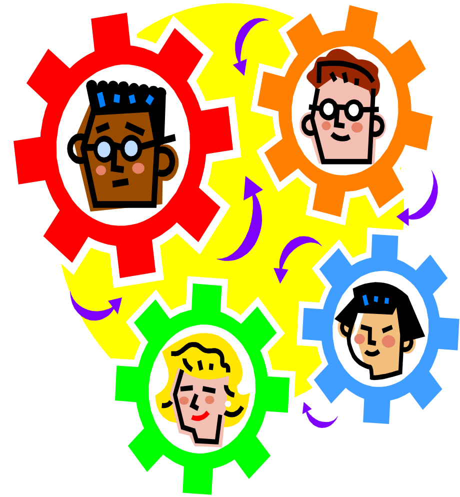
Santa Monica Municipal Employees Association May-June 2011 News



Contract Negotiations Kicked Off

Last month our Negotiating Team (April Hansen, Lou Enriquez, Martha Santana, Stephen Demmer, Orvilette Echols, Art Lopez, Anthony Maxwell, Angela Walton, Gloria Fernandez, alternate John Shipley and professional rep, Brian Niehaus) began meeting formally with the City to try to negotiate a new MOU.

Using the input we received from our membership meeting, the Negotiating Team is putting together a list of proposals, which will be submitted within the next few weeks. Thank you again to everyone who participated and responded to the survey. We promise to keep you informed about our progress and to call a membership meeting if/when there are crucial decisions to make.

This year is going to be extremely difficult for bargaining. Although our City is doing much better than some, we do expect Management to try to exact some “takeaways” in benefits. Our team is well-prepared and up for the challenge, but it will probably be a long season.

In the meantime, we appreciate everyones support. Please talk to any member of the Board for more detailed information. Mr. Niehaus can be reached at the CEA office: 562-433-6983 or cea@cityemployees.net.

WHAT HAPPENS WHEN PUBLIC EMPLOYEE UNIONS ARE DESTROYED?

By Robin Nahin, CEA Staff

The recent uprising in Wisconsin has fostered some good debate about the cost of public employees and the "value" of their services. The big philosophical question is: what difference do all the "services" make in people lives? **Is there a relationship between public services and public well being?** Does it make any difference what we **pay** these "public servants?" Does it make any difference whether they have the ability to **negotiate** over that pay?

Commentators are now trying to address these questions objectively by comparing states with varying tax and service levels. One of the best analyses I've seen compared Wisconsin and Missouri. Wisconsin, until the recent "slash and burn" actions of its new Governor Walker, had always devoted a LOT of resources to public programs. Missouri, on the other hand, is a "business friendly" state, with low taxes and low public spending. Neither one is much like California (which has its own special problems) but the comparison still tells us a lot…

Missouri and Wisconsin are good "comparables." Both have populations of roughly six million; both are mid-western, bordering Illinois; both have a rough 70/30 urban/rural mix. However, Wisconsin has one of the earliest histories of public employee unionization, starting in the '50s; while public unions were ILLEGAL in Missouri until 2007 (and there's still no law in Missouri allowing public unions to actually form.)

Public employees in Missouri are amongst the lowest paid in the country. The average teacher with 20 years' experience makes less than $40,000 a year. In Wisconsin the same teacher makes about $50,000. A veteran prison worker in Missouri makes about $31,000; in Wisconsin he makes about $48,000. This means, of course, that *public employees* are probably less happy in Missouri – but what about the public, in general?

PUBLIC "WELL-BEING:" TAXES…

Taxes in Missouri are low. The corporate tax is a flat 6.2%. In Wisconsin, it's 7.9%. Missourians also pay much lower sales, income, and property taxes. Missouri is ranked by the National Chamber of Commerce as the 7th most "business-friendly" state in the country. Wisconsin is ranked 33rd in "business friendliness."

The gas tax in Missouri is 17.3 cents a gallon; in Wisconsin, it's 32.9-cents. On the other hand, the bridges in Missouri are considered the 7th worst in the nation, while Wisconsin's bridges are ranked 15th best. Missourians spend an average of $129 annually more on car maintenance, attributable largely to the poor road conditions. (There's a documented relationship between the gas tax and road maintenance….)

UNEMPLOYMENT, INCARCERATION, EDUCATION, LIFE EXPECTANCY

But here's where the rubber really meets the road: **Missouri's unemployment rate is 9.1%** (high for a business-friendly state?) **Wisconsin's unemployment rate is 7.4%.** The rate of incarceration (people in prison) is also much higher in Missouri than Wisconsin…

Education is heavily subsidized in Wisconsin. Working class students pay far less to go to college in Wisconsin than they do in Missouri. Consequently, Wisconsin's population has a higher rate of college education, and higher incomes overall. **The average life expectancy is higher in Wisconsin than Missouri.** On the other hand, the State budget is always balanced in Missouri. In Wisconsin, like California, it's often in turmoil.

WHO BENEFITS FROM LOWER TAXES?

So…Is there a correlation between the amount of money that a state spends on roads or schools or jails the standard of living of its population? Does the population, ***as a whole***, benefit more or less from lower taxes? If a state moves from well-funded public services (and employees) to lesser

services and lower-paid public employees, what effect does this have on the well-being of its citizens? Here are some obvious answers:

We cannot prove that people live longer in Wisconsin because of the higher level of public spending; but we CAN prove that more people go to college when government subsidizes it, and that they have fewer car repairs when the state maintains the roads. We can probably also prove that free classes at senior centers lengthen the lives of seniors and that after school programs reduce teen delinquency. In other words: taxes collected from businesses and citizens, spent in the form of services for citizens, genuinely raise the standard of living for those citizens. In a way, taxes collected from wealthier individuals and businesses really does "equalize the wealth" across the population.

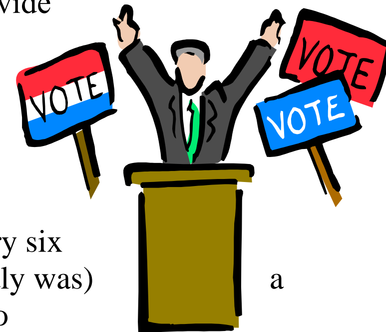
SACRIFICING STANDARD OF LIVING?

There is no way that a society can "de-fund" public services without sacrificing the standard of living of its residents. This is central to the debate in California, where legislators struggle daily to decide what programs will be sacrificed next. Right-wing governors like Walker in Wisconsin are pushing right to cut taxes and reduce employee benefits on grounds that government will magically become "more efficient" and "more accountable." Somehow this belt-tightening is supposed to cause "the good employees" to rise to the surface for "ultimate rewards." Somehow, the "good employees'" love of their jobs is supposed to outweigh their anger at the damage being done to their families!

In truth all these claims -- that employee wages and benefits are causing fiscal crises for their governments -- are one big lie. The lie is being perpetrated by people and corporations who just don't want to pay taxes. When you look at the *actual* effects of the expenditure of taxes on public services, the benefits are exponential: first, they keep the population safe, healthy, educated, and secure; and second, *almost all of the money the "public servants" receive goes back into their own communities.*

HOW PUBLIC EMPLOYEES SPEND THEIR MONEY

Unlike corporations, public employees are not socking away their money in banks in the Cayman Islands. They spend their money on rent, food, clothing, health care and (hopefully) a small amount on entertainment and (maybe) some college for their children. The average city employee in California still makes less than $50,000 a year. The average PERS retiree still receives less than $29,00. Many public employees still CAN'T retire, because they can't live on their PERS benefits at today's cost-of-living – especially if their employer doesn't provide retiree health care.



PUBLIC EMPLOYEES ARE A BIG PORTION OF "THE PUBLIC"

In California, one out of every six employees is (or, until recently was) a public employee. There is no question that recent layoffs of public employees have contributed to the high unemployment rate in California. **There is no question that furloughs, benefit reductions, and in some cases, outright pay reductions, have reduced public employees' ability to support the economies of their own communities**. It's a circular problem that will only get worse until "the public" and their legislators decide to reinvest, once again in public services. In California, for right now, everything is getting worse rather than better.

Having said all this, the good thing is that we have **not** elected a Scott Walker – yet. California's population is generally better paid and better educated than other parts of the country. Hopefully, OUR public is less likely to be tricked with stupid slogans, and our government less likely to be hijacked by greed. Perhaps this debate, triggered by the big showdown in Wisconsin, will be educational for us all. Better off in Wisconsin than here….

Public Opinion About Public Employees is Changing

Last month California voters were asked their opinions of public employee unions, and public employee pension plans. The Field Poll, which surveyed 1035 people found that nearly half (46%) felt that "unions do more good than harm." Only 35% felt the opposite. The opinion split along party lines. Nearly six in 10 Democrats surveyed support labor unions, while 57 percent of Republicans believe unions do more harm than good.

In 2009, Field pollsters found that 32% of California voters thought public pensions were "too generous" and 40% thought they were "about right." This month, the polling flipped: 42% said pensions are too generous and 34% said pensions are about right.

However, an overwhelming majority of all respondents said they believed that public employee retirement benefits were too generous. Nearly three-quarters of voters, including 68% of registered Democrats, said they supported an upper limit on retirement benefits. Only 20% disagree. The poll showed 69% of those polled, including two-thirds of Democrats, want state and city employees to pay more toward their own pensions; 26% oppose the idea.

Another poll, a nationwide Gallup Poll, found that Americans in general DON'T AGREE with right-wing governors' efforts to take away public employees' bargaining rights. 48% of respondents said that they agree with the union side in these disputes. There were 39% who said that they agreed with the governors' efforts while 13% said they favor neither side or have no opinion on the subject.

Governor Proposes BIG Changes to PERS System

Governor Brown has "floated" some huge changes to the Public Employment Retirement System. We use the term "floated" on purpose: no one knows whether he intends the proposal to be taken seriously or whether he was simply testing his various constituencies to see their reactions. We DO know that the changes, listed below, would be massive and could trigger renegotiation of most of the benefits packages in public agencies in California. If passed by the legislature, the hypothetical implementation date is July 1, 2011 – although there is also much conjecture that it would be found unconstitutional.

Some of the changes, especially those focused on spiking, are not bad for the average employee. They are aimed at high-paid managers and some sworn employees who have been "gaming the system" for years. But one provision is disastrous: it would block all public employers from paying any portion of the employee-side PERS contributions. Most agencies still pay all or most of that 7% or 8% (9% for sworn employees) so, if employees were forced to absorb this cost, it would mean huge deductions from their paychecks. Similarly, several of the "anti-spiking" provisions could mean that negotiated "EPMC" benefits would evaporate or that individuals would no longer be able to purchase "airtime" (service credit for years that you did not work." (If you've been thinking about buying extra service credit, the time to do it would be NOW…)

The most obvious question for city and utility district employees is: **if this plan DOES go into effect, can the State override our current MOU?** After all, many unions' PERS benefits have been negotiated over many years of hard bargaining. Often, retirement improvements were "trade-offs" for lower wages or lower caps on medical contributions. It doesn't seem fair, then, that an outside agency could simply "zap them away…"

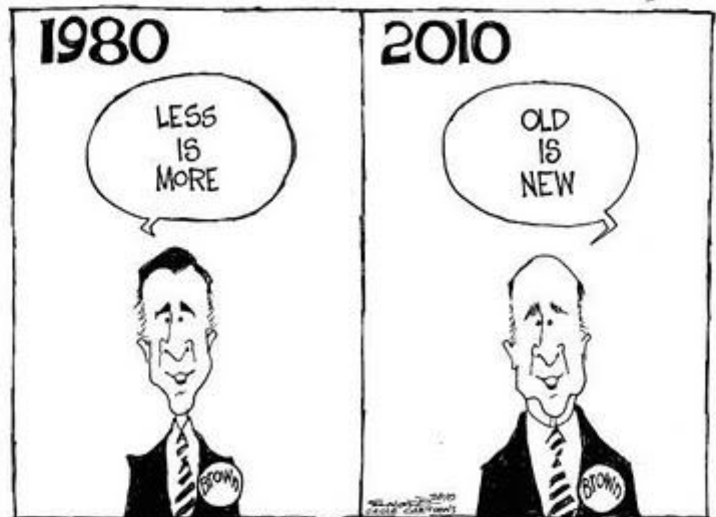
Strictly speaking, the answer is "yes:" if the State passes a law which requires a change in your "terms and conditions of employment," the City must comply with that change. The City would still be required to negotiate with your union over the "impact" of the change. But, if you refused to cooperate, they could declare "impasse," and implement a last, best offer.

Essentially the ONLY time the City can legally "force open" your contract is when another, higher governmental authority mandates a change. Many agencies have experienced this, to a lesser level, when they have had to introduce licensing requirements (particularly to heavy vehicle drivers or water department workers) or drug- testing programs (to commercial license holders.) The state DOES have the ability to require city government to comply. Here is a summary of the ideas the Governor has "put out there:"

1. Eliminate Purchase of Airtime. Would eliminate the opportunity for all current and future PERS members, to purchase additional retirement service credit.

2. Prohibit Pension "Holidays." Agencies would never be able to suspend contributions necessary to fund the normal cost of pension benefits.

3. Prohibit Employers from Making Employee Pension Contributions. Agencies would be prohibited from making the employee portion of its PERS contributions.

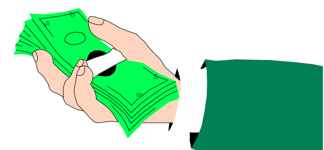


4. Prohibit Retroactive Pension Increases. Agencies would be prohibited from granting retroactive benefit increases, such as benefit formula improvements that credit prior service.

5. Three Year Final Compensation. For new employees, final compensation would be based on average pay during the highest 36 month period. (No more "single highest year" option.)

6. No Pension "Spiking:" Compensation Defined as Only Regular, Non-recurring Pay. Compensation means normal rate of base pay. Stops some employers' practice of counting "special pays," bonuses, allowances or leave payoffs as "pay."

7. Felony Convictions. Prohibits payment of PERS benefits to anyone who commits an employment-related felony.



Money Matters

What Does the City "Have To Pay" Toward Your Retirement Benefits?

PENSION PLANS

Most, but not all, Cities and Water Districts in California participate in the California Public Employment Retirement System, commonly known as CalPERS. There's no legal requirement that they belong to PERS. Several dozen belong to county retirement systems, such as the San Bernardino- or Orange County Retirement Systems. A few agencies also have privately-funded retirement programs.

All of the *public employees systems* operate on the same principal: the employer and employee both contribute percentages of the employee's income into an account which, when the employee reaches retirement age, he may begin "cashing in." The employer's portion is "experience rated" which means it can go up and down based on an actuarial analysis, derived from the plans past usage, and intended to make sure that the contributions fully cover the future predicted costs.

The employees' contribution is fixed, although different plans require slightly different contributions. For example, the PERS "2% at 55" plan requires a 7% employee contribution. The more lucrative plans (the "2.5% or 2.7% at 55" and the "3% at 60") require 8% contributions.

Many employers have agreed to pay *both* the employee and the employer contributions. But there is no legal requirement that the employer pay both parts -- nor that it *continues* to pay both parts. This is a subject of bargaining. When time are hard, when rates skyrocket or when the parties agree to negotiate an upgrade in retirement plans, the question of "who pays what" may come up for renegotiation. But the employer can NEVER pay less than the entire employer portion of the plan. For non-sworn employees, this cost can vary from 5% to about 15% of payroll; for police or fire employees (most of whom have the PERS "3% at 50" program) the employer cost may be 15% to 25%, with an employee-side contribution of 9%.

RETIREE MEDICAL

There is NO legal requirement that the employer make ANY contribution to retirees' health care. The only exception to this applies to participants in PERS Health must make contributions of at least $107.80 in 2011 with additional increases each year until the contributions for active employees and retirees become the same. (And there are exceptions to this, also, if the parties agree to set up a "cafeteria plan.")

The bottom line is that employer contributions to retiree health care are largely the result of contract negotiations. Once a program is established and memorialized in the MOU, it cannot be modified without bargaining. For employees who have already retired, it cannot be modified at all.

County's Failure to Promote Returning Vet Violates Veteran's Reemployment Rights Act

A registered nurse who worked for LA County for 18 years, and was also a Captain in the United States Army Reserve, was recalled to active military status. She spent several months on active duty, and then took a three month leave of absence, as allowed per policy. 21 days after returning to work, she applied for a newly-opened position as a "Program Specialist, Public Health Nurse." Her supervisor gave her a failing score.

Other employees heard the supervisor make negative comments about her being away on military service. She sued, claiming that the failure to fairly consider her for promotion was based on her military service. The Court found there was sufficient evidence to go forward with a claim that the employer violated the Veterans' Reemployment Rights Act. This law provides that: **[a]ny person [employed by a State, or political subdivision thereof] shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.**

Labor Relations Updates…

The following are some major legal decisions which improve the rights of public employees. If YOU have a question or problem, you may contact your board, or association staff at (562) 433-6983 or cea@cityemployees.net.

The Federal Law protects employees against retaliation - Even for verbal complaints

Employees at a factory were required by the employer to report to the changing room and put on protective gear before clocking in. The same was required when they left work: they clocked out, then changed clothes. One employee complained to management that he thought this "changing time: should be paid." The company retaliated by firing him. He sued, and the court ruled that the employer was violating the FLSA (wages and hours law) by not paying their employees for the time spent putting on/taking off the protective gear.

The Supreme Court ultimately heard the retaliation claim, overturning lower courts rulings, which said that the retaliation had not been proven because the employee had not filed a written complaint. The High Court said that even VERBAL complaints can establish the basis for a retaliation claim.

An employer is responsible for justifying why they failed to reinstate an employee on FMLA

A 10-year employee began having health issues when her City began using a different kind of paper. Her doctor determined that she was sensitive to chemicals in the new paper. She took time off the job, under the Family Medical Leave Act and, after three months, recovered and requested to return to work. The City denied her request, even though her physician cleared her to return to work, basing their decision on their belief that they could not guarantee a safe environment due to her chemical sensitivity. The employee continued to request reinstatement, but the City ultimately terminated her.

The employee sued for violation of her rights under the FMLA and ADA, and the court granted her a trial. FMLA rules state that the burden is on the employer to prove legitimate reasons for a refusal to reinstate.

Seniority rules Negotiated with one union are not necessarily applicable to employees in a different organization

A public sector employer laid off 72 employees. Some of the employees (non-management) had a union and an MOU. The MOU contained clear language that employees would be laid off in seniority order. The management employees had not union or MOU, and were governed by the City's Personnel Manual – which said nothing about seniority. Laid off management employees asserted that they had "bumping rights" into lower positions in the general employees unit. The City refused to allow this. They management employees then sued, arguing that the seniority provisions established in their subordinate's Contract should apply to them. The Court disagreed, finding that the provisions of the contract for one group of employees has no application to any other group.

When "Religious freedom" Crosses the Line

A supervisor who was an evangelical Christian sent letters to her manager and one of her subordinates in which she told them they were not pleasing God and that they should stop sinning before it is too late. After investigating, the employer terminated the supervisor's employment because the letters deeply offended the people who received them, disrupted the workplace and invaded their privacy. The supervisor sued for failure to reasonably accommodate her religion. The Court of Appeals held that this was not the type of behavior an employer was required to accommodate, and upheld the termination. The court relied heavily on the fact that this person was a supervisor, who is held to a higher standard.

The Law Protects Against Discipline For "Off Duty" Conduct

The California Labor Code has been amended to resolve one of the big questions in public labor law: does your City have the right to punish you for what you do in your personal life?" Although most Court decisions would tell you that your employer has NO right to take disciplinary action against you for "off duty" behavior, a great many employers continued to believe that you could be held liable for "behavior unbecoming a representative of the City" or "bringing discredit to the employer."

The new law, however, makes it clear that if you suffer "a loss of wages as the result of demotion, suspension or discharge for lawful conduct during non-working hours," you may file a claim with the California Labor Commissioner. The Labor Commissioner has "full remedial authority" over its cases. It may award back pay as well as reinstatement. The Commissioner is not bound by any local hearing process. This means is that, even if you go through your City's grievance or discipline process and lose, you may appeal to the Labor Commission.

Labor Code Section 96(k) means that an employer cannot discipline any employee – including Police Officers -- for any off-duty lawful conduct, regardless of the effect it may have on the employer or on the employee. However, the employer is not prevented from taking disciplinary action if an employee is found guilty of *unlawful* conduct away from the job.

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 cea@cityemployees.net. There is no charge to Association members, and all conversations are confidential.

Question: I was just promoted to a new job, and today is my last day at the old one. My supervisor has just come to me and asked that I forward all of my email from the last three years to her. Some of it is a bit personal. Do I have to comply?

Answer: It's generally recognized that messages to co-workers of a personal nature do take place from time to time. A reasonable interpretation of your supervisor's request is that they want only the work related messages. Forward only those, unless you're directed differently. Chances are they are not going to read through three years of e-mail anyway.

Question: One of our members asked if their manager can force them to come in on their 9/80 day or on the weekend. No one in our bargaining group receives overtime.

Answer: First of all, if by saying "no one receives overtime, you mean the bargaining unit employees are FLSA "exempt," it is true no one would receive overtime. However, employees who are not "exempt" must be paid overtime for time over 40 hours in the work week. Either way, employees may be required to come in on a non-work day. If this occurs frequently, however – in other words, if your member is chronically required to work on his day off – this can be considered excessive and may be grounds for a grievance.

Question: I used to be friendly with an employee who quit and is now suing the City. Apparently, I'm going to be interviewed by the City about things she said to me while she was here. They have also asked me for personal communications, such as my PERSONAL email. Do I have to give this to them?

Answer: Any communications between you two while either you or she was on the job are legitimately subject to investigation. This includes "personal email" if it's on their computer, but NOT personal information on your home network (unless you were on the job while you were using it.)

Question: Some of our members were laid off, but may be rehired later. The City is trying to lower our retirement formula for "new hires." If we agree to this, would the rehired employees have to come in under the lower formula?

Answer: This would depend entirely on their status during this waiting period – if it IS a waiting period. If the employees are on a "reemployment list" or have a potential re-hire date, then they should still be considered employees, and should come back with the same level of benefit in place.

If there is no reemployment list or rehire period, they can be considered new employees. HOWEVER, if you are negotiating now over potential changes in your retirement benefit for new hires, it is also possible to negotiate now for reemployment status for your laid off employees.

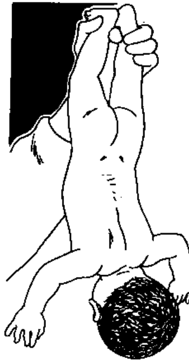
Question: I'm taking time off the job to care for my wife, who has cancer. The City says that I must use my sick leave first, but I want to use my vacation. Don't I have the right to make this choice?

Answer: Yes, unless your MOU or Personnel Rules clearly state that you must use this leave in some specific order, you have the choice. However, it might be better to use sick leave first because the vacation has a vested value, while sick leave has little or no cash value in most jurisdictions. (It is illegal for the city to penalize you for "excessive use of sick leave" if it's used for FMLA purposes.)

Question: Part of my daily job duties is to drive the company car from the bus yard to the transit store and back at night. This takes an additional 20-30 minutes per day. Am I entitled to be paid for this time?

Answer: Yes, this IS time worked. If you're denied payment for this time, you should seriously consider grieving.

Question: I am currently on family leave (as I had a baby 4 months ago) but am working intermittently. The City is going through reorganization and my boss's position is likely to be eliminated. I'm worried about MY job. Does family leave protect me at all? Am I protected less because I am working part time?



Answer: The fact that you are working part-time doesn't take you out of the protection of the Family Leave laws as long as long as the reason you are working part-time is the birth of your child. The City can reorganize the work site even if you are out on a protected leave. They just can't use your absence as a reason to eliminate your position. You are protected on Family or Pregnancy Leaves to the same extent you would be if you had not left the workplace.

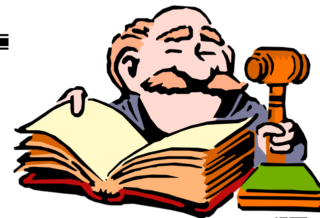
Question: I was laid off several months ago and wasn't able to afford the COBRA payments, so I let my medical plan lapse. Now I'm having back problems and can't get insurance (it's a pre-existing condition.)
In truth, part of the problem with my back was caused by my work. In fact, I went to the doctor after pulling a muscle last year. I never filed a workers comp claim because I was concerned that they would be mad at me. Can I file a claim now? I don't really want to sue the City. I just need some medical attention for my back!

Answer: This is a terrible story. Similar scenarios are probably occurring all over the state: people failing to exercise important rights because "the city might get mad" (and do what -- lay them off?)

Yes, you CAN now file a workers comp claim, but it is likely to be denied. If you told ANYONE (a co-worker, the doctor…) that you hurt your back at work try to get statements from them now. If you are denied, you'll need a workers comp attorney. Feel free to call staff at the CEA office for a referral to an honest hard-working attorney.

Workers comp attorneys don't cost anything "out of pocket," by the way. They receive payment from your settlement, and that payment is "capped" at 15%. Also, keep in mind that if you are still without health care when the Obama Health Plan goes into effect for adults in 2013, companies will no longer be able to deny you care for pre-existing conditions. If you're making less than $44,000 you'll also be eligible for subsidized care.

Association Members Are Eligible for Free Legal Services



As part of our arrangement with City Employees Associates, members have access to an attorney for all types of legal advice. If you are a current Association member, you may call our Attorney, John Stanton for assistance with any non-work legal problem.

This service does NOT include representation in Court, but does include evaluating your case, and up to two hours' of assistance in 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 a reputable attorney in that field.

John is available at (714) 974-8941 or stantonlaw@hotmail.com.

(If you need help with a WORK-RELATED problem, call our staff at the CEA office: 562-433-6983 or cea@cityemployees.net)