Regional Employees Association of Professionals July 2016 News

WE HAVE FILED TO DECERTIFY SEIU!

On July 1, 2016, our staff at the CEA office filed REAP's petition to decertify SEIU and "certify" REAP as the collective bargaining agent for four County units: the Professionals, Paraprofessionals, Supervisors, and Registered Nurses. Our goal is to establish an independent union, controlled and funded by the members, which focuses on OUR goals, rather than the agenda of an International Union. By controlling our own resources we will hire *skilled* legal staff (rather than terminated County employees and "organizers") and be prepared to negotiate a successful new MOU in the months ahead.

We will be continuing to gather signatures through the end of the year. If you have not yet had a chance to sign the petition (*If you have, get a copy to circulate amongst your co-workers*), please contact Robin or Pat at the CEA office: cea@cityemployees.net or 562-433-6983; OR any member of the REAP Board:

DALE DIGIAMBATTISTA……DALE@REAP4US.ORG
JOHN ABERLE ……..JOHN@REAP4US.ORG
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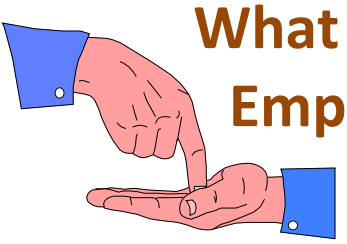
We know that defeating SEIU isn't an easy task, but our staff at CEA have conducted 29 successful decertifications against them at other agencies. SEIU has also lost ALL of their members in several large County bargaining units, including San Diego, Santa Barbara and Marin. We have talked to members at many of these agencies and they are universally happy with the change. They are democratically controlled and have much better MOU's.

We promise to keep you updated as our campaign unfolds. In the meantime, thanks for your support!



What Is the Difference Between a Union and An Employees Association?

The decision to leave the SEIU and form the Regional Employees Association of Professionals wasn't an easy one. It revolves around the question about how we get the best results *for employees in the County of Riverside.* The majority of employees at most cities in Southern California were ONCE represented by big international unions – and have since dropped out of these to form independent unions.

LEGALLY, THERE IS NO DIFFERENCE BETWEEN THE ROLE OF A LOCAL UNION AND THE ROLE OF AN INTERNATIONAL. That role, which is established by state law, is to 1) negotiate a Contract (also called MOU,) 2) to enforce that Contract, on behalf of the membership and 3) to represent individual members in the exercise of their rights under both law and Contract.

Structurally, however, the difference between the two kinds of unions is significant. In truth, the reason that most city employees have left the Big Unions and formed "independents," is comes down to control: Control over money. Control over legal staff. Control over service. Control over bargaining style. Here is a summary:

1. MEMBER CONTROL. The other word for this is democracy. In <u>any</u> union, the dues-payers, *not the union*, should make policy decisions (such as bargaining proposals, dues rates, relations with management, etc.) With a big union, our representative isn't paid by US, and therefore, doesn't report to us.

Representatives of international unions are responsible for bringing in money, in the form of new members. Service to CURRENT members is secondary. SEIU reps report to a regional director. ***As one big labor rep said, point blank, "I don't work for you; I work for the union!"***

2. ACCOUNTABILITY. <u>Local unions hire and direct their own legal staff</u>. **Union Staff should provide regular reports to the elected Board about the status of their work.** They should do the work, professionally, and do it the way the Board directs! Contract negotiations, for example, should reflect the interests of the members, not the International. Staff who DON'T do the work as directed, should be subject to termination.

Local unions have the ability to terminate their representatives on short notice. But it is extremely difficult to decertify an international union (and the ability to accomplish this comes up only once every 2 or 3 years…). For this reason, it is easy for unions to become "lax" in their response to members.

3. FINANCIAL CONTROL. **Members, *not the Big Unions*, should control their dues money. Control over money is control over the quality of service our members receive.** Spending decisions by the Board should be subject to review by the members. Dues should only be spent in service to our own organization, not organizing other work locations or national politics. **Only members should be able to approve a dues increase.**

4. POLITICAL CONTROL. **LOCAL UNIONS DO NEED POLITICAL INFLUENCE… at the local level. Independent unions CAN establish PAC's and CAN make political endorsements. The members should decide how much money they should spend on these activities.**

Answers to Your Questions About Decertification

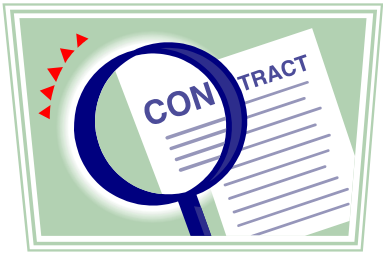
Our Association is awaiting a decertification election, so we can establish our own local union. If 50% of those voting in the election support the change, the REAP will become our new "exclusive representative."

During this waiting period, the INCUMBENT union still represents us and our members have good questions about what happens both NOW -- and after -- the election. Here are some answers:

If REAP becomes our new union, does our MOU remain in force? Can we lose anything if we decertify?

ANSWER: The current MOU remains in force. Nothing is lost. **The contract belongs to the employees, NOT the union.** By state law, all 'terms and conditions of employment' remain in effect until a new MOU is ratified.

Can the current union continue to negotiate with the City during this "waiting period?" Can we ratify a contract during this time?



ANSWER: Yes, the parties can continue to negotiate and, you CAN ratify a new MOU. That contract remains in effect -- although the NEW UNION MAY REQUEST to start bargaining, anew. **You can insist on reopening negotiations.**

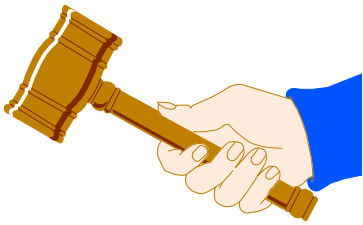
If we ratify a new MOU, does this stop us from decertifying the old union?

ANSWER: No, it has no effect. The decertification election moves forward whether or not we ratify a contract.

What is the difference between a Union & an Association?

ANSWER: Legally, none. They are BOTH unions. Structurally, an international union conducts many functions *not related to the "locals:"* lobbying, "organizing the unorganized," and conferences. They use OUR MONEY to conduct these activities. But, the rights and obligations conferred by the State to a Union, under law, are exactly with an "international" and with an independent, local union. Basically, they are the right to negotiate a contract and to represent members under that contract.

How can we afford to really take care of our members the way a big union can?



Our Association will have full membership and will be collecting dues to support the needs of our members. **The key is having skilled, attentive legal staff.**

Our staff at CEA currently represents 152 other independent unions. They are offering to represent us for a fee of $15 per person, which will cover all labor relations costs. Also, they cannot raise the fee without our agreement and we may terminate the Contract with CEA with a simple 30-day notice.

How can we make sure that the new Association is more responsive to our needs than the old Union?

It will be our OWN, democratic organization. We will be electing our own leaders, making our own policies, voting on our own negotiations, making our own financial decisions, directing our own staff. Our staff will conduct grievances, disciplinary appeals, contract negotiations and other tasks assigned by the Board. They will take direction from our Board, rather than the other way around!

Law Requires Employers to Reimburse Employees for Personal Expenses

As personal technology becomes increasingly embedded in our daily work lives, the Courts have been called upon to decide WHO PAYS for it all. Here are some recent rulings…

Cell Phone Reimbursement

Last year a California Superior Court ruled that an employer is required to reimburse an employee for the expense of the mandatory use of his personal cell phone. Absent such reimbursement, the court maintained that the employer would be receiving an unfair benefit from its employees… passing its own operating expenses onto its workers. Thus, to be in compliance with California law employers must now pay some "reasonable percentage" of the employee's cell phone bill, if the employee is required to use his/her phone for business purposes.

Mileage Reimbursement

In California, an employer is required to indemnify its employees for all "necessary expenditures or losses" incurred by the employee in direct consequence of the discharge of his or her duties. (Cal. Labor Code §2802) The most common and significant expenses that employees incur on behalf of employers involve the use of personal vehicles. The easiest way the employer may compensate employees for the use of their cars is by paying for mileage. Last year, the reimbursement rate rose to 57.5 cents per mile.

YOUR RIGHT TO REPRESENTATION IN AN INVESTIGATIVE MEETING

As a union member you have the absolute right to representation of your choice in any questioning meeting with management that you believe might lead to disciplinary action. This is called your ***WEINGARTEN RIGHT***, after a long-standing Court decision. Here is a summary of how *Weingarten* works:

RULE 1: The County does not have to tell you about your right to a rep. You can make a clear request for union representation before, *or during,* the interview. You can't be punished for making this request.

RULE 2: After you make the request, Management must either: 1) delay the meeting until your representative can be there (**and** has a chance to consult with you privately); 2) deny the request and end the interview; or 3) give you the choice of going ahead with the interview without representation or ending it.

RULE 3: If Management doesn't agree to wait, doesn't give you a choice, and insists that you continue with the meeting, **you should not refuse to participate.** You should remind the interviewer that you've requested representation, then give brief, honest answers to questions. After this, call your union rep! Your rep will contact Management about the fact that you were denied representation. Any discipline that may result from the meeting may be challenged and overturned.

RULE 4: **You can be required to attend a meeting without representation if Management AGREES that no discipline will result from the information gathered**. (This agreement is usually verified by an email exchange between the parties.) If this turns out to be false, and discipline IS imposed, this may be challenged and overturned.

RULE 5: **The *Weingarten Decision* covers *investigative meetings***. It doesn't cover

grievances, performance review meetings, or even actual meetings in which you are handed a disciplinary letter. You probably DO have the right to representation in the first two of these situations, but this doesn't arise from *Weingarten.*

You have the right to know the purpose of a meeting in advance. If the purpose is to pick up a letter, it's best just to receive it and NOT hold a discussion. You have the right to appeal, in a calm and thoughtful manner, later. If your Management insists that discipline must be discussed right away, you DO have the right to representation. You can ask you nion rep to clarify this with Management *in advance* of the meeting.

Post-Traumatic Stress Syndrome: Now a Recognized Disability

As employees return from the wars in Iraq and Afghanistan, many are returning with psychological disturbances. Lumped into the broad category of PTSD, symptoms include irritability, inability to sleep or to make decisions clearly, loss of memory, loss of enthusiasm, loss of focus or direction.

PTSD is recognized as a disability, not simply a temporary state of mind. It often requires medical attention and is treated, legally, the same as other disabilities. Employers cannot ask job applicants, even veterans, about their disabilities, (or perceived disabilities) as bases for hiring or promotional decisions. They cannot probe current employees, even those returning from combat, about their medical conditions. Employees and applicants need only disclose disabilities when, they need to ask their employer for accommodation, to enable them to perform the essential functions of the job.

Employees with psychological disabilities may need to take time off the job intermittently, or for longer-term treatment. For this reason, they should probably have a letter on file with the County explaining that they have a medical condition, establishing some job protection under the Family Medical Leave Act. The letter does need to be accompanied with substantiation from a doctor, but does not need to specifically identify the illness.

Age Discrimination: The Most Common Form of Discrimination…

Age discrimination is REAL. When an agency wants to downsize or a department needs to cut its budget, older employees are the first to go. Why? Two reasons: senior employees generally cost more than younger workers; and they are often viewed as a greater liability (or less productive) than younger employees.

It's illegal to discriminate against employees because of their age, but it can be nearly impossible to prove that kind of discrimination is happening. Agencies don't come out and say, "Let's get rid of the older, expensive employees," but the overall pattern is obvious. From 2009 to 2012, the Department of Fair Employment and Housing and saw a 15% increase in discrimination claims, *the majority of which were age discrimination complaints*. When older workers are the first on the layoff list, or threatened with layoff if they don't agree to retire, this could very likely be discrimination.

The Age Discrimination in Employment Act (ADEA) is the federal law that protects people from employment discrimination based on age. In order to **prove** discrimination, you need to have evidence, either in the form of remarks or a pattern of "adverse actions" which are targeted at a particular group of employees. Examples might be:

- A statement that you weren't promoted because the manager wanted "some new blood" in the department.
- A negative job evaluation which says that you are "too set in your ways" or seem less capable of learning new skills.
- A pattern of criticism and/or petty discipline coupled with questions from management about when you are going to retire.
- An offer of severance or "early retirement bonus" coupled with threats of layoff if you don't accept the offer.
- A statement that layoffs will be based on "employee cost and productivity."
- A pattern of layoffs which seems to target older employees, while younger workers with less seniority and experience are kept on.

A RETIREMENT INCENTIVE OFFER ISN'T DISCRIMINATION, UNLESS….

It is NOT illegal discrimination for the County to offer you a "Golden Handshake" or any other retirement incentive. Nor is it discrimination for them to ask about your "future plans." But **it IS discrimination for the County to offer "early retirement incentive" with a threat of negative action if you don't accept it.** If this happens, you might want to contact your union staff, or file a claim with the DFEH.

If an older employee provides evidence of probable age discrimination, the burden shifts to the employer to show that it had valid reason, *not related to age,* for the objectionable employment decision. It's a

valid reason, for example, to terminate an older employee for poor job performance. It's also valid to lay employees off due to economic problems; **but employers cannot use age as criteria for determining who is to be laid off.** Thus, if most people who are laid off are 40 or older, and the majority of workers not laid off are younger than 40, this may be a basis for an ADEA complaint.

IT'S ALSO ILLEGAL TO DENY BENEFITS TO OLDER WORKERS

In 1990, the Older Workers Benefit Protection Act (OWBPA) amended the ADEA by prohibiting employers from denying benefits to older employees. With this law, terminating an employee in order to prevent him/her from using promised benefits became illegal. It is also illegal to use an employee's age as the basis for deciding what benefits s/he will be offered or to target older workers for program cuts because of the cost of their benefits.

It is generally NOT legal, in the public sector, for employers to establish mandatory retirements ages. However, there are a few exceptions:

- Executives or others "in high policy-making positions" can be required to retire at age 65.
- Police and fire personnel and air traffic controllers can be forced to retire at age 65.
- On rare occasions, selection by age is considered a "bona fide occupational qualification." For example, if a modeling job requires a "youthful look," selection by age is a "BFOQ."

Don't They Have to Let Me Take a Vacation?

Most permanent public employees have vacation benefits. This is clearly so you can TAKE a vacation. The theory is that some time off – a respite from the workplace – is good for you, and good for productivity when you return. The amount of vacation you receive is negotiated by your Association, but vacation is also a "vested benefit" under law. This means that it belongs to you and that any portion of your vacation which you aren't able to use must be paid to you when you leave the City.

Most MOU's also contain a section about the conditions under which your vacation can be taken. This usually says something about "mutual agreement of the parties," or scheduling "with supervisor's permission" or "based on the needs of the department." In other words, you CAN'T usually take vacation whenever you want. In some agencies (or departments) there are policies about the length of time you must request the vacation in advance; in others, there are limits on the amount of vacation that must be used at one time. In still others, there are whole policies about vacation bidding and seniority.

Management can't simply generate new policies about how vacation may be used or scheduled. Such policies are subject to negotiations (although it's not unusual for managers to argue that they can be changed as a matter of "operational necessity.") As public workplaces are becoming understaffed, more and more employees are having difficulty scheduling time off. Thus, people who used to be able to call in for a day off on an "emergency basis," are being told that they cannot do this anymore. Others who used to schedule two weeks every summer for a family vacation are being told that they must put their plans on hold "for the good of the department." All of this raises questions about whether vacation *really is* a vested benefit, or whether management can just dictate the terms. Here's the answer:

Vacation IS your benefit and you DO have the right to use it.

Management can make you adhere to some rules about scheduling, and they don't have to agree to every request, ***but if you are chronically unable to use this benefit, you have a grievance!*** Similarly, if they change the rules for scheduling without bargaining, your Union has a grievance!

Vacation is earned paycheck by paycheck and the accrual rate is based on your years of service. Most vacation policies also have a "cap" on the amount you may accrue. When you reach that cap, your employer can stop allowing you to accrue any more vacation. (However, if you do accrue hours over the cap, these hours become yours and cannot be taken from you.) Employees who are chronically reaching their vacation caps, but are unable to schedule their vacations have the legitimate right to ask their employers for some solution. **It is NOT okay for you to lose vacation because your workplace is understaffed!**

NEGOTIATING "PAYOFFS"

One solution to the "use it or lose it" problem is to negotiate a policy where employees may "cash out" a reasonable portion of vacation time each year. This doesn't give you more time off, but can put a little more money in your pocket during hard times. An even simpler solution is to negotiate a higher accrual "cap" which would mean that you would be able to use the time (or take the money) later.

Deferred Compensation: When Can You Access Your "Rainy Day Money?"

"Deferred compensation" is exactly what it sounds like: money set aside by you and your employer for use at a later time – presumably when you are not earning an income any longer. The terms and conditions surrounding your deferred comp program (if you have one) are negotiated between your employees association and your employer. Most programs involve some sort of "matching" between employee and employer contribution. The money set aside may be as little as $5 per month or as much as 3% of your salary.

Since most public employees are already enrolled in a retirement system, what's the point of deferred compensation? There are several. **First of all, "deferred comp" is an additional form of income**: a *secondary* savings plan. Under the auspices of the IRS, **these programs allow you to sock away money from each paycheck before any tax is taken out.** When you DO begin taking the money out, it IS taxed, but presumably this is when you are in a much lower tax bracket.

All deferred compensation programs are strictly regulated by the IRS. Why? Because the pay you are "deferring" is not included in your gross income, and no taxes are being paid on it. As long as there is untaxed money put away for you, the IRS has the ability to track where it is kept and how it is used. If, under certain "hardship" circumstances, it is used while you are still working, it will be taxed at your normal pay rate.

HOW CAN YOU USE YOUR DEFERRED COMP MONEY?

Your deferred comp account is intended to become available to you (or your family) at retirement, termination, disability, or death. However, as more and more employees are struggling with high bills and mortgages NOW, questions about your ability to access this money are becoming common. **The answer is that deferred comp accounts may be "cracked open" while you are still working under "conditions of severe hardship created by an unforeseeable emergency."**

What IS "severe hardship" or "an unforeseeable emergency"? It is a "financial circumstance resulting from an illness, accident, loss of property due to casualty, or other similar extraordinary circumstance beyond your control." Events that *may* be considered unforeseeable emergencies *might* include imminent foreclosure on, or eviction from one's home, or medical expenses, and funeral expenses. On the other hand, events such as the purchase of a home, payment of bills, or of college tuition are **not** considered unforeseeable emergencies.

IT REVOLVES AROUND THE IRS…

The IRS has no formal definition of "unforeseeable emergency." Each case depends on the particular facts. But, as a rule of thumb, *if your need for cash can be relieved with reimbursement from insurance, liquidation of your assets, or discontinuing deferrals under the plan, then it will not qualify as an unforeseeable emergency.*

If you have a need to try to access the savings in your deferred compensation account, and believe that your circumstances may qualify as an "unforeseeable emergency," you can request a withdrawal form from your Human Resources Department. In the end, the IRS determines whether your employer will be authorized to allow emergency withdrawals.

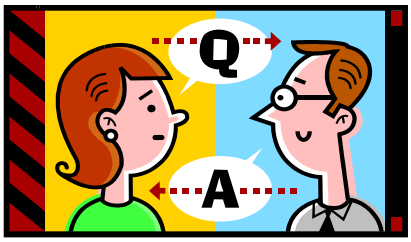
Keep in mind, also, that deferred comp programs are a subject of bargaining. If you have no program, you might propose one. If you have one, you might propose to increase the employer "match." You cannot negotiate the money to be available to employees prior to retirement, but you *could* negotiate suspension of the program for a year or so, in order to direct this money to members' pay increases. (Be careful with this, though: once you decide to put any benefit aside, even for a short period, it is not always easy to get it re-established.) In the end, it's probably best to understand that deferred comp programs are really only intended for retirement – or for <u>really, really</u> rainy days.

No Workplace Retaliation for Filing Bankruptcy!

Did you know that it is illegal for your employer to discriminate against you for declaring bankruptcy? The Bankruptcy Reform Act of 1978 protects employees from "adverse employment action," such as termination or demotion for filing for bankruptcy or even for being associated with someone who has. (The Act also prevents government lenders from withholding student loans on the basis of a prior bankruptcy, by the way.)

The bankruptcy reform laws of 2005 made the declaration of bankruptcy much more difficult for the average citizen. Nonetheless, you may be relieved to know that, if you or a co-worker is in this situation, it cannot be used against you on the job.

Questions & Answers About Your Job

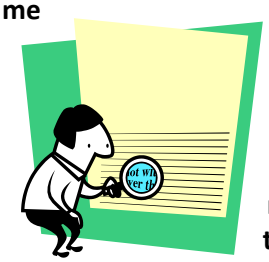


Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, feel free to talk to your Board Rep or Staff at (562) 433-6983 or cea@cityemployees.net.

Question: Is there a minimum number of hours that hourly employees must have between shifts? For example, I had a VERY late Commission meeting last night, and did not leave work until 1:15 am. Do I have the legal right to wait until at least 9:15 (8 hours from the time my shift ended) to being work again?

Answer: Except for commercial vehicle drivers, there is no legal requirement for "rest time" between shifts. A public employee over the age of 16 years can be required to work any number of continuous hours. HOWEVER, the subject of rest periods is completely negotiable. Many MOUs address this issue for emergency standby crews, who often work through the night. In general, they all provide 6 to 8 hours of rest time before the next day starts, if someone works more than 12 or 14 hours in a row.

Question: I lost my wife two months ago after a lengthy illness. I was covered by the FMLA while taking care of her, but am not any longer. I admit that my attendance has been spotty since I returned to work, and I'm having a tough time getting there at 7:00 a.m., but I didn't think I was about to lose my job because of this! The County has now taken me off the job and sent me for a fitness for duty exam. My doctor says I'm temporarily depressed, but will be fine in a few months. I've used up all my sick leave! How long can they keep me off the job without pay? Could I really be fired because of this difficulty?



Answer: We want to extend our condolences regarding your wife. Just as you were on FMLA due to your wife's illness, you can have your doctor fill out FMLA paperwork regarding your own depression. This will enable you to take time off intermittently if you need to, up to a total of 12 weeks in a year.

If you are able to work, even if it's inconsistently, the County doesn't have the right to take you off the job – at least not without pay! If the County's doctor says you're sick, but your doctor says you're able to work, *your doctor's opinion has precedence.* You should contact your union rep for help. The County may owe you money!

By the way, if you do use up the entire 12 weeks of FMLA time and are unable to work consistently, the County may conduct an ADA analysis in order to see if your job can be modified to accommodate your mental state. But they cannot terminate you without **proving** that you're unable to perform your job, giving you a full evidentiary hearing and securing your PERS disability retirement. You've got quite a bit of law on your side!

Question: Our MOU reads, "The County will pay for water division staff certification and recertification. This includes time spent in training, the cost of the training classes and necessary supplies, if applicable." Our County has changed its procedures, though, so we get reimbursed after we take the class and we pay for it ourselves. The class is about $300 and the recertification is about $100, and I don't always have the money available. What is your opinion? Is this grievable?

Answer: Arguably, you may have a grievance here, as the language reads, "the County will pay," and NOT, "the County will reimburse." If the County *negotiated* this change in procedure with your association Board, then there is no violation. But if it wasn't negotiated, you have clear contract language and may want to initiate an informal grievance.

Question: **I work in Code Enforcement in a mostly Hispanic community. I didn't grow up speaking Spanish, but I speak it well enough to do my job. Recently, a resident (who was not happy because I was giving him a citation) complained that I didn't explain the violation to him well enough - in Spanish. Now I think I'm going to be written up! Can they do this? (Should I give up bi-lingual pay so I don't get in trouble for not being more fluent?)**

Answer: It doesn't sound as if you have done anything wrong; if you are "written up," you should appeal. If you passed a test for bilingual pay, this is the standard required by the city, and it means that you speak Spanish well enough to do your job. An angry citizen can complain about anything. But if you really don't want to be liable for "miscommunications" in the future, you might tell the City that you don't want to function as a bi-lingual employee.

Question: I have a permanent injury (carpal-tunnel syndrome, from typing...) and will have surgery this week. My Workers Comp claim has been settled, and my doctor believes that I WILL be able to continue to work. But the City has terminated me and filed for my PERS Disability Retirement! What should I do?

Answer: First of all, you can't be terminated, even for disability, without a fair hearing. The first step, the "Skelly hearing" is usually with the Department Head; the second step is a full evidentiary hearing. At a full hearing you'll have the opportunity to present evidence of your ability to continue to work. The burden is on the employer, by the way, to prove that you are UNABLE to work. If they can't prove this, your job is retained.

You may also have a claim under the American's With Disabilities Act, which now requires employers to 'provide reasonable accommodation' to disabled workers (i.e., modify your work station or reclassify you.) AND you may have a claim on the basis of your Workers Compensation case, because it is illegal to retaliate against an employee for filing a claim.