Private Attorneys General Act

Reform Needed to Curb Costly Litigation, Help Workers/Employers

California labor and employment laws are 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). PAGA allows an aggrieved employee to file a representative action on behalf of themselves, all other aggrieved employees, and the state of California for alleged Labor Code violations.

INCREASED LITIGATION BUT NO IMPROVED COMPENSATION FOR EMPLOYEES

PAGA has significantly increased employment litigation in California yet has left unfulfilled its promise of 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). There was a significant increase during the COVID-19 pandemic, with a record high 6,502 notices filed in 2021, according to LWDA data reviewed in a July 2022 article by law firm Ogletree, Deakins, Nash, Smoak & Stewart P.C.

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. The threatened penalties therefore often are very high, especially in relationship to the actual alleged harm. For example, 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 DATA CONFIRMS IT 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 $1,300, compared to $5,700 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 matter how much legal work actually was 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 23 months compared to 12 months for the state-decided cases.

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LABOR AGENCY RECOGNIZES PAGA ABUSE

Even the LWDA recognizes PAGA abuse. In its budget proposal for PAGA, 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).

Despite this analysis, the California Legislature has consistently rejected PAGA reform bills except for two unionized industry carveouts. Notably, in support of one of those carveouts, the author acknowledged that PAGA puts "enormous pressure on employers to settle claims regardless of the validity of those claims." *See* Assembly Appropriations Committee analysis of SB 646 (Hertzberg; D-Van Nuys) (2021).

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. In *Price v. Uber Technologies, Inc.*, the plaintiffs' 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).

Although PAGA requires 75% of any penalty award go to the state of California, most settlement agreements are written 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. Some courts catch on and deny approval of those settlements, but 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 a 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 a total settlement amount of $2.8 million).

PAGA REFORMS NEEDED

Despite the failing grade from the LWDA, proponents of PAGA still maintain it is an important enforcement tool that encourages compliance and protects employees. But a review of PAGA case law shows that it is abused to evade procedural safeguards typically found in litigation and to force employers into costly settlements for minor, innocent mistakes:

- **There is no requirement under PAGA that an employee actually suffer harm**, such as unpaid wages, as a result of the violation. For example, you can recover PAGA penalties if your paycheck says "XYZ, Inc." instead of "XYZ, LLC."
- **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. You can then recover penalties for all alleged violations. Recent cases also held that an employee has standing even where they settled their own individual claims, where the statute of limitations has expired, and where they do not live in the venue where the case is filed if another employee does.
- **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.
- **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.
- **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. Since a PAGA complaint is not filed formally 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.

FATE OF ARBITRATING PAGA CASES UNDECIDED

In June 2022, the U.S. Supreme Court held in *Viking River Cruises v. Moriana* that where a plaintiff has signed an enforceable arbitration agreement, they do not have standing to maintain a non-individual PAGA claim in court on behalf of others. This was viewed as a victory for the employer community because prior case law holding PAGA claims were exempt from arbitration had led to an explosion of PAGA filings and nullified many benefits of arbitration for both employers and workers.

Despite the majority's holding, however, many saw Justice Sonia Sotomayor's concurrence as opening the door for *Viking River's* undoing. Her concurrence provides, in pertinent part:

"Of course, if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word. Alternatively, if this Court's understanding is right, the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits. With this understanding, I join the Court's opinion."

This leaves the fate of PAGA undecided in two ways: through the California courts and the California Legislature. Indeed, shortly after the *Viking River* decision was issued, the California Supreme Court granted review in *Adolph v. Uber Technologies*. *Adolph* requested the court to address whether *Viking River* correctly interpreted state law in holding that the plaintiff loses their standing to bring a PAGA claim if their individual claims are compelled to arbitration. There is concern that, by granting review, the court intends to undo *Viking River* by saying that the U.S. Supreme Court misunderstood California law.

Even if *Adolph* does not undo *Viking River*, we will likely see legislation pushed by the California plaintiffs' bar. At least one legislator stated publicly after *Viking River* that they would author such legislation. The likely legislative "solution" would be ***broadening*** PAGA's standing requirement because the issue in *Viking River* was that once a plaintiff's individual claims have been compelled to arbitration, they lose their standing requirement. In the U.S. Supreme Court's reasoning regarding standing, it specifically noted that PAGA could have been written more broadly, for example giving standing to anyone in the general public, not just to "aggrieved employees," but the Legislature chose not to do so. This and Sotomayor's concurrence imply then that broadening the definition of who has standing under PAGA is the legislative solution to undo *Viking River*. Amending PAGA to specifically allow workers who have had individual claims arbitrated or who no longer even have individual claims (for example, they are time barred or have been settled) will return California to a state of allowing workers who have not suffered any harm to be allowed to maintain PAGA lawsuits on behalf of all other workers and will further embolden the trend of rising PAGA claims. If the Legislature were to go a step further and allow the general public to file, there surely would be an explosion of these predatory lawsuits to further enrich plaintiffs' attorneys.

THE CALIFORNIA FAIR PAY AND EMPLOYER ACCOUNTABILITY ACT

In light of PAGA's failure to protect workers or employers, the California Chamber of Commerce, the New Car Dealers Association, California Restaurant Association, California Grocers Association, California Retailers Association, California Manufacturers & Technology Association, and the Western Growers Association are sponsoring a ballot initiative titled "The California Fair Pay and Employer Accountability Act." The initiative qualified for the 2024 ballot.

The initiative 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 STRONG VOTER SUPPORT FOR REFORM

The CalChamber annual voter poll showed strong support to reform litigation over Labor Code violations. When asked whether they would support a ballot measure to 1) require Labor Code violations to be handled by independent state regulators, 2) require 100% of penalties go to employees instead of the state, and 3) allow employees to take their case to court if they were dissatisfied with the regulator's decision, **62%** of voters indicated their support. Further, when asked what is the best way to deal with Labor Code violations, **51%** said independent state regulators and only 11% said trial attorneys.

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.

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January 2023