

Santa Monica Municipal Employees Association December 2011 News



Jerry Brown's "12-Point Plan" Doesn't Affect Cities or Utility Districts (Yet...)

In October, Governor Brown unveiled a proposal for the massive overhaul of the Public Employment Retirement System. Although the plan could NOT affect cities or utility districts immediately (because they all have independent contracts with PERS) it holds real potential for future benefit losses. The key points of the "12-point plan," *most of which are aimed at state employees,* would

- Raise the retirement age for **new**, non safety workers from 55 to 67;
- Do away with the "single highest year" option for calculating benefits, and return to the average of the three highest years' earnings;
- Force new employees' pensions onto a "hybrid" plan, combining social security, a defined pension plan (which is what we have now) and 401(k) that would be "professionally managed."
- Require a 50%-50% split in contributions between employees and employers;
- Reduce "double dipping" (retired employees returning to their jobs in part-time or contractor capacity)
 - Reduce spiking (cease counting bonuses, leave time or other benefits as pay)
 - Cancel pension benefits for employees convicted of felonies in the course of employment;
 - Eliminate "air time" (employees' purchase of service credit for more time than they worked)



IS THIS A REAL THREAT OR JUST POLITICAL POSTURING?

These changes are drastic, but they are still in the early discussion phase. They may not make much headway in the legislature, which is still composed mostly of pro-employee Democrats. In fact, many analysts are suggesting that this "Plan" is Brown's way of showing a lot of public interest in pension costs, without really expecting to accomplish much. (For example, it's unlikely that ANYONE expects public employees' retirement age to be moved back by 12 years!) And it is also unlikely that the current legislature would move to make ANY PART of the PERS program subject

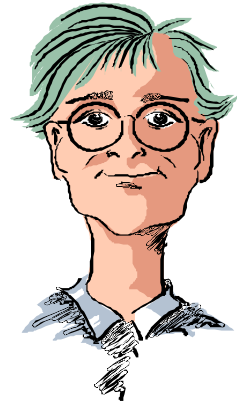
to privately managed investments. However, it is possible (in fact, probable) that PERS will crack down on spiking and double-dipping, take benefits away from felons, and do away with “air time” purchases.

WHO WOULD PLAN CHANGES AFFECT?

If current PERS contract options (such as the “2.7% @ 55” or “3% @ 60”) are eliminated, these changes *could be* applied to the cities. **However, they could NOT be applied to active employees.** The current state of the law is that benefits for current employees are “locked in” at the point of hire. They can be negotiated up; but they cannot go down.

Right now, all cities and utility districts that contract with PERS are covered by a set of plan options which are fixed by contract. These can’t be changed without bargaining, and can’t be reduced for any current employee. PERS is a defined benefit plan. The amount of the employee contribution is fixed, and the “pay off” at retirement is fixed, too.

The only part of your retirement benefit which can be changed to your detriment is the part involving “who pays.” And, as most public employees have learned in the last few years, your employer can, through negotiations, force you to share in the cost of the monthly retirement contributions.



Threat of Pension Reform Leads to 50% Increase in “Airtime” Purchases!

Fearing that the legislature may soon take away a public employees’ right to purchase “airtime,” CalPERS offices have been flooded with requests for the purchase cost estimates.

Right now, the PERS members have the option of purchasing up to five years of service time, based on a rate that is equal to the cost of both the employer and employee contributions. The payout can enhance your retirement A LOT: an investment with much higher returns than most other forms of investment today.

So far this year, the number of employees seeking actuarial on the cost of airtime purchases has increased by 50% over the previous two years... So much for the purchasing power of a good threat!

Economic Policy Institute Finds No Link Between Public Sector Benefits & State Budget Deficits

Last month the Institute for Public Policy published a study which demolishes the myth that public employees' retirement benefits are a cause for the states' budgets crises. Nationwide, it says, the average public employee collects \$19,000 after retirement. Similarly, "pension obligations currently account for 3.8 percent of the average state's spending. That's not where the current crisis is coming from."

So, what IS the cause of our states' financial crises? According to the Institute, most of the public agencies were quite well off until 2009. With the collapse of Wall Street, however, followed by the collapse of the housing market, public agencies lost the taxes they were collecting from property, incomes, and sales. The states' drop in revenues became a direct reflection of the slowing economy and rising unemployment. Further, the rising unemployment rate created a huge demand for social services at the same time that revenues were going down.

What does all of this have to do with public employees?

Not a thing. "State and local public employees make 11 to 12 percent less in salary than those in the private sector." And when education and experience are factored in, the gap is even greater. Further, if public employees were to receive even less than their meager retirement benefits, they would be unable to pay their own taxes, unable to support themselves in the economy, and they would become a drain on the social services in their states.

How much can we blame on state pensions?

The fact is that most state and local governments have been rapidly reducing their labor (and benefits) costs for nearly three years now – and their economic problems are only becoming worse. The problem is the lack of jobs and buying power and, thus taxation power, in the overall economy. Public employees and their benefits are irrelevant, "except for their role as scapegoats."



RECENT LEGAL DECISIONS

The following are significant legal decisions that further the rights of public employees in California. Please keep in mind that each case is unique. If you have a *specific* legal question or problem, call your Board Representative or our Professional Staff at (562) 433-6983 or cea@cityemployees.net.

Employer's Failure to Apply Discipline Consistently May be Grounds for Discrimination Complaint

A 59 year-old recruiter for Nielsen Media Research received several verbal warnings for small errors on the

job between 2005 and 2006. In 2006 she was placed on a “DIP” (Developmental Improvement Program), but was also commended in her performance review for “strong abilities” and a high level of production. At the end of 2006, she made another small, work-related error and the Company terminated her. The Company replaced her with a much younger staff recruiter. The (now unemployed) recruiter sued the company for age discrimination.

If an employee can establish a “prima facie” case of discrimination, the burden shifts to the employer to prove that discrimination was NOT the reason for the termination. Although the company was able to show that this employee had made several errors on the job, she was able to show that at least three employees, between the ages of 37 and 42 had made similar errors and violated numerous policies without serious consequences. The Court ultimately held the errors were merely a “pretext” and the company really terminated the recruiter so it could hire younger, more attractive recruiters.

New Law Raises Penalties for Employers who Mischaracterize Employees as Contractors



Governor Brown has signed SB 459, which has the capacity to impose big penalties on employers that willfully misclassify employees as independent contractors. Currently, millions (if not billions) of dollars are lost each year to both state and federal governments when employers force employees to absorb the cost of their own payroll taxes.

The new law takes effect January 1, 2012. Key points are:

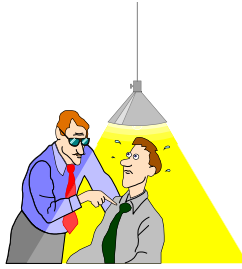
- The law prohibits the willful misclassification of employees as independent contractors.
- The law prohibits charging misclassified employees any fees or making deductions from their compensation where these would not apply if employees had been properly classified.
- The law gives the State Labor and Workforce Development Agency authority to assess penalties and take other action against violators.
- The law requires the Labor and Workforce Development Agency to report agencies that are licensed contractors to the Contractors’ License Board and requires the Board to bring an action against the contractor.
- The law subjects violators to civil penalties of \$5,000 to \$15,000 per violation in addition to any other penalties or fines permitted. If the employer is engaged in a *pattern* of violations, it subjects them to potential penalties of \$10,000 to \$25,000 for each violation.
- Subjects non-lawyers who advise an employer to misclassify an employee to joint liability with the employer.

SB 459 does apply to the public sector. If your employer is hiring contractors to fill positions normally filled by employees, they may be reported.

Further, if they are filling positions with contractors (or temps or part-timers) that normally are represented by your Association, the City may ALSO be violating your MOU. Your union has the right to grieve this “erosion” of the bargaining unit.

YOUR “LYBARGER RIGHT: Your Right to Confidentiality During an On-the-Job Investigation

If you are called into a questioning meeting with management, you do not have against self incrimination under the 5th Amendment. You DON'T have “Miranda Rights.” *Miranda* applies to criminal investigations; your **management cannot prosecute you criminally.** But it CAN compel you to answer questions, and does have the right to discipline you -- even to terminate you -- if you refuse to cooperate.



Therefore, if you are called in for questioning on the job, you should do two things: (1) call your Association Board rep or staff and (2) be prepared to answer questions truthfully. You DO have the right to know the subject matter of the questioning, and telling the truth is a very big deal with public agencies. Lying in an investigative meeting almost always results in discipline, even if the underlying issue was minor.

What if the underlying issue ISN'T minor? What if you are being accused of stealing, or something else, which COULD lead to criminal prosecution? In this case, you have what is called your “Lybarger Right,” the right to your employer’s guarantee that the information you provide in an administrative setting will not be provided to criminal authorities, nor used against you, for criminal prosecution. In other words, you can’t refuse to answer questions from the employer, under threat of losing your job, but you should be assured that your answers will not be used in any other setting.

We say “should be assured,” because, in reality, this protection can be a very thin wall – especially in cities that have their own Police forces. After all, especially in serious matters, the cities use their police detectives to conduct their administrative interviews! If the Police Department is ALSO conducting a criminal investigation of the same matter, it is hard to believe that information provided to a detective in one room cannot make its way into *another* room.

NO REAL “IMMUNITY...”

This lack of REAL immunity against prosecution was challenged by Thomas Spielbauer, a Santa Clara County attorney, who was terminated for refusing to answer questions during an administrative investigation in 2003. He argued that the 5th amendment “protects the

individual against answering official questions put to him in any proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”

The superior court upheld Spielbauer’s argument, and said that employers could no longer force employees to answer questions on matters involving possible criminal prosecution unless they provided IMMUNITY from prosecution. The County appealed, however, and the “Spielbauer Decision” was struck down by the State Supreme Court in 2008.

So, today, public employees enjoy the “Lybarger Right:” the right to be promised that no information provided in an investigative meeting with management will be provided to authorities who may prosecute you criminally. If you are called into a meeting, in addition to answering questions truthfully, you and your representative should:

- **Make sure that the questioner(s) affirm your Lybarger Right (and make sure that it is part of the record of the meeting.)**
- **Make sure you not waive any rights guaranteed under the law, if asked**
- **If your employer, refuses to provide your Lybarger Right, you and your representative might consider leaving the meeting, as the issue at hand may be more serious than the potential discipline for refusing to answer questions; and**
- **If the City DOES “read you your MIRANDA rights,” you should consider that the information gathering at the meeting might very well be used against you criminally – and you may refuse to answer questions under the 5th Amendment.**

Recent court decisions have had effects on your Lybarger Right, rendering it even weaker. The current state of the law is that a prosecutor or Federal Grand Jury *may subpoena your statements made during an administrative hearing*, but they may not “base the case” on statements you might have made. Criminal prosecutors have the burden of proof to show that any charges filed against you are based entirely on information gathered independently of your administrative investigation. (HMMMMM...)





A FEW MORE NEW LAWS...

The California legislature has passed a whole slew of new laws that would be of no interest to anyone but a public employee – or someone who represents them. Here's a good summary:

AB 195. Cities Must Provide Accurate Financial Information

It is now specifically illegal for a public agency to discriminate against employees for exercising their rights under the Meyers-Milias-Brown Act (the state bargaining law for cities and special districts.) **“Discrimination” now includes “knowingly providing an employee organization with inaccurate information regarding the financial resources of the employer...”**

SB 299. No Discontinuation of Health Benefits for Employees on Pregnancy Leave

Existing law prohibits discrimination based on race, sex, age or disability. Pregnancy disability law requires employers to provide reasonable time off (up to four months) for pregnant employees before and after childbirth. **The new law makes it illegal for employers to discontinue health care contributions during the period of that leave.**

AB 592. Accommodation for Pregnant Employees

This law “piggybacks” on SB 299, also making it unlawful for employers to fail to offer reasonable workplace accommodation for an employee who is temporarily, partially “disabled” due to pregnancy- or childbirth-related conditions.

AB210. Health Plans Must Provide Maternity Services.

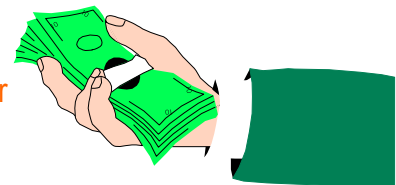
Effective January 1, 2012, all group health insurance plans must provide maternity care for anyone insured under their plan.

AB 22. Limits on Employers’ Ability to Gather Credit Reports on Employees

This law prohibits employers, except in financial institutions, from considering credit reports for most classes of employees (or prospective employees.) Classes for which employer CAN obtain reports are 1) jobs at the Department of Justice, 2) managerial jobs, 3) peace officers (and certain other law enforcement positions, 4) a job which requires regular access to personnel information or 5) a position which has regular access to \$10,000 or more of cash. The law also specifies that employers must give written notice to any employee (in one of the categories above) for whom it does request credit report information.

AB23. Transparency of Compensation for Attending Public Meetings

This law requires public officials who “constitute a quorum of any legislative body that convenes a meeting” to publicly announce the amount of compensation they receive for attending that meeting.



AB506. Raises Threshold for Declaration of Bankruptcy for California Public Agencies

Currently, a public agency in California may declare bankruptcy under the same conditions as apply to private companies or individuals. The new law prohibits an agency from filing bankruptcy unless it has participated in a “specified neutral evaluation process” or has declared AND ESTABLISHED a state of fiscal emergency.

“Fiscal emergency” is defined as “findings that the financial state of the public entity jeopardizes the health, safety or well-being of the residents...”

AB 1028. PERS Law: Greater Restrictions on “Double Dipping”

Current law prohibits any person who has retired under PERS from being re-employed unless s/he is reinstated from retirement. The exception to this lies with positions “of limited duration and requiring specialized skills or during an emergency to prevent stoppage of public business.” These appointments cannot exceed 960 hours in a fiscal year.

The changes in this law allow the interim appointment only if the position is deemed to require specialized skills or during an emergency to prevent stoppage of public business.. The law also prohibits the compensation for the interim appointment from exceeding the published pay **schedule for the vacant position, and it prohibits the agency from appointing a retired person under this provision more than once.**



IRS Clarifies Tax Treatment Of Employer-Provided Cell Phones

The IRS has issued clarification on the subject of taxation of employer-provided cell phones. The notice provides guidance on two issues:

First, if an employer provides an employee with a cell phone for business reasons, the IRS will treat the employee’s use of the phone as a “working condition fringe benefit.” This means that the value of this use has nothing to do with the employee’s income. It isn’t taxed.

Second, if the employee uses the employer-provided phone for personal calls, the value of the personal use will also be excluded from the employee’s income because it is a “de minimus” fringe benefit. In other words, the personal benefit is so small, that it is not counted as income.

According to the IRS, a cell phone is provided for “non-compensatory business reasons” if there are substantial business related reasons for giving the phone to the employee. A phone is NOT provided for “non-compensatory business reasons” if it is given to the employee “to promote the morale or good will of the employee,” to recruit him, or to provide a form of compensation.

Until 2010, employers and employees were required to keep detailed records of whether calls made on employer provided cell phones were for work or personal purposes. This put an enormous record keeping burden on employers. If no records were kept, the value of the cell phone was considered a “perk” that had to be been treated as taxable income to the employee. As a result, employers were being hit with back tax charges by the IRS. This IRS’ clarification resolves that problem. As long as your employer’s phone policy clearly states that the phone is intended to be used for business purposes, neither employees nor employers will hold tax liability.

When Can You File A Workers Comp Claim Over a Psychological Illness?



Everyone knows that people who are physically injured on the job have the right to workers compensation benefits. But it is also true that employees who suffer psychological or psychiatric injury may be due payment or medical care under the workers comp system.

The California Labor Code, Section 3208.3, says “A psychiatric injury shall be compensable if it is a mental disorder which causes disability or the need for medical treatment.” The common term for a psychologically-based workers compensation claim is a “stress claim.” Stress claims are not easy to win. Just as a claim for physical injury must be traceable to events at the workplace, an employee with a psychological injury will be cared for under workers compensation **if he or she can show that the actual events of employment were the primary cause of the condition.** The big difference between physical injuries and psychological ones, of course, is that cause of psychological ones are often not visible, or easily traceable.



Unlike physical injuries, where everyone usually agrees on the event that caused the injury (or at least the ongoing physical activity and equipment that caused the injury) most employers DON’T agree on the cause for most stress claims. In other words, most stress claims are initially denied. The burden is on the employee (and his/her doctor and often, lawyer) to prove that his employer, literally, made him ill.

Employer Has the Right to Investigate...

When an employee files ANY workers compensation claim, his employer has the right to investigate the facts of his case. With stress claims, the employer’s doctors have the right to ask personal questions, and conduct in-depth investigations of his personal life. Their goal is to “prove” that the injury came from other aspects of the employee’s life. It is up to the employee’s representatives to show that his employer’s actions were so abusive to him they actually rendered him mentally ill. In order to win this kind of case, the “evidence” of mistreatment must be solid and well documented.

The Person with the Claim Must Be Under Medical Care

Employees aren’t in a position to “go out on stress” based on their own diagnoses. As in any workers compensation claim, only a licensed medical doctor can diagnose an injury, prescribe a course of treatment, and identify the cause. In the case of a psychological injury, the doctor is usually a psychiatrist. Unlike other types of injuries, however, psychiatrists may have wildly different opinions about the cause of a mental illness.

This means that when an employee files a stress claim, the employer may conduct an investigation to search for *non-work* causes of the illness.



Several sections of the Labor Code provide guidelines to help the Courts determine whether a psychiatric injury is caused by employment. These include:

1. **The “six month rule,”** which generally means that if the employee has not been on the job for at least six months, the employer is probably not responsible for the psychological problem. (However, this “rule” doesn’t apply if the psychiatric injury was caused by a “sudden and extraordinary employment condition,” such as a traumatic event. A bank teller held hostage in a robbery, for example, would probably have legitimate work-related trauma...)
2. **The “post termination rule”** which says that a stress claim isn’t viable if it is brought after

notice of termination or layoff. There are exceptions to this, too, though: a) if the employer had prior notice of the psychiatric injury or b) there was evidence about the treatment of the psychiatric injury in the employee's medical records prior to termination or layoff or c) There was **also** a finding of sexual or racial harassment in the employee's complaint.

3. **An understanding that a claim is not likely to be "viable" if caused by a "lawful, nondiscriminatory personnel action."** (In other words the emotional distress caused by legitimate discipline, a pay cut or layoff probably won't be considered an acceptable basis for a workers comp claim.)



component. In these cases, a psychiatric claim can be added to an existing claim of physical injury.

If You Think YOU have a Stress Claim...

It is difficult to win a stress claim unless you have done serious groundwork. Because there is rarely a single event that caused the illness, you will need a good written record of the events or abuses that have led to your condition. It's also important that you be able to show that the employer **knew** of your distress, and did little or nothing about it. If this groundwork has not been laid, you should probably contact your union rep *prior to filing a claim*. You have some obligation to try to resolve the problem on the job before filing a legal complaint.

The Emotional Distress Caused by a Physical Injury

There are two kinds of psychological claims: "pure" psychiatric injuries, where the employee claims that the employer's treatment literally and directly made them ill, and those where an employee becomes disturbed or depressed after a physical injury due to chronic pain, inability to work, or diminished quality of life. People with serious injuries often develop an emotional

When Do You Need a Lawyer?

People ARE made psychologically ill by harassment, discrimination or other kinds of abusive work conditions. But the pitfalls are much greater -- and the "threshold" for winning is much higher -- in stress-related workers compensation claims. Most claims are initially denied. To appeal, and you *should* appeal if the claim is legitimate, you will probably need an attorney. Call your Association staff for a referral.

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.



Question: I used 15 sick days last year, mostly taking care of my wife, who has been in and out of the hospital. The city gave me a "letter of warning" about my "apparent sick leave abuse," but I brought in a doctor's slip every time I was off. I thought I had the right to use a certain amount of sick leave to care for family members. Isn't this true?

Answer: Under the Family Medical Leave Act, you have the right to use up to twelve weeks of time off the job to care for a sick family



member (or yourself, if you are sick.) If your management knows that you are using the sick leave to take care of a seriously ill relative, they are supposed to tell you about your rights under the FMLA. Alternately, you can tell them, and fill out the appropriate form, with some doctor's information. Once this is done, there shouldn't be any repercussions: no letters, no mention of the leave on your performance reviews. If you can demonstrate, now, that your time off was due to your wife's serious

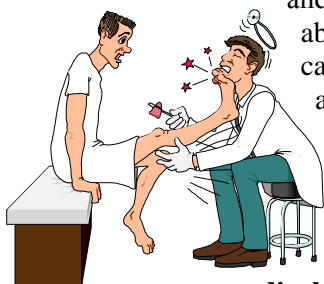
illness, you can probably get the letter rescinded. If you need help with this, feel free to call your Association Board Rep or staff.

Question: I've become personal friends with one of the vendors at work and recently borrowed some money from him. My manager found out and says I can be fired for this. Is that true?

Answer: Yes it is, especially if you're in a position to influence business that could go to this vendor. It's a complete conflict of interest for a City employee to take any gift (or loan) from any member of the public. It's even worse if that person does business with the City. Even if the loan was based on friendship, it's tainted. Your smartest move now is to pay back the loan as quickly as possible. You might also want to go to Management and tell them that you took this action, but realized afterward that it was an error, and have given the money back.

Question: If an employee has a chronic illness and fills out the proper forms to be protected by the FMLA, can his Department Head or HR Department deny the request?

Answer: There are a few basic requirements to be eligible for the FMLA. You must have worked at least 1250 hours in the last year, and have not already used up your 12 weeks in that year. After this, if your doctor says that you have a serious illness, you should not have any problem. If the City believes that your doctor's note is somehow not legitimate, or that your illness is not serious, they CAN send you to their doctor for verification. In the event that YOUR doctor and the CITY's doctor disagree about your condition, the dispute can be resolved by sending you and/or your medical information to a third, agreed-upon doctor.



Question: I am wondering if the city can require us to see their doctor for the medical check up related to our commercial driver's license renewals. In my previous job, I saw my own doctor, but this city wants us to see theirs. It seems to me that the license is the property of the individual. I don't see why the City should have any control over this.

Answer: There is no law addressing this topic. If the City has a policy requiring that you see their doctor, then you need to comply with their request. If there is no policy, and you don't want to see their doctor, let the City know this. If they insist, talk to your union

rep. You should *never* refuse a direct order, but you and your association may grieve this violation of your medical privacy rights.

Question: I have been doing the work of a higher job class for ten months and receiving acting pay all along. Now the City is finally filling the job. I took the so-called exam, which was nothing more than a subjective interview. There were no technical questions. No one took into consideration that I've been doing the job for most of the year. Of course, they gave the job to someone else, saying I did not pass the exam! Is there anything I can do about this?

Answer: It's too bad that you didn't press at some point for the City to properly fill the position by reclassifying you. Under those circumstances, the City would have a hard time arguing that you shouldn't be given the job. At this point, you can still file a grievance, arguing that the testing procedure wasn't appropriate to the position. But it's much harder to get an employer to reverse a decision after it's already been made.



Question: I'm off the job for a 30-day detox program, using my own sick leave and vacation. I just found out that I'm not going to be paid for the 2 holidays this month! Is this legal?

Answer: Generally, if you're in active employee status (and you *are*, if you're using accrued leave) then you should be paid for your holidays. HOWEVER, if the local rules (MOU or Personnel Rules) say anything like "the employee must work the day before and/or after a holiday in order to receive holiday pay," then the City is within its rights to deny your holiday pay.

Question: We have a co-worker who seems pretty unstable. He loses his temper, threatens people physically and has a bad case of "road rage." I don't want to get the guy in trouble, but frankly, I'm afraid to be around him. Several of us have complained to our supervisor, but nothing happens. Is there anything we can do?

Answer: You have the right to a safe work environment. If your supervisor has failed to take action, then you should go above the supervisor's head, to the Department Head or Personnel Department. – as far as necessary. If you and your co-workers are reluctant to do this on your own, feel free to call your union staff for help. Raising this concern will probably also have the secondary benefit of getting your angry co-worker some help -- although your own health and safety should be your first consideration.