

ELECTED OFFICIALS AND EMPLOYMENT LAW: DO THE RULES APPLY?

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Roadmap For Today:

- Elected officials and the city's workforce
- Workplace harassment
- Ensuring a safe workplace
- Protecting confidential personnel information



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Inherent Conflict:

- Elected officials have a duty to prevent and correct sexual harassment, discrimination, and retaliation in the workforce.
- Elected officials are exempt from the personnel system and should not be directly involved in personnel matters.



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ELECTED OFFICIALS AND THE WORKFORCE



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The Elected Official's Role in the City's Workforce

- **An elected official's role in the city's workforce is described in the charter or municipal code.**
- **Council-manager form of government?**
 - Gov't Code § 34851
 - Councilmembers should not undermine the city manager's authority by becoming directly involved in personnel matters.
- **But this doesn't mean a councilmember will never get involved in personnel matters.**



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WORKPLACE HARASSMENT



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Workplace Harassment:

- Are elected officials subject to anti-discrimination and anti-harassment rules in the city workplace?
 - Are they part of the city workplace?
- AB 1661, codified at Gov't Code § 53237.1 requires “local agency officials” to attend two hours of sexual harassment prevention training every two years.



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Workplace Harassment and the FEHA:

- Elected officials are considered supervisors under the FEHA.
- They might also be considered “agents.”
- Elected officials’ conduct exposes a city to liability in a FEHA lawsuit.
 - A city is responsible for harassment against its employees **even if carried out by a nonemployee**, if the city knew or should have known about the harassment and failed to take corrective action.



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Next Steps After Workplace Allegation Against Councilmember:

- Find out what the complainant needs in the short term to feel comfortable.
- Speak with the councilmember.
 - Nature of the allegations;
 - City's obligation to investigate the allegations;
 - Advise to cease contact with the complainant, to the extent possible; and
 - Advise not to take any action that could be perceived as retaliatory.



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Next Steps After Workplace Allegation Against Councilmember:

- Initiate an investigation by a neutral, third-party investigator.
 - Councilmember cannot be compelled to participate in the investigation.
- If the allegations are sustained, explain and advise about possible liability.
- If the allegations are sustained, consider what can be done to protect the complainant from future harassing conduct.



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WORKPLACE COMPLAINTS MADE BY ELECTED OFFICIALS



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Workplace Complaint by Elected Official:

- Example, a councilmember complains about harassing conduct by another councilmember.
- Difference between opinions and harassment.
- Safest approach? Conduct an investigation.
- If the allegations are sustained, what are the options?
 - Censure.



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ENSURING A SAFE WORKPLACE



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Ensuring a Safe Workplace:

Employers are required to provide a safe and secure workplace for their employees and to take reasonable steps to address credible threats of violence in the workplace.



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Workplace Violence Restraining Orders:

- Workplace Violence Restraining Orders: legal tool available to employers to protect employees and prevent violence in the workplace.
- Code of Civil Procedure § 527.8.
- “Any employer, whose employee has suffered **unlawful violence or a credible threat of violence** from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an order after hearing on behalf of the employee and, at the discretion of the court, any number of other employees at the workplace, and, if appropriate, other employees at other workplaces of the employer.”



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Workplace Violence Restraining Orders:

- Evaluate the particular circumstances and consider whether the employee has suffered unlawful violence or a credible threat of violence in the workplace.
- “Credible threat of violence” is a knowing and willful statement or course of conduct that serves no legitimate purpose and that would place a reasonable person in fear for his or her safety or the safety of his or her immediate family.



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Workplace Violence Restraining Orders:

- Court may not issue a WVRO that prohibits speech or other activities that are constitutionally protected
- Tailor personal conduct and stay-away orders
- Typically, the WVRO will contain orders requiring:
 - Stay a certain distance away from the protected employee(s);
 - Tailored so restrained elected still able to go to city hall and attend council meetings upon notice to the city.
 - Prohibit harassing, threatening or violence against protected employee
 - Prohibit contacting the employee, including by phone or email
- Possibly also require anger management classes
- Violate orders -- criminal prosecution per Penal Code § 273.6.



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Workplace Violence Restraining Orders:

- WVRO's are an available option to protect an elected official who has suffered violence or has been threatened with violence in the city workplace.
- Definition of "employee" in the Workplace Violence Safety Act (Code Civ. Proc. § 527.8(b)(3)) includes "elected and appointed public officers."



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Other Specific Safety Requirements:

- For example, COVID-19 related regulations, including wearing face coverings and requiring social distancing.
- Can elected officials be required to comply with these and similar safety requirements?
- If a councilmember is not wearing a face covering in city hall, then the city has failed to remediate COVID-19 hazards in the workplace.
 - Could be subject to significant monetary penalties, mandatory abatement, and increased scrutiny and inspection by the Division of Industrial Relations.



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ELECTED OFFICIALS' ACCESS TO CONFIDENTIAL PERSONNEL RECORDS



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Elected Officials' Access to Personnel Records:

- Under the council-manager form of government, the city council does not have a role in staff personnel matters.
- Councilmembers have no greater access to staff personnel records just because they are elected officials.
- Whether access is proper will come down to “need to know.”



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Elected Officials' Access to Personnel Records:

- A city is obligated to maintain employee personnel records so that they are not inappropriately disclosed to third parties.
- Public employees have constitutional and statutory rights to privacy in their personnel records.



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Important Common Examples:

- **Americans with Disabilities Act requires employers to keep medical information of employees separate.**
 - 42 USC § 12112(d).
- **Peace officer personnel records are confidential.**
 - Penal Code § 832.7.



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QUESTIONS?

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