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# Businesses Beware: Chapter 906 Deputizes 17 Million Private Attorneys General to Enforce the Labor Code

*Ben Nicholson*

## *Code Sections Affected.*

Labor Code §§ 2698, 2699 (new).

SB 796 (Dunn); 2003 STAT. Ch. 906.

## I. INTRODUCTION

Over the last thirty years, the growth of California's businesses has far outstripped the state's capacity to enforce its Labor Code.<sup>1</sup> Illustrative of the effects of this growing discrepancy is the state of the Department of Industrial Relations, which is charged with "enforcing the state's minimum wage, prevailing wage, child labor, employment discrimination, working conditions, and overtime laws."<sup>2</sup>

While the number of employers and employees in California has more than doubled since 1970,<sup>3</sup> the amount of staff available to enforce the Labor Code has not kept pace.<sup>4</sup> Since 1980, staff at the Division of Labor Standards Enforcement ("DLSE") and California Occupational Safety and Health Association, two of the enforcement arms of the Department of Industrial Relations, decreased by 7.6% and 10.8%, respectively.<sup>5</sup> More recently, two executive orders eliminated 270 vacant positions from the Department of Industrial Relations.<sup>6</sup> As a result of the decreased staff available, inspections, citations, and penalties pursuant to the Labor Code diminished despite the contemporaneous growth in California's economy.<sup>7</sup>

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1. See generally TOM GALLAGHER, TOUGH ON CRIME? THE DECLINE OF LABOR LAW ENFORCEMENT IN CALIFORNIA 1970-2000 (June 2001) (copy on file with the *McGeorge Law Review*) (reporting employment statistics in California over the last thirty years and comparing them to declines in enforcement staffing).

2. *Id.* at 6.

3. *Id.* at 7-9 (indicating that the number of employees in the state has increased 114% since 1970, while the number of employers has grown by 122% since 1970).

4. *Id.* at 7 (indicating that employees in the enforcement division of the Division of Labor Standards Enforcement decreased 8.9 percent relative to increases in employees and employers).

5. See ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 796, at 4 (July 9, 2003) (citing a recent study on labor law enforcement in California).

6. See E-mail from Patrick W. Henning, Staff Director, Senate Labor and Industrial Relations Committee, to Elena Lopez-Guzman, Consultant, Senator Joseph Dunn (July 17, 2003) [hereinafter Henning E-mail] (on file with the *McGeorge Law Review*) (describing the effects of Executive Orders D70-03 and 71-03 on vacant positions within the Department of Industrial Relations).

7. See GALLAGHER, *supra* note 1, at 5, 13 (showing that investigations, citations and penalties have declined).

A 2001 study indicated that the DLSE inspected 981 restaurants for various labor violations in 1998-1999.<sup>8</sup> At that pace it would take over 100 years to inspect each of California's restaurants, despite restaurants being a targeted industry of the DLSE.<sup>9</sup>

Further evidence of inadequate inspections and citations exists in Los Angeles's garment industry where a study of the garment industry in Los Angeles indicated that despite 33,000 "serious and ongoing" wage violations, the Department of Industrial Relations issued fewer than one hundred wage citations per year throughout the entire state for all industries combined.<sup>10</sup> In all, citations issued by the Bureau of Field Enforcement ("BOFE") have diminished by 46.4%,<sup>11</sup> while "the amount of wages that BOFE has recovered for workers also declined by 9.8%, and the amount of penalties transferred to the General Fund dropped by 32.7%."<sup>12</sup>

In the wake of these statistics, the Legislature made findings that while adequate financing was required to ensure maximum compliance with the Labor Code, "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."<sup>13</sup> In essence, the Legislature found that it needed funding to hire enforcement staff but that no funding was available. To address this problem, the Legislature enacted Chapter 906 which effectively hired more than 17 million labor law watchdogs without spending a single dollar.<sup>14</sup>

## II. LEGAL BACKGROUND

Prior to Chapter 906, violations of California's Labor Code were punishable as misdemeanors, by civil penalty, or both.<sup>15</sup> Enforcement of most of these provisions came under the purview of the Labor and Workforce Development Agency,<sup>16</sup> which is composed of the Department of Industrial Relations, the Employment Development Department, the Agricultural Labor Relations Board,

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8. *Id.* at 11.

9. *Id.*

10. ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 796, at 3 (July 9, 2003) (citing a U.S. Department of Labor study of the Los Angeles garment industry).

11. GALLAGHER, *supra* note 1, at 12.

12. *Id.* at 12.

13. ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 796, at 3 (July 9, 2003).

14. *See* CAL. LAB. CODE §§ 2698-2699 (enacted by Chapter 906) (authorizing an aggrieved employee to bring private civil suits).

15. *See* Letter from Mark S. Schacht, Deputy Director, Law Offices of California Rural Legal Assistance Foundation, to Senator Richard Alarcon, Chairman, Labor and Industrial Relations Committee, Addendum (Mar. 31, 2003) [hereinafter Schacht Letter] (on file with the *McGeorge Law Review*) (describing each Labor Code section punishable as misdemeanors, by civil penalty, or both).

16. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 796, at 1 (Apr. 29, 2003).

and the Workforce Investment Board.<sup>17</sup> These four entities were authorized to assess and collect civil penalties for specified violations of the Labor Code<sup>18</sup> while various public prosecutors were empowered to pursue misdemeanor charges against violators of Labor Code sections.<sup>19</sup>

An aggrieved employee, however, was restricted under the Labor Code to filing a traditional suit for damages or, where damages were difficult to prove, specified “statutory damages.”<sup>20</sup>

### III. CHAPTER 906

Known as the “Labor Code Private Attorneys General Act of 2004,”<sup>21</sup> Chapter 906 is intended to address inadequacies of labor law enforcement in two ways: (1) authorizing aggrieved employees acting as private attorney generals to file actions to recover civil penalties,<sup>22</sup> and (2) attaching nominal civil fine amounts to many Labor Code violations which previously carried only criminal penalties.<sup>23</sup>

Under this new statutory scheme, an aggrieved employee can bring an action against an employer for \$100 per pay period for an initial violation, and \$200 for each subsequent violation.<sup>24</sup> Any civil penalty recovered pursuant to the action is to be distributed “fifty percent to the General Fund, twenty-five percent to the Labor and Workforce Development Agency for education of employers and employees about their rights and responsibilities under [the Labor Code],” and “twenty-five percent to the aggrieved employees.”<sup>25</sup> If the violator does not have any employees at the time of the violation, the civil penalty is \$500,<sup>26</sup> and any penalty collected is to be distributed 50% to the General Fund and 50% to the Labor and Workforce Development Agency.<sup>27</sup>

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17. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 796, at 2 (June 26, 2003).

18. CAL. LAB. CODE § 210 (West 2003 & Supp. 2004) (prescribing civil penalties for specified labor law violations to be paid into the State Treasury to the credit of the General Fund and for educating employers about California’s Labor Law); ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 796, at 2 (June 26, 2003).

19. CAL. LAB. CODE §§ 215, 218 (West 2003) (authorizing public prosecutors of counties and cities, *inter alia*, to pursue misdemeanor charges for specified violations of the Labor Code).

20. ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 796, at 1 (July 9, 2003); ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 796, at 2 (June 26, 2003).

21. CAL. LAB. CODE § 2698 (enacted by Chapter 906).

22. *See* CAL. LAB. CODE § 2699(a).

23. *Id.* § 2699(e)(1)-(2) (assigning a civil penalty to all violations of the Labor Code which did not formerly have one).

24. *Id.* § 2699(e)(2).

25. *Id.* § 2699(h).

26. *Id.* § 2699(e)(1).

27. *Id.* § 2699(i).

## IV. ANALYSIS OF THE NEW LAW

## A. Adequacy and Effect of the New Statutory Scheme

Faced with a budgetary shortfall<sup>28</sup> and a growing underground economy,<sup>29</sup> California could not afford to enforce compliance with its Labor Code prior to the enactment of Chapter 906.<sup>30</sup> Already insufficient staffs were being further depleted by cutbacks<sup>31</sup> while the number of employees in California continued to increase.<sup>32</sup> Essentially, the climate called for a creative solution to a problem that would otherwise continue to grow.<sup>33</sup>

By authorizing aggrieved employees to act as private attorneys general and to file actions to recover civil penalties,<sup>34</sup> Chapter 906 overcomes the core problem with Labor Code enforcement: lack of manpower.<sup>35</sup> Rather than remaining stifled by budget constraints and hopeful that the Labor and Workforce Development Agency could eventually hire enough staff to enforce the Labor Code, Chapter 906 effectively deputizes California's more than 17 million workers to enforce the Labor Code themselves.<sup>36</sup> In fact, supporters of Chapter 906 argue that not only does the new statutory scheme have no negative impact on the state's General Fund,<sup>37</sup> it will actually raise additional revenue because more actions will be brought, resulting in more fines.<sup>38</sup>

Further, by attaching nominal civil fine amounts to all Labor Code violations which previously carried only criminal penalties, the Legislature ensured that these provisions will be enforced with the same regularity as the provisions that do not require criminal prosecutions.<sup>39</sup> Prior to the enactment of Chapter 906,

28. See John M. Broder, *California Turmoil: Budget Talks Stall Recall Drive Gains*, N.Y. TIMES, June 25, 2003, at A1 (describing the state's \$38 billion budget deficit).

29. See ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 796, at 3 (July 9, 2003) (estimating that businesses operating outside the state's tax and licensing requirements earned between \$60 and \$140 billion per year); GALLAGHER, *supra* note 1, at 5 (quoting an estimate that California loses \$2-3 billion annually as a result of unreported wages and various other underground activities).

30. See Letter from Tom Rankin, President, California Labor Federation, to Assemblymember Ellen Corbett, Chairperson, Assembly Judiciary Committee (June 25, 2003) [hereinafter Rankin Letter] (on file with the *McGeorge Law Review*) (attributing inadequate enforcement of the Labor Code to budget constraints).

31. See Henning E-mail, *supra* note 6 (describing the effects of Executive Orders D70-03 and 71-03 on vacant positions within the Department of Industrial Relations).

32. GALLAGHER, *supra* note 1, at 7.

33. See Rankin Letter, *supra* note 30 (calling for a "creative solution" to aid in the enforcement of the Labor Code).

34. CAL. LAB. CODE § 2699(a) (enacted by Chapter 906).

35. See Rankin Letter, *supra* note 30 (attributing the state's inability to enforce existing labor laws to inadequate staffing).

36. See CAL. LAB. CODE § 2699(a) (enacted by Chapter 906) (creating a rights of action for "aggrieved employees"); GALLAGHER, *supra* note 1, at 7 (reporting that in 2000 California had more than 16 million employees).

37. Schacht Letter, *supra* note 15.

38. Rankin Letter, *supra* note 30.

39. See CAL. LAB. CODE § 2699(e) (enacted by Chapter 906) (assigning a civil penalty to all violations of the Labor Code which did not formerly have one).

violations that were only enforceable as misdemeanors were largely neglected by the prosecutors who had the sole jurisdiction to enforce the Code.<sup>40</sup> By augmenting these provisions with civil fines that are enforceable by aggrieved employees, the Legislature increased the likelihood that these provisions will be enforced.<sup>41</sup>

Opponents, however, contend that the evidence submitted in support of reconstructing the statutory scheme failed to adequately justify Chapter 906.<sup>42</sup> Further, opponents argue that Chapter 906 adds to an already unfriendly business climate in the state by encouraging suits against employers.<sup>43</sup>

### B. Comparisons to Business and Professions Code Sections 17200-17209

The most significant criticism of Chapter 906 has been its similarity to Business and Professions Code sections 17200-17209<sup>44</sup> which allows any person acting for the interests of himself or the general public to bring an action for a violation of California's Unfair Competition Law.<sup>45</sup> Critics argue that this "private attorney general" provision of the Business and Professions Code has led to allegations of rampant abuse by the bar<sup>46</sup> and "lends itself to a shakedown."<sup>47</sup>

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40. See ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 796, at 4 (July 9, 2003) (relaying the argument of Chapter 906's author that district attorneys largely neglect criminal misdemeanor prosecutions of Labor Code provisions, instead dedicating their resources to other public priorities).

41. See *id.* (arguing that many district attorneys tend to direct their resources at violent crimes at the expense of litigating Labor Law violations that are punishable only as misdemeanors).

42. See Letter from Julianne Broyles, Director, Employee Relations and Small Business for the California Chamber of Commerce, to Members of the Assembly Judiciary Committee (June 20, 2003) [hereinafter Broyles Letter] (on file with the *McGeorge Law Review*) (stating that supporters of Chapter 906 have not provided any evidence to indicate that the state's enforcement of the Labor Code was inadequate); Letter from Michael Pro시오, Legislative Director, California Restaurant Association, to Ellen Corbett, Chairperson, Assembly Judiciary Committee (June 18, 2003) (on file with the *McGeorge Law Review*) (indicating that there was "no apparent need to bypass the current system"); see also Letter from Brian Maas, Government and Legal Affairs Counsel, California Motor Car Dealers Association, to Assemblymember Ellen Corbett, Chairperson, Assembly Judiciary Committee (June 20, 2003) (on file with the *McGeorge Law Review*) (arguing in part that Chapter 906 "puts the proverbial cart before the horse" by enacting this new statutory scheme before an independent research organization submits an assembly-mandated study on both "the most effective and efficient means of enforcing wage and hour laws," and the available federal and state resources to enforce the same).

43. See Broyles Letter, *supra* note 42 (arguing that prevailing employers' inability to recover attorney fees and costs under Chapter 906 will contribute to the state's "less-than-employer-friendly atmosphere").

44. See *e.g., id.* (arguing that the private attorney general provisions will lead to meritless lawsuits); Letter from Prem Hunji Turner, Legislative Counsel, California Employment Law Council, to Members of the Senate Labor and Industrial Relations Committee (Mar. 25, 2003) (on file with the *McGeorge Law Review*) (arguing that the private attorney general provisions of Chapter 906 remove prosecutorial discretion in bringing actions pursuant to the Labor Code, and thus open the door to lawsuits over minor and technical violations).

45. CAL. LAB. CODE §§ 17200-17209 (West 2003).

46. ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 796, at 5 (July 9, 2003).

47. See Rob Garver, *Class-Action Arbitration: Next Big Litigation Thing?*, AM. BANKER, June 11, 2003, at 4A (quoting a Los Angeles attorney).

Illustrative of this criticism is the case of the Trevor Law Group in Beverly Hills.<sup>48</sup> The Group's three attorneys were alleged to have created a shell corporation to serve as plaintiff in suits filed against thousands of small businesses pursuant to the "private attorney general" provisions of Business and Professions Code sections 17200-17209.<sup>49</sup> The attorneys then reportedly lied to and threatened defendants in order to leverage settlements before the matters went to court.<sup>50</sup>

Opponents of Chapter 906 fear that the private attorney general provisions will lead to the same abuses and spawn a cottage industry of bounty hunting litigation against California's employers.<sup>51</sup> As a corollary, opponents argue that these lawsuits will further "clog the already overburdened" court system.<sup>52</sup>

Supporters of Chapter 906, however, offer a number of reasons why such fears are misplaced.<sup>53</sup> First, unlike Business and Professions Code sections 17200-17209, Chapter 906 does not allow a person who did not suffer a harm to bring an action.<sup>54</sup> Instead, only an aggrieved employee can bring an action pursuant to Chapter 906.<sup>55</sup> Second, the civil penalties are relatively low<sup>56</sup> and the majority of the fines collected will go to the Labor and Workforce Development Agency and the state's General Fund.<sup>57</sup> Supporters argue that the relatively small recovery available to an aggrieved employee will deter "bounty hunters" from bringing suits based on minor violations.<sup>58</sup> Finally, Chapter 906 gives proceedings initiated by the agencies under the Labor and Workforce Development Agency primacy over those brought by aggrieved employees.<sup>59</sup> That is, if one of the agencies has initiated proceedings against the employer, the aggrieved employee is precluded from doing so himself.<sup>60</sup>

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48. See Jeff Chorney, *State Bar Judge Suspends Licenses of 17200 Trio*, THE RECORDER, May 22, 2003 (describing one law firm's alleged scheme to abuse their status as private attorney generals).

49. *Id.*

50. *Id.*

51. ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 796, at 7 (July 9, 2003).

52. Broyles Letter, *supra* note 42.

53. See ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 796, at 7-8 (July 9, 2003) (distinguishing the Labor Code private attorney general from the Unfair Competition Law private attorney general).

54. CAL. LAB. CODE § 2699(a), (c) (enacted by Chapter 906).

55. *Id.*

56. See *id.* §§ 2699(e)(1)-(2) (setting forth fines of between \$100 and \$500 for each violation); ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 796, at 4 (June 26, 2003) (contrasting the \$100 and \$500 fines under Chapter 906 to a \$25,000 fine set forth under Labor Code section 6428).

57. See CAL. LAB. CODE § 2699(h) (enacted by Chapter 906) (setting forth how civil fines are to be distributed).

58. ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF SB 796, at 8 (July 9, 2003).

59. CAL. LAB. CODE § 2699(h) (enacted by Chapter 906).

60. *Id.*

V. CONCLUSION

In creating a private right of action<sup>61</sup> and attaching nominal civil fine amounts to all Labor Code violations,<sup>62</sup> Chapter 906 provides aggrieved employees with a viable alternative to the incomplete enforcement of the state's Labor Code.<sup>63</sup> The evidence of inadequate enforcement<sup>64</sup> and the likelihood of budgetary shortfalls in the foreseeable future<sup>65</sup> warranted a creative solution to a looming problem.<sup>66</sup> While Chapter 906 is a creative solution that does not further strain the state's budget,<sup>67</sup> the true test of its efficacy and prudence will be whether aggrieved employees and the bar acting as private attorneys general responsibly and ethically administer its provisions.

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61. *Id.* § 2699(a).

62. *See id.* § 2699(e)(1)-(2) (assigning a civil penalty to all violations of the Labor Code which did not formerly have one).

63. *See* GALLAGHER, *supra* note 1 (tracking inspection, citation, and penalty statistics over the last thirty years).

64. *Id.*

65. *See* Broder, *supra* note 28 (describing the state's \$38 billion dollar budget deficit).

66. *See* Rankin Letter, *supra* note 30 (calling for a "creative solution" to aid in the enforcement of the Labor Code).

67. *Id.*

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