

Employers Must Brace For PAGA-Like Bills Across US

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If you're an employer in California, you've heard of PAGA — California's controversial Private Attorneys General Act, which took the employment litigation landscape by storm over the course of the last two decades.

If you're an employer that's not in California though, who cares? And until a few years ago, most would have agreed with that sentiment.

Until, that is, other states started taking notice.

Spurred on by news that PAGA had managed to fill California's coffers with around \$42 million in civil penalties a year,[1] PAGA has recently begun to push past local pastures and into the legislative houses of states near you.

With states now considering the passage of similar laws, it's more critical than ever to understand what PAGA is, how it's evolving in other states, and the ways in which it stands to upend current employment and class action litigation trends in those states if adopted.

As legislative debates roar on, employers should take seriously the potential for increased litigative burdens, provide input and feedback during the legislative process, and undertake to mitigate PAGA liability risks in states proposing enhanced enforcement.

A Primer on California's Private Attorneys General Act

We start with PAGA. At its core, PAGA is a statute that allows an allegedly aggrieved employee to sue an employer for alleged violations of the California Labor Code (i.e., wage and hour laws), on behalf of him- or herself and other aggrieved employees.



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In a PAGA case, the employee acts not in his or her individual capacity, but as a representative of the government, and seeks to collect civil penalties on behalf of the state, rather than wages, interest and statutory penalties payable to employees directly.

To incentivize these types of suits, PAGA provides that aggrieved employees retain 25% of any financial recovery — relinquishing the remaining 75% to the state's coffers.

Because of this, in practice, employees typically bring representative PAGA claims (i.e., seeking civil penalties) in tandem with other class claims (i.e., seeking unpaid wages, interest and statutory penalties) to maximize their potential recovery on each alleged Labor Code violation.

Since its passage in 2004, PAGA has been a boon to both California and the plaintiffs bar alike. In 2019 alone, PAGA resulted in the state's collection of approximately \$88 million in civil penalties^[2] and an overall liability of over \$117 million against employers statewide.^[3]

PAGA's unique litigation advantages, discussed below, contributed significantly to this success by imposing both statutory and judicially created barriers that made the representative suits more difficult to defend than traditional wage and hour class actions.

In time, without question, PAGA had become a juggernaut.

PAGA's Recent Evolution and Courting of Various State Legislatures

Understandably, other states took notice. By the 2019-2020 legislative session, no fewer than nine other states were actively in the process of considering bills similar to PAGA, including Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, Oregon, Vermont and Washington — all with various nuances.

In most cases, the basic framework remained the same: Aggrieved employees would be allowed to bring representative suits for civil penalties against employers on behalf of their respective states.

When the plaintiffs secure recovery, the civil penalties would be divided between the aggrieved employees and the state according to allocations ranging from 20/80 to 40/60.

In some cases, the states went further than PAGA. For example, Maine, Vermont and Washington's bills allow recovery for more than just wage and hour violations, allowing for recovery on violations related to protected leave, workplace safety and discrimination.

In New York's version, representative claims could also be brought by unions and representative organizations, in addition to aggrieved employees.

Massachusetts and Washington's versions even allowed for representative recovery of traditional damages, as well as civil penalties.

In doing so, these states evidenced a willingness to push past PAGA, not only in jurisdictional application but also in legislative scope.

The fates of these bills remain varied. While some, such as Maine and Vermont, permanently died in committee during the 2019-2020 legislative session, others continued on with advocates and bill sponsors vowing to continually reintroduce the bills.

And although bills introduced in Oregon and Washington suffered this same fate just months ago during the 2020-2021 legislative session, Washington's version was able to pick up majority approval in the state's House before doing so — leaving a strong chance for another reintroduction.

Several bills, however, including those in Massachusetts and New York, remain in play and are up for consideration this year — showing that, at least for some states, the shadow of PAGA remains present and looming.

What to Potentially Expect If Passed

If successful, these PAGA-like bills could significantly disrupt prevailing employment litigation trends in their respective states. Although the potential impacts vary by jurisdiction, California's own experiences can provide helpful insight into what employers outside of California can likely expect. This includes the following examples.

No Arbitration Agreements or Class Action Waivers

First, representative claims under PAGA bills would likely be immune to both arbitration agreements and class action waivers.

In 2014, for example, the California Supreme Court held in *Iskanian v. CLS Transportation Los Angeles LLC* that an employee's execution of a mandatory employment arbitration agreement had almost no bearing on the employee's PAGA claims.

Because PAGA claims are brought on behalf of the state, the claims belong to the state, not the employee, and the employee has no right to contract away those rights.

So while the U.S. Supreme Court's landmark 2018 decision in *Epic Systems Corp. v. Lewis* upheld the continued viability of using class action waivers in mandatory employment arbitration agreements, the holding would likely have little application in PAGA-like contexts.

Settlement Ability

Second, traditional settlement mechanisms, such as severance agreements, generally cannot absolve employers of liability for civil penalties under PAGA.

In 2020's *Kim v. Reins International California Inc.*, the California Supreme Court held that an employee's continued injury, or lack thereof, has no bearing on his or her standing or ability to bring suit under PAGA — meaning that even individual settlement agreements that fully redress employee injuries wouldn't preclude the collection of civil penalties on that employee's behalf.

Otherwise, the court reasoned that the ability to reduce the number of aggrieved employees through private agreement would, among other things, act to reduce the number of penalties owed to the state — effectively absolving employers for past violations that warranted civil penalties.

No Class Action Requirements

Third, representative claims generally are not subject to traditional class action requirements.

Several California cases supported this conclusion, including the California Supreme

Court's 2009 ruling in *Arias v. The Superior Court of San Joaquin County*, and the California Court of Appeal for the Sixth Appellate District's 2018 ruling in *Huff v. Securitas Security Services USA Inc.* Both rulings effectively allowed any aggrieved employee to seek civil penalties for any Labor Code violation affecting others, even if never personally experienced and even if predicated on wildly distinguishable facts.

And with almost none of the proposed legislation — save for Illinois' bill — imposing traditional class action strictures such as commonality or typicality within their statutory language, other states may follow suit.

Although the future remains uncertain, now may be the time for companies to take action and get involved in the process.

Although some of these bills have since died, many may continue their prior pattern of repeated introduction and incrementally improved success. Others continue to fight on.

In all cases though, these bills are still in their formation — leaving employers and commercial organizations alike with an opportunity to provide input and feedback into the crafting and passage of these potentially dramatic pieces of legislation in ways that will minimize overreaching by deputized state citizens.

Employers also should undertake to mitigate potential PAGA liability risks by reviewing and updating employee training and procedures, among other things.

In short, it is critical to watch the legislative docket for any potential updates on whether PAGA ultimately finds success in pushing past California to a state near you.

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[1] Note: Deutsch, et al., California's Hero Labor Law (Feb. 2020) UCLA Labor Center, <https://www.forworkingfamilies.org/sites/default/files/publications/CA%27s%20Hero%20Labor%20Law.pdf>.

[2] Note: Id.

[3] <https://lao.ca.gov/Publications/Report/4274>.