

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

SB 550 (Dahle)
Version: February 18, 2021
Hearing Date: April 27, 2021
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Legislature: employment

DIGEST

This bill applies to the Legislature all of the laws that regulate the employment practices of private employers. It overrides any provision in the law that would otherwise exempt the Legislature from such laws.

EXECUTIVE SUMMARY

It is a common allegation against the Legislature that it exempts itself from all the rules and regulations it imposes on private employers. The truth is a bit more nuanced. Many of California's most significant employment laws apply to both the Legislature and the private sector in equal measure. At the same time, there are some discrepancies between the rules that private sector employers are obliged to follow and what is legally required of the Legislature. In particular, the courts have ruled that the Labor Code does not generally apply to public sector employers, including the Legislature, unless the particular statute contains an express statement that it applies to the public sector. This bill would eliminate any such differences by taking every law that applies to private sector employment, and imposing it upon the Legislature. The bill would also override any provision in the law that otherwise operates to exempt the Legislature from having to comply with employment laws applicable in the private sector. While this concept has the allure of making the Legislature abide by the same rules it imposes on others, because the bill makes no allowance for circumstances in which there may be a sound policy basis for treating Legislative employees differently from their private sector counterparts, the bill could lead to problematic results.

The bill is author-sponsored. There is no support or opposition on file. The bill passed out of the Senate Labor, Public Employment and Retirement Committee by a 5-0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Prohibits both private and public sector employers, including the Legislature, from engaging in employment discrimination, harassment, or related acts of retaliation. (Gov. Code § 12926(d).)
- 2) Prohibits both private and public sector employers, including the Legislature, from paying two or more employees different amounts for substantially similar work on account of the employee's race, gender, or ethnicity, unless based upon a bona fide factor other than race, gender, or ethnicity, as specified. (Lab. Code § 1197.5(l).)
- 3) Prohibits both private and public sector employers, including the Legislature, from preventing employees to report unlawful conduct in the workplace, as specified. (Lab. Code § 1106).
- 4) Requires both private and public sector employers, including the Legislature, to pay at least minimum wage. (Lab. Code § 1182.12(b)(3).)
- 5) Requires both private and public sector employers, including the Legislature, to adhere to minimum workplace health and safety standards. (Lab. Code § 6304.)
- 6) Provides that the Labor Code is a general statute, and as such, does not apply to public employers absent an explicit statement from the Legislature to the contrary. (*Stoetzl v. Department of Human Resources* (2019) 7 Cal.5th 718.)
- 7) Exempts officers and employees appointed or employed by the Legislature, either House, or legislative employees from the civil service. (Cal. Const., art. VII, § 4.)

This bill:

- 1) Requires that existing law that regulates employment practices of private employers apply to the Legislature.
- 2) Clarifies that a provision of law that regulates the employment practices of employers, including provisions of the labor code, applies to the Legislature regardless if it exempts state agencies or other public employers from its requirements.
- 3) Requires that expenditure of the proceeds of a civil penalty imposed on the Legislature pursuant to any provision of law that regulates employment practices is contingent upon an appropriation in the annual Budget Act or another statute for that purpose.

COMMENTS

1. Many employment laws apply to both the private sector and the Legislature

A central premise of the author's argument for why this bill is necessary is the claim that "[t]he employee protections that are available to private sector employees are not made available within the CA State Legislature."¹ It is true that the Labor Code does not ordinarily apply to government entities, including the Legislature, unless the particular statute contains an express provision applying that statute to the government. (*Stoetzl v. Department of Human Resources* (2019) 7 Cal.5th 718.) It is not accurate, however, to say that none of the employment protections available in the private sector applies to Legislative staff. As just one major example, the Fair Employment and Housing Act, which prohibits a wide variety of employment discrimination, harassment, and related retaliation, applies every bit as much in the context of the Legislature as it does in the private sector. (Gov. Code § 12926(d).) The same is true of California's Equal Pay Act (Lab. Code § 1197.5(l), California's Whistleblower Act (Lab. Code § 1106), the minimum wage (Lab. Code § 1182.12(b)(3)), and the California Occupational Safety and Health Act (Lab. Code § 6304) just to name a few easily identifiable examples.

2. One size fits all approach may not adequately account for sound policy rationales behind at least some differences between employment law applicable in the private sector and employment law applicable to the Legislature

By sweeping up all private sector employment law and applying it to the Legislature, the bill may not adequately account for scenarios in which the laws that are applicable in the private sector would be problematic or even unworkable in the context of the Legislature. An obvious example is Labor Code Sections 1101 through 1103. Among other similar prohibitions, those statutes make it a crime for employers to try to influence the political activities of their employees by threatening to fire them or let them go. The very essence of work in and around the Legislature is political. It may be desirable policy to empower the workers at a private company to resist pressure from their employer to spend time organizing people to write letters in support of a particular piece of legislation, for instance. But the Legislature could not possibly function effectively if a member of the Legislature could face jail time for asking a legislative staffer to do that.

Labor Code Sections 1101 through 1103 illustrate that there can be sound policy justifications for why not all employment laws applicable in the private sector should also apply to the Legislature. Even the California Constitution embraces the concept that legislative employees occupy a unique role and that the employment rules applicable to them should be adjusted accordingly. (Cal. Const., art. VII, § 4.)²

¹ Author's Background Sheet for SB 550 (2021-22 Reg. Sess.), on file with the Committee.

² Section 4 of Article VII exempts legislative employees from the state civil service. Thus, unlike most other state employees, legislative employees do not have to apply through a process of competitive

At the same time, there are almost certainly many instances of employment laws that do not apply to the Legislature and for which no similarly compelling policy rationale can be found. For instance, as the author highlighted during presentation of the bill before the Senate Labor, Public Employment and Retirement Committee, the Legislature is not obligated to pay overtime to its employees under either state or federal law. (*Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal.App.4th 729; 29 U.S.C. § 203(e)(2)(C)(ii)(V).) There is no obvious reason why.

The problem is that this bill draws no distinction between situations in which it might make policy sense to treat legislative employees differently, and situations in which it would not. The bill simply sweeps up *all* employment laws applicable to the private sector and dumps them on the Legislature without taking into consideration the wisdom of such a move in any individual case.

3. About the payment of overtime to California legislative employees

During presentation of this bill before the Senate Labor, Public Employment and Retirement Committee, the author of this bill pointed to overtime as a key example of something that private sector employers have to pay, but the Legislature does not. That is accurate. (*Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal.App.4th 729; 29 U.S.C. § 203(e)(2)(C)(ii)(V).) However, to the degree that the author intends to suggest that legislative employees would be earning overtime if only the private sector rules applied to them, the argument may be somewhat misleading.

Many private sector workers in California are entitled to receive overtime pay at the rate, among other things, of one-and-a-half times their base hourly wage for each hour worked beyond eight hours in a day or 40 hours in a week. (Lab. Code § 510.) By contrast, private sector executive, administrative, and professional employees who earn the salary equivalent of at least two times the state minimum wage for full employment and who customarily and regularly exercise discretion over matters of significance are *not* entitled to overtime pay. (Lab. Code § 515(a).)

The overwhelming majority of legislative staff are salaried executive, administrative, or professional employees who most likely meet the “white collar” exemption from overtime laws described above. Thus, even if private sector laws regarding overtime were applied to the Legislature, it would probably have little practical effect on how much legislative staff earn.

4. Arguments in support of the bill

According to the author:

As a business owner, I am very much aware of the burdens and restrictions placed on employers in California. The level of compliance, and pay, and legal exposure in the state is quite extreme. The Legislature has passed law after law that has resulted in California being ranked as one of the worst places to do business for years. However, nobody in the Legislature has to truly feel that pain that private sector businesses do, because we exempt ourselves from all of the requirements. Ultimately, we are left under paying our staff for their long hours, and not operating on the level playing field of the private sector that has to comply with the laws we pass.

SUPPORT

None known

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: AB 969 (Gonzalez, 2019) would have allowed legislative employees to engage in collective bargaining. AB 969 died in the Assembly Public Employment Committee.

PRIOR VOTES:

Senate Labor, Public Employment, and Retirement Committee (Ayes 5, Noes 0)
