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City Under Scrutiny: Employment Matters and High-Profile Investigations

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INTRODUCTION

Workplace complaints within California public agencies rarely fit neatly into a single legal category. A report of discrimination may evolve into a retaliation claim. A whistleblower allegation may implicate First Amendment protections. Union activity may overlap with protected concerted activity and trigger unfair practice concerns. And in the public sector, virtually any of these matters may generate California Public Records Act ("CPRA") exposure. CPRA requests that accompany workplace claims present a significant and often underappreciated challenge for organizations managing internal investigations: outside scrutiny resulting from what once was a confidential internal investigation transformed into public record. This publicity can create real operational problems as witnesses grow reluctant to participate, parties feel pressure to posture publicity, and the organization's ability to conduct a thorough, impartial inquiry is compromised. What begins as a personnel issue can quickly become a liability game of whack-a-mole.

This whitepaper examines several of the most consequential areas of exposure facing public employers: discrimination, harassment, and retaliation under California's Fair Employment and Housing Act; whistleblower liability; constitutional speech protections; labor and union considerations; and potential CPRA implications. Each of these doctrines carries its own legal framework and evidentiary standards. Yet in practice, they often converge in a single investigation. The same set of facts may be scrutinized under statutory, constitutional, and labor law lenses simultaneously.

The connective tissue across these high-risk domains is the investigative process itself. Decisions about whether to investigate, how to define scope, who should conduct the inquiry, how findings are framed, and how records are maintained can materially shape agency legal compliance efforts and potential liability across all of these areas. An investigation that is narrowly structured to address harassment may inadvertently create retaliation exposure. An inquiry into whistleblower complaints may generate discoverable communications or public records requests. A disciplinary review touching on employee speech or union advocacy may raise constitutional or unfair practice implications.

Accordingly, this paper approaches these substantive areas of law through a common strategic lens: how investigative choices intersect with, and often influence, legal outcomes. Understanding that intersectionality is critical. In high-profile public-sector employment matters, the investigation is not merely responsive, it is foundational.

LEGAL CONSIDERATIONS

a. DISCRIMINATION, HARASSMENT AND RETALIATION

California's Fair Employment and Housing Act ("FEHA") imposes expansive obligations on public and private employers to prevent and remedy discrimination, harassment, and retaliation in the workplace. FEHA prohibits discrimination and harassment based on protected characteristics and makes it unlawful for an employer to retaliate against an employee for engaging in protected activity, including complaining about or opposing conduct reasonably believed to violate the statute. (Gov. Code §§ 12940(a), (h), (j).)

Courts have construed these protections broadly, recognizing retaliation where protected activity is a substantial motivating factor in an adverse employment action. See *Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028. Critically, FEHA also imposes an affirmative duty on employers to take "all reasonable steps necessary to prevent discrimination and harassment from occurring" (Gov. Code § 12940(k)), which California courts have interpreted to include a prompt, thorough, and impartial investigation once the employer becomes aware of allegations of misconduct. See *Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264. In practice, therefore, an employer's response to complaints, particularly the decision whether and how to investigate, often becomes central to both liability exposure and defense strategy.

Investigations into discrimination, harassment, and retaliation clams demand a structured, even-handed process that affords both the complainant(s) and the respondent(s) a full and fair opportunity to be heard and to present supporting evidence. This can be achieved by providing all parties with a clear explanation of the process and their rights within it at the outset of the investigation, coupled with preserving a complete and organized record of all evidence gathered. Mitigation of liability depends not only on reaching a well-supported conclusion but also on demonstrating that the process itself was impartial. Organizations that can demonstrate procedural fairness are significantly better positioned to defend against claims that the investigation was pretextual or outcome driven.

i. <u>Discrimination and Disparate Treatment</u>

Discrimination based upon protected categories is unlawful under both State and Federal law. When an employee alleges that they are subject to "disparate treatment," the employee must prove by a preponderance of the evidence that the employer intentionally treated them less favorably than other employees because of their membership in the protected category. *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502. In a disparate treatment case, the employee must either present direct evidence of discriminatory intent or prove their case with circumstantial evidence under the burden shifting analysis framework set out in *McDonnell-Douglas Corp. v. Green* (1973) 41 U.S. 792; *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317. An employer will be liable for intentional discrimination if it is shown that its employment decision was premised upon an illegitimate criterion. *Heard v. Lockheed Missiles & Space Co*. (1996) 44 Cal.App.4th 1735.

Although the employee ultimately has the burden of persuading the trier-of-fact that the employer intentionally discriminated against the employee, courts have developed a burden-shifting analysis for cases involving circumstantial proof of discrimination. *St. Mary's Honor Center v. Hicks*. The allocation of the burden of producing evidence in a disparate treatment case is well established. *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248; *McDonnell-Douglas Corp*. The employee first must establish a prima facie case of discrimination. The employer is then obligated to articulate a legitimate, non-discriminatory reason for the action taken against the employee. Finally, the employee must demonstrate through "specific, substantial" evidence that the employer's proffered reason was pretextual, and the real reason for the employer's decision was discrimination. *Godwin v. Hunt Wesson, Inc*. (9th Cir. 1998) 150 F.3d 121. If the plaintiff can show pretext, then the sole remaining issue is whether there was intentional discrimination. *Reeves v. Sanderson Plumbing Products* (2000) 530 U.S. 133.

In *McDonnell-Douglas*, the Supreme Court created the model for a prima facie case focusing on discriminatory hiring practices, but the elements vary to fit the particular theory of discrimination. For example, the prima facie elements for discriminatory failure to promote are: (1) complainant belongs to a protected class; (2) his job performance was satisfactory; (3) he was not promoted; and (4) others not in the protected class with similar qualifications were promoted and/or the positions were filled by individuals of comparable qualifications not in the protected class. *Mixon v. Fair Employment & Housing Com*. (1987) 192 Cal.App.3d 1306.

Once the employer has demonstrated that it had a legitimate nondiscriminatory reason for its actions, the employee must offer evidence demonstrating that the stated reasons for the action were either untrue or a pretext for discrimination. *Villiarimo v. Aloha Island Air* (9th Cir. 2002) 281 F.3d 1054. Circumstantial evidence used to show that the employer's proffered motives were not the actual motives must be "specific" and "substantial" to create a triable issue with respect to whether the employer intended to discriminate on the basis of the protected category. Employees must do more than attack the soundness of the employer's decision. The reasons must be implausible, or inconsistent or baseless, to support a reasonable inference the reasons were pretextual. *Hersant v. Dept. of Social Services* (1997) 57 Cal.App.4th 997. Courts do not sit as "super-personnel departments" reviewing the wisdom or fairness of business judgments, except to the extent that they involve intentional discrimination. The employee loses a discrimination case if the employer honestly believed in the nondiscriminatory reasons for its actions, even if they are foolish, trivial, or baseless. The issue of pretext does not address the correctness or desirability of reasons offered for employment decisions.

ii. <u>Harassment and Hostile Work Environment</u>

State and federal law prohibit harassment in the workplace. Harassment in employment occurs when an employee is: 1) subject to unwelcome conduct; 2) based on the employee's protected status; and 3) the conduct affects a term, condition, or privilege of employment. *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57; *Harris v. Forklift Systems, Inc*. (1993) 510 U.S. 17. Federal and state law recognize that these three components must be met to impose liability. Hostile work environment harassment occurs when unwelcome and offensive conduct (based on any protected classification) unreasonably interferes with an individual's job performance or creates an intimidating, hostile or offensive work environment. The courts have provided guidelines regarding what constitutes hostile work environment harassment:

- Conduct that a reasonable person would find hostile or abusive, and that the victim subjectively perceives as abusive, is enough to constitute harassment.

- Whether a working environment is "hostile" or "abusive" can be determined only by looking at all the circumstances surrounding the alleged harassment.

- Relevant factors to consider in deciding whether a working environment is "hostile" or "abusive" include: 1) frequency of the conduct; 2) its severity; 3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and 4) whether it unreasonably interferes with the employee's work performance.

- Conduct must be "unwelcome", i.e., unsolicited, uninvited, undesirable and offensive in order to constitute harassment. *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590.

In a hostile environment case, the employee must show that the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Hostile environment harassment is analyzed from the standpoint of a reasonable person. This means that conduct does not constitute harassment unless it would substantially affect a reasonable person with the same fundamental characteristics as the victim in a similar work environment under similar circumstances. *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522. The working environment must be both subjectively and objectively abusive. *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917. Additionally, the conduct must be based on the employee's protected status. The harassment laws are not a general civility code which protects employees from difficult or demeaning supervisors. *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75. "Occasional, isolated, sporadic or trivial acts" of harassment including verbal abuse are not actionable. *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457.

iii. <u>Retaliation</u>

Retaliation is unlawful under federal and state law. The employee must prove the employer took an adverse employment action against the employee because the employee engaged in a protected activity. Courts use a burden-shifting analysis in retaliation claims. To establish a prima facie case of retaliation, an employee must show that: 1) the employee engaged in a protected activity (such as opposing discrimination or participating in an investigation into discrimination or harassment); 2) the employee was thereafter subjected to an adverse employment action; and 3) there is a casual link between the protected activity and the adverse employment action. *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.

Retaliation claims can be based on a wide variety of activities protected under both state and federal law. The protected activity could be opposing an employment practice prohibited by state or federal statute, rule or regulation. The protected activity can also be filing a charge, testifying, or assisting or participating in an investigation, proceeding or hearing of the employee's own claim of unlawful conduct or the claim of another employee under a statute, regulation or an employer's own policies. Employees must reasonably believe that the action they opposed was unlawful, but even if the action is later found to have been a lawful action by a court, the employer's liability for employees' claims for retaliation may remain. *Clark County School City v. Breeden* (2001) 532 U.S. 268; *Yanowitz v. L'Oreal USA, Inc.*, *supra*; *Ohton v. Board of Trustees of the California State University* (2010) 180 Cal.App.4th 1402.

A causal connection for a retaliation claim may be established through evidence that an employee engaged in protected activities and that the adverse action followed within a relatively short time thereafter ("temporal proximity"). *Morgan v. Regents of University of Cal.* (2000) 88 Cal.App.4th 52; *Addy v. Bliss & Glennon* (1996) Cal.App.4th 205; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590. In addition to temporal proximity, it must be demonstrated that employers have knowledge of the protected activity in order to show that a causal link exists between the protected activity and the adverse action taken thereafter. Even if the person who made the decision to impose the adverse action upon the employee did not have knowledge of the employee's involvement in protected activity, knowledge will still be found if the decision maker was acting on information provided by a supervisor, or other individual, who had knowledge of the protected activity. *Reeves v. Safeway Stores, Inc.* (2003) 121 Cal.App.4th 95. Once a prima facie case is established, as in discrimination cases, the burden shifts to the employer to state a legitimate non-retaliatory reason for its actions, and if the burden is discharged the burden shifts back to the employee to show pretext.

Once the employee has met her initial burden, the employer must articulate a non-discriminatory, non-retaliatory reason for its actions. The employer does not have to prove that its proffered business reason for the adverse action was good cause. The employer merely has to articulate some non-retaliatory, non-discriminatory reason for the action for the burden to shift back to the employee, as "employers must be given wide latitude to make independent, good-faith personnel decisions without the threat of a jury second-guessing their business judgments." *Gonzalez v. Metpath, Inc.* (1989 214 Cal.App.3d 422, 428. Once the employer has articulated a legitimate explanation for the adverse action, the presumption of retaliation, discrimination is rebutted and the burden shifts back to the employee to prove intentional discrimination or retaliation. *McDonnell-Douglas Corp. v. Green* (1973) 41 U.S. 792. The employee must prove, by "specific" and "substantial" evidence that the employer's stated reasons for taking adverse action are merely a pretext for retaliation. To do this, the employee must point to evidence which raises a rational inference that intentional retaliation or discrimination occurred. The evidence offered by the employee must be such that it could reasonably be concluded that the employer's articulated business reasons for acting were implausible, inconsistent, or baseless and, therefore, support a reasonable inference that the stated reasons were pretext. *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1009.

b. WHISTLEBLOWER LIABILITY

The California Whistleblower Protection Act (Gov. Code §§8547–8547.12), enacted in 1993, applies only to state employees, who should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution. Gov. Code §8547.1. The Whistleblower Protection Act (Gov. Code §§9149.20–9149.23), enacted in 1999, applies only to state and other public employees, who should disclose, to the extent not expressly prohibited by law, improper governmental activities. Gov. Code §9149.21.

California Labor Code generally protects all workers who might have reason to fear retribution for reporting improper activities. Labor Code §§1101–1106. California law provides employees with whistleblower protections in Labor Code Section 1102.5 which is a general whistleblower statute applicable to both private and public workplaces. The most utilized section of this law is section 1102.5, subdivision (b), which states: "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

Put succinctly, section 1102.5, subdivision (b) protects an employee from retaliation by his employer for making a good faith disclosure of a violation of federal or state law. The protections of section 1102.5(b) are only available to employees. *Bennett v. Rancho California Water Dist*. (2019) 35 Cal.App.5th 908, 911. To avail oneself of Labor Code section 1102.5, subdivision (b), an employee must be able to articulate both a "protected activity" and a resulting "adverse employment action." Therefore, both prongs are analyzed below.

To engage in activity protected under section 1102.5(b), the employee must disclose reasonably based suspicions of illegality to a government employee, law enforcement employee, or a fellow employee who has authority over the disclosing employee or authority to investigate, discover or correct the violation. The information disclosed can be a potential violation of state or federal statute or of a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties. *Killgore v. SpecPro Professional Services, LLC*, (2022) 51 F.4th 973. The burden is fairly low for an employee, as an employee need not be correct in their belief, but rather must only prove that they held the belief in good faith, even if mistaken. *Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.4th 913, 922.

"Protected activity" not only includes reports of an employer's unlawful activity but also includes reports of unlawful activity by third parties. *McVeigh v. Recology San Francisco* (2013) 213 Cal. App. 4th 443, 471. An employee engages in a "protected activity" even though the disclosure might fall within the employee's general job duties. *Id*. at 469. Further, the employee's motivation for reporting suspected illegality is irrelevant to the analysis of whether the disclosure is considered a "protected activity." *Mize-Kurzman v. Marin Comm. College Dist*. (2012) 202 Cal.4th 832, 850-852.

In addition, a disclosure does not need to be the first or only report of suspected illegal activity to qualify as "protected activity." *Hager v. County of Los Angeles* (2014) 228 Cal.4th 1538, 1551-1552 (disapproved on other grounds).) Unlike a *Tameny* claim, a "protected activity" need not implicate or concern a violation of public policy. See *Cardenas v. M. Fanaian, D.D.S., Inc*., 194 Cal.Rptr.3d 1, 9-10, review granted and opinion superseded sub nom. *Cardenas v. Fanaian*, 362 P.3d 431 (Cal. 2015), and review dismissed on Feb. 24, 2016.

California courts define "adverse employment action" as an action or course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges of employment. *Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1052-1056. The most obvious adverse employment actions are termination and demotion. However, there is no requirement that an employer's retaliatory acts constitute one swift blow. Rather, a determination of whether an adverse employment action occurred must "take into consideration the unique circumstances of the affected employee as well as the workplace context of the claims." *Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 366-367. Therefore, a series of subtle actions, such as workplace harassment (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 212), a reduction of work hours (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 93), a reduction in support staff (W*ysinger v. Automobile Club of Southern California*

(2007) 157 Cal.App.4th 413, 424), or an undesirable reassignment (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424) has been regarded as an "adverse employment action" taking as a whole the unique facts of each case.

Whistleblower claims introduce a layer of legal complexity to workplace investigations because of the statutory protections that can convert otherwise routine investigative decisions, such as scope limitations or interview sequencing, into alleged acts of retaliation. Organizations can mitigate this risk by maintaining rigorous documentation concerning the legitimate business rationale for investigative decisions and maintaining strict separation between those managing the investigation and those with operational authority over the whistleblower. A clearly defined, consistently applied reporting structure that shields the investigator from management pressure is essential to both the integrity of the process and the defensibility of its outcome.

c. <u>FIRST AMENDMENT PROBLEMS</u>

First Amendment issues arise frequently in California public-sector employment disputes, where disciplinary decisions intersect with employee speech. Unlike private employers, public agencies must navigate constitutional constraints when responding to employee expression. Under controlling precedent, a public employee establishes a First Amendment retaliation claim by showing that they spoke as a private citizen on a matter of public concern and that the speech was a substantial or motivating factor in an adverse employment action. See *Garcetti v. Ceballos*, 547 U.S. 410 (2006). However, speech made pursuant to official job duties is not constitutionally protected, even if it concerns misconduct or public policy. California courts apply these principles in fact-intensive analyses, often focusing on the employee's role, the forum in which the speech occurred, and the employer's asserted justification for discipline. In practice, internal complaints, communications with elected officials, union advocacy, and public criticism of agency leadership can quickly implicate constitutional protections. As a result, investigative and disciplinary decisions in these contexts require careful evaluation of both the legal framework and the broader governance implications that follow.

d. <u>UNION DISPUTES</u>

In California public agencies, union-related disputes present a distinct layer of legal risk that often intersects with broader employment liability. The Meyers-Milias-Brown Act ("MMBA") (Gov. Code § 3500 et seq.) governs labor relations between local public agencies and employee organizations and protects employees' rights to engage in concerted activities for purposes of collective bargaining and mutual aid or protection. Gov. Code § 3502. It is unlawful for a public agency to interfere with, intimidate, restrain, coerce, or discriminate against employees because of their exercise of these protected rights. Gov. Code §§ 3503, 3506. As a result, disciplinary actions, workplace investigations, and management responses to employee conduct must be evaluated not only through a performance lens, but also through a labor-relations framework.

Union grievances and unfair practice charges frequently arise when employees or union representatives allege that an employer's actions were motivated, at least in part, by protected activity. These claims are adjudicated by the Public Employment Relations Board ("PERB"), the administrative agency charged with enforcing the MMBA and related public-sector labor statutes. PERB evaluates whether the employer's conduct would reasonably tend to chill protected activity and whether protected conduct was a motivating factor in the challenged action. Even where legitimate performance concerns exist, poorly timed or inadequately documented disciplinary decisions, particularly those following grievances, meet-and-confer disputes, or outspoken union advocacy, can trigger liability in the form of unfair practice findings, reinstatement orders, backpay awards, and remedial notices.

Carefully structured investigations can play a critical role in mitigating these risks. When allegations arise involving union stewards, employee advocates, or participants in protected concerted activity, an investigation that clearly distinguishes between protected conduct and unprotected misconduct helps create a defensible record. For example, aggressive advocacy during bargaining or grievance proceedings may be protected under the MMBA, whereas threats, insubordination unrelated to protected activity, or violations of neutral workplace rules may not be. An impartial, well-documented inquiry focused on specific conduct rather than the employee's union role can demonstrate that any resulting discipline was based on legitimate, nondiscriminatory reasons rather than animus toward protected activity.

At the same time, investigative missteps can themselves become the basis for unfair practice charges. Denying representation rights during investigatory interviews, expanding the scope of an inquiry in response to protected activity, or appearing to single out union representatives for heightened scrutiny may be viewed by PERB as interference or retaliation. Accordingly, in unionized public workplaces, investigations must be designed not only to address the underlying complaint, but also to withstand review under the MMBA's protections. When properly structured, they serve as both a compliance mechanism and a safeguard against labor-relations liability.

e. CPRA CONSIDERATIONS

Finally, in the public sector, personnel matters, including employment investigations, do not occur in a vacuum. Unlike private employers, public agencies must evaluate investigative strategy against the backdrop of the CPRA. Gov. Code § 7920.000 *et seq*. Investigative reports, interview notes, communications regarding scope, and even preliminary drafts may be subject to disclosure unless a statutory exemption applies. As a result, the manner in which an investigation is structured, documented, and communicated can have significant implications beyond the immediate employment dispute.

The tension between transparency and confidentiality is particularly acute in high-profile matters involving allegations of misconduct by public officials or senior leadership. While agencies may assert exemptions for personnel records, investigative materials, or records protected by the attorney-client privilege and attorney work product doctrines, those exemptions are not absolute. Courts balance privacy interests against the public's right to access information concerning the conduct of public business. In *Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041, the court noted that the public has the right to know about well-founded, substantive complaints against public employees, even if the complaint has not been confirmed as true. In *BRV, Inc. v. Superior Court* (2006) 143 Cal. App. 4th 742, the court noted that a public official in an important and highly visible position, such as a school superintendent, has a lesser expectation of privacy in his or her personnel records when a well-founded complaint is involved.

In *Marken v. Santa Monica-Malibu Unified School District*, 202 Cal.App.4th 1250 (2012), the Court of Appeal built upon the precedent established in *Bakersfield* and *BRV* and addressed the disclosure of records arising from a teacher misconduct investigation. The court held that while certain personal information could be redacted, the public's interest in understanding how the district responded to allegations of misconduct weighed in favor of disclosure of significant portions of the investigative findings. While the *Bakersfield*, *BRV*, and *Marken* cases all occurred before the holding reached in the *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, these decisions underscore that investigative records in public agencies may ultimately become public documents, particularly where they concern substantiated misconduct or the performance of public duties by high-ranking officials and employees.

Accordingly, CPRA considerations should inform investigative design from the outset including, most notably, the decision of who should conduct the investigation. Agencies and counsel must anticipate that reports may be reviewed not only by litigants and adjudicators, but also by the press and the public. Careful attention to tone, factual clarity, separation of legal advice from factual findings, and compliance with statutory exemptions is essential. In high-visibility employment matters, the investigative file may serve a dual role: as evidence in potential litigation and as a public record subject to scrutiny. Thoughtful planning at the front end can reduce the risk that the investigative process itself becomes an additional source of exposure.

Even when a workplace investigation is conducted by outside counsel, the organization may find itself in the difficult position of needing to waive, either in-part or wholly, the attorney-client privilege or work product protection that would otherwise shield the investigation report. This most commonly arises when the organization seeks to rely on the report itself as evidence of its good-faith response to a complaint, to demonstrate the reasonableness of its conclusions, or to establish an affirmative defense. Organizations must also be mindful that the election to disclose portions of a privileged report may trigger broader waiver of related communications and materials.

THE DETERMINATION OF WHEN, HOW AND WHO SHOULD INVESTIGATE

In California, an employer's duty to investigate workplace complaints arises both from statute and from the broader obligation to take reasonable steps to prevent and correct unlawful conduct. For example, under FEHA, it is unlawful for an employer to fail to take "all reasonable steps necessary to prevent discrimination and harassment from occurring." Gov. Code § 12940(k). California courts have interpreted this provision to require a prompt, thorough, and impartial investigation once the employer knows or reasonably should know of allegations of discrimination, harassment, or retaliation. An investigation that is delayed, biased, superficial, or pretextual may not only fail to shield the employer from liability but may itself become evidence of unlawful motive or indifference. That said, as the paper notes above, other allegations may trigger liability and while not legally required, an investigation may be helpful as a risk mitigation technique.

While FEHA does not prescribe a single investigative model, best practices have emerged through case law and administrative guidance: the investigator should be adequately trained, neutral, and vested with authority to gather relevant evidence; witnesses should be interviewed in a timely manner; findings should be based on credibility assessments and documentary support; and appropriate remedial action should follow. In public-sector settings especially, the scope and structure of the investigation can carry additional legal and political consequences, including Public Records Act exposure and heightened scrutiny by elected officials or the media.

When employers elect to retain an external investigator, California law imposes additional considerations. Under Business and Professions Code section 17200, individuals who conduct investigations on behalf of others for compensation may fall within the statutory definition of a private investigator, requiring licensure unless an exemption applies. Attorneys conducting investigations within the scope of their law practice are generally exempt from private investigator licensing requirements, but non-attorney investigators must ensure compliance with the statute's licensing framework. Selecting an external investigator, therefore, is not simply a matter of experience or cost; it implicates regulatory compliance and, in some instances, the admissibility and credibility of the investigative process itself.

Ethical boundaries also matter. In *Sabey v. City of Pomona*, 215 Cal.App.4th 489 (2013), the court addressed concerns arising from two attorneys from the same law firm who served in dual roles for the same employer. The case highlights the tension that can emerge when different attorneys from the same law firm serve in different roles, both as neutral and advocate. For example, when one attorney from a law firm serves as an advisor or litigation counsel and a separate attorney serves as an investigator for the same client, risks with the actual or perceived impartiality of an investigation will exist. Such was the case in *Sabey* where the court held that this conflict could not be mitigated by remedial measures such as the use of ethical walls and similar preventative measures.

Although dual roles are not categorically prohibited, they can raise questions about neutrality, credibility, and potential conflicts, particularly if the investigative report becomes central evidence in subsequent proceedings. As a practical matter, employers and counsel must consider not only whether an investigation satisfies legal requirements, including FEHA's "reasonable steps" requirement, but whether the structure of the engagement will withstand judicial scrutiny and avoid undermining the very defense it was intended to support.

In high-risk matters, the duty to investigate is therefore not merely procedural, it is strategic. Who conducts the investigation, how it is scoped, and how its findings are integrated into employment decisions can significantly influence both liability exposure and the defensibility of the employer's response.

CONCLUSION

Public-sector employment disputes rarely begin in a courtroom. They begin with an email, a complaint, a meet-and-confer exchange, or a disciplinary decision that feels routine in the moment. Yet within public agencies, those routine moments often become governance events. An internal complaint can mature into a retaliation claim. A whistleblower allegation can draw council scrutiny, media attention, and Public Records Act requests. And an investigation launched reflexively, or without a clearly defined objective, can become the centerpiece of subsequent litigation.

As explored throughout this paper, high-profile employment matters in California public agencies do not arise in isolation. They emerge at the intersection of discrimination and retaliation law, whistleblower protections, First Amendment constraints, labor relations obligations, and transparency requirements. The investigative decisions made at the outset including whether to initiate an inquiry, how to structure it, who should conduct it, and how findings are framed and implemented, often shape legal exposure long before a complaint is filed. Ultimately, the investigation is not merely a procedural response to workplace conflict. It is a strategic inflection point. In public-sector settings, it frequently becomes the foundation upon which liability is argued, defenses are built, and public narratives are formed. For city attorneys and agency counsel, the critical question is not simply whether to investigate, but how investigative choices will define the record that follows.

Further, while workplace investigations are often deployed in response to legal risk, their strategic value extends well beyond liability mitigation. When conducted thoughtfully, investigations serve as a critical mechanism for ensuring policy compliance, reinforcing organizational values, and promoting a safe, productive work environment. At their core, workplace investigations provide leadership with a structured, fact-based means of assessing whether organizational practices align with established policies, legal obligations, and cultural expectations. This function is essential not only for addressing individual complaints, but also for maintaining institutional credibility and accountability.

Investigations allow agencies to evaluate whether employees, including those in leadership roles, are adhering to internal policies and procedures. Even where no unlawful conduct is substantiated, the investigative process frequently reveals important insights, such as inconsistent application of policies, gaps between written standards and actual practices, cultural norms that undermine compliance efforts, or breakdowns in supervision and accountability structures. Identifying these issues early allows organizations to take corrective action before they develop into systemic problems or give rise to legal exposure.

Beyond compliance, workplace investigations play an important role in promoting a safe and productive work environment. A workplace that is perceived as unresponsive to employee concerns, regardless of whether those concerns ultimately rise to the level of legal violations, may experience diminished morale, reduced productivity, and increased turnover. By contrast, a timely, thorough, and fair investigative response signals that the organization takes concerns seriously and is committed to a principled and transparent process. This, in turn, fosters trust among employees and reinforces clear behavioral expectations across the workforce. Workplace investigations also advance organizational accountability, particularly in environments where power imbalances may otherwise discourage reporting or obscure misconduct. While investigations are often focused on individual behavior, they also serve to evaluate whether broader organizational systems, leadership decisions, or institutional practices contributed to the issue at hand. In this respect, investigations do more than assign individual responsibility; they create a mechanism for examining and reinforcing accountability at the organizational level.

In addition, investigations are a valuable and often underutilized source of organizational insight. When viewed collectively rather than as isolated events, investigative findings can inform meaningful improvements, including policy revisions and clarifications, the development of targeted training initiatives, leadership coaching, and enhancements to reporting mechanisms and complaint intake processes. Organizations that treat investigations as part of a broader feedback loop are better positioned to strengthen workplace effectiveness and prevent recurring issues.

To realize these benefits, investigations must be conducted with rigor, neutrality, and integrity. Confidentiality and thoroughness are essential to encouraging candid participation, protecting the integrity of the fact-finding process, and producing reliable, defensible findings. In turn, well-executed investigations enhance credibility not only with employees, but quite often the public at large.

In this way, workplace investigations are not merely reactive tools for managing risk, but proactive instruments of organizational governance that support compliance, reinforce culture, and drive continuous improvement over the long term.