



POSSIBLE

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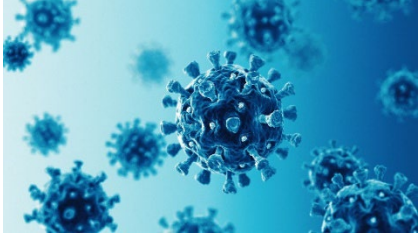
SWACC
Statewide Association of Community Colleges

The Impossible is Possible:
Adapting Risk Strategies to
Modern Challenges

EPL...We're Talking About This Again!

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You've Had Some Stuff Going On



TITLEIX
X



The Story Remains The Same

Not following
your policies/
procedures



Supervisor
Training



Interactive
Process



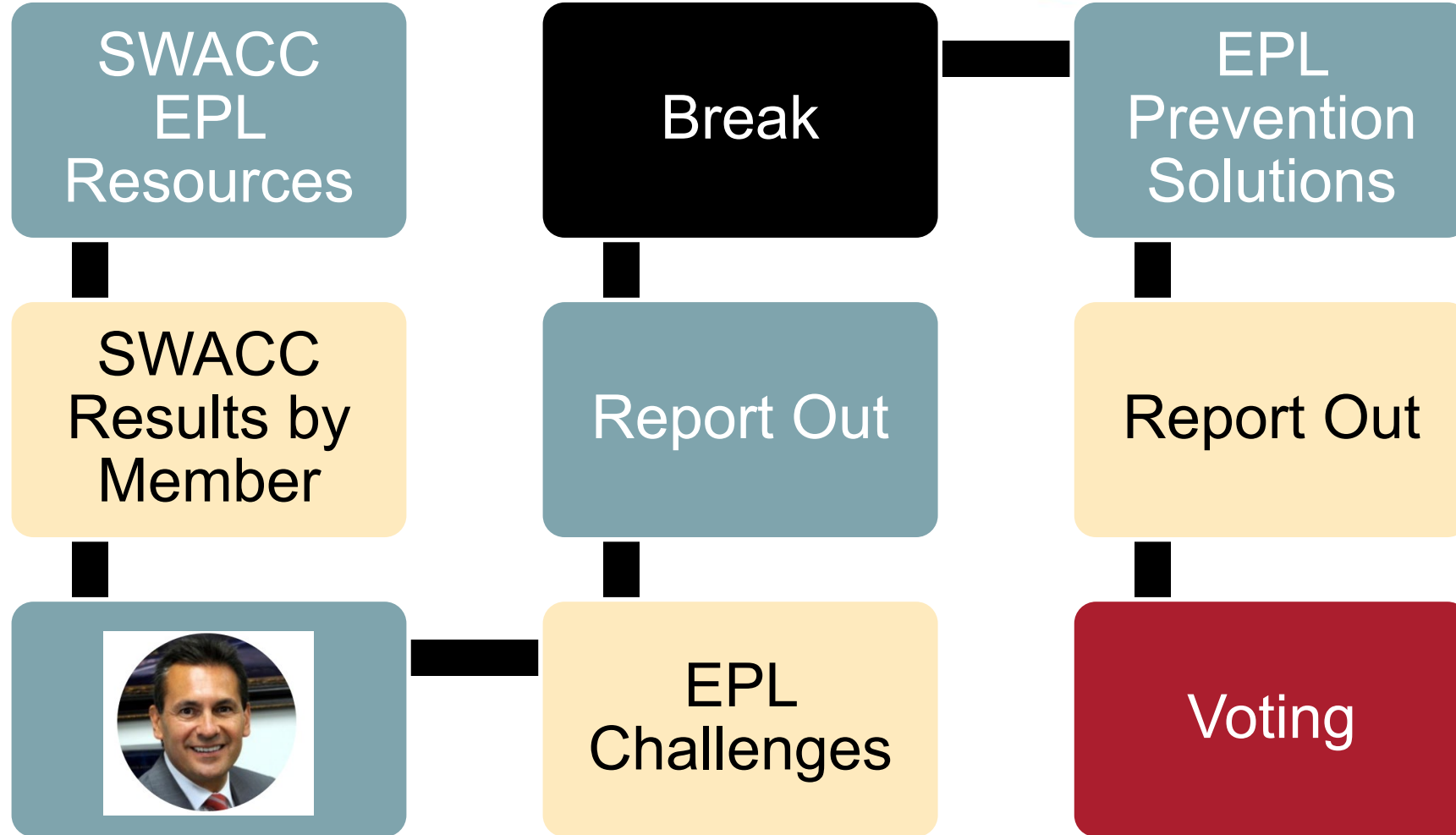
Performance
Documentation



Jury-
Someone
has to pay!



Agenda



HR EPL Prevention Resources

2015 EPL Initiative - \$25,000

Developed comprehensive online and live training to assist in prevention and mitigation of EPL Claims focused on SWACC loss drivers in the areas around: Performance Management Solutions, Supervisory Investigation and Wrongful Termination Prevention.

For a small additional fee, LCW would provide live half day training for all district supervisors.

HR EPL Prevention Resources

2020 EPL Initiative - \$5,210

1. Liability Risk Assessment/Self-Assessment Checklist

Developed to assess how well a district is doing to prevent the conditions that create Employment Practices Liability losses.

HR EPL Prevention Resources

2020 EPL Initiative

2. Loss Control EPL Prevention Audit Checklist

Program Questions

Is there communication between the sites, Risk Manager, and Human Resources prior to any significant employment action decisions taking place?

Are investigation procedures in place, with related documentation maintained, for employee/employment complaints?

Is training provided, and documentation maintained, for supervisors on employment/management/supervisory related topics?

Does the district review EPL related policies on a regular basis?

Does the District review policies annually to ensure compliance with Title IX?

Within the past 12-months, has the district provided mandatory training on harassment prevention for managers and employees?

Does the District have a policy or procedure outlining the process and frequency of performance evaluations for management, classified, confidential, and/or academic staff?

Does the District have documentation showing that they have conducted employee performance evaluations within their defined frequency?

Model Policy Inspection Results

LC Inspection Year	2024	2023
Number of Districts Inspected	21	32
Number of Districts with Ineffective EPL Policies	1	2

HR EPL Prevention Resources

2023 Rachel Shaw ADA/FEHA Training - \$25,000

Developed training for all supervisors and managers to receive quality training on their role and obligations under Title I of the Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA).

Name	Unique Viewers	Plays	Avg. % Watched
SWACC ADA FEHA Supervisor Training	96	130	51

EPL Specific SafeCollege Courses (12/1/15 to 1/21/25)

Course	Completions
1. Conducting Job Interviews	677
2. Discrimination: Avoiding Discriminatory Practices	1,015
3. Diversity Equity and Inclusion Considerations in the Hiring Process	563
4. Managing Difficult Behaviors	607
5. Performance Evaluations	285
6. Performance Management	907
7. Reasonable Suspicion for Drugs/Alcohol Use in the Workplace	97
8. Retaliation Liability	109
9. Sensitivity Awareness	874
10. Sexual Harassment Prevention: Policy and Prevention (AB 1825)	20,310
11. Supervisory Investigations: An Overview	540
12. Supervisory Investigations: Procedures	462
13. Termination: Practice and Procedure	91
14. Wrongful Termination	145
Courses Completed	26,682

Where SWACC Was

2015/2016*

Total Districts: 46

All Liability Freq: 139

All Liability Severity: \$10,633,000

EPL Freq: 33

EPL Severity: \$6,032, 225

2016 EPL Severity is 56.7% of all 2016 liability claims

*Valued as of 12/31/24

2018/2019*

Total Districts: 50

Increase: 8.6%

All Liability Freq: 149

All Liability Severity: \$12,560,530

EPL Freq: 48

EPL Severity: \$9,283,655

2019 EPL severity is 73.9 % of all 2019 liability claims

Change from 2016:

EPL Freq: 45.5%

EPL Severity: 53.9%

Where SWACC Is

2023/2024 – 50% of the year

Total Districts: 57

Increase: 14%

All Liab Freq: 155

All Liability Severity: \$9,780,870

EPL Freq: 41

EPL Severity: \$5,990,450

2024 EPL severity is 61% of all 2024 liability claims

*Valued as of 12/31/24 (undeveloped)

Comparison to 2024

Total # Districts:

From 2016: 24%

From 2019: 14%

EPL Frequency

From 2016: 24%

From 2019: -31.2%

Projected for 2024: 82 claims = 70% increase

Severity will be UP!

Model Policy Inspection Results

LC Inspection Year	2024	2023
Number of Districts Inspected	21	32
Number of Districts with Ineffective EPL Policies	1	2

After seeing the numbers
Do you think it's been effective?

Case Studies

The Habitual Offender

Current employee
Applied for promotion &
someone else selected
Denied preferred training
Alleged racial
discrimination

Alleged Comments from
Supv:
“You’re a little black hot
potato”
“Your people are your own
worst enemy”
“Why don’t you go back where
you came from?”
“Atta boy” to many employees

Investigator found supervisor
regularly made comments of:
“Andale, Andale”
“Black people always begging
for extras”
“Call someone to get those
monkeys out of here”
“We go from black to indian,
the college is going down”
“What does your husband do?
Is he a drug dealer?”

Investigator's Findings – 122 Pages

The investigation concluded that the supervisor did subject P to a hostile work environment but the failure to promote and lack of training were not race based

The Supervisor was given discipline and required to participate in a three-hour online training course

The supervisor and the plaintiff continue to work together, although the plaintiff admitted that the hostile work environment ceased after the investigation

Plaintiff filed a lawsuit alleging hostile work environment and claimed emotional distress and attorney fees. There was no loss of earnings claim.

Your Verdict

The Investigation?

The response to investigation?

Lessons Learned

The punishment needs to fit the crime

Fortunate the supervisor learned his lesson.....has he??

Regular follow ups if the harasser is not terminated

Disability Slip Ups??

Long term employee. No work-related disability. Req reduced hours. Granted.

Later. EE submits Dr. note stating she needs to work in quiet area due to her disability.

Supv denies accommodation without meeting w/EE. EE works with EE & students

EE submits another Dr. note. EE must work at home.

Accom meeting held. Handwritten notes are unintelligible after the fact

Due to EE's disability, many job functions were eliminated by supervisor.

Appears the only job duties remaining could've been performed at home.

Two interactive meetings are held. No accom as Dr. did not provide work restrictions

ER did not reach out to Dr. to clarify what the work restrictions were/are

EE on unpaid leave until exhausted. Placed on the 39 month re-hire list w/o further interactive meetings.

Had EE been performing all essential job functions, the employee could possibly not have been accommodated

Given EE disability and potential restrictions from that disability, ER could have prevailed.

Potential Issues?

Frustration or lack of diligence?

Is unpaid leave a form of accommodation?

Was the interactive process followed?

Is placing an employee on the 39-month re-hire list, a form of accommodation?

What if the employee is given the opportunity to apply for other jobs while on the rehire list and chooses to ignore them?

Lessons Learned

Even though human resources typically handles, accommodation issues, supervisors need to be aware of the employer's obligations to engage in the interactive process

If you receive accommodations from a doctor and not work restrictions, you must clarify that with the doctor. Advise the Dr to provide an updated medical status containing work restrictions.

Always have an interactive process meeting shortly before placing someone on the 39-month re-hire list.

Hire an outside facilitator to assist in making sure you comply with the law regarding the interactive process and reasonable accommodation and documenting same.

Workers' Compensation & FEHA

Still Getting it Wrong

EE suffers work-related injury. It's handled in house by the employer and with TPA

Employee is TTD and placed off work

QME report says EE is P&S/MMI and cannot return to work. The treating doctor says the EE can return with restriction(s)

HR is not advised of case. In-house person and TPA decide to rely upon QME doctor's opinion and immediately put EE on the 39-month re-hire list

No meetings are held with EE as the employer saw this as a WC claim issue

EE's husband passes. ER in-house person makes note about call w/TPA. It's suggested EE be offered money for a resignation as EE may need money

Employee is then placed on 39 month rehire list

What Went Wrong?

QME v. Treating Dr. – Whose opinion wins?

Should HR be involved?

Is claims file discoverable in FEHA Lawsuit?

Are your emails to WC examiner discoverable in FEHA Lawsuit?

What if notes are about a call to an attorney?

Lessons Learned = New Golden Rules

All WC claims are potential ADA/FEHA claims.

No one doctor's opinion trumps the other - FFD is the alternative

Risk management and HR must be involved. Should have regular meetings

When should the interaction start? When an employee is first TTD. Why?

WC claims file will be discoverable. Plaintiff attorneys are suing the TPA too as a co-conspirator.

Challenges

1. Make sure you have at least one HR person at your table
2. Discuss situations that lead to EPL claims at your district
3. Select top 4 situations
4. Identify those root causes, if possible
5. Select someone to report to the group

20 Minutes

Report Out



Solutions

Help Us Help You and SWACC

Break Out - 30 Minutes

1. Pass your challenges to the next table
2. Make sure you still have an HR person at your table
3. Provide possible solutions to the challenges outline
4. Select someone to report for your group



Voting
Recommendations
to
HR Committee



Dennis Has Good News!

Intern or Volunteer?

- Plaintiff was a full-time nursing student at a community college. As part of her nursing courses, she was required to attend clinicals at a local hospital. The local hospital was contracted with the community college to allow the nurses to assist on treating patients.
- The students did not receive remuneration
- During the clinicals, a professor from the college, was there to supervise the students.
- Plaintiff alleged in her lawsuit that she was sexually harassed by her professor while performing duties at the clinicals.
- After an investigation, it was concluded that the professor did engage in inappropriate behavior with the student at the clinicals, as well as offsite and after hours and on campus.

Intern v. Volunteer

Plaintiff was a full-time nursing student at a community college.

As part of her nursing courses, she was required to attend clinicals at a local hospital.

Local hospital was contracted with CCD allowing student nurses to do clinicals.

The students do not receive remuneration.

Professor from college attends clinicals to supervise students.

Lawsuit alleges she was sexually harassed by her professor during clinicals

Intern or Volunteer?

Investigation - professor engaged in inappropriate behavior with student at clinicals, after hours, etc.

Plaintiff sued under FEHA, alleging she was covered under the amendments that include interns and volunteers.

She submitted volunteer forms, indicating that as part of her coursework, she was required to volunteer at certain activities

She was not harassed by her professor during volunteer activities.

She was also covered by the District's WC while doing clinicals

Intern or Volunteer?

We argued the plaintiff was not an intern or volunteer at the clinicals because it was part of the District's mandatory course work and was considered a class

We further argued that since the other harassment occurred on campus or as a student, students are not covered by FEHA and therefore, her claims for sexual harassment

How did the trial court rule on our motion???

The Ruling – Case Dismissed!!!

- “Plaintiff was neither an unpaid intern, or volunteer for District during the alleged discriminatory, harassing, and retaliatory events, but was completing course work at the hospital secondary to her educational requirement”
- The volunteer extension of FEHA protection was created to allow persons that would otherwise be employees, not students, to be protected from harassment.
- The fact there was no remuneration in the form of compensation was also critical to the courts analysis and is supported by case law
 - *Avalos v. University of San Francisco* (N.D. Cal 2013) 2013 WL 1390406
 - Northern District of California denied a plaintiff student nurse’ MSJ on the grounds she was not an employee of the University of San Francisco for purposes of the FEHA

Lessons learned

Make clear to students during orientation that while they are performing clinical type work that they are "guests" and not volunteers or interns in writing under the law

- I. E Make sure the course work and student handbook specify the same and state any volunteer work done as part of course work is done as a student performing mandatory hours to graduate and at clinicals and such requirements do not change their status as a student to a volunteer or intern under the law

Further thoughts:

- What if a student works on campus- i.e. bookstore, cafeteria, security?
- Does that change things?

Government Claim or No Government Claim?

- Plaintiff's counsel sends a demand letter regarding negligent conduct towards his client
- Demand letter is marked “Confidential and Privileged” under the Evidence Code- meaning it cannot be used as evidence
- The letter contained the following:
 - 1) Claimant name and address and where notices are to be sent;
 - 2) Statement of the “date, place, and other circumstances of the occurrence or transaction that gave rise to the claim
 - 3) Description of the...injury, damage, or loss incurred, as far as they are known when the claim is presented;
 - 4) Name of the public employee who caused the injury;
 - 5) For claims over \$10,000 whether it would be a limited civil case; and
 - 6) Signature of Claimant or her representative. (§§910, 910.2.)

Government Claim or No Government Claim?



It lists the verdicts
PA received and
threatens litigation



It also demands a
response to the
letter within 14 days
or litigation will
result



PA argued that it
“substantially
complied” with the
Act



What do
you think?

The Ruling



Not a Government Tort Claim



By requiring a response within 14 days, the demand letter did not comply with Govt. Code § 912.4 (“The public entity has 45 days to grant or deny the claim; if the claim is not acted upon within 45 days, it is deemed rejected.”).



Schaefer Dixon Associates v. Santa Ana Watershed Project Authority, (1996) 48 Cal.App.4th 524:

Attorney demand letter contained all other information required by claims statute was found not to comply or substantially comply because letters demanded immediate response rather than the 45-day repose period.



We argued the “substantial compliance” although a defense did not apply because that doctrine applies to the content of the claim and not the amount of time required to be given to the Board under the separate code section 912.4

Thank you for your
time today!!