Private Attorneys General Act

Reform Can End Abuse Forcing Costly Settlements that Benefit Attorneys, Not Workers

California labor and employment laws are complex and burdensome compared 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). PAGA 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 CalChamber is not aware of any other state that has such a law, and each of the other 49 states should resist any effort to adopt such a law.

INCREASED EMPLOYMENT LITIGATION, BUT NOT BETTER COMPLIANCE

PAGA has significantly increased employment litigation in California, yet has left unfulfilled its promise of promoting better compliance with California's burdensome labor and employment protections and improved compensation for employees for alleged harm.

PAGA lawsuits have increased more than 1,000% since the law took effect in 2004. By 2014 and every year since, the Labor and Workforce Development Agency (LWDA) has received approximately 4,000 PAGA notices. *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 (PAGA BCP, p. 7).

The popularity of these lawsuits is likely due to the significant monetary awards that can be levied 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 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 succeeded 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 to fight PAGA claims force employers to either settle the case or risk hundreds of thousands of dollars, if not millions, litigating the case on the merits.

DATA CONFIRMS PAGA BENEFITS ATTORNEYS, NOT WORKERS

A review of PAGA case data demonstrates that the law benefits trial attorneys, not workers. The current average payment that a worker receives from a PAGA case filed in court is $1,200, compared to $5,900 for cases adjudicated by the state's enforcement agency. Even though workers are receiving higher awards in state-adjudicated cases, employers are paying out 29% less per award. This is likely because of the high attorney fees in PAGA cases filed in court. Attorneys usually demand a minimum of 33% of the workers' total recovery, or $372,000 on average, no

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matter how much legal work was actually performed. In addition to receiving lower average recoveries in PAGA cases, workers also wait almost twice as long for their owed wages. The average wait time for a PAGA court case is 18 months, compared to 11 months for the state-decided cases.

Labor Agency Recognizes PAGA Abuse

Even the LWDA recognizes PAGA abuse. In its budget proposal for PAGA, the LWDA stated that "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. As the data above shows, publicizing these settlement documents has not resulted in less abuse. Workers are still recovering less and waiting longer than if their case had gone through the labor agency.

Why Attorneys Benefit

Attorneys benefit because PAGA often is leveraged for a high settlement amount in settlement agreements. The 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).

PAGA requires 75% of any penalty award go to the state of California. Therefore, most settlement agreements are written so as to allocate little if any proceeds to the state. They reserve most of the settlement for the plaintiffs' attorneys, representative plaintiffs, and employees, even if it was the PAGA claim that 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 titled "California's Hero Labor Law: The Private Attorneys General Act Fights Wage Theft and Recovers Millions from Lawbreaking Corporations," illustrates perfectly how small the state's share of a settlement can be. 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.

Suitable Seating Not Typical PAGA Cases

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 that generated $10 million to the LWDA. The cases cited, however, are distinguishable from most other PAGA cases. Most of the cases cited 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.

Suitable seating cases are not representative of the majority of cases because unlike most cases that tack on PAGA to underlying causes of action for wages such as failure to pay overtime or provide meal or rest breaks, in a suitable seating case, PAGA is the only cause of action. 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 *McLeod v. Bank of America*, after the plaintiffs' 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.

PAGA REFORMS NEEDED

Despite this failing grade from the LWDA, proponents of PAGA still maintain that 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 suffer 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 is really "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 were already 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 to also 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.

• **A 2021 case held that an employee can sue under PAGA even if the statute of limitations for their individual claims has expired.**

• **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 could also 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 they 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. Because 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 the case in civil court.

• **PAGA plaintiffs can sue in any venue as long as one employee worked in that county**, allowing trial attorneys to forum shop.

LEGISLATIVE ACTIVITY AND BALLOT INITIATIVE

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 useful reform. Of more than 20 bills in recent years proposed to reform PAGA or repeal it, only two were successful: AB 1654 (B. Rubio; D-Baldwin Park, Chapter 529, Statutes of 2018) exempted employers in the construction industry from PAGA if there is a collective bargaining agreement; and SB 646 (Hertzberg; D-Van Nuys; Chapter 337, Statutes of 2021) exempted employers in the janitorial industry from PAGA if there is a collective bargaining agreement.

Numerous other bills introduced in 2021 were not set for hearing, including AB 530 (Fong; R-Bakersfield), which would have required more detailed PAGA notices; and AB 385 (Flora; R-Ripon), which would have exempted cases from PAGA during the COVID-19 state of emergency where the employee signed a valid arbitration agreement and the employer agreed to waive the right to enforce that agreement.

In light of PAGA's failure to protect workers or employers, the California Chamber of Commerce, the New Car Dealers Association, and the Western Growers Association are sponsoring a ballot initiative titled "The California Fair Pay and Employer Accountability Act." The initiative repeals PAGA while also bolstering the powers of the Labor Commissioner and providing more effective compensation for aggrieved employees. It replaces PAGA with alternative enforcement mechanisms in the hands of the Labor Commissioner to ensure workers recover more of their unpaid wages in a timely manner.

Those mechanisms include creating additional penalties where one is not statutorily provided and providing for double penalties where the Labor Commissioner determines the employer willfully withheld wages. The measure requires 100% of penalties for violations be paid to employees — instead of the state. The initiative also creates a Consultation and Publication Unit to provide confidential consultation to employers and binding compliance letter advice to be posted on the unit's website. Finally, this initiative prohibits arbitration of hearings before the Labor Commissioner.

Poll Shows Voters Support Initiative

The annual CalChamber poll in 2021 asked voters to choose between the two major arguments over this proposal:

• Supporters say that using independent regulators to quickly resolve wage claims is better and faster than hiring a lawyer and going to court, which can take years and cost thousands of dollars. Supporters say this measure offers a better way to quickly get problems fixed, and still protect workers' rights.

• Opponents say that the threat of immediately getting a lawyer and filing a lawsuit is the only way to get a company's attention and fair compensation. Opponents say this measure would reduce workers' rights, and still tie up most cases in court.

By a margin of 79% to 21%, voters agreed with proponents to the labor law enforcement proposed in this measure.

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 supports any efforts to reform PAGA to ensure that labor law is enforced appropriately, and that it is not used as a vehicle to enrich trial attorneys.

Staff Contact
Ashley Hoffman
Policy Advocate

ashley.hoffman@calchamber.com
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