PAGA Is Even Too Much For Labor – Governor Signs Bill to Let Unionized Construction Employers Off the Hook

Insights
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In perhaps the ultimate case of, "do as I say, not as I do," Governor Brown recently signed legislation to provide PAGA relief to one narrow segment of California employers – unionized construction contractors.

Employers in California have been complaining about the Labor Code Private Attorneys General Act (PAGA) for years. PAGA authorizes employees to file private lawsuits to recover civil penalties for alleged violations of the Labor Code on behalf of themselves and other "aggrieved employees." Despite perhaps noble intentions, instead PAGA has resulted in a flood of litigation against California employers – often over minor or technical violations of the law where the employee(s) suffered no harm.

Despite these pleas from the employer community, organized labor (and their allies in the plaintiffs' bar) have been resistant to making any changes to PAGA, even to address these abusive and frivolous lawsuits.

Until now that is.

But how far does labor's largesse extend? Not very far, unfortunately – only to unionized employers in the construction industry.

Assembly Bill 1654 (Rubio) was sponsored by the California Conference of Carpenters, who argued that it was needed "to protect construction industry employers from frivolous lawsuits brought under PAGA."

Does that sound familiar? Virtually every employer in California has been making this same case for years – with no response from the Legislature. In fact, a committee analysis of AB 1654 directly called out this hypocrisy:

"The immediate impact of this bill is limited to the construction industry. Its longer term policy implications may not be. The justification provided for the PAGA exemption proposed by this bill is that some construction industry employers have been recently targeted by frivolous PAGA lawsuits. It is not hard to imagine employers in many other sectors making the same argument...

...With that in mind, a key policy question presented by this bill is whether there is sound basis for distinguishing the construction industry from other sectors of the economy in relation to the application of PAGA. If not, it may be difficult, from a policy point of view, to rationalize denying future requests for PAGA exemptions under similar circumstances.

Relatedly, a number of opponents of this bill dislike it precisely because it does not, in their view, go far enough in undermining PAGA. The exemption from PAGA proposed by this bill would apply only to union construction employers. Non-union construction employers feel equally aggrieved by PAGA and argue that any PAGA exemption should extend to them as well...

...Assuming that many PAGA lawsuits are trivial, however, another key question for the Committee to consider is whether the best policy response to that problem is carving out an exemption to PAGA or whether it might be better to engage in further efforts to reform PAGA itself. Further refinement to PAGA could cut down on lawsuits involving more technical violations of the Labor Code, while still maintaining PAGA as a powerful deterrent against more serious workplace abuses."

Despite this clear (and refreshing) articulation of why broader PAGA reform is necessary (and despite opposition to the bill from plaintiffs' attorneys), the bill passed and was signed into law by Governor Brown on September 19, 2018.

So What Exactly Does AB 1654 Provide?

The new law creates a carve-out by providing that PAGA does not apply to an employee in the construction industry with respect to work performed under a valid collective bargaining agreement (that meets certain conditions) where the agreement:

- Prohibits all of the violations of the Labor Code that would be redressable by PAGA, and provides for a grievance and binding arbitration procedure to redress those violations.
- Expressly waives the requirements of PAGA in clear and unambiguous terms.
- Authorizes the arbitrator to award any and all remedies otherwise available under the Labor Code (other than those that would be payable to the state).

The carve-out under AB 1654 expires on the date the collective bargaining agreement expires, or on January 1, 2028, whichever is earlier.

Conclusion

So there you have it. According to organized labor, PAGA is such a sacrosanct and fundamental right, that we cannot even deign to discuss potential reforms to it to address documented problems and abuse...but when *unionized* employers are subject to the same frivolous litigation? By all means, let's pass special legislation to exempt them from the onerous provisions of PAGA.

In addition, the real story here is also about creating incentives for unionization in the construction industry. This bill represents the latest in a long series of measures designed to provide favorable

treatment to employers – but only those that are unionized - in a not-so-transparent effort to "encourage" employers to unionize as the only way to receive this special treatment. This is an increasingly common tactic in the construction industry in particular, where non-union contractors face tremendous pressure to unionize in order to work on particular types of projects. However, laws such as this that tip too strongly in favor of "encouraging" employers to unionize are susceptible to running afoul of preemption under the National Labor Relations Act.

But when it comes to Sacramento, what's good for the goose apparently is not always good for the gander.

This article provides an overview of a specific state law change. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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