



Employment Practices Guidelines

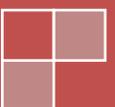


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EMPLOYMENT PRACTICES GUIDELINES

INTRODUCTION

The area of employment law is constantly changing and has become fertile ground for litigation between employees and employers. This trend is readily apparent in the claims experience of ASCIP members, not only from a frequency of claims perspective but also from the high cost of defending these claims.

ASCIP strongly believes that claim prevention stems from empowering our members with the knowledge to make the right employment decisions through the various employment practice phases; recruitment, hiring, disciplining, and terminating employees. Members that have the best employment law background when making decisions in these areas will be better prepared to avoid and/or minimize their exposure to employment practices liability claims.

ASCIP has developed this Guide to assist members in implementing appropriate procedures to prevent an employment practice claim. This is by no means a complete and exhaustive guidebook on employment practices. Understanding all of the various nuances of employment law is complex and members should consult with counsel in implementing any practice, policy or decision that affects the district.

In addition to this Guide, we also encourage our members to take advantage of our ASCIP HR Hotline to assist you in implementing your employment practices liability procedures and policies. Collectively, we believe that they will give you a general understanding of the issues that you need to be aware of before making critical decisions that could result in a claim.

FEDERAL LAWS GOVERNING RECRUITMENT, HIRING, DISCIPLINE AND TERMINATIONS

The following federal laws apply to public sector school employers with respect to recruitment, hiring, disciplining and terminating of employees. You should have a general idea of how these laws affect you.

I. TITLE VII – CIVIL RIGHTS OF 1964 AND CIVIL RIGHTS ACT OF 1991

Title VII prohibits discrimination in recruitment, hiring, discipline and termination based on certain protected categories.

- Race/Color
- National Origin
- Gender (including same sex harassment)
- Religion

Title VII makes it illegal to discriminate against someone based on the protected categories stated above. It also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an

employment discrimination investigation or lawsuit. This law applies when making decisions with respect to recruitment of applicants for positions with an employer, the hiring of applicants, the disciplining and terminating of employees. Any such actions based on any of the protected categories stated above could potentially violate Title VII of the Civil Rights Act.

II. THE PREGNANCY DISCRIMINATION ACT

This law amended Title VII to make it illegal to discriminate against a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. This law also makes it illegal to retaliate against the person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

III. THE EQUAL PAY ACT OF 1963

This law makes it illegal to pay different wages to men and women if they perform equal work in the same workplace. The law also makes it illegal to retaliate against the person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

IV. AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (ADEA)

Age discrimination involves treating someone less favorably than another person because of his or her age. The ADEA forbids age discrimination against people who are age 40 or older but it does not protect workers under the age of 40. The ADEA forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, and any other term or condition of employment. It also makes it unlawful to harass a person because of his or her age. Examples of age discrimination/harassment can include:

- Offensive remarks about a person's age
- Giving an older worker less desirable work assignments due to his or her age
- Denying fringe benefits and perks due to the person's age

V. THE AMERICANS WITH DISABILITIES ACT OF 1990 (ADA)

This law makes it illegal to discriminate against a person with a disability and the law also requires employers to reasonably accommodate the known physical or mental limitations of a qualified individual with the disability unless doing so would impose an undue hardship on the operations of the employer. The law also makes it illegal to retaliate against the person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Disability discrimination occurs when an employer treats a qualified individual with a disability unfavorably because of that disability or because the employee is believed to have a physical or mental impairment. In addition, the law requires the employer to provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer. This is also known as "undue hardship."

The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits and any other term or condition of employment.

The law requires an employer to provide reasonable accommodation to an employee or job applicant with a disability unless it would cause an undue hardship. A reasonable accommodation is any change in the work environment to help the person with the disability apply for a job, perform the duties of a job, or enjoy the benefits and privileges of employment. For example, it could mean making the workplace accessible for wheelchair users or providing a reader or interpreter for someone who is blind or hearing impaired.

VI. THE GENETIC INFORMATION NON-DISCRIMINATION ACT OF 2008 (GINA)

This law makes it illegal to discriminate against employees or applicants because of genetic information. Genetic information is information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder or condition of an individual's family members. The law also makes it illegal to retaliate against the person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

PROHIBITED EMPLOYMENT PRACTICES

The federal laws previously described prohibit certain types of employment practices that relate to the protected category of individuals relating to race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. The following information provides an overview of prohibited activity associated with common employment practices.:

I. JOB ADVERTISEMENTS

It will be illegal for an employer to publish a job advertisement that shows a preference or discourages someone from applying for a job because of his or her race, color, religion, s For example, it will be illegal if an employer had a job advertisement that only sought "females" or "recent college graduates" because this would discourage men and people over 40 from applying for those positions and this may violate the law.

II. RECRUITMENT

It would be illegal for an employer to recruit new employees in a way that discriminates against them because of their race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. For example, if an employer's recruitment plan was based solely on word of mouth recruitment by its mostly Asian workforce, it may violate the law if the result is that almost all new hires are Asian.

III. APPLICATION AND HIRING

It would be illegal for an employer to discriminate against a job applicant because of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. The employer may not base hiring decisions on stereotypes and assumptions about a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. If a job applicant with a disability needs an

accommodation to apply for a job, the employer is required to provide the accommodation, so long as the accommodation does not cause the employer significant difficulty or expense.

IV. JOB ASSIGNMENTS AND PROMOTIONS

It would be illegal for an employer to make decisions about job assignments and promotions based on an employee's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not give preference to employees of a specific race while making job assignments and may not segregate employees based on any of these protected categories from other employees or from customers.

Along similar lines, an employer may not make promotional decisions based on stereotypes and assumptions about a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

V. PAY AND BENEFITS

It would be illegal for an employer to discriminate against an employee in the payment of wages or employee benefits on the basis of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Example of employee benefits includes sick and vacation leave, insurance, access to overtime, and retirement programs. For example, it will be illegal for an employer to pay African-American workers less than Hispanic workers due to their national origin and men and women in the same workplace must be given equal pay for equal work.

VI. DISCIPLINE AND DISCHARGE

It will be illegal for an employer to take into account a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information when making employment related decisions about administering discipline or discharge. As an example, if two employees make a similar offense, an employer may not discipline them differently because of these protected categories.

Along similar lines, when making a decision on layoffs, an employer may not choose the older worker simply due to the worker's age.

VII. HARASSMENT

It will be illegal to harass an employee because of the employee's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It would also be illegal to harass somebody because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Harassment can take many forms in the workplace and typical examples would be slurs, graffiti, offensive or derogatory comments, or other types of verbal or physical conduct. Sexual harassment can also include unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature. While the law does not prohibit horseplay, offhanded comments, even if isolated, can become illegal if it is so frequent or severe that it creates a hostile or offensive work environment.

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, a subordinate, or someone who is not an employee of the employer such as a student, parent, or vendor.

With these concepts in mind, the following section discusses best practices for employee recruitment, selection and hiring.

EMPLOYMENT RECRUITMENT AND HIRING BEST PRACTICES

Among the most important decisions an employer will make is making good hiring decisions. This requires careful planning, proper investigation and a small degree of intuition to anticipate potential human resource and legal issues before they become a problem. The following guidelines are intended to provide tools to assist you in selecting the right candidates, taking these candidates through the hiring process and ultimately making the decision to hire the ideal candidate for the position. The employer should assess the applicability and usefulness of any particular guideline mentioned here to your particular circumstances and if necessary, consult your legal counsel if you have questions regarding this process. Creating a consistent hiring process will help you streamline this task. This process should be comprised of several elements as follows:

1. Accurate job descriptions.
2. Appropriate posting and advertising for the position.
3. A thorough job application.
4. Appropriate screening of applicants.
5. The interview process.
6. The conditional job offer.
7. The background investigation.

I. JOB DESCRIPTIONS

A written job description serves as a tool to appropriately attract, advertise and screen the candidate that will ultimately hold the position. The job description is also used to determine the training, safety and essential job duties for that position. As such, the job description should be accurate and up-to-date, as this document will be used potentially in court to defend or support the employment decisions you will make with respect to an applicant or an employee in the position. The job description, at a minimum, should include the following:

- The "essential functions" of the job.
- Knowledge, skills and abilities required for the job.
- Minimum educational requirements.
- Preferred educational requirements.

- Minimum experience.
- Preferred experience.
- Necessary licenses, certifications.
- Physical performance or agility requirements.
- Tools, devices and aids needed for the job.
- Environment in which the job is performed.

Accuracy is key to a good job description and the employer may be required to audit the duties necessary for the position in order to revise and keep the job description current.

An important aspect of the job description is to have the essential functions of the job defined. This will provide a better way in establishing the requirements under the Americans with Disabilities Act when an employer is required to engage in the reasonable accommodation process should the employee become a qualified individual with a disability at some point in time.

Some tips to remember in reviewing your job description for accuracy:

- Make sure the job functions are truly necessary and are required in order to perform the job.
- Determine the frequency at which the task is performed and how much time is spent performing the task.
- Determine the consequences of not performing the functions and whether it will be detrimental to the employer's operations or result in severe consequences.
- Determine if the job duties can be redesigned or performed in another way.
- Determine if the task can be transferred to another employee.

II. POSTING AND ADVERTISING FOR THE POSITION

When deciding where to post and advertise for the position, it is important that you check your Handbook and/or Personnel Policies, and any collective bargaining agreements applicable for the position in question. These documents may give you requirements as to where the employer may post and advertise for the position. For example, some collective bargaining agreements may require the employer to post the positions internally first before advertising publically. A strategic plan as to the best areas of recruitment should also be considered in deciding where to post and advertise the position. It is important that applicants be recruited from geographically diverse areas in order to attract a diverse range of candidates for that

position. The employer should confirm these requirements with the employer's counsel if you have any questions as to where to advertise and post the position.

III. THE APPLICATION

The job application is the first contact an employer may have with all potential candidates and it will provide an opportunity to collect relevant and pertinent information to help the screening process. The application should collect relevant information that will assist the employer in screening and determining whether or not the applicant is qualified to perform the job. It is important that the application not solicit information that is beyond what is needed to make an employment decision. And most critically, the application should be anti-discriminatory and must not solicit information that would elicit information that is prohibited under the anti-discrimination and harassment laws. For example, the application should not solicit information regarding the age of the applicant, the race of the applicant, the marital status of the applicant or topics such as the applicant's religion, pregnancy status or other protected categories prohibited under Title VII.

You may never ask questions with respect to whether or not an applicant has been arrested but you may conduct a background check and seek any prior convictions during the background screening.

You may ask applicants if they are eligible to work in the United States but you may not ask if they are from a foreign country. Eventually, a background check will be conducted as part of the employer's due diligence in hiring the best candidate. It is critical that consent is obtained from the applicant to conduct such a screening. It is also important that you state in the employment application that the applicant certify that all the information in the application is true and correct to the best of the applicant's knowledge and that withholding pertinent information or submitting false or misleading information on the application or any time during the hiring process constitutes valid grounds for disqualification from the employment process and may lead to immediate dismissal from employment.

IV. SCREENING OF APPLICANTS

Once you have received your applications, it is important to screen them to determine whether or not the applicant meets the minimum qualification for the position. The screener may review the application and the job description to eliminate any applicant that does not meet the minimum requirements for the job.

V. INTERVIEWING APPLICANTS

Interviews provide an opportunity to discover more about the applicant's skill, personality and general compatibility and suitability for the position. The interview should also serve as an opportunity to learn about the applicant in order to determine whether or not he or she would be an appropriate fit for the position.

The anti-discrimination laws prohibit inquiries that solicit information with respect to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age or sexual orientation. "Sex" includes pregnancy, childbirth or

pregnancy related medical conditions and inquiries that solicit the person's gender or gender identity are generally prohibited.

There are questions that, when asked during the interview might elicit such information and could result in liability for the employer. It is therefore important to ask questions in such a way that pertinent information is given without eliciting information that runs afoul of the anti-discrimination and harassment laws.

Exhibit 1 contains a list of acceptable and unacceptable interview questions. This table serves only as a guide to questions that are permissible and questions that should be avoided or at a minimum, asked with a certain degree of caution. The guide is not an exhaustive list but illustrates the importance of being aware of the specific questions asked and the wording that can be used.

Exhibit 1 is not a comprehensive list of prohibited questions, it is suggested that you submit your questions to your legal counsel for consultation. It is advised that you follow your own list of standard interview questions based on the specific needs of the position. It is also important to train your interviewers in knowing the specific needs and job duties for the position, the requirements for the position and the types of questions that are legally prohibited by reference to the above guidelines of unacceptable questions.

VI. BACKGROUND INVESTIGATIONS

As part of an employer's due diligence in screening for the best applicant, the background investigation is an important tool to determine whether or not the applicant's representation of his or her qualifications, certifications, references and background is appropriate for the position in question. A typical background investigation would include matters such as verifying the educational requirements and licensing and/or certification requirements for the position, confirming an applicant's employment history and checking references and qualifications. It is advisable to have a signed release authorizing the employer to conduct a background check.

The types of background checks include, but is not limited to, the following:

- Educational degrees obtained
- Technical schools
- Licensing bureaus
- Personal references
- Credit checks for those positions that involve financial or accounting responsibilities

When conducting criminal background checks, employers should also be careful of the various laws that relate to the background check process. For example, the Equal Employment Opportunity Commission has investigated whether or not criminal background checks have a "disparate impact" on protected class members under Title VII.

VII. MEDICAL EXAMINATIONS

Pre-employment medical exams may be conducted after the applicant has been offered a job and only if the medical examination is given to all employees entering into a particular job classification. Employers should not require applicants to disclose personal medical information and to pass a medical exam without having successfully completed all the non-medical stages of the hiring process such as the background checks, the initial screening and the interviews. The offer of employment may be withdrawn on the basis of the results of the medical exam only if the applicant is unable to perform the essential functions of the job with reasonable accommodation, no reasonable accommodation exists, or the applicant poses a direct threat to the health or safety in the workplace and no reasonable accommodation would eliminate this risk or reduce it to an acceptable level.

To prevent discrimination against individuals with disabilities, the Americans with Disability Act prevents employers from requiring medical exams to determine the existence of the extent of a disability. The only exception is for “business necessity.” It is advisable that you consult your legal counsel if you have any concerns regarding the appropriateness of the medical examination.

EMPLOYMENT RETENTION BEST PRACTICES

I. FITNESS FOR DUTY EXAMS

Fitness for duty examinations are occasionally required by employers in order to determine whether or not an employee is able to perform the essential functions of the job. However, federal and state laws impose restrictions on when a fitness for duty exam can be given. As discussed previously, the medical examination can be given after a job offer has been made. However, fitness for duty examinations for current employees under the Americans for Disabilities Act are permissible as soon as the employer has a reasonable belief, based on objective factors, that the employee’s ability to perform the essential functions of the job are impaired by a medical condition or the employee poses a direct threat due to a medical condition. In addition, fitness for duty exams in response to an employee’s request for a reasonable accommodation is also appropriate when the disability or need for accommodation is not known or obvious. The employer will make an individual assessment and determine whether or not an evaluation is necessary.

Factors to Consider in Determining Whether or Not a Fitness for Duty Exam is Appropriate

In making an assessment as to whether or not a fitness for duty exam is appropriate, the following factors are considered in assessing whether information learned from another person is enough to justify a medical examination of an employee:

1. The relationship of the person providing the information to the employee about whom it is being provided;
2. The seriousness of the medical condition at issue;
3. The possible motivation of the person providing the information;

4. How a person learned about the information (i.e., directly from the employee whose medical condition is in question or from someone else); and
5. Any other evidence the employer has that bears on the reliability of the information provided.

The employer will assess the circumstances and determine whether or not a fitness for duty evaluation is necessary.

If the evaluation by the health care professional concludes that the employee is not able to perform the essential functions of the position, the employer should work with the employee in determining whether or not a reasonable accommodation is appropriate to afford the employee the ability to continue performing the position to the extent required by law. If an appropriate accommodation can be made, the employer may consider other options with the employee. It is highly advisable that you work with your legal counsel in this reasonable accommodation process.

The evaluation by the licensed health care professional should result in a written report that contains the following information:

1. A conclusion regarding the determination of the employee's fitness for duty;
2. A description of the nature and extent of any functional limitations on the employee's ability to perform the job;
3. A description of the expected duration of each functional limitation.

The results of this evaluation will be treated as confidential and kept in a separate file from the employee's personnel file.

II. DRUG TESTING

A common question that arises is whether or not employers can drug test employees for either legal or illegal drugs. In general, it is inappropriate for employees to report to work while under the influence of illegal drugs or alcohol as it poses a safety risk to themselves and to others with whom they work. Employers may ask employees to submit to a drug and alcohol test if the employee's supervisor or other person has reasonable suspicion to believe, based on objective factors, that the employee's ability to perform the functions of the job is impaired or present a safety and/or security risk.

These objective factors can include, but are not limited to, the following:

1. Employee's appearance
2. Behavior
3. Odor of alcohol
4. Blood-shot eyes
5. Unsteady walking or movement

6. Slurred speech
7. Engages in safety violations at work
8. Accidents involving employer's property
9. Physical altercation
10. Unusual behavior
11. Verbal altercation
12. Possession of alcohol or illegal drugs

The law does not require the employee to possess all of the above factors as each situation is assessed on a case by case basis.

Employees suspected of working while under the influence of illegal drugs, including marijuana, or alcohol should be placed on paid administrative leave until the employer receives the results of the drug or alcohol test from the testing facility and any other information the employer may require to make an appropriate investigatory determination.

All drug and alcohol testing under any policy adopted by an employer should be conducted by an independent facility licensed by the State of California and the employer should obtain the employee's written consent prior to testing. In addition, the employer should pay for the full cost of the test and compensate employees at their regular rate of pay for time spent submitting to a drug and alcohol test. Any records relating to the employee's drug and alcohol test are confidential and should be maintained separately from the employee's personnel file.

Employees who test positive can be subject to discipline, up to and including immediate termination of employment, depending on the circumstances of the test. In addition, employers can adopt a policy that employees who fail to comply with any part of the testing process after being directed to do so by the employer can also be subjected to discipline.

III. THE REASONABLE ACCOMMODATION PROCESS

As a supervisor, it will be inevitable that employees will have some physical or mental limitation that prevents them from performing the essential functions of their job. The California Fair Employment and Housing Act and the Americans with Disabilities Act (ADA) prohibit discrimination on a multitude of protected categories, including disabilities. The purpose of the Fair Employment and Housing Act is to provide remedies to eliminate any type of discrimination on this basis. In addition, the protections of FEHA are very broad and one could qualify as a protected individual even based on the employer's perception that the employee is disabled and thus, the law would cover an employee who is "erroneously or mistaken believed to have or had a physical or mental condition that would limit a major life activity."

Under FEHA, several medical conditions are covered such as cancer, genetic characteristics, physiological and anatomical conditions, and conditions that would limit an employee's ability to participate in major life activities such as working. The law also protects those who have chronic or episodic conditions such as hepatitis, epilepsy, seizure disorder, diabetes, and heart

disease. The courts are constantly expanding the scope of what constitutes a disability under the law. As such, the time will come when the supervisor will have to respond to an employee's request for a reasonable accommodation because of a physical or mental impairment that prevents them from performing the essential functions of the job.

I. Accommodating Employees with Disabilities

If you have employees that are qualified under the Fair Employment and Housing Act and the Americans with Disabilities Act as a disabled individual and is unable to perform the essential functions of the position, the law requires the employer to make a good faith and reasonable effort to accommodate the employee in order to afford the employee the opportunity to perform the essential functions of the job. This obligation requires employers to reasonably accommodate for the known disabilities unless doing so would result in an undue hardship to the employer's operations. As such, employers have an affirmative duty to accommodate their employees and the issue which always presents itself is how the employer knows there is a need for an accommodation.

The most obvious is through the employee's direct supervisor. The supervisor has knowledge of the employee's disability and once the supervisor obtains such knowledge, an obligation exists to initiate efforts to engage in the reasonable accommodation analysis. Most importantly, this obligation exists even if the employee did not ask for an accommodation. And furthermore, the obligation to reasonably accommodate an employee is still required even when the employer regards the employee as disabled when in fact the employee is not actually disabled.

II. Types of Accommodations

Once the employer determines that an individual is qualified under the law as a qualified individual with a disability and is unable to perform the essential functions of the job, the obligation to accommodate the employee is initiated through a variety of ways. Selecting the right accommodation is determined on a case by case basis, depending on the employee's functional limitations and the individual circumstances of the employer. Under the California Fair Employment and Housing Act, the regulations provide a non-exhaustive list of possible accommodations:

- Making facilities readily accessible and useable by disabled individuals
- Job restructuring
- Offering part-time or modified work schedules
- Reassignment to a vacant position
- Acquiring or modifying equipment or devices
- Adjusting or modifying examinations, training materials or policies
- Providing qualified readers or interpreters
- Allowing assistive animals on the worksite

- Altering when and/or how an essential function is performed
- Modifying supervisory methods
- Providing additional training
- Allowing an employee to work from home
- Providing paid or unpaid leave for treatment or recovery
- Other similar accommodations for individuals with disabilities

III. Assistive Animals as an Accommodation

Recently, issues have surfaced as to whether or not employees have the right under the Fair Employment and Housing Act to bring assistive animals to work as a reasonable form of an accommodation.

The regulations to the Fair Employment and Housing Act provide for assistive animals at the workplace as a reasonable accommodation. 2 California Code of Regulations Section 11065(p)(2)(B). Assistive animals can include guide dogs, service dogs, support dogs or animals that provide emotional or other support to the disabled person, including those suffering from traumatic brain injuries and mental disabilities such as major depression. 2 California Code of Regulations Section 11065(a)(1).

The employer may require the employee to produce a letter from a healthcare provider indicating that the employee has a disability and to explain why the assistive animal is needed in the workplace. The employer may require the employee to provide confirmation that the animal is free from offensive odors and displays habits appropriate to the work environment, does not engage in behavior that endangers the health and safety of the disabled individual or others in the workplace and is trained to provide assistance for the employee's disability. 2 California Code of Regulations Sections 11065(a)(2), 11069(e).

IV. Leaves of Absences as an Accommodation

Another form of an accommodation is giving an employee a paid or unpaid leave of absence for the purpose of treatment and/or recovery. In general, a finite leave of absence may be considered a reasonable accommodation if, after the exhaustion of all paid and statutory leaves of absences, the employee can resume his or her duties.

On the other hand, it is not reasonable to require the employer to hold the position indefinitely for the employee's medical condition to be corrected, or to allow the employee to fully recover. It is cautioned, however, that there is no minimum under the ADA as to the fixed duration of the leave of absence. Therefore, caution should be exercised in analyzing any request for a leave of absence on a case by case basis and employers should work with their legal counsel to determine whether or not a leave should be granted.

V. Reassignment as an Accommodation

Reassignment to a vacant position may also be a reasonable accommodation even if the position pays less than what the employee is currently earning if the employee can no longer perform the current job. On the other hand, the employer is not mandated under the ADA to promote or create a new position to accommodate a disabled employee.

VI. The Good Faith Interactive Process

As part of the accommodation requirements, the employer is required to engage in a “timely, good faith interactive process” in responding to a request for a reasonable accommodation from an employee with a known physical or mental disability or known medical condition. Under the regulations to the ADA, the employer must initiate this process if the employee with the known physical or mental condition asks for a reasonable accommodation, the employer becomes aware of the need for the accommodation, the employer becomes aware of the possible need for an accommodation because the employee has exhausted his/her leave of absence under the employer’s leave policy or Family Medical Leave Act, and the employee or employee’s health care provider states that a further accommodation is necessary for recuperation, or to allow the employee to perform the essential functions of the job.

The employee also has obligations as part of this accommodation process. The employee is responsible to initiate the process by asking for a reasonable accommodation. The employee is also required to cooperate in good faith with the employer by providing medical documentation when his/her disability or need for accommodation is not obvious. In general, the interactive process contemplates that both parties would talk directly with each other to exchange information about what is necessary to accommodate the employee. Although direct communication is the preferred method, it is not absolutely required. In deciding on the accommodation, the employer should give consideration to the employee’s preference although ultimately, the employer makes the final decision on the accommodation selected.

IV. SEXUAL HARASSMENT PREVENTION

Sexual harassment in the workplace is one of the most destructive and demoralizing issues that can face employers. In today litigious environment, supervisors must be trained on how to identify, recognize and respond to sexual harassment in the workplace. In fact, California law requires all employers with 50 or more employees to mandate sexual harassment prevention training for two hours every two years. The law also requires employers to provide sexual harassment prevention training to new supervisors within six months of being employed in a supervisory position.

As a supervisor, you need to identify sexual harassment and other forms of unlawful harassment and the different forms of sexual harassment such as quid pro quo sexual harassment, and a hostile work. As supervisors learn to recognize the subtle forms of harassment, it is also important to understand how to respond to these incidents of harassment. Part of the employer’s obligation in response to claims of harassment in the workplace is to conduct a prompt internal investigation to determine whether or not the complaint has merit and to take proactive steps to prevent the incidents from reoccurring. In addition to identifying the

most obvious forms of sexual harassment, there are also subtle forms of harassment that may occur under the supervisor's nose and could result in a potential claim.

For example, it is quite common that managers and co-workers engage in subtle forms of favoritism among its subordinates. However, if the favoritism is based upon the granting of sexual favors or the supervisor favors one gender over the other, this could constitute sexual harassment and give rise to a claim. Other subtle forms of harassment also include establishing different types of dress and grooming standards for men and women employees. Although it is appropriate to have grooming standards, employers that establish different grooming standards for different genders should consult with legal counsel to ensure that it complies with the anti-discrimination laws.

Treating employees based on sexual stereotypes could also constitute a form of sexual harassment. For example, a supervisor could make an off-the-cuff comment about the propensity of men to harass their female colleagues or the propensity of women to flirt with their male colleagues. Such comments could create a hostile work environment.

In addition, federal and state laws have expanded the different forms of sex discrimination such as sexual identity discrimination, sexual orientation discrimination and discrimination against transgender employees and applicants. Therefore, it is important that all supervisors be trained in sexual harassment prevention as subtle remarks and inadvertent incidents could give rise to a sexual harassment claim. All employers should have a sexual and unlawful harassment policy that includes procedures for filing complaints of harassment. See Exhibit 2 for a model policy.

V. CONDUCTING INTERNAL INVESTIGATIONS

At some point in time, an employer may be presented with an obligation either as mandated under federal and/or state laws or as it deems appropriate, to conduct an internal investigation into employee misconduct or complaints of unlawful conduct or activity occurring in the workplace. As such, there are many reasons why an employer should conduct an investigation. An investigation may be related to:

- Complaints of harassment, discrimination and/or retaliation
- Misconduct
- Theft
- Bullying
- Drug and alcohol use
- Safety violations
- Harm to property
- Deficient performance

While some investigations are mandated under federal and state laws such as Title VII and the California Fair Employment and Housing Act, some internal investigations are necessary to discover information with which to make a decision with respect to the alleged complaint. A prompt and thorough investigation is useful in resolving problems and preventing problems from becoming bigger or reoccurring and in some instances, to prevent external investigations by governmental authorities or other interested stakeholders such as parents and special interest groups. A well-done, thorough and unbiased investigation will ferret out whether or not the complaint is supported by actual facts. The goal of the investigation is to use the findings of facts made by the investigator to resolve issues as they present themselves in the workplace.

The key to a solid investigation is the need for objectivity by the investigator. The investigator must not be prejudiced or biased with respect to the complainant or any of the witnesses involved. The investigator's role is to investigate all of the allegations by reviewing documents, interviewing witnesses, and doing independent research to verify the complaint.

The investigator will need to engage in a variety of investigative techniques such as the following:

- Interviewing employees, students, parents, and outside parties
- Reviewing documents provided by the employer
- Searches of computers, desks, voicemails and emails
- Reviewing or taking photographs
- Soliciting assistance from third parties such as law enforcement or legal counsel

Before engaging in any type of an investigation, it is important that the investigator knows all of the applicable federal, state and local laws as well as work policies and applicable collective bargaining agreements.

The following are some tips in conducting internal investigations:

1. Thoroughly review the complaint and identify all possible witnesses

When starting the investigation, it is important to have a thorough understanding of what exactly the scope and parameters of the investigation demand. And further, it is very easy to go off course from the investigation based on information gathered and thus, it is important to stay focused on the actual allegations and what the investigator needs to research in verifying the complaint.

2. Gathering sufficient facts from the concerned employee

Interviewing the complaining employee is a critical element to the investigation process because he or she is the one that has the facts that led to the complaint in the first place. The most important goal of this interview is to get to the facts. Find the WHO, WHAT, WHERE, WHEN, and WHY.

In addition, determine what other witnesses or documents support the complainant's allegations and get as much information about the whereabouts of these documents and witnesses in order to further the investigative process.

When interviewing the complainant, it is important that the investigator informs the complaining employee that the employer does not permit any retaliation in any way and the complaining employee needs to keep the investigation confidential.

3. Stay organized

A good investigation requires a high degree of organization and the investigator will have to organize his or her thoughts and plan the investigation before conducting interviews. Otherwise, the investigator can easily become sidetracked and investigate matters that are not relevant to the investigation. Staying organized requires knowing what policies, laws or rules have been violated.

The investigator needs to determine who needs to be interviewed and why that person's interview is necessary as it relates to the complaint.

4. Assess whether or not any interim action is necessary pending the outcome of the investigation

Depending on the complaint, interim action may be necessary if the complaint is serious enough. For example, if the complaint involves bullying, health or safety risks, or harassment, the employer may want to separate the accused from the victim pending the outcome of the investigation. This is not done for disciplinary reasons but is done to help facilitate the investigation and to prevent continuing harm pending the outcome of the investigation.

5. Meet with the accused employee

Once you have gathered enough facts regarding the complaint, the investigator will have to meet with the accused to get his or her side of the story. It is important to prepare before this meeting and it is recommended that the investigator prepare an outline related to each issue and the questions that are planned.

When interviewing the accused, start off with very general questions such as: "What is your work experience like with the [complainant]?" Use open-ended questions in the beginning as this may solicit information that you may need. You may then move to more specific and follow-up questions, but it is important to listen very carefully to the answers. Try to be flexible in the types of questions you plan to ask.

The investigator may want to stay away from confrontational questions as the goal to an investigative process is to solicit information from the witness and to not put the witness in a defensive position.

6. Make Findings of Facts

The investigator will have to make findings of fact. When making factual findings, make sure that each fact is supported by either testimony of witnesses directly interviewed or by documentation obtained during the investigation. The ultimate fact

finding is whether or not there were any violations of any policies, guidelines or internal rules. If the investigation concludes that there was a violation, the employer will then want to consider whether or not discipline is appropriate.

The goal of the investigative process is to be prompt, thorough and unbiased. If the internal investigator has any relationship with any of the witnesses, the complainant or the accused, the employer might want to consider retaining an outside investigator to maintain objectivity.

POLICIES AND PROCEDURES

I. THE EMPLOYEE HANDBOOK AND/OR PERSONNEL POLICIES.

The employer's Handbook and/or Personnel Policies set forth the basic expectations employers have of employees and is utilized as a communication device to inform employees of work expectations. Employee Handbooks and/or Personnel Policies are useful when applied consistently and fairly to all employees. It is important that all employees receive a copy of the Handbook and/or Personnel Policies and that the employer have a signed acknowledgement that the employee received a copy of these policies (as well as any subsequent revision to the policies) and has read them. In litigation, the courts will consider whether or not a supervisor's employment practices are consistent with the rules and policies in the handbook. Inconsistency in application could give rise or an inference to a claim of discrimination. Legal counsel should be consulted when policies are developed, implemented and revised.

II. PERFORMANCE EVALUATIONS

Performance evaluations are designed to review the performance standards and provide employees with feedback and assistance in meeting the employer's expectations. Performance appraisals are also helpful because it gives managers an opportunity to provide feedback to employees. Advantages of performance evaluations include:

- Assist in creating an environment where supervisors are treating employees fairly
- Helps the employer establish performance objectives and goals for the employee
- When done properly, provides notice to employees of their performance deficiencies
- Aids in the defense of an employment litigation matter as it provides written record of the employee's performance issues

In order to reap the benefits of a performance evaluation, the evaluation should be completed in a timely fashion, consistent with any collective bargaining agreement or personnel rules and be done accurately. Most employees want to know their performance rating and supervisors need to document both the positive and negative aspects of the employee's work. A well-documented performance evaluation should provide support for promotions, discipline or termination and good documentation makes a difference between winning and losing a lawsuit.

The following is a suggested checklist for conducting performance evaluations:

1. Setting an appropriate atmosphere for the evaluation

- Area of the evaluation is uncluttered, clean, well organized and free of distractions
- Cell phones, pagers and telephones are turned off or placed in silent mode
- Maintain an attitude of optimism, staying positive and focused on the employee

2. Being specific in your comments

- Thank the employee for setting aside the time for the performance evaluation
- Start with strong attributes of the employee's performance and to give credit where credit is due
- Discuss employee's performance and performance deficiencies in a factual and non-critical manner
- Discuss how the employee can improve in the areas that need improvement
- Focus on the goals and mission of the organization and how the employee's contributions fit within the overall goals and mission

3. Listening to the employee

- Provide opportunity for the employee to speak freely, candidly and openly
- Show empathy to the employee's challenges
- Allow the employee to express his or her emotions, challenges and frustration
- Acknowledge the employee's challenges and frustration
- Be mindful to avoid appearing judgmental or making judgmental statements
- Discuss with the employee an action plan on how to improve his or her performance

4. Follow up issues after a performance evaluation

- Discuss with the employee a follow up plan on how to improve the employee's performance

- Discuss and set specific objectives for the employee
- Set specific goals for the employee
- Arrange a future follow up date, if appropriate, for the employee
- Thank the employee again for participating in the performance evaluation
- Have the employee sign the evaluation

III. EMPLOYEE DISCIPLINE

Disciplining an employee effectively can reduce your potential for an employment liability claim if administered consistently with the applicable collective bargaining agreement, Handbook and/or Personnel Policies. When administering employee discipline, the supervisor focuses on the actual job performance of the employee and the impact the employee's conduct has to the organization as a whole. Discipline can take many forms and the severity of the discipline should be proportionate to the misconduct or performance deficiency of the employee. Prior to issuing any discipline, the supervisor should consult with Human Resources to ensure that the discipline comports with the employer's guidelines.

When efforts to correct a performance problem through discipline fail, termination may be the only appropriate option. It is critical that supervisors comply with all the procedural requirements in the applicable collective bargaining agreement, Handbook and/or Personnel Policies before taking any action to terminate an employee as a mistake on procedural grounds can not only be costly, but may also void the termination decision if the employer's rules require a mandated procedural process.

The following forms of progressive discipline are stated in order of the least to the greatest:

1. Verbal counseling
2. Documented verbal counseling
3. Written counseling/reprimand
4. Suspension
5. Demotion
6. Termination

In deciding the level of appropriate discipline, the following guidelines should be considered:

1. Assess whether or not the anticipated discipline is comparable to the discipline meted out to other employees that are similarly situated based on the totality of the employee's work history and other employees that have engaged in similar conduct.

2. Review the collective bargaining agreement, Handbook and/or Personnel Policies to determine whether or not a violation of a particular provision has occurred.
3. Investigate to determine whether or not the employee engaged in the conduct warranting the discipline.
4. Check whether or not there is sufficient documentation to support discipline of a suspension or greater.
5. Discuss the anticipated discipline with Human Resources or counsel beforehand.
6. Before taking the anticipated discipline, review the employee's personnel file and assess whether or not there is any prior discipline of a similar matter and, if so, consider whether or not the anticipated discipline will rectify the performance.
7. When meeting with the employee to discuss the anticipated discipline, focus on the behavior and not the employee.
8. Advise the employee of the specific policy, collective bargaining agreement, Handbook provision and/or Personnel Policies that was violated and the conduct of the employee. Discuss how the conduct negatively impacts the work environment.
9. Advise the employee of the employer's expectations, and what is required to improve the employee's performance. Advise the employee that any further repeat violations may result in additional discipline, up to and including discharge.
10. After your meeting with the employee, document what was said and place it in the employee's personnel file to memorialize the meeting. If the discipline was based on a performance issue, the supervisor should follow up with the employee and offer any additional training, guidance or assistance needed to help the employee improve. Advise the employee that any further repeat violations may result in additional discipline, up to and including discharge.

IV. FAMILY AND MEDICAL LEAVE ACT

One of the key leaves of absences under federal and state law is the Federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA). Both statutes require employers with 50 or more employees to provide a leave of absence for up to 12 work weeks. Leave is generally available for the serious health condition of an employee or his or her family member and second, leave is also permitted for prenatal care, bonding with a newborn, and birth or placement for adoption or foster care of a child. Under recent amendments under FMLA, leave is also allowed to attend to a "qualifying exigency" or to care for a covered service member with a serious injury or illness. Although the FMLA and CFRA overlap in a majority of instances, a minor difference exists.

1. Eligibility for leave under FMLA/CFRA

Employee is eligible for FMLA/CFRA leave if the employee is employed by a covered employer and:

- i) Has been employed for at least 12 months;
- ii) Has been employed for at least 1250 hours of service during the 12-month period immediately preceding the commencement of the leave; and
- iii) Is employed at a worksite where the employer employs 50 employees within 75 miles of that worksite.

2. Amount of leave under FMLA/CFRA

Generally, an eligible employee is entitled to a total of 12 workweeks during any 12-month period for the employee's own serious health condition, to care for a family member with a serious health condition, for the birth or placement of a child for adoption or foster care, and to address a "qualifying exigency" involving an employee's family member on active military duty or called to active duty status in support of a contingency operation.

Due to the recent changes to the FMLA, an employee may also be entitled to up to 26 weeks of leave during a single 12-month period to care for a family member or "next of kin" servicemember who incurs a serious injury or illness while on active duty.

In addition, under certain situations, employees may take FMLA/CFRA leave on an intermittent or on a reduced schedule basis. Intermittent leave is considered leave that is taken in separate blocks of time rather than for one continuous period of time while a "reduced leave schedule" is a schedule in which the employee's regular number of working hours is reduced.

3. California also has the Pregnancy Disability Leave law.

This leave applies to employers with five or more employees and provides up to four months of protected leave. This leave runs concurrently with FMLA but not CFRA. As such, an employee could take up to four months of Pregnancy Disability/FMLA leave and still have another 12 workweeks of CFRA for bonding with the new child or to care for the employee's/family member's serious medical condition. There are many other leave laws under the Labor Code.

In addition to the FMLA and CFRA, the California Labor Code affords employees various leaves of absences for different reasons. Please see Exhibit 4 for a table of the most common leave statutes applicable to employers.

V. TIPS FOR NEW SUPERVISORS

Exhibit 3 contains some practical tips for those who are brand new to supervision and would like some tips on some of the key responsibilities and challenges often encountered by new supervisors. These tips can be provided directly to the new supervisor to help them understand their new responsibilities.

CONCLUSION

A lot of information is covered in this guide but it's only a guide. The employment laws are vast and complex and this guide only serves as an introduction to this complicated landscape. As with any legal situation, please consult with your Human Resources Department or legal counsel for guidance to your specific situation.

EXHIBIT 1
ACCEPTABLE AND UNACCEPTABLE INTERVIEW QUESTIONS

TOPIC	ACCEPTABLE	UNACCEPTABLE
Employee Name	<p>“Have you ever used another name?”</p>	<p>“What is your maiden name?”</p> <p>“Is it Miss or Mrs.?”</p> <p>“What is the origin of your name?”</p> <p>“What does your name mean in your native language?”</p>
Age	<p>“If you are hired, can you show proof of your age?”</p> <p>“Are you over 18 years of age?”</p> <p>“If you are under 18, can you, after employment, provide a work permit?”</p>	<p>“What is your date of birth?”</p> <p>“When were you born?”</p> <p>“How old are you?”</p> <p>Any questions that imply a preference for younger persons or applicants under the age of 40.</p>
Education	<p>“What subjects did you enjoy in school?”</p> <p>“What did you select as your major and why?”</p> <p>“Did your education help prepare you for this position and if so, how?”</p> <p>“Where did you attend college or graduate school?”</p>	<p>Questions regarding dates of attendance or completion of elementary or high school.</p> <p>“Do you still owe any student loans?”</p>
National Origin, Birthplace and Citizenship	<p>“Are you authorized to work in the United States? If hired, you will be required to submit verification of your legal right to work in the U.S.” (It is important that all applicants are asked this question, not merely those who appear to be from a foreign origin.)</p> <p>“What languages do you read, speak or write?” (Provided that a language other than English is required for the position the applicant seeks.)</p> <p>“Are you prevented from being</p>	<p>“Can you produce naturalization or alien registration information or documents?” (Impermissible prior to an employment offer.)</p> <p>“Where were you born?” (Any questions regarding the birthplace of the applicant’s spouse, parents or other relatives should not be asked.)</p> <p>Any questions concerning nationality, lineage, ancestry, national origin, descent, or parentage of the applicant or</p>

TOPIC	ACCEPTABLE	UNACCEPTABLE
	employed in the United States because of your Visa or immigration status?"	his or her parents or spouse. "What is your native language?" "How did you acquire the ability to read, write or speak a foreign language?"
Sex, Sexual Orientation, Family and Marital Status	The name and address of a parent or guardian if the applicant is a minor. The name and address of a person to be notified in the event of an emergency. Questions regarding having any relatives employed with the employer.	Any questions that indicate or refer to the applicant's sex, gender identity or proof of gender. Questions that indicate the applicant's marital status, domestic partnership status, name of the applicant's spouse or domestic partner or what the spouse or domestic partner does for a living or his or her salary. Questions regarding the number and ages of the applicant's children or dependents or questions regarding childcare. Questions regarding pregnancy, childbearing, plans for becoming pregnant or birth control. Questions regarding the spouse, domestic partner, relatives or children of the applicant. Questions regarding the applicant's sexual orientation.

TOPIC	ACCEPTABLE	UNACCEPTABLE
Race and Color		Questions regarding the applicant's race or color. Questions regarding the applicant's complexion or color of skin, hair and eyes. Asking the applicant to attach a

TOPIC	ACCEPTABLE	UNACCEPTABLE
		<p>photograph to the application.</p>
<p>Physical or Mental Condition or Disability, Genetic Information</p>	<p>“Can you perform the essential functions of the job for which you are applying, with or without reasonable accommodation?” (Provide the applicant with a copy of the job description.)</p> <p>“Please describe or demonstrate how you would perform the essential functions of the job for which you are applying?”</p> <p>“Can you meet the attendance requirements of the job?”</p> <p>Questions regarding the current or recent use of illegal drugs.</p> <p>An employment offer contingent on the applicant’s passing a job-related physical examination.</p>	<p>Questions regarding the applicant’s general medical condition, state of health or illness, or amount of sick time or medical leave taken at applicant’s prior job.</p> <p>Questions about the existence, nature or severity of a disability.</p> <p>Questions about the receipt of workers’ compensation or filing of claims.</p> <p>Questions regarding the receipt of disability benefits or filing of claims.</p> <p>“Do you have any physical handicaps or disabilities?”</p> <p>“Do you have AIDS/HIV?”</p> <p>“What prescription drugs are you currently taking?”</p> <p>Questions regarding past addictions.</p> <p>Questions about an applicant’s alcohol use or participation in an alcohol rehabilitation program.</p> <p>Questions regarding family medical history or requests to submit to genetic tests.</p>
<p>Religion</p>	<p>A statement of the days, hours, or shifts to be worked in the position sought.</p> <p>“Are you available to work weekends?” (Assuming the job so requires.)</p>	<p>Any questions regarding the applicant’s religion or church or place of worship.</p> <p>“What religious days do you observe?”</p> <p>“Does your religion prevent you from working weekends or holidays?”</p>
<p>Physical Description</p>	<p>A statement that a photograph may be required after employment.</p>	<p>Questions about applicant’s height or weight.</p> <p>Requiring applicant to attach a</p>

TOPIC	ACCEPTABLE	UNACCEPTABLE
		<p>photograph to application.</p>
<p>Military Service</p>	<p>“Have you served in the U.S. Military?”</p> <p>Questions regarding relevant skills acquired during the applicant’s U.S. military service that are related to the job for which the applicant is applying.</p>	<p>“What type of discharge did you receive from the U.S. military service?”</p> <p>“Can you provide discharge papers?”</p> <p>Questions regarding service in a foreign military service.</p> <p>“Do you have any obligations to the military for training or reserve status?”</p>
<p>Organizations and Activities</p>	<p>“Please list job related organizations, clubs, professional societies, or other associations to which you belong, omitting those that indicate race, religion, national origin, sex or age.”</p> <p>“Do you enjoy being active in community affairs?”</p>	<p>“List all organizations, clubs, societies and lodges to which you belong?”</p>
<p>References</p>	<p>“By whom were you referred to a position?”</p> <p>The names of persons willing to provide professional or character references for the applicant.</p>	<p>Questions of an applicant’s former employers or acquaintances that elicit information about the applicant’s race, religion, national origin, physical or mental disability or condition, marital or domestic partner status, age, sex, or sexual orientation.</p>
<p>Miscellaneous</p>		<p>Questions regarding past or current membership in a Union.</p> <p>Questions concerning the applicant’s feelings about being represented by a Union.</p> <p>Questions about the applicant’s previous filing of charges or complaints with federal or state equal employment agencies or other labor law enforcement agencies.</p>

EXHIBIT 2
POLICY ON SEXUAL AND OTHER UNLAWFUL HARASSMENT

I. INTRODUCTION

The District is committed to maintaining a learning and working environment that is free from sexual and other unlawful harassment.

II. PURPOSE OF POLICY

The purpose of this policy is to (1) familiarize all employees with the definition of sexual and other unlawful harassment and the forms it can take; (2) make clear that sexual and other unlawful harassment is prohibited and will be punished; (3) inform victims of the course of action they should take to report sexual and other unlawful harassment; and (4) clarify the rights of those accused of harassment.

III. SCOPE OF POLICY

This policy applies to all employees, volunteers, interns and visitors. Persons who are not employees, but perform work at the District for its benefit (such as contractors and temporary employees) are also protected and required to abide by this policy.

IV. DEFINITION OF HARASSMENT

- A. Harassment is defined as any conduct, on or off campus, directed toward an individual based on sex (including pregnancy, childbirth, breastfeeding and related medical conditions), sexual orientation, gender, gender expression, gender identity, race, religion (including religious dress and grooming practices), color, national origin (including language use restrictions and possession of driver's license obtainable by undocumented persons), physical or mental disability (including HIV and AIDS), age (40 and over), denial of family and medical care leave, military and veteran status, marital status, medical conditions meaning cancerous/health related impairments and genetic characteristics, or any other basis protected by federal, state or local law that is sufficiently severe or pervasive to alter or interfere with an individual's work, or that creates an intimidating, hostile or offensive, educational, work or living environment.
- B. Whether particular physical, non-verbal, or verbal conduct constitutes harassment in violation of this policy will depend upon all of the circumstances involved, the context in which the conduct occurred, and the frequency, severity, and pattern of the conduct. Conduct does not constitute harassment in violation of this policy unless it occurs based on a legally protected characteristic or trait and is sufficiently severe or pervasive to alter or interfere with an individual's work, or that creates an intimidating, hostile or offensive work environment. The fact that someone did not intend to harass an individual is no defense to a complaint of harassment. Regardless of intent, it is the effect and characteristics of the behavior that determine whether the conduct constitutes harassment. Conduct alleged to constitute harassment will be evaluated according to the objective standard of a reasonable person. Thus, conduct that is objectionable to some, but that is not severe or pervasive enough to create an objectively intimidating, hostile or offensive environment, is beyond the purview of this policy. The anti-

harassment laws prohibit managers, supervisors and third parties from engaging in unlawful harassment.

- C. Because sexual harassment has been more thoroughly defined in the law than harassment based upon other protected categories, the following definition of sexual harassment is included in this policy.
1. Sexual harassment includes any unwelcome sexual advances, requests for sexual favors, or other unwelcome written, verbal or physical conduct of a sexual nature when:
 - (a) Submission to the conduct is explicitly or implicitly made a term or condition of an individual's employment, academic status or progress; and/or
 - (b) Submission to or rejection of the conduct by the individual is used as the basis of employment or academic decisions affecting the individual; and/or
 - (c) Submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, programs, or activities available or through the District; and/or
 - (d) The conduct has the purpose or effect of having a negative impact upon the individual's work performance or of creating an intimidating, hostile, or offensive work environment.
 2. Sexual harassment may occur between members of the same or opposite sex. Further, harassment based on a person's sex is not limited to instances involving sexual behavior. That is, harassment on the basis of sex may occur without sexual advances or sexual overtones when conduct is directed at individuals because of their sex. This is often referred to as sex or gender harassment and violates this policy.

V. FORMS OF HARASSMENT

Unlawful harassment can take many forms and will vary with the particular circumstances. Examples of harassment prohibited by this policy may include, but are not limited to: (1) verbal conduct such as epithets, derogatory jokes or comments, or slurs; (2) unwanted advances and/or propositions of a sexual nature including relationships which began as consensual but later ceased to be mutual wherein one party then harasses the other; (3) visual displays such as derogatory and/or sexually-oriented posters, photography, cartoons, or drawings not protected by policies on academic freedom and freedom of expression; (4) suggesting or implying that submission to or rejection of sexual advances will affect decisions regarding such matters as an individual's work assignment or status, salary; (5) physical conduct including unnecessary and unwanted touching, intentionally blocking normal movement, or assault including sexual assault and rape.

VI. PROCEDURES

A. Informal Resolution Procedures

1. Individuals who believe they have been or may be the victim of sexual or other unlawful harassment (hereinafter “complainant”) may choose to avail themselves of informal resolution procedures. Use of these informal procedures is not a prerequisite to the filing of a complaint under the formal procedures described below.
2. Requests for assistance under these informal procedures may be oral or written and should usually be made as soon as possible after the most recent alleged act of sexual or other unlawful harassment. Such requests should be directed to Human Resources.
3. Requests for assistance under these informal procedures will be dealt with, to the greatest extent practical and possible, on a confidential basis and disclosure of their existence will be limited to those who, in the interests of fairness and problem resolution, have an immediate need to know or as legally required. Because the District has an obligation to address sexual and other forms of unlawful harassment, it cannot guarantee that the identity of a complainant will be treated as completely confidential where it would conflict with its obligations to provide a safe or nondiscriminatory work environment.
4. Upon receipt of a request for assistance under these informal procedures, the individual requesting assistance will be counseled on options for resolving the problem and about sources of further assistance.
5. Requests for assistance may have several outcomes. The person who makes such a request may only want to discuss the matter in order to clarify whether sexual or other unlawful harassment may be occurring and to determine her or his options, including the pursuit of more formal action. In such situations, the person to whom the request is brought may be asked to take action to see whether an informal resolution can be reached. If resolution is reached by this process, no further actions will be taken and the matter considered closed. If the matter cannot be resolved informally, the person to whom the request was brought will assist the complainant in filing a formal complaint.

B. Formal Resolution Procedures

1. Individuals who believe they have been the victim of sexual or other unlawful harassment may file a formal complaint. Such a complaint will result in an investigation, the purpose of which shall be to determine whether a violation of this policy has occurred. An investigation may also be initiated upon the request of the District.
2. Formal complaints under this procedure should be directed to Human Resources. The complaint must be either oral or in writing and should include details concerning the conduct that gives rise to the complaint, the name of the person(s) against whom the complaint is made, and the names of witnesses. If the Human Resources Officer is the accused, the complaint may be directed to the

Superintendent. Supervisors must report any notice of alleged harassment under this policy to Human Resources. If the accused is the Human Resources Officer, supervisors may report the conduct to the Superintendent. Employees may also file a complaint with the California Department of Fair Employment and Housing and the Equal Employment Opportunity Commission.

3. The results of the investigation shall be set forth in a written report consisting of findings, conclusions and, if applicable, remedies to be provided and/or sanctions to be imposed. The complainant and the person(s) against whom the complaint is made shall be promptly notified of the outcome of the investigation and of the actions, if any, taken in connection with the complaint.

C. Respect for the Rights of the Complainant and Accused

The District recognizes the sensitive nature of harassment and harassment complaints both for the complainant and the person(s) against whom the complaint is made. All parties to the complaint should treat the matter under investigation with discretion and respect for the reputation of all parties involved. The complaint will be treated to ensure confidentiality to the extent possible and the District will promptly and timely investigate the complaint thoroughly by qualified personnel or investigators. The investigation will be confidential to the extent possible or to the extent permitted by law and the investigation process will be documented and tracked to ensure reasonable progress. The District will undertake appropriate remedial actions and resolve the complaint timely.

VII. **REMEDIES AND SANCTIONS**

A. Remedies

Remedies may include but are not limited to offering to remove the complainant from the hostile environment (or vice versa); changes in schedules or work hours.

B. Sanctions

Persons who violate this policy will be disciplined. The particular form of discipline will depend on the nature of the offense. Such discipline shall be imposed pursuant to and in accordance with any and all applicable District rules, policies and procedures. Sanctions may include but are not limited to verbal warnings; written warnings; loss of privileges, probation; suspension; or termination of employment.

VIII. **RETALIATION PROHIBITED**

Retaliation against any individual for seeking assistance or bringing a harassment complaint through the processes described in this policy is strictly prohibited. Similarly, any person who participates or cooperates in any manner in an investigation or any other aspect of the process described herein shall not be retaliated against. Retaliation is itself a violation of this policy and is a serious separate offense.

IX. FALSE ACCUSATIONS

Accusations of sexual and other unlawful harassment may have injurious, far-reaching effects on the careers and lives of accused individuals. Allegations of harassment must be made in good faith and not out of malice. Knowingly making a false allegation of harassment, whether under the informal or formal procedures of this policy, is itself a violation of this policy and a basis for disciplinary action up to and including termination of employment. Failure to prove a claim of harassment is not the equivalent of a knowingly false accusation.

X. RESPONSIBILITY

All supervisors and managers are responsible for assuring that their conduct does not violate this policy. If managers and supervisors know sexual or other unlawful harassment is occurring, receive a complaint of sexual or other unlawful harassment, or obtain other information indicating possible sexual or other unlawful harassment, they must take immediate steps to ensure that the matter is addressed. Failure to do so may result in legal liability. Managers and supervisors have the further responsibility of preventing and eliminating sexual or other unlawful harassment within the areas they supervise.

EXHIBIT 3

TIPS FOR NEW SUPERVISORS

First of all, congratulations for being promoted to supervisor! Your hard work, dedication and commitment to quality and superior work were factors in your promotion. That same work ethic will be required to become a successful supervisor. Not only will you be responsible for your own success but the success of your subordinates as well. To help with this transition, consider the following practice tips:

Reframe Your Perspective

Making the switch from co-worker to supervisor is a huge transition. Your role as a supervisor will require you to think differently as to how you see your superiors, peers and subordinates with whom you formally work side-by-side. To succeed as a newly minted supervisor, it is important that you establish the right perspective about your position.

Being a supervisor is a big responsibility. You are not only responsible for making sure your department's objectives are met, and consistent with your employer's overall goals and mission, but you are also accountable for the results and performance of those you supervise. Most critically, you now have the authority to direct and assess the work of employees and discipline employees if necessary.

As a supervisor, you are responsible for establishing goals for your department, including objective measures in determining its success. Those you supervise will look to you for direction and guidance towards the accomplishment of these goals. You are now responsible for making sure your employees are working towards the objectives and standards you have set for them.

As such, learn as much as you can about your employer's goals and mission. You should also learn as much as possible about how to manage your time. Your employees, peers and supervisors will make demands on your time and you will have to manage your time in order to meet the needs of all those that look to you for answers and guidance. Learning to juggle the interests of all these stakeholders is an important skill and one that you will need in order to succeed as a supervisor.

Know What is Expected of You

You were promoted to supervisor because you are good at what you do. Now that you are managing a staff of your own, it is important to know what your employer expects from you. You may want to have a heart-to-heart discussion with your supervisor and find out what he/she expects from your department and what he/she expects from you as an individual. For example, does the employer expect you to spend a part of your workday working side-by-side with your employees? Or, are you expected to dedicate your time managing and making sure your employees are doing a good job? Does your employer expect you to help with project management and to communicate with your supervisors on a regular basis?

Knowing what is expected of you will help you determine where to devote a majority of your time and will also help you determine if you have the necessary skills to accomplish the goals set for you.

Set Clear Expectations

As a supervisor, your employer is looking to you to produce results for your department. In doing so, you will rely on your employees' hard work to accomplish the objective measures of accountability set by you and your employer. In order for you to achieve the results you want, it is important that you establish clear expectations from your employees.

If possible, your expectations should be measurable and objective. For example, what time do you expect your employees to be ready and able to report to work? Does your Handbook and/or Personnel Policies have a set standard regarding punctuality and attendance? If your Policies set a specific standard on what time to report to work, you should be consistent in applying the standard for your staff. If your Policies are silent, you need to set the expectations so your employees know what time they need to be ready for work.

Do your employees know how you determine the quality and quantity of good work? If they do not, set expectations for your employees. They will not know what is expected of them if you do not tell them. Establishing objective expectations gives employees a clear direction of what is expected of them. This will result in an objective measure of accountability and will make it easier for you in the long run when you conduct the performance evaluation of your employees.

Know Your Employer's Handbook and/or Personnel Policies

As a supervisor, you stand in the shoes of the employer. This means that what you say and how you say it will be interpreted as the "Company line." If you make statements that contradict your Handbook and/or Personnel Policies, this will confuse your employee. In addition, it could lead to potential legal liability if your statements to the employees contradict the specific provisions of the Handbook and/or Personnel Policies. It is important that you know your policies inside and out.

Know How to Communicate

Being an effective supervisor requires you to have good communication skills; otherwise, employees will get confused or be unclear about their job duties. Knowing when and how to communicate, and in what form, is important because employees take directions from you.

Think about how you are going to communicate with your employees. This means you need to put some thought into your delivery. Consider whether you want to communicate your ideas in writing, through a formal department memo, or personally. If the communication is to an entire group, a meeting with an accompanying memo may be appropriate. If you are addressing a particular individual, a face to face communication, with the follow-up memo if necessary, may be appropriate.

Communicate directly whenever you can. Don't wait for rumors to circulate before letting your employees know what you want from them.

It is also important that you consider the timing of your communication. Communication with employees should be at an appropriate time when you have the employees' undivided attention and when they are not distracted. You may want to give them advanced notice of the meeting and the subject matter to be discussed so everyone can set aside the time and come prepared with questions if they have any.

Be a Good Listener

To gain the respect of your employees, you need to establish credibility as a supervisor. Employees want to be heard and they want to know that their supervisors know how they feel about their jobs and the workplace in general. Establishing yourself as a good listener will help engender the trust and respect of your employees.

As such, being a good listener starts with your body language. Your body language speaks volumes to the employee. You want to send a message through your body language that you're open to what the employee is saying and you will give serious consideration to your employee's opinions.

Part of good body language also requires you to maintain the appearance of openness. Are your arms crossed and folded? Are you distracted by cell phones and pagers? Do you pick up your cell phone and check emails while the employee is talking to you? Is there a desk between you and your employee, creating the impression of a barrier between the two of you or are you sitting side by side with the employee at a small desk or conference table? Be sensitive to your non-verbal communication because your employee is interpreting all of these non-verbal cues to see if you are really interested in what he or she has to say to you.

Moreover, if you do not have an answer to a question, follow up with the employee once you have that information. Employees want closure and they want some form of an answer to their inquiries. Even though it may not be the answer they want to hear, they still want to know that you took their questions seriously and provided them with a response.

Learn the Art of Effective Criticism

No one likes to hear criticism but it's an inevitable part of a supervisor's job. As stated above, the supervisor sets the standards of expectations and performance for employees and it is the supervisor that is making the employees accountable to meet those standards.

Part of this requires you to inform your employees if they are not performing well and you may not know how the employee will respond to the criticism. Learning the art of effective criticism will go a long way in establishing your credibility as an effective supervisor. The following tips are recommended:

1. Start with the positive aspect of the employee's work and reassure the employee that there are several aspects of the employee that are valuable to your department;
2. Communicate your expectations to the employee and criticize the employee's work and not the employee personally;
3. Be as specific and objective as possible when telling the employee of the performance deficiency;
4. Restate your expectations and inform the employee how he or she needs to perform at the standard you have set;
5. Suggest ways for improvement and explore solutions with the employee.

Be prepared that the employee may be resistant to your criticism. Anticipate how you will address the resistance before the meeting. Reaffirm your commitment to the standards you set and schedule a follow-up meeting if necessary. Keep an open mind as to the employee's response, ideas or suggestions. If the employee provides an explanation or suggestion and it requires you to investigate further, tell the employee you will get back to him or her as soon as you find an answer or have a response.

Understanding Anti-Discrimination Laws

Have a basic understanding of the anti-discrimination laws. The legal landscape has many landmines that can trigger an employment discrimination claim. These claims can be costly as well as damaging to morale. Having a general idea of the anti-discrimination laws will help you know when to seek Human Resources or legal counsel for advice and guidance. It is recommended that new supervisors take training in the following areas:

- Introduction to Employment Law
- Sexual Harassment Prevention training
- How to Conduct Performance Evaluations
- Conducting In-House Investigations
- The Family Medical Leave Act/California Family Rights Act
- Americans with Disabilities Act
- Understanding School Liability

There's a lot to learn about being a new supervisor. It's a big responsibility but with these tips in mind, you should be able to transition into your role quickly. We suggest you practice some of these tips and see what works for you. Not all of these tips may be applicable with every employee or every supervisor. Learning how to respond to each individual employee is important in order to bring out the best in each person.

EXHIBIT 4
LEAVE OF ABSENCE CHART

Labor Code	Leave of Absence	Minimum No. of Employees	Number of Days Allowed	Sick	Vacation	PTO/CTO	Advance Notice
246	Statutory sick leave/AB 1522	0	As provided per statute or employer	As provided	Not applicable	Not applicable	If foreseeable
230(a)	Jury Duty leave	0	Not specified	Not specified	Yes	Yes	Reasonable
230(b)	Victim of crime leave (pursuant to subpoena)	0	Not specified	Not specified	Yes	Yes	None stated
230(c)	Leave for victim of domestic violence, sexual assault, stalking to obtain relief to ensure safety	0	Not specified	Not specified	Yes	Yes	Reasonable, unless not feasible
230.1	Leave for victim of domestic violence, sexual assault, stalking, to seek medical attention or other services	25	Not specified	Not specified	Yes	Yes	Reasonable, unless not feasible
230.2	Victim of crime leave to attend judicial proceedings related to that crime	0	Not specified	Yes	Yes	Yes and unpaid leave	Advance notice, unless not feasible
230.3	Voluntary firefighter, reserve peace officer, emergency rescue personnel	0	Not specified	Not specified	Not specified	Not specified	Not specified
230.4	Volunteer firefighter, reserve peace officer, emergency rescue personnel; leave for training	50	14	Not specified	Not specified	Not specified	Not specified.

Labor Code	Leave of Absence	Minimum No. of Employees	Number of Days Allowed	Sick	Vacation	PTO/CTO	Advance Notice
230.5	Excused absences for crime victims for certain offenses listed in Labor Code § 230.5	0	Not specified	Not specified	Yes	Yes	Reasonable, unless not feasible
230.7	Leave to appear at child's school at teacher's request, per Education Code § 48900.1	0	Not specified	Not specified	Not specified	Not specified	Reasonable
230.8	School activity/school emergency leave	25	40 hours/8 hours per month	Not specified	Yes	Yes and unpaid leave	Reasonable
1025	Accommodation for alcohol and drug rehabilitation program participation ¹	25	None/Undue hardship defense	Yes	Unspecified	Unspecified	Unspecified
1040	Accommodation for enrollment in adult literacy education program ²	25	None/Undue hardship defense	Unspecified	Unspecified	Unspecified	Unspecified
1508	Organ donation leave ³	0	30 business days	2 weeks	2 weeks	2 weeks	Unspecified
1508	Bone marrow donation leave ⁴	0	5 business days	5 days	5 days	5 days	Not specified

¹ Only for private employers.

² Only for private employers.

³ The employer may require, as a condition of taking this leave, that the employee take up to 2 weeks of earned but unused sick leave, vacation or paid time off for organ donation.

⁴ The employer may require, as a condition of an employee's initial receipt of bone marrow donation leave, that the employee take up to 5 days of earned but unused sick leave, vacation or paid time off for bone marrow donation.