

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

AB 237 (Gray)
Version: March 1, 2021
Hearing Date: July 6, 2021
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Public employment: unfair practices: health protection

DIGEST

This bill prohibits public employers from terminating, or threatening to terminate, the health care coverage and related benefits of employees and their families during an authorized strike, and grants the Public Employee Relations Board jurisdiction to enforce this prohibition.

EXECUTIVE SUMMARY

When workers go out on strike, they temporarily sacrifice their paychecks in order to demonstrate the importance of their labor and, they hope, convince their employers to concede to their demands for higher wages, better benefits, or improved conditions. If employers could also take away strikers' health care coverage and related benefits, the workers would not just be squeezed financially; it could mean loss of medical services that they or their family members depend on for their safety and well-being. With that in mind, and in light of recent incidents in which employers have threatened to cut off the health care coverage of striking employees, this bill proposes to prohibit public employers from terminating or threatening to terminate the health care coverage or related benefits of their employees during an authorized strike. Private employers would not be affected. The bill would give the Public Employee Relations Board jurisdiction to investigate complaints of alleged violations and make workers whole if the violations are confirmed.

The bill is author-sponsored. Support comes from organized labor. Opposition comes from some public employers, who contend that they do not cut off striker's health care coverage or related benefits, but that prohibiting such benefits from expiring where workers no longer qualify for them due to missing work will reduce incentives to bargain and prolong strikes. The bill passed out of the Senate Labor, Public Employment, and Retirement Committee by a vote of 5-0.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Governs collective bargaining in the private sector under the federal National Labor Relations Act (NLRA) but leaves to the states to regulate collective bargaining in their respective public sectors. (29 USC §§ 151-169.)
- 2) Provides that while the NLRA and the decisions of its National Labor Relations Board (NLRB) often provide persuasive precedent in interpreting state collective bargaining law, public employees generally have no collective bargaining rights absent specific statutory authority establishing those rights and are not subject to the NLRA. (29 USC § 152.)
- 3) Provides several statutory frameworks under California law to provide public employees collective bargaining rights, govern public employer-employee relations, and limit labor strife and economic disruption in the public sector through 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. These include the Meyers-Milias-Brown Act (MMBA), which provides for public employer-employee relations between local government employers and their employees, including some, but not all public transit districts as well as the Higher Education Employer-Employee Relations Act (HEERA), which provides a statutory framework to regulate labor relations between UC, CSU, and Hastings College of Law and their respective employees. (Gov. Code § 3500 *et seq.*)
- 4) Establishes the Public Employment Relations Board (PERB) to administer and enforce the several collective bargaining statutes covering employees of California's public schools, colleges, and universities, employees of the State of California, employees of California local public agencies (cities, counties and special districts), trial court employees, trial court interpreters, supervisory employees of the Los Angeles County Metropolitan Transportation Authority, and judicial council employees. PERB functions as a quasi-judicial administrative agency responsible for adjudicating employer-employee relations, resolving disputes, and enforcing the statutory duties and rights of public agency employers and employee organizations. (Gov. Code § 3541.)

This bill:

1. Makes a series of findings and declarations regarding the critical role that continuity in health care coverage and related benefits plays for workers and how some employers have used that fact as leverage within the context of strikes.
2. Makes it an unfair labor practice for a public employer to do any of the following:

- a) fail or refuse to maintain and pay for continued health care or other medical coverage, as defined, for an enrolled employee or their enrolled dependents, for the duration of the employee's participation in an authorized strike, as defined, at the level and under the conditions that coverage would have been provided if the employee had continued to work in their position for the duration of the strike;
 - b) fail to collect and remit the employee's contributions, if any, for this coverage; or
 - c) maintain any policy purporting to authorize any action prohibited or otherwise threaten an employee's or their dependents' continued access to health and other medical care during or as a result of the employee's participation in a strike.
3. Requires an employer to restore any health or other medical care premiums, contributions, or out-of-pocket expenses actually paid by the employee or their dependents as a result of the employer's violation, or because the employer failed to ensure continued coverage during a strike, along with any other equitable adjustments necessary and proper under the circumstances to ensure that the employee and their dependents are made whole.
 4. Vests the Public Employment Relations Board (PERB) with jurisdiction over violations of (1) and (2), above.
 5. Requires that the bill's provisions be construed liberally to effectuate its purposes, to protect employees' access to health care during a labor dispute, and to preserve state resources, to the fullest extent not preempted by federal law.

COMMENTS

1. Impetus for the bill

According to the author, this bill is inspired by tactics that General Motors employed against its workers during a 2019 United Auto Workers (UAW) strike, the first by the union in over ten years.

Media reports from the time indicate that shortly after the strike began, General Motors informed all 50,000 striking workers in nine different states that it would no longer provide the workers' health insurance, leaving it to the union or the workers to extend coverage through COBRA, find and pay for alternative coverage, or lose coverage altogether.¹ The author states that the strikers' health insurance coverage was only

¹ Woolston. GM Stops Paying for Health Insurance for Striking Union Workers; Talks Continue (Sep. 17, 2019) Reuters <https://www.reuters.com/article/us-usa-autos-labor/gm-stops-paying-for-health-insurance-for-striking-union-workers-talks-continue-idUSKBN1W21TW> (as of Jun. 26, 2021).

reinstated “after a national outcry and direct engagement from the highest office of government.” The author concludes that:

While UAW made COBRA payments to protect many workers from complete loss of coverage during the strike, the confusion and lesser quality coverage under COBRA was a significant hardship on the striking workers who had already gone more than a week without pay. The move was designed to demoralize the workers with little regard for the short and long-term impacts on their overall health.

Because this bill would apply to public employers only, it would not alter the outcome of a strike, like the one described above, involving a private employer. However, the author asserts that public employers in California have threatened to use similar tactics here. Specifically, the author provides documentation of a University of California human resources policy indicating that strikes are a form of unapproved leave. As a result, if a strike prevents employees from working the minimum required hours to maintain employer-provided health insurance coverage, the strikers will lose that coverage.

The policy reads:

During an Unapproved Leave - Coverage terminates when an Eligible Employee is not on Pay Status and does not have an approved leave of absence. Coverage ends at the end of the month in which an unapproved leave or pay status existed. Employees do not qualify for continued coverage during unapproved leave and may not pay premiums directly to local Benefits or Payroll Office to continue coverage. A strike or suspension are considered to be types of unapproved Leave.

2. Why private employers are not covered under the bill

The federal National Labor Relations Act (NLRA) outlines the rules that private employers and unions must follow during labor disputes. It contains provisions about when a strike is lawful, when a striking employee has a right to return to work, and the appropriate remedies if the Act is violated. According to the author’s assessment, the NLRA would likely preempt a state law protecting the health coverage of private-sector workers during a strike. As a result, the author has chosen to limit the scope of the bill to public sector employers.

3. Opposition arguments against the bill

The opponents of the bill are, not surprisingly, large public employers. They make two primary points about the bill, one that questions the wisdom behind the bill's overall concept, and another related very specifically to what might constitute a "threat" to terminate benefits under the bill.

- a. *Would preventing health care and related benefits from expiring cause strikes to last longer?*

All three opponents of the bill (the University of California, the California Special Districts Association, and the California State Association of Counties) assert that they or the public employer entities they represent would not terminate an employee's health care coverage or related benefits in response to a worker's decision to participate in a strike. They appear to draw a distinction, however, between proactively cutting off a worker's health benefits, and allowing those benefits to lapse when, because of a strike, an employee has not worked a sufficient amount to continue to qualify for those benefits. The latter, the opposition implies, is both appropriate legally, and an effective incentive to resolve strikes quickly. All three opponents claim that they have never endured a strike lasting long enough to reach the point where worker's health care coverage was at any serious risk of being lost. They implicitly suggest that the potential loss of healthcare coverage, had these strikes lasted longer, was one of the incentives that drove quick resolution of the work stoppage. If this bill were enacted, they suggest, strikes might begin to last much longer. Because of that possibility, two of the opponents urge that a sunset provision be added to the bill so that the impact of the bill on the length of strikes could be assessed before the Legislature decides whether to make the bill's provisions permanent.

- b. *Would notification about COBRA benefits constitute a threat to terminate coverage?*

In its letter opposing this bill, the Office of the President of the University of California raises the narrower concern that, under federal law, employers are required to notify their employees of the availability of COBRA benefits in the event that the employee's medical insurance coverage may lapse, and that the COBRA notification might be considered an unlawful "threat" to terminate coverage under the terms of the bill. The proponents respond that the very purpose of the bill is to ensure that coverage does not lapse as a result of a strike. Accordingly, notifications about lapses in coverage should not be necessary and, if allowed, would undermine the intent of the bill.

4. Arguments in support of the bill

According to the author:

Strikes are a legally protected mechanism granted to certain employees to enforce and advocate for their rights and wellbeing.

The termination of health care coverage in response to a strike is a coercive action which threatens to create a de facto ban on this labor right for anyone with a medical condition which requires timely care or who has a child or spouse with such a condition. Threats and policies by public employers to withhold the health care coverage relied on by workers and their families is by definition an unfair labor practice and the law should be clear that such a move is not legal in the State of California.

In support of the bill, the American Federation of State, County and Municipal Employees, AFL-CIO, Local 3299 writes:

There is no justification for making medication or treatment inaccessible or allowing a deadly virus to spread as a weapon against the exercise of legal labor rights. In recent years, thousands of frontline public employees have made the difficult decision to strike for better schools, livable wages, safer staffing, and affordable health care. When University of California Santa Cruz informed striking maintenance workers that if they remained on strike, they would lose their family health coverage eligibility UC knew that a strike leader's son was battling brain cancer. While such action may violate existing collective bargaining statutes, holding a worker's family as bargaining hostages should be explicitly prohibited.

In further support, the California Labor Federation writes:

Threats by employers to withhold the health care coverage relied on by workers and their families during a strike is unconscionable. Particularly in a time of public health crisis, it is especially difficult to rationalize the weaponization of health care upon workers who are exercising their legal rights. By passing the Public Employee Health Protection Act, it protects those employees striking from employers unlawfully threatening to stop paying the employer share of health insurance premiums, or even dis-enrolling workers from their insurance, if workers remain on strike.

5. Arguments in opposition to the bill

In opposition to the bill, the University of California, Office of the President writes:

The bill implies that public employers withhold these benefits while employees exercise their rights, but no UC employee has lost their employer-paid benefits while exercising their right to strike.

UC currently pays for covered healthcare costs during a strike or other unauthorized leave, as long as the employee works at least half the hours in the month. Historically, strikes at UC last fewer than five days, well within the window implicitly afforded by this policy rendering the bill unnecessary. [...] Finally, the University does not impede on an employee's right to strike, as exemplified by actions in 2019 at locations across the system. Our represented employees' rights are affirmed by the collective bargaining process, but employee strikes have significant impacts on our students, patients and campus operations; thus the current system incentivizes both sides to peacefully resolve labor disputes.

In further opposition to the bill, the California Special Districts Association and the California State Association of Counties jointly write:

Our respective public agencies greatly value our employees and as a result have seen very few work stoppages due to strikes. Additionally, on the rare occurrence of a public agency strike, the work stoppage typically only lasts a few days. We are not aware of a single incident where a strike extended to the point where employee health benefits expired. As a result, we believe that the provisions of AB 237 are unnecessary and we are concerned that the provisions of the bill could have negative consequences that would encourage prolonged work stoppages and reduced services to the communities served by special districts and counties. Given the unknown consequences this bill may have, we encourage your committee to amend AB 237 to include a sunset date so the impacts can be properly monitored prior to the provisions becoming permanent.

SUPPORT

American Federation of State, County, and Municipal Employees, AFL-CIO
American Federation of State, County, and Municipal Employees, Local 3299
Alliance of Californians for Community Empowerment
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Democratic Party
California Faculty Association
California Federation of Teachers, AFT, AFL-CIO
California Labor Federation, AFL-CIO
California Nurses Association
California Professional Firefighters
California School Employees Association

California Teachers Association
California Teamsters Public Affairs Council
Courage California
Engineers and Scientists of California, IFPTE Local 20, AFL-CIO
Los Angeles County Democratic Party
North Valley Labor Federation
Orange County Employees Association
Professional and Technical Engineers, IFPTE Local 21, AFL-CIO
Service Employees International Union, California State Council
Service Employees International Union, Committee of Interns and Residents
SMART-Transportation Division, California State Legislative Board
United Auto Workers, Local 2865
United Auto Workers, Local 5810
United Domestic Workers, American Federation of State, County, and Municipal
Employees, Local 3930
UNITE-HERE International Union, AFL-CIO
United Food and Commercial Workers, Western States Council
United Nurses Associations of California/Union of Health Care Professionals
Utility Workers Union of America

OPPOSITION

California Special District Association
California State Association of Counties
University of California, Office of the President

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 3240 (Gray, 2020) proposed the same concept as this bill, but would have applied to both public and private employers. Due to the limitations imposed on legislation because of the COVID-19 pandemic, AB 3240 was introduced, but never heard in a policy committee.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 5, Noes 0)
Assembly Floor (Ayes 62, Noes 9)
Assembly Appropriations Committee (Ayes 13, Noes 3)
Assembly Public Employment and Retirement Committee (Ayes 6, Noes 0)
