Torrance Professionals & Supervisors Association February 2018 News

Protecting the Rights of Older Workers

We reached a major milestone last year! The federal law that protects workers from age discrimination – the Age Discrimination in Employment Act of 1967 – turned 50 years old! Signed into law by President Lyndon B. Johnson, the Act has achieved many milestones in protecting "older" employees from workplace discrimination. Bi-partisan majorities in Congress have strengthened the law since its first passage. But a long-standing conservative majority on the U.S. Supreme Court has weakened the law's protections. What did the law achieve? How can we further strengthen the rights of older workers?

Let's start with who is an "older" worker. Under the Act, it's anyone age 40 and over. This should surprise you! Today, it's quite common for young people to enter the workforce in their mid to late 20s, after military service, college, and even advanced degree programs. Most don't begin to settle into their careers until their 30s and 40s. The state-wide pension reform law, passed in 2013, pushed back the retirement formula to age 62. Prior retirement formulas had made it lucrative for most employees to retire in their mid to late fifties. For most of the baby boomer generation, it's not uncommon to see employees working into their late sixties or even early seventies, health permitting, of course.

This was not the lay of the land in 1967! The law originally protected workers between ages 40 and 65. Congress moved the upper limit to 70, and eliminated it altogether in the mid-1980s. In the mid-1960s, it was common for employers to have a mandatory retirement age, and to ban applicants older than age 45. Thankfully, the Act has largely fixed these more blatant bars to employment. It has made it illegal to discriminate based on age in hiring, promotions, wages, termination, and layoffs. It has banned job postings that specify an age preference or limitation. It has largely cured the employer practice of denying certain benefits – such as health insurance or retirement benefits – to older employees. Or to reduce those benefits or require older workers to pay more. Since the mid-1980s, it has prohibited mandatory retirement in most sectors. It applies broadly to employers who employ at least twenty employees or more.

But it has not been a cure-all. Employers may still discipline or discharge employees, including for reasons such as attendance and low productivity. Employers can act based on any "reasonable factors other than age." Other defenses to an age claim include bona fide occupational qualifications and seniority systems. Employers may legally offer voluntary early retirement incentives. Arbitration clauses may deprive the employee of the right to sue in court. And, since a 2009 U.S. Supreme Court case, workers must prove that age is the primary reason they were discriminated against, not just one of the reasons.

The larger challenge today is how to prove age discrimination when it's not blatantly obvious. In December, applicants filed suit against Facebook claiming that ads they hosted on their social media platform specifically targeted younger job seekers. The suit included Amazon, T-Mobile, and Cox Communications as defendants. Last spring, the Illinois Attorney General launched an investigation after a 70-year old man complained he'd been unable to use a resume building tool on a job search site. The drop-down menu required you to select the year you graduated or got your first job. It only went back to 1980 (thereby excluding anyone over age 52). And just this past October, in California, Governor Brown signed a state-wide law that bans employer inquiries into an individual's salary history. The law applies to all employers, including state and local governments. It took effect January 1st, 2018. Employers had previously used salary history to filter out applicants based on age, and to pay women less for equal work.

But it's not advisable to rely solely on one law – and its enforcement – to ensure equal rights for older workers. The Association can bargain for seniority in a layoff procedure, or in overtime, shift bidding, or vacation policies. It can negotiate stronger procedures for reclassifications, promotional recruitments and exams, and various hiring practices. It can seek longevity pay to provide financial incentives for more tenured members to stay with your agency. And members can contact professional staff for assistance in filing a grievance or internal complaint if they suffer harassment or discrimination due to their age.

News Release - CPI Increases!

Each month the U.S. Department of Labor, Bureau of Labor Statistics publishes monthly consumer price index figures. The data looks back over a rolling 12-month period at how much goods and services have increased from a year ago.

These numbers are important! They're a rough measure of inflation, and elected officials and agency management often look to these numbers in determining "Cost of Living" raises. Here are the important figures you need to know:

2.1% - CPI for All Urban Consumers (CPI-U) Nationally

3.1% - CPI for All Urban Consumers (CPI-U) for the West Region

3.6% - CPI for All Urban Consumers (CPI-U) for the Los Angeles Area

2.9% - CPI for All Urban Consumers (CPI-U) for San Francisco Bay Area

2.8% - CPI for All Urban Consumers (CPI-U) for San Diego Area

Legal Updates

Gov. Brown Argues for Robust Enforcement of Pension Reform Act of 2013; Says Elimination of Option to Purchase Airtime was Lawful.

Governor Brown made waves in November, when he directed his office to intervene in a lawsuit currently pending before the California Supreme Court over the Pension Reform Act's elimination of the ability to buy "air-time" – *i.e.* extra years of service credit towards pension calculations that weren't worked.

Typically, the State Attorney General's office files briefs on behalf of the State in lawsuits. But with Governor Brown close to the end of his second term, and officials from the Attorney General's Office running for office in upcoming elections, it appears Governor Brown wanted the State to take a more robust stance in defending the Pension Reform Act that he helped pass into law.

The Pension Reform Act eliminated the ability for public employees to purchase airtime. A local fire-fighters union and several of its members filed a lawsuit alleging that this legislative repeal of the airtime statute violated the California Constitution's contract clause, at least as applied to any employee hired before January 1st, 2013. The trial court and Court of Appeal dismissed the claims, but the firefighters sought review by the California Supreme Court, who agreed to hear the case. A decision is anticipated later this year.

This case – along with *Marin Assn of Public Employees v. Marin County Employees' Retirement Assn*, Case No. S237460, also pending before the California Supreme Court – challenges the "California Rule," which says that pension benefits in effect the day a government employee is hired are a vested right and must be honored throughout the employee's entire career. In his brief, Governor Brown argued:

> Unlike the narrow set of laws that have been held to impliedly create pension rights protected by the contract clause, the statutory option to purchase airtime bears no resemblance to deferred compensation earned in exchange for work performed. The airtime purchase option was therefore not a "pension right," subject to heightened protection under the contract clause. Especially when unfunded liabilities of California's public pension systems are at record levels and rising rapidly, the Union's attempt to radically *expand* the scope of the vested rights doctrine should be rejected.
>
> Furthermore, even if this Court were to assume that the Legislature created a vested right to purchase airtime, the Legislature was free to withdraw it. Withdrawing the offer did not substantially impair employees' right to a substantial or reasonable pension, or their reasonable expectations. And even a law substantially impairing a contract will generally stand if it was reasonable and necessary to serve an important public purpose. The law here easily meets this test. Ending the costly, imperfect practice of selling additional "service credit" untethered to service was necessary to re-align pension benefits with public service, eliminate a cause of premature retirements, and address a well-established source of unfunded liabilities never intended by the Legislature. And because the mere offer to sell airtime conferred no cash value, withdrawing the

> offer from employees who never purchased airtime did not materially disadvantage anyone.

[*emphasis in original*]. The case is *Cal Fire Local 2881 v. CalPERS*, Case No. S239958, out of Alameda County.

Retired Public Employees Association News

To say that the pension landscape has been tumultuous is a bit of an understatement. With the pension cuts in Loyalton and the East San Gabriel Valley, eyes and ears are attuned to certain court proceedings that could have a significant impact on the future of pension security.

On January 8, 2018, the First Appellate District appeals court ruled on a case involving pensioners from those governed by the County Employees Retirement Law of 1937 (CERL). Specifically, Alameda, Contra Costa and Merced counties challenged the constitutionality of Governor Brown's Public Employee Pension Reform Act of 2013 (PEPRA), which the CERL Boards proceeded to implement.

The dispute surrounds what can be considered "compensation earnable," which would go toward the retiring employee's "final compensation." Due to PEPRA, the question of what is or is not included is up for debate. Up for consideration were leave cash-outs, terminal pay, pay outside normal working hours and enhancement payments—all of which are considered excluded under PEPRA.

The three-judge panel—led by Judge Timothy Reardon—heard the appeal and challenged the ruling of a 2016 case in Marin County. In the end, they affirmed part of it, reversed part of it and will be sending it back to the lower courts for further proceedings. Ultimately, they determined that "(t)he trial court's detailed analysis of PEPRA's effects on the pensions of legacy members was incorrect in certain respects and also improperly failed to include a necessary vested rights analysis."

They opined that some of the benefits for pensioners may be protected. Judge Reardon stated, "the application of the detrimental changes to legacy members can only be justified by *compelling* evidence establishing that the required

changes 'bear a material relation to the theory…of a pension system' and its successful operation."

The case will ultimately be heard by the California Supreme Court, who promised to review it upon lower court hearings. RPEA will continue to monitor the outcome of these proceedings.

Since the beginning, RPEA has been actively involved in enhancing the lives of retirees. We are the only statewide association representing all PERS retirees. RPEA works tirelessly to safeguard and promote the retiree benefits of California's public employees. For more information regarding retiree pensions and health benefits or to learn more about the Retired Public Employees' Association of California, check out our website www.rpea.com.

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 specific problem, talk to a Board Rep or CEA Staff at (562) 433-6983 or cea@cityemployees.net.

Question: For the past 18 months, our employer has been overpaying 3 of us. It is double what we are supposed to get for double time pay. I read online that California law says the employer cannot force the employee to pay back overpayment of wages. What are our legal rights? They have not told us anything yet.

Answer: In California, the Division of Labor Standards Enforcement (DLSE) views deductions from wages to recover overpayments to an employee as unlawful. Wage deductions in California are regulated by numerous court decisions as well as California Labor Code §221, which stipulates that it is unlawful for an employer to collect or receive any part of wages already paid to an employee. However, the law does allow for an employee to voluntarily agree to repayment of any overpaid wages as long as the employee's wages are not reduced below minimum wage, and, ultimately, the employer could take you to Court in order to garnish your wages.

This means that you might want to cut a deal with your employer where you agree to pay a partial amount, or lesser amount, over a long period of time. If you're unsure how to do this, please contact your rep or professional staff for assistance.

Question: I work as a special program coordinator. Last month, our employer started a compensation study which compares benchmark classifications to 7 survey agencies. Mine is a benchmark classification (because it doesn't belong to a job family). The problem is none of the survey agencies have a similar position to compare to. The special program I coordinate is unique which most employers don't even do, much less have a position like mine. How can my salary be set competitively as part of the survey? What are my options?

Answer: Good question! An option here is to search outside the 7 survey employers and compile your own list based on positions that coordinate the same, or similar, special programs. Since your position sounds specialized and rare, it's reasonable for the employer to expand the survey, if only for your classification.

Question: I have a workers' compensation case for an on-the-job injury. Good news is I'm back on the job. But I have follow-up medical appointments. The agency is now saying that I must use my own leave time (sick) to cover my absences from work to go to these follow-up appointments. Can they do that? I thought, since they're requiring me to go they must pay my wages for the visit.

Answer: Unfortunately, the employer doesn't necessarily have to pay for time at follow-up appointments, so ideally you should schedule your appointments before or after working hours. However, once your claim is accepted and you are being treated, the employer cannot cause you to lose pay over the injury, which means if the physician is ONLY available during your working hours, the employer should pay for your time.

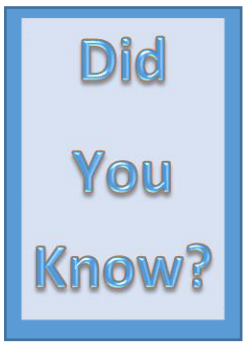
Question: I'm an Association Board Member. Last year, our employer hired an employee for a position in our unit, but the employee quit. The employer is now recruiting for the same position, but under a new title. They're also putting it in a different bargaining unit. Can the employer do this without our approval? The recruitment request has not gone to the personnel board, but it might soon.

Answer: No! The employer is required to meet and confer with the Association before making any changes to the position – and if the employer wants to remove a position from your bargaining unit entirely,

the employer must follow its local rules, or the Public Employment Relations Board's procedure, for unit modification. These procedures will include notifying any affected party, as well as providing the opportunity to challenge the employer's position based on community of interest.

Question: My co-worker left 18 months ago. I've taken over many of his duties, plus mine. He was in a higher classification. Initially, my employer made it look like a great opportunity, like I would be able to move up into the higher class since I was taking over the work. Per our MOU, after 6 months of working out of class, you can ask to start the reclassification process. I did that 12 months ago, per the advice of my manager. I wrote out a correct job description and completed a Position Description Questionnaire (PDQ). My manager and the Director both signed off. It went to HR 6 months ago. It was "lost" on someone's desk for 3 months, went to the new HR Manager's desk, and then the General Manager's office. They say the next step is a desk audit (which would clearly show I'm working in a higher class). Others who worked out of class had no issues getting re-classified. I'm being shut out and want honest answers. Isn't there something we can do? This is taking forever, meanwhile I keep doing the higher-class work.

Answer: Yes! It is a violation of your Association's MOU and job descriptions to assign work that belongs to another classification without properly paying you for the work you are performing. You should contact your Rep or professional staff to help you go through your current job description, and the job description of the higher class to identify the specific duties you're now responsible for. From there, your Rep can help draft an "out of class" grievance that will move much faster, and hopefully prove more effective, than a desk audit.



The California Public Employment Relations Board (PERB) is a quasi-judicial administrative agency charged with administering 7 labor relations statutes (MMBA, EERA, HEERA, TEERA, Dills Act, Trial Court Act, & Court Interpreter Act), covering employees of California's public schools, colleges, and universities, employees of the State of California, employees of California local public agencies (cities, counties, and special districts), trial court

employees, trial court interpreters, and supervisory employees of the LA County Metropolitan Transportation Authority.

The Board is composed of five members. PERB is headquartered in Sacramento with regional offices in Oakland and Glendale. The regional offices are staffed mostly by regional attorneys and administrative law judges, who largely handle matters from within that region. PERB has exclusive initial jurisdiction over unfair practice charges and their remedies under each of these 7 collective bargaining statutes. This means you must file with PERB and exhaust their procedures before filing suit in court.

PERB enforces alleged violations of these statutes. It has broad discretion to take remedial measures necessary to effectuate the purposes and policies of these Acts (except it can't award punitive damages). This may include front pay, back pay, orders of reinstatement (if you're terminated for union activity), removal of disciplinary materials from personnel files, notice postings, orders to bargain in good faith, and damages resulting from unalwful unilateral changes in terms and conditions of employment. If necessary, PERB will seek enforcement of its subpoenas, rulings, orders, and decisions in state court. PERB's website (https://perb.ca.gov/) has a wealth of resources, including administrative decisions searchable by a topic index, administrative regulations, the text of each of the 7 statutes, and "Fact Finder" Reports that are issued in bargaining disputes. You may also find information on how to file charges.

Starting January 1st, 2012, employee organizations (under the MMBA) who reach in impasse in collective bargaining can file with PERB for a mandatory impasse process called fact finding. This includes a union member, a management member, and a neutral chairperson appointed by PERB. This panel holds a hearing and issues an advisory report that must be made public.

Starting July 1st, 2012, the State Mediation & Conciliation Service (SMCS) became a division of PERB. SMCS is a staff of skilled neutrals who mediate labor disputes between employers and unions. They also conduct representation elections. You can request a mediator through PERB.