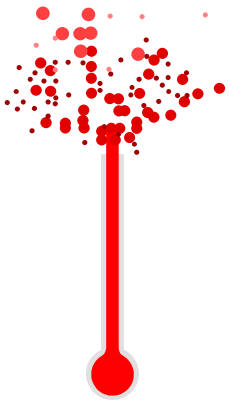
Regional Employees Association of Professionals May 2017 News

Drugs, Alcohol & Your Public Job

In the late 1980s, during a wave of public hysteria over drunken oil rig crews and drug-addled airline pilots, Congress passed the "Drug Free Workplace Act." This law was immediately used by many public agencies as the basis for enacting (or attempting to enact) random, unannounced drug testing. In reaction, unions filed suits to defend their members' constitutional right of privacy. In California, the most important of these was *Glendale City Employees Association vs. City of Glendale,* which established that public employees could *not* be randomly tested *UNLESS* they held "safety sensitive" positions or "top secret" national security clearances. The Court concluded that "the collection and testing of urine infringes upon protected privacy interests […] and that the validity of a drug testing program must balance the privacy interests of the employee against the interests promoted by the search."



The Court's "balancing test" agreed that the need for public safety outweighed the right to privacy, but did *not* agree that a city's concern with its public image outweighed that privacy right. The Court suggested that cities could, if they wished, conduct a job-by-job review of all its classes to determine which ones were "safety" sensitive (in other words, which would result in 'danger of disastrous proportions' to the public if the employee on duty had an "impairment of judgment") but, absent such review, could NOT randomly test.

Negotiated Substance Testing

The *Glendale* decision left public employers with the problem of needing to negotiate with their employees if they wanted to implement drug-testing programs. When they invoked the "Drug Free Workplace Act," most unions agreed to something called "Reasonable Suspicion" testing. Reasonable suspicion has no actual legal meaning in the workplace. Many such policies simply state that an employee may be tested when a supervisor believes he is "suspicious" – in other words, if the supervisor believes that the employee's eyes look strange, or his thought process seems cloudy or he emits an unusual smell.

Associations that opposed such fuzzy definitions were accused of trying to defend potential felons against appropriate punishment. In the best of circumstances, these policies have come to

require corroboration of a supervisor's "suspicion" by other management personnel before an employee can be forcibly tested. Under the worst circumstances, involuntary testing is used by bad supervisors as a form of humiliation and coercion.

The funny thing is that employees rarely asked what the "Drug Free Workplace Act" really says. Basically, it says that public agencies, which employ known drug-related felons, shall be in danger of losing federal grant money. Most counties don't use a lot of federal grant money, nor employ many known felons.

Random Testing for Safety Sensitive Jobs

Not long after the *Glendale* decision, the federal Department of Transportation established guidelines for the random testing of heavy vehicle drivers. Although local agencies were required to cooperate with the broad strokes of the law, they were ALSO required to negotiate with their employee organizations prior to implementation. Basically, such policies identified which job classes would be subject to random, quarterly testing; how the testing would be carried out (including how the testing agency would protect against mishandling of samples); how an employee who tested positive would be treated, etc. In the late '90s the law was modified to ensure that someone who tested positive for drugs or alcohol did not drive a vehicle again until he had gone through some further testing.

The DOT mandate leaves it up to the employer to decide what discipline will be meted out to an offending employee. Over the years, some patterns have developed in the way that cities and water counties handle offenders – hence the arrival of the "last chance agreement." In some cases, if an employee has been found "dirty" by a substance test, but has been a good employee and has not committed another violation in connection to drug or alcohol use, he is given the opportunity to save his job by agreeing to a "last chance agreement" with some nasty contingencies: agreement to be randomly tested at any time, agreement to go to expensive treatment and/or counseling programs and agreement that, if s/he is found to show any evidence of drug/alcohol use while on duty again, s/he waives the right to a hearing and will be immediately terminated.

This last condition has been challenged legally because it violates an employee's constitutionally-based "Skelly" right to a full hearing prior to the imposition of major discipline. But most employees will agree to it, and it does seem to have an effective deterrent effect. In fact, there doesn't seem to be any doubt that while the DOT testing program *IS* an incursion on employee privacy, it has also gone far to ensure that bus drivers, truck drivers, and heavy equipment operators are almost always sober while driving.

Excessive Punishment…

Punishment for drug- or alcohol-related infractions, if they go beyond a mere "dirty" test, is almost always severe, and isn't limited to vehicle drivers. Employees who have vehicle accidents or cause other losses to the County while under the influence can usually expect to be fired. Employees caught *in possession* of drugs or alcohol on the job are usually fired. The same goes for trafficking of any kind of substance, even when this is not on the job – and even though employees are not supposed to be held liable *on the job* for their activities *off the job.* The concept that non-sworn employees are somehow "representatives of the county" in their personal life still hangs heavy over employees charged with drug-usage, although the courts have struck down this concept when applied more broadly.

The fact that marijuana is now a legal drug is largely irrelevant, at least for the moment. Marijuana is still a "controlled substance" under

federal law, and almost all public agencies have rules against ANY KIND of inebriation on the job.

People who are given a second chance are usually long-term employees with good records who manage to convince the County that they recognize the error of their ways and have medical addiction problems for which they sincerely apologize and desperately need their employers support to conquer.

What Does "the Right to Privacy" Mean?

Although most employees cannot be compelled (under most circumstances) to provide urine or blood samples for substance testing, they CAN be compelled to cooperate with workplace inspections. There is very little privacy in a public work place. Your desk, your locker, your computer can all be searched without your knowledge or agreement. The employer can videotape you (except in restrooms and changing areas) without your knowledge.

You can also be compelled to answer questions about criminal activity by yourself or others, as a condition of employment. You do have the right to representation, **but if you refuse to answer at all, you *can be* fired.** Public employers who compel employees to answer questions about topics that could involve criminal penalties are simply required to tell the employee that questions answered in this administrative setting won't be provided to criminal authorities.

PENDING NEW LAW: SB 285:
Public Employers Cannot Discourage Union Membership

SB 285, introduced by Senator Atkins (D-San Diego) would amend the Government Code for all public employees in California by prohibiting an employer from "discouraging or deterring" employees from becoming members of an employee organization. PERB would have jurisdiction to enforce it. This bill is supported by all of the public sector unions that have taken a position and it is based on a concern that the Supreme Court may soon decide that Agency Shop unconstitutional. The bill is expected to pass.

Here's a Good Question…

I'VE BEEN DIAGNOSED WITH CARPAL TUNNEL SHOULD I FILE A WORKERS' COMP CLAIM?

Question: My doctor diagnosed me with carpel tunnel syndrome due to repetitive motions at my job. I've never asked for workers' compensation and only know what I've heard from coworkers. I'm worried that if I file, it could affect my performance and my capabilities in the eyes of my supervisor. Also, I worry that I could be forced to see specific

doctors that might impose procedures or surgeries I may not agree with, that I could endanger my job if I have to go to appointments or have procedures that keep me out of the office for long periods of time, and I am worried that I might not have enough sick leave to cover the ongoing therapy or procedures or recovery time.

On the other hand, my pain is increasing every month and it's definitely caused by my job. My doctor is now sending me to a specialist for diagnosis and treatment. I'm doing this with my own insurance and on my own initiative. Could you please tell me whether you think I should file for workers' compensation and how will it affect the issues I've raised here.

Answer: You should never avoid filing a legitimate workers' compensation claim. Filing a claim doesn't necessarily mean you will take time off work, but it does mean that your job is protected (and injury cared for). If you are truly hurt, you may need to take time off the job. ***This will occur whether you file a workers' compensation claim or not.***

Filing a claim simply notifies the County that you've been hurt. (And, if you fail to do this at the beginning, your claim is more likely to be challenged at a later date.)

With a "cumulative trauma," such as yours, you may be able to work *now,* but may need modified duty or time off the job if the condition becomes worse. Seeing a doctor early will help PREVENT IT from becoming worse. Further, if you do need to take time off the job, your workers' compensation notice ***protects you*** against loss of income during this period. It also guarantees at least 2/3 of your pay for up to 24 months. It also guarantees medical care (at least for the injury) and a financial settlement, if the injury turns into a permanent disability.

RETALIATION

If you're concerned that your job could be threatened in retaliation for filing a claim, you should know that it's illegal for your employer to punish or fire you for this. The California Labor Code Section 132(a) prohibits this kind of discrimination. All public employers are used to handling workers' compensation claims. This is just a matter of business. Retaliation for workers' compensation claims is uncommon these days.

On the subject of medical care, you have complete choice about the treating physician if you pre-designate your doctor. This means providing the County, NOW, with the name of the doctor you'd want to see to if you were hurt. Your Human Resources Department should have a form for this.

If you haven't pre-designated your doctor, the County may choose your medical provider ONLY for the first month. After that, it is the employer's duty to notify you about their Medical Provider Network (MPN), which is a list of pre-approved doctors from which an injured worker can select. If you have a workers' compensation attorney, s/he can send you to a good doctor for this kind of injury. HOWEVER, you do NOT need an attorney for most workers' compensation claims. You DO need an attorney if your claim is denied or if your injury turns out to be so severe that you are likely to lose your job. A good lawyer will make sure you get the best doctors AND the highest settlement on any permanent disability. A good lawyer will NOT exaggerate your injury in a way that will unnecessarily jeopardize your job.

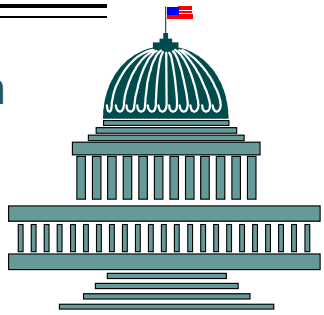
On the question of your employer's view of you, this is more likely to be affected by your actual injury (and possible work limitations) than by filing a workers' compensation claim. If you have tendonitis and cannot type, this WILL affect your assignments. If

your doctor says you need surgery or physical therapy, this WILL affect your time off the job. This will happen whether you file a workers' compensation claim or not. But at least you'll receive PAY and medical care while you're off.

AVOIDING CONFLICT WITH YOUR EMPLOYER

The best way to avoid any risk of conflict with your supervisors when you have a work-related injury is to maintain good, cooperative communication with them. Although you are protected by the Family Medical Leave Act (for some time off) and the Americans with Disabilities Act (if your job needs to accommodate your medical condition) an accepted workers' compensation claim is more potent. In general, employers feel more responsible for employees who are hurt on the job than those whose injuries occur in their own private lives. So, *in general,* they are less likely to threaten, retaliate against, or terminate an employee with a workers' compensation claim. Filing a workers' compensation claim is a matter of normal business in public agencies. It doesn't mean that you are a trouble-maker; it means that you are hurt BECAUSE OF THAT JOB, and expect your employer's assistance with the recovery. Most people who are hurt report the injury, get medical care, and continue to do their jobs until they retire.

Landmark Ruling Extends Discrimination Protection to Cases Involving Sexual Orientation



On April 4, 2017, the 7th Circuit Court of Appeals issued a "game changer" legal decision. The court extended protections under Title VII of the Civil Rights Act to discrimination on the basis of sexual orientation. The case heard by the court, *Hively v. Ivy Tech Community College of Indiana*, was filed by Kimberly Hively against her former employer which, she alleged, denied her promotions and did not renew her contract because she was a lesbian.

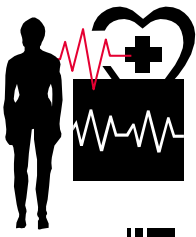
Judge Diane Wood wrote the majority opinion stating: "Viewed through the lens of the gender non-conformity line of cases, (plaintiff Kimberly) Hively represents the ultimate case of failure to conform to the female stereotype […] she is not heterosexual." Further, the judge wrote, "[I]t is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."

This decision overrules decades of precedent that not only excluded sexual orientation from Title VII protection, but also excluded gender identity and transgender status. The significance of this ruling is there will no longer be a distinction between discrimination on the basis of gender and discrimination on the basis of LGBT status.

Report from the Retired Public Employees Association

Maintaining security for all California retirees remains one of the most important issues for the RPEA. As a result, we are continuing to monitor bills before both state and federal legislatures that are significant to current and future retirees. We have specifically taken a stance against six bills proposed by Senator John Moorlach.

Most of these bills have the goal of altering, limiting or destabilizing public employees' pension programs. Three of these bills are intended as actual amendments to the State Constitution! This can only be accomplished by legislation or by initiative, but these changes must be adopted by a vote of the pubic at a statewide election. SCA 1 and SCA 8 are crucially important:



SCA 1: Regarding Retirement Savings Plans. California Secure Choice Retirement Savings Program (SB 1234) was signed into law in 2016, which provides access to a retirement plan for those who would otherwise not have access. This amendment prohibits taxpayer funds from being used to pay for this program.

SCA 8: Regarding Public Employee Retirement Benefits. The reduction in retirement benefits would eliminate the commonly used "California Rule." This rule says that the pension offered at hire becomes a "vested right" that can only be cut when it is met with new and comparable benefits. This rule has been in effect for over sixty years.

Even if these amendments are chaptered, they would still have to be approved in a statewide election. Though many constitutional amendments have been proposed in the past, the last one that was approved by popular vote was Proposition 162 in 1992. RPEA will continue to watch the progression of these bills.

For more information regarding retiree pensions and health benefits, check out our website www.rpea.com.

Questions & Answers:
Your Rights on the Job

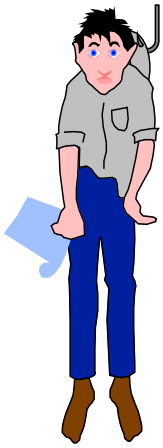
Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a work-related problem, feel free to talk to your Board Rep or contact CEA at cea@cityemployees.net or 562-433-6983.

Question: I'm on our Association Board and have a member who has been falsely accused of sexual assault by an employee who only worked here a short time. She is also suing her

supervisor, the Department Director, and the State of California. I want to know if the County is responsible for representing our member if this ex-employee sues him. Also, does he have the right to have a representative when he is interviewed by the County lawyers?

Answer: Yes, the County is obligated to defend your member UNLESS it believes that he actually did commit the assault. The County would be relieved of this responsibility to "indemnify" your member if his actions had been "outside the scope of employment" – which would be the case if the accusations were true.

Your member DOES have the right to representation if the questioning about this incident could lead to possible discipline. However, if the employee is called into questioning in response to the ex-employee's complaint against the County, the County would represent him in any meeting with an investigator.



Question: My co-worker was let go just before the end of his probation period. Does he have the right to challenge this dismissal?

Answer: In general, no. An employee on a probationary period is essentially an at-will employee. However, your co-worker cannot be terminated for any reason barred by state or federal law. So, he MAY have the right to appeal if (1) he can show that his termination was in retaliation for union activity (such as serving on a bargaining committee or filing a grievance), (2) he was a whistleblower or was terminated shortly after testifying on behalf of a co-worker against the county, or (3) the termination shows evidence of discrimination on the basis of gender, race, ethnic

Question: I want to promote to a supervisor's position, and am being told this requires that I get a T-3 (water) certificate. I am taking a class to prepare and will take this test soon. But it's a lot of work and I know for a fact that the previous supervisor did NOT have this Certification. Do I have grounds for a complaint?

Answer: The employer does have the right to hire employees who meet certain qualifications, as found on the job description. However, the job description should NOT be modified without negotiations between the County and the union. Even if a job description must be modified in order to comply with the law, as is often the case with water certifications, the union has the right to negotiate over aspects of the change, such as the pay level.

In this case, you probably don't know enough about the previous supervisor's circumstances to have the basis for a complaint. For example, did the certificate requirement change *after* he took the job? (Was he "grandfathered in"?)

Or, did your Agency fail to extend the opportunity to meet and confer to the union, in which case, it could be compelled to now. Or it could even be that the County didn't know that he lacked the certificate.

Either way, although you MIGHT have grounds for a complaint, it probably wouldn't help your cause. If the state now requires the holder of this job to have the T-3 certification and you are going to acquire it, you have a good chance of getting the job.

Raising questions about your predecessor's qualifications would only be looking backward, and would probably not endear you to the people who are make hiring decisions.

QUESTION: I was sexually harassed by a co-worker to the point of being made ill and losing time from work. Eventually, I filed a worker's compensation claim, which was accepted. I was off the job for two months. Now I'm back on the job, but I still have to work with the person who was harassing me! There is a lot of tension. Is there anything I can do?

ANSWER: Is the harassment continuing or are you just uncomfortable because of the previous problem? When your original claim was filed, the manager should have held a meeting with the person to discuss your complaints and the specific things he did that qualify as sexual harassment. The manager would then instruct the person on how to behave in the future and the possibility of discipline if they did not. The harasser often chooses a strategy of ignoring the claimant because if there is little or no contact, then the possibility of subsequent charges is reduced. Although this can cause tension between the parties, usually time and good behavior on the part of both employees solves the problem.

You do **not** have to work with someone who is continuing to harassing you. Your employer is responsible for providing a good working environment, and can be held liable for even greater expenses than your worker's compensation claim if you continue to be violated. If the harasser is still exhibiting overt behavior, which makes you uncomfortable, you should bring it to your manager's attention immediately. You should be removed from contact with one another (and he, not you, should be the one who is moved).

Could the County Videotape Me While I'm On Sick Leave?

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

Answer: The answer is complicated. Under HIPAA, it is illegal for your employer to ask about the *specific* nature of an employee's illness or injury. It's also not legal for the County to call your doctor without your permission.

However, if an employer suspects that an employee is *committing fraud* by claiming to be sick when he is not, it *does* have the right to investigate. Such investigation can definitely include covert surveillance. This is not very different from the County's right to conduct surveillance if they think someone is committing worker's compensation fraud.

Most public employees are overwhelmingly honest, but every once in a while, there is someone who takes advantage of the system. The County not only has the right to investigate, but to take disciplinary action