# Regional Employees Association of Professionals August 2017 News

## The "Value" of Your Vacation

**There is no requirement that employers provide paid vacation in California.** However, if you have a union contract, you probably accrue a number of vacation hours with each paycheck. We say *probably* because an increasing number of employees – mostly "at-wills" and "part-timers" – have no paid benefits at all. Except for a few fundamental legal protections, vacation leave is a negotiable benefit.

In California, if an employer DOES provide vacation leave, then that leave has a monetary value. Your employer cannot take your accrued leave without allowing you to either use it or receive payment for it. The Courts consider accrued leave a form of earned wages. In fact, an employee cannot "forfeit" vacation time which is already earned (although you may cease to accrue it once accruals reach an agreed upon limit or "cap").
So… most aspects of your "vacation rights" are the result of contract negotiations between your employer and your union. These include the amount of leave you may earn and the maximum amount you may hold in your "bank."

But others are protected by law. For example, vacation time is considered, by law, to be earned on a *daily* basis. This means that if you leave a job in the middle of a pay period, your vacation may be calculated to the hour. A 1982 Supreme Court decision held that the vacation time "vests as labor is rendered…It is not an inducement for future services, but compensation for past service."

(It's legal, however, for employers to have a policy that prevents vacation pay from "vesting" for a certain period of time. For example, there may be a 60-day probationary period during which vacation time does not accrue.)

### "Capping" Vacation Pay

Employers may place a limit on the amount of vacation time an employee can earn. If you have a union, then this "cap" can't be lowered (or raised) without bargaining. Further, since vacation time can be considered a form of wages, it is unlawful for employers to have a "use it or lose it" policy.

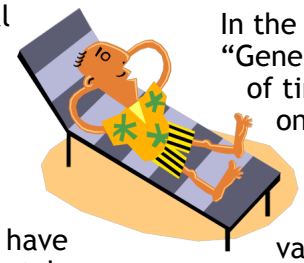
Once you accrue vacation time, it remains yours. However, if there is a "cap," and your accrued leave has reached this cap, your employer may stop you from accruing more leave until you "spend down" some of this time.

## Employers can Control when Vacation Time is Used

Legally, your employer has the right to control *when* vacation time is taken, and *how much* can be taken at one time. This, too, is subject to bargaining. If employees have always been able to use vacation on short-term notice or in hourly increments, and your employer suddenly says you must now give two-weeks' notice or can only use vacation in day-long blocks, this is a "change in terms and conditions" – and your union may grieve. **If the County wants to change your policy, they need to negotiate.**

## Conflicts over Scheduling

When agencies are understaffed, conflicts over time off become common. It's perfectly legal, as a solution, for the parties to develop "sign up systems," usually based on seniority, to regulate selection of the most coveted days off. It's also legal for the Supervisor to block off certain days or times of the year when no one may take a vacation. But it's NOT OK for employers to deny requests for time off to such an extent that employees are unable to take time off at all and/or are constantly hitting the accrual cap. If this occurs, you may have a grievance based on the denial or right to use a negotiated benefit.



The parties may also negotiate periodic "cash out" provisions. These are good solutions for departments where people have excess time piling up and are too busy to take vacations.

## Vacation Accruals are Paid Out at the Employee's Current Wage

<u>If you leave the employer before you have used all of your accrued leave, the remainder must be paid to you, as money</u>. Further, it must be paid off at the *current* rate of pay, not the rate in place when the time was accrued. It is illegal for an employer to reduce an employee's pay before termination as a tactic for reducing the value of his accrued leave.

## Other Forms of Paid Time Off

Most public agencies give employees paid time off in multiple forms: vacation, "comp time," sick leave, holidays, personal days, administrative leave, etc. The ONLY categories which are guaranteed, by law, to have monetary value are vacation and "comp time" ("comp time" is a substitute for overtime pay). However, the value of the other kinds of leave is completely negotiable. Many MOU's include provisions allowing employees to "cash out" sick leave and/or administrative leave, either on an annual basis or at retirement.

## What about General Leave?

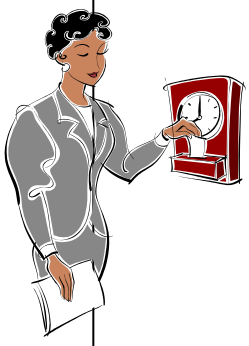
In the '80s and '90s, many agencies established "General Leave" programs, where multiple forms of time off were lumped together in one leave bank. *These generally work to the employees' advantage*. The use of the time is usually flexible (to accommodate sudden illness as well as planned vacation) and ALL the leave in a General Leave Bank must be treated as money when an employee leaves. (For these reasons, few employers establish General Leave programs any longer…)

## California Family Rights Act Expands Definition of "Family"

**The California Family Rights Act (CFRA) is much more generous than the federal Family Medical Leave Act, and includes a much wider range of family members. Since 2014, under the CFRA, you have had the right to use up to 12 weeks off the job per year to care for grandparents, grandchildren, siblings, and parent-in-laws who may be suffering from serious medical conditions. This is in addition to coverage for children, parents, spouses, and domestic partners, established under the original law.**

**The time off may be used intermittently, and employers are barred from taking "adverse action" against you for taking this time off. Employees may use accrued leave during the FMLA/CFRA period, but the time off is NOT paid. If you are enrolled in the State Disability Insurance program (most public employees are not…) you may apply for up to six weeks' disability insurance payments.**

## *Employers Can't Convert Hourly Employees to "Exempt" to Avoid Payment of Overtime*



In today's economy, some employers leave no stone unturned in their efforts to cut labor costs. So, overtime expenses often come under special scrutiny. Runaway overtime can easily double the cost of an employee. It's legal for public agencies to cut back sharply on overtime opportunities. In fact, it's even legal to negotiate an agreement to allow overtime to be paid in the form of "comp time." **But it's NOT legal for the Agency to attempt to designate hourly employees as "salaried," or "exempt," in the attempt to avoid payment of overtime.**

Salaried employees are a relatively small portion of the workforce. They are "highly specialized professionals" and managers, as defined by the Fair Labor Standards Act. Salaried (or "FLSA-exempt") employees can be asked to work any number of hours in exchange for their (presumably high) salaries. Today, it's not surprising that the number one complaint of most "exempt" employees is excessive workload and/or hours of work.

Although much muddied by the 2004 Bush administration "reforms," the FLSA still has explicit criteria for determining what kinds of jobs may be considered exempt. In general, an employee may be salaried rather than hourly if s/he is 1) a manager, clearly spending the majority of his time supervising and directing other employees, 2) a professional, with "specific advanced knowledge in a field of science or learning," or 3) an administrator, making decisions independently in handling projects or programs. If you or a co-worker have been told that you are exempt, but do not meet one of these criteria, you may have a claim for back overtime.

The FLSA is violated constantly. There is an entire world of attorneys processing FLSA claims on behalf of employees who have been mislabeled "exempt." In 2015, the Department of Labor under President Obama passed significant reforms which would have made the definition of exempt employee narrower, but these were overturned by the Trump administration.

In public employment, violations are not as common as the private sector, but some agencies do attempt to re-designate positions as "exempt" on a regular basis. Thus, lower-level supervisors, or even crew leaders,

may be told they are no longer eligible for overtime (although they do NOT spend the majority of their time "managing"). Or Secretaries – especially "confidential" secretaries – may be told that they are exempt because of their "special access" to information or work with public officials. All too often "white collar" workers are flattered into believing that they are exempt because of the "specialized" or professional nature of their jobs.

In truth, when these jobs are analyzed, they rarely meet the "exemption test." It's almost NEVER true that clerical staff would be anything other than hourly (no matter how important their bosses may be).

With professional exemptions, the issue is more complicated, but it's generally true that a position cannot be considered "professional" unless it requires a college degree. *Further, even when job specifications are being written to include educational requirements, this does not mean that all jobs with degree requirements are considered "professional" under the FLSA*. Again, the law is specific; the threshold which employers must cross to avoid overtime obligations is quite high.

**Even if they do not believe that their jobs are truly managerial or professional, most people assume that they do not have any choice in designation.** BUT THEY DO. Even if you ARE in a job class which could be moved, legally, from hourly to salaried status, your employer cannot do this without the agreement of your Association. FLSA status is a subject of bargaining; the County cannot takeaway your right to collect overtime without BOTH meeting the "exemptions test" for your job under law AND negotiating with your union!

# *News from Retired Public Employees Association*

RPEA has a goal of ensuring that prescription drugs remain affordable and accessible for working employees and retirees alike. Drug prices are spiraling out of control, with no explanation for the consumer. From 2012 to 2015, the amount we spent on prescription drugs increased by $65 billion. The burden of this additional cost is placed on patients, state programs, employers and taxpayers.

The crisis is exacerbated by the drug companies' complete lack of transparency. This leaves purchasers unable to compare prices and, ultimately, enables the companies to avoid any competition.

RPEA believes that consumers should be able to find out WHY their drugs are so expensive, and WHY they cannot have explanations about the differences between drugs (and drug prices). State Senator Ed Hernandez has proposed a remedy to this situation. Senate Bill 17 seeks to bring prescription drugs into conformity with the rest of the health care system which have transparency policies in place. It would require drug makers to give prior notice to purchasers before raising prices, require health plans to report the portions of the premiums that are spent on drugs, and give consumers access to this spending data.

Advocates hope that SB 17 could give some stability to prices and help control health care costs overall. It has passed through the Assembly Health Committee and has now been referred to the Committee on Appropriations. RPEA has been talking to the Senator's office since the bill's inception and will continue to follow and support it.

*Since the beginning, RPEA has been actively involved in enhancing the lives of retirees. We are the only statewide association representing all PERS 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.*

# If You Need to File a Workers' Compensation Claim…

By Sherry Grant, Esq. Partner, Gordon, Edelstein, Krepack, Grant, Felton & Goldstein, LLP

Reporting a work-related injury to your employer and formally filing a Workers' Compensation claim can be intimidating, but it doesn't have to be. The fear factor is often high because most people have only second-hand knowledge of the system. There are many myths, promulgated by the media, about how bad the "workers' comp" system is, and how much an injured worker can be "punished even worse" under that system. However, if you are equipped with the correct information—and have an experienced attorney if you need one— justice usually prevails. This article will provide answers to frequently asked questions so you do not need to be fearful of exercising your rights.

## Q: When should I file a Workers' Compensation claim?

A: Report your work-related injury or illness, regardless of the type or severity of the injury, to your supervisor immediately. You will be given a Workers' Compensation Claim Form, known as a DWC-1, to complete. When filling out the form, make sure that you include every body part that has been affected by your injury. The claims process begins when you give the completed DWC-1 form to your employer. Verbally reporting the injury is not enough to trigger your employer's responsibility to take care of you. Be sure to keep a copy of the form for your records; it is one of the most important documents in your case.

## Q: What happens after I file a claim?

A: Within 14 days of receiving the completed Claim Form, your employer will accept your industrial injury claim, reject it, or delay a decision. If the claim is put "on delay," your employer has 90 days to decide whether to accept or reject the claim. During this period, your employer is required to provide up to $10,000 worth of medical care to you. But, your employer is not required to pay temporary disability benefits for wages you lost during this delay period.

## Q: Why do I need a lawyer to handle my Workers' Compensation case?

A: Obtaining the correct medical treatment for your workplace injury or illness is often the most important part of the case because it is vital to your health and that of your family. Workers' Compensation laws are constantly changing – not always for the better. Senate Bill 863, which became effective in January 2013, gives your employer more control than ever over the medical treatment for your injury. An experienced, knowledgeable attorney can make sure you are able to choose a doctor who fits your needs and can help if a dispute arises over that treatment.

## Q: If I file a Workers' Compensation Claim, am I suing my employer?

A: Workers' Compensation is a no-fault system, so by filing a claim, you are not suing your employer. You are merely filing a claim for benefits (disability pay, medical treatment, lifetime care, if necessary). The Workers' Compensation system protects good employers; it doesn't penalize them. In most instances in California, employees who are injured on the job are prohibited from suing their employers in civil court. This is true even where a worker is injured through gross negligence on the employer's part. This protects businesses from incurring litigation costs whenever an employee sustains an injury.

## Q: What if my employer gets angry at me for filing a claim and retaliates against me for it?

A: It is illegal for an employer to discriminate against an employee because of a work injury or filing a Workers' Compensation claim. That doesn't mean it doesn't happen, though. Retaliation may take many different forms, such as:

- Demotion
- Failure to promote
- Negative performance review
- Wage decrease
- Refusal to rehire
- Negative reassignment, classification or transfer
- Unwarranted disciplinary action
- Wrongful termination

If you feel you were retaliated against because of your Workers' Compensation claim, you can file a California Labor Code 132(a) petition, which can include reinstatement and back pay as part of your Worker's Compensation claim. If you have an attorney, he or she will do this for you. The federal Civil Rights Act of 1964 and the California Fair Employment and Housing Act give employees a right to sue employers for violations of their rights, including the right to file a workers' compensation claim. If the violations are proven, the employee recovery may include lost wages and benefits, future wage loss, emotional distress damages, attorney's fees and punitive damages.

# *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 <u>you</u> have a specific problem, feel free to talk to your Board representative.**

**Question: On Saturday our Department's truck was broken into while I was on duty. My purse and all of its contents were stolen. Does the County have to reimburse me?**

**Answer:** Yes, your employer is generally obligated to reimburse you if personal items are stolen or damaged on the job. Because you were on duty and you were not negligent (i.e. your truck was locked), you should file a claim and expect to be compensated.

**Question: My boss just called me in to tell me that "someone" in our office said I smelled like marijuana and that I'm going to be sent for a drug test. Can they do this?**

**Answer:** If your Employer has a Drug and Alcohol Policy, it probably allows employees to be sent for testing based on "reasonable suspicion." The standard for reasonable suspicion involves "observed behaviors" (including smell) **<u>by a trained supervisor and corroboration by another trained supervisor</u>**. It does not appear that this standard was met in this case. If you do not want to comply with the test, call your Association staff. They will intervene.

**Question: I am a Librarian and, a few weeks ago, I ran a report that showed that our patrons owe more than $300,000 in fines and fees. I know the City is having financial problems, so I did the ethical thing and reported the finding to my supervisor, who followed the chain of command and gave the information to our Director.**

**I received an almost immediate "thank you" e-mail from the director, followed soon thereafter by a message from my supervisor, saying that I was not to use the report generating software any longer because I might break it! I think this is retaliation because the Department Head was embarrassed by my discovery. What should I do?**

**Answer:** You should do what your supervisor tells you to do unless it is unsafe or obviously illegal. To do otherwise jeopardizes your job. Whistleblowers are protected against "adverse action." But your action was probably NOT whistleblowing, and not to use certain computer software isn't really punishment.

You did the right thing – and probably *DID* embarrass your supervisor. But unless there is ***more direct*** retaliation (threats of

termination, assignment to bad work hours or days, etc.) you don't need to do anything at this point. For now, you should leave it alone.

**Question: Last month our Department Head told me to issue a permit to someone without having the plans approved. Not wanting to be insubordinate, I did it. Legally, though, I know I should not have done this. The building could be unsafe or violate local building codes, and I could lose my license.**

**What should I have done? It goes against my work ethic to break the rules, but I am afraid that refusing could affect my evaluation or job security.**

Answer: You probably did exactly the right thing. You have no right to refuse a direct order unless your actions would, literally, immediately place you or others in danger. You are not in a position to determine whether an action is "legal," and the threat of punishment for insubordinate behavior is real.

The best response is to tell your concerns to your supervisor, by e-mail. You can say, "Boss, I'll do what you ask but I want you to know that I am going to issue this permit without looking at the plans." This establishes a record. No need to say any more: you are "covered."

If this is a repeating pattern, you should continue to do what you are told, but may want to bring this to attention of higher management, and follow up with a written summary of *that* conversation.

**Question: I am doing the work of two jobs, which my manager recognizes. In fact they have agreed to pay me 10 hours of overtime a week for this, on a regular basis. However, they don't want to pay it in cash; they want it to be comp time. This is OK with me, too. My question is this: is there a limit to how much comp time I can accrue? Right now, I've got over 300 hours.**

Answer: Yes, unless you're a police officer or fire fighter, the legal limit on "comp time" that a public employee may accrue is 240 hours. But you should know that ALL of the time you have already accrued is yours. It's YOUR choice about whether you wish to be in money, down to the 240 cap, or take time off. Also, keep in mind that all this accrued comp time is convertible to cash when you leave – at the time-and-a-half rate.

**Question: I am sometimes required to run to the store for my department with petty cash. It's never over $50. Not long ago, I was told that there was a discrepancy between the amount I was given and the receipt and cash that I turned in. After that, I have always asked my supervisor to sign a paper, stating the amount of petty cash and the amount on the receipt that I am turning in. Today, however, my supervisor refused to sign the paper. What can I do? Can I refuse to run these errands?**

Answer: You can't just refuse to run the errands (although it is possible that this is outside your job description, so you can raise the issue and ask that they send someone else).

You can also absolutely ask the Department to provide you with a mechanism for protecting yourself against accusations of theft. The system you developed was perfectly good. Try sending an e-mail to your supervisor explaining why you'd like some verification of the money you turn in. If he's not responsive, try talking to *his* boss. If you need help, call your union rep to make a phone call or arrange a meeting. Your goal might be to establish your informal procedure as a *requirement* for anyone handling petty cash.

# What's a "Me Too" Agreement?

Generally, a "me too" agreement is a Contract (MOU) provision that is a tool for both labor and management to help bring contract negotiations to a close when OTHER bargaining units are still haggling. The idea is to tie YOUR raises (or benefits) to ANOTHER group which may or may not accomplish their goals.

Discussions about "me too" agreements often arise when your union has a reasonable number of Tentative Agreements, which WILL improve your members' lives – but perhaps not very much. The greatest sticking point to your team's agreeing to "the deal" is that other unions just *might* work out a better deal. A "me too" provision assures your members that their acceptance of the offer at hand won't be a mistake; specifically, if another group gets a raise they will receive the same. A typical "me-too" clause says:

> **During the term of this MOU, if any other bargaining unit(s) receives a larger salary/wage increase, the County shall offer the same increase to the Association. This increase shall be retroactive to the date that the County implemented the larger increase for the other bargaining unit(s).**

A "me-too" clause can apply to other increases besides salary: health insurance contributions, retirement- related benefits, leave time, specialty pays, etc. Or it can apply to the entire MOU. During the recession, some associations even agreed to "Me-Neither" clauses, especially in regard to pension cost-sharing. A "Me-Neither" clause essentially says that if other units DON'T agree to the same concession, then the Association doesn't have to either.

Sophisticated managers understand that a "me too" clause can benefit the employer. This is because it can depress the expectations of unions that "won't give up" at the bargaining table. "Me too" agreements give management the ability to say to OTHER units (often much higher paid units…) "we CAN'T give you a raise because we'd have to give the same thing to ALL THE OTHER EMPLOYEES who work here!"

Some managers say they will NEVER agree to a "me-too" clause. But this might still be a provision you should push for. After all, *someone HAS to be the first to sign!* If your Association secures a "me too" agreement and a few other worthy benefits, you might just be willing to be the first to go!