



Governor Brown's Proposed 2017-18 Budget – What Do Employers Need to Know?

Insights

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Last month, Governor Jerry Brown released his proposed state budget for the 2017-18 fiscal year. This move represents only the opening salvo in a months-long budget negotiation that will occur over the next six months between the Governor and the Legislature. The Governor will release a revised budget proposal in May, and the final budget will be negotiated and voted upon by June 15, 2017.

Buried in the thousands of pages of arcane budget documents are several proposals of interest to employers. Consistent with the Governor's budget proposals in recent years, this year's proposal seeks to increase various resources dedicated to labor law enforcement.

These items include:

Strategic Enforcement of Labor Standards – The Governor's budget includes \$4.6 million in additional funding (and 31 positions) to implement a strategic enforcement effort to combat wage theft and other labor law violations in specified industries. These augmentations will increase to \$11.4 million and 82.5 positions in 2020-21 and ongoing. According to the Governor's budget summary, "These resources will enable [the Department of Industrial Relations] to more effectively combat wage theft and other labor law violations in those industries with the greatest needs for rigorous enforcement, such as the janitorial, garment manufacturing, construction, agricultural, food processing, and restaurant industries."

In recent years, the Governor has devoted more resources to enforcement, including last year's budget which increased resources for PAGA enforcement at the Labor and Workforce Development Agency. Labor and worker advocates have been pushing for more resources within the Bureau of Field Enforcement (BOFE) within the Division of Labor Standards Enforcement (DLSE), and this budget proposal can largely be seen as responding to those requests. Additionally, during the last budget crisis, the Legislature decided to remove General Fund (general state tax revenue) funding for DLSE. Instead, employers now pay for DLSE's budget through an assessment based on the size of their workers' compensation premiums. Therefore, these budget augmentations will need to be paid for by increases in those employer assessments.

Cal/OSHA's Process Safety Management Unit – Cal/OSHA's Process Safety Management (PSM) Unit is the division specifically tasked with enforcement of safety and health standards in refineries and other chemical facilities. Following a high-profile incident in 2012 at an oil refinery in Richmond, the Legislature augmented the PSM budget by nearly doubling the positions dedicated to refineries. The Governor's 2017-18 budget proposal provides \$2.5 million and 13 positions to more than double the number of safety inspections at non-refinery facilities over several years. Like DLSE, Cal/OSHA resources are now funded by employers through workers' compensation premium assessments, so this budget augmentation will likely be funded by increased employer assessments.

Public Works Education and Enforcement – The Governor's budget includes around \$1 million and 7 positions to enhance the overall compliance and enforcement of public works labor law.

California Unemployment Insurance Appeals Board (CUIAB) – The Governor's budget provides \$1.6 million and 12.5 new positions for the CUIAB to address a high volume of pending payroll tax appeal hearings in the Tax Appeal Program. The Governor contends that this will also stabilize the program to prevent future backlogs.

California Secure Choice Retirement Savings Program – As recently amended, the California Secure Choice Savings Trust Act of 2012 ("Secure Choice") will eventually require employers with at least five employees, and which do not offer employer-sponsored retirement benefits, to establish automatic payroll deductions for their employees to participate in the Secure Choice Retirement Savings Program. The Governor's budget proposal provides an initial \$15 million (General Fund) loan to fund the necessary start-up and administrative costs to implement Secure Choice. The Governor indicates that additional loans will be provided in future years as the program ramps up activities, and that loans will be repaid from the administrative fees charged to program participants.

The Elephant in the Room – California budget watchers are waiting to see what the implications of a Trump presidency and a Republican Congress are on California's budget. Most significantly, repeal of the Affordable Care Act and other potential changes to health care programs may create significant holes in California's budget – by some estimates as much as \$15 to \$20 billion. If that occurs, the Governor's initial budget proposal would be essentially moot, and he and the Legislature would have to scramble to find ways to fill the gap, which would impact almost all other state programs. Therefore, many commentators view the Governor's January budget for 2017-18 as a mere "placeholder" to see what happens at the federal level. The Governor's "May Revise" (which usually represents a modification to the Governor's original budget proposal) may take on more significance as the real articulation of the Governor's budget proposal, depending on what happens in Washington, D.C. over the next few months.

In addition, it is important to remember that two significant pieces of labor legislation enacted last year – SB 3 to increase the minimum wage, and AB 1066 to change the overtime pay requirements

for agricultural workers – both contained provisions that allow the Governor to pause scheduled increases in both laws should specified budget conditions warrant. Of course, whether this Governor or a future governor would do so is a different matter. But if actions at the federal level create large holes in California’s budget, the situation would likely arise where the Governor *could potentially* pause implementation of both laws. Of course, any pauses would only be temporary in nature and full implementation of the laws would simply be kicked down the road until budget conditions improve.

Keep Your Eyes on the Trailer Bills – For good or bad, “trailer bills” that accompany the main budget bill (and are supposed to help implement budget proposals) are often places where significant policy changes are made. For example, last year, the Governor proposed significant changes to PAGA in a budget trailer bill. After objections from labor and plaintiff attorney groups, these changes were modified to reflect the modest administrative changes to PAGA that were enacted last year. But trailer bills are often places where policy changes are buried often with very little public notice or discussion. Therefore, it is critical to keep a close eye on the budget discussions and budget trailer bills.

On February 1, 2017, Governor Brown’s Department of Finance posted the text of several trailer bills online, a number of which make changes relevant to employers, including:

Cal/OSHA Penalties – [Trailer bill language](#) proposes to increase or eliminate caps on several types of Cal/OSHA penalties. According to the Governor’s office, these increases are meant to conform California state law to recent increases at the federal level for OSHA violations. In addition to the increases, the trailer bill language would index the maximum penalty amounts for inflation.

Cal/OSHA Retaliation – Trailer bill language provides that unlawful retaliation may include adverse action against the employee for reporting a “work-related fatality, injury, or illness” and other related activity. Claims alleging retaliation for filing workers’ compensation claims would continue to be under the jurisdiction of the Workers’ Compensation Appeals Board.

Tolling During Labor Commissioner Investigations – Trailer bill language provides that a written notice from the Labor Commissioner to an employer for specified violations deems an investigation to have commenced, during which time the statute of limitations for any private claim or action is tolled until the investigation is complete.

Licensing Discipline for Unpaid Wage Judgments – Trailer bill language provides that if a person or employer has an unpaid wage judgment for longer than 30 days after the entry of judgment, the Labor Commissioner may refer them to the following agencies (if the employer is licensed) for disciplinary action: the Department of Alcoholic Beverage Control, the Board of Barbering and Cosmetology, and the Bureau of Automotive Repairs.

Retaliation – The most significant policy language contained in the Governor’s budget trailer bills concerns retaliation and discharge claims under Labor Code section 98.7. Among other things, his

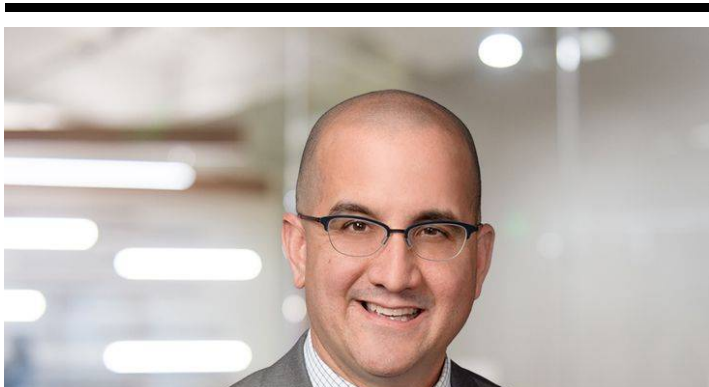
concerns retaliation and discharge claims under Labor Code section 76.7. Among other things, the trailer bill language (which can be found [here](#)) proposes to make the following changes:

- Authorizes the Labor Commissioner, during the course of a retaliation investigation, to petition a court for temporary relief or a restraining order where he or she determines good cause exists for doing so. This would likely be in the form of temporary relief reinstating the employee pending the adjudication of his or her claim.
- Provides the Labor Commissioner may collect attorney's fees against an employer for successfully prosecuting a retaliation/discharge enforcement action in court. The language specifies that the Labor Commissioner is "successful" if the court awards any relief sought in the enforcement action (not necessarily a monetary award).
- Provides that specified administrative determinations by the Labor Commissioner regarding violations shall be final and not subject to administrative appeal, except for certain Cal/OSHA claims.
- Provides for a three year statute of limitations for Labor Commissioner actions for discrimination and retaliation.
- Authorizes the Labor Commissioner to close an investigation where the complainant also files a civil claim in court. The language also provides that the Labor Commissioner has the discretion to reject a claim where the complainant has already challenged the discipline or discharge through the State Personnel Board or other internal governmental procedure, or through a collective bargaining grievance procedure that incorporates the Labor Code anti-retaliation provisions.

What's Next?

As noted, these budget proposals by the Governor constitute only the first step in the budget process. Over the next several months, the Legislature's budget committees and subcommittees will hear and vote on the Governor's proposals (including trailer bills). The Governor will release a revised budget in May, and he and the Legislature will aim to negotiate a final budget deal by June 15. Check back here for developments.

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