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Assessing the Amended Labor Code Private Attorneys General Act

ON OCTOBER 12, 2003, Governor Gray Davis signed SB 796, the Labor Code Private Attorneys General Act, into law. PAGA quickly became known among employers and the defense bar as the Bounty Hunter Law. Codified as Labor Code Section 2699, the law gave employees the right to sue for penalties to enforce virtually any provision of the Labor Code,[1] thus exposing employers to potentially enormous liability for very minor violations. In addition to creating this right, PAGA also established a scheme for assessing significant penalties against those who violate Labor Code provisions that do not contain specified civil penalties.

The legislature amended PAGA in 2004 with the passage of SB 1809. The amendments limit employees' right to sue over inconsequential, technical violations and provide new procedural prerequisites for filing suit. These procedural changes, however, generally will have little practical effect.

The legislature justified its passage of PAGA by pointing to the need for the enforcement of California's labor laws despite the inability of the financially strapped state to investigate more than a small portion of claims made by employees. Lawmakers reasoned that active enforcement of California's legal protections of workers is necessary to deter employers from engaging in unlawful practices. However, staffing levels and budgets for state labor law enforcement agencies have not kept pace with the growth of the labor market. Given California's budget crisis, the legislature was not optimistic that the situation would improve in the foreseeable future, and so it passed the Labor Code Private Attorneys General Act as a way to bridge the gap.

Despite the legislature's rationale, employers feared PAGA, with some justification. Under PAGA, employees do not have to show that they suffered actual harm from the employer's violation. Thus, the statute encouraged employees to sue over insignificant technical violations. This effect was heightened by the fact that a prevailing plaintiff in a Section 2699 suit is awarded attorney's fees and costs. Moreover, PAGA allows an employee to bring a representative suit on behalf of the employee and other current and/or former employees but does not require the employee to show that the case meets the requirements for filing a class action. By providing this back-door route to a class action lawsuit, the statute greatly increases an employer's potential liability.

Further, PAGA provides hefty penalties for violations of Labor Code provisions that do not contain language specifying civil penalties for those violations. For each of these provisions, Section 2699 established a $100 penalty for an initial violation and a $200 penalty for each subsequent violation. Penalties are assessed on a per employee, per pay period basis. Thus, if an employer with 25 employees is found liable for a violation spanning 52 pay periods, the penalty will be $257,500. (For the initial violation, the penalty will be $100 x 25 = $2,500. For the next 51 pay periods, the penalty will be $200 x 51 x 25 = $255,000.)[2] For violations of Labor Code sections containing their own penalty schemes, plaintiffs still follow the procedures of Section 2699, but the penalties awarded are those determined by the appropriate statute. Any civil penalties awarded in a lawsuit under Section 2699 are divided between the employee (25 percent) and the state (75 percent). These penalties, combined with the attorney's fees and costs that employers must pay to victorious plaintiffs, result in substantial potential liability.

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In the first seven months after PAGA took effect, about 65 cases were filed. The California Chamber of Commerce reported that plaintiffs in the first nine suits sought penalties totaling more than $336 million. Many of these cases alleged only minor violations. Nonetheless, the penalties allowed by Section 2699 are substantial, particularly when a company with numerous employees is sued. For example, the chemical company Amgen, which employs 6,000 workers, was sued for $170 million for primarily technical violations. Specifically, the suit alleged Amgen violated a requirement that employers file with the Division of Labor Standards Enforcement (DLSE) a copy of their employment applications if employees are compelled to sign them.[3] Amgen also allegedly violated the law by posting a statement of rights for whistle blowers that was printed using a type size that was smaller than 16-point type. The fact that the company posted the statement was insufficient for the employees who sued over the small size of the font.[4]

Not surprisingly, the state Chamber of Commerce and various other

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business groups lobbied for the repeal of PAGA. Though repeal efforts failed, the author of SB 796, Senator Joseph Dunn, introduced SB 1809 with an intent to reform the law, and Governor Arnold Schwarzenegger signed the bill on August 11, 2004. The law took effect immediately and retroactively. As a result, suits based solely on violations no longer covered by Section 2699 have been dismissed. Other cases that involve insignificant technical violations as well as more substantial violations have not been dismissed entirely. The potential liability in these cases has decreased significantly, because causes of action based on posting requirements have been dismissed. In *Umbrasas* v. *Amgen, Inc.*, for example, only a single cause of action for damages remained after the amendments took effect. Thus, SB 1809 achieved its primary aim while still preserving the right of aggrieved employees to seek enforcement of the Labor Code.

The elimination of suits over essentially harmless technical violations is SB 1809's single most important change to PAGA. Section 2699(g)(2) states, "No action shall be brought under this part 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." In addition, SB 1809 repealed Labor Code Section 431, which compelled employers to file with the DLSE a copy of any application that employees were required to sign. As a result of these changes, the most frivolous claims under Section 2699 have been dismissed. Although relatively few cases since the passage of PAGA were based solely on technical violations, the amended law reduces the potential liability of employers facing the same circumstances as Amgen.

Another substantive change affects Labor Code Section 98.6, which protects employees against discrimination and retaliation for exercising their rights under the Labor Code. Under Section 98.6, an employee cannot be fired for filing a complaint with the Labor Commissioner or for testifying in an investigation of an employer. SB 1809 revised Section 98.6 to explicitly include employees who initiate actions under Section 2699. That protection includes not only employees who eventually file suit but also those who simply notify the Labor and Workforce Development Agency (LWDA) of a claim. This change in the law further highlights the legislature's commitment to safeguarding the rights of workers while ironing out the wrinkles of PAGA as it was originally enacted.

New Administrative Requirements

Still, most of the text of SB 1809 addresses procedural issues. The amendments create administrative requirements that must be met before filing suit, provide for greater judicial oversight, and change the way penalties are divided between plaintiffs and state agencies.

The administrative requirements that an employee must meet prior to bringing suit are codified in Labor Code Section 2699.3. The statute classifies violations into three categories: Serious Labor Code Violations, Health and Safety Violations, and Other Labor Code Violations. For any violation, the employee must first notify his or her employer and the appropriate state agency of the alleged violation. The specific procedures an employee must follow in addition to this notification depend on the type of violation alleged.

The first category, Serious Labor Code Violations, includes breaches of the approximately 150 provisions specified in Section 2699.5. Most of these provisions address setting and paying wages and salaries; hours of work, meals, and rest breaks; employment of minors; employment under state and public works contracts; and protection of whistle blowers. Several other miscellaneous provisions, which seem somewhat less serious, are included as well. For example, a violation of Labor Code Section 232's prohibition of employer-imposed policies against employees disclosing their wages to one another is classified as a Serious Labor Code Violation for the purposes of PAGA. Although some of these miscellaneous violations do not rise to the level of, for example, violating child labor laws or firing whistle blowers, their inclusion in the PAGA's enforcement scheme poses considerably less risk of abuse than the inclusion of the extremely minor technical violations that were enforceable under SB 796.

To pursue the remedy for a Serious Labor Code Violation under Section 2699, an employee must first notify the employer and the LWDA. The LWDA will decide whether to investigate the claim and must inform both the employer and the employee of its decision within 33 calendar days. If the LWDA chooses not to investigate, or if it does not inform the parties of its intent to take action within 33 days, the employee may file a lawsuit. If, on the other hand, the LWDA does intend to investigate, it has 120 days to complete the investigation. Following the investigation, the employee may file suit if the LWDA gives notice of its decision not to cite the employer or if the LWDA takes no action within 158 days of the employee's claim.[5]

The second category, Health and Safety Violations, includes most violations of Labor Code Division 5—the California Occupational Safety and Health Act of 1973. These violations involve a wide range of workplace safety issues, including the use of proper safety devices, the implementation of injury prevention programs, and the reporting of workplace injuries and illnesses. Not included in this category are violations of sections that prohibit retaliation or discrimination against employees who report unsafe conditions,[6] refuse to work under unlawful hazardous conditions,[7] or participate in an investigation of possible health and safety violations.[8] Violations of these provisions are included within the Serious Labor Code Violations category.

Before filing suit under Section 2699 for one of the violations included in the Health and Safety Violations category, an employee must notify his or her employer, the LWDA, and the Division of Occupational Safety and Health (DOSH) of the complaint. DOSH will inspect the work site or investigate the complaint according to its own rules and timetable. If DOSH fails to inspect or investigate, the employee may proceed according to the procedure for claims under the third category of violations, Other Labor Code Violations. DOSH may allow the employer to correct the violation. If this course is taken, DOSH must notify the employer and the employee within 14 days of certifying that the violation has been corrected. If the agency issues a citation, no lawsuit may be filed. If DOSH does not issue a citation, the employee can challenge that decision in court. However, if the court directs DOSH to issue a citation, the employee cannot sue. No private lawsuits may be filed when the employer and DOSH have an existing agreement regarding the abatement of conditions, or when they have previously entered into a consultation agreement addressing a condition at a particular work site.

The third category, Other Labor Code Violations, includes numerous miscellaneous infractions as well as any health and safety violations that DOSH fails to investigate. After an employee notifies his or her employer and the appropriate state agency, the employer has 33 days to cure the alleged violation and notify the employee and state agency of the actions taken. PAGA defines "curing" as coming into compliance with the law and making whole any aggrieved employee. If the employer fails to timely cure the violation, the employee may file a private action. If the employee believes that the employer's actions did not cure the violation, the employee may notify the state agency. The agency can then take up to 17 days to investigate and may grant the employer 3 additional business days to cure the violation. If the agency determines that the alleged violation has not been cured, the employee may file suit. If the agency determines the violation has been cured, but the employee disagrees, the employee may appeal the decision to the superior court by filing a petition for writ of mandamus. If the court holds that the violation was not cured,

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the employee can then file suit under Section 2699.

The first appellate decision interpreting the amended PAGA directly addressed these administrative procedures. In *Caliber Bodyworks, Inc.* v. *Superior Court*,[9] the plaintiffs sought civil penalties as well as other forms of relief for several Serious Labor Code Violations. However, they failed to plead in their complaint that they had complied with PAGA's procedural requirements. Thus, the court held that the defendant's demurrer should have been sustained without leave to amend as to causes of action seeking only civil penalties.

In other causes of action, the plaintiffs sought civil penalties in combination with statutory penalties that could have been recovered directly by the plaintiffs before PAGA took effect. The distinction between civil penalties and statutory penalties is important. Prior to the enactment of PAGA, civil penalties could only be assessed by state agencies. However, some Labor Code provisions provided that plaintiffs could recover statutory penalties through private actions. For example, Labor Code Section 203 states that a terminated employee whose wages are not paid at the time of discharge may recover a statutory penalty equal to the employee's daily wages for each day, up to 30 days, that the payment is delayed. In addition, Section 256 authorizes the Labor Commissioner to assess civil penalties for the same violation. The *Caliber* plaintiffs sought their unpaid wages, plus civil and statutory penalties. The court ordered stricken the portions of those causes of action that prayed for civil penalties.

Significantly, however, that ruling did not foreclose the possibility that the *Caliber* plaintiffs may still recover civil penalties. In a footnote, the court cited Section 2699.3(a)(2)(C), which states that "a plaintiff may as a matter of right amend an existing complaint to add a cause of action arising under this part at any time within 60 days of the time periods specified in this part."[10] The court stated that the plaintiffs could file the required notice with the LWDA and then—assuming the LWDA chose not to investigate or not to cite the employer—amend their complaint and pursue civil penalties. The court left open the question whether the plaintiffs should be permitted to amend a complaint after the 60-day period lapses.

This issue in *Caliber* arose at the demurrer stage. The court did not address at what point during the course of litigation amendments should no longer be allowed. However, the court's quotation of *Aubry* v. *Tri-City Hospital District*[11] for the proposition that "in the furtherance of justice great liberality should be exercised" in this regard suggests that at least some courts will be lenient with plaintiffs who do not initially comply with Section 2699.3.

Judicial Oversight and Division of Penalties

An additional procedural change to PAGA is increased judicial oversight of penalties and settlements. Under Section 2699(e)(1), a court has discretion to reduce a penalty in circumstances in which the LWDA would have discretion to do so. The court's discretion is "subject to the same limitations and conditions" affecting the LWDA. Section 2699(e)(2) gives courts further discretion to award less than the maximum civil penalty amount if the award would be "unjust, arbitrary and oppressive, or confiscatory." This is a high standard to meet, so the potential for employers to incur extremely severe penalties remains.

Disagreement exists among attorneys regarding these provisions. Some have suggested that Section 2699(e)(2) gives courts broader discretion than is given to the LWDA—and thus, in essence, Section 2699 (e)(2) trumps Section 2699(e)(1). A better interpretation is that Section 2699(e)(1) applies to violations of Labor Code provisions with their own statutory penalties, and Section 2699(e)(2) applies to violations for which the penalties are derived from Section 2699. The language of Section 2699(e)(2) supports this interpretation. Specifically, the provision refers to penalties "available under subdivision (a) or (f)" and to reducing the "maximum civil penalty amount specified by this part." Thus, for violations of provisions specifying their own penalty schemes, courts are given the same degree of discretion exercised by the LWDA; courts may also exercise discretion to reduce the amount of penalties calculated according to Section 2699, but only when the penalty is unjust or arbitrary.

Under Section 2699(l), courts also must review and approve all settlements of cases with a Section 2699 cause of action. Whether this provision will significantly reduce the size of settlements remains to be seen.

The final procedural issue addressed by SB 1809 is the division of penalties awarded when a settlement is reached or when a verdict is in favor of the plaintiff. Under SB 796, 50 percent of the penalties went into the state's General Fund. An additional 25 percent was given to the LWDA, with the remaining 25 percent going to the aggrieved employee. Under the amendments to PAGA, the LWDA receives 75 percent of the penalties. The funds are to be used for enforcing labor laws and for educating employers and employees of their rights and obligations under the Labor Code. SB 1809 further specifies that these funds are intended to "supplement and not supplant" funding otherwise provided to the agency. Prevailing employees continue to receive 25 percent of the penalties, plus attorney's fees and costs.

Practical Impact of the Amendments

The most readily apparent effect of SB 1809 is that employers no longer face penalties for minor technical violations. This greatly reduces the potential for frivolous litigation. Aside from abolishing these penalties, however, the amendments are unlikely to significantly affect litigation between employees and employers. This is perhaps not surprising, given that the majority of the changes to PAGA only address procedural matters. In addition, the amendments fail to substantially change the types of cases that are filed under Section 2699.

Indeed, the new procedural guidelines of Section 2699.3 do not impose significant obstacles to plaintiffs. A primary reason for the passage of Section 2699 was the inability of state labor agencies to effectively enforce the Labor Code or investigate more than a small percentage of claims. Presumably, the new procedural requirements will only increase the number of claims received by the LWDA, further adding to the agency's workload. Clearly, the LWDA will not investigate most claims, and employees will be free to file suit. An attorney for the DLSE has reported that the agency does not even attempt to investigate the majority of the complaints it receives. As a result, aside from imposing a 33-day waiting period, Section 2699.3 will have little practical effect in many cases. That said, the notice provisions do give state agencies the option of intervening in particularly egregious cases. Additionally, the agencies have the authority to help resolve disputes without resorting to litigation.

Similarly, the provision allowing employers an opportunity to avoid liability by curing violations is unlikely to significantly change the application of PAGA. The most common Labor Code violations for which employees bring Section 2699 suits—such as claims for unpaid overtime and the lack of meal and rest breaks—are classified as Serious Labor Code Violations. The cure provision of the PAGA amendments does not apply to that category of infractions, nor to Health and Safety Violations.[12] Thus, the cure provision will have only a minimal impact. Because employers cannot cure the violations that most often result in Section 2699 suits, they can still be sued even after coming into compliance with the law and making whole employees affected by the violations. Therefore, it is not entirely clear what purpose is served by compelling the employee to notify his or her employer of the employee's administrative complaint. The legislature may have intended the notice requirement to forestall litigation by encouraging the parties to reach

a solution before a lawsuit is filed.

Aside from eliminating relatively trivial causes of action, the PAGA amendments have not had an impact on the types of lawsuits being filed. That is, the majority of cases filed both before and after SB 1809 took effect involve wage and hour disputes and classification of employees as exempt or nonexempt. The amendments do not significantly affect the prevalence of these types of cases. Rather, plaintiffs now are simply adding Section 2699 claims to their more traditional causes of action to create a larger potential overall recovery. Section 2699 does not prevent employees from recovering their damages, such as unpaid overtime. Plaintiffs still seek their actual damages but also pursue a strategy to increase their awards through Section 2699 penalties.

PAGA was passed to facilitate active enforcement of legal protections for workers. In its original form, however, the law had the potential for overly harsh penalties for employers. The amendments in SB 1809 alleviate the risk faced by employers under PAGA of being sued by employees for minor technical violations. Nevertheless, many of the amendments—particularly the LWDA notification requirement for potential plaintiffs and the cure provision—will not significantly change the liability exposure for employers. Thus, PAGA still remains a powerful tool for aggrieved employees. ■

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[1] The exclusive remedy provided by the workers' compensation provisions of the Labor Code is not affected by PAGA.

[2] This penalty scheme applies to employers who, at the time of the alleged violation, employed "one or more employees." Section 2699(f)(1) provides a separate penalty for "the person who does not employ one or more employees" at the time of the alleged violation. However, it is unclear whether the Section 2699(f)(1) penalty would ever be applied. After all, who could bring suit?

[3] Umbrasas v. Amgen, Inc., No. SCO 38844 (Ventura Co. Super. Ct., *filed* Mar. 4, 2004, *judgment entered* May 26, 2005); LAB. CODE §431.

[4] The *Amgen* case also involved an allegation that the arbitration agreement employees were required to sign was illegal. Thus the entire $170 million figure did not result from technical violations.

[5] The 158-day time limit includes the initial 33-day period in which the LWDA must decide whether to investigate, 120 days for completing any investigation, and 5 days allowed by the statute for the LWDA to notify the employer and the employee of its decision whether to issue a citation.

[6] LAB. CODE §6310.

[7] LAB. CODE §6311.

[8] LAB. CODE §6399.7.

[9] Caliber Bodyworks, Inc. v. Superior Court, No. B184120 (2d Dist., Nov. 23, 2005).

[10] This provision applies only to actions seeking penalties for Serious Labor Code Violations.

[11] Aubry v. Tri-City Hosp. Dist., 2 Cal. 4th 962, 967 (1992).

[12] DOSH may (but is not required to) grant the employer 14 days to correct a Health and Safety Violation.