

# Transactions Involving Grocery Stores: The Effect of the New California Grocery Worker Retention Law

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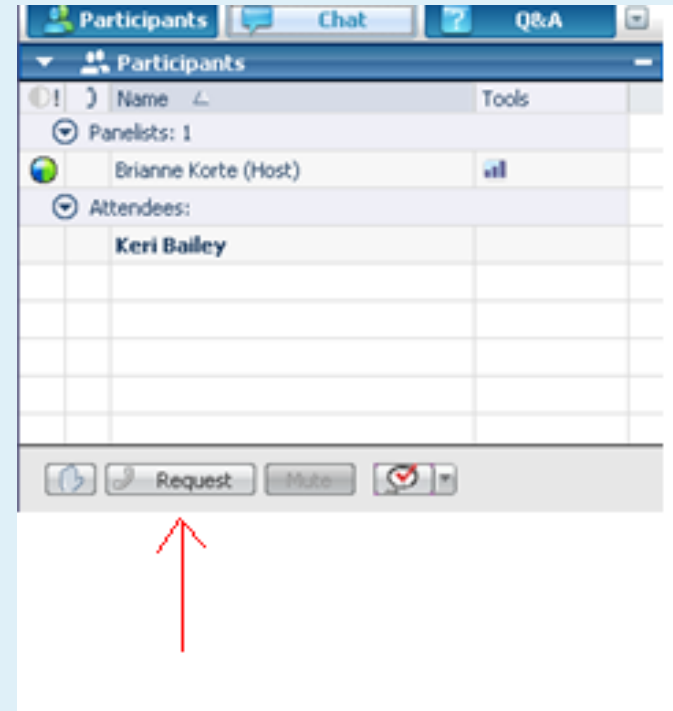


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# Overview of Topics

- Impetus of AB 359
- Key Requirements
  - Open issues that have yet to be interpreted
  - Crucial questions that remain unresolved
- Amendments
- Comparison of AB 359 to Ordinances in Los Angeles and San Francisco



# AB 359: Impetus To Bill

- Sponsored by United Food and Commercial Workers Union Western States Council (UFCW)
  - Argued that bill would protect California's' grocery workers from being dismissed with large grocery stores go through change of ownership
  - Claimed bill is not different than ordinances passed in SF, LA, Gardena and Santa Monica
  - Maintained that bill necessary to combat effects of "Wall Street-style mergers that can be detrimental to consumers and workers
  - Bill consistent with existing Labor Code provisions (i.e., janitors)

# AB 359: Impetus To Bill

- Sponsored by United Food and Commercial Workers Union Western States Council (UFCW):
  - Research from UC Davis demonstrated that LA Ordinance had no detrimental economic impact on grocery industry
    - From 2005 to 2013, employment in retail grocery industry grew by 15,000+
    - Number of stores in LA county grew by 8.5%
    - From 2005 to 2013, the grocery industry grew at a rate substantially greater than overall economy



# AB 359: Impetus To Bill

- Opposition to the bill:
  - Unfairly forced grocery employers to hire employees
  - Denies employers the right to choose and undermines the at-will employment presumption
  - Precludes employers from conducting pre-hire background checks or interviews
  - Potentially forces employers to adhere to provisions of a CBA to which it is not a party
  - Based on LA, SF and other cities, will have chilling effect on business transactions

# AB 359: Impetus To Bill

Since the unions complained, I have to do something - Wall Street is bad, after all!



# AB 359: Impetus To Bill

- Lorena Gonzalez (D-San Diego):
  - “Wall Street mergers and acquisitions that make big money for corporations and private equity firms should not jeopardize jobs of the grocery workers who live and work in our communities . . . This is a common sense opportunity to save people's jobs and make sure the most experienced, best prepared workers stay on the job during a complicated transition period”
  - Approved less than a week after Haggen Inc. announced it will be putting up 27 stores for sale after the company acquired the stores as part of last year’s \$9 billion giant grocery merger



# AB 359: Requirements

- Adds Section 2500-2522 to Labor Code:
  - Applies January 1, 2016
  - Applies to an incumbent and successor grocery employer operating a grocery establishment
    - “Grocery establishment” means a retail store in this state 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

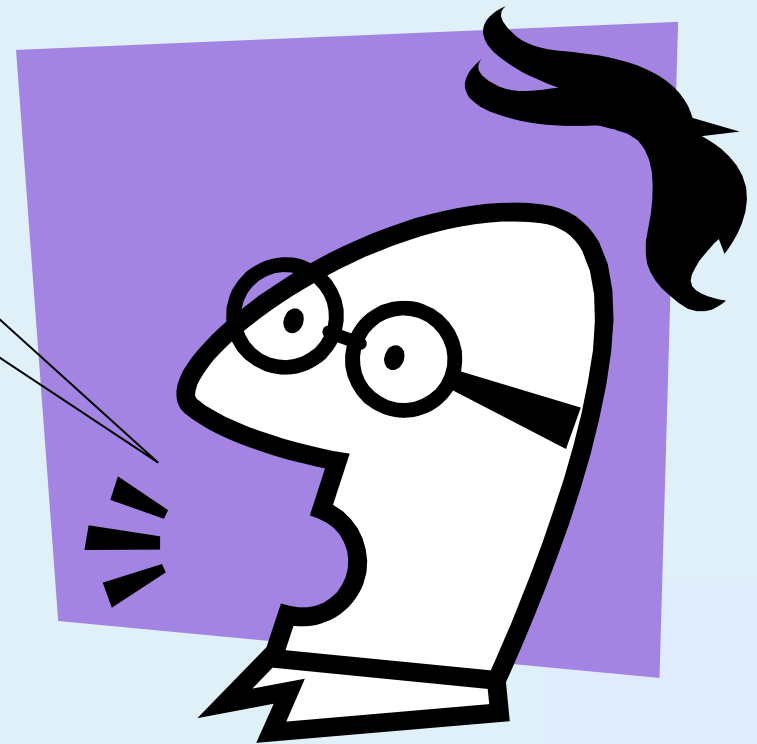


# AB 359: Requirements

- Applies when there is a “change of control”
  - 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

# AB 359: Requirements

What does "all or substantially all" mean?



# AB 359: Requirements

- Any sale, assignment, transfer, contribution, or other disposition of all or substantially all of the assets or a controlling interest . . . .”
  - All or substantially all is not defined in bill
  - Other law?
    - Corp. Code 1001(a) identifies what a corporate needs to do to dispose of “all or substantially all” of its assets, but does not define the term
    - *In re Liquimatic Systems* (SD Cal. 1961): sale of 45% of interest in partnership is not “all or substantially all” of partnership assets

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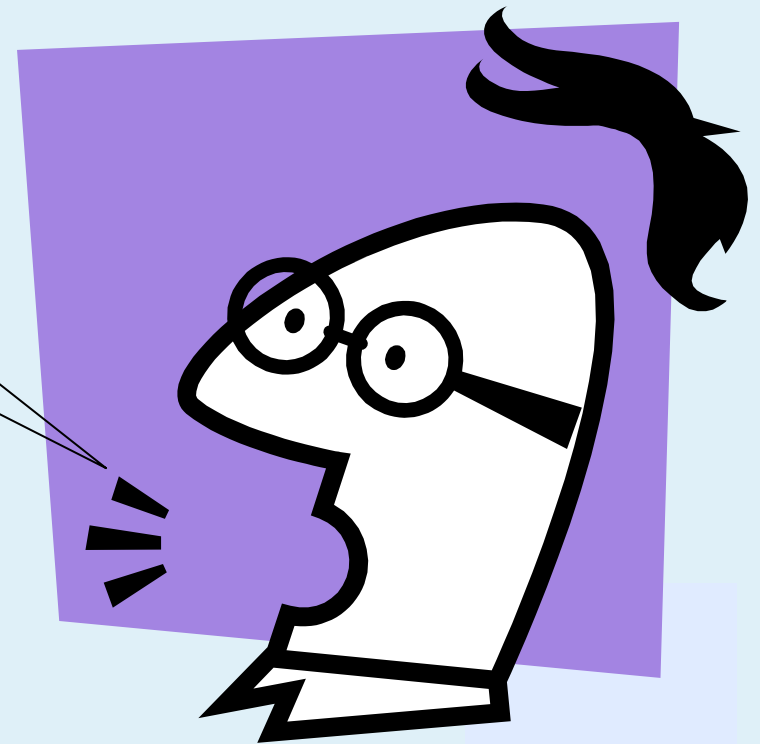


# AB 359: Requirements

- Other law
  - Bulk sales statute
    - Somewhat helpful on “all or substantially all”
    - Statute uses the term “more than half”
    - Definition of assets
      - Inventory, equipment, and any tangible and intangible personal property used in seller's business
      - Does not include fixtures (other than readily removable factory and office machines) or lessee's interest in a lease of real property

# AB 359: Requirements

So back to my question; what does "all or substantially all" mean?



# AB 359: Requirements

- Does the sale or transfer language relate to an entire company or just to a particular store?
  - What if a company just sold off one store, as opposed to selling all or substantially all of its assets?
    - 2502(a) and (d): applies to the sale or transfer of a “grocery establishment,” which is a particular retail store
    - Clearly applies to a sale of single store

# AB 359: Requirements

- Hypothetical:
  - Grocer A is leasing a retail space that is 16,000 sq. feet in Orange County. The lease is set to expire on December 30, 2015. Lease expires, and property returns to Landlord.
  - Grocer A leaves all of its equipment in the space.
  - On January 3, 2016, Grocer B signs a lease with Landlord for the same space. Grocer B makes a one-time payment of \$10,000 to convince Landlord to leave existing equipment in place.

# AB 359: Requirements

- Hypothetical:
  - Is the transaction covered by AB 359?
    - If transfer document is signed after January 1, 2016?
    - Do we have a incumbent grocer and a successor grocer?
    - Has there been a change of control?
      - Does not appear to be a sale, assignment or transfer of assets from Grocer A to Grocer B
      - Could be “other disposition”?

# AB 359: Requirements

- Hypothetical:
  - Would your answer be different if Grocer A and B came to agreement in advance of the lease expiring where Grocer B paid Grocer A \$10,000 to let the lease expire and leave the equipment inside the space?
    - Sham transaction?

# AB 359: Requirements

- Incumbent owner must prepare a list of eligible grocery workers for a successor grocery employer within 15 days of the execution of the transfer document
  - An “eligible” worker is one who has worked for the incumbent employer for at least six months
  - *Excludes* managerial, supervisory, and confidential employees
    - “Confidential employee” defined by Government Code as one who is responsible for developing or presenting management positions



# AB 359: Requirements

- New grocer employer must:
  - Maintain a preferential hiring list based on the list supplied by the incumbent grocery employer
  - Hire employees from the preferential hiring list for 90 days
    - 90 days is measured from date grocery establishment is fully operational and open to the public



# AB 359: Requirements

- For a period of 90 days, new grocer employer must refrain from terminating the employment of any eligible grocer employee, except for cause
  - Cause is not defined in bill
  - California Labor Code 2924: An employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it
  - Perhaps different standard for cause if CBA involved

# AB 359: Requirements

- Retained employees must be employed pursuant to terms established by new employer **and pursuant to the terms of a relevant CBA, if applicable**
  - What if incumbent grocer employer had a CBA, but successor grocer employer has no CBA for the retained employees?



# AB 359: Requirements

- Unclear if any CBA applies
  - Perhaps yes if the successor grocery employer has an existing CBA with after acquired clause
  - Likely no if status is referencing prior employer CBA; cannot force successor employer to adopt prior employer CBA
    - *California Grocers Assn v. City of Los Angeles*, 52 Cal.4<sup>th</sup> 177 (2011) held that successor employer covered by Los Angeles grocery retention ordinance had no duty to bargain or engage in negotiations with incumbent bargaining representative until after transition period expired

# AB 359: Requirements

- What if new grocer needs fewer employees?
  - If new grocer determines that it requires fewer employees, new grocer shall retain workers by seniority
  - What if successor grocery employer needs individuals in different positions?
    - Bill specifies that seniority retention shall be evaluated based on job classifications to the extent that comparable job classifications exist
    - Non-classified employees retained by seniority and according to experience

# AB 359: Requirements

- Additional requirements
  - New employer must provide each retained employee a written performance evaluation at the end of the 90 days
  - If the eligible grocery worker's performance during the 90-day transition period is satisfactory, the new employer must consider offering the eligible grocery worker continued employment under the new employer's terms and conditions
    - The new employer must also retain a record of the written performance evaluation and any job offer for at least three years

What does "must consider" for employment mean? What if I don't want to hire the employee because I think they are lazy, even though they did a fine job for 90 days.

Well - wouldn't you effectively be terminating the employee? What standard would apply at that juncture?



# AB 359: Requirements

- Additional requirements
  - Incumbent grocery employer must post public notice of change of control at the location of the affected establishment within 5 days of signing the transition document
  - Requirements do not apply to areas designated by USDA as a food desert



# AB 359: Impact of Existing Union

- “Parties subject to bill” may, by collective bargaining agreement, provide that the agreement supersedes the requirements of this bill
- *NLRB v. Burns*: Successor Employer Doctrine
  - A subsequent employer who *intends* and *voluntarily chooses* to hire a majority of the new workforce from among the seller’s employees and is generally in the same business must recognize incumbent union and bargain with it



# AB 359: Impact of Existing Union

- *NLRB v. Burns*:
  - AB 359 requires successor grocery employer to hire and retain predecessor employees and therefore creates successor employer situation
  - Is that a voluntary hire?
- *GVS Properties LLC* (2015)
  - When is the appropriate time to determine successor status in circumstances involving retention statutes?
    - At time of hiring or after mandatory retention period expires?

# AB 359: Impact of Existing CBA

- *GVS Properties LLC* (2015):
  - Appropriate time to determine successor status is when new employer assumes control over business and hires predecessor employees pursuant to retention statute
  - Dissent: “The coercive nature of the [retention regulation] negates the voluntariness upon which the successor doctrine is based. Compliance with the [regulation] is not a voluntary choice . . . By forcing . . . bargaining with the Union, the majority allows the government to place its thumb on the scale of the incumbent union . . . .”

# AB 359: Impact of Existing CBA

- Burns Successorship:
  - Usually successor employer can unilaterally establish initial hiring terms, but then must bargain with incumbent union
  - Burns successor need not assume the existing CBA, but can agree to assume the existing CBA terms
  - If successor is “perfectly clear,” it cannot even announce new terms without first bargaining with union
    - Does AB 359 make buyers “perfectly clear successors”?

# AB 359: Grocery Workers Retention Bill

To the Members of the California State Assembly:

I am signing Assembly Bill 359, which would require a successor grocery employer to retain eligible grocery workers for a 90-day transitional period and, upon completion of that period, require the successor grocery employer to consider offering continued employment to those workers.

As drafted, the bill is not clear how the provisions apply if an incumbent grocery employer has ceased operations. The author and sponsors have committed to clarify that the law would not apply to a grocery store that has ceased operations for six months or more. I look forward to receiving that fix before the end of this legislative session.

Sincerely,

A handwritten signature in blue ink that reads "Edmund G. Brown Jr." with a long, sweeping tail on the "J".

Edmund G. Brown Jr.

# AB 897: Clean Up Bill

- AB 897
  - Upon a change of control, an incumbent grocery employer is required to prepare a list of eligible grocery workers for successor employer and would require successor grocery employer to hire and retain during 90 day transition period
  - Grocery establishment **does not** include a retail store that has ceased operations for 6 months or more
    - If willing to close down the store for 6 months, AB 359 may not apply
    - What if “transition document” signed during 6 month period?

# AB 359: Other Ordinances

- Labor Code sections do not preempt any local ordinance that may provide equal or greater protection to eligible grocery workers
- Los Angeles Ordinance requires
  - Upon a change of control, incumbent grocery employer to provide list of eligible grocery worker to successor
  - Successor grocery employer must hire from this list, retain employees for 90 days, and refrain from discharging without cause
  - Same rules on excess employees, terms and conditions of new employment, performance evals and notice

# AB 359: Other Ordinances

- San Francisco Ordinance requires:
  - Upon change of control, incumbent grocery employer to provide list of eligible grocery worker to successor grocery employer
  - Successor grocery employer must hire from this list, retain employees for 90 days, and refrain from discharging without cause
  - Same rules on excess employees, terms and conditions of new employment, performance evals and notice

# AB 359: Grocery Workers Retention Bill

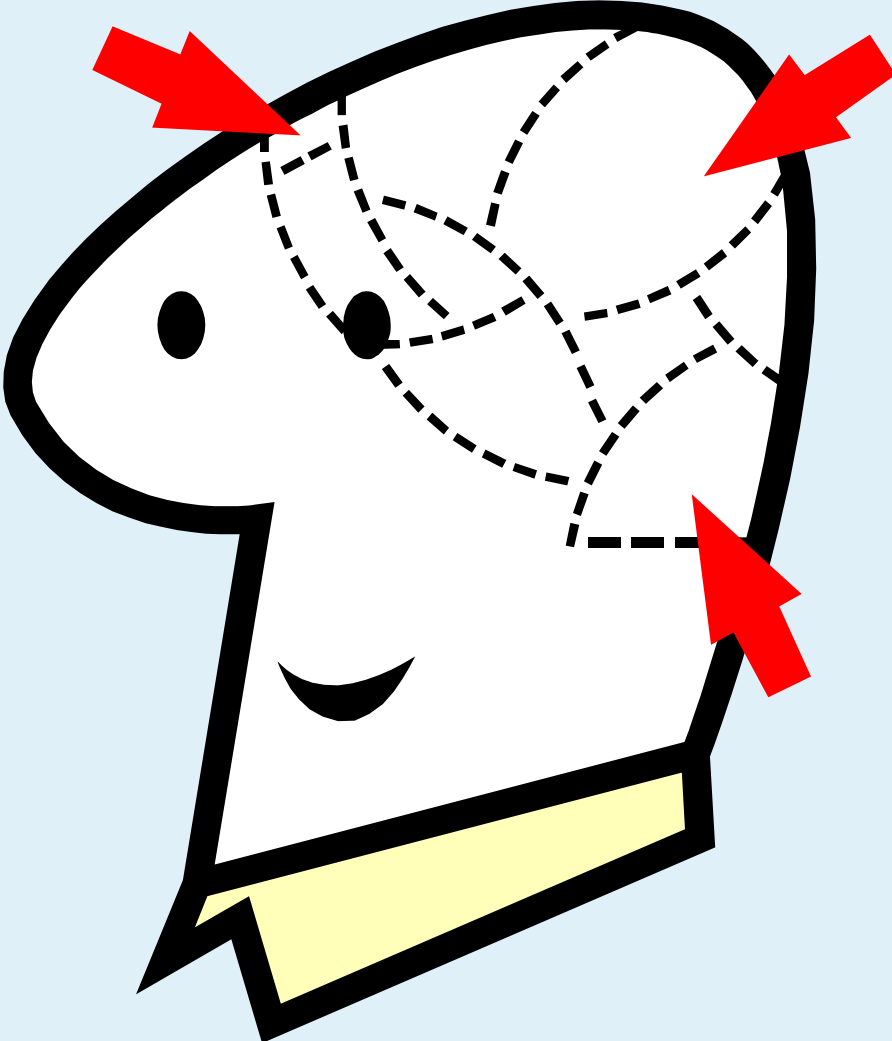
- The cities of Santa Monica, Alameda, and Gardena adopted similar local ordinances
  - If conflict, stricter statute would apply
  - California is the first state in the nation to create a statewide worker-retention law for grocery store employees





# The End -- Questions

Questions?



Questions?

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