

# *Santa Monica Municipal Employees Association July/August 2011 News*



## **Contract Negotiations Update**

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 attorney, Brian Niehaus) continued meeting with management toward the goal of working out a new MOU.

Although the June 30<sup>th</sup> expiration of our MOU has passed, by law, the current Contract “remains in effect until a successor agreement is reached.” We do hope to reach a new agreement, and to call a ratification meeting, before the end of the month.

Thanks you for your support. Please talk to any member of the Board for more detailed information.

## **CalPERS Confirms It: Pensions Are a Vested Right**

In response to the many rumors swirling around the questions of retirement takeaways, CalPERS released its own “analysis of the law” last month. It confirmed what ALL employee-side representatives have been saying all along: Pension promises made to BOTH current and retired CalPERS members are a “vested right.” They are protected under state and federal law, based on the contracts clause of the Constitution.

The CalPERS report confirms that public employee retirement benefits are a form of deferred compensation. This means that the pension program in place *when you are hired* must be available when you retire. As Anne Stausboll, CalPERS’ Chief Executive Officer put it, a

public employer's promise to its employees for a pension "is a promise that employer must keep." Stausbolls says that the CalPERS report was released "to reaffirm the provisions ... to ensure that our members' vested rights are honored."

CalPERS analysis, which studied appellate cases going back 70 years, arrives at these key legal principles:

- Active employees are entitled, at retirement, to whatever benefits were negotiated on their behalf during their employment.
- Retired employees have continued vested rights to the benefits promised to them when they worked.
- Future employees have no vested rights.
- **The State's "emergency" powers are limited and cannot be used to reduce the benefits that have been promised. The State's emergency powers do not enable it to solve its budgetary problems by eliminating or reducing the long-term benefit commitments.**



- Active employees' retirement benefits *may be* "unilaterally modified" (changed by the employer, without employees' agreement) under extremely limited circumstances. The changes must be reasonable and bear "material relation" to the theory of a pension system and its successful operation. Changes that result in loss to employees must be accompanied by comparable "new advantages."

The fact that one recent court decision allowed employers to modify a retirement plan if they accompany the loss with some "new advantages" has raised huge questions about the security of vested benefits. It is probable this issue will be tested again, legally, very soon. In the meantime, however, PERS stands by its position that it is not within an employer's power – or a union's power – to "trade away" an individual's retirement benefits.

The full analysis entitled "Vested Rights of CalPERS Members," can be found at [www.calpers.ca.gov](http://www.calpers.ca.gov).



# Anti-Tax Group Seeks to Abolish Collective Bargaining For Public Employees in California

The bad news is that they're at it again: a group called the "California Center for Public Policy" lead by Santa Barbara-based Lanny Ebenstein, is gathering signatures for three initiatives which would reduce benefits and bargaining rights of all state and local public employees. The good news is that they probably cannot raise the funds to qualify for the ballot.

Predictably, the Center released a report last year which found that most of California's fiscal problems could be resolved by cutting government workers' compensation packages. Ebenstein said, "Government does not exist to provide compensation and pensions for government workers. Government exists to provide public service at a reasonable cost."

The three ballot measures would:

- Ban recognition of all public-sector labor unions and prevent government authorities from collectively bargaining with them.
- Impose higher taxes on pensions paid through CalPERS or CalSTRS. Someone who receives an annual pension of \$100,000 to \$150,000 would pay 15% above the regular state income tax. Anyone above \$150,000 would pay 25% more.
- Raise the retirement age for state employees to 65, and for public safety workers to age 58.

Ebenstein said the higher tax on high-paid pensioners, alone, would raise \$1 billion a year for the state. But, since only 5% of public employees receive benefits of over \$100,000, these calculations seem a tad high.... The average CalPERS pensioner receives \$28,400 per year.



The initiatives were filed in early June with the State Attorney General's Office. Once that office writes legal summaries for them, the group will need clearance from the Secretary of State's Office to begin collecting signatures to place it on a ballot.

The good news is that California is a really big state. The signature-gathering process will cost at least \$1 million for each initiative. After that, the group expects that it will need at least \$12 million to win the election. Union-side analysts predict that they will be unable to raise this kind of money in a state which is NOT inherently anti-employee.

Ebenstein's fundraising committee is just beginning to solicit donations. He says that he will be "speaking to people from both parties who have made large donations to past initiative campaigns." There is no prohibition on his use of donations from *other* anti-tax groups, across the country....

# If You're Suffering Side Effects From Medications ...You May Be Due Additional Workers Comp Pay

If you are taking medication for a work-related injury, you may be entitled to additional Compensation benefits for any side effects related to the medication. Some common medications can cause or aggravate these serious conditions:

- Prednisone (and other steroids including cortisone) - cataracts, osteoporosis, obesity, hypertension, diabetes
- Coumadin and other blood thinners - anemia, hemorrhage, blood clots, hair loss
- Non-Steroidal Anti-inflammatory Drugs (NSAIDs) - hypertension, upper gastrointestinal disorders, heart attack, renal damage
- Narcotics - lower gastrointestinal disorders, irritable bowel syndrome, sleep apnea, drowsiness, abdominal distension, sexual dysfunction
- Muscle Relaxants - lower gastrointestinal disorders, irritable bowel syndrome, sleep apnea, drowsiness, abdominal distension
- Psychotropics (including anti-depressants) - sleep apnea, diabetes, sexual dysfunction

If you are experiencing side effects from medication, immediately notify your physician. If the side effects are caused by medication you are taking for a work-related condition, you may be eligible for additional treatment or benefits. If you need assistance or referral to a reputable workers compensation attorney, call our staff at the CEA office: 562-433-6983.

## Can the City Deny Your Use of Vacation?



employees.

Today, however, increasing numbers of people are having difficulty scheduling vacation time off. Sometimes this problem is self-imposed.

Responsible employees have so much work to do that they are reluctant to leave it, either for fear that something catastrophic may happen in their absence or fear that the work load will be intolerable when

Almost all permanent public employees are provided monthly allotments of vacation time. So, it follows that you should be able to USE your vacation time, doesn't it? In the "old days" – before most public agencies were understaffed -- everyone seemed to agree on the basic principle that vacations are good for both labor and management. Employees who take time to rest and "recreate" are, ultimately, more productive

the return. But sometimes, it is caused by Managers, who are responsible for accomplishing the same number of tasks, despite a diminishing workforce. The end result is the same: you are provided a negotiated benefit, but not really able to use it

There are a wide range of solutions to the problem. Obviously, if YOU are the one telling yourself that "you can't take a vacation," you can either just change your mind and take one, or you can engage in some discussion with Management about the structure of your job which leaves you so burdened. Truly, no one is indispensable; the problem CAN BE worked out. If you need assistance talking to the City, feel free to call your association staff.



If the problem is that *someone above you* won't let you use your vacation, you may have a legitimate

grievance. You DO have the right to take leave time, despite the fact that most MOUs say that that scheduling will be based on the mutual agreement of the employee and supervisor. If you routinely put in for time off, but are denied, this is not “mutual agreement!” Feel free to call your union rep for assistance, but make sure you have kept good records. Managers normally deny the severity of this problem.

### One Solution: A Vacation Bidding System

One of the solutions to vacation scheduling problems is to come up with a bidding system. These are routinely used in Transportation or Police Departments, where scheduling is very tight and/or operations must be maintained 24 hours a day. This kind of a system, usually based on seniority, requires that people designate their vacation “picks” well in advance. There are often disputes about operations of bidding systems, but they DO make sure that everyone gets some time off.

(It is perfectly legal for management to “black out” certain times of the month or year for vacations. But it is not legal for them to black out so much time that you can NEVER take time off...)

### Another Solution: Vacation “Pay Outs”

Another “solution” doesn’t solve the time off problem at all, but it does ensure employers compensate employees for the vacation they don’t get to take. This is by allowing yearly “pay-outs” of time which has piled up in your leave bank unused.



Management can agree to allow some pay-outs as the result of a grievance where employees prove that they have been denied the right to use vacation. Or, a pay-out system can be negotiated as part of contract bargaining. Usually such a program requires that employees use *some* of their leave before they can cash out the remainder. It also usually requires some sort of supervisory agreement that the employee has had legitimate difficulty in scheduling time off.

### Your Vacation Time is Your Property

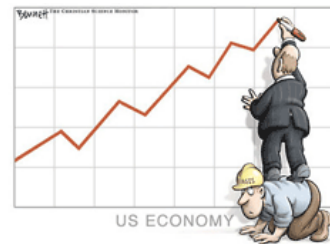
By law, once you have accrued vacation, it becomes your property. When you leave the employer you must be paid for that accrued leave. To limit this “liability,” employers establish limits or “caps” on the amount of leave time you may accrue. (Both the amount of monthly accruals and the “caps” are negotiable, by the way...) **It is legal for your employer to discontinue your monthly accruals when you reach the cap.** This is why some agreement on annual “cash-outs” may be important to you and your co-workers.

Because vacation is treated much like property under the law, if the City fails to enforce the cap and allows people to accrue more hours than the policy provides for, those hours become the property of the employee. You must be allowed to use them or cash them out when you leave. The City can also require that you use the excess leave or accept payment for it. But, they cannot institute a “use it or lose it” policy for accrued vacation which is under the negotiated “cap.”

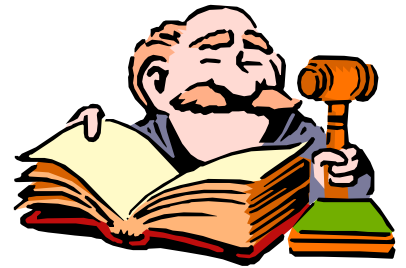
## CalPERS Reports Best Investment Returns in 14 Years

California’s economy may be stagnant, but the stock market is cooking! Last month, CalPERS reported a 20.65% gain in its investments – the largest increase in 14 years. Even PERS’ real estate portfolio rose 10.2%, although residential housing prices are still slipping.

Although these numbers say something about the curious “disconnect” between reality and the stock market, they are relevant to public employee unions. This is because employers’ PERS contributions are reduced when PERS stock market income rises. Throughout the ’90s many agencies made no PERS contributions at all because the Fund’s investments were doing so well. With the crash in ’08, employers’ rates began to rise dramatically. Now they should begin to drop, just as dramatically.



# Labor Relations Updates...



The following are some major legal decisions which improve the rights of public employees. If YOU have a question please call association staff at (562) 433-6983 or [cea@cityemployees.net](mailto:cea@cityemployees.net).

## Court Compels City to Conduct Disciplinary Hearing; Employee Not Barred from Appealing Termination Because She Retired

The City of Fresno has been ordered to provide a pre-disciplinary hearing for an employee who filed the appeal of her termination one day late. The employee received notice of termination for allegedly accessing police department files for personal use and for “making false statements,” when questioned about this. The municipal code required that her appeal be filed within 15 days of receiving notice of the termination. After she received the notice, she contacted her union representative, but he did not respond. She then scheduled an appointment with an employment law attorney, who cancelled the appointment at the last minute. She finally filed the appeal herself – one day late.

The City denied the employee’s request for a hearing, on grounds that her request was tardy. She then sought legal assistance and, at the same time, filed for retirement.



The Court found in favor of this employee and advised the City that it must allow for “good-cause exceptions” in their administrative procedures if the “fundamental right of continued employment” is at issue. The City appealed, arguing that the employee had already retired, so the question of her right to a hearing was moot. The Appeals Court upheld the lower court’s decision, saying that the employee’s action to file for retirement, while her appeal was pending, was irrelevant. She was granted a hearing before the City’s Civil Service Commission ... and provided back pay until the hearing was completed.

## No Privacy in a Railway Cab

The Los Angeles County Superior Court has ruled that the Rail Authority’s use of audio and video monitoring equipment in train cabs is perfectly lawful. The Engineers’ Union, and one individual engineer, sued Metrolink, arguing that the use of such monitors was an invasion of the engineers’ “reasonable expectation of privacy.” The Court upheld the employer’s right to monitor: there is no “expectation of privacy” in a publicly-owned vehicle.

## Employee Who Fails to Provide Proof of Medical Condition CAN BE Terminated.

A federal employee applied for the position of director of a child development center. When she was not selected for the position, she filed a complaint with the EEOC (Equal Employment Opportunity Commission) alleging racial discrimination. Immediately after this, she requested 120 leave days, pursuant to the Family Medical Leave Act (FMLA). The request was accompanied by a letter from her doctor, saying that she had “post-traumatic stress disorder,” needed therapy, bed rest, two prescription medications and 120 days off work.

The employee’s supervisor told her that the documents were insufficient, and requested more information. She failed to provide additional information, but took the leave anyway. The employer terminated her, for being AWOL (absent without leave.)

The employee sued for unlawful removal from employment in violation of the FMLA. The Court found in favor of the employer, saying that it did have the right to ask for more medical information. FMLA medical certification is considered “sufficient” under the law if it states “appropriate medical facts within the knowledge of the health care provider regarding the condition.” The Court said that this employee’s certification was inadequate because it did not explain why she was unable to perform her duties or whether additional treatments would be required for her condition. The employer gave the employee extra time to resolve this “insufficiency,” but she never responded.





## “I’M SICK! YOU MEAN THEY CAN FIRE ME?”

Here’s a hypothetical:

“I’m having surgery and will be off the job for five months. I’ve filled out all the City’s Family Medical

Leave Act forms, but they say this will only cover me for 12 weeks. DOES THIS MEAN THAT THEY CAN FIRE ME after 12 weeks?”

Here’s the answer:

If the only law protecting you was the FMLA, then the answer could be yes. However, if you have a medical condition which keeps you off the job for more than three months, other laws come into play:

### Workers Compensation

First, if the medical condition is at all work-related, your employer will want to be careful not to be accused of discriminating against you for filing a worker’s compensation claim. For this reason, if you are expected to return to work within a reasonable time period, it is unlikely that your job will be threatened. There’s a psychological component here, too: employers truly feel (and often believe they are) more responsible for the employees who are injured on the job, than those who are hurt or sick due to non-work causes.



### Family Medical Leave Act Laws

Second, even if your FMLA time runs out, you are protected by the ADA, by “Skelly” Due Process and by PERS law. The ADA (Americans with Disabilities Act) requires your employer to offer to conduct an “Interactive Meeting” with you, before they can fire you, to see whether you can perform your job, with or without “accommodation.” Accommodation could be part-time work, or working at a desk, or without bending and lifting, or at a different job entirely. The interactive meeting process is supposed to explore these options.

### Americans with Disabilities Act

The interactive process takes time and what is said at these meetings is important. If your goal is to get the City to wait an additional two months, until your doctor says you can return to full duty, you should

not ignore the City’s offer to conduct an interactive meeting. Also, although the City’s invitation may seem informal, your job may be at stake. You should not attend without a representative.

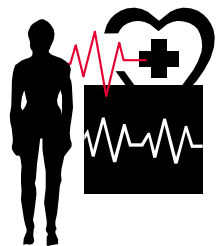
One form of accommodation may be the employer’s agreement to provide some additional leave of absence. The Chair of California’s EEOC (the Equal Employment Opportunity Commission, which receives claims of violation of the ADA) recently stated, “a period of leave - whether for medical treatment, recovery, or training to use adaptive equipment - is often the reasonable accommodation that permits a person with a disability to remain gainfully employed.” Although the courts have made clear that the leave of absence need only be reasonable, and not indefinite, there is no clear definition of “reasonable.” *The burden is on the employer to establish a business necessity or undue hardship as the reason it can’t provide a lengthy leave of absence.*

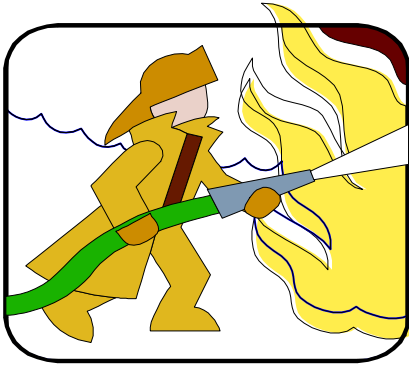
### Your “Skelly” Rights

Third, employees in California can’t be terminated “for disability reasons” without the right of appeal. This is your right to a “Skelly hearing,” which derives from the fact that your job is considered a “property right” under the constitution. If your employer decides that it can’t accommodate you under the ADA, it must send you a notice of termination and give you at least five days to appeal. This all takes *more time*, and at the hearing, you have the opportunity to explain how the City *could have* accommodated you, or how it has accommodated other people but is refusing to accommodate you, or how you are NOW fully able to return to work.

### Retirement Disability Law

Finally, if you are vested in PERS, or any of the County retirement systems, and are unable to return to work due to a medical condition, the City is obligated to file for *and be granted* your PERS disability retirement BEFORE they can completely terminate you. If you disagree, and believe that you CAN return to work, or that the City is failing to properly accommodate you, you CAN appeal to PERS not to grant the disability retirement.





## Did You Know That You Are An “Emergency Disaster Service Worker”?

Under Government Code 3100 all public employees in California are considered “Emergency Disaster Service Workers.” The law specifically says that “In the exercise of the police power of the state, in protection of its citizens and resources, all public employees are hereby declared disaster service workers subject to such disaster service activities as may be assigned to them by their superiors or by law.”

This means that in the event of natural, manmade or war-caused emergencies, you may be called upon to serve the needs of the public BEFORE you serve the needs of yourself or your family. It means that your management has the right to alter your job assignment and direct your activities. If you are at work, you can be compelled to stay at work until you are released. If you are at home, you can be compelled to come into work, *if it is safe for you to do so.*

What are your responsibilities in the case of disaster? Only firefighters and police officers are considered “front line” or first responders. You are NOT required to put yourself in physical danger. After that, however, you are required to do whatever work you are told to do.

All public agencies are required to have a Disaster Preparedness Plan. Under the Plan, specific individuals are assigned to carry out specific duties, in accordance with their training. If you have not been directly involved in the training exercises, it is likely that your job class doesn’t involve work that would be considered essential during a disaster. Nonetheless, be advised: you may *still* be called upon to serve as an Emergency Disaster Service Worker.

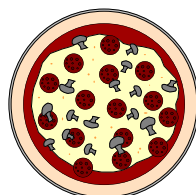
## Questions & Answers about Your Job

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](mailto:cea@cityemployees.net).



**Question:** Can a Supervisor choose to pay for overtime in the form of pay rather than comp time? Some of us prefer to be paid compensatory time, but our supervisor isn’t giving us the choice.

**Answer:** Yes, a supervisor can inform an employee that overtime is available for pay only *unless your MOU says that the choice belongs with the employee.* The form of payment for overtime is a negotiable subject as long as it’s paid (in compliance with federal law) at time and a half.



**Question:** I have a subordinate who claims she is allergic to the foods that we bring in to share

(birthdays, potlucks, etc.). I advised her that she should not eat these foods, but then she said that that she feels “excluded.” I am concerned because she brags about her legal victories when she feel discriminated against. Is this discrimination?

**Answer:** The law prohibits discrimination based on race, sex, religion, national origin, physical disability, age, and sexual orientation. In most cases, a food allergy will not qualify as a physical disability. We don’t think that bringing food to a party that an employee can’t eat would meet the

test of discrimination – particularly as eating the food isn't mandatory!



**Question: I want to know whether the City has to hold up a promotional exam for an employee who is on military duty. If they don't hold up the exam (verbal interviews) can they give him an interview, with a different panel, on a later date? Do they have to wait to fill the position until he has his interview?**

**Answer:** Under Federal law, employees called to active duty have the right to return to the same or similar position as the one they were employed in at the time of the call up. The service person's seniority related benefits are restored upon returning to employment. *The law does not require the employer to hold further advancement opportunities open until the service person's return.* (However, the military has pursued such advancements in technology that it may be possible -- and a good business practice -- to research video chat (i.e. Skype) to allow for a timely interview.



**Question: I'm going off the job for 2 weeks for a minor medical procedure. I want to know if the City can force me to use the FMLA.**

**Answer:** Yes, the Family Medical Leave Act allows for the employer to determine that the type of leave that the employee is requesting does qualify as FMLA.

This determination is generally *good* for employees. The FMLA is a "job protection" policy. However, if you believe that there is some downside, and that your procedure doesn't qualify for FMLA coverage, you can have your medical provider fill out the documentation to support non-FMLA sick leave usage.

**Question: For the last 20 years employees in our department have been allowed to wear shorts. Now, a new manager is telling us that we must wear long pants. Is there anything we can do about this?**

**Answer:** Yes, even if the practice of wearing shorts isn't written down, after 20 years it has been established as a "past practice" and cannot be changed without negotiation with your union. The only exception to this would occur if wearing shorts was specifically prohibited either by your MOU or by some state safety procedure, based on your job duties.

The negotiations on this subject, if the City is adamant about trying to make the change, would include

discussion about the legitimate business need of the employer to compel employees to wear long pants.

**Question: I was talking to a co-worker about the difficulty of my new job, and I mentioned that I was really stressed and thinking about resigning. The next day I was called to a meeting with our Human Resources Director who handed me a letter sending me to a MANDATORY medical exam. Must I cooperate with this? I am not ill and believe this is a form of harassment.**

**Answer:** In order to send you for a medical exam, the employer must show that there's a "nexus" (relationship) between an apparent medical condition and the essential duties of your job. Your complaint about the stress *could* be such nexus – or it might not.

It is probably best to cooperate and go to the exam, if you are confident you are able to perform your job. If you refuse, you CAN require the employer to provide its "evidence" of your performance problems – but this will, most certainly exacerbate the stress.

At a later date, you might consider a harassment complaint. Sending you for an unnecessary exam may be a form of harassment.

**Question: I am being laid off and my last day of work will be Thursday. I thought the City had to give me my paycheck immediately or at least within 72 hours. This is what the Labor Code says. Payroll is telling me that won't have my check till the end of the pay period. What can I do?**

**Answer:** Unfortunately, public agencies are exempt from this labor code section. They MAY wait until the end of the pay period.



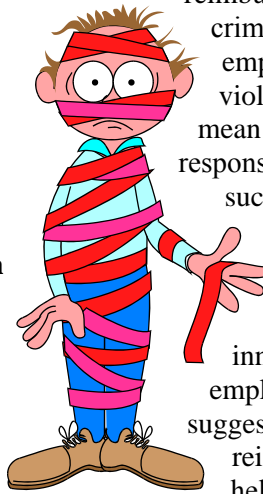
**Question: I gave the City the form my association provided to us regarding "designation of doctor" in case of work-related injury, but the City says they will not accept this form. I want to pre-designate my doctor! What should I do?**

**ANSWER:** Your employer is not only required to allow you to pre-designate your doctor, *they are required to post information* about your workers' compensation rights, including the right to pre-designate. If your employer didn't post the required information and/or doesn't tell you about your right to pre-designate your physician, you can see a doctor of your choice immediately after you suffer a work-related illness or injury.

However, no one wants to have an argument about doctors AFTER the injury has occurred, so we suggest that you call your Board rep or Association staff now. We will straighten the problem out. The law does not establish what kind of form you use to notify the City about your choice of doctor. Nor does the law require that the doctor sign the form...

**Question: I was falsely accused of doing something criminal on job. I went through a court trial and spent \$9,000 on a lawyer. I asked the City to provide a lawyer for me and/or to pay for mine, but my supervisor said they didn't do that sort of thing. I was found completely innocent, and never would have been put through this if I weren't a public employee. Shouldn't the City have defended me?**

**ANSWER:** California Labor Code Section 2802 requires employers to reimburse employees for legal defense costs related to performing their job duties. In other words, if you are performing your

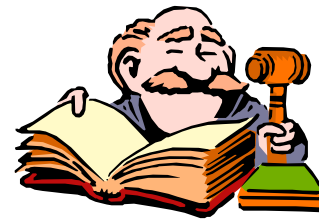


job duties and are charged with a crime or sued by a citizen, the employer is obligated to "indemnify" you and pay for your defense costs.

However, the law has been modified since 1995, making it possible for employers to avoid reimbursement if they can argue that the alleged criminal activity was "outside the scope of employment." This usually involves charges of violence and/or sexual activity. This does not mean that the employer can avoid all responsibility for defending employee's accused of such activities. It just means that there is no blanket answer to your question; each case is "fact specific."

In your case, since you were found innocent, it seems extremely likely that your employer was obligated to defend you. We suggest you file a grievance to seek reimbursement. Feel free to call staff for help...

## League of California Cities Files Suit Over State "Seizure" of Cities' Redevelopment Funds



The League of California Cities and the cities of San Jose and Union City have filed a petition with the State Supreme Court challenging the constitutionality of two redevelopment bills which were passed as part of the State budget in June. The lawsuit claims the State's action violates Proposition 22, which "*conclusively and completely prohibits the State seizing, diverting, shifting, borrowing, transferring, suspending, or otherwise taking or interfering with*" moneys designated for local government. Prop 22 was the constitutional amendment passed by 61% of California voters in November 2010. The lawsuit also asks the Court to issue a stay to prevent the legislation from going into effect until the Court can rule on the merits of the case.

The League maintains that the revenues protected by Proposition 22 specifically include property taxes which were allocated to California's 400 redevelopment agencies. Unless the new law is nullified, the challengers assert, hundreds of thousands of jobs may be lost and hundreds of communities will be left without revitalization funds – further adding to the economic decline.

The petition asks the Supreme Court to make an initial ruling on the request for stay by August 15. (*More next month...*)