The coronavirus ("COVID-19") pandemic has had an unprecedented impact on our modern-day world, including on how employers and employees interact in the workplace. For employers, the COVID-19 pandemic has posed several novel employment law issues. For many of these challenges, federal, state, and local government agencies have issued vital guidance or regulation on pandemic-related employment issues. However, such guidance has been largely absent with respect to employee discipline, a critical element of workplace operations. As a result, public entity employers continue to grapple with how to address disciplinary matters that arose prior to and during the COVID-19 pandemic.

This Alert will discuss how cities, counties, housing authorities, transit agencies, water districts, and other special districts ("public entity employers") can address disciplinary matters during the COVID-19 pandemic.

**Disciplinary Issues Posed by COVID-19**

COVID-19 poses practical challenges for public entity employers seeking to document timely public employee discipline. As a general matter, public entity employers should strive to follow consistent procedures in which public employee misconduct and/or work performance issues are documented. It is particularly important to document each step of the disciplinary process, including informal attempts to resolve the matter or the decision to adopt a Performance Improvement Plan (PIP). Timely and consistent documentation of misconduct or work performance issues enables public entity employers to provide credible and legitimate support for taking disciplinary action. Such protocols permit public entity employers to
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rebut arguments that disciplinary action was based on bias, discrimination, retaliation, or other improper motivation.

For public employees working remotely due to COVID-19 concerns or the closure of physical workspaces, supervisors and managers may have difficulty monitoring daily work performance, ensuring misconduct does not occur during the work day, and resolving minor issues through informal counseling. For public employees deemed “essential workers” who continue to work at physical facilities, reduced supervisory or managerial staff may hinder prior procedures for communicating and addressing disciplinary matters.

The current work environment requires that public entity employers adapt their procedures to accommodate remote work and the changed physical workspace. For instance, public entity employers should circulate written notice to public employees who may be working remotely, of the agency’s continued expectations regarding work performance and misconduct. Public entity employers should also consider creative and new ways of fostering communication with public employees, such as scheduling check-in conversations with remotely-working public employees or holding group meetings on telephonic or video conference calls rather than in-person meetings. Public entity employers should also redouble efforts at documenting pre-disciplinary efforts, such as sending email summaries of informal counseling discussions or mentorship on performance issues.

Due Process Issues Posed by COVID-19 Pandemic

The present pandemic also poses due process-related legal challenges for public entity employers seeking to discipline public employees. While public entity employers would otherwise hold live pre-disciplinary Skelly meetings and/or disciplinary appeal hearings, COVID-19 concerns may preclude public entity employers’ from conducting these proceedings in-person.

Brief Overview of a Public Employee’s Due Process Rights

*Skelly v. California Personnel Board* (1975) 15 Cal.3d 194 (“*Skelly*”) provides the framework for minimum procedures prior to effective disciplinary action. At the heart of *Skelly* is the principle that public employees have a protected property interest in their employment that cannot be
taken away without due process of law. Prior to the imposition of disciplinary action, public entity employers generally must provide the following due process: (1) a notice of the proposed action; (2) the reasons thereof; (3) a copy of the charges and materials upon which the action is based; and (4) a right to respond. (Id. at 215.) In sum, a public entity employer is not required to hold an evidentiary hearing prior to imposition of discipline, but instead provide notice of the charges against the employee and the opportunity to respond to those charges.

Public employees may appeal a decision rendered at the Skelly meeting. In general, disciplinary appeals are comprised of full evidentiary hearings, in which public entity employers bear the burden of proof and must persuade an impartial decision maker to uphold the discipline taken.

Providing Due Process amid the COVID-19 Pandemic.

As noted above, public entity employers are considering how to proceed with disciplinary matters in the context of the COVID-19 pandemic. In particular, public entity employers must consider how the health and safety limitations posed by the pandemic affect these disciplinary proceedings, including its due process obligations. Public health orders and other government agency directives pose challenges to holding in-person disciplinary hearings, requiring that public entity employers evaluate their options — including whether they may hold remote and/or telephonic disciplinary proceedings.

Government agencies and courts have rarely faced legal disputes occurring in the context of widespread and/or global pandemics. Consequently, public entity employers have limited legal guidance concerning whether public health emergencies impact their due process obligations with respect to public employee discipline. However, there is judicial authority to support the proposition that conducting administrative hearings remotely does not violate due process. One appellate court found that the use of telephonic testimony in administrative hearings does not necessarily violate due process. (Kang v. City of Los Angeles (Cal. Ct. App. Dec. 21, 2016) Case No. B264346 (“Kang”), 2016 WL 7387227 at *9.) There, a police officer had appealed the results of an administrative hearing before a local administrative agency that resulted in his termination. The police officer argued that the telephonic testimony of one of the witnesses who testified against him violated his due process rights to a fair hearing. The court conducted a due process analysis of this case, and weighed the three factors considered by the Supreme Court in its Matthews v. Eldridge (1976) 424 U.S. 319 decision: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of the private interest through the procedures to be used, and the probable value of additional procedural safeguards; and (3) the government’s interest, including the administrative or other burdens posed by additional procedural safeguards. (Kang, supra, 2016 WL 7387227, at *8, citing Matthews, supra, 424 U.S. at 355.) The court found that the public employee’s protected property interest in his continued employment was “significant.” (Ibid.) As to the second element, the court observed that live testimony is traditionally an important tool in assessing witness credibility, but that telephonic cross examination also bore on this issue by interrogating inconsistencies in testimony. (Id. at *8–9.) The court found that the witness’s telephonic testimony permitted the neutral decision maker to evaluate the witness’s demeanor over the telephone “by listening to his tone of voice, cadence, hesitation or delay in answering, and other
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The court found “limited additional value in requiring in-person testimony” by comparison. (Id.) As to the third factor, the court found it noteworthy that the public entity employer’s board frequently conducted full evidentiary hearings, rendering the additional fiscal or administrative burdens of requiring in-person testimony in this matter “not substantial.” (Id.)

The Kang court decision also cited to two other noteworthy legal standards. First, the court cited to section 11440.30 of the Administrative Procedures Act (“APA”), which provides that administrative hearings may be conducted telephonically or by other electronic means if all parties consent.[1] While the APA applies to state agencies and does not govern most local administrative hearings, it provides further support for local public entity employers’ efforts to seek alternatives to live disciplinary appeal hearings. Further, the court observed that the Confrontation Clause (U.S. Const., 6th Amend.) does not apply to administrative hearings. (See Melkonians v. Los Angeles County Civil Service Com. (2009) 174 Cal.App.4th 1159, 1171.) Consequently, in evidentiary administrative hearings, public employees cannot rely on a constitutional entitlement to cross-examine witnesses.

In an analogous context, courts have also considered the due process owed to individuals in license revocation administrative hearings. (See Arnett v. Office of Administrative Hearings (1996) 49 Cal.App.4th 332.) As with public employees’ property interest in their employment, individuals hold a protected property interest in state-issued licenses and must receive due process of law before that interest may be infringed. The Arnett court found that individuals do not have an absolute right to be present in-person at these administrative hearings, notwithstanding the constitutionally-protected property interest at stake. (Arnett, supra, 49 Cal.App.4th at 340.) While the adjudicatory hearing must include the right to cross examination and to confront adversary witnesses, the right of confrontation does not include an “absolute right to face-to-face confrontation.” (Ibid at 339.) This finding mirrors the Melkonians decision.

The approach taken by the Kang court is helpful for public entity employers in the present climate. The court highlighted the importance of considering the potential deprivation risked for the individual’s due process rights, the degree of due process provided by remote and/or telephonic hearings, and the extent of burdens imposed by additional procedural safeguards. The court’s consideration of witness credibility, and the ability to investigate it through remote testimony, is helpful for public entity employers considering how to accommodate public employees’ due process rights in the present pandemic environment. Further, while the Kang court did not face the risk of administrative or other burdens if live testimony were required, the third element in the Matthews test enables public entity employers to persuade disciplinary appeal hearing officers of the public health risks posed by live evidentiary hearings.

Given the support provided by this case law authority, public entity employers should consider various alternatives to in-person evidentiary hearings in disciplinary proceedings. For the Skelly meeting, public entity employers can feasibly hold such meetings remotely either over the telephone or a video conference application.
As to evidentiary hearings, due to the need for documentary and witness testimony, public entity employers should consider whether to use video conference applications with screen sharing capabilities when possible. Utilizing a video conference application with screen sharing capabilities can allow a participant to take control of the presentation of exhibits and share what is being shown on their personal computer, so that all participants (including the hearing officer and the public employee or their counsel) can see what the presenter is sharing on screen. The parties can also effectively question witnesses through a video conference application. These capabilities permit the parties and hearing officers to sufficiently address witness credibility — a core concern in the Kang case and crucial due process obligation in public employee disciplinary cases.

In some instances, it may not be feasible to conduct evidentiary hearings through video conference applications. If conducting an in-person evidentiary hearing is necessary, we recommend that all parties practice social distancing guidelines established by public health authorities and wear masks to reduce the risk of exposure to COVID-19.

**Conclusion**

It can be daunting for public entity employers to resolve the many challenges to public employee discipline arising from the present COVID-19 pandemic. Despite these challenges, we continue to recommend that disciplinary issues be addressed promptly, rather than waiting until after the current pandemic dissipates. With respect to whether it is a violation of due process to conduct administrative hearings remotely (whether via telephone, a video conference application, or some other electronic means), it will depend on the circumstances. Please do not hesitate to contact AALRR for assistance in navigating these issues during these challenging times.

[1] The Firm is also aware of the Office of Administrative Hearings (OAH) having conducted certain types of public employee due process hearing by telephone over the last several months.

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