SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 270 (Durazo)
Version: January 28, 2021
Hearing Date: April 13, 2021
Fiscal: Yes
Urgency: No
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SUBJECT

Public employment: labor relations: employee information

DIGEST

This bill authorizes an unfair labor practice charge to be filed against a public employer who violates requirements regarding the provision of public employee information to the authorized representative or recognized employee organization for the relevant bargaining unit, as specified. It authorizes the recovery of attorneys' fees and costs in connection with the claim, as provided.

EXECUTIVE SUMMARY

Existing law requires specified public employers to provide the exclusive representative or recognized employee organization for the relevant bargaining unit with the name, job title, department, work location, work, home, and personal cellular telephone numbers, personal email addresses on file with the employer, and home address of any newly hired employee within 30 days of the date of hire or by the first pay period of the month following hire. (Gov. Code § 3558 ("Section 3558").) The employer must also provide a list of that information for all employees in the bargaining unit at least every 120 days, unless otherwise agreed to by the parties.

Concerns have been raised regarding certain public employers failing to comply with this law and the lack of adequate enforcement mechanisms to ensure compliance. This bill addresses these concerns by authorizing the exclusive representative to file an unfair labor practice charge with the Public Employment Relations Board (PERB) alleging a violation of Section 3558. The representative must first provide notice and certain documentation to the employer, and, in certain circumstances, the employer is afforded an opportunity to cure the violation. PERB is authorized to impose a civil penalty and attorneys' fees and costs, as specified.

This bill is co-sponsored by the California School Employees Association, the California Labor Federation, and SEIU California. It is supported by organizations representing public employees and opposed by many organizations representing public employers. It passed out of the Senate Labor, Public Employment and Retirement Committee on a 4 to 0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Requires a public employer, as defined, to provide the exclusive representative or recognized employee organization for the bargaining unit with the name, job title, department, work location, work, home, and personal cellular telephone numbers, personal email addresses on file with the employer, and home address of any newly hired employee within 30 days of the date of hire or by the first pay period of the month following hire. (Gov. Code § 3558.)

2) Requires a public employer to also provide the exclusive representative with a list of that information for all employees in the bargaining unit at least every 120 days unless more frequent or more detailed lists are required by an agreement with the exclusive representative. The provision of information under this section shall be consistent with the employee privacy requirements described in *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905. (Gov. Code § 3558.)

3) Authorizes a public employer and exclusive representative to establish a different interval within which the public employer provides the exclusive representative with the information. (Gov. Code § 3558.)

4) Establishes the Public Employment Relations Board (PERB) and empowers it to administer the collective bargaining statutes covering specified public employees. (Gov. Code § 3541 et seq.)

5) Authorizes PERB to investigate unfair practice charges and other violations of the relevant law. (Gov. Code § 3541.3.) The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary shall be a matter within the exclusive jurisdiction of PERB. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by PERB. (Gov. Code § 3541.5.)

This bill:

1) Authorizes an exclusive representative to file a charge of an unfair labor practice alleging a violation of Section 3558.

2) Requires the aggrieved exclusive representative to first give written notice to the public employer, or a designated representative, of the alleged violation, including the facts and theories to support the alleged violation.

3) Provides the public employer 10 calendar days to cure the alleged violation by complying with the requirements of Section 3558 where, and only where, the alleged violation is that a public employer has provided an inaccurate or incomplete list of employees to the exclusive representative. The opportunity to cure does not apply to any other violation.

4) Requires the public employer to give written notice by either certified mail or electronically within the 10-calendar day period to the applicable exclusive representative of the actions taken. The aggrieved exclusive representative may file an unfair practice charge with PERB if the alleged violation is not cured.

5) Provides that a public employer may avail itself of this opportunity to cure not more than three times in any 12-month period.

6) Provides that, in addition to any other remedy provided by law, a public employer found to have violated Section 3558 shall be subject to a civil penalty not to exceed $10,000 and which is payable to the General Fund. Such penalty shall be determined by PERB through application of the following criteria:
    a) the public employer's annual budget;
    b) the severity of the violation; and
    c) any prior history of violations by the public employer.

7) Requires PERB to award to a prevailing party attorney's fees and costs that accrue after a decision of PERB's Division of Administrative Law until the board initiates compliance or enforcement proceedings. If PERB initiates enforcement proceedings with a superior court to achieve compliance with a board order involving this section, the charging party may separately seek attorney's fees and costs for the enforcement action, which the board shall award.

8) Establishes the operative date of these changes to Section 3558 as July 1, 2022.

COMMENTS

1. Public employer-employee relations

The Meyers-Milias-Brown Act (Gov. Code § 3500 et seq.), the Ralph C. Dills Act (Gov. Code § 3512 et seq.), the Los Angeles County Metropolitan Transportation Authority Transit Employer–Employee Relations Act (Pub. Util. Code § 99560 et seq.), the Judicial Council Employer-Employee Relations Act (Gov. Code § 3524.50 et seq.), the Trial Court Employment Protection and Governance Act (Gov. Code § 71600 et seq.), the Trial

Court Interpreter Employment and Labor Relations Act (Gov. Code § 71800 et seq.), the Educational Employee Relations Act (Gov. Code § 3540 et seq.), and the Higher Education Employer-Employee Relations Act (Gov. Code § 3560 et seq.) govern public employer-public employee relations in California. These acts grant state, local, transit, educational, and other public employees the right to form, join, and participate in the activities of employee organizations of their choosing and requires the relevant public employers, among other things, to meet and confer with representatives of recognized employee organizations and exclusive representatives on terms and conditions of employment. PERB is a quasi-judicial administrative agency charged with administering the collective bargaining statutes covering these public employees.

AB 119 (Committee on Budget, Ch. 21, Stats. 2017) built on these acts and places additional obligations on public employers, enacting the Public Employee Communication Chapter (PECC). (Gov. Code § 3555 et seq.) Except as otherwise provided, PERB maintains jurisdiction over violations of the provisions of the PECC. (Gov. Code § 3555.5.) Among other elements, the PECC requires these public employers to provide the exclusive representative notice of and mandatory access to its new employee orientations. (Gov. Code §§ 3556, 3557.) In 2018, SB 1085 (Skinner, Ch. 893, Stats. 2018) added to the PECC and requires public employers to provide public employees reasonable leaves of absence to serve as stewards or officers of the exclusive representative. (Gov. Code § 3558.8.)

Relevant here, AB 119 enacted Section 3558, which requires public employers to provide an exclusive representative with information on any newly hired employee within 30 days of the date of hire or by the first pay period of the month following hire the name, including information such as their job title and contact information. It further requires the public employer to provide the representative with a list of that information for *all* employees in the bargaining unit at least every 120 days, except as specified. The transfer of this information must abide by specified privacy requirements. Public employers and employees can agree to a different interval for the provision of this information.

2. Enforcement of Section 3558

This bill involves the operation of Section 3558, which requires the provision of new employee information. As stated by the author, "[Section] 3558, in its current form, includes no enforcement elements. Without any measures to compel compliance, many public employers choose instead to ignore their legal obligation and withhold the relevant information from public employee organizations."

a. Authorizing an unfair labor practice charge

This bill addresses this lack of compliance by authorizing an exclusive representative to file an unfair labor practice claim with PERB against a public employer for failure to

provide the information required by Section 3558 after taking several prerequisite steps. The representative must provide written notice to the public employer alleged to be in violation and must include supporting facts and theories. In certain situations, the public employer is granted an ability to cure before a claim can be filed.

Where the representative is alleging that an inaccurate or incomplete list of employees was provided, the employer is granted a 10-day period to cure the alleged violation. The employer must then provide written notice to the representative within that period detailing the actions taken. Only after the public employer has failed to cure the alleged violation within the 10-day period may the unfair practice charge be filed. To avoid abuse of this get-out-of-jail-free card, employers are only allowed to take advantage of this opportunity to cure three times within any 12-month period. Opposition from various public employer associations raises concerns about this limitation. They argue:

> Some public agencies are quite large and have dozens of unions for which they must file regularly, but those agencies would only be allowed to cure data errors three times in a year. The limitation is arbitrary and would mostly result in large public agencies being vulnerable to sizeable civil penalties for data errors without an opportunity to cure more than three errors.

If the exclusive representative is alleging any other violation of Section 3558, such as a total failure to provide the required information, the public employer is not provided an opportunity to cure.

After these prerequisite steps have been taken and a charge is filed, PERB is tasked with determining whether a violation has occurred. PERB is authorized to impose a civil penalty of up to $10,000. In making a determination of the size of such a penalty, PERB must consider the annual budget of the employer, the severity of the relevant violation, and any prior history of violations by that employer. The assessed penalty does not go to the aggrieved party but rather is paid to the General Fund.

b. Fee-shifting provisions

Ordinarily, under the so-called "American Rule," each party to an action must bear its own attorneys' fees, regardless of the outcome.[1] However, the American Rule can be altered by contract or statute. Such changes to the American Rule are known as "fee-shifting provisions."

Fee-shifting provisions may be one-way or two-way. A two-way fee shifting provision entitles the winning party to have its attorney's fees covered by the losing party. A one-way fee-shifting provision only allows one side in a case, usually the plaintiff, to

[1] Code of Civil Procedure § 1021; *Musaelian v. Adams* (2009) 45 Cal.4th 512.

recover attorney's fees, if that side prevails. One-way fee shifting provisions are generally used to help litigants obtain counsel where they might not otherwise be able to afford one.[2] One-way fee-shifting provisions can also be employed to encourage private enforcement of a public policy aim.[3] "The approach that should uniformly encourage the pursuit of claims of all sorts in all situations is a one-way pro-prevailing-plaintiff rule. Such a policy permits plaintiffs to expect greater net recoveries, without adding a counterbalancing threat of loss."[4]

This bill provides:

> The Public Employment Relations Board shall award to a prevailing party attorney's fees and costs that accrue after a decision of the board's Division of Administrative Law until the board initiates compliance or enforcement proceedings. If the board initiates enforcement proceedings with a superior court to achieve compliance with a board order involving this section, the charging party may separately seek attorney's fees and costs for the enforcement action, which the board shall award.

The first sentence of this provision enables a public employer or a public employee union to recoup any attorneys' fees or costs that are incurred as a result of a charge filed. However, the accrual of such fees and costs does not begin until after a decision has been made by PERB. Therefore, there are no fees or costs awarded for initially identifying and investigating the violation, for engaging in informal mediation, or for arguing the charge to an administrative law judge (ALJ) within PERB's formal process. It is during the period after a decision is made and until "compliance or enforcement proceedings" are initiated that fees and costs accrue; this is generally the period during which appeals to the actual PERB board are made and disposed of. However, in many cases, it is not necessary to initiate compliance or enforcement proceedings and so this end point never occurs. Generally, once an initial decision is made by an ALJ it can be appealed internally at PERB and PERB makes a final determination.

In order to more fully capture the work that is done throughout the PERB process, the author has agreed to amend this provision so that fees accrue at the inception of proceedings before the Division of Administrative Law and until final disposition of the charge by PERB. Fees and costs are still recoverable by the prevailing party, whether it is the public employer or the exclusive representative. This incentivizes the parties to come to agreement before the case is even set before an ALJ, likely making the initial

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[2] *Flannery v. Prentice* (2001) 26 Cal.4th 572.
[3] *See* Krent, *Explaining One Way Fee Shifting* (November 1993) 79 Va. L. Rev. 2039, 2044; *Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 326 ("Economic analysis . . . supports the proposition that two-way fee-shifting will cause fewer claims to be filed than either the American rule of no fee-shifting or one way proplaintiff fee-shifting").
[4] *Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 327, quoting Rowe, *Predicting the Effects of Attorney Fee Shifting*.

informal settlement conference at PERB more fruitful and saving all parties, as well as PERB, time and resources.

The second sentence of the attorneys' fees and costs provision deals with the process outside of PERB when the judicial system is involved. It specifically awards fees and costs to the "charging party" when PERB is forced to turn to the superior court to achieve compliance with its order. The provision provides these fees and costs shall be awarded by PERB. Two concerns arise from this provision. First, it does not capture the appeals process that can take place after a final disposition at PERB, wherein a losing party can petition the appropriate California Court of Appeal for a writ of extraordinary relief. Second, it places the responsibility of making this award with PERB, even though the relevant proceedings are not occurring within the court system.

In order to address these concerns, the author has agreed to amend the bill to provide for the recovery of fees and costs to be awarded by the court whenever the defense or enforcement of a PERB order enters the court system.

The new provision, with both sets of amendments, reads:

> The Public Employment Relations Board shall award to a prevailing party attorney's fees and costs that accrue from the inception of proceedings before the board's Division of Administrative Law until final disposition of the charge by the board. The board, however, shall not award attorney's fees and costs under this section for any proceedings before the board itself that challenge the dismissal of an unfair practice charge by the board's Office of the General Counsel. If the board initiates proceedings with a superior court to enforce or achieve compliance with a board order, or is required to defend a decision of the board involving this section after a party seeks judicial review, the court shall award the board attorney's fees and costs if the board is the prevailing party.

The coalition of public employers in opposition asserts that "allowing unions to recover attorney's fees for bringing such claims will only encourage unions to threaten to bring lawsuits rather than encourage them to work cooperatively with public agencies. Unfortunately, in this scenario, attorneys make money to the detriment of the general public."

Section 3555 of the Government Code states the policy of the state in connection with the PECC:

> The Legislature finds and declares that the ability of an exclusive representative to communicate with the public employees it represents is necessary to ensure the effectiveness of state labor relations statutes, and the exclusive representative cannot properly discharge its legal obligations unless it is able to meaningfully communicate through cost-effective and

> efficient means with the public employees on whose behalf it acts. In most cases, that communication includes an opportunity to discuss the rights and obligations created by the contract and the role of the representative, and to answer questions. That communication is necessary for harmonious public employment relations and is a matter of statewide concern. Therefore, it is the Legislature's intent that recognized exclusive representatives of California's public employees be provided meaningful access to their represented members as described in this chapter unless expressly prohibited by law.

This bill is aimed at ensuring the smooth flow of communications between public employee unions and the employees it represents by providing stronger enforcement tools. The aim of these provisions is to ensure unions are able to practically enforce the rights afforded them under Section 3558 and to deter noncompliance. The author highlights the need:

> If a public employer does not comply with these requirements, the only recourse a public employee organization can take is filing a charge with the Public Employee Relations Board (PERB). This process can take two years to complete and PERB can only order employers to pay provable damages. Employee organizations have no recourse to collect attorney's fees or the staff costs they may have incurred trying to enforce this right.

The California School Employees Association, the sponsor of the bill, makes the case for stronger enforcement:

> The list of employees' contact information is vital, especially during the COVID-19 crisis. To be able to represent our members, we need to have their contact information. Without contact information, the bargaining unit cannot reach out to ensure that workers have the needed protective equipment, access to virus testing and vaccines, that appropriate protections are in place at their worksite, or inform employees of their rights if employers execute layoffs.
>
> SB 270 would enact a process of enforcement at the Public Employment Relations Board (PERB). When public employers fail to provide the employment list, this bill would allow PERB to review the case and decide if penalties or other remedies can resolve the problem. This bill also provides an opportunity for the employer to remedy ("cure") the situation by complying with the information requirements under existing law.

3. Additional arguments in support of and in opposition to the bill

A coalition of groups representing public employers, including the League of California Cities and the California State Association of Counties, argues in opposition that there "is no data supporting the need for this bill, the 'right to cure' contained in the bill is illusory, and the legislation would divert much needed funds away from public benefit in the middle of a pandemic." They assert:

> California is entering the second year of the COVID-19 pandemic and public agency budgets – especially local public agencies – are stressed under the combined weight of limited resources and increased demand for public services. SB 270 will divert much needed public resources away from public benefit and into the pockets of labor unions who are having disputes with their employers. There continues to be a lack of data suggesting that there is even a meaningful problem that needs to be addressed. When this bill was advanced last year (SB 1173), the analyses contained only anecdotal evidence of problems with timely and accurate reporting.

The Service Employees International Union, California, argues why the bill is needed:

> Recognized exclusive representatives have a vested interest in their membership and must have an effective way to communicate with them in-order to fulfill their representational duties. Both California's case and statutory law recognize this need and require certain contact information be provided to unions about the people they represent. In 2018, the Legislature and Governor reaffirmed this by enacting Government Code Section 3558. However, the statute failed to include an enforcement mechanism, and accordingly has not been as effective as intended.

Writing in support, the California Federation of Interpreters state:

> SB 270 would help to ensure compliance with these requirements by allowing a labor representative to file a charge of an unfair labor practice if this information is not provided. Violators would be subject to a hefty penalty. This bill will ensure that all new employees can be contacted by labor representatives with information about their employment and worker's rights.

SUPPORT

California Labor Federation (co-sponsor)
California School Employees Association (co-sponsor)
SEIU California (co-sponsor)

California Conference of the Amalgamated Transit Union
California Conference of Machinists
California Faculty Association
California Federation of Interpreters
California Federation of Teachers
California Professional Firefighters
California Teachers Association
California Teamsters Public Affairs Council
California-Nevada Conference of Operating Engineers
Engineers and Scientists of California, IFPTE Local 20, AFL-CIO
Professional and Technical Engineers, IFPTE Local 21, AFL-CIO
United Public Employees

OPPOSITION

Association of California Healthcare Districts
California Association of Joint Powers Authorities
California Special Districts Association
California State Association of Counties
League of California Cities
Public Risk Innovation, Solutions, and Management
Rural County Representatives of California
Urban Counties of California

RELATED LEGISLATION

Pending: AB 1484 (Kiley, 2021) prohibits a public school employer from deducting the amount of the fair share service fee or the alternative fee provided for in Section 3546 of the Government Code from the wages and salary of a public school employee unless the employer has received permission from the employee, and would require an employee's authorization to only be valid for the calendar year in which it is given unless terminated, as provided. This bill is currently in the Assembly Public Employment and Retirement Committee.

Prior Legislation:

SB 1173 (Durazo, 2020) was identical to the current bill. It died on the Senate Floor after passing both houses of the Legislature.

SB 1085 (Skinner, Ch. 893, Stats. 2018) *See* Comment 1.

AB 119 (Committee on Budget, Ch. 21, Stats. 2017) *See* Comment 1.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 4, Noes 0)

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