



Do Read the Fine Print – California’s Recent Budget Makes a Number of Labor and Employment Policy Changes

Insights

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Last week, (by their constitutional June 15 deadline) the California Legislature passed and sent to the Governor a \$184.5 billion budget for fiscal year 2017-18. Most of the media attention focused on tobacco tax expenditures, efforts to reform the Board of Equalization, and an attempt to revise the election procedures to protect a sitting State Senator who is facing a recall effort.

However, as we cautioned back in February, for good or for bad, “trailer bills” that accompany the main budget bill (and are supposed to help implement the provisions of the budget) are often places where significant policy changes are made. These “trailer bills” are often places where major policy changes are buried – largely with very little public notice or discussion.

This year’s budget was no exception. Although these bills have not yet been signed by Governor Brown, it is anticipated that they will receive his signature within the next few days.

These bills make a number of changes relevant to California employers, including the following:

Public Employee Orientation

In anticipation of potential United States Supreme Court action on the constitutionality of mandatory union dues for public employees, labor groups in California have been working for several years to enact legislation to mandate union participation in public employee orientation meetings. Labor’s strategy attempts to blunt the impact of any adverse court decision by ensuring that they have an opportunity to educate public employees about unions and convince them to voluntarily join the union.

Last session, the Court appeared to be close to deciding that mandatory union “security fees” were unconstitutional in the *Friedrichs v. California Teachers Association* case, but the untimely passing of Justice Scalia instead resulted in a 4-4 deadlock. Organized labor earned a temporary respite, but now that President Trump has appointed Justice Neil Gorsuch to fill the vacancy, it appears likely the Court may soon rule in a fashion adverse to labor. A current case (*Janus v. AFSCME*) appears to be the likely candidate for a Supreme Court decision on this issue.

Labor’s response? Budget trailer bill language (AB 119) to do the following:

- Require public employers to provide unions with mandatory access to new employee orientations, and 10 days' advance notice of such orientations.
- Provide that the structure, time and manner of the union access are to be negotiated between the public employer and the union.
- Require public employers to provide the union with the name, phone numbers, email address and home address of newly hired employees within 30 days of hire.
- Require public employers to provide this information to the union for all employees at least every 120 days.

California Secure Choice Retirement Savings Program

In recent years, California enacted a state-run retirement savings plan (which has not yet been implemented) for private sector employees that featured automatic enrollment for employees. A significant issue of concern for employers in the negotiation of this program has been to ensure that the program is not subject to the Employee Retirement Income Security Act (ERISA), which would raise potential liabilities for employers. Last year, the Department of Labor issued regulations that granted California employers a safe harbor by exempting the program from ERISA. In fact, the legislation enacting the program in California specifically mandated the obtaining of this safe harbor as a prerequisite for implementation of the program.

However, last month President Trump signed legislation to rescind the DOL safe harbor, raising significant questions about the applicability of ERISA to the program.

Budget trailer bill language ([AB 119](#)) attempts to allow the Secure Choice Board to self-certify that the program is not subject to ERISA, structure the program so that it is not subject to ERISA, and eliminate statutory language that mandated the DOL safe harbor. Program supporters argue that a legal opinion they recently obtained demonstrates that this is a legal course of action to avoid the application of ERISA. However, employers have expressed concerns that the state (by itself) cannot enact legislation that protects employers from federal ERISA preemption, which was why the DOL-issued safe harbor was so crucial. Even with this budget trailer bill language, there will be much uncertainty for employers going forward (and likely legal challenges to the validity of the program itself).

Labor Commissioner Enforcement Activity

Budget trailer bill language ([SB 96](#)) proposes to make a number of significant changes to the Labor Commissioner's enforcement of California employment laws.

Thankfully, two of the more onerous provisions for California employers did not make it into the final budget. One proposal would have rescinded various business licenses for employers that had unpaid wage claims. A second proposal would have allowed the Labor Commissioner to pursue injunctive relief (such as a TRO reinstating an employee to their position) during the pendency of a retaliation claim and investigation. These two proposals are not part of the budget (although a

separate policy bill is moving through the process regarding the injunctive relief in retaliation cases).

Remaining provisions of the budget trailer bill do the following:

- Provide that the date of written notice to an employer that a Labor Commissioner investigation has commenced is the date an action has commenced for purposes of any statute of limitations, and this statute of limitations is tolled for 12 months while the investigation occurs.
- Authorize the Labor Commissioner to close a retaliation investigation if the employee brings a separate civil action, or reject a complaint if the employee pursues a claim through the collective bargaining grievance procedure or the State Personnel Board.
- Extend the period from 60 days to one year for the Labor Commissioner to investigate retaliation claims.
- Provide for attorneys' fees for the Labor Commissioner in prevailing in specified enforcement actions related to retaliation claims.
- Prohibit (with certain exceptions) an employer from introducing as evidence in an administrative proceeding, certain records that were not provided pursuant to a request by the Labor Commissioner.
- Streamline worker access to various remedial worker accounts for employees with judgments who cannot collect from their employers in the car wash, garment manufacturing, and farm labor industries.

Public Works Contractor Registration

In 2014, as a mechanism to provide funding for enforcement of the state's prevailing wage laws, the Legislature established a public works contractor registration program. This program imposed an annual \$300 registration fee on contractors and subcontractors wishing to conduct work on public works projects. However, the revenue generated by this program was less than anticipated – either (1) because policymakers over-estimated the number of contractors that would register under the program, or (2) due to significant noncompliance by contractors who should be registering.

The Brown Administration argues that it is the latter, and budget trailer bill language ([SB 96](#)) sets forth language to dramatically increase penalties for failure to comply with the public works contractor registration requirements.

The trailer bill language does the following:

- Increases the annual registration fee from \$300 to \$400.
- Authorizes contractors to pre-register for a three-year period (paying the full amount of fees for that period).

- Establishes small project exemptions for the registration requirements – for new construction projects of \$25,000 or less, or maintenance work projects of \$15,000 or less.
- Eliminates the Labor Commissioner’s discretion to waive liquidated damages.
- Increases the penalty for unregistered contractors to \$100 per day, up to \$8,000. The penalty for using an unlicensed subcontractor is \$100 per day, up to \$10,000.
- Authorizes the Labor Commissioner to issue a stop order against an unregistered contractor or subcontractor. Failure to abide by the stop order constitutes a misdemeanor and/or a \$10,000 fine.
- Establishes penalties for awarding bodies that do not notify the Labor Commissioner of public works projects, or use unregistered contractors or subcontractors, of \$100 per day up to \$10,000.
- Provides for one-year debarment for contractors with two or more willful violations within a 12 month period.

OSHA Penalty Increases

Budget trailer bill language ([SB 96](#)) also increases or eliminates 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 indexes the maximum penalty amounts annually for inflation. Specifically, the trailer bill language:

- Increases maximum civil penalties for non-serious, posting, recordkeeping, and notice requirements from \$7,000 to \$12,471.
- Increases maximum civil penalties for willful or repeat violations from \$70,000 to \$124,709 (and not less than \$8,908).
- Indexes these amounts annually for inflation.
- Deletes civil penalty maximums for certain crane safety order violations and violations related to carcinogens.
- Makes it unlawful for an employer to discharge or discriminate against an employees for reporting a work-related fatality, injury or illness (other than Labor Code Section 132a retaliation claims for filing a workers’ compensation claim.)

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