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SB-846 Employment. (2017-2018)

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Date Published: 09/17/2018 09:00 PM

Senate Bill No. 846

CHAPTER 405

An act to amend Sections 1159, 19230, 19232, 19236, 19237, and 31552.5 of the Government Code, to amend Section 101853.1 of the Health and Safety Code, and to add Section 10298.1 to the Public Contract Code, relating to employment, and making an appropriation therefor, to take effect immediately, bill related to the budget.

[Approved by Governor September 14, 2018. Filed with Secretary of State September 14, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 846, Committee on Budget and Fiscal Review. Employment.

(1) Existing law regulates the labor relations of the state, the courts, and specified local public entities and their employees and grants specified public employees of these entities the right to form, join, and participate in the activities of employee organizations of their choosing. The Ralph C. Dills Act defines "fair share fee" as the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of, and financially support, the recognized employee organization, and prescribes conditions for its use. The Meyers-Milias-Brown Act, if an agency shop agreement is in place, provides for the payment of an agency fee, which requires an employee either to join the recognized employee organization or pay a fee, as specified. A recent Supreme Court opinion held that fair share and agency fees violate the free speech rights of employees who are not employee organization members.

This bill would prohibit the Controller, a public employer, an employee organization, or any of their employees or agents, from being liable under state law for, and would grant to them a complete defense to, any claims or actions under California law for requiring, deducting, receiving, or retaining agency or fair share fees from public employees, and would deny standing to current or former public employees to pursue these claims or actions, if the fees were permitted at the time and paid prior to June 27, 2018. The bill would specify that its provisions apply to pending claims. The bill would define "public employer" broadly for these purposes, and would include in the definition of an employee organization any labor organization with which the employee organization is affiliated. The bill would make legislative findings and declarations.

(2) Existing law requires that each state agency establish an effective affirmative action program to ensure equal access to positions in state service for individuals with a disability who are capable of remunerative employment, as provided, and requires the Department of Human Resources to, among other things, outline specific actions and establish guidelines for state agencies and departments to set goals and timetables to improve the representation of individuals with a disability in the state workforce. Existing law further requires the department, on or before November 15 of each year, to report to the Governor and the Legislature on the current activity, future plans, and past accomplishments of the overall employment program for individuals with a disability in state government, including an evaluation of the achievement of annual employment objectives. Existing law makes various legislative findings regarding these provisions.

This bill would additionally require that the report include an evaluation of reasonable accommodation policies and practices. The bill would also make various technical changes and revise the above-described legislative findings.

(3) Existing law, the Kern County Hospital Authority Act, authorizes the board of supervisors of the County of Kern to, among other things, establish the Kern County Hospital Authority to manage, administer, and control the Kern Medical Center. Existing law requires the board of supervisors to adopt and implement a personnel transition plan for the transfer of specified personnel from the control of the medical center by the county to the Kern County Hospital Authority. Existing law provides that certain employees of the authority hired before June 27, 2018, may participate, subject to the personnel transition plan and the applicable memorandum of understanding, in the Kern County Employees' Retirement Association. Existing law requires employees of the authority hired on or after June 27, 2018, to participate in the Kern County Employees' Retirement Association, unless modified in the applicable memorandum of understanding.

This bill would provide that an employee hired by the authority on or after the operative date of this act may participate in the Kern County Employees' Retirement Association, as provided, subject to the sole discretion of the retirement board of the association to maintain their tax-qualified or governmental plan status under federal law.

(4) Existing law creates in state government, in the Government Operations Agency, the Department of General Services to provide centralized services, including, but not limited to, planning, acquisition, construction, and maintenance of state buildings and property; purchasing; printing; architectural services; administrative hearings; government claims; and accounting services. Existing law declares it is the policy of this state that a department, agency, or commission shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee who is an individual with a disability, unless the hiring authority can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

This bill would require the Department of General Services to periodically review policies and procedures in the State Contracting Manual and training provided to state personnel related to reasonable accommodation purchases for state employees. The bill would require the Department of General Services, in consultation with the Department of Human Resources and the Department of Rehabilitation, to post on its Internet Web site, on January 1, 2019, and biennially thereafter, a report on the purchases of services, goods, information technology, and telecommunications related to reasonable accommodations for state employees.

(5) This bill would appropriate \$1,371,000 from grant funds received from the federal Department of Labor for expenditure in the 2018–19 fiscal year to the Department of Industrial Relations for purposes of expanding or supporting existing apprenticeship programs and activities.

(6) This bill would declare that it is to take effect immediately as a bill providing for appropriations related to the Budget Bill.

Vote: majority Appropriation: yes Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1159 is added to the Government Code, to read:

1159. (a) The Controller, a public employer, an employee organization, or any of their employees or agents, shall not be liable for, and shall have a complete defense to, any claims or actions under the law of this state for requiring, deducting, receiving, or retaining agency or fair share fees from public employees, and current or former public employees shall not have standing to pursue these claims or actions, if the fees were permitted at the time under the laws of this state then in force and paid, through payroll deduction or otherwise, prior to June 27, 2018.

(b) This section shall apply to claims and actions pending on its effective date, as well as to claims and actions filed on or after that date.

(c) The enactment of this section shall not be interpreted to create the inference that any relief made unavailable by this section would otherwise be available.

(d) For purposes of this section:

(1) "Employee organization" means any organization that functioned as an exclusive collective bargaining representative for public employees under any statute, ordinance, regulation, or other state or local law, and any labor organization with which it was affiliated.

(2) "Public employer" means any public employer, including, but not limited to, the state, the Regents of the University of California, the Trustees of the California State University, the California State University, the Judicial Council, a trial court, a city, a county, a city and county, a school district, a community college district, a transit district, any public authority, public agency,

or any other political subdivision or public corporation, or any other entity considered a public employer for purposes of the labor relations statutes of California.

(e) The Legislature finds and declares:

(1) Application of this section to pending claims and actions clarifies existing state law rather than changes it. Public employees who paid agency or fair share fees as a condition of public employment in accordance with state law and Supreme Court precedent prior to June 27, 2018, had no legitimate expectation of receiving that money under any available cause of action. Public employers and employee organizations who relied on, and abided by, state law and Supreme Court precedent in deducting and accepting those fees were not liable to refund them. Agency or fair share fees paid for collective bargaining representation that employee organizations were obligated by state law to provide to public employees. Application of this section to pending claims will preserve, rather than interfere with, important reliance interests.

(2) This section is necessary to provide certainty to public employers and employee organizations that relied on state law, and to avoid disruption of public employee labor relations, after the Supreme Court's decision in *Janus v. American Federation of State, County, and Mun. Employees*, Council 31 (2018) 138 S.Ct. 2448.

SEC. 2. Section 19230 of the Government Code is amended to read:

19230. The Legislature hereby declares that:

(a) It is the policy of this state to encourage and enable individuals with a disability to participate fully in the social and economic life of the state and to engage in remunerative employment.

(b) It is the policy of this state that qualified individuals with a disability shall be employed in the state service, the service of the political subdivisions of the state, in public schools, and in all other employment supported in whole or in part by public funds on the same terms and conditions as the nondisabled, consistent with applicable state or federal law.

(c) It is the policy of this state that a department, agency, or commission shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee who is an individual with a disability, unless the hiring authority can demonstrate that the accommodation would impose an undue hardship on the operation of its program. A department shall not deny any employment opportunity to a qualified applicant or employee who is an individual with a disability if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the applicant or employee.

SEC. 3. Section 19232 of the Government Code is amended to read:

19232. Each state agency shall be responsible for establishing an effective affirmative action program to ensure individuals with a disability, who are capable of remunerative employment, access to positions in state service on an equal and competitive basis with the general population.

Each state agency shall develop and implement an affirmative action employment plan for individuals with a disability, which shall include goals and timetables. These goals and timetables shall be set annually for disabilities identified pursuant to guidelines established by the department, and shall be submitted to the department no later than June 1 of each year beginning in 1978, for review and approval or modification. Goals and timetables shall be made available to the public upon request.

SEC. 4. Section 19236 of the Government Code is amended to read:

19236. The department shall provide technical assistance, statewide advocacy, coordination, and monitoring of plans to overcome any underrepresentation determined pursuant to Section 19234.

SEC. 5. Section 19237 of the Government Code is amended to read:

19237. On or before November 15 of each year, the department shall report to the Governor and the Legislature on the current activity, future plans, and past accomplishments of the overall employment program for individuals with a disability in state government, including an evaluation of the achievement of annual employment objectives and reasonable accommodation policies and practices.

SEC. 6. Section 31552.5 of the Government Code is amended to read:

31552.5. (a) Except as provided in subdivision (b), employees and officers of the Kern County Hospital Authority, a public agency that is a local unit of government established pursuant to Chapter 5.5 (commencing with Section 101852) of Part 4 of Division 101

of the Health and Safety Code, shall not automatically become members of the Kern County Employees' Retirement Association, but shall have their eligibility for membership in the Kern County Employees' Retirement Association be established pursuant to the provisions of that chapter.

(b) An employee who is hired by the authority on or after the operative date of the act adding this subdivision shall be a member of the Kern County Employees' Retirement Association as provided in subdivisions (g) and (h) of Section 101853.1 of the Health and Safety Code.

SEC. 7. Section 101853.1 of the Health and Safety Code is amended to read:

101853.1. (a) In exercising its powers to employ personnel, the authority shall implement, and the board of supervisors shall adopt, a personnel transition plan. The personnel transition plan shall require all of the following:

(1) Ongoing communication to employees and recognized employee organizations regarding the impact of the transition on existing medical center, county, and other health care facility employees and employee classifications.

(2) Meeting and conferring with representatives of affected bargaining unit employees on both of the following issues:

(A) A timeframe for which the transfer of personnel shall occur.

(B) Specified periods of time during which county or medical center employees affected by the establishment of the authority may elect to be considered for appointment and exercise reinstatement rights, if applicable, to funded, equivalent, vacant county positions for which they are qualified and eligible. An employee who first elects to remain with the county may subsequently seek reinstatement with the authority within 30 days of the election to remain with the county and shall be subject to the requirements of this article.

(3) Acknowledgment that the authority, to the extent permitted by federal and state law, and consistent with paragraph (3) of subdivision (d), shall be bound by the terms of those memoranda of understanding executed between the county and its exclusive employee representatives that are in effect on the date of the transfer of control of the medical center to the authority. Subsequent memoranda of understanding with exclusive employee representatives shall be subject to approval only by the board of governors.

(4) Communication to the Board of Retirement of the Kern County Employees' Retirement Association or other retirement plan of any personnel transition plan, memoranda of understanding, or other arrangements that are related to the participation of the authority's employees or the addition of new employees in the retirement plan.

(b) Implementation of this chapter shall not be a cause for the modification of the medical center or county employment benefits. Employees of the medical center or county on the date of transfer, who become authority employees, shall retain their existing or equivalent classifications and job descriptions upon transfer to the authority, comparable pension benefits (if permissible pursuant to relevant plan terms), and their existing salaries and other benefits that include, but are not limited to, accrued and unused vacation, sick leave, personal leave, health care, retiree health benefits, and deferred compensation plans. The transfer of an employee from the medical center or county shall not constitute a termination of employment for purposes of Section 227.3 of the Labor Code, or employee benefit plans and arrangements maintained by the medical center or county, except as otherwise provided in the enabling ordinance or personnel transition plan, nor shall it be counted as a break in uninterrupted employment for purposes of Section 31641 of the Government Code with respect to the Kern County Employees' Retirement Association, or state service for purposes of the Public Employees' Retirement System (Part 3 (commencing with Section 20000) of Division 5 of Title 2 of the Government Code).

(c) Subject to applicable state law, the authority shall recognize the exclusive employee representatives of those authority employees who are transferred from the county or medical center to the authority pursuant to this chapter.

(d) In order to stabilize labor and employment relations and provide continuity of care and services to the people of the county, and notwithstanding any other law, the authority shall do all of the following for a period of 24 months after the effective date of the transfer of control of the medical center to the authority:

(1) Continue to recognize each exclusive employee representative of each bargaining unit.

(2) Continue to provide the same level of employee benefits to authority employees, whether the obligation to provide those benefits arises out of a memorandum of understanding, or other agreement or law.

(3) Extend and continue to be bound by any existing memoranda of understanding covering the terms and conditions of employment for employees of the authority, including the level of wages and benefits, and any county rules, ordinances, or policies specifically identified and incorporated by reference in a memorandum of understanding for 24 months or through the term of the memorandum of understanding, whichever is longer, unless modified by mutual agreement with each of the

exclusive employee representatives. The authority shall continue to provide those pension benefits specified in any memoranda of agreement as long as doing so does not conflict with any Kern County Employees' Retirement Association plan provisions, or federal or state law including the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code and the federal Internal Revenue Code). If a memoranda of understanding is expired on the date of the transfer of control of the medical center, then the authority shall continue to be bound by the terms and conditions of the most recent memoranda of understanding, unless modified by a mutual agreement with each of the exclusive employee representatives, and the benefits and wages of transferred employees shall be retained consistent with subdivision (b).

(4) Meet and confer with the exclusive employee representatives to develop processes and procedures to address employee disciplinary action taken against permanent employees. If the authority terminates, suspends, demotes, or reduces the pay of a permanent employee for disciplinary reasons, those actions shall only be for cause consistent with state law, and an employee shall be afforded applicable due process protections granted to public employees under state law. Permanent employees laid off by the authority within six months of the date of the transfer of control of the medical center shall remain on the county reemployment list for two years. Inclusion on the county reemployment list is not a guarantee of reemployment. For the purposes of this paragraph, the term "permanent employees" excludes probationary employees, temporary employees, seasonal employees, provisional employees, extra help employees, and per diem employees.

(5) To the extent layoffs occur, and provided that all other previously agreed upon factors are equal, ensure that seniority shall prevail. The authority shall meet and confer with the exclusive employee representatives to address layoff procedures and the manner in which, and the extent to which, seniority shall be measured for employees who transfer from the medical center or county.

(e) Permanent employees of the medical center or county on the effective date of the transfer of control of the medical center to the authority, shall be deemed qualified for employment in equivalent positions at the authority, and no other qualifications shall be required except as otherwise required by state or federal law. Probationary employees on the effective date of the transfer, as set forth in this paragraph, shall retain their probationary status and rights and shall not be required to serve a new probationary period or extend their probationary period by reason of the transfer. To the extent possible, employees who transfer to equivalent positions at the authority shall retain their existing classifications and job descriptions, but if there is a dispute over this issue, the authority agrees to meet and confer with the exclusive employee representatives of the transferred employees.

(f) Employees who transfer from the medical center or county to the authority shall retain the seniority they earned at the medical center or county and any benefits or privileges based on the seniority.

(g) Notwithstanding any other law, except as provided in subdivision (h), employees of the authority may participate in the Kern County Employees' Retirement Association, operated pursuant to the County Employees Retirement Law of 1937 (Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3 of the Government Code) as set forth below. However, the authority and employees of the authority, or certain designated parts thereof, shall not participate in the Kern County Employees' Retirement Association if the board of retirement, in its sole discretion, determines that their participation could jeopardize the Kern County Employees' Retirement Association's tax-qualified or governmental plan status under federal law, or if a contract or related contract amendment proposed by the authority contains any benefit provisions that are not specifically authorized by Chapters 3 (commencing with Section 31450) and 3.9 (commencing with Section 31899) of Part 3 of Division 4 of Title 3 of the Government Code or Article 4 (commencing with Section 7522) of Chapter 21 of Division 7 of Title 1 of the Government Code, and that the board determines would adversely affect the administration of the system. There shall not be any individual employee elections regarding participation in the Kern County Employees' Retirement Association or other retirement plans except to the extent such retirement plans provide for elective employee salary deferral contributions in accordance with federal Internal Revenue Code rules.

(1) Employees transferred from the county or medical center to the authority who are subject to a memorandum of understanding between the authority and an exclusive employee representative, as described in paragraphs (2) and (3) of subdivision (d), and who were members of the Kern County Employees' Retirement Association at the time of their transfer of employment, shall continue to be a member of the Kern County Employees' Retirement Association, retaining service credit earned to the date of transfer, to the extent provided for in the applicable memorandum of understanding.

(2) Employees transferred from the county or medical center to the authority who are subject to a memorandum of understanding between the authority and an exclusive employee representative, as described in paragraphs (2) and (3) of subdivision (d), and who were not members of the Kern County Employees' Retirement Association at the time of their transfer of employment, shall subsequently become a member of the Kern County Employees' Retirement Association only to the extent provided for in the applicable memorandum of understanding.

(3) Employees transferred from the county or medical center to the authority who are not subject to a memorandum of understanding between the authority and an exclusive employee representative, as described in paragraphs (2) and (3) of

subdivision (d), and who were members of the Kern County Employees' Retirement Association at the time of their transfer of employment, shall continue to be a member of the Kern County Employees' Retirement Association, retaining service credit earned to the date of transfer, as provided in the enabling ordinance or the personnel transition plan.

(4) Employees transferred from the county or medical center to the authority who are not subject to a memorandum of understanding between the authority and an exclusive employee representative, as described in paragraphs (2) and (3) of subdivision (d), and who were not members of the Kern County Employees' Retirement Association at the time of their transfer of employment, shall subsequently become a member of the Kern County Employees' Retirement Association only to the extent provided in the enabling ordinance or the personnel transition plan.

(5) Employees hired by the authority on or after the effective date of the transfer of control of the medical center shall become a member of the Kern County Employees' Retirement Association only to the extent provided in the enabling ordinance or personnel transition plan described in subdivision (a), or, if subject to a memorandum of understanding between the authority and an exclusive employee representative as described in paragraphs (2) and (3) of subdivision (d), to the extent provided for in the applicable memorandum of understanding.

(6) (A) Notwithstanding any other law, for purposes of California Public Employees' Pension Reform Act of 2013 (Article 4 (commencing with Section 7522) of Chapter 21 of Division 7 of Title 1 of the Government Code), an individual who was employed by the county or the medical center when it was a constituent department of the county, and is a member of the Kern County Employees' Retirement Association or the Public Employees' Retirement System, as set forth in Part 3 (commencing with Section 20000) of Division 5 of Title 2 of the Government Code or a member prior to January 1, 2013, and who transfers, directly or after a break in service of less than six months, to the authority, in which the individual continues to be a member of either the Kern County Employees' Retirement Association or the Public Employees' Retirement System, as applicable, shall not be deemed to be a new employee or a new member within the meaning of Section 7522.04 of the Government Code, and shall continue to be subject, immediately after the transfer, to the same defined benefit formula, as defined in Section 7522.04 of the Government Code, and plan of replacement benefits offered by the county pursuant to Section 31899.4 of the Government Code and the Kern County Replacement Benefits Plan for retirement benefits limited by Section 415 of Title 26 of the United States Code.

(B) For purposes of subdivision (c) of Section 7522.43 of the Government Code, the authority shall be treated as a public employer that offered a plan of replacement benefits prior to January 1, 2013. The county's plan of replacement benefits that was in effect prior to January 1, 2013, is deemed to also be the authority's replacement plan for the sole purpose of allowing the authority to continue to offer the plan of replacement benefits, immediately after the transfer, for Kern County Employees' Retirement Association members who meet both of the following requirements, and the qualifying survivors or beneficiaries of those members:

(i) The employee was employed as of January 1, 2013, by the county or the medical center when it was a constituent department of the county.

(ii) The employee is part of a member group to which the county offered a plan of replacement benefits prior to January 1, 2013.

(7) (A) Notwithstanding any other law, legacy employees shall be deemed to be county employees for purposes of participation in a benefit plan administered by the Kern County Employees' Retirement Association, but only for that purpose, and shall not be employees of the county for any other purpose. Upon the transfer of control of the medical center and thereafter, the county shall include legacy employees in a special county employee group for which the county has primary financial responsibility to fund all employer contributions that, together with contributions by employees and earnings thereon, are necessary to fund all benefits for legacy employees administered by the Kern County Employees' Retirement Association, notwithstanding the fact that, following the transfer of control of the medical center, the authority shall commence making periodic employer contributions for legacy employees. In the event the authority fails to make required employer contributions for legacy employees when due and after demand from the Kern County Employees' Retirement Association, the county, after receipt of notice and demand from the Kern County Employees' Retirement Association, shall be obligated to make those contributions in place of the authority.

(B) The authority shall be primarily responsible for any employer contributions that, together with contributions by employees and earnings thereon, are necessary to fund all benefits for new employees. In the event the authority fails to make required contributions for new employees, the county shall be obligated to make the required contributions after receipt of notice and demand from the Kern County Employees' Retirement Association. The county shall maintain this obligation for new employees until the authority demonstrates, and the Kern County Employees' Retirement Association's Board of Retirement determines, that the authority is sufficiently capable financially to fully assume the obligation to make all employer contributions for new employees, based upon the standard of financial capability approved by the Kern County Employees' Retirement Association and the county in a plan of participation, and incorporated within a written agreement

between the county and the authority. In the event the authority fails to make required contributions for any new employees due to the authority's dissolution or bankruptcy, the county shall be obligated to make the required contributions after receipt of notice and demand from the Kern County Employees' Retirement Association.

(h) Subject to the provisions of subdivision (g) granting the Board of Retirement of the Kern County Employees' Retirement Association the sole discretion to exclude the authority or employees of the authority from the Kern County Employees' Retirement Association if the board determines that their participation could jeopardize the association's tax-qualified or governmental plan status under federal law, an employee hired by the authority on or after the operative date of the act adding this subdivision shall be a member of the Kern County Employees' Retirement Association, except as modified in an applicable memorandum of understanding.

(i) This chapter does not prohibit the authority from contracting with the Public Employees' Retirement System, in accordance with the requirements of Section 20508 and any other applicable provisions of Part 3 (commencing with Section 20000) of Division 5 of Title 2 of the Government Code, for the purpose of providing employee participation in that system, or from establishing an alternative or supplemental retirement system or arrangement, including, but not limited to, deferred compensation arrangements, to the extent permitted by law and subject to any applicable agreement between the authority and the exclusive employee representatives, and as provided in the enabling ordinance or the personnel transition plan. Notwithstanding any other law, the authority and employees of the authority shall not participate in the Public Employees' Retirement System if the Board of Administration of the Public Employees' Retirement System, in its sole discretion, determines that their participation could jeopardize the Public Employees' Retirement System's tax-qualified or governmental plan status under federal law, or if a contract or related contract amendment proposed by the authority contains any benefit provisions that are not specifically authorized by Part 3 (commencing with Section 20000) of Division 5 of Title 2 of the Government Code, and that the board determines would adversely affect the administration of the system.

(j) Provided that this is not inconsistent with anything in this chapter, this chapter does not prohibit the authority from determining the number of employees, the number of full-time equivalent positions, job descriptions, the nature and extent of classified employment positions, and salaries of employees.

SEC. 8. Section 10298.1 is added to the Public Contract Code, to read:

10298.1. (a) The Department of General Services shall periodically review policies and procedures in the State Contracting Manual, and training provided to state personnel as it relates to reasonable accommodation purchases for state employees, pursuant to Section 19230 of the Government Code.

(b) On January 1, 2019, and biennially thereafter, the department, in consultation with the Department of Human Resources and the Department of Rehabilitation, shall post on its Internet Web site a report regarding the purchases of services, goods, information technology, and telecommunications related to reasonable accommodations for state employees, pursuant to Section 19230 of the Government Code. The report shall include, but not be limited to, the following:

- (1) A review of policies and procedures in the State Contracting Manual and personnel training relating to acquisitions.
- (2) Available data on the number and types of acquisitions made by state entities.
- (3) Any recommendations to improve the acquisition process.

SEC. 9. There is hereby appropriated one million three hundred seventy-one thousand dollars (\$1,371,000) from grant funds received from the federal Department of Labor for expenditure in 2018–19 fiscal year to the Department of Industrial Relations for purposes of expanding, or supporting existing, apprenticeship programs and activities.

SEC. 10. This act is a bill providing for appropriations related to the Budget Bill within the meaning of subdivision (e) of Section 12 of Article IV of the California Constitution, has been identified as related to the budget in the Budget Bill, and shall take effect immediately.