
SENATE COMMITTEE ON LABOR, PUBLIC EMPLOYMENT AND RETIREMENT

Senator Jerry Hill, Chair

2019 - 2020 Regular

Bill No: AB 1066 **Hearing Date:** August 5, 2020
Author: Gonzalez
Version: June 30, 2020
Urgency: No **Fiscal:** Yes
Consultant: Gideon L. Baum

SUBJECT: Unemployment compensation: benefits payable: collection

KEY ISSUE

Should the Legislature permit the Director of the Employment Development Department to delegate their authority to collect and recover funds from a business or employer to the Attorney General when the business or employer has 500 or more employees, including misclassified independent contractors?

ANALYSIS

Existing law:

- 1) Creates a comprehensive unemployment insurance system, administered by the Employment Development Department (EDD), where employers pay an experienced-based tax on total payroll that are used to fund unemployment benefits to unemployed workers. (Unemployment Insurance Code §§ 301, 602, 675, 926, 970, 977 & 1251)
- 2) Defines a worker as “unemployed” in any week in which he or she meets any of the following conditions:
 - a) Any week during which he or she performs no services and with respect to which no wages are payable to him or her.
 - b) Any week of less than full-time work, if the wages payable to him or her with respect to the week, when reduced by twenty-five dollars (\$25) or 25 percent of the wages payable, whichever is greater, do not equal or exceed the worker’s weekly benefit.
 - c) Any week for which, a worker is unable to work due to mental or physical health illness or injury, as specified.
 - d) Any week during which he or she performs full-time work for five days as a juror, or as a witness under subpoena.
(Unemployment Insurance Code §1252)
- 3) Provides that in the event any employer fails to keep and furnish to the director of EDD, upon notice, any required records or reports necessary for a full determination, decision on appeal, or other proper disposition of any claim for benefits in any proceeding under this division, within such reasonable time as the director may by rule, regulation, or procedure prescribe, it shall be conclusively presumed that the claimant is entitled to the maximum total amount of benefits payable under this division unless it is established by other evidence which the director deems sufficient that a lesser total amount of benefits is properly due and owing to the claimant. (Unemployment Insurance Code §1093)

This bill:

- 1) Provides that, if an employer fails, within 10 days, to provide the requested records or reports to the director of EDD necessary to make a unemployment insurance (UI) or disability insurance (DI) benefit determination, it must be conclusively presumed that the claimant is entitled to maximum total benefits permitted under the unemployment insurance system, unless the director determines, based on the evidence, that the claimant is entitled to a lesser amount.
- 2) Provides that, if an employer employing 5 or more claimants, fails to furnish any required records or reports within 10 days after receiving notice from the director of the need to furnish records for the purposes of an UI or DI benefit determination, then it shall be conclusively presumed that all claimants of that employer are entitled to the maximum total amount of benefits payable under the unemployment insurance system, unless the director determines, based on the evidence, that the claimants are entitled to a lesser amount.
- 3) Provides that the director may delegate its authority to recover and collect contributions from an “employing unit” that has five or more persons claiming benefits through the UI or disability insurance system to the Attorney General. If this authority is delegated to the Attorney General, the Attorney General shall collect the entire required contribution from the employing unit, including interest and penalties, and this amount shall be deposited into the Unemployment Fund.
- 4) Provides that the director of EDD must reimburse the Attorney General for its reasonable regulatory costs in recovering and collecting contributions pursuant to subdivision (a) from the Unemployment Administration Fund, in accordance with existing law.
- 5) Defines “employing unit” means a business or employer that has *more than 500 employees*, including employees who have been misclassified as independent contractors.

COMMENTS**1. Need for this bill?**

Broadly speaking, AB 1066 seeks to address two distinct issues. The **first** is to fix the train wreck that is Unemployment Insurance Code Section 1093. Untouched since 1953, the statute creates a conclusive presumption for situations where the employer fails to provide necessary records or reports for a benefit determination, but is uniquely vague and poorly structured. While this likely reflects the difficulty of processing and transporting paper records and funds in 1953, it does not reflect the state of technology and law in 2020.

AB 1066 seeks to address this issue by clarifying when an employer needs to provide records (within 10 days), the circumstances the director may reduce the presumed benefits, and provides that, for employers with 5 or more *claimants*, if the employer fails to provide records for 1 claimant, then the presumption applies to all claimants.

Second, AB 1066 permits the director of EDD to delegate to the Attorney General EDD's authority to recover and collect unpaid unemployment insurance and disability insurance contributions to the relevant trust funds for "employing units" with 5 or more claimants. This delegated authority, however, only applies to employing units for 500 or more employees, including misclassified independent contractors. AB 1066 also requires the director of EDD to reimburse the Attorney General, as specified.

2. Pending Amendments for AB 1066 (Gonzalez):

During Committee, the author will present amendments that are technical and clarifying on the scope of the bill. Notably, the amendments will:

- a) Clarify that the Director of EDD may, with good cause, extend the 10 day requirement for records, both for individual claimants and the presumption for 5 or more claimants;
- b) Clarify that, if good cause is extended, the benefit presumption due to not sending records for 5 or more claimants does not apply; and
- c) Clarify the definition of an employing unit based on the issuance of relevant tax forms.

3. Proponent Arguments:

The California Labor Federation, writing in support of this bill, argues the following:

"The failure to provide records is not a new problem since employers have failed to furnish wage data in the past. However, the scope of the problem and the length of the delays involved threaten the economic security of tens of thousands of workers who are waiting months to access benefits. Existing law states if an employer fails to provide wage records "within a reasonable time" for EDD to determine a workers' UI benefit amount that it is conclusively presumed that the worker is entitled to the maximum benefit amount, unless the Director determines otherwise.

Despite this, many employers still have not provided EDD this information in a timely manner, or in other cases, provided any records at all. Without a clearly defined timeline for this presumption to be applicable, many workers without wage records in the system are left waiting indefinitely for the UI benefits they are entitled to under the law. Some have been waiting for their claims to be resolved as early as March and April of this year.

In addition, EDD requests wage records and determine UI benefit amounts for each individual worker. While this may have worked when there were one or two cases, this process is time-consuming when millions of workers are flooding EDD and when gig companies have misclassified tens of thousands of Californians who are now unemployed. Mass misclassification also threatens the solvency of the UI fund since those employers do not pay taxes into the fund though their workers are eligible for benefits. It is estimated that misclassifying employers shift \$831.4 million in unemployment insurance taxes to law-abiding employers.

AB 1066 addresses these issues by making the process more efficient for EDD and misclassified workers. It requires employers to turn over any necessary wage records to the EDD within 10 days after receiving notice from the department. Consistent with existing law, if the necessary wage records are not provided to EDD in the allotted time frame, it is presumed that the worker is entitled to the maximum benefit amount, unless determined otherwise by EDD....

Finally, AB 1066 ensures that employers who evade their obligation to pay into the UI Fund are held accountable. If a large business has failed to contribute to the UI Fund, while at least five of their workers have received UI benefits, then AB 1066 states EDD has the authority to delegate to the Attorney General the ability to recover UI contributions, including interest and penalties.”

4. Opponent Arguments:

The California Chamber of Commerce, writing in opposition, argues the following:

“Though the author has asserted that **AB 1066** is intended to address misclassification, that justification is nonsensical as AB 5 was enacted to address misclassification for all purposes, including unemployment benefits. **AB 1066**, potentially eliminates the opportunity for an employer to present evidence of independent contractor status by imposing an arbitrary 10-day statutory deadline for a business to produce records, or face a “conclusive presumption” that the individual is entitled to benefits, i.e. an employee....

In addition, AB 1066 adds a new punishment - if an employer with more than five claimants fails to respond to any individual request, then all claimants are presumed to be due the maximum benefits. This punishment is absolutely unjustified at a time when businesses are struggling to survive and many locations (where mail arrives) are not functioning. And this penalty will certainly catch a large segment of the business community, as nearly every employer who is subject to the Governor’s shutdown will have five employees on unemployment.

Compounding the above concerns about even good-faith businesses facing penalties and losing their appellate opportunities, AB 1066 adds enforcement by the Attorney General against any businesses which have failed to make contributions in the past. But this enforcement itself is problematic. For example, if a worker incorrectly asserts that they were misclassified, and the employer is not quick enough in responding, the employer will now face the potential of the Attorney General pursuing them for allegedly missed contributions – all based on an understandable mistake by a worker seeking benefits. Given the likelihood of confusion around classification under AB 5, adding enforcement isn’t appropriate at this time. After the dust settles, and both legislation and initiatives have been resolved, then adding enforcement makes sense. But now, with businesses struggling to survive and ambiguity around classification still being resolved, we do not believe this additional enforcement will serve any benefit.”

5. Prior Legislation:

AB 5 (Gonzalez), Chapter 296, Statutes of 2019, codifies the recent Dynamex decision, requiring that employers prove that their workers can meet a 3 part (ABC) test in order to be lawfully classified as independent contractors.

SUPPORT

Alliance of Californians for Community Empowerment Action
American Federation of State, County and Municipal Employees, AFL-CIO
Bet Tzedek
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Labor Federation, AFL-CIO
California Rural Legal Assistance Foundation, INC.
California School Employees Association
California State Association of Electrical Workers
California State Council of Service Employees International Union - California
California State Pipe Trades Council
California Teamsters Public Affairs Council
Communication Workers of America, District 9
Engineers & Scientists of California, Local 20, IFPTE, AFL-CIO
Inlandboatman's Union of the Pacific, Marine Division of the International Longshore & Warehouse Union
Los Angeles Worker Center Network
National Employment Law Project
Professional & Technical Engineers, Local 21, IFPTE, AFL-CIO
SEIU California
Unite Here International Union, AFL-CIO
United Auto Workers
United Auto Workers Local 2865
United Auto Workers Local 5810
United Food and Commercial Workers, Western States Council
United Steelworkers District 12
University Professional & Technical Employees-CWA Local 9119
Utility Workers of America
Utility Workers Union of America, Local 132
Western States Council Sheet Metal, Air, Rail and Transportation

OPPOSITION

Acclamation Insurance Management Services
African American Farmers of California
Allied Managed Care
American Pistachio Growers
Associated Builders and Contractors - Southern California Chapter
California Association of School Business Officials

California Association of Winegrape Growers
California Beer and Beverage Distributors
California Chamber of Commerce
California Citrus Mutual
California Cotton Ginners & Growers Association
California Farm Bureau Federation
California Fresh Fruit Association
California Hotel & Lodging Association
California Landscape Contractor's Association
California League of Food Producers
California Professional Association of Specialty Contractors
California Restaurant Association
California Retailers Association
California Staffing Professionals
California Travel Association
City Of Fountain Valley
Far West Equipment Dealers Association
Flasher Barricade Association
Nisei Farmers League
Orange County Business Council
Plumbing-heating-cooling Contractors Association of California
Valley Industry and Commerce Association
Western Agricultural Processors Association
Western Electrical Contractors Association

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