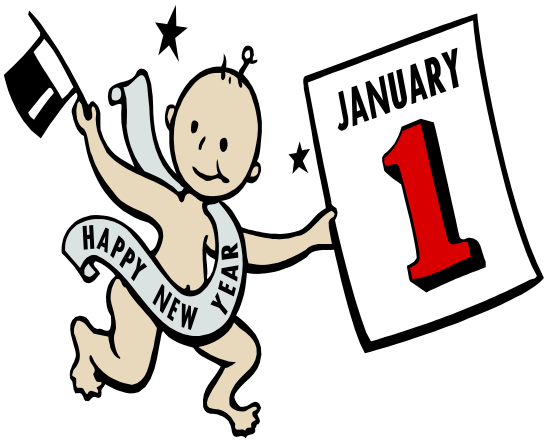


Regional Employees Association of Professionals

January 2017 News

WORKPLACE VIOLENCE:

A LITTLE LAW… A LITTLE LOGIC

It's hard to listen to the news nowadays without hearing about another incident of violence at the workplace. You should know that nearly 16 years ago – after September 11, 2001 -- our state legislature directed OSHA to develop guidelines for employers, to protect public employees in the workplace. Here is a summary of these guidelines, along with tactical suggestions for your defending yourself against violent behavior from members of the public, or co-workers, on the job...

First, CAL-OSHA requires your employer to have an Injury and Illness Prevention Program (IIP) which includes the following components:

- **Designation of a person or persons in charge of the program**
- **A system of assuring compliance by all employees including Management.**
- **A system of communicating to employees about workplace violence and encouraging employees to report any perceived danger. (Regular safety meetings in the workplace are advised.)**
- **Procedures for investigating injuries or illness that arise from an assault or *threat of assault.***
- **Procedures to correct unsafe conditions, practices and procedures with attention to protecting employees from retaliation for reporting threats.**
- **Training and instruction on identifying security hazards, measures to prevent assaults and procedures to follow if an assault does occur.**

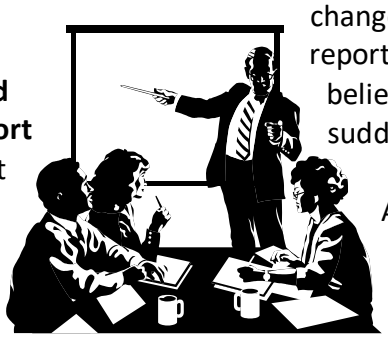
As part of this program, **employers are required to perform background checks on prospective employees in order to identify any history of violence.** These checks must be conducted in

accordance with privacy rights, but may include questions about convictions (not arrests or investigations) for a crime.

NEGLIGENT EMPLOYERS CAN BE HELD LIABLE…

As violence in the workplace has increased, employers have been sued, *and found liable,* because they knew, or "should have known," about the history of an unstable employee. So, agencies are increasingly asking prospective employees to sign release forms, allowing them to probe personnel files, and sometimes even hold conversations with previous employers. If the applicant refuses to sign such a release, he or she need not be given further consideration for the job.

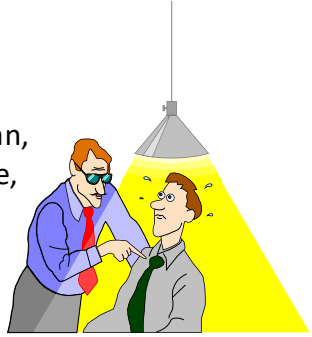
WATCH WHAT YOU SAY!



Managers and supervisors are supposed to be trained how to recognize and report both real and threatened violence. Part of this training is building employees' confidence that, in the case of a threat, a proper investigation *will be* conducted. Supervisors are supposed to educate employees about a "zero tolerance policy" for violent behavior on the job, so they will take threats seriously and report them.

Employers DO NOT need to follow progressive discipline practices in the case of violence. A menacing employee may be removed from the job *immediately,* and his "due process rights" can be provided LATER. While public employees have the right to a fair hearing (and must be paid UNTIL this hearing is provided), the Courts have consistently upheld terminations of violent employees, without regard to "constructive discipline" or prior work records.

All of these measures are good for employee protection, but BAD for the person who might not censure his speech very well. Be careful what you say when you are angry. One comment, made in the heat of the moment can, if it involves intent to hurt someone, mean the end of your job.



REPORTING AN APPARENT THREAT

Employees are often first to notice a co-worker's erratic behavior. Statistics show that most employee "eruptions" come from people who NEVER seemed violent in the past. Mental illness often manifests first in the workplace. All too often it's a "good, quiet" employee who begins acting out.

When some imagined last straw hits this person, it triggers an explosion, which surprises everyone. What investigators often find, however, when they interview co-workers, is that behavioral changes WERE present, which no one reported: agitation, arguments, paranoid beliefs, tardiness, sudden absences or sudden fixations with firearms.

Anyone who brings a weapon to work is an obvious threat. People who mutter threats against others shouldn't be ignored either; there's always a possibility that they may act upon them.

If you see a coworker exhibiting danger signals, you should bring this to the attention of the Human Resource Department's. The County is then obligated to conduct an investigation, and your involvement should be kept confidential.

WHAT HAPPENS TO THE PERSON YOU REPORT?

The County's response to the report of a threat is based on what an investigation uncovers. If the threat appears real or immediate, the employee will be placed on paid administrative leave until the investigation is complete. *This is not discipline;* in fact, this often gives the employee an opportunity to get some urgently needed help.

An employee who needs, and receives, medical help is very likely to be able to continue to work.

WHAT IF YOUR EMPLOYER FAILS TO TAKE YOUR REPORT SERIOUSLY?

Most employers are responsive to reports of potential violence; but some are not. If you believe that your legitimate concerns are not being taken seriously or, if you think that management is not following appropriate protocol, you should call your Association representative. **Your representative will make sure that Management pays attention to the threat -** and, if necessary, make sure your concern is on the record.

FALSE REPORTS…

It's up to **you** to decide when you think a co-worker's threats or unusual behavior merit further investigation. You should lean in the direction of being cautious; your report can be a benefit to everyone.

However, you should be careful that your report isn't motivated by less-than-helpful impulses (such as "getting even" with a co-worker.) Employees who are investigated often consider this a form of harassment, and agencies have the right to take disciplinary action against employees who make bad faith false accusations against others.

DISABILITY IS NO DEFENSE AGAINST DISCIPLINE FOR VIOLENCE

An employee working for the Orange County Superior Court had a recognized mental disability, bi-polar disorder, which caused her extreme mood swings. During the "manic" phase, she angrily yelled at co-workers, told two police officers that she was adding them to her "Kill Bill" list, and accused another officer of intentionally victimizing her.

The Court removed her from her assignment and her doctor placed her on medical leave. During the leave, the employee sent threats to co-workers in the form of alarming e-mails and phone calls, including statements to the effect that "God will ensure that you pay" for her mistreatment.

After several weeks, she was released by her doctor for return to duty. The Court put her on paid leave, conducted an investigation of the complaints, and sent her a termination notice. She then filed a complaint with the Department of Fair Employment and Housing (DFEH) alleging violation of both the FMLA and the Americans with Disabilities Act. She pointed out that she had never been given an "interactive meeting" under the ADA. The employer argued that she was not terminated due to her disability, but due to her unacceptable behavior.

The Court agreed that the employee's bad behavior was clearly caused by her disability, but did not agree that the Court was required to accommodate this behavior. The Court stated that the law allows employers to distinguish between disability-caused misconduct and the disability itself and ***"in the narrow context of threats or violence against co-workers"*** would NOT require the employer to run the risk of endangering anyone. (The Court pointed out, however, that the same distinction would NOT be made if the employee's psychological disability merely resulted in poor job performance or other difficulties, which could have been accommodated.)

Can the County Require You to Show Your Child's Birth Certificate?

Although it appears to be a violation of your privacy, you employer DOES have the right to request social security numbers and/or birth certificates for dependent children. The reason for this stems from regulations established by health care providers, including CalPERS. The underlying reason is that health care companies do have the right to see PROOF that they are insuring an employee's actual or adopted children, or children for whom they hold legal guardianship – and not a grandchild or other relative.

CalPERS specifically requires employers to keep birth certificates on file for all employees who have dependent child coverage. Employers who fail to maintain proper documentation can face penalties.

The requirement to provide this information is ONLY triggered by the employee's request for dependent child health coverage. So, if you feel strongly about maintaining the privacy of your child's social security number or birth information, you can avoid this intrusion by not applying for his/her insurance. Since many employers now charge employees for the full cost of dependent coverage, it might well "pay off" for you to buy your child a separate policy – or list him on your spouse's plan.

Is Sexual Harassment A Thing of the Past?

One of the biggest success stories in the world of employee relations has been the significant reduction of sexual harassment in the workplace. This development didn't come quickly or easily. Hundreds of lawsuits, brought by thousands of women, with settlements mounting to billions of dollars, resulted in legal changes that require employers to implement anti-harassment training and take harassment complaints seriously.

Most of this change has occurred only since the 1990s. Before this, it wasn't unusual for employees who were offended by lewd jokes, demeaning pictures, or even offensive personal remarks, to be told that they were "over-sensitive." And it wasn't unknown for a supervisor to hold an employee's job or promotion "hostage" to his sexual advances.

In 2015 fewer sexual harassment charges were filed with the Equal Employment Opportunity Commission than at any year since 1992 (when the county first began tracking these claims). However, some harassment persists, and some amazing cases still make their way into the court system. Take the example of Dr. Sagun Tuli, a female neurosurgeon who was awarded $1.6 million a few years ago, after tolerating years of harassment by her high-profile director – and years of retaliation after she reported it.

It seems that Dr. Tuli's manager was an "old school" doctor who didn't believe a woman could be a good surgeon, and took every opportunity to demean her. At a graduation dinner, he asked her to "get up on the table to dance so you can show them [the other female residents] how to behave." In front of others he said, "You're just a little girl, you know," and,

"Oh, girls can do spine surgery? Are you strong enough to use the hand instruments?"

When she complained to others that she was being left out of the normal rotation of doctors in her field, he said, “Our relationship is like that of lovers and you've cheated on me," with his hand on her arm. When she attempted to shake his hand at the end of the meeting, he gave her a long hug. When she applied for a position in spine oncology research, he told her not to bother, because he had "a guy in mind" for the job. Dr. Tuli finally brought her complaint to the hospital's chief medical officer, who discouraged her from filing a formal grievance. She filed anyway, and was then brought before a “credentials committee,” based on her supervisor’s suggestion that she was mentally imbalanced. She was suspended and the committee ordered her to go for a psychiatric evaluation. **Instead Tuli went to a lawyer.** She filed a sexual harassment suit, including an injunction which blocked the hospital from suspending her during the litigation. After a seven-week trial, a jury ordered the hospital to pay her $1 million to compensate for the sexual harassment, and $600,000 for the retaliation. She was awarded an additional $20,000 in damages against the department head personally, as well as $1.3 million in attorneys' fees.

That department head will never ask an employee to dance on a table again…

DOL’S Expanded Overtime Program is Frozen; Paid Sick Leave Plan, Put on Hold

In June, the Labor Department announced a big adjustment in the federal overtime law to enable low paid “managers” to be eligible for overtime. The new regs, which were scheduled to go into effect in December 2016, would have raised the “cut-off” for overtime from about $23,000 per year to $47,476 (or $913 a week.) Last month, however, a Federal judge in Texas issued an injunction against the Department’s ruling, saying it lacked the county to make this change. The injunction blocks the new regs from going into effect nationwide, until the Supreme Court can hear the case.

The last time the overtime regs were modified was in 2004, when the government broadened the definition of “exempt” employees, making it easier to keep employees out of the overtime system. The 2016 changes would have enabled nearly 6,000,000 people to earn overtime. Also last summer, the Labor Department announced a campaign to establish a national “Paid Sick Leave” program. While the Family Medical Leave Act currently allows employees up to 12 weeks of protected leave to care for sick family members, none of this time is paid. The U.S. is one of the few industrialized countries that provide no paid sick leave; the DOL program would have required employers with more than 50 workers to provide at least six weeks of paid time. *This initiative has been tabled, indefinitely…*

A Few New Labor Laws…

While the Feds are canceling improvements to the Fair Labor Standards Act, California is moving ahead with some positive changes. **These new laws became effective January 1st:**

Expansion of California Equal Pay Act

Last year, the Legislature passed the California Fair Pay Act which prohibits an employer from paying any employees wage rates that are less than the rates paid to employees of the opposite sex for "substantially similar work." The Act defines "substantially similar work" as work that is mostly similar in skill, effort, responsibility, and performed under similar working conditions. The law also prohibits employers from enforcing policies that block employees from disclosing or discussing wages, discussing the wages of others, or inquiring about each other's wages.

This year, the governor signed two new laws which expand upon the Fair Pay Act. AB 1676 prohibits employers from using prior salary history, by itself, to justify pay disparities amongst employees who perform "substantially similar work." The law is intended to challenge deep, widespread history of gaps in pay between the "men's" and "women's" jobs. It prohibits the use of prior salaries as a justification for paying one employee less than another. In a similar vein, SB 1063, prohibits an employer from paying any employees a pay rate which is less than rates of other employees, based on race or ethnicity, for "substantially similar work." This law basically extended the California Equal Pay Act from gender inequality to racial inequality.

Safety Regulations for Indoor Workers

Cal-OSHA, the county that that establishes workplace safety standards has a long history of enforcing safety rules for employees working *outside* in high temperatures: access to shade and water, rest periods, etc. This new law applies similar standards for "heat illness prevention" for indoor workers. In recognition of global warming, Cal-OSHA is now authorized to set health regulations for work spaces ranging from cafeterias to offices based on "environmental temperatures, work activity levels, and other key factors."

Legislative Update, Retired Public Employees Association

SB 923, goes into effect this month. It prohibits a health care plan or health insurance policy issued, amended or reviewed after this month, from changing its cost-sharing design, during the plan year – unless the change is required by state or federal law. This law applies even to individual and small group policies.

SB 923 ensures health care consumers are provided what they were promised when initially signing up for health care coverage. It prohibits a health care company plan from changing any cost requirements during the plan year. Consumers should get what they pay for and what they were promised.

The bill was supported by the Retired Public Employees Association.

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

Almost all 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 your employer's productivity. The amount of vacation you receive is negotiated by your Association, **but vacation is also a "vested benefit" under law.** This means that this time belongs to you and that any portion of it that you aren't able to use must be paid to you when you leave the County.

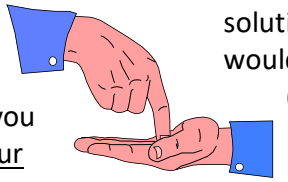
Most MOUs also contain a section about the conditions under which you take your vacation. This usually says something about "mutual agreement of the parties," or scheduling "with supervisor's permission" or "based on the needs of the department." In other words, you CAN'T just take vacation time whenever 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 can be used at one time. In still others, there are whole policies about vacation bidding and seniority.

These policies are all negotiable. Management can't simply "make up the rules" about how vacation may be used or scheduled – although they often do. (In truth, many managers don't *realize* that these policies are negotiable, while others DO realize this, but try to argue that they DO have this right as a matter of "operational necessity." They don't.) Many public agencies are still understaffed, which means that employees often have trouble scheduling time off. This means, for example, that people who used to be able to "take a day off" on an "emergency basis," might now be denied. Or, it might mean that someone who normally schedules two weeks off every June for a family vacation must now 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 the County can just dictate the terms. It's a complicated subject… Here are some answers:

First of all, vacation IS your negotiated benefit and you DO have the right to use it. Management can make you adhere to some rules about scheduling,

and they don't need to agree to your every request. B***ut 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 usually based on 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. 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.

Sometimes a grievance can result in the negotiation of an improved vacation policy. Or you may simply broach the issue in your next MOU negotiations. Either way, it is legitimate to remind management that vacation is a vested benefit and that Association members who are already working hard under stressful circumstances cannot be denied the right to use it – or spend it.

Did You Know?

Employees On Disability Are Eligible for COBRA

If you are off the job with an illness or injury, the Family Medical Leave Act requires the City to continue your medical benefits (including the City's contribution to those benefits) for at least twelve weeks. But what if the condition lasts LONGER than twelve weeks? Can the City discontinue your benefits?

The answer is NO. Under this circumstance, you have the right to continued benefits under COBRA: the same federal law which allows you to use of the City's medical plan, after you are laid off or terminated. COBRA enables you to purchase the same benefits you had as an active employee at no more than 102% of the actual cost.

Under most circumstances, COBRA benefits last for a maximum of 18 months. But under some conditions, such as disability, they may be continued for up to 29 months. Thus, if you or a family member become disabled either before applying for COBRA coverage, or within the first 60 days of being covered, you will be eligible for an additional eleven months.

This disability extension applies not only to the person who is disabled, but to the family members who are receiving COBRA benefits via the disabled person's plan. This benefit applies whether the disabled person has lost his job permanently or is off the job temporarily awaiting return to work. It's just another element of the federal safety net…

Questions & Answers:
Your Rights on the Job

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

Question: When I moved into my management position, I started holding my staff accountable, which meant taking corrective action with one employee. She has now filed FIVE different complaints against me, none of which are valid. I consider these complaints harassment, and they are causing me to have difficulty completing my

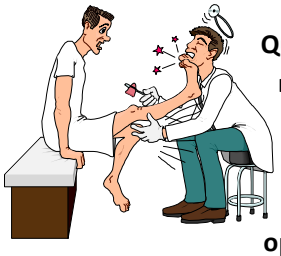
daily tasks. Do I have a potential case building?

Answer: Probably not; but *maybe.* The first thing you should know is that complaints of "harassment" from employees being disciplined are not uncommon. Your employee has the right to file complaints if she thinks she's being mistreated. Your employer isn't necessarily agreeing with her, but has the obligation to investigate. An investigation isn't discipline although it may feel like it.

Unless you are truly brow beaten, *or unjustifiably disciplined,* the County's requirement that you respond to repeated complaints isn't harassment. It's part of the job. (And, presumably you are higher paid than your subordinate because of this unattractive component of the job…)

If you ARE disciplined, and believe this is unjustified, you have the right to appeal (just as your employee has the right to appeal her discipline) – and unjustified or excessive discipline COULD BE considered harassment. Also, if responding to these complaints is taking up so much time that you can't do your job effectively, then you may have a legitimate complaint about workload. Your Management shouldn't put you in a situation where you're unable to do your work. If this is happening, you may want to call your Association Staff for help interfacing with Management to resolve this.

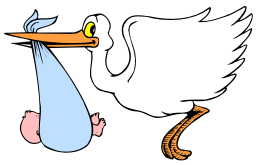
Finally, some employers have policies that employees who knowingly file unfounded complaints can be disciplined. You might talk to your Human Resources Department to see whether charges under this provision could be brought against your subordinate.



Question: I hurt myself on the job and had my own doctor pre-designated. The County has agreed that I'm under my own doctor's treatment, but they want to send me to THEIR doctor for a second opinion. Can they require this?

Answer: As if being hurt on the job wasn't enough, now the County is making you jump through their hoops to get medical help! Unfortunately, yes, they have the right to send you to their doctor for a separate diagnosis. This is a "heads up," though, that you may want to retain a workers' compensation attorney. The County might decide to dispute your claim and could interfere with your medical treatment. Feel free to call Association staff for a referral. Workers' compensation can be a "slippery slope"; you want to be sure you have good counsel!

Question: I'm on maternity leave and am planning to use my FMLA period (up to 12 weeks) for baby bonding. But the county just told me that I won't be paid for this! I thought that state disability pays for this… no?



Answer: First of all, congratulations! Unfortunately, FMLA time is unpaid and most public agencies don't participate in the State Disability Insurance Program. However, you do have the right to use all of your accrued

leave. Also, if your doctor determines that you are temporarily disabled after the baby's birth, and IF your employer has a local disability plan, you should be able access this plan.

Question: My supervisor asked me to attend a training program on my day off. I told him I couldn't and he asked "why." I told him it was "personal reasons," and he said this wasn't good enough. Do I have to give him a more specific answer?

Answer: It sounds as if you don't know that your supervisor could COMPEL you to attend this training on your day off. So, if you want his cooperation, you should probably provide him with an explanation (hopefully a good one) about why you cannot attend. Legally speaking, the best reasons would involve attending religious activities or the need to care for seriously ill family members.

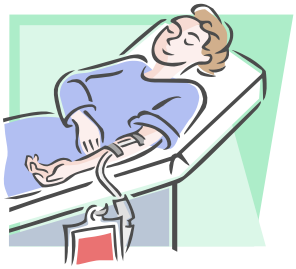
Question: I started my employment with the County 6 months ago and am now leaving for a better job. The County paid for a training class and my certification testing. Now they say they are going to deduct these costs from my final paycheck. Can they legally do this?

Answer: This depends… was the training class and certification test a requirement for the position you held? If so, they cannot require you to pay them back. Further, unless you were notified at the point of hire AND there is a provision allowing for this in your MOU or the County's Policies and Procedure, they cannot take money from you, out of your final paycheck.

Question: I am resigning from my job, under threat of termination. I wasn't really worried about the issue of medical care, but yesterday my son broke his arm at school. I need to know if I will still have medical coverage and how long this will be in effect.

Answer: Unless you worked out some specific arrangement, your medical insurance will be in effect until the end of the current month. If you're at the end of the month, it may be in effect for another 30 days after this. Talk to your HR Department to be sure.

This information should be given to you, in writing, when the terms of the resignation are finalized. You also need information about COBRA. COBRA is a law requiring your employer to allow you to use its medical plan (at your own cost) for a period up to 18 months.



PAID LEAVE FOR ORGAN DONORS

Did you know that California law require employers with 15 or more employees to provide paid leave for employees who donate an organ or bone marrow to another person? The paid leave period is up to 30 days per year for an organ donation and up to five days for a bone marrow donation.

The law permits employers to require their employees to use up to two (2) weeks of their own accrued paid leave (including vacation time) for organ donation and up to five (5) days' accrued paid leave for bone marrow donation, before the employer must provide paid time. Healthcare benefits must be maintained during this period, which cannot be considered a break in service.

Employers are required to reinstate employees after organ donor leave, unless the job would not otherwise be available (for example, at the end of a temporary project or in the case of a reduction in force.) Finally, these leaves do not count against Family Medical Leave time.