No. S246911

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JUSTIN KIM,

Plaintiff and Petitioner,

v.

REINS INTERNATIONAL CALIFORNIA, INC.,

Defendant and Respondent.

After a Decision of the Court of Appeal
Second Appellate District, Division Four, Case No. B278642
Published at 18 Cal.App.5th 1052

Appeal from a Judgment of the Superior Court of Los Angeles County
Case No. BC539194, Honorable Kenneth R. Freeman, Judge Presiding

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CALIFORNIA NEW CAR DEALER ASSOCIATION'S APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF REINS INTERNATIONAL CALIFORNIA, INC.; AND *AMICUS CURIAE* BRIEF

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to California Rules of Court, rule 8.520(f), the California New Car Dealers Association (CNCDA) respectfully requests leave to file the attached *amicus curiae* brief in support of Defendant and Respondent Reins International California, Inc.

California New Car Dealers Association (CNCDA) is a non-profit mutual benefit corporation representing over 1,100 California new car and truck dealers. CNCDA's members are primarily engaged in the retail sale and lease of new vehicles, automotive service, repair, and part sales. CNCDA frequently files *amicus curiae* briefs in cases such as this that implicate the important concerns of its dealer-members.

California's franchised new vehicle dealers have about 140,000 employees - i.e., over 100 employees per dealership on average. Their total payroll is over $8.5 billion annually. (CNCDA 2018 Economic Impact Report https://www.cncda.org/wp-content/uploads/2018-Economic-Impact-Report.pdf [as of January 3, 2019].)[1]

As major California employers, CNCDA's dealer-members have a direct interest in ensuring that California's employment laws are fairly and properly construed and enforced, especially when it comes to PAGA claims, which have become a serious threat to their continuing viability as businesses.

CNCDA's counsel have reviewed the briefing in this matter and believe that CNCDA can provide an important broader perspective

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[1] Attached at the end of this brief at Tab 1, per Cal. Rules of Court, Rule 8.204(d).

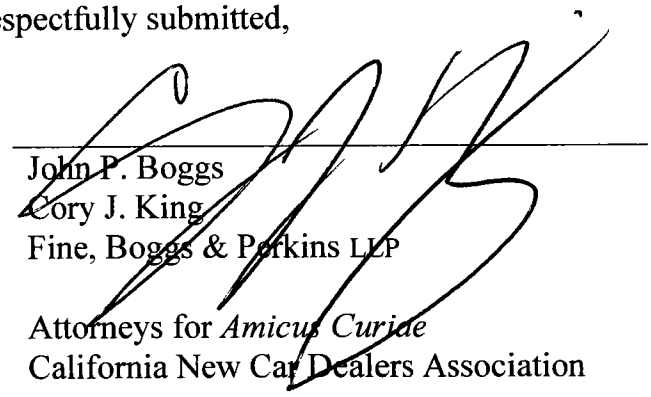
regarding the proper interpretation of the application the Private Attorneys General Act, Labor Code section 2699.

CNCDA has entirely funded the preparation and submission of its brief without any monetary contribution from any other person or entity. This brief is solely the work of counsel representing CNCDA. (See Cal. Rules of Court, rule 8.520(f)(4).)

For all of these reasons, CNCDA respectfully requests leave to file the accompanying *Amicus Curiae* Brief of the California New Car Dealers Association in support of Defendant and Respondent Reins International California, Inc.

DATED: January 14, 2019

Respectfully submitted,



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AMICUS CURIAE BRIEF OF THE CALIFORNIA NEW CAR DEALERS ASSOCIATION

Introduction

CNCDA members depend on a robust, production-based workforce to sell and service vehicles in California. With a California workforce of over 140,000 employees, and in an industry that widely utilized piece-rate and commission compensation plans, CNCDA member dealerships have had far more than their fair share of the shakedown litigation spawned by the Private Attorneys General Act ("PAGA"). Because CNCDA members almost universally utilized piece-rate compensation plans for technicians and commission-based compensation plans for sales staff, the vast majority of its workforce was directly affected by *Gonzalez v. Downtown LA Motors LP* ((2013) 215 Cal.App.4th 36 [finding traditional piece-rate plans unlawful]) and *Vaquero v. Stoneledge Furniture LLC* ((2017) 9 Cal.App.5th 98 [holding that commissioned salespersons have to be paid additional minimum wages for non-productive time]). Although such compensation plans were universally viewed as compliant with the California Labor Code for decades, even according to the Labor Commissioner's own opinion, and even though favored by employees because of the opportunity such plans provide to earn higher wages through higher productivity, these performance-based compensation plans are particularly susceptible to wage and hour claims after *Gonzalez* and *Vaquero*. This makes CNCDA members frequent targets of wage claims by individual employees, as well as PAGA lawsuits.

Moreover, the routine nature of workplace disputes, the need to respond and resolve the matter quickly, and the business need to control the escalating costs flowing from traditional litigation align CNCDA with

California's long-embraced policy favoring arbitration as the forum for dispute resolution. (*Moncharsch v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) As a result, like Respondent Reins International California, Inc., CNCDA members often seek to compel wage and hour claims into binding arbitration.

As the Court is well aware, the playing field for addressing multi-employee wage claims in the arbitration arena changed dramatically in 2014 with this Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348. Therein, this Court confirmed the enforceability of class action waivers in private employment agreements requiring binding arbitration of employment-related disputes, but held that representative actions under PAGA for recovery of civil penalties on behalf of the State of California are not subject to such agreements. Since that time, CNCDA members frequently find themselves in the same litigation position as Respondent: the individual wage claims of a current or former employee are compelled into binding arbitration, while the corresponding PAGA cause of action is stayed in the superior court pending completion of the individual arbitration.

The CNCDA's purpose in appearing as *amicus curiae* in this matter is to ensure that PAGA is enforced as enacted, and the enforcement process established by the legislature is applied properly to protect the interests of all three stakeholders – employees, employers, and the State of California. This requires that this Court interpret the provisions of PAGA properly by limiting the standing of certain persons that file PAGA actions.

The parties' briefing herein addresses the legal mechanics of the "standing" issue that is before this Court. While those legal mechanics are important, and support the ruling of the Court of Appeal below, they are

not the only reason this Court should affirm the Appellate Court's ruling. The issue of an employee's standing under PAGA has a far-reaching impact on California employers, and is central to the legislature's objective and purpose in enacting PAGA. In reaching its well-reasoned decision, the Court of Appeal in the case below provided California employers with confirmation that PAGA will be enforced as enacted, thereby providing hope in the fight against an onslaught of abuse of the PAGA process by predatory plaintiffs and their legal counsel that threatens employers, such as CNCDA's members, with financial ruin. By affirming the Court of Appeal's ruling in this matter, this Court will affirm the enforcement process envisioned by the legislature – a process whereby an employee must not only plead that he is "aggrieved" by his employer's alleged Labor Code violations at the time the complaint is filed, but must also prove with admissible evidence that he remains "aggrieved" at the time of trial. With that affirmation, this Court will provide clear direction for both employers and employees that an employee who brings individual and PAGA claims in a single lawsuit, and then settles and dismisses the individual claims with prejudice, affirmatively disqualifies himself as an "aggrieved employee" as that term is defined in the PAGA, and thus relinquishes standing to pursue a PAGA claim. (*Kim v. Reins International California, Inc.* (2017) 18 Cal.App.5th 1052, 1054–1055.)

Legal Argument

I. THE LEGISLATURE PLACED UNIQUE AND IMPORTANT STANDING REQUIREMENTS IN THE PAGA STATUTE.

In 2003 the State of California found itself in a tough situation – on one hand, employees needed protection from unscrupulous

employers who refused to comply with the Labor Code, and on the other hand the State's labor law enforcement resources were overwhelmed, leaving employees with inadequate protection. The legislature provided a solution by enacting the PAGA, which simultaneously addressed the protection needs of employees and the State's enforcement objectives, while carefully affording employers protection against private plaintiff abuse by including a limited standing requirement to place enforcement authority only in the hands of carefully defined "aggrieved" employees.

In *Arias v. Superior Court* (2009) 46 Cal.4th 969, this Court summarized the Legislature's enactment of PAGA to address these interests:

> In September 2003, the Legislature enacted the Labor Code Private Attorneys General Act of 2004 [citations]. The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts. (Stats.2003, ch. 906, § 1.)
>
> Under this legislation, an 'aggrieved employee' may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (Lab.Code, § 2699, subd. (a).) Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the 'aggrieved employees.' (*Id.*, § 2699, subd. (i).)

> Before bringing a civil action for statutory penalties, an employee must comply with Labor Code section 2699.3. (Lab.Code, § 2699, subd. (a).) That statute requires the employee to give written notice of the alleged Labor Code violation to both the employer and the Labor and Workforce Development Agency, and the notice must describe facts and theories supporting the violation. (*Id.*, § 2699.3, subd. (a).) If the agency notifies the employee and the employer that it does not intend to investigate..., or if the agency fails to respond within 33 days, the employee may then bring a civil action against the employer. (*Id.*, § 2699.3, subd. (a)(2)(A).) If the agency decides to investigate, it then has 120 days to do so. If the agency decides not to issue a citation, or does not issue a citation within 158 days after the postmark date of the employee's notice, the employee may commence a civil action. (*Id.*, § 2699.3, subd. (a)(2)(B).)"

(*Arias, supra,* 46 Cal.4th at pp. 980–981, fn. omitted; see also *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 379–380 [quoting *Arias*].)

Thus, while opening the door to an additional enforcement alternative to protect employees and expand the State's enforcement presence, PAGA expressly limits standing to pursue such an alternative enforcement action to "aggrieved employees":

> . . . any provision of this code that provides for a civil penalty to be assessed and collected . . . for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

(Lab. Code § 2699, subd. (a).) There is no question that "a person may not bring a PAGA action unless he or she is 'an aggrieved employee' [citations omitted]." (*Iskanian, supra,* 59 Cal.4th at p. 387.)

The Labor Code further defines "aggrieved employee" to mean "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (Lab. Code § 2699, subd. (c).) In addition,

> 'A plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but must bring it as a representative action and include "other current or former employees.' (*Machado v. M.A.T. & Sons Landscape, Inc.* (E.D.Cal., July 23, 2009, No. 2:09–cv–00459 JAM JFM) 2009 U.S.Dist. Lexis 63414, *6, 2009 WL 2230788, *2.) In *Machado*, the district court, using the 'common acceptation' of the word 'and,' held that the claim must be brought on behalf of other employees. (Ibid.) 'The PAGA statute does not enable a single aggrieved employee to litigate his or her claims, but requires an aggrieved employee 'on behalf of herself or himself *and* other current or former employees' to enforce violations of the Labor Code by their employers.' [citations omitted.]

(*Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123-1124 ("*Reyes*").)

Instead of applying the rule for standing that an employee had to have actually been aggrieved in fact, Appellant seeks a ruling that would only require that such a fact be contained in the pleadings. This ruling requested by Appellant would set an untenable precedent for all litigation – that simply pleading facts sufficient to withstand demurrer is all that is necessary to ensure plaintiff of victory and recovery; proving those facts with admissible evidence at trial is not necessary. This could never be the standard the legislature intended to set in enacting PAGA. While simple good faith pleading of relevant facts alleging Labor Code violations may suffice to withstand demurrer, actual "**recovery** of civil penalties under the [PAGA] **requires proof of a Labor Code violation**." (*Arias, supra,* 46 Cal.4th at p. 987 (emphasis added).) Thus, an employee may plead facts

alleging that they and other employees are "aggrieved" by some violation of the Labor Code by their employer sufficient to survive a demurrer or other challenge to their complaint, but in order to survive summary judgment, prevail at trial and ultimately recover any civil penalties, the employee must prove, with admissible evidence, that: (1) he/she is an "aggrieved employee"; AND (2) there are other current or former employees who are similarly "aggrieved."

Once an employee dismisses, with prejudice, claims that the employer violated the Labor Code, those alleged violations are conclusively adjudicated in favor of the employer, i.e., it is conclusively adjudicated that violations vis-à-vis the complaining employee did not occur. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798.) If that dismissal with prejudice occurs prior to trial of any PAGA cause of action predicated on Labor Code violations alleged solely by that employee, it is impossible for that employee to sustain his burden to prove, at the time of trial, that he is "aggrieved."

Proving at the time of trial that the plaintiff is an "aggrieved employee" is critical and essential because, although a "PAGA representative action is . . . a type of *qui tam* action" (*Iskanian, supra*, 59 Cal.4th at p. 382), the requirement of section 2699(a) that a PAGA action must be "brought by an aggrieved employee" is unique among *qui tam* actions. In contrast, a traditional *qui tam* action may be maintained by a private plaintiff on behalf of the government even though the plaintiff has suffered no injury in fact. (See, e.g., *Vermont Agency of Natural Resources v. United States ex rel. Stevens* (2000) 529 U.S. 765, 773 [*qui tam* plaintiff under Federal False Claims Act has standing even though plaintiff has suffered no injury in fact]; *Campbell v. Regents of University of California*

(2005) 35 Cal.4th 311, 325 [California False Claims Act "protects public funds by authorizing employee informants who discover fraudulent claims made against state and local governmental entities to file qui tam suits on behalf of those entities."].)

Appellant blurs this critical legal distinction in his Reply Brief on the Merits ("RBM"), citing to *Rothschild v. Tyco International (US), Inc.* (2000) 83 Cal.App.4th 488 for the proposition that PAGA's "aggrieved employee" standing requirement is meaningless because a PAGA representative action is brought as the proxy or agent of the state, which possesses primary rights that are different from those of the individual plaintiff. (RBM at 27.) However, the discussion of primary rights in *qui tam* actions in *Rothschild* is actually what is meaningless to the issue before this Court.

The two statutory schemes at issue in *Rothschild*, the False Claims Act and the Unfair Competition Law (UCL), did not contain an explicit standing requirement[2] akin to PAGA's "aggrieved employee" requirement, thus an analysis of primary rights was necessary in that case.

In this case, unlike *Rothschild*, there is no need for this Court to balance primary rights in determining standing under PAGA because

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[2] In 2004, the adoption of Proposition 64 " 'substantially revised the UCL's standing requirement; where once private suits could be brought by "any person acting for the interests of itself, its members or the general public" (former [Bus. & Prof. Code] § 17204, as amended by Stats.1993, ch. 926, § 2, p. 5198), now private standing is limited to any "person who has suffered injury in fact and has lost money or property" as a result of unfair competition (§ 17204, as amended by Prop. 64, as approved by voters, Gen. Elec. (Nov. 2, 2004) § 3.)' " (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320–321.)

section 2699(a) expressly confers standing only upon an aggrieved employee. Indeed, as all parties agree, the Legislature expressly drafted PAGA with an actual injury requirement, i.e. the representative employee must be "aggrieved" by alleged violation(s), in order to avoid the private plaintiff abuse of the UCL that Proposition 64 ultimately sought to curb. The Legislature specifically included PAGA's standing requirement to limit the class of individuals who can pursue a representative action for civil penalties to those "aggrieved" by the actions of their employers to protect employers. CNCDA members and other California employers are entitled to the certainty that the "aggrieved employee" limitation imposes on a plaintiff's ability to maintain a PAGA enforcement action.

II. NO COURT HAS ALLOWED AN INDIVIDUAL WITHOUT LABOR CODE CLAIMS TO PURSUE A PAGA ACTION

Appellant relies on a trio of cases—*Huff, Lopez,* and *Raines*—for the proposition that an employee without a viable Labor Code claim may bring and maintain a representative action under PAGA. However, none of those cases support such a broad interpretation, and the proposition itself is contrary to the express language of the PAGA.

In *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, the representative plaintiff in a PAGA action asserted that he and other employees were aggrieved by several Labor Code violations. At trial, the plaintiff was unable to prove that he was aggrieved by one of the alleged violations, and the trial court entered judgment in favor of the defendant on the basis that the plaintiff had no standing to pursue penalties under PAGA on behalf of others who were aggrieved by that violation. The trial court subsequently granted the plaintiff a new trial, determining it made an error in law, and concluding that so long as the plaintiff could

prove he was *aggrieved by at least one Labor Code violation*, he could pursue penalties on behalf of other employees for additional violations. (*Id.*, 23 Cal.App.5th at p. 752.) The Court of Appeal affirmed the order granting new trial, holding that an employee *aggrieved by at least one Labor Code violation* may pursue penalties on behalf of the State for unrelated violations by the same employer. (*Id.*, 23 Cal.App.5th at pp. 753-761.) When it is boiled down, *Huff* does nothing to support Appellant's position vis-à-vis the issue before this Court, and actually supports the ruling of the Court of Appeal below.

In *Huff* the plaintiff remained in the shoes of the State for purposes of continuing to prosecute a PAGA cause of action in a new trial because the court determined that he had pled that he was "aggrieved" by his employer's violation of *at least one* provision of the Labor Code – the new trial still required him to prove that violation occurred before he could recover under PAGA. In contrast, though the Appellant here stood in the shoes of the State when he filed his complaint, he effectively took off those shoes when he dismissed, with prejudice, all known and unknown claims for violation of the Labor Code, leaving him unable establish at trial that he is "aggrieved" by, or personally suffered from, a Labor Code violation. (See *Donohue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068, 142 [summary judgment of PAGA claims proper where plaintiff did not establish that she suffered a Labor Code violation or that her PAGA claims were not derivative of her individual claims].) No one forced Appellant to take off the shoes of the State's labor enforcement authority, he did so of his own free-will and for his own purposes. Some other employee who meets the aggrieved standard may put on the State's shoes and continue

with a PAGA action, but Appellant cannot put those shoes back on again and continue to pursue the employer.

Equally distinguishable are *Lopez v. Friant & Associates, LLC* (2017) 15 Cal.App.5th 773 and *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, both of which discuss the burden of proof on a representative claim for civil penalties under PAGA based on violations of Labor Code section 226, subdivision (a). Both cases held that a representative plaintiff need not prove an individual claim for statutory damages under the Labor Code section 226(e) based on the same violations of section 226, subdivision (a) in order to recover civil penalties under PAGA. Although a representative PAGA claim for penalties and an individual claim for damages both require proof of a violation of the requirements for itemized wage statements under section 226, subdivision (a), the PAGA claim requires only proof that the employer's wage statement violated section 226, subdivision (a), whereas the individual claim requires proof that the plaintiff suffered an " 'injury' resulting from a 'knowing and intentional' violation of section 226(a)." (*Lopez,* at pp. 784, 784-786; see also *Raines* at p. 679.)

The opinions in *Lopez* and *Raines* shed no light on whether an employee who releases and dismisses individual claims retains standing to maintain a PAGA action. Neither opinion makes any mention of settlement of the underlying individual claims. Rather, *Lopez* involved a sole cause of action under PAGA and determined only the burden of proof for recovery of civil penalties under Labor Code section 226(e). And although *Raines* concluded that "[a]n act may be wrongful and subject to civil penalties even if it does not result in injury" (23 Cal.App.5th at 681), the opinion sheds no light on whether an employee releasing all individual claims has standing

under PAGA to maintain a representative civil action. However, it is instructive that the civil penalties of PAGA only attach when a Labor Code violation is proven to have occurred – when an employee dismisses his individual violation claims with prejudice, no evidence remains to enable that employee to prove a violation to which civil penalties may attach.

Appellant argues that he remains vested with standing to continue as the PAGA representative because he "stands to share in the state's civil penalties, which are distributed '25 percent to the aggrieved employees,' " and cites to *Amey v. Cinemark USA Inc.* ((N.D.Cal., Aug. 17, 2018, No. 13-CV-05669-WHO) 2018 WL 3956326), to support this argument. However Appellant's argument misses the mark for two reasons. First, it is circular – plaintiff argues that he is an aggrieved employee because he will share in the civil penalties, but he will only share in those civil penalties if he is an aggrieved employee. Second, contrary to Appellant's assertion, the *Amey* case is based on very different facts than present here. In *Amey*, like Appellant, the plaintiff settled her individual wage claims, but the settlement agreement signed by the parties in *Amey* expressly stated that the plaintiff "will retain her personal stake and continued financial interest in the advancement of the class claims and the Private Attorneys General Act ("PAGA") claims". (*Id.*, at *4). Based on that express retention, she was allowed to continue as the representative plaintiff. Such a ruling makes sense on those facts. Allowing a plaintiff, like Appellant, to continue as a representative plaintiff in a PAGA action after dismissing his individual claims, absent such an express retention, does not.

III. ELIMINATING THE STANDING REQUIREMENT WILL LEAD TO ABUSES COMPARABLE TO THE UCL—A RESULT THE LEGISLATURE SPECIFICALLY SOUGHT TO AVOID.

California has been down the road of overbroad statutory readings before with the UCL. That experience led to Proposition 64 which established an actual injury requirement to gain standing to purse a claim under the UCL, and also was instrumental in the legislature limiting PAGA standing to potential private plaintiffs to who could both plead and prove that they were aggrieved employees.

But even that has not stopped the explosion in PAGA claims. (See, e.g., Michael Saltsman, *Private Attorneys General Act is another burden to California small businesses* (June 4, 2017) https://www.ocregister.com/2017/06/04/private-attorneys-general-act-is-another-burden-to-california-small-businesses [as of January 3, 2019].)[3] According to the Legislative Analyst's Office, PAGA notices ballooned from 4,430 in 2010 to 6,307 in 2014. (*The 2016-17 Budget: Labor Code Private Attorneys General Act Resources* (Mar. 25, 2016) Legislative Analyst's Office https://lao.ca.gov/Publications/Report/3403 [as of January 3, 2019])[4] A large percentage of individual claims for unpaid wages are now filed as representative PAGA actions. The trial courts are flooded with PAGA filings, most of which, as quasi-class actions, are deemed complex. (see Cal. Rules of Court, rule 3.400(c)(6).)

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[3] A copy is attached to the end of this Brief at Tab 2.

[4] A copy is attached to the end of this Brief at Tab 3. Ironically, the huge increase in PAGA notices has put a strain on administrative resources, triggering the need for budget increases - the exact problem PAGA was supposed to resolve.

The explosion in PAGA claims is not surprising, as the mere filing of a PAGA claim has an *in terrorem* effect. Those suing employers are advised to include PAGA claims because "[t]he ability to recover large civil penalties and attorneys' fees from employers can create important leverage in PAGA cases." (Lisa P. Mak, *PAGA Procedural Amendments: Same statute, new requirements for Labor Code violations* (Feb. 2017) Plaintiff Magazine https://www.plaintiffmagazine.com/item/paga-procedural-amendments [as of January 3, 2019].)[5] The ability to evade the due process protections built into the class action procedures is what generates and drives the filing of many PAGA unpaid wages claims: "A major benefit of PAGA actions is that plaintiffs do not need to satisfy the strict and often onerous class-certification requirements of traditional class actions." (*Ibid.*)

This abuse of the PAGA mechanism recently spawned the filing of a lawsuit in the Orange County Superior Court entitled *California Business & Industrial Alliance v. Becerra*, Case No. 2018-01035180-CU-JR-CXC (filed November 28, 2018), which seeks declaratory and injunctive relief to curb the abuse of PAGA by the state and plaintiff's bar.[6]

This wasn't supposed to happen. The legislative history reflects that "[t]he sponsors [of PAGA] are mindful of the recent, well-publicized allegations of private plaintiff abuse of the UCL [Bus. & Prof. Code, § 17200] and have attempted to craft a private right of action that will not be subject to such abuse." (Sen. Judiciary Com., Rep. on Sen. Bill

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[5] A copy is attached to the end of this Brief at Tab 4.

[6] A file-endorsed copy of the complaint is attached at the end of this brief at Tab 5.

No. 796 (2003-2004 Reg. Sess.) Apr. 29, 2003, p. 7.)[7] To that end, by limiting PAGA standing to aggrieved employees, the legislature built in a brake to stop untoward and abusive lawsuits. But that brake disappears if PAGA is judicially extended to allow employees who no longer meet the "aggrieved employee" definition to maintain and prevail on representative actions.

At a minimum, the legislative understanding and sentiment that there should be, and would be, self-dampening brakes on PAGA lawsuits, demands a restrained interpretation when an attempt, such as this one, is made to push PAGA to its limits and beyond.

IV. APPELLANT'S POLICY ARGUMENTS ASSERTED ON REPLY LACK MERIT.

In his Reply Brief on the Merits ("RBM"), Appellant raises several policy arguments which fail to persuade that an individual's PAGA representative action should survive a full release of all individual claims. First, Appellant asserts "if Kim loses standing, the state loses its statute of limitations secured by Kim's action." (RBM at 29.) Notably, Appellant fails to cite any legal authority for this contention. Moreover, Appellant concedes that " 'the record is devoid of any evidence that other employees made the same allegations that Kim made.' " (RBM at 30.) But what Kim is really saying in making this argument is that his self-serving action in settling his individual claims might potentially deprive the State of an opportunity to recover civil penalties for the statutory period associated

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[7] Found at http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200320040SB796# (S.B. 796, session year 2003-2004), copy attached at Tab 6.

with Kim's allegedly "aggrieved" period, and if there are no other aggrieved employees the state loses out on recovering civil penalties. However, this purportedly altruistic argument ignores the stated goal of PAGA, which is to improve enforcement of Labor Code obligations (See *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 370.) By creating an incentive through sharing civil penalties with aggrieved employees, the PAGA increased the LWDA's enforcement footprint exponentially, thereby accomplishing its goal, and "an action to recover civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986). It also it must not be ignored that the stated purpose of civil penalties in the PAGA is to "deter violations," **not generate revenue**. (Sen. Judiciary Com., Rep. on Sen. Bill No. 796 (2003-2004 Reg. Sess.) Apr. 29, 2003, p. 4 [see attached Tab 6.].) Kim's argument presupposes that the employer did not correct its allegedly violative conduct in the face of the PAGA claim and, thereby discounts both the stated goal of PAGA and the purpose of the State's labor laws and enforcement agencies. (See *Caliber, supra*, 134 Cal.App.4th at p. 370 fn.1 ["Created in 2002, the LWDA is a cabinet-level state agency whose 'mission is to provide leadership to protect and improve the well-being of California's current and future workforce.' (http://www.labor.ca.gov/default.htm; see also http://www.labor.ca.gov/aboutindex.htm.) The LWDA 'is committed to ensuring California businesses and employees have a level playing field upon which to compete" through education about rights and responsibilities under state labor laws and "impartial and consistent enforcement of the law." (http://www.labor.ca.gov/welcome/htm.)"].) Thus, it is actually a good thing for employees and the State when violative

behavior is corrected, and the fact that no viable violation exists upon which a further enforcement action might be premised is evidence that the PAGA worked exactly as intended.

Second, Appellant erroneously conflates individual standing as an aggrieved employee under Labor Code section 2699(a) with the State's right to recover civil penalties from an employer for violation of the Labor Code. (See RBM at 15-17.) It makes no difference whether the plaintiff also brings concurrent individual claims. A plaintiff can bring a purely PAGA action with or without bringing concurrent individual claims and PAGA standing does not change one way or the other provided the standing requirements are met. There is no statutory basis for any other interpretation. Regardless of whether an employee includes concurrent individual claims with a PAGA action, the plaintiff's burden is the same for recovery of civil penalties: the PAGA complaint must allege that a Labor Code violation exists and that he/she was aggrieved by it, and at trial the plaintiff must prove the same. Standing as an aggrieved employee under PAGA does not rest on the concurrent pursuit of the employee's individual claims—the question is, "Is the employee aggrieved?" By dismissing his individual claims with prejudice, Kim precluded himself from an opportunity to prove that such a grievance exists as California law is clear that when an individual dismisses with prejudice the allegation of a grievance, the grievance is adjudicated out of existence. (*Boeken v. Philip Morris USA, Inc., supra,* 48 Cal.4th at p. 798.)

Third, Appellant's argument regarding the requirement that a PAGA settlement must have court approval (RBM at 28) misses the point. The logic underlying Labor Code section 2699(*l*)(2)'s requirement of court approval of PAGA settlements is that a settlement deprives the State of the

right to further recovery of civil penalties, since civil penalties can only be recovered once for each violation. However, a settlement similar to Kim's does not even address an award of civil penalties, thus there is no preclusive effect. The State, either on its own, or through a PAGA action filed by some other allegedly aggrieved employee, still may pursue recovery of civil penalties against the employer. Kim did not settle or release his PAGA cause of action, but there can be no question that the settlement of his individual claims eliminated his ability to prevail on that cause of action by relinquishing his aggrieved employee status. Absent that status, and if the appellate decision below is overturned, the protection against private plaintiff abuse put in place by the Legislature will be destroyed.

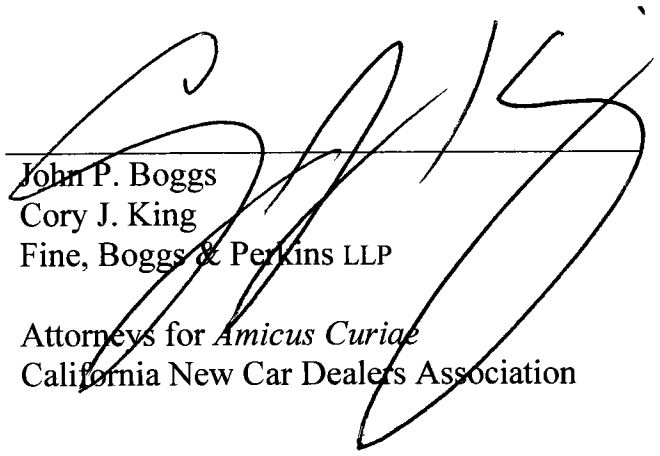
Fourth, Appellant argues: "Once the employee prevails in arbitration and the court affirms his arbitration award, he has been fully redressed and no longer has 'viable individual Labor Code claims to pursue.' " (RBM at 30-31.) This is nonsensical as an employee who prevails in an arbitration on the merits of an individual Labor Code claim establishes a fundamentally different scenario than presented here. An employee who establishes in an arbitration of individual claims that an employer violated the Labor Code, by definition, establishes himself as an "aggrieved employee," and undoubtedly would so argue to a Court in his summary judgment motion as a PAGA representative. The same, in contra form, would hold true, were the employer to prevail in arbitration and defeat the employee's individual claims. Correspondingly, as noted above, where, as here, the employee settles and dismisses his individual claims with prejudice (and does not expressly retain his personal stake in the

PAGA action as part of the settlement), the employee cannot present evidence at trial of "aggrieved" status.

Conclusion

PAGA was intended to allow employees that are aggrieved to represent the State of California in enforcement actions. By all accounts, PAGA is readily subject to abuse by over-reaching plaintiffs and their legal counsel. By holding that only currently aggrieved employees can file, continue to pursue, and actually recover on a PAGA cause of action, this Court is following the both the letter and spirit of PAGA as it was enacted by the Legislature. For all of these reasons, the California New Car Dealers Association urges this Court to affirm the Court of Appeal's decision in this matter.

Respectfully submitted,

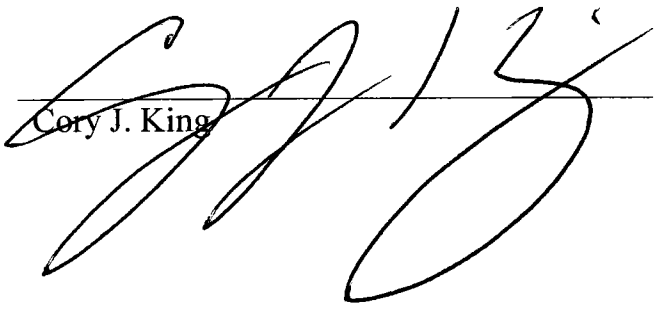


John P. Boggs
Cory J. King
Fine, Boggs & Perkins LLP

Attorneys for *Amicus Curiae*
California New Car Dealers Association

CERTIFICATION OF WORD COUNT

Pursuant to Rules of Court, Rule 8.204(c)(1), I certify that the text of this **CALIFORNIA NEW CAR DEALER ASSOCIATION'S APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF REINS INTERNATIONAL CALIFORNIA, INC.; AND *AMICUS CURIAE* BRIEF** consists of 6,897 words as counted by the Microsoft Word 2010 software program used to generate this document, including footnotes, titles, and proof of service, etc.



Cory J. King

PROOF OF SERVICE

JUSTIN KIM VS. REINS INTERNATIONAL CALIFORNIA, INC.
Supreme Court Case No. S246977

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of San Diego in the office of a member of the bar of this court at whose direction the service was made. My business address is 300 Rancheros Drive, Suite 375, San Marcos, California 92069.

On January 14, 2019, I served the foregoing document described as:

CALIFORNIA NEW CAR DEALER ASSOCIATION'S APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF REINS INTERNATIONAL CALIFORNIA, INC.; AND *AMICUS CURIAE* BRIEF

by placing ☐ (the original) ☒ (a true copy thereof) in a sealed envelope addressed as stated in the attached mailing list.

☒ **BY MAIL:** I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Fine, Boggs & Perkins LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☐ **BY MAIL:** I deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid at 300 Rancheros Drive, Suite 375, San Marcos, California 92069.

☒ **BY OVERNIGHT DELIVERY:** I placed the sealed envelope(s) or package(s) designated by the express service carrier for collection and overnight delivery by following the ordinary business practices of Fine, Boggs & Perkins LLP, San Marcos, California. I am readily familiar with Fine, Boggs & Perkins LLP's practice for collecting and processing of correspondence for overnight delivery, said practice being that, in the ordinary course of business, correspondence for overnight delivery is deposited with delivery

fees paid or provided for at the carrier's express service offices for next-day delivery.

☐ **BY FACSIMILE** by transmitting a facsimile transmission a copy of said document(s) to the following addressee(s) at the following number(s), in accordance with:

☐ the written confirmation of counsel in this action:

☐ [State Court motion, opposition or reply only] in accordance with Code of Civil Procedure section 1005(b);

☐ [Federal Court] in accordance with the written confirmation of counsel in this action and order of the court;

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION: by TRUEFILING:** Based on a court order or an agreement, of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the person[s] at the e-mail addresses listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Addressee(s)

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- **COURT OF APPEAL**
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  Division Four
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  Los Angeles, CA 90013
  VIA TRUE FILING / VIA U.S. MAIL

- **CLERK OF THE SUPERIOR COURT**
  Los Angeles County Superior Court
  600 S. Commonwealth Avenue
  Los Angeles, CA 90005
  VIA U.S. MAIL

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 14, 2019, San Marcos, California.

Kathryn M Cherry

Kathryn M. Cherry

California's New Car Dealers Are Driving the California Economy

ANNUAL CONTRIBUTIONS OF CALIFONRIA NEW CAR DEALERS	
Total sales	$123.06 billion
Average sales per dealership	$90.17 million
Percent of total statewide sales tax collected	13%
Number of new car dealerships	1,366

DEALERS PROVIDE JOBS IN CALIFORNIA	
Total payroll for all dealerships	$8.56 billion
Total number of new car dealership employees in California	140,596

DEALERS PLAY AN IMPORTANT ROLE IN THE STATE AS LOCAL BUSINESS AND CIVIC LEADERS	
Total taxes collected or paid	$9.38 billion
Total spent for products and services form other California businesses	$2.74 billion
Donations to charitable and civic organizations	$49.28 million

2017 VEHICLE SALES	
New vehicles sold*	2,047,632
Used retail vehicles sold	825,825
Total new and used vehicles sold	2,873,457

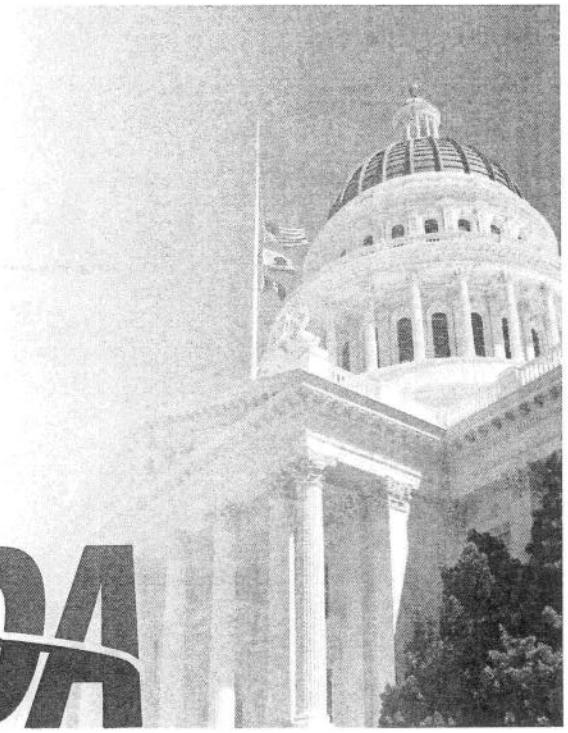
* New vehicles sold based on California registrations.

This report provides an in-depth analysis of the economic impact of California new car and truck dealers on the State's economy. It includes estimates of employment, personal income, and tax collections generated by California new car dealers. Also included is a review of dealership financial statistics and operations. This report was prepared by Auto Outlook, Inc., an independent automotive market analysis firm, and was sponsored by the California New Car Dealers Association. The report was compiled based on data collected from new car dealerships throughout the state, as well as government sources.

CNCDA

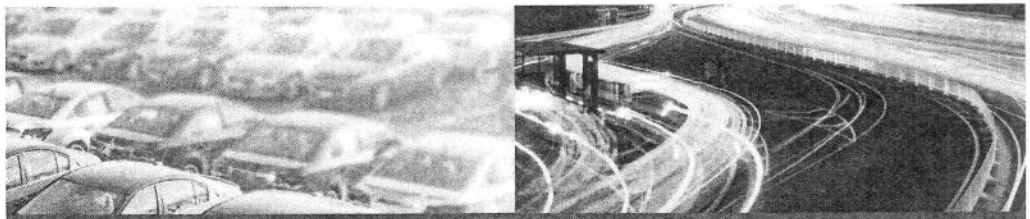
CALIFORNIA NEW CAR DEALERS ASSOCIATION

1517 L Street • Sacramento, CA 95814 • Phone 916.441.2599 • www.cncda.org



CNCDA

2018 Economic Impact Report

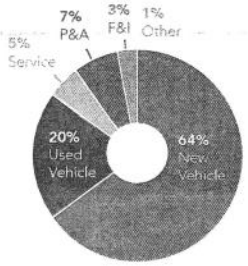


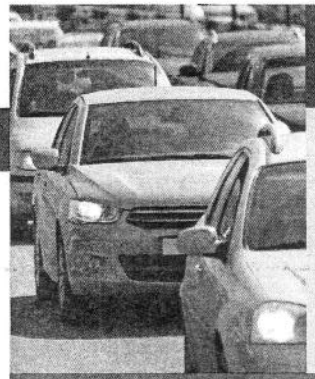
THE CONTRIBUTIONS OF CALIFORNIA'S FRANCHISED NEW CAR DEALERS

Greater Los Angeles New Car Dealers Association · Sacramento Region Automobile Dealers Association · OCADA · New San Diego County Auto Dealers Association · AUTO · SMCDA

2017 DEALERSHIP SALES

	AVERAGE DEALERSHIP	INDUSTRY TOTAL
New Vehicle Department	$58.10 million	$79.31 billion
Used Vehicle Department	$17.95 million	$24.50 billion
Service Department	$4.43 million	$6.04 billion
Parts and Accessories Department	$6.09 million	$8.31 billion
Finanace and Insurance Department	$2.93 million	$3.99 billion
Other	$.67 million	$.91 billion
Total Dealership Sales	**$90.17 million**	**$123.06 billion**





TAXES

	AVERAGE DEALERSHIP	INDUSTRY TOTAL
State Sales Tax	$5.24 million	$7.15 billion
Federal Payroll Taxes	$1.63 million	$2.22 billion
State Payroll Taxes	$357,000	$487.31 million
Real Estate Taxes	$154,000	$210.21 million
Other State and Local Taxes	$98,000	$133.78 million
Total Taxes Collected or Paid	**$7.48 million**	**$10.20 billion**

Average sales tax and VLF generated on the sale of a new vehicle in Los Angeles: **$3,362.23**

CHARITABLE GIVING

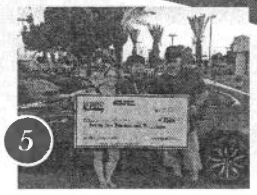
In 2017, California new car dealers made over **$49 million** in donations to charitable and civic organizations.

RETAIL VEHICLE SALES

(SUMMARY FOR AVERAGE DEALERSHIP)

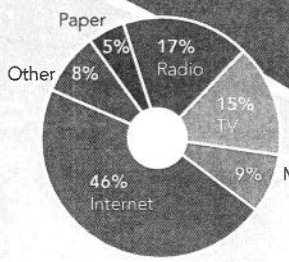
	UNITS SOLD	$ PER UNIT	TOTAL
New Vehicles	1,582	$36,726	$58.10 million
Used Vehicles	605	$17,310	$10.47 million

1. San Diego Hyundai dealers donate $50,000 to Rady Children's Hospital
2. Harper Motors awards District 26 Little League with $1,550
3. Shingle Springs Subaru supports its local veterans
4. Nello Company Drive To Give Holiday Program benefiting the Salvation Army
5. Elk Grove Auto Mall awards couple with $25,000 for the American Hero Wedding



EMPLOYMENT AND PAYROLL

	AVERAGE DEALERSHIP	INDUSTRY TOTAL
Full time employees	97	132,405
Part time employees	6	8,190
Total Employees	**103**	**140,595**
Annual Payroll	**$6.270 million**	**$8.56 billion**
Percentage of dealerships that provide access to health insurance for employees	96%	96%
Workers' compensation premiums per employee	$1,780	
Workers' compensation premiums paid	$172,660	$235.68 million
Total spent for products and services from other California businesses	$2.01 million	$2.74 billion

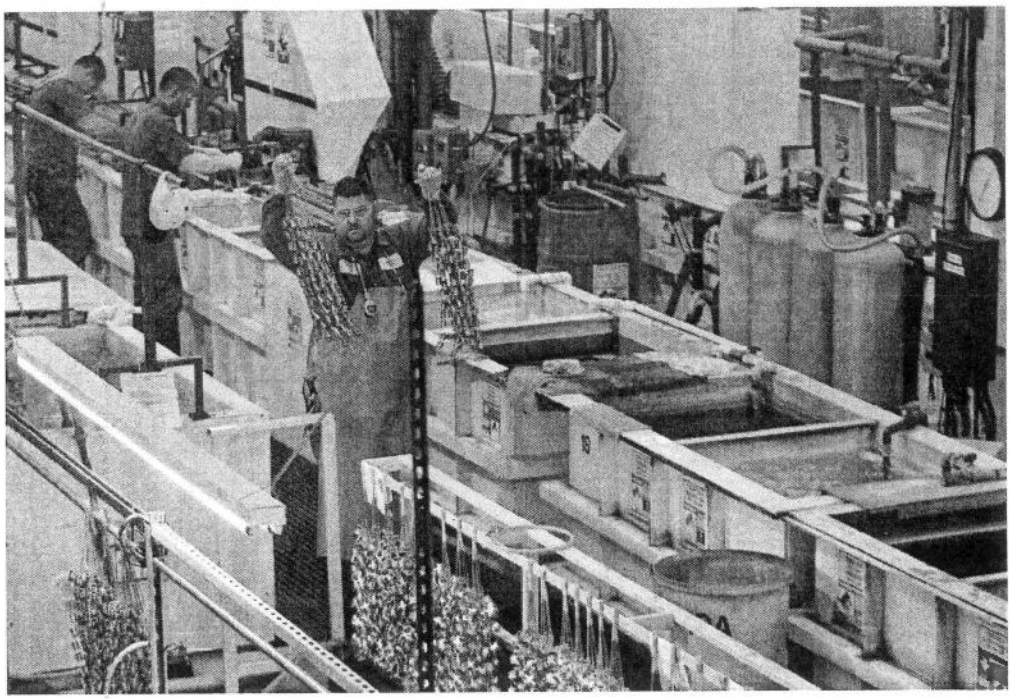


ADVERTISING

In 2017, franchised new car dealers in California collectively spent over **$1.2 billion** on advertising.

OPINION

Private Attorneys General Act is another burden to California small businesses



AP Photo/Lenny Ignelzi

Employees at Sheffield Platers Inc. work on the factory floor in San Diego.

By MICHAEL SALTSMAN | Orange County Register

June 4, 2017 at 12:05 am

1 COMMENT

No one questions the necessity of basic workplace protections that keep employees safe. But what happens when minor compliance or technical errors, like a missed lunch break or misclassified information on a paystub, become multi-million dollar liabilities for small employers?

Such is the status quo under California's Private Attorneys General Act, known colloquially as the "sue your boss" law. PAGA allows employees to sue their employer for such minor labor violations — even if they are not the aggrieved party. Passed in 2004 to increase labor enforcement by deputizing employees, the law can leave businesses with six-figure penalties (and seven- or eight-figure liabilities) for retroactive violations that didn't meaningfully affect employment.

The law requires that three-quarters of penalty payouts go to the state and one-quarter to plaintiffs — but the lawyers' cut is the real story. Because employers must cover attorney fees, PAGA has become a dream for plaintiffs' attorneys. A 2013 PAGA lawsuit against Goodyear Tire for allegedly failing to issue wage statements that included the last four digits of employees' social security or employee ID numbers is representative. The attorneys walked away with $105,000 in fees. The plaintiff? Just $1,000.

Led by "bounty hunter" attorneys, the state receives more than 6,000 PAGA notices to initiate a PAGA lawsuit every year. Claims increased by more than 400 percent between 2005 and 2013. While the list of frivolous PAGA lawsuits is long, among the most ridiculous is a recent suit against Timely Prefinished Steel Door Frames in the San Fernando Valley.

The company was targeted by a disgruntled employee, who claimed it had not provided a lunch break at the appropriate time and had misclassified a safety bonus. The backstory here is instructive. Employees at Timely start their shift at different times, but most prefer to take a common lunch break to share a meal with family members and friends. Put differently, the lunch break "violation" was a consequence of employees' free choice.

The lunch break lawsuit could cost the company over $1 million dollars, threatening the survival of the business and its 200 employees, many who have worked there for decades. Timely employees took the extraordinary step of launching a letter-writing campaign to California's Department of Industrial Relations to defend their workplace. Among the dozens of unique letters — many handwritten in Spanish — employees highlighted the job perks and flexibility, and argued that an employer shouldn't be sued over when an

The consequences for the employees from the PAGA suit are already being felt. Company president Tom Manzo was forced to eliminate safety bonuses, on which many of his employees depend. He was also forced to become much stricter about lunch breaks, ending the flexibility his employees previously enjoyed to take breaks when it best suited them. As the costs of the complaint grow, he may also be forced to lay off some of his employees.

Timely isn't the only Valley employer under pressure. In a story profiled by the San Fernando Valley Business Journal, Town & Country Event Rentals was forced to settle a potential $29 million lawsuit for missed lunchbreaks. Whether lunchbreaks were actually missed was beside the point; as the owner told the Business Journal, "I've been in business for 35 years, and I've never had one person complain to me that they didn't get their lunch ... ." Because the owner hadn't documented these lunch breaks, two disgruntled former employees were able to sue the company under PAGA. Town & Country settled for $1.2 million, the lion's share of which went to the state and the attorneys.

In 2015, Gov. Jerry Brown signed a PAGA amendment in an effort to reduce frivolous litigation, but the reforms don't go far enough. Some employers are fighting back: Manzo is working with lawmakers on a more-meaningful set of reforms, and organizing fellow small business owners to educate the public on the abuse of the law. He's launched a website called PAGAScam.com. California's reputation as a business-unfriendly state is well-earned; perhaps PAGA abuse will be the galvanizing event that motivates small business to fight back.

Michael Saltsman is managing director at the Employment Policies Institute.

Michael Saltsman

LAO Legislative Analyst's Office
The California Legislature's Nonpartisan Fiscal and Policy Advisor

Budget and Policy Post

March 25, 2016

The 2016-17 Budget

Labor Code Private Attorneys General Act Resources

This post addresses the Governor's 2016-17 budget proposal related to the Labor Code Private Attorneys General Act (PAGA). The following sections provide background on PAGA, describe and assess the Governor's proposal, and outline our recommendations for the Legislature's consideration.

Background

Labor Code Places Various Requirements on Employers Related to Employee Wages, Hours, and Working Conditions. Various provisions of the California Labor Code outline requirements that employers must meet with respect to employee wages, hours, and working conditions. For example, the Labor Code specifies a minimum hourly wage that must be paid to most workers, when overtime compensation must be paid, when meal and rest periods must be provided, what information employers must include on itemized wage statements, and what steps employers must take to provide a safe and healthy workplace.

Employers That Violate Labor Code Provisions Are Liable for Back Wages and Civil Penalties. When an employer does not pay wages as required by law (such as by not paying overtime), the Labor Code allows employees to recover these wages, either through an administrative proceeding with the state's Labor and Workforce Development Agency (LWDA) or through private legal action in Superior Court. The Labor Code also specifies additional civil penalties that may be imposed on

employers who violate Labor Code provisions. Such civil penalties are in addition to wages that may be recovered and are intended to act as a deterrent against violations. The LWDA and the related state agencies that it oversees, including the Department of Industrial Relations (DIR) and the Division of Labor Standards Enforcement (DLSE) and Division of Occupational Safety and Health (DOSH) within DIR, are responsible for enforcing the Labor Code and are authorized to impose the civil penalties outlined in state law.

The PAGA Allows Employees to Seek Civil Penalties on Their Own Behalf. As noted above, employees who have wages improperly withheld may seek to recover these wages through private legal action against the employer. For those who do so, the PAGA—enacted by Chapter 906 of 2003 (SB 796, Dunn) and Chapter 221 of 2004 (SB 1809, Dunn)—grants employees the right to additionally seek civil penalties from employers that prior to PAGA could only be pursued by LWDA and related state agencies. The general intent of PAGA is to allow employees to pursue civil penalties through the legal system when LWDA and related state agencies do not have the resources to do so, with a goal of increasing the deterrent effect of the civil penalties and compliance with labor law. While civil penalties collected by LWDA are generally deposited in the state General Fund, any penalties collected under PAGA are split between the employee, who receives 25 percent, and LWDA, which receives the remaining 75 percent. The LWDA's portion of PAGA penalties is deposited into the Labor and Workforce Development Fund (LWDF), which is used for enforcement of labor laws and to educate employers and employees about their rights and responsibilities under the Labor Code. Figure 1 displays the amount of PAGA penalties received by the LWDF in recent years.

Figure 1

PAGA Penalties Deposited in the Labor and Workforce Development Fund

(In Millions)

2010-11	$4.5
2011-12	5.3
2012-13	4.5
2013-14	5.7
2014-15	8.4

PAGA = Private Attorneys General Act.

Current Law Allows PAGA Claims to Proceed Only After LWDA Declines to Investigate or Does Not Issue a Citation. Under PAGA, an individual who wishes to pursue civil penalties against an employer must provide a written notice to both the employer and LWDA of the alleged violations and his or her intent to pursue civil penalties under PAGA. This notice is the first step in a PAGA claim. (We note that, in practice, PAGA notices have varying levels of detail about alleged violations and the facts supporting them.) This requirement is intended to allow LWDA to step in and investigate claims that it views as preferable to handle administratively rather than through the PAGA process, such as when the claim overlaps with other matters already under investigation by LWDA.

In most cases, LWDA has 30 days to determine whether to investigate and, if it does investigate, 120 additional days to complete the investigation and determine whether to issue a citation. If LWDA does not investigate, or does investigate but does not issue a citation, the PAGA claim may proceed. For certain violations that are considered less serious (for example, failing to correctly display the legal name and address of the employer on an itemized wage statement), employers are provided 33 days to prevent a PAGA claim from proceeding by correcting the alleged violations. In the infrequent case of a PAGA claim related to workplace health and safety, a DOSH investigation is mandatory and separate time lines apply to the DOSH investigation and for the employer to correct the alleged violation. The number of PAGA notices received by LWDA over the past few years is displayed in Figure 2.

Figure 2

PAGA Notices Filed With LWDA

2010	4,430
2011	5,064
2012	6,047
2013	7,626
2014	6,307

PAGA = Private Attorneys General Act and
LWDA = Labor and Workforce Development Agency.

Following Initial Notice and Possible Investigation, LWDA Role in PAGA Process Is Limited. Once the PAGA claim proceeds, LWDA typically receives no further information beyond payment of the portion of any civil penalties that is due to the LWDF. Civil penalties can be assessed through the PAGA process in two ways. When the court finds that the allegations in the PAGA claim have merit, they have the authority to impose civil penalties. Alternatively, the parties to the claim may settle out of court and include civil penalties as part of such a settlement. However, not all settlements include civil penalties. In fact, LWDA reports that in 2014-15 it received just under 600 payments for PAGA claims that resulted in civil penalties. This number is low relative to the amount of PAGA notices LWDA receives each year (roughly 10 percent of notices received in 2014), implying that the final disposition of a large portion of PAGA claims, and likely many settlements, do not involve civil penalties. When cases that involve a PAGA claim settle out of court and civil penalties are included as part of the settlement, PAGA requires court review and approval of the settlement.

Administration Raises Issues Related to PAGA Implementation

The administration has raised several issues regarding the current implementation of PAGA that motivate the Governor's 2016-17 budget proposal, as described below.

Insufficient Time and Resources to Review PAGA Notices and Investigate Claims. The LWDA notes that in the past it has been able to devote only minimal staff and resources—specifically, one position at DLSE beginning in 2014—to perform a high-level review of PAGA notices and determine which claims to investigate. In 2014, less than half of PAGA notices were reviewed, and LWDA estimates that less than 1 percent of PAGA notices have been reviewed or investigated since PAGA was implemented. When a PAGA notice is investigated, LWDA reports that it has difficulty completing the investigation within the timeframes outlined in PAGA. When an investigation is not completed, or not completed on time, the PAGA claim is automatically authorized to proceed.

Reports of Undesirable Outcomes From PAGA Litigation. The LWDA also highlights concerns from stakeholders that the outcomes of PAGA litigation may not always be in the best interest of the state as a whole. Specifically, the concern has been raised that some employers are incurring substantial legal costs to defend against PAGA claims that allege what might be viewed as relatively minor labor law violations. On the other hand, the concern has also been raised that PAGA settlements may not achieve the same level of wage recovery and civil penalties as might be the case were LWDA to investigate. Because parties to PAGA claims currently are not required to notify LWDA on the outcomes of PAGA claims after the agency declines to investigate or issue a citation (other than to forward any penalties due to the LWDF), complete information on the final disposition of PAGA claims is not available. This lack of information makes it difficult to evaluate whether, and how often, these potential undesirable outcomes are occurring.

Potential for Significant PAGA Penalties When New Precedent Is Established. Finally, as a rationale for the 2016-17 proposal, LWDA cites employer concerns about court decisions in which widespread industry practices that a significant number of employers believe in good faith to be legal are found to violate the Labor Code. Such decisions set a new precedent that could lead to PAGA claims with potentially significant penalties for employers.

Overview of the Governor's Proposal

As part of the 2016-17 budget, the Governor proposes several actions intended to reduce litigation costs for employers and improve outcomes for employees by addressing the issues discussed above.

Increase Staff to Review Notices and Oversee PAGA Process. The Governor's proposal would provide $1.6 million in 2016-17 and $1.5 million ongoing from the LWDF to support ten new positions—one at LWDA and nine at DIR—that would allow for greater oversight of the PAGA process. Figure 3 lists the specific positions requested. The new positions would allow for a greater number of PAGA notices to be reviewed and investigated. Specifically, the administration estimates that the proposed positions would review about 900 additional PAGA notices (a more in-depth review than current resources allow) and investigate an additional 45 claims each year. The proposed positions would also help address some increased workload related to various proposed changes to the PAGA process described below.

Figure 3

Positions Requested to Increase PAGA Oversight

Classification	Agency	Number of Positions
Assistant General Counsel	LWDA	1
Attorney IV	DIR	3
Deputy Labor Commissioner III	DIR	1
Investigator	DIR	1
Legal Analyst	DIR	1
Auditor I	DIR	2
Office Technician	DIR	1
Total		**10**

PAGA = Private Attorneys General Act; LWDA = Labor and Workforce Development Agency; and DIR = Department of Industrial Relations.

Require Additional Information on PAGA Proceedings Be Provided to LWDA. The Governor's proposal would also amend PAGA to require that more information about PAGA proceedings be provided to LWDA. Specifically, the proposal would (1) require that initial PAGA notices filed with LWDA have more detail than is currently required about the legal contentions and authorities supporting each alleged violation, (2) require that DIR receive a copy of the complaint when the

legal action is initiated, (3) require that DIR be notified of the terms of PAGA settlements, and (4) require all PAGA-related notices to LWDA or related state agencies be submitted through a new online system.

Make Various Other Changes to the PAGA Process. In addition to the proposed PAGA amendments described above, the Governor's proposal would make several other changes to the existing PAGA process, as described below.

- ***Require a Filing Fee for PAGA Notices.*** The proposal would require that employees wishing to pursue a PAGA claim pay a fee of $75 (or $150 if the PAGA claim is seeking penalties on behalf of ten or more employees) when filing the initial PAGA notice with LWDA, except when the alleged violation relates to workplace safety or health. These fees would be deposited into the LWDF and used to offset some of the cost of the proposed new positions.
- ***Require That PAGA Notices Involving Multiple Employees Be Verified.*** The proposal would require that PAGA notices that are seeking penalties on behalf of ten or more employees be verified, meaning that the employee filing the notice must attest that the information in the notice is true.
- ***Clarify That Employers May Request LWDA Investigation.*** The proposal would amend PAGA to clarify that employers who receive a PAGA notice have the ability to request an investigation by LWDA or related state agencies. Employers would be required to pay a $50 fee to file such a request.
- ***Extend Investigation Time Lines.*** The proposal would extend the time allotted for LWDA to consider whether to investigate the violations in a PAGA notice from 30 to 60 days and extend the time to investigate and issue a citation from 120 to 180 days.
- ***Require Court Approval of All PAGA Settlements.*** Currently, courts are generally required to review and approve only PAGA settlements that include civil penalties or that relate to violations of health and safety requirements. The proposal would require that all settlements be submitted to the court for review and approval.
- ***Allow LWDA to Object to Proposed PAGA Settlements.*** Currently, in addition to being reviewed by the court, PAGA requires that settlements related to health and safety requirements are also submitted to DOSH for comment and that courts give appropriate weight to DOSH comments when considering approval

of the settlement. The proposal would extend this requirement to all PAGA settlements by allowing the Director of DIR to object to any proposed settlement prior to the court's consideration of the settlement.

Grant Authority to DIR to Create Ad Hoc Employer Amnesty Programs Under Specified Conditions. In some instances where a widespread industry practice has been found to be in violation of labor law, the Legislature has enacted temporary amnesty or safe harbor programs to allow affected employers to receive relief from potentially substantial penalties in exchange for quickly compensating employees for past violations. For example, Chapter 741 of 2015 (AB 621, Hernández) recently created the Motor Carrier Employer Amnesty Program. This program allows motor carriers to pay back wages and benefits to drivers whom are misclassified as independent contractors in exchange for relief from penalties for the violations in question.

The Governor's proposal would give DIR the authority to create temporary amnesty programs when certain conditions exist, including that (1) a court decision or other legal development invalidates a common industry practice that a substantial portion of the industry believed in good faith to be legal, (2) the decision or legal development affects at least 10,000 employees and is likely to lead to PAGA claims against at least five employers, and (3) the amnesty program is likely to provide more relief to employees than private legal action. The process of creating a temporary amnesty program would begin after a petition from an interested party (such as an employer) is filed with DIR and an opportunity is given to other interested parties, including employees, employers, and worker or industry advocacy groups, to comment on the petition. Amnesty programs created under the proposed new authority would be limited to 18 months and would require that an employer fully compensate employees for any back wages due.

Assessment

Additional Funding and Staffing Would Provide Greater PAGA Oversight, Consistent With Legislative Intent. In our view, the intent of PAGA is that LWDA have the opportunity to review PAGA notices and at least in some cases conduct its own investigation prior to the PAGA claim proceeding. Given the minimal resources currently devoted to the review and investigation of PAGA notices, we do not believe LWDA is currently able to fulfill the role intended for it in the PAGA legislation. Providing the additional funding and positions in the Governor's

proposal likely would not be sufficient to review and investigate even a majority of PAGA notices, but would greatly expand LWDA's ability to meet the intent of the PAGA legislation.

Requiring That More Information Be Provided to LWDA Would Clarify Nature and Extent of Undesirable Outcomes. The administration has raised concerns about possible negative outcomes from PAGA litigation for both employers and employees, but because comprehensive information about the final disposition of PAGA claims is not available to the LWDA, it is difficult to assess how serious or prevalent these issues are. We think the Governor's proposed amendments to PAGA requiring more information be provided to LWDA—specifically, more detail in the initial PAGA notice and that a copy of the PAGA complaint and any settlement be provided to LWDA—are a reasonable extension of LWDA's oversight of the PAGA process that would make it possible to better assess the nature and extent of the undesirable outcomes highlighted in the Governor's proposal. Information obtained about the disposition of PAGA claims could play an important role in future consideration of other potential proposals to modify the PAGA process.

Other Proposed Amendments to PAGA Raise More Significant Policy Issues That Warrant Greater Legislative Deliberation. In our view, the remaining proposed amendments to the PAGA process differ from those discussed immediately above in that they raise more significant policy issues that are more central to the Legislature's intent for PAGA. For example, the remaining proposed changes touch on questions of employee access to the PAGA process, how long employees should wait for LWDA to conduct an investigation before the claim may proceed, and whether LWDA should be able to influence the outcome of a PAGA claim once it has decided not to investigate or issue a citation. While the proposed changes may have merit, such fundamental changes to PAGA, in our view, would be more appropriately considered in the legislative policy process rather than the state budget process. This policy deliberation also may be more productive once LWDA has more complete information about the outcomes of PAGA claims—as proposed by the Governor.

Granting Authority to DIR to Create Ad Hoc Temporary Amnesty Programs Would Undermine Legislature's Role. Temporary amnesty programs, such as the Motor Carrier Employer Amnesty Program recently enacted through Chapter 741, can be effective tools to more quickly bring about compliance, provide back wages

and benefits to employees, and protect employers from potentially damaging penalties in instances when a longstanding industry practice is found to violate the law. Giving DIR the authority to create future amnesty programs under certain conditions but without specific legislative authorization in each case would likely expedite the creation of such programs. However, we believe that the Legislature has an important role to play in considering when employers should be granted relief from penalties imposed for violating labor law, and under what terms this relief should be granted. We are concerned that giving DIR the authority to establish amnesty programs on an ad hoc basis would undermine the Legislature's role in this area, and believe that this concern outweighs the potential benefit of establishing future amnesty programs more rapidly.

Recommendations

We recommend that the Legislature take the following actions with respect to the Governor's 2016-17 PAGA proposal.

Approve Requested Funding and Positions. To enable LWDA to more effectively fulfill its role of reviewing and, in some cases, investigating PAGA claims, we recommend that the Legislature approve funding for the ten positions requested in the Governor's proposal. We note that, if the Legislature does not approve the administration's proposed fee on PAGA filings at this time (see our recommendation below), fee revenues will not be available to offset a portion of the costs of these positions and the full cost will be borne by penalties deposited in the LWDF. The LWDF has a sufficient balance to pay the full cost of these positions for the next several years, but the ability of the fund to support the positions over the longer term is unclear because it depends on potential growth or decline in PAGA penalty payments (payments appear to have been increasing in recent years). We note that the administration's proposal also depends on uncertain revenue projections. Should the Legislature approve the requested positions but reject the proposed fee, it will be important to monitor the condition of the LWDF and consider future adjustments to the expenditures of the fund or possibly identify an additional funding source—such as a potential fee on PAGA filings as proposed by the Governor—as necessary.

Amend PAGA to Require That Additional Information Be Provided to LWDA. In order to better understand the outcomes of PAGA litigation, we further recommend that the Legislature amend PAGA to require more detail in initial PAGA notices,

require that LWDA receive copies of PAGA complaints and any settlement agreements, and require that notices to LWDA related to PAGA claims be submitted through an online system, consistent with the Governor's proposal.

Reject Remaining Proposed PAGA Amendments Without Prejudice in Favor of Separate Legislative Deliberation on PAGA Priorities. At this time, we recommend that the Legislature reject without prejudice the remaining proposed amendments, including (1) the proposed filing fee, (2) verification of PAGA notices involving more than ten employees, (3) clarifying that employers may request an LWDA investigation following a PAGA notice, (4) extending investigation time lines, (5) requiring court approval of all PAGA settlements, and (6) allowing LWDA to object to proposed PAGA settlements. These proposed amendments may have merit, but would be better addressed through a legislative policy process that examines the Legislature's priorities for the PAGA process, allows for greater input from affected stakeholders to identify potential benefits and drawbacks, and allows for consideration of potential reporting requirements that would draw on the better information LWDA receives on the final outcomes of PAGA litigation.

Reject Proposed Language Allowing DIR to Create Ad Hoc Temporary Amnesty Programs. We recommend rejecting proposed language to grant DIR the authority to create temporary amnesty programs on an ad hoc basis, in favor of reviewing proposals for such programs on a case-by-case basis through the regular legislative policy process. This approach may slow the creation of future amnesty programs relative to what might be possible under the Governor's proposal, but would preserve the Legislature's important role in determining when to relieve significant groups of employers from penalties associated with violating labor law.

Plaintiff
(http://www.plaintiffmagazine.com)

PAGA Procedural Amendments (/Recent-Issues/Item/Paga-Procedural-Amendments)

Same statute, new requirements for Labor Code violations

Lisa P. Mak

2017 February (/recent-issues/category/2017-february)

The Private Attorneys General Act ("PAGA") of the California Labor Code allows aggrieved employees to file representative lawsuits to recover civil penalties on behalf of themselves, other aggrieved employees, and the State of California for Labor Code violations. Enacted in 2004, the purpose of PAGA was to increase enforcement of the Labor Code by "deputizing" citizens to act as private attorneys general and allowing them to pursue civil penalties on behalf of the State. This private enforcement mechanism was meant to help address the reality that labor enforcement agencies could not keep up with the growth of the labor market and the number of Labor Code violations occurring in workplaces.

In order to bring a valid PAGA claim, the employee has to meet the formal notice and waiting requirements specified under Labor Code section 2698, *et seq.* This involves submitting a PAGA claim notice to the Labor and Workforce Development Agency ("LWDA") and giving the agency time to review the notice and decide whether it wishes to investigate the claim. Within a specified time period, if the LWDA chooses not to investigate, or does not otherwise respond to the claim notice, the claimant employee is then entitled to bring a PAGA lawsuit in court. Any civil penalties recovered from an employer in a PAGA action are divided with the LWDA, with the agency receiving 75 percent and the aggrieved employees receiving 25 percent. Attorneys' fees can also be recovered for successful PAGA claims.

PAGA creates leverage for plaintiffs

In recent years, PAGA has been a useful tool for plaintiffs to file lawsuits on behalf of a group or "class" of employees who have suffered Labor Code violations, such as unpaid wages, missed meal and rest breaks, non-compliant wage statements, and overtime violations. PAGA claims can be added to traditional class action lawsuits, or stand alone as a "PAGA only" representative action. The ability to recover large civil penalties and attorneys' fees from employers can create important leverage in PAGA cases. Plaintiffs can also potentially conduct broader discovery in PAGA cases due to the representative nature of such claims.

A major benefit of PAGA actions is that plaintiffs do not need to satisfy the strict and often onerous class-certification requirements of traditional class actions. This was decided under the 2009 California Supreme Court case of *Arias v. Superior Court*. Furthermore, California courts have held that PAGA claims cannot be waived under an arbitration clause, even though other types of class actions can be waived.

In the 2014 case of *Iskanian v. CLS Transportation Los Angeles LLC*, the California Supreme Court held that an employee's waiver of a representative PAGA claim in an arbitration clause of an employment contract was unenforceable, as it was contrary to public policy given that a PAGA dispute is between the employer and the State. *Iskanian* also held that such a rule prohibiting waiver of a PAGA claim in an arbitration agreement was not pre-empted by the Federal Arbitration Act. The *Iskanian* rule was reinforced in the recent case of *Hernandez v. Ross Stores*, in which the Fourth District Court of Appeal held

that an employer cannot compel an employee to arbitrate individual aspects of his PAGA claim while maintaining the representative PAGA action in court. Thus, even with the increased difficulties of certifying employment class actions and the proliferation of forced classwide arbitration clauses, PAGAs remain a viable and powerful way to hold employers accountable for large-scale Labor Code violations.

Last year, as part of Governor Jerry Brown's approved budget, the California legislature passed SB 836, which made some important procedural amendments to PAGA. The bill became effective on June 27, 2016, and was part of Governor Brown's plan to increase oversight and enforcement of PAGA claims by the LWDA. Practitioners should be mindful of meeting these new procedural requirements in PAGA cases.

New filing requirements for PAGA claims

The amendments require PAGA documentation to now be filed online, along with the implementation of new filing fees.

New PAGA claim notices now must be filed online on the Department of Industrial Relations ("DIR") website, with a copy of the claim notice sent by certified mail to the employer.

Due to the enactment of AB 1506 in 2015, an employer has 33 days from the filing of a PAGA claim to "cure" certain defects on wage statements (e.g., the legal name of the employer, the dates of the pay period). The amendments now require that all employer cure notices or other responses to a PAGA claim must also be filed online, with a copy sent by certified mail to the aggrieved employee or his or her representative.

There is now a *$75 filing fee* for a new PAGA claim notice and any initial employer response to a PAGA claim, including cure notices. Previously, the filing fee was $3. The filing fee may be waived if the party is entitled to *in forma pauperis* status. As of now, the LWDA does not have an online payment system to process filing fees, so the fees should be paid by check, made out to the LWDA, and sent by regular mail to the DIR office in San Francisco.

Review time for PAGA claims

The amendments have increased the time for the LWDA to review an employee's PAGA claim notice and for an employee to file a PAGA lawsuit.

Previously, the LWDA had 30 days to review an employee's PAGA claim notice to decide whether to investigate the claim. The time for the LWDA to review such a notice has now been extended from 30 days to *60 days*. If the agency investigates the claim, it has 120 days to issue citations to the employer.

For PAGA claims filed on or after July 1, 2016, the LWDA may also extend its deadline to issue citations to employers to up to *180 days*, as opposed to 120 days.

Previously, a plaintiff could not file a civil PAGA lawsuit until 33 days after sending the claim notice to the LWDA. This occurs when the LWDA notifies the plaintiff that it does not intend to investigate the claim, or does not notify the plaintiff either way. Under the new rule, a plaintiff cannot file a civil lawsuit until *65 days* after sending the claim notice to the LWDA. Note, however, that employers still only have 33 days to cure wage statement violations.

Submission of litigation information to the LWDA

Finally, the amendments have created new requirements on the submission of court complaints and proposed settlements in PAGA actions to the LWDA. How the LWDA will use such information remains to be seen.

When a plaintiff files a new PAGA lawsuit in court, a file-stamped copy of the complaint must be provided to the LWDA within 10 days of filing the lawsuit.

Courts previously had to review and approve proposed settlements that included PAGA claims. That is still the case, although the amendments now make clear that court approval is required for settlement of a PAGA action regardless of whether the settlement includes an award of PAGA penalties.

A copy of the proposed settlement of a PAGA action must be provided to the LWDA at the same time that it is submitted to the court.

If there is a court judgment or any other order awarding or denying PAGA penalties, a copy of that judgment or order must also be provided to the LWDA, within 10 days after entry of the judgment or order.

While the amendments do add some extra time and cost for PAGA filings, those new requirements do not seem to create significant obstacles for plaintiffs, especially in light of the high penalty amounts that could possibly be obtained from a PAGA action. Governor Brown had initially considered far more sweeping changes to the PAGA statute to "stabilize" the handling of PAGA cases. This had included requiring plaintiffs to provide more details in PAGA claim notices; allowing employers to request that the LWDA investigate a PAGA claim notice; and giving the Director of the DIR an opportunity to object to proposed PAGA settlements. The amendments ultimately passed, as described above, were much more modest. The amendments passed also did not include additional funding or the creation of a "PAGA Unit" for the LWDA to increase its oversight and involvement for claims, which means that PAGA enforcement actions will likely primarily remain with plaintiffs and their attorneys.

It remains to be seen what the impact, if any, of these amendments will be on PAGA claims enforcement by the LWDA and litigation by private plaintiffs in the courts. It is also uncertain whether the new requirements for submission of PAGA complaints and settlements to the LWDA will have any effect on the litigation and settlement process. In the meantime, practitioners should pay attention to these new requirements when filing and litigating PAGA claims.

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Lisa P. Mak is a trial attorney at Minami Tamaki LLP in the Consumer and Employee Rights Group, where she handles plaintiff side employment and consumer litigation cases. Ms. Mak has many years of experience

handles plaintiff-side employment and consumer litigation cases. Ms. Mak has many years of experience representing employees across a broad range of industries for all types of employment disputes, including claims for discrimination, harassment, retaliation, defamation, and wage and hour violations. She currently serves on the Board of Directors for the Asian American Bar Association of the Greater Bay Area and is an active leader in the California Employment Lawyers Association. She has been selected as a SuperLawyers Rising Star since 2015. In 2016, she obtained a jury verdict in a case that was included in the LexisNexis "Top 10 Employment Verdicts" for 2016. She can be reached at LMak@MinamiTamaki.com (mailto:LMak@MinamiTamaki.com). Her firm's website is www.minamitamaki.com (http://www.minamitamaki.com).

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Private Attorneys General Act (PAGA) (/tag/Private%20Attorneys%20General%20Act%20(PAGA))

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

CALIFORNIA BUSINESS & INDUSTRIAL ALLIANCE, an association representing California-based employers,

Plaintiff,

v.

XAVIER BECERRA, in his official capacity as the Attorney General of the State of California,

Defendant.

Case No.: 30-2018-01035180-CU-JR-CXC

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Assigned: Judge Peter Wilson
Dept: CX102

SYNOPSIS

Are California business owners who inadvertently make a payroll error equivalent to the worst perpetrators of hate crimes? That's the twisted logic that, more than a decade ago, led the state legislature to pass a harmful law called the Private Attorneys General Act (PAGA).

PAGA was conceived as a means to help employees right workplace wrongs without further burdening the state bureaucracy. Trial attorneys quickly discovered that they could use the law for their own benefit; today, thousands of PAGA complaints are filed annually against large and small businesses, nonprofit charities, and even labor unions.

PAGA, as written and practiced, is unconstitutional. With this complaint, we're asking the state to enforce its own laws--rather than transferring the state's power to private attorneys who operate for their own personal gain.

Plaintiff CALIFORNIA BUSINESS AND INDUSTRIAL ALLIANCE (hereafter "CABIA" or "Plaintiff") alleges as follows:

INTRODUCTION

1. The California Supreme Court has held that "the continued operation of an established, lawful business is subject to heightened protections." *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35, 53 (2010) ("*Santa Clara*").

2. Notwithstanding, in 2004, the California Legislature passed the Labor Code Private Attorneys General Act ("PAGA"), which "deputized" each and every California employee (and his or her private contingency-fee attorneys) to sue their employers on behalf of the State. In so doing, the California Legislature vested in millions of private individuals the scale-tipping power of the State-litigant status.

3. As pleaded in greater detail below, the current construction of PAGA by California courts (which have their own constitutional infirmities) gives rise to the following unconstitutional framework: valid and binding arbitration agreements are rendered unenforceable; private contingency-fee attorneys are permitted to litigate on behalf of the State without oversight or coordination with any State official; private attorneys are allowed to negotiate settlements that enrich themselves at the expense of everyone but themselves; due

process protections embodied in class action procedural rules do not apply; trial courts are divested of discretion to manage certain discovery issues; "fishing expeditions" are expressly authorized, allowing discovery into claims and theories about which a litigant has no personal knowledge; limited liability structures and/or a person's relationship to an employer is meaningless for the purposes of imposing liability for PAGA penalties.

4. The above, plus the complete lack of oversight by the legislative, executive, and judicial branches of the California State government, has allowed PAGA to become a tool of extortion and abuse by the Plaintiffs' Bar, who exploit the special standing of their PAGA plaintiff clients to avoid arbitration, threaten business-crushing lawsuits, and extract billions of dollars in settlements, their one-third of which comes right off the top.

5. Each day that PAGA continues to empower greedy and unscrupulous plaintiffs' attorneys to shake down California employers, the fundamental right of employers to the "continued operation of an established, lawful business" is imperiled. *Santa Clara*, 50 Cal. 4th at 53.

6. COMES NOW CABIA to challenge the constitutionality of PAGA not only as written, but also as applied to its members and other California employers.

THE PARTIES

7. Plaintiff is an association that was incorporated in Washington, D.C., which principally represents the interests of small and mid-sized businesses in California, a number of which have been sued under PAGA.

8. Many of Plaintiff's members have suffered damages as a result of the existence of PAGA, in the form of legal fees to defend against PAGA actions, settlement payments to resolve PAGA lawsuits, or judgments or orders to pay PAGA penalties from California courts.

9. CABIA was formed for the general purpose of promoting the interests of small and mid-sized business through a mix of public education, lobbying, and grassroots organizing, and the specific purpose of accomplishing the repeal or reform of PAGA.

10. CABIA is willing and capable to represent the interests of its members in this lawsuit, whose individual participation is not required in order for this Court to evaluate and to

adjudicate the constitutional challenges asserted against PAGA herein.

11. Defendant Attorney General Xavier Becerra is sued in this action in his official capacity as a representative of the State of California charged with the enforcement of PAGA.

JURISDICTION AND VENUE

12. This Court has original jurisdiction in this matter under Article VI, Section 10, of the California Constitution. This Court also has jurisdiction under California Code of Civil Procedure Sections 410.10, 525, 526, 526a, 1060, 1062, and 1085.

13. Venue in this Court is proper under California Code of Civil Procedure Sections 393, 395, and 401. Some or all of Plaintiff's members reside, do business, and/or have suffered an injury in this county.

14. Declaratory relief is authorized by California Code of Civil Procedure Sections 1060 and 1062.

15. Injunctive relief is authorized by California Code of Civil Procedure Sections 525, 526, and 526a.

STATEMENT OF FACTS

I. THE STATUTORY AND CONSTITUTIONAL FRAMEWORK

A. Federal and State Prohibitions on Excessive Fines and Unusual Punishment

16. The Eighth Amendment to the U.S. Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const., amend. VIII.

17. The United States Supreme Court has held that the Excessive Fines Clause applies to the states. *See Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014).

18. The Excessive Fines Clause, as interpreted by the United States Supreme Court, "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'? *R.L. Austin v. United States*, 509 U.S. 602, 609–10 (1993) ("*Austin*").

19. "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." *Id.* at 610.

20. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 US 321, 334 (1998) (citing *Austin*, 509 U.S. at 622–23).

21. The California Supreme Court, as well as the U.S. Court of Appeals for the Ninth Circuit, have held that these prohibitions apply with equal force to the California State government. *See People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707 (2005) ("*R.J. Reynolds*") ("[T]he Due Process Clause of the Fourteenth Amendment to the Federal Constitution . . . makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States."); *accord Wright v. Riveland*, 219 F.3d 905, 916 (9th Cir. 2000) (analyzing whether state fine was excessive under the Eighth Amendment).

22. Moreover, the California Constitution contains similar protections to those embodied in the Eighth Amendment. Article I, Section 17, prohibits "cruel or unusual punishment" and "excessive fines"; article I, Section 7, prohibits the taking of property "without due process of law." *R.J. Reynolds*, 37 Cal. 4th at 728.

B. Due Process

23. The Fifth Amendment to the U.S. Constitution provides, in relevant part, that:

> "No person shall ...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const., amend. V.

24. Likewise, the Due Process Clause of the 14th Amendment to the United States Constitution provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." *Id.*, amend. XIV.

25. The California Constitution also separately prohibits a person from being "deprived of life, liberty, or property without due process of law[.]" Cal. Const. art. I, Section 7.

26. This due process guarantee has been interpreted to have both procedural and substantive components, the latter which protects fundamental rights that are so "implicit in the

concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Conn.*, 302 U.S. 319, 325 (1937). These fundamental rights include those guaranteed by the Bill of Rights, as well as certain liberty and privacy interests implicitly protected by the Due Process Clause. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Substantive due process also protects against government conduct that "shocks the conscience," even where the conduct does not implicate any specific fundamental right. *See United States v. Salerno*, 481 U.S. 739, 746 (1987).

C. Separation of Powers

27. Pursuant to the California Constitution, the legislative power of the State is vested in the California Legislature, save the reserved powers of initiative and referendum. *See* Cal. Const. art. IV, Section 1. The supreme executive power of the State is vested in the Governor. *See Id.*, art. V, Section 1. And "[t]he judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." *Id.*, art. VI, Section 1. The California Constitution expressly provides for the separation of these government powers. *Id.*, art. III, Section 3 (hereafter, "Separation of Powers Doctrine"). The California Supreme Court has articulated the "classic understanding of the separation of powers doctrine—that the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality." *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1068 (2004).

28. Under the Separation of Powers Doctrine, the Legislature cannot exercise any core judicial functions. *See Pryor v. Downey*, 40 Cal. 388, 403 (1875) ("The Legislature of California cannot exercise any judicial function, and no person in this State can be deprived of life, liberty or property without due process of law."). And the California Supreme Court will hold unconstitutional legislation that violates the Separation of Powers Doctrine. *See In re Application of Lavine*, 2 Cal. 2d 324, 328 (1935); *Merco Constr. Eng'rs, Inc. v. Mun. Court*, 21 Cal. 3d 724, 731 (1984).

29. The California Supreme Court has set forth "the basic test for assessing whether

the Legislature has overstepped its oversight authority: '[The] legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions.'" *Conway v. State Bar*, 47 Cal. 3d 1107, 1128 (1989). And "[w]here a statute creates a special liability upon the part of employers and grants power to an agency of government to determine when liability exists and to render a judgment in favor of the employee against the employer, the power exercised constitutes basic judicial power within the meaning of the Constitution." *Laisne v. Cal. State Bd. of Optometry*, 19 Cal. 2d 831, 864 (1942).

D. Equal Protection

30. The 14th Amendment to the United States Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws . . . ." U.S. Const., amend. XIV.

31. Similarly, the California Constitution guarantees all persons "equal protection of the laws[.]" Cal. Const. art. I, Section 7.

E. The California Labor Code

32. The California Labor Code, California Code of Regulations, and the Industrial Welfare Commission Orders (collectively, the "California Labor Laws") govern the rights and obligations of employers, employees, and other "persons," as that term is defined in Labor Code Section 18, with respect to employment and/or the provision of labor by and between parties in the State of California. The California Labor Laws are composed of myriad rules, standards, and obligations, which touch nearly every aspect of the employment relationship, including, but not limited to, working hours, payment of minimum wages and overtime, the provision of meal and rest breaks, the temperature of workplace bathrooms, what information that must appear on a paystub, the place of payment of wages, the timing of payment during employment, the timing of payment after employment, mandatory paid sick leave, State-approved workplace posters, the nature of gratuities, use of credit reports, what records must be kept and for how long, and a multitude of other matters.

33. Many of the California Labor Laws are unclear, cumbersome, counterintuitive,

impossible to follow, or all of the foregoing.

34. For example, to comply with California law with respect to meal periods, employers must navigate and harmonize a combination of Labor Code Sections, California Code of Regulations provisions, Industrial Welfare Commission Orders, and California judicial opinions. More specifically, Labor Code Section 512(a) sets forth a portion of most employers' obligations with respect to meal periods:

> An employer shall not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer shall not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

Additional obligations (and exceptions to the rule) are set forth in the Industrial Welfare Commission orders, many of which contain the following or similar language:

> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement

> shall state that the employee may, in writing, revoke the agreement at any time.

See, e.g., I.W.C. Wage Order 4-2001, Section 11, (A)-(B) ("Wage Order 4"). As pleaded in further detail below, attempting to comply with just the timing rules of a meal period is difficult enough. But even a dozen years after the codification of an employer's meal period obligation in Labor Code Section 512, there was still ambiguity over what it meant to "provide" meal periods under California law. This ambiguity, which for many California employers carried the prospect of business-crushing lawsuits, was not settled law until the California Supreme Court "explained" the obligation in 2012:

> The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. . . .
>
> Bona fide relief from duty and relinquishing of control satisfies the employer's obligations. . . .

Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004, 1040-41 (2012).

35. The penalty for not complying with the meal period rules is set forth in the Labor Code Section 226.7, which provides in relevant part:

> If an employer fails to provide an employee a meal or rest or recovery period in accordance with a[n] . . . order of the Industrial Welfare Commission . . . the employer shall pay at the employee's regular rate of compensation for each workday that the meal or recovery period is not provided.

36. As demonstrated by the hundreds of meal period class and/or representative actions filed each year, there is no policy, practice, or combination thereof that can achieve full and irrefutable compliance with California meal period rules.

a. This is so because full compliance would require that an employer have perfect foresight regarding how long each shift for each employee would last, which is impracticable.

b. It would also require that an employer be able to read the minds of all its non-exempt employees, specifically whether they felt as if they had a "reasonable opportunity" to take a meal period, which is preposterous.

c. It would also require that an employer anticipate and prevent every possible circumstance, event, or contingency that might lead to an interrupted meal break, which is hopeless.

37. And even if an employer could accomplish all of the foregoing, it would be still impossible to create, to preserve, and to present sufficient evidence of its compliance with the rules to dissuade self-interest employees (current or former) and their attorneys from filing suit.

38. California rest period rules, which share many of the characteristics that make meal period compliance unattainable, are virtually impossible to comply in the wake of the California Supreme Court's decision in *Augustus v. ABM Security Services, Inc.*, 2 Cal. 5th 257 (2016) ("*Augustus*"). In *Augustus*, the Supreme Court inferred that employers' responsibilities were "the same for meal and rest periods[,]" even though the language in Wage Order 4 that expressly requires employees to be "relieved of all duty" during meal periods has no corollary in the rules relating to rest periods. *Id.* at 265. Applying that rule to the facts of the case, the Court went onto hold that merely requiring an employee to carry a communication device, even if never used, was tantamount to an "on-duty" rest period and thus violated the employer's obligation under the Labor Code. *Id.* at 273. As highlighted by the dissent in *Augustus*, this was a "marked departure from the approach we have taken in prior cases concerning whether on-call time counts as work, and in sharp contrast to the DLSE's views about what constitutes a duty-free break," and there was "no reason to believe that the bare requirement to carry a radio, phone, or pager necessarily prevents employees from taking brief walks, making phone calls, or otherwise using their rest breaks for their own purposes, and certainly there is no evidence in this record to that effect." *Id.* at 276. What *Augustus* means for employers is that virtually every employee in California who carries a cell phone or pager can allege a cognizable claim for non-compliant rest breaks. And, again, there is no policy, practice, or combination thereof that can achieve full and irrefutable compliance with the rules as written and applied by the courts.

39. As another example, Labor Code Section 201(a) provides that "[i]f an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." Pursuant to Labor Code Section 203(a), "[i]f an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201 . . . the wages of the employee shall continue as a penalty . . . until paid or until an action therefore is commenced; but the wages shall not continue for more than 30 days" ("Section 203"). Though the plain language of Section 203 suggests that it punishes volitional and/or intentional conduct of employers (*i.e.*, "willfully fails to pay"), that turns out not to be the case. Rather, this is how the Department of Industrial Relations ("DIR") defines the concept of "willful" within the meaning of Section 203:

> Assessment of the waiting time penalty does not require that the employer intended the action or anything blameworthy, but rather that the employer knows what he is doing, that the action occurred and is within the employer's control, and that the employer fails to perform a required act.

See Department of Industrial Relations, Waiting time penalty, available at < https://www.dir.ca.gov/dlse/faq_waitingtimepenalty.htm > (last accessed Nov. 21, 2018). And this standard has been reinforced by California Courts of Appeal:

> In civil cases the word "willful" as ordinarily used in courts of law, does not necessarily imply anything blameable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.

See Nishiki v. Danko Meredith, P.C., 25 Cal. App. 5th 883, 891 (2018) (quoting *Davis v. Morris*, 37 Cal. App. 2d 269, 274 (1940)).

Thus, under California law, the assessment of waiting time penalties has nothing to do with innocence or guilt. In this State, *mens rea* is all but irrelevant; and the well-meaning and blameless employer can be punished exactly the same as the ill-intended and guilty employer.

And the penalty is the same regardless of whether the employer failed to pay the separating employee one cent, one dollar, one hundred dollars, or one million dollars because the penalty is based on the average daily pay. In the vast majority of circumstances, the amount of underpayment is minuscule, and more often than not the product of a mistake, which means the penalty assessed exceeds any harm suffered by the separating employee. Below is a chart detailing the maximum waiting time penalties that can be assessed against an employer who fails to pay a separating employee one dollar, or a million dollars—again, it makes no difference in California:

Hourly Rate	Average Hours Worked	Max Waiting Time Penalties
$11.00 per hour	8	$2,640
$13.50 per hour	8	$3,240
$15.00 per hour	8	$3,600
$25.00 per hour	8	$6,000
$35.00 per hour	8	$8,400
$45.00 per hour	8	$10,800

40. A common allegation made in support of a claim for Section 203 penalties is that employees were not paid for work they did not record in the timekeeping system (i.e., "off-the-clock" work). In California, an employer is liable for such "unpaid" wages (and derivative 203 Penalties) if an employee can show that the employer "knew or should have known off-the-clock work was occurring." *Brinker*, 53 Cal. 4th at 1051. And the difficulty of combating such claims has greatly increased in the wake of the Supreme Court's decision in *Troester v. Starbucks Corp.*, 5 Cal. 5th 829, 848 (2018), which all but eliminated the "*de minimis*" defense, and, at a minimum, made almost all claims of off-the-clock work cognizable under California law.

41. California wage statement laws present their own unique challenges for employers. Labor Code Section 226(a) requires employers to furnish paystubs that contain up to nine different pieces of information. These required items of information are: gross wages

earned by the employee, total hours worked by the employee, all applicable hourly rates during the pay period, all deductions taken from the employee's wages, the net wages the employee earned, the pay period that the wage statement reflects, including the start and end date, the employee's name and ID number (which can be the last four digits of the Social Security number (SSN)), the name and address of the legal employer, and if the employee earns a piece rate, then the number of piece-rate units earned and the applicable piece rate.

42. In order to prevail on a Labor Code 226(a) claim, an employee must be able to show that (1) a violation of the statutory provision setting forth criteria for wage statements, (2) the violation was knowing and intentional, and (3) the employee suffered an injury as a result of the violation. *See Cleveland v. Groceryworks.com, LLC*, 200 F. Supp. 3d 924, 957 (N.D. Cal. 2016). Though not a "strict liability" statute, the Labor Code deems an employee to suffer injury if the employee cannot readily ascertain certain information from the wage statement (*e.g.*, the amount of gross or net wages), even if the employee suffers no financial injury as a result of the error.

43. As a result, Labor Code Section 226(a) has spawned countless lawsuits alleging hyper-technical violations that have required employers to incur significant legal expenses in their defense as well as large settlements and damage awards in numerous cases. The absurd theories put forward by the Plaintiffs' Bar in pursuit of wage statement penalties include: neglecting to total all the hours worked, even though the wage statement lists all the various types of hours individually; accidentally showing net wages as "zero" where an employee gets direct deposit; leaving off either the start or end date of the pay period; not showing the number of hours worked at each applicable rate; recording an incomplete employer name (*e.g.*, "Acme" instead of "Acme, Inc."); recording an incomplete employer address; failing to provide an employee ID number, or reporting a full nine-digit SSN instead of a four-digit SSN.

44. The penalty for violating the wage statement rules are "the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000)," and reasonable attorneys' fees.

See Cal. Lab. Code 226(e)(1).

45. The Labor Code also contains numerous one-way fee-shifting provisions in favor of employees who sue to enforce its provisions. *See, e.g.*, Cal. Lab. Code 1194(a).

46. In sum, the California Labor Laws contain a daunting and confusing web of obligations for employers, robust and generous remedies for employees, and a framework that encourages enforcement through private litigant access to the courts.

F. The Labor Code Private Attorneys General Act

1. History of the Law

47. In the early 2000's, the California State Assembly and Employment Committee held hearings about the effectiveness and efficiency of the enforcement of wage and hour laws by the State Department of Industrial Relations ("DIR"). SB 796, Analysis of S. R. Comm., at 3 (May 21, 2003). The Senate Rules Committee reported the Legislature appropriated over $42 million dollars to the State Labor Commission for the enforcement of over 300 laws, and that that the DIR's authorized staffed numbered over 460, which made it the largest State labor law enforcement organization in the country. *Id.* Notwithstanding, the California Legislature put forward SB 796 (hereafter "PAGA Bill") to "augment the LWDA's civil enforcement efforts by allowing employees to sue employees for civil penalties." *Id.* at 4. The Legislative Digest of the PAGA Bill described it as follows:

> Under existing law, the Labor and Workforce Development Agency and its departments, divisions, commissions, boards, agencies, or employees may assess and collect penalties for violations of the Labor Code. . . .
>
> This bill would allow aggrieved employees to bring civil actions to recover these penalties, if the agency or its departments, divisions, commissions, boards, agencies, or employees do not do so. The penalties collected in these actions would be distributed 50% to the General Fund, 25% to the agency for education, to be available for expenditure upon appropriation by the Legislature, and 25% to the aggrieved employee, except that if the person does not employ one or more persons, the penalties would be distributed

> 50% to the General Fund and 50% to the agency. In addition, the aggrieved employee would be authorized to recover attorney's fees and costs and, in some cases, penalties. For any violation of the code for which no civil penalty is otherwise established, the bill would establish a civil penalty, but no penalty is established for any failure to act by the Labor and Workplace Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees.

48. The report of the Assembly Committee on Judiciary ("Judiciary Committee") cited the following justifications for the PAGA Bill:

> [M]any Labor Code provisions are unenforced because they are punishable only as criminal misdemeanors, with no civil penalty or other sanction attached. Since district attorneys tend to direct their resources to violent crimes and other public priorities, supporters argue, Labor Code violations rarely result in criminal investigations and prosecutions.

SB 796, Assembly Comm. On Jud. Analysis, at 3-4 (June 26, 2003). The foregoing was reiterated by another Assembly Committee as the "Purpose" of the PAGA Bill. *See* SB 796, Assembly Comm. On Appropriations, at 1 (Aug. 20, 2003). Notably, the Judiciary Committee conceded that "[g]enerally, civil penalties are recoverable only by prosecutors, not by private litigants, and the moneys are paid directly to the government." SB 796, Assembly Comm. On Jud. Analysis, at 5 (June 26, 2003). Seeking to justify this departure from legal norms, the Judiciary Committee then went onto say that "recovery of civil penalties by private litigants does have precedent in law." *Id.* at 5. The "precedent" the Assembly Comments cited in support of this deviation from the norm was that "the Unruh Civil Rights Act allows the victim of a hate crime to bring an action for a civil penalty of $25,000 against the perpetrator of the crime." *Id.* The relevant portion of the Unruh Civil Rights Act to which the Legislature was referring provides, in relevant part:

> If a person or persons . . . ***interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion***, with the exercise or

enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General . . . may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California. . . . Cal. Civ. Code § 52.1(a) (emphasis added).

49. The PAGA Bill was supported exclusively by labor union and applicant attorney special interest groups, including, but not limited to, The California Labor Federation, AFL-CIO (co-source), the California Rural Legal Assistance Foundation (co-source), California Applicants Attorneys Association, California Teamsters, and Hotel Employees, Restaurant Employees International Union. SB 796, S. Floor Analysis, at 5 (May 21, 2003). Those in opposition included, but were not limited to, the California Chamber of Commerce, the Civil Justice Association of California, and the Orange County Business Council. *Id.* Opponents raised salient and prescient objections to the PAGA Bill, namely:

a. That "[a]llowing such 'bounty hunter' provisions will increase costs to businesses of all sizes, and add thousands of new cases to California's already over-burdened civil court system." SB 796, Assembly Comm. On Lab. & Emp., at 7 (July 9, 2003).

b. That "a private enforcement statute in the hands of unscrupulous lawyers is a recipe for disaster." *Id.*

c. And that "there is no requirement for the employee to exhaust the administrative procedure or even file with the Labor Commissioner . . . ." SB 796, Analysis of S. Comm. on Lab. & Indus. Relations, at 6 (Apr. 9, 2003).

50. In response to these concerns, and more, the Assembly Committee on Labor Employment proffered the following:

> The sponsors are mindful of the recent, well-publicized allegations of private plaintiffs [sic] abuse of the UCL, and have attempted to craft a private right of action that will not be subject to such abuse, pointing to amendments taken in the Senate to clarify the bill's intended scope. First,

> unlike the UCL, this bill would not open up private actions to persons who suffered no harm from the alleged wrongful act. Instead, private suits for Labor Code violations could only be brought by an "aggrieved employee" - an employee of the alleged violator against whom the alleged violation was committed.
>
> . . .
>
> Second, a private action under this bill would be brought by the employee "on behalf of himself or herself and other current or former employees"— that is, fellow employees also harmed by the alleged violation - instead of "on behalf of the general public," as private suits are brought under the UCL.
>
> . . .
>
> Third, the proposed civil penalties are relatively low.

SB 796, Assembly Comm. On Lab. & Emp., at 7 (July 9, 2003).

51. On September 11, 2003, the PAGA Bill was passed by the State Assembly by a margin of just one vote above the bare minimum for passage a regular bill, 42. The following day, September 12, 2003, the State Senate passed the PAGA Bill by the bare minimum number of votes necessary for a regular bill, 21. The PAGA Bill was approved by Governor Gray Davis on October 12, 2003, just five days after the California electorate voted to recall him from office on October 7, 2003. As a result, the first iteration of the PAGA took effect on January 1, 2004.

52. Less than two months after PAGA took effect, on February 20, 2004, SB 1809 was introduced, which according to the Senate Rules Committee Digest was intended to "significantly amend[] 'The Labor Code Private Attorneys General Act of 2004' [citation] 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 1809, Analysis of Sen. R. Comm., at 1-2 (July 28, 2004).

53. SB 1809 became law in July 2004, but because of its status as an emergency measure, it had retroactive application dating back to January 1, 2004. The PAGA Bill, SB

1809, as well as series of amendments to PAGA in 2016 provide the modern framework for the unconstitutional delegation of State authority that plagues *most* California employers, including Plaintiff's members, today.

2. The California Legislature Recently Exempted Just One Industry Group from PAGA - Construction

54. On September 19, 2018, Governor Jerry Brown signed AB 1654 ("AB 1654"), adding Section 2699.6 to the California Labor Code ("Section 2699.6"). The effect of Section 2699.6 is to exempt employees in the construction industry who are subject to a collective bargaining agreement (with certain other components) from the entirety of PAGA. One of the other components, ironically, is the existence of a "binding arbitration procedure." *See* Cal. Lab. Code 2699.6(a).

55. The justifications put forward by the proponents of the bill include:

a. "[AB 1654] is needed to protect construction industry employer from frivolous lawsuits brought under PAGA." AB 1654, Analysis of S. J. Comm., at 7 (June 18, 2018).

b. "While well intended to protect aggrieved employees, [PAGA] is a complex legal process that has led to the unintended consequence of significant legal abuse. The threat of extended litigation on behalf of an entire class of workers provides enormous pressure on employers to settle claims regardless of the validity of those claims . . . ." AB 1654, Analysis of S. Comm. on Indus. Rel., at 4 (June 18, 2018).

c. "Attorneys representing workers sue employers for Labor Code violations by limiting their complaints to those arising under PAGA. These 'stand-alone PAGA suits' allow those attorneys to represent all employees potentially affected by the alleged Labor Code violations and to conduct wide-ranging discovery allowed when prosecuting civil claims in court." *Id.*

d. "PAGA was a well-intended law that gives workers the power to fight unscrupulous employers directly through the court system when the Labor Commissioner lacks the resources to enforce but it has, in many cases, become another form of litigation abuse by unscrupulous lawyers . . . ." AB 1654, Analysis of S. Rules Comm., at 4 (Aug. 24, 2018).

e. "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." AB 1654, Analysis of Assembly Comm. On Lab. & Emp., at 2 (Aug. 24, 2018).

56. On information and belief, the justifications asserted by the proponents of AB 1654 are equally applicable to Plaintiff's members and California employers generally. More specifically, Plaintiff's members, and California employers generally, are similarly subject to "frivolous lawsuits," "legal abuse," "enormous pressure ... to settle claims regardless of the validity of those claims," "wide ranging discovery," "unscrupulous [plaintiffs'] lawyers," and "lawsuits over minor employment issues."

57. On information and belief, there is no rational basis for the Legislature exempting the construction industry alone from the unfair, unconstitutional, and business-crushing impact of PAGA.

3. <u>The Basic PAGA Framework</u>

58. PAGA "deputizes" each and every current and former "aggrieved employee" in California to sue to recover civil penalties on behalf of the State. Cal. Lab. Code §2699(a). To prevail, the aggrieved employee need only show that a violation occurred, not that he or she was actually harmed by the violation. *See* Cal. Lab. Code § 2699(a); *see also Raines v. Coastal Pac. Food Distribs., Inc.*, 23 Cal. App. 5th 667 (2018) ("the trial court incorrectly found an employee must suffer an injury in order to bring a PAGA claim") ("*Raines*"); *Lopez v. Friant & Assoc.*, 15 Cal. App. 5th 773, 778 (2017). The statutory timeframe for filing a PAGA claim is one year.

59. PAGA has three categories of violations, each with its own penalty and

administrative exhaustion scheme, as pleaded in further detail below:

(a) Category One: Violations of Labor Code Provisions Specifically Listed in Labor Code Section 2699.5

60. This first category includes violations of those Labor Code sections identified in Section 2699.5. There are over 150 different violations listed, including Section 203 (waiting time penalties), Section 226.7 (meal and rest break premiums), Section 1198 (which includes any "conditions prohibited by the wage order"), and certain violations of Section 226 (wage statement penalties). Before commencing a Category One claim, an employee must satisfy certain notice requirements. A PAGA lawsuit can be dismissed outright if the notice is deficient, but this rarely occurs due to low standard for sufficiency applied by California courts. The employee is required to give written notice describing the "specific provisions . . . alleged to have been violated, including the facts and theories to support the alleged violation" to the LWDA via its website (along with a $75 filing fee) and on the employer via certified mail. If the LWDA declines to investigate, or otherwise fails to respond to the employee, within 65 days of the postmark date of the notice, then the employee can proceed to file a civil lawsuit seeking PAGA penalties.

(b) Category Two: Health and Safety Violations (Labor Code Sections 6300 *et seq.*)

61. The second category is for health and safety violations predicated on any section of Labor Code sections 6300 *et seq.* (other than those listed in Section 2699.5). In addition to sending notice to LWDA and employer, an employee bringing a health and safety-based PAGA claim must also send notice to the Division of Occupational Safety and Health, which is then required to investigate the claim. If the Division issues a citation, the employee is precluded from commencing a civil action under PAGA. In the alternative, if the Division does not issue a citation then the aggrieved employee may appeal to the Superior Court for an order directing the Division to issue a citation.

(c) Category Three: All Other Labor Code Violations

62. The third category is for Labor Code violations other than those covered by the

first two categories. Some common violations include wage statements that fail to provide inclusive dates of a pay period or the legal employer's name and address, as required by Labor Code Section 226.

63. The notice requirement is the same as Category One claims but an employer can "cure" the violation within 33 days of the PAGA notice. An employer sends notice to LWDA and the employee describing the actions taken to cure the violation. The employee can respond to the LWDA, as to why those actions did not actually cure the violation, and the LWDA has 17 days to review the actions taken and make a determination on whether the employer did, in fact, cure the violations.

64. There are limitations on the number of times an employer can avail itself of the cure provision. If the LWDA determines that the employer did not cure the violations, or otherwise fails to provide a timely response, then the employee can proceed with the civil lawsuit. But even if the LWDA determines the violations have been cured then an employee can appeal the agency's determination by filing an action with the Superior Court.

(d) The PAGA Penalty Framework

65. Where the Labor Code does not specifically provide for a civil penalty, PAGA creates one. These "default penalties" are assessed against employers in the amount of $100 per employee per pay period for an initial Labor Code violation, and $200 per employee per pay period for each subsequent violation. *See* Cal. Lab. Code § 2699(f)(2). These penalties can be collected for each employee for each pay period the employee worked within the statutory period (one year). Civil penalties recovered under the PAGA statute (*i.e.*, California Labor Code Section 2698 *et seq.*) do not include unpaid wages or individualized damages, and damages are split between the California government and the aggrieved employees. *See, e.g., Thurman v. Bayshore Transp. Mgmt. Inc.*, 203 Cal. App. 4th 1112 (2012). The split is 75% to the State and 25% to aggrieved employees. Cal. Lab. Code § 2699(i). PAGA also provides for an award of the employee's attorney fees and costs incurred in litigation. *See* Cal. Lab. Code § 2699(g). Because only a fraction of PAGA cases are litigated through verdict, however, counsel for PAGA plaintiffs are almost always compensated by court-approval of their lofty contingency

fees (*e.g.*, one third), based on the gross recovery and/or settlement amount.

66. PAGA has also been interpreted by some California courts and agencies to allow employees to recover unpaid wages, liquidated damages, waiting time penalties, as well as civil penalties provided for under other statutes that, historically, could only be enforced by the State—*e.g.*, California Labor Code Sections 558, 1197.1.

67. Where a civil penalty is already enumerated for a Labor Code violation, California Courts have held that the enumerated penalty (which is normally much higher) displaces the default penalty. *See, e.g., Raines*, 23 Cal. App. 5th at 680 (holding that civil penalty for wage statement set forth in 226.3 in the amount of $250 per employee per initial violation and $1000 per employee for each subsequent violation applied over penalty set forth in 2699(f)(2)).

(e) <u>The Limited Court and Agency Involvement In Settlement, Court Orders, and Judgments</u>

68. Court approval is required by statute for settlement of PAGA claims. *See* Cal. Lab. Code § 2699(l). However, judicial oversight in PAGA claims is strikingly different from the oversight for class actions. In PAGA actions, the Court is not required to exercise anywhere near the same level of scrutiny required in a class action. *Arias v Superior Court,* 46 Cal. 4th 969 (2009) (holding that PAGA actions are not subject to class action requirements).

69. For example, PAGA approval requires none of the various findings required by Rule 23 of the Federal Rules of Civil Procedure, Civil Procedure Section 382, and/or corresponding case law.

70. Indeed, the language of the statute suggests an extremely limited inquiry. The PAGA statute does not even require the Court to review the entire settlement, but only "any penalties sought as a part of a proposed settlement agreement[.]" *See* Cal. Lab. Code § 2699(l). Any proposed settlement must be provided to LWDA at the same time that it is submitted to the court. Similarly, judgments and orders regarding PAGA penalties must be provided to LWDA. In neither case, however, is the LWDA required to take any action or even review the proposed settlement agreement, judgments, or orders.

4. PAGA's Lack of Judicial and/or Administrative Oversight

71. As outlined above, the State exercises virtually no control over any aspect of PAGA litigation. Rather, the sole manner in which the government plays any role in controlling a PAGA case is through the pre-filing notice requirements imposed by California Labor Code Section 2699.3. But that notice provision merely requires the potential PAGA litigant to mail a notice to the LWDA and the Employer of the intention to bring PAGA claims, to provide a bare-bones description of the facts and Labor Code sections the employee intends to sue under, and then to wait until the LWDA either decides to investigate (which occurs less than 1% of the time) or does nothing, which is almost always the case.

72. On information and belief, the LWDA does not receive, loses, and/or fails to review the vast majority of notices addressed to its attention by aggrieved employees and/or their attorneys. Indeed, the LWDA website all but admits as much:

> The PAGA statute does not require parties to prove affirmatively that documents were received by LWDA. The statute only requires proof that items were mailed or submitted in the required manner.

See Labor Workforce Development Agency, Private Attorneys General Act (PAGA), available at <https://www.labor.ca.gov/Private_Attorneys_General_Act.htm> (last accessed Nov. 21, 2018).

73. If the LWDA declines to investigate the alleged violations or fails to respond within the time allotted under PAGA, which, again is the outcome 99% of the time, that single, pre-litigation event constitutes the only connection the government will ever have to the PAGA action filed thereafter, other than the LWDA's potential receipt of settlement agreements, judicial verdicts and/or order, and its share of recovered penalties.

74. Indeed, PAGA does not provide for any means by which the government can later intervene to ensure neutrality or that the public's interests are being met.

75. To that end, PAGA provides no means by which the government can monitor the litigation or later step in to oversee negotiations or ensure that the government's interests are adequately represented and/or compensated in settlement agreements or litigation (except in the

limited circumstances of certain health and safety violations for which the Division of Occupational Safety and Health is entitled to "comment" on the proposed settlement, and the court must give those comments "appropriate weight").

76. Consequently, subject only to the limited oversight by the trial court of a final settlement agreement (Cal. Lab. Code § 2699(l)), the "aggrieved employee" and his or her private attorney prosecuting a PAGA action alone decide whether to settle PAGA claims that the LWDA declines to pursue itself, and on what terms. Such "aggrieved employees" and, more precisely, their private attorneys who stand to recover significant attorneys' fees enjoy carte blanche authority to prosecute the PAGA action, guided only by their personal needs and interests. The government has no say in whether or how a PAGA action will be brought, the facts or theories on which the claim will be based, what discovery will be conducted, what motions will be filed and how defense motions will be opposed, whether the case will be settled, or the terms of any settlement.

5. PAGA Plaintiffs' Proxy Role Vests Them With Unconstitutional Power In the Courts

77. On June 23, 2014, the California Supreme Court issued its decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, holding that an express class action waiver in an employment arbitration agreement is unenforceable with respect to PAGA claims under California law. *Id.* at 59 Cal. 4th 348, 391 ("*Iskanian*"). The California Supreme Court reasoned that an arbitration agreement precluding representative PAGA claims is invalid as a matter of California public policy and that that public policy to enforce wage-and-hour laws on behalf of the State is not preempted by the FAA (since the dispute was not between two contracting private parties, but between the State and an employer). *Id.* at 388-89.

78. The Court also clarified an important open-ended question about who receives the PAGA civil penalties that are recovered through the action. Specifically, the California Supreme Court made clear that the penalties are distributed to all aggrieved employees (unlike a typical *qui tam* action where the bounty hunter keeps all of the money that does not go to the State), unequivocally stating that "a portion of the penalty goes not only to the citizen bringing

the suit but to all employees affected by the Labor Code violation." *Id.* at 382.

79. Lastly, the California Supreme Court found that PAGA does not violate constitutional separation of powers on the basis that a PAGA action is a type of *qui tam* action—because it conforms to three traditional criteria: (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty. *Id.* at 382. To the Court, there was only one distinction between PAGA and the classic *qui tam* action, "that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation." *Id.* But this, the Court reasoned, does not change the fact that the "government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." *Id.*

80. As alleged in further detail below, however, the private contingency-fee attorneys who file and pursue PAGA claims make no effort to further the interests of the State in litigation, and actively work against the interests of the State in private mediations. In practice, private contingency-fee attorneys exploit the holding of *Iskanian* to persuade employers with binding arbitration agreements (with class action waivers) to participate in private mediation. Once at mediation, PAGA penalties rarely receive any serious consideration. Rather, the parties usually arrive at a sum that will resolve the underlying statutory claims on a class-wide basis and the private contingency-fee attorney usually suggests a very small allocation of that total to PAGA – so as to maximize his or her fees.

81. On June 29, 2009, the Supreme Court of California issued its decision in *Arias v. Superior Court*, holding that representative PAGA claims are not subject to California's class-action requirements because PAGA's purpose is as a law enforcement action on behalf of the State. 46 Cal. 4th 969 (2009). More specifically, the Court reasoned:

> When a government agency is authorized to bring an action on behalf of an individual or in the public interest, and a private person lacks an independent legal right to bring the action, a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party. [Citation]. Accordingly, with respect to the recovery

> of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the act, and therefore defendants' due process concerns are to that extent unfounded.

Id. at 986.

82. On July 13, 2017, the California Supreme Court issued its decision in *Williams v. Superior Court*, holding that an employee need not provide any proof of his or her allegations before being presumptively entitled to State-wide contact information in discovery. 3 Cal. 3d 531 (2017) ("*Williams*"). Specifically, the Court reasoned:

> PAGA's standing provision similarly contains no evidence of a legislative intent to impose a heightened preliminary proof requirement. Suit may be brought by any "aggrieved employee" [citation]; in turn, an "'aggrieved employee'" is defined as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed" [citation]. If the Legislature intended to demand more than mere allegations as a condition to the filing of suit or preliminary discovery, it could have specified as much. That it did not implies no such heightened requirement was intended.

Id. at 546. The *Williams* Court also blessed the PAGA plaintiffs' ability to embark on fishing expeditions:

> The Legislature was aware that establishing a broad right to discovery might permit parties lacking any valid cause of action to engage in "fishing expedition[s]," to a defendant's inevitable annoyance. [citation]. It granted such a right anyway, comfortable in the conclusion that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."

Id. at 551.

83. On March 23, 2018, the California Court of Appeal issued its decision in *Huff v. Securitas Security Services USA, Inc.*, 23 Cal. App. 5th 745 (2018) ("*Huff*"), holding that PAGA

allows an employee who suffers just one Labor Code violation to seek PAGA penalties for any and all other violations committed by that employer against any other employee. In so holding, the Court of Appeal disregarded legislative history that demonstrated the California Legislature's intent to limit a PAGA plaintiff's ability to pursue penalties only for the same type of Labor Code violations he or she is alleged to have suffered. *Id.* at 755-56. Among the bases for this holding was the court's determination that: "Given the goal of achieving maximum compliance with State labor laws, it would make little sense to prevent a PAGA plaintiff (who is simply a proxy for State enforcement authorities) from seeking penalties for all the violations an employer committed." *Id.* at 757. The practical impact of the *Huff* decision is that an employee who alleges to have been aggrieved in one isolated way by an employer is vested with the power of the State to audit a business for all potential violations.

84. On September 29, 2018, the California Court of Appeal issued its decision in *Atempa v. Pedrazzani*, which held that any person who is in fact responsible for overtime and/or minimum wage violations may be held personally liable for civil penalties, and that these penalties can be recovered through PAGA, regardless of whether the person was the employer or whether the employer is a limited liability entity. 27 Cal. App. 5th 809 (2018). The Court of Appeal reasoned:

> [T]he Legislature has decided that both the employer and any "other person" who causes a violation of the overtime pay or minimum wage laws are subject to specified civil penalties. [citation]. Neither of these statutes mentions the business structure of the employer, the benefits or protections of the corporate form, or any potential reason or basis for disregarding the corporate form. To the contrary, as we explain, the business structure of the employer is irrelevant; if there is evidence and a finding that a party other than the employer "violates, or causes to be violated" the overtime laws (§ 558(a)) or "pays or causes to be paid to any employee" less than minimum wage (§ 1197.1(a)), then that party is liable for certain civil penalties regardless of the identity or business structure of the employer.

6. Contrary to the Conclusion of the California Supreme Court in *Iskanian*, PAGA is Unconstitutional On Its Face.

85. In *Iskanian*, the California Supreme Court incorrectly labeled a "PAGA representative action . . . a type of *qui tam* action," and found that a PAGA action could not be waived because the State—and not the named plaintiff—is the real party in interest. The analogy is incorrect. A *qui tam* action differs significantly from a PAGA action.

86. Unlike *qui tam* actions arising under the False Claims Act, the State of California plays almost no role in a PAGA action. Under PAGA, the LWDA has a limited opportunity to investigate or intervene in an aggrieved employee's claims. In most cases, LWDA has 65 days to determine whether to investigate and, if it does investigate, 120 additional days to complete the investigation and determine whether to issue a citation. On information and belief, LWDA rarely investigates such claims. A March 25, 2016 report from the Legislative Analysist's Office ("March 2016 Report") stated:

> The LWDA . . . has been able to devote only minimal staff and resources—specifically, one position at DLSE beginning in 2014—to perform a high-level review of PAGA notices and determine which claims to investigate. **In 2014, less than half of PAGA notices were reviewed, and LWDA estimates that less than 1 percent of PAGA notices have been reviewed or investigated since PAGA was implemented.** When a PAGA notice is investigated, LWDA reports that it has difficulty completing the investigation within the timeframes outlined in PAGA. When an investigation is not completed, or not completed on time, the PAGA claim is automatically authorized to proceed."

See Legislative Analyst's Office, *The 2016-17 Budget: Labor Code Private Attorneys General Act Resources*, Budget and Policy Post (Mar. 25, 2016), available at <https://lao.ca.gov/publications/report/3403> (last accessed Nov. 27, 2018) (emphasis added). The March 2016 Report also noted that:

> [T]he intent of PAGA is that LWDA have the opportunity to review PAGA notices and at least in some cases conduct its own investigation prior to the PAGA claim

proceeding. Given the minimal resources currently devoted to the review and investigation of PAGA notices, we do not believe LWDA is currently able to fulfill the role intended for it in the PAGA legislation."

Id.

87. In contrast to the lack of State governmental involvement in PAGA actions, the State maintains substantial control in *qui tam* actions. The Attorney General has 60 days in which to intervene and proceed with an action, and may seek numerous extensions of time in which to do so. Cal. Gov't Code §§ 12652(c)(4)-(5). While the State is investigating a claim, which is first filed under seal, the *qui tam* plaintiff cannot serve the complaint, litigate, or negotiate a settlement. *See* Cal. Gov't Code § 12652. If the State declines to intervene, it can intervene at a later time and assume substantial control over the litigation. *See* Cal. Gov't Code §§ 12652(f), (i). Moreover, the standards for filing bringing a claim under the False Claims Act, and the information provided to the State, are materially greater than what is required under PAGA. Until July 2016, PAGA only required that minimal notice be provided to the LWDA. An aggrieved employee was not required to provide a copy of a proposed complaint, settlement agreement, or even report whether the matter has settled. In fact, the March 25, 2016 report from the Legislative Analysist's Office recommended changes to PAGA to require "more detail in the initial PAGA notice and that a copy of the PAGA complaint and any settlement be provided to LWDA," and stated that doing so would be "a reasonable extension of LWDA's oversight of the PAGA process[.]" *Id.*

a. In contrast, the False Claims Act requires a complaint be filed, under seal, with a copy served on the Attorney General. Furthermore, the *qui tam* Plaintiff is required to furnish to the Attorney General a written disclosure of "substantially all material evidence and information the person possesses." Cal. Gov't Code § 12652(c)(3).

b. Actions arising under the False Claims Act can also only be dismissed with approval from a court **and** the State Attorney General, "taking into account the best interests of the parties involved and the public purpose of the statute." Cal. Gov't Code § 12652(c)(1). No claim arising under the False Claim Act may be released by a

private person, except as part of a court-approved settlement. *Id.* (emphasis added).

88. PAGA contains no comparable judicial oversight. On information and belief, settlements of Labor Code claims enforced under PAGA frequently involve very little or no allocation of PAGA penalties. There is no judicial oversight unless PAGA penalties are allocated. On information and belief, PAGA claims are used to wrestle greater settlements from private claims and produce very little for the State, despite the fact that PAGA requires that the LWDA receive 75 percent of any civil penalties collected. The above referenced March 2016 Report stated:

> [N]ot all settlements include civil penalties. In fact, LWDA reports that in 2014-15 it received just under 600 payments for PAGA claims that resulted in civil penalties. This number is low relative to the amount of PAGA notices LWDA receives each year (roughly 10 percent of notices received in 2014), implying that the final disposition of a large portion of PAGA claims, and likely many settlements, do not involve civil penalties.

Id. The March 2016 Report also states that the amount of PAGA notices filed with the LWDA in 2014 exceeded 6,300 and the amount of PAGA penalties deposited in the Labor and Workforce Development Fund in 2014 was $8,400,000. *Id.* On information and belief, the issue identified in the 2016 Legislative Analysist's Office report—a large portion of PAGA claims settling without allocating civil penalties—continues to this day.

7. PAGA is Unconstitutional As-Applied.

89. In *Iskanian*, our Supreme Court declared that PAGA did not violate the Separation of Powers Doctrine. 59 Cal. 4th at 391. The Court decided the question over the over the objection of the party Iskanian, who argued that "this issue was not raised in CLS's answer to the petition for review and is not properly before [the Court]." *Id.* at 389. The Court grounded its authority to address the unraised issue in a California Rule of Court which provides, in relevant part, that the Supreme Court may "decide an issue that is neither raised nor fairly included in the petition or answer if the case presents the issue and the court has given the parties reasonable notice and opportunity to brief and argue it." *Id.* (citing Cal. R. Ct.

8.516(b)(1)-(2)). The Court expressly invoked the "reasonable opportunity to brief the issue" portion of the rule, which, at a minimum, is a tacit admission that the Court had an incomplete record before it, at least for the purposes of determining whether PAGA is unconstitutional as applied to CLS in that case.

The following allegations, made on information and belief, will allow this court to develop a sufficient factual record for this Court, the Court of Appeal, our Supreme Court, and/or the United States Supreme Court to determine whether PAGA is unconstitutional as applied to Plaintiff's members and other California employers.

(a) PAGA's Penalty Scheme Is Unconstitutional As Applied.

90. As alleged, *supra*, where the Labor Code does not provide for a civil penalty, PAGA exacts a penalty of $100 per employee, per pay period, for initial violations, and $200 per employee, per pay period, for subsequent violations. And though still an open question in the law, the weight of authority suggests that PAGA penalties may be "stacked" or "aggregated" for multiple PAGA violations in the same pay period. *See, e.g., Schiller v. David's Bridal, Inc.*, 2010 U.S. Dist. LEXIS 81128, *18 (E.D. Cal. July 14, 2010) ("Plaintiff cites no authority establishing that PAGA penalties could not be awarded for every cause of action under which they are alleged."; "the Court concludes that Defendant may aggregate all alleged PAGA penalties asserted as to each cause of action for purposes of establishing the amount in controversy."); *see also Pulera v. F & B, Inc.*, 2008 U.S. Dist. LEXIS 72659, at * 2-3 (E.D. Cal. Aug. 19, 2008) (aggregating 25% of all PAGA penalties alleged when making amount in controversy determination); *Smith v. Brinker Intern, Inc.*, 2010 U.S. Dist. LEXIS 54110, (N.D. Cal. May 5, 2010).

91. Under this framework, the allegation by a single employee that an employer has unknowingly underpaid him or her by just a few dollars could provide the basis for millions of dollars in PAGA penalties, even for a small employer, and regardless of the employer's innocent intent or mistake. What follows is an example of how such an allegation (which on information and belief are similar to the allegations that have been pleaded against Plaintiff's members) could lead to such an absurd and unconstitutional result.

92. Employee alleges (without any proof) that for the past year, he has worked 2 minutes of "off-the-clock" overtime each pay period attending to miscellaneous tasks related to opening or closing Employer's place of business—without ever telling Employer—and that Employer has not paid him for this time. Under the *Starbucks* decision, discussed *supra*, the employee has a cognizable claim of failure to pay minimum wages and overtime. Employer has 30 employees and weekly pay periods. Employee's hourly rate of pay is $11.00 per hour, which means the approximate amount of unpaid minimum wages is: $19.07 (2 minutes x 52 pay periods = 104 minutes; 104 minutes / 60 minutes = 1.73 hours; 1.73 hours x $11.00 = $19.07), and the approximate amount of unpaid overtime wages are: $9.54 ($19.07 x. 0.5 = $ 9.54). So the total approximate amount of wages Employer failed to pay Employee, unknowingly, is $28.61.

93. Below is a breakdown of the maximum penalties that Employee could threaten against the Employer under PAGA.

Type of Violation	Statute	Penalties Per Employee
Non-Payment of Minimum Wages	1197.1	• Unpaid Wages: $19.07 • Penalties: $12,850
Non-Payment of Overtime	558	• Unpaid Wages: $9.54 • Penalties: $5150
Failure to Provide Accurate Wage Statements	226.3	• Penalties: $51,250
Failure to Maintain Accurate Payroll Records	1174.5	• Penalties: $500
Total Exposure For Employee	N/A	**$69,508.61**
Workforce Exposure (for 30 employee business)	N/A	**$2,085,258.30**

94. Through PAGA, Employee has authority to seek a maximum of $69,508.61 civil penalties and personal damages for the alleged failure of Employer to pay Employee: $28.61, which is ***2,430 times the alleged actual damages***. And Employee is further empowered to threaten Employer (through extrapolation) with ***over $2 million dollars in penalties and damages*** for its 30-person workforce. This does not even account for penalties that could be

assessed for separated employees, which would increase the exposure by $3,640 per separated employee. *See* Cal. Lab. Code § 1197.1(a)(1)-(2) (making available the recovery of Cal. Lab. Code 203).

95. Plaintiff is aware that PAGA provides the trial court the discretion to "award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Cal. Lab. Code § 2699(e)(2) ("Section (e)(2)"). Indeed, state and federal courts alike have relied almost exclusively on this provision in holding that PAGA is constitutional.

96. However, the California Court of Appeal has made clear that PAGA penalties "are mandatory, not discretionary" and that the considerations in Section (e)(2) may only be exercised to reduce penalties, not for "exercising discretion in general with regard to the amount of penalties, because the amount is fixed by statute." *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1213 (2008). In the context of our example, this means that the amount of civil penalties and damages to which Employee is entitled under PAGA is set at $69,508.61, which (by extrapolation) means that Employee can threaten this small 30-person Employer with a lawsuit with exposure that exceeds $2,000,000. And only if Employer is willing and able to incur the costs and expenses necessary to litigate Employee's PAGA case through verdict—which could cost hundreds of thousands of dollars—does the Court have any discretion to reduce the mandatory ***2,430 multiple of the alleged actual damages*** provided for under PAGA.

97. Thus, under PAGA, employers must endure years of cost-prohibitive litigation, under the constant threat of bankrupting liability, and proceed all the way to trial on the hope that a judge just might exercise an undefined "discretion" to reduce the mandatory penalties provided for under the statute. Such a framework is not a fair, reasonable, appropriate, or constitutional state of affairs, and its inequitable results "shock the conscience."

(b) <u>PAGA's Lack of Government Oversight Is Unconstitutional As-Applied.</u>

98. On information and belief, CABIA alleges that the Plaintiffs' Bar—specifically

those that focus on wage/hour actions—have exploited the Legislature's unfettered delegation of power through PAGA to enrich themselves at the expense of the State of California, the "aggrieved employees" they purported to represent, and the ethical standards for attorney conduct.

99. On information and belief, the Plaintiffs' Bar routinely exploits the fact that the Supreme Court has ruled that PAGA claims are non-arbitrable to avoid the effect of arbitration agreements, particularly those with class action waivers.

100. More specifically, and on information and belief, the typical tactic employed by the Plaintiffs' Bar is to file a class action lawsuit and add non-arbitrable PAGA claims, not to vindicate the interest of the State, or to fulfill the express purpose of PAGA of enhancing employer compliance with California Labor Laws, but rather to coerce employers to agree to early-stage mediation.

101. During the vast majority of these mediations, the Plaintiffs' Bar engages in practices made possible by PAGA which, as applied to Plaintiff's members and other California employers, are unconstitutional under State and federal law, including, but not limited to:

a. Not requiring the "aggrieved employee" to attend the mediation;

b. Not consulting with the "aggrieved employee" or the State before agreeing to a settlement of PAGA claims;

c. After using PAGA to avoid arbitration (and the effect of a class waiver), attempting to settle for the value of Labor Code violations and allocate only a very small portion of the settlement to PAGA, thereby minimizing the share of the recovery that goes to the State;

d. Threatening to pursue the life savings, homes, college tuition funds, and other personal property as a means to intimidate and coerce those connected with an employer-business to pay large settlements, very little of which is normally allocated to PAGA in the end.

102. PAGA litigation also lacks any appreciable oversight and/or coordination with the legislative, executive, and/or judicial branches of government, which results in the

unconstitutional application of PAGA to Plaintiff's members and California employers generally, including, but not limited to:

a. Not requiring the LWDA to review any number or percentage of PAGA notices;

b. Not requiring the LWDA to investigate any number of PAGA notices;

c. Not monitoring or auditing the Plaintiffs' Bar's use of PAGA (e.g., the number of notices filed by firms);

d. Not requiring a representative of LWDA to be present at mediations, court hearings, or trials involving PAGA claims;

e. Not requiring the LWDA to review settlement agreements, court orders, or court judgments that are based on or relate to PAGA claims;

f. Permitting the LWDA to understaff the LWDA's PAGA unit, lose PAGA notices, and maintain inadequate records of PAGA notices, fees collected, lawsuits, settlements, judgment, and orders;

g. Failing to establish and enforce ethical guidelines for attorneys who are representing the State's proxies, the aggrieved employees; and

h. Failing to vet or screen the attorneys who are representing the State's proxies, the aggrieved employees.

103. The Legislature's unfettered grant of authority to the Plaintiffs' Bar to exercise State power through PAGA, without any oversight or coordination, has resulted in an oppressive regime of opportunism that threatens "the continued operation of an established, lawful business" in this State, which the Supreme Court has held is subject to heightened protections. *See County of Santa Clara*, *supra*, 50 Cal. 4th at 53. This unconstitutional grant of State power has been aggressively exploited by dozens of law firms. According to State records, which are incomplete, well over 100 firms have sent 50 or more PAGA Notices to the LWDA since it the law was enacted, and the 30 most aggressive PAGA plaintiffs' firms (by number of PAGA Notices) appear in the chart below:

No.	Law Firm	PAGA Notices
1	Law Offices of Ramin R. Younessi	753
2	Kingsley & Kingsley	599

3	Lawyers for Workplace Fairness	542
4	Gaines & Gaines	514
5	Initiative Legal Group APC	501
6	Capstone Law APC	440
7	Blumenthal Nordrehaug Bhowmik De Blouw LLP	433
8	Lavi & Ebrahimian LLP	431
9	Crosner Legal P.C.	424
10	Matern Law Group	382
11	Fitzpatrick & Swanston	377
12	Harris & Ruble	369
13	Lawyers for Justice	352
14	JML Law	348
15	Mayall Hurley P.C.	333
16	Law Offices of Stephen Glick	318
17	Mahoney Law Group	300
18	JAMES HAWKINS APLC	291
19	United Employees Law Group, PC	286
20	Diversity Law Group	285
21	Kesluk Silverstein & Jacob	278
22	Aegis Law Firm	258
23	Setareh Law Group	234
24	David Yeremian & Associates, Inc.	227
25	Haines Law Group	227
26	Spivak Law	210
27	Rastegar Law Group	204
28	Law Offices of Gregory A. Douglas	193
29	Shimoda Law Corp	192
30	The Nourmand Law Firm	182

104. The Legislature's unfettered grant of authority to the Plaintiffs' Bar to exercise State power through PAGA, without any oversight or coordination, has resulted in ***the Plaintiffs' Bar targeting charities, non-profits, and other employers who provide valuable and charitable services to California residents, including, but not limited to children's hospitals, AIDS centers, senior living centers, ambulance companies, sustainable energy companies, foster homes***, and more; a non-exhaustive list of such employers who have been targeted by the Plaintiffs' Bar via the Legislature's unfettered and unconstitutional delegation of State power through PAGA include:

Employer Name	Law Firm
Paramount Meadows Nursing Center LP; Paramount Meadows Nursing Center LLC	Aegis Law Firm
Kindercare Education LLC; Kindercare Learning Centers LLC	Baltodano & Baltodano LLP
Sober Living By The Sea, Inc.	Bibiyan Law Group, P.C.
Carriage Funeral Holdings, Inc.	Blumenthal Nordrehaug Bhowmik De Blouw LLP
Kaiser Foundation Hospitals	Blumenthal Nordrehaug Bhowmik De Blouw LLP
Navajo Express, Inc.	Blumenthal Nordrehaug Bhowmik De Blouw LLP
Pride Transport Inc.	Blumenthal Nordrehaug Bhowmik De Blouw LLP
AIDS Healthcare Foundation	Blumenthal Nordrehaug Bhowmik De Blouw LLP
El Camino Hospital	Blumenthal Nordrehaug Bhowmik De Blouw LLP
Methodist Hospital of Sacramento	Bohm Law Group, Inc.
Center for Interventional Spine; Integrated Pain Management Medical Group, et al	Bohm Law Group, Inc.
United Ambulance Services, Inc.	Bohm Law Group, Inc.
Providence Saint John's Health Center	Bradley Grombacher LLP
Center for Elders' Independence	Bradley Grombacher LLP
Victor Valley Union High School District	California School Employees Association
Lifecare Solutions, Inc.	Capstone Law APC
Healing Care Hospice, Inc./Shahrouz Golshani	Chesler McCaffrey LLP
Valley Presbyterian Hospital	Cohelan Khoury & Singer
Max Laufer, Inc. d/b/a MaxCare Ambulance	Cohelan Khoury & Singer
BHC Sierra Vista Hospital, Inc.	Crosner Legal P.C.
Fairwinds-West Hills, A Leisure Care Community, et al.	David Yeremian & Associates, Inc.
24-7 Caregivers Registry, Inc dba Advantage Plus Caregivers	David Yeremian & Associates, Inc.
Mental Health America of Los Angeles	Diana Gevorkian Law Firm
Earthbound Farm, LLC	Diversity Law Group
Planned Parenthood Mar Monte, Inc.	Diversity Law Group
Adventist Health/Reedley Community Hospital	Diversity Law Group
The Salvation Army	Diversity Law Group
Samaritan LLC	Diversity Law Group
Regional Medical Center of San Jose	Diversity Law Group
Grand Terrace Health Care, Inc.	Diversity Law Group

Carmichael Care, Inc.	Diversity Law Group
Watsonville Community Hospital	Diversity Law Group
San Jose Foothill Family Community	Diversity Law Group
Mama Petrillo's-Temple City, Incorporated	Employee Justice Legal Group, LLP
Fresno Community Hospital And Medical Center	Employee Law Group
Westlake Wellbeing Properties LLC	Ferguson Case Orr Paterson LLP
John Muir Health & John Muir Behavioral Health	Gaines & Gaines
Front Porch Communities and Services	Gaines & Gaines
Encore Education Corporation	Gaines & Gaines
The Endoscopy Center of Santa Maria, Inc.	Gaines & Gaines
Sutter Central Valley Hospitals	Gaines & Gaines
Valley Children's Medical Group	Gaines & Gaines
Silver Crown Home Care, LLC	Gaines & Gaines
Childrens Hospital Los Angeles Medical Group, Inc.	Gartenberg Gelfand Hayton LLP
Youth Policy Institute Charter Schools, Monsignor Oscar Romero Charter School...	Genie Harrison Law Firm
Life Alert Emergency Response, Inc.	Geragos & Geragos, APC
Rehabilitation Center of Santa Monica Holding Company GP, LLC	GrahamHollis APC
First Alarm	GrahamHollis APC
Progressus Therapy, LLC & other employers	Gurnee Mason & Forestiere
Soquel Union Elementary School District	Habbu & Park
California Friends Home dba Quaker Gardens	Haines Law Group
Evergreen Hospice Care, Inc.	Haines Law Group
Life Care Centers of America, Inc.	Haines Law Group
Big League Dreams USC, LLC	Haines Law Group
Chhatrala Hospitality Group, LLC dba Howard Johnson Hotel Circle	Hasbini Law Firm
Central Coast Community Health Care, Inc.; Central Coast VNA, VNA Community Serv	Humphrey & Rist, LLP
California Rehabilitation Institute, LLC (and other Defendant in the notice)	J.B. Twomey Law
San Diego Humane Society and S.P.C.A.	Jackson Law, APC
Seasons Hospice & Palliative Care of California-San Bernardino, LLC	Jafari Law Group
Eureka Rehabilitation & Wellness Center, LP.	Janssen Malloy LLP
EFR Environmental Services, Inc.	JUSTICE LAW CORPORATION
Central Coast Home Health, Inc.	JUSTICE LAW CORPORATION
Universal Hospital Services, Inc.	JUSTICE LAW CORPORATION
Covanta Long Beach Renewable Energy Corp.	Kokozian Law Firm, APC

Central City Community Health Center	Kokozian Law Firm, APC
CHLB, LLC dba College Medical Center	Kokozian Law Firm, APC
St. John's Well Child and Family Center, Inc.	Lavi & Ebrahimian LLP
City of Hope National Medical Center	Lavi & Ebrahimian LLP
North Hills Healthcare & Wellness Centre, LP	Lavi & Ebrahimian LLP
Assistalife Family Assisted Care, LLC; Assistalife Family Assisted Care et al.	Law Office of Alfredo Nava Jr.
Greater Los Angeles Agency on Deafness, Inc.	Law Office of Alfredo Nava Jr.
Family Housing and Adult Resources, Inc.	Law Office of Allan A. Villanueva
Brookdale Senior Living, Inc., and others-see PAGA Notice	Law Offices of C. Joe Sayas, Jr.
CHA Hollywood Medical Center, L.P.; CHA Health Systems, Inc.	Law Offices of C. Joe Sayas, Jr.
National Student Aid Care/CSADVO, LLC	Law Offices of Carlin & Buchsbaum
New Life Treatment Center	Law Offices of Carlin & Buchsbaum
J&L Day Care Centers, J&L Day Cares, VOICE	Law Offices of Carlin & Buchsbaum
Redwood Memorial Hospital of Fortuna	Law Offices of Choi & Associates
Silverado Senior Living Management, Inc.	Law Offices of Choi & Associates
Regional Medical Center of San Jose	Law Offices of Kevin T. Barnes
Antelope Valley Hospital Foundation	Law Offices of Kevin T. Barnes
Social Vocational Services, Inc.	Law Offices of Kirk D. Hanson
Ambuserve, Inc; Shoreline Ambulance, LLC; Shoreline Ambulance Company, LLC; M. Harris	Law Offices of Morris Nazarian
We Are Family Center	Law Offices of Ramin R. Younessi
Dr. Sandhu Animal Hospital, Inc.	Law Offices of Stephen Glick
BHC Sierra Vista Hospital (Sierra Vista Hospital); UHS of Delaware; UHS SUB III	Law Offices of Traci M. Hinden
Greenfield Care Center of Fullerton, LLC	Law Offices of Zorik Mooradian
Mercy Services Corp; Mercy Housing, Inc.; Mercy Housing Management Group, Inc.	Lawyers for Justice
St. John's Well Child and Family Center, Inc.	Lawyers for Justice
Always There Homecare	Lidman Law APC
Covenant Care California dba Covenant Care La Jolla LLC	Light & Miller, LLP
Senior Lifestyle Holding Company, LLC dba Sunflower Gardens	Mahoney Law Group
Edgewater Skilled Nursing Center	Mahoney Law Group
California Rehabilitation Institute, LLC	Matern Law Group
South Pasadena Care Center, LLC	Matern Law Group
Valley Oak Residental Treatment Program Inc	Mayall Hurley P.C.
Brookdale Senior Living, Inc.	Mayall Hurley P.C.
Gage Medical Clinic, Inc.	Messrelian Law Inc.

Central Calif Found. for Health dba Delano Reg'l Med. Ctr; Delano Health Assocs.	Moss Bollinger LLP
Greenfield Care Center of Gardena, Inc.	Moss Bollinger LLP
Pacific Coast Tree Experts	Moss Bollinger LLP
New School for Child Development	Otkupman Law Firm
Southern Monterey County Memorial Hospital dba George L. Mee Memorial Hospital	Polaris Law Group LLP
Green Messenger, Inc.	Scott Cole & Associates
St. Jude Medical, Inc.; Bolt Staffing Service, Inc.	Setareh Law Group
American Addiction Centers, Inc.	Setareh Law Group
Karma, Inc. DBA Manteca Care & Rehabilitation Center, et al.	Shimoda Law Corp
Sierra Forever Families, Robert Herne	Shimoda Law Corp
Mom365, Inc.	Shimoda Law Corp
Freda's Residential Care Facility for the Elderly, Inc.; Freda and Zoilo Robles	The Law Office of Nina Baumler
Sheridan Assisted Living, Inc.	Verum Law Group, APC
Desert Valley Hospital, Inc.	Wagner & Pelayes, LLP
Sustainable Energy Outreach, LLC.	Wilshire Law Firm, PLC
A1 Solar Power, Inc./American Pro Energy/Renewable Energy Center, LLC.	Wilshire Law Firm, PLC

105. On information and belief, the above employers, and those like them, are the types of entities that the State of California would not be interested in prosecuting or driving into bankruptcy through PAGA litigation. At a minimum, these entities are deserving of a balanced and neutral approach (the type of approach required by a State attorney, not a private attorney) to ensure a "just" result for the public.

106. The Legislature's unfettered and unconstitutional delegation of State power to the Plaintiffs' Bar, without any oversight or coordination, has allowed the Plaintiffs' Bar to enrich themselves at the expense of the State and the alleged aggrieved for whom they are supposed to advocate.

107. For example, in *Viceral v. Mistras Group, Inc.*, case number 15-cv-02198-EMC, a federal judge of the Northern District approved a $6,000,000 settlement, of which only $20,000 was allocated to the PAGA claim, even though it was valued at $12,900,000. The plaintiffs' attorneys were awarded $2,000,000 in fees (double the lodestar estimate) and

$46,000 in costs.

108. In *Price v. Uber Technologies Inc.*, case number BC55451, a Los Angeles Superior Court judge approved a $7,750,000 settlement, even though the estimated liability was over $1,000,000,000. The plaintiffs' attorneys were awarded $2,325,000, whereas the average Uber Driver was awarded just over one dollar ($1.08).

109. In *John Doe v. Google Inc.*, case number CGC-16-556034, a San Francisco Superior Court judge approved a $1,000,000 settlement, of which the attorneys were awarded $330,000 (which tripled their hourly rate), and each aggrieved employee received just fifteen and one-half dollars ($15.50).

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Violation of California Separation of Powers Doctrine)

110. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

111. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

112. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff's members and other California employers.

113. The California Constitution provides for the separation of the legislative, executive, and judicial powers of the State government. Under the classic understanding of the Separation of Powers Doctrine, the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality. Among the limitations imposed by the Separation of Powers Doctrine is that the Legislature can neither exercise any core judicial function nor place restrictions on the Judiciary that materially impair or defeat the exercise of the Judiciary's functions. Similarly, the Legislature cannot exercise any core executive functions, and correlatively, the Executive may not abdicate the exercise of its function.

114. As pleaded more fully above, the Private Attorneys General Act violates the

California Separation of Powers Doctrine, on its face and/or as practiced because, *inter alia*: PAGA does not provide the judiciary sufficient oversight of the judicial functions it has unconstitutionally delegated to private citizens and their counsel; PAGA vests private citizens in their proxy role with the same unique and powerful status as would be enjoyed by the Executive without requiring any coordination or oversight by the Executive to ensure such persons are acting on behalf of the interests of the State and commonsense principles of equity and justice; and PAGA vests private citizens with the power to initiate, steer, litigate, and resolve lawsuits on behalf of the executive without providing meaningful coordination or oversight by the Executive to ensure such persons are acting on behalf of the interests of the State and commonsense principles of equity and justice.

115. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the California Constitutional provision and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

116. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.

117. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court's injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or

other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

SECOND CAUSE OF ACTION

(Violation of the United States Constitution's Fourteenth Amendment Procedural Due Process Protections)

118. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

119. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

120. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff's members and other California employers.

121. The Due Process Clause of the Fourteenth Amendment prohibits the states from depriving any person of life, liberty, or process, without due process of law. This due process guarantee has both procedural and substantive components.

122. As pleaded more fully above, the Private Attorneys General Act violates the Fourteenth Amendment's procedural due process guarantee, on its face and/or as practiced, in part, because PAGA imposes and/or results in the imposition of criminal or quasi-criminal liability without the protections of the grand jury and indictment process; PAGA imposes or results in the imposition of criminal or quasi-criminal liability without requiring the heightened burden of proof required such as "beyond or reasonable doubt" or "clear and convincing evidence"; PAGA imposes and/or results in the imposition of criminal or quasi-criminal liability without requiring proof of a sufficiently culpable *mens rea*; PAGA imposes or results in the criminal or quasi-criminal liability in the absence of a neutral prosecutor; and PAGA provides for the taking of property in the absence of a fair, neutral, decision maker.

123. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the United States Constitutional protections and the

legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

124. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.

125. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court's injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

THIRD CAUSE OF ACTION

(Violation of the United States Constitution's Fourteenth Amendment Substantive Due Process Protections)

126. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

127. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

128. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff's members and other California employers.

129. The Due Process Clause of the Fourteenth Amendment prohibits the states from

depriving any person of life, liberty, or process, without due process of law. This due process guarantee has both procedural and substantive components.

130. As pleaded more fully above, the Private Attorneys General Act violates the Fourteenth Amendment's substantive due process guarantee, on its face and/or as practiced, in part, because PAGA imposes or results in penalties, fines, and/or extorted settlement sums disconnected from, and/or grossly disproportionate to, any harm or wrongdoing committed, to the extent that it "shocks the conscience."

131. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the United States Constitutional protections and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

132. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.

133. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court's injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

FOURTH CAUSE OF ACTION

(Violation of California Constitutional Procedural Due Process Protections)

134. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

135. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

136. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff's members and other California employers.

137. The California Constitution prohibits the State government from depriving any person of life, liberty, or process, without due process of law. This due process guarantee has both procedural and substantive components.

138. As pleaded more fully above, the Private Attorneys General Act violates the procedural due process guarantee of the California Constitution, on its face and/or as practiced, in part, because? PAGA imposes and/or results in the imposition of criminal or quasi-criminal liability without the protections of the grand jury and indictment process; PAGA imposes or results in the imposition of criminal or quasi-criminal liability without requiring the heightened burden of proof required such as "beyond or reasonable doubt" or "clear and convincing evidence"; PAGA imposes and/or results in the imposition of criminal or quasi-criminal liability without requiring proof of a sufficiently culpable *mens rea*; PAGA imposes or results in the criminal or quasi-criminal liability in the absence of a neutral prosecutor; and PAGA provides for the taking of property in the absence of a fair, neutral, decision maker.

139. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the California Constitutional protections and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

140. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.

141. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court's injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

FIFTH CAUSE OF ACTION

(Violation of California Constitutional Substantive Due Process Protections)

142. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

143. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

144. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff's members and other California employers.

145. The California Constitution prohibits the State government from depriving any person of life, liberty, or process, without due process of law. This due process guarantee has both procedural and substantive components.

146. As pleaded more fully above, the Private Attorneys General Act violates the substantive due process guarantee of the California Constitution, on its face and/or as practiced, in part, because PAGA imposes or results in penalties, fines, and/or extorted settlement sums

disconnected from, and/or grossly disproportionate to, any harm or wrongdoing committed, to the extent that it "shocks the conscience."

147. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the California Constitutional protections and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

148. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.

149. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court's injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

SIXTH CAUSE OF ACTION

(Violation of the United States Constitution's Eighth Amendment Excessive Fines and Unusual Punishment Protections)

150. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

151. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

152. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff's members and other California employers.

153. The Eighth Amendment to the United States Constitution prohibits the federal government from extracting payments, fines, or penalties that are not proportional and/or that do not bear some relationship to the gravity of the offense a law is designed to punish. These protections apply to the government of the State of California.

154. As pleaded more fully above, the Private Attorneys General Act violates the Eighth Amendment prohibition on excessive fines and unusual punishment because the PAGA penalty framework is not proportional and/or does not bear any conceivable relationship to the gravity of the offenses that PAGA is designed to punish.

155. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the United States Constitutional protections provision and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

156. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.

157. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court's injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California

Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

SEVENTH CAUSE OF ACTION

(Violation of California Constitution's Excessive Fines and Unusual Punishment Protections)

158. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

159. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

160. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff's members and other California employers.

161. The California Constitution prohibits the State government from extracting payments, fines, or penalties that are not proportional and/or that do not bear some relationship to the gravity of the offense a law is designed to punish.

162. As pleaded more fully above, the Private Attorneys General Act violates the this California Constitutional prohibition on excessive fines and unusual punishment because the PAGA penalty framework is not proportional and/or does not bear any conceivable relationship to the gravity of the offenses that PAGA is designed to punish.

163. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the California Constitutional protections and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

164. This Court has the power to issue injunctive relief under Code of Civil Procedure

Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.

165. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court's injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

EIGHTH CAUSE OF ACTION

(Violation of the United States Constitution's Fourteenth Amendment Equal Protection of the Laws Guarantee)

166. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

167. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

168. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff's members and other California employers.

169. The Fourteenth Amendment to the United States Constitution prohibits the federal government from denying any person equal protection of the laws. These protections apply to the government of the State of California.

170. As pleaded more fully above, the Private Attorneys General Act violates the Fourteenth Amendment guarantee of equal protection because the California Legislature recently, and without any rational basis, exempted the construction industry from the impact of

PAGA via the passage of AB 1654, now codified in California Labor Code Section 2699.6. In so doing, the California Legislature has unconstitutionally denied Plaintiff's members, and California employers not subject to the exemption, the equal protection of California law.

171. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the United States Constitutional protections provision and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

172. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.

173. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court's injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

NINTH CAUSE OF ACTION

(Violation of California Constitution's Equal Protection Clause)

174. Plaintiff realleges and incorporates by reference Paragraphs 1-109 of this Complaint as though each were set forth herein in full.

175. This action presents an actual case or controversy between Plaintiff and Defendant concerning the constitutionality and enforceability of PAGA.

176. Plaintiff reasonably believes Defendant will continue to enforce PAGA against Plaintiff's members and other California employers.

177. The California Constitution prohibits the State government from denying any person equal protection of the laws.

178. As pleaded more fully above, the Private Attorneys General Act violates the California Constitution's guarantee of equal protection because the California Legislature recently, and without any rational basis, exempted the construction industry from the impact of PAGA via the passage of AB 1654, now codified in California Labor Code Section 2699.6. In so doing, the California Legislature has unconstitutionally denied Plaintiff's members, and California employers not subject to the exemption, the equal protection of California law.

179. This Court has the power to issue declaratory relief under Code of Civil Procedure Sections 1060 and 1062. A judicial declaration is necessary and appropriate regarding the proper interpretation of the California Constitutional protections and the legality of the Private Attorneys General Act thereunder, and regarding the respective rights and obligations of Plaintiff and Defendants thereunder. A judicial determination is necessary and proper at this time and under these circumstances in order to determine whether Defendant may continue to enforce the provisions of the Private Attorneys General Act.

180. This Court has the power to issue injunctive relief under Code of Civil Procedure Sections 525, 526, and 526a. Plaintiff seeks a temporary restraining order and a preliminary and temporary injunction to compel Defendant, and those public officers and employees acting by and through their authority, to immediately set aside any and all actions taken to continue to implement or enforce the provisions of the Private Attorneys General Act, pending the hearing on the merits of Plaintiff's claims to avoid irreparable harm to Plaintiff and its members.

181. Plaintiff has no plain, speedy, and adequate remedy at law, in the absence of this Court's injunction, Defendants will continue to implement and enforce the provisions of the Private Attorneys General Act in violation of Section 3, of Article 3 of the California

Constitution, Section 17, Article 1, of the California Constitution, and the Eighth and Fourteenth Amendment to the United States Constitution. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff, and its members, for the irreparable harm that it, its members, and California employers generally, would suffer from the violations of law described herein.

PRAYER FOR RELIEF

1. On the First through Ninth Causes of Action, a temporary restraining order and preliminary and permanent injunctions enjoining Defendant from implementing or enforcing the Private Attorneys General Act, or any of its unconstitutional provisions.

2. On the First through Ninth Causes of Action, that this Court issue its judgment declaring that the Private Attorneys General Act is, in whole or in part, unconstitutional and unenforceable because it violates Section 3, Article III, and/or Section 17, Article I, of the California Constitution, and/or the Eighth and/or Fourteenth Amendment of the United States Constitution.

3. On the First through Ninth Causes of Action, that this Court enter orders reforming the Private Attorneys General Act to the extent mandated by constitutional concerns and permitted by law.

4. On each and every Cause of Action, that this Court grant Plaintiff its costs, including out-of-pocket expenses and reasonable attorneys' fees; and

5. On each and every Cause of Action, that this Court grant such other, different or further, relief as this Court may deem just and proper.

DATED: November 27, 2018

EPSTEIN, BECKER & GREEN, P.C.

By: 

Richard J. Frey
Robert H. Pepple
David M. Prager
Paul DeCamp

Attorneys for Plaintiff
California Business & Industrial Alliance

BILL ANALYSIS

SENATE JUDICIARY COMMITTEE
Martha M. Escutia, Chair
2003-2004 Regular Session

SB 796	S
Senator Dunn	B
As Amended April 22, 2003	
Hearing Date: April 29, 2003	7
Labor Code	9
CJW	6

SUBJECT

Employment

DESCRIPTION

This bill would allow employees to sue their employers for civil penalties for employment law violations, and upon prevailing, to recover costs and attorneys' fees. The bill is intended to augment the enforcement abilities of the Labor Commissioner by creating an alternative "private attorney general" system for labor law enforcement.

This analysis reflects author's amendments to be offered in Committee.

BACKGROUND

California's Labor Code is enforced by the state Labor and Workforce Development Agency (LWDA) and its various boards and departments, which may assess and collect civil penalties for specified violations of the code. Some Labor Code sections also provide for criminal sanctions, which may be obtained through actions by the Attorney General and other public prosecutors.

In 2001, the Assembly Committee on Labor and Employment held hearings about the effectiveness and efficiency of the enforcement of wage and hour laws by the Department of Industrial Relations (DIR), one of four subdivisions of the LWDA. The Committee reported that in fiscal year 2001-2002, the Legislature appropriated over $42 million to

(more)

the State Labor Commission for the enforcement of over 300 laws under its jurisdiction. The DIR's authorized staff numbered over 460, making it the largest state labor law enforcement organization in the country.

Nevertheless, evidence received by the Committee indicated that the DIR was failing to effectively enforce labor law violations. Estimates of the size California's "underground economy" - businesses operating outside the state's tax and licensing requirements -- ranged from 60 to 140 billion dollars a year, representing a tax loss to the state of three to six billion dollars annually. Further, a U.S. Department of Labor study of the garment industry in Los Angeles, which employs over 100,000 workers, estimated the existence of over 33,000 serious and ongoing wage violations by the city's garment industry employers, but the DIR was currently issuing fewer than 100 wage citations per year for all industries throughout the state.

As a result of these hearings, the Legislature enacted AB 2985 (Ch. 662, Stats. of 2002), requiring the LWDA to contract with an independent research organization to study the enforcement of wage and hour laws, and to identify state and federal resources that may be utilized to enhance enforcement. The completed study is to be submitted to the Legislature by December 31, 2003.

This bill would propose to augment the LWDA's civil enforcement efforts by allowing employees to sue employers for civil penalties for labor law violations, and to collect attorneys' fees and a portion of the penalties upon prevailing in these actions, as specified below.

CHANGES TO EXISTING LAW

Existing law authorizes the LWDA (comprised of the DIR, the Employment Development Department, the Agricultural Labor Relations Board, and the Workforce Investment Board) to assess and collect civil penalties for violations of the Labor Code, where specified. [Labor Code Secs. 201 et seq .]

Existing law authorizes the Attorney General and other public prosecutors to pursue misdemeanor charges against violators of specified provisions of the code. [Labor Code

Sec. 215 et seq .]

Existing law authorizes an individual employee to file a claim with the Labor Commissioner alleging that his or her employer has violated specified provisions of the code, and to sue the employer directly for damages, reinstatement, and other appropriate relief if the Commissioner declines to bring an action based on the employee's complaint. [Labor Code Sec. 98.7.]

Existing law further provides that any person acting for itself, its members, or the general public, may sue to enjoin any unlawful, unfair, or fraudulent business act or practice, and to recover restitution and disgorgement of any profits from the unlawful activity. [Bus. & Profs. Code Sec. 17200 et seq .]

This bill would provide that any Labor Code violation for which specific civil penalties have not previously been established shall be subject to a civil penalty of $100 for each aggrieved employee per pay period for an initial violation, and $200 for each aggrieved employee per pay period for continuing violations. (The penalty would be $500 per violation for a violator who is not an employer.)

This bill further would provide that, for any Labor Code violation for which the LWDA does not pursue a complaint, any aggrieved employee may sue to recover civil penalties in an action brought on behalf of himself or herself or other current or former employees.

This bill would define "aggrieved employee" as "any person employed by the alleged violator within the period covered by the applicable statute of limitation against whom one or more of the violations alleged in the action was committed."

This bill further would provide that an aggrieved employee who prevails in such an action shall be entitled to an award of reasonable attorney's fees and costs.

This bill further would provide that any penalties recovered in an action by an aggrieved employee shall be distributed as follows: 50 percent to the General Fund, 25 percent to the LWDA for employer education, and 25 percent

to the aggrieved employees. (Penalties recovered against a violator who is not an employer, which under this bill could be pursued only by a public prosecutor or the LWDA, would be divided evenly between the General Fund and the LWDA.)

This bill further would provide that nothing in this section shall limit an employee's right to pursue other remedies available under state or federal law.

This bill further would provide that no action may be maintained by an aggrieved employee under this section where the LWDA initiates proceedings against the alleged violator on the same facts and under the same section or sections of the Labor Code.

COMMENT

1. Stated need for legislation

The California Labor Federation, co-sponsor, states that this bill would "attack the underground economy and enhance our state's revenues" by allowing workers to

crack down on labor violators:

> In the last decade, as California has grown to become one of the world's largest economies, state government labor law enforcement functions have failed to keep pace. . . . The state's current inability to enforce our existing labor laws effectively is due to inadequate staffing and to the continued growth of the underground economy. This inability coupled with our severe state budget shortfall calls for a creative solution that will help the state crack down on those who choose to flout our laws.

The California Rural Legal Assistance (CRLA) Foundation, also a co-sponsor, states that violations of minimum or overtime wage violations are common, and many other violations for which only rarely enforced criminal penalties exist are increasing: For example, "company store" arrangements in which workers are required to cash their checks with their employer, for a fee, allegedly are widespread in the agricultural industry. The CRLA Foundation notes that the bill's proposed penalty

structure is "nominal" and is based on existing provisions of the Labor Code.

Protection & Advocacy, Inc., which supports the rights of people with disabilities, asserts that SB 796 will assist disabled employees "by providing some mechanism by which to get an employer to comply with the Labor Code."

2. SB 796 would attach civil penalties to existing provisions

The sponsors state that many Labor Code provisions are unenforced because they are punishable only as criminal misdemeanors, with no civil penalty or other sanction attached. Since district attorneys tend to direct their resources to violent crimes and other public priorities, Labor Code violations rarely result in criminal investigations and prosecutions.

Accordingly, this bill would attach a civil penalty of $100 for each aggrieved employee per pay period (increasing to $200 for each aggrieved employee per pay period for continuing violations) to any Labor Code provision that does not already contain a financial penalty for its violation. The sponsors state that this proposed penalty is "on the low end" of existing civil penalties attached to other Labor Code provisions, but should be significant enough to deter violations.

3. The bill would allow "aggrieved employees" to bring private actions to recover the civil penalties

The sponsors state that private actions to enforce the Labor Code are needed because LWDA simply does not have the resources to pursue all of the labor violations occurring in the garment industry, agriculture, and other industries.

Although the Unfair Competition Law (UCL), Section 17200 of the Business & Professions Code, permits private actions to enjoin unlawful business acts, the sponsors assert that it is an inadequate tool for correcting Labor Code violations. First, the UCL only permits private litigants to obtain injunctive relief and restitution, which the sponsors say is not a sufficient deterrent to

labor violations. Second, since the UCL does not award attorneys' fees to a prevailing plaintiff, few aggrieved employees can afford to bring an action to enjoin the violations. Finally, since most employees fear they will be fired or subject to hostile treatment if they file complaints against their employers, they are discouraged from bringing UCL actions.

Generally, civil enforcement statutes allow civil penalties to be recovered only by prosecutors, not by private litigants. Private plaintiffs who have been

damaged by a statutory violation usually are restricted to traditional damage suits, or where damages are difficult to prove, to "statutory damages" in a specified amount or range. [_See_ , _e.g._ ., Unruh Civil Rights Act, Civ. Code Sec. 51 _et seq._ ., allowing statutory damages in a minimum amount of $4,000 per violation to prevailing private litigants in actions alleging denial of equal access or other forms of discrimination.]

In this bill, allowing private recovery of civil penalties as opposed to statutory damages would allow the penalty to be dedicated in part to public use (to the General Fund and the LWDA) instead of being awarded entirely to a private plaintiff, as would occur with a damage award. Recovery of civil penalties by private litigants does have some precedent in existing law: The Unruh Civil Rights Act allows either the victim of a hate crime or a public prosecutor to bring an action for a civil penalty of $25,000 against the perpetrator of the crime. (Civ. Code Secs. 51.7, 52.)

4. Opponents' concerns

The employer groups opposing the bill argue that SB 796 will encourage private attorneys to "act as vigilantes" pursuing any and all types of Labor Code violations on behalf of different employees, and that this incentive will be increased by allowing employees to recover both attorneys' fees and a portion of the penalties. A representative letter states:

> There is a major concern that this type of statute could be abused in a manner similar to the legal community's abuse of Business and Professions Code

> Section 17200 when it sued thousands of small businesses for minor violations and demanded settlements in order to avoid costly litigation.

The California Chamber of Commerce argues that, since the bill would award attorneys' fees to prevailing employees, but not to employers when they prevail, SB 796 would clog already-overburdened courts because there would be no disincentive to pursue meritless claims.

The California Employment Law Council states that the the Labor Code contains "innumerable penalty provisions, many of which would be applicable to minor and inadvertent actions." Under current law, however, the prospect of excessive penalties is mitigated by prosecutorial discretion, which would disappear under SB 796:

> If, for example, a large employer inadvertently omitted a piece of information on a paycheck, a "private attorney general" could sue for penalties that could reach staggering amounts if . . . the inadvertent deletion of information on a paycheck went on for some time.

5. Sponsors say bill has been drafted to avoid abuse of private actions

The sponsors are mindful of the recent, well-publicized allegations of private plaintiff abuse of the UCL, and have attempted to craft a private right of action that will not be subject to such abuse. First, unlike the UCL, this bill would not open private actions up to persons who suffered no harm from the alleged wrongful act. Instead, private suits for Labor Code violations could be brought only by an "aggrieved employee" - an employee of the alleged violator against whom the alleged violation was committed. (Labor Code violators who are not employers would be subject to suit only by the LWDA or by public prosecutors.)

Second, a private action under this bill would be brought by the employee "on behalf of himself or herself or others" - that is, fellow employees also harmed by the alleged violation - instead of "on behalf of the general public," as private suits are brought under the UCL.

This would dispense with the issue of res judicata ("finality of the judgment") that is the subject of some criticism of private UCL actions. An action on behalf of other aggrieved employees would be final as to those plaintiffs, and an employer would not have to be concerned with future suits on the same issues by someone else "on behalf of the general public."

Third, the proposed civil penalties are relatively low, most of the penalty recovery would be divided between the LWDA (25 percent) and the General Fund (50 percent), and the remaining 25 percent would be divided between all identified employees aggrieved by the violation, instead of being retained by a single plaintiff. This distribution of penalties would discourage any potential plaintiff from bringing suit over minor violations in order to collect a "bounty" in civil penalties.

Finally, the bill provides that no private action may be brought when the LWDA or any of its subdivisions initiates proceedings to collect penalties on the same facts and under the same code provisions.

6. Author's amendments

In order to address concerns that the bill might invite frivolous suits or impose excessive penalties, and pursuant to discussions between the sponsors and Committee staff, the author has agreed to accept the following amendments to clarify the bill's intended scope of its private right of action and the assessment and distribution of its civil penalties:

(a) To clarify who would qualify as an "aggrieved employee" entitled to bring a private action under this section, the author will define the term as follows (at page 2, line 38):

"For purposes of this part, an aggrieved employee means any person employed by the alleged violator within the period covered by the applicable statute of limitations against whom one or more of the violations alleged in the action was committed."

The bill would further be amended to reflect that any civil penalty recoverable by the LWDA under existing law may be recovered through a civil action "brought by an aggrieved employee on behalf of himself or herself or other current or former employees" (at page 2, lines 31-36).

(b) To clarify that civil penalties would be assessed only with respect to the number of employees aggrieved by the violation, as opposed to the total number of an alleged violator's employees, the author will amend the bill to reflect that penalties will be determined "for each aggrieved employee" instead of "per employee" (at page 3, lines 7 and 8).

(c) To allay opponents' concerns that res judicata issues may arise if all known potential plaintiffs are not included in the private action, the author will amend the bill as follows (at page 3, lines 11-13):

"An aggrieved employee may recover the civil penalty described in subdivision (b) in a civil action filed on behalf of himself or herself or ~~others~~ other current or former employees for whom evidence of a violation was developed during the trial or at settlement of the action ."

(d) To conform its attorney's fees provision with similar provisions in existing law, the author will amend the bill to delete the phrase "in whole or in part" from the provision allowing attorney's fees to be awarded to a prevailing plaintiff (at page 3, lines 13-14).

Support: American Federation of State, County and Municipal Employees (AFSCME); California Conference

Board of the Amalgamated Transit Union; California Council of Machinists; California Independent Public Employees Legislative Council; California State Pipe Trades Council; California State Association of Electrical Workers; California Teamsters; Engineers and Scientists of California, Local 20; Hotel Employees, Restaurant Employees International Union; Professional and Technical Engineers, Local 21; Protection & Advocacy, Inc.; Region 8 States Council of the United Food & Commercial Workers; Western States Council of Sheet Metal Workers

Opposition: Associated General Contractors of California; California Apartment Association; California Chamber of Commerce; California Employment Law Council; California Landscape Contractors Association; California Manufacturers and Technology Association; Civil Justice Association of California (CJAC); Construction Employers' Association; Motion Picture Association of America; Orange County Business Council

HISTORY

Source: California Labor Federation AFL-CIO; CRLA Foundation

Related Pending Legislation: None Known

Prior Legislation: AB 2985 (Committee on Labor and Private Employment) (Ch. 662, Stats. of 2002) (requires Labor and Workforce Development Agency to contract with independent research organization to study most effective ways to enforce wage and hour laws, and to identify all available state and federal resources available for enforcement; completed study to be submitted to Legislature by December 31, 2003)

Prior Vote: Senate Labor & Industrial Relations Committee 5-3

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