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California Governor Signs New Collective Bargaining Law Requiring Factfinding Procedures for Impasse Resolution for Public Sector Employers Covered by the MMBA

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On October 9, 2011, California Governor Jerry Brown signed AB 646, which amends the Meyers-Milias-Brown Act (MMBA) to require certain public sector employers to submit their differences with a labor organization representing their employees to a "factfinding panel" for impasse resolution. The new law allows an employer covered by the MMBA to implement its "last, best, and final offer" after the parties' respective positions over wages, benefits and other terms and conditions of employment have been presented to the panel, the panel's findings and recommendations have been made public and a public hearing has been held on the impasse.

This amendment to the MMBA, which is effective January 1, 2012, is significant because it now requires public sector employers covered by the MMBA to engage in the same type of factfinding, or "nonbinding interest arbitration," that has long been required under other public sector employment statutes, such as the Educational Employment Relations Act (EERA) and the Higher Education Employment Relations Act (HEERA). Employers will need to rethink their strategies when negotiating with unions over a labor agreement in light of the new requirements that must be satisfied prior to unilaterally implementing their last, best and final offer.

Current Impasse Resolution Procedures Under the MMBA

The Public Employment Relations Board (PERB) is a quasi-judicial agency that oversees public sector collective bargaining in California. Among other things, PERB administers seven collective bargaining statutes and adjudicates disputes between the parties subject to them. Those statutes include, among others: the Educational Employment Relations Act (EERA) (covering California's public schools (K-12) and community colleges); the State Employer-Employee Relations Act (Dills Act) (covering state government employees); and the Higher Education Employer-Employee Relations Act (HEERA) (which covers the California State University System, the University of California System and Hastings College of Law). The MMBA, which was enacted in 1968, establishes collective bargaining for California's municipal, county and local special district employers and employees. Although the MMBA covers peace officers, management employees and the City and County of Los Angeles, PERB's jurisdiction, which was extended to the MMBA in 2001, does not extend to these groups.

The MMBA requires local public agencies to meet and confer in good faith with representatives of recognized labor organizations regarding wages, hours and other terms and conditions of employment. Under existing law, if the parties are unable to reach an agreement, the MMBA allows them to mutually agree on the appointment of a mediator and to share the mediator's costs. If the employer and the union still cannot agree and have reached "impasse," the MMBA allows the public sector employer to implement its last, best and final offer. Unlike the EERA and the HEERA, both of which *require* parties to submit their bargaining dispute to a mediator and a factfinding panel before implementing the last, best and final offer, the decision to proceed to mediation under the MMBA has always been voluntary and factfinding has never been required. The MMBA further allows for local control of the process for resolving impasse disputes by providing that specific impasse procedures may be contained in local rules, regulations, or ordinances, or when such procedures are agreed upon by the parties.

The New Law Amends the MMBA to Require Factfinding and a Public Hearing

AB 646 is a significant change to what historically has been considered an informal and undefined process under the MMBA for breaking an impasse between the parties. Indeed, the new law amends the MMBA to impose additional requirements on counties, cities and special districts if voluntary mediation is unable to effectively settle the parties' dispute. If the mediator is unable to settle the dispute within 30 days of his or her appointment, the labor organization, *but not the employer*, may request that the dispute be submitted to a "factfinding panel." The panel must consist of one member selected by each party, as well as a chairperson selected by PERB or by agreement of the parties. The new law authorizes this factfinding panel to conduct an investigation, hold a hearing, issue subpoenas to require witnesses to appear and testify, and subpoena the production of evidence. All political subdivisions of the state will be required to comply with a factfinding panel's information request, even if the subdivision is not a party to the proceedings. Although AB 646 is silent as to how this requirement will be enforced, existing PERB regulations provide a process by which a superior court order compelling compliance can be obtained.

If the dispute still is not settled within 30 days after appointment of the panel, or longer if the parties agree to an extension, the new law authorizes the panel to make findings of fact and recommend terms of settlement, which shall be "advisory only." In making this determination, the panel is required to consider the following factors:

- State and federal laws applicable to the employer;
- Local rules, regulations or ordinances;
- Any stipulations between the parties;
- The interests and welfare of the public and the financial ability of the public agency;
- Comparison of wages, hours and conditions of employment of the employees at issue in the dispute with those of employees performing similar services in comparable public agencies;
- The consumer price index;
- The overall compensation and other benefits received by the employees along with the continuity and stability of employment; and
- Any other facts that are normally considered when making findings and recommendations.

Before the findings and recommendations are available to the public, the panel must first make them available to the parties for a period of 10 days. However, if a public sector employer intends to implement its last, best and final offer, it must wait until at least 10 days after the panel's written findings of fact and recommended terms of settlement have been submitted to the parties *and* the employer has held a public hearing regarding the impasse. Charter cities and counties with charters that provide for impasse procedures which include, at a minimum, "binding arbitration," are exempt from this factfinding process.

Open Questions Under the New Law

It is questionable whether this new law actually fulfills the bill sponsor's apparent intent of requiring an employer to submit to factfinding before implementing its last, best and final offer in *all* cases where the union has requested factfinding. The bill sponsor's comments regarding AB 646 reference "the creation of *mandatory* impasse procedures," giving the impression of an intent to require these impasse procedures (*e.g.*, factfinding and a public hearing) in all cases where a union requests them.

However, the law, as written, arguably does not achieve this goal. AB 646 specifically states that "*[i]f the mediator is unable to effect settlement* of the controversy within 30 days after his or her appointment, the employee organization may request . . . factfinding . . . ." Because mediation is not required under the current version of the MMBA and, importantly, AB 646 did not change the voluntariness of mediation under the statute, it appears the union may not be able to insist on factfinding in the absence of a failed attempt at settling the dispute before a mediator. If true, it is possible that an employer can avoid the costs and delays associated with factfinding by declining to participate in mediation and, thereafter, implementing its last, best and final offer. Indeed, new Government Code section 3505.7, which was added by AB 646 and permits implementation of the last, best and final offer "[a]fter any applicable mediation and factfinding procedures have been exhausted," lends some support to this interpretation of the new law because it opens the door to the possibility that such procedures are permissive, but not necessarily required.

Another ambiguity in AB 646 is the requirement of a "public hearing" regarding the impasse, which must occur before the employer implements its last, best and final offer even if the parties do not proceed to mediation or factfinding. The term "public hearing" is undefined in AB 646. However, it is used elsewhere in the MMBA, which allows a governing body of a public agency to act "by resolution or ordinance adopted after a *public hearing*." Such a "public hearing" presumably refers to posting, agendizing and permitting an opportunity for public comment at a duly organized meeting of the governing body under the Ralph M. Brown Act, which is the open meeting law for local public agencies. Although this is a reasonable and likely interpretation of the "public hearing" requirement under AB 646, it remains to be seen whether PERB will require something different.

Implications for MMBA Employers

The imposition of the factfinding process, if it is really required, changes the landscape of bargaining for MMBA agencies, leading up to and including impasse. Some local public agencies and municipalities will no doubt take the position that factfinding is not required unless the parties first mediate the dispute and, therefore, may decline mediation as part of their bargaining strategy. On the other hand, given the absence of any deadline for a union to request factfinding, it is possible that a union may attempt to completely thwart an employer's efforts to implement its last, best and final offer by adamantly refusing to submit, or causing an unreasonable delay in the submission of, the dispute to factfinding. Regardless, employers should consult with legal counsel and proceed with caution before either refusing to mediate altogether or implementing its last, best and final offer following an unsuccessful mediation, as labor organizations are likely to argue that factfinding is required if requested, even if the parties do not proceed to mediation, that there is no deadline by which it must request factfinding and that the employer's failure to proceed to factfinding or implementation of its final offer are unfair labor practices. As a result, AB 646 is likely destined for litigation and/or future amendment by the legislature.

For agencies that proceed to factfinding, it is helpful to know that factfinding, which is akin to nonbinding interest arbitration, is nothing new for public education institutions covered by the EERA and HEERA. Drawing from their experiences, local public entities covered by the MMBA should keep in mind the following implications of the new law:

- Factfinding will prolong the bargaining and impasse resolution process, and will delay implementation of the last, best and final offer. Because unions may attempt to use the many ambiguities in the statute to their advantage employers should, before negotiations commence, formulate strategies for avoiding and responding to possible union delay tactics.
- Employers may not request that a labor organization proceed to a factfinding panel; only the labor organization has this option.
- When convening the factfinding panel, the parties have the option of selecting a mutually agreeable chairperson, often called a "neutral," in lieu of the chairperson selected by PERB. The nature of the employer's relationship with the union and the complexity of the issues may bear on whether the parties should mutually agree to a neutral or proceed with a PERB-selected neutral. In practice, PERB often provides the parties with a panel of "neutral factfinders," from which they may select, rather than designating a chairperson.
- Because factfinding timelines move relatively quickly, the parties have the option, and often do, waive the timelines prescribed for submitting required documentation, holding the hearing and issuing findings and recommendations. Some neutrals that are sought by mutual agreement of the parties will only agree to be a part of the factfinding panel if timelines are waived. Moreover, the process rarely proceeds according to the required timelines due to scheduling issues and the time needed to prepare for the proceedings.

- Factfinding is expensive. Substantial preparation is the norm and parties often utilize experts and consultants to prepare the detailed financial data and comparables that will be presented as evidence. Like an arbitration, the hearing can span several days and requires the presence of staff, witnesses and, often, legal counsel. Additionally, the parties are required to split the costs associated with the neutral panel member, and each party bears the cost of its own panel member. When constructing an overall bargaining strategy, public employers should balance the time and labor-intensive nature of factfinding (which results in a recommendation that is not binding) against the costs and benefits of reaching a settlement, short of impasse.
- Although the factfinding process is nonbinding and results in "advisory" findings and recommendations, public employers covered by the MMBA should not underestimate the impact of adverse findings, which can hinder implementation of the last, best and final offer for political and/or public relations reasons.
- Even under the new law, the MMBA still allows for the provision of specific impasse procedures by local rule, regulation, or ordinance, or when such a procedure is agreed upon by the parties. To the extent permissible by the MMBA, employers may want to consider negotiating changes to their employee resolutions with the labor organizations or implementing changes to applicable local rules.

With these considerations in mind, public agency employers can rest assured that factfinding under AB 646 is not a bar to implementation of a last, best and final offer; rather, it is merely another hurdle.

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