REAP

Regional Employees Association of Professionals

February 2015 News

REAP Announces Decertification Campaign:

DECERTIFY SEIU!

The Regional Employees Association of Professionals has filed an unfair practice claim with PERB: the Public Employment Relations Board. Because a majority of Riverside County employees are no longer pleased with the services being provided by SEIU, Local 721, REAP is now, officially, kicking off an effort to DECERTIFY SEIU. One of the stumbling blocks to this effort is that SEIU and the County have negotiated a five-year contract with no window period for decertification. Under state law, however, employees can't be denied the right to vote on union representation for a period of longer than three years.

We have asked the County to allow an election, and they have refused. Therefore, REAP has decided to take matters into our own hands and, with the assistance of our staff at CEA, have file an unfair practices complaint with the State Public Employment Relations Board. The complaint asks PERB to set aside the County's "unreasonable rule" which bars a decertification election for five years – and violates the Meyers- Milias-Brown Act, the state bargaining law.

We have also filed two other PERB claims: one which appeals the County's refusal to cease dues deductions for 7 employees who filed, during last April's window, to drop out of SEIU; the other which appeals the County's denial of our request to become a "Registered Employees Organization." We expect to receive notice of our hearing within the next few months, and will keep you informed.

In the interim, if you are displeased with SEIU and would like to remove SEIU as your Exclusive Representative, please fill out the below form, scan it and send it to: reap4us@hotmail.com. REAP will send you additional information.

Additionally, if you are in the Supervisory Bargaining unit, you will once again have the opportunity to ***drop out of SEIU altogether in April, 2015!***

We, the undersigned employees of the County of Riverside, no longer wish to be represented by the Service Employees International Union-Local 721.

Print Name	Signature	Date	Position Title

Welcome Riverside County Welfare Fraud Investigators!!!

REAP would like to announce we have new associate members coming to us from the County of Riverside. Some Riverside County Welfare Fraud Investigators have opted to join REAP as associate members in order to access representation from CEA. Welfare Fraud Investigators are Peace Officers under 830.35 of the Penal Code. Not all unions provide the expertise needed to represent ALL members. As Peace Officers, the County and Management must follow specific procedures when investigating and disciplining Peace Officers. CEA's representatives are well versed on the Peace Officer's Bill of Rights and are more than willing to represent the Welfare Fraud Investigators. With the current volatile environment facing law enforcement all over the country, it is imperative law enforcement officers have the best representation possible and CEA is happy to fill that need for the Welfare Fraud Investigators. ***Welcome!!***

But…Don't They Have to PAY Me?

In 1938, Congress passed the Fair Labor Standards Act (FLSA) which established the minimum wage ($0.25,) the 40-hour week, and strict rules which said hours worked beyond the 40-hour week must be paid at time-and-one half. Initially, the law didn't cover public employees; however, in 1985 the Garcia Act brought public agencies under the jurisdiction of the FLSA.

Since 1985, the Department of Labor (DOL) has generated *hundreds* of legal rulings on the unique overtime-related issues affecting public employees. The DOL recognized that public employees can be called upon to work long hours, often in emergency circumstances, serving very special needs of the

public, and often performing duties that no other employees perform. Many of these decisions revolve around questions of *which* employees are eligible for overtime pay, *when* an employee is considered to be "on the clock," and when an employee may receive "comp time," rather than overtime *money*, and *how* "comp time" or overtime may be used or paid. Here are some interesting examples…

WHO is eligible for overtime pay?

All employees are eligible for overtime UNLESS the duties they perform allow their employer to "exempt" them from the FLSA. In general, they may be so exempted because they are 1) executives, 2) specialized professionals or 3) administrators.

Over the years, many more employees have been classified as "FLSA exempt" than was contemplated by the original law. This is partly because some employers have aggressively excluded employees from overtime coverage, and partly because pro-business administrations have allowed the definitions of managers, professionals, and administrators to become exceedingly "fuzzy."

The Obama administration has gone to some trouble to correct these overly broad definitions, and there have also been some big cases heard by the DOL from groups of "exempt" employees who did not believe they were properly classified. The end result, today, gives us some useful parameters:

In order to be granted an **"executive" exemption,** employees must 1) have as their primary duty managing a department or subdivision of a county, AND 2) must direct the work of subordinate employees AND 3) must have authority to hire, fire or change the work status of those employees.

In order to meet the **"learned professional" exemption,** an employee must have as his/her primary duty "the performance of work requiring knowledge on an advanced field of science or learning acquired by a prolonged course of specialized intellectual instruction." The work must be "predominantly intellectual in character… as distinguished from routine mental or mechanical work."

Administrative exemptions should be granted only when an employee performs office work "directly related to the business operations of the employer" AND exercises "discretion and independent judgment regarding significant matters…" The law goes into detail about what kinds of decisions indicate "independent judgment:" authority to waive or deviate from established policy, to negotiate on behalf of the employer, to provide "expert advice" to the employer, to conduct investigations and resolve "matters of significance," and to plan and conduct employer's objectives, etc.

These parameters can be useful in helping employees decide whether they might be improperly designated "exempt" under the FLSA. For example, holding a bachelor's degree, alone, may not be grounds for an employer to designate a job class "exempt." In 2009, social workers for the state of Washington filed an FLSA claim arguing that, although they were required to have degrees, their work was, largely, routine – and that they did not meet the test for "learned professionals." The Court agreed, and today most public social workers are eligible for overtime.

In a similar vein, many first-line supervisors should NOT be FLSA exempt. This is because they generally don't make departmental policy decisions. Similarly, most office employees would not qualify for the "administrative" exemption -- even if they are considered "confidential" employees or work directly for department heads or the County's Board of Supervisors. This is because they rarely exercise the level of "discretion and independent decision-making" that would allow the employer to treat them differently from other working people.

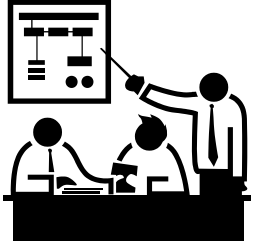
PUBLIC SAFETY JOB CLASSES

The FLSA has some special rules intended to benefit public employees, especially "first responders." For example, certain jobs can NEVER be characterized as FLSA-exempt: police officers, detectives, inspectors, investigators, correctional officers, parole or probation officers, park rangers, fire fighters and paramedics.

COMPUTER WORK EXEMPTIONS

When computers first came on the scene during the Reagan administration, the Feds were quick to allow employers to exempt people in this highly specialized field from overtime. More recently, however, the DOL has made it clear that the exemption does NOT include people who "are engaged in the manufacture or repair of computers" or "who are not

primarily engaged in computer system analysis or programming…" In other words, the millions of people who work with computers today are mostly **not** FLSA exempt.



When Are You "On the Clock?"

EATING AND SLEEPING

Because of the myriad of strange jobs performed by public employees, the Department of Labor has had to generate some unique rules. For example, there are occasions when employees (such as emergency dispatchers) must remain on the job for very long hours. Under these circumstances, the time that they may need to sleep or to eat may be counted as time worked, toward overtime.

On the other hand, the decisions on whether you must be paid overtime for your lunch period, if it is interrupted by work, are mixed. Similarly, having to monitor a radio during an unpaid lunch time might or might not convert that lunchtime into paid work time. If the employer *does not allow you* to leave the workplace during lunchtime, this will generally mean they must pay you for that hour.

PRE- and POST-WORK ACTIVITIES

In recent years there have been lots of decisions about the time employees spend before or after a shift, preparing for, or wrapping up, work activities. In general, the rule is that if the time is spent on an activity which is an integral part of the employee's principal activity at work, then it must be paid. For example, employees must be paid for cleaning, fueling or preparing a machine or vehicle that must be used on the job. They must also be paid for attending pre-shift meetings, checking email, completing paperwork or cleaning up equipment or the workplace. "Clothes changing time" must be paid if an employee is required to change into or out of a uniform *only at work.*

TRAVEL TIME

An employee is considered "on the clock" while traveling, if he/she must go to another work location during *or after* the normal work shift. But, the time spent returning *from* "another work location" is paid only if the employee must return to the workplace, rather than going home, when the job is done. Overnight travel, to conduct work-related activity is NOT paid if someone uses public transportation (plane, train, boat or bus) unless the employee can show that he/she was working during that travel time. On the other hand, time spent driving one's own car to another location to conduct work is considered paid time.

TRAINING TIME

The Department of Labor requires employers to pay for time spent training *to the extent that the training is required by the employer*. Training is considered voluntary (and therefore doesn't need to be paid) ONLY IF 1) the program isn't directly related to the job and 2) the employee doesn't perform any productive work during the training.

Whether or not a training course is truly voluntary can be the source of dispute. Luckily, DOL decisions err on the side of the employee. In other words, if the employee believes that his/her working conditions, or future employment could be negatively affected by failing to take the training, the attendance is generally not considered voluntary - and should be paid. On the other hand, people who take classes *because the training may enable them to promote*, don't have the right to be paid (unless the employer actually required the classes.)

Time spent taking classes to satisfy *other levels of government* (i.e. state certificates) may NOT be paid time, even if the employer pays for the class or certificate. This has to do with whether the certificate is a *requirement* of the employee's current job.

WORKING FROM HOME

Working at home, on the phone or on the computer, is considered *work.* If your employer calls, texts or emails you at home during non-work hours, *and this causes you to work more than 40 hours that week,* this is overtime pay.

STANDBY TIME

If your employer requires you to "be available to come in," the time you spend "standing by" should probably be paid. We say "probably" because the FLSA generally says that **you must be compensated if the way you spend this time is primarily for the benefit of the employer.** The law waffles back and forth on this subject, and each case is "fact-specific." It's safe to say, though, that you must be paid if 1) you are **required** to answer the phone if called, 2) you are required to stay within a certain travel radius and/or to be available to return to work within a certain time period and/or 3) you are required to remain in "work

ready" condition and limited in your ability to "engage in personal activities."

Most public employees who are required to "stand by" to deal with utility or street emergencies are eligible for stand by pay. The employer cannot tell you that you must be available to answer the phone or respond to "call outs" if they are not paying you to stand by.

GRIEVANCE PROCESSING TIME.

Most people don't know that the FLSA actually requires agencies to give employees time on the job for processing their grievances. Specifically it says "time spent adjusting grievances between employer and employees during the time that employees are required to be on the premises is considered time worked." But, if the grievance time (or any time spent on union activity) takes you into after-work hours, your employer is not required to pay overtime.

The State of the Law: *MEDICAL PRIVACY FOR JOB APPLICANTS*

By law, employers may not ask job candidates, either verbally or on a written application, about the job applicants' health or medical history. (And it's also illegal to ask the applicant if he/she has ever filed a Workers Compensation claim.)

A Few New Labor and Employment Laws

AB 1443: Volunteers and Interns Receive "Employee" Anti-Discrimination Protections

This new law amends the California Fair Employment and Housing Act ("FEHA") by providing protection against discrimination and harassment for volunteers and unpaid interns. It prohibits discrimination and harassment not only in the selection or termination of unpaid workers, but in their "training" or "other terms of employment." This law arises from concerns that came out of the Recession, where large numbers of people were volunteering or taking unpaid internships in an effort to enhance their employability. Its goal is to extend basic workplace protections to people who can easily be exploited while trying to get "a foot in the door…"

AB 2053: Employers Must Provide Supervisorial Training on "Abusive Conduct"

Since 2006, employers with 50 or more employees have been required to provide at least two hours of sexual harassment prevention training to all supervisors. This law expands the training to include "abusive conduct." The training must be provided within six months of the time the employee becomes a supervisor, and every two years thereafter.

Under the new law, "abusive conduct" is defined as conduct that a "reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." This may include "repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance."

AB 2751: Employees' Right to File Civil Claims and Receive Employers' Penalties

Currently, the law prohibits employers from retaliating against an employee who has filed a claim with the California Division of Labor Standards Enforcement ("DLSE"). The penalty for retaliation can be as high as $10,000 for each violation. This law makes it clear that the penalty an employer may be assessed is to be paid to the employee who was the victim of retaliation.

AB2751 also broadens the definition of an unfair immigration-related practice. It's now illegal for an employer to threaten to file, or actually file, false police reports, or false reports or complaints to state or federal agencies. The law authorizes victims of such unfair immigration-related practices to bring civil actions for damages and penalties.

AB 1897: Employer Liability for Use of Contract Labor

This law applies only to private companies. It requires companies to provide workers compensation coverage, and to comply with health and safety regulations, even for contract laborers. It is an attempt to crack down on employers who fail to provide safe working conditions and/or use contractors to avoid the costs of workers compensation insurance.

AB 1792: No Discrimination against People who Use Public Assistance

It is now illegal for an employer in California to "discharge, discriminate or retaliate against an employee who enrolls in a public assistance program." This includes employees who may be using government-funded medical insurance. It's also illegal for an employer to disclose information it may have on employees' use of, or application for, public benefits.

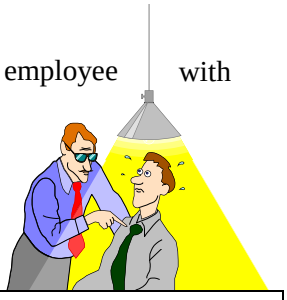
SB400: Protection for Victims of Domestic Violence or Stalking

This law builds on pre-existing law which prohibits employers from taking "adverse action" against an employee who must takes time off the job to deal with issues arising from domestic violence or sexual assault. This new law extends the same protection to victims of stalking, and also requires employers to provide reasonable accommodations (in the form of safety measures or procedures) for a victim of domestic violence, sexual assault, or stalking.

SB 496 Protections to Public Employees Who Are Whistleblowers

This law protects public employees when they disclose information to another county about apparent violations of local rules or regulations. It specifically prohibits an employer from retaliating against an employee:

- because the employer believes that the employee disclosed or may disclose information to a government or law enforcement agency;
- because the employer believes that the employee may disclose information to a managerial employee with authority to investigate, discover, or correct the violation; or
- for disclosing, or refusing to participate in an activity that would result in a violation or a failure to comply with a local rule or regulation.



WHEN DO I HAVE THE RIGHT TO A REPRESENTATIVE?

Employees' right to representation at investigatory interviews was established by the U.S. Supreme Court in 1975. The case (*NLRB vs. Weingarten)* involved stock clerks at the Weingarten Department store who were asked about possible theft by *other* stock clerks. Thus, this right has become known as your "*Weingarten* Right." *Weingarten* doesn't apply to all meetings with Management; it applies to investigative meetings, where employees could be asked to reveal information which could be damaging to themselves or other employees.

What IS an investigatory interview? When a supervisor questions an employee about matters which could be used as grounds for discipline, this is an investigatory interview. *"Weingarten"* also applies when a supervisor tells an employee that he will be called to a meeting to explain or defend his conduct. If the

employee has a reasonable belief that discipline could result from what he or she says, he or she has the right to union representation. The employee has the right to know the purpose of the meeting in advance. After that, *unless the employer will guarantee that no discipline will arise,* the decision about whether he has a "reasonable belief" that there could be later discipline, lies with the *employee,* not the employer. I**f the employer will guarantee that no discipline will arise from the meeting, then the employee no longer has the right to representation, and no information gathered in the interview can be used against him.** Management is not required to inform the employee of his/her *Weingarten* rights; it is the employee's responsibility to ask. When an employee does make such a request management have two options: 1) they can delay the questioning until the representative arrives, or 2) they can cancel the interview. The Courts have ruled that the employer has to give the employee enough notice about the meeting that he can contact a representative, but it does not have to delay the meeting for an "unreasonable time period." 72 hours is generally considered a "reasonable period of time."

The Role of Your Representative: Employers sometimes argue that the only role of a union representative in an investigatory interview is to observe the discussion. But the Supreme Court doesn't agree. It asserted that an employee's representative may assist and counsel him during the interview, may speak privately with him before and during questioning, and may interrupt to clarify a question or to object to confusing or intimidating tactics. While the interview is in progress the representative cannot tell the employee what to say but he may advise his client on how to answer a question. At the end of the interview the union representative may also add information to support the employee's case.

Did You Know?

Employers May be Held Liable for Exacerbating Employee's Injury

If an employer *knows* of a dangerous condition that causes an employee's work-related injury *and fails to correct that condition*, the employee may be entitled to an additional 50% compensation beyond the normal workers compensation settlement.

This applies particularly to situations where the employee has work-restrictions from an injury or disability, but the employer pushes him or her to work beyond those restrictions. For example, if an employee is not supposed to lift items over 25 pounds, but finds that he must to do so in order to do his job, the employer may be penalized by paying significant additional benefits. In fact, if exceeding his work-restrictions worsens his original injury, the employee may have basis for another lawsuit to file against the employer.

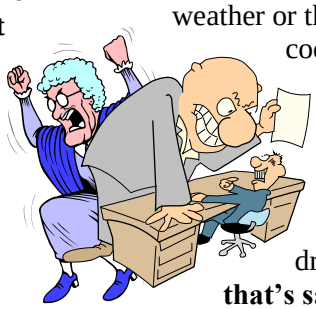
There are strict legal time limits for filing such "exacerbation" claims, so if this situation applies to you, you should not delay in seeking legal advice.

Does the County have the Right to Tell You What to Wear?

Since the '60s, people have been 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 dress codes be a form of discrimination? 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 presumably, "free dress") *in your personal life.* **When you're on the job, however, the County can tell you what it wants you to talk about, *and how it wants you to look.***



Public agencies, particularly, have strong ideas about the image they want to convey to their constituents. 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, in fact, the County is *in charge*... That, in fact, *the County can tell you what to do!*

So, to insure that you impart the right message, most public agencies take action to try to make you look as mature and respectable as possible. Of course, what your boss thinks is respectable-looking and what YOU think is respectable may be two different things. In the absence of any written definitions, if he/he tries to tell you that your nose ring is unacceptable, you might have grounds for complaining that he is discriminating against you.

Hence the employer's need for a Dress Code, which not only specifies what manner of "expression" they find acceptable, but also tells you what discipline may befall you if you break the rules.

In California, if there's a union in place, public employers must "extend the opportunity to meet and confer" before changing or implementing a dress code. Your Association has the role of making sure the policy is specific, rather than vague, and making sure it doesn't impose unreasonable restrictions upon you. For example, it's unacceptable for a dress code to say that employees can be disciplined if they fail to "dress professionally." It should specifically identify the elements of dress that are unacceptable: see-through clothing, rubber footwear, shorts, etc.

Speaking of shorts, the Association can absolutely raise safety or comfort issues such as the maintenance guys' right to wear shorts during hot weather or their right to wear hats in the sun. Dress code negotiations have been known to address such minor topics as length of beards – or length of skirts.

Discipline for Violations

The most important element of a proposed dress code is the discipline section. **A policy that's says that employees who violate the code will be sent home *without pay* is NOT OK – and your association should never agree to this**. It IS within Management's prerogative to tell someone to go home, or to go home and change; but the employee should not lose pay without due process. One supervisor's opinion about appropriate attire cannot be the basis of a suspension!

On the other hand, **it's completely possible that a new dress code can require you to change the way you've been dressing, or looking, all along.** For example, many agencies are now banning tattoos or piercings – and many employees already have them. Even if your Department knew about your nose rings when they hired you, they can now establish a "No facial piercings" policy. Hopefully, when your Association negotiates the policy, they will work out some "grandfathering" for people who already have certain "body art." But, in the absence of this, you CAN be told to take the rings out – and cover the tattoos.

"Being Yourself" -- Off the Job

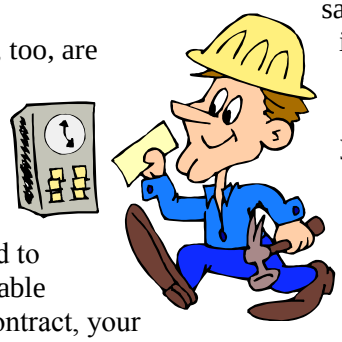
When you are working, you are paid to serve as a "representative of the County." When you're off the job, however, unless you are a sworn police officer or fire fighter, you are ***not*** a representative of the County,

and (with certain limitations) can dress or behave any way you want. Public employers do not have the right to discipline you for the way you "express yourself" on your own time – but this doesn't mean that they don't sometimes try. There have been some interesting legal cases in recent years about employee's pictures or comments about their workplaces in Facebook or blogs.

In general, the Courts have defended your right to a private life, and one of your union's functions is to vigorously defend anyone who is threatened on the job for things he does or says *off the job.*

The one obvious exception to this rule involves employees who are shown in pictures or videos in their County UNIFORMS. Once you're in uniform, you *can* be construed as "a representative of the County" and held accountable for your behavior. This is why it's never a good policy to go into a bar, or even order a drink, in uniform. Also, posing for pictures with nothing on but your hat and badge is a really bad idea…

Speaking of uniforms they, too, are negotiable: not only what you will wear, but who will pay for it. The County can change your "terms and conditions of employment" by requiring your job class to wear uniforms, even if you weren't required to when you were hired. This is a negotiable subject. If you're in the middle of a contract, your union *may* have the ability to block it. However, in my experience, many employees actually prefer to wear uniforms – especially if their employers will pay for them.



How they pay and *how much* they pay is always the big question. The best arrangement is one where the County provides uniforms, as well as replacements, upon employee request. But employees often prefer receiving lump-sum uniform allowances, which they can spend at their leisure. The disadvantage of this is that inevitably, one must really use the money to purchase uniforms, the cost of which seem to be rising much faster than your COLA. This puts you (and your association) in a position where you must continually bargain for higher uniform allowances.

You'll probably be shocked to learn that although the County can force you to wear a uniform, it's under very limited obligation to pay for it. The only items of clothing that the employer is ***required*** to pay for involve safety: safety glasses, for example; or steel-toes boots for warehouse workers. The vast majority of manual labor jobs do not require much in the way of safety attire, although employees really do need such items as good work shoes. For this reason, most employers provide allowances for work boots, but it's left up to the union to negotiate the amount on a year-to-year basis.

All in all, your employer does have the right to enforce standards of dress and hygiene in the workplace, but you retain your right of free speech and expression off the job.

Here's A Good Question…

Can the County Videotape Me When I'm On Sick Leave?

Question: If my department suspects that someone is lying about being sick, can they call his doctor? Can they hire an investigator for surveillance purposes?

Answer: The answer is complicated. Under HIPAA, it is illegal for your employer to ask about the *specific* nature of an employee's illness or injury. It's also not legal for the County to call your doctor without your permission. However, if an employer suspects that an employee is *committing fraud* by claiming to be sick when he is not, it *does* have the right to investigate. Such investigation can definitely include covert surveillance. This is not very different from the County's right to conduct surveillance if they think someone is committing workers compensation fraud.

The vast majority of employees – especially public employees -- are honest. But every once in a while however, there is a liar or faker. When an employee claims to be sick or injured, but then goes skiing or is found conducting a "side business" on county time, this takes a toll on the whole system. The County not only has the right to investigate, but to take disciplinary action…

CA Supreme Court Sets New Precedent for Standby Time

Last year California Supreme Court unanimously ruled (in *Mendiola v. CPS Security Solutions*) that employees who are required to remain on the employer's premises *in case they might be called to work* must be paid for all time at the workplace. This case was brought by a group of security guards who stay in trailers, provided by their employers, on construction sites. They were paid for time actually worked, but not for time they were "on call" in the trailers.

The Supreme Court agreed with the lower court that had already ruled on this case that the on-call time involved enough "significant employer control" of the employees' non-working hours that the time spent sleeping or waiting to be called must be considered "time worked." In essence, the law says "When an employer directs, commands or restrains an employee from leaving the work place . . . and thus prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer's control."

Over the years, the Courts have identified a range of factors to measure the degree of an employer's "control" during "on-call" or "stand by" time:

- **whether there is an on-premises living requirement;**
- **whether there are significant geographical restrictions on employee's movements;**
- **whether the frequency of calls is restrictive on the employee's personal activities;**
- **whether a fixed time limit for response is restrictive on the employee's activities;**
- **whether the on-call employee can easily trade on-call responsibilities;**
- **whether the employee can actually engage in personal activities during call-in time.**

In the case of the security guards, the Supreme Court found a high degree of control. They were required to spend their non-working hours at the worksite; were required to respond, immediately and in uniform, if they were contacted if called upon to work; could not easily trade on-call duty, and couldn't request relief from this duty unless a "reliever" was available. Even if relieved, guards had to report where they were going, were subject to recall, and could be no more than 30 minutes away from the site. Restrictions were placed on nonemployee visitors, pets, and alcohol use.

The lower court had issued a ruling that the company could avoid payment to the guards during 8 hours of sleep time per day. But the Supreme Court overruled this, saying that if the employees were required to remain on the premises, they were restricted and were, therefore, "engaged to wait."

Public employees in California who are required to answer phones during non-work hours, to live within a certain radius of the workplace, to be in "work ready" condition (no alcohol,) and to respond emergencies within a certain time are deemed "sufficiently controlled" to be on paid time. Most cities and utility agencies provide standby pay for this purpose. The amount of standby pay is negotiable.

Hourly employees who are not provided standby pay cannot legally be compelled to respond to calls from their employer during non-work hours. (However, they can be compelled to return to work, if the workplace reaches them.) Exempt (salaried) employees are also eligible for standby pay, and cannot be compelled to "stand by" without pay unless 1) this duty is included in the job description or 2) this duty was a clear agreed-upon requirement of the job at point of hire.

If you have been told that you must be available to respond to work "24/7" without extra pay, you probably have grounds for a grievance. Feel free to call staff at CEA: 562-433-6983 or cea@cityemployees.net

Questions & Answers about Your 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 problem, feel free to talk to your Board Rep or Association Staff at (562) 433-6983 or cea@cityemployees.net. You may also access CEA's "Know Your Rights Library" on the website: cityemployeesassociates.com.

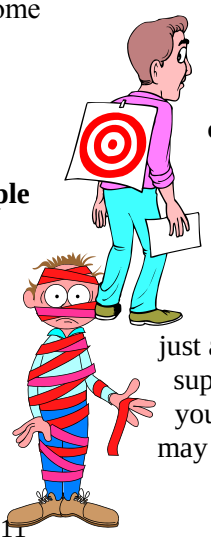
Question: I've been off the job for 7 months due to a work injury. I'm having physical therapy and my doctor does think I'll be able to return to work soon. My question is about the notice of an ADA interactive meeting which the County has sent me. It *sounds* as if they are just checking on my situation, but I'm always a little worried. Do I need a representative?

Answer: YES, you need a representative. At an ADA interactive meeting your employer will be trying to figure out whether you are able to do your job (with reasonable accommodation, if necessary) or whether you can be terminated. If the County decides that you are not able to work, and you have exhausted your FMLA leave period (12 weeks) you CAN, in theory, be fired.

Your union rep will make sure that the County knows you'll be returning to work soon, and will request some additional leave time as part of your "reasonable accommodation."

Question: The County has discovered some ugly mold in the walls of our building, and they have sent all of us to see their doctor. Of the eight people who work here, it seems like most of us have respiratory problems. I have several questions: 1) If they do find that this mold has caused our illnesses, would this be covered by workers compensation? Could we also sue the County over this? 2) Do we have the right to see our OWN doctor? 3) Shouldn't our time off the job to see the doctor be paid time (they are telling us to use our own sick leave)?

Answer: 1) Illness caused by mold in your workplace is covered by workers compensation. 2) A workers comp claim is, essentially, a lawsuit. If your health has been seriously impaired, this could involve a lot of money and medical care for life. You could, possibly, file a claim against any other company that might have caused the illness. (For example, if the illness has been caused by asbestos, you might file a claim against the company that constructed the building.) 3) You do have the right to see your own doctor about this illness, but only *in addition to* seeing the County's chosen doctors, not *instead of* doing so. (However, if you have predesignated your physician for workers comp, you are entitled to see your doctor first.) 4) If the County is requiring you to see its doctor you may do so during work time and should not lose pay or sick leave to do so.



Question: In our department, we have a rule that if someone calls in sick, the person with the highest seniority on that shift gets first call on the extra (overtime) hours. But I have a supervisor who doesn't like me, and almost never calls me. I have the most seniority on this shift and am literally losing pay. What can I do about this?

Answer: If the rule is written down (and is not just an informal practice) it sounds like your supervisor is violating that rule by failing to give you the first opportunity to work overtime. You may have a grievance.

If the rule is NOT written down, you also may have a grievance, but your challenge may be to prove that everyone agrees that this "rule" exists. The first step involves a discussion with the supervisor. If you want help with this, feel free to contact your Association staff.

Question: I was injured at work, had surgery, and have been working light duty, for three months. The doctor says I will be fine, with all medical limitations lifted, very soon. My problem is that the County is refusing to allow me to test for a promotion because they say I'm not able to do the job! They say that my injury will prevent me from taking/ passing the test.

I've been working for years toward this promotion and everyone knows I'm the next person in line for it. I keep telling them that I'll be 100% "capable" within a couple of months. Can they do this to me?

A: It depends a lot on the job you're testing for. If you have been working there for years, and "everyone knows" your capabilities, there is a good argument that you should be able to take the test. There is also a legal argument that the County should allow you to take the test with "reasonable accommodation," per the Americans with Disabilities Act. Call your union rep for help. He/she should work with you to discuss this situation with the County, and take your case "up the chain of command," if necessary.

Question: I have been with the Police Department for 20 years and, for that entire time, they have never called us to come to work on our days off. Everyone knows about this long standing rule for people in our job class. Now, however, the Department is understaffed and management is starting to call people at home and ordering them in!

Is this legal? Can they just change a past practice that has been place for 20 years?

Answer: It depends on the strength of this "rule" which "everyone knows about." The problem with unwritten practices is that Management has to **agree** that they are in effect. The first step would be for you, or a group of you, or your union rep, to talk to management about your right not to be bothered on your days off. If the County *doesn't* agree, the next step would be a formal grievance, where you may need to prove that this past practice has been adhered to for many years. With good evidence you may be able to stop the County from calling people in on their days off – at least until the next bargaining season comes around.

What Is a "Past Practice" (and Why This DOES Matter to You)

What happens when a new Department Head arrives – and all the "rules" in your workplace suddenly seem to be changing? What if he wants to do away with the weekly rotation for Standby? Or the seniority system for bidding on shifts? What if YOU were next in line for the day shift, but now told "the boss is going to make the assignments?" You would probably be mad! After all, you and your co-workers had been operating under a set of practices for years… You've been playing by the rules, and now they've been pulled out from under you. You might well want to file a grievance.

But what would be the violation? Does the Department Head have the "Management Right" to establish his own new systems? Or do you have the right to INSIST that the County follow its "past practice? ***Well, it's a really complicated subject….***

First, you should know that the notion of "Past Practice" does have legal standing. The courts define a Past Practice as *"a practice that exists for a reasonably long time, occurs repeatedly, and is known and accepted by both the association and management."* The concept usually comes into play when the employer wants to change something and the union wants to maintain the Past Practice. The implication is that there's a sort-of unwritten contract between the parties… that everyone *agrees* on the Practice*, but it's just not written down.* You and your union have every right to insist -- to the point of arbitration or a claim before the Public Employment Relations Board -- that a long-standing Practice be enforced, and that it can be modified only by mutual agreement of the parties. Then again, your Management may insist that no such "agreement" exists at all – and that it's a "Management Right" to control the operations of the workplace.

So… Who decides? Under what circumstances does your union truly have the power to COMPEL the County to respect your Shift Bidding Practice, so YOU can move to the day shift? Here are some guidelines:

1) The Past Practice must be identifiable AND agreed-upon. Although the employees may *insist* that "everyone knows" about the practice, this is not always easy to prove. If Management wants to take control over departmental operations, they will NOT agree that an agreed upon practice is in place. Your union may have to prove this with evidence and testimony.

2) "Past Practice prevails" ONLY when there is no other clear policy on the subject. If there is a WRITTEN rule or Contract language on the subject, *even if it has never been practiced*, then this will override the Past Practice, legally. The only way around this, is to argue that the written language is so vague or ambiguous, that the Past Practice is the agreed-upon *interpretation* of the vague language.

3) "Past Practice prevails" only if the subject matter is "within the scope of bargaining." So, state law says that the parties must negotiate over changes in wages, hours or conditions of employment, and a Practice may be considered a "condition of employment." Thus, if you can prove that your Shift Bidding system was an agreed-upon practice, it has the same "legal force" as any contract language. **HOWEVER, the law *also* says that *some* subjects are "operational" or "administrative" in nature, and that those decisions fall into the arena of "Management Rights."** Luckily there have been many precedents set over the years addressing what kinds of topics are negotiable and which are Management Rights, but in the absence of a written policy, almost all Managers will insist that the right to set new work practices is a Management Right.

Bottom line: Past Practices are one thing to assert, but quite another to prove. There is really only one way to insure that an employee-friendly Practice remains in effect: negotiate with your employer to WRITE IT DOWN!