

# Mandatory mediation changes rules for negotiating farm labor contracts

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*In September 2002, Governor Gray Davis signed the first major amendments to the 1975 Agricultural Labor Relations Act in 27 years. Under these amendments, if a farm employer and certified union are unable to negotiate a first collective bargaining agreement within 6 months, a mediator can impose an agreement. The number of contracts in California agriculture has declined precipitously since the mid-1980s, and we are skeptical that mandatory mediation will sharply increase the number of workers employed on farms under collective bargaining agreements.*

**I**n fall 2002, Governor Gray Davis signed the first major amendments to the 1975 Agricultural Labor Relations Act (ALRA) in 27 years. Under these amendments (SB 1156 and AB 2596), if a farm employer and certified union are unable to negotiate a first collective bargaining agreement within 6 months, a mediator can impose one. These new “mandatory mediation” procedures will apply to farm employers with 25 or more workers, and are limited to a maximum of 75 labor disputes between 2003 and 2007.

The purpose of the 1975 ALRA was to end a decade of strife and “ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations” (ALRA section 1140). The ALRA includes three major elements: organizing and bargaining rights for farmworkers; unfair labor practices when employers and unions interfere with these worker rights; and a state agency, the Agricultural Labor Relations Board (ALRB), to



**In August 2002, labor unions rallied for the first reforms to the state's Agricultural Labor Relations Act since 1975. To encourage Governor Davis to sign the law, the United Farmworkers retraced the route of a historic 1966 march led by Cesar Chavez along Highway 99 from Merced to Sacramento.**

supervise elections for farmworkers to decide if they want to be represented by unions and to remedy unfair labor practices.

California in the mid-1970s had about 35,000 farm employers, and it initially appeared that many of the 600,000 to 800,000 workers employed on farms sometime during a typical year wanted to be represented by unions. Between 1975 and 1984 there were about 950 elections on California farms, 775 of which resulted in the ALRB's certification of a union as the bargaining representative for workers on a farm or for no union representative. During this first decade, unions were certified 88% of the time and no union was certified in 12% of the cases. Since then there have been 225 elections, and unions were certified as winners on less than 50% of farms where elections were held (fig. 1).

There are many reasons for the declining ability of farmworker unions to request and win elections and be certified as the bargaining representatives for farmworkers, including the inability of farmworker unions to negotiate first agreements with farms where they were certified to represent workers (Martin 2001). The number of collective bargaining agreements in California agriculture

has never exceeded 300, and in 2002 there were about 225, with 80% of the current contracts covering three to four workers each under Christian Labor Association contracts with dairy and poultry farms. The United Farmworkers (UFW), Teamsters and other unions representing field workers currently have fewer than 30 contracts covering less than 25,000 workers.

## Unions push for change

Unions such as the UFW charge that farm employers have avoided reaching first or subsequent contracts by refusing to bargain toward agreement. The UFW led the effort to amend the ALRA for intervention that would ensure contracts on farms where workers have voted for union representation. The union's original goal was binding arbitration, sometimes called interest arbitration to distinguish it from grievance arbitration (the settlement of issues that arise under a contract).

Under binding or interest arbitration, a union and employer that cannot agree on a contract typically go through a three-step procedure. First is mediation, when a neutral third party listens to each party separately and makes suggestions to narrow differences and allow them to reach a voluntary settle-

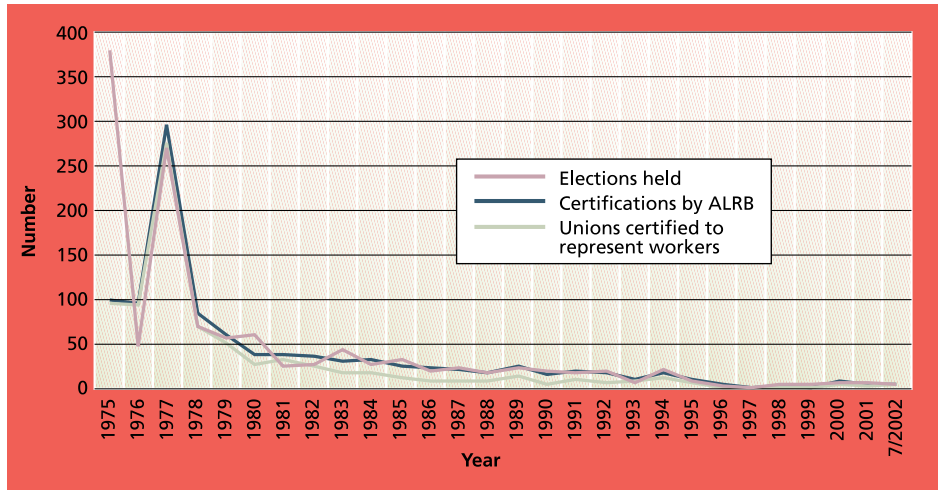


Fig. 1. Union elections and certifications by ALRB, 1975–2002. Data is for calendar years, except in 2002. Source: ALRB, <http://www.alrb.ca.gov>.

ment. Second is fact finding, when a neutral party listens to both sides and proposes a nonbinding settlement. Third is binding arbitration, when a neutral party proposes either any settlement deemed best or when the arbitrator is required to recommend one of the party’s final offers at the bargaining table. Binding arbitration is normally restricted to public employees such as police and firefighters who cannot strike lawfully.

In justifying the need for binding arbitration in California agriculture, the UFW’s first bill, SB 1736, stated that:

“Extensive use of undocumented workers and farm labor contractors results in workplace injustice, and has greatly weakened the bargaining power of California farmworkers since the passage of the Agricultural Labor Relations Act . . . Binding arbitration will promote comprehensive collective bargaining agreements, and further peace and stability in labor relations in California’s most vital industry.”

The California Senate approved SB 1736 on a 21-13 vote in May 2002, and the Assembly approved it on a 49-22 vote in August 2002. To encourage Governor Davis to sign SB 1736, the UFW in August 2002 retraced the route of UFW marches in 1966 and 1994 in a “March for the Governor’s Signature” from Merced to Sacramen-

to along Highway 99.

Farmers bitterly opposed binding arbitration because they felt it could lead to contracts “imposed” on them. With Governor Davis expected to veto SB 1736 because of grower opposition, the UFW persuaded the Legislature to approve a last-minute compromise called mandatory mediation. Under the bills signed into law, which go into effect Jan. 1, 2003, farmworker unions and farm employers bargain for 180 days for a first contract. If they cannot reach agreement, a mediator tries to help the parties resolve their differences for another 30 days. If mediation fails, the mediator would, within 21 days, recommend the terms of a collective bargaining agreement to the ALRB and provide reasons for wage recommendations that are based on the record.

The ALRB then reviews the mediator’s report (the proposed collective bargaining agreement), and either issues a final order that makes the contract effective, or begins a review of one or more portions of the contract while allowing other portions to go into effect. Unions or employers objecting to the mediator’s report must specify the “particular provisions” and the “specific grounds” for having the ALRB review them. The ALRB may review objections to the mediator’s report only if the provisions in question do not relate to wages and working conditions, or if they are “based on clearly erroneous findings of material fact.” Either the union or the

employer may ask a court of appeal to review the proposed contract within 30 days, and ask a court to enforce the collective bargaining agreement within 60 days.

How many farm employers could be affected by mandatory mediation? Mandatory mediation is an experiment. A party — unions or employers — may request mediation for up to 75 cases between 2003 and 2007; there is some dispute as to exactly who a “party” is. Furthermore, mediation may be requested only on farms with 25 or more agricultural employees during any calendar week in the previous year. Unemployment insurance data suggests that 15% to 20% of farm employers and 75% to 85% of farmworkers could be affected by mandatory mediation. The unemployment insurance data is reported for employers with 20 or more workers, of which there were 3,770 during the third quarter of 2001 — normally the period of peak farm employment. These 20-or-more agricultural employers comprised 17% of all agricultural employers, but they accounted for 83% of workers employed in the third quarter (table 1).

However, smaller farm employers and more workers could also be covered by mandatory mediation. If a farm hires five workers directly and has a farm labor contractor bring a crew of 20 to a farm for 1 week, it becomes eligible for mandatory mediation, since farm labor contractors cannot be employers under the ALRA.





California has an average of 450,000 agricultural employees working for 23,000 farm employers. The percentage of farmworkers represented by unions has declined significantly since the 1970s.

### ALRB and make whole: 1975–2002

Farmworkers were excluded from the National Labor Relations Act of 1935, which granted union organizing and collective bargaining rights to most private-sector nonfarmworkers. The ALRA, enacted 40 years later to cover excluded farmworkers in California, included several features to accommodate unique agricultural circumstances, including quick elections, a “make-whole” remedy for bad-faith bargaining and more extensive rights for unions vis-à-vis their members.

The make-whole provision was intended to encourage employers to bargain in good faith by transferring any monetary savings to affected workers, thereby depriving the employer of economic benefits derived from violating their obligation to bargain with the certified union and speeding up bargaining for contracts.

Rose Bird, Secretary of Food and Agriculture in 1975 and a major author of the ALRA, testified that, in light of the discussion in Congress to give the National Labor Relations Board authority to issue make-whole remedies, “since we were starting anew here in California, that we would take that progressive

TABLE 1. California agricultural employers and employees by size of firm (NAICS\*), 3rd quarter, 2001

	Total	Less than 20	20–99	100–999	1,000+	20 or more (%)
<b>Employers†</b>						
California (all)	1,075,523	941,566	110,687	22,359	911	133,957 (12)
Agriculture	22,626	18,856	2,875	870	25	3,770 (17)
Crop production‡	14,221	12,090	1,744	265	10	2,131 (15)
Ag support activities§	3,934	2,675	769	475	15	1,259 (32)
<b>Employees</b>						
California (all)	14,997,165	3,284,794	4,587,853	4,958,800	2,165,718	11,712,371 (78)
Agriculture	451,039	78,755	119,385	212,091	40,808	372,284 (83)
Crop production	223,306	48,367	70,909	40,251	18,714	129,874 (58)
Ag support activities	193,173	11,947	35,777	123,355	22,094	181,226 (94)

Source: EDD 2002.

\* NAICS = North American Industrial Classification System.

† Employers are reporting units.

‡ Crop production and agricultural support activities are subsets of agriculture; livestock is not included.

§ Includes firms such as farm labor contractors, which gather workers and bring them to farms, as well as other support services.

step” and include a make-whole remedy in the ALRA. The ALRB has authority to order employers who fail to bargain in good faith to “take affirmative action including . . . making employees whole, when the Board deems such relief appropriate, for the loss of pay resulting from the employer’s refusal to bargain” (ALRA Section 1160.3).

According to its proponents, without a make-whole remedy employers could violate their obligation to bargain in good faith, and the only remedy would be an ALRB order for the employer to do so. Make whole transfers any economic savings from the employer to workers who lost wages and benefits as a result of the employer’s violation of the ALRA. But there is still the risk that during the time it takes for the ALRB to order this remedy, the union would lose support due to high turnover and wind up with reduced economic leverage (Martin and Egan 1989).

The make-whole remedy did not work as expected. The UFW asserted that the union won elections and was certified to represent workers on 428 farms. However, it negotiated contracts at only 185 farms, a 43% certification-to-contract rate between 1975 and 2001. The ALRB agreed with the UFW in 2002 that procedures for determining whether make whole is owed, the amount and subsequent distribution of funds to workers usually took years, so that “a remedy designed to act as a goad to bargaining often produces years of litigation” (ALRB 2002).

### Slow pace to agreement

Negotiating collective bargaining agreements in California agriculture has often been slow, for several reasons. In an industry with little collective bargaining experience, there are often wide gaps between union demands and employer offers. For example, in 1979 the UFW demanded increases in wages and benefits from vegetable growers that, according to the growers, would have raised labor costs by more than 100% over 3 years. The employers countered with offers of wage increases of 20% to 25%, declared that bargaining was at an impasse, and made unilateral wage changes. The UFW charged these vegetable producers with bad-faith bargaining, and the ALRB agreed in *Admiral Packing 7 ALRB 43* (1981). However, the Court of Appeals disagreed, concluding that the employers were engaged in lawful hard bargaining, citing the gap between the UFW’s demands and the growers’ offer to explain why no agreement was likely to be reached (*Maggio et al. v. ALRB*, 154 Cal. App. 3d 40 [1984]).

Even when it is clear that the employer has engaged in bad-faith bargaining, the ALRB must decide what wages and benefits would have been agreed to if the employer had bargained lawfully; calculate the difference between “good faith” and actual wages and benefits; collect funds from the employer; and then distribute them to workers, a process that can take several years.



**Under the ALRA's make-whole remedy, the Agricultural Labor Relations Board can order employers to pay wages and benefits to workers if they fail to bargain in good faith with unions. While the ALRB has ordered \$34 million in make-whole payments for bad-faith bargaining, only \$4.5 million has been distributed to workers.**

Furthermore, these calculations are complicated by several factors. First, there can be delays in determining how much an employer owes because of a 1987 Court of Appeals ruling. After the ALRB determines there was bad-faith bargaining, the ruling allows employers to present evidence that even with good-faith bargaining there would not have been an agreement negotiated with higher wages, and thus no make whole is owed (*Dal Porto and Sons v. ALRB*, 191 Cal. App. 3d 1195 [1987]).

Second, no reliable data is available on the wages and benefits of union and nonunion workers in California agriculture. The ALRB often uses a "comparable contract" to determine the amount of make-whole remedies. But the employer often counters that the contract is not comparable because it covers a different commodity mix, is in a different region or covers a different size farm, which produces litigation and delays.

Finally, after the employer exhausts appeals to the courts, the ALRB collects make-whole monies and distributes them to workers. However, in a farm labor force with 10% annual turnover,

and that is more than 50% not authorized to work in the United States, it is easy to see why make whole can seem like a hollow remedy. Since 1975, the ALRB has ordered employers to pay \$34 million in make whole, but workers received only \$4.5 million or 13% of the amount found owing (ALRB 2002). Many of the growers ordered to pay make whole went out of business. Others settled for a fraction of the original remedy, which was accepted because the ALRB knew that more litigation would make it even harder to locate workers owed money. For example, Abatti Farms, whose \$1.6 million make-whole payment was 35% of the entire make-whole monies paid in the past 27 years, was originally assessed \$19 million (ALRB 2002).

### **Arbitration and mediation**

Despite a steady erosion of contracts and membership, the UFW has been reluctant to lobby for amendments to the ALRA, fearing that this could open the door to pro-grower amendments as well. However, the UFW pushed for binding arbitration in 2002, asserting

that it "would replace [make whole] litigation with mediation and arbitration" and contracts. The Western Growers Association, representing fruit and vegetable growers, countered that binding arbitration was "anti-business. We think it could be unconstitutional and we think it's absolutely unnecessary and it will kill California's number one industry" (Rural Migration News, October 2002).

There is little difference to unions and employers between binding arbitration and mandatory mediation: both procedures result in a third party imposing a collective bargaining agreement if there is no agreement at the bargaining table. But will the new mandatory mediation law improve the certification-to-contract ratio in California agriculture? We see three issues that could make mediation another promise unfulfilled in the 3-decade effort to resolve agricultural labor issues via collective bargaining.

**Unrealistic demands.** With the prospect of mandatory mediation, bargaining may become more unrealistic as unions push for very high wages in negotiations and during mediation, while employers counter that meeting union demands would put them out of business. Instead of negotiating behind closed doors to narrow differences and reach agreement, hard positions in private negotiations could become public debates in mediation hearings marked by rallies and demonstrations.

**Lack of data.** The mediator could be handicapped by the same lack of data that has impeded quick resolution of make-whole compliance hearings. What data will the mediator use to "establish the terms of a collective bargaining agreement?" Should the mediator rely on the available data for farmworker wages in the region, or on comparable contracts? What weight should be given to assertions that an employer cannot pay more than is being offered and stay in business? The mandatory mediation law includes no



guidance for the mediator, nor does it provide any direction to the ALRB to develop regulations to implement these changes. Mediators may also have credibility problems, since they will first try to mediate farm labor disputes, and then recommend the terms of a collective bargaining agreement.

**Contentious elections.** There could be more lags between elections and certifications, as election campaigns become more contentious because the parties know that, even if they do not agree on a contract, one can be imposed on them. Employers seeking to delay bargaining would still be allowed to file numerous objections to the election — including time-consuming technical refusals to bargain — that the ALRB and courts must resolve before certifying the union and starting the mandatory mediation clock.

### Future of bargaining

Since the ALRA was passed in 1975, collective bargaining has not become widespread in California agriculture. There are currently fewer than 250 contracts between unions and the state's approximately 25,000 farm employers (less than 1%). On about 250 farms, workers voted for union representation but have not obtained a contract (another 1%). The goal of mandatory mediation is to secure contracts for certified unions within a relatively short period of time.

The purpose of collective bargaining is to allow the parties closest to the workplace — employers and unions — to establish fair wages and benefits in private negotiations, with both sides using the economic leverage under government-set rules. A cardinal principle of collective bargaining has been that the government does not determine the content of the agreements negotiated, only the procedures under which they are negotiated — like referees who ensure that the game is played by the rules but do not follow the score. The make-whole remedy for bad-faith bargaining



The new mandatory mediation law changes the rules for collective bargaining, allowing a mediator to impose an agreement if collective bargaining does not lead to a contract. Unions hope the law will usher in a new era for farm labor.

required the ALRB to impinge on this hands-off-the-content-of-bargaining rule, and mandatory mediation represents another effort, like make whole, to experiment with a unique remedy to facilitate collective bargaining in agriculture.

The golden age for farmworkers and farmworker unions was 1965 to 1980, when there were no *braceros* and few unauthorized foreign workers in the fields. Cesar Chavez had won widespread support for grape and other boycotts, and competition between the UFW and Teamsters unions convinced many growers that their farmworkers would be represented by unions. The enactment of the ALRA in 1975 was expected to usher in a new era for farm labor in which wages were determined largely by collective bargaining. The reasons cited for the decline of collective bargaining in the 1990s include the rising number of unauthorized workers, many of whom found jobs with the help of labor contractors, and changes within the UFW and at the ALRB that impeded organizing and bargaining. A quarter-century after the ALRA was enacted

with high hopes, unions now hope that mandatory mediation will launch the new era for farm labor.

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