Contra Costa County

To: Board of Supervisors

From: David Twa, County Administrator

Date: September 12, 2017

Subject: AB 1603 (Ridley-Thomas): Meyers-Milias-Brown Act: Local Public Agencies--OPPOSE

RECOMMENDATION(S):

ADOPT an "Oppose" position on AB 1603 (Ridley-Thomas): Meyers-Milias-Brown Act: Local Public Agencies, as amended on August 24, 2017, a bill that permits a union to include in a collective bargaining unit the workers employed at a public agency by contract through a temporary staffing company together with the public agency's permanent employees when the two groups share a community of interest and without obtaining the consent of the public agency or temporary staffing agency, as recommended by Dr. William Walker, and as adopted by the Chair of the Board.

FISCAL IMPACT:

· The expansion of collective bargaining for a new classification of employees will result in new county costs.

· Contract physicians would have access to the same mediation provided to public employees, which would likely result in increased state costs for the Public Employment Retirement Board and state court system.

☑ APPROVE ☐ OTHER

☑ RECOMMENDATION OF CNTY ADMINISTRATOR ☐ RECOMMENDATION OF BOARD COMMITTEE

Action of Board On: **09/12/2017** ☑ APPROVED AS RECOMMENDED ☐ OTHER

Clerks Notes:

VOTE OF SUPERVISORS

AYE: John Gioia, District I Supervisor
Candace Andersen, District II Supervisor
Diane Burgis, District III Supervisor
Karen Mitchoff, District IV Supervisor
Federal D. Glover, District V Supervisor

I hereby certify that this is a true and correct copy of an action taken and entered on the minutes of the Board of Supervisors on the date shown.

ATTESTED: September 12, 2017

David Twa, County Administrator and Clerk of the Board of Supervisors

By: Stephanie Mello, Deputy

Contact: L. DeLaney, 925-335-1097

cc:

BACKGROUND:

Due to the urgency of requests for Contra Costa County advocacy to oppose the bill, a letter has been sent from Chair Federal Glover (*attached*). The County's legislative advocacy protocols require that action from the full Board of Supervisors on bills of particular interest to the County follow action by the Chair at the next available Board meeting, to establish the County's official position on a bill.

County Health Executives Association of California (CHEAC), California State Association of Counties (CSAC), Urban Counties of California (UCC), County Behavioral Health Directors Association (CBHDA) and California Association of Public Hospitals (CAPH) have all taken an "oppose" position on the measure.

Counties struggle with understanding how the provisions of the bill would be implemented given the various ways and circumstances under which counties contract for physicians. A few questions are noted below:

· County systems have multiple types of arrangements with contracted physicians and in a number of instances the county is not the employer of record. How can the county enter into a collective bargaining arrangement with these contracted physicians if they are not the employer of record? Furthermore, what can they negotiate if the terms of employment have already been agreed to by the employer of record?

· If contract physicians joined the same bargaining unit with our employed physicians, how could we ensure fairness for both groups if the contracted physicians have different employment terms?

· How would counties enter into collective bargaining agreements when the individual is contracting with multiple counties and/or with state entities?

· How are county health facilities defined? How are physicians defined? Will the bill be limited to primary care physicians?

The text of the bill can be found here:
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB1603

2017 CA A 1603: Bill Analysis - 07/05/2017 - Senate Public Employment & Retirement Committee

SENATE COMMITTEE ON

PUBLIC EMPLOYMENT AND RETIREMENT

Dr. Richard Pan, Chair

2017 - 2018 Regular

Bill No: AB 1603 Hearing Date: 7/10/17 Author: Ridley-Thomas Version: 2/17/17 As introduced Urgency: No Fiscal: Yes Consultant: Glenn Miles Subject: Meyers-Milias-Brown Act: local public agencies

SOURCE: Union of American Physicians and Dentists

ASSEMBLY VOTES: Assembly Floor: 54 - 21 Assembly Appropriations Committee: 12 - 5 Assembly Public Employees, 5 - 2 Retirement/Soc Sec Committee:

DIGEST: This bill permits a union to include in a collective bargaining unit the workers employed at a public agency by contract through a temporary staffing company together with the public agency's permanent employees when the two groups share a community of interest and without obtaining the consent of the public agency or temporary staffing agency.

ANALYSIS:

Existing law:

State Law- Meyers-Milias-Brown Act (MMBA)

1) Establishes a statutory framework which provides for public employer-employee relations between employees and public agencies by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and recognized public employee organizations or their exclusive representatives.

2) Provides rights to public employees to join or participate in the activities of employee organizations, or represent themselves in their employment relations with the public agency, and representation of local public agency employees who are members of a recognized employee organization, among other provisions.

3) Requires a public agency to grant exclusive or majority recognition to an employee organization based on a signed petition, authorization cards, or union membership cards showing that the majority of the employees in the appropriate bargaining unit desire representation, unless another labor organization has been lawfully recognized as the exclusive or majority representative of all or part of the same unit.

4) Authorizes a local public agency to adopt reasonable rules and regulations for the administration of those relations under the act, after consultation in good faith with representatives of an employer-employee organization.

5) Delegates jurisdiction over the public employer-employee relationship to the Public Employment Relations Board (PERB) and charges PERB with resolving disputes and enforcing the statutory duties and rights of state and local public agency employers and employee organizations, but provides the City and County of Los Angeles a local alternative to PERB oversight.

Federal Law - National Labor Relations Act (NLRA) and National Labor Relations Board (NLRB)

1) Guarantees the right of private sector workers to organize and collectively bargain with their employers and to participate in concerted activities to improve their pay and working conditions, with or without representatives advocating on their behalf.

2) Protects employers and employees from unfair labor practices and requires labor relations disputes to be resolved by the NLRB, an independent federal agency created by Congress in 1935, and responsible for administering the provisions of the NLRA. The NLRB conducts elections for union organizing, investigates charges, facilitates settlements, decides cases brought before it, and enforces orders.

3) Exempts state public sector labor relations from NLRA and NLRB jurisdiction in recognition of states' sovereign rights under the U.S. Constitution but provides federal preemption of state law where states seek to otherwise exercise authority to regulate labor relations ascertained to be under the jurisdiction of the NLRA (i.e., when states attempt to regulate labor relations in private sector employment).

This bill:

1) Clarifies that the definition of "public employee" in the Meyers-Milias-Brown Act (MMBA) includes persons jointly employed by a public agency.

2) Clarifies that a public agency's reasonable rules and regulations to administer its employer-employee relations may include provisions for the exclusive recognition of employee organizations formally recognized by employees of the agency, as specified, subject to the right of an employee to represent himself or herself and provided that an otherwise appropriate unit consisting of employees of the public agency and one or more joint employers does not require the consent of the agency or joint employer.

3) Clarifies that the public agency's process for representation elections must require a majority of votes cast by the employees in the appropriate bargaining unit, including an appropriate bargaining unit consisting of a public agency and one or more joint employers.

4) Clarifies that the public agency's exclusive or majority recognition of an employee organization be based on a signed petition, authorization cards, or union membership cards showing that a majority of employees in an appropriate bargaining unit, including

an appropriate bargaining unit consisting of a public agency and one or more joint employers, desire the representation.

Background

This bill attempts to address the growing use of temporary (temp) employees in public agencies by enabling temp employees to join bargaining units together with their permanent employee colleagues. Because temp employees are officially employed by private employers (i.e. temp agencies but also referred to as "the supplier employer") there is ongoing dispute between employer and employee representatives whether they can be organized in a bargaining unit with the public employees with whom they work and whether consent of both the temp agency and the public agency employer (also referred to as the "user employer") is required before a union can organize them into a bargaining unit.

This bill authorizes unions to organize and represent temp employees contracted through temp agencies and used by public agency employers alongside permanent public employees by clarifying that consent to form appropriate bargaining units of the "joint employers" (i.e., the supplier employer and the user employer) is not required under the MMBA. The bill would accomplish this by authorizing the grouping of temp employees and permanent employees in the same bargaining units, as specified.

Fluctuating Federal Law

The effort to address collective bargaining for temp employees in the public sector is complicated by the interaction between federal and state law governing labor relations. By designating temp employees as employees of a private sector temp agency, employers invoke NLRA jurisdiction and the political vagaries associated with the changing control over the NLRB between differing pro-union and pro-management Administrations.

Thus, under certain Administrations, the NLRB has required that a union must gain the consent of "joint employers" (i.e. the public agency who uses the employees and the temp agency that provides the employees) before grouping the temp and permanent employees in a bargaining unit. Effectively, the requirement of consent from the joint employers blocks the temp employees' unionization effort as consent is never given.

Under other Administrations and most recently, the NLRB has not required the consent of joint employers where there is a "community of interest" among the employees and the where the joint employers are not bonafide multiemployers with different, even competitive interests. Under these rules, unions could organize the employees of the joint employers. AB 1603 would codify this approach in the MMBA.

However, it appears that the new Administration will shift the NLRB once again to a position where consent of the joint employers will be required. Should this occur and should the NLRB claim that its jurisdiction preempts state law with respect to AB 1603,

the likely result would be continued litigation perhaps rising to the U.S. Supreme Court to determine whether a state has a right to define who are its public employees versus the right of the federal government to determine the labor relations of private sector employees, even employees who but for legal engineering are otherwise common law employees of the public agency.

Key NLRB Cases

Greenhoot, Inc., 205 NLRB 250 (1973) et al., found that bargaining units containing both an employer's regular employees and the employer's temporary employees supplied by a temporary staffing agency were inappropriate without the consent of both the employer and the staffing agency.

M.B. Sturgis, Inc., 331 NLRB 1298 (2000) provided that petitioners seeking to represent employees in bargaining units that combine both solely- and jointly-employed workers are no longer required to obtain employer consent. While the employer is required to bargain on all terms and condition of employment for solely-employed workers, the employer is only obligated to bargain over the jointly-employed workers' terms and conditions which it possesses the authority to control.

Oakwood Care Center, 343 NLRB 659 (2004) ruled that bargaining units that combine employees who are solely employed by a user employer and those who are jointly employed by the user and supplier employer are multiemployer units, which may be appropriate with the consent of the parties. In practical effect, the NLRB overruled its prior decision in Sturgis.

Miller & Anderson, Inc., Case No. 05-RC-079249 (2016) overturned its prior ruling in Oakwood Care Center and returned to the rule established in Sturgis and clarified that units combining solely and jointly employed workers of a single user employer must share a "community of interest" for a single unit combining the two to be appropriate. Here, the NLRB will apply the traditional community of interest factors for determining unit appropriateness. These factors are commonly defined as, or refer to, a common interest of a class of people living in a community or sharing a common grievance (i.e., wages, hours and other conditions of employment sufficient to justify their mutual inclusion in a single bargaining unit).

According to former NLRB member, Brian Hayes, Miller and Anderson "is unlikely to survive a court challenge or a soon to be reorganized NLRB."

Related/Prior Legislation

None known.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Assembly Appropriations Committee, this bill results in "no fiscal impact for the Public Employees Relations Board (PERB) because this bill codifies PERB's existing interpretation of MMBA."

SUPPORT:

Union of American Physicians and Dentists (source)

American Federation of State, County and Municipal Employees, District Council

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OPPOSITION:

American Staffing Association

Brian E. Hayes, Ogaltree Deakens, former NLRB member

California Special Districts Association

California Staffing Professionals

California State Association of Counties

ARGUMENTS IN SUPPORT: According to AFSCME District Council 36, "AB 1603 would codify that longstanding doctrine [that "public employee" includes an employee who is jointly employed by the public agency] in the MMBA's text and would adopt the M.B. Sturgis rule for bargaining units that include both solely and jointly employed employees of a public agency."

ARGUMENTS IN OPPOSITION: According to former NLRB member Hayes, "Because AB 1603 represents an attempt by the State to regulate the labor relations of private employers that are subject to the jurisdiction of the NLRB, AB 1603 is thus preempted under long-settled federal labor law, and cannot be properly enacted, much less enforced."

ATTACHMENTS

AB 1603 Oppose by Chair letter