

California Compliant: The “Fix PAGA” Initiative: Employers’ Last Hope to Curb PAGA Abuses

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Later this year, California voters may have the chance to repeal and replace what may be the state’s most divisive employment statute – the Private Attorneys General Act (PAGA). In theory, PAGA incentivizes employers to comply with California employment laws by allowing employees to act as deputized agents of the state to seek redress – not only for themselves, but also on behalf of other “aggrieved” employees – for alleged violations of the Labor Code. But some claim that in practice, PAGA is used by plaintiffs’ attorneys to shake down employers for six and seven figure attorneys’ fee awards – in some cases for seemingly minor violations, or when companies knew they hadn’t done anything wrong. California’s Supreme Court largely has rejected employers’ efforts to curtail abuses of PAGA (read more [here](#)), and a “Fix PAGA” coalition supports an initiative to repeal PAGA and replace it with a Fair Pay and Employer Accountability Act.

Overview of PAGA and its Impact on Employers

PAGA (Labor Code Section 2698, *et seq.*) permits workers who have suffered a violation of the Labor Code to act as the agent of the state, deputized to enforce the Code on its behalf. PAGA lawsuits are “representative actions,” and so a PAGA plaintiff can seek to recover penalties for violations the employee individually suffered and penalties for violations that other employees suffered. Still, a PAGA suit is not a “class action.” A PAGA plaintiff is not held to the same standards as are required in traditional class cases, meaning that many tools that employers might deploy to resist or limit a class claim are unavailable in defending a PAGA case.

Only 25% of penalties recovered by a successful PAGA plaintiff are distributed to the affected employees; the other 75% goes to the state’s Labor and Workforce Development Agency “for enforcement of labor laws.” In practice, awards of legal fees to lawyers bringing PAGA claims often exceed the total recovery of the employees on whose behalf the case nominally is brought. Some have suggested that PAGA claims tend to be brought, not against truly “bad actor” employers, but instead against employers likely to be able (and willing) to pay a significant sum to buy peace.

PAGA dramatically changed the playing field for employers accused of violating the Labor Code. Like a traditional class action, defending a PAGA suit is time-consuming and costly. PAGA also provides for an automatic award of attorneys’ fees and costs to counsel for a successful PAGA plaintiff. Fees “shall” be awarded, regardless how minimal the recovery is for the affected employees. For obvious reasons, PAGA lawsuits have become quite popular with members of the plaintiffs’ bar, and the number of PAGA cases filed annually increases every year. Defendant employers often reluctantly write large settlement checks because they have concluded that it will be less expensive to settle PAGA lawsuits – even if based on weak or frivolous claims – than to pay the costs to defend the cases on the merits.

According to **Fix PAGA**, “[t]he only ones who have benefited are the lawyers.” The coalition’s website lists **examples** of lawsuits that generated millions of dollars for attorneys even when recoveries for workers were minimal.

Initiative to Repeal and Replace PAGA

Dozens of industry groups, including the California Chamber of Commerce, say that there’s a better way to protect California workers. If voters approve a **pending ballot measure** on November 5, 2024, PAGA would be repealed and replaced by the Fair Pay and Employer Accountability Act. Among other things, amendments to the Labor Code would:

- direct the Legislature to grant the Division of Labor Standards Enforcement (DLSE) “all necessary funding” to meet its enforcement mandates;



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- permit employees to seek damages for alleged violations (in individual cases or as a traditional class action), but provide that only the Labor Commissioner can recover civil penalties;
- require that 100% of penalties be awarded to harmed employees;
- require the DLSE to be a party to all labor complaints;
- bar an award of attorneys’ fees for enforcement proceedings, except as is otherwise authorized by law;
- double statutory and civil penalties for “willful” violators;
- clarify that an employer has not committed a “willful” violation unless “the employer intentionally violated the law, and there is no good faith dispute regarding whether a violation occurred”;
- clarify that an employer has only committed a “subsequent” violation if “a court or the Labor Commissioner [previously] has determine[d] that the practice or omission by the same employer is a violation of the law”; and
- provide resources to employers to ensure labor compliance.

What to Watch

Given the high stakes – for employers and the plaintiff’s bar – we expect that both sides will go to the mattresses over PAGA. Unless the initiative is approved by the voters, PAGA will remain intact, and employers can expect their PAGA headaches to continue, perhaps indefinitely.

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