CLIENT ALERTS & INSIGHTS

Updating State Private Attorney General Laws

AUGUST 2, 2021

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In the past few months, there have been several developments regarding California's controversial Private Attorneys General Act ("PAGA") and similar legislation making its way through other states.

PAGA permits workers to sue on behalf of the State of California for labor code violations. The law has been subject to several challenges by employers and business advocacy groups, who contend it permits workers to circumvent individual arbitration provisions in employment agreements. California courts have nevertheless upheld the law, holding that PAGA is outside the scope of the Federal Arbitration Act ("FAA") and refusing to push PAGA claims into mandatory arbitration. PAGA's success in the face of these challenges has prompted worker advocacy groups to attempt to replicate it in other states (*see* our earlier analysis of these developments here).

Recent Ninth Circuit Opinions Have Begun to Reign in PAGA

PAGA has recently suffered a few setbacks at the United States Court of Appeals for the Ninth Circuit. As we detailed in a prior alert, on May 28, 2021, the Ninth Circuit held in *Magadia v. Wal-Mart Assocs., Inc.* that an employee must suffer an injury personally in order to have standing to bring a claim under PAGA. The plaintiff in *Magadia* did not contend that he was injured by the class action claim he asserted against Wal-Mart for meal-break violations, but that he nevertheless had standing to bring the claim on behalf of fellow employees who were injured. The Ninth Circuit disagreed, finding he lacked standing to bring the meal-break claim, overturning a $100 million judgment, and remanding the claim back to state court.

The Ninth Circuit also significantly limited the potential penalties that employers and management personnel could face in private lawsuits brought pursuant to PAGA. Under PAGA, the penalty for an initial violation of the California Labor Code is $100 per employee per pay period, while the penalty for a "subsequent" violation doubles to $200 per employee per pay period. Cal. Lab. Code (the "Labor Code") § 2699(f)(2). Plaintiffs often contend that employers are subject to the heightened "subsequent violation" penalties for any violations that occur after the initial violation within the limitations period, or after receipt of the PAGA notice letter by California's Labor and Workforce Development Agency and/or the court-filed complaint. This means that if an employee received a wage statement which did not comport with the all requirements of Labor Code Section 226, and the employee received 26 non-conforming wage statements over the course of a year, PAGA penalties would total $5,100 for the single employee (*i.e.*, $100 x 1 pay period + $200 x 25 pay periods = $5,100). If the employer provides non-compliant wage statements to 100 employees, the potential penalties under this assumption balloon to $510,000.

However, in *Bernstein v. Virgin America, Inc.*, the Ninth Circuit found this argument unavailing. The Court instead held that a defendant employer is not subject to the heightened penalties for

subsequent violations where it is not previously "notified" by the California Labor Commissioner or any court that its conduct is in violation of the Labor Code. In *Bernstein*, the Court explained that Defendant Virgin America, Inc. was "not notified by the Labor Commissioner or any court that it was subject to the California Labor Code until the district court partially granted Plaintiffs' motion for summary judgment." No. 19-15382, 2021 WL 686281, at *12 (9th Cir., Feb. 23, 2021).

Under this ruling, it seems a "subsequent" violation subject to heightened penalties occurs only where the employer has been notified that it is in violation of the Labor Code, either through an administrative decision or court ruling, and thereafter fails to mitigate the issue. This is significant because it effectively halves the potential exposure for employers and their management personnel under PAGA. An employer would not be subject to heightened damages for "subsequent" violations under PAGA until the issuance of such decision or ruling. Employers would nevertheless be wise to investigate allegations contained in any PAGA letter or lawsuit brought under PAGA and ensure that their practices are compliant with the statute or revise them accordingly.

Maine Passes Private AG Law; Gov. Vetoes It

On June 18, 2021, Maine became the first state outside of California to pass PAGA-type legislation, only to have it vetoed by Governor Janet Mills a month later.

Specifically, Legislative Document 1711, An Act to Enhance Enforcement of Employment Law ("L.D. 1711") passed the Maine Senate with a vote of 21-13 and the Maine House with vote of 74-55. The bill was similar to PAGA in that it deputized workers (defined as "Whistleblowers" in the bill), to bring private enforcement actions alleging violations of certain labor laws, most notably for wage and hour violations, in the name of the state.

However, L.D. 1711 differed from PAGA on a few notable bases. First, the law allowed advocacy groups and other organizations to sue on behalf of workers, greatly expanding who would have standing. By contrast, PAGA only authorizes the aggrieved worker or workers to sue on behalf of themselves and other employees. Second, L.D. 1711 permitted workers to sue for alleged violations of Maine anti-discrimination laws, whereas PAGA is mostly limited to California wage and hour claims. These portions of L.D. 1711 were widely criticized by opponents of the law, who argued that allowing advocacy groups to do the work of employees in enforcing such laws could substantially strain state and judicial resources.

Maine lawmakers also made the notice periods under L.D. 1711 longer than those provided by PAGA. While, PAGA provides California's Labor and Workforce Development Agency a mere 60 days to review an alleged violation the Maine law provided 180 days to investigate, 90 more days to attempt conciliation, and another 90 days to bring an enforcement action..

Surprisingly, L.D. 1711 was vetoed by Governor Janet Mills. Governor Mills described her concern that the new law could undermine the current enforcement mechanisms and undermine public interest. She also highlighted that the state's enforcement budget increased, which previously was included as a reason for passing PAGA-like legislation.

Other States Seeking to Pass State AG Legislation

Besides Maine, several other states have proposed or are in the process of considering their own legislation similar to PAGA.

- New York: The Empowering People in Rights Enforcement Worker Protection Act, or EMPIRE Act, would allow employees, whistleblowers, or organizations selected by the employee to initiate public enforcement on behalf of the state. Such organizations would include unions and other employee advocacy groups. The bill is currently in committee in the State's Senate and Assembly.
- Washington: Proposed law actually allows for representative recovery of traditional damages, in addition to civil penalties. The bill died in the state's Senate committee, but not before it passed the state's House with majority approval. For this reason, it will likely be reintroduced.
- Oregon: Proposal would also allow individuals and certain representative organizations to bring an enforcement action for alleged violations. The current bill also permits the individuals and organizations to receive up to 40 percent of the penalties recovered, including attorney fees.
- New Jersey: This bill is narrower than PAGA and focused on promoting a "fair workweek." It would establish employee scheduling rules for large chains of retailers, hotels restaurants, and warehouses, and give workers the right to sue on behalf of the state to enforce those rules.
- Connecticut: Proposed measure would let labor unions and other advocacy groups file claims over workplace violations but stalled in the State's Senate committee.

Conclusion

As more states seek to pass their own versions of PAGA, it is important for employers to understand to risks posed by such prospective legislation. PAGA does not discriminate in the way it holds employers accountable. Even employers who are largely complaint in their payroll practices can be sued for minor infractions (*e.g.*, failure to provide all required information on a wage statement) by current or former employees acting on behalf of the state. In many cases, the penalties for these infractions are disproportionate to the actual losses suffered by the employees, if any. Using the wage statement example above, even after *Bernstein*, an employer that fails to provide proper wage statements under the California Labor Code would be subject to penalties of $100 per employee per pay period (assuming it received no "notice" of its violation of the Labor Code), notwithstanding the fact that its employees were properly paid at all times. And while such a violation may technically be the fault of an employer's payroll provider, an employer will ultimately bear responsibility to its employees for the infraction. For these reasons, and in light of the potential for such significant exposure based on mere allegations alone, employers are often put in the unenviable position of considering an early resolution when hit with a PAGA class action claim.

Employers should therefore take steps to ensure that both they and their payroll providers are in compliance with all applicable federal and state wage and hour laws. Indeed, absent reversals like the one seen last month in Maine, the push for PAGA-type legislation will only continue to gain traction in the months and years ahead and employers should prepare accordingly.

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