

# Mandatory Fact-Finding Under the Meyers-Milias-Brown Act

By Emily Prescott



Emily Prescott is a Senior Labor Counsel with Renne Sloan Holtzman Sakai LLP, where she practices labor and employment law on behalf of public sector employers. Her practice focuses on traditional labor relations, including collective bargaining, preventative counseling, and unfair labor practice charges. Ms. Prescott is a former labor arbitrator, hearing officer, and panel member of the California State Mediation and Conciliation Services. Ms. Prescott is an advisory member of the Labor and Employment Law Section's Executive Committee.

## INTRODUCTION

The Meyers-Milias-Brown Act (MMBA) requires the governing body of a public agency to meet with recognized employee organizations to meet and confer in good faith regarding “wages, hours, and other terms and conditions of employment.”<sup>1</sup> Under current law, when the parties are unable to reach agreement, ultimately the public agency can implement its last, best and final offer after exhaustion of any applicable impasse procedures. Impasse procedures under the MMBA have largely been governed by local rules, and until now the MMBA had provided only for voluntary mediation<sup>2</sup> and did not contain any mandatory impasse procedures.

AB 646, signed by California Governor Jerry Brown on October 9, 2011, amends the MMBA to require a new mandatory fact-finding<sup>3</sup> impasse process. Effective January 1, 2012, if a local public employer and its employee organization are unable to reach agreement in negotiations, the employee organization (but not the employer) “may request that the parties’ differences be submitted to a factfinding panel.”<sup>4</sup> This new process will be overseen by the California Public Employment Relations Board (PERB), which administers the labor laws governing public sector labor-management relationships.<sup>5</sup>

While many public entities, including all of California’s public schools, have managed collective bargaining under fact-finding for years, AB 646 likely will have a significant impact on labor relations

in cities, counties, and special districts because it will impact the timing of negotiations by potentially adding two to four months to the process, and because the statute’s vague and inconsistent language leaves many questions unanswered as to how this new process will really work.

## HOW AB 646 CHANGES EXISTING LAW

Before AB 646, the only impasse procedure outlined in the MMBA was an option for mediation by mutual agreement of the parties.<sup>6</sup> Local public agencies had the option to develop their own impasse resolution procedures through local rules adopted pursuant to Cal. Gov’t Code § 3507, and local impasse

interest arbitration as a method for resolving disputes. These variations are examples of how local agencies over the years have exercised local control by deciding, after meeting and consulting with affected employee organizations, what impasse processes work best given local conditions and history.

AB 646 changes the landscape for public agencies covered by the MMBA who do not already have binding interest arbitration.<sup>7</sup> It imposes a state law requirement for fact-finding in any instance in which an employee organization requests it. AB 646 borrows heavily from the fact-finding provisions of the Educational Employment Relations Act (EERA)<sup>8</sup> and the Higher Education Employer-Employee Relations Act (HEERA)<sup>9</sup> for both the procedural and substantive elements of the new fact-finding procedure,<sup>10</sup> with three key differences:

- If the parties go to mediation, the timeline under the MMBA will be thirty days instead of EERA’s fifteen-day timeline;<sup>11</sup>
- Under the MMBA *only* employee organizations may request fact-finding, whereas under EERA and HEERA, the employer also has the right to request; and
- Under EERA and HEERA, PERB pays the costs and expenses of the PERB-appointed panel chairperson, whereas under the MMBA, those costs and expenses will be shared equally by the parties.

AB 646 also now mandates that prior to implementation of a last, best and final offer, the public agency must “hold a public hearing

---

*“AB 646 changes the landscape for public agencies covered by the MMBA who do not already have binding interest arbitration.”*

---

procedures therefore vary widely. Many agencies’ local rules provide for mediation—either mandatory or by mutual agreement, some provide for fact-finding—again, either mandatory or optional, and a handful of local charters provide for

regarding the impasse.<sup>12</sup> There is no requirement that this public hearing regarding the impasse occur at a separate public meeting prior to the date of implementation.

## LEGISLATIVE HISTORY

The initial versions of AB 646 included mandatory mediation<sup>13</sup> in addition to fact-finding, provided a fifteen-day timeline for mediation, and would have applied to all public employers covered by the MMBA. Early on in the amendment process, the bill's author indicated that all provisions related to mediation would be removed, "making no changes to existing law."<sup>14</sup> Although mandatory mediation was removed from the final bill, in the event the parties do mediate, the timeline for mediation was extended from fifteen days to thirty days.<sup>15</sup> Finally, in the final bill, bargaining units in charter cities and counties who are covered by binding interest arbitration are exempted from the fact-finding provision.<sup>16</sup>

In the final version of the bill, the author of AB 646, Assembly Member Toni Atkins (D-San Diego) provided the following statement of purpose in support of the legislation:

Although the MMBA requires employers and employees to bargain in good faith, some municipalities and agencies choose not to adhere to this principle and instead, attempt to expedite an impasse in order to unilaterally impose their last, best, and final offer when negotiations for collective bargaining agreements fail. This creates an incentive for surface bargaining in which local governments rush through the motions of a meet-and-confer process to unilaterally meet the goal of the agency's management.

While some municipalities have elected to include local impasse rules and procedures, no standard requirement exists for using impasse procedures. This lack of uniformity causes confusion and uncertainty for workers. Fact-finding is an effective tool in labor relations because it can facilitate agreement through objective determinations that help the parties engage in productive discussions and reach reasonable decisions.<sup>17</sup>

AB 646 was opposed by numerous city, county, and special district representatives, who protested that it would impose significant increased costs on agencies for a process that will be triggered at the sole discretion of unions. Additionally, the opposition raised serious concerns that the bill would delay the conclusion of negotiations, inevitably create more adversarial relations rather than promote settlement, and undermine a local agency's authority to establish local rules for resolving impasse. Notwithstanding these concerns, Governor Brown signed AB 646 on October 9, 2011, without comment.

## HOW FACT-FINDING CAN BE TRIGGERED

### Because Mediation Likely Is Not Required, There Is No Clear Trigger

When first introduced, AB 646 mirrored the EERA's requirement for mandatory mediation as well as fact-finding. The mediation requirement was later removed from the bill, but the final version retained a reference to mediation preceding fact-finding. The first line of the new provision, § 3505.4(a) starts out as follows:

If the mediator is unable to effect settlement of the

controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel.

Despite the opening phrase "if the mediator," there is no provision in the bill requiring the parties to go to mediation, and Cal. Gov't Code § 3505.2, providing for voluntary mediation, remains intact in the MMBA. The legislative history further indicates that mediation is not required.

## Ambiguity as to Whether Fact-Finding Is Mandatory

Without mediation—voluntary or mandatory—there is no explicit trigger for fact-finding, and opinions as to whether fact-finding is truly mandatory are already split.<sup>18</sup> Those agencies that are considering a challenge to the law will likely contend that fact-finding is not mandatory, because nothing in the statute mandates fact-finding if the parties have not proceeded to mediation, mediation is still voluntary, and newly-enacted Cal. Gov't Code § 3505.7 lends support to the argument because it contains language arguably suggesting the procedures are permissive.<sup>19</sup> Conversely, under a technical reading of the statute, a union may argue that absent fact-finding, the employer cannot implement a last, best and final offer.<sup>20</sup>

In this author's opinion, based on legislative intent and in the absence of clean-up legislation or litigation, fact-finding likely will remain a mandatory impasse procedure *only if* requested by the employee organization—and regardless of whether the parties proceed to mediation first.

## There Is No Explicit Time Limit Within Which an Employee Organization Must Request Fact-Finding

Whether or not mediation occurs, there is no provision to ensure that fact-finding is requested in a timely manner. When an earlier version of the bill required mediation, it also allowed an employee organization to request fact-finding only after a mediator had been unsuccessful at resolving the dispute within thirty days of appointment—effectively setting the earliest date a request could be made. But no provision exists setting the latest date a request could be made. Thus, instead of facilitating cooperative efforts during impasse, the lack of an explicit timeline could encourage additional delays and protracted battles, in contravention to the stated legislative intent.

To fill this void, PERB will likely have promulgated emergency regulations by the time this article is printed. Public agencies may also amend their local rules, pursuant to Cal. Gov't Code § 3507, to address the timing and process for fact-finding. To the extent PERB regulations fill a gap in an agency's local rules, PERB's rules will apply.<sup>21</sup>

### THE FACT-FINDING PROCESS

#### Timelines and Conducting the Hearing

The fact-finding process under the MMBA will be very similar to that under the EERA and the HEERA. The timelines are compact in all three statutes.<sup>22</sup> Under EERA and HEERA, in practice the process has been known to extend far beyond the statutory timelines. Scheduling issues, time needed to prepare, and availability of the fact-finding chairperson all impact the parties' ability to meet the timelines, often

resulting in mutual agreements to extend the time.

The hearing process, if mediation is included, likely will add at least eighty days to the negotiations process:<sup>23</sup>

Mediation (if parties mediate)	+30 days
Panel member selection after a union requests fact-finding	+5 days
Panel chairperson appointed by PERB	+5 days
Time before hearing must begin	+10 days
Findings issued (if no settlement and no agreed-upon extension, thirty days from appointment of chairperson)	+20 days
Findings made public by the employer	+10 days
<b>Total minimum additional time (if parties mediate)</b>	<b>+80 days</b>

In general, the fact-finding panel hears evidence on the negotiation issues in dispute and provides findings and recommended terms for settlement. Once convened, the panel is to conduct an investigation, hold hearings, and issue subpoenas for those purposes. A fact-finding hearing is typically structured as follows:

- In advance of the hearing, the parties identify the issues in dispute to be presented to the panel;
- Position statements on all issues are submitted at the beginning of the process;
- Evidence regarding the employer's fiscal condition and comparability often is presented at the beginning of the process because such evidence frames the other issues;

- The parties then present their respective cases on each issue in dispute through the introduction of foundational evidence in support of proposals;
- After the hearing, post-hearing briefs or position statements may be submitted to support and summarize the parties' positions;
- Within thirty days after its appointment, the fact-finding panel must make findings of fact and recommend terms of settlement;
- The agency and employee organization share the costs and expenses of the PERB-appointed panel chairperson (and pay their own separately-incurred costs associated with their panel member).

#### Fact-Finding Criteria

The statute specifies criteria to be considered by the fact-finding panel:<sup>24</sup>

1. State and federal laws that are applicable to the employer.
2. Local rules, regulations, or ordinances.
3. Stipulations of the parties.
4. The interests and welfare of the public and the financial ability of the public agency.
5. Comparison of the wages, hours, and conditions of employment of the employees involved in the fact-finding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
6. The consumer price index for goods and services, commonly known as the cost of living.
7. The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, other excused time, insurance, pensions, medical and hospitalization benefits,

the continuity and stability of employment, and all other benefits received.

8. Any other facts that are normally or traditionally taken into consideration in making the findings and recommendations.

Under EERA and HEERA (and in binding interest arbitration), comparability is generally afforded significant weight, meaning that local public agencies may now have to consider the expense and time required to manage a comparability study as part of the negotiation process.<sup>25</sup> In addition, the financial condition of the employer and the impact of union proposals on the agency's ability to deliver public services are typically significant criteria.

### Conclusion of Fact-Finding Process

At the conclusion of fact-finding, the panel issues a written report and "shall make findings of fact and recommend terms of settlement, which shall be advisory only."<sup>26</sup> AB 646 does not specify the form of the report or how it is organized. For instance, it is not clear that the fact-finder must make findings on an issue-by-issue basis or that the fact-finder must choose between the proposals submitted by the parties.

The public agency must make public the findings and recommendations within ten days after their receipt. Because the statute does not explicitly require an employee organization to maintain the confidentiality of the report during this ten-day period, public agencies may want to clarify through a local rule that both sides are expected to keep the report confidential.

An employer may not unilaterally impose a last, best and final offer until after holding a public hearing and no earlier than ten days after receipt of the findings and recommendations

(i.e., at the same time the findings and recommendations must be made public).

### INTERPLAY WITH LOCAL RULES

AB 646 does not abrogate the right of local public agencies to adopt rules and regulations for the administration of employer-employee relations, including rules involving impasse resolution procedures.<sup>27</sup> Absent clean-up legislation, or resolution of potential legal challenges, agencies who do not want to rely solely on PERB's regulations can tackle many of the ambiguities of this statute through revisions to their local rules. As with their current local rules, agencies can determine what impasse processes will work best given local conditions and history. Issues that could be addressed through local rules to provide for more structure, clearer timelines, and predictability include:

- Whether mediation should be voluntary or mandatory;
- Whether fact-finding should be mandatory (i.e., provide an employer option to trigger fact-finding after impasse);
- Whether to set specific timelines to trigger fact-finding in the absence of mediation;
- Whether to require pre-designation of a fact-finding panel chairperson in order to ensure statutory timelines can be met;
- Whether to specify additional criteria for the fact-finding panel to consider;
- Whether the fact-finding panel may be allowed to consider matters that fall outside of mandatory subjects of bargaining;
- Whether the fact-finding panel should provide findings and recommendations issue-by-issue;
- Whether to clarify other timelines of the process, such as requiring the fact-finding report to be issued

in time for an agency to adopt changes before the expiration of a contract or before the start of a new budget year; and

- Whether to require both sides to maintain confidentiality of the fact-finder's report for the ten-day quiet period.

This list is not exhaustive, and serves to highlight the potential pitfalls of the new statute.

### CONCLUSIONS—FOR NOW

In the current environment, many agencies have focused their bargaining preparation on making a strong financial case to support the need for concessions and long-term structural changes. No doubt, the financial condition of public agencies will continue to remain a centerpiece of bargaining regardless of the state of the economy. Going forward, negotiation preparation may need to be expanded, because if the parties go to fact-finding, a fact-finding panel will be required to apply the additional specific statutory criteria when evaluating proposals. Comparability thus may move from an important consideration for ensuring the ability to attract and retain talented employees to a key component of bargaining. To meet the timelines required by their budgets, public agencies will need to begin bargaining preparation earlier.

It remains to be seen whether the ambiguities of the new statute will be resolved through clean-up legislation or through legal challenges. In the meantime, fact-finding likely is coming soon to a public agency near you. [↩](#)

### ENDNOTES

1. Cal. Gov't Code § 3505.
2. Cal. Gov't Code § 3505.2.
3. Although the Legislature uses the term "factfinding," most commentators have used the term "fact-finding," in accord with Webster's Dictionary. This

article uses the more accepted spelling.

4. Cal. Gov't Code § 3505.4(a).
5. PERB's jurisdiction was extended to all MMBA-covered employers in 2001, with the exception of peace officers, management employees, and the City and County of Los Angeles. While it is clear that AB 646 applies to all MMBA-covered bargaining units, those who do not fall within PERB's jurisdiction are questioning whether PERB can regulate the fact-finding process as to them. See commentary by the City and County of Los Angeles and by Carroll, Burdick & McDonough LLP at <http://www.perb.ca.gov/news/default.aspx>.
6. Cal. Gov't Code § 3505.2.
7. Charter cities and counties who have binding interest arbitration are exempted from the new law. Cal. Gov't Code § 3505.5(e).
8. Cal. Gov't Code §§ 3540, et seq.
9. Cal. Gov't Code §§ 3560, et seq. The HEERA does not include any factors for the fact-finding panel to consider. The MMBA factors are modeled on the EERA factors.
10. The Ralph C. Dills Act, which covers State employment, is now the only public sector labor relations act in California which does not mandate fact-finding.
11. Cal. Gov't Code §§ 3548 (EERA), and 3590 (HEERA).
12. Cal. Gov't Code § 3505.7.
13. In earlier versions, Assembly Member Atkins' statement of purpose included references to the benefits of both mediation and fact-finding:

The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ *mediation and fact-finding* in order to assist them in resolving

differences that remain after negotiations have been unsuccessful. *Mediators are often useful in restarting stalled negotiations, by encouraging dialogue where talks have broken down; identifying potential areas where agreement may be reached; diffusing tension; and suggesting creative compromise proposals.* Fact-finding panels can also help facilitate agreement, by making objective, factual determinations that can help the parties engage in productive discussions and reach reasonable decisions

Assem. Comm. On Public Employees, Retirement and Soc. Sec., Analysis of Assem. Bill No. 646 (2011-2012 Reg. Sess.) May 4, 2011, at 3 (emphasis added). The references to mediation were dropped from the final statement of purpose.

14. Assem. Comm. on Public Employees, Retirement and Social Security, Analysis of Assem. Bill No. 646 (2011-2012 Reg. Sess.), May 3, 2011, at 4.
15. Assem. Amend. to Assem. Bill No. 646 (2011-2012 Reg. Sess.), May 27, 2011.
16. Cal. Gov't Code § 3505.5(e).
17. Sen. Rules Comm., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 646 (2011-2012 Reg. Sess.), Aug. 29, 2011, at 5.
18. See <http://www.perb.ca.gov/news/default.aspx> for extensive commentary on AB 646 provided by labor and management.
19. Government Code § 3505.7 permits implementation of the last, best and final offer "[a]fter any applicable mediation and factfinding procedures have been exhausted."
20. However, this interpretation likely would violate California

Constitution art. XI, § 1(b), which forbids the Legislature from interfering with a local governing body's determination of the number, compensation, tenure and appointment of employees. See *County of Riverside v. Superior Court*, 30 Cal. 4th 278, 285 (2003) (holding that mandatory interest arbitration was an unconstitutional interference with the county's exclusive authority to establish compensation for employees).

21. See Cal. Gov't Code § 3509(a); *County of Siskiyou/Siskiyou County Superior Court*, PERB Decision No. 2113 (2010).
22. The short statutory timelines could be viewed as an indication that fact-finding is meant to be informal, with evidence presented by only a handful of witnesses, exhibits and testimony being introduced with limited foundation, and without the need for a court reporter.
23. See Cal. Gov't Code §§ 3505.4, 3505.5, 3505.7.
24. Cal. Gov't Code § 3505.4(d). The criteria are virtually identical to those established under the EERA. See Cal. Gov't Code § 3548.2.
25. Comparability is the key factor relied on by many arbitrators, and will likely carry great weight in a fact-finding process. (See *City of San Jose* (Cossack 2007) [awarding enhanced retirement benefit based on comparability]; *City of Modesto* (Brand 2002); *City of San Luis Obispo* (Goldberg 2008) [awarding 32.82% wage increases over 3 years].) Will Aitchison's treatise on interest arbitration dedicates four chapters, nearly a third of the book, to issues of comparability. See Aitchison, Will, INTEREST ARBITRATION (2nd ed. 2000), at 31-120.
26. Cal. Gov't Code § 3505.5(a).
27. Cal. Gov't Code § 3507.