



Elected Officials and Employment Law: When the Rules Don't Apply

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**ELECTED OFFICIALS AND
EMPLOYMENT LAW:
DO THE RULES APPLY?**

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Elected Officials and Employment Law

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I. Introduction

Your phone rings late at night. The city manager is in a panic. A city employee has just complained about harassment by a councilmember. The city has a protocol for handling harassment complaints. But what does it mean when the accused harasser is an elected official? Councilmembers can't be forced to participate in workplace investigations. They don't take orders. They can't be disciplined. Does that mean workplace harassment laws don't really apply to them? Are they even part of the "workplace"? And how are you supposed to tell a person who may have appointed you (and can fire you!) that you received serious allegations against them?¹

If you have ever sat through an AB 1661 training with city councilmembers, you may have observed that elected officials grapple with the uncertainty of how they fit into the concept of a "workforce." They are told in the training that they have a duty to prevent and correct sexual harassment, discrimination, and

¹ The pronouns "they," "them," and "their" are used in this paper as singular, gender neutral substitutes for "he" and "she."

retaliation in the workplace, but they are likely told in other settings to involve themselves as little as possible in personnel matters. That uncertainty is fair; councilmembers are treated as employees by some aspects of the law, and not by others. They may be paid on a W-2 form, receive medical benefits through the city, and collect workers' compensation benefits; but they are not entitled to leave under the federal Family and Medical Leave Act, or protected by discrimination laws. The California Labor Code, which does not contain a uniform definition of "employee" for all purposes, is generally silent on elected officials.

Even when employment laws do apply to elected officials, enforcement mechanisms are limited. Telling a councilmember "you've been accused of misconduct" is probably one of the least pleasant conversations you'll ever have. Or telling a councilmember that they cannot have access to confidential employee information. Or asking them to wear a face covering to protect employees from COVID-19.

This paper examines a few of the situations a city attorney might encounter where an elected official has to be told "no," or "stop," or "these rules do apply to you." While there is no all-purpose statute (or even principle) that defines whether or when an elected official is considered an employee, often that isn't really the question: the question is whether elected officials have to play by the rules, and

mostly they do. We suggest some practical approaches and real-life solutions to the challenges you might face when someone thinks the rules are being (or should be!) broken -- and how to protect your city from becoming another front-page news story when someone at the top is accused of workplace misconduct.

II. Elected Officials and the Workforce

Elected officials preside over the local government structure, making the policy-based decisions that inform and direct actions taken by employees to serve the public's interest. Members of the public often believe elected officials are directly involved in managing city staff, including making personnel decisions. In reality, their role in directing and managing city staff will depend on how that role is described in the city's charter or municipal code. The most common form of city government is the council-manager form of government provided for in Government Code section 34851 *et seq.*² Under the council-manager form of government, the city council appoints a city manager to manage the daily operations of the city and implement the council's policies, and the council should not undermine the city manager's authority or have direct involvement in managing city staff. But that doesn't mean councilmembers will never get involved in personnel matters.

² Discussed in more detail in sections 1.181 and 1.258 of the Municipal Law Handbook.

III. Workplace Harassment³: Who is Responsible?

A. Complaints from Staff Against a Council Member

The California Legislature has been plagued by complaints of sexual harassment, many made by staff against the legislators for whom they work.⁴ Of course, state legislators are full-time state employees, with full-time staff assigned to their offices. There has never been any real debate over the proposition that the conduct of California Senators and Assembly Members is subject to employment laws, conferring on them certain obligations to fellow employees. The same is true for state government officials in other states. In response to multiple claims of sexual harassment and assault, New York Governor Andrew Cuomo has used just about every excuse *except* “I am not an employee and therefore am not bound by workplace rules.”

But are local elected officials, many of whom have other full-time jobs (or are retired), who may receive only a stipend and not true wages, and who usually do not have their own staff also part of the “workplace”? The California Legislature thinks so. AB 1661, codified at Government Code section 53237.1,

³ For a general discussion of antidiscrimination and harassment laws, see section VIII of Chapter 4 of the Municipal Law Handbook.

⁴ CalMatters has published lists and copies of many of the complaints, which can be accessed here: <https://calmatters.org/politics/inside-california-capitol/2018/02/california-legislature-last-releases-sexual-harassment-records/>

requires “local agency officials” to attend two hours of sexual harassment prevention training every two years, which must include “information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against, and the prevention and correction of, sexual harassment and the remedies available to victims of sexual harassment in employment. The training shall also include practical examples aimed at instructing the local agency official in the prevention of sexual harassment, discrimination and retaliation”

AB 1661 contains the exact same language as AB 1825, codified at Government Code section 12950.1 and enacted 10 years earlier, which requires all employees in supervisory positions to attend sexual harassment prevention training. Additionally, AB 1661 provides that local agencies may have non-elected employees satisfy their training requirement under Government Code section 53237.1, rather than under Section 12950.1. In other words, elected and non-elected members of an agency’s workforce may attend the same training (as they often do) and thus learn about the common set of workplace responsibilities that belong equally to both groups.

The training requirement for elected officials benefits not only the trainees, but also the city or public agency, which is almost always named as a co-defendant in workplace harassment lawsuits involving the misconduct of governing

members.⁵ Under the Fair Employment and Housing Act (FEHA), employers are liable for harassment against their employees as follows:

- Employers are strictly liable for the acts of agents and supervisors.⁶
- Employers are responsible for the acts of a non-supervisory employee if the employer, or one of its agents or supervisors, knows or should have known of the conduct and fails to take immediate corrective action.⁷
- Employers are responsible for the acts of nonemployees if the employer, or one of its agents or supervisors, knows or should have known of the conduct and fails to take immediate corrective action.⁸

So where do elected officials fit in? First, under the FEHA, elected officials are supervisors. A supervisor is defined as “any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority ... requires the use of independent judgment.”⁹ Because a city council generally has the authority to hire, fire, and issue direction to, at minimum, the city manager, councilmembers fit within the definition of “supervisor.” (The same would be true of any elected

⁵ See, e.g., *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511 (workplace harassment lawsuit brought against Los Angeles City Councilmember).

⁶ *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042.

⁷ Government Code § 12940(j)(1).

⁸ *Ibid.*

⁹ Government Code § 12926(t).

body with authority over an executive employee, such as a general manager or chief executive officer.) Therefore, public agencies face liability when an elected official is accused of harassment, or when an elected official knows about harassment and fails to take action.

Additionally, elected officials may be considered agents. Because the FEHA does not provide a definition of “agent,” courts have looked to general principles of agency law to determine who is an “agent” in the employment context.¹⁰ An agent is a person authorized by the employer to conduct transactions with third parties and to exercise a degree of discretion in effecting the purpose of the employer.¹¹ Supervisors are considered agents of an employer under the FEHA.¹² But even if we do not consider elected officials supervisors, they still exercise agency on behalf of a city to carry out transactions. When a city takes a particular action, it is, most likely, because the city council -- its agent -- decided to do so.

Finally, elected officials may expose a city to liability in a FEHA lawsuit because the 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. Therefore, even if we consider a city

¹⁰ *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1328.

¹¹ *Ibid.*

¹² *Ibid.*

councilmember to be a member of the public for purposes of the FEHA, if a city employee complains about harassment by the councilmember, the city must take immediate action to investigate and, if necessary, protect the employee.

B. Steps to Take

Where does this leave you when you receive the panicked call about workplace allegations against a councilmember? Here are some steps you may need to take, without coming to any conclusion on whether the allegations are true:

1. Find out what the complainant needs in the short-term to feel comfortable. The city is not obligated to honor any request made by the complainant, but if there are reasonable steps such as a short stress leave, or removal of the complainant from a job duty that requires direct contact with the elected official, those options should be considered.
2. Speak with the councilmember. It is often more effective if the city attorney speaks with the councilmember alone (rather than with the city manager) to explain candidly the city's potential liability without causing embarrassment to the councilmember. The key points to convey are (1) the nature of the allegations, (2) the city's legal obligation to investigate the allegations, and (3) advice to cease contact with the complainant, to the extent possible, and not to take any action that could possibly be perceived as retaliatory.
3. Initiate an investigation by a third-party, neutral investigator. Investigating allegations made against an elected official should follow normal city policy, except that the elected official cannot be compelled to participate in the investigation. An investigation report should be prepared and the results should be shared first with the councilmember and then with the full city council. In most situations, it would also be appropriate to share the report with the City Manager.

4. If the allegations are sustained by the investigator, the city attorney or city manager should explain to the councilmember why such conduct puts the city at risk, and may put the councilmember individually at risk too.
5. If the allegations are sustained, the complainant's supervisor, in consultation with the city manager, should determine what can be done to protect the complainant from future harassing conduct. The complainant's input should be sought, and no action taken to protect them should appear punitive. For example, alteration of job duties may be considered, but only if the complainant wants that to occur.

IV. Workplace Violence Restraining Orders

Similar to the duty to protect employees against unlawful workplace harassment, employers are also 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.¹³ In 1994, the Legislature enacted the Workplace Violence Safety Act, codified at Code of Civil Procedure section 527.8, to provide California employers with a legal option to prevent violence in the workplace by petitioning the courts for what is commonly referred to as a Workplace Violence Restraining Order (“WVRO”).

Section 528.7(a) provides that “[a]ny employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, that

¹³ *Franklin v. The Monadnock Co.* (2007) 151 Cal.App.4th 252, 259 (“Labor Code section 6400 *et seq.* and Code of Civil Procedure section 527.8, when read together, establish an explicit public policy requiring employers to provide a safe and secure workplace, including a requirement that an employer take reasonable steps to address credible threats of violence in the workplace.”); *see also*, Labor Code §§ 6300, 6306 (requiring employers to maintain safe and healthy workplaces, free from “danger to the life, safety, or health of employees as the nature of the employment reasonably permits.”)

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.” The statute defines “employer” to include a city, county, district, or any public agency thereof or therein.¹⁴ “Unlawful violence” includes assault, battery, or stalking, and a “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.¹⁵

When an employee expresses, or the employer otherwise gains knowledge of, a violence-related safety concern, the first step is to evaluate the particular circumstances and whether there is reason to believe that an employee has suffered unlawful violence and/or a credible threat of violence at the workplace. If so, the employer may petition the court for a temporary restraining order (TRO) based on evidence that the employee has suffered unlawful violence and/or a credible threat of violence, *and* that great or irreparable harm would result to the employee if the

¹⁴ Code Civ. Proc. § 527.8(b)(3).

¹⁵ Code Civ. Proc. § 527.8(b)(2), (7).

TRO is not issued.¹⁶ Regardless of whether a request for a TRO is granted or denied, the court will set a hearing to take place within 21 days.¹⁷ If a TRO is issued, the terms of the TRO will remain in effect until that hearing date. At the hearing, the court will evaluate whether there is clear and convincing evidence that the respondent engaged in unlawful violence or made a credible threat of violence against the employee. If the judge finds that the respondent engaged in unlawful violence or made a credible threat of violence, an order shall issue prohibiting further unlawful violence or threats of violence.¹⁸ A WVRO can be issued for a period of up to three years, and can be renewed for an additional three years upon written stipulation or on the motion of a party.¹⁹

Whether a WVRO is an appropriate or available option to address threats of violence made by an elected official to an employee will require a careful analysis of the facts at issue. Although a court may not issue a WVRO that prohibits speech or other activities that are constitutionally protected or otherwise protected by any other provision of law, the court can craft personal conduct and stay-away orders that are tailored to address particular factual circumstances. Typically, a WVRO

¹⁶ Code Civ. Proc. § 527.8(e).

¹⁷ Code Civ. Proc. § 527.8(h).

¹⁸ Code Civ. Proc. § 527.8(j)

¹⁹ Code Civ. Proc. § 527.8(k)(1)

will contain orders requiring the restrained person to stay a certain distance away from the protected employee and prohibiting the restrained person from harassing the protected employee, committing acts of violence or making threats of violence against the protected employee, or contacting the employee in any way, including by telephone or electronic mail. The court can also impose additional orders such as requiring the restrained person to attend a certain number of anger management classes. Stay away orders can be tailored so that a restrained elected official is still able to visit city hall and attend council meetings upon notice to the city. A restrained person who intentionally disobeys any of the orders within the WVRO faces criminal prosecution pursuant to Penal Code section 273.6.

Workplace Violence Restraining Orders are also available to an elected official who has been subjected to a credible threat of violence in the city workplace. The definition of “employee” in the Workplace Violence Safety Act at Code of Civil Procedure section 527.8(b)(3) includes “elected and appointed public officers.” Of course, whether a WVRO is an appropriate or available option to address a threat of violence made against an elected official will require looking at the particular facts surrounding the threat, including the context of the threats and the individual making the threats. If the threat of violence was made against the elected official outside of the context of the elected official’s role with the city, it could be that a more appropriate course of action would be for the elected official

to seek a Civil Harassment Restraining Order pursuant to Code of Civil Procedure section 527.6.

V. COVID-19 Related Safety

In November 2020, Cal/OSHA promulgated regulations regarding COVID-19 related workplace safety.²⁰ The regulations require all individuals at City worksites to abide by certain rules, including wearing face coverings and socially distancing. The question has frequently arisen whether elected officials are required to follow the Cal/OSHA rules at in-person public meetings. Under the regulations, the answer is yes -- an answer that may be met with “Cal/OSHA doesn’t have jurisdiction over me.” The key point: Cal/OSHA has jurisdiction over the workplace, regardless of what individuals are present. 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, and could be subject to significant monetary penalties, mandatory abatement, and increased scrutiny and inspection by the Division of Industrial Relations.

VI. Elected Officials’ Access to Personnel Records

Councilmembers are often under pressure from the public, especially from critical or unhappy constituents, to address personnel-related issues. It can be

²⁰ 8 Cal. Code Regs. §§ 3205-3205.4.

tempting for elected officials to insert themselves into a personnel-related matter that is best left addressed through the city's established policies and procedures. For example, a councilmember might feel obligated to follow up on a complaint made by a member of the public against a city employee, and ask staff to provide details about an investigation, the outcome of the investigation, and what action, if any, was ultimately taken. However, a councilmember is not entitled to this information and does not have greater access to employee personnel records by virtue of their position as an elected official. Put simply, under the council-manager form of government, the city council does not have a role in staff personnel matters.

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. This right to privacy begins with the California Constitution in Article 1 Section 1²¹, and is further supported by statutes such as Government Code section 6254(c), which exempts from disclosure under the Public Records Act personnel records the disclosure of which would be an unwarranted invasion of privacy; Civil Code section 56.20,

²¹ “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*.” (Cal. Const. Art. I, § 1 (amended 1972) (emphasis added)).

which requires an employer to ensure the confidentiality and protection from unauthorized use and disclosure of employee medical information; the Americans with Disabilities Act²², which requires employers to keep medical information of employees separate from other personnel files; and California Code of Civil Procedure section 1985.6, which applies special procedural requirements to subpoenas for employment records. Indeed, the Legislature was mindful of the right of individuals to privacy when it enacted the California Public Records Act. Government Code section 6250 notes that “[i]n enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.” For peace officers, additional protections are provided through Penal Code section 832.7, which makes peace officer personnel records²³ confidential.

²² 42 USC § 12112(d).

²³ Penal Code section 832.8(a) defines peace officer “personnel records” to mean “any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:

(1) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.

(2) Medical history.

(3) Election of employee benefits.

(4) Employee advancement, appraisal, or discipline.

Although an employee has a right to inspect their *own* personnel files under Labor Code section 1198.5, councilmembers do not have a blanket right to access employee personnel files. Whether a councilmember is entitled to information from an employee's personnel file will depend on the purpose of the inquiry and the relevance of the information to the councilmember's duties as a member of the city council. For example, if the city or city employees are involved in litigation in which an employee's personnel records are at issue, certainly councilmembers are permitted to review personnel information that is relevant and necessary to their evaluation of the litigation, such as personnel information relevant to a settlement offer that requires council direction.

However, what if a councilmember receives a complaint by a member of the public that a police officer committed serious acts of misconduct? The councilmember might feel an obligation to follow up on the complaint, ensure that it is being investigated fully, and report back to the complaining individual about the status and outcome of the investigation. However, the councilmember is not entitled to information regarding the investigation, including the findings and

(5) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.

(6) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

conclusions of the investigator. Information regarding an investigation of a complaint made against a peace officer is confidential and cannot be disclosed absent compliance with Penal Code section 832.7 and Evidence Code section 1043.

The legal ramifications for the unauthorized disclosure of information from personnel records will depend on the substance of the disclosed information and the consequences to the employee. For example, an employee's medical information must be kept confidential under both federal and state law, regardless of whether an employee has a disability. Under California's Confidentiality of Medical Information Act ("CCMIA") (Civil Code § 56 *et seq.*), an employer is prohibited from disclosing an employee's medical or health information except with the employee's prior authorization or under the narrow circumstances found in Civil Code section 56.20(c). An unauthorized disclosure of medical information in violation of the CCMIA is a misdemeanor and employers may be subject to compensatory damages, punitive damages up to \$2,000, attorneys' fees, and the cost of litigation.²⁴

Telling a councilmember that they cannot access confidential employee records or be kept abreast of personnel investigations may be met with significant

²⁴ Cal. Civ. Code §§ 56.35 & 56.36.

resistance. But limiting councilmembers' knowledge of personnel matters actually protects them. If a councilmember is under pressure to take a particular personnel action, it should be easier for them to say "I do not have access to any information regarding this matter" rather than having to explain why they did or not do what the public wanted.

VII. Workplace Complaints Made by Public Officials

In an increasingly polarized political climate, complaints made by elected officials against each other are increasingly common. City attorneys will be asked to advise on the acceptable limits of hostile or insulting treatment by one councilmember against another. For the vast majority of complaints regarding publicly displayed conduct, the inquiry ends with the First Amendment. But what if a councilmember sends their colleague lewd photos or repeatedly pressures them to engage in sexual acts? Should the city investigate? Because this question has not been directly addressed by the courts, the safest approach is to conduct an investigation (in accordance with the procedures previously discussed), with an admonition to the complainant that even if the allegations are sustained, there is no employment action the city can take. The city council would have the option to censure the offending councilmember.²⁵

²⁵ See Section 1.228 of the Municipal Law Handbook.

It may also help to explain to elected officials the difference between opinions and harassment -- a difference that is more nuanced in the non-elected workforce. A male councilmember saying to a female councilmember "I don't think you are qualified to hold public office because you are a woman" is protected speech; calling her a misogynistic slur may be harassment (although still without recourse under employment laws). The analysis would be different for a member of city staff telling a co-worker she is not qualified for her job because she is female -- conduct that should be prohibited by city policy and could, even though it is an opinion, give rise to a harassment lawsuit.

VIII. Conclusion

Courts have not resolved the issue of whether local elected officials are employees. But that may not be the important question. The question is whether an elected official's conduct toward city employees can expose the city to liability, and almost always, the answer is yes. Therefore it is important for city attorneys to let councilmembers know when they are putting the city (and themselves) at risk, and why the city has the responsibility to take corrective action, even though corrective action cannot be discipline or termination.