
SENATE COMMITTEE ON LABOR, PUBLIC EMPLOYMENT AND RETIREMENT

Senator Jerry Hill, Chair

2019 - 2020 Regular

Bill No: SB 1384 **Hearing Date:** May 14, 2020
Author: Monning
Version: March 25, 2020
Urgency: No **Fiscal:** Yes
Consultant: Jake Ferrera

SUBJECT: Labor Commissioner: financially disabled persons: representation.

Due to the COVID-19 Pandemic and the unprecedented nature of the 2020 Legislative Session, all Senate Policy Committees are working under a compressed timeline. This timeline does not allow this bill to be referred and heard by more than one committee as a typical timeline would allow. In order to fully vet the contents of this measure for the benefit of Senators and the public, this analysis includes information from the Senate Judiciary Committee.

KEY ISSUE

Should the Legislature allow the Labor Commissioner to represent financially unable wage claimants in arbitral proceedings when arbitration has been compelled by a court order?

ANALYSIS

Existing law:

- 1) Authorizes the Labor Commissioner to investigate employee complaints. Further authorizes the Labor Commissioner to provide for a hearing, known as a Berman Hearing, in any action to recover wages, penalties, and other demands for compensation, including liquidated damages if the complaint alleges payment of a wage less than the minimum wage. (Labor Code §98)
- 2) Requires that within 15 days of the conclusion of a Berman Hearing, the Labor Commissioner must file a copy of the order, decision or award in the office of the Division of Labor Standards Enforcement. The order, decision, or award shall include a summary of the hearing and the reasons for the decision. (Labor Code §98.1)
- 3) Allows a party who receives notice of an order, decision, or award following the conclusion of a Berman Hearing to seek review by filing an appeal to the superior court, where the appeal shall be heard de novo. This appeal must be filed within 10 days of receipt of the notice. (Labor Code §98.2)
- 4) Requires a party who wishes to appeal an order, decision or award to post a bond issued by a licensed surety or cash deposit in the amount of the order, decision or award. If any judgment is entered in favor of the employee, the employer shall pay the amount owed pursuant to the judgment. If the appeal is withdrawn or dismissed, the employer shall pay the amount owed pursuant to the order, decision, or award issued by the Labor Commissioner. (Labor Code §98.2)

- 5) Empowers the Labor Commissioner to prosecute all actions for the collection of wages, penalties, and demands of persons who are financially unable to employ counsel and who the Labor Commissioner believes have claims which are valid and enforceable. (Labor Code §98.3)
- 6) Allows the Labor Commissioner to, upon the request of a claimant financially unable to afford counsel, represent such claimant in the de novo proceedings provided for in Section 98.2. In the event that such claimant is attempting to uphold the amount awarded by the Labor Commissioner and is not objecting to any part of the Labor Commissioner's final order, the Labor Commissioner shall represent the claimant. (Labor Code §98.4)

This bill:

- 1) Allows the Labor Commissioner, upon request of a claimant financially unable to afford counsel, to represent such a claimant in the de novo proceedings provided for in Labor Code 98.2, regardless of whether such proceedings are held in a judicial or arbitral form.
- 2) Allows a wage claimant who is unable to have their claim adjudicated and decided by the Labor Commissioner due to the entry of a court order compelling arbitration to request that the Labor Commissioner represent them in the arbitral proceeding. The Labor Commissioner shall represent such a claimant if they are financially unable to afford counsel and if the Labor Commissioner determines that the claim has merit.
- 3) Orders that a petition to compel arbitration of a claim pursuant to Labor Code 98, 98.1, or 98.2 be served to the Labor Commissioner. Upon request of a claimant, the Labor Commissioner has the right to represent the claimant in proceedings to determine the enforceability of the arbitration agreement, regardless if that adjudication takes place in a judicial or arbitral form.

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

According to the Author:

“Under existing law, the Labor Commissioner plays an adjudicatory role in the Berman hearing, but thereafter, if the Berman hearing results in an order, decision or award (ODA) in favor of the claimant, and the employer files a de novo appeal of that ODA, and the claimant cannot afford private counsel, the Labor Commissioner is required to represent the claimant in the de novo proceedings. Existing law does not provide authorization for the Labor Commissioner to represent a wage claimant unless there has been a Berman hearing and a resulting Order, Decision or Award in the claimant's favor. Thus, a wage claimant forced to arbitrate a wage claim, and prohibited from having the claim heard and decided by the Labor Commissioner, is deprived of the right to no-cost representation. Claimants who cannot afford private counsel face a higher prospect of a defeat in arbitration or settlement of their claim at a substantial discount.”

2. Staff Comments

Under current law, the Labor Commissioner is authorized to adjudicate claims by employees that allege their employer has paid them less than the minimum wage. This administrative process is known as a Berman Hearing. During this process, the commissioner can represent a worker who is financially unable to afford counsel and, due to the more informal nature of the process, often a Berman Hearing is much swifter at rendering a judgment than judicial avenues. Upon the conclusion of a Berman Hearing, a party that does not agree with the decision they may appeal it and have the claim heard again from the beginning. At this point, several potential obstacles present themselves to employees.

More and more, employers are requiring their employees to sign documents as a condition of hiring that compel arbitration in disputes with their employer. Arbitration is not inherently unfair, but for a variety of reasons arbitration favors employers and exacerbates the inherent resource disadvantage present in an employee-employer relationship. Depending on the type of mandatory arbitration document, an employee may be prohibited from having the Labor Commissioner represent them in a Berman Hearing, might be compelled into arbitration following the appeal of a judgment or may be blocked from utilizing the Berman Hearing process at all.

To address these challenges, SB 1384 grants the Labor Commissioner additional leeway to represent a minimum wage claimant in two important ways. First, it allows the commissioner to represent the worker in a de novo appeal to a Berman Hearing decision, whether that appeal takes place in an arbitral setting or not. Second, it requires that a court order to compel arbitration of an employee's wage claim be served to Labor Commissioner, rather than to the employee. The employee may then request that the commissioner represent them in any proceedings to determine whether that court order is valid and enforceable.

With mandatory arbitration contracts becoming standard across numerous industries, it becomes harder and harder for employees to successfully bring wage claims against their employers for violations. These two technical changes to the Labor Commissioner's ability to represent financially-unable workers will help ensure that unpaid wage claims are resolved swiftly and fairly.

3. Proponent Arguments

According to the Author:

“This proposal addresses the increasing use of mandatory arbitration agreements in employment and would allow the Division of Labor Standards Enforcement to represent wage claimants in arbitral proceedings when they are unable to have their wage claims adjudicated by the Labor Commissioner in the Berman hearing process due to a court order compelling arbitration of the claim.”

4. Opponent Arguments:

None on file.

5. Prior Legislation:

AB 51 (Gonzalez) Chapter 711, Statutes of 2019 prohibits requiring applicants for employment or employees to waive their right to a judicial forum as a condition of employment or continued employment.

SUPPORT

California Employment Lawyers Association

OPPOSITION

None on file.

-- END --