

Date of Hearing: August 31, 2018

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT

Tony Thurmond, Chair

AB 1654 (Rubio) – As Amended August 24, 2018

**SUBJECT:** Labor Code Private Attorneys General Act of 2004: construction industry

**SUMMARY:** Exempts construction workers from the Private Attorneys General Act (PAGA) who are covered by a collective bargaining agreement, if that agreement expressly provides for, among other things, a grievance and binding arbitration procedure to redress violations that would have been remedied under PAGA. Specifically, **this bill:**

- 1) Exempts an employee in the construction industry from the provisions of PAGA if the employee is covered by a collective bargaining agreement in effect any time before January 1, 2025, and does the following:
  - a) Provides for a grievance and binding arbitration procedure to redress violations that would be redressable under PAGA.
  - b) Expressly waives the requirements of PAGA in clear and unambiguous terms.
  - c) Authorizes an arbitrator to award any and all remedies otherwise available under PAGA except for the award of penalties that would be payable to the Labor and Workforce Development Agency (LWDA).
- 2) Provides that employees are not precluded from pursuing any other civil action against an employer for actions in violation of the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, or any other prohibition of discrimination or harassment.
- 3) Provides that the exception to PAGA shall expire on the date the collective bargaining agreement expires or on January 1, 2028, whichever is earlier.
- 4) Defines an employee in the construction industry as an employee performing work associated with construction, including work involving alteration, demolition, building, excavation, renovation, remodeling, maintenance, improvement, repair work, and other work as specified.
- 5) Provides that the bill's provisions shall remain in effect until January 1, 2028, and thereafter, are repealed.

**EXISTING LAW:**

- 1) Establishes the Private Attorneys General Act (PAGA) of 2004, which authorizes an aggrieved employee to bring a civil action to recover specified civil penalties that would otherwise be assessed and collected by the LWDA, on behalf of the employee and other current or former employees for certain violations of the Labor Code.

- 2) Requires the aggrieved employee to follow prescribed procedures before bringing an action under PAGA, including but not limited to, giving written notice to both the LWDA and the employer of the provisions of the Code allegedly violated as well as facts supporting the claim.
- 3) Requires that the LWDA provide written notice to the employer and the aggrieved employee or representative as to whether it intends to investigate the alleged violation within 60-65 calendar days of the postmark date of the written notice.
- 4) Provides that, in the event the LWDA decides to investigate the alleged violation, it has up to 180 calendar days to investigate and cite the employer.
- 5) Provides, with certain exceptions, the following distribution of civil penalties under PAGA: 75% to be distributed to the LWDA for enforcement of labor laws and for education of employers and employees about their rights and responsibilities, and 25% to be distributed to the aggrieved employees.
- 6) Requires superior court review and approval of any settlement under PAGA.

**FISCAL EFFECT:** According to the Senate Appropriations Committee, this bill would have minimal administrative costs to the Department of Industrial Relations (DIR). However, by moving disputes from the courts to arbitration, the state would experience an unknown, potentially significant annual reduction in penalty revenue (Special Fund).

**COMMENTS:** According to the author, “PAGA is a complex legal process that has led to the unintended consequence of significant legal abuse. PAGA, in effect, encourages class action type lawsuits over minor employment issues because once a PAGA lawsuit has been filed, the employee (or class) plaintiff is suing on behalf of the state and the issues involved are no longer subject to arbitration. The threat of extended litigation, including wide-ranging discovery allowed when prosecuting civil claims in court, on behalf of an entire class of workers provides enormous pressure on employers to settle claims regardless of the validity of those claims.”

The author further states, “this bill would commit PAGA claims arising in the building and construction industry to the grievance and arbitration machinery of a collective bargaining agreement (‘CBA’) maintained by employers and [a] union in that industry so long as the CBA expressly provides for...” key provisions such as a grievance and binding arbitration procedure.

In addition, “under Section 203(d) of the Labor Management Relations Act, resolution of labor disputes pursuant to collective bargaining agreements has been ‘declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.’ This bill carries forth this Congressional intent by using the well-established process to [resolve] disputes under PAGA.”

In support of the bill, the California Conference of Carpenters state, “while PAGA is a powerful tool for unrepresented workers because it allows direct litigation by workers, it has resulted in unintended consequences that actually undermine workers most important workplace protection, a Collective Bargaining Agreement (CBA). CBA’s, authorized by the National Labor Relations Act in 1935, provide well-developed grievance/arbitration procedures for the resolution of workplace disputes...They are effective and fair to workers and employers because they are mutually agreed upon with a relative ‘balance of power’ between employees and employers.”

## **General Background on PAGA**

PAGA was enacted pursuant to SB 796 (Dunn), Chapter 906, Statutes of 2003, and went into effect on January 1, 2004. SB 796 assigned civil fines to violations of numerous Labor Code provisions, which previously included prohibitions or criminal fines only. It also authorized the filing of civil actions to recover civil penalties by aggrieved workers acting as an attorney general.

The next year, PAGA was further refined by SB 1809 (Dunn), Chapter 221, Statutes of 2004. SB 1809 significantly revised the provisions of PAGA by enacting specified procedural and administrative requirements that must be met prior to bringing a private action to recover civil penalties. SB 1809 essentially enacted three different procedural requirements depending on the type of violation, including: occupational safety and health violations, “serious” Labor Code violations, and notice to cure violations that are not considered serious or related to occupational safety and health.

The provisions of SB 1809 also expanded judicial review of PAGA claims by requiring courts to review and approve any penalties sought as part of a proposed settlement agreement, and those settlement provisions concerning health and safety violations. In addition, courts were authorized to award a lesser amount if doing otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.

SB 1809 also provided that no action shall be brought for a posting, notice, agency reporting, or filing requirement, except as specified.

Finally, SB 1809 appropriated \$150,000 from the General Fund to the LWDA for the purposes of implementing its provisions, and changed the prior penalty formula to provide that 75 percent of most civil penalties recovered pursuant to PAGA shall go to the LWDA for labor law enforcement and education.

## **Recent PAGA Reform**

In 2015, the Governor signed AB 1506 (R. Hernández), Chapter 445, Statutes of 2015, which provides an employer with the right to cure a violation of failing to provide its employees with a wage statement containing the inclusive dates of the pay period and the name and address of the legal entity that is the employer.

In 2016, a budget trailer bill, SB 836 (Committee on Budget), Chapter 31, Statutes of 2016, made further revisions to PAGA and increased enforcement funding for the Labor Commissioner. SB 836 requires a copy of a proposed settlement to be submitted to the LWDA at the same time that it is submitted to a court, and requires parties to provide the LWDA with a copy of the court’s judgement. SB 836 also extends various timelines, including the period for the LWDA to review new cases from 30 to 60 days and the time period for the LWDA to notify parties of its intent to investigate a violation from 33 to 65 days. It also provided the LWDA with an option to send a notice to extend the 120 day time limit for investigating and citing the employer by an additional 60 days and sunsets this 60 day extension on July 1, 2021. SB 836 included a \$75 filing fee for new case notices and any employer response to such notices, and required online filing of all items submitted to the LWDA.

### **Prior and Related Legislation**

AB 2016 (Fong) of 2018. Modifies the procedures for bringing a civil action under PAGA, what violations may be cured, the timeline for curing those violations, and the remedies available to aggrieved employees. This measure died in this Committee.

AB 281 (Salas) of 2017. Would have extended the period of time in which an employer may cure PAGA violations of the Labor Code from 33 to 65 calendar days. This measure died in this Committee.

AB 1429 (Fong) of 2017. This measure would have limited the violations for which an aggrieved employee is authorized to bring a civil action under PAGA and would have required the employee to follow specified procedures before bringing an action. The bill would have capped the civil penalties recoverable under PAGA to \$10,000 per claimant and would have excluded the recovery of filing fees by a successful claimant. The bill would have also required the superior court to review any penalties sought as part of a settlement agreement under PAGA. The measure died in this Committee without a hearing.

AB 1430 (Fong) of 2017. Would have revised PAGA to require the LWDA, after receiving notification of an alleged PAGA violation, to investigate the alleged violation and either issue a citation or determine if there is a reasonable basis for a civil action. The bill would have authorized an aggrieved employee to commence an action upon receipt of notice from the LWDA that there is a reasonable basis for a civil action, or if the LWDA fails to provide timely notification or any notification, as specified. The measure died in this Committee without a hearing.

SB 836 (Committee on Budget), Chapter 31, Statutes of 2016. Among other things, this budget trailer bill makes several changes to PAGA, including an extension of the time period for the LWDA to review and investigate PAGA claims. SB 836 also requires a copy of the proposed settlement of a PAGA claim to be submitted to the LWDA at the same time that it is submitted to a court, and requires parties to provide the LWDA with a copy of the court's judgement.

AB 1506 (R. Hernández), Chapter 445, Statutes of 2015. Provides an employer with the right to cure a violation of failing to provide its employees with a wage statement containing the inclusive dates of the pay period and the name and address of the legal entity that is the employer.

SB 1255 (Wright), Chapter 843, Statutes of 2012. Provides a statutory definition of what constitutes "suffering injury" for purposes of recovering damages pursuant to the itemized wage statement requirements, including failure by the employer to provide a wage statement or failure to provide accurate or complete information regarding other specified items.

SB 899 (Poochigian), Chapter 34, Statutes of 2004. Exempted workers compensation provisions of the Labor Code from enforcement through PAGA.

SB 1809 (Dunn), Chapter 221, Statutes of 2004. Significantly amended PAGA by enacting specified procedural and administrative requirements that must be met prior to bringing a private action to recover civil penalties for Labor Code violations.

SB 796 (Dunn), Chapter 906, Statutes of 2003. Established a process whereby an aggrieved employee can bring a civil action to recover specified civil penalties that would otherwise be assessed and collected by the LWDA, on behalf of the employee and other current or former employees for certain violations of the Labor Code.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

Air Conditioning Sheet Metal Association  
Associated General Contractors, CA Chapters  
California Conference of Carpenters  
California Legislative Conference of the Plumbing, Heating and Piping Industry  
California Sheet Metal and Air Conditioning, National Association  
Construction Employers Association  
District Council of Iron Workers of California  
Northern California Allied Trades  
Southern California Contractors Association  
State Building and Construction Trades Council  
United Contractors  
Wall and Ceiling Alliance  
Western Wall & Ceiling Contractors Association

**Opposition**

Associated Builders and Contractors of Northern California  
Central California Chapters of Associated Builders and Contractors  
Plumbing-Heating-Cooling Contractors Association of California  
San Diego Chapters of Associated Builders and Contractors  
Southern California Chapters of Associated Builders and Contractors  
Western Electrical Contractors Association

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