ACHRO/EEO
Association of Chief Human Resources Officers/
Equal Employment Officers

"THE COMMUNICATOR"

2010 Fall Edition **Volume IV, Issue 1**

Articles of Interest Inside This Issue:

An Update from our ACHRO/EEO President Wyman Fong. . .

Colleagues:

As President of ACHRO/EEO this fiscal year, it is my distinct privilege and honor to welcome you to the 2010 Fall Training Institute. I am proud of this year's theme "**ACHRO/EEO: The Next Generation"** which is in alignment with our organization's leadership in professional development efforts for our human resources and equal employment professionals. I am extremely excited about our new efforts to support professional development through expanding networking opportunities among our membership. This will be discussed further at our conference.

With that said, please join me in welcoming Cynthia Hoover as our new Vice President, and Diane Clerou, as Secretary. I would also like to express my gratitude and heartfelt thanks to the ACHRO/EEO 2009-2010 Officers (Randy Rowe, Irma Ramos, Connie Carlson, and Teddi Lorch) for their support, encouragement, and friendship. Lastly, I am thankful for the ACHRO/EEO Staff Dream Team comprised of Ron Cataraha, Ruth Cortez, and Reneé Gallegos - they really make it all happen!

As you look over this year's program, I believe you will find relevant, diverse, and inclusive topics for all our members. I look forward to our keynote speaker, Barbara Whorley, who I believe you will find dynamic, our mini-getaway dinner cruise aboard the Tahoe Queen as sponsored by Keenan and Associates, and I am particularly looking forward to simply seeing my colleagues from around the state – can we say therapy!

I look forward to meeting and connecting with many of you. Have a great conference!

Wyman Fong

Wyman Fong, ACHRO/EEO President
ACHRO/EEO President
WFong@clpccd.org

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ACHRO/EEO OFFICERS 2010-2011

Wyman Fong
ACHRO/EEO President
WFong@clpccd.org

Cynthia Hoover
ACHRO/EEO Vice-President
CHoover@avc.edu

Diane Clerou
ACHRO/EEO Secretary
diane.clerou@scccd.edu

Connie Carlson
ACHRO/EEO Treasurer
connie-carlson@redwoods.edu

Randy Rowe
ACHRO/EEO Past-President
randy.rowe@scccd.edu

ACHRO/EEO STAFF

Ron Cataraha
ACHRO/EEO Consultant
rcatsr@aol.com

Ruth Cortez
ACHRO/EEO Support Staff
Administrative Assistant
Klavier88@verizon.net

Reneé Gallegos
ACHRO/EEO Support Staff
Web Developer / Publications
RDGallegos@achroeeo.com

These days social networks are the way to go for the latest information and updates!
ACHRO/EEO is now active and looking for "friends" on Facebook!

Achroeeo

Public Agency Retirement Services (PARS) is pleased to contribute this article for the "The Communicator" highlighting recent retirement-related legislative and regulatory developments of interest to Human Resources Officers in California's community colleges.

FIRST STEPS TOWARDS PENSION CHANGES

This year, pension reform has been a focus for the governor, the candidates for governor, and the legislature. Union political strength may impede any changes this year, but this is clearly a topic that will be in the political arena and media for awhile.

Governor's Actions on Pensions

The year began with Governor Schwarzenegger again presented pension reform as part of his 2010-2011 budget proposal. The Governor has indicated that he will not sign a budget without pension reform. As far back as 2005, the Governor has had pension reform as a priority, then proposing alongside a ballot initiative that newly hired employees be covered by a defined contribution plan, rather than defined benefit pensions under PERS and STRS. Last year Gov. Schwarzenegger proposed that pensions for new state hires be reduced. Both times union opposition led to abandonment of these plans.

On June 16, the Governor announced tentative contract agreements with four state unions that include as he called it: "significant first step towards pension reform and reining in the state's growing pension costs". The agreements roll back the expansion of pension benefits adopted in SB 400 in 1999 and will move pension contributions for all employees in the four unions to a minimum of 10%. The union agreements also make changes to benefits for new employees including requiring new hires to work additional years to receive full benefits and basing final retirement compensation on the highest three years of wages instead of highest year. Since then, Schwarzenegger has struck tentative agreements with several more state employee unions.

Pension Reform Legislation Fails

The governor's pension reform language also made it into Senate Bill 919, introduced by Senate Minority Leader Dennis Hollingsworth. The bill would raise the retirement ages for non-safety employees from 55 to 65 while safety employees would be raised from 50 to 57. The bill would also scale back benefits for new hires and the number of employees who could qualify for some of the more lucrative benefits. New non-safety hires would be subject to a 2% at 65 retirement formula. Pensions would be capped at 90% of final compensation, which would now be based on the highest three years of average annual compensation. The bill died on June 14 but continues to be part of the budget negotiation process.

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The Candidates Weigh-in

Republican candidate for Governor, Meg Whitman, advocates switching most new state hires, except for police and firefighters, to a 401(k)-type plans. The Whitman plan also calls for raising the retirement age from 50 to 55 for public safety employees and from 55 to 65 for non-safety state workers, qualifying for a pension to take more than five years, and curbing 'spiking' of final pay to boost pensions. Most worker pension contributions would be increased from 5 to 10 percent of pay. Democratic candidate (and former Governor) Jerry Brown, on the other hand, has criticized defined contribution plans because they leave retirees vulnerable to investment losses when the stock market plunges. He has introduced his own pension reform proposal --

PERS Contribution Rate Increases

This summer the PERS Board approved 2010-11 employer contribution rates for the state and schools. The action brings the 2010-11 contribution rate for K-12 and community college employers to 10.707%, up from the 9.709% rate in effect for the current year.

Contribution increases are impacted by PERS' response to a recent actuarial study that revealed longer-than-expected member life expectancies, earlier retirement ages, and higher salary levels. Because of those findings, the PERS Board approved new actuarial assumptions at its April meeting that are being used in setting the new contribution rates that take effect July 1, 2011. The increases also reflect the approximately 25% investment loss experienced by PERS, as well as the Board's adoption of a new smoothing method to phase in the impact of the investment losses on contribution rate over three years.

STRS May Reduce Investment Return Assumption

In June the STRS Board delayed action on staff-recommended reductions in the investment return assumption used to determine the funded status. The current 8% investment return assumption was used to prepare the overdue June 30, 2009 actuarial assumption, which was presented to the Board at its September meeting. STRS has been contemplating a reduction of its investment return rate assumption by half a percentage point, from 8% to 7.5%.

STRS has not altered the investment return assumption since 1995. Schwarzenegger's administration wants STRS investment forecasts to be lowered even more, to around 6 or 6.1 percent, claiming that STRS (and PERS) has been ignoring the growing financial problems. The Board now plans to vote on the matter in November. If it adopts a lower investment return assumption, that assumption could be used for the next actuarial valuation of the fund, which will be done in April.

Any reduction in the STRS investment forecast will play a huge part in determining how much districts, employees, and the state will have to spend to support the system. Already severely underfunded, STRS has been preparing to ask the Legislature in the future to increase the contributions from the state, community college districts and school districts.

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(Unlike PERS, STRS does not have authority to increase contribution rates.) A reduced forecast could translate into a 20% increase in contributions to STRS at a time when districts are already facing intense budget pressures. PERS has begun to examine the issue but isn't planning a board vote on lowering its investment return rate assumption until next February.

SB 1425 Anti-Spiking Bill

SB 1425 (Simitian, D- Palo Alto) was passed by the legislature and now awaits signature by the governor. It prohibits a PERS or STRS member, who retires on or after January l, 2012, from returning to work for an employer covered by the retirement system they retired from for 180 days following the date of retirement. STRS members under normal retirement age (age 60) must currently sit out 180 days before returning to work, but as of Jan 1, 2012 all STRS members, regardless of age, would have to sit out 180 days before returning to work. The bill also prohibits any change in compensation for the sole purpose of increasing pension benefits and prohibits use of severance pay and limits cash conversions of accrued benefits (sick/vacation time) from being included in final pension calculation. SB 1425 limits the compensation used in pension calculations to the average increase received in proceeding two years by employees in the same or related group and requires each retirement system to establish an audit process for reviewing compensation. The compensation provisions go into effect January 1, 2011, while only the return-to-work rules go into effect January 1, 2012.

"Bell Bills" on Compensation Disclosure

In August a package of legislation was introduced in response to the revelation of exorbitant salaries for high-level officials in the City of Bell and other municipalities. On the last day of session, only two of these bills were passed by the legislature and will move on to the governor:

AB 194 (Torrico) Retirement Cap - This bill would institute a cap on benefits for a person who first becomes a member of a public retirement system on or after January 1, 2011. Maximum pay upon which retirement benefits can be based would be set at 125% of the Governor's Dec 7, 2009 recommended salary ($173,987) – or $217,483.75. Annual COLAs would be allowed going forward based on the All Urban California Consumer Price Index. This applies to all retirement systems and would affect very highly compensated employees at community college districts only.

AB 827 (De La Torre) Automatic Compensation Increases - AB 827 applies to all public agency types and deals with "evergreen" provisions – or automatic renewals and compensation increases – of employment contracts for excluded employees (those employees reporting directly to legislative bodies). After 1/1/10, AB 827 prohibits any executed contracts from including automatic renewal clauses, automatic salary increases (except for COLA), and severance payments more than 1 year's salary. The bill also requires a performance review to be discussed at open session (and publicly available).

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prior to increasing the salary beyond a COLA. Last-minute Senate amendments added employer contributions to pensions and "deferred compensation" to the definition of "compensation" – most likely meaning 457, 401(a) and 403(b) defined contribution plans.

PERS Compensation Disclosure Actions

PERS announced it will post audit reviews of public agency membership and payroll data submitted to the retirement system. PERS will highlight significant findings of public agency reviews and regularly report them to the PERS Board. They are also working on establishing procedures and guidelines for PERS working-level staff to notify supervisors and senior management of unusually high compensation and salary increases such as those that occurred in Bell.

In addition, the PERS Board's Benefit and Program Administration Committee was briefed on 8/17 on the establishment of the Public Employee Compensation and Benefits Task Force, which includes PERS staff and representatives of all major constituent groups. The task force will focus on options for providing greater public disclosure of public employee compensation and benefits and options regarding caps on total compensation.

If you have any questions on these issues call Maureen at (800) 540-6369 ext. 135 or email to mtoal@pars.org. Please come ACHRO Training Institute session on early retirement incentives in Lake Tahoe.

Human Resource Moves Around our State:

New Hires/Promotions:

Victoria Simmons, Interim Vice-President, *HR Sierra Joint CCD*
Cameron Abbott, Director HR, *Sierra Joint CCD*
Tammy Kenber, Manager, HR, *Sierra Joint CCD*
Karen Bridges, Interim Administrative Assistant, HR, *Sierra Joint CCD*
James Andrews, Manager, Employment, Diversity & Employee Relations *Chabot-Las Positas CCD*
Karen Ulkrich, Director, HR, *Solano CCD*
Annette Loria, Vice-President, HR, *Mt. San Antonio College*
Jaime Cannon, Director, HR/EEO Officer, *Feather River College*
Amber Green, Director Employment Services, *Grossmont-Cuyamaca CCD*
Tim Corcoran, Director, Employee & Labor Relations, *Grossmont-Cuyamaca CCD*
Andrea Riesgo, HR Manager, *Copper Mountain CCD*
Sandy Chung, Assistant Director, HR, *Santa Monica CCD*
Ribhalin Khapuri Mukhim, HR Analyst, *Santa Monica CCD*
Vanna Ratnaransy, HR Analyst, Leaves & Benefits, *Santa Monica CCD*
Monica La Benda, Professional Development Coordinator, *Santa Monica CCD*
Heather Bridges Memarian, Benefits Clerk, *Santa Monica CCD*
Susan Mac Briar, Benefits Support Technician, *Santa Monica CCD*
Connie Carlson, Associate Faculty Coordinator, *College of the Redwoods*
Tina Wahlund, HR Technician, *College of the Redwoods*

Retirees:

Ronald Martinez, Vice-President, HR, *Sierra Joint CCD*
Jeanne Leland, Manager, HR, *Sierra Joint CCD*
Judy Mc Clymonds, Administrative Assistant, HR, *Sierra Joint CCD*
Dr. Joseph Quarles, Vice Chancellor*, HR, Coast CCD*
Allene Quarles, Assistant Director*, HR, El Camino CCD*
Dr. Patricia Brown, Dean, *HR, Santa Monica CCD*

Please email any personnel updates to Ron Cataraha at RCatsr@aol.com for posting in future newsletters.

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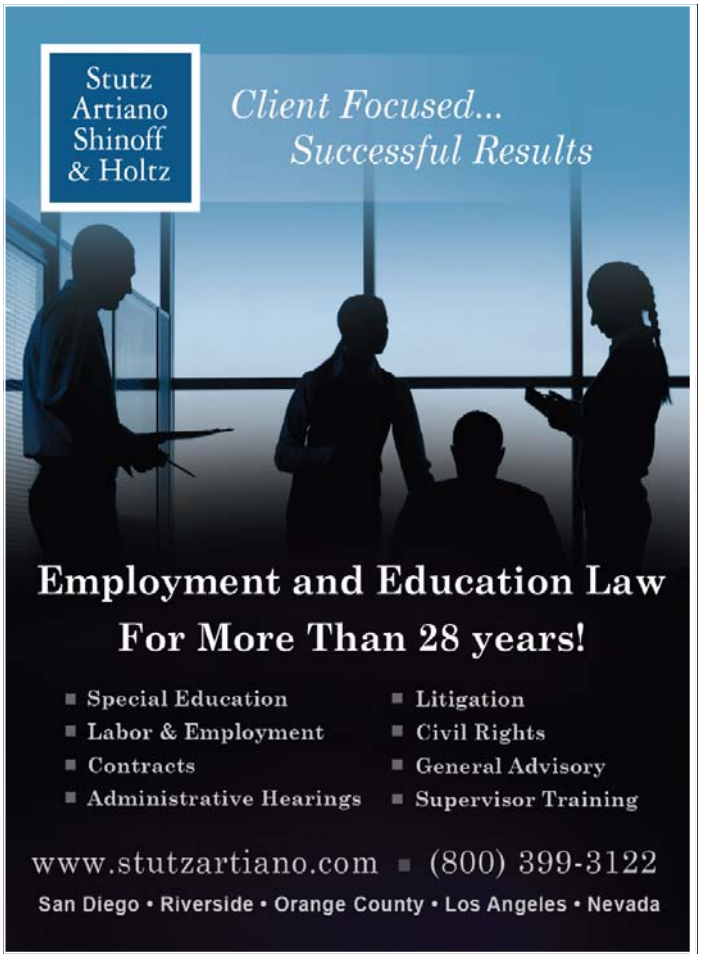

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In addition to the advantages LTC insurance brings to your employees, its introduction can help your college attract the best and brightest, with a benefits package that stands out from the rest. Even more important, LTC insurance can provide a solution to the employee productivity that is lost as a result of caregiving responsibilities. Employees may spend hours on the telephone making care arrangements or miss work entirely to assist a loved one in need.

Karen Marblestone Perry, CLTC, is President of Marblestone Insurance Services, LLC, a firm committed to providing retirement and long-term care solutions for individuals, and long-term care benefits through employers and associations. Building on her background in gerontology and work in senior services, Karen changed her career to focus on financial needs related to aging.

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STRATEGIC EARLY RETIREMENT INCENTIVE

By Steven Berliner and Frances Rogers, Liebert Cassidy Whitmore

During this time of recession, many American businesses and public entities are considering reducing their workforce to save costs. Early retirement incentives ("ERI") or "golden handshakes" provide an avenue for the employer to reduce payroll costs over the long run, while providing an attractive and economically feasible way for eligible employees to retire. Employers can either implement their own type of ERI (e.g. lump sum cash incentive) or employers can implement a statutory ERI for employees who are members of California's Public Employees' Retirement System ("CalPERS") or State Teachers Retirement System ("CalSTRS") (i.e. a purchase of two additional years of service credit for eligible members). The CalPERS and CalSTRS statutory incentives have strict parameters that employers must comply with while employer-created incentives are much more flexible.

Whether the incentive is statutory or employer-created, ERIs can result in costly litigious woes. Since ERIs are geared toward older workers, if they are not structured properly, they may expose employers to age discrimination lawsuits under the Age Discrimination in Employment Act ("ADEA"). The ADEA makes it unlawful to take an adverse employment action against persons over the age of 40, including discriminating against the employee with respect to his or her compensation, terms, conditions, or privileges of employment because of the employee's age. (29 U.S.C. §623.)

Two measures can limit exposure to ADEA liability: (1) appropriate structuring of the ERI; and (2) obtaining legally enforceable waivers and releases in exchange for the ERI.

Structuring An Early Retirement Incentive

Voluntary ERIs fall under a "safe harbor" provision to the ADEA. (29 U.S.C. §623(l).) By statute, It is not unlawful for an employer to offer a voluntary ERI plan that is "consistent with the relevant purpose or purposes" of the ADEA. An appropriately structured ERI balances the employer's interest in offering an ERI that is attractive to employees in order to induce early retirement with the purpose of the ADEA, that is, to prevent arbitrary discrimination against employees based on age.

For example, consider a plan that provides an employee retiring between the ages of 50 to 54, with a minimum of 5 years of service, a retirement bonus of 50% of the employee's current annual salary. The plan provides the same benefit for employees aged 55 to 59, but at 30% of the employee's current annual salary; as well as 15% for those between 60-64, but no retirement bonus after the age of 65. This example may induce an employee to retire earlier. However, the drop-off in the value of the retirement bonus is based solely on age. The ERI arbitrarily discriminates against employees simply based on the employee's age. This type of plan would most likely violate the ADEA unless it met one of the limited exceptions under the ADEA, such as an ERI offered by institutions of higher education to tenured faculty as discussed below.

Consider, instead, a plan that offers an ERI to all employees who are at least 50 years of age, with five years of service, at 5% of the employee's last annual salary and 5% more for each additional year of service. The retirement incentive caps at 100% of the employee's last annual salary or 24 years of service.

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This provides an incentive to employee's to retire at the time when he or she has reached the cap since the employee would not continue to gain a larger retirement bonus after 24 years of service. This type of plan would not likely violate the ADEA because there is no arbitrary decrease in benefits based solely on age.

There are a few exceptions, however. For example, if the employer offers a defined benefit plan that provides an early retirement incentive that subsidizes an employee until the age at which they can receive a normal service pension or social security benefits, then the ERI may cease at the age when the employee is eligible for the service pension or social security benefits without violating the ADEA if it is properly structured. Another exception applies solely to ERI's offered to tenured academic employees of an institution of higher education (e.g. community college districts). Under this exception, the college or university may offer a voluntary ERI to employees who are serving under a contract of unlimited tenure consisting of "supplemental benefits" that are reduced or eliminated on the basis of age, but only if several elements are satisfied.. (29 U.S.C. §623(m).) Given that these elements are mandatory, legal counsel should be utilized to assist the employer in structuring an ERI to take advantage of this exception.

Another important aspect to the structuring of an ERI is that it must be truly "voluntary," otherwise it does not fall under the safe harbor provision of the ADEA. Courts will use a "totality of the circumstances" test, considering factors such as the length of time the employee has to consider the ERI. Many employers offer ERIs as a one-time option or during a "window period." For example, on October 1 an employer may offer an ERI which eligible employees must indicate acceptance on or before December 1. This factor would weigh in favor of finding the incentive as truly voluntary. An ERI which an employee has one day to accept or reject may not meet the ADEA's standard for voluntary.

Other factors considered include whether management employees pressured or coerced employees into accepting the incentive, or whether employees are told if they do not accept the incentive, they will certainly be terminated. It is perfectly acceptable for management to explain the terms and conditions of the incentive or discuss the employer's considerations to reduce costs. When offering an ERI, employers should prepare a memorandum or booklet describing the terms and conditions as well as copies of the agreement and release, which are distributed to eligible employees. The employer should also designate one person within the organization as the person to whom questions should be directed. This is not to say that an employer cannot (and indeed, should) be frank with employees about the potential for future layoffs. It is one thing to say, "accept or be fired" and quite another to inform employees that depending on the number of employees accepting the incentive, the employer's financial picture is such that a reduction-in-force may occur.

If an employer chooses to offer a CalPERS or CalSTRS statutory golden handshake, and the employer complies with the statutory requirements for offering such an incentive, the statutory golden handshake would be consistent with the purpose of the ADEA. That is because the ERIs of these statutory schemes do not decrease benefits based solely on age and are considered to be truly voluntary when properly offered.

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The bottom line is that an early retirement incentive must not arbitrarily decrease the amount of the incentive or terminate the incentive based solely on the employee's age unless a statutory exception applies under the ADEA, and the acceptance of that incentive must be truly "voluntary."

Creating Legally Enforceable ADEA Waivers

The second measure to reducing exposure when offering ERIs, is to ensure that employees sign a legally enforceable release or waiver of claims arising under the ADEA, in addition to the usual boiler plate releases. In 1990, Congress adopted the Older Workers Benefit Protection Act ("OWBPA"; 29 U.S.C. §626(f)) as an amendment to the ADEA. Among the provisions of the OWBPA, an employee may not waive any right or claim under the ADEA unless the waiver is "knowing and voluntary." A waiver is not considered such unless at a *minimum*, the waiver complies with the following: (1) it is written in a manner calculated to be understood by the individual employee or average eligible employee; (2) it specifically refers to the rights and claims arising under the ADEA; (3) it provides consideration in exchange for the waiver in addition to anything of value to which the employee is already entitled; (4) it advises the employee, in writing, to consult with an attorney prior to executing the agreement; (5) it provides the employee with a period of 21 days to consider the agreement if it is an individualized agreement between the employer and a specific employee, or 45 days if the waiver is requested in connection with a program offered to a group or class of employees (e.g. ERIs) (an employee may choose to execute the agreement prior to the lapse of 21 or 45 days, however); (6) it provides the employee with a period of 7 days following execution of the agreement to revoke the agreement and the waiver is not enforceable until the revocation period has expired; (7) if the waiver is a part of an exit incentive program offered to a group or class of employees, the employer must inform the employees in writing of the class, unit, or group of individuals covered by the program, any eligibility factors for such program, and any time limits applicable to the program and the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Keep in mind that the OWBPA are the *minimum* requirements necessary to uphold the validity of a waiver under the ADEA. Courts will also apply a "totality of the circumstances" test to consider non-statutory factors in assessing if an ADEA waiver was "knowing and voluntary." These factors include fraud, duress, or mutual mistake.

If an employee signs an ADEA waiver and accepts an ERI or severance package, he or she may bring suit for a violation of the ADEA and allege that the waiver did not comply with the OWBPA. If a waiver does not comply with the OWBPA, the waiver is voidable. The employee is then free to pursue his or her claims under the ADEA. Whether the employee is successful on the merits is an entirely different issue. However, tremendous amounts of time and money can be saved at the outset if the employer has a legally enforceable ADEA waiver and release.

Keep in mind that when offering statutory CalPERS or CalSTRS golden handshakes, neither statutory scheme provides an automatic waiver of the ADEA or OWBPA. In fact, there is no authority that provides that an employer, once it offers a statutory CalPERS or CalSTRS golden handshake, that it may condition acceptance on execution of a waiver .

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Consequently, once one of the statutory golden handshakes are offered and accepted, the employer remains exposed to ADEA and/or OWBPA claims because there is no waiver. However, if done properly, these statutory golden handshakes should not violate the ADEA or OWBPA.

Some of the common mistakes made by employers in drafting a waiver include the following:

- Failing to specifically use the words "Age Discrimination in Employment Act" or "Older Workers Benefit Protection Act." It is not sufficient to merely state, "the employee agrees to waive all claims for discrimination…" An employer must use the magic words.
- Not providing consideration for the waiver. The employee must receive something of value which he or she is not already entitled to in exchange for signing an ADEA waiver.
- Not providing an employee with the actual agreement and release 21 days or 45 days prior to the last day on which the employee may accept the ERI. Providing a memo or booklet with information about the incentive is not sufficient. The employee must be given 21 days (for individualized incentives) or 45 days (for incentives offered to a group or class) to consider the entire agreement and release. Whether the employee chooses to sign the agreement and release prior to the end of those 21 or 45 days is up to the employee.
- Not *presently* advising an employee to consult an attorney. It is not sufficient to merely recite in the agreement that the employee "has been given an opportunity to consult an attorney." Instead, the agreement and waiver should state in bold letters, "You are advised to consult a lawyer regarding the terms and conditions of the agreement and release of claims prior to executing this agreement."
- If the ERI is offered to a group or class of employees, failing to provide to the employee, in writing, the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. It is not sufficient for an employer to merely say, "I'll provide it to the employee if he or she asks for it." Prepare this information and attach it to the agreement and release as an attachment.

If the ERI is offered to a group or class of employees, failing to accurately set forth the ages of those in the same job classification or organizational unit eligible, and not eligible, for the program. For example, stating that the ages for all ineligible employees in the classification of "Maintenance Worker I" are 20 to 50 years old is not sufficient. You must list the age of *each* individual in that classification (e.g. 20, 22, 24, 31(x2), 33, etc.). If the ERI is being offered to only eligible employees in the Finance Departments of the company's 4 branches, the employer should provide the job classifications and ages of all employees in all four branches' Finance Departments to all eligible employees. Do not be over-inclusive either. If the incentive is only being offered to eligible employees in one Department, do not list the job classifications and ages of all employees in the entire organization.

Taking the time and effort to carefully structure the voluntary ERI as well as preparing a legally enforceable ADEA/OWBPA waiver, will go a long way to avoiding costly litigation and thus, realizing the cost-savings the employer seeks.

Steve Berliner is a partner and Frances Rogers is an associate in the employment law firm of Liebert Cassidy Whitmore. The firm represents California community colleges in all aspects of labor and employment law, including retirement issues.

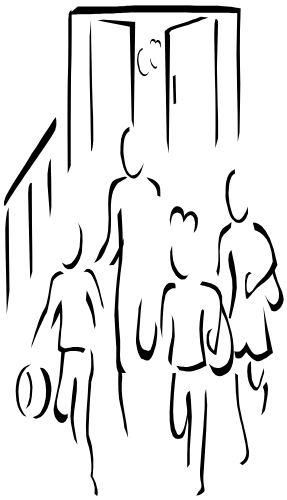
An update from ACHRO/EEO Consultant Ron Cataraha . . .

Welcome to the 16th Year ACHRO/EEO Conference! Imagine...16 years since we first started organizing these conferences. The conferences have provided invaluable information and a tremendous asset to practitioners in carrying out the day-to-day responsibilities of their position in their respective human resources offices. Many of us seasoned practitioners who benefited from the conferences and the workshops in the past have retired and moved on to greener pastures, and every year 'new' faces appear in the California community colleges human resources system. Our theme this year, "ACHRO/EEO: The Next Generation," is a very fitting theme as we recognize and acknowledge these 'new' faces and their need for continued training. We will continue to welcome 'new' faces in the years to come as more of our 'seasoned' practitioners retire. I realize many of the workshops we offer each year may seem routine and redundant--particularly for the 'seasoned' practitioners--but we must also realize and support the need for these workshops for the 'new' folks as the workshops are not routine and redundant to them. Those of you who have been in the system for some time now, please welcome the new folks and take them under your wing—after all they are the next generation.

I'd like to acknowledge and thank Randy Rowe, 2009 President and Wyman Fong, 2009 Vice President and Chair of the 2009 Training Committee for their leadership and support and to Ruth Cortez and Renee Gallegos — this conference would not have come to a successful conclusion without both your support and assistance. You two are second to none! ***Thank you Ruth & Renee!*** Enjoy the conference folks!

Ron Cataraha

ACHRO/EEO Consultant
rcatsr@aol.com



NEWS FLASH!

ACHRO/EEO 2010 Fall Institute, October 20-22, 2010 at Harvey's Resort in South Lake Tahoe!

Did you know that Faculty & Staff Diversity Funds may be used to pay for the cost of attending the Fall 2010 Institute! You can still register.

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ACHRO/EEO Secretary's Column . . . . . .

ACHRO used to sponsor two conferences each year, spring and fall, but one conference was eliminated due to budget cuts in 2001. Point being, budgets will always dip and peak, but we must keep abreast of the changes in human resources and its specialty areas such as negotiations, benefits, worker's compensation, and the myriad of court rulings which impact our daily work.

To help us keep up with the constant changes, there are wonderful area HR management groups composed of just California Community College System professionals. These groups can be found around the state and are formed with other CCCD's within a geographic area. They are called the Southern 30, the Central 14, the Bay 10, North 14, EEDEC-South, and EEDEC-North (disbanded a couple of years ago for lack of interest) , to name a few. These organizations will introduce you to and keep you in touch with local HR professionals.

These local HR groups sponsor training and/or round table events throughout the year. These groups often have a nominal annual fee of around $100 making them a great value even in these tough economic times. Some of these area organizations have also formed a consortium which contracts with a law firm to provide legal workshops to its members throughout the year. There is an additional charge to belong to the legal consortium, but they provide excellent training and often free legal consultation within set parameters. If you do not know who to contact regarding the CCCD HR group in your area, please feel free to contact me, and I will provide you with the name and contact person.

Even with the year-long support of these area HR groups, we believe it would still benefit you greatly if your District can afford to send you to the annual conference in Lake Tahoe, Tuesday, October 19 through Friday, October 22, 2010. This conference has always been very good, but it has gotten better each year since its inception in 1995. The organizing committee selects only the best HR lawyers and subject matter experts in our field. So if you have never been to one before, or if you have never missed one in the last 15 years, then don't miss this year's lineup of speakers on topics such as:

- Preparing and Sunshining Initial Proposals for Labor Negotiations
- Identifying and Addressing Workplace Aggression
- Bumping Rights and Preferences Following Tucker v. Grossmont
- Wage and Hour Law 101
- Making the HR Process Transparent

It is our hope that you take advantage of this annual conference and learn firsthand the benefits it will provide your District for the entire year. See you in Tahoe!

Diane Clerou

ACHRO/EEO Secretary
diane.clerou@scccd.edu

SIX WAYS TO HARM THE INTEGRITY OF YOUR INVESTIGATION

By Atkinson, Andelson, Loya, Ruud & Romo

Irrespective of the basis for the complaint, the investigation must be conducted in a manner that is thorough and credible. Whether it is a formal, written complaint or an informal, verbal complaint, arguably the most critical aspect of responding is the ability to conduct a prompt, thorough and effective investigation into the complainant's concerns or allegations. However, many investigations are hampered by common mistakes that threaten the district's ability to complete a prompt, thorough investigation that leads to an effective remedy, or to a credible conclusion adverse to the complaining party. Below is a brief discussion of some of those mistakes:

1) Failure to Review the Laws and Policies Related to the Complaint

In the rush to start an investigation, sometimes an investigator fails to review the laws or policies relevant to the complaint *before* gathering the facts. Without knowing the law, the investigator's questions during the interviews may be naïve of irrelevant. A common example involves a sexual harassment complaint. While most investigators remember to ask "who, what, where, when, why and how" questions about the incidents leading up to the complaint, many investigators forget to ask detailed questions about the actual impact on the work place or educational environment.

Hostile environment sexual harassment includes an actual negative impact, such as the creation of an intimidating, hostile or offensive work or educational environment. (See Education Code sections 66262.5 and 212.5.) A quick review of the law and policy would place all the elements of sexual harassment in the forefront of an investigator's mind so that he or she can ask appropriate questions. Each community college district should have written policies regarding discrimination and harassment pursuant to Title V, section 59322, and those policies should be reviewed *before* the fact-finding of the investigation begins.

2) Failure to Interview the Complainant

In this day and age, an over-worked human resources administrator must prioritize tasks and look for ways to save time. However, it's not a good idea to skip an interview with the complainant just because you have received a written complaint with ample detail. Think about this situation: A young female instructor filed a detailed written complaint about three incidents that happened between her and her male department chair. These incidents caused her to feel sexually harassed in her work environment. The Vice President of HR found the written complaint to be thorough and detailed so she thought she would start the investigation by interviewing the department chair, who she knew to be forthcoming. Sure enough, the department chair admitted to all of the incidents set forth in the complaint, he agreed that he lacked good judgment in his interactions with the junior instructor and he understood why she was uncomfortable.

Instead of interviewing the complainant, the VP expediently wrote her report, took disciplinary action against the department chair and placed a phone call to the complaining instructor. During that phone call, the VP explained that the department chair admitted to the incidents in the complaint and the employer had taken action to make sure that these things did not occur in

the future. Three months later, the complainant, with the help of an attorney, files a complaint with the DFEH against the district in part because she felt the district did not take her concerns seriously. What went wrong? The complainant simply did not feel heard by the district so she assumed her employer did not take the complaint seriously and failed to take sufficient action.

By failing to interview the complainant, the VP missed the opportunity to find out if anything else happened that was not articulated in the complaint, she failed to provide a real opportunity for the complainant to be heard, she missed the opportunity to judge the complainant's demeanor, and she missed a chance to evaluate what remedy may be the best between these particular parties. Title V regulations contemplate interviewing the complainant in section 59334 when it states that the investigator shall notify the complainant that it is conducting an investigation and the written report shall include a summary of the testimony of the complainant. Providing this interview may take time, but it helps further a more effective and complete resolution to the complaint.

3) Failure to Maintain Impartiality throughout the Investigation

When people think about using an "impartial" investigator, they often wonder whether the investigator knows the parties involved or is too involved in the subject-matter to be objective. These are important considerations, and it is important for the investigator to establish and maintain her impartiality throughout the entire fact-gathering portion of the investigation.

It is human nature to form an opinion, one way or another, about a situation after speaking to someone, especially someone who is emotionally charged or passionate about their story. Who hasn't interviewed a complainant and thought, "Houston, we have a problem." Who hasn't made the hasty conclusion, "This complaint is ridiculous!" These opinions are not impartial and lack objectivity. Why? Because the investigator has not reviewed and weighed all of the available evidence before reaching conclusions about what happened and the merits of the complaint. Sure enough, after interviewing other witnesses and the respondent, the investigator will sometimes have a different perspective. If the investigator insisted on following his or her initial reaction to the complaint, the investigation could have resulted in a conclusion that simply reflected the personal biases of the investigator.

Therefore, I advise investigators to simply observe their own initial opinions, set them aside, and continue to gather all relevant facts in the investigation. Once you have exhausted those steps, then you can look at all the evidence, weigh it and form an opinion based upon substantial evidence as to what occurred.

4) Failure to Ask Hard Questions

Caveat: I'm going to list some explicit questions in this paragraph. Why? Because it helps you understand what I mean by a "hard question." Let's look at a student who claimed the Lab Assistant touched her buttocks while she was in the Lab. Some investigators just ask about what led up to the touching, where they were, when did it take place, was anyone else there, what did the student do in response, and how did it make the student feel. These are all necessary questions. However, I encourage investigators to ask enough questions to be able to visualize the incident in great detail. Where on the buttocks did the touch take place? Right or left cheek? Top or bottom? Closer to the crotch or near the hip? Was it a rub, brush up, pinch, grab, caress, or slap?

Top or bottom? Closer to the crotch or near the hip? Was it a rub, brush up, pinch, grab, caress, or slap? Was it a romantic or aggressive touch? Did the Lab Assistant say anything or appear aroused? Did the Lab Assistant use his right or left hand? Palm or back of hand? Open fingers or fist? Even though some questions are explicit and potentially uncomfortable to ask, it is important to be thorough so you can evaluate the credibility of the claims, you can assess the feasibility of the story, you can offer the respondent sufficient details to understand what the claim is about, and you can determine the type of violation involved in the complaint.

5) Failure to Make Hard Decisions

A good investigator knows that he or she will have to make hard decisions, sometimes without the benefit of eye-witness testimony. Some investigators avoid these decisions by warning both parties to "get along," or simply declaring the "contest" a tie, instead of weighing the available evidence and making a specific finding as to what occurred. The good news is that an investigator is not governed by a standard of perfection. An investigator need only have substantial evidence (or probable cause under Title V regulations) to make a specific finding about each allegation. If an investigator avoids the mistakes listed above, he or she will be able to determine what, more likely than not, happened. When a case is close, the detailed questions you have asked and follow-up on will help you to assess credibility. Frequently, cases appropriately turn on credibility determinations. It is not enough, however, to just say that one person is believable and the other is not. You must articulate the observed facts that lead to this conclusion.

Also remember that the burden of proof can be your friend. Essentially, the complaining party has the burden of proving that it is more likely than not that the alleged conduct occurred and constituted a violation of law. If you are not persuaded by the evidence of the truth or accuracy of the allegations, then the conclusion is that the complaint is not established. However, even if this is your conclusion, you must still articulate in detail the reasons for your decision.

6) Failure to Implement an Effective Remedy

After an investigator makes the hard decisions on the evidence, and states specific findings about each allegation, then a conclusion may be reached about whether a policy or law was violated. If a policy violation was found, the next question is what remedy would be most effective. While determining the best remedy is not always the decision of the investigator, it remains an important aspect of a good investigation.

An effective remedy should include: a) remedial or disciplinary action for the perpetrator, b) efforts to help restore a safe and productive work or educational environment for the complainant, c) appropriate and timely follow-up measures to determine if the remedies are working, and d) documentation of the efforts taken with both parties. Sometimes a district issues discipline to a harasser, but fails to address the victim's lingering concerns or fails to follow-up with the parties to make sure the problems have ceased. An effective remedy is the best ending to a difficult situation, and it avoids potential liability.

If you enjoyed this type of discussion about investigations, these issues and many others are discussed in our training entitled, "Do Your Investigations Satisfy the Burden of P-R-O-O-F?" Our three-hour basic training from the FRISK Leadership Training Series provides investigation tools and a general formula which allow an investigator to approach each investigation thoroughly and effectively. You may contact Keesha Clark at (562) 653-3200 Atkinson, Andelson, Loya, Ruud, & Romo for further information.

Message from our ACHRO/EEO Vice-President Cynthia Hoover …..

As Chair of the Fall 2011 Training Committee, I invite you to be a member of our team that will be planning next year's conference in Palm Springs, California. This meeting will be held after the last workshop on Friday, October 22, 2010, from 1:15 - 2:15 p.m. (you will still have time to catch a shuttle to the airport). If you are interested in contributing to the training committee, please contact me at (661)722-6300 (x6610)

Cynthia Hoover

Cynthia Hoover
ACHRO/EEO V.P.
choover@avc.edu

ACHRO/EEO TRAINING COMMITTEE

FOR FALL 2010 CONFERENCE

- Abe Ali, Kern Community College District
- Linda Beam, College of Marin
- David Betts, Peralta CCD
- Connie Carlson, College of the Redwoods
- Ron Cataraha, ACHRO Consultant
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- Marcia Wade, Santa Monica Community College District

Retiree Subsidy Program Offers Financial Benefits, But Challenges Resources

By Tim Crawford, V.P. Marketing & Communications, Keenan & Associates

Under new federal Health Care Reform laws, community colleges providing coverage to early retirees, who are age 55 and above but not yet eligible for Medicare, may be eligible to participate in the Early Retiree Reimbursement Program, that offers reimbursement of 80% of the portion of early retiree claims paid in the plan year totaling between $15,000 and $90,000.

Plan sponsors who wish to receive this subsidy must certify the plan's eligibility for the program and substantiate claims for reimbursement. Both timeliness and accuracy are critical, because DHHS will send any incomplete or insufficient applications back to the end of the line. Reimbursement requests under the program are processed on a first-come, first-served basis, and no further reimbursements will be made once the $5 billion funding for the program is depleted.

Keenan & Associates, the largest privately held insurance brokerage and consulting firm in California, has implemented a program to assist educational institutions in applying for participation in the new Early Retiree Claims Reimbursement Program of the U.S. Department of Health and Human Services (DHHS). The research, analysis and application for program certification requires about 170 hours to complete, an imposing challenge for districts with limited internal resources.

Keenan has conducted these applications processes for a number of clients, and in just the first months of the program, has already received certification from DHHS for five agencies. Approximately six applications for other Keenan clients are currently pending approval from the DHHS.

The program provides comprehensive, step-by-step assistance in compiling and completing the program application, including a review of data, projections and policies, as well as legal support in interpreting subsidy regulations, assistance in the final reconciliation process, and participation in any potential audits. Most other services offered to plan sponsors, including those from by insurance companies and health plans, are only partial in nature.

"The state budget and revenue outlook are already putting extreme pressures on educational institutions. This early retiree health care subsidy is a significant opportunity to relieve some of that pressure," said Tim Keenan, Senior Vice President and Community Colleges Practice Leader. "Our goal is to help these agencies participate in and gain important financial benefits from this program as soon as possible."

As a prerequisite to certification, plan sponsors must have programs and procedures in place for "chronic and high-cost conditions" that have generated or have the potential to generate cost savings for participants with such conditions.

The term "Early Retiree" includes the enrolled spouse and dependents so that all of their claims are combined and subject to reimbursement if they total between $15,000 and $90,000. The Program is available to virtually all self-funded and fully insured employment-based plans (other than Federal plans), without regard to the source of funding. In the case of a plan maintained jointly by an employee organization and an employer who is the primary source of funding, the employer will be treated as the sponsor.

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NEWS UPDATE

Districts Have The Right To Preclude Unions From Using District Mailboxes To Distribute The Union's Choice Of Candidates For An Upcoming Election

PERB recently upheld a board agent's dismissal of an unfair practice charge in which a union unsuccessfully contended that the district violated the EERA by prohibiting the distribution of union newsletters containing information on the union's political recommendations in district mailboxes.

In *United Association of Conejo Teachers v. Conejo Valley Unified School District* PERB Dec. No. 2054 (*Conejo Valley*), the United Association of Conejo Teachers ("Association") attempted to place a newsletter, created entirely at its own expense, into District-owned mailboxes affixed to the walls inside various school sites in the District. The newsletter contained, among other things, a list of Association recommended candidates for the District school board and an endorsement of a particular candidate for California governor. The District superintendent prohibited the Association from using District mailboxes to distribute the newsletter because it contained political materials, referring to Education Code section 7054(a), which states that "no school district or community college district funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district." The Association subsequently filed an unfair practice charge.

In upholding the Board's dismissal of the charge, PERB found that it was not unlawful interference for a district to prevent the distribution of a union newsletter containing political endorsements in the district mailbox because such material is prohibited by Education Code section 7054(a). Relying on the decision in *San Leandro Unified School District* (2005) PERB Dec. No. 1772, which found that mailboxes are not "services, supplies, or equipment" as the boxes are permanent fixtures to the building walls and do not require specialized maintenance or service. Finally, the Board found that the newsletter in question did not simply inform Association members, but actively advocated on behalf of the candidates. The newsletter stated that "[t]he committee found that each one would bring his/her own special knowledge, experiences, and qualities to the position that would complete a strong and qualified school board for all of the constituents of the Conejo Valley Unified School District." Thus, the Board found that the recommendation was the same as an endorsement, and therefore, was prohibited by Education Code section 7054(a).

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