusive and excessive absenteeism typically involve patterns of behavior that take place over time. Through aggressive supervision, a manager can identify and correct attendance problems before they grow out of control. This section highlights performance management techniques for absenteeism control.

a. Use Performance Management

Performance management is an ongoing process. For performance management to work, administrators, managers and supervisors must regularly evaluate employee performance, and not put off reviewing employees until their review dates. For an employee with attendance or leave abuse problems, this means:

- Setting attendance goals and objectives;
- Evaluating and measuring employee progress in the area of attendance;
- Providing continual feedback;
- Isolating performance problems that may lead to attendance problems and providing coaching when needed; and
- Recognizing and reinforcing improvements.

b. Enforce the District's Policies Uniformly and Consistently

For performance management to be effective, it must be applied to all employees. Singling out only certain employees for aggressive supervision, while being lax with others, will lead to many problems, including claims of favoritism, illegal discrimination and overturned discipline.

Case in Point - Uneven Enforcement and Favoritism

Worcester Quality Foods, Inc. (Arbitration)⁵³

Two employees were improperly discharged for tardiness and excessively poor attendance even though they were warned that their next violation would result in termination, and the collective bargaining agreement provided for such disciplinary action. The discharges were improper because the attendance

policy was unevenly enforced. The corrective intent of progressive discipline was lacking under these circumstances, and the grievants were reinstated with no loss of seniority.

Bottom Line: Inconsistent enforcement can backfire on the employer.

Case in Point - Inconsistent Reporting Enforcement

ABM Space Care Inc. (Arbitration)⁵⁴

An arbitrator ruled that an employer could not discharge an employee for not following proper procedures for calling in sick. The arbitrator found that the employer condoned the actions of the employee who called in sick in the same manner which the employee thought was proper for six weeks prior to discharge. The arbitrator found that the employer's inaction during that time gave the employee a reasonable basis to conclude that she was using the proper procedure.

Bottom Line: Inconsistent enforcement with the same employee can lead to overturned discipline.

c. Document Attendance Issues as They Occur

Concurrent documentation of absenteeism problems enables the manager to keep a “running record” of performance that will refresh the manager’s memory at the time the manager prepares the formal annual (or periodic) performance evaluation. The administrator, manager or supervisor should document positive attendance developments and improvements, as well as negative developments and regressive behavior. This helps nip absenteeism problems in the bud.

When documenting absenteeism issues, the manager or supervisor should note the following:

- Date and time of attendance incident;
- Type of absence or attendance issue (e.g., tardiness, unauthorized leave, failure to report, failure to call in, etc.);
- Employee’s stated reason for attendance problem or failure;
- Employee’s efforts if any to obtain authorization for absence;
- Date, time, and method of reporting absence by the employee;
- Management response to the absence; and
- The employee’s reaction to management action.

Case in Point - Discharge Upheld for Well-Documented Tardiness Problem

Waddy v. Sears, Roebuck & Co.⁵⁵

Termination of an employee who had an established problem with chronic lateness, and had been warned that continued lateness would result in further

discipline was upheld. The employee's claim that termination was retaliatory and in violation of public policy failed in the face of the employer's evidence that the employee had a history of tardiness. The employee had received a number of counseling sessions and there were numerous memos documenting his tardy behavior. The court held that the employer's documentation proved that there were legitimate grounds for the termination.

d. Accurately Address Attendance in Performance Evaluations

Well-prepared performance evaluations provide employees notice of performance deficiencies, and enable management to defend disciplinary personnel decisions. Thus, performance evaluations should include a record of all attendance problems and leave abuse incidents that occurred during the review period.

3. MAINTAIN ATTENDANCE DATA

An effective prevention strategy must include a process for accurately tracking the types and number of employee absences as they occur. The availability of detailed records enables administrators, managers, supervisors and human resources professionals to refer to specific absences and to tabulate absence and leave usage data. From a preventive standpoint, accurate absence tracking enables the employer to determine leave eligibility and to identify absenteeism problems in their early stages.

Failure to implement a system for gathering attendance data likely results in inadequate procedures to track leaves, inadequate or inconsistent enforcement of rules and policies, and insufficient legitimate leave options – all of which increase absenteeism. Conversely, having an effective absence-tracking system in place will actually work to deter abuse of leave.

a. Track All Absences

The district must maintain attendance and leave usage records that are reliable, accurate, and ultimately able to withstand the scrutiny of an arbitrator, judge or jury. Methods of documentation include:

- Time cards;
- Payroll records;
- Computerized or electronic time tracking;
- Absence authorization forms;
- Written letters or memos to employee;
- Computer databases; and
- Medical verifications.

b. Track Use of Protected Leaves

The proper calculation and tracking of federal and state leave entitlements, such as the FMLA or CFRA, works hand-in-hand with control of absences. Absenteeism problems are often

compounded by a district's failure to accurately and systematically document employee use of accrued and legally protected leaves. The following procedures will help track leaves accurately:

- Categorize leaves, especially when they overlap;
- Provide employees with written notice when leaves have been triggered, e.g. FMLA;
- Provide employees with written notice of impending accrued leave exhaustion;
- Avoid authorizing leave time for employees with exhausted leaves; and
- Systematically require medical verifications when required under a district's policy.

Administrators, managers and supervisors should contact their District's human resources professionals if they suspect an absence may be protected, or if they have any questions regarding protected leave.

F. RESPONDING TO ABSENTEEISM

An employee calls in sick . . . the third Friday in a row; or the employee is late and blames it on a flat tire . . . again. You suspect that the employee is not being truthful. What do you do? Using authorized leave for unauthorized purposes constitutes abuse of leave and dishonesty warranting progressive discipline. The challenge for managers and supervisors is how to:

- Confirm your suspicions;
- Correct the problem; and
- Discipline appropriately.

1. CONFIRM YOUR SUSPICIONS: INVESTIGATE ABUSE BEFORE IMPOSING DISCIPLINE

When an apparent incident of abuse of leave does occur, the employer will need to conduct an investigation. This section highlights aspects of investigations that are the most relevant for responding to absenteeism abuse. There are many practical and legal requirements surrounding investigations that exceed the scope of this workbook but are contained in other Liebert Cassidy Whitmore workbooks. Employers desiring more information on investigations should refer to those.

An investigation is nothing more than the necessary fact-finding required to adequately determine what really happened. Depending on the circumstances, an investigation may be very simple or extremely involved. A detailed investigation is not always necessary if the manager or supervisor alone can evaluate the misconduct. For example, if the abuse at issue is the employee's failure to report that he or she was going to miss work due to illness, the employer may be able to simply rely on the manager or supervisor's record. On the other hand, if the

employee repeatedly uses sick leave to work at another job, a more involved investigation may be required.

2. IDENTIFY THE PROBLEM AND SEGREGATE “PROTECTED” ABSENCES

The appropriate response to absenteeism will depend, in part, on whether the employee is abusing leave for legitimate or illegitimate purposes. If the absenteeism results from the illegitimate use of leave (e.g., calling in sick when the employee really is not sick), then the appropriate response will be performance-based, and may include counseling or progressive discipline. The following checklist will help managers and supervisors determine whether the absenteeism involves abuse of leave for illegitimate purposes:

Checklist: Objective Criteria that May Indicate Abuse of Leave

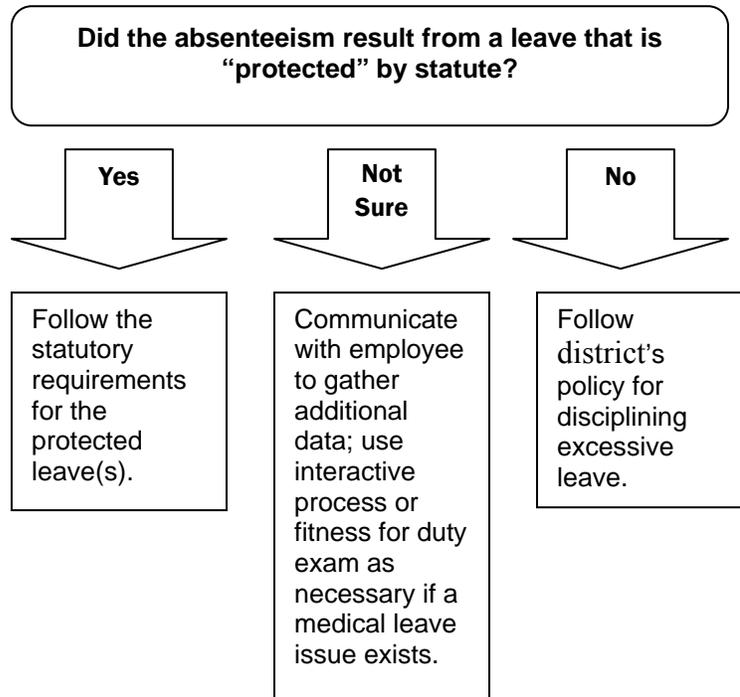
Performance History

- Long history of poor attendance;
- History of similar attendance issues;
- History of discipline for poor attendance;
- History of other performance problems;
- Employee has a poor attitude or marginal performer;
- No other employees have a similar problem; and
- Employee has already been given prior warnings and opportunities to improve.

Credibility Issues

- Stated reason for absence is not feasible;
- Inconsistency between the stated reasons and surrounding circumstances;
- Excuse or reason has been used before;
- Conflicting investigator or eyewitness reports;
- Medical documentation does not appear valid or cannot be verified;
- Questionable patterns or timing (e.g., Monday/Friday pattern);
- Involves chronic lateness, long lunches or leaving early;
- Employee’s absenteeism is well above the average for other employees;
- Regularly absent on Monday/Friday;
- Absent the day before or after holidays and vacations;
- Absence coincides with a denied request for time off;
- Absence coincides with periods of anticipated heavy workloads or with deadlines; and
- Absence follows disciplinary action.

If the problem involves excessive use of leave for legitimate reasons, the employer must first determine whether any of the absences at issue are legally “protected.” If any dates within a leave are protected by one of the laws discussed above, the district cannot count them in applying the district’s excessive leave calculations. If the employer concludes that the absences in question are **not** protected, then it may follow its policies or applicable collective bargaining agreement provisions for excessive absenteeism. The following flow-chart illustrates this process:



Employers analyzing excessive leave situations will also have to consider whether the employee is “disabled” within the meaning of California’s anti-discrimination law, the FEHA.⁵⁶ As discussed in more detail above, providing an extended leave of absence could be a “reasonable accommodation” under the FEHA. Where a possible disability may be causing an employee’s absenteeism, the employer will have to be careful to implement the “interactive process” to determine whether it can accommodate a leave of absence. Since managers and supervisors are usually the first persons who encounter this issue, they should be especially alert for the possibility that an absenteeism issue is really a disability issue.

Case in Point - Discharge of Disabled Employee

Roby v. McKesson Corp.⁵⁷

A Yolo County jury awarded a record \$19 million verdict to a long-term employee who was fired for taking medical leave due to panic attacks. The attacks caused the employee to miss occasional days at work that totaled less than one a month in the year preceding her firing. However, she was terminated for violating the employer’s attendance policies. The jury found that her

termination constituted wrongful termination in violation of public policy and that the employer had failed to provide a reasonable accommodation for her mental disability.

Bottom Line: Before disciplining, discharging, or taking any other adverse action against an employee for absences, the employer **MUST** ensure that the absenteeism is not for a reason protected by statute.

a. What Do You Do When You Do Not Know if an Absence is “Protected?”

Sometimes managers are unsure how to respond to what may be an excessive absenteeism situation simply because they do not have enough information. This happens most often in situations where the employee appears to have a medical condition, but it is unclear whether the medical condition has anything to do with the absenteeism.

Thus, the first step the employer must take in addressing excessive absenteeism is to meet with the employee and provide him or her with the opportunity to state the reason for the absences at issue. The following tips will assist administrators, managers, supervisors and human resources professionals in this task:

Checklist: Communication Tips for Assessing Whether the Leave is “Protected”

- Focus on concrete data and tie it to specific district policies.** For example: “During the last month, you have missed ten full days of work. This appears to be excessive under the district’s excessive absenteeism policy. What is the cause?”
- Focus on the impact of the absences on the employee’s job duties and position.**
- Ask open-ended questions:** “What is the cause of the absences?” “Can you explain?” “Have you given me all of the reasons for the absences?” “Are there any others?”
- Do NOT ask leading questions that suggest a medical cause or any other cause** for the absenteeism, e.g., Do NOT ask: “Are there any medical conditions that are causing your attendance issues?” or “How is your health?”
- Do NOT ask personal questions,** e.g., “Is everything okay with your day care arrangement?” or “Are you having car problems?” By contrast, if the employee volunteers personal problems as reason for the attendance problem, it is appropriate to discuss solutions with the employee from the standpoint of improving job attendance.
- Be prepared for the employee to raise a medical condition.** If the employee volunteers that a medical condition is the issue, then take the meeting in the direction of an interactive process:
 - Discuss what job functions the employee feels he or she is unable to do.
 - Ask the employee if he or she currently has a doctor’s restriction on any job functions.

- If the employee indicates that he or she cannot perform any job functions, identify possible accommodations and discuss how the employee thinks they will enable the employee to successfully perform the position.
 - Do not ask for information about the employee’s condition or diagnosis.
- ❑ **Do NOT concede or suggest during the meeting that the employee in fact has an industrial injury, disability, or serious health condition.** These are all legal terms of art and conditions that can only be established by a physician – not by the employee or the manager.
- ❑ **Discuss follow up steps:** “I will call you next week for a follow up meeting, after I have had a chance to consider the information that you have provided.”

b. Be Mindful of Medical Privacy Rights

If an administrator, manager, supervisor or human resources professional confirms that a medical condition is the cause of an employee’s absence or need for leave, the district must take precautions to avoid violating the employee’s privacy rights. The following are some of the laws which protect the privacy of employees’ medical information.

- **Article I, Section 1, California Constitution:** Limits employer inquiries to only that information necessary to ascertain fitness for duty.
- **FMLA and CFRA:** These laws limit the employer’s inquiries only to whether the employee has a serious medical condition and the extent and duration of the employee’s functional limitations. Employers must not inquire into the specific medical diagnosis.⁵⁸
- **ADA and FEHA:** Limits employer medical inquiries only to those that are job-related and consistent with a business necessity. Employers must not inquire about the medical cause but are entitled only to know whether the employee can perform the essential job functions with or without reasonable accommodation.⁵⁹
- **Confidentiality of Medical Information Act (CMIA):** This California law limits employer inquires only to whether the employee can perform the essential functions of the job with or without reasonable accommodation.⁶⁰
- **Workers’ Compensation Act:** Limits employer medical inquiries about an employee’s industrial injury to: (1) the diagnosis of the injury (but only if it would affect the employer’s premium); and (2) that which is necessary for the employer to have in order for the employer to modify the employee’s work duties.⁶¹

In light of these medical privacy laws, an employer should not request a diagnosis from an employee’s medical provider(s). Rather, the employer is only entitled to information about the job limitations or work restrictions and duration of the medical condition. In the context of absenteeism, the question then is whether the medical condition is legitimately causing the employee to have to miss work, and if so, how much and for how long.

3. IF ABSENCES ARE NOT PROTECTED, FOLLOW DISTRICT POLICY AND PROGRESSIVELY DISCIPLINE

If an investigation or direct observations of an employee leads a manager to conclude that the employee is abusing leave (e.g., that leave is “excessive” and not legally protected), the manager should consult with the district’s human resources professionals to ascertain the proper disciplinary measure. Absenteeism scenarios that fall within the excessive but unprotected leave category commonly include:

- Employees who continually call in sick for frequent minor illnesses such as colds, the flu, and sniffles.
- Employees who continually request leave time because they are juggling many personal issues, e.g. daycare issues, unreliable car.
- Employees who request a significant amount of time off for major life events, such as a wedding, bereavement, or a “mid-life crisis.”

Progressive discipline creates a history of employer notice and attempts to correct that will bolster the employer’s case in the event of discharge. Additionally, as discussed below, progressive discipline may also become part of the solution to a continuing problem.

a. Factors to Consider in Determining Appropriate Level of Discipline

- **Seriousness of Problem:** How severe and frequent is the attendance problem?
- **Time Span:** Have there been other such problems in the past, and over how long a time span?
- **Frequency and Nature of Problem:** Is the current problem part of an emerging or continuing pattern of absenteeism or leave abuse?
- **Employee’s Work History:** How long has the employee worked for the district, and what was the quality of performance?
- **Extenuating Factors:** Are there extenuating circumstances related to the problem such as use of protected leaves?
- **Degree of Orientation:** To what extent has management made an earlier effort to educate the employee about the existing rules and procedures and the consequences of continued violations?
- **History of District Discipline Practices:** How have similar infractions been dealt with in the past within the department? Within the entire organization?
- **Implications for Other Employees:** What impact will the decision have on other employees in the unit?
- **Management Backing:** If employees decide to take their case to higher management, is there reasonable evidence to justify the decision?

- **Progressive Discipline:** Was the specific discipline or action based on the progressive discipline approach? Generally, counseling would be the first step. Otherwise, the use of suspensions and other disciplinary steps, short of discharge, may not be of much usefulness.
- **Rules Violated:** If the employee violated a rule, was the rule or order reasonably related to the efficient and safe operation of the work area?
- **Investigation:** Was the employer’s investigation conducted fairly and objectively and was it fully completed before it took action? Was there substantial evidence or proof that the employee had committed the offense, e.g., falsified his leave?
- **Degree of Discipline:** Was the degree of discipline administered in the particular case related to the seriousness of the employee’s proven offense and the employee’s work record? Are there mitigating factors that would affect the degree of discipline imposed?
- **Performance Improvement Plan:** Has the plan been effective? Has the employee been responding to the plan and improving? Has the employee complied with the terms and conditions of the plan?
- **Last Chance Agreement:** Following appropriate warnings and attempts to assist, it may be appropriate to negotiate a “last chance” settlement agreement in which continued employment is contingent upon satisfactory attendance.
- **Job Abandonment:** If an employee fails to report for work and fails to notify the employer of his or her absences, the district must still go through the disciplinary process to terminate the employee. In addition, in order to terminate on this basis, job abandonment must be a cause for discipline in the collective bargaining agreement.

Case in Point - Six Months Sufficient for Progressive Discipline

Muskegon Public Schools (Arbitration)⁶²

An employee was properly discharged for absenteeism and poor performance despite a good six-year record prior to the commencement of such problems. Following a personal crisis involving divorce and child custody issues, the employee exhibited severe absentee problems and poor performance over a six-month period. Despite his employer’s attempts to motivate the employee to improve through meetings, counseling and progressive discipline, his absenteeism and performance did not improve.

Bottom Line: Six months may be sufficient under some circumstances to complete progressive discipline.

Case in Point - Employer Failed to Comply with Own Policy

Shell Oil Products US (Arbitration)⁶³

The employer had an attendance management program that provided for progressive discipline consisting first of informal coaching or counseling before formal discipline. An employee's termination was overturned despite numerous incidents of attendance problems because the employer addressed them only at the informal level and rather than progressing through to the formal discipline stages before terminating the employee.

Bottom Line: Use progressive discipline, especially when district policy requires it.

4. HOW TO HANDLE THE UNIQUE SITUATION OF THE INCARCERATED EMPLOYEE

From the standpoint of managing absenteeism, the district must treat a leave request by an incarcerated employee, like any other request for unprotected leave due to special circumstances. For example, an employee who requests leave because he or she is about to be incarcerated for a month should be treated no differently than an employee of like seniority, performance history, etc., who requests a month's leave for some other special circumstances. Factors relevant to the employer's decision on whether or not to grant the leave generally include:

- The employee's prior attendance record;
- The employee's prior work performance record;
- The employee's length of service;
- The length of the incarceration;
- The stage of the criminal proceedings (before trial the presumption of innocence should weigh in the employee's favor);
- The inconvenience to the employer;
- The employee's compliance with notice and leave request provisions; and
- Past practice.

Employers should avoid confusing the absenteeism aspect of incarceration with the conduct or alleged conduct that gave rise to the incarceration. They are two separate issues. Whether the employee should be disciplined for the conduct that gave rise to the incarceration will depend on whether there is a close enough nexus between the conduct and the workplace, such as when the criminal act:

- Occurred on the district premises;
- Within the scope of employment; or
- Is of such a nature that the employer is affected (i.e., the reputation of the district).

Case in Point - Employee Convicted for DUI

Westvaco (Arbitration)⁶⁴

An employee was unjustly discharged as a result of a drunk-driving conviction resulting in a 90-day incarceration. The employee had demonstrated many years of good service with the employer, his absence did not inconvenience the employer, his crime was not related to his work, and his alcoholism did not affect his job performance. Thus, the worker was reinstated.

Bottom Line: When the crime is not related to the employee's job position, it should not be a basis for termination.

Case in Point - Employee Requests 274 Days Off

Westinghouse Materials Co. of Ohio (Arbitration)⁶⁵

A company did not act in an arbitrary and capricious manner in failing to extend a grievant's leave of absence in order for him to fulfill his jail and probation sentence. The employee was an admitted alcoholic and received an alcohol-related jail sentence for which he requested a leave of absence. The company denied his request for 274 days of leave and instead provided 30 days' leave plus one week of vacation to clear things up with the court. He was unable to do so and claimed his leave should be extended due to his extraordinary circumstances. The company properly denied the extension where the employee had brought his problems upon himself.

Bottom Line: Employers have no obligation to extend unreasonable amounts of leave time for an incarcerated employee.

G. RESPOND TO INSTITUTIONAL CAUSES

As noted earlier, administrators, managers and supervisors should not assume that an absenteeism problem is completely attributable to the employee. Even in an abuse of leave situation, when the employee is clearly responsible for wrongdoing, it is possible that poor morale or poor supervisory skills were a contributing factor.

1. SIGNS OF AN INSTITUTIONAL PROBLEM

Administrators, managers and supervisors should evaluate whether there are institutional or systemic problems when circumstances like the following exist:

- The absenteeism problem is uncharacteristic of the employee (e.g., a great employee with years of perfect attendance starts logging absences on Mondays and Fridays); and
- Similarly-situated employees (e.g. same department, manager) have the same absenteeism issues.

2. DIAGNOSING INSTITUTIONAL PROBLEMS

Administrators, managers and supervisors who believe that institutional problems exist within their district should evaluate the adequacy of their absenteeism prevention measures. The following checklist will help with this evaluation:

Checklist: Questions That Detect Institutional Problems

Communication of Attendance Standards

- Has the district clearly articulated and consistently enforced attendance policies?
- Has the district adequately warned that disciplinary action could result if the attendance failed to improve?
- Did the district give the employee adequate opportunity to improve his or her attendance record?

Quality of Job or Workplace

Do the employees with the absenteeism problems:

- Share any other work-related similarities that might point to an institutional problem, such as the same department, manager, facility or job duties?
- Have on file similar grievances or complaints regarding working conditions?
- Is there a visible attendance or performance problem with managers?
- Has there been a recent reorganization of work or reduction in staff that has affected the employees in question?
- Do employees feel free to discuss their on-the-job problems?
- Are managers approachable; do they have an open-door policy?
- Do managers listen?
- Is the work environment team-focused and supportive?
- Does the district encourage self-confidence and professional growth?
- Does the district regularly recognize employees, in meaningful ways, for their contributions?
- Are employees satisfied with their economic compensation?
- Do employees have the opportunity to utilize their skills and learn new skills?
- Do employees generally enjoy their work?

Work-Life Issues

Do the employees with the absenteeism problems:

- Have work site(s) accessible to public transportation?

- Have work site(s) in an area of high rush-hour traffic?
- Have young children?
- Have they recently requested and been denied a leave?
- Do they have a history of performance problems?
- Have they exhausted available leave?

Once a manager or supervisor has diagnosed any institutional problems, the manager or supervisor should establish a concrete plan for improvement and set realistic targets for reduction of absenteeism.

CONCLUSION

The challenges facing educators in today's world are ever-expanding and ever-changing. The need to effectively manage staff has always been, and will always remain at the top of that challenge list. Administrators, managers and supervisors must be flexible, responsive and constantly in touch both with the employees they manage and the rapidly evolving laws and obligations that govern most aspects of their management.

This workbook is not an all-inclusive guide on management techniques or attendance issues, but rather a starting point from which a manager might fashion philosophy, practices and steps to most effectively manage staff.

APPENDIX A

DAILY TIME ANALYSIS

Time	Action	*Priority Code	**Disposition
8:00			
8:30			
9:00			
9:30			
10:00			
10:30			
11:00			
11:30			
12:00			
12:30			
1:00			
1:30			
2:00			
2:30			
3:00			
3:30			
4:00			
4:30			
5:00			
5:30			
Evening			

***Priority Code**

- 1 – important & urgent
- 2 – important, not urgent
- 3 – urgent, not important
- 4 – routine

****Disposition**

- Complete
- Follow-Up
- Delegate to
- Train
- Eliminate
- Consolidate
- Other

APPENDIX B

SAMPLE NOTE TO SUPERVISOR'S FILE

August 21, 2013; 3:30 p.m.

At this time, I observed John Quay sleeping at his desk. I approached Quay and shook his shoulder until he woke up. Quay was startled and expressed surprise that he had fallen asleep. I advised Quay that sleeping in the office was not acceptable because he was not getting any work done. In addition, I told Quay that students who came to the counter could see him sleeping which would undermine the credibility of the District. Quay told me that he was very sorry and must have fallen asleep because he had a “rough night” last night and was forced to sleep on the couch. I told Quay that I did not have to know the details, but that I expected him to not fall asleep at his desk again. I instructed Quay that in the future he should advise me if he felt sleepy and perhaps we could arrange for him to take a short break. Quay assured me that he would do this in the future and again reiterated that it would not happen again.

APPENDIX C

SAMPLE MEMO TO EMPLOYEE WHICH WOULD BE INCLUDED IN SUPERVISOR'S FILE AND GIVEN TO EMPLOYEE

To: John Quay
From: Susan Spears
Date: August 22, 2013
Re: Meeting of August 21, 2013

Before I summarize the content of our meeting yesterday, I want to thank you for your participation and cooperation in the matter.

Yesterday, I observed you sleeping at your desk at approximately 3:30 p.m. I woke you up and advised you that sleeping at your desk was contrary to the District's rules, and projected a negative image to the public.

During the meeting, you assured me that you would not engage in this conduct again and characterized it as an unusual occurrence. During the meeting, I also advised that you could come to me if you felt like you needed a break in the future so that we could try to schedule a break so you could rest.

If this is not an accurate summary of our meeting, please notify me in writing by August 31, 2013. If I do not hear from you, I will assume that the above is an accurate summary of our meeting.

APPENDIX D

SAMPLE INTERVIEW COUNSELING MEMORANDUM

Date _____
To [Employee]
From [Supervisor]
Subject [Conference of _____ (date)]

This is to summarize our conference on the above date.

- A. During the conference, we discussed the following items:
(Insert a short description, but be specific and complete.)
- B. During the conference, you stated the following:
(Use this paragraph only if the employee makes statements significant to the issue.)
- C. During the conference, I offered you the following assistance and guidance
 - 1. Be specific. Spell out the help offered. Do not generalize.
 - 2. Include the names of individuals you suggested could help the employee, training the employee could attend, publications the employee could read, etc.
- D. During the conference you were directed to: Specifically indicate the direction given to the employee

If you do not believe this to be an accurate summary of our conference, please notify me in writing by _____ so we can clarify any misunderstandings.

APPENDIX E

SAMPLE WRITTEN REPRIMAND

(The purpose of a written reprimand is to make a permanent record of a specific violation. A copy of the written reprimand is forwarded to the Personnel Office for retention in the employee's permanent personnel file. The original memo should go to the employee and the supervisor should retain a copy for his or her file.)

Date: September 14, 2013
To: Bill Jones
From: Jerry Smith
Subject: Tardiness

(Start out by stating in a brief and concise manner those events that have led up to the written reprimand. Include specific situations; dates and times.)

On September 10, 2013, you arrived to work forty (40) minutes after your scheduled start time. As you will recall, I spoke to you on June 3, 2013 regarding returning to work ½ hour after your scheduled lunch period. I spoke with you again on July 13, 2013 regarding coming to work twenty (20) minutes after your scheduled start time. Finally, I spoke with you last week concerning coming to work forty (40) minutes after your scheduled start time. You did not notify me on any of these occasions that you would be arriving at, or returning to work late.

As a result of the above conduct, this memo shall serve as a written reprimand, a copy of which will be placed in your personnel file.

(Identify the specific expectations you have for the employee)

I expect you to be familiar with your scheduled hours and to report to work on time. I also expect you to return from lunch on time. Tardiness affects the entire workforce by requiring other employees to fill in for you and perform your duties as well as their own duties. In addition, excessive tardiness detrimentally affects the quality and services we provide to the public. In addition, you must inform me immediately upon learning that you will be tardy to work. Despite previous counseling on this subject, you continue to violate the rules regarding tardiness.

(Depending on the nature of the situation, you may want to use one of the following where appropriate)

Further action of this nature could result in further disciplinary action, up to and including dismissal.

(or)

Failure to correct this situation could result in further disciplinary action up to and including dismissal.

If you wish to discuss this situation further, please arrange a meeting with me.

This reprimand will be placed in your personnel file. You may respond in writing. Any written response will also be placed in your personnel file.

(If the employee has any right to appeal or grieve, you will want to reference the appeal or grievance procedure)

APPENDIX F

CREATING ABSENTEEISM STANDARDS

A. CREATE STANDARDS THAT WORK FOR YOUR DISTRICT

The crucial first step for any district in preventing and controlling absenteeism is to establish clear standards for what constitutes “excessive” and “abusive” forms of leave. Districts who fail to define these absenteeism standards will find themselves:

- Unable to distinguish between “normal” and “excessive” levels of employee absences;
- Unable to control employees who are abusing the system;
- In danger of neglecting statutory leave law protections when responding to absenteeism;
- Unable to articulate why instances of excessive (non-statutorily protected) or abusive absenteeism is a basis for disciplinary action; and
- Vulnerable to legal challenges of discrimination because of inconsistent responses to absenteeism.

In developing absenteeism standards, a district’s policy makers may want to review and consider definitions that other community college districts of similar size and type have successfully implemented. Employers may also want to consider definitions established by federal, local or private experts. Ultimately, however, employers should develop definitions that meet the unique needs of the district in a workable and practical way.

One reason employers need to define “absenteeism” is because in general usage, the term can be construed very broadly – referring to any time that employees are not present for work during their working hours. Under this definition, “absenteeism” includes all forms of absences – legitimate and illegitimate, statutorily protected and unprotected, frequent, and sporadic. Because absenteeism generally poses a problem for employers only when it is excessive or abusive, employers may find such a broad definition impractical and unworkable for purposes of enforcing good attendance in the workplace.

A more functional definition is the one used by the U.S. Bureau of Labor Statistics: “absences” are “any unscheduled time off from work for reasons of illness, injury, or medical problems; child-care problems; other family or personal obligations; civic or military duty; and maternity or paternity leave.”⁶⁶ This definition may work for some agencies, but not for others. The goal for any district is to choose a definition that is clear and workable for the district.

B. WHAT TO INCLUDE IN THE DEFINITION

At a minimum, any definition of “absenteeism” adopted by the employer should address the following:

- What constitutes excessive leave;
- What constitutes abuse of leave;
- What constitutes unauthorized use of leave; and
- Include tardiness

While tardiness may not appear to warrant the same level of concern as full absences, it can be a form of both abuse and excess. Tardiness is – and should be treated as – a form of absenteeism. Just like full absences, tardiness can disrupt workflow and reduce productivity and morale. Arriving late for work, leaving early, or taking excessively long lunch breaks all fall within the category of tardiness. Chronic tardiness should be analyzed as an absenteeism issue to determine if the tardiness is excessive, abusive, or signals a possible health issue.

C. WHAT NOT TO INCLUDE IN THE DEFINITION

In defining “absenteeism,” the District should take care **not** to confuse the failure to attend work with performance issues that take place when the employee *is at work* – such as inefficiency, conducting personal activities on district time, horseplay, or sleeping on the job. While absenteeism might result in low productivity, for example, the conduct at issue is not how the employee is performing his or her work, but the employee’s failure to attend work.

D. DEFINING “EXCESSIVE”

“Excessive” absenteeism need not be defined as simply more absences than an employee has accrued leave. Rather, excessive absenteeism is that level of absence that significantly disrupts the work of your district or department.

The definition should be specific enough to allow for objective rather than subjective evaluation of whether absenteeism has become excessive in a given case. Additionally, it should be specific enough to provide an identifiable standard that employers can communicate to employees and to which employees can thereafter be held accountable.

1. CONSIDER DISTRICT-SPECIFIC CRITERIA

The key to developing a functional definition of “excessive” is to consider the district’s unique characteristics. The definition of “excessive” will vary from employer to employer because different districts can tolerate different degrees of absenteeism. Similarly, within each district, different departments, and divisions may have varying levels of tolerance. District and department-specific factors include:

- Size of district, department or division;
- Number of employees;
- Number of similar positions;
- Manner of work organization;
- Scheduling methods;
- Nature of product or service;
- Feasibility of job-reassignment to existing or temporary employees; and
- Degree of technical skill or expertise required by the position.

2. WHAT NOT TO INCLUDE IN THE DEFINITION

a. *Do Not Equate with Exhausting Leave Balances*

Employers need not define excessive absenteeism as absences in excess of accrued leave. Absenteeism may be “excessive” although the employee is still able to draw upon accrued leave accounts, i.e., sick leave, vacation leave, or compensatory time. The touchstone for “excessive” leave is whether the level of absenteeism interferes with the smooth operation of the district.

b. *Exclude Use of Protected Leaves*

Because the primary purpose of defining “excessive” is to establish a standard to which employees will be held accountable from a performance standpoint, it is crucial that the definition expressly exclude use of protected leave. All of the protected leave laws expressly prohibit any form of discipline in response to the exercise of a protected leave right. Placing this concept in the district’s policy will better assure that those “protected” leave rights are respected, thereby reducing the risk of a lawsuit for violation of such leave rights.

3. PRACTICAL METHODS FOR DEFINING “EXCESSIVE”

Districts that need to develop a definition of “excessive” may want to use one of the approaches listed below:

- **District average:** A district may define excessive absenteeism as absences that number well above the district or department’s average. Districts wishing to utilize this definition must compile records necessary for the calculation of average absenteeism. Payroll and other personnel records likely provide the required information. However, districts that believe they are experiencing a widespread absenteeism problem should avoid this method, as the district will not want to communicate that its current “average” reflects an acceptable level of absence.
- **Ratio of scheduled hours to worked hours:** A district may also establish standards for acceptable versus unacceptable levels of absence by defining the acceptable minimum ratio of employee scheduled days or hours to days

or hours actually worked. The standard may take into account historical information, such as number of separate instances of absenteeism, length of absences and pattern of absences (e.g., Monday/Friday pattern). Thus, different employers may arrive at different levels of acceptable absence.

- **Point system:** Some employers utilize a “point system” to establish standards of acceptable versus unacceptable absenteeism. Under this system, employees receive different point values for each incident of tardiness, failure to call a supervisor in advance of an absence, an absence of a day or less, etc. Under this system, employees have notice of the level of discipline that the district will impose based upon the accumulation of point amounts. The point system method has been used most frequently in the private sector, but it can be equally effective for public agencies.

E. DEFINING “ABUSE”

The definition of “abuse,” like “excessive,” should be developed according to the district’s individual needs and unique characteristics.

1. CONSIDER DISTRICT-SPECIFIC CRITERIA

Districts may want to consider the following types of factors:

- The number of employees;
- Recurring types of abuse in the district’s history;
- The type of employees, i.e., supervisory, classified, or line; and
- Past areas of uncertainty or confusion when the district had to evaluate instances of possible abuse.

2. WHAT TO INCLUDE IN THE DEFINITION

Districts may want to include the following types of abuse:

- Use of leave for a purpose other than the one set forth in district policy, or otherwise authorized by management;
- Any misrepresentation concerning requests for leave or use of leave;
- Taking unauthorized leave;
- Failure to follow district policies on obtaining authorization for leave;
- Failure to maintain scheduled working hours;
- Failure to report or record leave when taken;
- Failure to adhere to district policies on leave entitlement;
- Coming to work late, leaving work early, taking extended breaks, or taking lunch hours beyond the allotted time; and

- Chronic, persistent, or patterned use of sick leave.

Note that abuse of leave need not be confined to instances of dishonesty; it can be defined to encompass willful and negligent failures to adhere to attendance and leave policies.

APPENDIX G

WRITTEN PERSONNEL POLICIES

Clear, well-disseminated policies and procedures are the cornerstone to any effective strategy for controlling and preventing absenteeism. Policies and procedures should make clear the employer's expectations and the consequences for failing to meet those expectations.

Checklist: What to Include in Absenteeism Policies

- Clearly define acceptable and unacceptable levels of absenteeism;
- Define key terms: e.g., authorized leave, unexcused absence, tardiness;
- Provide specific procedures for calling in and obtaining approval for leave;
- Describe conditions under which medical verification may be required;
- Describe conditions under which employee may be sent for fitness for duty exam;
- Set forth consequences for abusing leave and excessive absenteeism;
- Communicate district philosophy, e.g., that improper use of leave is dishonest, including a single absence taken under false pretenses;
- Notify employees that a “pattern” of suspected leave abuse (e.g., Friday/Monday syndrome) constitutes a reasonable basis for investigation and may require verification;
- Clearly communicate there will be disciplinary sanctions for abuse of leave and unprotected excessive leave’
- Ensure consistent application of procedures for requests for leave, extensions of leave, and returns from leave (do not become lax in your enforcement!);
- Remind employees that regular attendance, honesty and reliability are employee performance factors, as well as evaluative criteria for the employer; and
- Retain district discretion to make exceptions to consequences for absenteeism for extenuating circumstances.

Sample Policy Provisions

The following have been excerpted from various district policy manuals and agreement clauses as examples of reasonable standards for use of leave and control of excessive absenteeism:

Sample Definitions

- “Authorized Absence” is permission to be absent from duty for a specified purpose, with the right to return before or upon the expiration of the leave.
- “Unexcused Absences” are those that have not been approved in accordance with district policy, e.g., absent without calling in, leaving work early without prior approval.

- ❑ “Tardiness” is the failure of the employee to report to work at the commencement of the scheduled shift or workday or the failure to return to work at the scheduled time following a meal break or rest period.
- ❑ “Abuse of Sick Leave” means the misrepresentation of the actual reason for taking sick leave, using sick leave for unauthorized purposes, failure to report sick leave, and may include chronic, persistent, or patterned use of sick leave.

Sample Counseling Provision

- ❑ Employees who demonstrate attendance problems shall first be counseled by their immediate superior. If problems persist for one month, a written reprimand shall be issued and the employee shall be counseled by the director. If an employee has a personal health, physical or emotional problem, he or she shall be referred immediately for assistance.

Sample Statement of District Position

- ❑ The district’s successful operation depends in large part upon the attendance of each of its employees. You have an important job that fits into a pattern of service. Unnecessary and unexcused absences, therefore, are undesirable because they affect not only operations but the way in which fellow employees are able to do their jobs. It is important, too, to have a uniform attendance policy to avoid any misunderstandings regarding attendance expectations.

Sample Personnel File and Records Provisions

- ❑ Reprimands for attendance will become a part of the employee’s permanent personnel record.
- ❑ Each supervisor will maintain attendance records on employees.

Sample Absence Reporting Procedure

- ❑ Any employee who is unable to report for work or who will be delayed is responsible for insuring that his or her immediate supervisor is notified within one hour after the regularly scheduled starting time or, in an emergency situation, as soon as is practical.
- ❑ In all cases of absenteeism or lateness, the immediate supervisor will determine whether the facts call for a charge against sick leave, an excused absence, or a pay deduction. Immediate supervisors should review the attendance record of each employee and review periodically the frequency of absences and lateness of each employee. In cases of continued unsatisfactory employee attendance or punctuality, the immediate supervisor will issue a written warning to the employee with a copy to the Personnel Department.
- ❑ Further incidents of lateness or absence will be grounds for further disciplinary action.

Sample Sick Leave Provision

- Sick leave is a privilege granted employees to allow the continuation of pay and fringe benefits in case of personal [or family] illness, [injury or death]. Sick leave is not an earned right to be taken as earned vacation. Sick leave is accumulated at the rate provided in the Education Code or in the applicable collective bargaining agreement provision.

Sample Sick Leave Verification Requirement

- Employees may be required to furnish reasonable acceptable evidence, including a doctor's certificate, to substantiate a request for sick leave if an employee uses sick leave. Having a rule permitting the employer to require a doctor's note after only one day of sick leave allows the verification process to dissuade abuses of sick leave.

Sample Disciplinary Provision

- Any unauthorized absence may constitute cause for disciplinary action, up to and including discharge from employment.
- If it appears that an employee is abusing sick leave or is using sick leave excessively, the employee will be counseled that continued use of sick leave may result in a requirement to furnish a medical certificate for each such subsequent absence for sick leave regardless of duration. Continued abuse of leave or excessive use of sick leave constitutes grounds for dismissal.

ENDNOTES

- 1 e.g., Ed. Code, §§ 88027, 88040.
- 2 Gov. Code, § 3540, et seq.
- 3 *N.L.R.B. v. J. Weingarten, Inc.* (1975) 420 U.S. 251 [95 S.Ct. 959].
- 4 Ed. Code, § 87031.
- 5 *Miller v. Chico Unified School District, Board of Education* (1979) 24 Cal.3d 703 [157 Cal.Rptr. 72].
- 6 Ed. Code, § 87732.
- 7 Ed. Code, § 88013.
- 8 Ed. Code, § 88013(a).
- 9 Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964); California Fair Employment and Housing Act - FEHA - Government Code 12900 – 12996.
- 10 WBI-ZOGBY Survey, 2007.
- 11 The Silent Epidemic: Workplace Bullying, Ray Williams in *Wired for Success*, May, 2011.
- 12 The Impact of Leader Behavior on Employee Health: Lessons for Leadership Development, Richard Williams Ph.D., Wallace Higgins M.B.A. and Harvey Greenberg M.S., M.B.A.; NEHRA Articles, February 2011.
- 13 *In re Carrier Air Conditioning Co. and Sheet Metal Workers' International Association, Local 483* 1995 WL 787161, 105 Lab. Arb. (BNA) 756.
- 14 *Niemand Industries, Inc.* (1987) 88-1 ARB 3333.
- 15 *In re Sprague Devices, Inc. and International Association of Machinists and Aerospace Workers, District Lodge 72* (1982) 79 Lab. Arb. (BNA) 543; see also *Menasha Corp.* (1987) 88-1 ARB 3708.
- 16 *City of Berkley*, 2003 WL 21029521.
- 17 Ed. Code, § 87780.
- 18 Ed. Code, § 88196.
- 19 Ed. Code, § 87786.
- 20 Lab. Code, § 3600, et. seq.
- 21 Lab. Code, §§ 5400-5401.
- 22 *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658 [150 Cal.Rptr. 250].
- 23 *Kimbrow v. Atlantic Richfield Co.* (9th Cir. 1989) 889 F.2d 869, petition for writ. den. (1990) 498 U.S. 814 [111 S.Ct. 53].
- 24 *Gore v. GTE South, Inc.* (M.D. Ala. 1996) 917 F. Supp. 1564, 1572 (operators); *Tyndall v. National Educ. Centers, Inc. of California* (4th Cir. 1994) 31 F. 3d 209, 213-214 (teachers); *Salmon v. Dade County School Board* (S.D.Fla., 1998) 4 F.Supp.2d 1157, 1162 (counselors); *Corr v. MTA Long Island Bus* (E.D.N.Y., 1998) 27 F.Supp.2d 359, 366-367, aff. (2d Cir. 1999) 199 F.3d 1321 (bus driver); *EEOC v. Ford Motor Co.* (6th Cir. 2015) 782 F.3d 753 (resale buyer for automotive company).
- 25 *Salmon v. Dade County School Bd* (S.D.Fla., 1998) 4 F.Supp.2d 1157.
- 26 *Kimbrow v. Atlantic Richfield Co.* (9th Cir. 1989) 889 F.2d 869, petition for writ. den. (1990) 498 U.S. 814 [111 S.Ct. 53].
- 27 *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, petition for writ. den. (2002) 535 U.S. 1011 [122 S.Ct. 1592].

28 *EEOC v. Ford Motor Co.* (6th Cir. 2015) 782 F.3d 753
29 29 C.F.R. § 825.114; Cal. Code Regs., tit. 2 § 7297.0.
30 29 C.F.R. § 825.126(a).
31 29 C.F.R. § 825.126(b)(1), (2).
32 29 C.F.R. § 825.100(a).
33 29 C.F.R. § 825.302(a).
34 29 C.F.R. § 825.127(a), (c).
35 29 C.F.R. § 825.127(a)(1).
36 29 C.F.R. § 825.127(c).
37 29 C.F.R. § 825.127(c)(1).
38 29 C.F.R. § 825.127(c)(2).
39 29 C.F.R. § 825.127(c)(2).
40 29 C.F.R. § 825.127(c)(4).
41 29 C.F.R. § 825.127(c)(4).
42 29 C.F.R. § 825.302(a).
43 29 C.F.R. § 825.303(a).
44 38 U.S.C. § 4313(a).
45 Mil. & Vet. Code, § 395.1(a); 38 U.S.C. § 4312(e)(1).
46 38 U.S.C. § 4312(e)(3).
47 Mil. & Vet. Code, § 395.1(b).
48 38 U.S.C. § 4312(d)(1).
49 Fam. Code, § 6211.
50 “Sexual assault” means any of the crimes set forth in sections 261, 261.5, 262, 265, 266, 266a, 266b, 266c,
51 266g, 266j, 267, 269, 273.4, 285, 286, 288, 288a, 288.5, 289, or 311.4 of the Penal Code, as amended.
52 “Stalking” means a crime set forth in Section 646.9 of the Penal Code or Section 1708.7 of the Civil Code.
53 It is not clear whether districts may apply excessive absence policies to high rates of usage of the 10 days’
54 leave. A district may argue that, although there is an entitlement to 10 days, employees must use this leave in a
55 manner that is not excessive, as defined by district policy. On the other hand, an employee could argue that the
56 district cannot restrict a statutory leave entitlement. There is no definitive statutory or case law on this issue.
57 *Worcester Quality Foods, Inc.* (1988) 88-2 ARB 5187.
58 *In re ABM Space Care, Inc. and Service Employees International Union, Local 47* 1995 WL 629062, 105 Lab.
Arb. (BNA) 199.
Waddy v. Sears, Roebuck & Co. (N.D.Cal., 1994) 1994 WL 392483, 11 (not reported in F.Supp.) (*affirmed on
other grounds, Waddy v. Sears, Roebuck & Co.* (9th Cir. 1996) 97 F.3d 1463 (unpublished)).
Gov. Code, § 12940.
Roby v. McKesson Corp. (2009) 47 Cal.4th 686 [101 Cal.Rptr.3d 773] Reported in the San Francisco Daily
Journal, May 10, 2004; See also, Kalb, Loretta, *\$19 million for fired worker*. SACRAMENTO BEE, May 5, 2004,
at Business Section (Web).
29 C.F.R. § 825.305(a); Cal. Code Regs., tit. 2, § 7297.11.

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- ⁵⁹ 29 C.F.R. Pt. 1630, App.; Gov. Code, § 12940(f)(1), (2); *Yin v. State of California* (9th Cir. 1996) 95 F.3d 864 (exam limited to whether there is a disability and the extent of the disability); *Sullivan v. River Valley School Dist.* (6th Cir. 1999) 197 F.3d 804, 811 (exam limited to employee's job performance capability).
- ⁶⁰ Civ. Code, § 56.10(c)(8)(B).
- ⁶¹ Lab. Code, § 3762(c)(1), (2).
- ⁶² *In re Muskegon Public Schools and Non-Instructional Employees Association* 1990 WL 138411, 94 Lab. Arb. (BNA) 1316.
- ⁶³ *Shell Oil Products U.S.* (2004) 2004 WL 2260856.
- ⁶⁴ *Westvaco* (1985) 85-1, ARB 8279.
- ⁶⁵ *Westinghouse Materials Co. of Ohio* (1987) 88-1, ARB 8128.
- ⁶⁶ Absence rates and occupation, 2004, Bureau of Labor Statistics, Published February 14, 2005.

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