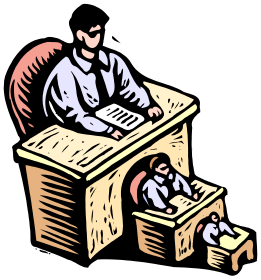
Regional Employees Association of Professionals October 2016 News



Hiring and Promotional Practices:

What Rules Must a Public Employer Follow?

(And Which Ones Can They Make Up As They Go Along?)

Employers are supposed to be unbiased when it comes to hiring and promotional practices. It is illegal to discriminate on the basis of race, ethnicity, gender, age, sexual orientation or disability. *Government agencies* have an even greater responsibility to be fair and equitable because they are entrusted with the *public's* money. Their jobs are supposed to be filled primarily on the basis of merit: the absolute best person for the job determined on the basis of an objective testing procedure.

Rules for Objectivity

Government agencies differ from private companies in that you are NOT supposed to be hired on the basis of "who you know" or what money your family may have contributed to a political campaign. Hence most agencies have detailed rules barring nepotism and explaining how positions shall be properly filled from eligibility lists. In general this means that job applicants, for both entry-level positions and higher jobs in a series must take a written exam AND be interviewed by an oral panel. Some (larger) cities and counties have Civil Service Departments to oversee the testing and selection process. But in most agencies this function is carried out by the Human Resources (or Personnel) Department.

Despite the fact that the rules are fairly thorough, Management may exercise considerable interpretation when it decides how to fill a particular position. It's not unusual for employees to complain that a testing process wasn't fair, that an interview panel was biased (or had prior relationships with managers or candidates), that the eligibility standards were manipulated, that a candidate who didn't meet the standards was allowed to test, that the successful candidate was pre-selected, or that an eligibility list was completely ignored (or deliberately suspended) in order to allow a hand-picked candidate to fill a position.

All of these accusations are occasionally true! Management often DOES have a particular person in mind for a job. Rules about merit and equity ARE often bypassed in order to achieve Management's goal, and employees who believe they are the victims of these practices have every right to file a complaint. Violations of Civil Service Rules or promotional rules are completely grievable. Be advised, however, that grievances over

"unfair hiring practices" have some serious inherent pitfalls. This doesn't mean that you, and possibly your co-workers, shouldn't file a complaint when it's clear that the rules have been broken. It just means that you should be prepared to overcome some obstacles.

Alleging Isn't Proving…

The biggest obstacle involves the problem of PROOF. It is one thing to allege that one of the guys on the interview panel is best friends with the guy who got the job; it is another to *prove this.* Similarly, although "everyone knew" that one person had already been groomed for this job, it's almost impossible to *prove this.* As long as Management goes through the motions of following the County's rules, it can be difficult to demonstrate, legally, an ulterior motive.

On the other hand, some aspects of a violation are completely provable. For example, it is not legal for Management to change jobs specifications or eligibility requirements in order to hire an otherwise ineligible applicant. Job specs are negotiable. The County cannot change them without "extending the opportunity to meet and confer" to your employees association. If Management has manipulated the job duties or requirements in order to "be able to reach" a particular candidate, you and your organization may want to take a strong stand on this.

Hiring Practices are Negotiable

Speaking of "negotiability," you should know that the procedures by which people are hired are completely negotiable. The most common topic for discussion in this arena involves what unions call "promotional preference," that is, giving strong preference to current employees over outside applicants. Older cities (which went through the "good government" era of the 1910's and '20s) almost always have written language about "meritorious promotion" and hiring from within. Examples are rules that say "if there are three (or five) internal applicants" for a job, the employer must fill the job by promotion, rather than "open and competitive" exam. Similarly, almost all old Civil Service Systems required that positions be filled by one of the top scorers on an objective exam.

Erosion of Rules; Expansion of "Management Rights"

Since the Reagan Era, however, there has been a steady erosion of these "restrictions," to allow Management to hire "the best and the brightest" employees in the WHOLE WORLD. After all, why should they be bound by those rigid promotional preference requirements?

This erosion of in-house promotional rules has gone hand-in-hand with the introduction of contract and at-will employment in public agencies, which was strictly prohibited under old Civil Service Rules. As jobs are filled by non-permanent, non-union labor, this also shrinks the bargaining units and the bargaining power of the employees' organizations. **After all, if there are no more civil service rules, then there can be no violations for the union to grieve!**

Assuming There ARE STILL Some Rules in Your County…

Assuming that there ARE still rules in your County, the other big obstacle facing employees who have been bypassed, unjustly, for promotion is retaliation. Once Management has made a decision about who to hire for a position, they are not likely to change their minds about this unless forced. However, if the rules truly have been broken you CAN force the County to go back and run an honest, equitable exam.

When this is all finished, though, the last person they are likely to hire is the complainer. This is just reality. Management will do everything in its power to avoid rewarding the person who "blew the whistle." Yes, this IS retaliation – but, again, it is difficult to prove.

Affirmative Action, ADA and Layoffs

Finally, it is important to know that other laws may also **legitimately** interfere with a County's merit or seniority system. In the '60s and '70s, claims of racial discrimination really did result in federal investigations, leading to outright orders that local agencies increase their hiring of minorities. The subjects of investigation were usually Police and Fire Departments, not general government. Today, these affirmative action programs either no longer exist, or have ceased to be enforced. But they did work. Today public jobs are well integrated -- including large numbers of women and minorities in law enforcement.

On the other hand, local hiring rules can be put aside to gain compliance with other legal mandates such as the accommodation of disabled workers under the ADA (Americans with Disabilities Act) and "bumping," triggered by layoff. On the subject of the ADA, suffice it to say that if an employee is found to have limitations which prevent her from doing her normal job, the County is *obligated* to assign her to a job that she can perform *if there is a vacancy*. This means that if there are employees waiting for a position on an eligibility list, they may be pushed aside to facilitate the disabled person's placement. This issue of "local rules verses federal law been tested in the Courts – and the Feds have won.

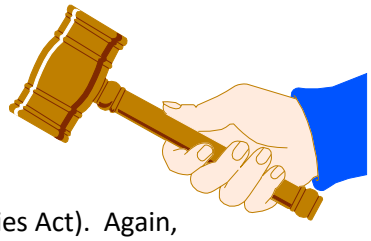
Similarly, seniority language (or other rules pertaining to layoffs) in an MOU will have priority over hiring practices. Thus, if an employee's job is being eliminated, *and the Personnel Rules allow for him to bump to any position for which he may be qualified and/or have seniority*, then he will have precedence over people on an eligibility list for that vacant job.

Class-Action Lawsuit Claims Gender Discrimination in California's Workers' Compensation System

Equal pay for equal work has been a long term battle for people in "women's jobs." And now there is a new twist: a class action lawsuit has been filed against the State, arguing systemic gender discrimination in the system that compensates injured women workers. If this claim is true, it violates both state and federal "equal pay" laws.

The primary argument is pretty simple: workers compensation provides benefits based not only on the severity of a disability resulting from an injury, but on the loss of income caused by the disability. The System, it seems, values the same disability higher for men, in relation to the jobs they normally fill. When a woman's earning capacity is disrupted, the percentage "rating" for many injuries isn't as high, nor the loss of income considered so significant, which means the ultimate settlement many women receive is lower than if they were men, or performing manual labor jobs. One case included in the lawsuit involves a telecommunications specialist who worked a 40-hour week for 17 years. She developed severe pain and numbness in her hands and wrists, as well as major sleep disturbances – and she ultimately lost her job. Although her injuries were fully recognized as work-related, the Medical Examiner who established her "disability rating" lowered her settlement because "she has multiple risk factors for carpal tunnel syndrome, **primarily age and gender**." The attorneys for the plaintiffs claim that "[e]ven the guide used to determine permanent disability includes biases against women workers, such as undervaluing the disability rating of breast cancer in woman relation to prostate cancer in a man."

How Would the Legalization of Marijuana Affect YOUR Job?



Next month, an initiative to allow recreational use of marijuana is on the ballot, and expected to pass. This raises BIG questions about how marijuana usage will be treated differently (or not) in the workplace. Based on the legal decisions in states like Colorado and Washington, which have already decriminalized we can make several predictions:

1) The legalization of marijuana won't cause most employers to change their policies at all. Employers will STILL want rules in place about "performing under the influence" – just as such rules apply to alcohol.

2) Whatever California voters might decide, marijuana use remains a prohibited substance under *federal* law. So, if any aspect of your work rules are set by federal regulation (such as the Department of Transportation for truck and bus drivers and "safety sensitive" positions) these won't change. The federal Drug Free Workplace Act also *requires* employers who receive federal grant money to have a zero tolerance policy with regard to ANY federally prohibited substance.

What MIGHT Change?

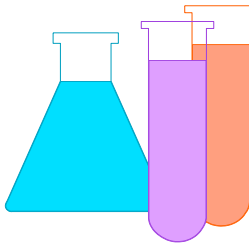
It's not legal for employers to discriminate against employees for engaging in off duty conduct which is "lawful." So, if you are drunk at a party, or make a fool of yourself on Facebook, this cannot be grounds for discipline by the County. You'd *think* that this would apply to smoking marijuana, if it becomes legal, but no one is sure yet. The only published case, so far, was in Colorado where the Supreme Court found that law did not protect a quadriplegic man from termination, even though his marijuana use was **off duty and under doctor's care AND he was protected by the ADA** (Americans with Disabilities Act). Again, the court cited federal law as the basis of the employer's right to discipline.

On the other hand, we are likely to see other test cases on this subject soon, and it's going to become difficult for employers to discipline every employee, equitably, who merely tests positive for marijuana. New precedents may be set – and we will probably see the tide shift to greater tolerance.

What about the Americans With Disabilities Act? (Medical Marijuana)

If you're disabled, following a doctor's order and have a prescription for marijuana, aren't you protected against discipline by the ADA? Not necessarily. The California Supreme Court decided several years ago that the medical marijuana law was "not intend[ed] to affect an employer's ability to take adverse employment actions…" Even if marijuana becomes legal, neither disability nor medical need will protect your right to be "under the influence" on the job.

Would *Anything* Definitely Change?



Yes. States which have legalized marijuana have mostly stopped random drug testing, while others have relaxed their "zero tolerance" policies. To some extent this has been necessary because **people may have marijuana in their systems without showing any "impairment" in behavior or performance.** Unlike alcohol, which passes in and out of the blood stream within a few hours, marijuana is fat soluble, and therefore may show up in a test for weeks after the "mental effects" have worn off.

This circumstance has already created dilemmas for employers (and protection for employees) states where marijuana is legal. In Washington, Oregon, and Colorado, for example, it has become standard that employers who want to terminate employees for marijuana use must show that the employee was *actually impaired* at work before they fire them.

The level of scientific testing in this field leaves much to be desired. At the moment, it's nearly impossible to tell when a person with marijuana in his/her system is actually "under the influence." Failing to pass a screen is not much of a violation if the drug is legal and the employee is having no problems on the job.

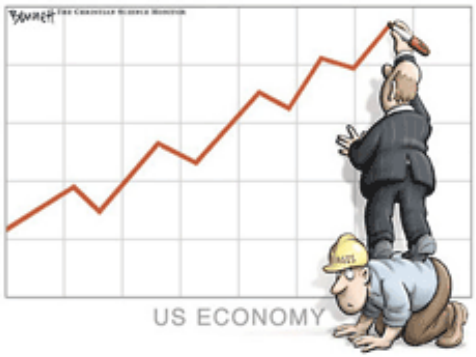
How Would Legalization of Marijuana Affect Your Agency's Income?

When California residents have been polled about their position on legalizing marijuana, the subject of tax comes up nearly half the time. There is a general assumption that millions in revenue will find their way to the state coffers. This is because cannabis in Colorado, which was legalized in 2012, has led to taxes and fees which contributed significantly to new schools and roads.

The initiative on California's November ballot, however, doesn't designate any "pot-tax" for local government or schools. The estimated $1 billion in new tax revenues would be directed toward specific programs in the areas of drug use prevention and treatment, helping at-risk youth, law enforcement, and environmental clean-up and research. Spokespeople for the Yes on Prop. 64 campaign have said the restrictions on public use of the new tax monies was intentional: "If public agencies were allowed to balance their general budgets with marijuana taxes, it could create an incentive for them to encourage a bigger marijuana industry."

REVENUE PREDICTIONS

On the other hand, the State of California is already making money off the marijuana business. In 2015, it took in $58 million in sales tax revenue from 974 registered dispensaries. According to the Board of Equalization, this included nearly 400 in Los Angeles County, and 70 to 80 each in Orange, Riverside and San Bernardino counties. This amount is expected to double this year.



Under Prop. 64, all marijuana sales would be taxed an additional 15 percent starting Jan. 1, 2018, on top of levies on regulated growers of $9.25 per ounce. Medical cannabis patients would be exempt from the state sales tax. The independent Legislative Analyst's Office predicts that this would result in revenues close to $1 billion each year. This is roughly the amount California brings in annually now from taxes on tobacco.

Tax revenue from legalized marijuana would be used, first, to cover "all reasonable costs" incurred by the state to enforce the recreational cannabis regulations. The Department of Consumer Affairs doesn't have an estimate yet of those administrative costs, but the programs in Oregon and Washington spend about $6 million and $8 million a year, respectively. Colorado is budgeted to spend $16.3 million regulating marijuana this year. The program "pays its own way," says the state administrator, while excess funds go to school construction, youth education programs and poison control centers.

Opponents of Prop. 64 argue that the higher tax revenue would be offset by the "hard-to-quantify" effects on public safety and health: more crime, more enforcement expense, and more auto accidents.

WHAT ABOUT LOCAL BENEFITS?

In Colorado on marijuana taxes and fees go directly to the cities in which the drug is sold. Thus Denver added $29 million to its general fund budget in 2015. California cities can also assess fees and taxes on businesses that sell marijuana. Currently 18 cities do this and there are another 37 pot-tax measures on city ballots in November. Santa Ana, for example, will collect $1.5 million in marijuana-related fees this year. These could generate up to $22 million a year in revenue for the affected cities and counties.

New Law, AB241, Protects Retirees' Right to Negotiate in Case of Public Employer's Bankruptcy

When the City of Stockton filed for bankruptcy, the retirees asked for a list of people who had retired from the City, in order to protect their rights during the bankruptcy proceedings. The City refused to provide the list, forcing the retirees to try to find each other on a "hit or miss" basis. Although each retiree had a legitimate claim against the City, the bankruptcy trustee would not recognize individuals to present their relatively small claims. The still employed workers DID have a representative: their union.

The Retired Public Employees' Association (RPEA) a statewide advocacy group for retirees, stepped in to help the retirees form a group so they could negotiate on behalf of their members. The group was certified by the IRS, hired an attorney, and recognized by the Bankruptcy Trustees as a party to the litigation. In the end, they were able to block the loss of ANY of their pension benefits.

One of the most difficult parts of the entire process was the retirees' inability to "find' one another. This is what the new law addresses: that when a public agency declares bankruptcy, it MUST provide the names and addresses of their retired employees to a recognized non-profit organization for the limited purpose of representing the retirees in the bankruptcy proceedings. Any attempt to use this list for other purposes is punishable by a fine.

On September 9, 2016, Governor Brown signed AB 241. It will become effective on January 1, 2017.

Founded in 1958, the RPEA advocates for ALL retirees from public agencies. The group currently has 24,000 members with 85 active chapters in California, Arizona, Nevada, New Mexico and Oregon. In California, much of their work involves monitoring and supporting key legislation at CalPERS. RPEA has a member serving on the PERS Advisory Committee and meets regularly with PERS executives and board members. For more information regarding retiree pensions and health benefits or to learn more about the Retired Public Employees' Association of California, see www.rpea.com.

HERE'S A GOOD QUESTION…
TIME OFF TO VOTE

Question: Can you tell me what the law says about an employee's right to take time off to vote? Our HR Department is telling us that because the polls close at 8:00 p.m. there is no right to take time off.

This is what the Election Code actually says:

(A) If a voter does not have sufficient time outside of working hours to vote at a statewide election, the voter may, without loss of pay, take off enough working time that, when added to the voting time available outside of working hours, will enable the voter to vote.

(B) No more than two hours of the time taken off for voting shall be without loss of pay. The time off for voting shall be only at the beginning or end of the regular working shift, whichever allows the most free time for voting and the least time off from the regular working shift.

(C) If the employee on the third working day prior to the day of election, knows that time off will be necessary, the employee shall give the employer at least two working days' notice that time off for voting is desired.

Translated: since the polls are open until 8:00 p.m., most employees who work a day shift probably don't have the right to take time off to vote – *unless they live very far from their workplace.* However, *some* employees work very long shifts, or literally, cannot leave the workplace for days at a time. These employees may need to exercise their right to take up to two hours off at beginning or end of shift, as the law allows. They should let their employer know about this, at least two days in advance. (This law applies only to State elections, by the way. Nov. 8, 2016 is a State election.)

California Online Voter Registration

Tuesday, November 8 is Election Day.

Registration Deadline. The deadline to register or re-register to vote for any election is 11:59 p.m. on the 15th calendar day before that election (Monday, October 24 for this year's Presidential election). If you submit an application after this time, your application will still be processed for future elections.

What You Will Need. You need to provide your California driver license or California identification card number, the last four digits of your social security number, and your date of birth. Your information will be provided to the California Department of Motor Vehicles (DMV) to retrieve a copy of your DMV signature. If you do not have a California driver license or California identification card, you can still use this form to apply to register to vote by completing the online interview by 11:59:59 p.m. Pacific Time on the 15th calendar day before an election.

Additional Information: For more information on registering to vote you may want to visit the Secretary of State's Frequently Asked Questions.

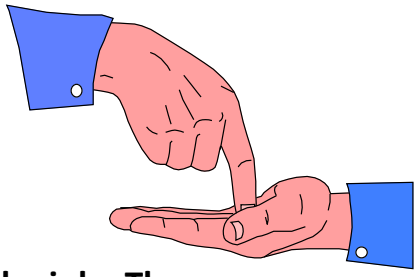
Does HR Have the Right to Call My Doctor?

Question: Our HR Manager called my doctor's office to find out if I had been there to get my FMLA papers filled out. They also asked about my upcoming appointments and what treatment I was receiving. Is this legal?

Answer: Federal regs allow employers to contact the physician's office to verify that the information contained on the FMLA certification form was completed and/or authorized by the doctor who signed the certification. The regs also allow employers to ask the doctor's office to decipher the handwriting on the medical certification or help in understanding the meaning of a response. Employers may not ask health providers for ***medical*** information beyond this. However, the employer can send the doctor a record of the employee's absences and ask whether the serious health condition and need for leave is consistent with such a pattern.

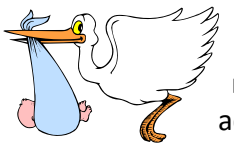
So, if HR simply asked whether you had been to the doctor's office when you said you were, and asked whether you were being treated for the condition you said you were, and verified that the doctor's office had filled out the form you submitted, that's OK. But if HR pried further into your diagnosis, prognosis or treatment, or asked for information not called for on the FMLA forms, this would be a violation.

Questions & Answers:
Your Rights on the Job



Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, feel free to talk to your HELP representative.

Q: My co-worker is off the job on maternity leave, but we have a staffing problem and our supervisor has asked her if she can put in a few shifts this week. Is this legal?



A: Yes it is. If your co-worker is on maternity she is most likely using Family Medical Leave Act (FMLA) and/or Pregnancy Disability Leave Act (PDLA) that allows her 12 to 16 weeks per year. Arrangements should have been made to cover her work during this time. But things happen.

There is nothing wrong with the county's *asking* if she'd like to put in some time at work. She has the right to say NO, and to not be coerced. There is actually a positive side to coming to work intermittently. This can extend her leave time, and possibly extend the amount of time that the County must pay for her benefits while she is off.

Q: Is it true that if I am terminated I could lose my retirement?

A: NO! Your retirement is a vested benefit. You have paid into it and cannot lose it even if you are terminated – with one exception. If you are convicted of bribery, embezzlement, extortion, theft of public monies and perjury arising from your "official duties," your PERS benefits can be denied.

Q: I'm retiring in 4 months and have nearly 400 hours of vacation accrued. I'm taking a 3-week trip, but after that, would like to use my time in 2-hour increments on a daily basis, until I retire. My supervisor said this was fine, but the department head vetoed it. Don't I have the right to schedule my vacation the way I want to schedule it?

A. Unfortunately, no. Having tons of hours "in the bank" does not mean you can take it without mutual agreement from your employer. On the other hand, vacation is a vested benefit. If you don't spend the time down, you will be receiving a nice lump sum check when you retire.

Q: About a year ago, my workstation was moved to an area with very bright lights. They create a glare on my computer, which gives me headaches. I've asked that some of the lights be turned off, but my co-workers have objected. My head and eyes have been hurting chronically at work, so I asked for an ergonomic evaluation of my work station. The county responded by saying I need to provide medical certification of my "disability." I don't have a disability! I just have a glaring computer screen! Isn't there anything I can do short of seeing a doctor?

A. Yes, call your union rep. He or she can contact the County and ask them for a glare screen or another work location. You don't need to go through an accommodation meeting because you aren't claiming to be disabled. However, a note from your doctor, saying that the glare is causing you headaches would probably be useful. It puts the county on notice that you have a potential workers comp claim. It's unlikely that the County will continue to ignore both your doctor and your union rep, but if they do, you can file a grievance over the violation of your right to a healthy work environment.

Q: I am requesting a quiet work space, with some privacy, due to a chronic medical condition. My doctor has sent a letter, saying I have an ongoing condition and need some accommodation. Now the County's Risk Manager is asking to know what the exact condition is. Do I legally have to disclose this information?

A: If you claim to have a medical condition requiring accommodation, the County is required to conduct an "interactive meeting" pursuant to the ADA (Americans with Disabilities Act) to see what your needs are. They don't need to know a lot about the actual condition, but your doctor needs to provide enough information that they know how to accommodate you. In general, this doesn't need to be much more than a list of your physical limitations.

Q: My co-worker and I had a disagreement about how some work that should be done, and this carried over to our personal phones – texting – on the weekend. On Monday, he showed my texts to our supervisor, who called me in and chewed me out. Aren't my communications, off the job on my OWN phone, considered private? Did he violate my privacy rights?

A. This is complicated. Technically, for non-sworn employees, activities off the job cannot be used against you at the workplace. However, you were discussing work related matters with a co-worker, so this could probably be considered "work." Your co-worker was the legitimate recipient of your texts, so he didn't violate any privacy rights by showing them to his supervisor. Next time try not to use texts to argue with a co-worker. In fact, it's best not to allow work problems to enter your personal life at all. If your co-worker tries to do this again, ignore him!