California Voters Will Decide PAGA’s Fate at the Ballot Box in 2024

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Earlier this year we wrote on the U.S. Supreme Court’s decision in Viking River Cruises, Inc. v. Moriana that struck a major blow to California’s Private Attorneys General Act (“PAGA”). Now on the heels of the Viking River decision, California officials have announced that a proposed law to overhaul PAGA, called the California Fair Pay and Employer Accountability Act (“Act”), will be put on a referendum to the voters in November 2024. The Act proposes in large part to repeal PAGA, including PAGA’s mechanism that allows an employee to sue in civil court on the state’s behalf.
to enforce the California Labor Code and seek penalties for doing so. We highlight here why PAGA is under fire, what the Act would change, and some key takeaways for employers to combat PAGA lawsuits leading up to the 2024 ballot.

What is PAGA and Why is it Under Fire?

PAGA is a unique California statute that allows an employee to stand in the shoes of the State of California as its representative and bring a lawsuit for violations of many California Labor Code provisions.

PAGA’s key features include:

- An employee’s right to bring a representative lawsuit on behalf of similarly situated employees for Labor Code violations triggering penalties;
- An award of 75% of any penalties to the state and 25% to employees; and
- An award of reasonable attorneys’ fees.

These features account for the uptick in PAGA litigation against both large and small employers, and why the statute has been sharply criticized by California businesses. California employers have pushed back on PAGA litigation, backed in part by a group called the Californians for Fair Pay and Accountability, because of the harsh economic impact that these lawsuits can have on California businesses for even minor Labor Code violations, and further, because the statute may not necessarily be delivering on its core purpose: to correct actual violations of the Labor Code while compensating the intended primary beneficiaries: employees.

How Would the Act Change the Current PAGA System?

The Act proposes a major overhaul to PAGA’s key features. The Act’s stated purpose is to streamline the current enforcement system, avoid lawsuits that can be punishing for small employers, and help employees collect any amounts they are owed quickly and efficiently.

Under the proposed Act:

- Employees could no longer sue in civil court on behalf of the state; they would instead file a complaint directly with the LWDA, which would have the sole right to enforce the Labor Code and levy penalties for violations of the Act;
- Employees would recover 100% of any penalties (as opposed to 25% under the current PAGA system);
- Increased funding would go to the state to enforce the Labor Code;
- The Labor Commissioner would have the authority to double penalties for “willful violations”;
- Attorneys’ fees would no longer be available; and
- A Consultation and Publication Unit would be created to, among other purposes,
allow employers without pending actions against them to request a confidential consultation with the Unit, obtain binding guidance, and cure violations without penalty.

Of these proposed changes, California employers would benefit most if an employee was no longer able to sue in court and collect attorneys’ fees. The threat of large attorneys’ fee awards is a significant driver for many PAGA lawsuits. That threat would cease to exist under the Proposed Act.

Employer Takeaways

Despite the news that the Act will be on the ballot in 2024, California employers should expect the Act to face an uphill battle. Presumably the Act will face staunch resistance by opponent organizations, the plaintiffs’ bar, and officials who have benefited over the years from the current PAGA framework. Until PAGA goes to the voters in 2024, California employers can continue to take concrete steps to combat PAGA lawsuits:

- Implement an arbitration agreement that complies with the Viking River Cruises, Inc. v. Moriana decision (for more information view our article here) as well as AB 51 (at least until the litigation challenging that statute has concluded);

- Conduct regular (semi-annual or yearly) audits of employment policies to ensure Labor Code compliance;

- Conduct refresher training for supervisors and management on employment policies and best practices; and

- Stay apprised of developing areas of the California Labor Code, proposed initiatives, and potential pitfalls ripe for PAGA claims.

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