

The 2015-16 May Revision: Review of Changes to Labor Contracts

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Summary

Under current law, labor contracts (referred to as memoranda of understanding, or MOUs) between the State of California and its employees do not take effect unless they are ratified by the Legislature. Subsequent amendments to these MOUs (often called “MOU addenda”) are reviewed by the Legislature’s Joint Legislative Budget Committee (JLBC). If the JLBC determines that an MOU addendum requires the expenditure of funds not previously approved by the Legislature, the addendum must be submitted to the Legislature for approval. In recent years, the legislative approval process for MOU addenda has been criticized because it can result in lengthy delays to implement even minor changes. The May Revision proposes to establish a new process for reviewing these MOU amendments in 2015-16. This analysis reviews the administration’s proposal and recommends that the Legislature adopt it with modifications to ensure legislative and public oversight.

Background

Ralph C. Dills Act Provides for State Employee Collective Bargaining. With passage of the Dills Act in 1977, the Legislature authorized collective bargaining between the Governor and rank-and-file state employees. In collective bargaining, the Governor is represented by the California Department of Human Resources (CalHR) and employees are represented by unions. The product of the collective bargaining process is an MOU that establishes the terms and conditions of employment for rank-and-file state employees.

MOUs Require Ratification. An MOU must be ratified by votes of the Legislature and union members in order to take effect. Legislative ratification can occur in the annual budget act or in separate legislation. In addition, under the Dills Act, the Legislature generally may choose whether to appropriate funds in each annual budget to continue the financial provisions of an MOU.

MOUs Frequently Amended. State law allows CalHR and unions to amend a ratified MOU—an agreement referred to as an MOU addendum. MOU addenda are common and may establish new MOU provisions or change existing provisions.

The subject of MOU addenda can range from minor operational changes (for example, changing how employees choose work shifts), policy changes with significant fiscal implications for the state (for example, establishing pay increases for specific classifications), or significant policy changes with little to no immediate fiscal effect (for example, providing employees additional paid days off each year for professional development).

MOU Addenda Subject to Legislative Review.

Under the current MOU addenda review process, CalHR submits all proposed MOU addenda to the JLBC. The JLBC determines if an MOU addendum requires legislative approval based on whether the agreement (1) requires the expenditure of funds or (2) presents substantial additions that are not reasonably within the parameters of the ratified MOU. The Legislature established this addenda review process in Chapter 499, Statutes of 2005 (SB 621, Speier), in response to concerns that a past administration was implementing MOU addenda without sufficient notice to the public and the Legislature. The JLBC's role is intended to ensure legislative oversight of MOU addenda.

Costs to Implement MOUs and MOU Addenda Approved in Budget. The Legislature appropriates funds for MOU-related augmentations to employee compensation under a single budget item—Item 9800. The Legislature's stated intent of Item 9800 is "that all proposed augmentations for increased employee compensation costs [...] be budgeted and considered on a comprehensive, statewide basis." In addition to appropriating funds for employee compensation augmentations, Item 9800 also has been used to ratify MOUs and MOU addenda.

Concerns About Addenda Review Process.

Over the past couple of years, many people involved in the MOU addenda process—including members of the JLBC, staff from the administration, and union representatives—have

raised concerns about the timeliness and appropriateness of the legislative review process for MOU addenda. Some of the concern stems from an ambiguity in the laws relating to the review process. Specifically, Chapter 499 requires that an addendum resulting in an expenditure of funds greater than \$250,000 be approved by the Legislature; however, the Dills Act requires that *any* labor agreement requiring the expenditure of funds be approved by the Legislature. The Chair of the JLBC has encouraged the administration to explore possible changes to the process that would (1) ensure JLBC review of all MOU addenda and (2) necessitate legislative approval of only those MOU addenda that significantly deviate from the parameters of the original MOU and/or have significant cost implications.

Assessment: Current MOU Addenda Review Process

Given the concerns articulated by many parties about the MOU addenda review process, we conducted a wide-ranging review of it, including reviewing (1) the factors leading the Legislature to establish the current process and (2) JLBC responses to past MOU addenda subject to this process. As we discuss more fully below, the Legislature designed the current review process to give the Legislature significant oversight and to make the process more transparent to the public. One trade-off of this rigorous legislative oversight, however, is that it requires the Legislature to play more of a year-round role and to devote time to approve relatively minor policy changes. The process can also create implementation delays and other challenges for the administration.

Ensures Legislative and Public Oversight

The MOU addenda review process accomplishes the Legislature's objective of providing legislative and public oversight of the

collective bargaining process by requiring (1) each MOU addendum to be submitted to the JLBC and (2) CalHR to post MOUs in their entirety—including any MOU addenda—on its website. In general, the administration has adhered to these oversight requirements. There have been a few instances where CalHR has not submitted addenda to the JLBC or posted addenda to its website in a timely fashion. Specifically, some agreements have been submitted to the JLBC *after* the agreement was already implemented, thereby making it virtually impossible for the Legislature to take action if the JLBC determined that the agreement required legislative approval. Notwithstanding these occasional lapses, legislative oversight and public transparency concerning collective bargaining agreements have been much improved as a result of this review process.

Can Result in Lengthy Delays

The administration and unions may meet at any time in the year to address issues that emerge after an MOU is ratified. Although many of these negotiations deal with issues that are not urgent in nature, some issues arise that need quick resolution. For example, the administration and unions may agree to an expedited layoff process to ensure that affected departments reduce operational costs to a certain level before the end of the fiscal year. The legislative calendar and process can impede the administration's ability to implement time-sensitive addenda quickly. This issue is especially problematic during the fall when the Legislature is in recess and typically does not meet unless a special session is called. If the JLBC determines that an addendum received during this time requires legislative approval, months can pass before the Legislature considers it. This delay can impose significant challenges for the administration to implement addenda that address time-sensitive issues.

Requires Legislative Action on Minor Matters

When reviewing MOU addenda, the JLBC bases its determination on a longstanding provision of the Dills Act: any labor agreement requiring the expenditure of funds not already approved by the Legislature must be submitted to the Legislature. Using this standard, an addendum that results in an expenditure of \$1 must be submitted to the Legislature—even if the \$1 expenditure (1) can be absorbed within a department's resources in the current year or (2) is offset by \$2 in savings, resulting in net savings of \$1. Requiring minor addenda to obtain legislative approval can reduce the amount of time the Legislature has to address more pressing fiscal and policy concerns.

Governor Proposes New MOU Addenda Review Process

The May Revision proposes to modify Item 9800 of the budget bill to establish a new MOU addenda review process in 2015-16. This new process would supersede any conflicting requirements in Chapter 499 or the Dills Act during the fiscal year. Unless the budget bill language were included in future years' budget acts, however, the MOU addenda process would revert to the current process at the end of the fiscal year.

Department of Finance (DOF) Plays Greater Role. Under the Governor's proposed process, DOF would review addenda and CalHR would post them on their website. If DOF determined that an MOU addendum would have "no fiscal impacts," the administration could implement it immediately. Even if DOF determined that the MOU addendum would have a fiscal impact, it could still request to implement the addendum without legislative approval if it met the following conditions: (1) it resulted in net costs of less than \$1 million in 2015-16, (2) costs could be absorbed within affected departments' existing budgetary authority, or (3) it does not include substantial policy changes relative

to the legislatively ratified MOU. In such cases, the committee would have 30 days to review the administration's determination that an addendum can be implemented without legislative approval. Agreements that do not meet the conditions listed above would need to be submitted to the Legislature for approval.

JLBC Plays Smaller Role. Under the administration's proposal, the JLBC would not review MOU addenda determined by the DOF to have no fiscal impact. The JLBC would play its customary budgetary oversight role regarding all other MOU addenda. In this role, the JLBC would have 30 days to inform DOF that it disagrees with its determination that an addendum may be implemented without legislative approval. If the JLBC disagreed with DOF's determination, it would advise DOF to seek legislative approval. While the JLBC's role would be advisory, this alternative review is similar to ones currently used by the JLBC to review many other fiscal and administrative matters, and, with few exceptions, DOF follows the JLBC's advice.

Requires Budget Approval of Costs in Future Years. The Governor's proposal would authorize the administration to increase net costs in the current fiscal year only. If an MOU addendum results in net costs in years beyond the current fiscal year—even if the administration intends to absorb these fiscal effects within existing departmental resources—these costs would need to be identified and approved by the Legislature under Item 9800 of the budget act.

Analysis

Given the extensive legislative review responsibilities, lack of clarity, and time delays inherent in the existing process, we think changes to the current process are warranted.

Administration's General Approach Is Reasonable

In general, we think the administration's proposal makes sense. In particular, we think it is a good idea to (1) formalize a role for DOF in the review process and (2) establish the new process through the annual budget bill.

DOF Well Situated to Estimate Fiscal Effects. The DOF plays no formal role in the current MOU addenda review process; however, it frequently assists CalHR in preparing fiscal estimates of MOU addenda before CalHR submits the addenda to the JLBC. Considering the significant effects MOU addenda can have on the state's budget, it is appropriate for DOF to play a greater role in the addenda review process. Formalizing DOF's role would use the department's significant understanding of the broad range of fiscal issues facing the state budget to determine an agreement's fiscal effect.

Use of Budget Bill Language Enhances Legislative Oversight. Changes to the MOU addenda review process could be established through statutory changes to the Dills Act; however, using the budget bill to effect these changes provides the Legislature the greatest degree of oversight and flexibility. Using budget bill language establishes a dynamic process that could be reexamined and modified each year to address any issues that might arise. Ultimately, if the process does not meet the Legislature's expectations, the Legislature could delete this provision from future budget bills. This, in turn, would revive the current MOU addenda process—a process with a very high standard of legislative oversight.

Oversight Could Be Improved Under Proposed Language

The primary purpose of Chapter 499 was to bring transparency to the MOU addenda implementation process and prevent the administration from committing the state to

significant financial obligations without legislative or public oversight. These are laudable objectives. For the reasons discussed below, we believe the language included in the May Revision should be modified to ensure that these goals are met in the future.

No Oversight of Addenda Deemed to Have No Fiscal Impact. The May Revision language would allow the administration to immediately implement any MOU addendum that it determined would have no fiscal impact. The language does not define “fiscal impacts.” This is important because the Legislature and DOF might reasonably have a different interpretation of an agreement’s fiscal impact. For example, an agreement might require a department to shift resources between programs. On net, the agreement might not increase the affected department’s costs. The DOF could interpret this net zero cost as having no fiscal impact on the department. The Legislature, however, might interpret a net zero cost differently if the Legislature had (1) different assumptions regarding the ability of a department to reduce program spending or (2) concerns about the fiscal effect on the program with reduced funding. Under the proposed language, MOU addenda of this nature could be implemented immediately without legislative review.

Components of Agreements Might Not Be Posted on Internet. The proposed language would require an MOU addendum be posted on the CalHR website “in its entirety.” This is also a requirement under the current process. It is fairly common for an MOU addendum to make reference to some other document that becomes an integral part of the agreement. For example, an agreement making changes to employees’ shift hours might say that “the parties agree to the attached work schedule.” In another example, an agreement might say that “the parties agree that ‘policy memo #1234’ will be used to determine seniority status.”

Under its current practice, CalHR does not always include copies of these referenced documents when it posts agreements on its website. When an agreement references an ancillary document as part of the agreement, that document also should be posted to ensure oversight and transparency. This is especially important in instances when the referenced document is not otherwise publicly available.

Missed Opportunity to Address MOU Addenda That Are Time Sensitive

Under the May Revision proposal, the soonest that any addendum could be implemented is 30 days after DOF has notified the JLBC. This may be too long for certain agreements. For many other budgetary matters, when the JLBC reviews time-sensitive administrative actions, the Chair of the JLBC has been given the authority to expedite the committee’s review and allow the administration to take a proposed action before 30 days have elapsed. Including the possibility of this type of an expedited JLBC review of MOU addenda could improve administrative flexibility while still maintaining legislative oversight.

Recommendations

We think the Legislature should adopt a new MOU addenda review process in the budget bill that grants the administration greater flexibility than the current process allows while maintaining legislative and public oversight. The budget bill is already a primary vehicle in which the Legislature controls employee compensation costs. Therefore, adopting this new process as part of the budget would allow the Legislature to easily adjust the process in the future to correct any issues that may arise.

We think that the Governor’s proposal has merit; however, because of the concerns raised above, we recommend that the Legislature

approve the Governor’s proposal with some minor modifications. Specifically, we recommend that the Legislature:

- **Base DOF Determination on “Expenditure of Funds.”** When determining whether an agreement can be implemented without JLBC notification, DOF should have some meaningful standard against which to measure the agreement. Accordingly, we recommend striking the proposed sentence referencing the subjective term “fiscal impact” and instead base DOF’s determination on whether an agreement results in the expenditure of funds—a more meaningful standard, in our view.
- **Specify What Must Be Posted Online.** Adding language that specifies that agreements must be posted in their entirety, including any attachments referenced in the agreement, would help the Legislature and public know the full terms of an agreement.

- **Allow for Expedited JLBC Review.** Including language that allows the JLBC to expedite its review would allow the administration to implement an agreement in less than 30 days in instances when an agreement is addressing a time-sensitive issue.

In our view, these modifications would provide legislative and public oversight of all MOU addenda while granting the administration significantly greater flexibility than it enjoys under the current process—especially in the case of agreements that do not require the expenditure of funds. Given the high degree of administrative flexibility, we recommend that the Legislature closely monitor the new MOU addenda review process over the next year to ensure that legislative intent is met. Our recommended modifications are included in the Appendix.

Appendix: LAO Recommended Modifications to Proposal

Add Provisions 7 thru 10 to Item 9800-001-0001:

7. *Notwithstanding Sections 3517.6 and 3517.63 of the Government Code, the Department of Finance (Finance) shall provide written notification to the Joint Legislative Budget Committee (JLBC) regarding any expenditure of funds resulting from any side letter, appendix, or other addendum (collectively addendum) to a properly ratified memorandum of understanding (MOU). ~~Addendum determined by Finance to have no fiscal impacts do not require JLBC notification, however, these shall be posted on the Department of Human Resources' (CalHR) website pursuant to provision 10 of this section.~~*
8. *The notice shall include a copy of the addendum and a fiscal summary of any expenditure of funds resulting from the agreement in 2015-16 and future fiscal years. The notice shall indicate whether Finance determines that an agreement does or does not require legislative action to ratify the addendum before implementation, pursuant to paragraphs (A), (B), or (C) of this provision.*
 - (A) *An addendum to a properly ratified MOU may be implemented without legislative action not less than 30 calendar days after notice has been provided to the JLBC—or not sooner than whatever lesser time after that notification the chairperson of the JLBC, or his or her designee, may in each instance determine—if all the following apply: (1) the agreement results in total net costs of less than \$1,000,000 (all funds) during the 2015-16 fiscal year; (2) any cost resulting from the agreement can be absorbed within the 2015-16 appropriation authority of impacted departments; and (3) the addendum does not present substantial additions that are reasonably outside the parameters of the original MOU.*
 - (B) *An addendum to a properly ratified MOU that results in any expenditure of funds may be implemented not less than 30 calendar days after notice has been provided to the JLBC—or not sooner than whatever lesser time after that notification the chairperson of the JLBC, or his or her designee, may in each instance determine—if, during the legislative consideration of the 2015-16 Governor's Budget, Finance identified to the Legislature that (1) the administration anticipated that the addendum would be signed during 2015-16 and (2) any costs resulting from the addendum are included in the 2015-16 Governor's Budget or in another legislative vehicle.*
 - (C) *An addendum to a properly ratified MOU that results in any expenditure of funds requires legislative action prior to implementation if any of the following applies: (1) the agreement results in total net costs greater than \$1,000,000 (all funds) during the 2015-16 fiscal year; (2) the agreement results in costs that cannot be absorbed within the 2015-16 appropriation authority of impacted departments; or (3) the addendum presents substantial additions that are not reasonably within the parameters of the original MOU.*
9. *Notwithstanding Sections 3517.6 and 3517.63 of the Government Code, any addendum to a properly ratified MOU that is implemented in 2015-16, pursuant to paragraph (A) of Provision (8) of this item, and requires the expenditure of funds beyond 2015-16 that was not approved as part of the 2015-16 Budget Act, must be approved by the Legislature as part of the 2016-17 Budget Act or through another legislative vehicle.*
10. *The Department of Human Resources CalHR shall promptly post on its public website all signed addendum. The addendum shall be posted in its entirety—including any attachments, schedules, or other documents included as part of the agreement—along with the fiscal summary documents of the agreement.*

Add Provisions 8 thru 11 to Items 9800-001-0494 and 9800-001-0988:

8. *Notwithstanding Sections 3517.6 and 3517.63 of the Government Code, the Department of Finance (Finance) shall provide written notification to the Joint Legislative Budget Committee (JLBC) regarding any expenditure of funds resulting from any side letter, appendix, or other addendum (collectively addendum) to a properly ratified memorandum of understanding (MOU). ~~Addendum determined by Finance to have no fiscal impacts do not require JLBC notification, however, these shall be posted on the Department of Human Resources' (CalHR) website pursuant to provision 11 of this section.~~*
9. *The notice shall include a copy of the addendum and a fiscal summary of any expenditure of funds resulting from the agreement in 2015-16 and future fiscal years. The notice shall indicate whether Finance determines that an agreement does or does not require legislative action to ratify the addendum before implementation, pursuant to paragraphs (A), (B), or (C) of this provision.*
 - (A) *An addendum to a properly ratified MOU may be implemented without legislative action not less than 30 calendar days after notice has been provided to the JLBC—or not sooner than whatever lesser time after that notification the chairperson of the JLBC, or his or her designee, may in each instance determine—if all the following apply: (1) the agreement results in total net costs of less than \$1,000,000 (all funds) during the 2015-16 fiscal year; (2) any cost resulting from the agreement can be absorbed within the 2015-16 appropriation authority of impacted departments; and (3) the addendum does not present substantial additions that are reasonably outside the parameters of the original MOU.*
 - (B) *An addendum to a properly ratified MOU that results in any expenditure of funds may be implemented not less than 30 calendar days after notice has been provided to the JLBC—or not sooner than whatever lesser time after that notification the chairperson of the JLBC, or his or her designee, may in each instance determine—if, during the legislative consideration of the 2015-16 Governor's Budget, Finance identified to the Legislature that (1) the administration anticipated that the addendum would be signed during 2015-16 and (2) any costs resulting from the addendum are included in the 2015-16 Governor's Budget or in another legislative vehicle.*
 - (C) *An addendum to a properly ratified MOU that results in any expenditure of funds requires legislative action prior to implementation if any of the following applies: (1) the agreement results in total net costs greater than \$1,000,000 (all funds) during the 2015-16 fiscal year; (2) the agreement results in costs that cannot be absorbed within the 2015-16 appropriation authority of impacted departments; or (3) the addendum presents substantial additions that are not reasonably within the parameters of the original MOU.*
10. *Notwithstanding Sections 3517.6 and 3517.63 of the Government Code, any addendum to a properly ratified MOU that is implemented in 2015-16, pursuant to paragraph (A) of Provision (9) of this item, and requires the expenditure of funds beyond 2015-16 that was not approved as part of the 2015-16 Budget Act, must be approved by the Legislature as part of the 2016-17 Budget Act or through another legislative vehicle.*
11. *The Department of Human Resources CalHR shall promptly post on its public website all signed addendum. The addendum shall be posted in its entirety—including any attachments, schedules, or other documents included as part of the agreement—along with the fiscal summary documents of the agreement.*

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This brief was prepared by Nick Schroeder, and reviewed by Marianne O'Malley and Jason Sisney. The Legislative Analyst's Office (LAO) is a nonpartisan office that provides fiscal and policy information and advice to the Legislature.

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