Private Attorneys General Act

Unique State Law in Need of Reform

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 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. However, any state should 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 labor and employment protections or compensating employees for alleged harm. The past decade of legal decisions, as well as numerous examples of abuse, indicates that the current state of PAGA is in need of significant reform.

WHY IS PAGA SO UNFAIR?

Proponents of PAGA still maintain that it is an important enforcement tool which encourages compliance and protects employees. However, 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. A 2016 *Santa Clara Law Review* article by Matthew Goodman, "The Private Attorney General Act: How to Manage the Unmanageable," described PAGA in the following way:

"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 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... [t]he 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.'" (pages 447-448.)

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 that a paystub state the legal entity which 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 penalties are imposed regardless of intent. Thus, employers are held liable even if they make a good faith error. For example, the simple, unintentional error of including the employee's entire Social Security number instead of just the last four digits of the Social Security number on a paystub can cause a PAGA suit for hundreds of thousands of dollars, or even millions in some cases, depending on how many employees are included in the PAGA suit.

• PAGA applies to all employers regardless of size.

• Legal precedent has established that PAGA provides a "civil penalty." This means that employees are allowed to recover **both** the statutory penalty associated with the Labor Code provision at issue as well as civil penalties under PAGA, 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 employee 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

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bonus into the hourly rate for overtime purposes, the employer could face a devastating lawsuit in which the penalties alone exceed a 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.

• PAGA actions are a "representative action" rather than 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. Thus, PAGA actions are much easier to file and easier to include much larger groups of employees than 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 Labor and Workforce Development Agency (LWDA).

• As a result, critics allege the LWDA is not 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. The penalties collected under PAGA are supposed to be divided as follows: 75% to the LWDA and 25% to the aggrieved employees. The penalties portion to the state is intended to help fund LWDA to ensure the state has adequate funding to investigate and prosecute violations of the state's labor laws. However, "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 [financial] 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 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 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.

As part of California's 2016–2017 state budget accord, Governor Edmund G. Brown Jr. sought to address these issues in budget "trailer bill" SB 836. SB 836 requires that a copy of a proposed settlement be submitted to the LWDA at the same time that it is submitted for the court's required approval, requires parties to provide the LWDA with a copy of the court's judgment (i.e., any order that approves or denies a PAGA settlement), and requires court review and approval of any penalties sought as a part of a proposed settlement of a claim. It is still too soon to determine the success of SB 836 in ensuring the proper allocation of PAGA penalties to the LWDA.

One issue not addressed by SB 836 is the abuse of "draft" PAGA complaints. Plaintiff's attorneys create draft PAGA complaints and send them to the employer without actually filing these claims with the LWDA. 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 a dime from 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 plaintiff's 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.

An April 2014 *Los Angeles Daily Journal* article found that, over the last eight years, PAGA lawsuits have increased by more than 400%. As noted in the Governor's 2016–2017 budget, the 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.

CALCHAMBER POSITION

PAGA is a primary concern of the employer community due to the financial leverage it provides to plaintiff's attorneys to pursue claims for minor violations of the California Labor Code. Frivolous litigation that results in significant monetary settlements wherein the plaintiff's 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.

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January 2019