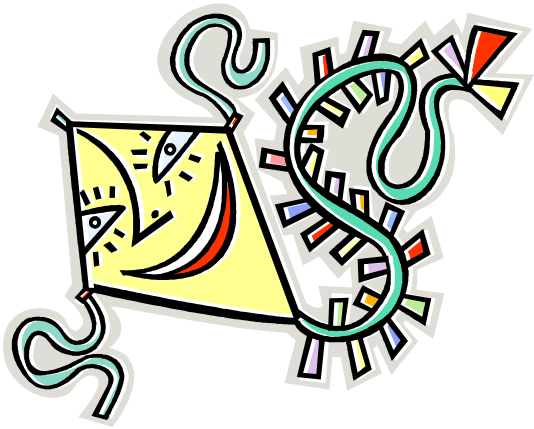
Regional Employees Association of Professionals April 2014 News



Who Qualifies for Overtime Pay – and Why?

There are very few federal employment laws… but there is ONE important one: the Fair Labor Standards Act. The FLSA is our national wage-and-hour law. Passed in 1938, it establishes the minimum wage, AND the overtime rate. *The overtime rate is high (*one-and-a-half times your normal pay) because the Congress and the President were working hard, back then, establish the 40-hour week. The intent was not only to discourage employers from forcing long hours upon their employees with long work hours, but also to *encourage* them to hire more people.

Because the FLSA was part of the effort to raise the working class out of poverty it was extremely "inclusive." It applied to the vast majority of workers. Only very small groups of high-paid professionals and managers (and large groups of low-paid domestics and farm workers) were supposed to be "exempt." Oh, and public employees; they were not covered by the FLSA until 1985.

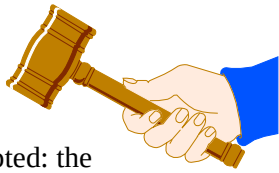
Overtime law remained largely the same until 2004, when then-President Bush made some sweeping "redefinitions" to the kinds of jobs that may be considered "exempt." The new definitions caused many jobs, which used to be "FLSA-eligible" to become "salaried." In practical terms this meant that much larger numbers of people could be asked to work unlimited numbers of hours, without any expectation of extra pay. Few people realized at the time that this change was so large.

So, What IS an "exempt" Employee, TODAY?

Today, anyone from a college professor to a secretary or first-line supervisor might be told that he or she is "exempt." Is it possible that employers deliberately tell employees that they are exempt in order to avoid paying overtime? Of course! At any given moment, hundreds of people are awaiting hearings from the State Labor Commission over claims that they have been improperly designated exempt. So, is it possible that you, or your co-worker, may be doing a job that is "salaried" but shouldn't be? Yes. Does this mean that you might be owed a lot of money? Very possibly…

What Does the Law Actually Say?

The FLSA was enacted to protect workers from two basic injustices: 1) excessive hours of work and 2) exploitive rates of pay. There was an exemption, however, for very highly paid managers and professionals. The law established two kinds of tests to see who should be exempted: the **salary test** and the **duties test.** The salary test is rarely used because the old wage guidelines ($455 per week) were rendered obsolete by inflation. But "Duties Test"



remains in effect.

Today there are four basic categories under which a job may be found exempt: **administrative**, **executive**, **professional and computer-related**. In ALL CASES these exclusions were designed to be limited: *to exempt the employee from overtime only because his job was far above "working class" status.*

The **Administrative** exemption was for office work directly related to management policies or business administration. These jobs must exercise independent judgment and decision-making more than 50% of the time and require special training or knowledge.

The **Executive** exemption was for positions where the primary duty is management of a department or subdivision. To fall under the executive exemption, the position must exercise independent judgment and discretion more than 50% of the time. People exempted because they are managers *must* directly supervise two or more full-time employees, with the ability to make employment/disciplinary decisions.

The **Professional** exemption is for work that requires an advanced degree and that is original, intellectual, or creative in nature. The exemption also requires that independent judgment and discretion be exercised more than 50% of the time. This category includes librarians, college professors, doctors, accountants, architects, engineers, and lawyers; **but many employers designate all job classes which require a degree FLSA exempt.**

The **Computer-related** exemption is for work in the computer field in which more than 50% of the time is spent doing programming and diagnostics. The category was established when IT work was considered rare. To qualify for an exemption, the employee's pay rate must be at least $27.63 an hour.

What does Independent Judgment mean?

All four exemptions require the employee to exercise "independent judgment and discretion" more than 50% of the time. W*hat exactly does this mean?* The FLSA defines it as "comparing and evaluating possible courses of conduct and acting or making a decision after consideration." Such positions are *supposed to* have authority to make choices, free from supervision.

Because employers often designate employees "exempt" who are **not** truly autonomous decision-makers, this is one of the most heavily litigated provisions of the law. Very few clerical employees, for example, have authority to make decisions without supervision. But many are flatteringly told that they are "salaried."

All too often, employees at public agencies who are considered "confidential" (because they work closely with top management and are excluded from the general bargaining unit) are designated FLSA exempt. But there is not any legitimate connection between being confidential and being salaried. Most clerical jobs will never meet the "duties test" for FLSA exemption, no matter how closely they work with Management, nor how "special" the nature of their business.

Another common "mis-designation" shows up amongst supervisory job classes. Almost all supervisors report to managers who have the *real* decision-making capacity. Very few first line supervisors operate autonomously. Further, a supervisor who spends more than 20% of his time "in the field" is considered a "working supervisor," and defined automatically as eligible to receive overtime.

Can Your FLSA Designation be Changed?

People generally assume that their FLSA status not only correct, but unchangeable. As you can see, however, the designation is sometimes wrong. It can be corrected through the grievance procedure, through the Court system OR via contract negotiations. *Even if your current designation is listed in your MOU,* the County doesn't have the right to violate federal law. The law trumps your Contract and you may insist on a correction. ***Your right to collect over time cannot be negotiated away***. In fact, you can skip the grievance procedure and go straight to court over this issue.

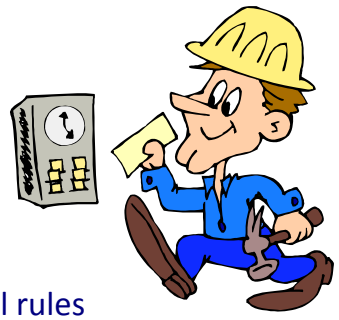
However, the opposite is NOT true. If the County believes that you should NOT be eligible to collect overtime, and wants to move you *into* exempt status, they must make a proposal to you and your Association. You have the right to challenge this determination, and it must be negotiated with your union.

What can you do if you believe your job is NOT really exempt?

The bottom line is that your FLSA status is not "written in stone." Jobs change all the time, and errors (intentional or unintentional) are not uncommon. If you have been mis-designated as exempt, and successfully challenge this, you may well be owed back pay.

Claims may go back two years (or three if you can prove that your employer was knowingly evading the law.) Feel free to call your Association rep for more information or take a look at the Department of Labor website: www.dol.gov/esa/regs/compliance/whd/fairpay.

President Orders Labor Department to Develop New Rules For Overtime Designation



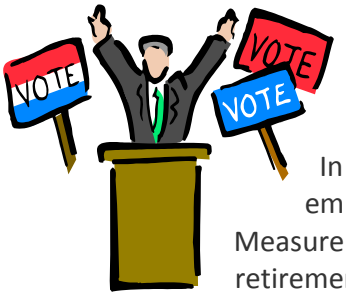
Declaring that "Americans have spent too long working more and getting less in return," President Obama has directed the Labor Department to review the federal rules for determining who is eligible for overtime. The reason for this is that fewer and fewer people are collecting overtime when they work 40+ hours a week. The reason for *this* is that the overtime eligibility guidelines were greatly "relaxed" as the result of the Bush administration's "improvements." The goal is to define the average American working person as an hourly employee -- not salaried -- eligible for overtime. "Overtime is a pretty simple idea," Obama said. "If you have to work more, you should get paid more."

The administration is indicating that as many as 88 percent of employees who are now considered "salaried" should actually be eligible for overtime pay after 40 hours a week. This is because the definition of an "exempt" employee (which was expanded in 2004 to include anyone who earns more than $455 a week and spends ANY time supervising anyone) has become so broad that it is almost meaningless.

The Order does not affect any change in the federal guidelines at this time. It simply directs the Labor Secretary to come up with new guidelines for the FLSA definition of hourly and exempt employees. This assignment takes the form of an executive order, thus sidestepping congress, where opponents to this change might be able to squelch it. Obama took the same steps last year, when he ordered an increase in the minimum wage for companies which do business with the federal government.

The Obama administration is publicizing this action as an attempt to overcome the widening gap between the rich and the poor, which became much deeper during the Recession. As profits among the "Fortune 500" have doubled since 2008, the amount of money in the economy channeled into the working class has dropped to an all-time low. Department of Labor spokespeople have said that employers' legally-authorized avoidance of overtime payments is a partial explanation of decline of middle-class incomes.

The proposed new guidelines are expected this summer, and political forces are already lining up for opposition. These include representatives of the state and national chambers of commerce. Eric Reller, spokesman for the National Federation of Independent Business, has stated "The President's plan to increase overtime pay demonstrates another anti-business policy — coming on the heels of a proposal to increase the minimum wage, increase the minimum tipped wage, rising health care costs, as well as ever-growing, costly, and unwieldy regulations."



Court Strikes Down San Jose Voters' Effort to Gut City Retirement Program

In late 2012, 70% of San Jose's voters approved a measure which could have devastated its employees' retirement plan. In January, 2014, the Court struck down most of the initiative. Measure B, as it was called, included nearly a dozen takeaways to the employees' pay and retirement-related benefits: changes to retirement benefits, to employees' pay schedules, to the disability retirement program, suspension of retirement-related cost of living adjustment adjustments, and modifications to the retiree health benefit.

Six of the local unions filed suits and all but a few of the provisions were struck down. Overall, the Court upheld the state of the law on vested benefits… Retirement benefits which are in place when an employee is hired must be available to him when he retires.

Provisions of the new law which the Judge overturned include:

1) The requirement that employees make additional contributions to the city's retirement program to help control the City's pension liability. (**The Court said retirement benefits are a vested right. City can't make employees pay more and it is City's responsibility to manage its liabilities.)**

2) Pay reductions. **(Court rejected this on grounds that the city may propose to modify employee compensation, but can't do so without bargaining.)**

3) Suspension of Cost Of Living Adjustments to retirement payments. **(Court stated clearly that the City's declaration of fiscal crisis can't be used to undercut a vested benefit.)**

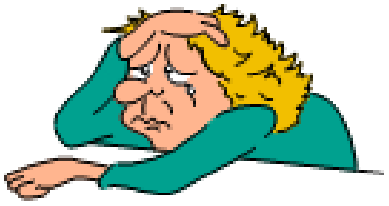
These parts of the new law were upheld:

- **The elimination of the "supplemental retiree benefit reserve" was upheld**. The city was able to show that this program was within its discretion and, therefore, no vested right existed.
- **Changes to retiree health benefit program.** The Court found that employees do not have a vested right to a *particular* plan or benefit but, DO have a vested right to coverage in general. The court also held that the employees cannot be compelled to pay more than 50% of the cost of this benefit.
- **Modifications to the disability retirement system**. The initiative changed the plan so decisions about granting disability retirements will be made a) by an independent panel of medical experts and b) will only occur if the affected employee is completely unable to perform his job. (But the Court agreed that disability retirement benefits, like other retirement benefits, are "vested" on the day an employee first works for the City.)
- **New Employees are not protected**. The Court agreed that employees hired *after* the passage of Measure B are not protected against the changes that may be implemented in the City's retirement programs.

Unions Are Still Moving Forward with PERB Claim…

In general, this decision supports the principle of public employees' vested benefit rights; however, the unions are proceeding with a PERB claim, over the City's failure to bargain. None of the elements of the voter initiative were brought to the bargaining table before they were brought to the public. PERB has already rendered clear decisions that even if voter initiatives are upheld by the Court system, if they impact "wages, hours or conditions of employment," they must be negotiate. So, once PERB renders *this* decision, all of the changes to retiree health, to the disability plan and to the retirement benefit for new employees may well be rescinded.

Here's A Good Question…



Is My Job at Risk Because I Take Medication?

Question: I have a medical condition which requires that I take medication which often leaves me groggy in the morning. This often causes me to be late to work. I've been written up for the lateness and, even though I've explained the problem to my boss, he says the next step will be a suspension or termination. He also says that I could be fired because the medication could cause me to be unsafe on the job. Is there anything I can do about this?

Answer: You actually have three issues here: 1) chronic tardiness and 2) potential hazard on the job, and 3) the probable need for your employer to accommodate you under the Americans with Disabilities Act.

Tardiness. If you had no medical condition, or had never brought the condition to your supervisor's attention, you could definitely be subject to discipline for the chronic lateness. Employees are expected to get to work on time. HOWEVER, since you've explained that the lateness is the result of medication for a disabling condition, you have reasonable cause for accommodation under the ADA. The first step involves a letter from your doctor, explaining that you have a permanent medical condition, and suggesting the modification of your job – or your work hours – that will enable you to continue to do your job.

Hazard & Accommodation. It's reasonable for you to request that the Department allow you to flex your hours to work around the effects of your medication. However, depending on the nature of your job, they may refuse to do this, on the grounds that this would create "undue hardship." If they do argue this, they may threaten you with termination, due to your inability to perform the job adequately. If you operate vehicles or machinery, they even might argue that your grogginess makes you unsafe to perform the job. An employer may exclude someone from employment for safety reasons only if it can show that the employee poses a "direct threat." This is defined as "a significant risk of substantial harm to the safety of the individual or others that cannot be reduced by reasonable accommodation." To determine whether there is such a "significant risk," the employer must do an assessment based on medical judgment considering (1) the duration of the risk; (2) the severity of the potential harm; (3) the likelihood and imminence of the harm.

So, seeking accommodation can be a two-edged sword. **If the County does threaten your employment, rather than accommodating you, you DO have the right to appeal, and you would probably have an ADA claim.** Ultimately, a judge or arbitrator might have to render an opinion about whether your need for a flexible schedule really creates "undue hardship" for your employer or poses a "significant risk of harm."

Does Your Department have the Right to Tell You What to Wear?

More than any time since the '60s, people are expressing their "uniqueness" through their dress: short skirts, bare midriffs, tattoos, piercings, neon hair, (or no hair,) etc. Employers, in response, are expressing *their* needs for order and uniformity by passing dress codes, right and left. So… it's an inevitable question: how much DOES a public agency have the right to interfere with your right to "be yourself" on the job? Do their rules about dress or hair or tattoos violate your First Amendment right of self-expression? Can the enforcement of dress codes be discriminatory? And does your union have any say in this matter, anyway?

Your "Constitutional Rights…"

First of all, there is no such thing as a constitutional right of self-expression – or at least none which protects your appearance at work. The constitution protects your right to free speech (and "free dress") *in your personal life.* **When you're on the job, the County can tell you how it wants you to look.**

Public agencies have particularly strong ideas about the image they want to convey. They want to assure the public, largely through the appearance and behavior of their employees, that the County knows how to take care of their needs…. That they are professional, and they are *in charge*... The County must convey a message which says it has the knowledge and the power to tell its constituents what to do…

To insure that you play your part in this message, the County may take steps to insure that you look as "official" and respectable as possible. If you work in a Police or Fire Department, you probably wear a uniform. You are probably also required to wear certain clothing, with identifying information, if you work in the field, particularly if you have a job which requires that you go to businesses or residents' homes.

Dress Code

Most employers have a Dress Code, which not only specifies what sorts of attire are acceptable, but what discipline may befall you if you violate these rules. **The Dress Code is entirely negotiable,** and changes are not unusual. For example, as tattoos gained popularity a few decades ago, many employers enacted rules restricting their visibility to the public. In order to implement these changes, your County should have contacted your Association, to secure its agreement with the new policy.

Even on a minor subject like dress codes, your union has the duty of making sure the policy is reasonable and doesn't impose unreasonable restrictions upon you. One problem with dress codes, for example, is that they may be too vague to be useful. Thus, a dress code which says that employees can be disciplined if they fail to "dress professionally" is open for abuse. The policy should specifically identify the elements of dress that are unacceptable: see-through clothing, rubber footwear, shorts, etc.

Speaking of shorts, this is actually the subject of one of the most common dress code "debates." If you have members who perform labor outside in the heat, they (and your Association) want to make sure they are comfortable. But the County wants to make sure they are *safe.* Like any negotiations, both sides should listen to the other, and come up with a reasonable compromise. Similar debates occur over subject of "propriety": for example, hats, footwear, t-shirts, facial hair, hair color, Levis, etc.

Discipline for Violations

The most important element of a proposed dress code is the discipline section. **A policy that says employees who violate the code will be sent home without pay is NOT acceptable.** Your association should never agree to this. Although it's within Management's prerogative to send an employee home (presumably to change clothes,) it is NOT within their right to dock her pay. This is, essentially, a suspension and the employee has the right to due process. One manager's opinion about an employee's attire cannot be the sole basis for a suspension!

Change Happens…

On the other hand, **it's not unusual for a change in the Dress Code to require a change in the way you've been dressing all along.** For example, if you have a ring in your nose, or purple hair and the parties agree on a dress code which prohibits these, you CAN be disciplined if you refuse to change your appearance. There is no constitutional right to "be yourself" in the workplace. The County can't send you to jail for your "free expression," but they can take away your job…

The Right to "Be Yourself "- Off the Clock

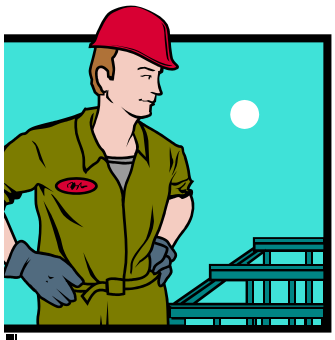
When you are being paid, you serve as a representative of the County. When you're off the job, however, you can dress or behave any way you want. Non-sworn employees are NOT considered "representatives of the

County" when they are off the clock. Your employer has no right to discipline you for the way you express yourself on your own time – unless you identify yourself as a county employee. If you do this, the issue can become very murky. The Courts have upheld terminations of employees who draw "inappropriate" attention to themselves while in uniform, in social media.

In general, however, the law is very solid about your right to a private life. Even if you are found guilty of a legal violation, unless this has impact upon your job (such as losing your driver's license) you should not be held liable for this *on the job.*

What if there is no dress code?

In most cases, if there is no dress code, employees can't be disciplined for dressing in a manner that their management finds vaguely unacceptable. It's that simple. If your boss gives you a reprimand, ordering you to "go home and come back looking respectable," you should probably try to comply, *but you should probably also appeal the reprimand.* If there are no rules in place, defining how you should dress, you should not be punished for selecting your own style. In fact, what your boss considers "respectable" and what YOU think is respectable may be wildly divergent manners of dress. Hence the need for an agreed-upon *specific* set of rules…



About Uniforms

Although it seems obvious that many government employees must wear uniforms, the entire subject is negotiable. If employees in your job class have *never* worn uniforms before, and the County wants you to wear them now, this is a subject of bargaining. The negotiations can cover not only WHAT you will wear, but who will purchase it, how often it will be replaced, how it will be maintained, etc. Employees don't necessarily mind wearing uniforms – especially if the employer absorbs the entire cost. In California if an employer requires *non-exempt* employees to wear a uniform, *the employer must pay for the cost of the uniform and its maintenance.*

What constitutes a "uniform" is not always clear

According to the California Labor Commissioner, the term "uniform" includes wearing apparel and accessories of distinctive design and color. So if the County requires you to wear "basic wardrobe items" which are generally usable outside the workplace, this is not considered a uniform and they are not required to pay for them. Examples include: specifying that employees wear white shirts, dark pants, or black shoes.

Safety Equipment

Additionally, safety equipment or protective apparel, such as protective glasses or steel-toed boots, which must be worn as a matter of law (usually OSHA requirements) must always be provided by the employer.

Maintenance of a uniform

Your employer is required to "reasonably maintain" uniforms. However they may require you to maintain the uniform if all that is required is washing and drying. If the uniform requires special care, such as ironing, dry cleaning, or separate laundering, you must be reimbursed for any costs and for your time. The FLSA provides that an employer can never impose a financial burden on employees, with respect to purchasing or maintaining clothing that reduces the employees' wage rate below the minimum wage.

Negotiations really matter

If the County wants to put you in uniform, take you out of uniform, change the method for purchase or reimbursement, or even the method for laundering your uniform, your Union has the right to meet and confer. Sometimes there are unpredictable consequences of these changes that need to be discussed. For example, if you receive a uniform allowance, what happens when the price of the uniform goes up? Don't be deterred from exercising your full right to negotiate. Sometimes, it's the "little subjects" that matter the most…

DISABILITY IS NOT A DEFENSE AGAINST DISCIPLINE IN THE CASE OF WORKPLACE VIOLENCE

An employee working for the Orange County Superior Court had a recognized mental disability, bi-polar disorder, which caused her extreme mood swings. During an intermittent "manic" phase, she angrily yelled at co-workers in one of the City Police Departments. She also told two police officers that she was adding them to her "Kill Bill" list, and accused another of intentionally victimizing her.

The Court removed her from her assignment and her doctor placed her on medical leave. While on leave, the employee continued to send threats to co-workers in the form of alarming e-mails and phone calls including statements to the effect that "God will ensure that you pay" for her mistreatment.

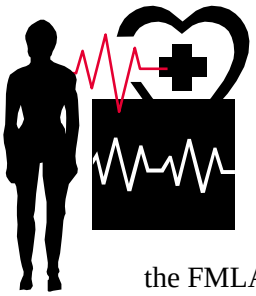
After several weeks, she was released by her doctor for return to duty. The Court put her on paid leave, conducted an investigation of the complaints, and sent her a termination notice. She then filed a complaint with the Department of Fair Employment and Housing (DFEH) alleging violation of her right to use leave time under the FMLA. Later she also filed suit, alleging that she had not been provided an "interactive process" under the Americans with Disabilities Act.

The employer responded by pointing out that this employee had already used all of her leave time under the FMLA, and was not being terminated due to her disability, but due to her unacceptable behavior. Ultimately, the Court said that although the employee's bad behavior was clearly caused by her disability, this did not prevent the employer from terminating her because of that behavior. The Court stated that the law authorizes employers to distinguish between disability-caused misconduct and the disability itself *"in the narrow context of threats or violence against co-workers."* (But the Court pointed out that the same distinction would NOT be made if the employee's psychological disability merely resulted in poor job performance or other difficulties, which could be accommodated…) The Court upheld this termination, based on threats of violence, as legitimate – without regard to the employee's legitimate disability.

The Family Medical Leave Act – Two Decades later

By Robin Nahin, Association Staff

When the FMLA was passed in 1994, there were threats that it would cause widespread disruption and/or bankruptcies among small employers who could not afford to "float" an employee for months off the job. In truth, however, the concept of "family leave" wasn't really all that radical. Most Western countries had been providing extended leave for maternity, disability, and sick-family- care for decades. (In fact, in most Western countries, this leave is ***paid…***) But in the United States, the FMLA was a big step toward employer-mandated humanitarianism.



In the years since '94, none of the dire warnings have come true, but millions of people have enjoyed the "luxury" of taking care of themselves, or their seriously ill spouses and children without fear of losing their jobs.

As a union rep, I can personally attest to the change the law has made: one of my first assignments in the '80's was to represent a woman who was being terminated for sick leave abuse: she had taken more than 40 days off to care for her sick child. The day after her son died, she was terminated for sick leave "abuse."

Today, no one would suggest that the parent who stays home with a desperately ill child is a sick leave abuser! Nor have I ever heard an employer complain that Family Medical Leave is responsible for its financial difficulties. Of course, this is because Family Medical Leave in the U.S. is an *unpaid* leave, imposed only on employers with 50 or more employees, and provided only those who have been on the job for at more than 1250 hours. The employee and must fill out forms, provide a doctors' proof of illness, and an expected return-to-work date.

NOW CONSIDERED A 'BASIC RIGHT'

In only a few short years, we have come to view the FMLA as a basic right: the right to take up to twelve weeks off the job, intermittently if necessary, to deal with a serious illness. Employer are required to allow employees to use their accrued vacations during FMLA-time taken for family and, thanks to the 1999, California "Kin Care" law, they must also allow the use of one-half of any year's allotment of sick leave.

Other aspects of FMLA leave are negotiable. For example, some MOUs allow employees to use **all** accrued sick leave during the care of sick family members. Also, some groups negotiate a broader definition of "family member" than the law establishes.

CONTINUATION OF BENEFITS

The employer is also required to continue all benefits, as if the employee is still on the job, during the entire twelve-week leave period. Once an employee is no longer in paid status (i.e. once his leaves are exhausted) it CAN treat him as a non-employee for seniority purposes. In other words, his anniversary date can be moved forward, along with scheduled pay adjustments and such "rights" as rotation and "shift-bidding." It can also transfer him to a position that better accommodates his disability or inconsistent work schedule *so long as the position is equal in pay to his normal job.*

If an employee can't return to work after a 12-week FMLA leave, he *can* be terminated (although there are many extenuating circumstances that can make termination difficult.) Also, if an able-bodied employee *fails to* return to work after the 12 weeks (which sometimes occurs in maternity situations) she can be required to pay back the cost of health benefits.

EMPLOYERS MUST NOTIFY EMPLOYEES ABOUT FMLA RIGHTS…

The employer has an "affirmative obligation" to notify employees about their rights under the FMLA. This means that if an employer believes that an employee has a medical condition (or is taking time off due to a family member's medical condition) it has the responsibility to notify the employee about his rights under the law. The employer also has the right to *put* an employee "on FMLA-time" when he takes time off for an extended medical leave. This simply means that the employee is, as the leave continues, exhausting his 12-week "protection period."

FMLA MAY BE APPLIED TO WORKERS COMP LEAVE

People on workers comp leave can also be advised that they're on FMLA time. (Yes, even people on workers compensation leave can eventually be terminated…) But, if the employer *fails* to advise an employee that he's on FMLA-time, then the leave does not start UNTIL it informs him. Employers *cannot* apply FMLA leave retroactively, nor can they try to count an employee's sick leave, which is not connected to the FMLA-designated illness, as FMLA-time.

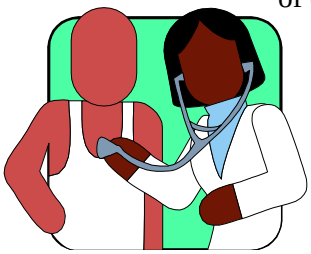
An employee who knows he will need to take an extended amount of time off for his own or his family member's medical problem should notify his employer, verbally or in writing about the situation. Although employers have an "affirmative obligation" to notify people about their rights under the FMLA, employers are not mind-readers. If you have a situation that will be causing you to use a lot of sick leave, the earlier you tell Management about the situation, the greater your protection.

MEDICAL CERTIFICATION

You must provide medical certification of the illness or injury, but it does not need to be specific. If an employer has questions about an employee's certification, it may contact the doctor *with the employee's permission.* Thanks to the HIPAA laws, employers cannot gather detailed information about the nature of the illness. If they have doubts about the validity of the medical information, they can require the employee (or family member) to see a second doctor, at the employer's expense. If the conclusions of the two doctors differ, the employer can ask for a third doctor's opinion, jointly selected by the two parties, but again, at the employer's expense. *In the 20 years since passage of the FMLA, I have only seen this procedure utilized once…*

UPON RETURNING TO WORK..

When an employee returns to work after an FMLA-leave caused by his own illness or injury, he can be sent for a "fitness for duty" exam. The exam can't be used to gather information not relevant to the medical condition, however (such as substance tests) and the same return-to-work policy must apply to all employees returning from such leave. Also, the returning employee must receive any improvements in pay and benefits that were negotiated for his job class; but the employer doesn't have to grant adjustments or bonuses that are based on performance.



One of the big "holes" in the original FMLA was that although it protected employees from being ***fired*** during the leave period, it didn't protect them from being written up or evaluated negatively, or just simply ***bothered*** about using this time off. In 2003, however, the state legislature passed the "Kin Care Clean Up" law which explicitly states that "an employer's absence control policy that counts sick leave taken pursuant to the Family Leave Act as an absence that may lead to discipline, is violation of the law. In other words, it is illegal for employers to consider the use of family sick leave as any basis for future discipline.

Today, if an employee has a letter about his or his family member's serious illness on file with the County, he will be substantially protected against discipline for using sick leave. This is NOT a "get home free" card; after all, most people DON'T have serious medical conditions. But it is important protection against the kinds of retaliation which can deer people from exercising their legal rights when they need too…

So…. What can we say about the long-term effects of the Family Medical Leave Act? They are enormous – but not for the obvious reasons. Yes, it is true that many people have been able to heal from illnesses or injuries, or care for sick family members without loss of employment. This is very good. More importantly though, the FMLA is the very first piece national legislation that says "Employers must recognize that people have families – and families come first." In a civilized country, it isn't necessary for people to have to *choose* between their families and their jobs.

Questions & Answers: Your Rights on the Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a *specific* work-related problem, feel free to talk to your Board Rep or Staff at (562) 433-6983 or cea@cityemployees.net.

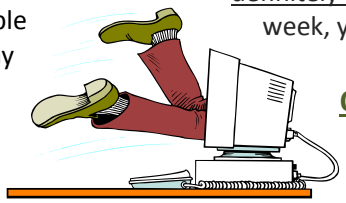
QUESTION: I work 12 hour shifts and want to know if my management has the right to compel me to work another four hours at the end of my shift. Also, if I am at work and haven't left for the day yet, can they tell me that I must come in the next day to work – even if I'm schedule to be off?

ANSWER: Yes, your employer does have the right to require you to work the extra hours and to require you to come in the next day. The law requires them to pay you time-and-a-half over 40 hours in recognition that this can be a huge inconvenience. However, this doesn't mean that you have no right to raise questions about the situation. If the length of the shift raises safety issues, you should communicate that to your supervisor. Also, if you have specific plans for your day off, it's perfectly reasonable to explain this to your supervisor and request that they select someone else. (Though, they don't need to cooperate with your request.) Finally, if the overtime is chronic and excessive, this might be grievable as one symptom of understaffing. Work conditions that cross the line into abusive conditions are grievable.

QUESTION: Dispatchers are allowed to trade shifts with other dispatchers in our Police Department. However, our management has just made a change in the procedure. Now, if a dispatcher calls in sick on the day they're supposed to work a trade (someone else's regular day) they are punished by not being allowed to do trade days for the next 90 days. Does this violate FMLA? It seems very punitive. Is there anything we can do about this?

ANSWER: Although both the State and Federal Family Medical Leave Act (FMLA) prohibit discipline or retaliation for one's exercise of the right to take time off for serious illness, most sick leave doesn't occur under FMLA-protected circumstances. HOWEVER, it sounds as if your management is changing a policy without negotiating with your Association. Someone on your Board, or your legal staff, should tell the Department management that you're not interested in this *proposed* change in policy – although you *might be* willing to discuss the staffing problem with the County.

The County's reaction to what is probably an occasional problem does sound punitive. In your discussion, the parties might be able to work out an acceptable solution. But, if you can't work it out, you may also "just say no" to this change in policy…



QUESTION: I have a question relating to my maternity leave. Here is my scenario: My first day off of work was May 7th. The doctor deemed me disabled and unable to continue working due to signs of early labor. Baby was born on October 17th via C-section. My question is, do I now have the full 12 weeks of "bonding" time utilizing CFRA beginning after the 8 weeks of PDL/FMLA for cesarean birth?

ANSWER: The right to bonding time with your infant is provided by the California Family Rights Act, which allows for up to twelve weeks. This is separate from disability leave, for *this* purpose. It is possible to take a maximum of 7 months of leave, combining maternity and child bonding leave, in California. In your case, you took 5 months of leave while pregnant and, while you probably exhausted your Pregnancy Disability and Family Medical Leave time, you can still use the 12 weeks of "bonding" time provided by the CFRA.

QUESTION: Can we use our work email addresses to send and receive correspondence from the Employees Association? I am asking because I am the Association president and some people have commented that we are not allowed to conduct union business during work hours.

ANSWER: Yes. You can use your employer's email for union business if the email is used for *other* non-work purposes, such as personal communications. In most work places even where there is a policy against using work email for personal communications, it is not enforced. People write back and forth regularly, socializing and non-work events, on their employer's email. The courts have held that an employer cannot enforce an email policy selectively against a union, while other non-work related communications are allowed.

QUESTION: We have a mandatory lunch meeting once a month. The meetings are from 1 to 1.5 hours. Shouldn't we be paid for this time?

ANSWER: Yes, if you are required to be at the meeting you must be paid for the time you attend it. Unless you are relieved of all duty during your lunch period and are able to leave the worksite, you are considered to be "on duty." If the meeting is truly mandatory, you are definitely on duty, so if this puts you over a 40-hour week, you should be paid overtime.

QUESTION: I am being continually asked to perform free computer work for managers in our county, during both work and non-work hours. I asked my president about this and he said that as long as I am not being put in danger by the work, I am to perform the work and can later file a complaint later. Is this true? In addition, I am asked to go to County Board members' homes to perform computer work. 90% of the time, this work has absolutely nothing to do with county business. This is

happening so often that I am sometimes doing this work all weekend. I don't want to do it any longer, but am concerned about losing my job. What can I do?

ANSWER: This is a complicated situation. You KNOW that your rights are being violated. You know that it's not appropriate for Board officials to be asking you to work on their personal computers, whether it's during work time OR on the weekend. However, you're probably concerned with retaliation if you refuse or even raise questions about propriety. You should probably talk to your immediate supervisor about it, especially asking about overtime pay for the weekend work. (Or, you simply might begin invoicing these officials for your PRIVATE services, during non-work hours…) If this doesn't resolve the problem (in other words, if someone doesn't step in to stop this practice) then you might want to contact the Human Resources Director or County Manager. Don't hesitate to ask your Board or staff for help. You want to make sure your concerns are well documented.