

Maine's New Private AG Law Might Blaze Trail For Other States

By **Mike LaSusa**

Law360 (July 12, 2021, 7:01 PM EDT) -- Maine is on the verge of becoming the first state outside California to allow workers to sue on behalf of the state to enforce wage and hour requirements, but attorneys and lawmakers say it won't be the last, as similar proposals gain steam across the country.

Maine lawmakers recently **sent a bill** to the governor's desk that would give workers rights like those contained in California's Private Attorneys General Act, which allows workers to bring employment suits in the name of the state.

What's more, New York, Massachusetts, Washington, Connecticut and Oregon all considered legislation this year that contained similar provisions.

Worker advocates have long pushed for other states to adopt laws like California's PAGA, and the passage of the legislation in Maine suggests those efforts could be paying off, said Adam Primm, a partner who represents employers at Benesch Friedlander Coplan & Aronoff.

"The first is always going to be significant, especially with so many others in the pipeline," he said.

Different Laws, Similar Aims

The various bills considered this year had some differences, but they were all aimed at addressing barriers to enforcement of employment laws, according to interviews with state lawmakers from New York, Massachusetts and Washington.

The New York legislation, dubbed the Empowering People in Rights Enforcement Worker Protection Act, or EMPIRE Act, is meant to ensure that workers can take claims of employment law violations to court rather than facing an arbitration process that's often considered less worker-friendly, said New York Assembly Member Latoya Joyner, D-Bronx, who sponsored the bill.

"It ensures that claims filed under the act are both public in nature and not subject to private agreements," Joyner said. "The resulting claims will not be hidden under a nondisclosure agreement or forced into the often biased system of binding arbitration."

New York already has strong worker protections on the books, but public resources limitations mean the state can't take on every violation, said state Sen. Brad Hoylman, a Democrat who sponsored the Senate version of the EMPIRE Act.

"All these rights are essentially meaningless if we can't enforce the law," he said.

In Massachusetts, lawmakers are also seeking to address the effects of private arbitration agreements and limited public enforcement

resources, said state Rep. Tram T. Nguyen, D-Andover, who presented the legislation.

"Our bill would grant workers some of the powers of the attorney general to be able to enforce their own wage rights in our court systems," Nguyen told Law360.

And in Washington, lawmakers heard testimony about vulnerable workers who feared putting their own names on a lawsuit or complaint due to potential retaliation by their employer.

"I think it makes a lot of sense to allow them to designate a representative organization to act on their behalf," said state Rep. Drew Hansen, D-Kitsap County, who introduced the Evergreen State's legislation.

All of those concerns factored into the drafting and passage of the legislation in Maine, said Hugh Baran, a senior staff attorney at the National Employment Law Project, or NELP, a worker advocacy group.

"We think this is a really encouraging development that Maine's Legislature has seen the harm that is being caused by the enforcement crisis and is responding to it in such a robust way," he said.

Most of the PAGA-type bills introduced this year failed, including Connecticut's, which was explicitly aimed at defanging arbitration agreements, and Oregon's, which alludes to utilizing private enforcement to offset "scarce state funds." But Benesch Friedlander's Primm said similar proposals are likely to be reintroduced. And while Maine has a relatively small workforce and economy, the passage of similar legislation in a state like New York or Washington would be even more noteworthy, he said.

"They technically wouldn't be the first, but they would be more on par with California," Primm said.

Likely Legal Challenges

California's PAGA has faced numerous legal challenges from various angles over the years, and attorneys agreed that the same would be true of any similar legislation that might be enacted in Maine or another state.

The basic concept of allowing private parties to step into the shoes of the state for the purpose of enforcing laws in the public interest goes back centuries, and that long history of jurisprudence has helped PAGA weather many of the attacks it has faced since it was adopted in 2003, said NELP's Baran.

"These laws will face challenges, but they rest on a really strong foundation," he said. "The qui tam model is a very old, time-tested model of law enforcement that has broad support."

At the same time, federal appellate judges have recently signaled a willingness to set limits on PAGA in response to employers' arguments that the law gives workers too much latitude to sue for violations they didn't experience themselves.

In May, the Ninth Circuit **nixed** a \$102 million class action judgment against Walmart for alleged pay stub and meal break violations.

The panel held that because lead plaintiff Roderick Magadia was not personally injured by the alleged meal break violations, he had no standing to bring the claim under PAGA, and that while he had standing to bring the pay stub claims, there was no violation of state law by the retail giant.

The issue of who has standing to bring private attorney general actions could come into play in challenges to Maine's legislation, which

goes further than California's by allowing whistleblowers, not just workers, to bring claims under the law, Primm said.

"You could have entities or individuals that you've never really had any contact with at all theoretically bringing a PAGA case against you with potentially significant penalties," he said.

The broad scope of Maine's law and the substantial penalties it provides for could lead to a flood of employment litigation that goes further than what lawmakers expected, Primm added.

"If it starts becoming way beyond the scope of what the Legislature anticipated, I wonder if there will be a push outside the courtroom to simply rein it in a little bit," he said.

Advocates will be closely watching what happens in Maine as they keep up efforts to pass similar legislation elsewhere, Baran said.

"Workers and advocates are really pressing for this and I think will continue to be pushing for this in the coming year," he said.

--Additional reporting by Max Kutner and Craig Clough. Editing by Abbie Sarfo.

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