

Private Attorneys General Act

Reform Needed to Stop Abuse Forcing Employers into Costly Settlements

California labor and employment laws are known for being complex and burdensome in comparison to the rest of the nation. There is no better example of California's distinction in this area than the Private Attorneys General Act (PAGA), which allows aggrieved employees to file a representative action on behalf of themselves, all other aggrieved employees, and the State of California for alleged Labor Code violations. The California Chamber of Commerce is not aware of any other state that has such a law—and any state should take pause before seeking to mirror this unique law.

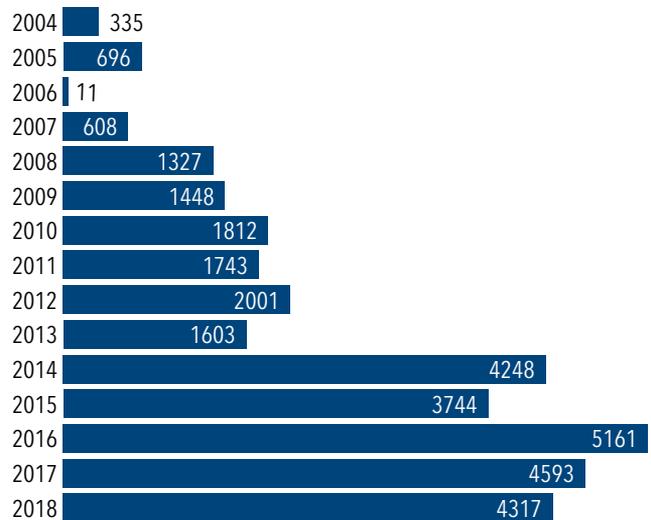
PAGA has had a significant litigation impact in California, with many questions left regarding how effective it has been in encouraging compliance with California's burdensome labor and employment protections or compensating employees for alleged harm.

BIG INCREASE IN PAGA LAWSUITS

PAGA lawsuits have increased more than 1,000% from the law's first year in effect with the Labor and Workforce Development Agency (LWDA) receiving approximately 4,000 PAGA notices each year since 2014. See [2019 Budget Change Proposal, PAGA Unit Staffing Alignment, 7350-110-BCP-2019-MR](#) (hereinafter PAGA BCP). This number is anticipated to grow to more than 7,000 by 2022.

The popularity of these lawsuits is likely due to the significant monetary awards that can be leveraged against an employer. The threatened penalties can be staggering. The default penalty for a violation of the Labor Code is \$100 per employee per pay period for an initial violation and \$200 per employee per pay period for each subsequent violation. Courts have provided little clarity as

PAGA NOTICES: 2004–2018



Source: California Business & Industrial Alliance, 2019.

to what constitutes a “subsequent violation” and whether those penalties can be compounded for multiple alleged Labor Code violations, also known as penalty “stacking.” The threatened penalties are therefore often very high, especially in relationship to the actual alleged harm. In *O'Connor v. Uber Technologies, Inc.*, a group of drivers sued Uber claiming they were misclassified as independent contractors and were owed expense reimbursements and converted tips. The LWDA submitted a statement to the court saying that if the drivers were successful on their PAGA claim, PAGA penalties would exceed *\$1 billion*, which was more than half of the highest possible verdict value of the case. See 201 F. Supp. 3d 1110, 1133 (N.D. Cal. 2016).

PAGA lawsuits also are expensive to litigate. The alleged Labor Code violations that form the basis of these lawsuits usually are wage and hour issues. Even if an employer has Employment Practices Liability Insurance (EPLI), those policies often either do not cover wage and hour lawsuits at all or cover only a limited amount of defense costs. The remaining legal fees and any award or settlement itself must come directly from the employer. The threatened penalties and inability to obtain insurance coverage

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to fight PAGA claims forces employers to either settle or risk hundreds of thousands of dollars if not millions litigating the case on the merits.

In those settlement agreements, PAGA often is leveraged for a high settlement amount, but the plaintiffs' attorneys walk away with a considerable amount of money while the employees and/or the LWDA receive hardly anything. For example, in *Price v. Uber Technologies, Inc.*, the plaintiff's attorneys were awarded \$2.325 million, while the average Uber driver was awarded \$1.08. See *California Business & Industrial Alliance v. Becerra*, Case No. 30-2018-01035180-CU-JR-CXC (Cal. Super. Ct. 2018).

Because 75% of any PAGA penalties award goes to the State of California, allocating too much to PAGA in a settlement agreement would prevent the plaintiffs' attorneys, representative plaintiffs, and employees from a higher recovery. Attorneys therefore willingly allocate very little to the PAGA claim, even if it is that claim which allows them to get such a high settlement amount in the first place. Although some courts catch on and deny approval of those settlements, others approve them. See, for example, *Ruch v. AM Retail Group, Inc.*, 2016 WL 5462451 (N.D. Cal. Sept. 28, 2016) (approving settlement agreement allocating \$10,000 to PAGA and attorney fees of \$365,000 out of a total settlement amount of \$1.15 million); *McLeod v. Bank of America, N.A.*, 2018 WL 5982863 (N.D. Cal. Nov. 14, 2018) (approving settlement agreement allocating \$50,000 to PAGA and attorney fees of \$3.3 million out of a total settlement amount of \$11 million); *Lacy T. v. Oakland Raiders*, 2016 WL 7217584 (Cal. Ct. App. Dec. 13, 2016) (affirming trial court's approval of allocating \$10,000 to PAGA and attorney fees of \$400,000 out of total settlement amount of \$1.25 million); *Diamond Reports Wage and Hour Cases*, 2020 WL 4188098 (Cal. Ct. App. July 21, 2020) (affirming trial court's approval of allocating \$130,000 to PAGA and attorney fees of \$933,333.33 out of total settlement amount of \$2.8 million).

A case cited in a recent publication by the UCLA Labor Law Center ironically entitled "California's Hero Labor Law: The Private Attorneys General Act Fights Wage Theft and Recovers Millions from Lawbreaking Corporations" illustrates this perfectly. In *Coates v. Farmers Insurance*, a group of female attorneys sued for general discrimination in violation of Title VII and the Fair Employment and Housing Act, violation of the federal and California Equal Pay Acts, PAGA, and violation of California's Unfair Competition Law. Suing under the California Equal Pay Act allowed the plaintiffs to also bring their PAGA claim because that law is found in California's Labor Code.

Coates' attorney says that the threat of PAGA penalties

"unquestionably contributed" to Farmers' willingness to agree to "comprehensive monetary and injunctive relief" in the amount of \$4.1 million. Despite touting PAGA as the reason that her clients were able to get a \$4.1 million settlement from Farmers, she took home \$1.83 million and allocated only \$15,000 to the LWDA for PAGA, which is a mere 0.3% of the total settlement.

That same article praises PAGA for remitting millions of dollars to the LWDA by citing seven cases which brought in higher-than-average PAGA penalties. The publication cites a string of cases that it describes as "[t]he most significant PAGA judgments," including one case cited that generated \$10 million to the LWDA. Most of the cases are suitable seating cases, which represent a unique scenario uncommon to most PAGA cases.

The Industrial Wage Orders have included a seating provision since their inception in 1919. The most current version, which was the basis for those lawsuits, was established in 1976 and contains no individual monetary remedy for an alleged violation. The Labor Commissioner never enforced the provision and issued multiple opinion letters limiting the provision's applicability to retail establishments and others. After PAGA was enacted, attorneys decided to sue retailers and banks to enforce this provision.

Unlike many cases that tack on PAGA to underlying causes of action for wages such as failure to pay overtime or provide meal or rest breaks, the only cause of action for which economic relief is recoverable in suitable seating cases is under PAGA. So, in a settlement there is no other cause of action to allocate the money to in order to avoid paying money to the state. For example, in the Bank of America case, after the plaintiff's attorneys took their \$5 million share of the \$15 million settlement, the remaining \$10 million was statutorily required to be split 75/25 between the LWDA and the employees. These cases cited do not represent a run-of-the-mill PAGA case.

LABOR AGENCY AND GOVERNOR RECOGNIZE PAGA ABUSE

Even the LWDA itself recognizes PAGA abuse. In its PAGA BCP, the LWDA stated "the substantial majority" of proposed private court settlements in PAGA cases reviewed by the PAGA Unit fell short of protecting the interests of the state workers. The analysis continues, "Seventy-five percent of the 1,546 settlement agreements reviewed by the PAGA Unit in fiscal years 2016/17 and 2017/18 received a grade of fail or marginal pass, reflecting the failure of many private plaintiffs' attorneys to fully protect the interests of the aggrieved employees and the state." (emphasis added).

Governor Edmund G. Brown, Jr. sought to address these issues in a budget "trailer bill," SB 836 (2016–17). SB 836

requires that a copy of a proposed settlement be submitted to the LWDA. It is still too soon to determine the success of SB 836; hopefully, SB 836 will continue to raise awareness of this issue like those noted above in the PAGA BCP.

PAGA REFORMS NEEDED

Despite this failing grade from the LWDA, proponents of PAGA still maintain it is an important enforcement tool that encourages compliance and protects employees. On the other hand, employers and legal counsel claim that PAGA is not working as intended. Rather, they say the law is being utilized against employers as financial leverage to force employers into costly settlements for minor, innocent mistakes. Some of the most notable issues with PAGA are as follows:

- **There is no requirement under PAGA that an employee actually suffers harm**, such as unpaid wages, as a result of the violation. For example, the Labor Code requires a paystub state the legal entity that is the employer. So, if an employee's paycheck says "XYZ, Inc.," but the employer's name really is "XYZ, LLC," the employee can recover PAGA penalties even though the employee suffered no harm because of this simple mistake.

- **PAGA has a unique standing requirement.** PAGA defines "aggrieved employee" as any person who was employed by the employer and against whom "one or more of the alleged violations" was committed. This language means that the representative employee pursuing a civil action for multiple Labor Code violations needs to have suffered only one of the alleged violations. In March 2020, the California Supreme Court also held that an employee can pursue a PAGA claim even when they settled their own individual claims.

Even if the representative employee suffered only one of the alleged violations or received compensation to settle their individual claims, the employee can collect penalties for all the violations alleged and, under PAGA, retain 25% of those penalties. This means the representative employee receives penalties for Labor Code violations that they never encountered or that they already were compensated for under a separate settlement agreement, thereby potentially taking away penalties for employees who actually were affected by the Labor Code violation.

- **PAGA penalties are imposed regardless of intent or the extent of any harm.** Thus, employers are held liable even if they make a good faith error. A disgruntled employee who missed one lunch break can file a PAGA lawsuit to collect thousands of dollars in penalties from an employer and is likely also to end up with an enhancement award upwards of \$10,000 or \$20,000 for themselves for serving as the lawsuit's representative, even if they

do little to no work to further the case.

- **PAGA applies to all employers regardless of size.**
- **Legal precedent has established that PAGA provides a "civil penalty."** This means that employees can recover both the statutory penalty associated with the Labor Code provision at issue, as well as civil penalties under PAGA, thereby creating a stacking of penalties against the employer.

As an example: Employer provides its 100 employees with a quarterly bonus of \$500, but fails to include that bonus as a part of its regular rate of pay calculation for purposes of overtime. This one mistake by the employer would create potential liability for: 1) unpaid overtime for the prior four years; 2) statutory penalties for incorrect paystubs; 3) interest; and 4) attorney fees. Under PAGA, the employer also could face the following statutory penalties (per alleged Labor Code violation):

\$100 for the first violation x 100 employees = \$10,000
 \$200 x 25 for each subsequent violation/pay period x 100 employees = \$500,000
 Total: \$510,000 penalties

Due to one mistake by the employer of calculating a quarterly bonus into the hourly rate for overtime purposes, the employer could face a devastating lawsuit in which the penalties alone exceed half a million dollars for just one, alleged Labor Code violation. If this one mistake results in the violation of multiple Labor Code sections (incorrect paystubs, miscalculation of meal period or rest break premiums, payment of wages upon termination, etc.), this half million dollars in penalties can be doubled, tripled, etc.

- **PAGA lawsuits are a "representative action" rather than a class action** and therefore the aggrieved employee does not have to satisfy class action requirements. Thus, PAGA actions are much easier to file and it is easier to include much larger groups of employees than in a class action. Additionally, the employee often files a PAGA action and a class action simultaneously so the employee can recover the PAGA penalties but not allocate the correct amount owed to the LWDA, as demonstrated by the above cases.

- Another issue is the **abuse of "draft" PAGA complaints.** Plaintiffs' attorneys create draft PAGA complaints and send them to the employer. These litigation threats compel settlement before a PAGA complaint is filed. Since a PAGA complaint is not formally filed in these situations, and probably never is intended to be filed, the LWDA is not made aware of the dispute and never receives its share of the settlement.

- **PAGA also provides a statutory right to attorney fees for the employee's attorney only**, thereby adding another layer of

cost onto employers and providing an incentive for plaintiffs' attorneys to file the case.

- **PAGA claims cannot be waived by an arbitration agreement;** thus, the employer is forced to settle the case or litigate it in civil court.

LEGISLATIVE ACTIVITY

Although there appears to be acknowledgment of PAGA abuse as noted by the LWDA in the PAGA BCP, there still is no appetite in the Legislature for major reform. A very small carve-out was created in 2018 when Governor Brown signed AB 1654 (B. Rubio; D-Baldwin Park), preventing employees in the construction industry from filing PAGA claims where the employee is covered by a collective bargaining agreement that includes a grievance procedure and binding arbitration.

Nonetheless, bills introduced in 2020 proposing limitations on the ability to seek PAGA penalties failed to be heard in committee or never made it out. See SB 1129 (Dodd; D-Napa) and SB 729 (Portantino; D-La Cañada Flintridge). Even amidst the COVID-19 pandemic, members of the Assembly Labor and Employment Committee were pressured by labor unions not to second a vote on SB 729, which would have prohibited employees who are working at home from seeking PAGA penalties on

meal and rest break claims given that employers cannot observe or control employees' actions at home.

Since PAGA reform proposals have been unsuccessful with the Legislature, business organizations have gone as far as suing the state over PAGA. See *California Business & Industrial Alliance v. Becerra*, Case No. 30-2018-01035180-CU-JR-CXC (Cal. Super. Ct. 2018). While the success of the lawsuit is unknown and the case could take years to resolve, the last decade of legal decisions, as well as numerous examples of abuse, indicate that the current state of PAGA is in need of significant reform.

CALCHAMBER POSITION

PAGA is a primary concern of the employer community due to the financial leverage it provides to plaintiffs' attorneys to pursue claims for minor violations of the California Labor Code, especially as thousands of business struggle to survive the recession created by the COVID-19 pandemic. Questionable litigation that results in significant monetary settlements wherein the plaintiffs' attorneys retain a majority of the money for fees and employees are provided a minimal amount is not fulfilling the stated intent of PAGA.

The CalChamber is supportive of any efforts to reform PAGA to ensure the goals of labor law enforcement are satisfied, and that it is not used as a vehicle to enrich trial attorneys.



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