Regional Employees Association of Professionals October 2015 News

My Boss Harasses Me! What Can I Do?

Harassment can refer to a wide spectrum of offensive behavior – much of it is "in the eyes of the beholder." Strictly speaking, the term refers to behaviors that are found threatening or disturbing, beyond those that are sanctioned by society. **Found by whom?** If we're talking about the law, the Courts say speech that is "repetitive, persistent and untruthful" could, *possibly,* be considered harassment – at least the kind of harassment over which one party (an employee) might successfully sue another (the employer).

In other words, the legal threshold for "proving" harassment is very high. In a country which allows free speech, one person's claim of harassment could easily be another person's normal behavior. Even in the realm of sexual harassment, only those behaviors which are **repeated, persistent, and unwanted,** will meet the legal definition of harassment in the workplace.

Of course, most people who are victims of harassment in the workplace, sexual or otherwise, don't care about *legal* definitions. They don't intend to *sue* anyone; they just want the offensive or threatening behavior to stop! So, putting the law aside for a moment, and recognizing that *people often think they are victims when no offense was necessarily intended,* how can we understand what constitutes harassment in the workplace? **How should the average employee respond to it?** Let's start with some examples…

You are a 58-year old jailer, and, admittedly, a "large" person. Your boss, and some of the Police Officers you work with, have called you "big-ass," "pizza-face," and "the whale." You found a derisive picture of yourself pinned over the waste basket in the break room. When you returned from work after a recent knee surgery, your boss said, "Maybe, if you dropped some of the weight, your knees would stop giving out." He has also asked when you think you'll be retiring. (So… is THIS harassment?)

You are an Administrative Assistant with 20 years on the job. Your new supervisor "criticizes every move you make." She circles every misplaced comma. She corrects your grammar when you answer the phone. She has told you that you chat too much with co-workers and seem to take "a lot of bathroom breaks." She makes a note in a file every time you are two or three minutes late, and mentions this "frequent tardiness," along with your "sloppy work" on your performance review. (Is THIS harassment?)

You are a Parks Maintenance worker. Although there are six people in your crew, your boss consistently sends you to do the dirtiest, most boring jobs: cleaning the dog park, cleaning bathrooms, painting over graffiti, etc. You've asked to rotate into some of the other jobs, and have been denied. You heard your boss

comment to someone that you and a co-worker were "Dumb and Dumber." HARASSMENT?

You have been a construction inspector for 12 years and have recently been told that you are not allowed to sign-off on any contractor's work without your supervisor's permission. Your supervisor often shows up at your job site and criticizes or disagrees with you *in front of the public.* Sometimes when you arrive at a worksite, you find that your boss has given the job to someone else, but not told you. Sometimes he changes your assignments three or four times a day, leaving you feeling like you never finish anything. You also have a feeling that he's following you around during the day, even during breaks and lunch. IS THIS HARASSMENT?

You are a Librarian. At staff meetings, your department head clearly "plays favorites," praising some people and making disparaging remarks about others. She is often critical and sarcastic, to the point of making people cry. Although you are an experienced professional, she rejects all your suggestions for improvements in the workplace. She arranges your schedule, so you work more weekends than anyone else. She has refused to allow you to attend seminars or training programs that would enhance your performance (while others have been approved to go). Is *THIS* harassment?

So….Which of these are examples of harassment?
Not as many as you would think. There's an old adage: "Management has the right to manage." This means they may make changes in the workplace. They have the right to assign your work, critique it, or tell you to how to do it differently – even though you have been doing it this way for thirty years. *Even though you may know how to do it better.*

Change can be very irritating, especially when new managers are heavy-handed or poor communicators. Management can change your work assignments (as long as these are part of the normal job description,) your work location, your tools or equipment, and to some extent, your work hours.

Also, Management CAN treat people differently (as long as they don't do it on the basis of race, religion, sex, age or disability.) When a new supervisor tells a long-term employee that his work needs to improve or his habits need to change, this can be viewed as "harassment." (But it probably isn't.)

The problem with claims of harassment is that they are so very, very subjective. Is the boss who constantly points out your errors or your tardiness, or your time spent socializing, harassing you or just a careful manager? Is "micro-management" harassment? In most cases, it is not. **However, if it crosses over to frequent or repetitive offensive remarks, raised voices, slammed fists, foul language, scapegoating or personal attacks, THIS is harassment.** Although employers often still don't know what to do about it, the problem of bullying is increasingly recognized as a workplace problem. This is not only because it hurts individuals, but because it interferes with productivity.

People who believe they are the victims of bullying or harassment DO have the right to demand relief. To exercise this right, they can file a complaint with Human Resources, or a formal grievance with the help of the Union. Further, if they have been rendered ill, they can file a stress claim with workers compensation.

What Happens in a Complaint?

In recent years, almost all agencies have implemented workplace harassment policies. If there is none at your agency, your union MOU probably has a Health and Safety provision which can be the basis of a grievance. You can initiate a complaint by going directly to Human Resources or by calling your Association staff. Your rep can evaluate your situation and decide the best course of action based upon the facts you provide. Hopefully, you have already been keeping a record of "harassing events" which can be turned into a formal list. It should include incidents, dates and times, and witnesses.

Verifiable Evidence…

Without witnesses or documentation, you do not have a case. Documentation can be in the form of email exchanges or memos, but witnesses are crucial. Your witnesses will be interviewed. If you think they may change their opinions over time (or under pressure) have them write statements about what they have witnessed *right away.*

A harassment complaint isn't about your hurt feelings; it's about factual, observable mistreatment, which you are asking your employer to act upon. (This is not to say that your feelings don't matter, or that you can't talk to HR about them. But if your complaint is not verifiable, they will either take no action, or send you to the Employee Assistance program for emotional support.)

The Investigation

The County is responsible for investigating your claims and determining whether you've actually been harmed. For certain kinds of cases, such as sexual harassment, they are obligated to hire a third-party investigator. You, your witnesses, and "the harasser" should be interviewed. You and the "harasser" both have the right to representation in those interviews.

This process often takes months, after which your Management will make a finding about whether your supervisor really was harassing you. There will be lots of conversations you'll never know about. The supervisor may be disciplined; *it is likely that you will never know.* And, *after this,* the harassment should stop.

The "Remedy" to Your Grievance

When you are asking the County to resolve your harassment complaint, the only real "remedy" available is that the harassment cease. You CAN sue your harasser in Court. However, your workplace isn't a Court of Law, and a grievance isn't a lawsuit. The purpose of the grievance is to get the abusive behavior to stop, so you can get on with your work. Unless you've been rendered ill and lost pay (in which case, you should file a stress claim) the County doesn't "owe" you anything -- except relief, *in the future.*

This lack of closure can be *extremely* frustrating. You may have been abused and tormented, belittled, embarrassed, undermined, threatened… *whatever!* You want to see some action! But be forewarned: no one is going to apologize or admit that you were mistreated. You're unlikely to receive report of the investigation, and your grievance will probably go unanswered or be denied. Why? Because if your employer admits that you *were* the victim of mistreatment, you COULD use this information as the basis for a lawsuit. Again, you CAN sue your harasser in Court, and you CAN sue your employer, but the only "closure" you'll receive from the County's internal procedure will be an end to the harassment.

What if the harassment DOESN'T end?

Because of the increasing number of lawsuits, most employers now take harassment complaints seriously. Although you may not see the activity, the vast majority of verified complaints ARE acted on. In simple terms, this means that the harasser is either disciplined or sufficiently threatened so that the problem doesn't repeat. Remember: that was your goal.

On the other hand, some people are just compulsive bullies. Some, also, can't resist the impulse to retaliate**. It's up to you, the victim, to continue to keep good records.** If the problem continues, or worsens, your Union should represent you. They can also assist you with a workers compensation claim or moving toward a formal lawsuit.

Consider a Group Grievance

It's extremely common that bad bosses extend their behavior to more than one subordinate. When several employees report the same nasty behavior, this magnifies the strength of a complaint exponentially. This is especially true when the bad behavior is "border-line," when the line between "firm management" and harassment a thin one.

A group grievance needs coordination. If you and your co-workers need help with this, you should call your Union staff directly.

Is Harassment the Same as "Discrimination?"

NO! If your boss treats you differently from other employees -- giving you the crummiest assignments or denying you benefits or training that others enjoy – you DO have the right to complain, or ask why. **But discrimination has to do with taking negative action toward someone because he or she is a member of a "protected class."**

Some bosses really don't want women on their crews. Some managers really are racist. A lot of people would like to get rid of their older, slower or physically limited employees. If you have **evidence** that the reason for your management's negative behavior is because you are a member of a protected class, you have a discrimination claim.

Employers are required by law to take discrimination complaints seriously, investigate thoroughly and correct problems immediately. You can also take these complaints to the EEOC (Equal Employment Opportunity Commission) or the California Department of Fair Housing and Employment.

Be advised though: it's one thing to *claim* discrimination; it's another to *prove* it. Public employers are careful, overt discrimination is not common. Although individuals may certainly harbor biased attitudes, most workplaces are diverse, and most supervisors go through "diversity" training. Therefore, documenting evidence for these claims is crucial if you are going to try to prove that the reasons you are treated differently from your co-workers is based on discrimination.

Filing a Workers Comp Stress Claim…

Everyone knows that people who are physically injured on the job have the right to workers compensation benefits. But it is also true that employees who suffer psychological or psychiatric injury may be due payment or medical care under the workers comp system.

The California Labor Code says "*A psychiatric injury shall be compensable if it is a mental disorder which causes disability or the need for medical treatment*." The common term for a psychologically-based workers compensation claim is a "stress claim." Stress claims are not easy to win. Just as a claim for physical injury must be traceable to events at the workplace, an employee with a psychological injury will be cared for under workers compensation **if he or she can show that the *actual events of employment* were the primary cause of the condition.** The big difference between physical injuries and psychological ones, of course, is that the causes of psychological injuries are often not visible, or easily traceable.

The Person with the Claim Must Be Under Medical Care

Employees aren't in a position to "go out on stress" based on their own diagnoses. As in any workers compensation claim, only a licensed medical doctor can diagnose an injury, prescribe a course of treatment, and identify the cause. In the case of a psychological injury, the doctor is usually a psychiatrist. Unlike other types of injuries, however, psychiatrists may have wildly different opinions about the cause of a mental illness. This means that when an employee files a stress claim, the employer may conduct an investigation to search for *non-work* causes of the illness.

Unlike physical injuries, where everyone usually agrees on the event that caused the injury (or at least the ongoing physical activity and equipment that caused the injury), most employers DON'T agree on the cause for most stress claims. In other words, most stress claims are initially denied. The burden is on the employee (and his/her doctor and often, lawyer) to prove that his employer, literally, made him ill.

Employers Have the Right to Investigate…

When an employee files ANY workers compensation claim, his employer has the right to investigate the facts of his case. With stress claims, the employer's doctors have the right to ask personal questions, and conduct in-depth investigations of his personal life. The employer's goal is to "prove" that the injury came from other aspects of the employee's life. It is up to the employee's representatives to show that his employer's actions were so abusive to him they actually rendered him mentally ill. In order to win this kind of case, the "evidence" of mistreatment must be solid and well documented. The Labor Code provides guidelines to help the Courts determine whether a psychiatric injury is caused by employment. These include:

1. The "six month rule," which generally means that if the employee has not been on the job for at least six months, the employer is probably not responsible for the psychological problem. (However, this "rule" doesn't apply if the psychiatric injury was caused by a "sudden and extraordinary employment condition," such as a traumatic event. A bank teller held hostage in a robbery, for example, would probably have legitimate work-related trauma…)

2. **The "post termination rule,"** which says that a stress claim isn't viable if it is brought after notice of termination or layoff. There are exceptions to this, too, though: a) if the employer had prior notice of the psychiatric injury, or b) there was evidence about the treatment of the psychiatric injury in the employee's medical records prior to termination or layoff, or c) there was **also** a finding of sexual or racial harassment in the employee's complaint.

3. **An understanding that a claim is not likely to be "viable" if caused by a "lawful, nondiscriminatory personnel action."** (In other words the emotional distress caused by legitimate discipline, a pay cut or layoff probably won't be considered an acceptable basis for a workers comp claim.)

The Emotional Distress Caused by a Physical Injury

There are two kinds of psychological claims: "pure" psychiatric injuries, where the employee claims that the employer's treatment literally and directly made them ill, and those where an employee becomes disturbed or depressed after a physical injury due to chronic pain, inability to work, or diminished quality of life. People with serious injuries often develop an emotional component. In these cases, a psychiatric claim can be added to an existing claim of physical injury.

If You Think YOU have a Stress Claim...

It is difficult to win a stress claim unless you have done serious groundwork. Because there is rarely a single event that caused the illness, you will need a good written record of the events or abuses that have lead to your condition. It's also important that you be able to show that the employer **knew** of your distress, and did little or nothing about it. If this groundwork has not been laid, you should probably contact your union rep *prior to filing a claim.* You have some obligation to try to resolve the problem on the job before filing a legal complaint.

When Do You Need a Lawyer?

People ARE made psychologically ill by harassment, discrimination and other kinds of abusive work conditions. But the pitfalls are much greater – and the "threshold" for winning is much higher – in stress- related workers compensation claims. Most claims are initially denied. To appeal, and you *should* appeal if the claim is legitimate, you will probably need an attorney. Call your Association staff for a referral.

WARNING! CONTACT YOUR ASSOCIATION STAFF BEFORE YOU CALL A WORKERS COMP LAWYER!

Why? Because all too often workers comp lawyers are focused on the short term goal of maximizing your workers comp claim without giving due consideration to the long term goal of getting you back to full work duty – which could, ultimately, cause you to LOSE YOUR JOB.

If you are injured or made ill at work, and are later found 'permanently incapable of performing the duties of the position' you *can* be terminated. If you have a bad lawyer, he may have the goal of working out the highest workers comp settlement, by claiming that you are severely injured. You might earn a higher settlement, but possibly lose your earning capacity - *for the rest of your life.*

If you are injured on the job, call your union rep FIRST, before calling a lawyer. Your rep will be concerned with the "whole picture;" not just the workers comp settlement. They can assess whether or not you need a lawyer and, if you DO need one, make sure you are sent to a competent and reputable one.

WARNING! Be Careful What You Sign!

The "Public Employee's Pension and Retiree Healthcare Benefits Initiative"

by Oshea Orchid, CEA Attorney

The newest ploy for turning off the caviar and champagne for you opulent public employees is headed for the November 2016 ballot. Sponsored by Chuck Reed's pension busting brigade in San Jose and San Diego, this initiative would do away with CalPERS and allow voters to overturn negotiated MOUs. Last month, the State Attorney General's office released its summary of this initiative; now its proponents are out gathering signatures.

If you care about your job or your future, you should tell friends and family: do NOT sign this initiative. Here's why:

The Public Employees' Pension and Retiree Healthcare Benefits Initiative has the goal of removing the constitutional protection that the law currently provides to retirement-related benefits for public employees. In plain English, this means that currently, the Contracts Clause of our State Constitution protects you against losing any retirement-related benefit, once you become "vested" in a retirement program. To be "vested" means that you have worked for a period of time at an employer which provides these benefits. You are "vested" in CalPERS after five years. If your employer has a retiree health benefit, you are "vested" on the first day of employment.

In the last few years, there have been a LOT of legal challenges to "vested rights" of public employee retirement programs. So far, we have prevailed in almost all of them:

In Stockton the Court held that a declaration of fiscal emergency doesn't enable the City to "force open" a closed MOU.

In Los Angeles the court held that declaring "fiscal emergency" doesn't permit the City to freeze retiree medical benefits or impose furloughs.

In Pacific Grove, the Court held that a ballot measure capping PERS pension contributions was unconstitutional.

In San Jose and San Diego, the Courts ruled that public initiatives changing the City's retirement formulas were illegal pension "impairments."

These cases were all founded on the Contracts Clause in California's Constitution, which says that "vested benefits" are part of the contract between employees and their employers.

This *newest* initiative attempts to interfere with the concept of negotiated agreements between employers and employees, by making ***the public*** a party to the process. It provides that "voters have the right to use the power of initiative or referendum... to determine the amount of and manner in which compensation and retirement benefits are provided to government employees." It would specifically abolish ALL "defined benefit" programs (such as CalPERS) for employees hired after January 1, 2019 and replace them with a "defined-contribution" system. In other words, employees hired after this date would have no promise of any fixed retirement payment at all. They would "invest" in their own future, with 401K-like options.

Although it's *possible* that public employees might benefit from investing a portion of their paychecks in the stock market, the Great Recession caused millions of private company employees to lose their shirts – if not their homes. Further, if new employee contributions were cut off from the CalPERS system in 2019, this would create an immediate crisis, both for PERS AND for public agencies. This is because the benefits of older employees are hugely dependent on the contributions of the younger people in the system.

In the last decade, we have watched this crisis unfold in some of the national union pension programs, where union membership is dropping. The absence of young Teamsters and Steelworkers contributing to their program has caused the retirement funds of older workers to border on insolvency. The same has happened in a number of state programs:

In Alaska, the state blocked entrance to the traditional retirement plan to new hires in 2006, and forced "new hires' into a defined *contribution* plan. The debt of the remaining defined benefit plan more than doubled, from $5.7 billion in 2006 to $12.4 billion in 2014, because no one was contributing to it -- and the new employees lost much of their savings in the Recession. In the end, the state had to pass emergency legislation to move all public employees back to the old program.

In Michigan, the traditional plan was actually *overfunded* in 1997, so state leaders switched employees to a defined contribution program to save money. The result was that the abandoned defined benefit program amassed a debt of $6.2 billion by 2012. Most employees hired after 1997 ended up with no retirement, or very meager benefits.

West Virginia closed its teachers' retirement system to new hires in 1991. As the already vested employees continued to draw on the system, it bordered on collapse, while the post 1991 employees found that their "self-directed" plans rendered "inconsistent" earnings. The state returned to a defined benefit program for teachers in 2005, and it was fully funded until 2008.

REMOVAL OF PERB PROTECTION

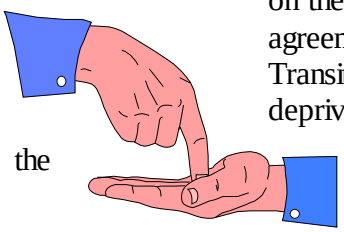
Last but not least, the "Retirement Initiative" seeks to protect its actions from legal challenge! It would eliminate public employees' unions' right to challenge these violations of their contracts by eliminating their coverage by PERB, the Public Employment Relations Board! Presumably, if PERB couldn't hear unfair practice charges, then the voters could do whatever they want with their city employees' contracts!

LABOR RELATIONS UPDATE

The following are significant legal decisions that further the rights of public employees in California. Please keep in mind that each case is unique. If you have a *specific* legal question or problem, contact your Board Representative or our Professional Staff at (562) 433-6983 or cea@cityemployees.net

Court Says Last Chance Agreement Doesn't Cancel Out Employees' Due Process Rights

In *Walls v. Central Contra Costa Transit Authority*, the Ninth Circuit Court of Appeals has ruled that an employee terminated for violating a Last Chance Agreement was entitled to a pre-termination (Skelly) hearing even though he agreed that "failing to comply with the agreement would result in immediate and final termination." The employee was a bus driver, who received a termination notice. During the appeal, he agreed to a Last Chance Agreement, which included a week's suspension.



When the employee returned from his suspension, he requested to take time off pursuant to the Family Medical Leave Act. The Transit Authority refused to grant the leave, and charged him with an unexcused absence when he did not return from work. He was then terminated without a hearing, on the ground that he had violated the last chance agreement. The employee sued, arguing that the Transit Authority was violating the FMLA, and depriving him of his right to due process (i.e. to a hearing prior to termination). The Court agreed, ordered the transit Authority to give him a hearing, and provided full back

pay until the hearing requirement was met. The Court said that the **right to a full hearing is a basic right of all permanent, public employees and cannot be waived *even as a "deal" under threat of termination***. Walls was, therefore, entitled to notice of the charges against him, to see the employer's evidence against him, and to an opportunity to tell his side of the story before being fired.

Some Professionals ARE Eligible for Overtime Pay

Several years ago, social workers for the State of Washington filed a federal claim over the Fair Labor Standards Act to challenge their "exempt" status. The state had classified Social Workers as "learned professionals" in order to avoid paying them overtime.

In settling this suit, the Feds have now explained to Washington that, in order to qualify for the "learned professionals" exemption, the employees must hold positions that require a "prolonged course of specialized intellectual instruction." Since the social workers are only required to hold a BA degree from any department in the social sciences, they were found NOT to be "learned professionals" -- and are now receiving overtime pay after 40 hours in a week.

Employee's Complaints About City Violation of Rules Can't Protect him Against Termination

After he had already started the job, an employee in the San Francisco Water Department learned that his position was actually a "temporary exempt" job, rather than a permanent civil service position. Within a short period of time, he was speaking up at staff meetings, union meetings and meetings of DWP officials about this abuse. He maintained that the City's use of temporary labor not only exploited employees, but violated the City Charter. He also alleged that the City was deliberately underbidding survey work at other agencies in order to "corner the market" with its underpaid staff.

As the result of his outspokenness, the employee was sent to do some of the most unpleasant work in the department. When he tried to promote to a full-time position, he found that the DWP had blocked his attempts at promotion, and interfered with a permanent job offer that had been extended to him. He filed a grievance.

At the grievance meeting with his Human Resources Manager, he said that he planned to "expose" his department's practices to "whatever authority will hold them responsible." Shortly after this, he was terminated.

The employee filed a wrongful termination case against both the City and County of San Francisco, alleging retaliation for asserting his First Amendment rights: his right to speak out against abuse. The court dismissed his complaint. He appealed, and the Court of Appeals dismissed the case too.

Why? The Court agreed that the employee DID have the right to speak out publicly, and should not be disciplined for this. But it made a distinction between staff who speak out as citizens on "matters of public concern" and *those who speak out as disgruntled employees*. People who speak out as "disgruntled employees are NOT protected under the 1st Amendment. To be "protected" under this law, an employee must show that 1) he engaged in "protected speech," 2) the employer took adverse employment action against him, and 3) that his speech was a substantial or motivating factor for the adverse action.

"Protected speech," in general, means speaking out, primarily as a citizen, *or leader of an organization,* on a matter of public concern. In this particular case, the court considered whether the employee sought "to bring to light wrongdoing or breach of public trust," or whether he was "animated instead by 'dissatisfaction'" with his own situation. The Court pointed out that this employee did not file a grievance on behalf of others in the same situation, nor did he "go public" by filing a complaint with the Civil Service Commission or the media. They concluded that his complaint was "driven by his internal grievance," "desire for professional advancement," and dissatisfaction with his own job status.

California Fair Pay Act: "Toughest in the Country"

Last month, our state's legislature overwhelmingly passed SB 358, the "**Fair Pay Act**." The governor is expected to sign it imminently. The law, which is being praised by advocates as "one of the best in the country," will require employers to pay men and women equally when they are performing jobs with "substantially similar duties." Although discrimination in pay doesn't show up often in public employment (where jobs are defined by written descriptions) it's not entirely unknown. Aileen Rizo, who recently testified in support of the Act, was a math consultant at the Office of Education in Fresno. She discovered in 2012 that a male colleague was making $12,000 more a year for the same work, although she had four years' seniority. When the Department refused to correct the problem, she was forced to file an "equal pay" lawsuit.

The gender gap shows up frequently in the private sector. Janitors, for example, *who are mostly male,* earn higher wages than "housekeepers," *who are mostly female.* Under the Equal Pay Act, a housekeeper may be able to demonstrate that the jobs are substantially the same.

Sponsors of the bill include the California Association of Nurses, who point out that women in our state earn an average $.84 on every dollar a man makes. Nationally, the figure is $.78. This is a huge improvement on the "57-cents" campaign of the 1970's, but still real. A recent study in the Journal of the American Medicine found that male registered nurses earn nearly $11,000 a year more than female RNs. The gap in pay between Hispanic women workers, nationwide, and white males is $.44 on the dollar.

What the New Law Does – and DOESN'T Do

The Equal Pay Act enables employees who believe they are being paid less for equal work to file a claim with the State Division of Labor Standards Enforcement (DLSE), which also investigates pay discrimination complaints. The DLSE will research the claim, keeping the applicant's name confidential. If the claim is accepted, the burden then flips to the employer to prove that wage differentials are based on seniority, merit, a system that measures earnings by quantity or quality of production, or some other "bona fide" factor other than sex which is a legitimate business necessity. **(In other words, the gender of the person doing the job cannot be the reason that the job is paid differently.)** The DLSE does have the capacity to sue employers for back wages, if necessary.

The new law also prevents employers from passing rules about "salary secrecy." It prohibits retaliation against employees who discuss their wages, and ensures that male and female employees doing "substantially similar" work are paid equally, *even if their job titles aren't the same*, and even if they work in different offices for the same employer.

What is the cost to employers?

According to Noreen Farrell, executive director of Equal Rights Advocates, the law will not cost employers any money "as long as they are in compliance." "If any employer determines that it has pay differentials based on sex, any cost associated with complying with the law will depend on the scope of its violation." What this law does, says Farrell is eliminate barriers for people whose jobs are similar, but are often filled by people of only one gender. "It's looking beyond just the title."

When Am I "On the Clock?"

It's not unusual for an employee to be working on behalf of his/her employer, but *not* at the regular worksite or during normal work hours. The law controlling wages and hours for most employees is the Fair Labor Standards Act and, with few exceptions, it says that **all work "suffered" on the part of your employer must be paid**.

So…what is work? Is it flying on a plane to a seminar? Is it staying late in the office when no one knows you are there? Is it waking up in the middle of the night to answer a co-worker's questions? The law is not always clear, but it definitely leans in the direction of paying employees whenever – and wherever – they are working. The following is a summary of a variety of circumstances governed by the FLSA. If you believe that your rights have been violated, please talk to your Board representative or Association staff *before* taking action.

"Volunteering" to work overtime.

The law is clear: you CAN be compelled to work overtime. Most agencies also have rules that say if you want to work overtime, this must be authorized by a supervisor or department head. **So what happens when you must work overtime to complete a task, but there is no one around to ask?** The law says that "work not requested, but permitted to be performed" is time worked that must be paid. In other words, if you believe that you are expected to work overtime, and you do so, you must be paid. If the County disagrees that you should have worked the overtime, they can tell you this (and can even warn you not to do it again) but they cannot fail to pay you…

On-Call Time.

An employee who is required to remain available to work is working while "on call." An employee who is required to carry a phone, or leave information about where he can be reached, ***may be considered working.*** Whether the on-call time must be paid depends on the extent to which the employer restricts the employee's time, distance from the workplace and activities during those hours.

Rest and Meal Periods.

Rest periods of short duration, usually 20 minutes or less are normally considered work time. Bona fide meal periods (typically 30 minutes or more) generally need not be paid as work time. However, the employee must be completely relieved from duty during unpaid meal times. The employee is not considered relieved if he/she is required to perform work, even answering the phone or monitoring a radio, while eating.

Sleeping Time and Other Activities.

An employee who is required to be on duty for less than 24 hours is working even though he/she might be permitted to sleep or engage in other personal activities. An employee required to be on duty for 24 hours or more may not be paid for regularly scheduled sleeping periods IF the employer provides adequate sleeping facilities and the employee can usually enjoy an uninterrupted night's sleep. Unpaid sleeping periods, which are interrupted by work, are like interrupted lunches: they must be considered paid time.

Lectures, Meetings, Training Programs.

Attendance at lectures, meetings, training programs and similar activities IS counted as working time UNLESS all four of these criteria are met: 1) the training it is outside normal work hours, 2) it is voluntary, 3) it is not job related and, 4) and no other work is performed at the same time.

Travel Time - Home to Work.

Your travel from home to a regularly-assigned workplace is not work time. However, if you are sent to a one day assignment in another location and you return home the same day, your time spent traveling is considered work time, except that your employer may deduct that amount of travel time you would normally spend commuting to and from work.

Travel from home to another community is clearly work time when it cuts across the employee's workday. Time spent in travel *outside the regular workday* is NOT counted as time worked if you are a passenger on an airplane, train, boat, bus, or car.

Travel in the Course of the Day.

Time spent traveling **during** the workday, such as driving from job site to job site, **is** considered paid time. No question!

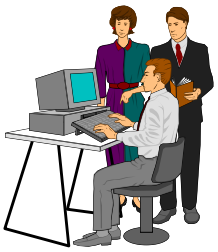
Questions & Answers:
Your "Right to Privacy" on the Job

In general, when people talk about the "right to privacy" they are referring to the right to be left alone by the government. While the Constitution doesn't refer specifically to privacy, the 4th Amendment *does* protect citizens from "unlawful search and seizure." From this, the courts have created, through case law, a "zone of privacy" for individuals, which is not to be invaded by the government.

So it would seem that employees in California, *who work for the government,* would have the right to expect privacy on the job. **But it's not generally true.** You **don't** have much "right to privacy" in the workplace. In fact, the state of the law on this subject at the moment is a hodge-podge of conflicting statutes and court decisions, which mostly tell us that each case is based on its own specific set of facts.

So, if you are a public employee, you should err on the side of assuming that you have very little privacy, in either your communications or your locker, or desk, at the workplace. Here are some of our best answers to common questions on this subject. If you have specific questions, call staff at the CEA office: 562-433-6983 or cea@cityemployees.net

QUESTION: Can my supervisor monitor my e-mail and voice mail?



ANSWER: Yes. E-mails and voice mails may be monitored by your supervisor. In fact, under certain conditions, the public can request copies of any correspondence generated by a public employee. You should assume that when you use ANY County equipment or communication device, that work product is public.

QUESTION: I was out on leave and my supervisor went through my desk and files. Isn't this an invasion of my privacy?

ANSWER: Probably not. Your desk and your work belong to the County. If your supervisor has a business reason to retrieve papers or files from your desk she can do so. She also may search your computer.

If you are doing ANYTHING at work that you don't want your management to see, don't leave it on your desk or in your computer!

QUESTION: Is my personnel file private? My supervisor gave me a letter that I don't want anyone to see. Can other employees or potential employers see these?

ANSWER: Mostly No. The California Public Records Act excludes personnel files from public access. This means that other agencies and other people at YOUR agency are not privy to your file. The only exception to this might be people in your line of management, and those in the Human Resources who maintain the files.

However, there are exceptions! Recent court decisions have found that if you are convicted of certain kinds of crimes while working for a public agency, the agency has a legal obligation to notify prospective employers.

ALSO prospective employers may review your personnel file if you sign a waiver authorizing them to do this. In some agencies, especially Police Departments, this practice is now standard.

QUESTION: I have a workers compensation claim and my H.R. Department has asked for all of my medical records. Do I have to comply?

ANSWER: Yes, with certain limitations. The company providing worker's compensation coverage to your employer is entitled to review your medical records, *as they pertain to this injury.* Increasingly, these companies are challenging worker's comp claims, and they have

the right to question whether your injury occurred on the job, whether you had a pre-existing injury, or whether, you're hurt at all. These medical records can only be reviewed after you sign a consent form. The insurance company is not supposed to share your medical records with your employer. If your employer is "self-insured" for workers compensation, the staff reviewing your claim can read your medical records. Again, however, this is only to determine whether or not your injury or illness is work related, and only after you sign a consent form. No other employee is supposed to have access to your medical records.

QUESTION: I am disabled and requesting that the County accommodate me. Is the County entitled to see my medical records?

ANSWER: Under the Americans with Disabilities Act, the employer may request medical information concerning your disability and any work restrictions related to your disability. But it cannot go on a "fishing expedition" to access any other medical records.

QUESTION: Can my employer require me to tell them what I do "off the job"?

ANSWER: Under most circumstances, no. What you do off the job is generally your own business. However, there are a few instances when a public employer can inquire about your off the job activities. For example, if you are claiming to be sick or injured, the County may conduct an investigation to see what activities you're involved in when you're not working.

They can also conduct similar covert investigations if they suspect you of stealing from the County or any other illegal activity.

QUESTION: Does the County have the right to know if I have another job"?

ANSWER: Yes; most agencies have policies requiring employees to disclose information about outside employment. The courts have found this to be legal because they have the right to determine whether a worker's outside employment presents any conflict of interest, or greater exposure to hazard or injury.

QUESTION: Does the County have a right to know if I got into a fight at a party on the weekend and was arrested?

ANSWER: Not unless you are a Police Officer or Fire Fighter. Sworn employees are considered representatives of the city at all times, and can be disciplined for off-duty activity. Non-sworn employees aren't held to the same standards and do NOT have a reporting obligation. Unless you are "on call," you should not be disciplined for off-duty activity which your employer may not like. An employee who is on call is actually on-duty, and shouldn't be engaged in any activity which could interfere with his return to work.

QUESTION: Can my supervisor require me to let him see what I have in my purse or briefcase before I leave work?

ANSWER: No. You have a reasonable expectation that your personal items are off limits to search. However, if you work in a public agency that requires all persons entering the building to be checked for security purposes, being an employee there doesn't exempt you from the inspection.

QUESTION: I drive a bus. Do I have to submit to a drug test on days I am off work?

ANSWER: No. The courts have been clear that public employees have the right to be left alone on their days off, *unless they are called in to the workplace (in which case, they are restored to paid status*.) The only exception to this might involve some agreement between you and your employer which allows them to substance test you as a condition of continued employment.

QUESTION: Can I be fired because of a drunk-driving charge on my way home?

ANSWER: Generally, no, **unless** you were drinking at work or required to carry a Class A or Class B license (*in which case, your job is in jeopardy because you'll be unable to drive for a good while.)*

However, even if you **aren't** required to carry a Class A license, your job could be at stake if you must drive on the job and lose your license.