THE PUBLIC SECTOR

New public-sector laws in 2012

by Jonathan Holtzman

For public employers in California, this has truly been an "annus horribilis" — a "year of horrors." Revenues are down, costs are out of control, reserves are fading, and now, to cap the year, the legislature has passed and the governor has signed a slew of bills further hobbling public agencies' ability to control costs. The governor was a big-city mayor for eight years and understands the problems of local government.

Last month, I lamented the signing of **Assembly Bill (AB) 646,** which mandates fact-finding under the Meyers-Milias-Brown Act. This poorly drafted legislation is exactly what public agencies didn't need. The Public Employee Relations Board (PERB) is now feverishly working on "emergency" regulations implementing AB 646, and public agencies are coming to the conclusion that it may be impossible to conclude annual bargaining before the beginning of the fiscal year — meaning annual budgets will need to change midyear.

Some other bills of note signed by the governor include:

- **AB 506** — requiring local public entities to either engage in mediation with all interested parties or declare a fiscal emergency before filing for bankruptcy;
- **AB 857** — abolishing PERB's authority to award damages for an unlawful strike; and
- **Senate Bill (SB) 922** — authorizing public agencies to require project labor agreements (PLAs) for publicly funded construction and forbidding the use of state funding for public construction in jurisdictions that ban PLAs.

AB 506 (Wieckowski)

Background. Local public agencies may seek protection from creditors and reorganize debt under Chapter 9 of the federal Bankruptcy Code. After the city of Vallejo declared bankruptcy in 2008, the legislature — at the behest of labor unions seeking to protect their collective bargaining agreements — has considered various proposals that would limit a local agency's ability to file for bankruptcy. AB 506 represents an attempt to balance the interests of creditors — *i.e.,* public employee unions — with the needs of local governments struggling under the burden of unsustainable financial obligations.

What it does. This bill is a companion to AB 646, setting up two alternative obstacles to a local agency's declaration of bankruptcy. First, before filing for bankruptcy, an agency must participate in mediation with all interested parties in an attempt to reach a prebankruptcy agreement on the reorganization of its labor contracts and other debt. The mediation process is initially limited to 60 days, although either the public agency or a majority of its creditors may choose to extend the process for another 30 days.

Alternatively, the agency may declare a fiscal emergency and adopt a resolution, after a public hearing, finding that its financial situation jeopardizes the health, safety, or well-being of its residents and that it will *run out of money within 60 days*. Notably, the requirements signed into law are far less burdensome than the initial proposal, which provided neither timelines for the mediation process nor an option to declare a fiscal emergency.

Bottom line. Mediation under AB 506 will add time and expense to the bankruptcy process for local agencies that are already facing unsustainable burdens. Bankruptcy is always a last resort that normally will follow diligent attempts to negotiate concessions from labor to improve the agency's financial outlook. Unions might argue that the ambiguous "emergency" provisions bar local agencies from declaring emergencies under their home-rule powers as a way to *avoid* bankruptcy. This bill *shouldn't* be construed to bar local declarations of emergencies under home-rule powers because state interference in federal bankruptcy protections isn't a good thing.

AB 857 (Lieu)

Background. In 2005, the California Nurses Association threatened to strike against the University of California (UC). UC was successful in obtaining a temporary restraining order against the strike and eventually obtained a decision from PERB declaring the threatened preimpasse strike an unfair bargaining practice. The board sent the case back to the hearing officer to determine what damages UC suffered in preparation for the unlawful threatened strike.

What it does. This bill amends Government Code Section 3509 to state that PERB lacks the authority to award damages incurred in preparation for or as a result of an unlawful strike. The bill states that it is declaratory of existing law, which gives it retroactive

effect, overturning the PERB award in the California Nurses Association case. The bill also states that it is "not intended to modify existing law, holding that a *court* of competent jurisdiction may . . . award costs, expenses, or lost revenue resulting from independently unlawful, tortious [*i.e.,* wrongful] activity [associated with an unlawful strike]."

The governor's signing statement noted: "For the future, I however, would favor legislation authorizing PERB to award damages to a public employer in the event of an unlawful strike or strike threat that necessitates expenditures by the employer to preserve the health and safety of the public."

Bottom line. Although PERB retains jurisdiction to determine whether a public-employee strike constitutes an unfair bargaining practice, AB 857 eliminates its ability to award damages for such conduct. This removes an important deterrent to public-employee strikes since courts generally also lack the power to award damages for an illegal strike by public employees. Nonetheless, the California Supreme Court has noted that courts may award damages when there is some claim beyond the simple illegality of the strike — *e.g.,* for tortious acts occurring during a strike or for breach of a contractual no-strike clause. *City and County of San Francisco v. United Assn. of Journeymen* (1986) 42 Cal. 3d 810, 819.

SB 922 (Steinberg)

Background. PLAs are prehire agreements that establish the general terms and conditions of employment for a specific construction project before the engagement of labor. Negotiated by the owner or project sponsor and construction craft unions, a PLA establishes a framework for common conditions and projectwide labor relations not otherwise attained through existing collective bargaining agreements. The PLA applies to all contractors and subcontractors that are awarded work by the project sponsor after the agreement is adopted and becomes effective. Although there are many benefits to PLAs (*e.g.,* uniformity of rules across contractors and faster resolution of disputes), some contend they can add costs and constrain public employers from using the most efficient and cost-effective construction techniques.

What it does. The bill authorizes public agencies to use PLAs for publicly funded construction projects despite charter provisions, initiatives, or ordinances to the contrary. More important, the bill forbids the use of state funding for public construction in any jurisdiction that categorically bans PLAs.

Bottom line. SB 922 requires public agencies to at least consider the use of PLAs for all publicly funded construction. PLAs can be a very important tool in preventing labor disruption on large labor projects, and used in the proper circumstances, they can improve the chances of a large project being concluded on time and on budget. Successive federal administrations have variously outlawed PLAs or encouraged their use. The better question is *when* PLAs can assist and whether they are properly constructed to ensure efficiency and protect modern construction techniques.

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