# Regional Employees Association of Professionals August 2014 News


## Your "Right to a Life": When Must Your Employer Accommodate Your Personal Needs?

Beginning in the '70s, unions and women's groups began lobbying hard to make America's workplaces more humanistic. The goal was to require employers to recognize, *legally*, that employees have personal lives, that their personal lives might occasionally interfere with their jobs -- and that it's not reasonable to force people to choose between their jobs and their families. The greatest response to this pressure took the form of the 1994 Family Medical Leave Act (FMLA). The FMLA goes far to protect people from termination when they must take time off the job for their own, or a family member's, serious illness.

For several decades, a good number of bills were passed which genuinely accommodated a range of employees' personal and family needs. But big changes (employer-provided childcare, flexible scheduling, and paid family leave) never came to fruition. With the Recession, if these "family-friendly fantasies" weren't dead already, their coffins were sealed by the State's financial problems.

What remains, however, are a variety of laws most people know little about, which enable employees to take time off the job to manage personal problems. They protect your right to vote, to care for children's needs, to go to court, to flee from domestic violence – all without loss of employment. Another set of laws provide for your privacy and confidentiality of records, and almost all protect you against retaliation for making use of these rights. These are mostly state laws; California is considerably more liberal than the federal government when it comes to "personal rights" in the workplace. If they cannot be enforced via your grievance procedure, they can be enforced with the State Labor Commission. Here is a very brief summary. For greater detail, take a look at the California Industrial Relations Department's website.

### Accommodation for Illiteracy…

Employers must "reasonably accommodate" employees who wish to enroll in a literacy program. Time is NOT paid, and employers must make reasonable efforts to protect enrollees' privacy.

### Alcohol and Drug Rehabilitation…

Employers must reasonably accommodate an employee who wishes to enter a rehabilitation program. Accommodation generally means that the employee will not be terminated during the time spent in a program, unless they can demonstrate "undue hardship" showing the employee is a danger to himself or others.

## Privacy of Arrest Records…

It is unlawful for employers to ask job applicants or employees for information about an arrest record or participation in "diversion" programs which did not result in a conviction. (The two exceptions to this law are applicants for positions as (1) Police Officers and (2) health care workers who have been arrested under sex- or drug-related statutes.)

## Child or Spousal Support, Garnishment of Wages

Employers cannot terminate employees based on court-ordered wage deductions for family support, nor because of wage garnishments by the courts.

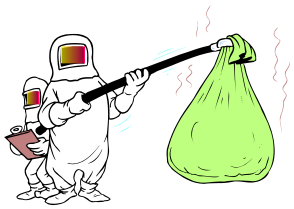
## Protection Against Discrimination and Harassment

Employers cannot terminate, harass, or treat employees differently based on race, gender, national origin, marital status, medical disability, religion, sexual orientation, gender identity, age, or pregnancy. Complaints about violations of discrimination laws may go directly to the Equal Employment Opportunities Commission or State Department of Fair Employment and Housing.

Supervisors and co-workers may be held *personally* liable for on-the-job discrimination and harassment. Employers may also be liable if they have been informed about the circumstances and failed to act.

## Disclosure about Wages or Working Conditions

Employers cannot forbid employees from discussing wages or work conditions on the job, nor can they ask employees to sign agreements forbidding disclosure on these subjects. It is also illegal for employers to retaliate against employees for filing complaints about work conditions with the Labor Commission.



## Filing a Worker's Compensation Claim or calling Cal/OSHA

The law protects employees from discharge, or threat of discharge, for filing worker's compensation claims, receiving a settlement, or testifying in a worker's compensation proceeding. Similarly, it is illegal to terminate or layoff an employee who makes an oral or written complaint about safety either to the employer or to ANY government agency. The law protects employees who testify in safety-related hearings or who refuse to work in a condition which they believe to be unsafe

## Employment References

It is a violation of the Labor Code for an employer to attempt to prevent a former employee from obtaining *another job* by making "false references" about the employee. Also, slander and libel are subject to civil penalties. (But there is no liability if the employer making the negative reference is able to show that the information is true.)

## Jurors, Witnesses, and Domestic Violence/Sexual Assault Victims

Employees cannot be penalized on the job for taking time off the job to (1) serve as a juror or witness, (2) appear in court in order to seek a protective order for oneself or one's child, or (3) obtain counseling or services from a shelter or relocating to a "safe house."

Employees should provide reasonable advance notice whenever possible, and the employer may request documentation: police report, court order, or note from counselor, or advocate.

## Personnel Files and Payroll Records

Every employee (and former employee) has the right to see and copy his/her personnel file and payroll records. The employer must comply with the request "as soon as practicable" but no later than 21 calendar days from the date of the request, and may charge the employee the actual cost of the reproduction.

## Political Activity

Employers cannot penalize employees for running for elective office, engaging in concerted political activity (i.e. wearing armbands or participating in a march). It is illegal for employers to attempt to control political affiliations or activities.

## Polygraph Exams

Public employees in California cannot be compelled to cooperate with a polygraph exam. Nor can employers use "voice stress analyzers," or psychological evaluators "to render a diagnostic opinion about an individual's honesty."

## No Retaliation for Union Activity

Employees cannot be punished for unionizing or attempting to unionize. The law provides the right to "full freedom of association, self-organization, and designation of representatives of one's own choosing to negotiate the terms and conditions of employment.." An employee who is fired or disciplined for hiring an attorney or representative to assist him in dealing with his employer may sue for damages.

### Elections Officer

Employers cannot discriminate against employees who may be absent from work to serve as election officers on Election Day.

### Military Duty

Employers cannot terminate employees who must leave the job due to the "performance of any ordered military duty."

### Confidentiality of Social Security Number

Employers cannot publicly post or share employees' social security numbers. They cannot print the number on any card required for the individual to access products or services provided by the employer. And they cannot require employees to transmit their social security numbers over the internet.

### Surveillance

It is illegal for employers to videotape employees in restrooms, locker rooms, or changing rooms. This illegality extends to the use of two-way mirrors.

### School Visits

Employees cannot be penalized for taking time off when a child is suspended and/or for taking up to 40 hours per year to attend a child's school activities. Employees must be the actual parent or guardian, must give advance notice, if possible, and may be required to provide verification of participation

### Whistle blowing

Employers cannot adopt or enforce rules preventing employees from informing government agencies about what they have "reasonable cause to believe" is their employer's violation of state or federal law. Employees who ARE terminated or retaliated against for whistle blowing may sue for wrongful termination

## California Family Rights Act Expands Definition of "Family"

**On July 1, 2014, the California Family Rights Act (CFRA) was expanded to include a wider range of family members. You now have the right to use up to 12 weeks per year to care for grandparents, grandchildren, siblings, and parent-in-laws who may be suffering from serious medical conditions. This is in addition to coverage for children, parents, spouses, and domestic partners, under the original law.**

**The time off may be used intermittently and employers are barred from taking "adverse action" against you for taking this time off. Employees may use accrued leave during the FMLA/CFRA period, but the time off is NOT paid. If you are enrolled in the State Disability Insurance program (most public employees are not…) you may apply for up to six weeks' disability insurance payments.**

# *What if I'm Accused of Doing Something Illegal?*

People who work for public agencies work *with the public*. Total strangers. A LOT. They go into people's yards and sometimes into their houses. They rescue them, fine them, arrest them, transport them, teach them, watch their children, feed their grandparents, and clean up all around them. With all this interaction, there is occasional friction…and sometimes real sparks. So, what happens if a member of the public accuses you of doing something improper – or perhaps even illegal? Here's a scenario:

**QUESTION: I am a recreation supervisor and have been falsely accused of molesting a child at the park I oversee. I have been removed from the job, interrogated, threatened with termination – and NOW I'm now being told that the child's parents are going to sue me!**

**I am completely innocent! I've worked for the County for 15 years, with great reviews and never a problem. In my opinion, the County should be defending me – NOT threatening me! What can I do?**

**What if this were you?** What consideration would you expect from your employer? What does the law say? First, you should know that neither your job nor your freedom can be taken from you without a full hearing. However, *even when accusations are completely false*, you are likely to be taken off the job and placed on administrative leave. Why? Because people who work for public agencies are held to a high standard; your employer must respond quickly and appropriately to any question about a serious "impropriety."

"Administrative leave" is paid leave -- but it's not a vacation. You need to be available to be called into work at any moment, and you will probably be told not to talk to your co-workers (or anyone in the public who may be involved in the complaint.) It's possible that you'll remain on administrative leave for weeks, or even months, but eventually, you'll be called in for questioning. If you think you may be threatened with serious discipline, you should bring an attorney or a union staff person.

Most of these interviews are conducted by Human Resources, or, if your employer has a Police Department, by someone from investigations. Increasingly, though, public agencies are hiring professional investigators, especially for complex cases. The process can be intimidating, but it does not mean that you are about to be fired, or even formally charged with anything. It's a fact-finding session.

## *Criminal Accusations…*

You have the right to know the subject of the questioning, and whether it will touch on any matter that could lead to criminal prosecution. If so, *and you think you could be found guilty*, you need to call a criminal attorney and think hard about whether you want to participate in the interview. In this circumstance, your employer is supposed to provide you with a "Lybarger Admonition," which is basically a statement that no information from the interview may be used in any criminal proceeding. However, this doesn't preclude them from sharing your statements with authorities.

Your employer can threaten you with termination if you don't cooperate in this *administrative* interview. But they cannot threaten to send you to jail. So, you have no "Miranda Rights" or 4th Amendment "protection against incrimination." If you don't want to be interviewed, you don't have to… you simply run the risk of losing your job.

If you are facing criminal charges and could be found guilty, you need to decide what is more important: your job or your right to remain silent. And you need a criminal attorney.

## *False Criminal Accusations*

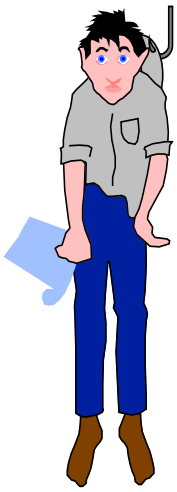
In this questioning phase, based on the advice of your attorney, if you are being falsely accused, and you know that your honest answers will demonstrate this, you probably want to answer the County's questions. A refusal will arouse suspicion – AND you could lose your job! You haven't been "charged" with anything; it's an interview. But you should have an attorney or professional

representative attend the meeting with you, not a co-worker.

The state of the law is such that your employer must investigate even the most preposterous accusations if they raise serious issues. This makes for a lot of wasted time and paper – and a lot of damage to employee morale. Most insulting of all, when the County finishes its investigation, you'll probably be provided no information at all. No one will apologize for the false accusations. No one will provide a report. If you request a copy, you'll probably be denied. You won't be "exonerated" because you weren't actually charged with anything…

## *Investigating Non-Criminal "Infractions"*

The vast majority of these workplace investigations don't involve criminal issues at all. They are usually about some sort of misbehavior or suspected violation of county rules. Someone has reported or complained about you. It could be rudeness, foul language, sexual, or racial remarks, insubordination, dishonesty, etc.



**Management often springs these meetings on employees suddenly because they want you to come to the meeting without any time to think.** They want to surprise you with their questions and receive your most spontaneous answers. By law, however, you have the right to know the subject matter of the interview, and to be represented, if you believe that your answers could lead to discipline.

In most cases, these interviews result in no action at all, or in some level of discipline which, hopefully, is appropriate to the "offense." (And, if it is NOT appropriate, you have the right to appeal, of course…) Sometimes, however, the interview takes an unexpected turn: you ARE accused of something serious: falsifying a time card, lying about a work injury, "borrowing" tools, etc. In this case (where there are, now, potentially criminal accusations) your union rep may stop the meeting and help you decide what to do next. There are options to weigh and your entire work future might be at risk. Again, though, rest assured that you cannot be terminated merely for being investigated, or even for being arrested by the police. You really ARE "innocent until proven guilty."

## *Your Conduct at An Interview*

The most important thing to do in an investigation is TELL THE TRUTH. You can assume that the County already knows the answer to most of its questions. They have, or will be, talking to your co-workers. Even if the subject involves a very minor "bending of the rules," *if you lie, you are likely to be terminated.* (After all, public employees must be "paragons of virtue" for the rest of the community.)

After this, give answers that are direct and complete, but no longer than necessary. ("Over talking" often sounds as if the subject is trying to hide something.) The County will probably record the interview; you may ask for a copy of the tape. You don't need to record it – although you can. Your rep will stop the meeting if the questions infringe on your personal life or become badgering. But he will not ask "counter questions;" nor will you present evidence. This isn't court; it isn't even a hearing.

## *Employer Must Defend you against FALSE accusations.*

Now, to get back to the original question: what role does your employer play if you are charged with committing a criminal act on the job? In most cases, <u>whether you are being sued by a resident in civil court, or defending yourself against criminal action by the state, if the alleged action took place *while you were on the job*, the County has an obligation to defend you.</u> We say "in most cases" because a series of legal precedents (mostly involving abuse of prisoners in jails) have established a big exception: if the alleged wrongdoing occurred outside "the scope of employment" the employer does not have to defend the accused employee. The courts have found, for example, that rape is "outside the scope of employment." In the case of our Parks employee who was accused of child molestation, for example, the County might well argue that this conduct was "outside the scope" of his job -- and refuse to pay for his defense. **But, what if this employee is innocent?** What if he has spent thousands of dollars on an attorney (which he wouldn't have needed if he didn't work for the County) and is exonerated? <u>In this case, he has every right to insist that the County</u>

reimburse him for his defense.

**Finally…one more twist: what happens if both the County AND an employee are sued, either by a citizen or by an arm of the state or federal government?** In this case, because there is a potential conflict of interest, the employer must still defend the employee, but provide a ***different*** attorney from its own.

# E-Cigarettes in the Workplace

**Electronic cigarettes, or e-cigarettes, have grown in popularity in the last few years and this trend is expected to continue. An e-cigarette is a battery-powered device that provides the user with inhaled doses of vaporized liquid, usually nicotine. The vapor is inhaled as an alternative to a tobacco smoke.**

**E-cigarettes are usually made of plastic or metal and often look like a cigarette. Since they don't produce smoke, some advocates argue that they should not be treated the same as cigarettes are, in the workplace. At this time, there is no legal ruling on the subject; "e-smoking" is in a gray area. Most employers do not have rules about e-smoking and it is unclear if they are covered by non-smoking bans.**

**Under federal law, e-cigarettes are not considered drug or medical devices, so they are not subject to Federal Drug Administration laws – yet. However, some states are now passing legislation to restrict the sale or use of e-cigarettes. New Jersey has banned the use of e-cigarettes in the workplace and other indoor public places. California (and many other states) has banned the sale of e-cigarettes to minors. The U.S. Department of Transportation recently said that federal regulations about smoking in airplanes apply to e-cigarettes.**

**In 2013, Senate Bill 648 was introduced to the California State Legislature that proposed extending existing restrictions on tobacco products to e-cigarettes. The bill is currently on hold, but if passed, this bill would prohibit and restrict their use in many public places, including work places. Many cities have also enacted bans. Just this April, Los Angeles imposed a ban on smoking e-cigarettes in public places, including workplaces, bars, restaurants and night clubs.**

**In the absence of outside restrictions, employers may create their own workplace policies to address the use of e-cigarettes subject to the requirement to negotiate, if there is a union in place. Many large employers, including, Exxon Mobil, Starbucks Corp. and Wal-Mart don't allow them; others such as McDonalds, allow e-cigarettes to be used by both patrons and workers. In making a decision to limit or ban an activity in the workplace, employers are supposed to weigh the costs and benefits of the decision. In general, employers have been imposing the same limitations on e-cigarettes that they do on tobacco cigarettes, because these policies address the same concerns. E-cigarettes usually contain nicotine as well as detectable levels of known carcinogens and toxic chemicals; so, prohibiting their use in the workplace eliminates the risk of any complaints from nonsmoking co-workers,**

customers, or others annoyed by the vapors.

# What If My Job Makes My (Pre-Existing) Injury Worse?

By Attorney Sherry Grant

Everyone knows that you can file a workers compensation claim if you are hurt on the job. But what if you are hurt (or sick) from causes *outside* your job, but the condition becomes *worse* as the result of the work you perform? Under the law, these situations are called "exacerbation" or "aggravation," and you *may* be able to collect worker's compensation benefits when they occur. There is a significant difference between the two circumstances, however. Here's an explanation:

## EXACERBATION OF INJURY

"Exacerbation" of a pre-existing injury essentially means a "flare up." In other words, the pain level of a pre-existing injury increases while you are working, but then decreases when you reduce the activity, for example, on the weekend. If the pre-existing injury is exacerbated by working, there is no remedy under worker's compensation law. Your workplace has caused temporary pain, but no actual physical damage.

## AGGRAVATION OF INJURY

On the other hand, the "aggravation" of a pre-existing injury may be considered a new injury. Typically, the pain level of a pre-existing injury will increase while at work, ***and will then stay at that new, increased level.*** Or, sometimes, a "new" injury will be felt. For example, an employee with a pre-existing, non-work injury in his lower back may feel a "pop" in his back while working. This would be an "aggravation." **Aggravation injuries are compensable under the law.**

Your employer's worker's compensation carrier must pay for all medical treatment associated with an aggravated injury. However, if there is a permanent disability which requires a financial settlement through worker's compensation, your employer will want to "apportion" the cost, to cover only the part they were responsible for: the aggravation. This means that a doctor will attempt to divide the value of the injury between the parts that you hurt off the job, with what happened later on the job.

## MEDICAL EVIDENCE

Although an employee may believe that his injury has become worse as the result of workplace "aggravation," that decision can only be made by a medical doctor. It's not uncommon for employers to challenge these claims. Anyone who believes that his activities on the job are causing a pre-existing injury to become worse should consider filing a worker's compensation claim. If you think you need an attorney, contact your employee association staff for a referral. Most attorneys will evaluate your situation without any charge, and can advise you about your next step in the process.

## ***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 Association staff at (562) 433-6983 or cea@cityemployees.net.**

**Question: My supervisor keeps a grease board on his wall with a list of his "problem" employees. It has the name and the kind of problem. Everyone who comes into his office can see this list. I think it's a form of harassment. What can we do about this?**

**Answer:** Although this is not a good management practice – it's probably not harassment. Management has the right to tell employees how to do their work and point out employee deficiencies. This is, after all, his office. If he's not falsifying the information, then it probably wouldn't be considered harassment. However, if you and your co-workers find this practice to be intolerable, you can file a grievance. If you can't get the grease board removed, you can probably at least get it removed from public sight.

**Question: In our Department some people who work holidays get double time, but my group only gets time-and-a-half. Is this legal? Don't they have to treat us all the same?**

**Answer:** No, holiday pay is not covered by any law. It's a negotiated item. Check your MOU to make sure that your group is supposed to be treated differently. If the County is paying you incorrectly, a simple grievance would fix this. If the status quo is correct, then you need to address this in the next round of negotiations.

**Question: I work in a small division. Last year, one of my co-workers quit and the other retired. So, I was on call 7/24 for 5 months straight! Is there any law that puts limits on how many days in a row you can work?**

**Answer:** Unless you are a commercial driver, there is no limit on the number of days in a row that a public employee can be required to work. A limit, or extra premium pay, could be negotiated as part of your MOU.

**Question: I'm a financial analyst. There are also analysts in HR, in Water, and in the legal department. They all are at the same pay range, which <u>is about $500 a month more than mine.</u> Do I have the right to insist on pay equity?**

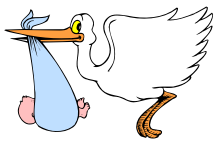
**Answer:** If you are all in the same job class, then the pay range should be the same for everyone. However, if the analysts are each considered different job classes, then there is no automatic solution. It might be worth your time to analyze the other classes' job descriptions to see if your job duties closely match theirs closely. If they are a close match, then you can file a grievance, arguing that you should be on the same pay scale. The "devil is in the details" with this kind of case…

**Question: I'm on our union board and would like to know whether we have the right to use the County's e-mail system for conducting certain business such as announcing a meeting or helping a co-worker with a grievance.**

**Answer:** Yes, you can use the County's e-mail for union business to the same extent that the e-mail system is used for <u>other</u> types of non-work purposes. Even if your Employer has a policy that forbids using work e-mail for personal business, most employees use it to communicate about personal issues and events. In this case, then the County can't discriminate against the union while tacitly allowing other types of non-work e-mail communication.

**Question: I am requesting to utilize my full 12 weeks of PDLA/FMLA, and full 12 weeks of CFRA for maternity leave and to "bond" with the baby. Can you give me an**

**explanation of how these laws work together?**



**Answer:** PDLA is a California law that provides up to 4 months (or 88 work days) of leave for disability due to pregnancy, childbirth, or related conditions. FMLA is a federal law that provides up to 12 weeks also. The two laws run concurrently so the maximum time you are entitled to under those laws is 4 months. However, if your disability requires more than 4 months of leave, for example, if you were placed on bed rest 4 months into your pregnancy, you may be entitled to additional time off under the Americans with Disabilities Act.

Once you've had your baby and are released to return to work, CFRA provides an additional 12 weeks of leave to bond with your baby. You are entitled to use the CFRA leave for baby bonding up until your baby's first birthday.

# More Answers to Questions About Your Medical Plan

**Q: When I started working here, the County provided FULLY paid health care for me and my family. It's one of the reasons I took this job. Now, the County is saying that we will begin paying over $100 a month toward our plan. The only way I can avoid this is by switching to an HMO. Do I have grounds for legal action?**

**A. If the County is simply "saying" this, without bargaining with your union, then, yes, you and all others similarly affected would have grounds for action. However, if the County negotiated properly and this loss is part of an overall agreement, then there is no violation. Almost all public employees used to have fully paid health care – and almost none of them do any longer. It is part of the political trend to make public employees "share" in their benefit costs – which started long before the recession.**

**Q: Since I retired four years ago the County has been paying $350 toward my health care. Now they are saying that the retiree health care fund is running out of money and my contribution is being reduced to $100. Can they just do this?**

**A. Probably not. Retiree health care and other retirement benefits are considered forms of deferred compensation. You *earned* this benefit and the Courts have ruled that it generally can't be taken away. We say "probably" because the benefit depends on the language in the MOU in place when you were working. If it says that the amount can be reduced or depends on the solvency of some fund, then the amount CAN change.**

**Q: I've been told that the County is going to get out of Kaiser and go with a different HMO. I'm very attached to my doctor and have been undergoing some specialized treatment. Can they just DO this?**

**A. The County normally can't change your plan without bargaining. If the parties have negotiated the change, it's legitimate (and you should have been given an opportunity to vote on this.) If there have been no negotiations, unless your MOU specifically names your health carrier, the County *might* be able to change plans as long as your health care *benefits* remain the same. Obviously, the benefits are NOT the same if you must change doctors! If you determine that this change was made without your union's agreement, you may have grounds for a significant grievance.**