



1-1-2018

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Recommended Citation

Chris Micheli, *Private Attorneys General Act Lawsuits in California: A Review of PAGA and Proposals for Reforming the “Sue Your Boss” Law*, 49 U. PAC. L. REV. 265 (2017).

Available at: <https://scholarlycommons.pacific.edu/uoplawreview/vol49/iss2/7>

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Private Attorneys General Act Lawsuits in California: A Review of PAGA and Proposals for Reforming the “Sue Your Boss” Law

Chris Micheli*

I. INTRODUCTION

Often referred to as the “Sue Your Boss” law, California’s Labor Code Private Attorneys General Act (PAGA) of 2004¹ is in need of significant reform.² It is a statute unique among the states.³ PAGA⁴ authorizes an aggrieved employee to bring a civil action to recover specified civil penalties that would otherwise be assessed and collected by the Labor and Workforce Development Agency⁵ (LWDA) on behalf of the employee and other current or former employees for the violation of certain provisions of the California Labor Code affecting employees.⁶

According to the California Chamber of Commerce, “California’s labor and employment laws, housed in various code sections, all provide an opportunity for costly civil litigation against an employer for any alleged mistake. These multiple

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1. Hereinafter referred to as “PAGA.”

2. See, e.g., Dave Roberts, *Legislator Warns Against Lawsuit Abuse*, CALWATCHDOG.COM (Apr. 29, 2015), <https://calwatchdog.com/2015/04/29/legislator-warns-against-lawsuit-abuse/> (on file with *The University of the Pacific Law Review*); Dave Roberts, *Lawsuit Abuse Shuts Down CA Businesses*, CAL. POL. REV. (May 1, 2015), <http://www.capoliticalreview.com/top-stories/lawsuit-abuse-shuts-down-ca-businesses/> (on file with *The University of the Pacific Law Review*).

3. JENNIFER BARRERA, CAL. CHAMBER OF COMMERCE, EMPLOYMENT LITIGATION ON THE RISE 1 (Jan. 2016), available at <http://advocacy.calchamber.com/wp-content/uploads/policy/issue-reports/employment-litigation-issue-summaries-2016.pdf> (on file with *The University of the Pacific Law Review*) (“The [California Chamber of Commerce] is not aware of any other state that has a statutory representative action and penalty scheme similar to PAGA, which makes California unique with this litigation opportunity against employers.”).

4. PAGA is found in California Labor Code Division 2, Part 13, Sections 2698–2699.5. CAL. LAB. CODE §§ 2698–99.5 (enacted by Chapter 906). Chapter 906 Section 2 of the Statutes of 2003 added Part 13.

5. *Private Attorneys General Act (PAGA)*, ST. CAL. LAB. & WORKFORCE DEV. AGENCY, http://www.labor.ca.gov/Private_Attorneys_General_Act.htm (last visited Oct. 15, 2017) (on file with *The University of the Pacific Law Review*) (According to its website, the State of California Labor & Workforce Development Agency (LWDA) is “an Executive Branch Agency, and the Secretary is a member of the Governor’s Cabinet. The Agency oversees seven major departments, boards and panels that serve California businesses and workers.”).

6. CAL. LAB. CODE § 2699(a) (West 2016).

threats of litigation create significant costs for California employers and limit their ability to create new jobs and expand their business.”⁷

PAGA8 was enacted pursuant to Senate Bill (SB) 796⁹ (Dunn) and went into effect on January 1, 2004.¹⁰ The bill barely passed the Assembly¹¹ and Senate¹² before getting to the Governor’s Desk. The bill was signed over the objections of the California business community. Since its enactment, PAGA suits have increased fourfold in a decade.¹³ According to data from the LWDA, there were 759 PAGA claims filed in 2005 and 3,137 in 2013.¹⁴

The stated purpose of SB 796 was to “augment the enforcement abilities of the Labor Commissioner by creating an alternative ‘private attorney general’ system for labor law enforcement.”¹⁵

The legislative findings and declarations¹⁶ accompanying the enactment of SB 796 stated the following:

Adequate financing of essential labor law enforcement functions is necessary to achieve maximum compliance with state labor laws in the underground economy and to ensure an effective disincentive for employers to engage in unlawful and anticompetitive business practices.¹⁷

Although innovative labor law education programs and self-policing efforts by industry watchdog groups may have some success in educating some employers about their obligations under state labor laws, in other cases the

7. BARRERA, *supra* note 3 (“The [California Chamber of Commerce] is not aware of any other state that has a statutory representative action and penalty scheme similar to PAGA, which makes California unique with this litigation opportunity against employers.”).

8. Note that existing law provides an exclusive remedy under workers’ compensation for an employer’s liability for compensation for an employee’s injury or death arising in the course of employment. PAGA does not affect that exclusive remedy.

9. SB 796, 2003 Leg., 2003–2004 Sess. (Cal. 2003). SB 796 only contained two new sections to the Labor Code: Section 2698, containing the title of the act, and Section 2699, containing the substantive provisions of the act. *Id.*

10. California chaptered the bill on October 12, 2003. CAL. CHAMBER, PRIVATE ATTORNEY’S GENERAL ACT, available at <http://advocacy.calchamber.com/wp-content/uploads/policy/issue-reports/Labor-and-Employment-PAGA-2017.pdf> (on file with *The University of the Pacific Law Review*).

11. The bill passed the Assembly on September 11, 2003 by a vote of 42–34, which is one more than the bare minimum. Cal. Assemb. Journal, 2003–2004 Reg. Sess., No. 128.

12. The bill passed the Senate on September 12, 2003 by the bare minimum vote of 21–17. Cal. S. Journal, 2003–2004 Reg. Sess., No. 132.

13. *An Alternative to Employee Class Actions*, L.A. DAILY J. (Apr. 16, 2014) (on file with *The University of the Pacific Law Review*).

14. *Id.*

15. See SENATE FLOOR, FLOOR ANALYSIS OF SB 796, at 2 (Sept. 11, 2003).

16. Legislative findings and declarations assist in determining the intent of the Legislature when they enacted this statute.

17. SB 796, 2003 Leg., 2003–2004 Sess., § 1(a) (Cal. 2003).

only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties as provided in the Labor Code.¹⁸

Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future.¹⁹

It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general, while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.²⁰

II. THE ENACTMENT OF SB 796 AND SB 1809

The co-sponsors²¹ of SB 796, the California Labor Federation²² and California Rural Legal Assistance Foundation,²³ argued that the bill would address inadequacies in labor law enforcement in two major ways: “[f]irst, this bill assigns nominal civil fine amounts to the large number of Labor Code provisions, which currently carry criminal, but not civil, penalties.”²⁴ “Second, it authorizes the filing of civil actions to recover existing and new civil penalties by aggrieved workers acting as private attorneys general.”²⁵

Specifically, proponents argued that the state’s “inability to enforce labor laws effectively is due to inadequate staffing” and to the “continued growth of

18. SB 796, 2003 Leg., 2003–2004 Sess., § 1(b) (Cal. 2003).

19. SB 796, 2003 Leg., 2003–2004 Sess., § 1(c) (Cal. 2003).

20. SB 796, 2003 Leg., 2003–2004 Sess., § 1(d) (Cal. 2003).

21. The official groups backing the bill are co-sponsors. The author of the bill is the legislator whose name is attached to the measure.

22. *See About Us*, CAL. LAB. FED’N, <http://calaborfed.org/about-us/> (last visited Aug. 13, 2017) (on file with *The University of the Pacific Law Review*). “The California Labor Federation is made up of more than 1,200 AFL-CIO and Change to Win unions, which represent 2.1 million union members in manufacturing, retail, construction, hospitality, public sector, health care, entertainment, and other industries. The California Labor Federation dedicates itself to promoting and defending the interests of working people and their families for the betterment of California’s communities. From legislative campaigns to grassroots organizing, prompting and defending the interests of working people actively engages affiliates in every aspect of California’s economy and government.” *Id.*

23. *About Us*, CAL. RURAL LEGAL ASSISTANCE FOUND., <http://calaborfed.org/about-us/> (last visited Oct. 15, 2017) (on file with *The University of the Pacific Law Review*). According to its website, CRLAF is “a statewide non-profit organization providing legal services and policy advocacy for California’s rural poor. We focus on some of the most marginalized communities: the unrepresented, the unorganized and the undocumented. We engage in impact litigation, community education and outreach, legislative and administrative advocacy, and public policy leadership on the state and local levels in the areas of labor, housing, education, health, worker safety, pesticides, citizenship, immigration, and environmental justice. We seek to bring social justice to rural poor communities throughout California.” *Id.*

24. *See ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 796*, at 3 (July 16, 2003).

25. *Id.*

the underground economy.”²⁶ “This inability[,] coupled with the states’ severe budgetary shortfall, requires a creative solution that will help the state crack down on labor law violators.”²⁷

On the other hand, opponents argued SB 796:

Tip[ped] the balance of Labor Law protection in disproportionate favor to the employee to the detriment of already overburdened employers. Opponents cite the fact that employees are entitled to attorneys’ fees and costs if they prevail in their actions under this bill, yet the bill fails to provide similar attorneys fees and costs for prevailing employers. Additionally, opponents cite[d] the fact that there are no requirements imposed upon employees prior to filing civil action such as preliminary claim filing with the Labor Commissioner. Furthermore, opponents complain[ed] that ... aggrieved employees may file on behalf of a class, but are not required to fulfill class certification requirements.²⁸

Opponents also “express[] concern that this bill will encourage private attorneys to ‘act as vigilantes’ pursuing frivolous violations on behalf of different employees.”²⁹ “Opponents liken the danger of this bill to alleged abuses of Business and Professions Code Section 17200.”³⁰

While there were initial efforts to repeal PAGA,³¹ the following year PAGA was significantly amended by SB 1809³² (Dunn). First, SB 1809 modified existing law that prohibits an employer from discriminating against an employee because the employee has specified existing rights.³³ SB 1809 included among those protected rights the bringing of an action to collect penalties for the violation of labor laws pursuant to PAGA.³⁴

In addition, “existing law requires an employer to file in the office of the Director of Labor Standards Enforcement a copy of any application for employment that the employer requires an applicant to sign.”³⁵ SB 1809 repealed that requirement.³⁶

26. *Id.*

27. See SENATE FLOOR, FLOOR ANALYSIS OF SB 796, at 6 (Sept. 11, 2003).

28. *Id.*

29. ASSEMBLY FLOOR, FLOOR ANALYSIS OF SB 796, at 3 (July 16, 2003).

30. See *id.* at 3–4.

31. AB 2181 (Campbell) of 2004 would have repealed the provisions of SB 796. That measure died in the Assembly Committee on Labor and Employment.

32. SB 1809, 2004 Leg., 2003–2004 Sess., § 1 (Cal. 2004) (Chaptered as Chapter 221 on August 11, 2004).

33. CAL. LAB. CODE § 98.6 (amended by Chapter 221).

34. SB 1809, 2004 Leg., 2003–2004 Sess., § 1 (Cal. 2004).

35. SB 1809, 2004 Leg., 2003–2004 Sess., § 2 (Cal. 2004); see also CAL. LAB. CODE § 431 (repealed by Chapter 221).

36. See SB 1809, 2004 Leg., 2003–2004 Sess., § 2 (Cal. 2004).

As it relates to PAGA, SB 1809 amended the provisions of PAGA by enacting specified procedural and administrative requirements that must be met prior to bringing a private action to recover civil penalties.³⁷ Moreover, SB 1809 provided that “no action shall be brought ... for ... a posting, notice, agency reporting, or filing requirement,” except as specified.³⁸

The provisions of SB 1809 also expanded judicial review of PAGA claims by requiring courts to review and approve any penalties sought as part of a proposed settlement agreement and those portions of settlements concerning violations of health and safety laws.³⁹ The bill, in addition, authorizes courts to award a lesser amount if “to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”⁴⁰

Finally, SB 1809 appropriated \$150,000 from the General Fund to the Labor and Workforce Development Agency for the purposes of implementing its provisions, and changed the prior penalty formula to provide that 75% be provided to the LWDA and 25% to the aggrieved employee.⁴¹

SB 1809 also contained findings and declarations. Specifically, the bill stated:

The Legislature finds and declares that, as enunciated in long-standing judicial precedent, its inherent authority to create causes of action or remedies necessarily includes the authority to abolish them. Therefore, a plaintiff seeking recovery upon a legislatively created cause of action runs the risk that the Legislature may repeal or alter that cause during the pendency of the claim. Thus, the Legislature further finds and declares that the alteration of the right to recover civil penalties for violations of the Labor Code made by this act may be applied retroactively to any applicable pending proceeding without depriving any person of a substantive right without due process of law.⁴²

SB 1809 went into effect immediately as an urgency statute,⁴³ although two provisions were made retroactive to January 1, 2004, which is the date that PAGA took effect.⁴⁴ It also contained a severability clause.⁴⁵

37. CAL. LAB. CODE § 2699.3 (added by Chapter 221).

38. *Id.* § 2699 (amended by Chapter 221).

39. SB 1809, 2004 Leg., 2003–2004 Sess., § 2 (Cal. 2004); CAL. LAB. CODE § 2699 (amended by Chapter 221).

40. CAL. LAB. CODE § 2699 (amended by Chapter 221).

41. *See id.* § 2699(i).

42. *See* SB 1809, 2004 Leg., 2003–2004 Sess., § 6(a) (Cal. 2004).

43. *See* SB 1809, 2004 Leg., 2003–2004 Sess., § 10 (Cal. 2004). Section 10 reads: “This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: To provide relief to some employers who may be adversely affected by frivolous lawsuits brought pursuant to the Labor Code Private Attorneys General Act of 2004 and to provide meaningful remedies to

III. PROVISIONS OF THE ACT

Part 13 of Division 2 of the Labor Code is known and may be cited as the Labor Code Private Attorneys General Act of 2004.⁴⁶

Under PAGA:

[A]ny provision of the Labor Code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of the Labor 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.⁴⁷

The term person “has the same meaning as defined in Section 18 of the Labor Code.”⁴⁸ The term aggrieved employee means “any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.”⁴⁹ The term “cure means that the employer abates each violation alleged by any aggrieved employee, the employer is in compliance with the underlying statutes as specified in the notice required by this part, and any aggrieved employee is made whole.”⁵⁰

“Whenever the LDWA, or any of its departments, divisions, commissions, boards, agencies, or employees, has discretion to assess a civil penalty, a court is authorized to exercise the same discretion, subject to the same limitations and conditions, to assess a civil penalty.”⁵¹

In any action by an aggrieved employee seeking recovery of a civil penalty, a court may award a lesser amount than the maximum civil penalty amount specified 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.⁵²

employees suffering from egregious violations of the Labor Code at the earliest possible time, it is necessary for this act to take effect immediately.” *Id.*

44. See SB 1809, 2004 Leg., 2003–2004 Sess., § 6(b)–(c) (Cal. 2004).

45. See SB 1809, 2004 Leg., 2003–2004 Sess., § 7 (Cal. 2004). Section 7 reads: “The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.” *Id.*

46. CAL. LAB. CODE § 2698 (added by Chapter 906).

47. *Id.* § 2699(a) (amended by Chapter 221).

48. *Id.* § 2699(b).

49. *Id.* § 2699(c).

50. *Id.* § 2699(d).

51. *Id.* § 2699(e)(1).

52. *Id.* § 2699(e)(2).

PAGA established a civil penalty for a violation of these provisions as follows:

- If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars (\$500).⁵³
- If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.⁵⁴
- If the alleged violation is a failure to act by the Labor and Workplace Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, there shall be no civil penalty.⁵⁵

Generally “an aggrieved employee may recover the civil penalty in a civil action filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed.”⁵⁶ “Any employee who prevails in any action shall be entitled to an award of reasonable attorney’s fees and costs.”⁵⁷ Nothing operates “to limit an employee’s right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.”⁵⁸

PAGA prohibits any action from being “brought for any violation of a posting, notice, agency reporting, or filing requirement of this code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.”⁵⁹

In addition:

[N]o action may be brought by an aggrieved employee if the agency or any of its departments, divisions, commissions, boards, agencies, or employees, on the same facts and theories, cites a person within the timeframes set forth in PAGA for a violation of the same section or sections of the Labor Code under which the aggrieved employee is

53. *Id.* § 2699(f)(2).

54. *Id.*

55. *Id.* § 2699(f)(3).

56. *Id.* § 2699(g)(1).

57. *Id.*

58. *Id.*

59. *Id.* § 2699(g)(2).

attempting to recover a civil penalty on behalf of himself or herself or others or initiates a proceeding.⁶⁰

[C]ivil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the LWDA for enforcement of labor laws . . . and for education of employers and employees about their rights and responsibilities under [the Labor Code], to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees.⁶¹

Civil penalties recovered “shall be distributed to the LWDA for enforcement of labor laws and education of employers and employees about their rights and responsibilities under the Labor Code to be continuously appropriated to supplement and not supplant the funding to the LWDA for those purposes.”⁶²

Nothing contained in PAGA “[intends] to alter or otherwise affect the exclusive remedy provided by the workers’ compensation provisions of the Labor Code for liability against an employer for the compensation for any injury to or death of an employee arising out of and in the course of employment.”⁶³

“The superior court shall review and approve any penalties sought as part of a proposed settlement agreement.”⁶⁴ Note that this section does not apply to the recovery of administrative and civil penalties in connection with the workers’ compensation law.⁶⁵ “The [LWDA] or any of its departments, divisions, commissions, boards, or agencies may promulgate regulations to implement the provisions of [PAGA.]”⁶⁶

An aggrieved employee who brings a civil action alleging a violation of any provision listed in PAGA⁶⁷ must meet the following requirements:⁶⁸

- The aggrieved employee or representative shall give written notice by certified mail to the LWDA and the employer of the specific provisions of the Labor Code alleged to have been violated, including the facts and theories to support the alleged violation.⁶⁹ The agency shall notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 30 calendar days of the postmark date of the notice received.

60. *Id.* § 2699(h).

61. *Id.* § 2699(i).

62. *Id.* § 2699(j).

63. *Id.* § 2699(k).

64. *Id.* § 2699(l).

65. *Id.* §§ 50, 2699(m).

66. *Id.* § 2699(n).

67. *See id.* § 2699.5.

68. *Id.* § 2699(a) (added by Chapter 221).

69. *Id.* § 2699.3(a)(1).

- Upon receipt of that notice or if no notice is provided “within 65 calendar days of the postmark date of the notice given, the aggrieved employee may commence a civil action pursuant to Section 2699.⁷⁰

If the LWDA intends to investigate the alleged violation, then the LWDA must “notify the employer and the aggrieved employee or representative by certified mail of its decision within 33 calendar days of the postmark date of the notice received.”⁷¹ Within 120 calendar days of that decision, the LWDA may investigate the alleged violation and issue any appropriate citation.⁷²

If the LWDA “determines that no citation will be issued, it must notify the employer and aggrieved employee of that decision within five business days by certified mail.”⁷³ “Upon receipt of that notice or if no citation is issued by the LWDA within the 158-day period or if the LWDA fails to provide timely or any notification, the aggrieved employee may commence a civil action.”⁷⁴

“A plaintiff may as a matter of right amend an existing complaint to add a cause of action arising under PAGA at any time within 60 days of the time periods specified.”⁷⁵

“A civil action by an aggrieved employee alleging a violation of any provision of Division 5 (commencing with Section 6300) of the Labor Code, other than those listed in Section 2699.5, must commence only after the following requirements have been met”.⁷⁶

- The aggrieved employee or representative shall give notice by certified mail to the “Division of Occupational Safety and Health⁷⁷ (DOSH) and ... the employer, with a copy to the LWDA, of the specific provisions ... alleged to have been violated, including the facts and theories to support the alleged violation.”⁷⁸

70. *Id.* § 2699.3(a)(2)(A).

71. *Id.* § 2699.3(a)(2)(B).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* § 2699.3(a)(2)(C).

76. *Id.* § 2699.3(b).

77. *Cal/OSHA*, ST. OF CAL. DEP’T OF INDUS. REL., <http://www.dir.ca.gov/dosh/> (last visited Oct. 15, 2917) (on file with *The University of the Pacific Law Review*). According to its website, “the Division of Occupational Safety and Health (DOSH), better known as Cal/OSHA, protects and improves the health and safety of working men and women in California and the safety of passengers riding on elevators, amusements rides, and tramways—through the following activities: Setting and enforcing standards; Providing outreach, education, and assistance; Issuing permits, licenses, certifications, registrations, and approvals.” *Id.*

78. CAL. LAB. CODE § 2699.3(b)(1) (West 2017).

- DOSH “shall inspect or investigate the alleged violation pursuant to the procedures specified.”⁷⁹
- If DOSH issues a citation, the employee may not commence an action pursuant to PAGA. DOSH shall “notify the aggrieved employee and employer in writing within 14 calendar days of certifying that the employer has corrected the violation.”⁸⁰
- If, by the end of the period for inspection or investigation, DOSH fails to issue a citation and the aggrieved employee disputes that decision, the employee may challenge that decision in the superior court. In such an action, the superior court shall follow precedents of the Occupational Safety and Health Appeals Board.⁸¹ If the court finds that DOSH “should have issued a citation and orders the division to issue a citation, then the aggrieved employee may not commence a civil action.”⁸²

“A complaint in superior court alleging a violation ... other than those listed in Labor Code Section 2699.5, shall include a copy of the notice of violation provided to [DOSHS] and the employer.”⁸³ “The superior court shall not dismiss the action for nonmaterial differences in facts or theories between those contained in the notice of violation provided to DOSHS and the employer and the complaint filed with the court.”⁸⁴

“If [DOSHS] fails to inspect or investigate the alleged violation ... [specified] provisions ... shall apply to the determination of the alleged violation.”⁸⁵ Nothing in the law “shall be construed to alter the authority of DOSHS to permit long-term abatement periods or to enter into memoranda of understanding or joint agreements with employers in the case of long-term abatement issues.”⁸⁶ In addition, nothing in the law intends “to authorize an employee to file a notice or to commence a civil action during the period that an employer has voluntarily entered into consultation with DOSHS to ameliorate a condition in that particular worksite.”⁸⁷

79. *Id.* § 2699.3(b)(2)(A).

80. *Id.* § 2699.3(b)(2)(A)(i).

81. *Occupational Safety & Health Appeals Board (OSHAB)*, ST. OF CAL. DEP’T OF INDUS. REL., <https://www.dir.ca.gov/oshab/oshab.html> (last visited Oct. 15, 2017) (on file with *The University of the Pacific Law Review*). According to its website, “the mission of the Appeals Board is to fairly, timely and efficiently resolve appeals and to provide clear, consistent guidance to the public, thereby promoting workplace safety and health. A three-member, judicial body appointed by the Governor and confirmed by the Senate handles appeals from private and public-sector employers regarding citations issued by the Division of Occupational Safety and Health for alleged violation of workplace safety and health laws and regulations.” *Id.*

82. CAL. LAB. CODE § 2699.3(b)(2)(A)(ii) (West 2017).

83. *Id.* § 2699.3(b)(2)(A)(iii).

84. *Id.* § 2699.3(b)(2)(A)(iv).

85. *Id.* § 2699.3(b)(2)(B).

86. *Id.* § 2699.3(b)(3)(A).

87. *Id.* § 2699.3(b)(3)(B).

“An employer who has been [on] notice may not then enter into consultation with DOSH in order to avoid an action under PAGA.”⁸⁸ “The superior court shall review and approve any proposed settlement of alleged violations ... [in order] to ensure that the settlement provisions are at least as effective as the protections or remedies provided by state and federal laws or regulations for the alleged violation.”⁸⁹ “The provisions of the settlement relating to health and safety laws shall be submitted to DOSH at the same time that they are submitted to the court.”⁹⁰ “This requirement [authorizes and permits] DOSH to comment on those settlement provisions, and the court shall grant DOSH’s commentary the appropriate weight.”⁹¹

In limited situations, “the employer may cure the alleged violation within 33 calendar days of the postmark date of the notice.”⁹² “The employer shall give written notice by certified mail within that period of time to the aggrieved employee or representative and the agency if the alleged violation is cured, including a description of actions taken, and no civil action pursuant to Section 2699 may commence.”⁹³ “If the alleged violation is not cured within the 33-day period, the employee may commence a civil action.”⁹⁴

“No employer may avail himself or herself of the notice and cure provisions more than three times in a 12-month period for the same violation or violations contained in the notice, regardless of the location of the worksite.”⁹⁵

“If the aggrieved employee disputes that the alleged violation has been cured, the aggrieved employee or representative shall provide written notice ... by certified mail ... including specified grounds to support that dispute, to the employer and the agency.”⁹⁶ “Within 17 calendar days of the [postmark date] of that notice, the [LWDA] shall review the actions taken by the employer to cure the alleged violation and provide written notice of its decision by certified mail to the aggrieved employee and the employer.”⁹⁷

The LWDA “may grant the employer three additional business days to cure the alleged violation.”⁹⁸ If the LWDA “determines that the alleged violation has not been cured or if the LWDA fails to provide timely or any notification, the employee may proceed with the civil action.”⁹⁹ If the LWDA “determines that

88. *Id.* § 2699.3(b)(3)(C).

89. *Id.* § 2699.3(b)(4).

90. *Id.*

91. *Id.*

92. *Id.* § 2699.3(c)(2)(A).

93. *Id.*

94. *Id.*

95. *Id.* § 2699.3(c)(2)(B).

96. *Id.* § 2699.3(c)(3).

97. *Id.*

98. *Id.*

99. *Id.*

the alleged violation has been cured, but the employee still disagrees, the employee may appeal that determination to the superior court.”¹⁰⁰

The law does not count the periods specified as part of the time limited for the commencement of the civil action to recover penalties.¹⁰¹ Also, section 2699.3(a) provisions apply to any alleged violation of specified PAGA provisions.¹⁰²

“The list of code sections considered serious violations are set forth in Labor Code Section 2699.5¹⁰³ and include such claims as meal and rest period violations, minimum wage, overtime, and payment of wages at time of termination.”¹⁰⁴

IV. CALIFORNIA BUDGET ACCORD ADOPTS MODEST PAGA CHANGES

As part of California’s 2016-17 state budget accord, Governor Jerry Brown signed numerous bills that made statutory changes to implement parts of that budget agreement. Among the omnibus bills signed into law was SB 836¹⁰⁵ (Committee on Budget & Fiscal Review), which makes several changes to PAGA.¹⁰⁶ The budget “trailer bill”¹⁰⁷ is 218 pages in length.¹⁰⁸

100. *Id.*

101. *Id.* § 2699.3(d).

102. CAL. LAB. CODE § 2699.5 (amended by Chapter 140) (including provisions: subdivision (k) of Section 96, Sections 98.6, 201, 201.3, 201.5, 201.7, 202, 203, 203.1, 203.5, 204, 204a, 204b, 204.1, 204.2, 205, 205.5, 206, 206.5, 208, 209, and 212, subdivision (d) of Section 213, Sections 221, 222, 222.5, 223, and 224, subdivision (a) of Section 226, Sections 226.7, 227, 227.3, 230, 230.1, 230.2, 230.3, 230.4, 230.7, 230.8, and 231, subdivision (c) of Section 232, subdivision (c) of Section 232.5, Sections 233, 234, 351, 353, and 403, subdivision (b) of Section 404, Sections 432.2, 432.5, 432.7, 435, 450, 510, 511, 512, 513, 551, 552, 601, 602, 603, 604, 750, 751.8, 800, 850, 851, 851.5, 852, 921, 922, 923, 970, 973, 976, 1021, 1021.5, 1025, 1026, 1101, 1102, 1102.5, and 1153, subdivisions (c) and (d) of Section 1174, Sections 1194, 1197, 1197.1, 1197.5, and 1198, subdivision (b) of Section 1198.3, Sections 1199, 1199.5, 1290, 1292, 1293, 1293.1, 1294, 1294.1, 1294.5, 1296, 1297, 1298, 1301, 1308, 1308.1, 1308.7, 1309, 1309.5, 1391, 1391.1, 1391.2, 1392, 1683, and 1695, subdivision (a) of Section 1695.5, Sections 1695.55, 1695.6, 1695.7, 1695.8, 1695.9, 1696, 1696.5, 1696.6, 1697.1, 1700.25, 1700.26, 1700.31, 1700.32, 1700.40, and 1700.47, paragraphs (1), (2), and (3) of subdivision (a) of, and subdivision (e) of, Section 1701.4, subdivision (a) of Section 1701.5, Sections 1701.8, 1701.10, 1701.12, 1735, 1771, 1774, 1776, 1777.5, 1811, 1815, 2651, and 2673, subdivision (a) of Section 2673.1, Sections 2695.2, 2800, 2801, 2802, 2806, and 2810, subdivision (b) of Section 2929, and Sections 3095, 6310, 6311, and 6399.7.).

103. *See supra* Part III (the discussion above).

104. BARRERA, *supra* note 3 (“The [California Chamber of Commerce] is not aware of any other state that has a statutory representative action and penalty scheme similar to PAGA, which makes California unique with this litigation opportunity against employers.”).

105. SB 836, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (Chapter 31).

106. *See Private Attorneys General Act (PAGA)—Filing*, ST. OF CAL. DEP’T OF INDUS. REL., <http://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html> (last visited Oct. 15, 2017) (on file with *The University of the Pacific Law Review*).

107. A trailer bill implements statutory changes as part of the adoption of the state budget. These bills “trail” the main budget bill and are therefore called “trailer bills.”

108. SB 836, 2016 Leg., 2015–2016 Sess. (Cal. 2016).

Earlier in 2016, in his January 10 budget proposal for the Legislature's consideration, Governor Brown proposed sweeping PAGA reform.¹⁰⁹ Governor Brown pleased California's business community when he stated:

"The administration is committed to reducing unnecessary litigation and lowering the costs of doing business in California to support a thriving economic environment," and that "[g]iven the scope and frequency of PAGA filings, there is a great opportunity to increase the rate of administrative handling of cases versus the courts."¹¹⁰

Governor Brown's budget proposal stated that, due to lack of resources, "less than one percent of all PAGA cases are reviewed or investigated."¹¹¹ "The volume of PAGA notices is as high as 635 notices per month."¹¹² Unfortunately, the Governor's initial proposals were met with fierce resistance by the plaintiff's bar and public employee unions. As such, the final budget agreement only contained modest changes from those that he had previously proposed.

For cases filed under PAGA, SB 836 makes several changes and declares the intent of the Legislature that the LWDA shall continue to assign duties under PAGA to entities that customarily perform those duties.¹¹³ Among the changes made to the PAGA statutes by SB 836¹¹⁴ are:

- Includes a \$75 filing fee for new case notices and any employer response to such notices.¹¹⁵
- Requires online filing and transmission of all items submitted to the LWDA.¹¹⁶
- Requires an employee to submit a copy of a proposed settlement to be submitted to the LWDA at the same time that it is submitted for the court's required approval.¹¹⁷

109. EDMUND G. BROWN JR. GOVERNOR, GOVERNOR'S BUDGET SUMMARY 136 (2016) ("The Budget additionally includes proposed legislation to streamline the administration of the Act.").

110. *Id.*

111. *Id.*

112. *Id.*

113. SB 836, 2016 Leg., 2015–2016 Sess., § 188 (Cal. 2016). ("It is the intent of the Legislature that the Labor and Workforce Development Agency shall continue to assign the duties prescribed in the Labor Code Private Attorneys General Act of 2004 (Part 13 (commencing with Section 2698) of Division 2 of the Labor Code) to the departments, divisions, commissions, boards, or agencies where those duties are customarily performed.").

114. SB 836, 2016 Leg., 2015–2016 Sess., §§ 189–91 (Cal. 2016).

115. CAL. LAB. CODE § 2699.3(a)(1)(B) (West 2017).

116. *Id.* § 2699.3(a)(1)(A).

117. *Id.* § 2699.3(b)(4).

- Requires PAGA cure notices to be submitted by employers to the LWDA online.¹¹⁸
- Extends various time lines including the time the LWDA reviews new cases from 30 to 60 days, the time for the LWDA to notify parties (plaintiff and employer) of its intent to investigate a violation from 33 to 65 days (as such, a plaintiff cannot commence a civil action until 65 days after sending a notice to the LWDA).¹¹⁹
- Provides the LWDA with the option to send a notice to extend the 120-day time limit for investigating and citing the employer by an additional 60 days (this 60-day extension provision will sunset on July 1, 2021).¹²⁰

The purposes of these changes are to give the LWDA additional time and resources to investigate alleged Labor Code violations, as well as a chance to object to proposed PAGA settlements.¹²¹ These changes to the PAGA statutes are effective for PAGA cases filed on or after July 1, 2016.

In addition, in 2015, Governor Brown signed AB 1506 (Hernández) that amended the PAGA statute to provide an employer with the right to cure a violation of failing to provide its employees with a wage statement containing “the inclusive dates of the” pay period” and “the name and address of the employer.”¹²² California enacted This bill as a response to concerns about PAGA claims being filed for alleged technical violations of an employer's obligation to provide accurate wage statements.¹²³ As an urgency measure,¹²⁴ the bill's provisions went into effect immediately.¹²⁵

V. SUGGESTIONS FOR REFORM

PAGA has become the excessive litigation tool that the business community feared more than a decade ago when PAGA was first enacted over their

118. *Id.* § 2699.3(c)(2)(A).

119. *Id.* § 2699.3(a)(2)(A).

120. *Id.* § 2699.3(a)(2)(B).

121. See SENATE FLOOR, FLOOR ANALYSIS OF SB 836, at 2 (June 16, 2016).

122. AB 1506, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (Chapter 455).

123. See ASSEMBLY FLOOR, FLOOR ANALYSIS OF AB 1506, at 3 (Sept. 8, 2015).

124. AB 1506, 2015 Leg., 2015–2016 Sess., § 4 (Cal. 2015). (“This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: In order to incentivize prompt resolution of disputes over itemized wage statements under Part 13 (commencing with Section 2698) of Division 2 of the Labor Code arising from certain specified claims under Section 226 of the Labor Code, it is necessary that this act take effect immediately.”).

125. AB 1506, 2015 Leg., 2015–2016 Sess., § 4 (Cal. 2015) (California chaptered the bill on October 2, 2015).

objections. In fact, the use of PAGA has become as prevalent as a litigation leverage tool that it is being used in a manner that is reminiscent of the excessive lawsuits filed under Business & Professions Code Section 17200 and the ADA. There are even websites dedicated to the use of PAGA.¹²⁶ As such, the Legislature should consider the following reforms:

A. Protecting Funds Intended for the State

PAGA has not served its purpose of supplementing funding for the Labor Commissioner in the way it was promised by the law's proponents. Under the statute, a court must review and approve any proposed settlement that purports to release PAGA claims. However, often times, PAGA claims are released as part of a wider settlement that includes causes of action for other Labor Code violations. In these cases, a portion of the total settlement amount is typically allocated towards the PAGA claims, but this appears to be a substantially reduced amount. As a result, not much money actually makes its way to the State.

Either the PAGA claim needs to remain intact and appropriately allocate the financial component to the State, or else PAGA should not be able to be used as a tool to leverage larger settlements from employers.

Expanding the Right to Cure While PAGA provides the employer with the right to cure certain violations before the employee may bring a civil action, it does not apply broadly enough. Instead, PAGA should be amended to eliminate statutory penalties and to allow all Labor Code violations to be cured, except for the most significant ones that directly and adversely impact an employee. PAGA has become an unfortunate tool to leverage settlements and needs to be modified to prevent this from happening.

B. Utilizing Class Action Protections

A PAGA claim does not have to be certified as a class action. Class action waivers do not bar PAGA claims. A PAGA claim is a class action in disguise that avoids some of the pitfalls of class actions normally encountered by plaintiffs.

Even though it acts like a class action, a PAGA claim is exempt from the usual class certification requirements that apply to all other class claims. It would, therefore, be appropriate to impose similar class action rules to PAGA claims. For example, aggrieved employees should be afforded an opportunity to opt-out so that they would not be bound by a PAGA judgment not of their liking.

A PAGA plaintiff's ability to go to trial without class certification gives him or her an enormous tactical advantage. In a routine class action, a class can be

126. See, e.g., *PAGA LAW*, PRIV. ATT'Y GEN., http://www.privateattorneygeneral.com/paga_law.html (last visited Oct. 15, 2017) (on file with *The University of the Pacific Law Review*).

certified only if rigorous requirements under Rule 23 of the Federal Rules of Civil Procedure and its California counterpart¹²⁷ are met. Unless the class action plaintiff complies with these standards, his or her lawsuit normally collapses. PAGA dispenses with all of these provisions.

Moreover, a plaintiff can sue under PAGA even if there has already been a class action settled over the very same Labor Code violation. And, because there is no class action “opt-out” procedure by which other employees decide whether they want to be bound by the outcome, a PAGA plaintiff can settle his or her case and bind other “aggrieved employees” without bothering to give them a say.

C. Providing Stronger Court Review

Even though PAGA requires the trial court to approve any PAGA settlement, the statute does not contain any standards for a court’s review. In addition, there is no requirement that a court review the amount of attorney’s fees awarded to the PAGA plaintiff’s counsel.¹²⁸

There should be appropriate standards for a court of law to review and approve proposed PAGA penalties. These could be similar to the standards used under current law to review and approve class action settlements.

D. Requiring Harm to Be Suffered

Under existing law, an “aggrieved employee” is entitled to PAGA penalties even if he or she has not incurred any harm. The statute should be amended to require a PAGA plaintiff to have suffered harm due to the alleged Labor Code violation before any damages can be awarded.

VI. RECENT REFORM EFFORTS

Assemblywoman Shannon Grove had a package of PAGA reform bills that she introduced during the 2016 Legislative Session. The committee did not hear any of the bills. This package of measures would have:

- Limited PAGA suits to violations of Labor Code provisions related to wage statements,¹²⁹ “meal or rest or recovery” periods,¹³⁰ overtime,¹³¹ and meal breaks after 5 and 10 hours.¹³²

127. See CAL.CIV. PROC. CODE § 382 (West 1972).

128. BARRERA, *supra* note 3 (“PAGA also provides a statutory right to attorney fees for the employee’s attorney only, thereby adding another layer of cost onto employers and providing an incentive for plaintiff’s attorneys to file the case”).

129. CAL. LAB. CODE § 226 (West 2017).

130. *Id.* § 226.7.

- Allowed a “right to cure for any violation of the Labor Code before an employee can bring a civil action.”¹³³
- Capped PAGA penalties at \$1,000 per aggrieved employee.¹³⁴
- Authorized a court to “dismiss a PAGA action if, after notice and hearing, the court finds that the aggrieved employee suffered no appreciable physical or economic harm.”¹³⁵
- Required the LWDA to investigate alleged violations and determine if there is a reasonable basis for a PAGA civil action. An employee can sue after notification that there is a reasonable basis, or if the LWDA fails to provide the prescribed notice.¹³⁶

While PAGA was enacted with a noble purpose, it has become a statute that is being over-utilized to extract excessive settlements against legitimate businesses in the State of California. Without at least modest reforms being enacted, PAGA will continue to be a source of excessive and unnecessary litigation against businesses operating in the State of California. As such, the Legislature has a responsibility to limit those potentials for abuse.

131. *Id.* § 510.

132. *Id.* § 512; *see* AB 2461, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Apr. 27, 2016).

133. *See* AB 2462, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Apr. 27, 2016).

134. *See* AB 2463, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Apr. 27, 2016).

135. *See* AB 2464, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Apr. 27, 2016).

136. *See* AB 2465, 2016 Leg., 2015–2016 Sess., §1 (Cal. 2016) (as introduced on Feb. 19, 2016).