Private Attorneys General Act: Unique State Law Needs Reform to Prevent Abuse, Assure Enforcement Goals Met

California's labor and employment laws are known for being unique from the rest of the nation. There is no greater example of California's distinction is this area than the Labor Code Private Attorneys General Act (PAGA), which allows an aggrieved employee to file a representative action on behalf of himself/herself and all other aggrieved employees for a Labor Code violation.

The California Chamber of Commerce is not aware of any other state that has such a law or is considering a similar proposal. Any state should pause before seeking to mirror this 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 labor and employment protections or compensating employees for harm.

The past decade of legal decisions as well as numerous examples of abuse indicate that the current state of PAGA is in need of further reform.

Background

In 2003, Governor Gray Davis signed into law SB 796 (Dunn; D-Garden Grove), which created PAGA and went into effect on January 1, 2004. PAGA basically allows an aggrieved employee to file a representative action on behalf of himself/herself and all other current or former employees similarly aggrieved, for civil penalties due to the violation(s) of a Labor Code provision. PAGA separates the Labor Code violations into two categories:

- **Nonserious violations**: An employee must provide the employer and the Labor and Workforce Development Agency (LWDA) with written notice of the alleged violation, and thereafter, 33 days for the employer to cure the violation before pursuing a civil action; and
- **Serious violations**: An employee must provide the employer and LWDA with written notice of the alleged violation, and thereafter, the employee may pursue civil litigation without providing an employer a right to cure the violation.

PAGA also has a separate investigation procedure for occupational and health standards that is coordinated with the procedures for the Division of Occupational Safety and Health. PAGA is not utilized for Labor Code violations regarding workers' compensation, as Labor Code Section 3602 sets forth that workers' compensation is the exclusive remedy for work-related injuries.

The list of code sections considered serious violations are set forth in Labor Code Section 2699.5, and include such claims as meal-and-rest period violations, minimum wage, overtime and payment of wages at time of termination.

When the Labor Code section at issue has a "civil" penalty associated with it, then that is the penalty the employee may collect on behalf of himself/herself and the "aggrieved employees" in the PAGA action. If the Labor Code provision does not have a specific "civil" penalty associated with it, then PAGA provides a civil penalty as follows:

- If, at the time of the alleged violation, the employer does not employ one or more employees, the penalty is $500; and
- If, at the time of the alleged violation, the employer employs one or more employees, the civil penalty is $100 per employee, per pay period for the first violation, and $200 per pay period, per employee, for each subsequent violation.

Notably, there is no requirement under PAGA that an employee actually suffer harm, such as unpaid wages, as a result of the violation, nor is there any required intent by the employer to have actually committed the violation for the penalties to apply. PAGA penalties are imposed regardless of whether the employer simply made a good faith mistake or the employee is actually harmed.

The penalties collected under PAGA are supposed to be divided as follows: 75% to the LWDA and 25% to the aggrieved employees. PAGA also provides a statutory right to attorney's fees for the employee's attorney only, thereby adding another layer of cost onto employers and providing an incentive for plaintiff's attorneys to file the case. The statute of limitations to recover civil penalties under PAGA is one year.

In 2005 and 2006, two significant court decisions expanded the monetary threat of PAGA. In *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal.App.4th 365 (2005), and *Dunlap v. Superior Court*, 142 Cal.App.4th 330 (2006), the courts dealt with whether a statutory penalty is the same as a civil penalty for purposes of PAGA. The courts in both cases distinguished between statutory penalties that are paid directly to the employee versus civil penalties that were previously enforced and collected only by the state's labor law enforcement agencies. Both concluded that PAGA provides a "civil penalty." These decisions are significant as they allow any employee to recover both the statutory penalty associated with the Labor Code at issue as well as civil penalties under PAGA.

CalChamber

Expanding Opportunity
An Agenda for All Californians

2018 Business Issues and Legislative Guide

See the entire CalChamber 2018 Business Issues and Legislative Guide at
www.calchamber.com/businessissues
Free PDF or epub available to download.

Special Thanks to the Sponsors
Of the 2018 Business Issues and Legislative Guide

Premier

Chevron

Silver

WELLS FARGO

Bronze

enterprise

Iron

AAA Automobile Club Southern California
We're always with you.®

manatt

In 2009, the California Supreme Court ruled in *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 46 Cal.4th 993, that a union representative had no standing to assert a claim under PAGA for Labor Code violations committed against the union's members. The right under PAGA is only for an aggrieved employee and cannot be assigned.

On June 23, 2014, the California Supreme Court opinion in *Iskanian v. CLS Transportation Los Angeles, LLC*, held that an employment arbitration agreement which contains a class action waiver is not unconscionable or against public policy, based upon the Federal Arbitration Act (FAA). Comparatively, the Supreme Court further held that an arbitration agreement which requires an employee to waive his/her right to bring a representative action under PAGA does violate public policy, is not pre-empted by the FAA, and therefore is unenforceable. The court reasoned that PAGA is not a dispute between an employee/employer, but rather an employer and the State of California, and therefore outside the scope of the FAA. The U.S. Supreme Court denied review of *Iskanian*.

On July 13, 2017, the Supreme Court issued its opinion in *Williams v. Superior Court*, in which it held that the discovery rights under PAGA are extremely broad. In *Williams*, a trial court had limited initial discovery of employee contact information to only those employees in similar positions at the same physical location. The plaintiffs opposed, seeking broader discovery to employees throughout California. The Supreme Court sided with the plaintiffs and opined that discovery in California is liberally construed and provides for somewhat of a fishing expedition. With regard to employee privacy, the Supreme Court determined that there are means available to protect individual privacy other than denying discovery of contact information.

Class Action/Manageability

Another significant decision involving PAGA was issued by the state Supreme Court in 2009, in *Arias v. Superior Court*, 46 Cal.4th 469. In *Arias*, the court clarified a PAGA action is a "representative action," not a class action, and therefore the aggrieved employee does not have to satisfy class action requirements such as proving 1) common questions of law or fact amongst the employees/class members; 2) class representative claims or defenses are typical of the class; and 3) class counsel are adequate representatives. *Arias* also explained that collateral estoppel can be utilized only against non-named aggrieved employees with regard to civil penalties collected under PAGA, not the underlying Labor Code violations. Conversely, if a plaintiff prevails under a PAGA claim, that judgment can be used as collateral estoppel by an employee who pursues a claim for the same Labor Code violation, even if the employee cannot recover the civil penalty under PAGA.

A 2016 *Santa Clara Law Review* article by Matthew Goodman, "*The Private Attorney General Act: How to Manage the Unmanageable*," stated: "[T]he implications of this decision are enormous. For one, it eases the process of bringing a PAGA representative action compared to a parallel class action. Secondly, by allowing employees to obtain non-penalty remedies through collateral estoppel, *Arias* increased the effect a PAGA representative action could have on employer liability."

Even though PAGA does not necessarily have to satisfy class action requirements, there still is a question of whether this decision has any impact on Federal Civil Procedure Rule 23 with regard to class action certification in federal court. See *Ortiz v. CVS Caremark Corporation*, 2014 WL 117614 (N.D. Cal. 2014); *Fields v. QSP, Inc*. 2012 WL 2049528 (C.D. Cal. 2012).

The theory of judicial "manageability" derived from class action litigation is having an impact on PAGA claims. "Manageability" is a decision by the court regarding whether it can "fairly and efficiently conduct a trial, or whether its magnitude and complexity prevent a fair adjudication." Goodman, *supra*, at 429; see also *Duran v. U.S. Bank National Association*, 59 Cal.4th 1 (2014)(referencing the importance of manageability when dealing with individual issues in class actions). The theory is usually made as a part of the class action certification decision; however, courts have recently applied this theory to PAGA representative actions.

In *Rix v. Lockheed Martin*, 2013 WL 9988381 (S.D. Cal. 2013), plaintiffs pursued a class action and PAGA action for alleged Labor Code violations. The court denied class certification on the class action, and referenced *Arias*, stating a PAGA action does not need to meet class certification requirements. Despite this, the court still dismissed the PAGA claim due to the inability of plaintiffs to adequately prove 15 separate Labor Code violations for 88 different employees through common evidence. *Id*. at *2.

Similarly, in *Ortiz v. CVS Caremark Corporation*, 2014 WL 117614 (N.D. Cal. 2014), the court dismissed the PAGA claim on the grounds it was "unmanageable." The court referenced that the plaintiffs' burden of proof to establish liability for all the employees magnified the manageability issues in the case, especially due to the lack of support for the notion that statistical evidence was sufficient to prove PAGA claims as utilized in class actions. *See also Litty v Merrill Lynch,* 2014 WL 5904904 (C.D. Cal. 2014) (striking PAGA claims on the basis it was "unmanageable.") But see *Plaisted v. Dress Barn*, 2012 WL 4356158 (C.D. Cal. 2012) (holding that dismissing PAGA actions due to the presence of individualized assessments would "obliterate" the purpose of PAGA); and *Zackaria v. Wal-Mart Stores, Inc.,* 142 F.Supp.3d 949 (C.D. 2015) (stating "the imposition of a manageability requirement—which finds its genesis in Rule 23—makes little sense in this context").

Given this current split of authority regarding judicial management of PAGA claims, the question of how courts will procedurally handle PAGA cases, especially in federal court, is still undetermined.

PAGA Cases on Rise Afainst Public and Private Employers

An April 2014 *Los Angeles Daily Journal* article stated that in the eight years from 2005 to 2013, PAGA lawsuits increased by more than 400%. As noted in the Governor's *2016-2017 Budget*, the Labor and Workforce Development Agency (LWDA) receives more than 6,000 PAGA notices each year. The popularity of these lawsuits is likely due to the significant monetary awards that can be leveraged against an employer for minor violations.

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 could create potential liability for: 1) unpaid overtime for the prior four years; 2) statutory penalties for incorrect paystubs; 3) interest; and 4) attorney's fees. Under PAGA, the employee also could face the following statutory penalties:

$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 one-half 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 or rest period premiums, payment of wages upon termination, etc.), this half million dollars in penalties can be doubled, tripled, etc.

Just recently, a court determined that PAGA is also applicable to governmental entities as well.

Is PAGA Working as Intended?

The intent and purpose of PAGA was to supplement the LWDA's enforcement efforts for Labor Code violations, as the agency's staffing levels were declining and could not keep up with the growth of the labor market (see *Arias*, *supra*, at 980). Accordingly, PAGA provided employees with the right to enforce these violations and collect penalties on behalf of the LWDA. The statutory layout of PAGA reflects this intent, with the aggrieved employee who pursues the action retaining 25% of the penalties collected and the remaining 75% being allocated to the LWDA.

PAGA opponents claim that PAGA is not working as intended. Rather, they claim it is being utilized against employers as financial leverage to force employers into costly settlements for minor, innocent mistakes. Goodman described this phenomenon in his article:

"The coercive settlement concept is well developed in the class action. In what has been termed the 'blackmail' settlement by commentators, the plaintiffs recover more than they should, 'because the class counsel is able to threaten the defendant with a costly and risky trial.' . . . it forces 'defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.' The possibility of a 'blackmail settlement' looms even larger in PAGA actions….. The threat of expensive litigation, combined with the unavailability of insurance, will compel settlement for many employers and can work as a type of 'legalized blackmail.'" *Id* at 447–448.

Critics also allege the LWDA is not necessarily receiving its fair share of PAGA settlements, as the employees' attorneys often allocate a small monetary amount for PAGA in the settlement agreement to minimize the amount of the settlement they have to deposit as penalties with the LWDA.

"A typical PAGA class action lawsuit settles most of its proceeds towards the class action claim, while directing a nominal amount towards the PAGA claim, assuming it is not dropped altogether prior to settlement. There is a large incentive to accomplish this because the plaintiffs no longer have to allocate 75% towards the State.... [p]ermitting large settlements in PAGA actions with little money action going towards PAGA is not appropriate when PAGA's enforcement purpose is substantially undermined." Goodman, *supra*, at 449.

A potential example of this occurrence is in *Johnson v. Goodyear Tire & Rubber Co.* (N.D. Cal. 2013), in which a class action involving a claim under PAGA settled for $305,000. From the total settlement, the plaintiff's attorney took $105,000 for attorney's fees. The class representatives each received $1,000. The settlement agreement allocated only $666.67 for PAGA penalties, thereby providing the LWDA with only $500. Despite these criticisms, proponents of PAGA still maintain that it is an important enforcement tool that encourages compliance.

Another potential example of this questionable allocation occurred in *Stuart v. Radioshack Corporatio*n, Case No. C-07-4499 EMC (N.D. Cal. 2010). An employee alleged a violation of the Labor Code and PAGA for the employer's failure to reimburse him for expenses related to use of his personal vehicle for work. The case ultimately settled for $4.5 million. From the total settlement, the attorneys took $1.5 million in fees and $78,436 in litigation expenses. Only $50,000 of the $4.5 million settlement was allocated to PAGA, providing the LWDA with only $37,500.

The recent changes made to PAGA as a part of the Governor's *2016–2017 Budget*, referenced below, should help highlight some of these issues and whether there are any concerns with PAGA fulfilling its intended goal of enforcing important labor protections.

Recent Legislation

In 2015, Assemblyman Roger Hernández (D-West Covina) authored AB 1506, which provides a 33-day right-to-cure for alleged violations of Labor Code Section 226 regarding itemized wage statements. Under this proposal, alleged violations on a paystub regarding the pay period and the employer's name and address are now entitled to a 33-day right-to-cure before a civil action can proceed and PAGA penalties assessed. In order to cure such

violations, the employer must provide accurate wage statements for the prior three years. The Governor signed this legislation.

A Budget Change Proposal (BCP) regarding PAGA in the Governor's *Proposed 2016-2017 Budget* included several reforms: 1) nine new positions solely for review and investigation of PAGA claims; 2) additional details in the notice to the LWDA, required before a PAGA claim may proceed to civil litigation; 3) expanding from 30 days to 60 days the time for the LWDA to investigate a claim; 4) a filing fee for the notice to the LWDA; 5) delivery of all civil complaints that allege a PAGA claim to the Director of the Department of Industrial Relations (DIR); 6) delivery and review of all PAGA settlements to the Director of DIR; 7) authority for the Director to object to any proposed settlement of PAGA claims; and 8) authority for the DIR to create amnesty programs when there has been a change in industry practice that has an impact on more than 10,000 employees. The Governor's BCP indicated these reforms were necessary to handle the workload of PAGA. The LWDA receives more than 6,000 PAGA notices a year.

The only proposals from the Governor's BCP to actually make it through the budget process and chaptered were: 1) the additional nine positions requested; 2) expansion of the period for the LWDA to investigate a claim from 30 days to 65 days; 3) a $75 filing fee with all notices to the LWDA; 4) delivery of all civil complaints to the LWDA within 10 days after being filed; and 5) delivery of any PAGA judgments or settlements to the LWDA at the same time that the proposed settlement is filed with the court. The other proposals failed due to opposition from private sector labor and/or the trial attorneys.

In 2017, several PAGA legislative reform proposals were introduced: AB 281 (Salas; D-Baldwin Park); AB 1429 (Fong; R-Bakersfield); AB 1430 (Fong; R-Bakersfield). None of these bills moved forward.

Ballot Initiatives

In September 2017, three ballot initiatives to repeal and/or reform PAGA were filed with the Attorney General's office. One initiative proposes to repeal PAGA completely and restore the authority to pursue civil penalties for Labor Code violations to the Labor Commissioner. The other two initiatives propose to cap the financial recovery trial attorneys can obtain in a PAGA lawsuit, thereby leaving more of any recovery to the employee and state.

The proponent of these initiatives ultimately decided to proceed with a potential legislative fix regarding PAGA instead of pursuing any of these initiatives.

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. Frivolous 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, but that it is not used as a vehicle to enrich trial attorneys.

Staff Contact
Jennifer Barrera
Senior Vice President, Policy

jennifer.barrera@calchamber.com
January 2018