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March 16, 2011

MOU Fiscal Analysis
Bargaining Unit 2 (Attorneys, Administrative Law Judges, and Hearing Officers)

L E G I S L A T I V E   A N A L Y S T ' S   O F F I C E

Presented to:

The California Legislature

Pursuant to Section 19829.5 of the Government Code

Background on the State Memorandum of Understanding (MOU) Process

- ☑ ***Ralph C. Dills Act Provides for State Employee Collective Bargaining.*** With passage of the Dills Act in 1977, the Legislature authorized collective bargaining between unions representing rank-and-file state employees and the administration. Currently, about 200,000 state workers belong to one of the state's 21 bargaining units.

- ☑ ***Legislature and Employees Must Ratify MOUs.*** Fiscal provisions of MOUs must be ratified by the Legislature and MOUs must be approved by bargaining unit members in order to take effect. In addition, under the Dills Act, the Legislature annually may choose whether to appropriate funds in the budget to continue the financial provisions of each MOU.

- ☑ ***Fiscal Analysis Required by State Law.*** Section 19829.5 of the Government Code—approved by the Legislature in 2005—requires the Legislative Analyst's Office (LAO) to issue a fiscal analysis of proposed MOUs.

- ☑ ***MOU for California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment (CASE) Now Before Legislature.*** The proposed MOU addressed in this analysis applies to rank-and-file Unit 2 employees. The term of the proposed MOU would be April 1, 2011 through July 1, 2013.

Bargaining Unit 2 at a Glance

- ☑ ***Unit 2 Represents More Than 3,300 Employees.*** The more than 3,300 full-time equivalent employees in Unit 2 are exclusively represented by CASE. Unit 2 employees make up less than 2 percent of the state workforce.

- ☑ ***Employees Work in Many Departments.*** Unit 2 employees are state employed attorneys, administrative law judges, and other legal professionals who provide legal expertise for the state in many state departments. About 25 percent of Unit 2 employees work for the Department of Justice. Other agencies with significant numbers of Unit 2 employees are the State Compensation Insurance Fund (SCIF), Department of Industrial Relations, Employee Development Department, and the Department of Corrections and Rehabilitation.

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Current MOU

- ☑ ***MOU Expired in 2007.*** The term of the current MOU was from July 1, 2005 to June 30, 2007. Under the "evergreen" provision of the Dills Act (Government Code Section 3517.8 [a]), terms of an expired MOU continue to be in effect until a new MOU replaces the expired MOU.

- ☑ ***Employees Received Pay Increases.*** Effective July 1, 2005, all Unit 2 employees received a 2.5 percent cost-of-living adjustment (COLA), and the starting salary for new attorneys with less than one year of legal experience was increased from $3,834 to $4,410 per month. On July 1, 2006, all Unit 2 employees received a 3.4 percent COLA and the pay range for all Attorney III and Attorney IV classes went up by one step. This meant that employees who were at the top step for at least 12 months received a 5 percent increase in addition to the COLA.

- ☑ ***State Pays a Fixed Amount Toward Employee Health Premiums.*** Under the expired MOU, the state agreed to pay a fixed amount toward employee health, dental, and vision premiums equal to about 85 percent of the average premiums in 2006. (The flat dollar rate was set to be equivalent to the 85/80 benefit formula where the state contributes 85 percent of the average premium costs for the employee and 80 percent for dependents.) The flat dollar state contribution to employee health was last increased in 2008.

- ☑ ***Professional Development Activities.*** The expired MOU provides Unit 2 employees, subject to management approval, three days of professional leave each calendar year without loss of compensation. The leave is intended for employees to engage in professional activities such as state or local Bar committees and similar professional organizations that enhance the "knowledge, skills and abilities which the state's legal professionals provide to their employer as well as enhancing the employee's own career development opportunities."

Current MOU *(Continued)*

- ☑ ***Most Employees Eligible for "2 Percent at 55" Retirement Formula.*** Most Unit 2 employees are eligible for 2 percent at 55 retirement benefits and contribute 6 percent of monthly pay to cover part of the costs of these benefits. The state pays the remainder of the costs, including costs to address unfunded liabilities. Pension benefits paid to retired employees are based on the highest pay received during three consecutive years of employment. Chapter 3, Statutes of 2010, Sixth Extraordinary Session (SBX6 22, Hollingsworth), changed the pension formula for miscellaneous employees hired on or after January 15, 2011 to be "2 percent at 60."

- ☑ ***More Details at Department of Personnel Administration (DPA) Website.*** This analysis does not describe every provision of the current or proposed MOU. Summaries and text of MOUs are available at DPA's website: http://www.dpa.ca.gov/bargaining/contracts/index.htm

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Proposed MOU—Unpaid Leave Days

☑ ***One Day of Unpaid Leave Each Month for 12 Months.*** The proposed MOU would establish a 12 month personal leave program (PLP). For the first 12 months of the MOU, the PLP provides every employee eight hours of unpaid leave each month, resulting in a 4.6 percent pay reduction. Unused leave under the PLP accrues on a monthly basis, but expires June 30, 2016.

☑ ***No Furloughs During PLP.*** The MOU ends the three-day-per-month furlough program that the administration imposed on approximately half of Unit 2 employees. (About 1,800 Unit 2 employees were not subject to furloughs, either because they work for a constitutional officer who chose to reduce costs without furloughing employees or because the executive order establishing the furlough program specifically exempted their department from the furlough program.) During the 12 month PLP, the MOUs specify that the state shall not impose a new furlough program on Unit 2 employees. The state could reinstate a furlough program on Unit 2 employees after the PLP has expired.

☑ ***Reduced Take-Home Pay Would Not Affect Retirement Benefits.*** Although employee and employer pension contributions to the California Public Employees' Retirement System are based on the lower pay levels for employees, the PLP would not reduce the amount of final compensation used to determine employee pension benefit levels.

☑ ***SCIF Employees Exempt From PLP.*** Unit 2 employees who work at SCIF would not be subject to PLP or furloughs.

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Proposed MOU—Paid Leave Days

- ***Additional 1.73 Hours of Leave Each Month.*** The proposed MOU provides Unit 2 employees with 1.73 hours of personal leave (not to be confused with the PLP) each month from the beginning of the MOU through June 30, 2013. The leave equals 1 percent of pay and has cash value similar to vacation leave.

- ***Five Professional Development Days.*** The proposed MOU increases by two the number of days granted to Unit 2 employees for professional development. This brings to five the number of days that an employee may take off with compensation for professional development.

- ***Recasts Allowable Uses of Professional Development Days.*** While the expired MOU limits the purposes for which an employee can take a day of leave for professional development, the proposed MOU would allow employees to take leave days for virtually any personal or professional purpose. Specifically, the MOU authorizes employees to take leave days for activities such as "professional association activities, professional or personal development activities and seminars, other types of activities to enhance and promote personal and professional growth, productivity, and goals." The MOU specifically states that the "choice of activities is at the employee's discretion" and that the days shall be requested and approved in the same manner as vacation/annual leave.

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Proposed MOU—Pay and Employee Pension Contribution Increases

- ☑ ***General 4 Percent Increase to Top Step.*** The proposed MOUs specify that all Unit 2 classifications shall be adjusted by increasing the maximum salary range by 4 percent effective July 1, 2013.

- ☑ ***All Employees Contribute Larger Share Towards Pension.*** All state safety employees and miscellaneous and industrial employees would contribute an additional 3 percent towards retirement beginning April 2011. Miscellaneous and industrial employees would generally contribute 9 percent of their pay towards retirement and state safety employees would contribute 10 percent (as summarized in Figure 1).

Figure 1

Current and Proposed Employee Pension Contributions

(Percent of Monthly Pay[a])

Retirement Category	Current Contributions	Contributions Under Proposed MOU
Miscellaneous	6%	9%
Industrial	6	9
Safety	7	10

[a] A small portion of monthly pay is excluded from the calculation. In some cases, different contributions are applicable for employees not subject to Social Security.

Proposed MOU—Health Care and Other Financial Provisions

- ***Proposed Continuous Appropriations for Duration of MOU.*** The administration and CASE agreed to present to the Legislature, as part of the legislation implementing the proposed MOU, a provision allowing for continuous appropriation to cover the economic terms of the MOU through July 1, 2013.

- ***State Would Increase Flat Dollar Contribution to Health Care.*** The proposed MOU increases the flat dollar state contribution to employee health care to be equivalent to the 80/80 formula (80 percent of the weighted average of premium costs for both the employee and dependents). Under the proposed MOU, the flat rate would be adjusted to maintain the 80/80 equivalency on January 1, 2012 and again on January 1, 2013.

- ***Contract Protection Clause.*** The proposed MOU includes a contract protection provision. If another bargaining unit currently without a contract enters into an agreement that does not have pension reform or provides a greater value than that provided to Unit 2, CASE may reopen related economic provisions of its MOU and meet and confer to discuss the similar or equivalent increases to be provided to CASE.

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Proposed MOU—Changes in Holidays and Overtime Provisions

- ☑ ***Changes in Hours Used to Calculate Overtime.*** Chapter 4, Statutes of 2009, Third Extraordinary Session (SBX3 8, Ducheny), added Section 19844.1 to the Government Code, which provides that various types of paid and unpaid leave "shall not be considered as time worked by the employee for the purpose of computing cash compensation for overtime." For example, if a worker takes leave on Monday (an eight-hour workday) and then works eight-hour days on Tuesday through Friday (32 work hours), she cannot count her first hour of work on that Saturday as the 41^{st} weekly work hour and earn overtime pay at 150 percent of her regular pay rate. Section 19844.1 provides that if there is a conflict between its provisions and a future MOU, the MOU generally will be controlling. The proposed MOU conforms to Chapter 4 and establishes that no leave can be counted as hours worked for purposes of calculating overtime.

- ☑ ***Eliminates Two Holidays.*** The MOU eliminates Columbus Day and Lincoln's Birthday from the list of holidays granted to Unit 2 employees. This provision aligns the MOU with Chapter 4.

DPA Estimates

Figure 2

Department of Personnel Administration's Cost Estimates[a]

(In Millions)

Proposal	2010-11 GF	2010-11 AF	2011-12 GF	2011-12 AF	2012-13 GF	2012-13 AF	2013-14 GF	2013-14 AF
24 furlough days (August 2010 through March 2011)	-$8.1	-$29.7	—	—	—	—	—	—
Personal leave program (first 12 months)	-1.2	-4.5	-$3.6	-$13.4	—	—	—	—
3 percent employee pension contribution	-0.5	-2.3	-2.1	-9.1	-$2.2	-$9.4	-$2.3	-$9.8
Increased state share of health care costs	0.2	0.8	1.1	4.8	1.7	7.3	2.0	8.3
Five days of professional development	—	—	—	—	—	—	—	—
1.73 hours per month of leave	0.3	1.1	1.0	4.4	1.0	4.4	—	—
4 percent pay increase to top step	—	—	—	—	—	—	4.1	17.5
Total Costs (+)/Savings(-)	**-$9.4**	**-$34.5**	**-$3.6**	**-$13.4**	**$0.5**	**$2.2**	**$3.8**	**$16.1**

[a] We adjusted the numbers we received from the Department of Personnel Administration to reflect costs and savings in each year compared with current law.

GF = General Fund; AF = all funds.

- ☑ ***Savings in 2010-11 and 2011-12.*** As shown in Figure 2, the administration's fiscal estimates for the proposed MOU indicate that the state would experience savings for the remainder of 2010-11 and in 2011-12. Most of the savings DPA shows for 2010-11 reflect the furlough program that has been in effect since August 2010.

- ☑ ***Rising Costs Beginning 2012-13.*** The DPA estimates that the MOU would result in annual cost increases for the state relative to the expired MOUs. As Figure 2 shows, in 2012-13 DPA estimates the proposed MOU would result in a net cost of $2.2 million (over $500,000 General Fund). After the 4 percent pay increase for employees at the top step goes into effect on July 1, 2013, the net costs in 2013-14 grow to over $16.1 million ($3.8 million General Fund).

LAO Comments—DPA Fiscal Estimates

☑ ***Eliminating Furloughs Results in State Costs, Not Savings.*** In August 2010, the previous administration imposed an ongoing three-day-per-month furlough as part of its plan to achieve the savings specified in Control Section 3.91 of the *2010-11 Budget Act*. The MOU proposes to end these furloughs (established by Executive Order S-12-10) and implement new employment policies. In its fiscal estimate, the DPA includes the savings associated with the furloughs as well as the savings associated with new MOU provisions. While DPA's estimate accurately reflects the impact of these policies on employees, it overstates the savings the state would realize in 2010-11 from adoption of the MOU. Compared with current law—including Executive Order S-12-10—the MOU would result in increased costs (from the termination of the furlough program), offset by the net savings attributable to the proposed provisions in the MOU.

☑ ***Inconsistent Accounting for Leave Days.*** The DPA's fiscal estimate reflects additional state costs from the increased number of leave days, but does not reflect similar costs associated with the increased number of professional development days. As we discuss later in more detail, this costing approach does not take into account that the MOU expands the authorized uses of professional development days so broadly that they are indistinguishable from other leave days.

☑ ***Cost of Salary Increase Overstated.*** The DPA overstates the cost of the 2013-14 salary increase because it assumes that all employees would receive it. We understand that typically about 80 percent of Unit 2 employees are at the top step of their classification and thus eligible for such a salary increase.

LAO Estimates

Figure 3

LAO Cost Estimates (Relative to Current Law[a])

(In Millions)

Costing Proposal	2010-11 GF	2010-11 AF	2011-12 GF	2011-12 AF	2012-13 GF	2012-13 AF	2013-14 GF	2013-14 AF
Nine furlough days eliminated (April-June 2011)	$3.1	$11.1	—	—	—	—	—	—
Personal leave program (first 12 months)	-1.2	-4.5	-$3.6	-$13.4	—	—	—	—
3 percent employee pension contribution	-0.5	-2.3	-2.1	-9.1	-$2.2	-$9.4	-$2.3	-$9.8
Increased state share of health care costs	0.2	0.8	1.1	4.8	1.7	7.3	2.0	8.3
Five days of professional development	UK	UK	UK	UK	UK	UK	UK	UK
1.73 hours per month of leave	0.3	1.1	1.0	4.4	1.0	4.4	—	—
4 percent pay increase to top step	—	—	—	—	—	—	3.3	14.0
Total Costs (+)/Savings (-)	**$1.8**	**$6.3**	**-$3.6**	**-$13.4**	**$0.5**	**$2.2**	**$3.0**	**$12.6**

[a] For purposes of this analysis, current law is the continuing provisions of the expired MOUs and the Executive Order establishing the three-day-per-month furlough.

GF = General Fund; AF = all funds; UK = unknown.

☑ ***Erosions to Current-Year Savings.*** The proposed MOU terminates the furlough program for Unit 2 employees beginning April 2011. As a result, Unit 2 employees would not be furloughed or experience furlough-related pay reductions for nine days in spring 2011. As shown in Figure 3, this decrease in furlough days—a change from current law—increases state employee compensation costs. After accounting for other provisions in the MOU, we estimate that it would increase overall state costs in 2010-11 by $6.3 million ($1.8 million General Fund).

☑ ***Savings Fall Short of 2011-12 Targets.*** Although the proposed MOU would result in savings in 2011-12, these savings are significantly less than the amounts anticipated in the budget recently approved by the Conference Committee. Specifically, the Conference Committee assumed that the new MOUs would reduce state employee compensation costs by an average of 10 percent. This proposed MOU reduces state costs by about 3.5 percent.

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LAO Comments—Days Off

- ☑ ***All Leave Days Are Not the Same.*** Under the MOU, employees are granted a wide variety of leave days, including days off for vacation, state holidays, the PLP, and professional development days. Some of these leave days have "cash value" (vacation days and personal leave), meaning that the state compensates an employee for any unused time when he or she terminates employment. All other leave days do not have cash value and the employee is not compensated for unused time when he or she terminates employment.

- ☑ ***DPA: Days Without Cash Value Have No Cost.*** In the view of the DPA, the state does not incur a cost when it grants a leave day without cash value. Thus, DPA's fiscal estimate shows increased state costs for the provisions of the MOU that provide 1.73 additional hours per month of personal leave (with cash value), but no costs related to broadening the definition of professional development or increasing to five the number of leave days an employee may take off for this purpose (no cash value).

- ☑ ***LAO: All Days Off Can Create an Out-Year State Fiscal Liability.*** Given the different financial treatment of leave days, employees typically use days without cash value first, and reserve or "bank" days with cash value. Thus, any action by the state to add a leave day that an employee does not use before he or she terminates employment can pose an out-year state fiscal liability. While we have not shown a cost associated with these days (because of difficulties in determining when state employees would terminate employment and what their salaries would be at that time), the large number of leave days provided by this MOU likely would result in an out-year state fiscal liability.

LAO Comments—Days Off *(Continued)*

☑ ***MOU Provides More Days Off Than Most Employees Could Use.*** As Figure 4 shows, a new employee hired at the beginning of the term of the MOU would have nearly nine weeks of days off during his or her first 12 months. More senior employees would have more leave time (because they are eligible for longer vacations). The MOU continues to provide a large (but reduced) number of days off throughout the remainder of its term. In our view, it is unlikely that Unit 2 employees would be able to take off all of this time. As a result, employees would likely reserve some of these days off for use in future years and cash the remainder out when they terminate state employment.

Figure 4

Number of Days Off for a New Unit 2 Employee Under the Proposed MOU From April 2011 Through April 2012

Type of Day Off	First 12 Months
Vacation leave	10.5
Professional development	7.0[a]
Holidays	11.0
Personal holiday	1.0
Personal leave	2.6
Personal leave program[b]	12.0
Personal holiday	1.0
Total Days Off Available	**44.1**
Total Weeks Off	**8.8**

[a] An employee would receive five professional development days in 2010-11. On July 1, 2011, two of these days expire, but the employee would get two new days for 2011-12, resulting in a one-time doubling up of professional development days.

[b] Excludes State Compensation Insurance Fund employees.

MOU = memorandum of understanding.

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LAO Bottom Line

☑ ***Professional Development Days or Personal Holidays?*** Referring to the five annual non-accumulating leave days as "professional development days" is confusing and misleading. In prior Unit 2 MOUs, this term was used to refer to verifiable professional training, important for the state's legal attorneys, administrative law judges, and hearing staff to maintain and enhance their knowledge and skills. Under the new MOU, however, this term is used to describe a leave program that allows employees to take five days off to participate in personal or professional activities without verification. We recommend that in the future, the administration refer to these leave days as "personal holidays" to reduce confusion and to promote transparency.

☑ ***MOU Complicates State's Effort to Achieve Expected Savings for 2011-12.*** The 2011-12 budget, as approved by the Conference Committee, assumes that the state will save 10 percent in employee compensation costs for the six bargaining units with expired contracts. This proposed MOU would result in significantly lower savings (around 3.5 percent), falling short of the assumed savings target by $30 million ($6 million General Fund). If the proposed Unit 2 MOU were ratified, achieving the savings assumed in the budget would require the remaining five bargaining units to agree to contracts with savings averaging 10.6 percent. In our view, achieving this level of savings through collective bargaining will be difficult. We note, for example, that most of the contracts ratified in 2010 resulted in 8 percent employee compensation savings.