CALIFORNIA
EMPLOYMENT LAW LETTER

PAGA CLAIMS

Governor Brown's budget proposal targets misguided and inefficient PAGA litigation

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In January, Governor Edmund G. Brown submitted his 2016-17 budget to the California Legislature. The governor's budget includes a proposal that, if approved, would have a resounding impact on civil actions filed by California employees under the Private Attorney General Act (PAGA). Since the PAGA was enacted, it has been criticized as wasteful and excessively costly for employers. This article is intended to illuminate the scope of those issues and explain why the proposal is an appropriate and measured plan to resolve them.

History of the PAGA

California legislators supposedly enacted the PAGA because the Department of Industrial Relations (DIR) lacked the staffing and funding to enforce Labor Code sections and collect civil penalties as intended. Proponents of the law stated that the "vigorous assessment and collection of civil penalties" was "necessary to achieve maximum compliance with state labor laws."

Since it went into effect, the PAGA has permitted employees to represent the state and recover civil penalties on behalf of themselves and other employees. Employees who bring PAGA actions may recover penalties for violations of numerous Labor Code sections. (Currently, the PAGA encompasses approximately 150 sections.) Penalties may accrue for violations that occurred approximately one year before the lawsuit was filed through the date a court enters judgment.

To be clear, the PAGA is not about employees' financial interests. Prevailing PAGA employees retain only 25% of the civil penalties they recover; the remaining 75% is distributed to the state. However, prevailing PAGA employees are entitled to their attorneys' fees and costs.

Less than two months after the PAGA went into effect, legislators apparently recognized that employees—or their attorneys—were perhaps too vigorously seeking to assess and collect civil penalties. The legislature sought to amend the PAGA to "provide relief to some employers who may be adversely affected by frivolous lawsuits." Only months later, the PAGA was amended as an urgency statute that was effective immediately.

In relevant part, the amendment required employees to mail notices to the Labor and Workforce Development Agency (LWDA) and the employer before filing a PAGA lawsuit. The PAGA notices must set forth "the fact and theories" supporting the alleged Labor Code violations. The amendment sought to give the LWDA the opportunity to "investigate the alleged violation and issue any appropriate citation" before a PAGA lawsuit was filed. The amendment also required courts to review and authorize any PAGA settlement.

The amendments did nothing to reduce frivolous PAGA lawsuits. According to Governor Brown's proposal, only one LWDA employee is authorized to review PAGA notices, and fewer than 1% of them are actually reviewed and investigated. Additionally, data from the LWDA indicate that many PAGA claims are being settled, in one way or another, outside of judicial review.

Potential costs of PAGA lawsuits

PAGA lawsuits can create hundreds of thousands, if not millions, of dollars in potential liability for employers. Generally, the PAGA provides for a $100 civil penalty for each employee per pay period in which a violation was committed. For example, a $24,000 civil penalty may be assessed for two violations committed against five employees during each semimonthly pay period over one year ($100 x 240 pay period violations). The state would receive $18,000 of the penalty.

However, PAGA lawsuits typically involve much more than two alleged violations and five employees. In fact, all current or former employees in California may be represented in a PAGA lawsuit. Moreover, it's common for PAGA employees to seek and recover civil penalties that include any unpaid wages resulting from the violations. Such penalties further increase employers' potential liability.

On top of these penalties, an employer is liable for a prevailing PAGA employee's attorneys' fees and costs as well as its own. Adding to the litigation costs, PAGA employees typically engage in substantial amounts of discovery (pretrial fact-finding) because they seek payroll,

timekeeping, and other relevant information for all of the employees they purportedly represent.

The state's PAGA revenues

According to Governor Brown's proposal, the LWDA received 29,474 PAGA notices from 2010 through 2014. Because only 1% of those notices were reviewed and investigated by the LWDA, about 600 employees were empowered to file PAGA lawsuits each month in that time.

According to LWDA data obtained through a California Public Records Act request sent by Christian Schreiber, an attorney at Chavez & Gertler, the state received no fewer than 1,298 PAGA distributions between July 2010 and June 2014, or about 27 per month. Governor Brown's proposal states that the LWDA received $19,953,000 over the same period. While that is a substantial amount of revenue, the data expose two major concerns with the administration of PAGA notices and lawsuits.

First, it seems inexplicable that about 27 PAGA lawsuits result in a finding of Labor Code violations each month when about 600 potential PAGA lawsuits are brought each month. Conceivably, 95% of PAGA notices completely lack merit. More likely, the state's interest is left behind after employees are granted the right to file a PAGA lawsuit.

Second, assuming that the state received only 1,298 penalty distributions, for a total of $19,953,000, the average civil penalty assessment was no more than $20,500 per PAGA lawsuit, $15,372 of which was distributed to the state. In our example above, a PAGA lawsuit involving only two violations committed against five employees could result in a civil penalty assessment of $24,000. Yet many (if not most) PAGA lawsuits allege 10 or more violations against hundreds or thousands of employees.

It seems evident that the PAGA doesn't work as intended. While the state has received a good deal of revenue from PAGA lawsuits, it's highly unlikely that outweighs the costs and burdens placed on employers that must deal with what appear to be many frivolous PAGA claims.

CALIFORNIA NEWS IN BRIEF

Silicon Valley firm's unpaid interns owed back wages. The U.S. Department of Labor (DOL) has found that Fenox Venture Capital of San Jose wrongfully classified 56 workers as unpaid interns. The workers will now be paid $331,269 in back wages and damages, according to a February 22 announcement from the DOL.

Investigators found the workers performed high-level jobs such as screening start-up companies for potential investment, sending reports to investors in Japan, and networking and recruiting potential staff for the company. The workers were treated as unpaid interns in violation of the minimum wage provisions of the Fair Labor Standards Act (FLSA). The DOL said the workers displaced regular employees, staffed the majority of the company's investment team, and performed duties that benefited the company directly. "Employers cannot simply label an employee an 'intern' and not pay [him] anything," said Susan Blanco, the district director for the DOL's Wage and Hour Division (WHD) in San Francisco.

DOL continues garment industry crackdown. The DOL announced a consent judgment on February 24 that requires one of the primary clothing suppliers for off-price retailer Ross Stores to pay $212,000 in back wages to employees of its garment subcontractors for minimum wage and overtime violations. The judgment continues a multiyear enforcement crackdown against garment manufacturers in Southern California that WHD Administrator David Weil first highlighted in Los Angeles in November 2014. In the last five years, WHD officials in Southern California have concluded more than 1,000 investigations in the garment industry, resulting in more than $11.7 million in back wages, according to the DOL.

Adult care home paying back wages, damages. The WHD has found Elizabeth Homes Adult Residential Care, headquartered in Buena Park, in violation of the overtime, hourly wage, and record-keeping provisions of the FLSA. An investigation found that the employer failed to pay employees time and a half when they worked overtime and failed to pay them for all hours worked. The employer must pay 138 workers $113,652 in back wages and an equal amount in liquidated damages. The employer agreed to pay the back wages and damages under a three-month installment plan and comply with the FLSA in the future.

Cal/OSHA cites ExxonMobil for failing to repair equipment. The California Division of Occupational Safety and Health (Cal/OSHA) announced on March 4 that it has issued citations to ExxonMobil Refining & Supply Company after it discovered the company did not repair faulty equipment at its Torrance refinery for four years, exposing workers to possible serious injury or death. The three citations include one willful-serious violation, indicating the employer was aware of the hazardous condition and didn't take reasonable steps to address it, and two general citations for the company's failure to conduct a hazard analysis. Proposed penalties total $72,120. ✤

Governor Brown's PAGA proposal

Governor Brown's proposal requests 10 positions within the LWDA and DIR along with approximately $1.5 million in annual funding from the existing Labor Workforce Development Fund so the agencies may actually review and investigate PAGA notices. More important, the governor is requesting the approval and implementation of numerous statutory changes that would greatly relieve the burden PAGA lawsuits place on employers.

The most striking statutory revisions would affect the PAGA notice process. Employees would be required to pay a $50 fee before filing a notice, which must contain the relevant facts, legal contentions, and authorities (as opposed to "the fact and theories") supporting each alleged violation. The notices must include an estimate of the number of represented employees. If that number is 10 or more, the filing fee is $150, and the notice must be verified (filed under the penalty of perjury). The proposed revisions give the LWDA additional time to review and investigate PAGA notices. They also provide employers with the ability to request that the LWDA investigate a notice.

While there are several other important proposed revisions, the changes to the notice process would significantly reduce the number of frivolous PAGA claims. Perhaps most important, the heightened standards for the notice pleading could significantly reduce the cost of PAGA litigation.

Bottom line

The proposal requires legislative action to become a reality, and the revisions will likely face significant opposition during the budget process. In the meantime, employers should monitor developments and voice their support for the proposed PAGA revisions.

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