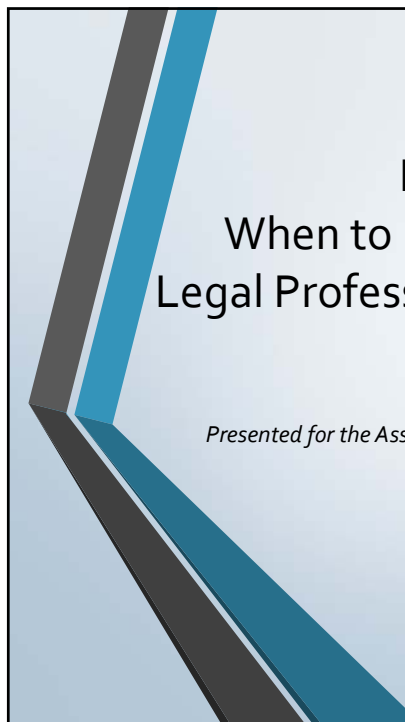


Effective Management: When to Bring in a Consultant or Legal Professional/ Contract Review

*Presented for the Association of Chief Human Resources Officers and
Equal Employment Officers*

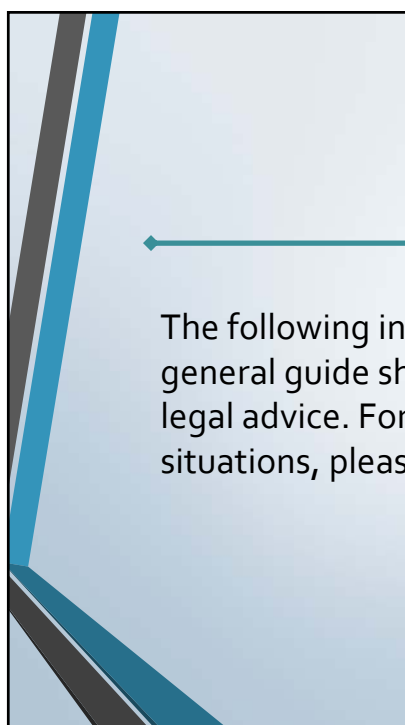
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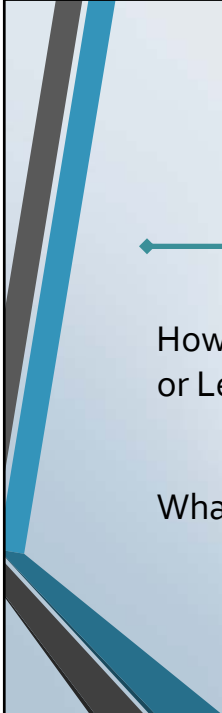
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Disclaimer

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The following information is designed to be a general guide should NOT be considered legal advice. For questions about specific situations, please consult an attorney.

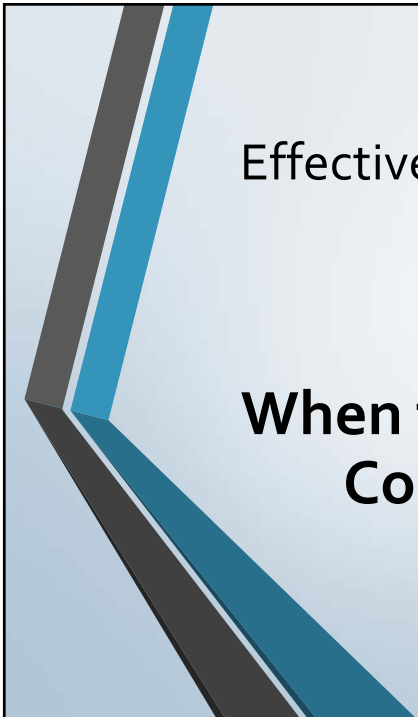


Purpose of the Seminar

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How to Decide When to Bring in a Consultant or Legal Professional

What to look for in Contracts Before Signing



Effective Management

I.

When to Bring in a Consultant

When Do You Need a Consultant?

- Employee Discipline
- Investigations
- Labor Relations

Factors To Consider

- Expense
- Contract Duration
- Complexity of Contract Terms
- Downside
- Liability and Exposure to District
- Insurance Carrier

Reasons for Outside Consultant

- Assist With Recruiting
- Expertise in Particular Areas
- Outsourcing and Contracting Out
- Strategic Planning
- Legal Compliance and Litigation

Types of Consultants

- Recruiting
 - "Head-hunters"
 - Specialized Searches for Administrators and other Positions

Types of Consultants

- IT Experts – for computer issues above and beyond in-house capabilities
 - Installation of new software systems such as Banner
 - Updates and Maintenance of system
 - Training associated with new vendor

Types of Consultants

- Specialized Assistance
 - “Pro-Employer” doctor to test fitness for duty for an employee returning to work
 - District may use its own medical professional to determine existence of disability and available reasonable accommodations
 - Advise re ADA / FEHA issues

Types of Consultants

- Non-attorney investigations
 - Criminal issues – former law enforcement officer
 - Computer forensics and file recovery
 - Business or forensic accounting
 - FCMAT or other specialist
- Must be licensed

Types of Consultants

- Workplace Training
 - Discrimination / Harassment Training
 - Campus Safety Training
 - Disaster Training
 - Live Shooter Training

When to Bring in a Legal Consultant

Employee Discipline

- Exposure to Liability
- High Level Employee
- Union Issues
- Independent Investigation Necessary

Employee Discipline

Consult an Attorney Prior to Issuing Discipline if the Employee Potentially Has Claims of:

- Discrimination
- Harassment
- Retaliation
- Free Speech
- Whistleblowing

Employee Discipline

Consult an Attorney Prior to Issuing Discipline if the Employee Has Recently Taken:

- Family Leave
- Pregnancy Leave
- Disability / Request for Reasonable Accommodation
- Work Related Injury

Employee Discipline

Consult an Attorney Prior to Issuing Discipline in the Following Situations:

- Lack of proper evaluations
- Lack of documented evidence in personnel file
- Discipline not consistent with similarly situated employees
- Conduct occurring off the job

Investigations

Selecting an Investigator

- Human Resources Staff
 - Organization and communication skills
 - Knowledge of personnel issues
 - Awareness of potential legal issues
- Independent Department Manager
 - Technical knowledge
 - Level of independence

Investigations

Selecting an Investigator

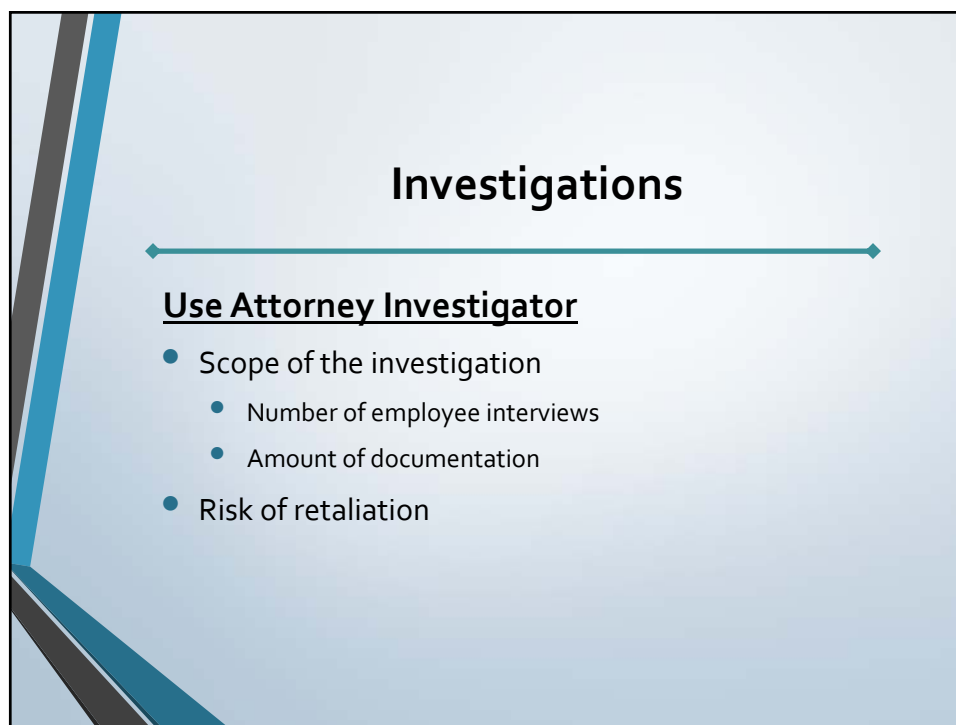
- Outside investigator
 - Independent
 - Knowledge of personnel, technical, and legal issues
 - Trained in interviewing witnesses and assessing credibility
 - If an attorney, the communications may have some attorney-client privilege



Investigations

Use of Attorney Investigator

- Type of investigation
 - Harassment or illegal conduct
 - Employee dispute or workplace misconduct
- Scope of the investigation
 - Laws, regulations, and company policies and procedures that must be followed



Investigations

Use Attorney Investigator

- Scope of the investigation
 - Number of employee interviews
 - Amount of documentation
- Risk of retaliation

Labor Relations

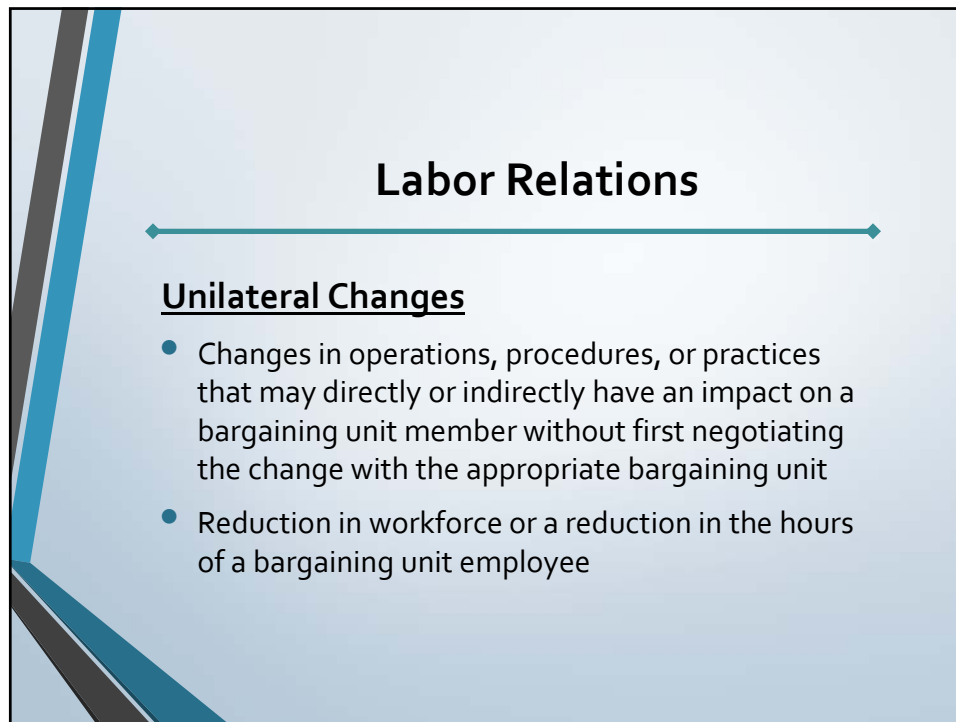
Consult and Attorney Regarding the Following Legal Issues:

- Transfer of Bargaining Work / Subcontracting
- Unilateral Changes
- Interference / Retaliation
- Grievance / Arbitration / Litigation
- Collective Bargaining

Labor Relations

Transfer of Bargaining Work / Subcontracting

- Assigning work previously conducted exclusively by one bargaining unit to an employee outside of that bargaining unit who has never performed that work
- Stop assigning work to employees of a bargaining unit who have previously performed the work, yet continue to assign the work to employees outside of that bargaining unit who also have previously performed the work
- Contracting out to a private party work typically performed by union employees



Labor Relations

Unilateral Changes

- Changes in operations, procedures, or practices that may directly or indirectly have an impact on a bargaining unit member without first negotiating the change with the appropriate bargaining unit
- Reduction in workforce or a reduction in the hours of a bargaining unit employee



Labor Relations

Grievance Processing / Arbitration

- Reasons to bring in legal consultant to determine if District can refuse to process
 - Expired Contract – grievance and arbitration procedures generally do not survive the expiration of the CBA
 - The union violated a procedural step in the CBA in the request for arbitration

Labor Relations

Grievance Processing / Arbitration

- Reasons to bring in legal consultant to determine if District can refuse to process
 - When an issue directly conflicts with a mandatory provision of the Education Code
 - Exclusive management decisions set forth in the Education Code are not subject to bargaining or the grievance procedure

Labor Relations

Grievance Processing / Arbitration

- Potential issues where District may be able to refuse to process a grievance
 - Grievances alleging entitlement to a specific course or class
 - Termination of extra-duty assignments
 - Temporary employee issues

Risk that union will then file an unfair practice with PERB or seek a court order compelling arbitration

Labor Relations

Grievance Processing / Arbitration

- Bring in legal consultant when a grievance:
 - May be untimely
 - Fails to follow grievance procedures
 - Does not allege a violation, misinterpretation, or misapplication of a provision of the collective bargaining agreement
 - Violations of past practices cannot be alleged as grievances
 - Education Code violations cannot be alleged as grievances
 - Alleges conduct is authorized by the collective bargaining agreement, binding past practice, or the Education Code

Labor Relations

Grievance Processing / Arbitration

- Bring in legal consultant when a grievance:
 - Is raised after undue delay (Laches)
 - Involves employee's or union's own misconduct (Unclean Hands)
 - Involves a dispute subsumed under pending PERB complaint or lawsuit
 - Requests a remedy would require an arbitrator to alter, amend or change the collective bargaining agreement
 - Requests a remedy is precluded by the Education Code

All appropriate defenses should be raised at the earliest opportunity or they may be waived

Labor Relations

Reasons to Bring Legal Consultant into Negotiations

- More than 80% of a District's budget is part of the faculty and classified CBAs
- Terms and conditions of employment will be written into contract language and interpreted as contracts
- Attorney's fees and expenses are reimbursable as mandated costs

Labor Relations

Negotiations – Legal Can Help Review Existing Contract Thoroughly

- Identify existing provisions which are prohibited subjects of bargaining in light of recent decisions
- Identify existing provisions which are permissive (but not mandatory) subjects of bargaining (i.e., subjects which are typically considered within management or union discretion, but not statutorily prescribed, per above)

Labor Relations

Negotiations – Legal Can Help Review Existing Contract Thoroughly

- Mandatory subjects of bargaining
 - Wages, Health Benefits, and Other Compensation
 - Hours, Schedules, Breaks
 - Leaves / Vacation
 - Transfers / Reassignments
 - Many Others
- Must be negotiated, but the District does not need to give into every union demand

Labor Relations

Negotiations – Legal Can Help Review Existing Contract Thoroughly

- Prohibited Subjects of Bargaining – subjects where the Education Code gives general or specific discretion to the District
 - Layoffs
 - Release of Temporary or Probationary Employees
 - Sabbaticals
 - Leave for Union Officers
- Legal can review to recover these and other management rights

Labor Relations

Negotiations – Legal Can Help Review Existing Contract Thoroughly

- Permissive Subjects of Bargaining – all matters not mandatory or prohibited may be included in the CBA but are not mandatory subjects for future negotiations
- Cannot be taken to impasse by either side
- Legal can review to recover these management rights

Labor Relations

Negotiations – Legal Can Help Review Existing Contract Thoroughly

- Compile Data Necessary to Support Terms Offered in the Initial Proposal
- Draft Actual Proposals to be Presented During Negotiations
- Recover management rights

Labor Relations

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Other Reasons to Bring Legal Consultant into Negotiations

- Unions have regional officers that specialize in negotiations
- Administrators and managers have day-to-day relationships with union officers

Labor Relations

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Other Reasons to Bring Legal Consultant into Negotiations

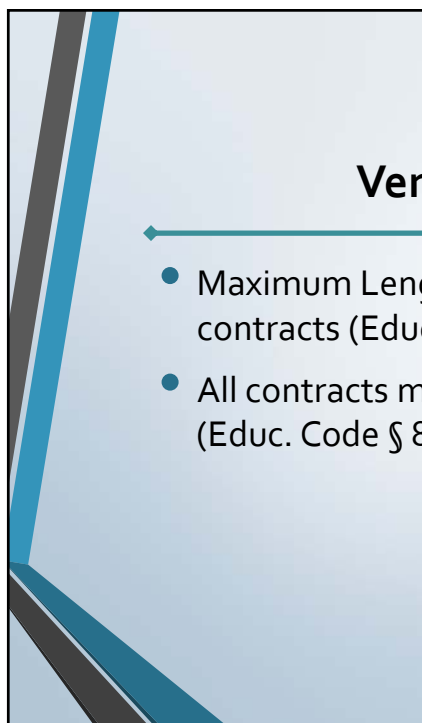
- Experience legal consultants negotiate for other employers
- Knowledge of what other unions will settle for
- Knowledge of ambiguous and problematic terms and conditions of employment that lead to grievances



Effective Management

II.

Contract Review

- 
- ### Vendor Contracts
- Maximum Length: 5 years for most contracts (Educ. Code § 81644.)
 - All contracts must be ratified by the Board (Educ. Code § 81655.)



A presentation slide titled "Vendor Contracts" with a light blue background and a decorative blue and grey diagonal graphic on the left. A horizontal double-headed arrow is positioned below the title. The slide contains a bulleted list of three main items: Termination, Indemnification / Hold Harmless, and Limit warranties and damages as appropriate. Each main item has one or two sub-bullets.

Vendor Contracts

- Termination
 - Early termination - impact on students and facilities
 - Can the District get out of a bad deal?
- Indemnification / Hold Harmless
 - District needs to be adequately protected from vendor negligence
- Limit warranties and damages as appropriate



A presentation slide titled "Vendor Contracts" with a light blue background and a decorative blue and grey diagonal graphic on the left. A horizontal double-headed arrow is positioned below the title. The slide contains a bulleted list of three main items: Third parties, Independent Contractor Clause, and Entire Agreement Clause. Each main item has one or two sub-bullets.

Vendor Contracts

- Third parties
 - Do not create rights for third parties
 - Make sure other side cannot transfer the agreement to another company without District approval
- Independent Contractor Clause
 - Make sure independent contractors are in fact independent contractors
- Entire Agreement Clause

Vendor Contracts

- Legal Jurisdiction– California
 - Community Colleges are State Entities and should not subject themselves to the laws of another state
- Legal Venue – District county or an adjacent county
 - Do not want to travel to prosecute or defend lawsuit
 - Adding “adjacent county” helps prevent other side from arguing it cannot receive a fair trial in your county

Administrator Contracts

- “Administrator” - Any person employed by the governing board of a community college district in a supervisory or management position as defined in the EERA
- “Educational administrator” - Administrator who is employed in an academic position designated as having direct responsibility for instructional or student services program of the college
- “Classified administrator” - Administrator who is not employed as an educational administrator

Administrator Contracts

- Top administrators are in an intimate relationship which requires complete trust by the Board (See, e.g., Grant, 69 Cal.App.3d at 132; Hentschke, 34 Cal.App.3d at 22-23.)
- Mid-level administrators bear an intimate relationship which requires complete trust by top level administrators (Grant, 69 Cal.App.3d at 132; Hentschke, 34 Cal.App.3d at 22-23.)

Administrator Contracts

- Education Code 72411: “Educational administrators” shall and “other administrators” may be appointed by a contract or appointment of up to four years
- The Board may determine that an administrator is not to be reemployed at the expiration of his or her appointment or contract

Administrator Contracts

- Termination
 - More than one year: 6 months notice
 - One year or less: March 15
- Administrators without express appointments or contracts serve at the pleasure of the Governing Board

Administrator Contracts

- Duties and Responsibilities
 - Devote time, skill, labor, and attention to the District
 - Schedule
 - Job Description
 - Other jobs permitted?
- Terms and Conditions of Employment
 - Salary
 - Benefits
 - Expenses
 - Leaves and Vacation

Administrator Contracts

- Evaluation
- Removal For Cause
- Retreat Rights
 - Administrator previously employed as a tenured faculty member retains tenure and may retreat to the classroom
 - Administrator previously employed as a permanent classified employee retains right to classified position
 - Educational administrator not previously employee as faculty may have the right to retreat to a first year probationary faculty position

Any questions?

Thank You

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