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2014 Changes to Statutes Administered by PERB

A Public Law Group™ White Paper

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Tim Yeung is a Partner in the Sacramento office of Renne Sloan Holtzman Sakai LLP, Public Law Group™. Mr. Yeung's practice involves all areas of labor and employment law, with a particular emphasis on litigation. Mr. Yeung is also widely recognized for his expertise in public sector labor law. In 2004 he was appointed by the Governor as a Legal Adviser to the Public Employment Relations Board (PERB) where he advised the Board in over 100 precedential decisions. Mr. Yeung is one of only a handful of California attorneys to have litigated cases before PERB under the Dills Act (state employees), MMBA (city, county and other local employees), and HEERA (higher education employees). Mr. Yeung shares his experience and knowledge of PERB matters on the "California PERB Blog" (http://www.caperb.com), the first California legal blog focused on public sector labor relations.

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INTRODUCTION

The 2012-13 legislative session began with the introduction of several bills affecting the various statutes administered by the Public Employment Relations Board (PERB). However, by the end of the first year of the two-year session, only two bills affecting PERB passed the Legislature and were signed by the Governor. Both bills affect the Meyers Milias Brown Act (MMBA).

This document provides commentary and sets forth all the changes to the statutes administered by PERB as a result of those two bills:

- AB 537 (Bonta) Meyers-Milias-Brown Act: impasse procedures
- AB 1137 (Gray) Public employee organizations: members: paid leave of absence

MEYERS-MILIAS-BROWN ACT

AB 537

Effective January 1, 2014, section 3505.1 is amended, and section 3505.8 is added, to the Government Code, to read:

> 3505.1. If a tentative agreement is reached by the authorized representatives of the public agency and a recognized employee organization or recognized employee organizations, the governing body shall vote to accept or reject the tentative agreement within 30 days of the date it is first considered at a duly noticed public meeting. A decision by the governing body to reject the tentative agreement shall not bar the filing of a charge of unfair practice for failure to meet and confer in good faith. If the governing body adopts the tentative agreement, the parties shall jointly prepare a written memorandum of understanding.
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> 3505.8. An arbitration agreement contained in a memorandum of understanding entered into under this chapter shall be enforceable in an action brought pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure. An assertion that the arbitration claim is untimely or otherwise barred because the party seeking arbitration has failed to satisfy the procedural prerequisites to arbitration shall not be a basis for refusing to submit the dispute to arbitration. All procedural defenses shall be presented to the arbitrator for resolution. A court shall not refuse to order arbitration because a party to the memorandum of understanding contends that the conduct in question arguably constitutes an unfair practice subject to the jurisdiction of the board. If a party to a memorandum of understanding files an unfair practice charge based on such conduct, the board shall place the charge in abeyance if the dispute is subject to final and binding arbitration pursuant to the memorandum of understanding, and shall dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of this chapter.

[**Comments**: Section 3505.1 was amended by AB 537 which also added Section 3505.8. AB 537 amended Section 3505.1 to require that where the parties reach a tentative agreement, the governing body of the public agency must "vote to accept or reject the tentative agreement

within 30 days of the date it is first considered at a duly noticed public meeting." According to the author, this change is necessary because "too many governing bodies of public agencies reject a tentative agreement out-of-hand after the parties' negotiators have expended considerable time and resources to arrive at that agreement, and the employee organization has often already conducted a ratification vote among its members." The legislative analysis further adds that the bargaining process is thwarted when the employee organization's members ratify the tentative agreement and then the public agency's governing body rejects it.

AB 537 does not address the author's concerns about a public agency's rejection of a tentative agreement since nothing in the amendment to Section 3505.1 requires that the governing body of the public agency accept a tentative agreement after it has been ratified by the union. The public agency is still free to reject the tentative agreement. Further, the bill does not require the public agency to consider the tentative agreement at a duly notice public meeting by a certain time after the tentative agreement is reached. The bill merely requires that once the tentative agreement is considered at a duly noticed public meeting, the governing body must vote to accept or reject it within 30 days. The additional language that a decision by the governing body to reject a tentative agreement shall not bar the filing of a charge of unfair practice does not change existing law. Even before this new language, PERB could consider the rejection of a tentative agreement by either party to be an indicator of bad faith bargaining depending on the specific circumstances of the rejection.

Newly added Section 3505.8 provides that an arbitration agreement contained in a memorandum of understanding is enforceable under the California Arbitration Act (CAC) (Civ. Proc. Code, §1280 et seq.). Section 3505.8 also provides that "all" procedural defenses, including issues of timeliness, shall be presented to the arbitrator. This presumably applies to both contract-based and non-contract-based procedural defenses. With respect to non-contract-based procedural defenses, it is unclear how Section 3505.8 will be reconciled with the CAC which gives the courts the jurisdiction to decide whether the right to compel arbitration has been waived. (*See* Civ. Proc. Code, §1281.2, subd. (a).) Section 3505.8 also codifies PERB's deferral doctrine currently set forth in PERB Regulation 32603. Under PERB's deferral doctrine, PERB will place an unfair practice charge in abeyance if a dispute is subject to binding arbitration under a memorandum of understanding.

AB 1181

Effective January 1, 2014, section 3505.3 of the Government Code is amended, to read:

> 3505.3. (a) Public agencies shall allow a reasonable number of public agency employee representatives of recognized employee organizations reasonable time off without loss of compensation or other benefits when they are participating in any one of the following activities:
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> (1) Formally meeting and conferring with representatives of the public agency on matters within the scope of representation.
>
> (2) Testifying or appearing as the designated representative of the employee organization in conferences, hearings, or other proceedings before the board, or an agent thereof, in matters relating to a charge filed by the employee organization against the public agency or by the public agency against the employee organization.
>
> (3) Testifying or appearing as the designated representative of the employee organization in matters before a personnel or merit commission.
>
> (b) The employee organization being represented shall provide reasonable notification to the employer requesting a leave of absence without loss of compensation pursuant to subdivision (a).
>
> (c) For the purposes of this section, "designated representative" means an officer of the employee organization or a member serving in proxy of the employee organization.

[**Comments**: Section 3505.3 was amended by AB 1181. According to the author, this change is necessary because "local public employees who seek to represent their union membership in grievance adjustment meetings, legislative hearings, and proceedings before the PERB do not have a clear statutory right to release time to perform these duties and therefore, must take unpaid time off from work to participate in these matters that are important to enforce collective bargaining agreements." However, even before the amendment, Section 3505.3 required a public agency to provide paid leave time to a reasonable number of employee representatives of a recognized union for meeting and conferring over matters within the scope of representation. AB 1181 expands the right to paid leave time to proceedings before PERB and before a

personnel or merit commission. Notably, AB 1181 does not provide for paid leave time for participation or testifying at legislative hearings.

With respect to PERB hearings, AB 1181 only provides for paid leave time to serve as the designated representative of the employee organization at a PERB proceeding and for testifying at a PERB proceeding. AB 1181 provides similar restrictions with respect to personnel and merit commission proceedings.