

# PAGA: Is Your Business Protected from Claims – Frivolous or Otherwise -- from Aggrieved Employees?

*By Gustavo Rios, PE, Esq.*

***An Owner's View:*** During my time as Resident Engineer/Owners Representative for county government, I often came across contractors who, almost immediately after starting the project, began the relationship with a letter asking for additional compensation. As I progressed and the projects became bigger and two to three at a time, I could not afford to let things slide into tomorrow or the next day; an immediate response was critical. Luckily for me, during the multi-project administration period of my career, I was going through law school at night. That gave me the confidence and knowledge necessary to develop a proper response, not only immediately, but definitively as to leave no doubt regarding the owner's position. After one or two letters, the contractor would settle down and focus on completing the project instead of testing me in furtherance of potential claims.

***An Attorney's View:*** As an attorney, it was a similar story; the best approach to deal with every inquiry is to immediately send a well-developed response. For a small business, especially, very few inquiries are as critical as a Private Attorneys General Act (PAGA) claim from an employee. PAGA - Labor Code Sections 2698 - 2699.5 was passed in 2004 by the California legislature to allow employees to sue employers retroactively for violations as minor as missed break periods, wage errors, or incorrectly labeled paycheck stubs. The process starts with a claim filed by the employee with the California Labor & Workforce Development Agency (LWDA).

***Negative Effects on Small Businesses:*** The reason why a PAGA claim is so potentially devastating to a small business is that the law essentially deputizes the employee and allows him/her to fill the shoes of the California Attorney General as an enforcement agent for, not only the aggrieved employee, but every aggrieved employee of the business. It is an almost automatic class-action certification process without having to go through the normally required class certification for a class action. In other words a PAGA claim can essentially turn every employee into a plaintiff.

The potential effects can cripple any business, especially a small business. As an example, in a PAGA lawsuit against Goodyear Tire, paycheck stubs did not include the last four digits of employees' social security or employee ID numbers. The law requires penalties which are distributed as follows,  $\frac{3}{4}$  to the state and  $\frac{1}{4}$  to the plaintiffs. However, the law also allows for attorney's fees to be paid by the employer, so in the end, in the Goodyear case, the attorneys collected \$105,000 in fees and each plaintiff received \$1,000.

As you can imagine, this type of situation is ripe for predatory attorneys who file lawsuits in volume to extract quick settlements. In one case in which I'm involved, plaintiff's counsel files an average of 15 PAGA claims per month! Each year, attorneys file more than 6000 PAGA claims and between 2005 and 2013, the number of claims filed increased 400%.

There have been minor changes to PAGA since 2015 aimed at reducing the amount of frivolous lawsuits, but the law remains potentially very constricting to small businesses. This year, the California Conference of Carpenters sponsored and the governor signed Assembly Bill 1654 to reduce the number of frivolous lawsuits against employers in the construction industry and only union employers classified as union employers. So as it stands, this law does not go far enough to cover more employers in the construction industry and even more industries in which employers face similar impacts. This new law provides that PAGA does not apply to an employee in the construction industry with respect to work performed under a valid collective bargaining agreement (that meets certain conditions).

One of the most recent challenges to PAGA is a lawsuit filed this month (Dec 2018) by the California Business and Industrial Alliance (CABIA) against the California Attorney General, Xavier Becerra. The complaint challenges the constitutionality of PAGA both on at a federal and state level. Since the California Supreme Court has already rejected constitutional challenges to PAGA since its enactment, this lawsuit is not expected to gain any traction in providing relief to employers.

***How Can You Protect Your Small Business?*** Aside from moving out of California and/or getting rid of all employees, there are some steps a business can take to best protect itself from a PAGA claim or a labor code claim in general.

- Read and try and understand the California Labor Code requirements. The most common provisions which came up in PAGA suits are failure to provide a half hour lunch break for non-exempt employees, failure to provide regular breaks, improper overtime calculations, paying below the minimum wage, bonuses that weren't properly calculated, not including one of the nine specific pieces of information that must appear on wage statements in California, and not providing suitable seating.
- Create compliant policies that reflect requirements of the labor code.
- Review regularly to be sure policies are being followed and enforced on a daily basis. Regular audits of leaders to make sure they're following policy should help.
- Keep detailed records of things like payroll and employee timesheets, especially of the type which detail break periods.
- As the first lesson first discussed in this note - take care of problems quickly!! The employer has 33 days to fix the alleged violation in the PAGA letter to the LDWA before the lawsuit is officially filed. So time is critical

As with any doubt, it is best to seek the advice of counsel long before any issue comes up. The fee one pays for a consultation or even an evaluation of business policies and practices can be very helpful and make economic sense in mitigating the risk of a labor code claim, or any other type of adverse claim for that matter. And perhaps the new state governor and administration will bring a change in the business

climate strong enough to modify PAGA so that it serves the employees instead of their lawyers and without devastating effects on employers.

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