

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 647 (Holden)
Version: June 26, 2023
Hearing Date: July 11, 2023
Fiscal: Yes
Urgency: No
ME

SUBJECT

Grocery workers

DIGEST

This bill strengthens the existing recall and retention protections for grocery workers in the Labor Code (the Grocery Worker Retention Law) by, among other things, adding an enforcement mechanism to hold the employer accountable for violations of grocery worker rights.

EXECUTIVE SUMMARY

In 2015 the Legislature passed the Grocery Worker Retention Law that provides grocery workers with a 90-day transitional retention period upon change of ownership, control, or operation of the grocery establishment for whom they work. (AB 359, Gonzalez, Ch. 212, Stats. 2015). In other words, successor grocery employers are required to hire employees from a list of specified eligible grocery workers who worked at the prior establishment. The successor grocery employer is required to maintain a preferential hiring list of eligible grocery workers and required to must hire from that list for a period beginning upon the execution of the transfer document and continuing for 90 days after the grocery establishment is fully operational and open to the public under the successor grocery employer. In order to be covered by the protections of the law, eligible grocery workers had to be working for the incumbent grocery employer for at least six months prior to the execution of the document that effectuated the change in control. In order to come under the requirements of AB 359 the grocery establishment must be over 15,000 square feet and sell primarily household foodstuffs, as specified. A grocery establishment that ceases operations for six months or longer is not subject to the retention requirements under the law. Eligible grocery workers must be retained by the successor employer for a transition period of 90 days, however the employer retains their right to discharge the employee for cause. At the end of the 90-day transition employment period, the successor grocery employer is required to make a written performance evaluation of the retained worker and consider offering the worker

continued employment. During the 90-day transitional retention period the successor employer can reduce the work force but must retain the workers by seniority within each job classification or pursuant to the collective bargaining agreement.

The author and sponsor of this bill assert that a pending merger between Albertsons and Kroger necessitates that the current law be strengthened. The bill establishes enforcement mechanisms to hold the successor employers accountable if they violate the law that protects grocery workers. The bill also strengthens recall and retention provisions by, among other things, requiring retail stores that cease operations for up to 18 months to provide these recall rights. Additionally, the bill provides that former employees, as specified, are also entitled to recall rights.

The bill is sponsored by the United Food and Commercial Workers, Western States Council and is supported by organizations that advocate for and to protect workers. The bill is opposed by the California Chamber of Commerce, the California Grocers Association, and the California Retailers Association. The bill passed out of the Senate Labor, Public Employment and Retirement Committee with a 4 to 1 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes within the Department of Industrial Relations (DIR) and under the direction of the Labor Commissioner, the Division of Labor Standards Enforcement (DLSE) tasked with administering and enforcing labor code provisions concerning wages, hours and working conditions. (Labor Code § 56.) Establishes grocery worker retention provisions requiring the buyer of an existing grocery store to retain employees for a 90-day transition period during which an employee may only be discharged for cause, as specified, and considered for continued employment at the end of the transition period. (Labor Code § 2500-2522.)
- 2) Defines grocery establishment to mean a retail store that is over 15,000 square feet in size and that sells primarily household foodstuffs for offsite consumption, including the sale of fresh produce, meats, poultry, fish, deli products, dairy products, canned foods, dry foods, beverages, baked foods, or prepared foods. A grocery establishment does not include a retail store that has ceased operations for six months or more. (Labor Code § 2502 (d).)
- 3) Defines eligible grocery worker to mean any individual whose primary place of employment is at the grocery establishment subject to a change in control, and who has worked for the incumbent grocery employer for at least six months prior to the execution of the transfer document. An eligible grocery worker does not include a managerial, supervisory, or confidential employee. (Labor Code § 2502 (b).)

- 4) Defines transfer document to mean the purchase agreement or other document effecting the change in control. (Labor Code § 2502 (h).)
- 5) Requires the incumbent grocery employer, within 15 days after the execution of the transfer document, to provide to the successor grocery employer the name, address, date of hire, and employment occupation classification of each eligible grocery worker. (Labor Code § 2504 (a).)
- 6) Requires the successor grocery employer to maintain a preferential hiring list of eligible grocery workers identified by the incumbent grocery employer in 5) above and to hire from that list for a period beginning upon the execution of the transfer document and continuing for 90 days after the grocery establishment is fully operational and open to the public. (Labor Code § 2504 (b).)
- 7) Requires a successor grocery employer to retain each eligible grocery worker hired pursuant to 6) above for at least 90 days after the eligible grocery worker's employment commencement date. During this 90-day transition employment period, eligible grocery workers shall be employed under the terms and conditions established by the successor grocery employer and pursuant to the terms of a relevant collective bargaining agreement, if any. (Labor Code § 2506 (a).)
- 8) Prohibits the successor grocery employer during the 90-day transition employment period from discharging without cause an eligible grocery worker retained pursuant to 6) above. (Labor Code § 2506 (c).)
- 9) Requires, at the end of the 90-day transition employment period, the successor grocery employer to make a written performance evaluation for each eligible grocery worker who was retained. If the eligible grocery worker's performance during the 90-day transition employment period is satisfactory, the successor grocery employer shall consider offering the eligible grocery worker continued employment under the terms and conditions established by the successor grocery employer and as required by law. (Labor Code § 2506 (d).)
- 10) Defines "change in control" to mean any sale, assignment, transfer, contribution, or other disposition of all or substantially all of the assets or a controlling interest, including by consolidation, merger, or reorganization, of the incumbent grocery employer or any person who controls the incumbent grocery employer or any grocery establishment under the operation or control of either the incumbent grocery employer or any person who controls the incumbent grocery employer. (Labor Code §2502 (a).)
- 11) Defines "eligible grocery worker" to mean any individual whose primary place of employment is at the grocery establishment subject to a change in control, and who has worked for the incumbent grocery employer for at least six months prior to the

execution of the transfer document. An eligible grocery worker does not include a managerial, supervisory, or confidential employee. (Labor Code §2502 (b).)

- 12) Defines “grocery establishment” to mean a retail store that is over 15,000 square feet in size and that sells primarily household foodstuffs for offsite consumption, including the sale of fresh produce, meats, poultry, fish, deli products, dairy products, canned foods, dry foods, beverages, baked foods, or prepared foods. A grocery establishment does not include a retail store that has ceased operations for six months or more. (Labor Code §2502 (d).)
- 13) Requires an incumbent grocery employer, within 15 days after the execution of the transfer document (defined as the purchase agreement or other document effecting the change in control), to provide to the successor grocery employer the name, address, date of hire, and employment occupation classification of each eligible grocery worker. (Labor Code §2504 (a).)
- 14) Requires the successor grocery employer to maintain a preferential hiring list of eligible grocery workers identified by the incumbent grocery employer, per the above, and to hire from that list for a period beginning upon the execution of the transfer document and continuing for 90 days after the grocery establishment is fully operational and open to the public. (Labor Code §2504 (b).)
- 15) Requires a successor grocery employer to retain each eligible grocery worker hired for at least 90 days after the eligible grocery worker’s employment commencement date. During this 90-day transition employment period, eligible grocery workers shall be employed under the terms and conditions established by the successor grocery employer and pursuant to the terms of a relevant collective bargaining agreement, if any. (Labor Code § 2506 (a).)
- 16) Prohibits the successor grocery employer during the 90-day transition employment period from discharging without cause an eligible grocery worker retained per these provisions. (Labor Code § 2506 (c).)
- 17) Requires, at the end of the 90-day transition employment period, the successor grocery employer to make a written performance evaluation for each eligible grocery worker who was retained. If the eligible grocery worker’s performance during the 90-day transition employment period is satisfactory, the successor grocery employer shall consider offering the eligible grocery worker continued employment under the terms and conditions established by the successor grocery employer and as required by law. (Labor Code § 2506 (d).)

This bill:

- 1) Revises the definition of “eligible grocery worker” to include separated employee.
- 2) Defines “separated employee” as an employee who was employed by the incumbent grocery employer for 6 months or more in the 12 months preceding the change in control and whose most recent separation from active service was due to change in control, lack of business, reduction in force, a transfer of more than 15 miles from the employee’s residence, or another economic nondisciplinary reason.
 - a. Establishes a rebuttable presumption that any termination occurring within a year of a change in control was due to a nondisciplinary reason.
- 3) Defines “employer” to mean any person, as defined, including a proprietorship, joint venture, corporate officer, or executive, who has 300 or more employees nationwide.
- 4) Revises the definition of a “grocery establishment” to:
 - a. include a distribution center owned and operated by a grocery establishment that is used primarily to distribute goods to or from its owned stores regardless of its square footage;
 - b. specify that it does not include a retail store that has ceased operations for 18 months or more (increase from the current six months reference in current law).
- 5) Requires the incumbent grocery employer, in addition to providing the successor employer with specified employee information, to also provide the eligible worker list and contact information, including their cellular telephone number and email address, to any collective bargaining representative.
- 6) Specifies that if the incumbent grocery employer does not provide, within 15 days, the information on eligible grocery workers as required by law, the successor grocery employer may obtain the information from a collective bargaining representative.
- 7) Provides that any separated employee who is offered a position that is more than 15 miles from their place of residence shall have the right to refuse such recall without a loss of seniority and shall still retain a right to recall based on seniority prior to the hiring of any new employees for one year after the separation from employment.

- 8) Prohibits an employer from refusing to employ, terminating, reducing the compensation of, or otherwise taking adverse action against any laid-off employee for seeking to enforce their rights under these provisions, as specified.
- 9) Provides that an aggrieved employee or an employee representative, such as a collective bargaining representative or nonprofit corporation, may bring an action in the superior court of the State of California for violation and may be awarded the following:
 - a. hiring and reinstatement rights, as specified;
 - b. front pay or back pay for each day during which the violation continues;
 - c. the value of the benefits the employee would have received under any benefit plans;
 - d. punitive damages pursuant to Section 3294 of the Civil Code; and
 - e. reasonable attorney's fees and costs to any employee or employee representative who prevails in an enforcement action.
- 10) Authorizes an aggrieved employee or employee representative to file a complaint with the Division of Labor Standards Enforcement (DLSE) for a violation of these provisions and may be awarded remedies as follows:
 - a. hiring and reinstatement rights, as specified;
 - b. front pay or back pay for each day during which the violation continues; and
 - c. the value of the benefits the employee would have received under any benefit plans.
- 11) Provides the following civil penalties for a violation of these provisions which shall be recovered by the Labor Commissioner, deposited into the Labor and Workforce Development Fund, and paid to the employee as compensatory damages:
 - a. \$100 for each employee whose rights are violated; and
 - b. an additional amount payable as liquidated damages not to exceed \$1,000 per employee, as specified.
- 12) Requires the Labor Commissioner to enforce these provisions, including investigating an alleged violation and ordering appropriate temporary relief to mitigate the violation and pending the completion of a full investigation or hearing, through specified procedures in existing law, such as issuing a citation against an employer who violates this section and by filing a civil action.
- 13) Authorizes a court, in an action brought by the Labor Commissioner for enforcement of these provisions, to issue preliminary and permanent injunctive relief to vindicate the rights of employees.

- 14) Authorizes the Labor Commissioner or court, in an administrative or civil action brought pursuant to these provisions, to award interest on all amounts due and unpaid at the rate of interest specified in Civil Code section 3289 (b).
- 15) Specifies that these remedies, penalties, and procedures are cumulative.
- 16) Authorizes the DLSE to promulgate and enforce rules and regulations and issue determinations and interpretations consistent with and necessary for the implementation of these provisions.
- 17) Requires, when parties agree that a collective bargaining agreement supersedes the existing grocery retention requirements, as specified, the waiver to be explicitly set forth in the agreement in clear and unambiguous terms.

COMMENTS

1. Stated need for the bill

According to the author:

In October 2022, Kroger and Albertsons announced their plans for an unprecedented \$25 billion merger. These two grocery giants operate as some of the nation's largest full-service grocery chains, and have retail footprints in nearly every state and most major metropolitan areas. In addition, they employ over 700,000 workers across their numerous banners, with over 50 manufacturing facilities and over 5,000 retail stores.

While Kroger is leading consumers and workers to believe that this merger will result in more access to cheaper foods, a merger between these two companies will instead result in large scale layoffs for workers and grocery stores closing down. Based on the volume of both chains in California, this could result in an estimated 5,750 jobs lost in the Los Angeles region alone. The latter consequence of grocery store closures will contribute to food deserts, occurring rural areas or vulnerable communities. This will result in increased food costs and a reduction in product variety, including seasonal, organic, and climate-friendly plant-based foods for consumers. With already dwindling grocery store numbers, an unregulated merger of this size has very real implications for our grocery store workers and the communities they serve.

AB 647 addresses these concerns by strengthening the existing California Grocery Worker Retention Law, specifically including warehouse employees in retention laws and authorizing the Labor Commissioner to enforce a private right of action for aggrieved employees. In addition, this bill adopts a process for recall and rehiring of grocery workers by requiring the use of a preferential

hiring list for successor grocery employers, creating a specific right of recall for employees unable to work due to a transfer, and giving employees the right to refuse a transfer or recall without loss of seniority. With this, AB 647 ensures that skilled and trained workers can continue to provide our communities with access to safe food and lessen the economic impact to our social safety net.

2. Current law protects grocery workers through the Grocery Worker Retention Law

In 2015 the Legislature passed the Grocery Worker Retention Law that provides grocery workers with a 90-day transitional retention period upon change of ownership, control, or operation of the grocery establishment for whom they work. (AB 359, Gonzalez, Ch. 212, Stats. 2015). In other words, successor grocery employers are required to hire employees from a list of specified eligible grocery workers who worked at the prior establishment. The successor grocery employer is required to maintain a preferential hiring list of eligible grocery workers and required to hire from that list for a period beginning upon the execution of the transfer document and continuing for 90 days after the grocery establishment is fully operational and open to the public under the successor grocery employer. In order to be covered by the protections of the law, eligible grocery workers had to be working for the incumbent grocery employer for at least six months prior to the execution of the document that effectuated the change in control. In order to come under the requirements of AB 359 the grocery establishment must be over 15,000 square feet and sell primarily household foodstuffs, as specified. A grocery establishment that ceases operations for six months or longer is not subject to the retention requirements under the law. Eligible grocery workers must be retained by the successor employer for a transition period of 90 days, however the employer retains their right to discharge the employee for cause. At the end of the 90-day transition employment period, the successor grocery employer is required to make a written performance evaluation of the retained worker and consider offering the worker continued employment. During the 90-day transitional retention period the successor employer can reduce the work force but must retain the workers by seniority within each job classification or pursuant to the collective bargaining agreement.

3. This bill closes loopholes that allow grocery stores to skirt the intent of the original Grocery Worker Retention Law

This bill expands the protections initially established by AB 359 in several ways. The bill expands the types of positions covered by the recall and retention requirements to include warehouse workers and those who are unable to accept a position due to a transfer to a location more than 15 miles from their home without any loss of seniority.

The bill also attempts to close a potential loophole by modifying the exemption for retail stores that have been inoperative for at least six months. Under existing law, a retailer that has been closed for six months or more is exempted from any recall or retention requirements. The bill excludes a grocery establishment that ceases operations

for 18 months or longer, thus replacing the 6 month period under current law with an 18 month period. Proponents contend that grocery establishments remodel the newly acquired grocery establishments and commonly take longer than 6 months to reopen thus thwarting the protections established under the Grocery Worker Retention Law. Changing the exemption period to 18 months would close this loophole and protect more grocery workers.

The bill also covers distribution centers if they are owned and operated by grocery establishments that are used primarily to distribute goods to or from their owned stores regardless of the distribution center's square footage. The bill also makes employees who were employed by the incumbent grocery employer for 6 months or more in the 12 months preceding the change in control and whose employment was terminated or suspended by the employer because of a change in control, lack of business, reduction in force, a transfer of more than 15 miles from the employee's residence, or another economic nondisciplinary reason eligible for the protections of the Grocery Worker Retention Law. The bill establishes a rebuttable presumption that any termination occurring within a year of a change in control was due to a nondisciplinary reason. This provision exists to protect workers who are let go of through no fault of their own during a period of time leading up to a transfer of ownership. Given the fact that grocery mergers or acquisitions usually occur for economic reasons, it seems reasonable to presume that workers are let go of or seek other employment due to economic reasons, and not necessarily because they want to leave the grocery establishment. For these reasons the rebuttable presumption is arguably needed. The new employer could rebut the presumption if the termination was for reasons such as cause.

The bill also grants separated employees who are offered positions more than 15 miles from their place of residence the right to refuse an offer of employment that is more than 15 miles from the employee's residence without a loss of seniority. Separated employees are granted a right to recall based on seniority before hiring any new employees for one year. The bill prohibits an employer from taking adverse action against a person for seeking to enforce their rights.

The bill preserves the provision in the Grocery Worker Retention Law that provides that parties may, by collective bargaining agreement, agree to have the agreement supersede the provisions of the Grocery Worker Retention Law.

4. Enforcement mechanisms to effectuate compliance with the Grocery Worker Retention Law

This bill authorizes a private right of action for aggrieved employees, as well as an administrative complaint process via the DLSE and the Labor Commissioner. The proposed private right of action authorizes an aggrieved employee, or their employee representative (collective bargaining representative or nonprofit corporation), to bring an action for a violation of either the employees' recall or retention rights in the superior

court. A successful claim would entitle the employee to remedies, including front and back pay calculated at the highest of various pay rates, the value of any benefits the employee would have received, and punitive damages. The bill requires a court to award reasonable attorney's fees and costs to any employee or employee representative who prevails in an enforcement action. The new administrative process through the Labor Commissioner would require an employee, or their employee representative, to file a complaint with DLSE, and for the agency's investigation to be conducted pursuant to existing statutory procedures. The remedies available through an administrative complaint are similar in scope to those available through a claim made in court, but the bill adds civil penalties for claims made through the Labor Commissioner. The amounts recovered under this provision are directed to the Labor and Workforce Development Fund, and subsequently distributed to the employee as compensatory damages. A court is also authorized to order injunctive relief in a claim brought by the Labor Commissioner.

The author has agreed to amend the bill to ensure that it is not mandatory to award a prevailing employee or prevailing employee representative reasonable attorney's fees and costs.

Amendment

The court ~~shall~~ may award reasonable attorney's fees and costs to any employee or employee representative who prevails in an enforcement action.

5. Proponents arguments in support of the bill

A coalition of supporters, led by the California Labor Federation, AFL-CIO writes:

When federal regulators require the sale of stores as a condition of approving a merger, the results are, at best, uncertain. In 2015, there was the disastrous fall out of the Safeway-Haggen merger where thousands of workers were laid off, 100 stores were shut down, and Haggen declared bankruptcy four months after the merger. Indeed, from experience we know grocery store and pharmacy closures will specifically occur in existing food deserts and rural areas. This will result in skilled grocery employees experienced and trained in food safety and public health requirements will need to leave their neighborhoods to seek comparable work elsewhere.

Current law requires that a successor grocery employer retain their current workforce for a minimum of 90 days after a change in ownership, and requires hospitality and service industry employers to offer to rehire qualified former employees who were laid off due to the COVID-19 pandemic. But, there are loopholes and gaps that need to be filled.

AB 647 will strengthen this existing law to the benefit of our neighborhoods by closing a loophole that incentivizes successor grocery employers to keep their stores closed for longer than six months after the finalization of a merger or acquisition, expand the grocery worker retention law to include warehousing, and add enforcement provisions that allow for Labor Commissioner enforcement and grant a private right of action for aggrieved employees. Additionally, AB 647 adopts a specific process to recall and rehire grocery workers by creating a specific right of recall for employees unable to work due to a transfer of more than 15 miles from their place of residence, give workers the right to refuse a transfer or recall that is more than 15 miles from their place of residence without loss of seniority while maintaining recall rights for one year from separation, and create a preferential hiring list based on seniority, among other criteria, for the successor grocery employer to utilize.

Communities need to retain, to the extent possible, experienced grocery retail workers with knowledge of proper sanitation procedures, health regulations and laws, and an experience-based understanding of the clientele and communities in which the retailer is located.

6. Opponents arguments against the bill

The California Chamber of Commerce opposes this bill and has designated it a job killer. The California Chamber of Commerce writes:

AB 647 creates a private right of action by granting employees, collective bargaining representatives and nonprofit corporations the right to bring action in superior court for violations of an employee's right. The bill has a broad list of remedies including, hiring and reinstatement rights, front pay or back pay for each day during which the violation continues, the value of the benefits the employee would have received under any benefit plans, and attorney's fees and costs to any employee or employee representative.

The bill expands the list of eligible grocery workers covered by worker retention and private right of action conditions to include a newly-defined "separated employee." The broad definition of "separated employee" includes any employee employed by a grocer impacted by a change in ownership that was employed for 6 months or more in the 12 months preceding the change in store control and whose most recent separation was due to change in control, lack of business, reduction in force, or transfer. Under AB 647 grocers would now have to reenlist "separated employees" within an arbitrary 15-mile radius of their residence.

The bill also creates a rebuttable presumption that any employee's termination within a year of change of ownership was due to nondisciplinary reasons. It

then goes further by requiring the successor grocer to offer these employees right of refusal to return for employment. This requirement could force the successor grocer to rehire employees dismissed for cause. The bill ties a grocer employer's hands in hiring decisions, which may negatively impact current grocery employees during the transition period.

SUPPORT

United Food and Commercial Workers Western States Council (sponsor)
California Employment Lawyers Association
California Food and Farming Network
California Labor Federation, AFL-CIO
California State Legislative Board of the Sheet Metal, Air, Rail and Transportation Workers - Transportation Division
California Work and Family Coalition
Consumer Attorneys of California
Los Angeles Alliance for a New Economy
San Mateo Central Labor Council, AFL-CIO
TechEquity Collaborative

OPPOSITION

California Chamber of Commerce
California Grocers Association
California Retailers Association

RELATED LEGISLATION

Pending Legislation:

SB 627 (Smallwood-Cuevas, 2023) establishes the Displaced Worker Retention and Transfer Rights Act to (1) prohibit a chain employer (100 or more establishments, as defined) from closing a covered establishment without first giving a displacement notice to workers; (2) require a chain employer to provide workers the opportunity to transfer to a location of the chain within 25 miles of the closing establishment; (3) require chain employers to maintain a preferential transfer list and make job offers based on length of service; (4) prohibit a chain employer from taking adverse action against a covered worker for asserting these rights; and (5) requires the Division of Labor Standards Enforcement to enforce these provisions, as specified.

SB 627 is pending before the Assembly Judiciary Committee.

SB 725 (Smallwood-Cuevas, 2023) requires a successor grocery employer to provide an eligible grocery employee severance pay equal to one week of pay for each full year of employment with the incumbent grocery employer if the successor grocery employer

does not hire an eligible grocery worker following a change in control or does not retain an eligible grocery worker for at least 90 days following the change in control or the eligible grocery worker's employment commencement date. The provisions of this bill would apply to successor grocery employers and incumbent grocery employers with less than 300 employees combined. AB 725 is pending before the Assembly Labor and Employment Committee.

Prior Legislation: AB 359 (Gonzalez, Ch. 212, Stats. 2015) *See* Comment 2.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 4, Noes 1)

Assembly Floor (Ayes 58, Noes 16)

Assembly Appropriations Committee (Ayes 11, Noes 4)

Assembly Judiciary Committee (Ayes 7, Noes 3)

Assembly Labor and Employment Committee (Ayes 5, Noes 2)
