



Is This The Year for Real PAGA Reform? – Don't Hold Your Breath

Insights

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Over the last several years, the level of employer complaints about PAGA has reached a deafening crescendo. For some time now, employers have expressed deep concern about abusive litigation tactics and “extortionate” PAGA claims over very minor violations. Unfortunately, these concerns have largely fallen on deaf ears in Sacramento, with only incremental changes to the law.

This year, several bills have been introduced in the California Legislature to reign in some of these abuses. The Legislature should be applauded for at least shedding a light on PAGA and proposing measures to address legitimate concerns. The old phrase, “The squeaky wheel gets the oil” can be remarkably true when it comes to the legislative process. However, despite this continued focus and pressure on PAGA reform, it seems unlikely that any meaningful reform will advance very far in 2017.

Baby Steps

PAGA has been a source of controversy ever since it was first enacted (as one of the last bills signed by Governor Gray Davis before his historic recall in 2003). Republican pressure during the annual budget negotiations led to some modest procedural reforms that were enacted a year later.

In recent years, business groups and individuals reported to the Legislature that PAGA was being abused to pressure employers to pay large settlements over relatively minor claims – in a litigation environment often referred to as “the Wild, Wild West.” Kudos to former-Assemblywoman Shannon Grove (R-Bakersfield) who, for several years running, was virtually a one-woman band in the Legislature calling for PAGA reform. In fact, in 2016 alone, she introduced not one, not two...but **five** separate bills to reform PAGA. Needless to say, none of these bills advanced past the first policy committee.

The Legislature has made a few incremental changes of late. In 2015, Governor Brown signed AB 1506, which provided employers with an opportunity to cure Labor Code 226 claims for inaccurate wage statements that involved the employer’s name and address or the inclusive dates of the pay period. Last year, as part of his proposed budget, Governor Brown proposed a number of policy changes to PAGA. However, after concerns were raised by labor and plaintiffs’ attorneys, these proposals were watered down to make relatively minor and procedural changes to PAGA.

But more meaningful PAGA reform has remained elusive.

New Legislative Proposals for 2017

Several legislative proposals – including one from a Democratic Assemblyman – have been introduced in 2017, meaning that PAGA will continue to be a point of discussion in the Legislature. However, the odds of any of these proposals moving past the “discussion” stage is not very likely.

Assembly Bill 281 (Salas)

AB 281 by Assemblyman Rudy Salas (D-Bakersfield) proposes to make a number of reforms to PAGA. First, it extends the time period for an employer to cure certain Labor Code violations from 33 days to 65 days. Second, the bill attempts to expand the scope of the violations subject to the right to cure to include everything except health and safety violations (although some additional legislative drafting will be necessary to make this clear). Third, the bill addresses standing requirements that have given rise to concerns by reiterating that “an aggrieved employee may be awarded civil penalties based only upon a violation by the employer actually suffered by that employee.” Some plaintiffs have been successful in convincing courts that a worker who is “aggrieved” by one Labor Code claim can utilize PAGA to recover penalties for other violations never suffered by the employee. This proposal seeks to reiterate the concept (which appears to be the original intent) that PAGA plaintiffs must have been subject to an alleged violation in order to bring claims under PAGA.

The fact that the author of AB 281 is a Democratic Assemblyman is intriguing – and demonstrates that concerns over PAGA are bipartisan. However, labor groups and plaintiffs’ attorneys will have no qualms about opposing and killing a proposal from a Democratic lawmaker. Unfortunately, AB 281 will likely have a very short shelf life this year.

Assembly Bill 1429 (Fong)

Shannon Grove’s replacement in the California State Assembly – Assemblyman Vince Fong (R-Bakersfield) - appears to have willingly taken up the PAGA reform baton – introducing a pair of PAGA bills.

The first, AB 1429 limits an aggrieved employee’s ability to bring a civil action under PAGA to alleged violations of existing law related to itemized wage statements, overtime, and meal and rest periods (rather than the entire Labor Code). This portion of the bill is virtually identical to AB 2461 (Grove) from last year, a bill that was never heard in the Assembly Committee on Labor and Employment. Recent amendments to AB 1429 would also limit PAGA penalties to \$10,000 per claimant and require superior court review of any penalties sought as part of a proposed PAGA settlement.

Assembly Bill 1430 (Fong)

Assemblyman Fong has introduced another PAGA bill, AB 1430, which would provide that an aggrieved employee may bring a civil action under PAGA only after an investigation by, and receipt of notice from, the Labor and Workforce Development Agency that there is a reasonable basis for a civil action, or if the agency fails to provide timely or any notice. The idea is that the Labor Agency would serve as a “gatekeeper” to weed out frivolous PAGA claims and only allow those with a “reasonable basis” to proceed. This bill is identical to a previous legislative effort by former-Assemblywoman

Grove, AB 2465 from last year, which failed passage in the Assembly Committee on Labor and Employment.

Other Potential PAGA Vehicles?

In addition, a number of “spot” bills have been introduced that make minor or nonsubstantive changes to PAGA. These are likely placeholder bills for language that will be amended into the bills later in the process, so there could be further legislative efforts to address PAGA this year. These “spot” bills include AB 945 by Assemblywoman Melissa Melendez (R-Lake Elsinore) and AB 1045 by Assemblyman Heath Flora (R-Ripon).

The Elephant in the Room – Arbitration

Perhaps the biggest obstacle to meaningful PAGA reform is the shadow cast by the large issue in the background – employment arbitration agreements. Following the California Supreme Court’s 2014 decision in *Iskanian v. CLS Transportation*, in which it held that “an arbitration agreement requiring an employee as a condition of employment to bring representative PAGA actions in any forum is contrary to public policy,” worker advocates have dug in their heels more than ever to protect PAGA – which they see as the only way around mandatory arbitration clauses. For this reason, it is extremely unlikely that labor or plaintiffs’ attorneys will agree to any meaningful PAGA reform any time soon.

In addition, the election of President Trump dampened hopes on the left that a United States Supreme Court would provide any relief to the long line of cases favoring arbitration and preempting state legislative efforts under the Federal Arbitration Act. Therefore, it’s safe to assume that worker advocates in Sacramento will be doing all they can to protect PAGA for the foreseeable future.

Never Say Never

In light of the recent presidential election, which surprised many (if not most) observers, it’s probably safe to say that none of us should be making political predictions. Therefore, is it possible that there could be some movement on PAGA reform in the California Legislature? Yes. But I’ll go out on a limb here and say that that’s not very likely. There are rumors that some large political heavyweights in the state are contemplating sponsoring a ballot measure to repeal PAGA in its entirety. It probably would take a political shake-up along those lines to compel the Legislature and interested stakeholders on the employee side to enact any significant relief for the employer community regarding PAGA.

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