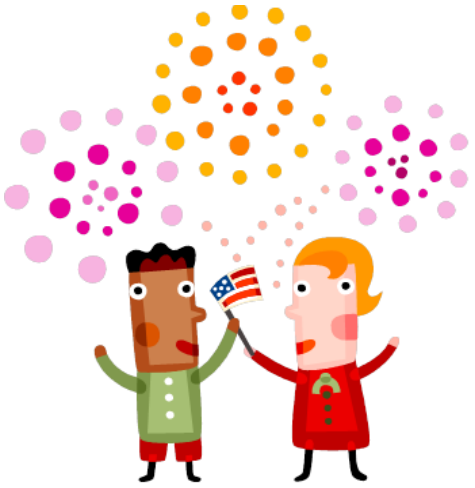
Regional Employees Association of Professionals July 2017 News



What is the "California Rule" for Public Employee Retirement … And Why is it in Jeopardy?

The "California Rule" is all about the right of public employees to retire with the pension plan they were promised when they first started their employment. The concept is that you "earn" your retirement benefit by working, and that these "earnings" can't be taken from you by a policy change – even a negotiated policy change -- during the course of your employment.

This "rule" arose from a 1955 California Supreme Court decision (*Allen v. City of Long Beach*) in which one employee challenged an amendment to the City's retirement plan which raised his contribution from 2% to 10% of salary. The Court held that the amendment was unconstitutional because it impaired the retirement contract already established with the employees. This decision became the *California Rule*, and established a "standard" by which future legal challenges on the subject of retirement could be measured. Basically, the Court said:

> ***An employee's vested pension rights may be modified, as long as the changes are necessary to maintain the integrity of the system, and the modifications are reasonable. BUT, to be "reasonable," changes must:***
> ***1) bear "material relation to the theory of a system and its successful operation" and***
> ***2) result in disadvantage to employees are accompanied by comparable new advantages.***

In the Long Beach case, there were no comparable new advantages the employees received in exchange for paying a much higher portion of their retirement benefit, nor was there any evidence that the changes were related to the integrity of the system. So the Court denied the City's right to make this change.

This "California Rule" remains in effect today; employers cannot modify any pension-related contract with their employees unless 1) they provide evidence that the change is necessary for the solvency of the system AND 2) (if there's a union present) they negotiate a benefit of equal value to the loss caused by the change. This doctrine has been tested repeatedly:

- In 1958, in *Abbott v. City of San Diego* the court told the City that it could NOT amend its charter to increase its Police and Firefighters' contributions from 6% to 8%.

- In 1961, in *Wisley v. City of San Diego* (Cal. App. 1961), the Court struck down a similar change which would have increased the general employees' contributions from 2% to 8%.
- In 1975, in *City of Downey v. Board of Administration* (Cal. App. 1975), the Court of Appeal found that an increase in employee contributions WAS constitutional because it was accompanied by increases in overall retirement benefits.
- In 1983 in *Pasadena Police Officers Ass'n v. City of Pasadena,* the Court held that an amendment that put a cap on cost of living adjustments in the Police Officers pension was unconstitutional because it impaired the benefits of both previous and future retirees, without any compensatory changes.
- And in 1991, in *Legislature v. Eu* (Cal. 1991), the California Supreme Court heard a challenge to Proposition 140, an initiative which would have amended the California constitution, had it not been overturned. In this case, the Court determined that state legislators couldn't lose their retirement benefits retroactively, *but the plans could be modified for new legislators.*

2017 MARIN COUNTY RULING: A GAME CHANGER?

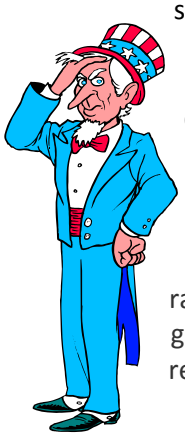
Today, however, the California Rule is under attack. In 2012, residents of San Jose voted at the rate of 69 percent to slash the benefits of city employees. The following year, citizens of San Diego supported a similar attack on their City employees, at the rate of 70%. In both cases, the Courts found that the new law violated the California Rule. **It's clear, however, that every time the public has had an opportunity to weigh in on YOUR benefits, they vote to SLASH them.**

In 2013 the Governor and Legislature responded to this pressure by passing PEPRA, the Public Employee Pension Reform Act, which reduced benefits immensely for all future California government employees, and also included some big "anti-spiking" measures. The Marin County employees sued, arguing that PEPRA impaired the contractual benefits of county employees by no longer allowing accrued leave, bonuses, severance pay, and uniform allowances to be counted as "base pay" for retirement purposes. The Court found AGAINST the union, saying that PEPRA's anti-spiking provisions were both legitimate but good. Justice James Richman, who authored the decision, said

> **"[W]hile a public employee does have a 'vested right' to a pension, that right is only to a 'reasonable' pension — not an immutable entitlement to the most optimal formula of calculating the pension….** The Legislature may, prior to the employee's retirement, alter the formula, thereby reducing the anticipated pension. So long as the Legislature's modifications do not deprive the employee of a 'reasonable' pension, there is no Constitutional violation."

The case is now heading to the State Supreme Court. If the Court upholds the lower court's decision, this will be a game changer. The "California Rule" will be seriously eroded.

Legal decisions are not supposed to be influenced by the mood of the public, *but they often are*. Because so many agencies are straining under rising retirement costs, it is very likely that the Supreme Court will uphold PEPRA's anti-spiking provisions. CalPERS has estimated that this one reform will save $29 to $38 billion over the next 30 years. Justice Richman specifically referred to the "soaring pension debt" after the financial crisis of 2008-09 and a State Commission report of 2011 (which urged cuts in pensions to *current* workers) as major contributors to his decision.



The attorney for the Marin County case warns that this decision is the edge of a slippery slope, signaling huge losses for public employees. "In California," he says, "the courts have held that even though the state can terminate a worker, lower her salary, or reduce her other benefits, the state cannot decrease the worker's rate of pension accrual as long as she is employed." In the future, however, it may no longer be required that government provide "reasonable" pensions, or that an agency implementing a change in its employees' retirement plan "provide comparable benefit."

WHAT'S THE DIFFERENCE BETWEEN A GRIEVANCE AND DISCIPLINARY APPEAL?

A grievance is an action initiated by an employee (or a group of employees or a union as a whole) aimed at correcting a violation of employee rights. This usually means a violation of the Union Contract (MOU) but it could also be a violation of state or federal employment laws, which are incorporated in your MOU, or a violation of your employer's Personnel Policies or even departmental policies.

The violation could, for example, be the Employer's requirement that you perform the work of a higher class without proper pay, or that you work overtime but receive only "comp time" in payment, that you work with high voltage equipment without the appropriate safety equipment, or that your whole bargaining unit "go on furlough" without having a chance to vote on this.

In a grievance, the employee or Union is the "moving party," which means that they hold the "burden of proof" to show that there really IS a violation. Most grievance processes start with an informal discussion, then allow the employee to "move up the chain of command" until the problem is fixed. If the problem *isn't* fixed by the Agency, then the Union can take your grievance, in the form of a "unilateral change" complaint to the State Public Employment Relations Board (PERB). In most cases, you may be represented by staff throughout the grievance process.

PERB is a third-party hearing board with the authority to compel the Agency to correct your violation which, once it goes outside the Agency's system, is identified as an un-negotiated change in your MOU.

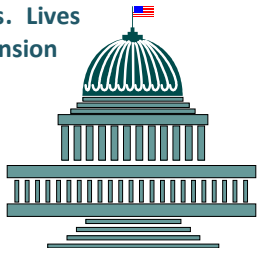
A discipline case, on the other hand, is an action initiated by the employer to punish an employee for doing something wrong. In a discipline case, the burden is on the employer to prove its case against the employee. The employee is considered innocent until proven guilty.

The process for appealing major discipline (substantial suspension, demotion, reduction in pay or termination) is established in the state "Doctrine of Skelly Due Process." This provides for a hearing BEFORE the discipline can be imposed, and the top step of the appeals procedure must be "a full evidentiary hearing before a reasonably impartial hearing officer."

If the discipline is "minor" (generally, an oral or written warning or letter of reprimand) there is no appeals process established by law. However, there is usually one negotiated between the County and your union, located in your MOU or Personnel Rules. Appeals of minor discipline rarely involve access to an "impartial, evidentiary hearing."

PERB DOES NOT hear individual employee's disciplinary appeals. It hears claims of unfair bargaining or contract violations *brought forth by unions.* Individuals have access to PERB only in one instance: if the individual claims to be a victim of retaliation for exercising his "protected activity rights," the right to participate in union activity. Union activity may be serving on a Board or Bargaining Committee, or even filing a grievance. **It's against state law for the Agency to retaliate against employees for exercising their right to file a grievance or to serve as a union activist.**

NEWS FROM THE RETIRED PUBLIC EMPLOYEES ASSOCIATION



As the legislative year progresses, RPEA places a priority on bills that impact retirees and active public employees. Lives are forever changed by the bills that are passed – or vetoed. It is now more important than ever to push for pension security and reform.

The RPEA is currently focusing on a few politicians whose actions could damage our members' interests. Senator John Moorlach has authored six bills that would diminish public employees' retirement programs. We have written to the Senator directly, outlining the problems of each of each bill, and provided opposing testimony in Sacramento. We have succeeded in deferring three of these bills (SB 32, SB 454 and SB 681,) although they may be acted upon again in January. The other three (SCA 1, SCA 8 and SCA 10) would directly amend the California Constitution, and are still on the agenda. The one that could most directly affect pension security is SCA 8.

SCA 8 seeks to reverse the 62-year-old "California Rule," effectively doing away with the concept of retirement "vestedness." It gives the Legislature the ability to modify benefit formulas, at will. It is set for hearing before the Senate Public Employment and Retirement Committee, and if it passes, will pave the way for other bills that undermine the security pension holders. RPEA will remain at the forefront of fighting against them.

RPEA is a statewide association representing all public agency retirees. For more information regarding retiree pensions and health benefits or to learn more about the Retired Public Employees' Association of California check out our website www.rpea.com.

Could I Be Fired for Using Marijuana?

In just a few months, it will be legal for adults in California to possess, cultivate, and use marijuana. Soon state-licensed stores will begin selling pot purely for adult recreation. Many cities are, in fact, looking for big boosts in revenue from the new industry.

But what does this mean for your job? Will you and your friends be able to gather for Friday night tokes – instead of drinks – without worry about on-the-job consequences? Will you be able to light up at lunch time? Will drug testing become a thing of the past?

The answer, in almost all cases, is NO! Although marijuana will be decriminalized, employers will still be able to ban its presence in the workplace (just as they do with alcohol) -- and employees may still need to be EXTREMELY careful about marijuana use, *even when they are not on the job.* Here's why:

How Do We Know When Someone is "Impaired"? The new law explicitly allows "both public and private employers to enforce workplace policies pertaining to marijuana." Although marijuana and alcohol may be equally legal for adult use, most employers have strong rules against "impairment." If someone is impaired by alcohol, this is fairly easily to detect and verify. If a blood test shows a certain level of alcohol in the system, he can be considered "under the influence." If someone consumes or smokes marijuana, on the other hand, this may show up in a test 3 weeks later. He may or may not be "impaired," but if he tests positive, he can still be considered under the influence. *The consequence of this is that ANY evidence of marijuana in the system may be grounds for discipline.*

Despite the new law, very few public agencies have rescinded their ("zero tolerance") substance policies. This means that you may be subject to dismissal for consuming marijuana, *even if it's on your own time and/or in your own home.* In other words, **before you partake, you may want to know what your employer does or doesn't allow.**

Cannabis is still considered a Schedule 1 Drug by the Federal Government, and the current administration shows no signs of becoming tolerant toward the residents of states where it has been legalized. This is one of the justifications public agencies point to in order to support their "zero tolerance" policies.

Further, the Department of Transportation still *requires* that bus or truck drivers to be randomly tested and, that employees with "dirty" tests be barred from performing their jobs for up to a year. If you drive a heavy vehicle, and marijuana shows up in a drug test, you probably will still lose your job.

Both private companies and local governments can still drug test job applicants for marijuana and refuse to offer employment to someone who tests positive.

But what about people with a prescription to use marijuana for a medical condition?

In California, there are no laws protecting the rights of medical marijuana patients in the workplace; nor is there any law requiring accommodation for medicating on the job or protection from termination. In fact, the opposite is true: the Supreme Court has ruled that companies can fire workers who fail substance tests, even if they present evidence of a doctor's recommendation for legal medicinal use.

Four states (Arizona, Delaware, New York, and Minnesota) offer limited anti-discrimination protection for people with medical prescriptions for marijuana use. In these states, employers must demonstrate impairment on the job rather than just a positive test, as the basis for termination. *California is NOT one of these states…*

What about public employees, specifically?

Most governmental agencies have established their right to test employees if there is "reasonable suspicion" of alcohol or drug use. **If there is a union present, these policies can't be implemented or changed without bargaining**. A State Supreme Court decision in the early '90s established that governments **DON'T** have the right to randomly test employees (unless they are heavy vehicle drivers or hold "safety sensitive" positions.)

So, if you are a public employee in the Golden State, be advised that marijuana usage could literally impair your job stability -- despite our State's liberal new drug laws. You may still be subjected to drug testing if you are a job applicant, if you drive a truck or bus, or if you show signs of "impairment." You may be subject to discipline, whether you are "impaired" or not -- and even if you have a doctor's note allowing marijuana use for medicinal purposes.

Is Alcoholism a "Workplace Disability"?

Legally-speaking, alcoholism may be considered an illness. Under the Americans with Disabilities Act (ADA) it may be recognized as a disability, triggering "workplace accommodation." However, this does NOT mean that employees who are found to be under the influence on the job may be protected from discipline. Decisions under the ADA dealing with individuals with "substance-related" illnesses are complex:

If an alcoholic is otherwise able to perform the essential functions of his job, he or she may request a "reasonable accommodation" based on the illness. This might be a modified work schedule, so he can attend AA meetings, or time off for a stay at a residential detox center. The employer is required to provide such accommodation unless it creates demonstrable "hardship."

On the other hand, the employer is not required to tolerate poor performance or misconduct from an alcoholic employee -- particularly if this conduct would be punished if committed by someone without the disability. If alcohol use adversely affects job performance, contributes to misconduct, or results in mistreatment of supervisors, co-workers, or customers, an individual's status as a "disabled person" doesn't shield him from discipline. (Conversely, though, an employer may not use the disease to treat a worker more harshly than a non-alcoholic employee, for the same or similar conduct.)

What Is "Discrimination?"

For nearly 200 years, our government has struggled with the question of discrimination: how and when the government should intervene in the world to insure "equal treatment under the law." The results of this struggle have been a series of laws in all arenas -- voting rights, education, housing, and most of all, employment – to insure that people are not treated differently for illegitimate reasons. In the world of employment, laws now prohibit "discriminatory practices" based on race, sex, religion, national origin, physical disability, age, and -- most recently -- sexual orientation. People who meet these criteria may be considered members of "protected classes." it is illegal to treat people differently in their jobs because they are members of these classes.

The courts have found that "discriminatory practices" may occur in any aspect of employment: hiring, promotion, job assignment, termination, or compensation. Harassment *may be* an example of discrimination, but not all harassment is evidence of discrimination. Thus, it is illegal not to hire someone because he is over 40 years old, not to pay someone equally because she is a woman, or not to offer a job because the applicant is in a wheelchair. But it is not necessarily illegal for an employer to treat people differently on the job. People who believe they have been victims of "disparate treatment" or a "hostile work environment" may have the right to sue over this, but *unless they are members of a protected class*, they will not have discrimination claims.

The 5th and 14th Amendments

The concept that individuals should be protected against mistreatment because of their minority status derives from the Fifth and Fourteenth Amendments. The 5th Amendment says that the federal government should not deprive individuals of "life, liberty, or property," without due process of the law. The 14th Amendment prohibits the states from violating individuals' rights of due process and equal protection. The 14th amendment prevents *governmental employers* from discriminating against employees, former employees, and job applicants because of their minority status. They also have equal access to "due process," which means that public employees have the right to a fair hearing process before they are deprived of the "property right" to their jobs.

Title VII and Equal Pay

The Equal Pay Act, passed in 1963, was one of the earliest employment discrimination laws. It prohibits employers from paying different wages, if the difference is based on sex. It says that where people perform work that is equal in "skill, effort, and responsibility and performed under similar working conditions," they must be provided equal pay.

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, sex (including pregnancy and childbirth) or national origin. It makes it illegal for employers to discriminate in hiring, discharging, compensation, or "terms, conditions, and privileges of employment." It prohibits employment agencies from discriminating in the hiring or referring applicants, and it prohibits labor unions from limiting membership on the basis of race, color, religion, sex, or national origin.

The Civil Rights Acts, amended in 1993, ensures all persons equal rights under the law, and outlines the damages available to people who take legal action under the Civil Rights Act, the Rehabilitation Act of 1973 or the American with Disabilities Act of 1990.

Age and Disability Discrimination

The Americans with Disabilities Act (ADA) was enacted to prevent discrimination against individuals with disabilities. This not only includes equal hiring, but protection for employees who become disabled in the course of their employment. The ADA requires employers to "reasonably accommodate" disabled employees, rather than terminating them.

The Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating on the basis of age. An employee is protected from discrimination

based on age if he or she is over 40. The ADEA also contains guidelines for benefit, pension and retirement plans.

The Equal Employment Opportunity Commission

The EEOC interprets and enforces all of the federal employment laws. But in California, where state statutes **also** extend protection to employees, the Department of Fair Employment and Housing has jurisdiction. In many arenas the state laws provide much broader protection (as well as faster, tougher enforcement) than the federal discrimination laws.

Assembly Bill 1250 Would Limit Contracting of Public Services

Assembly Bill 1250, introduced by former union activist Assemblyman Reggie Jones-Sawyer, is making its way through the California legislature. If enacted, this law would make it much more difficult for public services to be contracted out to private companies. Predictably, it is being opposed by the League of California Cities, which calls it "onerous, over-prescriptive, and forcing unnecessary requirements on agencies that impede on local control…"

Status of the Law Today…

RIGHT NOW, cities, counties, and special district in California are prohibited from contracting out most services to private companies unless they are charter cities and/or have negotiated the right to contract out with their employees' unions.

However, there is a big loophole in this law: there is no limit on the contracting out of "specialized services." These services include financial, economic, accounting, engineering, legal, and other specific "personal services." Current law allows public entities to contract for these special services "with persons, firms, or corporations who are specially trained, experienced, expert, and competent to perform the services, as prescribed…"

AB 1250 would establish steep standards for these "personal services contracts" with private companies. Beginning January 1, 2018, it would allow contracting out only when these conditions are met: 1) The agency can clearly demonstrate that the contract will result in actual overall costs savings AND 2) the contract does not cause the displacement of agency employees. Overall, AB 1250 would impose statewide standards on all local government in order to insure continued work for public employees – and to prevent excessive payments to private companies for public services. The bill would also require agencies to conduct audits of these contracts to determine whether cost savings have truly been realized and would require contractors to reimburse the cost of the audits.

The League of California Cities is taking a highly publicized stand against AB 1250. This bill would, after all, place a cap on contractors' incomes, and restrict government "flexibility" in reducing staff. The League contends, as it usually does, that it would "interfere with local control" and prevent agencies from making their own decisions about "whether it is more economically feasible to outsource work," rather than continuing to employ public employees.

City Manager, Steve Shwabauer of Lodi, says, "AB 1250 …. will guarantee that infrastructure and communities will not be maintained… The only option for a city or county that has to contract out to save money will be to stop performing services that they might otherwise be able to contract out at a lower cost." He says that the League is working actively "to make sure the legislature understands its impact."

DO I HAVE ANY RIGHTS WHILE I'M ON PROBATION?

I was told that I couldn't join my Union until I passed probation. Is that true?

Not at all! Unless the Association has passed some rule barring probationary employees from joining, you should join right away. The Association is obligated to represent you if you have ANY problem on the job – not just discipline.

But, if I'm on probation, and can be fired for any reason, what good can the Association do me?

First of all, you have all the rights of permanent employees, except the right of a "Skelly" hearing, in the case of major discipline. (And in some rare cases, you even DO have the right to a full hearing…) You are covered by all labor and employment laws: the Fair Labor Standards Act, the Family Medical Leave Act, the Americans with Disabilities Act, Workers Compensation Law, Harassment and Discrimination Law, ERISA, COBRA, etc. You're also covered by all local rules and ordinances, the County's Personnel Rules, and of course, your Labor Agreement (MOU). If **any** of your rights are violated you have the ability to grieve, and be represented by the Association in your grievance, whether you're probationary or not! You also have the right to "due process" in the case of termination, termination, under circumstances such as these if you are terminated based on an improper purpose (e.g., retaliation, discrimination, etc.)

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 work-related problem, feel free to talk to your Board Rep or Association Staff at 562-433-6983, or email cea@cityemployees.net.

QUESTION: I have a question about compensation for duties I've been assigned to perform. For months I was asking to learn how to do more around the department, but was always been denied any opportunity for cross training. Now, one of my co-workers is resigning, and they suddenly want me to train to do her job! My fear is that they will take advantage of me during the training period. What should I be looking out for? At what point can I refuse duties without proper compensation? How do I handle it as tactfully as possible to avoid tension in the department?

ANSWER: You may view this situation as an opportunity to be promoted to another job but you ALSO will be performing the higher-paid duties during the training period without receiving the pay that goes with those duties. You might just ask for "acting pay" or "higher class pay" during this training period. Once you're performing the majority of duties of the position, you should receive this extra money.

When the training period is over, if you are actually performing the higher-paid job, you should be promoted, reclassified or at least given the opportunity to apply for it. If the County wants you to continue to do this job in your current job class, you'll have a legitimate grievance.

Question: I have a supervisor who complains to me about my coworkers. She's paranoid and thinks they are stabbing her in the back. I don't think these discussions are appropriate. What should I do?

ANSWER: This behavior is unprofessional. You should explain to your supervisor that, although you are sympathetic to her frustrations, you feel uncomfortable being placed in the middle between her and your co-workers. You should feel free to tell her you don't want her to talk to you about these things any more. If she continues, it would be fine to talk to someone in HR about the difficult position you've been put in.

Question: There was an incident in our lobby last week where a homeless person became violent and grabbed one of our co-workers. After some scuffling; several people were hurt. The police arrived and arrested the guy and took reports. But overall, I think the Company handled this poorly. (For example, although there are emergency buttons under the desks, no one knew about these!) What are our rights? What should the agency have done?

ANSWER: The employer has an obligation to provide a safe work environment. A violence prevention program should be in place which enables employees to communicate any perceived danger directly to the police, and establishes procedures for investigating an injury arises from any assault. The program should provide for protection of employees from retaliation for reporting threats, and training on steps to prevent assaults and actions to follow if an assault does occur.

While most employers are responsive to reports of violence or potential violence, some are not. If you believe that your safety concerns are not being taken seriously, you should call your Association representative. Staff will get Management's attention, and, if necessary, compel them to establish a violence prevention program.

Question: Some of our members are allowed to take a vehicle home with them when they are on standby, while others (who are also on standby) are required to drive their own vehicles into the yard to pick up their work trucks. Isn't the County required to treat everyone the same?

ANSWER: Unless you've negotiated some sort of seniority or rotational policy, it's within Management's control to decide who may or may not take a company vehicle home. Hopefully, these decisions are based on who really needs to respond most urgently to emergency situations.

If you think the situation is unfair, it can be addressed at the bargaining table. You CAN establish a system for fair allotment of vehicle use. Also, keep in mind that you ARE "on the clock from the moment you leave your house during a "call-out." So, even if you aren't provided a vehicle, you are in paid status, and fully covered by workers compensation.

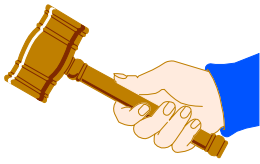
Question: I injured myself at work and reported it to HR. I will need to be off for several weeks. They now say that I must use my own sick leave. If this is a work injury, why would I have to use my own sick leave?

ANSWER: The Agency has the right to investigate the claim for up to 90 days before making the decision to accept or reject it. During this time period, you may be required to use your own accrued leave. Once the claim is approved, your leave should be restored. If it's NOT restored, you should call your Association staff for help with this.

If the Agency *denies* the claim (saying either that you're not really hurt or that the injury didn't occur at work) you should ask your union staff for a recommendation for an attorney.

Association Members Are Eligible for Free Legal Services

As part of our arrangement with CEA Association members have access to an attorney for all types of legal advice. You may call our Attorney, John Stanton for assistance with any non-employment legal problem. This service does NOT include representation in Court, but John will evaluate your case, and spend up to two hours' resolving it. There is no limit to the number of cases you may bring forward & all conversations are confidential.



John has advised us that very often, people don't need to *retain* a lawyer; they just need simple advice and perhaps a little help. If you do need formal representation, he will refer you to the appropriate attorney.

John is available at (714) 974-8941 or John@johnjstanton.com.
(This program is for Association members only, please …)