

AB 553 (Hernandez) Public Employment Relations Board

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Assembly Member Dr. Ed Hernandez, Chair of the Assembly Public Employee, Retirement and Social Security Committee, introduced Assembly Bill 553 on February 21, 2007. As introduced, the bill would expand the jurisdiction of the Public Employment Relations Board (PERB) under the Meyers-Milias-Brown Act (MMBA) by providing that:

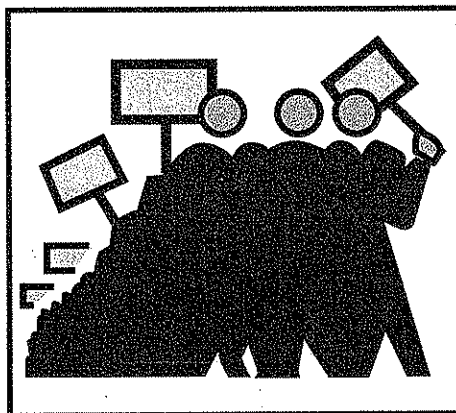
"The determination whether to seek from a court of competent jurisdiction injunctive relief involving or growing out of relations between an employee organization and a public agency is within the exclusive jurisdiction of the board."

This change is not, as the statement of legislative intent claims, "technical and clarifying of existing law." Rather, it greatly expands PERB's jurisdiction to potentially include all public employee strikes.

Currently, PERB has exclusive initial jurisdiction to determine whether a public employee strike constitutes an unfair practice under the MMBA. At the same time, there are categories of strikes that fall outside of PERB's jurisdiction. The MMBA itself divests PERB of jurisdiction over strikes involving local agency peace officers or employees of the City or County of Los Angeles, even if the strike would otherwise be an unfair practice. PERB also lacks jurisdiction over strikes that do not constitute unfair practices but are illegal under other California laws, such as the Labor Code § 1962 prohibition of strikes by firefighters. Perhaps most importantly, California common law prohibits a public employee strike when the strike "creates a substantial and imminent threat to the health or safety of the public."

Over the years, local public agencies have succeeded in using this common law exception to procure

injunctions against strikes by employees whose functions are essential to public health and safety. For example, in 2002, Santa Cruz County succeeded in getting an injunction against a strike by employees in several essential positions, including probation employees and physicians. Likewise, in September 2006, the Sacramento Superior Court enjoined strikes by county employees in a number of departments, including the Wastewater Treatment Plant and the Mental Health Treatment Center. In both cases, the strike by nones-



sential employees proceeded without interference.

Where public agencies have sought injunctive relief directly from a superior court, the agencies did not allege that the strike constituted an unfair labor practice or otherwise violated the MMBA. Instead, these strikes were enjoined based on California common law. In each of these cases, the public employee unions argued that PERB, to which the Legislature granted jurisdiction over the MMBA in 2001, has exclusive jurisdiction over whether to seek a court injunction of a strike by local agency employees. This is so, the unions argued, because the strike may be an unfair labor practice and the MMBA requires PERB to make that determination before an injunction is sought.

PERB has intervened in a number of these cases using the same argument. Over the past year, courts in Santa Clara and Mendocino counties have accepted PERB's argument and refused to issue injunctions on that basis, while courts in Contra Costa and Sacramento counties rejected it and issued injunctions in spite of PERB's claim of jurisdiction. Three of these cases are currently before the Courts of Appeal and the Mendocino case is likely to be appealed as well.

If enacted, AB 553 would dramatically expand PERB's jurisdiction by giving the agency the authority to seek an injunction of any public employee strike, even one that does not constitute an unfair practice or otherwise violate the MMBA. Thus PERB arguably would have jurisdiction over requests to enjoin strikes that threaten public health and safety. This is a concern for local agencies throughout California because local courts are often in the best position to quickly determine whether a strike threatens public health and safety. Additionally, it is unclear whether PERB could actually seek to enjoin a strike that threatens public health and safety as PERB has never held such strikes to be unfair practices and PERB has no jurisdiction to enforce California common law. It is also unclear whether PERB's decision not to seek an injunction would bar a local agency from subsequently applying directly to a court to enjoin a strike that threatens public health and safety.

Even assuming that PERB would have the authority to seek to enjoin such strikes, there is a concern about whether PERB could act quickly enough to protect the public. Under PERB regulations, a local agency must provide PERB and the union with 24 hours' notice before seek-

Please see AB 553, page 20

A Couple of Interesting Worker's Compensation Bills

ing an injunction. PERB's General Counsel then has 120 hours to investigate and advise the PERB Board on whether to seek an injunction. The Board, however, is under no obligation to act on the General Counsel's request within any specified period of time. Even if the Board acts quickly, PERB's General Counsel must still apply to a court for an injunction. By the time this occurs, several days may already have passed. In contrast, local public agencies currently can apply directly to a court for an injunction, thereby saving the time that AB 553 would require.

The language of AB 553 is also broad enough that public employee strikes against the City or County of Los Angeles would likely fall under PERB's jurisdiction. However, since PERB has no jurisdiction to determine unfair practices involving the City or County of Los Angeles, it is unclear how a strike against these public agencies could ever be enjoined by PERB. In addition, AB 553 would also apply to peace officer strikes, even though most peace officers are not otherwise under PERB's jurisdiction.

AB 553 dramatically expands PERB's jurisdiction to include areas over which it has never exercised authority and in which it has no particular expertise. As written, the bill would give PERB jurisdiction over all public employee strikes, even those that do not violate the statutes PERB administers. Moreover, the bill's broad language conflicts with MMBA provisions divesting PERB of jurisdiction over certain employees. In sum, AB 553 is not merely a clarification of existing law but rather a major shift in the landscape of California labor law.

For more information or to ask questions, please email Tim Yeung at tyeung@publiclawgroup.com or call 916-449-9550.



• SB 154 (Cedillo) Workers' Compensation – The Two Year Rule

This bill, which was introduced by Senator Cedillo on January 29, 2007, would provide that the two year limit on the payment of temporary disability shall not apply to certain volunteer and paid law enforcement and firefighter employees.

State law prohibits aggregate disability payments for a single injury for more than 104 weeks within a period of two years. This was derived from SB 899, which was signed into law in 2004 – the large workers' compensation reform package that made significant changes to not only temporary disability, but to permanent disability, apportionment and medical provider networks, as well.

The author's office claims that under current law, many chronic injuries or injuries which were treated by surgery can't be healed in the two year allotment. They give an example: say a firefighter suffers a debilitating injury, goes through physical therapy or surgery, but then later discovers that the injury wasn't resolved. Under current law, that firefighter would be barred from compensation if two years had elapsed from the time they had to file the workers' compensation claim.

But on second review, it appears as though this argument is not unique to firefighters. This issue affects all employees under the workers' compensation system that have temporary injuries that last longer than two years. Is the solution to chip away at the timeframe? Be on the lookout for opposition from the League of Cities and CSAC on this bill. To address the hardships, there is AB 1341 (Benoit) which deals with the loopholes that are posed by SB 154.

• AB 1341 (Benoit) Workers' Compensation: temporary disability

This bill is sponsored by the California Commission on Workers' Compensation (CCWC), which is a consortium of public and private employers that are engaged in legislation to combat the rising costs of workers' compensation. The CCWC has been around for awhile and was involved in the development of SB 899, along with the California Chamber of Commerce. It's more of a management association organization than a lobbying outfit. Nevertheless, they do get involved in legislation from time to time. This bill was born from their policy developments.

The bill would, for a single injury occurring on or after January 1, 2008, increase to 3 years from the date of commencement of temporary disability payments, or to 4 years from the date of injury, whichever is greater, the period of time during which an employee can receive aggregate disability payments. By not exempting specific classes of employees, like SB 154 does, it addresses the problem without doing away with temporary disability time constraints, which were originally set in place to encourage injured workers to get better and return to work.

• AB 419 (Lieber) Workers' Compensation: 4850 Time

Here's a bill that is authored by veteran Democrat Assembly Member Sally Lieber, who was approached to carry it on behalf of PORAC and the San Jose Peace Officers' Association. AB 419 would amend Labor Code Section 4850, which provides extended temporary disability workers' compensation benefits to specified public safety employees for 100 percent of salary for up to one year

Please see Compensation, page 21